An analysis of the sentencing of human trafficking offenders under South African and international law

by

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DECLARATION

Student number: **6406-098-5**

This research is submitted in accordance with the requirements for the degree of Masters of Laws (LLM) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **AN ANALYSIS OF THE SENTENCING OF HUMAN TRAFFICKING UNDER SOUTH AFRICAN AND INTERNATIONAL LAW** 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.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature:  Date: 15 November 2021

Itumeleng Lydia Ntlatlapa

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DEDICATION

I dedicate this study to my husband Professor Ntsibane Stephen Ntlatlapa, my son Nkeane Victor Ntlatlapa, my daughter Tlalane Stephanie Ntlatlapa, my late brother Mokhethi Bernard Moshoeshoe, and to my entire family.

SUMMARY

There are concerns that the sentencing regime of offenders convicted of human trafficking in South Africa under the Prevention and Combating of Trafficking in Persons Act 77 of 2013 is too harsh and goes beyond the international guidelines.

The international prescripts as found in the United Nations Convention Against Transnational Organised Crime and the Palermo Protocol (which South Africa is party to) do not provide much guidance on sentencing. Sentences for enslavement as a crime against humanity in international criminal law in the ICC, the ICTY, and the Special Court for Sierra Leone were studied to establish the background against which the South African courts sentences were analysed. The international courts' statutes and rules provide guidance towards factors to be considered for sentencing and the determination of sentences to be imposed on convicted human traffickers. The primary sentence for human trafficking under international law is imprisonment, including life imprisonment, for purposes of retribution and deterrence. Similar to international courts, South African courts mete out stringent imprisonment sentences including life imprisonment on convicted human traffickers, even though judges have discretionary powers in sentencing.

While South African legislation and case law are found to be compliant with international law; it is recommended in this study that the law be revised to be in line with the Rome Statute to establish a sentencing regime that will reflect the different levels of the blameworthiness of the offender, gravity of the offence, the impact on the victim and the interests of justice. This revision will address certain disparities in sentencing which are grounds for concerns regarding legality, proportionate sentencing and the protection of human rights.

KEY TERMS: Human trafficking, sentencing, ICC, South Africa, Rome Statute

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Constitution	:	Constitution of the Republic of South Africa, 1996
DPP	:	Director of Public Prosecutions
ICC	:	International Criminal Court
ICTR	:	International Criminal Tribunal for Rwanda
ICTY	:	International Criminal Tribunal for the former Yugoslavia
Minimum Sentences Act:		Criminal Law Amendment Act 105 of 1997
National Policy Framework:		Prevention and Combating of Trafficking in person National Policy Framework
Palermo Protocol	:	UN Supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
Rome Statute	:	Rome Statute of the International Criminal Court
Trafficking Act	:	Prevention and Combating of Trafficking in Persons Act 77 of 2013
UN	:	United Nations
UNGA	:	United Nations General Assembly
UN.GIFT	:	United Nations Global Initiative to Fight Human Trafficking
UNHCHR	:	United Nations High Commissioner for Human Rights
UNODC	:	United Nations Office on Drugs and Crime
UNTOC	:	UN Convention against Transnational Organised Crime
UNTS	:	United Nations Treaty Series

CHAPTER 1

INTRODUCTION

1.1 Background information

Human trafficking is a serious and atrocious crime in South Africa. No specific statistics are available on human trafficking in this country, because the crime is underreported or not reported at all.[1] Trafficking convictions are, however, on the rise, and as most cases indicate, victims of trafficking are seldom kidnapped – most of them are tricked into situations of exploitation by being offered fabricated job or study opportunities.

In order to combat human trafficking in South Africa, the jurisdiction ratified the United Nations (UN) Convention against Transnational Organised Crime (hereafter referred to as the UNTOC), and its Supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter referred to as the Palermo Protocol),[2] as well as the Protocol against the Smuggling of Migrants by Land, Sea and Air[3] on 20 February 2004. This means that South Africa, after approval was granted under its own internal procedures, has consented to be bound by the UNTOC. As such, the jurisdiction is obliged to adhere to the objects and the purposes of the UNTOC and its Supplementing Protocols.

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1 This is because victims of trafficking fear retaliation. See Kruger https://www.iol.co.za/the-star/opinion-analysis/the-truth-about-human-trafficking-in-south-africa-43f8bcf0-35c2-4374-95be-50ff4b274466#:~:text=But%20trafficking%20is%20a%20reality%20in%20South%20Africa.&text=This%20means%20victims%20are%20trafficked,country%20as%20their%20final%20destination (Date of use: 9 March 2021). The author states that police statistics indicate that 2132 cases were reported to the South African Police Service (SAPS) from 2015 to 2017.

2 Both instruments were adopted by the UNGA Resolution 55/25 of 15 November 2000. The UN Global Initiative to Fight Human Trafficking (UN.GIFT) was also established in 2007 in support of enforcing the Palermo Protocol.

3 University of Minnesota Human Rights Library http://hrlibrary.umn.edu/research/ ratification-southafrica.html (Date of use: 18 September 2020).

In its Preamble, the Palermo Protocol declares that combating human trafficking, especially the trafficking of the most vulnerable members of society – women and children – requires a comprehensive international approach. This means that countries must enact domestic legislation which includes measures to prevent trafficking, to punish the perpetrators, and to protect human trafficking victims. The victims' internationally recognised human rights must also be protected. The Palermo Protocol provides a universally accepted definition of human trafficking, which states thus:

> 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[4]

Combating human trafficking is an appropriate focus for international law, as according to King, "international law is a powerful conduit for combating human trafficking".[5] This is also evidenced in international criminal case law as adjudicated by the International Criminal Court (hereafter referred to as the ICC), established under the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute).[6] The ICC has universal jurisdiction on "the most serious crimes of concern to the international community as a whole".[7] These crimes comprise genocide,[8] crimes of aggression,[9] war crimes[10] and crimes against humanity.[11]

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4 Art 3(a) of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime. Adopted and opened for signature, ratification and accession by UNGA Resolution 55/25 of 15 November 2000

5 King 2013 *Topical Research Digest* 88.

6 Rome Statute of the International Criminal Court UNTS 2187 No 38544 (hereinafter Rome Statute).

7 Rome Statute art 5.

8 Rome Statute art 6.

9 Rome Statute art 8 *bis.*

10 Rome Statute art 8.

11 Rome Statute art 7.

Human trafficking is categorised as a crime against humanity under enslavement, especially as:

> [T]rafficking, however, is not an ordinary crime with transnational dimensions. It has increasingly been recognized that trafficking can rank among the "most serious crimes of concern to the international community as a whole" or *delicta juris gentium*.[12]

To ensure the harmonisation of national legislation with international standards; South Africa has enacted the Prevention and Combating of Trafficking in Persons Act 77 of 2013 (hereafter referred to as the Trafficking Act). The Trafficking Act came into operation on 9 August 2015, except for sections 15, 16 and 31(2) (b)(ii), in respect of which the Department of Home Affairs has not yet issued regulations.[13] The Department of Justice went further to draft the Prevention and Combating of Trafficking in Persons National Policy Framework (hereafter referred to as the National Policy Framework) to provide implementation strategies of the Act.

In evaluating whether South Africa is complying with international obligations when it comes to the sentencing of human traffickers; guidance has to be sought from the Palermo Protocol. Further, it would not be wrong to consider the sentencing regime under the Rome Statute for offences identical or similar to South African human trafficking offences if regard is had to the strong arguments above that human trafficking should be included as an offence against humanity under the Rome Statute.

1.2 Research problem

In any country of the world where crimes occur, one can expect some sort of penalty being meted out for the transgression. Sentencing refers to punishment imposed by a court of law in a criminal procedure. At the end of a trial, judges decide whether the guilty party should be imprisoned, given a fine and/or any other punishments considered applicable. The sentence apportioned depends on what the particular country's legal system regards as the purpose of punishment, which may be

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12 Obokata 2005 *The International and Comparative Law Quarterly* 445-457.

13 Department of Justice and Constitutional Development www.justice.gov.za/docs/other-docs/2019-TIP-NPF-10April2019.pdf (Date of use: 22 October 2020).

retribution,[14] deterrence,[15] reformation,[16] denunciation,[17] incapacitation[18] or reparation.[19] In some jurisdictions, the governments have great influence over the punishments actually handed down, by virtue of special statutes introduced to deter individuals through fear of further punishment.

In this regard, the minority apartheid regime that ruled South Africa for many years mainly used detention without trial as a measure to control and suppress black opposition.[20] Punishment consequently became an instrument of the state. The authoritarian apartheid regime was dispensed with and a new democratic order based on the justiciable Bill of Rights was ushered into South Africa.[21] This transition, which Klare terms 'transformative constitutionalism', transferred supremacy from the legislature to the Constitution.[22] In the new culture of justification; all actions in the exercise of power must be justified.[23] Further, transitional societies must be conscious that the form of justice or retribution employed by the new political regime should not violate domestic and international human rights prescripts,[24] and that it should be carried out through constitutional justice.[25]

International law, in the form of Article 10(4) of the Convention, already prescribes the manner in which punishment for transgressing any provision in the Convention should be effected:

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14 A theory of punishment purporting that offenders must endure punishment equal to the offence committed. See para 1.5.1 below; see also Snyman *Snyman's criminal law* 10-13.

15 Individuals or society are deterred by fearing further punishment. See para 1.5.1 below; see also Snyman *Snyman's criminal law* 14-15.

16 Punishment serves to rehabilitate the offender. See Snyman *Snyman's criminal law* 15-16.

17 The punishment occurs by means of the general society condemning the criminal act, thus bolstering society's moral boundaries.

18 The offender is incapacitated so as to not commit any further crime, and society is protected.

19 Some form of repayment is made to the aggrieved victim or community.

20 Anderson *Preventive detention in pre- and post apartheid South Africa* 2.

21 Mureinik 1994 *SAJHR* 32.

22 Klare 1998 *SAJHR* 147.

23 Mureinik 1994 *SAJHR* 32.

24 Mubangizi *The protection of human rights in South Africa* 2.

25 Clarke https://magnacarta800th.com/wp-content/uploads/2011/10/lessons_magnacarta.pdf (Date of use: 26 October 2020). Clarke states that: "Constitutional justice refers to the power of courts, usually constitutional courts like South African Constitutional Court … to review the legality of legislation and, where appropriate, either strike it from the statute book or hold that despite it being and remaining on the statute book, it is neither to be applied or followed".

> ...each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.[26]

The punishment of traffickers is one of the three objects of the Convention; for the purposes of this work, focus shall be on the punishment aspect of sentencing. This is a topic that has been considered by foreign jurisdictions, for example, Gallagher and Holmes aver that the European Union states:

> ...are moving toward even higher standards that require penalties that are "effective, proportionate, and dissuasive" including custodial sentences that give rise to extradition … Many countries are still working out what "effective, proportionate, and dissuasive" actually means in practice.[27]

In South Africa, Mollema and Terblanche; experts in the fields of human trafficking and sentencing in this country, are of the opinion that:

> The extremely high sentences in s 13 of the Trafficking Act do not, however, only raise practical issues related to low rates of enforcement and high prison populations. They also raise questions of proportionality, about the rule of law and basic human rights. The mandatory sentence of life imprisonment applies to a wide range of conduct, with widely different levels of harm to the victims, and disregarding differences in the blameworthiness of offenders. The legislation does not allow for a proper distinction between those wicked criminals who deserve to be removed from society for the longest time permitted by our law, and those people who do not deserve such severe sentences on any logical basis.[28]

The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution)[29] provides that state sanctions and responses against criminal offenders should never be cruel, inhuman or degrading in any way.[30] The sentences in most legal systems are determined by the courts for specific offences within the range set by the legislature. The wider the range, the greater the scope there is for the sentencing court to exercise discretion, however, the individual offender is also less certain about what sentence to expect for a particular offence.[31] In South Africa, the Magistrates'

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26 UNTOC Art 10(4).
27 Gallagher and Holmes 2008 *International Criminal Justice Review* 322.
28 Mollema and Terblanche 2017 *SACJ* 222-223.
29 The Constitution of the Republic of South Africa, 1996.
30 Constitution s 12(1)(e); Van Zyl Smit *Sentencing and punishment* 49-1.
31 Van Zyl Smit *Sentencing and punishment* 49-6.

Courts and the Regional Courts have statutory limitations to sentencing power.[32] However, the High Court has no general restriction on its punishment jurisdiction, and it can impose any sentence that it regards as appropriate:[33]

> In South Africa, sentencing is considered the primary prerogative of trial courts and they enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. In doing so, they follow judge-made, broad sentencing principles known as the "triad of Zinn", which require that, when making sentencing determinations, judges consider three things: the gravity of the offence, the circumstances of the offender, and public interest.[34]

The prescribed minimum sentences in the Criminal Law Amendment Act 105 of 1997 (hereafter referred to as the Minimum Sentences Act) have caused much debate in that these sentences removed the element of discretion from the judiciary. It seems that the dispute was settled in the Constitutional Court case of *S v Dodo*,[35] where the Court held that the minimum sentences merely limited and not eliminated the court's discretion. The Court further pronounced that:

> ...the construction of the phrase 'substantial and compelling circumstances' in section 51(3) goes to the heart of these issues. The existence of these circumstances permits the imposition of a lesser sentence than the one prescribed.[36]

The courts, however, were warned that even when opting for a lesser sentence:

> ...account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the benchmark which the legislature has provided.[37]

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32 Magistrates' Court Act 32 of 1944 s 91(1)(a): "Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division".

33 Van Zyl Smit *Sentencing and punishment* 49-3.

34 Library of Congress www.loc.gov/law/help/sentencing-gudelines/southafrica.php (Date of use: 17 May 2020).

35 *S v Dodo* 2001 (1) SACR 594.

36 *S v Dodo* 2001 (1) SACR para [10]. See also Burchell *Principles of criminal law* 25-27.

37 *S v Dodo* 2001 (1) SACR para [11].

In the case of *S v Mhlakaza*, the trial court placed much emphasis on the purpose of retribution and deterrence[38] in sentencing, in order to satisfy public opinion which was influenced largely by the gravity of the offence.[39] On appeal, it was stated that:

> The object of sentencing was not to satisfy public opinion but to serve the public interests ... A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed.[40]

Furthermore, the court stated that it is wrong to impose lengthy imprisonment sentences because the judicial officer is not in control of the effective time the accused will serve due to parole considerations, which is the prerogative of the state.[41]

In this research, it will be argued that the approach of Cameron J, an erstwhile Constitutional Court judge, would best benefit South Africa.[42] Cameron J is of the opinion that minimum sentences perpetuate prison overcrowding, the economic burden of the state to cater for inmates, and racial disparity, with the worst of it being felt by black people.[43] He is of the viewpoint that "the system is illogical, inefficient and counterproductive. It is a poor substitute for efficacy and reason in combating crime".[44] Cameron J strongly believes that minimum sentences for non-violent and non-serious offences should be scrapped, in particular, drug offences, and furthermore that the hands of the judiciary must not be tied as they are capable of imposing extraordinary sentences.[45] Even though he advocates for the discretion of the judiciary; Cameron J also acknowledges that some form of guidance is needed around sentencing, and in that regard parliament should consider the establishment of a sentencing council which should reform or replace mandatory minimum sentencing.

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38 These concepts will be fully discussed in para 1.5.1.1 below.
39 *S v Mhlakaza and Another* 1997 (1) SACR 575 (SCA) para 518e.
40 *S v Mhlakaza and Another* 1997 (1) SACR 575 (SCA) 518.
41 *S v Mhlakaza and Another* 1997 (1) SACR 575 (SCA) 521.
42 Cameron www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf (Date of use: 26 May 2020).
43 Cameron www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf 23-26.
44 Cameron www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf 30.
45 Cameron www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf 32.

In their article, Mollema and Terblanche also support Cameron's viewpoints. Notwithstanding their opinions and concerns, Mollema and Terblanche did not analyse how South African courts have interpreted the sentencing regime in the Act. In this research, a critical analysis on how the South African courts are interpreting the sentencing regime in the Trafficking Act as reflected in the sentences that have been imposed on human traffickers shall be carried out in order to establish whether the sentences are proportionate, and grounded in the rule of law and basic human rights. The following human-trafficking cases will be examined, amongst others: *Jezile v S and Others*;[46] *S v Mabuza*;[47] *S v De Waal Rossouw*;[48] *S v Dos Santos*;[49] *S v Obi;*[50] *S v Pillay*,[51] *S v Abba*[52], *S v Seleso*;[53] and *S v Akadoronge.*[54]

In order to establish whether the prescribed sentences under the Trafficking Act are "extremely high",[55] these sentences will be analysed against the Convention and the Rome Statute, the two international instruments that provide guidance towards the sentencing of human traffickers. The researcher will critically analyse the sentencing regime in the Trafficking Act against the international standards set in Article 2(b) of the Convention, and Articles 77and 88 read with Article 5 of the Rome Statute.

Further, a critical analysis will be carried out on how the courts are interpreting the sentencing regime in the Trafficking Act as reflected in the sentences that have been imposed on human traffickers to establish whether the sentences are commensurate to sentences handed down by the ICC on people convicted of human trafficking as a crime against humanity under the Rome Statute.

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46 *Jezile v S and Others* 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

47 *S v Mabuza and Chauke* case no SHG 9/13 Graskop Regional Court, Mpumalanga (21 November 2014).

48 *S v De Waal Rossouw* Case No CC18/19/2020 (Western Cape High Court Cape Town).

49 *S v Dos Santos* 2018 (1) SASV 20 (GP).

50 *S v Obi* 2020 JDR 0618 (GP).

51 *S v Pillay* Case No CCD39/2019 (KwaZulu-Natal Local Division, Durban) 26 March 2021.

52 *S v OB Abba and 2 Others* CC 41/2017 (Gauteng High Court Pretoria).

53 *S v Seleso* Case No SS45/2018 (GJ) Gauteng South (Johannesburg) High Court.

54 Mjonondwane https://www.facebook.com/page/438204912879558/search/?q=Akadoronge (Date of use: 10 November 2021).

55 See footnote 28 above.

The Act is fairly new and not many judgments are made publicly available, however, the available judgments of the South African courts since the coming into action of the Act will be analysed to establish what factors inform the courts during sentencing, and whether the courts' sentences lack proportionality and/or have no regard to the rule of law and basic human rights. Although human trafficking violates the basic human rights of those being trafficked, in this dissertation, these rights will be chiefly addressed in the context of the sentencing aspects.

1.3 Research aim, questions and hypothesis of the study

The aim of this study is to investigate the South African sentencing regime and the sentences handed down by South African courts under the Trafficking Act in comparison to the sentences prescribed under international law.

The research questions of this study are:

- Which factors inform the sentencing of human trafficking in South African courts?
- Does South Africa have appropriate laws to address the sentencing of human traffickers?
- What are the international law guidelines towards the sentencing of human traffickers?
- Are the South African laws in accordance with international law?
- Are there any reforms necessary in this respect?

The hypotheses underlying the research in this study are the following:

- There are a variety of factors informing the sentencing of human trafficking in South African courts.
- The Trafficking Act addresses the sentencing of human traffickers, and the sentences imposed under the Trafficking Act are stringent.
- Sentences enforced on human traffickers, and the reasons given by the courts for these sentences, differ.
- International law guidelines, such as in the Convention and the Rome Statute, provide guidance towards the sentencing of human traffickers.

- South African law on human trafficking is in accordance with international law.
- Legislative intervention is required to revise the sentencing legislation in such a manner so as to assist in the applying of judicial sentencing discretion in order to promote consistency in sentencing human traffickers.

1.4 Methodology

A qualitative research method will be suitable for this study and will therefore be used. This is going to be a desktop-based qualitative study through the use of literature on international law bearing reference to the sentencing of human traffickers, particularly the Palermo Protocol and the Rome Statute. The sentencing regime in the national legislation relating to human trafficking, particularly the Trafficking Act, will also be used. Reference will be made to textbooks, academic studies, journal articles, internet sources, and case law.

The normative legal theory is best suited for this study as it seeks to analyse the protection of rights which are entrenched in the Bill of Rights within the Constitution and prescribes the way forward which will enhance protection of these rights. The purpose of the normative legal theory:

> ...is to explore the integrity of legal ideas and legal reasoning thus assisting lawyers to rationalize legal doctrine by providing a coherent structure and systematic unity of the doctrine.[56]

In any given state, the apex of this structure is the Constitution, the basic norm, or the *grundnorm*, as outlined by Kelsen.[57] The South African justice system should recognise and acknowledge this form of justice based on normative theory other than a retributive one; a theory of justice that acknowledges the harm of criminal behaviour and responsibility of the offender which cannot be put right through punishment.[58] In conjunction with the normative theory, the offender-rights-based approach will be employed. This study demands descriptive, analytical and prescriptive theories.

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56 Muigua http://kmco.co.ke/wp-content/uploads/2018/08/073_Normative_legal_theory.pdf (Date of use: 26 October 2020).

57 Kelsen *Pure theory of law* 226. See also Lloyd *Lloyd's introduction to jurisprudence* 359.

58 Bazemore 2007 *Social Research* 655-656.

1.5 Literature review

The literature review has shown that there are adequate resources to undertake this research. Articles, textbooks, internet sources, legislation, and case law will be utilised during the completion of this research. This study regards the sentences as prescribed under the Trafficking Act. As such, the two focal points in this study will be on sentencing and human trafficking.

Several researchers have already addressed the topic of sentencing. For instance, Terblanche[59] has written many articles as well as a comprehensive guide on criminal law and procedure relating to sentencing in this jurisdiction. He does not, however, fully discuss the sentencing of human traffickers in his guide, and only one co-authored article focuses on human trafficking. Sloth-Nielson and Ehlers examine mandatory and minimum sentences in South Africa, and these authors come to the conclusion that the legislation has achieved little or no significant impact with regard to reducing violent and serious crime, achieving uniformity in sentencing, and satisfying "the public that sentences were sufficiently severe".[60] Jameson, in his thesis on sentencing, probes the manner in which sentencing discretion is exercised in South African criminal courts. The researcher finds that when extrapolating appropriate sentences for convicted offenders, courts may overemphasise one of the elements of the triad (the severity of the crime, the offender's personal circumstances, and the interest of society) to the detriment of the other factors. This may lead to grossly disproportionate sentences.[61] Jameson's research will be of great assistance in determining whether the South African anti-trafficking sentences are consistent and comparable to international law.

The topic of human trafficking has recently become very popular, not only globally, but also in South Africa. In this regard, both Kruger and Mollema have completed

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59 See, e.g., Terblanche *A guide to sentencing in South Africa*; Terblanche 2011 *Stellenbosch LR* 188-204; Terblanche 2017 *PELJ* 1-37; Mollema and Terblanche 2017 *SACJ* 198-223.

60 Sloth-Nielson and Ehlers 2005 *SA Crime Quarterly* 15.

61 Jameson *Structuring the exercising of sentencing discretion in South African criminal courts.*

much research on the subject matter.[62] However, only one article by Mollema and Terblanche centres on the sentencing of human-trafficking perpetrators. Much of the research on human trafficking relate to trafficking being a "modern form of slavery".[63] The world is being conscientised to the reality that slavery is not a thing of the past because the crime reappears in new forms;[64] it "is an ever growing problem and has its presence in almost all the countries across the world".[65] Trafficking takes place across and within national borders;[66] with horrific consequences to the point that some claim that trafficking in human beings can be considered as a crime against humanity.[67] The Rome Statute makes special reference to trafficking in persons which is defined under the crimes against humanity.[68] Several scholars are of the viewpoint that "human trafficking, as a modern form of slavery, is undoubtedly an issue for international criminal justice",[69] and that:

> ...the Rome Statute should extend its jurisdiction to the crime of human trafficking as a crime against humanity.[70]

This is a persuasive argument especially having consideration to the fact that trafficking in persons is already considered as a crime against humanity under the enslavement provision of the Rome Statute Article 7(1).[71] Further, some commentators are of the view that human trafficking as a distinct crime against humanity can strengthen the Palermo Protocol:

> ...because it makes those concerned realize the severity of the problems caused by the practice, and therefore can bind them together to eliminate this evil of the contemporary world.[72]

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62 See, e.g., Kruger *Combating human trafficking: A South African legal perspective*, Kruger and Oosthuizen 2012 *PELJ* 283-343; Mollema *Combating human trafficking in South Africa: A comparative legal study*; Mollema 2014 *JCRDL* 248-264; Mollema 2017 *Scientia Militaria* 20-35.

63 This is especially the view of international organisations, politicians and scholars. See Van der Wilt 2014 *Chinese Journal of International Law* 298; Kemp *et al Criminal law* 625.

64 Van der Wilt 2014 *Chinese Journal of International Law* 298.

65 Aston and Paranjape 2012 *SSRN* 1.

66 Aston and Paranjape 2012 *SSRN* 2.

67 Van der Wilt 2014 *Chinese Journal of International Law* 298. See also para 1.2 above.

68 Aston and Paranjape 2012 *SSRN* 1.

69 Moran 2014 *The Age of Human Rights Journal* 42.

70 Moran 2014 *The Age of Human Rights Journal* 42.

71 Aston and Paranjape 2012 *SSRN* 4.

72 Obokata 2005 *The International and Comparative Law Quarterly* 456.

There are, however, other commentators who argue that while there are overlaps between human trafficking, on the one hand, and slavery and enslavement as a crime against humanity, on the other, the two concepts cannot be equated because that would be to "ignore that the latter imply institutionalized repression with governmental approval or even involvement".[73] They hold the view that human trafficking should not be considered as an independent crime against humanity because it is predominantly an undertaking of private enterprises which is multi-faceted and very difficult to categorise.[74] According to Van der Wilt; the "problem is aggravated by the fact that the scope and the perpetrators of the crime are often hard to identify".[75]

While the argument of the proponents for the inclusion of human trafficking in the Rome Statute as a crime against humanity is persuasive, it is also submitted that the proponents for exclusion is sound on a practical level with regard to definitional challenges. It is not necessary, for the purposes of this study, to conclude whether human trafficking should, or should not be part of the crimes against humanity in the Rome Statute. It is of no significance whether human trafficking is included in the Rome Statute or not – of essence is the fact that there are distinct similarities and overlaps between human trafficking and crimes against humanity under Article 7(1) of the Rome Statute.

To the victims of human trafficking and their families, it is irrelevant whether the offence was committed by an institution, an organised crime unit, or an individual. The punitive responses at national level should reflect those similarities and overlaps through similar sentences to the ones provided in the Rome Statute. This view is also held by Obokata who opines that:

> States and international community must make a holistic approach which addresses multifaceted problems pertinent to trafficking, including its causes and the consequences. If such an approach is taken at the national regional and international levels with effective cooperation and coordination, then the fight against trafficking may be won sooner rather than later.[76]

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73 Van der Wilt 2014 *Chinese Journal of International Law* 298.
74 Van der Wilt 2014 *Chinese Journal of International Law* 298-299.
75 Van der Wilt 2014 *Chinese Journal of International Law* 299.
76 Obokata 2005 *The International and Comparative Law Quarterly* 457.

According to Touzenis, it is imperative that states legislate their domestic anti-trafficking laws "in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements".[77] This would address the requirement for cooperation and coordination in fighting human trafficking. Further, it is argued that such legislation should also contain penalty clauses which are at international standards, and to this end, Touzenis is of the view that:

> Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals) is part of creating an adequate legislative framework. Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.[78]

As such, in the following sub-paragraphs, a brief overview will be provided on the purposes and principles of sentencing; the sentencing of human traffickers under international and domestic law; as well as human-rights issues in sentencing.

1.5.1 Purposes and principles in sentencing

In paragraph 1.2 above, the purposes of sentencing were succinctly mentioned. In the following two sub-paragraphs, the sentencing objectives of retribution and deterrence will be discussed, as well as the proportionality principle in sentencing.

1.5.1.1 Retribution and deterrence

There are different purposes of sentencing; of importance to the scope of this work are the retribution and the deterrence principles. According to Kara, retribution can reflect denunciation, which portrays "society's disapproval of the offending behaviour and asserts the values of the society that criminal law is meant to uphold".[79] When such retribution is accompanied by incarceration; the incapacitation seeks to protect

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77 Touzenis *Trafficking in human beings: Human rights and trans-national criminal law* 107.
78 Touzenis *Trafficking in human beings: Human rights and trans-national criminal law* 55.
79 Kara 2011 *Northwestern Journal of International Human Rights* 129.

society from additional offences that may be committed by the offender by imprisoning the individual.[80]

The function of deterrence can either be specific, and thus dissuading the offender from committing similar offences in the future, or it can be general, making an example of the offender before a court to instil fear in the would-be offender so that they too do not commit similar offences.[81] The effectiveness of deterrence has not been proven.[82] However, there is a common belief that:

> ...an offender's perception of the likelihood of punishment serves as a tangible deterrent. If an offender perceives a sufficiently real possibility that he will be arrested and convicted of a crime (and the punishment is sufficiently severe), he is less likely to commit that crime. [83]

It is further argued that there is doubt as to whether life sentences or long sentences can actually achieve deterrence.[84] According to Gumboh, international law does not support the indiscriminate use of life sentences, and he supports his argument thus:

> International Criminal Court Article 77(1)(b) of the Rome Statute of the ICC (ICC Statute) restricts the imposition of life imprisonment to cases where it is "justified by the extreme gravity of the crime and the individual circumstances of the convicted person". Although the ICC is expected "to try nothing but crimes of extreme gravity" and "the most heinous offenders", the restriction implies that life imprisonment should be the exception rather than the rule.*[85]*

While states are concerned about heinous criminal offences and gross human rights violations, the underlying causes cannot and should not be curbed by the threat of long prison terms.[86]

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80 Kara 2011 *Northwestern Journal of International Human Rights* 129.
81 Kara 2011 *Northwestern Journal of International Human Rights* 129.
82 Mollema and Terblanche 2017 *SACJ* 198.
83 Kara 2011 *Northwestern Journal of International Human Rights* 129.
84 Gumboh 2011 *AHRLJ* 77.
85 Gumboh 2011 *AHRLJ* 84-85.
86 Gumboh 2011 *AHRLJ* 77.

1.5.1.2 Proportionality

The principle of proportionality in sentencing has been addressed in South African common law at the Constitutional Court level. In the case of *S v Dodo*, Ackerman J stated that:

> ...[t]o attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.[87]

According to Terblanche, the logic behind this finds its roots in section 12(1)(a) of the Constitution which provides that a person may "not to be deprived of freedom ... without just cause".[88] Constitutional rights are not inalienable; in terms of section 36 of the Constitution, rights can be limited to give effect to other rights. It has been commended that:

> In determining whether a limitation is reasonable and justifiable within the meaning of s 36 of the Constitution, it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose. [89]

The principle of the rule of law demands that institutions and their procedures respect and uphold the private rights of the people,[90] and their independence as manifested in their right to bodily integrity and dignity "in so far as this is compatible with equal respect for the independence of all others".[91] Sentences which are not proportional to the offence are generally regarded as violations of the offender's human rights.[92] Consequently, it is an essential requirement that those who hold and exercise the public power should do so without favour or arbitrariness but "acting only for the purpose of putting in place the conditions of equal freedom for all its subjects".[93] It follows, therefore, that in limiting the people's rights, there is a requirement for

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87 *S v Dodo* 2001 (1) SACR 594 (CC) para 38.
88 Terblanche 2017 *PELJ* 15.
89 Terblanche 2017 *PELJ* 21.
90 Thorburn *Proportionate sentencing and the rule of law* 281.
91 Thorburn *Proportionate sentencing and the rule of law* 281-282.
92 Gumboh 2011 *AHRLJ* 77.
93 Thorburn *Proportionate sentencing and the rule of law* 282.

balancing various considerations which the Constitutional Court expounded on in the case of *S v Makwanyane* as:

> …the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[94]

Further, it has been opined that:

> It is already trite that the infringement upon a right is only part of the constitutional issue, as it also needs to be established whether such a limitation might not be constitutionally acceptable. Legislation prescribing a sentence might infringe upon rights such as dignity and the prohibition against cruel, inhuman or degrading punishment, but such an infringement will not be unconstitutional if proven to be justified.[95]

The Supreme Court of Canada, in the case of *R v Lloyd*,[96] cautioned that the prescribed minimum sentences can present constitutional challenges in the justification of sentences thus:

> …mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.[97]

This study will take heed of the above caution when analysing the allotted sentences for human-trafficking transgressions in this jurisdiction.

1.5.2 Sentencing human traffickers under international law

Sentencing guidance in international law can be found in Article 2(b) of the Convention, in which a 'serious crime' has been defined as "conduct constituting an

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94 *S v Makwanyane* 1995 (2) SACR 1 (CC) para [104].
95 Terblanche 2017 *PELJ* 20.
96 *R v Lloyd* 2016 (1) SCC 130.
97 *R v Lloyd* 2016 (1) SCC 130 para [35].

offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".[98] This can mean that an offence punishable by one-year imprisonment is considered a serious offence. Under the Rome Statute, penalties for crimes against humanity (under which human trafficking falls) are provided for under Article 77 which states that:

> ...the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
> 2. In addition to imprisonment, the Court may order:
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.[99]

Furthermore, Article 78 provides that:

> 1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
> 2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
> 3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).[100]

From the above two excerpts, it is clear that international law does prescribe life imprisonment for serious crimes, but only under certain specified circumstances. In this regard, the various sentences of the *adhoc* international criminal courts[101] in interpreting the above articles will further supplement this research.

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98 UNTOC Art 2(b).
99 Rome Statute Art 77.
100 Rome Statute Art 78.
101 See para 2.5 below.

1.5.3 Sentencing human traffickers under South African law

Prior to the Trafficking Act, there have been calls for South Africa to enact a law that would provide for stringent sentences "necessary in serious human trafficking cases".[102] Penalties for the crime of human trafficking are provided for in section 13 of the Trafficking Act; they vary from "a fine or a maximum of five years imprisonment for the least severe offences to a maximum of life imprisonment or a fine of an amount not exceeding ZAR100 million, or both, for the most severe ones".[103] These punishments provide for a variety of human trafficking offences without any differentiation. Mollema is of the opinion that while the sentences "are severe enough to punish offenders appropriately and deter potential perpetrators",[104] the Trafficking Act should specify:

> ...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.[105]

In South Africa, as already mentioned, to determine the appropriate sentences, judicial officers make reference to the triad of Zinn,[106] however, these are not the only considerations.[107] Other factors include the underpinning of retribution, as a requisite of fair and reasonable punishment, and the constitutional requirement of proportionality.[108] On top of these considerations, the Trafficking Act provides guidance in section 14 of all the factors to be considered in sentencing, which have been summarised by Paizes as follows:

> ...the court is required to consider the following: the significance of the convicted person's role in the trafficking process (s 14(a)) and the nature of the relationship between the convicted person and the victim (s 14(j)) as well as the question whether the victim's drug addiction was caused by the convicted person (s 14(c)) and whether the latter has any previous convictions relating to the offence of trafficking in persons or related offences (s 14(b)). As far as the victim is

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102 Kruger and Oosthuizen 2012 *PELJ* 302.
103 Mollema 2014 *JCRDL* 252.
104 Mollema 2014 *JCRDL* 252.
105 Mollema 2014 *JCRDL* 251-252.
106 See footnote 34 above.
107 Terblanche 2011 *Stellenbosch LR* 196.
108 As discussed in para 6.1 above. See Terblanche 2011 *Stellenbosch LR* 196.

> concerned, the court must take into account whether the victim was held captive for any period (s 14(e)), in what conditions he or she was so held (s 14(d)) and whether the victim was a child (s 14(i)) or had any physical disability (s 14(l)). The court is also required to consider the state of the victim's mental health (s 14(k)) and the extent of the abuse, if any, suffered by the victim (s 14(f)) as well as the physical and psychological effects the abuse had on the victim (s 14(g)).[109]

These factors will be considered when analysing the anti-trafficking sentencing regime in South Africa.

1.5.4 Human-rights issues in sentencing

Even though there are some maximum boundaries on some offences, and there are minimum boundaries for others; there is, however, still a large degree of discretion on sentencing. This results in varying sentences by courts in regard to the same offences and, therefore, the uncertainty of what to expect on the side of the offender. This presents a challenge to the constitutional right of equality before the law as entrenched in the Constitution.[110] This does not on its own constitute unfair and unequal treatment; it is brought about by an assessment of case-by-case merits and the varying personal circumstances of the offender. This reasoning can suffice for the judicial officer, but it leaves the perception of discrimination; that justice was not served; as it is often said; justice should not only be done but should be seen to be done:

> Legislative guidelines for sentencing are subject not only to the requirement of legality but also to the related requirement of equality before the law and equal protection of the law.[111]

Human rights dictate that by virtue of being human; people should always be treated with dignity and respect, irrespective of the offences they commit. As commended by Gumboh:

> Human beings should always be treated as ends in themselves; hence, an offender should not be turned into an object of "crime prevention to the detriment

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109 Paizes and Van der Merwe 2015 *Criminal Justice Review* 11.
110 The Constitution of the Republic of South Africa, 1996 s 9.
111 Van Zyl Smit *Sentencing and punishment* 49-3.

> of his constitutionally-protected right to social worth and respect". Even the vilest offender remains possessed of human dignity.[112]

Gumboh further argues that, firstly, a sentence to life imprisonment is a violation of the right to human dignity, as it is imposed as a deterrent to potential offenders, hence the instrumentalisation of offenders.[113] Secondly, the argument put forward is that a life sentence is "an intolerable threat to the human dignity"[114] of the offender as it constitutes cruel, inhumane and degrading punishment. There is great uncertainty as to how long an offender sentenced to life imprisonment will actually serve in prison as that sentence may be for the actual duration of the offender's life or it may be altered by parole systems. In terms of the principle of legality, "certainty is a crucial element of the rule of law".[115]

Gallagher and Holmes argue that states should develop clear and precise laws to avoid ambiguity dangers common to complex offences, such as trafficking in persons:[116]

> Whereas international law is silent on the point of determinant sentencing models and does not yet categorically reject the death penalty …, it is unlikely that mandatory minimum custodial terms or provision for capital punishment meet the standard of "effective, proportionate, and dissuasive" in all cases given the complexity of the trafficking crime, inevitable investigatory difficulties, and highly variable levels of complicity among offenders.[117]

It is a recognised fact that sanctions as part of the states' response to human trafficking are essential:[118]

> Weak sanctions can undermine criminal justice efforts and may fail the victims by not offering them the protection they deserve. Weak sanctions can undermine criminal justice efforts and may fail the victims by not offering them the protection they deserve. On the other hand, rigid or extremely severe sanctions, such as mandatory minimum custodial terms or the death penalty, may not meet the required human rights and criminal justice standard.[119]

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112 Gumboh 2011 *AHRLJ* 77.
113 Gumboh 2011 *AHRLJ* 77.
114 Gumboh 2011 *AHRLJ* 77.
115 Gumboh 2011 *AHRLJ* 77.
116 Gallagher and Holmes 2008 *International Criminal Justice Review* 323.
117 Gallagher and Holmes 2008 *International Criminal Justice Review* 323.
118 UN OHCHR *Human rights and human trafficking* 38.
119 UN OHCHR *Human rights and human trafficking* 38.

Having noted the above, it is also important that when imposing sanctions; particularly when sentencing convicted human traffickers, "judicial officers need to be cognisant of the complexities and enduring legacies of trafficking".[120] Of importance are the effects of trafficking on the victims, and the trauma that may last for years.[121] In Kreston's opinion:

> ...the punishment of the perpetrators of this crime is done in such a manner as to genuinely reflects the seriousness of the harm inflicted upon the victims. A critical component of the latter goal is understanding and recognising the consequences to the victim of having been trafficked and considering those consequences when sentencing the offender.[122]

Holding a similar view to Kreston are Harmon and Gaynor, who go a step further and stipulate the manner in which the gravity of the offence should be assessed:

> A proper assessment of gravity in a particular case should require consideration of three principal elements: (i) the abstract gravity of the crime (i.e. a recognition that any conviction for genocide, a crime against humanity or a war crime is an inherently serious conviction); (ii) the concrete gravity of the crime (i.e. an assessment of the total quantum of suffering inflicted on, and social and economic harm caused to, direct and indirect victims of the crime, taking into account the number of victims, and the nature and duration of their suffering at the time of the crime, since the crime, and that which they are likely to continue to experience) and (iii) the level of intent and the level of participation of the convicted person in the commission of the crime.[123]

This study will take into consideration the above three elements in assessing the sentencing of human traffickers in South Africa.

1.6 Layout of the study

This study will only examine international law as pertaining to the sentencing of human traffickers, and not other international law areas.

The human-rights issues related to human trafficking will only be discussed as these relate to sentencing, and not the crime of human trafficking itself.

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120 Kreston 2014 *SACJ* 35.
121 Kreston 2014 *SACJ* 35.
122 Kreston 2014 *SACJ* 36.
123 Harmon and Gaynor 2007 *Journal of International Criminal Justice* 697-698.

Chapter 1 will be an introductory chapter that will briefly introduce the topic that is being discussed. The research background, the rationale, the research aims as well as the methodology utilised in the study will also be explained and be clarified. An overview will be provided of the research.

In chapter 2, the focus will fall on international law relating to human trafficking, specifically the sentencing of human traffickers. This international-law background will be a reference point to discussions in the subsequent chapters.

Chapter 3 will contain critical analysis of the South African efforts as reflected in legislation in the implementation of its international obligations to punish human traffickers. Court decisions on human traffickers will be examined, and the sentences that have been imposed on human traffickers since the coming into force of the Trafficking Act analysed.

Chapter 4 will conclude the research with evaluating the current legislation's effectiveness in sentencing human traffickers, and whether these sentences are in line with international law. It will also try to present an approach that might be suitable in dealing with the issue of intoxication and liability. The summary and recommendations made aim to be useful in further research that will be completed.

1.7 Summary

This study will attempt to bring to light the South African sentencing regime and the sentences handed down against human traffickers by the South African courts under the Trafficking Act. This shall be done against the background of international standards, the Constitution, the Trafficking Act prescripts, and any other legislation regulating sentencing, including case law. Deficiencies will be identified through comparative study on the background of international law, and recommendations made for suitable practices. In the chapter to follow, the legal frameworks available under international law will first be focussed on.

CHAPTER 2

HUMAN TRAFFICKING FRAMEWORKS UNDER INTERNATIONAL LAW

2.1 Introduction

There are several international instruments relating to human trafficking which provide for the criminalisation of the crime. In order to examine the sentencing of perpetrators of human trafficking as provided for under these instruments, the sentencing guidelines as stipulated under the UNTOC,[1] and one of its supplementing protocols; the Palermo Protocol,[2] will be focused on. The relevant provisions of these instruments will be used as the foundation towards the establishment of sentencing of human traffickers under international law. Further guidance will be sought from the Rome Statute[3] and the statutes of the *ad hoc* tribunals which were established under the UN Security Council directive to prosecute international crimes.[4] Specific attention will be paid to the sentencing principles and sentencing guidelines, and their application during sentencing. However, to commence the chapter a brief explanation of the sentencing principles utilised under international law will be provided.

2.2 Principles of sentencing under international law

The Rome Statute and other statutes of the various international criminal tribunals require that the various courts, when sentencing any violation of international humanitarian law, take into account the gravity or seriousness of the offence, the

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1 UN Convention against Transnational Organised Crime (Resolution 55/25 of 15 November 2000).

2 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime Adopted and opened for signature, ratification and accession by General Assembly Resolution 55/25 of 15 November 2000. The UN Global Initiative to Fight Human Trafficking (UN.GIFT) was also established in 2007 in support of enforcing the Palermo Protocol.

3 International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 3.

4 International Criminal Court (ICC) https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 3.

individual circumstances of the convicted person, as well as public interest.[5] This constitutes the well-known triad of Zinn[6] in making sentencing determinations, and it is imperative that the three factors must be considered equally. In the discussion below, the proportionality requirement will be elaborated on with the aid of international criminal case law. Perpetrators are punished for the purposes of retribution, deterrence, incapacitation, rehabilitation, and restitution. The punishment of human traffickers mainly rests on retribution and deterrence. As such, these two elements will be subsequently further discussed.

2.2.1 Proportionality

To properly assess the gravity of the offence, there should be proper acknowledgment of the seriousness of crime. In considering the perpetration of any crime against humanity, the amount of suffering inflicted and endured by the victims of the crime must be taken into account bearing in mind their number, duration and nature of suffering; the likelihood of further suffering after the crime has already been committed, and, lastly, the intention and level of participation in the commission of the crime by the convicted person.[7]

The emphasis on the gravity of the crime suggests that retribution is the major principle buttressing international punishment.[8] This is also the general conception that retribution advocates the principle of proportionality, as the punishment is matched to the gravity of the offence. As opined by Bishai:

> A fundamental goal of retribution is that the 'punishment fit the crime', yet in cases of mass atrocity there is literally no way to construct a punishment proportionate to the gravity of the crime.[9]

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5 See, e.g., Rome Statute art 78; Statute of the International Criminal Tribunal for the former Yugoslavia art 24(2); Statute of the International Criminal Tribunal for Rwanda art 23(2).

6 See Chapter 1, footnotes 34 and 113 above.

7 Harmon and Gaynor 2007 *Journal of International Criminal Justice* 697-698.

8 Bassett 2009 *Human Rights Brief* 22.

9 Bishai 2013 *Northwestern University Journal of International Human Rights* 105. See also *Prosecutor v Bosco Ntaganda* (7 November 2019) para 11 in which the Trial Chamber stated that: "The Court's legal framework does not contain mandatory minimum or maximum sentences, or sentence ranges, for specific crimes, and the Chamber enjoys broad discretion in determining the sentence. Yet, under Article 78(1), and given the importance of retribution as one the primary

As evidenced from the excerpt above, in the context of international crimes, it is very difficult and almost impossible to achieve any measure of proportionality if regard is had to the perpetrators of such great atrocities.[10] In determining a suitable punishment for human traffickers, the international adjudicators seem to experience impediments in balancing the three aspects in the Zinn-triad.

2.2.2 Retribution and deterrence

International law does not provide for the objectives of sentencing to guide judges in the ICC and the international tribunals on penalties they should impose in international criminal cases.[11] Commentators have noted that:

> Over the years, the following purposes have been listed by judges as relevant for international sentencing: retribution, justice, deterrence (general and specific), rehabilitation, expressivism, reprobation, stigmatisation, affirmative prevention, incapacitation, protection of society, social defence and finally restoration/maintenance of peace and reconciliation.[12]

However, the ICC Trial Chamber in the case of *Prosecutor v Ntaganda* stated that the Rome Statute "establishes retribution and deterrence as the primary objectives of punishment at the Court".[13] It has also been noted that the international tribunals put more emphasis on retribution and deterrence as objectives of sentencing. For example, the Special Court for Sierra Leone Trial Chamber in the case of *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*,[14] following in the opinion of its Appeals Chamber, stated that the legitimate sentencing purpose of the court must be

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objectives of sentencing, the totality of the sentence must be proportionate and reflect the culpability of the convicted person. The penalties must therefore be tailored to fit the gravity of the crimes. As discussed further below, the gravity is generally measured *in abstracto,* by assessing the constitutive elements of the crime and the mode of liability in general terms, and *in concreto,* by assessing the particular circumstances of the case looking at the degree of harm caused by the crime and the culpability of the perpetrator. The Chamber bases itself primarily in this regard on the findings in the Judgment".

10 Riegler 2020 *International Criminal Law Review* 706-707.

11 Hola 2012 *New Amsterdam Law Forum* 6.

12 Hola 2012 *New Amsterdam Law Forum* 6.

13 *Prosecutor v Bosco Ntaganda* No ICC 01/04-02/06 (7 November 2019) (hereafter *Prosecutor v Bosco Ntaganda* (7 November 2019)) para 9.

14 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Sentencing Judgment, Case No SCSL-04-15-T (8 April 2009) (hereafter *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009)).

premised in the acknowledgement that "the primary objectives must be retribution and deterrence".[15] Furthermore, in the case of *Prosecutor v Kunarac, Radomir Kovac and Zoran Vukovic*,[16] the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereafter referred to as the ICTY)[17] also stated that both the ICTY and the International Criminal Tribunal for Rwanda (hereafter referred to as the ICTR)[18] are consistent considering retribution as a primary purpose of sentencing to fit the offender's specific criminal conduct.[19] Along with retribution, as expounded on by Goffrier, deterrence is also interpreted "not only as a sentencing principle but also as general purpose of the ICTY".[20]

The Trial Chamber in the case of *Prosecutor v Momčilo Krajišnik*,[21] while referring to the legitimacy of retribution in the international court sentencing principles, stated that harsh sentences cannot rectify a wrong, and they provide limited comfort to the victim's suffering, hopelessness, anguish, and feelings of deprivation.[22] It was further indicated that a sentence should be an expression of society's condemnation of the criminal act and of the person who committed it.[23]

Under international criminal justice, the purpose of rehabilitation is difficult to envision and to achieve.[24] In this regard, the ICC Trial Chamber has asserted that "[a]lthough rehabilitation is also a relevant purpose of sentencing, it should not be given undue weight in the context of the crimes adjudicated by the Court".[25] It is because of the

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15 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 13.

16 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* Case No It-96-23& It-96-23/1-A (12 June 2002) (hereafter *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002)).

17 UN Security Council Resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] 25 May 1993.

18 UN Security Council Resolution 955 (1994). Adopted by the Security Council at its 3453rd meeting, 8 November 1994.

19 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 385.

20 Goffrier *Deterrence as principle of sentencing in international criminal justice* 15. See also Keller 2001 *Indiana International and Comparative Law Review* 57.

21 *Prosecutor v Momčilo Krajišnik* Case IT-00-39-T (27 September 2006).

22 *Prosecutor v Momčilo Krajišnik* Case IT-00-39-T (27 September 2006) para 1146.

23 *Prosecutor v Momčilo Krajišnik* Case IT-00-39-T (27 September 2006) para 1135.

24 Riegler 2020 *International Criminal Law Review* 708.

25 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 10.

seriousness of offences in international criminal trials that rehabilitation does not warrant too much emphasis in the majority of cases.[26]

These principles of sentencing are generally adhered to by the ICC and other related international judicial bodies, and also verified in international instruments. This will be elaborated on herein below.

2.3 The UN Convention against Transnational Organised Crime and the Palermo Protocol

In regard to the sentencing of human traffickers, there are not many guiding principles that the UNTOC provides. However, it is very clear that the individual states should retain sovereignty and discretion in regulating for the establishment of offences, the prosecution, adjudication and sentencing of human traffickers, taking into account the gravity of the offence.[27] The UNTOC further provides that the description of established offences is reserved to the individual domestic law of states, "and that such offences shall be prosecuted and punished in accordance with that law".[28] Furthermore, the UNTOC determines that:

> Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.[29]

The above provisions do not give any directives or guidelines in regard to the sentencing of human traffickers. Sentencing has to be dealt with by individual states in line with their established sentencing criteria.

The Palermo Protocol is linked to the UNTOC in terms of article 1(3) which states that the offences in article 5 of the Protocol "shall be regarded as offences established in

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26 Hola 2012 *New Amsterdam Law Forum* 7. See also Keller 2001 *Indiana International and Comparative Law Review* 57.
27 UNTOC art 11(1).
28 UNTOC art 11(6).
29 UNTOC art 11(2).

accordance with the Convention".[30] This link is regarded by commentators as critical because:

> It ensures that any offence or offences established by each country in order to criminalize trafficking in human beings as required by Protocol Article 5 will automatically be included within the scope of the basic Convention provisions governing forms of international cooperation.[31]

Article 5 of the Protocol refers to the criminalisation of conduct as set out in article 3, subject to the basic concepts of each individual state's legal system. Article 3, in turn, outlines the purpose of the Palermo Protocol, and defines the term 'trafficking in persons' thus:

> (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
> (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;
> (d) 'Child' shall mean any person under eighteen years of age.[32]

Despite the wording of its title; the Palermo Protocol (or its *Legislative guide for the implementation of the Protocol*) does not provide any guidance towards the issue of punishment in its provisions as can be seen from Article 2 which states the purpose of the Protocol as the prevention of human trafficking with particular emphasis on the most vulnerable of persons, i.e. women and children; the protection of human trafficking

30 UNTOC art 1(3); Palermo Protocol art 5.
31 UNODC *Legislative guide for the implementation of the Protocol* 15.
32 Palermo Protocol art 3.

victims, and the promotion of cooperation amongst the parties to the Protocol in order to fulfil these objectives.[33]

Some assistance is offered in the UN's *Recommended principles and guidelines on human rights and human trafficking*.[34] Principle 15 of this document relates to effective, proportional and dissuasive sanctions, where it is emphasised that punishment is an essential component to a comprehensive response to trafficking:

> Sanctions that are disproportionate to the harm caused and the potential benefits derived from trafficking will create distortions that can only hinder effective criminal justice responses. Inadequate penalties for trafficking can also impair the effectiveness of international cooperation procedures, such as extradition, which are triggered by a severity test linked to the gravity of sanctions.[35]

The authors make special effort to further explain that severe or extremely rigid sanctions, such as mandatory minimum custodial terms, cannot be reconciled with the required human rights and criminal-justice standards in all cases. Principle 15 confirms again that individual states have the obligation to impose effective and proportionate penalties on convicted human traffickers, as provided for by specific anti-trafficking legislation. In this regard, the UNTOC makes available the following prerequisites with respect to the offences established under the Palermo Protocol:

- Such offences are to be liable to sanctions that take into account the gravity of the offences; and
- Discretionary legal powers with regard to sentencing are to be exercised in a way that maximizes the effectiveness of law enforcement measures and gives due regard to the need to deter the commission of trafficking-related offences (art. 11).[36]

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33 Palermo Protocol art 2.

34 UNHCHR *Recommended principles and guidelines on human rights and human trafficking* (2010) 213-217.

35 UNHCHR *Recommended principles and guidelines on human rights and human trafficking* 213. Principle 15 is related to and implements Principle 12 and linked guidelines (dealing with criminalisation), and Principle 13 and associated guidelines (dealing with investigation and prosecution).

36 UNHCHR *Recommended principles and guidelines on human rights and human trafficking* 214. A state that is a party to the UNTOC, but not to the Palermo Protocol must establish that trafficking is, under its law, a 'serious crime' as defined in the UNTOC for these provisions to apply to trafficking offences. See UNTOC art 2 (9)(b); UNODC *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* Part 1, para 302. See also Combs 2016 *Yale Journal of International Law* 8.

Custodial sentences are to be preferred, but in certain instances non-custodial sanctions, such as monetary penalties, may be implemented. Custodial and non-custodial punishments may be applied together, such as where the assets of a trafficker or of legal persons, such as companies involved in human trafficking, are confiscated. By taking into account the gravity of the offence, and giving due regard to the aspect of deterrence, the punishment must be individualised for each perpetrator, depending on whether certain aggravating circumstances are present or not. These aggravating factors are the following: where the trafficker's conduct deliberately or by means of gross negligence endangered the trafficked person's life; where the trafficked person is a child; if the trafficking offence was committed by public officials in performing their duties; and whether the offence was committed as part of organised criminal activities.[37] As evidenced from the above requirements, sanctions must be generally consistent with the harm caused and the benefits derived from trafficking and related exploitation. Punishments must, in short, "clearly outweigh the benefits of the crime".[38] These very basic guidelines on sentencing are echoed in various international human-rights statutes and criminal tribunals as well. The contents of these statutes as well as the judgments of the international criminal tribunals will now be touched on.

2.4 The International Criminal Court

As the UNTOC and the Palermo Protocol do not provide any specific guidance in regard to the sentencing of human traffickers,[39] reference must also be made to the Rome Statute under which the ICC was established when the Rome Statute was adopted as a treaty.[40] The ICC is situated in the Hague in the Netherlands; however, when deemed

37 UNHCHR *Recommended principles and guidelines on human rights and human trafficking* 216.

38 UNODC *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* Part 1, para 262.

39 See Combs 2016 *Yale Journal of International Law* 9; Keller 2001 *Indiana International and Comparative Law Review* 57.

40 The ICC was established on 17 July 1998. See International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 3.

necessary, the ICC judges may establish *ad hoc* seats in other countries.[41] As provided under Article 5 of the Rome Statute; the purpose of the ICC is to:

> ...investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[42]

Human trafficking has been included under the crimes against humanity[43] where several offences are provided for; including enslavement.[44] In terms of the Rome Statute:

> 'Enslavement' means 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...[45]

If the definition of human trafficking as set out in article 3 of the Palermo Protocol is compared to the crime of enslavement as found in the Rome Statute and in the Slavery Conventions,[46] there are visible similarities. Commentators have opined that:

> References in the Rome Statute to human trafficking indicate an intention of its inclusion within the ICC's jurisdiction, and likewise, both slavery and enslavement are stipulated exploitative 'purposes' of human trafficking. However, the extent of this overlap and the degree to which human trafficking falls within the Rome Statute's legal framework remains unclear.[47]

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41 International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 4.

42 International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 3.

43 Crimes against humanity mean any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. See Kemp *et al* 533-540. See also footnote 12 above.

44 Rome Statute art 7(1)(c).

45 Rome Statute art 7(2)(c).

46 The Convention to Suppress the Slave Trade and Slavery, 1926; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

47 Mahmood 2019 *Journal of Trafficking and Human Exploitation* 37.

However, the Slavery Conventions refer to efforts to obtain permanent ownership over persons, and do not cover more volatile endeavours to acquire benefits from the temporary commercial exploitation of humans. It seems that slavery (or practices similar to slavery) only constitutes one of the forms of exploitation in the definition of human trafficking, being the purpose of trafficking. Still, trafficking in human beings (as assimilated to enslavement) has been prosecuted at the ICC and international criminal tribunals, as will be discussed hereunder.

2.4.1 Background to the sentencing practices of the ICC

The Rome Statute dictates, under Part 3, that the general principles of criminal law must be adhered to in sentencing, which includes the principle of legality; the *nullum crimen sine lege*[48] and the *nulla poena sine lege* principles.[49] People convicted by the ICC can only be sentenced in accordance with the Rome Statute.[50] Penalties under the Rome Statute are imprisonment for a determinate number of years which may not exceed 30 years, or life imprisonment in cases of extreme gravity of the offence.[51] In addition to imprisonment, the Rome Statute Rule of Procedure and Evidence provides for the imposition of a fine, forfeiture of profits, and property gained from the crime without prejudice to *bona fide* third parties.[52]

The ICC, in determining the appropriate sentence, should consider the gravity of the offence and the convicted person's individual circumstances.[53] For each count on which a person has been convicted, there should be a specific sentence, and a single sentence specifying the total term of imprisonment to be served. This single sentence must not be less than the highest individual sentence.[54] The single sentence should not exceed 30 years' imprisonment or imprisonment for life.

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48 Rome Statute art 22.
49 Rome Statute art 23.
50 Rome Statute art 22
51 ICC Statute art 77.1.
52 ICC Statute art 77.2.
53 ICC Statute art 78.1.
54 ICC Statute art 78.3.

The total sentence must reflect the culpability of the convicted person by balancing all relevant factors; aggravating factors, mitigating factors, circumstances of the crime and that of the convicted person, and in addition consider the harm done and the harm suffered by victims and their families. The ICC must also consider the nature of the offence and the means of its execution, the convicted person's degree of participation, level of intent, their age, level of education, social and economic standing.[55] Further factors that may be considered as aggravating factors should be previous criminal convictions of offences falling under the jurisdiction of the ICC, the abuse of power, the defencelessness of victims, discriminatory motives, and any other circumstances of similar nature to the ones mentioned.[56] In addition to the above, mitigating factors should include grounds such as the convicted person's diminished mental capacity, conduct after the act such as compensating victims and cooperation with the court.[57] Life imprisonment should always be reserved for crimes premised by extreme gravity evidenced by more aggravating factors.[58] The above-mentioned sentencing requisites will be displayed by means of case law below.

2.4.2 Sentencing practices of the ICC – case law

In the case of the *Prosecutor v Bosco Ntaganda*,[59] the ICC "convicted Mr. Ntaganda of various crimes against humanity and war crimes".[60] When passing sentence, the Trial Chamber took into consideration the provisions of Articles 76, 77 and 78 of the Rome Statute, and the provisions of Rules 145 to 147 of the Rules under the Rome Statute.[61] The Trial Chamber observed that the ICC legal framework "does not contain mandatory minimum or maximum sentences, or sentence ranges, for specific crimes, and the Chamber enjoys broad discretion in determining the sentence".[62] The Trial Chamber highlighted the recognition of the "importance of retribution as one of the primary

55 ICC Rules of Procedure and Evidence Rule 145.1.
56 ICC Rules of Procedure and Evidence Rule 145.2.
57 ICC Rules of Procedure and Evidence Rule 145.2.
58 ICC Rules of Procedure and Evidence Rule 145.3.
59 *Prosecutor v Bosco Ntaganda* (7 November 2019).
60 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 1.
61 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 8.
62 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 11.

objectives of sentencing".[63] Further, during sentencing, the participation of the convicted person in the crimes committed, the gravity of the crimes committed, and the aggravating as well as mitigating factors must all be balanced to inform a proportionate sentence.[64]

2.4.2.1 Nature and gravity of the offences

Amongst other offences, Mr. Ntaganda was convicted of sexual slavery as a crime against humanity.[65] The victims of the crime were an 11-year-old girl (a minor) and another person only referred to as P-0113. The two were captured and "subjected to deprivation of liberty lasting several days or even weeks",[66] which proved "the element of the exercise of a power of ownership".[67] During their time of captivity, the two were subjected to rape and slavery.[68] Evidence during trial showed that these victims of rape suffered:

> ...physical, psychological, psychiatric and social consequences (ostracisation, stigmatisation and social rejection), both in the immediate and longer term. Some of the effects were also experienced by the victims' family members and communities.[69]

2.4.2.2 Degree of participation

Mr. Ntaganda was a direct perpetrator, who along with his co-perpetrators conceived a plan through which they subjected civilians to sexual slavery.[70] The victims of these crimes were brought to his base in his presence, and he himself also brought the victims there. The Trial Chamber considered his degree of culpability to be substantial and stated that:

> ...in relation to sexual slavery as a crime against humanity and as a war crime committed during the Second Operation. The intensity of his involvement in, and his proximity to, the rapes of civilians committed at the *Appartements* camp are

63 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 11.
64 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 11.
65 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 94.
66 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 101.
67 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 101.
68 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 101.
69 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 101.
70 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 114.

> factors which, the Chamber considers, further increase his culpability for these rapes.[71]

2.4.2.3 Aggravating factors

The very young ages and the defencelessness of some of the victims were taken as aggravating circumstances by the Trial Chamber.

2.4.2.4 Mitigating circumstances

Mr. Ntaganda, in mitigation of sentence, raised the issue that he was married with seven children; six of which were minors, and further that he was indigent and owns no assets.[72] He further raised the fact that he had only received six visits from his family due to lack of resources, and has not seen his youngest three children since 2013.[73] The Trial Chamber considered and rejected Mr. Ntaganda's family circumstances as a mitigating factor.[74]

2.4.2.5 Proportional sentences

The Trial Chamber considered all the relevant facts relating to the gravity of the offence – Mr. Ntaganda's degree of participation, aggravating circumstances, and Mr. Ntaganda's personal circumstances, and awarded him a proportionate sentence stating thus:

> ...a sentence of 28 years to appropriately reflect the gravity of the rapes of civilian victims, Mr Ntaganda's culpability and the aggravating circumstances with respect to Counts 4 and 5; a sentence of 12 years to appropriately reflect the gravity of the sexual slavery of civilian victims, Mr Ntaganda's culpability and the aggravating circumstance with respect to Counts 7 and 8.[75]

It has to be noted that the sentence of twelve years' imprisonment for counts 7 and 8 which were crimes against humanity was so low as reasoned by the Trial Chamber:

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71 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 117.
72 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 240.
73 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 241.
74 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 244.
75 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 132.

> ...because the sexual violence the victims suffered forms the basis of the rape convictions and is therefore reflected in the sentences for rape, the Chamber considered only the additional element of exercise of a power of ownership. [76]

The Trial Chamber sentenced Mr. Ntaganda to 28 years' imprisonment for the rape of enslaved civilians in count 4 and count 5.[77] Essentially this means that for the all-inclusive crime of human trafficking, the sentence could have been 40 years' imprisonment. Mr Ntaganda appealed the sentence to the Appeals Chamber arguing that his alleged participation in and knowledge of sexual slavery were not concretely assessed.[78] The Appeals Chamber rejected the ground of appeal,[79] and confirmed the sentencing decision.[80]

2.5 The International Criminal Tribunals

Before the ICC came into force, and while the negotiations were still under way; heinous crimes took place in Yugoslavia and Rwanda.[81] As already mentioned, there was an urgent need for international intervention, and *ad hoc* tribunals were established by the UN. On 25 May 1993, the UN Security Council through Resolution 827 established the ICTY:[82]

> ...for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace...[83]

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76 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 131.
77 *Prosecutor v Bosco Ntaganda* (7 November 2019) para 246.
78 *Prosecutor v Bosco Ntaganda* No ICC-01/04-02/06 A3 (30 March 2021) para 67.
79 *Prosecutor v Bosco Ntaganda* No ICC-01/04-02/06 A3 (30 March 2021) para 82.
80 *Prosecutor v Bosco Ntaganda* No ICC-01/04-02/06 A3 (30 March 2021) para 284.
81 International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021) 3.
82 UN Security Council Resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] 25 May 1993.
83 UN Security Council Resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] 25 May 1993 para 2.

Around the same period, the UN Security Council received a request from the government of Rwanda for assistance in the prosecution of perpetrators of appalling crimes.[84] On 8 November 1994, the UN Security Council established the ICTR:

> ...for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.[85]

Similarly, following the unrest in Sierra Leone, the UN Security Council accepted an agreement reached between the UN Secretary General and the Government of Sierra Leone on 4 October 2000 establishing the Special Court for Sierra Leone.[86] The Special Court for Sierra Leone was established to:

> ...to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.[87]

All these tribunals have since been terminated; the ICTY was closed on 31 December 2017,[88] the ICTR formally closed on 31 December 2015,[89] and the Special Court for Sierra Leone closed on the 31 December 2013. In the following sub-paragraphs, background to the sentencing practices of the ICTY and the Special Court for Sierra Leone will be provided, as well as case law on these bodies' sentencing practices.

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84 UN Security Council Resolution 955 (1994). Adopted by the Security Council at its 3453rd meeting, 8 November 1994.

85 UN Security Council Resolution 955 (1994) para 1.

86 UN Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000.

87 UN Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000 para 1.

88 UN Security Council https://www.un.org/securitycouncil/content/repertoire/international-tribunals (Date of use: 20 June 2021).

89 UN Security Council https://www.un.org/securitycouncil/content/repertoire/international-tribunals (Date of use: 20 June 2021).

2.5.1 Background to the sentencing practices of the ICTY

The ICTY Statute provides that the Trial Chamber must pronounce judgments, and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.[90] The ICTY Statute limits sentences of the Trial Chamber to imprisonment.[91] In determining the terms of imprisonment, the Trial Chamber must have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia, and further take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.[92] The Trial Chamber may, in addition to imprisonment, order restitution of property and proceeds acquired through criminal conduct, to their rightful owners.[93]

The rules of procedure and evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY)[94] states that if the conviction results from a guilty plea, the prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.[95] The convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.[96]

In determining the sentence, the ICTY Trial Chamber must take into account the factors mentioned in the ICTY Statute, as well as such factors as: (i) aggravating factors; (ii) mitigating circumstances and the substantial cooperation of the convicted person with the prosecutor before or after conviction; (iii) the general sentencing practice of the courts of the former Yugoslavia; (iv) the time already served for any penalty imposed

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90 ICTY Statute art 23.1.
91 ICTY Statute art 24.1.
92 ICTY Statute art 23.2.
93 ICTY Statute art 23.3.
94 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991: Rules of Procedure and Evidence IT/32/Rev.50 (8 July 2015) (hereafter ICTY Rules of Procedure and Evidence).
95 ICTY Rules of Procedure and Evidence Rule 100(A).
96 ICTY Rules of Procedure and Evidence Rule 101 (A).

by a court of any state on the convicted person for the same act, as referred to in the ICTY Statute.[97]

Under the ICTY "the gravity of the offence is a factor of primary importance in the determination of the sentence and that it provides the litmus test in the imposition of the appropriate sentence".[98] The aggravating factors essential in sentencing were considered to be disregard for the victim's dignity, vulnerability of victims, sadistic tendencies of the accused, their active roles, and abuse of power.[99]

2.5.2 Sentencing practices of the ICTY – case law

In the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*,[100] the trial against the accused persons came in the wake of terrible atrocities and violations of international humanitarian law during the conflict that unfolded in the period between 1991 to 1995 when the three main groups; the Bosnian Serbs, supported by Serbia, the Bosnian Croats, supported by Croatia, and the Bosnian Muslims, that had formed the Yugoslavia federation broke ranks and fought over territories.[101] The trial was before the Trial Chamber of the ICTY, and commenced on 20 March 2000 and came to a close on 22 November 2000.[102] As this work focuses only on the sentencing of human trafficking as offences included in enslavement under the broad category of crimes against humanity, only the sentence against the accused will be discussed below, taking into account the nature and gravity of the offence, aggravating and mitigating factors as well as general considerations.

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97 ICTY Rules of Procedure and Evidence Rule 101 (B).

98 Windridge, Bossow and Beqiraj *Sentencing criteria in international criminal law: Towards consistency, certainty and fairness* 23.

99 Windridge, Bossow and Beqiraj *Sentencing criteria in international criminal law: Towards consistency, certainty and fairness* 24.

100 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* IT-96-23-T& IT-96-23/1-T (22 February 2001) (hereafter *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001)).

101 Harmon *War in the former Yugoslavia: Ethnic conflict or power politics?* 5.

102 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) paras 4-11.

2.5.2.1 Nature and gravity of the offence

It was established by the Trial Chamber that Kunarac was a commander in charge of a group of soldiers.[103] Kunarac was convicted of the crime of enslavement.[104] This conviction was based on the proven evidence that Kunarac and another comrade of his kept two girls in an abandoned house where they constantly raped them. The captors treated the girls as their property, forced them to carry out house chores and obey all demands made on them.[105] The girls did not have the freedom to go anywhere, and had no place to run to or hide from their captors.[106] They had no control over their lives, and they were also prostituted for money.[107]

Kunarac's co-accused, Kovac, was convicted of the offence of enslavement,[108] on the following proven evidence: On 30 October 1992, four girls were taken from a certain house and handed over to Kovac who kept them in an apartment over which he had control.[109] He detained two of these girls from that date until December 1992, and the other two until February 1993.[110] During their detention, the girls were enslaved to do chores around the house, were sexually assaulted, beaten, threatened, and oppressed psychologically through constant fear.[111] The girls were further subjected to constant rape, humiliation and degradation.[112] They were always being guarded by Kovac's men when out of the apartment, and were kept under lock in the apartment when the men were away.[113] They could not leave as they had nowhere to go, and for fear of what would happen to them if recaptured.[114] The girls' hygiene and diet were neglected by Kovac; they survived on left-over food from the men – they were deliberately starved as there was no shortage of food.[115] Over and above being repeatedly raped, the girls

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103 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 626.
104 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 745.
105 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 728.
106 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 740.
107 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 142.
108 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 782.
109 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 747.
110 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 747.
111 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 747.
112 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 748.
113 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 750.
114 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 750.
115 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 752.

were also prostituted for money;[116] they were constantly and painfully humiliated; forced to dance naked and marched through the streets naked.[117] When he was done with the girls, Kovac sold them off for money and washing powder:[118] "for all practical purposes, he possessed them and had complete control over their fate, and he treated them as his property."[119]

2.5.2.2 Aggravating circumstances

The Trial Chamber, having taken into consideration the nature and gravity of this offence, went further to consider the aggravating circumstances. The Trial Chamber found the following as aggravating factors: Kunarac's victims were very young, between the ages of fifteen and nineteen years.[120] The crimes were committed over the long period of two months;[121] more than one victim was involved, more than one perpetrator participated in the crime at the same time,[122] and the offences were accompanied by torture against vulnerable and defenceless victims.[123]

As aggravating circumstances against Kovac, the Trial Chamber found the following: the relative youth of the victims of about 20 years old, and the very young age of one of the victims (twelve years) were taken as aggravating circumstances.[124] The length of the enslavement, the sadistic nature of committing offences, the vulnerability and defencelessness of victims, and the involvement of more than one victim were further all found to be aggravating circumstances.

2.5.2.3 Mitigating factors

The Trial Chamber considered the mitigating factors and found that Kunarac's voluntary surrender and substantial cooperation with prosecution mitigated against his

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116 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 756.
117 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 766-773.
118 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 778.
119 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 781.
120 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 864.
121 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 865.
122 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 866.
123 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 867.
124 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 874.

sentence.[125] Further, the Court found Kunarac's remorse and guilty feelings about the fact that one girl was gang-raped in a room adjacent to the one he was in while raping another girl as a mitigating factor.[126] The Trial Chamber found that there were no mitigating circumstances for consideration in regard to Kovac.[127]

2.5.2.4 General considerations

The Trial Chamber imposed a single sentence in accordance with Rule 87(C) of the ICTY Rules of Procedure and Evidence which provide that:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.[128]

Unfortunately, as commentators have opined, the decision of the Trial Chamber to impose the single sentence provides no opportunity to assess the sentences for each individual crime the accused is found guilty of. This approach impacts on the analysis of the sentence relevant to enslavement as a stand-alone offence. However, it gives the general attitude of the Trial Chamber towards the accused persons' conduct.

2.5.2.5 Proportional sentences

The Trial Chamber sentenced Kunarac to a cumulative term of 28 years' imprisonment for all charges in which he was convicted including enslavement,[129] and sentenced Kovac to a cumulative term of 20 years' imprisonment for all charges in which he was convicted including enslavement.[130]

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125 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 868.
126 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 869.
127 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 876.
128 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991: Rules of Procedure and Evidence IT/32/Rev.50 (8 July 2015) Rule 87(C).
129 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 871.
130 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (22 February 2001) para 877.

2.5.2.6 On appeal

Kunarac appealed against his sentence on the grounds that the Trial Chamber erred in imposing a global sentence covering all criminal offences, claiming that individualised sentences ought to have been imposed. He further maintained that the Trial Chamber erred in delineating itself from the sentencing regime in the former Yugoslavia, thereby imposing a much higher sentence on him in excess of possible sentence. According to Kunarac, the Trial Chamber did not properly assess the aggravating factors; they overlooked some mitigating circumstances and was not clear on the credit to be awarded on time served.[131]

The Appeals Chamber dismissed Kunarac's appeal on all grounds except the part where he claimed mitigating circumstances. The Appeals Chamber acknowledged the relative weight of Kunarac's family circumstances, but even then it was not motivated to revise the sentence.[132] However, it added a correction in that Kunarac "is entitled to credit for the time he has spent in custody since his surrender on 4 March 1998".[133] The Appeals Chamber found that the Trial Chamber's sentence was appropriate considering the number and severity of committed offences, and affirmed the sentence of 28 years' imprisonment.[134]

Kovac also appealed against his sentence on the grounds that the Trial Chamber erred in delineating itself from the sentencing regime in the former Yugoslavia; they failed to properly assess the aggravating factors; overlooked some mitigating circumstances, and infringed his rights by denying to award him credit on time served.[135] The Appeals Chamber dismissed Kovac's appeal against his sentence in total, however, it added a correction that Kovac "is entitled to credit for the time he has spent in custody since his arrest on 2 August 1999".[136] The Appeals Chamber found that the Trial Chamber's

131 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 27.
132 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 125.
133 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 125.
134 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 125.
135 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 29.
136 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 126.

sentence was appropriate considering the number and severity of committed offences, and affirmed the sentence of 20 years' imprisonment.[137]

As seen from the sentencing requirements and final sentences provided by the ICTY, the crime of human trafficking is punished by long terms of incarceration (although not life terms). In the following section, the sentencing practices and case law of the Special Court for Sierra Leone will be considered for comparison with that of the ICC and ICTY.

2.5.3 Background to the sentencing practices of the Special Court for Sierra Leone

The Statute of the Special Court for Sierra Leone has a specific set of sentencing procedures for children which is apart from the general one. For children, imprisonment is not an option, the Trial Chamber may impose orders such as counselling, community service, guidance and supervision orders, correctional, educational and vocational training, foster care, programmes of disarmament, and where appropriate, to undergo child protection agencies programmes and reintegration.[138]

For the adult regime, the Special Court for Sierra Leone Statute provides for the imposition of "imprisonment for a specified number of years".[139] To determine the appropriate sentence, the Trial Chamber must give regard to the sentencing practices of the ICTR and the national courts of Sierra Leone.[140] Sentences imposed should bear account of the gravity of the offence, and the individual circumstances of the convicted person.[141] In addition to imprisonment, the Trial Chamber may order the forfeiture of property, monies, and assets acquired from the perpetrator's criminal conduct from him or the state of Sierra Leone.[142]

The Special Court for Sierra Leone Rules of Procedure and Evidence also gives guidance towards sentencing. In a case where a person was convicted or had entered a guilty plea, the Trail Chamber should give the prosecution seven days within which

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137 *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (12 June 2002) para 126.
138 Special Court for Sierra Leone Statute art 7.2.
139 Special Court for Sierra Leone Statute art 19.
140 Special Court for Sierra Leone Statute art 19 (1).
141 Special Court for Sierra Leone Statute art 19 (2).
142 Special Court for Sierra Leone Statute art 19 (3).

to submit any relevant information that may assist the Chamber to reach an appropriate sentence.[143] After the prosecution's submission, the defence is also given a chance to submit within seven days relevant information to assist the Chamber to reach an appropriate sentence. When deciding on the appropriate sentence, the Trial Chamber must take into consideration any aggravating factors, mitigating circumstances, the convicted person's cooperation with the prosecution, and time already served for the same criminal conduct.[144]

The Special Court for Sierra Leone Rules of Procedure and Evidence gives the Trial Chamber a discretion whether to order that the sentences run concurrently or consecutively.[145] Furthermore, the period of time the convicted person spent in custody pending trial shall be taken into consideration when sentencing.[146]

2.5.4 Sentencing practices of the Special Court for Sierra Leone – case law

On 25 February 2009, the Special Court for Sierra Leone convicted a high-ranking officer in the Revolutionary United Front (hereafter RUF) in the case of *Prosecutor v Sesay, Kallon and Gbao*.[147] The three accused were convicted on several charges, but for the purposes of this research, only convictions and sentences on sexual slavery and enslavement as crimes against humanity will be discussed.

2.5.4.1 Nature and gravity of the offences

Many women and girls were forced into illicit marriages with the RUF commanders, serving them as wives while carrying out domestic chores and acting as sexual slaves.[148] These women and girls were under the control of these commanders for protracted periods of time, and could not leave for fear of violence against them.[149] Some of the girls were as young as ten years old,[150] and most victims of forced

143 Special Court for Sierra Leone Rules of Procedure and Evidence Rule 100 (A).
144 Special Court for Sierra Leone Rules of Procedure and Evidence Rule 101 (B).
145 Special Court for Sierra Leone Rules of Procedure and Evidence Rule 101 (C).
146 Special Court for Sierra Leone Rules of Procedure and Evidence Rule 101 (D).
147 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009).
148 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 122.
149 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 122.
150 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 127.

marriages and sexual slavery were of school-going age.[151] These women and girls were subjected to these atrocities without regard to their age or status; some were even pregnant women.[152] The victims suffered physical and psychological harm, endured hostilities, and were unable to liberate themselves.[153] Some victims bore children from their ordeals; they continued to carry around their shame and resultant physical impairments such as incontinence and genital mutilations beyond the period of their enslavement.[154] These victims were ostracised from their communities and families, abandoned by their husbands, and could not marry within their communities.[155] The Trial Chamber concluded that the gravity of these criminal acts of sexual abuse was exceptionally high.[156]

As to the crime of enslavement, it was found that hundreds of civilians were abducted and transported to diamond mines tied together with ropes and chains, and kept in camps where their movement was severely limited.[157] Those who attempted to escape were stripped of their clothing and left naked, others were beaten or killed.[158] The victims received no pay, food, medical treatment or housing, working from sunrise to sunset digging for diamonds without any machinery, only using shovels and pickaxes.[159] These victims were living under humiliating conditions and in total submission to their captors,[160] and were constantly in immense pain.[161] The Trial Chamber similarly decided that the gravity of these criminal acts of enslavement was extremely great.[162]

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151 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 129.
152 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 129.
153 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 132.
154 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 132.
155 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 132.
156 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 136.
157 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 162.
158 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 160.
159 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 164.
160 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 168.
161 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 169.
162 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (08 April 2009) para 171.

2.5.4.2 Degree of participation and responsibility

The first accused, Sesay, was found liable under article 6(1) of the Sierra Leone Statute for:

> ...planning the enslavement of hundreds of civilians to work in mines at Tombodu and throughout Kono District between December 1998 and January 2000, as charged in Count 13 of the Indictment hundreds of civilians who were forced to work in the mines.[163]

Sesay was also actively involved in the mining in that he visited the mines in Kono, collected the diamonds, signed off mining log-books, and transported the diamonds.[164] His bodyguards supervised the mining and brought him reports from the mines.[165] The Trial Chamber found that he indeed participated in the forced labour of civilians in Kono for a period between 14 February to May 1998, and further collected diamonds from Kono throughout that period until the year 2000.[166] Between 1999 and 2000, he ordered the capture of civilians and arranged their transportation to work in the mines.[167] The Trial Chamber found that:

> ...Sesay's conduct was a significant contributory factor to the perpetration of enslavement and that he intended the commission of these crimes. The Chamber is therefore satisfied that Sesay, acting in concert with other senior members of the RUF, designed the abduction and enslavement of hundreds of civilians for diamond mining throughout Kono District.[168]

The Trial Chamber did not find any further aggravating factors.[169] The second accused, Kallon, was a senior commander in the RUF.[170] He was found to have been involved "in the creation and maintenance of a system of enslavement that was created by the

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163 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No SCSL-04-15-T) Judgment (2 March 2009) (hereafter *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009)) para 2116.

164 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2086.

165 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2086.

166 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2086.

167 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2113.

168 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2115.

169 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No SCSL-04-15-T) Sentencing Judgment (8 April 2009) (hereafter *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009)) para 219.

170 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2093.

RUF in order to maintain and strengthen their fighting force".[171] Like Sesay, his bodyguards supervised the enslaved miners for his private interests, and he received updates regularly from the Kono mines.[172] His participation in the enslavement of civilians was found to be significant.[173] These facts were taken into consideration in sentencing.[174]

In regard to Gbao, the third accused, even though the Trial Chamber found that his involvement was only at a subordinate level, the Chamber still found him liable for the fact that "he knew or ought to had reason to know that civilians were enslaved in order to pursue the common purpose".[175] He was directly involved in the enslavement of civilians who laboured on the RUF farms, and managed a large-scale forced civilian farming between 1996-2001.[176] Gbao, however, did not have any influence to give orders or the ability to contradict orders, and his overall involvement was limited compared to that of his co-accused for sentencing purposes.[177]

2.5.4.3 Mitigating circumstances

The Trial Chamber decided that Sesay's forced recruitment into the RUF at the age of nineteen years was not notable to be a mitigating factor as he could have chosen not to commit the offences he was charged with.[178] The Trial Chamber concluded that Sesay's lack of previous criminal conduct, and his assistance of victims should not be given undue weight in mitigation of sentence.[179] Also, nothing in his family circumstances necessitated mitigation of sentence.[180] Lastly, the Trial Chamber considered Sesay's remorse as not sincere, and, therefore, of no mitigating value,

171 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2095.
172 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2097.
173 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2095.
174 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 229-242.
175 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (2 March 2009) para 2108.
176 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 267.
177 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 268-271.
178 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 220.
179 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 221-224.
180 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 230.

however, his empathy with victims was upheld and granted limited mitigation value in sentencing.[181]

As to the second accused, the Trial Chamber rejected the defence's submission that Kallon's recruitment into the RUF should be taken as a mitigating factor as he had a choice in committing the crimes for which he was convicted.[182] His lack of previous criminal conduct, his assistance to the civilians, and his personal family circumstances were granted limited mitigating value.[183] Further, the Trial Chamber found him to be sincerely remorseful, and that was taken into count as a mitigating factor to reduce his sentence.[184]

In the case of Gbao, the Trial Chamber concluded that no establishment of remorse was made, therefore, no weight in mitigation was awarded in that regard.[185] Additionally, the Trial Chamber refused to take life expectancy as a relevant factor in sentencing, however, it took into consideration of Gbao's age as a relevant circumstance in mitigation, and the lack of previous criminal conduct was given limited mitigation effect on the sentence.[186]

2.5.4.4 Aggravating Factors

The Trial Chamber considered the aggravating factors that applied to Kallon and Gbao. The abduction of civilians from a mosque which was considered a place of sanctuary by the civilians, and the using of the same site by the Kallon and the rebels was found to be the only aggravating factor to his criminal activities.[187] Gbao's abuse of power, his leadership and authority were found to be aggravating circumstances.[188] However, the Trial Chamber refused to take Gboa's education and training as a police officer as aggravating factors.[189] His desire for pecuniary gain, his lack of respect for the judicial

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181 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 231-232.
182 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 250.
183 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 251-254.
184 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 256.
185 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 277.
186 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 278-279.
187 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 247.
188 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 272.
189 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 273.

process, and his refusal to attend trial at one stage were also rejected as aggravating factors.[190]

2.5.4.5 Proportional sentences

For sexual slavery as a crime against humanity, punishable under Article 2(g) of the Special Court for Sierra Leone Statute, Sesay was sentenced to a term of a imprisonment of 45 years;[191] Kallon was sentenced to imprisonment of 30 years;[192] and Gbao was sentenced to a term of a imprisonment of 15 years[193] For enslavement as a crime against humanity, punishable under Article 2(c) of the Special Court for Sierra Leone Statute, Sesay was sentenced to a term of a imprisonment of 50 years;[194] Kallon was sentenced to imprisonment of 35 years;[195] and Gbao was sentenced to a term of a imprisonment of 25 years.[196]

The Trial Chamber ordered that the sentences for all the convicted persons should run concurrently, and further ordered that in terms of Rule 101(d) of the Special Court for Sierra Leone of Procedure and Evidence, all will be given credit for period in custody pending trial.[197]

2.5.4.6 On appeal

The Appeals Chamber found that, in regard to all convicted persons, the "Trial Chamber erred in double-counting the specific intent of acts of terrorism and collective punishments as increasing the gravity of the underlying offences".[198] Moreover, in regard to Gbao, the Appeals Chamber held that the Trial Chamber "erred in finding that Gbao's role as an ideology expert and instructor contributed to the form and degree of

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190 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) paras 274-276.
191 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 93.
192 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 95.
193 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 97.
194 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 94.
195 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 96.
196 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 98.
197 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (8 April 2009) para 98.
198 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case No SCSL-04-15-A) (26 October 2009) (hereafter *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (26 October 2009)) paras 1250; 1282; 1320.

Gbao's conduct in relation to crimes he committed".[199] The Appeals Chamber, however, took into consideration the circumstances of the case, the gravity of the offences and the convicted persons' degree of participation, and found that the Trial Chamber's imposed sentence was proportionate to their culpability and imposed inclusive sentences of 52 years' imprisonment for Sesay,[200] 39 years' imprisonment for Kallon,[201] and 25 years' imprisonment for Gbao.[202]

It is clear from the final sentences imposed that punishment for the same types of crime differ as to the length of the incarceration, depending of the perpetrator's specific aggravating or mitigating circumstances. The sentences enacted by the Special Court for Sierra Leone is definitely more severe than that of the ICC or ICTY.

2.6 Conclusion

Human trafficking at any scale is a heinous crime, however, the offence only gets to be prosecuted under the ICC, the ICTY, the ICTR and the Special Court for Sierra Leone as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Under the ICTY, it is a crime against humanity when committed against civilians during armed conflict as per ICTY Statute article 5. The criminal offences discussed in the cases in this chapter all contain aspects of human trafficking. All the victims were forcefully removed and abducted from either their homes or places of refuge, and placed where they were kept against their will, subjected to enslavement in forced labour and sexual slavery and, further, their captors exploited them.

In convicting the perpetrators of this monstrous crime, imprisonment is the primary form of sentence in all the mentioned international criminal courts, and, in addition, the tribunals exercise wide discretionary powers in sentencing. These courts' main purpose in sentencing is based on the principles of retribution and deterrence, and the principle

199 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (26 October 2009) para 1320.
200 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (26 October 2009) para 479.
201 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (26 October 2009) para 479.
202 *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (26 October 2009) para 480.

of proportionality grounded on the gravity of the criminal act. When it comes to the factors that have to be considered to arrive at an appropriate sentence, the statutes of the tribunals provide little guidance except to state that consideration must be given to the gravity of the offence, as well as aggravating factors and mitigating circumstances. In addition, the ICTY and the ICTR are also enjoined to have recourse to the sentencing practice of the national courts where the crimes took place, however, these tribunals have determined that although they may consider domestic sentencing practices, they are not bound by them. The international tribunals mainly follow the ICC's sentencing provisions. In this regard, the Rome Statute provides a comprehensive list of aggravating factors and mitigating circumstances, permit imposition of fines, and restrain the maximum sentencing power to 30 years' imprisonment unless the gravity of the offence is so excessive as to demand life imprisonment. The ICC judges also do not have to consider any national sentencing practice while deciding on sentences.

In the following chapter, the practices of South Africa in determining suitable sentences for human trafficking perpetrators will be considered, especially as compared to the sentencing practices of international criminal law as discussed in this chapter.

CHAPTER 3

THE SOUTH AFRICAN HUMAN TRAFFICKING FRAMEWORK AND SENTENCING

3.1 Introduction

In this chapter, the relevant legislation and case law in regard to the sentencing of persons convicted of human trafficking in South Africa will be explored against the background of the sentencing of human traffickers in the international criminal courts as set out in the previous chapter. While it has been established from the previous chapter that both the UNTOC and the Palermo Protocol do not provide any guidance towards the sentencing for the offence of human trafficking, it has, however been established that the ICC and the *ad hoc* international tribunals do advance some guidelines towards sentencing; placing the principles of the proportionality of sentences, deterrence and retribution as the core purposes of sentencing under international criminal law.

The main legislation regulating human trafficking in South Africa is the Trafficking Act of 2013. As outlined in the introductory chapter; the Trafficking Act defines the offence of 'trafficking in persons' in section 4(1) which is mostly similar to the Palermo Protocol's definition of 'trafficking in persons'. The Act further provides for the penalty for the offence of trafficking in section 13(a). It is noted that the penalty provided in section 13(a) is subject to section 51 of the Minimum Sentences Act.

As seen from the previous chapter, the *ad hoc* tribunals only refer to the gravity of the offence and the personal circumstances of the offender as factors to consider to arrive at the appropriate sentence of persons convicted of the offence of human trafficking. The ICC, however, under the Rome Statute Article 78 read together with the ICC Rule 145(2)(b), do proffer further guidance. Similarly, the Trafficking Act also provides a comprehensive non-exhaustive list of aggravating factors to consider for the purposes of sentencing in section 14 as follows:

If a person is convicted of any offence in this chapter, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors:

(a) The significance of the role of the convicted person in the trafficking process;
(b) Previous convictions relating to the offence of trafficking persons or related offences;
(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 extent thereof;
(g) The physical and psychologic al effect the abuse had on the victim;
(h) Whether the offence formed part of organised crime;
(i) Whether the victim was a child;
(j) The nature of the relationship between the victim and the convicted person;
(k) The state of the victim's mental health and
(l) Whether the victim had any physical disability.[326]

The ICC Tribunals Rules and Statutes spell out even the mitigating factors that ought to be considered during sentencing in Rule 145(2)(a). However, the Trafficking Act is silent on mitigating factors that have to be considered.

In this chapter, the sentencing criteria and sentences conferred upon convicted human traffickers will be reflected on. In order to comprehensively compare sentencing standards in South Africa as regards human trafficking, the sentencing principles established prior to and after the implementation of the Trafficking Act will be provided. Case law on human trafficking convictions of the two stipulated periods will furthermore be presented. This chapter will conclude on legality and human-rights issues in the sentencing of human trafficking perpetrators.

3.2 The established sentencing criteria in South Africa prior to the Trafficking Act

As established from the previous chapter; the UNTOC provides that states parties must decide on the penalties in accordance with their established penal systems and states that:

326 Trafficking Act s 14.

> Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.[327]

The importance of domestic relevance in international law is further evidenced in the ICC Tribunals Rules and Statutes which provide that for sentencing purposes, the courts should consider the sentencing regime of the national courts of law of the states.[328] Further, it is important to note that according to the UNTOC, human trafficking is a serious offence. The UNTOC defines a serious offence as the "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".[329]

In South Africa, serious offences are provided for under section 51 of the Minimum Sentences Act. South Africa also considers human trafficking as a serious offence and had prior to the coming into force of the Trafficking Act included it under Part 1 of Schedule 2 of the Minimum Sentences Act in accordance with provisions of section 51. Part 1 of Schedule 2 contains the most serious offences such as premeditated murder of a law enforcement officer; rape where a victim was raped more than once; where the rape victim is under the age of 16 years, or where the victim of rape is physically or mentally disabled, amongst other offences.

The courts in South Africa take section 51 of the Minimum Sentences Act very seriously. In the case of *S v Malgas*,[330] the Supreme Court of Appeal stated that:

> First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When

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327 The UNTOC art 6.

328 The ICTY Rules of Procedure and Evidence Rule 101(B). See also Statute of the International Tribunal for Rwanda art 23(1).

329 UNTOC art 2(2).

330 *S v Malgas* 2001 (1) SACR 469 (SCA).

> considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.[331]

In the case of *S v Matyityi,*[332] the court stated that the courts have to impose minimum sentences for specified offences unless there are good reasons not to do so.[333] Courts do not have a choice to deviate from these sentences because of personal beliefs or individual notions of what would be fair because: "[P]redictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order".[334] The court in this case went further to state that it would, however, be ideal to have a victim-centred, broad range of sentencing options from which to choose an appropriate sentence to fit the circumstances of each case.[335] This is where the Trafficking Act is lacking, because it prescribes one sentence for the offence of trafficking in persons. Even though this sentence can be deviated from on good cause to give way to discretionary sentences, this also causes issues of disparities in sentences of similar gravity and circumstances, which offends against the principle of legality.

At this point, it is necessary to illustrate selected sentences of human traffickers before the introduction of the Trafficking Act. By means of an analysis of these sentences, the landscape upon which the sentencing regime in the Trafficking Act is premised will be revealed. This investigation is furthermore imperative to elucidate the kind of sentences imparted, and the various reasons for these sentences.

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331 *S v Malgas* 2001 (1) SACR 469 (SCA) para [8].
332 *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) (hereafter *S v Matyityi*).
333 *S v Matyityi* para [23].
334 *S v Matyityi* para [23].
335 *S v Matyityi* para [16].

3.3.1 Jezile v S and Others

In the case of *S v Jezile*,[336] a 28-year-old man took notice of a 14-year-old school girl and wanted to marry her.[337] He approached her family, and the following day the traditional marriage negotiations commenced, where the girl was told that she was to be married.[338] The child was forced into traditional marriage despite her protestations and R8000 *lobola*[339] was paid to her grandmother.[340] The child ran away from the appellant twice, but her male relatives brought her back to him each time, and eventually he took her with him to Cape Town where he proceeded to rape her several times, and forced her to carry out household chores for him.[341] The trial court had sentenced the appellant to ten years' imprisonment for the offence of human trafficking.[342] The appeal court noted that:

> As a first offender for the multiple rape of a minor, and for trafficking a person for sexual purposes, the appellant faced life imprisonment in terms of Part 1 of Schedule 2 of s 51(1) of the Criminal Law Amendment Act 105 of 1997, unless the trial court was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence in accordance with s 51(3). However, the charge sheet in respect of the count of trafficking did not reflect the minimum sentence provision.[343]

The trial court observed that the state had failed to reflect the minimum sentences in regard to the charge of trafficking and "correctly found that in the interests of justice, the court's ordinary penal jurisdiction would have to prevail".[344] The trial court used the triad of Zinn[345] to arrive at the appropriate sentence, and found that "the appellant's moral blameworthiness was mitigated by the belief which he held concerning traditional

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336 *Jezile v S and Others* 2015 (2) SACR 452 (WCC) (hereafter *Jezile v S and Others*).
337 *Jezile v S and Others* paras [6], [7].
338 *Jezile v S and Others* para [7].
339 *Lobola* consists of monies, cattle or any commodities paid by the betrothed man's family to the betrothed woman's family. It is also known as 'bride wealth'. See *Jezile v S and Others* para [72].
340 *Jezile v S and Others* paras [9], [10].
341 *Jezile v S and Others* para [10].
342 *Jezile v S and Others* para [2].
343 *Jezile v S and Others* para [101].
344 *Jezile v S and Others* para [102].
345 See footnote 34 above for an explanation of the triad of Zinn.

practices".[346] The sentence of the trial court was confirmed.[347]

3.2.2 Dos Santos v S

In the case of *Dos Santos*;[348] a 28-year-old Mozambique woman was convicted on three counts of trafficking in persons for sexual exploitation purposes.[349] The appellant had arranged for three young girls to cross the border from Mozambique into South Africa, and then fetched them under the false pretences that she was going to provide them jobs in her hair salon in South Africa, and give them a chance to further their education.[350] The reality was far from what they were promised, and the court found that:

> They were forced, against their will, to perform sexual acts, some occasions eight times a day, on the instructions of the appellant. They were not allowed to leave the house they were kept in unaccompanied by the appellant. They received little food, no money and very little clothing … The appellant carried on her belt an instrument described in evidence as something that resembles a whipping chain. She used that instrument to assault the complainants when she considered it necessary. The evidence shows that the complainants were under constant threat, lived in fear and were subjected to treatment that can only be described as inhumane.[351]

For sentencing, the court referred to sections 70 and 71 of the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007. These sections were provisionally enacted to cater for trafficking for sexual purposes which has since been repealed by section 48 of the Trafficking Act. Section 71 provided the definition of trafficking for sexual purposes. In terms of section 51(1) of the Minimum Sentences Act, a person convicted of an offence referred to in Part 1 of Schedule 2 was liable to be sentenced to life imprisonment, and the sentence for a person convicted of trafficking in persons for sexual purposes as contemplated in section 71 was subject to

346 *Jezile v S and Others* para [103].
347 *Jezile v S and Others* para [106].
348 *Dos Santos v S* (A26/2014) [2017] ZAGPPHC 641; 2018 (1) SACR 20 (GP) (hereafter *Dos Santos v S*).
349 *Dos Santos v S* para [1].
350 *Dos Santos v S* para [7].
351 *Dos Santos v S* para [9].

section 51 of the Minimum Sentences Act. The convictions were taken together for purposes of sentencing, and she was sentenced to life imprisonment.[352] In deciding on the appeal, the appeal court stated thus:

> The Regional Magistrate imposed the prescribed minimum sentence, the possibility of which the appellant was alerted to at the commencement of the proceedings *a quo.* In my view no compelling reasons exist to interfere with the imposed sentence of life imprisonment for the appellant's convictions on Counts 1, 2 and 3.[353]

Dos Santos' appeal was dismissed, and the sentence of life imprisonment imposed on the appellant for her convictions was confirmed.

3.2.3 S v Mabuza

Shortly after the *Dos Santos*-case, the Mpumalanga Regional court in the case of *S v Mabuza*,[354] found that the first accused and his co-accused trafficked children under the age of fourteen years from Mozambique into South Africa, and subjected them to sexual slavery for a period of about three years.[355] The trial court convicted the first accused on four counts of trafficking for sexual purposes, and sentenced him to life imprisonment on each count in terms of section 51 of the Minimum Sentences Act.[356] The first accused appealed against his conviction,[357] but the High Court dismissed his appeal.[358]

3.3 Case law on sentencing under the Trafficking Act

In order to evaluate whether the sentences under the Trafficking act are in harmony with international law, it is important to analyse the sentences that has been imposed on persons convicted of trafficking in persons under the Trafficking Act. The courts'

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352 *Dos Santos v S* para [1].
353 *Dos Santos v S* para [12].
354 *S v Mabuza* 2018 (2) SACR 54 (GP) (hereafter *S v Mabuza*).
355 *S v Mabuza* para [6].
356 *S v Mabuza* para [2].
357 *S v Mabuza* para [2].
358 *S v Mabuza* para [46].

reasoning behind sentences and the application of the sentencing guidelines such as proportionality, deterrence, retribution and rehabilitation will be looked into with reference to international law standards discussed in the previous chapter.

3.3.1 S v Obi

In the following case of *S v Obi*,[359] the background to the case will be provided, as well as the aggravating and mitigating circumstances considered by the particular court.

3.3.1.1 Background to the case

In this case, the accused had been convicted, amongst others, on three charges of human trafficking. The accused ran a brothel in Springs, he trafficked, groomed for sexual exploitation and repeatedly raped young, vulnerable children in their early teenage years, and he further prostituted them for his own financial benefit.[360] The children could not leave or get assistance from police officers as some law enforcement officers took bribes from the accused, and exploited the victims too.[361] The girls were held hostage and forced to use drugs, were hardly given food, and were paid with drugs for their prostitution.[362] The victims' half-naked photographs were advertised on adult entertainment websites to attract sex buyers, victims were forced to watch pornography, and at times raped in full view of other victims.[363]

3.3.1.2 Aggravating factors

In determining the sentence, the court considered each and every element of aggravation provided under section 14 of the Trafficking Act. The court found that Obi was the kingpin who masterminded how to attract the girls to use them for his human trafficking businesses.[364] He got the victims to be addicted to the drug 'rock', kept the victims in messy, unhygienic condom-strewn deplorable lodgings which were barely

359 *S v Obi* 2020 JDR 0618 (GP) (hereafter *S v Obi*).
360 *S v Obi* 3.
361 *S v Obi* 3.
362 Van der Watt 2020 *Child Abuse Research: A South African Journal* 72.
363 Van der Watt 2020 *Child Abuse Research: A South African Journal* 72.
364 *S v Obi* 5.

furnished.[365] One victim was held hostage for almost a year, and others for several days.[366] Even though there was no victim-impact report handed to court for the purposes of sentencing, the court concluded that:

> ...the abuse that the victims were subjected to, both physical, mental, psychological, would have caused those who were otherwise healthy to have suffered severe trauma.[367]

Furthermore, the court took note of the fact that all three victims were children when they were initially trafficked.[368] The court also took into consideration the fact that the human trafficking of which Obi was convicted of formed part of organised crime; he had links with other drug lords and used two of his co-accused as runners to fetch ingredients for the drugs from those drug lords to manufacture 'rock' which he dealt with, and kept his victims of trafficking hooked on.[369] The victims had no relationship with Obi,[370] and they were not physically disabled.[371] Obi himself was treated as a first offender for offence of human trafficking.[372]

3.3.1.3 Mitigating circumstances

In mitigation of sentence, the court considered Obi's personal circumstances; that he was already in his forties at the commencement of his offences, was brought up by both his parents, and held a matriculation certificate from Nigeria.[373] He was married with four children and was self-employed at the time of arrest. Further, the court considered that he had already been in prison for 26 months awaiting trial.[374]

The court held that in terms of section 13(a) of the Trafficking Act; section 51 of the Minimum Sentences Act is applicable.[375] Following from the discussion above, the applicability of the Minimum Sentences Act comes into relevance where the form of

365 *S v Obi* 5.
366 *S v Obi* 5-6.
367 *S v Obi* 7.
368 *S v Obi* 6.
369 *S v Obi* 6.
370 *S v Obi* 6-7.
371 *S v Obi* 7.
372 *S v Obi* 5.
373 *S v Obi* 8.
374 *S v Obi* 8.
375 *S v Obi* 7.

exploitation falls under the serious offences covered under the above-mentioned section 51. In this case, the purpose of trafficking was sexual exploitation[376] and servitude.[377] The victims in this case were repeatedly raped by more than one person, and at least two of the victims were below the age of sixteen years.[378] The court found that there were no personal circumstances or any other circumstances which were substantial and compelling to impose a lesser sentence other than the prescribed one.[379] The court, therefore, without resorting to the principles of sentencing or the triad of *Zinn*, imposed the prescribed sentences. Obi was sentenced to three life imprisonment terms for the three counts of human trafficking as provided in section 4 of the Trafficking Act, and several determinate imprisonment sentences were imposed for other offences he was convicted of. The court, however, did not order that the sentences should run concurrently.

It is submitted that due to the multiple nature of offences that accompany the crime of human trafficking, the accused persons face multiple charges as in this particular case. There are four splits with the offence of human trafficking as the main offence, rape, servitude and sexual exploitation. The offence of trafficking itself has to comprise of a form of exploitation as its purpose for it to be a complete crime, and the court itself in this case stated that "it is important to note that human trafficking does not take place in a vacuum".[380] Unlike in the case of *Ntaganda*[381] as discussed in Chapter 2, in this case at sentencing stage the court did not consider that the accused has already been sentenced to three life imprisonment terms for trafficking when it sentenced Obi to a further three terms of life imprisonment for the rape counts, and a further ten years'

376 Section 1 of the Trafficking Act provides that 'sexual exploitation' means "the commission of (a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act or (b) Any offence of a sexual nature in any other law".

377 Section 1 of the Trafficking Act states that 'slavery' denotes "reducing a person by any means to a state of submitting to the control of another as if that other person was the owner of that person".

378 Minimum Sentences Act s 51 read with its Part 1 Schedule 2.

379 *S v Obi* para [1].

380 *S v Obi* 2.

381 See para 2.4.2 above.

imprisonment on each count of sexual exploitation,[382] and fifteen years' imprisonment for each of the three counts for using the services of a victim of trafficking.[383]

3.3.2 S v Pillay

The case of *S v Pillay*[384] will be deliberated on by considering the background to the case, the particular offence as well as the offender, the interest of society, the proportionally of the sentence, deterrence and retribution in sentencing as well as the final judgment of the particular court.

3.3.2.1 Background

Mr. Pillay, the accused in this case, was convicted on three counts of trafficking in persons.[385] On count 19, Pillay was found to have trafficked the victim:

> ...by restricting her to the confines of their residences by means of threats or use of harm and/or other forms of coercion for the purposes of sexual exploitation for his own gratification and in preparation for the complainant to be made available to other unknown persons for the purpose of sexual exploitation in order to procure payment from them for the benefit of the accused and/or Candace.[386]

On count 40, Pillay was found guilty of trafficking the complainant at a certain residence on several occasions from March 2018 to 11 June 2018. On count 41, Pillay was convicted of trafficking the victim by:

> ...making her available to an unknown man at an unknown address in the Durban area where he demanded that the complainant perform sexual acts with the said unknown male and himself simultaneously for the purpose of sexual exploitation in order to procure payment from the said unknown male for the benefit of the accused.[387]

To determine its sentences, the court considered – instead of going through the aggravating circumstances provided in section 14 of the Trafficking Act as was done in

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382 *S v Obi* para [4].
383 *S v Obi* para [2].
384 *S v Pillay* Case No CCD39/2019 (KwaZulu-Natal Local Division, Durban) 26 March 2021 (hereafter *S v Pillay*).
385 *S v Pillay* para [48].
386 *S v Pillay* para [48].
387 *S v Pillay* para [48].

the case of *Obi* above – the established South African sentencing principles, and started off by referring to the quotation from the case of *S v PB* 2013 (2) SACR 533 (SCA) in which it was stated that:

> ...it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing.[388]

The court then considered the triad of Zinn, the gravity of the offence, the offender, and the interests of society.

3.3.2.2 The offence

The accused removed and isolated the victim from her maternal family; he moved her from province to province and to different areas within the Kwazulu-Natal province to the effect that the child was prevented from having a stable home, making friends or developing relationships or a sense of security; all of which were essential for her development.[389] The child's education was constantly disrupted, and she was two grades behind her peers.[390]

Pillay subjected the victim to persistent sexual assaults and threats of death.[391] He did not only subject her to physical assaults, "but he wrought untold damage on her mind and psyche"[392] to the point that she suffered horrible nightmares. The accused capitalised on the vulnerability of the victim, she was young, helpless and without any adult support or guidance.[393] The accused further prostituted the child on numerous occasions.[394] He groomed the victim for further trafficking and recorded the sexual acts with the child and posted the photographs on websites to attract paedophiles for his own financial benefit.[395] He also introduced the victim to cannabis.[396]

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388 *S v Pillay* para [19]; *S v PB* 2013 (2) SACR 533 (SCA).
389 *S v Pillay* para [21].
390 *S v Pillay* para [22].
391 *S v Pillay* para [23].
392 *S v Pillay* para [24].
393 *S v Pillay* para [24].
394 *S v Pillay* para [25].
395 *S v Pillay* para [27].
396 *S v Pillay* para [28].

3.3.2.3 The offender

The accused was an adequately educated man with a post-high school qualification, a man in his mid-forties without any intellectual challenges.[397] He was a divorcee with three children from the marriage and one child out of wedlock.[398] Pillay was a father figure to the victim, but failed to provide care and protection for the child.[399] The accused was a liar who showed little respect for the court or the truth.[400] In court, he displayed arrogance, aggression, vulgarity and violence.[401] Although he was sickly; the court found that he was receiving adequate treatment, and that there was no reason to believe that he would not receive proper medical care if sentenced to imprisonment.[402]

The only mitigating factor that the court could find was that Pillay was a first offender in regard to the offences he had been convicted of. However, this fact was found to pale in the face of the gravity of the offences with which he was convicted, and the court found that:

> ...[t]he nature of the crime and the callousness and brutality of the offender's actions may show that he has no regard or respect for other people.[403]

Although the convicted person was a first offender, the court did not find it appropriate to assign non-custodial measures in Pillay's case because of his grave misdeeds. It is always important to consider the interests of the individual in sentencing, but when the criminal's offences are extreme, it is more important to consider the interests of society.

3.3.2.4 Interests of society

The court stated that in determining the interests of society, the court "must consider the effect of the offences of which the accused has been convicted on the community".[404] The court emphasized that retribution should be considered, especially

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397 *S v Pillay* para [29].
398 *S v Pillay* para [29].
399 *S v Pillay* para [30].
400 *S v Pillay* para [31].
401 *S v Pillay* para [32].
402 *S v Pillay* para [33].
403 *S v Pillay* para [34].
404 *S v Pillay* para [35].

in this case, as the public's confidence and belief in the courts as well as the administration of justice "must not be undermined by the imposition of inappropriately light sentences for serious and prevalent crimes".[405]

3.3.2.5 Proportional sentencing

In addition to the triad of Zinn analysis as mentioned above, to reach an appropriate sentence, the court further invoked the principle of proportionality without particularly spelling it out. The court endeavoured to deliberate on 'appropriate' sentences which were premised on relevant factors to sentencing to ensure proper judicial discretion.[406] These factors included the accused's personal circumstances, the accused-victim relationship, the context in which the crimes were committed, the attitude of the accused towards the victim, the accused's criminal acts and the prosecution process, the victim's psychological assessment, and effects of the offences on her.[407] According to the court, these measures were taken because "[W]hen life imprisonment is a prescribed minimum sentence, the court must have sufficient information before it to justify that sentence".[408]

3.3.2.6 Deterrence and retribution

As stated above, the court considered retribution to be a worthy and accepted sentencing principle when serious offences are committed, as in this specific case. The court in *Pillay* gave recognition to the fact that in the current South African society, the trafficking of young children, rape, sexual abuse and physical violence are rife.[409] Nonetheless, the court acknowledged that retribution was not the only principle of sentencing, and held that:

> ...the deterrence intended by the sentence must also be individualised in relation to the accused and that the accused ought not to be sacrificed on the altar of deterrence by a sentence where the individual is treated harshly and unfairly in the

405 *S v Pillay* para [35].
406 *S v Pillay* para [5].
407 *S v Pillay* para [6].
408 *S v Pillay* para [6].
409 *S v Pillay* para [35].

> hope, not knowledge, that such treatment would prevent other potential crimes and promote law-abiding conduct in the community at large.[410]

However, it was noted by the court that the accused had no prospects of rehabilitation, he had also shown no remorse, and was instead hostile to the prosecution and the court.[411] The rehabilitation of the offender must be subordinate to deterrence and retribution, especially if the circumstances under which he committed his offences warrant it. The court was satisfied that in this case:

> ...the interests of the society demand that an offender of the accused's ilk and proclivities must be removed from society for as long as is lawfully appropriate, because of the cruelty of the accused's deliberate and constant sexual assaults on the complainant over a period of more than a year, and his expressed intention to traffic the complainant further and to violate another child.[412]

Unlike in the case of *S v Obi* (see paragraph 3.3.1 above) where the court imposed maximum sentences running consecutively, the court in *S v Pillay* stated that some convictions should be taken together for purposes of sentencing, and further sentences of offences that are ''inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent"[413] should be ordered to run concurrently as was also stated in the case of *S v Mokela*.[414]

3.3.2.7 Sentencing

The court did not find any substantial or compelling circumstances to deviate from the prescribed minimum sentences, however, despite the finding of aggravating factors that the victim was trafficked for almost a year, the court was of the opinion that the minimum prescribed sentence "is too harsh in respect of counts 19 and 40 as the accused has already been sentenced to life imprisonment for the rapes".[415] As a result, the court deviated from the prescribed minimum sentences, and the accused was sentenced to

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410 *S v Pillay* para [37]. See also *S v Furlong* 2012 (2) SACR 620 (SCA) para 14, where the court cautioned that "a court must not allow the retribution demanded by the community and the deterrence of the accused and other like-minded persons intended by the sentence, to detract from its responsibility to consider the prospects of rehabilitation of the accused".

411 *S v Pillay* para [38].

412 *S v Pillay* para [39].

413 *S v Pillay* para [41]

414 See *S v Mokela* 2012 (1) SACR 431 (SCA) para [11].

415 *S v Pillay* para [48].

20 years' imprisonment on each count.[416] In regard to count 41, the court was convinced that the minimum prescribed sentence was justified as "the same reservation does not apply to Count 41",[417] and sentenced the accused to a prescribed life imprisonment.[418]

The reasoning of the court in this case resembles the reasoning of the Trial Chamber in the *Ntaganda* case in which the court took into account the sentence imposed for rape when it sentenced the accused for sexual slavery.

In the following paragraphs, further examples will be provided as to the manner in which South African courts sentence human trafficking offenders.

3.3.3 Further examples of the sentencing of traffickers in South Africa

In the case of *S v Abba and Others,*[419] two accused persons were convicted on human trafficking for purposes of sexual exploitation charges. The court found that the victims "had suffered emotional and physical trauma at the hands of their captors".[420] Further, one suffered nightmares and fears of rejection by her family, the other "was not capable of living a normal life and kept reliving her experiences of when she was trafficked".[421] The court, however, deviated from the maximum sentences as prescribed in section 13 of the Trafficking Act and section 51 of the Minimum Sentences Act as it found that there were mitigating circumstances warranting lesser sentences.[422] The court gave weight to the fact that the accused persons were first offenders, and have already been awaiting trial for two years in prison.[423] Further, the court considered that the victims

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416 *S v Pillay* para [48].
417 *S v Pillay* para [48].
418 *S v Pillay* para [48].
419 *S v OB Abba and 2 Others* CC 41/2017 (Gauteng High Court Pretoria).
420 Dlwati https://power987.co.za/news/human-trafficking-brothers-slapped-with-hefty-sentence/ (Date of use: 12 August 2021).
421 Dlwati https://power987.co.za/news/human-trafficking-brothers-slapped-with-hefty-sentence/ (Date of use: 12 August 2021).
422 Venter https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021).
423 Venter https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021).

were already sex workers, and hooked on drugs when they were trafficked.[424] The court then sentenced the accused as follows: the 38-year-old man who was the mastermind of the offences was sentenced to an effective eighteen years' imprisonment while his co-accused, a 32-year-old man was sentenced to an effective twelve years' imprisonment.[425]

Another unreported case where no specific details on sentencing is provided, is that of *S v Seleso*,[426] where the Johannesburg High Court convicted two accused on several charges of human trafficking. In this case, the victim was trafficked from Lesotho. The accused persons (mother and daughter) lured the orphaned sixteen-year-old relative to South Africa with promises to help her further her education.[427] Upon arrival in South Africa, instead of being sent to school, the child was sexually exploited by the accused for economic benefit.[428] She was forced to perform sexual acts while the accused took videos and photos of her which they posted in websites for paying customers. These videos and photos were viewed by thousands of sex buyers across the world.[429] On 12 December 2019, both accused were sentenced to nineteen life terms on a range of charges related to sex trafficking.[430]

In *S v De Waal Rossouw*,[431] the Western Cape High Court sentenced a 32-year-old woman who was part of a human-trafficking syndicate to ten years' imprisonment which was wholly suspended.[432] De Waal Rossouw was convicted of trafficking in persons for sexual purposes and other related offences including the kidnapping of a minor, assault, the keeping of a brothel, living on the proceeds of prostitution, and extortion involving more than R3 million.[433] In this case as well, the victims were all "deprived of

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424 Venter https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021).
425 Venter https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021).
426 *S v Seleso* Case No SS45/2018 (GJ) Gauteng South (Johannesburg) High Court.
427 Van der Watt 2020 *Child Abuse Research: A South African Journal* 72.
428 Van der Watt 2020 *Child Abuse Research: A South African Journal* 72.
429 Van der Watt 2020 *Child Abuse Research: A South African Journal* 72.
430 Van der Watt 2020 *Child Abuse Research: A South African Journal* 73.
431 *S v De Waal Rossouw* Case No CC18/19/2020 (Western Cape High Court Cape Town).
432 The Citizen https://www.citizen.co.za/news/south-africa/crime/2381169/cape-town-woman-found-guilty-of-human-trafficking/ (Date of use: 13 September 2021).
433 The Citizen https://www.citizen.co.za/news/south-africa/crime/2381169/cape-town-woman-found-guilty-of-human-trafficking/ (Date of use: 13 September 2021).

their freedom, assaulted and forced to partake in criminal activities such as shoplifting, housebreaking and extortion".[434] This is by far one of the most lenient judgments imposed under the Trafficking Act considering previous sentences that have been imposed for similar offences in the cases of *Obi* and *Abba*. Critics opine that this judgment shows the incompetence of the South African courts in dealing with sexual offences, as stated below by Burgins:[435]

> My legal view is that the sentencing is not befitting the horrendous crimes orchestrated, as the laws are clear in that the sentencing ought to address restorative justice to the victim. Once again, this is proof that there is a disconnect within our criminal justice system which turns out to be a mockery, and a total overall is urgently required.[436]

In this particular case, both the state and the defence believed that there were substantial and compelling circumstances which justified a deviation from any prescribed minimum sentence. The prosecutor and the offender's representative requested the court that a sentence amounting to direct imprisonment not exceeding three years be imposed.[437] The reason provided to justify this deviation from the prescribed sentencing was De Waal Rossouw's testimony about her troubled youth. Parker J awarded De Waal Rossouw a suspended sentence, as he did not see any meaningful rehabilitative or even deterrent effect in incarcerating her.[438] It must be questioned whether the cumulative effect of the perpetrator's personal and other relevant circumstances indeed constituted substantial and compelling circumstances to warrant a divergence from the sentencing as prescribed.

In another human trafficking case, Peter Akadoronge, a 37-year-old Nigerian citizen, was sentenced by the Johannesburg Magistrate Court on 9 November 2021 to five life terms plus five years. His sentences will run concurrently, thus effectively resulting in life imprisonment. Akadoronge and two accomplices approached three women from

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434 The Citizen https://www.citizen.co.za/news/south-africa/crime/2381169/cape-town-woman-found-guilty-of-human-trafficking/ (Date of use: 13 September 2021).

435 Cruywagen https://www.dailymaverick.co.za/article/2020-11-11-a-slap-in-the-face-outrage-as-judge-suspends-sentence-for-child-kidnapper-and-trafficker/ (Date of use: 13 September 2021).

436 Cruywagen https://www.dailymaverick.co.za/article/2020-11-11-a-slap-in-the-face-outrage-as-judge-suspends-sentence-for-child-kidnapper-and-trafficker/ (Date of use: 13 September 2021).

437 *S v De Waal Rossouw* Case No CC18/19/2020 (Western Cape High Court Cape Town).

438 *S v De Waal Rossouw* Case No CC18/19/2020 (Western Cape High Court Cape Town).

Limpopo with the promise of employment. Instead of providing the assured work, they spiked the women's drinks who only woke up in Johannesburg where they were repeatedly raped, forced to take drugs on a daily basis, and trafficked for sexual exploitation. Akadoronge left his victims with permanent emotional and physical scars by assaulting them, depriving them of food, and sexually abusing them. As a visitor to this country, the perpetrator chose to disregard South African laws; as such, there were no substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence of life imprisonment.[439]

The *De Waal Rossouw* sentence, as well as other rulings, must be measured against the UNTOC that obliges state parties to "take into account the gravity of the offences covered by the Convention and impose appropriate and stringent sanctions".[440] In the majority of cases, the sentences that are issued by the South African courts under the Trafficking Act are evidently proportionate, retributive and deterrent in nature, and in harmony with international standards.[441] However, it is essential that there is a clear balance of all principles in sentencing, as Henman comments:

> As a moral position, the desire for retribution is justified by a need to re-assert the fundamental views of humanity as represented by the international community and democratic principles of justice. Nevertheless, the morality of retribution itself is questioned without the concomitant requirements of consistency and a rationale which determines how the severity of sentence should relate to the harm sustained by the offending behaviour.[442]

As evidenced from the previous chapter, the ICC and *ad hoc* tribunals endorse the basic sentencing principles as primary to passing judgment. South African courts clearly upholds the same tenets. The South African legislation, therefore, also complies with this obligation under the UNTOC. It is submitted that the seemingly severe

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439 Mjonondwane https://www.facebook.com/page/438204912879558/search/?q=Akadoronge (Date of use: 10 November 2021).

440 Kruger 2016 *CILSA* 80.

441 Kruger 2016 *CILSA* 81. It has to be kept in mind that foreign jurisdictions which also comply with international standards as to the imposition of human trafficking sentences (such as the United States, the United Kingdom, and Germany, amongst others) have less severe prison sentences than that of South Africa.

442 Henham 2003 *The International and Comparative Law Quarterly* 86.

sanction is a clear indication that South Africa will not make it easy for human traffickers to perpetrate their heinous crimes.[443]

3.4 Legality and human-rights issues

In this last section of the chapter, it will be investigated whether the sentencing of human trafficking offenders conforms to the principle of legality, as well as to the fundamental rights afforded to every person in the Bill of Rights.

3.4.1 The legality of South African human trafficking sentences

The principle of legality, *nullum crimen, nulla poena sine lege*, according to criminal-law commentators, dictates that crimes ought to be defined in law, and penalties for criminal offences must also be prescribed in law.[444] The law can either be written or unwritten, and has to be accessible and foreseeable.[445] Further, the principle of legality includes the rule that prohibits penalties for actions that were not criminal offences at the time of their omission or commission, or harsher penalties that were not prescribed at the time of the commission of the offence.[446] Consequently, the principle of legality is deemed a safeguard against any "arbitrary application of the criminal law, and is also viewed as an essential element of the rule of law".[447] The international *ad hoc* tribunals do not have explicit provisions in regard to the principle of legality, however, the ICC Statute does have a specific provision for the principle under Articles 22 and 23.[448] Similarly, section 35(3) of the Constitution provides that:

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443 Yesufu 2020 *Journal of Social Sciences and Humanities* 115.
444 Grădinaru *The principle of legality* 289.
445 Grădinaru *The principle of legality* 289.
446 Grădinaru *The principle of legality* 289.
447 Grădinaru *The principle of legality* 294.
448 The ICC Statute Art 22 states: "*Nullum crimen sine lege* – 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court", while Art 23 declares: "*Nulla poena sine lege* – A person convicted by the Court may be punished only in accordance with this Statute" See also Swart 2005 *SAYIL* 37.

> 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; ...
> (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing...

These provisions form the basis of the legality principle *nullum crimen, nulla poena sine lege* in South Africa. For punishment, the principle of legality hinges on these two maxims; the *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law).[449] These two tenets are the cornerstones of the principle of legality. The principle of legality demands that the penalties should be defined with reasonable precision, and further that the sentencing should be subject to clear rules which also comply with the prescripts of legality.[450] The principle of legality facilitates the protection of rights, guarantees liberty and it should also ensure the fair and transparent exercise of the judicial authority.[451]

In determining whether a statutory provision prohibiting conduct creates a crime, "there must be some punishment affixed to the commission of the act, and where no law exists affixing such punishment, there is no crime in law".[452] South African courts may impose penalties and fines using their sentencing discretion[453] as provided for in common law, but also as stipulated by sentencing legislation:

> The type and the length of punishment, whether determinate or indeterminate, have to be found in the common or statute law, which is a requirement of the principle of legality *nulla poena sine lege*.[454]

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449 Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* 67.

450 Van Zyl Smit *Sentencing and punishment* 49-4.

451 Erasmus and Ndzengu 2016 *SACJ* 247.

452 Burchell *Principles of criminal law* 99. See *DPP, Western Cape v Prins* 2012 (2) SACR 183 (SCA) paras 20-22, where the court held that the absence of a statutorily prescribed penalty clause in an Act does not necessarily negate the express creation of a criminal norm. Although it is expressly clear from the particular statute that a criminal offence has been created, the legal basis for the judicial imposition of sentences for statutorily created crimes may arise from the common law (i.e. the exercise of judicial discretion (see paras 10–13 of judgment) or from another applicable statute (see paras 23 and 26).

453 The extent to which South African courts may exercise their sentencing discretion is also limited by their court jurisdictions. See Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* 68.

454 Jameson *Structuring the exercising of sentencing discretion in South African criminal courts* 68.

It has been established that the Trafficking Act does establish and define the crime of trafficking and specifically prescribe the punishment for its contravention. From the sentences that were imposed on human traffickers in the cases discussed above, the courts used the sentencing regimes relevant to the time of the commission of the crime. Even in the case of *Jezile* which was decided before the implementation of the Trafficking Act, the court acknowledged the Act, but did not use it for purposes of sentencing because it was not yet enacted at the time of the commission of the crime. It is, however, recognised that when the courts deviate from the prescribed sentences to exercise their discretion, there appears to be disparities in sentences, some of which are so grave as to raise concerns around equality issues.

3.4.2 Human-rights issues as regards South African human trafficking sentences

Section 12(1)(e) of the Constitution provides that: "Everyone has the right to freedom and security of the person, which includes the right … not to be treated or punished in a cruel, inhuman or degrading way".[455] As seen from chapter 2, life imprisonment is sanctioned by the ICC and the *ad hoc* tribunals having regard to the extreme gravity of the offences and the circumstances of the offender. The Constitution also does not exclude life imprisonment, and it is provided for as a competent sentence for human trafficking in the Trafficking Act. In this regard, it has been commented that:

> Indeed, imprisonment for life is often considered the only appropriate alternative to the death penalty in order to condemn nefarious crimes and is strongly supported at the international level.[456]

On the other hand, it has been argued by critics such as Cameron J that:

> A fundamental principle in sentencing is the public interest, not public opinion. We cannot assume that life in prison is cushier or kinder than the death penalty. We must rethink our approaches to imprisonment. This is not only for the sanity, humanity and dignity of our nearly 18 000 lifers. It is for the better good of us all in our crime-ridden society.[457]

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455 The Constitution s 12(1)(e).

456 Marchesi 2018 *Utrecht Law Review* 97.

457 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021). See also Mollema and Terblanche 2017 *SACJ* 222-223

Cameron contends the "sadly misdirected mandatory minimum sentences"[458] enacted by Parliament and upheld by the Constitutional Court in *S v Dodo*[459] have largely resulted in the vastly increased numbers of lifers.[460] As from 1 October 2004, persons sentenced to life imprisonment in South Africa qualify to be considered for parole after serving at least a minimum of 25 years of the sentence.[461] Throughout the years, this minimum non-parole period has been steadily pushed upwards. Before 1987, the non-parole period for persons serving a life sentence was ten to fifteen years, which was then increased to 20 years.[462] The massive proliferation of life-term sentences[463] has not had the desired effect of curbing crime, as maintained by Cameron J:

> There is a grim truth about harsher sentences: they do not help. There is an unchallengeable fact of penology. It is this: what abates crime is certainty of detection, certainty of follow-up, arrest, arraignment and punishment – not length of sentence.[464]

To be sentenced to life without parole may be experienced as a fate worse than death, or a "slow death row".[465] From the case law discussions in this chapter, it was seen that in some cases, like in the case of *Obi*, the courts can order mandated sentences to run consecutively, which may result in cruel and inhumane sentences. The courts in South Africa strongly discourage such discriminatory exercise of discretion as it was seen in

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458 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021).

459 See footnote 35 above.

460 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021). Cameron quotes the latest 2021 Judicial Inspectorate for Correctional Services (JICS) annual report statistics, and states that there 17 188 lifers (12% of the total prison population), while in 1995, there were about 400 life-time prisoners.

461 Correctional Services Act 111 of 1998 s 78 read with s 73(6)(b)(iv). In *Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening)* [2019] ZACC 18, the Constitutional Court struck down the arbitrary manner in which the increase in the minimum non-parole period was imposed (s 136(1) of the Correctional Services Act 111 of 1998). The Court held that parole eligibility forms part of punishment, and that convicted persons had the right to the least severe punishment. If an offence (and not the sentencing date) occurred before 1 October 2004, the more lenient parole regime applied.

462 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021).

463 Further increased by granting Regional Courts the power to impose life sentences in 2008. See Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021).

464 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021).

465 Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021).

the case of *Zamila*,[466] in which the appellant was sentenced to an effective 77 years' imprisonment for an array of convictions.[467] This sentence was reduced to an effective 53 years' imprisonment by the High Court on appeal.[468] On further appeal to the Supreme Court of Appeal, the court noted that none of the charges on which the appellant was convicted warranted life imprisonment, however, the imposed sentence had the effect of removing the appellant permanently from society as the sentence of imprisonment for 53 years was more onerous than life imprisonment.[469] Sentences of this nature are termed 'Methuselah sentences' – a term that is so long that a prisoner would have absolutely no chance of being released at the expiry of the sentence or on parole after serving half the sentence – and this amounts to cruel, inhuman and degrading punishment.[470] In the interests of justice, the Supreme Court mitigated the length of the sentence by ordering some of the counts to run concurrently.[471] The Court ordered that the appellant serve an effective sentence of 35 years' imprisonment.[472]

With regard to the discretion to deviate from the prescribed sentence regime, it has been noted also that the sentences of the court may at times be so lenient as to undermine the principle of proportionality, deterrence and retribution which are the main sentencing purposes in human trafficking and the principles in the triad of Zinn.[473] This was evident in the sentence that was issued to De Waal Rossouw. This shows that even when the courts are exercising their jurisdiction to deviate from prescribed sentences, there should still be legislative guidance to guard against offending the right to equality before the law – the disparity between the sentence of De Waal Rossouw and the sentences in the cases of *Obi* and *Abba* is too broad considering that the accused persons in all three cases were convicted of trafficking in persons on similar facts.

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466 *Zimila v S* (1179/16) [2017] ZASCA 55 (hereafter *Zimila v S*).
467 *Zimila v S* para [1].
468 *Zimila v S* para [1].
469 *Zimila v S* para [7].
470 Van Zyl Smit *Sentencing and punishment* 49-26.
471 *Zimila v S* para [10].
472 *Zimila v S* para [12].
473 See footnote 34 above.

As previously remarked, the sentences under the Trafficking Act are in harmony with the international standards. These human-rights issues raised speak to the implementation of the Trafficking Act. As seen from the examples, the challenges are not unique to sentencing under the Trafficking Act but can be attributed to the whole South African sentencing regime.

3.5 Conclusion

The sentencing regulations under the Trafficking Act demand the imprisonment of human trafficking offenders, similar to sentences of the ICC and the *ad hoc* tribunals, as discussed in chapter 3. The international criminal courts, except for the Special Court for Sierra Leone and the ICTR which have no provision for imprisonment for life; consider imprisonment for life as a measure of last resort, and then work from that point of determinate sentences towards the imposition of imprisonment for life depending on the gravity of the offence, circumstances of the offender, and aggravating circumstances. Under the Trafficking Act, however, life imprisonment is a measure of first resort; the court determines the sentence from that point to confirm or differ from it depending on the absence or presence of substantial compelling circumstances. It is this disparity that has caused more offenders to receive life imprisonment under the Trafficking Act than those sentences obtained under the international criminal courts. However, that on its own is not reason enough to conclude that the sentencing regime under the Act exceeds the international prescripts; this is so because all the international criminal court statutes except the Rome statute elevate the importance of the domestic sentencing regime. The Trafficking Act also provides for sentencing in line with the established national sentencing regime as seen from case law preceding the Act. While the ICC sentences are mandated to run concurrently; the *ad hoc* tribunals' sentences and the sentences under the Trafficking Act can run either concurrently or cumulatively depending on the discretion of the sentencing court.

In the previous chapter, proportionality of penalties has been regarded as very important in sentencing under international criminal law. It is submitted that the same regard to proportionality in sentencing is embodied in the triad of Zinn in determining

appropriate sentences in South Africa. It has further been established from case law in the previous chapter that the international criminal courts prioritize deterrence and retribution principles of sentencing over rehabilitation. The same attitude has been evident in the South African case law under the Trafficking Act.

In the final chapter, the analysis of the sentencing of human trafficking offenders under South African and international law will briefly be summarised, where after recommendations and a final conclusion will be provided.

CHAPTER 4

RECOMMENDATIONS AND CONCLUSION

4.1 Summary

This final chapter will draw conclusions and put forward some answers to the research questions (as found in paragraph 1.3) of this study. As made clear in chapter 1 already, this study focused on the South African legislation as regards the sentencing of persons convicted of the offence of human trafficking, and in particular, the Trafficking Act, against the background of the sentencing of offenders of human trafficking under international criminal law. In paragraph 1.1, the background to the research focus was provided. It was seen that trafficking in persons is a serious and atrocious crime in South Africa, as well as in the rest of the world, and on the rise. In order to combat this transnational crime, international treaties such as the UNTOC and protocols such as the Palermo Protocol were established. However, as regards the punishment to be imposed on human trafficking perpetrators, the UNTOC and the Palermo Protocol do not provide proper guidance as to the suitable sentencing regime for human trafficking (as declared in paragraph 1.2 and further explicated on in chapter 2). Paragraph 1.5 provided a thorough literature review on human trafficking and sentencing, and it was confirmed that although several researchers have already addressed this subject matter, only Mollema and Terblanche have written on both these topics in a single article. This study purports to improve on this article as the authors did not analyse how South African courts have interpreted the sentencing regime in the Trafficking Act. As background to the discussions to follow in the subsequent chapters, paragraph 1.5 also provided a brief overview on the purposes and principles of sentencing; the sentencing of human traffickers under international and domestic law; as well as human-rights issues in sentencing. Lastly, a brief layout of the research was set out in paragraph 1.6.

In chapter 2, the human trafficking legal frameworks available in international law were introduced. The chapter set out by providing the principles of sentencing under international law in paragraph 2.2. In punishing human traffickers, courts have to

consider especially the elements of retribution and deterrence. These two sentencing essentials were further discussed in subsequent sub-paragraphs. Of further importance is proportionality in sentencing, where the gravity of the offence, the individual circumstances of the convicted person, as well as public interest are taken into account. This is elaborated on in paragraph 2.2.1. In paragraph 2.3 the UNTOC and the Palermo Protocol were focused on in order to gain knowledge on these instruments' prescriptions on sentencing convicted human traffickers. As mentioned afore hand, these resolutions do not provide proper guidelines as to the suitable sentencing regime for human trafficking. Guidance had to be sought from the ICC and *ad hoc* tribunals statutes dealing with offences under the umbrella of crimes against humanity which include enslavement and human trafficking (as explained in paragraphs 2.4 and 2.5).

In international law, human trafficking can only be prosecuted under the auspices of crimes against humanity which include enslavement, whose definition in turn includes exercise of ownership over a person for human trafficking purposes, particularly women and children. In the cases discussed under international law, offenders were mostly convicted of enslavement of women and children for sexual purposes. Sentences of the ICC and the *ad hoc* tribunals were found to be primarily lengthy imprisonment sentences, with the main purpose of sentencing being deterrence and retribution. To reach proportional sentences, the Trial Chambers were mostly guided by the gravity of the offences, as well as aggravating factors and mitigating circumstances. Under international law, except for the Rome Statute; the Trial Chambers were supposed to consider the perpetrator's national sentencing regime as a guidance towards appropriate sentencing, however, the *Ad hoc* tribunals declared that they were not bound by that provision. The tribunals had wide sentencing discretions unlike the ICC which kept imprisonment at 30 years regardless of the number of counts the offender has been convicted and sentenced on, unless the offence was so heinous as to warrant imprisonment for life.

In the third chapter, the South African case law under the Trafficking Act was analysed against the background of the international case law considered in chapter 2. In order to comprehensively compare the South African trafficking sentencing standards, the

sentencing principles established prior to and after the implementation of the Trafficking Act were provided in paragraphs 3.2 and 3.3. Case law on human trafficking convictions of the two stipulated periods were furthermore presented. The chapter concluded in paragraph 3.4 on legality and human-rights issues in the sentencing of human trafficking perpetrators in South Africa.

This study has established that South African laws regulating human trafficking are in accordance with international law. Similar to the sentences passed under the ICC and the *ad hoc* tribunals, and as seen from the judgments handed out in South Africa; human trafficking offences are mostly met with lengthy imprisonment terms. Although the ICTR and the Special Court for Sierra Leone statutes and rules do not provide for life imprisonment, the ICC does and the ICTY did. However, for all international instruments, life imprisonment is reserved for the gravest offences. The Trafficking Act was enacted to harmonise national legislation with the requirements of the UNTOC and the Palermo Protocol. The legislation considers human trafficking a serious offence which is evident by its subjection of sentencing to the Minimum Sentencing Act which is accompanied by predominantly heavy sentences reserved for grave offences. Under the Trafficking Act, human trafficking for sexual exploitation purposes is considered a very serious crime, and life imprisonment is considered as a measure of first resort. The court may only impose a lesser sentence if there exist substantial compelling circumstances. These circumstances are not provided under any legislation; it is upon the individual judge to make such findings after consideration has been had to all particulars of the specific crime committed. The sentencing discretion is substantially wide, subsequently the courts' sentences for similar offences may differ which impacts negatively on some protections provided for under the Bill of rights. In both the South African courts and international criminal courts, deterrence and retribution feature highly while rehabilitation as a sentencing purpose is rarely considered.

The major shortfall of sentencing under the Trafficking Act is that, like all sentencing in South Africa, it is the prerogative of the sentencing courts. There are no legislatively ordained levels of sentences corresponding to levels of the seriousness of the offences. As such, courts meet out substantially differing sentences. These inconsistencies in

turn offend on the principles of legality and human-rights issues. Even though the Trafficking Act is in full compliance with the dictates of international law, the open and broad sentencing provision can be subject to misuse and need to be revised.

4.2 Recommendations

After studying sentencing under the Trafficking Act of South Africa against the background of sentencing of human trafficking offences in international law, and particularly under the umbrella of crimes against humanity in international law as provided for under the Rome Statute and the *ad hoc* tribunals statutes; the following recommendations are made:

4.2.1 Reconsider the entire South African sentencing system

South Africa has been marred by so much inequality in almost all spheres of life; before the law, in wealth, education, access to health facilities, gender and many more, and these problems are still persisting even today. It is imperative that South Africa reconsiders its sentencing system, while still retaining the triad of Zinn's fundamental principles as to sentencing. Minimum sentences for serious and violent crimes were considered a solution to the rising crime rate in South Africa, however, as indicated in this study, not much has improved. Minimum sentences furthermore had to minimise or eliminate disparity in sentencing because most poor South Africans cannot afford appeal costs at the instance where a sentence is disproportionate. However, as again shown in this research, although the sentencing of human traffickers is subject to the Minimum Sentences Act, many judgments differ. As the ultimate penalty in South Africa, life imprisonment sentences have greatly increased which is directly attributed to the Minimum Sentences Act. To this end, this study proposes that the approach of Cameron J would best benefit South Africa. Life sentences should not be mandatory; and life imprisonment for human trafficking should be employed sparingly, justly and cautiously. Only the most heinous and extremely dangerous criminals should be locked away securely for the rest of their natural lives. It is also recommended that these lifers should be judiciously considered for parole when appropriate.

4.2.2 Incorporate the sentencing provisions of the Rome Statute in national legislation

Similar provisions to that in the Rome Statute and rules that prescribe the maximum number of years that a convicted offender may serve in prison when the life imprisonment has not been imposed is recommended. This would ensure that courts do not impose draconian sentences that are particularly designed to keep the offenders in prison for the rest of their lives. As stated in the chapters above, the international criminal courts (except for the Special Court for Sierra Leone and the ICTR which have no provision for imprisonment for life) consider imprisonment for life as a measure of last resort, and then work from that point of determinate sentences towards the imposition of imprisonment for life depending on the gravity of the offence, circumstances of the offender, and aggravating circumstances. In this regard, the Trafficking Act which considers life imprisonment is a measure of first resort where from the court determines the sentence from that point to confirm or differ from it depending on the absence or presence of substantial compelling circumstances, should be amended to follow the approach of the international criminal courts.

4.2.3 Punishment should not exceed the prescribed imprisonment

While it is good practice to have an individual sentence for an individual count on which a convict has been sentenced, there should, similar to the Rome Statute and rules be an overall sentence that should not exceed a certain number of years' imprisonment. This will guard against sentences that may even be more onerous than the life imprisonment itself, and which may offend against the constitutional right to freedom and security of a person in that no one should be deprived of their liberty arbitrarily or without just cause, and which further protects against cruel and inhuman punishments.

4.2.4 Courts should avoid awarding sentences for human trafficking indiscriminately

The other side of the coin as regards life imprisonment is that some courts sentence offenders to very lenient, and even wholly suspended jail terms. As elaborated on in the chapters above, South African judiciary have the discretion to deviate from the prescribed human-trafficking sentence regime in cases where they are satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. These court sentences may at times be so lenient as to undermine the principle of proportionality, deterrence and retribution which are the main sentencing purposes in human trafficking and the principles in the triad of Zinn. In such cases, the prosecution may of course lodge an appeal stating that the sentencing order made by the judge or magistrate was an error in law or fact. In this manner, the order may be overturned. Furthermore, guidelines to secure consistency in sentencing human trafficking offenders should be constructed in order to guide judicial officers to arrive at a specific sentence.

4.3 Conclusion

In conclusion, it can be stated that the research questions of this mini-dissertation have been answered, and the hypotheses proved:

- There are a variety of factors informing the sentencing of human trafficking in South African courts

As seen in *S v Pillay*, the courts in South Africa still follow the well-established triad of Zinn sentencing guidelines which enjoins the sentencing court to take into consideration the gravity of the offence, the offender's circumstances and the interests of society; and that the judgment is in accord with sentencing standards under international law (which also dictates that similar factors must be considered for sentencing purposes). The ICC provides aggravating circumstances factors that must be considered for sentencing purposes and so does the Trafficking Act. Further, the courts in South Africa, like the international courts, elevate deterrence and retribution as purposes for sentencing, while rehabilitation as a sentencing objective is not

dominant. Despite the guidelines already mentioned, some courts still battle to give effect to the principle of proportionality having regard to the great disparities in the sentencing of similar cases such.

There is, however, indication that the courts which ground their sentences in the guidelines provided by the Trafficking Act together with the sentencing principles of South Africa like in the case of *Pillay;* do arrive at sentences that take into consideration all the important factors that are considered internationally like the gravity of the offence, aggravating factors, offender's circumstances, deterrence and retribution, proportionality and human rights issues.

- The Trafficking Act addresses the sentencing of human traffickers, and the sentences imposed under the Trafficking Act are stringent

It has been established through decided cases that the sentences under the Trafficking Act are stringent, however, due to the broad discretionary powers the judicial officers have in sentencing, there are some disparities in the sentences imposed. Section 13 of the Trafficking Act read with section 51 of the Minimum Sentences Act provide for the sentencing of convicted human traffickers. Section 13 stipulates that the sentences of imprisonment for human trafficking may include imprisonment for life. Section 51 of the Minimum Sentences Act by its nature caters for serious offences which carry weighty sentences, including life imprisonment. In the result, penalties imposed under the Trafficking Act are heavy, as seen from the case of *Obi*. It has been established, however, through the cases of *Pillay* and *Abba* that sentences under the Trafficking Act are onerous even when the courts deviate from imposing the minimum sentences.

- Sentences enforced on human traffickers, and the reasons given by the courts for these sentences, differ

Despite the limitations in the accessibility of sentencing judgments under the Trafficking Act, this study has shown that due to the established basic sentencing principles in the triad of Zinn, and the discretion to deviate from the mandatory minimum sentences, the courts in South Africa impose different sentences for the seemingly similar cases because they must address facts unique to each case for sentencing. Furthermore, it

has been established that while some courts invoke the guidance of the triad *of* Zinn along with Trafficking Act, other courts use the provisions of the Trafficking Act only to the exclusion of the triad of the Zinn principles, and by so doing fail to ground their sentences on the proportionality principle. These different approaches impact on sentencing as it was in the cases of *Obi* and *Pillay.*

- International law guidelines, such as in the UNTOC and the Rome Statute, provide guidance towards the sentencing of human traffickers

As already stated, the Trafficking Act provides for sentences of a fine in less serious offences and imprisonment for up to life imprisonment for more serious crimes committed. However, the Rome Statute postulates a more conducive sentencing regime where imprisonment can be up to a maximum of 30 years unless the offence is so grievous that it would warrant life imprisonment. In this regard, international law guidelines, such as in the UNTOC and the Rome Statute, do provide guidance towards the sentencing of human traffickers in South Africa.

- South African law on human trafficking is in accordance with international law

Like the ICC and the *Ad hoc* Tribunals, the Trafficking Act sentences are imprisonment including imprisonment for life. This study has indicated that the sentencing of human traffickers' main objectives, both under international law and the Trafficking Act, are retribution and deterrence which should be imposed in accordance with the established national sentencing standards. Even though the Trafficking Act complies with international guidelines when it comes to sentencing; the Rome Statute may provide a more conducive guideline to sentencing, and it would be advisable for South Africa to embark on the revision of the sentencing provision under the Trafficking Act.

- Legislative intervention is required to revise the sentencing legislation in such a manner so as to assist in the applying of judicial sentencing discretion in order to promote consistency in sentencing human traffickers

Though there is guidance under section 13 of the Trafficking Act on what factors are aggravating factors, there is no guidance as to the ranking of offences in regard to their

gravity which would in turn inform on the severity of sentences. Judicial discretion may, in some instances, be too broad and requires regulating. The wide difference in the sentences in cases of *Obi* and *Rossouw* is a clear indication that there should be sentencing guidelines for judges to consider when passing judgment of human traffickers. The legislature should also reconsider the sentencing provision of the Trafficking Act under section 14 and reconstruct it in such a way that it provides sentencing groups according to the differing levels of the gravity of the offence while upholding the importance of judicial discretion as suggested by Cameron.

REFERENCES

Books

Burchell *Principles of criminal law*

Burchell J *Principles of criminal law* 5 ed (Juta & Co Ltd Cape Town 2016)

Kelsen *Pure theory of law*

Kelsen H *Pure theory of law* (The Lawbook Exchange Ltd New Jersey 2005)

Kemp *et al Criminal law*

Kemp G; Walker S; Palmer R; Baqwa D; Gevers C; Leslie B & Steynberg A *Criminal law in South Africa* (Oxford University Press Cape Town 2013)

Lloyd *Lloyd's introduction to jurisprudence*

Lloyd D *Lloyd's introduction to jurisprudence* 18 ed (Sweet & Maxwell London 2001)

Mubangizi *The protection of human rights in South Africa*

Mubangizi J *The protection of human rights in South Africa: A legal and practical guide* (Juta & Co Ltd Landsdowne 2004)

Snyman *Snyman's criminal law*

Snyman CR *Snyman's criminal law* 7 ed (updated by SV Hoctor) (LexisNexis Durban 2020)

Terblanche *A guide to sentencing in South Africa*

Terblanche S *A guide to sentencing in South Africa* (LexisNexis Durban 2016)

Thorburn *Proportionate sentencing and the rule of law*

Thorburn M "Proportionate sentencing and the rule of law" In Zedner L and Roberts J (eds) *Principles and values in criminal law and criminal justice* (Oxford University Press London 2012) 269-284

Van Zyl Smit *Sentencing and punishment*

Van Zyl Smit D "Sentencing and punishment" in Woolman S and Bishop M (eds) *Constitutional law of South Africa* 2 ed (Juta & Co Ltd Cape Town 2005) 49-1-49-38

Articles

Aston and Paranjape 2012 *SSRN*

Aston J and Paranjape V "Human trafficking and its prosecution: Challenges of the ICC" 2012 *Social Science Research Network* doi: http://ssrn.com/abstract=2203711

Bassett 2009 *Human Rights Brief*

Bassett MR "Defending international sentencing: Past criticism to the promise of the ICC" 2009 16(2) *Human Rights Brief* 22-28

Bazemore 2007 *Social Research*

Bazemore "The expansion of punishment and the restriction of justice: Loss of limits in retributive policy and the restorative justice alternative" 2007 74(2) *Social Research* 651-662

Bishai 2013 *Northwestern University Journal of International Human Rights*

Bishai C "Superior responsibility, inferior sentencing: Sentencing practice at the International Criminal Tribunals" 2013 11(3) *Northwestern University Journal of International Human Rights* 83-108

Combs 2016 *Yale Journal of International Law*

Combs NA "Seeking inconsistency: Advancing pluralism in international criminal sentencing" 2016 41(1) *Yale Journal of International Law* 1-49

Erasmus and Ndzengu 2016 *SACJ*

Erasmus D and Ndzengu N "A note on the introduction of the *nullum crimen nulla poena sine lege* or principle of legality in the South African asset forfeiture jurisprudence" 2016 3 *South African Journal of Criminal Justice* 247-272

Gallagher and Holmes 2008 *International Criminal Justice Review*

Gallagher A and Holmes P "Developing an effective criminal justice response to human trafficking: Lessons from the front line" 2008 18 *International Criminal Justice Review* 318-343

Gumboh 2011 *AHRLJ*

Gumboh E "The penalty of life imprisonment under international criminal law Esther" 2011 11 *African Human Rights Law Journal* 75-92

Harmon and Gaynor 2007 *Journal of International Criminal Justice*

Harmon M and Gaynor F "The sentencing practice of international criminal tribunals: Ordinary sentences for extraordinary crimes" 2007 5(3) *Journal of International Criminal Justice* 683-712

Henham 2003 *The International and Comparative Law Quarterly*

Henham R “Some Issues for Sentencing in the International Criminal Court” 52(1) 2003 *The International and Comparative Law Quarterly* 81-114

Hola 2012 *Amsterdam Law Forum*

Hola B 2012 “Sentencing of international crimes at the ICTY and ICTR” 2012 4(4) *New Amsterdam Law Forum* 3-24

Kara 2011 *Northwestern Journal of International Human Rights*

Kara S “Designing more effective laws against human trafficking” 2011 9(2) *Northwestern Journal of International Human Rights* 123-147

Keller 2001 *Indiana International and Comparative Law Review*

Keller AN “Punishment for violations of international criminal law: An analysis of sentencing at the ICTY and ICTR” 2001 12(1) *Indiana International and Comparative Law Review* 53-74

King 2013 *Topical Research Digest*

King L “International Law and human trafficking” 2013 *Topical Research Digest: Human Rights and Human Trafficking* 88-103

Klare 1998 *SAJHR*

Klare K “Legal culture and transformative constitutionalism” 1998 14 *South African Journal on Human Rights* 146-188

Kreston 2014 *SACJ*

Kreston S “Human trafficking legislation in South Africa: Consent, coercion and consequences” 2014 1 *South African Journal of Criminal Justice* 20-36

Kruger 2016 *CILSA*

Kruger B “Towards a sharp prosecution sword to combat human trafficking: comparing the new South African counter-trafficking law with international prosecution standards” 2016 XLIX *Comparative and International Law Journal of Southern Africa* 53-84

Kruger and Oosthuizen 2012 *PELJ*

Kruger H and Oosthuizen H “South Africa – Safe haven for human traffickers? Employing the arsenal of existing law to combat human trafficking” 2012 (15)1 *Potchefstroom Electronic Law Journal* 283-343

Mahmood 2019 *Journal of Trafficking and Human Exploitation*

Mahmood F “Prosecuting human trafficking for the purpose of sexual exploitation under Article 7 of the Rome Statute: Enslavement or sexual slavery?” 2019 3(1) *Journal of Trafficking and Human Exploitation* 35-57

Marchesi 2018 *Utrecht Law Review*

Marchesi D “Imprisonment for life at the International Criminal Court” 2018 14(1) *Utrecht Law Review* 97-115

Mollema 2014 *JCRDL*

Mollema N “Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013" 2014 77 *Journal of Contemporary Roman-Dutch Law* 248-262

Mollema 2017 *Scientia Militaria*

Mollema N “The role of the military in combating human trafficking: A South African perspective” 2017 45(2) *Scientia Militaria* 20-35

Mollema and Terblanche 2017 *SACJ*

Mollema N and Terblanche S “The effectiveness of sentencing as a measure to combat human trafficking” 2017 *South African Journal of Criminal Justice* 198-223

Moran 2014 *The Age of Human Rights Journal*

Moran C “Human trafficking and the Rome Statute of the International Criminal Court” 2014 3 *The Age of Human Rights Journal* 32-45

Mureinik 1994 *SAJHR*

Mureinik E “A Bridge to where? Introducing the Interim Bill of Rights” 1994 10 *South African Journal on Human Rights* 31-48

Obokata 2005 *The International and Comparative Law Quarterly*

Obokata T “Trafficking of human beings as a crime against humanity: Some implications for the international legal systems” 2005 54(2) *The International and Comparative Law Quarterly* 445-457

Paizes and Van der Merwe 2015 *Criminal Justice Review*

Paizes A and Van der Merwe S “A bi-annual update complementing the Commentary on the Criminal Procedure Act” 2015 2 *Criminal Justice Review* 1-32

Riegler 2020 *International Criminal Law Review*

Riegler E “Rehabilitating enemies of mankind: An exploration of the concept of rehabilitation as a sentencing Aim at the ICTY and the ICC” 2020 20(4) *International Criminal Law Review* 701-727

Sloth-Nielson and Ehlers 2005 *SA Crime Quarterly*

Sloth-Nielson J and Ehlers L “Assessing the impact: Mandatory and minimum sentences in South Africa” 2005 14 *SA Crime Quarterly* 15-22

Swart 2005 *SAYIL*

Swart M "Legality as inhibitor: The special place of *nullum crimen sine lege* in the jurisprudence of international criminal tribunals" 2005 30 *South African Yearbook of International Law* 33-49

Terblanche 2011 *Stellenbosch LR*

Terblanche S "The punishment must fit the crime: Also when the offender has previous convictions?" 2011 1 *Stellenbosch Law Review* 188-204

Terblanche 2017 *PELJ*

Terblanche S "Twenty years of Constitutional Court judgments: What lessons are there about sentencing?" 2017 20 *Potchefstroom Electronic Law Journal* 1-37

Van der Watt 2020 *Child Abuse Research: A South African Journal*

Van der Watt M "Child trafficking and children in South Africa's sex trade: Evidence, undercounting and obfuscations" 2020 1 *Child Abuse Research: A South African Journal* 58-82

Van der Wilt 2014 *Chinese Journal of International Law*

Van der Wilt H "Trafficking in human beings, enslavement, crimes against humanity: Unravelling the concepts" 2014 13 *Chinese Journal of International Law* 297-334

Yesufu 2020 *Journal of Social Sciences and Humanities*

Yesufu S "Human trafficking: A South African perspective" 2020 17(6) *Journal of Social Sciences and Humanities* 103-120

Research papers and reports

Anderson *Preventive detention in pre- and post apartheid South Africa*

Anderson A *Preventive detention in pre- and post apartheid South Africa: From a dark past to a brighter future* (Paper read at the "Codifying the criminal law: Modern initiatives" International Society for the Reform of Criminal Law Conference held in Dublin, Ireland 2008) doi: www.isrcl.org/Papers/2008/Anderson.pdf

Goffrier *Deterrence as principle of sentencing in international criminal justice*

Goffrier B *Deterrence as principle of sentencing in international criminal justice* (Centre for International Criminal Justice Amsterdam 2014)

Grădinaru *The principle of legality*

Grădinaru D *The principle of legality* (Paper delivered at the 11th International Research Association for Interdisciplinary Studies (RAIS) Conference on Social Sciences Johns Hopkins University Rockville 2018) 289-294

Harmon *War in the former Yugoslavia: Ethnic conflict or power politics?*

Harmon GF *War in the former Yugoslavia: Ethnic conflict or power politics?* (Unpublished Honours dissertation Department of Political Science Boston College 2007)

Jameson *Structuring the exercising of sentencing discretion in South African criminal courts*

Jameson VI *Structuring the exercising of sentencing discretion in South African criminal courts* (Unpublished LLD thesis North-West University 2018)

Kruger *Combating human trafficking: A South African legal perspective*

Kruger HB *Combating human trafficking: A South African legal perspective* (Unpublished LLD thesis University of the Free State 2010)

Mollema *Combating human trafficking in South Africa: A comparative legal study*

Mollema N *Combating human trafficking in South Africa: A comparative legal study* (Unpublished LLD thesis University of South Africa 2013)

Touzenis *Trafficking in human beings: Human rights and trans-national criminal law*

Touzenis K *Trafficking in human beings: Human rights and trans-national criminal law developments in law and practices* (UN Educational Scientific and Cultural Organization Paris 2010)

UNHCHR *Recommended principles and guidelines on human rights and human trafficking*

UNHCHR *Recommended principles and guidelines on human rights and human trafficking* (UN Geneva Legislative Guides to the Organised Crime Convention and its Protocols 2010)

UNODC *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*

UNODC *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN New York 2004)

UNODC *Legislative guide for the implementation of the Protocol*

UN Office on Drugs and Crime (UNODC) *Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime* (UN New York 2004)

UN OHCHR *Human rights and human trafficking*

UN Office of the High Commissioner for Human Rights (OHCHR) *Human rights and human trafficking* (UN New York 2014)

Windridge, Bossow and Beqiraj *Sentencing criteria in international criminal law: Towards consistency, certainty and fairness*

Windridge O, Bossow A, and Beqiraj J 2018 *Sentencing criteria in international criminal law: Towards consistency, certainty and fairness* (Bingham Centre for the Rule of Law Bloomsbury 2018)

Internet sources

Cameron www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf (Date of use: 26 May 2020)

Cameron E "Imprisoning the nation: Minimum sentences in South Africa" www.concourt.org.za/images/phocadownload/justice_cameron/UWC-Deans-distinguished-lecture-19-October-2017-Minimum-Sentences.pdf (Date of use: 26 May 2020)

Cameron https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021)

Cameron E "Our faulty approach to life sentences is catching up with us" https://www.groundup.org.za/article/our-faulty-approach-life-sentences-catching-us/ (Date of use: 10 November 2021)

Clarke https://magnacarta800th.com/wp-content/uploads/2011/10/lessons_magna carta.pdf (Date of use: 26 October 2020)

Clarke A "Constitutional justice: Lessons from Magna Carta" https://magnacarta800th.com/wp-content/uploads/2011/10/lessons_magna carta.pdf (Date of use: 26 October 2020)

Cruywagen https://www.dailymaverick.co.za/article/2020-11-11-a-slap-in-the-face-outrage-as-judge-suspends-sentence-for-child-kidnapper-and-trafficker/ (Date of use: 13 September 2021)

Cruywagen V "A slap in the face: Outrage as judge suspends sentence for child kidnapper and trafficker" https://www.dailymaverick.co.za/article/2020-11-11-a-slap-in-the-face-outrage-as-judge-suspends-sentence-for-child-kidnapper-and-trafficker/ (Date of use: 13 September 2021)

Dlwati https://power987.co.za/news/human-trafficking-brothers-slapped-with-hefty-sentence/ (Date of use: 12 August 2021)

Dlwati V "Human trafficking brothers slapped with hefty sentence" https://power987.co.za/news/human-trafficking-brothers-slapped-with-hefty-sentence/ (Date of use: 12 August 2021)

Department of Justice and Constitutional Development www.justice.gov.za/docs/other-docs/2019-TIP-NPF-10April2019.pdf (Date of use: 22 October 2020)

Department of of Justice and Constitutional Development "Prevention and Combating of Trafficking in Persons National Policy Framework" www.justice.gov.za/docs/other-docs/2019-TIP-NPF-10April2019.pdf (Date of use: 22 October 2020)

International Criminal Court " Understanding the International Criminal Court" https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021)

International Criminal Court " Understanding the International Criminal Court" https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (Date of access: 12 June 2021)

Kruger https://www.iol.co.za/the-star/opinion-analysis/the-truth-about-human-trafficking-in-south-africa-43f8bcf0-35c2-4374-95be-50ff4b274466#:~:text=But%20trafficking%20is%20a%20reality%20in%20South%20Africa.&text=This%20means%20victims%20are%20trafficked,country%20as%20their%20final%20destination (Date of use: 9 March 2021)

Kruger B "The truth about human trafficking in South Africa" https://www.iol.co.za/the-star/opinion-analysis/the-truth-about-human-trafficking-in-south-africa-43f8bcf0-35c2-4374-95be-50ff4b274466#:~:text=But%20trafficking%20is%20a%20reality%20in%20South%20Africa.&text=This%20means%20victims%20are%20trafficked,country%20as%20their%20final%20destination (Date of use: 9 March 2021)

Library of Congress www.loc.gov/law/help/sentencing-gudelines/southafrica.php (Date of use: 17 May 2020)

Library of Congress "Sentencing guidelines: South Africa" www.loc.gov/law/help/sentencing-gudelines/southafrica.php (Date of use: 17 May 2020)

Mjonondwane https://www.facebook.com/page/438204912879558/search/?q=Akadoronge (Date of use: 10 November 2021)

Mjonondwane P "Nigerian national sentenced for human trafficking and multiple rapes" https://www.facebook.com/page/438204912879558/search/?q=Akadoronge (Date of use: 10 November 2021)

Muigua http://kmco.co.ke/wp-content/uploads/2018/08/073_Normative_legal_theory.pdf (Date of use: 26 October 2020)

Muigua K "Normative legal theory: Its evaluation and search for structure and unity in law" http://kmco.co.ke/wp-content/uploads/2018/08/073_Normative_legal_theory.pdf (Date of use: 26 October 2020)

The Citizen https://www.citizen.co.za/news/south-africa/crime/2381169/cape-town-woman-found-guilty-of-human-trafficking/ (Date of use: 13 September 2021)

The Citizen "Cape Town woman found guilty of human trafficking" https://www.citizen.co.za/news/south-africa/crime/2381169/cape-town-woman-found-guilty-of-human-trafficking/ (Date of use: 13 September 2021)

University of Minnesota Human Rights Library http://hrlibrary.umn.edu/research/ratification-southafrica.html (Date of use: 18 September 2020)

University of Minnesota Human Rights Library "Ratification of international human rights treaties – South Africa" http://hrlibrary.umn.edu/research/ ratification-southafrica.html (Date of use: 18 September 2020)

UN Security Council https://www.un.org/securitycouncil/content/repertoire/international-tribunals (Date of use: 20 June 2021)

UN Security Council "International tribunals" https://www.un.org/securitycouncil/content/repertoire/international-tribunals (Date of use: 20 June 2021)

Venter https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021)

Venter Z " Lengthy sentences for Nigerian brothers convicted for human trafficking" https://www.iol.co.za/news/south-africa/gauteng/lengthy-sentences-for-nigerian-brothers-convicted-for-human-trafficking-17125422 (Date of use: 12 August 2021)

International instruments

Convention to Suppress the Slave Trade and Slavery, 1926

ICC Rules of Procedure and Evidence Rule

ICTY Rules of Procedure and Evidence Rule

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia (ICTY) since 1991: Rules of Procedure and Evidence IT/32/Rev.50 (8 July 2015)

Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998)

Rome Statute of the International Criminal Court Rules of Procedure and Evidence (ICC-ASP/1/3 and Corr.1)

Special Court for Sierra Leone Rules of Procedure and Evidence

Statute of the International Criminal Tribunal for the Former Yugoslavia (Adopted 25 May 1993 by Resolution 827)

Statute of the International Tribunal for Rwanda (Adopted by the Security Council at its 3453rd meeting, on 8 November 1994).

Statute of the Special Court for Sierra Leone (Security Council resolution 1315 of 14 August 2000)

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

UN Convention against Transnational Organised Crime (UNGA Resolution 55/25 of 15 November 2000)

UN Protocol against the Smuggling of Migrants by Land, Sea and Air (UNGA Resolution 55/25 of 15 November 2000)

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UNGA Resolution 55/25 of 15 November 2000)

UN Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000

UN Security Council Resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)] 25 May 1993

UN Security Council Resolution 955 (1994). Adopted by the Security Council at its 3453rd meeting, 8 November 1994

UN Security Council Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000

Legislation

Constitution of the Republic of South Africa, 1996

Correctional Services Act 111 of 1998

Criminal Law Amendment Act 1 of 1988

Criminal Law Amendment Act 105 of 1997

Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007

Criminal Procedure Act 51 of 1977

Magistrates' Court Act No 32 of 1944

Prevention and Combating of Trafficking in Persons Act 77 of 2013

Case law

Dos Santos v S (A26/2014) [2017] ZAGPPHC 641; 2018 (1) SACR 20 (GP)

DPP, Western Cape v Prins 2012 (2) SACR 183 (SCA)

Jezile v S and Others 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015)

Phaahla v Minister of Justice and Correctional Services and Another (Tlhakanye Intervening) [2019] ZACC 18

Prosecutor v Bosco Ntaganda No ICC- 01/04-02/06 (7 November 2019)

Prosecutor v Bosco Ntaganda No ICC-01/04-02/06 A3 (30 March 2021)

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic IT-96-23-T& IT-96-23/1-T (22 February 2001)

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case No It-96-23& It-96-23/1-A (12 June 2002)

Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Case No SCSL-04-15-A) (26 October 2009)

Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (Case No SCSL-04-15-T) Sentencing Judgment (8 April 2009)

Prosecutor v Momčilo Krajišnik Case IT-00-39-T (27 September 2006)

R v Lloyd 2016 (1) SCC 130

S v De Waal Rossouw Case No CC18/19/2020 (Western Cape High Court Cape Town)

S v Dodo 2001 (1) SACR 594 (CC)

S v Dos Santos 2018 (1) SASV 20 (GP)

S v Furlong 2012 (2) SACR 620 (SCA)

S v Mabuza 2018 (2) SACR 54 (GP)

S v Mabuza and Chauke Case No SHG 9/13 Graskop Regional Court, Mpumalanga (21 November 2014)

S v Makwanyane 1995 (2) SACR 1 (CC)

S v Malgas 2001 (1) SACR 469 (SCA)

S v Matyityi (695/09) [2010] ZASCA 127 (30 September 2010)

S v Mhlakaza and Another 1997 (1) SACR 575 (SCA)

S v Mokela 2012 (1) SACR 431 (SCA)

S v OB Abba and 2 Others CC 41/2017 (Gauteng High Court Pretoria)

S v Obi 2020 JDR 0618 (GP)

S v PB 2013 (2) SACR 533 (SCA)

S v Pillay Case No CCD39/2019 (KwaZulu-Natal Local Division, Durban) 26 March 2021

S v Seleso Case No SS45/2018 (GJ) Gauteng South (Johannesburg) High Court

Zimila v S (1179/16) [2017] ZASCA 55