

**HUMAN TRAFFICKING IN SOUTHERN AFRICA: THE NEED FOR AN EFFECTIVE
REGIONAL RESPONSE**

by

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SUMMARY

Human trafficking is an old practice that has become a matter of global concern irrespective whether a country is a country of origin where people are trafficked from; a country of transit where people are trafficked through and a country of destination where people are trafficked to. In 2009, the UN Office on Crime and Drugs stated that 66% females, 22% of children and 12% of men are trafficked. In Africa, human trafficking is identified as a problem in roughly one in three of the countries. According to the Salvation Army, at least 2,000,000 people are trafficked each year and of the estimated number, Africa accounts for 450,000. Furthermore, statistics reveal that 30% of cases handled by the Southern Africa Counter-Trafficking Assistance Programme (SACTAP) involved SADC nationals.

The purpose of this study was therefore to determine whether there is a need for an effective legislative response to human trafficking in SADC. This was established by tracing the evolvement of trafficking from its conceptualization as slavery to its evolvement to human trafficking. Further, by investigating the measures taken within the SADC region to address human trafficking both at the national and regional levels and a comparative study between different regions and between selected SADC countries was conducted.

In the summary of key findings, it was found that the definition of human trafficking as laid out in the Palermo Protocol cannot sufficiently and adequately combat human trafficking in SADC countries in its current form due to a number of reasons. Furthermore, at the institutional level it was found that the Protocols adopted by SADC do not afford all victims of trafficking protection and the Plan of Action is non-binding and faces implementation problems. At SADC country levels it was found that although twelve of the fifteen countries adopted anti-trafficking legislation, these countries struggle with compliance and implementation mechanisms, which show, that mere passing of legislation does not automatically translate to compliance.

This study therefore concluded by proposing a number of options that can be explored in order to effectively prevent, and combat human trafficking in SADC. Even though this

study does not offer a blueprint solution, it contributes towards the development of a model that will better be suited to address human trafficking problems at the SADC level.

KEYWORDS

Human trafficking; Trafficking in persons; Modern-day slavery; Victims of human trafficking

DECLARATION

Name: Phyllis Kedibone Chembe

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I declare that **HUMAN TRAFFICKING IN SOUTHERN AFRICA: THE NEED FOR AN EFFECTIVE REGIONAL RESPONSE** is my own independent work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

.....

Signature

(Phyllis Kedibone Chembe)

.....

Date

DEDICATION

To my husband **Stacy Mulenga** for your endless love, support and encouragement. To my children, **Kesy Lethabo** and **Kelu Nalishebo** always strive to have a positive impact in the world.

ACKNOWLEDGEMENTS

To God be the Glory, what is impossible with men, is possible with God.

First and foremost I offer my sincerest gratitude to my supervisor, Ms M Mooki for the patience that only a great teacher can have for a student. You have inspired me in so many ways. Through tears, trial and errors you have believed in this work and encouraged me to push myself to the limits. A perfectionist is what you are and it is an awesome quality to possess. Words cannot express my gratitude.

I must express my very profound gratitude to my husband Stacy Mulenga for supporting me through the sleepless nights, for being my shoulder to cry on and being a mommy and sister in my absence. Ndi obe pe na pe. To my sister Chisola it was great comfort and relief to know that you were there for Kesy in my absence while I completed my studies. You are heaven sent indeed. You are the best sisi anyone could ever ask for. To my brother Bongani Juda your dedication and perseverance with your studies inspires one to push no matter what and I thank you for your support.

To my parents, Potlakile Juda, and the late Baphelile Phildah Nhlapo, thank you for all the endless love and support. Your good examples have taught me to work hard for the things that I aspire to achieve. To Jabulani Nxumalo, you have planted a seed of ambition in me and today I am a dream chaser because of you. To Nalishebo Irene (Bamommy) and James Chembe your love, acceptance and support has been invaluable in my life, twatotella.

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To my son Kesy Lethabo, you will be seeing more of mommy now and know that your hugs and kisses have kept me going. You are the best son in the whole entire world. To Kelu Nalishebo I can't wait to hold you in my arms.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACSSA	Australian Centre for the Study of Sexual Assault
AU	African Union
AUC	African Union Commission
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CESCR	International Covenant on Economic, Social and Cultural Rights
CERD	International Convention on the Elimination of All forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COE	Council of Europe
CRC	Convention on the Rights of the Child
CSW	Commission on the Status of Women
CTOC	Convention against Transnational Organized Crime
DHA	Department of Home Affairs
DOJ	Department of Justice
DEVAW	Declaration on the Elimination of Violence against Women
DSA	Department of Social Affairs

DSD	Department of Social Development
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EU	European Union
EUROJUST	European Union's Judicial Cooperation Unit
EUROPOL	European Police Office
GRETA	Group of Experts against Trafficking in Human Beings
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
IOM	International Organisation for Migration
MIDSA	Migration Dialogue for Southern Africa
MLA Protocol	Mutual Legal Assistance Protocol

NGO	Non-Governmental Organization
NPA	National Prosecuting Authority
OAP	Ouagadougou Action Plan
OAS	Organization of American States
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC)
OSCE	Organization for Security and Co-operation in Europe's
Palermo Protocol	United Nation's Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
SAARC	South Asian Association for Regional Cooperation
SACTAP	Southern Africa Counter-Trafficking Assistance Programme
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordinating Conference
SAPS	South African Police Service
SARPPCO	Southern African Regional Police Chiefs Organisation
TIP Report	Trafficking in Persons Report (USA)
TSC	Temporary Slavery Commission
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organised Crime

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CHAPTER 1

INTRODUCING HUMAN TRAFFICKING IN THE SOUTHERN AFRICAN REGION

“With the surge of publicity that accompanied an official request by then-President Nelson Mandela to have the remains of Saartjie Baartman returned to South Africa in 1994, her story may be the most notorious case of African trafficking never to have been named as such, but Saartjie Baartman’s experience of recruitment by deception and cross-border transportation for sexual exploitation is one common to millions of women and children worldwide.”¹

1.1 Introduction

Saartjie Baartman² represents hundreds of thousands of men, women and children who have been and are still being subjected to the crime known as human trafficking. Human trafficking, which is sometimes referred to as trafficking in persons or modern-day slavery, is a worldwide trade of human beings whereby people profit from the control and exploitation of other people. Traffickers achieve control over victims of trafficking by using force, fraud or coercion and transporting the victims to a different location within the same country or across borders in order to subject those victims to commercial sex, forced labour, forced marriages and illegal adoptions amongst others.³ This crime is not a new phenomenon, but an age-old practice that has recently been reaching alarming proportions and becoming more organised and profitable.⁴ In actual fact, it is estimated that every year 600,000 to 800,000 victims of trafficking are bought, sold, or forced across international borders and the crime has become the third largest

¹International Organization for Migration (IOM) 2003 ‘Trafficking In Women & Children for Sexual Exploitation in Southern Africa’ page 4.

²Sarah Baartman was a Khoisan woman, born in the Eastern Cape, South Africa, in the early 1790s. In 1810 she was brought to England and exhibited to the public. The nature of the exhibition raised the ire of evangelical abolitionists, who took Sara Baartman’s keepers to court, both because of the indecent nature of the exhibition, and because they suspected she was being kept as a slave.

³There are different types of exploitation that victims of trafficking can be subjected to such as: sexual exploitation; forced labour and servitude; illegal adoption; traffic in human organs; forced marriage; and child soldiers. There are also different types of trafficking: in some instances victims of trafficking are trafficked within national borders which is called internal trafficking, whilst others are trafficked across national borders which is known as international trafficking.

⁴For a full discussion of factors that contributed to the rise in human trafficking refer to Chapter 4 paragraph 4.2 page 103 and 104 of this dissertation.

criminal industry in the world, with revenues totaling \$9.5 billion annually, and is expected to surpass the two largest criminal industries, narcotics and firearms soon.⁵ Owing to the rise of this crime, fighting it has become an important political priority for many governments around the world.⁶

The purpose of this chapter is to outline the background of the study, locate the central problem in as far as combating human trafficking is concerned and the extent to which this is a problem. This chapter will also outline the research questions that the study seeks to answer, research objectives, methodology adopted and the structure of the chapters

1.2 Background to the Research Problem

Human trafficking is a widespread practice, fast growing, and most lucrative illegal industry of the world. It has become a global concern although the scale may vary from country to country.⁷ The United Nations Office on Crime and Drugs in 2009 gave the percentage breakdown of trafficked females to be 66%, that of men to be 12% and children 22%.⁸ According to the Salvation Army, at least 2,000,000 people are trafficked each year and of the estimated number, Africa accounts for 450,000.⁹ Apart from it being a highly profitable undertaking, the additional advantage for agents in the human trafficking ring is that the risk of being detected, arrested and punished is minimal.¹⁰

⁵Dangler E L 2014 'Human Trafficking: The Evil Happening under our Noses' 2 (10) *Verbum*.

⁶Laczko F and Gozdzia E 2005 'Data and research on human trafficking' (43) Offprint of the Special Issue of International Migration page 6.

⁷Sychov A 2009 'Human Trafficking: A Call for Global Action' (14) *Globality Studies Journal* 5.

⁸UNICEF 2005 'Trafficking in Human Beings, Especially Women and Children, in Africa' Innocenti Insight 2nd edition 4.

⁹The Salvation Army, an international movement, is an evangelical part of the universal Christian Church and has been playing a major role in the fight against human trafficking. The Southern Africa Territory of The Salvation Army encompasses four countries being South Africa, Namibia, Lesotho and Swaziland. Information received via The Salvation Army's hotline is referred to the South African Police Service for investigation. To date, tip-offs received via their number have resulted in several breakthroughs in the fight against human trafficking.

¹⁰Kruger HB 2010 *Combating Human Trafficking: A South African legal perspective* (LLD thesis University of the Free State 2010) (**LLD thesis**). See also, Aronowitz A, Theuermann G and Tyurykanova E "Analysing the business model of trafficking in human beings to better prevent the crime".

Until December 2000, the term “trafficking” was not defined in international law, despite its incorporation in a number of international legal agreements.¹¹ The United Nations General Assembly adopted the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (Palermo Protocol)¹² in 2000, which supplements the United Nations Convention against Transnational Organized Crime.¹³ This protocol introduced an international definition of trafficking in persons and signified a step forward in an endeavour to fight human trafficking with 169 countries being party to the treaty including 15 of the SADC countries that have ratified or acceded to the treaty.¹⁴ The adoption of this Protocol created a new cornerstone upon which to build a global initiative to combat this crime.

From the early 1990’s most governments around the world began taking initiatives by means of legislations and protocols to fight this crime regionally, sub-regionally and nationally.¹⁵ At the regional level, the African Union (AU) is regarded as Africa’s principal organization for the promotion of regional integration and the co-operation of member states in their international relations. In order to supplement the international framework, the African Charter on Human and Peoples’ Rights of 1981¹⁶ was adopted by the former Organisation of African Unity (OAU). Even though the Charter does not specifically make reference to human trafficking; it explicitly outlaws slavery and related

¹¹Gallagher A T 2010 *The International Law of Human Trafficking* page 12. See also, Rahman M A ‘Human Trafficking in the era of Globalization: The Case of Trafficking in the Global Market Economy’ (2) *Transcience Journal* 55. Examples of those international agreements are: The slavery convention (1926), Universal Declaration of Human Rights (1948), the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) and the Convention on the Elimination of All Forms of Discrimination against Women (1979). Refer to chapter 2 for the full discussion of the aforementioned Conventions.

¹²Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done Nov.15, 2000, GA Res. 55/25, entered into force Dec. 25, 2003.

¹³United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, in accordance with article 36. For a full discussion of this Convention refer to chapter 3 paragraph 3.2.6 of this dissertation.

¹⁴*Trafficking Protocol: Ratification Status*, U.N. Treaty Collection.

¹⁵Laczko L and Gozdzia E 2005 ‘Data and Research on Human Trafficking: A Global Survey’ (43) *Offprint of the Special Issue of International Migration*. See also, Araujo E 2011 “The Need for Human Trafficking Policy” Africa Institute of South Africa Policy Brief no: 37.

¹⁶The African (Banjul) Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982) entered into force Oct. 21, 1986. It has been ratified by all 53 member states of the AU.

activities.¹⁷ Furthermore, the Charter is the parent treaty of the two African legal texts on the specific rights of African women and African children. The Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was adopted on the 11th of July 2003 in Maputo.¹⁸ The Protocol explicitly deals with trafficking of women.¹⁹ Furthermore, it also provides that women should not be subjected to exploitation or degradation, which is critical issues in so far as human trafficking is concerned.²⁰ The African Charter on the Rights and Welfare of the Child (ACRWC) specifically provides for the protection of victims of child trafficking.²¹ In addition to treaties, a number of softer mechanisms and consensus documents have been adopted to assist in this regard. For instance, in 2006 there was the very first Ministerial Conference on Migration and Development between the European Union and the African continent, which resulted in the adoption of the Ouagadougou Action Plan to combat human trafficking especially in women and children.²² This Plan was

¹⁷Article 5 of the Banjul Charter: 'every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

¹⁸Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (July. 11, 2003); reprinted in *1 Afr. Hum. Rts. L. J.* 40, Entered into Force Nov. 25, 2005.

¹⁹See Article 4 (2) (g) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women which obligate State Parties to 'prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'. Furthermore, Article 4 (1) states that 'every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.

²⁰Article 3 of the Women's Protocol provides for the promotion of respect for a woman's dignity and free development of her personality and places an obligation on State Parties to adopt and implement appropriate measures to prohibit any exploitation or degradation of women and to further adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.

²¹The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999. Article 24 (d) states that State Parties must 'take all appropriate measures to ensure that inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child'; 24 (e) directs that State Parties must 'promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs'. Article 29 deals with Sale Trafficking and Abduction and directs State Parties to 'take appropriate measures to prevent: the abduction, the sale of, or trafficking in children for any purpose or in any form, by any person including parents or legal guardians of the child'.

²²Ouagadougou Action Plan To Combat Trafficking In Human Beings, Especially Women And Children As Adopted By The Ministerial Conference On Migration And Development, Tripoli, 22-23 November 2006. For a full discussion on the Action Plan refer to chapter 3 paragraph 3.3.3. (b) of this dissertation.

endorsed in 2007 when the African Union adopted the executive council decision.²³ The Plan is mainly concerned with prevention, victim protection, legislative framework and cooperation amongst States. In addition, the AU.COMMIT Campaign against trafficking was initiated by the Department of Social Affairs (DSA) of the African Union Commission (AUC) in order to raise awareness on the Ouagadougou Action Plan across the African continent and fast track its implementation.

With all these efforts taking place internationally and regionally, SADC as an institution also began taking initiatives. SADC adopted the Protocol on Gender and Development.²⁴ The Protocol mainly tackles state obligations in addressing violence against women and children.²⁵ This Protocol explicitly deals with human trafficking and compels States Parties to enact and adopt specific legislative provisions to prevent human trafficking, and to provide holistic services to survivors, with the aim of re-integrating them into society.²⁶ The Gender Protocol is the only Protocol within the SADC institution that makes mention of human trafficking. However, there are a number of Protocols that may also be utilized to combat human trafficking in SADC such as the SADC Protocol on Mutual Assistance in Criminal Matters of 2002 and the SADC Protocol on Extradition of 2002 just to name a few. Apart from the legislative means, the ministers responsible for combating trafficking in persons met in 2009 in an attempt to promote regional and sub-regional cooperation on the issue.²⁷ The meeting resulted in all SADC Member States adopting a Ten Year (2009-2019) SADC Strategic Plan of Action to Combat Trafficking in Persons (PoA).²⁸

²³African Union 'Operationalizing the Ouagadougou Action Plan to Combat Trafficking in Human Being especially Women and Children & Launching of the AU Commission Initiative Against Trafficking in Persons (AU. Commit) Campaign within Regional Economic Communities.' Held at Djibouti Dec. 6-8, 2010. The Ouagadougou Action Plan.

²⁴The SADC Protocol on Gender and Development (2008).

²⁵Articles 20-25 in Part 6 of the SADC Protocol on Gender and Development (2008).

²⁶Article 20(5) of the SADC Protocol on Gender and Development. See *also*, Tsireledzani: Research Report.

²⁷Record of SADC Ministerial Meeting on Trafficking, Especially Women and Children, held at Maputo, Mozambique May. 28, 2009.

²⁸ The SADC Strategic Plan of Action is attached as SADC /M/2009/TIP/2 in the Record of SADC Ministerial document. For a detailed discussion of the Plan refer to chapter 4 paragraph 4.4 of this dissertation.

Human trafficking has region and country specific ramifications.²⁹ In some instances, it involves traffickers recruiting and kidnaping women, men and children and transporting them across borders and in other instances, it all happens within the country itself. For that reason, in order to strengthen international mechanisms in the area of human trafficking, 12 of the 15 SADC countries adopted anti-trafficking specific legislation to ensure compliance with international and regional conventions and to also curb this crime.³⁰ Whereas, Angola amended its 1886 penal code in 2014 to include human trafficking provisions and the Namibian government has draft anti-trafficking legislation and the DRC is without anti-trafficking legislation.³¹ Therefore, human trafficking in these 3 countries is addressed through existing pieces of legislation.³²

1.3 Statement of the Problem

Human trafficking is an international problem that has region and country-specific ramifications, including within the Southern African Development Community (SADC).³³ All SADC countries have been committed to fighting human trafficking by signing and ratifying international treaties, regional treaties as well as consensus and policy documents. Despite all these efforts, human trafficking is still escalating.³⁴ Although this rise can also be attributed to other factors such as endemic poverty, unemployment that creates a demand or better opportunities and porous borders that mask the movements of traffickers and their victims, another major issue is that the current protection measures are inadequate. Despite the fact that the Palermo Protocol has set pathway for governments, it has its shortcomings that makes it difficult to combat human

²⁹Policy Brief 2013 'Human Trafficking' Gender Links for Equality and Justice.

³⁰SADC Countries with comprehensive legislation: Botswana; Lesotho; Madagascar; Malawi; Mauritius; Mozambique; Seychelles; South Africa; Swaziland; Tanzania and Zambia and Zimbabwe. See also, chapter 5, paragraph 5.4 in page 142 of this dissertation.

³¹The Inter-Ministerial Committee responsible for drafting anti-trafficking legislation completed its initial draft of the bill in 2013, which is still awaiting a review by the Attorney General see, Trafficking in Persons Report 2015 "Country Narratives: Namibia" United States of America, page 256.

³²Those countries are Botswana; Malawi and Namibia.

³³Policy Brief (n 29).

³⁴Fahley D L "Can Tax Policy Stop Human Trafficking" 2009 (40) *George Town Journal of International Law* 342.

trafficking effectively, particularly in the African region.³⁵ Other alternative mechanisms adopted to address trafficking have also proved to be inadequate or ineffective. Firstly, the regional treaties adopted at the AU level do not offer adequate protection measures. For instance, they target a certain group of trafficking victims such as women or children and therefore fail to offer men the required protection.³⁶ Further, some of the other protection measures are non-binding such as the AU Ouagadougou Action Plan (OAP) and therefore falls short of being effective.³⁷

Secondly, the SADC region has only one protocol that addresses human trafficking which is the Gender Protocol, which also has its weaknesses particularly with regards to victim protection.³⁸ Just like the AU, SADC also adopted a non-binding mechanism in the form of the Ten Year Strategic Plan to Combat Trafficking in Persons, which has not yielded much result. Therefore, SADC still lacks an anti-trafficking treaty and as such, may require institutional reform.

Lastly, many of the SADC countries are source, transit and/or destination points of human trafficking and have reformed their laws in order to comply with both international and regional standards. According to the 2015 Trafficking in Persons Report, within SADC, none of the SADC countries were placed in “Tier 1” of the United States TVPA report, which indicates that all SADC countries do not fully comply with international standards in as far as human trafficking, is concerned.³⁹ Consequently, this could be attributed to the fact that, the SADC region in its totality does not have a

³⁵For full details of the Palermo Protocols shortcomings refer to chapter 3 in paragraph 3.2.6 and chapter 5 from paragraph 5.6 and chapter 6 in paragraph 6.2.1 of this dissertation.

³⁶The 1981 African Charter on Human and People’s Rights does not make specific reference to human trafficking. The 1990 African Charter on the Rights and Welfare of the Child (ACRWC) addresses human trafficking in as far as it relates to children. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) has specific provisions on human trafficking; however, it is with regards to women only. For a detailed discussion of those instruments refer to chapter 3 in paragraph 3.3.3 (a) of this dissertation.

³⁷For a detailed discussion of the OAP refer to chapter 3 in paragraph 3.3.3 (b) of this dissertation.

³⁸SADC Protocol on Gender and Development 2008. For a detailed discussion of the Gender Protocol refer to chapter 4 in paragraph 4.3.1 of this dissertation.

³⁹Trafficking in Persons Report 2015 “Tire Placement” United States of America, page 53. For a detailed analysis of the TIP report and its importance refer to chapter 5 in paragraph 5.3 of this dissertation.

workable frame work which combats human trafficking. Further, the lack of harmonized legislation in SADC countries creates disparities in addressing trafficking at both the national and regional level. This in turn makes it difficult to comply with international standards. In as much as the legislative progress is remarkable, harmonization of these laws at a regional level is lacking. There is therefore, a need for institutional and legal reform to combat human trafficking effectively and adequately at the SADC level.

1.4 Conceptual clarification

There are key terms used in this study to describe the crime, which is the main focus of this study. These key terms include “human trafficking”, “trafficking in persons”, “modern-day slavery” and “victims of trafficking”. Trafficking is an imprecise and highly contested term and as a result these terms may cause confusion and uncertainty.⁴⁰ It is imperative to clarify from the onset whether these terms have similar meaning or convey the same message.

Though the key term used in this study is human trafficking, a number of concepts have been used to describe this practice. For instance, the term “trafficking in persons” first appeared in the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others and it was the first Convention to prohibit trafficking “*in persons*”.⁴¹ According to this concept, trafficking in persons was limited to the procurement or enticement of another person for the purpose of prostitution.⁴² In 2000 when the Palermo Protocol was adopted trafficking “*in persons*” was defined for the first time to include all forms of exploitation. Consequently, most countries around the world used the term “trafficking in persons” when reforming and adopting new anti-trafficking national legislation.⁴³ Despite the common use of this term, the term “human trafficking” is also frequently used in the literature and bears the same meaning as

⁴⁰Lee ‘Contested Definitions of Human Trafficking’.

⁴¹Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (1949 Convention), signed in New York on 2 December 1949, 96 UNTS 271/UN Doc. A/RES/317. The 1949 Convention came into force on 25 July 1951 with 81 State Parties.

⁴²Article 1 of the 1949 Convention.

⁴³This may be due to the fact that the Protocol offered guidelines for formulating domestic legislation that would enable states parties to comply with the Protocol. See *also*, Kruger (n 10).

“trafficking in persons”. Therefore, in this study “human trafficking” and “trafficking in persons” is used as synonyms and interchangeable.

The concept “modern-day slavery” is also used in literature by many authors and international organisations and they are in agreement that human trafficking is a modern practice of slavery.⁴⁴ They are also of the view that modern human trafficking consists of an element of physical and psychological coercion that gives a person control over another’s life similar to slavery.⁴⁵ However, Gallagher⁴⁶ in line with the *Travaux Préparatoires* to the 1926 Convention and case law argues that practices, irrespective of their designations, would be considered “slavery” if they involved the exercise of “any or all of the powers attaching to the right of ownership”.⁴⁷ Therefore, for purposes of this study, human trafficking and traditional slavery are not the same.⁴⁸

Though there is no consensus on the definition of “victim” in international law according to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁴⁹ the term “victims” refers to the

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term ‘victim’ also includes, where appropriate, the immediate family or dependents

⁴⁴For instance, the United Nations Population Fund; the United States Department of State; Bales as well as Hathaway.

⁴⁵Lee M 2011 *Trafficking and Global Crime Control* 21.

⁴⁶Gallagher is an Australian born lawyer, practitioner and scholar. She is considered to be an international authority on human rights and gender issues.

⁴⁷The *travaux préparatoires* are the interpretative notes for the official records of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

⁴⁸For a detailed discussion on whether or not human trafficking qualifies as the modern-day slavery refer to chapter 2 paragraph 2.3 of this dissertation.

⁴⁹Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985.

of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁵⁰

The concept “victims of trafficking in persons’ is used in the Palermo Protocol to describe people who have been trafficked and governments who have ratified the protocol tend to adopt its language on the basis that the Palermo Protocol is regarded as a guiding standard for domestic law. In this study however, the term is used in line with the definition of the United Nations Declaration of Basic Principles of Justice for Victims to describe people who have been trafficked such as women, men and children.

1.5 Objectives of the Study

The general objective of this study is to examine the adequacy and effectiveness of anti-trafficking measures adopted in the SADC region. The specific objectives of the study are as follows:

- a) To trace the history and examine how early international law addressed human trafficking through treaties and other means.
- b) To examine the anti-trafficking measures adopted under international law and other regional systems and to draw lessons, if any for the SADC region.
- c) To appraise the normative framework utilised to combat human trafficking in Southern Africa from an institutional perspective.
- d) To appraise the normative framework to combat human trafficking in selected SADC countries and to reveal constraints, shortcomings and disparities in this regard.
- e) To highlight the key findings of this study and to propose recommendations and measures that can effectively address human trafficking in SADC.

⁵⁰Article 1 and 2 of the Victims and Crime Declaration. See *a/so*, paragraph V of Article 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

1.6 Research Questions

To be able to achieve the objectives of this study, the research will explore the following questions:

- a) How has human trafficking evolved from its conceptualisation as slavery to the contemporary human trafficking?
- b) How has international law and other regional systems addressed the problem of human trafficking and can these models serve as the best practice to curb the problem in SADC and its Member States?
- c) To what extent does SADC as an institution address human trafficking problems and what are the legal and institutional constraints, which impact on the proper combating of human trafficking in SADC?
- d) To what extent do selected SADC countries address human trafficking problems and are such measures effective in combating the problem?
- e) Is there a need for a legal and institutional reform in SADC and SADC countries for combating human trafficking?

1.7 Significance of the Study

Firstly, the studies significance lies in the fact that there is very scarce literature on human trafficking within Africa in general and Southern Africa in particular as compared to other regions like America and Europe.⁵¹ Where data is available it is sometimes unreliable due to various reasons such as the underground and illegal nature of human trafficking, the lack of anti-trafficking legislation in some African countries and the reluctance of victims to report their experiences to authorities.⁵² This study will therefore contribute to literature in that regard. Secondly, at the SADC level, there is no binding sub-regional treaty, which addresses human trafficking; this study will contribute to explore various mechanisms that can be used at the SADC level to heighten the

⁵¹Chitupila C V 2009 *Gold between their legs? Trafficking in women for sexual exploitation: An analysis of the SADC response at national and regional level* (LLM dissertation Makerere University, Uganda 2009) (LLM dissertation).

⁵²Sawadogo W R 2012 'The Challenges of Transnational Human Trafficking in West Africa' (13) *African Studies Quarterly* 100.

solution to human trafficking. Thirdly, not all SADC countries have adopted human trafficking legislation to combat this crime and therefore an overview of the SADC approach adopted in this study will contribute on various methods used by various countries including how a piecemeal approach can be utilized to curb human trafficking. As a result, this study contributes to the debates on human trafficking in Southern Africa.

1.8 Research Methodology

The research is largely based on desktop research and literature surveys. The primary research methodology, which is followed, is the desktop research method or literature review of both primary and secondary sources. By primary sources it is meant treaties/conventions, national constitutions, criminal/penal codes, and relevant case law. The secondary sources include books, journal articles, conference papers, newspaper articles, internet sources and reports of various organisations, which work on trafficking in persons. The study is also descriptive, analytical and comparative in nature. The comparative method is inevitable as the research compares and analyses literature and legislation of different SADC countries including jurisprudence of other regional systems like Europe and Inter-America. This method is employed in order to determine the best existing practices or models of reform available for regulating and combating trafficking in persons.

1.9 Literature Review

Human trafficking is not only a global issue, but also a regional issue that requires urgent and appropriate responses at the international, regional and national level. Until the late 1990's when activists, the media and NGO's began raising the alarm, very little had been written on human trafficking in Africa.⁵³ In support of the latter, the International Organization for Migration stated that about 80% of all studies on human trafficking are from Europe and the Asia-Pacific region, while only 13% is from the

⁵³Allais C 2006 "An Overview of Human Trafficking in Sub-Saharan Africa" Conference on Criminal Trafficking and Slavery, University of Illinois Urbana-Champaign Feb. 23-25.

African continent.⁵⁴ This significant lack of reliable data on trafficking in Africa may be attributed to the fact that “poor countries, from which victims are most likely to originate, are also least able to collect accurate data”.⁵⁵ This indicates that there is a need for Africans to start putting more effort on research on human trafficking from within and amongst developing African countries. So far, literature also seems to point to West Africa as having taken the lead in addressing human trafficking in the African region.⁵⁶ This then implies the Southern region is behind. In the SADC region more people are prone to trafficking as a result of vulnerabilities created by war, endemic poverty, minimal access to health and education, gender inequality, unemployment, porous borders, and weak institutions and structures.⁵⁷ As such, Southern Africa becomes the ‘hub’ for a host of diverse ranges of migrant-smuggling and human trafficking activities, which birth numerous moral and social ills.⁵⁸ The ministers of SADC in 2009 noted themselves that the phenomenon of trafficking in persons is growing in the SADC region.

1.10 Delineation and Limitation of the Study

Human trafficking is a complex crime, which can be researched from different perspectives. For instance, it can be studied in the context of human rights, criminology, sociology, women’s rights, children’s rights, sexual exploitation or migration, to name a few. However, for purposes of this study, covering all these aspects would not be possible. Although it is vital to deal with human trafficking in a holistic and integrated approach,⁵⁹ this study focuses mainly on combating the crime of human trafficking from a legal perspective by examining the existing counter trafficking mechanisms and

⁵⁴International Organization for Migration (IOM) ‘Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in eastern and Southern Africa’ 2006 Pretoria: South Africa 9.

⁵⁵Britton H. E and Dean L. A 2014 “Policy Response to Human Trafficking in Southern Africa: Domesticating International Norms” (15) *Human Rights Review* page 308.

⁵⁶Gallinetti J 2008 “Child Trafficking in SADC Countries: The Need for a Regional Response” Harare: Zimbabwe available at http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/publication/wcms_228787.pdf.

⁵⁷Conference on the development of a Strategic Plan of Action in Combating human trafficking.

⁵⁸IOM Breaking the Cycle of Vulnerability, 2006, page 22. See also, Gbadamosi *International Perspectives and Nigerian Laws on Human Trafficking* 2006 page 29.

⁵⁹Obokata T 2006 *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* page 101-104.

proposing reform in SADC as an institution and legal reform to harmonise national anti-trafficking laws within SADC. Although the study focuses on SADC as an institution and SADC countries, it will be difficult to offer a detailed country-by-country analysis. The study will therefore give an overview of the situational analysis in all SADC countries and focus in detail on the three selected countries (Mozambique, South Africa and the Democratic Republic of the Congo). These three countries are on different legal development in as far as combating human trafficking is concerned. For instance, Mozambique adopted its anti-trafficking law in 2008, South Africa in 2013 and the DRC does not currently have human trafficking specific legislation. These three countries also have different legal systems, capacities and are at different developmental stages and as such face different challenges in addressing this crime. This comparison and discussion is done in order determine the extent to which anti trafficking legislation is necessary, whether there is a need to harmonise anti trafficking laws in the sub-region and how best SADC can address this problem. Another limitation lies in the fact that during this research there has been a significant lack of data on human trafficking in the DRC hence the reliability on the information provided in the TIP reports.

STRUCTURE OF THE DISSERTATION

The study comprises six chapters. **Chapter one** is this introductory chapter which provides the general introduction and lays the foundation of the study. It further addresses the background to the problem, the research problem, research questions and objectives of the study. In addition, it includes the limitation of the study.

Chapter two locates the study in its historical sense. It clarifies key concepts associated with human trafficking and traces the evolution of human trafficking from its conceptualization as slavery to its evolution as it is currently known.

Chapter three analyses measures adopted at the international level and reflect on the key documents of the United Nations which can be used to combat human trafficking. It also discusses measures adopted by the three regional systems being the African Union; European Union and the Inter-American approaches.

Chapter four evaluates the normative framework used by SADC as an institution to combat human trafficking in order to establish constraints and shortcomings which hinders the effective combating of trafficking.

Chapter five evaluates all mechanisms and legislation adopted in selected SADC countries in order to reveal constraints, shortcomings and disparities which hinders on the effective combating of trafficking. The chapter makes a comparative analysis of how Mozambique, South Africa and the DRC address issues of human trafficking

Chapter six is the concluding chapter which sets out the key findings of the study. After revealing shortcomings and disparities, which hinders the effective combating of human trafficking, this chapter offers recommendations on how SADC can best address the problem.

CHAPTER 2

HISTORICAL BACKGROUND OF AND CONCEPTUAL APPROACHES TO LEGAL FRAMEWORKS REGULATING HUMAN TRAFFICKING GLOBALLY

2.1 Introduction

Human trafficking sometimes referred to as modern-day slavery is an old practice that has become a matter of global concern. No country has been left untouched, whether it is a country of origin where people are trafficked from; a country of transit where people are trafficked through and a country of destination where people are trafficked to.⁶⁰ Human trafficking has a lengthy legal and political history that sets it apart from many contemporary international legal issues.⁶¹ However, by far, only a few scholars have identified and explored the links between current trafficking discourses and their direct predecessors.⁶² As a result, it is of importance to obtain clarity about the evolution of human trafficking and its relevant treaties. The aim of this chapter is to outline the historical background of human trafficking in international law by analysing early international human trafficking laws adopted between 1904 and 1949. This is done to enable a discussion of human trafficking from its conceptualization as slavery to its evolution as human trafficking. The chapter will also address the debates surrounding the definition and adoption of the Palermo Protocol.

2.2 Slavery and Human Trafficking in a Historical Perspective

The international treaties addressing human trafficking can be traced to the time of the abolishment of slavery.⁶³ Human trafficking has historical parallels with the traffic in and exploitation of Africans when the colonial slave trade was considered not only a lawful

⁶⁰Stop the traffik 'People shouldn't be bought and sold' is a global movement of individuals, communities and organizations fighting to prevent human trafficking around the world. It was set up in 2006 and has over 45,000 members in countries all over the world.

⁶¹Gallagher (n 11) 13.

⁶²Gallagher *ibid*.

⁶³Gallinetti (n 56). See also, King L 'International Law and Human Trafficking' *Topical Research Digest: Human Rights and Human Trafficking*.

but desirable branch of commerce by European empires.⁶⁴ In Africa particularly, the oldest evidence of slavery dates back to 2,900 BC found at the second cataract on the Nile.⁶⁵ According to Kerr, during the eighteenth century, slavery spread from its origins in Senegambia to Upper Guinea and the Windward Coast, to the Gold Coast, the Bights of Benin and Biafra and finally West-Central Africa.⁶⁶ The story of Sarah Baartman⁶⁷ might not be familiar to many, but according to some authors⁶⁸ and organizations⁶⁹ her story could be the most notorious case of African trafficking never to have been named as such.⁷⁰ Contrary to this, some authors believe she was a slave due to the fact that she was treated as a commodity in her route to becoming a displayed object.⁷¹ To date there are still debates amongst some authors and organisations on whether or not slavery is a modern manifestation of human-trafficking.⁷²

2.2.1 Legal frameworks governing slavery and human trafficking pre-Palermo.

During the nineteenth century one of the first global prohibition campaigns directed at ending slavery was led by the British.⁷³ Sophisticated slave trading systems existed mostly in Africa, Asia and the Ottoman Empire, with Britain as the leading slave-trading nation and dominating the highly profitable trade of transporting Africans to the colonies and mines of the Americas.⁷⁴ However, due to pressure of moral entrepreneurs, Britain banned the slave trade with the Slave Trade Act 1807, which came into effect on 1

⁶⁴Lee M (n 45) 1.

⁶⁵Kerr G 2012 *A Short History of Africa: From The Origins of the Human Race to the Arab Spring* 42.

⁶⁶Kerr *ibid* 43.

⁶⁷Refer to foot 2 in Chapter 1.

⁶⁸Qureshi S 2004 'Displaying Sara Baartman, the 'Hottentot Venus'' Christs College, Cambridge 235-

⁶⁹International Organization for Migration 2003 'Seduction, Sale & Slavery: Trafficking in Women & Children for Sexual Exploitation in Southern Africa.

⁷⁰IOM 2003 'Seduction, Sale & Slavery: Trafficking in Women & Children for Sexual Exploitation in Southern Africa' Pretoria South Africa 6.

⁷¹Qureshi (n 68) 235-236. On 12 October 1810, the *Morning Chronicle*, a reforming newspaper, published a letter of indictment from "An English" who believed: "It was contrary to every principle of morality and good order" to allow the show, as it connected "offence to public decency, with that most horrid of all situations, *Slavery*".

⁷²United Nations Office on Drugs and Crime (UNODC); the United States (US); Kevin Bales and Hathaway argue that human trafficking is slavery, whereas, Anne Gallagher argues that institutions and practices, irrespective of their designations, would be considered "slavery" within the terms of the 1926 Convention only if they involved the exercise of "any or all of the powers attaching.

⁷³ Lee M(n 45) 4.

⁷⁴ Lee *ibid*.

January 1808.⁷⁵ As a result, slavery was abolished altogether and slaves were emancipated within the empire under the Slavery abolition Act in 1833. Regrettably, that was not the end of slavery.

a) The 1904 White Slave Traffic Agreement

Within Europe and the United States of America, human trafficking became an issue of concern from the nineteenth and early twentieth centuries in response to “white slave traffic”.⁷⁶ “White slave traffic” in general meant the exporting of European women to brothels throughout various colonial empires for purposes of forced prostitution.⁷⁷ The term “traffic” implied only “improper dealings” or “prostitution”.⁷⁸ Due to accounts of white slavery, a moral panic was instilled in Europe and in the United States. As a result, in 1885, a series of international conferences commenced which were aimed at promoting intergovernmental cooperation to deal with prostitution and white slavery in Europe.⁷⁹ The 1885 conference was organised by French authorities in Paris, and another was organised in 1895.⁸⁰ What's more, delegates from 12 States including Germany, France, Russia, Austria and the United States of America met in London as the Bureau for the Suppression of the White Slave Traffic in 1899, and officially defined “white slave traffic” as:

The purchase and transfer from place to place of women and girls for immoral purposes, who are in the first place inveigled into a vile life by the promise of

⁷⁵Davis D B 2006 *Inhuman Bondage: The Rise and Fall of Slavery in the New World* 242.

⁷⁶Chuang J 1998 ‘Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts’ (11) *Harvard Human Rights Journal* 65, 74. There are different definitions of white slavery depending on geographical and ideological location. However, despite variations on the term “white slavery,” some elements of white slavery were common to all geographical locations.

⁷⁷Doezema J 1999 ‘Loose Women or Lost Women: The Re-emergence of the Myth of White Slavery in Contemporary Discourse of Trafficking in Women’ (18) *Gender Issues* 27.

⁷⁸Aswini T 2005 ‘The Elusive Ingenue: A Transnational Feminist Analysis of European Prostitution in Colonia Bombay’ (19) *Gender and Society* 161.

⁷⁹Francine P 1998 ‘Deconstructing Trafficking in Women: The Example of Russia’ (27) *Millennium: Journal of International Studies* 1001.

⁸⁰Long, L. D 2004 ‘Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation’ (42) *International Migration* 20.

employment in a foreign country and, thereafter are practically prisoners, and who, if they really desire to escape from a life of shame cannot do so.⁸¹

Consequently, out of fear, in Paris on 15 July 1902 there was another conference held which led to the League of Nations⁸² (currently known as the United Nations) drafting the very first international agreement with regards to trafficking within the scope of slavery which is known as the International Agreement for the Suppression of White Slave Traffic 1904.⁸³ The Treaty was signed by 16 countries at the international diplomatic conference in 1904 in Paris.⁸⁴

From the title of the 1904 instrument, it can be deduced that only the exploitation of white women was afforded protection. The main aim of this agreement was intended to protect female victims of international trafficking, focusing on trafficking and trading for prostitution rather than slavery and further contained the definition of trafficking within the context of “white slaves”.⁸⁵ Moreover, this instrument sought to combat prostitution by setting up mechanisms to collect and coordinate information on international procurement of women for prostitution and the provisions of the agreement were ai

med at protecting victims, not at punishing procurers. The 1904 Agreements approach to white slave traffic proved ineffective and this may be attributed to the fact that the

⁸¹Fischer-Tine H 2003 “White women degrading themselves to the lowest depths’: European networks of prostitution and colonial anxieties in British India and Ceylon ca 1880-1914’ (40) *The Indian Economic and Social History Review* 172. See also, Yuko E I 2009 *Theories, Practices and Promises: Human Trafficking Laws and Policies in Destination States of the Council of Europe* (LLM dissertation, Dublin City University) (LLM dissertation) 45.

⁸²The League of Nations was created in 1919 and became the first international body to assemble major conventions regulating contemporary slavery. Its focus was on mediation, disarmament, and the prevention of war in pursuit of global welfare, and was further responsible for initiating steps toward the eradication of slavery.

⁸³International Agreement for the Suppression of the “White Slave Traffic,” 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, entered into force 18 July 1905. This agreement was followed by the 1910 International Convention for the Suppression of the White Slave Traffic. The 1904 Agreement was followed by: International Convention for the Suppression of the “White Slave Traffic,” May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, entered into force June 21, 1951 and others.

⁸⁴1904 International Agreement for the Suppression of the White Slave Traffic, League of Nations, *Treaty Series*, vol. 1, page 83.

⁸⁵Farrior S 1997 ‘The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential’ (10) *Harvard Human Rights Journal* 217.

agreement did not criminalize trafficking in persons in that, States Parties were not required to introduce national criminal laws criminalizing trafficking in women.⁸⁶ It was further critiqued for being discriminative since it only provided protection to a single racial group (White women) against trafficking in persons.⁸⁷ Moreover, it is not gender sensitive and defined trafficking mainly for prostitution while trafficking is a complex crime, which entails a number of exploitative end results. Six years later, the 1910 convention⁸⁸ was adopted in an attempt to address the failure of the 1904 Agreement to combat white slavery.⁸⁹

b) *The 1910 Suppression of the white Slave Traffic*

The scope of the 1904 agreement was broadened by the 1910 agreement to include the trafficking of women and girls within national borders.⁹⁰ Unlike the 1904 Agreement, the 1910 instrument was aimed at ensuring punishment of the procurer who enticed a woman or girl under age (even with her consent)⁹¹ for immoral purposes by using a method of compulsion.⁹² Therefore, it was the first Convention to contain the first direct criminal law provisions. Another purpose of this Convention was to introduce a system of cooperation between States Parties in the fight against trafficking of women for the purpose of prostitution.⁹³ Each State Party was required to ensure that their legislation criminalizes human trafficking offences and to further take the necessary steps to

⁸⁶Yuko (n 81).

⁸⁷Farrior (n 85) 217.

⁸⁸International Convention for the Suppression of the "White Slave Traffic," May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, entered into force June 21, 1951.

⁸⁹Gallagher (n 114) 13.

⁹⁰Mollema N 2013 *Combatting Human Trafficking in South Africa: A Comparative Study* (LLD thesis, University of South Africa 2013) (**LLD thesis**).

⁹¹Article 1 of the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 30 U.N.T.S. 23, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951 [hereinafter *Protocol WhiteSlave Traffic*]. For a child to be considered under age she had to be less than 20 years old.

⁹²Article 2 of the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 30 U.N.T.S. 23, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951 [hereinafter *Protocol WhiteSlave Traffic*].

⁹³Lenzerini F 2009 International Legal Instruments on Human Trafficking and a Victim-oriented Approach: Which Gaps are to be Filled? (4) *Intercultural Human Rights Law Review* 207.

implement such legislation. Furthermore, State Parties had to ensure that the offences are punished according to their gravity.⁹⁴ The Convention also recognized the transnational nature of human trafficking in that; it specified the irrelevance of whether or not the offence was committed in more than one State.⁹⁵ The 1910 Convention inherited the weaknesses of the 1904 Agreement, on the basis that, it is not gender sensitive and only a particular racial group is afforded protection. This in turn means the position of victims is not given particular attention in comparison to the 1904 Convention.⁹⁶ Just like its predecessor, human trafficking is defined mainly for prostitution. Both Conventions did not protect women held in brothels on the basis that forced prostitution was subject to domestic jurisdiction.⁹⁷ As a result of the aforementioned, the 1910 Convention was also ineffective in combatting trafficking in women. The League of Nations realized that the adoption of the 1904 and 1910 Conventions failed to render the desired objective of combatting trafficking in women. As a result, it was responsible for three other attempts to address human trafficking through the adoption of the 1921, the 1933 and the 1937 Draft Conventions.

c) *The 1921 Traffic in Women and Children Convention*

In order to extend the protection against trafficking in persons under the 1904 and 1910 Conventions, the International Convention for the Suppression of the Traffic in Women and Children was enacted in 1921 (1921 Convention).⁹⁸ This Convention stipulates that all States Parties are obliged to adhere to the provisions listed in the 1904 and 1910 Conventions, regardless of whether they were a party to the two previous instruments.⁹⁹ It is further, the first treaty which does not consist of the phrase “white slave traffic” suggesting that the document was the first to recognize the trafficking of women (as

⁹⁴Article 3 of the International Convention for the Suppression of the "White Slave Traffic," May 4, 1910.

⁹⁵ Article 1 and 2 of the International Convention for the Suppression of the "White Slave Traffic," May 4, 1910.

⁹⁶Lenzerini (n 93) 207.

⁹⁷Zalewski A 2005 Migrants for Sale: The International Failure to Address Contemporary Human Trafficking (29) *Suffolk Transnational Law Review* 116.

⁹⁸International Convention for the Suppression of the Traffic in Women and Children of 1921 (1921 Convention), signed in Geneva on 30 September 1921, 53 UNTS 39/[1950]. The Convention entered into force 24 April 1950 with 46 State Parties.

⁹⁹International Convention for the Suppression of the Traffic in Women and Children of 1921 (1921 Convention).

opposed to just white females) and children (inclusive of male minors) of all races.¹⁰⁰ Furthermore, it raised the age limit of minors from 20 to 21 years in the case of non-forcible recruitment for prostitution.¹⁰¹ The 1921 Convention expanded the protective measures contained and guaranteed under the 1904 Convention by requiring States Parties to take legislative and administrative measures to not only supervise the employment agencies and offices that assisted women and children seeking employment abroad, but to also adopt measures relating to immigration and emigration in order to monitor human trafficking in women and children.¹⁰² In addition, the 1921 Convention reiterated the criminal law provisions of the 1910 Convention on the importance of State Parties implementing necessary criminal legislation to punish those who commit trafficking offences.¹⁰³ Moreover, to promote and ensure the implementation of the 1921 Convention, the Advisory Committee on the Traffic in Women and Children was established by the League of Nations. The Committee was tasked with supervising the execution of the Convention and also required States Parties to submit reports periodically.¹⁰⁴ This became the first international monitoring body dealing with human trafficking. Yet, although this Convention addressed trafficking, it limited its scope to recruitment and transportation for the reason that it considered prostitution as a matter of domestic jurisdiction.¹⁰⁵

¹⁰⁰Article 2 of the International Convention for the Suppression of the Traffic in Women and Children of 1921, signed in Geneva on 30 September 1921, 53 UNTS 39/[1950]. See also, Yuko (n 81) 50.

¹⁰¹Kathryn E. Nelson, 2002 'Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches'(24) *Houston Journal of international Law* 558. See also, Yusran R 2011 Trafficking in Women and Children and an Observation to Asean Counter-Trafficking Efforts, Centre for International Law, National University of Singapore. This paper was presented at the 8th Asian Law Institute Conference Thursday and Friday, 26 and 27 May 2011, Kyushu, Japan, available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2011/06/ASLI-8th-Conference-ASEAN-and-Trafficking-in-Women-and-Children-RY-pdf.pdf>.

¹⁰²Article 6 and Article 7 of the International Convention for the Suppression of the Traffic in Women and Children of 1921, signed in Geneva on 30 September 1921, 53 UNTS 39/[1950]. See also, Zalewski (n 97) 117.

¹⁰³Article 2 and Article 3 of the International Convention for the Suppression of the Traffic in Women and Children of 1921, signed in Geneva on 30 September 1921, 53 UNTS 39/[1950].

¹⁰⁴Demleitner N 1994 'Forced Prostitution: Naming an International Offense' (18) *Fordham International Law Journal* 170.

¹⁰⁵Mollema (n 90).

d) The 1926 Slavery Convention

One of the reasons for the establishment of the League of Nations was to guarantee peace and to prevent the outbreak of another civil war following the First World War.¹⁰⁶ However, the League of Nations treaty did not mention the abolition of slavery, but instead it was entrusted with the general supervision over the execution of agreements with regard to the traffic in women and children.¹⁰⁷ As a result, in 1924 the League of Nations agreed to appoint a Temporary Slavery Commission (TSC) whose main aim would be to inquire into slavery.¹⁰⁸ In its second report the TSC made an imperative recommendation which recognized the need for a convention to abolish slavery.¹⁰⁹ The slavery Convention was subsequently adopted on 25 September 1926. For the first time, there was a Convention that articulated the definition of slavery, slavery like practices and trafficking as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised...”¹¹⁰ The definition asserted that slavery consists of a situation in which an individual is under the complete control of another, as if this individual was the property of the other.¹¹¹ States were further called upon to bring about “progressively and as soon as possible, the complete abolition of slavery in all its forms.”¹¹² The 1926 Convention can be said to have similarities to the trafficking definition contained in the Palermo Protocol (which will be discussed later in this chapter) because human trafficking was addressed in those parts of the definition, which focused on coercion, and loss of liberty.¹¹³ However, the “powers attaching to the right of ownership” and the “forms” of slavery that were to be progressively abolished were not specified in this Convention.¹¹⁴ Moreover, the

¹⁰⁶Scarpa S 2008 *Trafficking in Human Beings: Modern Slavery* 44.

¹⁰⁷Scarpa *ibid.* See also, Article 23 (1)(c) of the Covenant of the League of Nations.

¹⁰⁸Miers S 2003 *Slavery in the Twentieth Century: The Evolution of a Global Problem* 102.

¹⁰⁹Scarpa (n 106).

¹¹⁰Article 1 (1), (2) of the 1926 Slavery Convention Signed at Geneva on 25 September 1926, Entry into force: 9 March 1927, in accordance with article 12.

¹¹¹Bell J ‘Contemporary Slavery and International Law’ Topical Research Digest: Human Rights and Contemporary Slavery 36.

¹¹²Article 2 of the 1926 Slavery Convention Signed at Geneva on 25 September 1926, Entry into force: 9 March 1927, in accordance with article 12.

¹¹³Chitupila (n 51).

¹¹⁴Gallagher A 2009 ‘Human Rights and Human Trafficking: Quagmire or firm Ground? A Response to James Hathaway’ (49) *Virginia Journal of International Law* 800.

Convention lacked clear enforcement measures and deserted the creation of a permanent monitoring body, which could evaluate and pursue allegations of violations of the provisions of the Convention.¹¹⁵

e) *The 1933 Suppression of the Traffic in Women of Full Age Convention*

While none of the preceding treaties inclusive of the 1933 Convention defined “traffic” or “trafficking”, they were uniformly concerned with the organized and coerced movement of women and girls abroad for the purpose of prostitution. Under the 1933 Convention, the element of coercion was removed. The 1933 Convention is therefore notable for its provision that punishes traffickers without regard to whether or not the woman involved had consented.¹¹⁶ In addition to the criminal law provisions of the 1921 Convention, it broadened the scope of punishable acts to include ‘attempted offences’, or those preparing to commit trafficking offences.¹¹⁷ Additionally, it requires State Parties to update their legislation and to further take steps to punish trafficking offenses in accordance with severity.¹¹⁸ The only drawback of this Convention is the fact that, unlike the 1921 Convention, this Convention only applies to women and girls trafficked for prostitution, rather than affording protection to children of either gender.¹¹⁹ It is therefore discriminatory on the basis of gender. The detention of a woman or girl in a brothel was also considered to be outside the scope of international action just like the 1904, 1910 and 1921 Conventions, which means that, the Convention does not prohibit trafficking of adult women into voluntary prostitution within the borders of the same country, but only if it is “carried out in another country”.¹²⁰ This Convention was the last treaty dealing with trafficking in persons prior to the establishment of the United Nations.

¹¹⁵Weissbrodt D and Anti-Slavery International 2002 ‘Abolishing Slavery and its Contemporary Forms’ Office of the United Nations High Commissioner for Human Rights page 5. See also, Scarpa (n 106) 46.

¹¹⁶Gallagher (n 114) 14. See also, Anti-trafficking and Law Initiative Team (HRLN) 2011 *Trafficking and the Law* page 78.

¹¹⁷Article 1 of the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

¹¹⁸Article 2 of the International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

¹¹⁹The International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

¹²⁰Gallagher (n 114) 14.

Though several attempts were made to suppress the traffic of women and girls for prostitution under the League of Nations, such Conventions were ineffective in combatting trafficking (white slave traffic). As a result, the League of Nations prepared a 1937 Draft Convention for the purpose of consolidating earlier Conventions and securing concerted action at the international level for the abolition of brothels and punishment of any person managing a brothel or exploiting the prostitution of others.¹²¹ This draft was not finalised, owing to the outbreak of the Second World War. In 1947, the Economic and Social Council,¹²² in its resolution 43 (IV) of 29 March 1947, requested a study on the draft convention of 1937 and to make any necessary amendments in order to bring it up to date.¹²³

f) *The 1949 Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others Convention*

In the end of the 1930's the human trafficking issue was set aside due to the eruption of World War II, which disbanded the League of Nations. However, after World War II the United Nations¹²⁴ was established in 1945.¹²⁵ This meant that, the UN assumed responsibility for continuing the work of the League of Nations in the area of human trafficking. In fact, on 2 December 1949, the UN General Assembly adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the

¹²¹Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹²²The United Nations Economic and Social Council (ECOSOC) constitutes one of the principal organs of the United Nations. It is responsible for coordinating the economic, social and related work of 14 UN specialized agencies, their functional commissions and five regional commissions. The ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to member states and the United Nations system.

¹²³Reanda L 1991 'Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action' (13) *Human Rights Quarterly* 209.

¹²⁴The United Nations came into being on 24th October, 1945. This day, every year, is celebrated as the UN Day throughout the world. The charter of the United Nations is its constitution. Its main objectives are security and development, The United Nations has been made to work for the promotion of: peace and security for every country of the world; friendly relations among the member countries; human freedom and rights, and development, by raising the production of food, providing medical facilities and solution of the problems of children and refugees.

¹²⁵Yusran (n 101) 11.

Prostitution of Others,¹²⁶ with the purpose of consolidating and extending the scope of the four preceding international Conventions on the white slave traffic.¹²⁷ An additional purpose of the Convention was for embodying the substance of a 1937 draft Convention¹²⁸ prepared by the League of Nations.¹²⁹ The 1949 Convention became notable as the first UN Convention dealing with trafficking.¹³⁰

The Convention introduced a number of significant improvements. It was the first Convention to prohibit trafficking "*in persons*", thus extending protection not only to white women and children, but to adult males as well. Whereas, the previous four trafficking instruments protected only women and girls, even though later there was an inclusion of underage boys as well.¹³¹ In the main, it uses a race, gender and age neutral terminology. Consent of either trafficked persons or prostitutes is irrelevant.¹³² The Convention criminalises various elements of prostitution and requires the States parties to punish anyone who "procures, entices or leads away" another person for the purpose of prostitution. In so doing, the Convention attempts to deal with the process of trafficking (procurement etc.) as well as the result (exploitation of prostitution).¹³³ Unlike its predecessors, the Convention abolished brothels by explicitly proscribing the keeping

¹²⁶Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (1949 Convention), signed in New York on 2 December 1949, 96 UNTS 271/UN Doc. A/RES/317. The 1949 Convention came into force on 25 July 1951 with 81 State Parties.

¹²⁷The 1949 Conventions preamble recalls the 1921 Convention together with the "1910 Convention for Suppression of White Slave Traffic", the "1904 International Agreement for the Suppression of the "White Slave Traffic", and "1933 Convention on the Suppression of Traffic of Women of Full Age".

¹²⁸The League of Nations drafted a convention in 1937 designed to consolidate the previous instruments and obtain international cooperation for the closure of brothels, and the prosecution and punishment of brothel owners and managers. The Draft 1937 Convention was to be the first international law to regulate prostitution, as prostitution had always been a sovereign issue regulated by national laws.

¹²⁹Scarpa (n 106) 52. See also, Lenzerini (n 93).

¹³⁰Lee (n 45) 27. Additional international law instruments that include segments against the trafficking of persons include: the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights (1966), The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), and the Convention on the Elimination of all Forms of Discrimination Against Women (1979). These instruments laid the foundation for the contemporary conventions and efforts to eliminating trafficking.

¹³¹UN Dept. of Economic and Social Affairs, 'Study on Traffic in Persons and Prostitution-Suppression of the traffic in persons and of the exploitation of the prostitution of others' (1959) UN Doc ST/SOA/SD/8, United Nations Publication Sales No 59.IV.5,28.

¹³²Article 1 (1) and 2 of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

¹³³Article 1 (1) and 1 (2) of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949. See also, Gallagher (n 114) 15.

of a brothel and the renting or letting of a building for the purpose of prostitution.¹³⁴ It also considered prostitution as a matter of international law, rather than a domestic jurisdictional issue in that, trafficked persons do not need to be moved across international borders in order for the act concerned to constitute “trafficking”.¹³⁵ Furthermore, the Convention encourages States Parties to provide services for rehabilitation and social adjustment of the trafficked persons and prostitutes and further make provision for the temporary care and maintenance to trafficked persons while arrangements are being made for their repatriation.¹³⁶ Nonetheless, this treaty has been criticised for confining human trafficking solely for purposes of prostitution and sexual exploitation and ignoring other forms of trafficking, thereby excluding vast numbers of women and men from the assistance and protection they require.¹³⁷ Also, The Convention does not draw real distinction between the terms “trafficking” and “exploitation of the prostitution of others”. Demleitner¹³⁸ acknowledges that while the title speaks of trafficking and the prostitution of others, the text tends to refer solely to prostitution and therefore creates a certain degree of conceptual confusion.¹³⁹ The Convention consists of human rights provisions; however, they are minimal in nature, and general in terms of the specific protections and assistance that must be granted to trafficked persons. Moreover, the Convention is deficient in its enforcement mechanisms¹⁴⁰ and it was not widely ratified.¹⁴¹ To date, the 1949 Convention has

¹³⁴Article 2 of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

¹³⁵Weissbrodt D and Anti-Slavery International (n 115) 19.

¹³⁶Article 16 and 19 of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

¹³⁷Lee (n 45) 27. *See also*, Article 1 and 2 of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

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¹³⁹Demleitner (n 104) 170. *See also*, Scarpa (n 106) 53.

¹⁴⁰Pearson E 2000 *Human Rights and Trafficking in Persons: A Handbook* 17.

¹⁴¹Australian Institute of Family Studies, International Responses ACSSA BRIEFING NO. 5 JUNE 2005 The Australian Centre for the Study of Sexual Assault (ACSSA) was established in 2003 by the Services and Indigenous Affairs (FaHCSIA) and is hosted by the Australian Institute of Family Studies. *See also*, Pearson E 2002 Human traffic, human rights: redefining victim protection page 14.

been ratified by only 72 countries inclusive of only four of the SADC Member States.¹⁴² The 1949 Convention was the last treaty to address human trafficking for the next 50 years. Unfortunately, it concluded a series of conventions approaching trafficking with a narrow vision, because all these treaties (1904, 1910, 1921 and 1933) focused on prostitution and sexual exploitation.¹⁴³

g) *The 1956 Supplementary Convention on the Abolition of Slavery*

The 1926 Convention's definition of slavery, particularly of slavery-like practices was broadened by the 1956 Supplementary Convention¹⁴⁴ to include the prohibition of practices and institutions of debt-bondage,¹⁴⁵ serfdom,¹⁴⁶ servile marriage¹⁴⁷ and child labour.¹⁴⁸ Unlike the 1926 Convention, the supplementary Convention criminalises slavery in clear terms by stating that, the act of enslaving another person ... shall be a criminal offence under the laws of the States Parties to this Convention.¹⁴⁹ Furthermore, it stipulates that any person convicted thereof shall be liable to punishment. Additionally, the Supplementary Convention also criminalises acts with historical links to contemporary human trafficking such as inducement of a person into servile status or

¹⁴²Pearson (n 140) 18. See also, Marcovich M Guide to the UN Convention of 2 December 1949 for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Amongst the SADC Countries, Malawi, South Africa, Zimbabwe and Seychelles ratified the 1949 Convention.

¹⁴³Bruch E M 2004 'Models Wanted: The Search for an Effective Response to Human Trafficking' (40) *STAN. J. INT'L L.* 8-9. There was another series of treaties addressing slavery, forced labour and related issues of trafficking but those agreements were introduced in a human and labour rights forum.

¹⁴⁴Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956, Entry into force: 30 April 1957, in accordance with article 13.

¹⁴⁵Debt bondage means, the status or condition arising from a pledge by the debtor of his or her personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

¹⁴⁶Serfdom refers to the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determined service to such person, whether for reward or not, and is not free to change his status.

¹⁴⁷"A person of servile status" means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.

¹⁴⁸Article 7 (a) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

¹⁴⁹Article 6 (1) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

the transportation of a slave to another country.¹⁵⁰ However, one shortcoming of this Convention lies in the fact that, the obligation on States Parties to cooperate with one another in order to give effect to the provisions of this Convention is weakly formulated. The Convention only requires parties “to undertake” to cooperate with one another unlike the 1926 Convention which states that States Parties “shall” render assistance to one another.¹⁵¹ Despite their weaknesses, together, the 1926 and 1956 Slavery Conventions provide a foundation for a sound analysis of what slavery, servitude, forced labour and trafficking means in law.¹⁵²

In conclusion in regards to the early treaties that regulated trafficking, the 1904 and the 1910 Conventions (White Slave traffic Conventions), as well as the 1921 and 1933 Conventions, applied only to the recruitment and transportation process, as well as the prostitution and sexual exploitation, which according to former Special Rapporteur on Violence against Women rendered them ineffective in the fight against this phenomenon. The 1926 Slavery Convention and the 1956 Supplementary Convention although catered for human trafficking are said to be slavery Conventions. The 1949 treaty remained the major international agreement on the subject of trafficking for at least five decades until December 2000.¹⁵³

2.3 Is Slavery Akin To Trafficking

Many authors, international organisations and a substantial part of the literature consider human trafficking as a modern, slavery-like practice. For instance, The United Nations Population Fund;¹⁵⁴ the United States Department of State; Bales¹⁵⁵ as well as

¹⁵⁰Article 3 (1) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

¹⁵¹Article 8 (1) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.

¹⁵²Allain J 2008 *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and The 1956 United Nations Convention*.

¹⁵³Office of the United Nations High Commissioner for Human Rights 2010 ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary’ New York and Geneva, page 19 available at http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf.

¹⁵⁴UNFPA partners with governments, other agencies and civil society to advance UNFPA's mission. Two frameworks guide its efforts: the Programme of Action adopted at the 1994 International Conference on Population and Development and the Millennium Development Goals, eight targets to reduce extreme poverty by 2015. UNFPA *Trafficking in Human Misery*.

Hathaway¹⁵⁶ refer to trafficking as either slavery or a new slavery.¹⁵⁷ The general consensus among authors who write about trafficking is that it amounts to slavery. They have argued that, for the fact that individuals are still being acquired and transferred for whatever purpose today; modern human trafficking therefore, consists of an element of physical and psychological coercion that gives a person control over another's life akin to slavery.¹⁵⁸ Rassam¹⁵⁹ added by stating that:

While not meeting all the criteria of the classical definition of slavery, the practices of sex trafficking, forced prostitution, debt bondage, forced labour, and exploitation of immigrant domestic workers do share similar elements that deem them obvious candidates for inclusion in the term 'modern forms of slavery'¹⁶⁰

Consequently, the question to be answered is whether or not the international slavery conventions can be applied to human trafficking as well.¹⁶¹ In 1949 the United Nations Economic and Social Council (ECOSOC) appointed an Ad Hoc Committee of Experts on Slavery. This committee found that there was "not sufficient reason for discarding or amending the definition contained in Article 1 of the Slavery Convention 1926 even though the definition did not cover the full range of practices related to slavery."¹⁶² To cure the defect, the committee recommended the adoption of a supplementary convention, which got to be known as the 1956 Supplementary Slavery Convention. In

¹⁵⁵Kevin Bales is a Professor of Contemporary Slavery at the Wilberforce Institute for the Study of Slavery and Emancipation. He was Co-Founder of Free the Slaves, the US Sister organization of Anti-Slavery International and is Emeritus Professor of Sociology at Roehampton University in London. He also serves on the Board of Directors of the International Cocoa Initiative. His book *Disposable People: New Slavery in the Global Economy* published in 1999, was nominated for the Pulitzer Prize, and has now been published in ten other languages.

¹⁵⁶James C. Hathaway is a leading authority on international refugee law whose work is regularly cited by the most senior courts of the common law world. He is the founding director of the University of Michigan's Program in Refugee and Asylum Law, Distinguished Visiting Professor of International Refugee Law at the University of Amsterdam, and Professorial Fellow of the University of Melbourne.

¹⁵⁷Davis (n 75) 242. See also, M Esquibel 2005 *Human trafficking: a violation of human rights, a universal issue* (unpublished Honors in the Major thesis Florida State University 2005).

¹⁵⁸Lee (n 45) 21.

¹⁵⁹He is an Associate in Law, Columbia University School of Law, 1998. B.A. 1988, University of Virginia; J.D., *magna cum laude*, 1994, Indiana University, Bloomington; LL.M. 1998, Columbia University School of Law.

¹⁶⁰Rassam A 1998 'Contemporary forms of Slavery and the Evolution of the Prohibition of Slavery and the slave Trade under Customary International Law' (39) *Virginia Journal of International Law* 320.

¹⁶¹Rijken C 2003 *Trafficking in Persons: Prosecution from a European Perspective*. The Hague: TMC Asser Press.

¹⁶²Report of the Ad Hoc Committee of Experts on Slavery, United Nations document E/AC.33/13 (1951), paragraph. 11.

spite of this, the “powers attaching to the right of ownership” and the “forms” of slavery were not specified in both the 1926 and 1956 Conventions. According to Gallagher,¹⁶³ it is due to the aforementioned ambiguous provisions that have been used by Bales, Hathaway and other scholars, to justify an expanded definition of slavery beyond the strict confines of Article 1 of the 1926 Convention.¹⁶⁴ For instance, Bale¹⁶⁵ argues that in some instances slavery has been about legal *ownership* of one person by another (the old slavery). In other instances, it has been about *controlling* people for purposes of exploitation and not owning them as property (modern slavery or human trafficking).¹⁶⁶ In terms of the modern slavery, slaveholders maintain control of a person, having all the “benefits of ownership” without the “legalities”.¹⁶⁷ Whereas, according to Gallagher institutions and practices, irrespective of their designations, would be considered “slavery” within the terms of the 1926 Convention only if they involved the exercise of “any or all of the powers attaching to the right of ownership’.¹⁶⁸

With the above theoretical discussion of whether or not slavery is human trafficking, there are also decided cases on the issue. For instance, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia have made judgments, which appear to be in conflict with each other where slavery is concerned.¹⁶⁹ In *Prosecutor v Kunarac, Kovac&Vukovic*,¹⁷⁰ the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found that the traditional concept of slavery, as defined in the 1926 Slavery Convention has evolved to include various contemporary forms of slavery which are also based on the exercise of any or all of the powers

¹⁶³Gallagher (n 11).

¹⁶⁴Gallagher (n 114) 800.

¹⁶⁵Kevin Bales is regarded as a leading expert on contemporary forms of exploitation that he terms “slavery.” His major works include Kevin B 2004 Disposable People: New Slavery in the Global Economy; Kevin B 2007 Ending Slavery: How We Free Today’s Slaves; and Kevin B 2005 Understanding Global Slavery: A Reader.

¹⁶⁶Bales K 2004 *New Slavery: A Reference Handbook*. See also, Esquibel M (n 157).

¹⁶⁷Bales K 1999 Disposable People: New Slavery in the Global Economy 5.

¹⁶⁸Gallagher (n 114).

¹⁶⁹Allain (n 152).

¹⁷⁰*Prosecutor v. Kunarac, Kovac&Vukovic*, Case No. IT-96-23-T, Judgment (Feb. 22, 2001). The court confirmed that the core definition from the 1926 Convention applies to enslavement in customary international law. See also, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 955–57 (Mar. 15, 2001).

attaching to the right of ownership.¹⁷¹ The Appeals Chamber accepted the Trial Chambers thesis of slavery.¹⁷² However, for the European Court in *Siliadin v France*, the court highlighted the importance of “a genuine right of ownership” to establish enslavement under Article 4 by relying primarily upon the definition of slavery in the 1926 Slavery Convention.¹⁷³ In its conclusion, the court stated that although the applicant was, in the case in question, clearly deprived of her personal autonomy, the evidence did not suggest that she was held in slavery in the proper sense, meaning that the slaveholders exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object.” The court’s judgment was criticised which was not surprising taking into account that there had already been a shift in the EU towards the legal recognition of human trafficking as a form of slavery, despite the fact that there may not be actual rights of ownership involved. Nevertheless, the court’s decision in *Siliadin’s* case seems to be in line with the *travaux préparatoires* to the 1926 Convention, which confirms that the phrase “slavery in all its forms” was not intended to, and does not operate to, expand the definition beyond those practices involving the demonstrable exercise of powers attached to the right of ownership.¹⁷⁴ The latest case, which was heard in August 2008, before the Australian High Court, *The Queen v. Tang*,¹⁷⁵ brought much depth of understanding to the parameters of what constitutes

¹⁷¹*Prosecutor v. Kunarac, Kovac&Vukovic*, Case No. IT-96-23-T, Judgment (Feb. 22, 2001).The court defined the *actus reus* of enslavement as “ the exercise of any or all of the powers attaching to the right of ownership over a person” and the exercise of such powers includes control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.

¹⁷²Allain (n 152).

¹⁷³*Siliadin v. France*, 2005-VII Eur. Ct. H.R. 333. This case concerned Article 4 of the European Convention on Human Rights, which prohibits slavery, servitude, and forced labor (without defining any of the terms). A Togolese domestic worker complained that French criminal law “did not afford her sufficient and effective protection against the ‘servitude’ in which she had been held, or at the very least against the ‘forced and compulsory’ labour which she had been required to perform.”

¹⁷⁴A situation of trafficking, debt bondage, bonded labour, or forced labour will be identifiable as slavery only if it has involved, as required by the 1926 Convention, “the exercise of any or all of the powers attached to the right of ownership. The slave-holder must be wholly in the legal ownership of another person.

¹⁷⁵*The Queen V. Tang* (2008) HCA 39 (28 August 2008). Wei Tang, the respondent before the High Court, was originally tried in the County Court of Victoria, along with another accused in April 2005. The jury in that case found the co-defendant not guilty but could not reach a verdict where Tang was concerned. Having been retried on 3 June 2006, Tang was found guilty on five counts of possessing slaves and five counts of using slaves in relation to five women of Thai nationality used as sex workers in a brothel in 2002 and 2003. The women, who had worked in the sex industry in Thailand, had come to Australia

‘slavery’ both in the Australian and international law context.¹⁷⁶ The High Court of Australia upheld the convictions of Wei Tang, a brothel owner for slavery.¹⁷⁷ The court had to deal with the most contentious issue associated with the question of the modern definition of slavery. It sets out for the first time in an authoritative manner that the definition of slavery in international law applies in cases of both *de jure* and also *de facto* slavery.¹⁷⁸ The Court interpreted ‘slavery’ broadly. Even so, legal commentators on decisions in the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia have noted the complexity and substantial variability in trafficking scenarios and warned against making a blanket claim on slavery.¹⁷⁹

Conclusively, as a legal matter, it is unlikely that the international legal prohibition of slavery would apply to many of the individuals caught up in contemporary forms of exploitation because trafficking will be identifiable as slavery only if it encompasses, “the exercise of any or all of the powers attached to the right of ownership” as required by the 1926 Convention.

2.4 Developments Leading To the Adoption of the Palermo Protocol.

Human trafficking once again re-emerged as an issue of concern in the 1980s and 1990s following a nearly 50-year absence from a trafficking-specific convention. It resurfaced in a 1978 report compiled by the UN Working Group on Contemporary Forms of Slavery.¹⁸⁰ The issue was brought to the forefront because of the strengthening of women’s movement, increases in migration flows, the spread of AIDS, prostitution and child sex tourism.¹⁸¹ During the nineties, human trafficking concerns further re-emerged in the final documents from two world conferences on women: first,

voluntarily to work as sex workers. They were escorted during their flight and upon arrival were ‘treated as being “owned” by those who procured.

¹⁷⁶Allain J 2009 ‘Clarifying the Definition of ‘Slavery’ in International Law’ (10) *Melbourne Journal of International Law* Case notes: *R v Tang*.

¹⁷⁷Kolodizner I 2009 ‘*R v Tang*: Developing an Australian Anti-Slavery Jurisprudence’(31) *Sydney Law Review* 487.

¹⁷⁸Kolodizner (n 177) 497.

¹⁷⁹Munro V 2008 ‘Of Rights and Rhetoric: Discourses of degradation and exploitation in the context of Sex Trafficking’ (35) *Journal of Law and Society* 240-264.

¹⁸⁰Bravo K E 2007 ‘Exploring the Analogy between Modern Trafficking in Humans and the Trans- Atlantic Slave Trade’ (25) *Boston University International Law Journal* 223.

¹⁸¹Mollema (n 90) 29.

at the 1980 Copenhagen Conference and secondly, at the 1985 Nairobi Conference.¹⁸² During the 1990s human trafficking however, continued to be on the rise due to globalisation, migration and advances in technology. As a result, there were growing concerns over the spread of organised crime. During that period, NGOs and IGOs, including the United Nations High Commissioner for Refugees (UNHCR) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) also began to pay attention to the issue of human trafficking. For instance, in 1994, the 11th International Organisation for Migration (IOM) Seminar based on the theme of “Global Human Trafficking” took place.¹⁸³ The same year, the Declaration of the Ministerial Conference of Naples was adopted by the UN General Assembly, which figured that the only way to combat transnational organised crime would be by adopting an international convention.¹⁸⁴ Consequently, in order to ensure that the objection of the declaration is met, the General Assembly in 1997 appointed an Intergovernmental Group of experts who were to deal with the said task.¹⁸⁵ The group then expediently submitted a transnational organised crime draft convention. This in turn, led to the adoption of resolution 53/111 of 9 December 1998 adopted by the UN General Assembly, which went further and established an Intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime. The main aim of the latter committee was not only for the elaboration of a treaty against organised crime, but for treaties dealing with trafficking in women and children, combatting the illicit manufacturing of and trafficking in firearms, and illegal trafficking in and transporting of migrants, including by sea.¹⁸⁶ In 1995, the Fourth World Conference on Women in Beijing was held and had the issue of human trafficking on its agenda. It adopted the Platform of Action¹⁸⁷ and included forced marriage and labour to the list of forms of trafficking and slavery. Additionally, in 1998, human trafficking was included in the

¹⁸²U.N. Report of the World Conference of the U.N. Decade for Women: Equality, Development and Peace at 103, U.N. Doc. A/CONF 94/35, V~N~ Sales No. E.60.IV.3 (1980) and the U.N. Report of the World Conference to Review and Appraise the Achievements of the U.N. Decade for Women: Equality, Development and Peace at 70, paras. 290-91, U.N. Doc. A/CONF 116/28/Rev.I, U.N. Sales No.E.85.IY.10 (1986).

¹⁸³Wong D 2006 ‘The Rumour of Trafficking (42) *International Institute for Asian Studies Newsletter* 11.

¹⁸⁴Scarpa (n 106) 55.

¹⁸⁵UNGA Res 52/85 (12 December 1997) UN Doc A/RES/52/85. See also, Scarpa (n 106) 55.

¹⁸⁶UNGA Res 53/111 (20 January 1999) UN Doc A/RES/53/111 [10] (Ad Hoc Committee).

¹⁸⁷Long, L. D (n 80) 20.

Rome Statute of the International Criminal Court (ICC) as a crime against humanity.¹⁸⁸ From 1999 until 2000 the Ad Hoc Committee held 11 meetings in Vienna with more than 120 countries inclusive of several NGOs that took part in the negotiation process of these international treaties.¹⁸⁹ In December 2000 the Convention and its protocols against trafficking in persons and smuggling in migrants were opened for signature at a conference held in Palermo (Italy).¹⁹⁰ The Convention against Transnational Organised Crime (CTOC) entered into force on 29 September 2003, followed by the UN Trafficking Protocol on 25 December 2003 and the UN Smuggling Protocol on 28 January 2004.¹⁹¹

2.4.1 Debates surrounding the definition of human trafficking in the Palermo Protocol

Prior to the adoption of the Palermo Protocol, counter-trafficking efforts suffered from competing definitions. For instance, the UN Office of the High Commissioner for Human Rights, the UN Children's Fund (UNICEF), the UN Special Rapporteur on Violence Against Women and the International Organization for Migration (IOM) have all adopted definitions of trafficking that recognize it as a human rights problem involving forced labor, servitude or slavery and not a problem limited to prostitution.¹⁹² Yet, efforts by states and international organisations to create their own definitions have been problematic.¹⁹³ The lack of a clear definition of human trafficking led various governmental and inter-governmental organisations to adopt their own definitions of trafficking. For instance, in 1996, the UN Special Rapporteur on Violence against Women commissioned a global research project on human trafficking in order to assess

¹⁸⁸Article 7 of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, 1998.

¹⁸⁹Scarpa (n 106) 56.

¹⁹⁰Scarpa *ibid.* Delegates from 148 countries participated in this event.

¹⁹¹Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, done Nov. 15, 2000 (UNGA Res. 55/25) entered into force Dec. 25, 2003 (Palermo Protocol).

¹⁹²Pearson (n 140) 23.

¹⁹³Competing definitions were problematic to early data-gathering efforts and in deciding on precisely which practices should be combatted and can further render extradition and other forms of transnational policing collaboration much more difficult and slower, which is to the advantage of the traffickers. Furthermore, the differing definitions of human trafficking undermine certainty and complicate the study of human trafficking.

the parameters of the problem.¹⁹⁴ It was at this stage that a shift took place in the definition of human trafficking on the basis that the UN Special Rapporteur on Violence against Women adopted the definition of human trafficking to mean:

The recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage for the purpose of (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such persons lived at the time of the original act described in (i).¹⁹⁵

Most treaties dealing with human trafficking were framed in a manner that considered trafficking as undertaken for the purpose of either prostitution or sexual exploitation of women as aforementioned above.¹⁹⁶ However, the Special Rapporteur' definition shows a movement away from the 1949 Convention's approach which focuses solely on prostitution. This definition is the broadest and most inclusive of the definitions adopted by different governmental organizations. The Special Rapporteur' definition is gender neutral, acknowledges that trafficking takes place for a range of exploitative end purposes and sought to explain what separated trafficking from other practices with which it is commonly associated.¹⁹⁷ Therefore, it is safe to say that, the international community realized that human trafficking is undertaken for other purposes such as illegal adoptions, forced marriages, forced labour, human body organ removal and more

¹⁹⁴UN Commission on Human Rights 2000 Report of the Special Rapporteur.

¹⁹⁵UN Commission on Human Rights 2000 Report of the Special Rapporteur: Ms Radhika Coomaraswamy, on violence against women, its causes and consequences, on trafficking in women, women's migration and violence against women UN Doc. E/CN.4/2000/68, Feb 29. See also, Pearson (n 140) 15-16. See also, In Section 103(8) of the Victims of Trafficking and Violence Protection Act of 2000, Congress enacted a narrower definition of the crime, establishing that trafficking is:

(a) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. See also, The International Organization for Migration (IOM) definition: "a migrant is illicitly engaged (recruited, kidnapped, sold, etc.) and/or moved, either within national or across international borders; [and] intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion, and/or other forms of exploitation under conditions that violate the fundamental rights of migrants."

¹⁹⁶The International Convention for the Suppression of Traffic in Women and Children of 1921 and the International Convention on the Suppression of the Traffic in Women of Full Age of 1933 considers the end purpose of human trafficking to be that of exploitation.

¹⁹⁷Gallagher (n 11) 24.

recently for ritual purposes and making traditional medicines in Africa.¹⁹⁸ Nonetheless, an international instrument encompassing a comprehensive definition of human trafficking was still lacking. The latter problem resulted from the issue of consent, and whether or not voluntary adult prostitution should be included in the definition.¹⁹⁹ With regards to prostitution, the International Human Rights Network believed it was not possible to distinguish between forced and voluntary prostitution, since all forms of prostitution were considered to be forced.²⁰⁰ Therefore, the Human Rights Network maintained that inclusion of non-forced prostitution would blur the line between human trafficking and smuggling and reinforced that an adult could not consent to prostitution.²⁰¹ On the other hand, the Human Rights Caucus was of the view that it was imperative to maintain a distinction between free and forced prostitution.²⁰² This was on the basis that, not all prostitutes are coerced and for that reason prostitution can be considered as free sex work.²⁰³ In respect of consent, Gallagher argued that once it is established that deception, force or other prohibited means were used, consent is automatically irrelevant and should not be used as a defense, which is the long-standing principle of international human rights law.²⁰⁴ Regardless of all the debates, eventually a compromise was reached in the form of the final definition encapsulated in the 2000 Palermo Protocol.

2.4.2 The 2000 Palermo Protocol

The Palermo Protocol provides the definition of trafficking as currently agreed upon by the international community as:

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

¹⁹⁸Pearson (n 140) states that the making of traditional medicines entails the forced removal of body organs which are then used to make potions to cure common illness.

¹⁹⁹Bruch E M (n 143) 13.

²⁰⁰Scarpa (n 106) 59.

²⁰¹Bernadette M and Kneebone S 2008 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (12) *The International Journal of Human Rights* 71.

²⁰²Scarpa (n 106) 59.

²⁰³Scarpa (n 106) 60.

²⁰⁴Gallagher (n 11) 28.

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.²⁰⁵

From the definition of the Palermo Protocol, it is evident that it consists of three constitutive elements:

- An action consisting of: the recruitment, transportation, transfer, harbouring or receipt of persons;
- By means of: threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability,²⁰⁶ giving or receiving payments or benefits to achieve consent of a person having control over another;
- For the purpose of: exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs).

The Palermo Protocol's definition of human trafficking brought about a significant change from measures contained in earlier instruments such as the 1949 Convention to combat human trafficking. It contains the very first comprehensive definition of human trafficking with all the necessary elements of the criminal offence of human trafficking under international law. In respect of the prohibited acts, previous instruments did not define "trafficking" and only prohibited victims from being "procured, enticed or led away"²⁰⁷ whereas the Palermo Protocol explicitly prohibits the "recruitment,

²⁰⁵Article 3 (a) of the Palermo Protocol.

²⁰⁶In terms of the *travaux préparatoires* reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative, but to submit to the abuse involved.

²⁰⁷Article 1 of the 1904 International Agreement for the Suppression of the "White Slave Traffic"; articles 1 and 2 of the 1910 International Convention for the Suppression of the "White Slave Traffic"; article 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children; article 1 of the 1933 International Convention for the Traffic in Women of Full Age; and article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.

transportation, transfer, harbouring or receipt” of victims.²⁰⁸ The Palermo Protocol lists the prohibited methods used in committing the proscribed acts²⁰⁹ whereas; previous trafficking instruments did not require such methods. However, the 1910 Convention for the Suppression of the “White Slave Traffic” is an exception in that it banned the use of certain methods, but not as comprehensively as the Palermo Protocol.²¹⁰ The protocol recognises the existence of voluntary prostitution and forced prostitution, which then means it, recognizes that voluntary prostitution involving adults does not constitute trafficking.²¹¹ On the other hand, the 1949 Convention focused on prostitution, which it considered as trafficking, whether the prostitution was forced or voluntary.²¹² With regards to the purpose of exploitation, all previous trafficking instruments limited the exploitative purpose to prostitution or sexual exploitation.²¹³ The Palermo Protocol in contrast also lists other types of exploitation.²¹⁴ This then means, traffickers, who were previously immune to prosecution for human trafficking for purposes other than prostitution, can now be apprehended and prosecuted.²¹⁵ Preceding international instruments were aimed at protecting women alone and, later on, included children,²¹⁶ with the exception of the 1949 Convention, which applied to all trafficked persons,

²⁰⁸Article 3 (a) of the Palermo Protocol.

²⁰⁹Article 3 (a) of the Palermo Protocol.

²¹⁰The 1910 Convention prohibited the procurement of women by “fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion” as per Article 2 of the Convention.

²¹¹Shatsari R S ‘The Trafficking of Women and Children in Nigeria: An Analysis of the New Anti-Trafficking Legislation and its Application’ *Jurnal Undang-undang* 97.

²¹²Pearson (n 140) 23.

²¹³Article 1 of the 1904 International Agreement for the Suppression of the “White Slave Traffic”; articles 1 and 2 of the 1910 International Convention for the Suppression of the “White Slave Traffic”; article 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children; article 1 of the 1933 International Convention for the Traffic in Women of Full Age; and article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.

²¹⁴ Article 3 (a) of the Palermo Protocol, other types of exploitation are as follows: prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

²¹⁵Kruger (n 10) 256.

²¹⁶The definitions in the following international counter-trafficking instruments applied to trafficked women only: the 1904 International Agreement for the Suppression of the “White Slave Traffic”; the 1910 International Convention for the Suppression of the “White Slave Traffic”; the 1933 International Convention for the Traffic in Women of Full Age and; the 1921 International Convention for the Suppression of the Traffic in Women and Children which applied both to women and children of both sexes.

irrespective of age or sex. The Palermo Protocol's definition recognises that all trafficked persons, irrespective of age or sex, may qualify as victims of trafficking.

Although the UN approach to trafficking marks an important international consensus on the term human trafficking, the UN Protocols have been subject to extensive critique, which will be dwelled upon in chapter three.

2.5 Conclusion

The key focus of the early conventions was to criminalise and combat trafficking of white slaves from prostitution. It is clear from the analysis of each of the above instruments that early international human trafficking law was narrow in that protection provided was either limited or was not provided at all inclusive of assistance provided to victims, except for the 1904 Convention. However, even though the pre-Palermo conventions had major setbacks, those conventions set the platform for future international and regional human rights laws by recognizing the transferring of a person from one place to another for the purpose of exploitation. This is evidenced by the adoption of treaties that are discussed in chapter 3 such as the 2000 Palermo Protocol, the European Convention on Human Rights and the 1990 African Charter on the Rights and Welfare of the Child just to name a few.

CHAPTER 3

ADDRESSING HUMAN TRAFFICKING UNDER INTERNATIONAL LAW: ANALYSIS OF THE UNITED NATIONS AND REGIONAL FRAMEWORKS.

3.1 Introduction

Chapter 2 discussed the somewhat complex legal history of human trafficking through Conventions, such as those of 1904 and 1949. This chapter critically analyses regulatory measures adopted by both international and regional systems to combat human trafficking. This chapter focuses on the relevant international human rights instruments; soft law mechanisms adopted by the United Nations and international tribunal decisions. Further, it reflects on instruments within the framework of regional bodies that are the European, Inter-American and the African regional systems. This is done in order to determine the extent to which all these instruments to be discussed contribute to the effective elimination of human trafficking and to draw possible lessons for the SADC region.

3.2 United Nations Legal Framework on Human Trafficking

The United Nations at the end of World War II sparked the beginning of the development of universal and regional human rights law. Its main aim was to end violations of human rights, which not only resulted from war, but also from forced prostitution and further aimed at achieving international co-operation in promoting and encouraging respect for human rights.²¹⁷

Until the year 2000, trafficking was associated with the movement of women and girls into sexual exploitation. However, currently human trafficking victims are women, men and children and they are trafficked for various purposes, including slavery, forced and exploitative labour in factories, farms and private households, sexual exploitation, and

²¹⁷Preamble and Article 1 of the United Nations Charter 1945.

forced marriage.²¹⁸ This crime remains on the rise due to inequalities within and between countries, growing demand for cheap labour, increasingly restrictive immigration policies and unregulated labour practices.²¹⁹ The aforementioned practices are associated with trafficking and are also prohibited under international human rights law. For instance, slavery is a human trafficking related practice that is also prohibited under international human rights law.²²⁰ In terms of the No.36 Human Rights Fact Sheet, in such an instance, an important question to ask is whether international human rights law prohibits “trafficking in persons” or “practices associated with human trafficking” such as those listed above.²²¹ The second question is whether other Treaties apart from the Palermo Protocol can be effectively used in isolation or together with the Palermo Protocol to curb trafficking and why.

To answer the above questions this chapter discusses Conventions related to or that can be used with regards to trafficking as the primary sources of obligations for countries with respect to trafficking. In addition, other sources such as custom, general principles and international tribunal decisions are discussed in order to determine exactly what is required of countries in their response to trafficking.²²² Furthermore, soft law mechanisms such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking, Resolutions adopted by the General Assembly and the Human Rights Council amongst others are also discussed. The aforesaid Treaties, tribunal decisions and soft law instruments are discussed under the selected practices associated with human trafficking such as slavery, forced labour and gender based violence amongst others. If any of the elements of trafficking are lacking in these practices related to trafficking, the crime won’t constitute human trafficking but may fall within the scope of the other related crimes.

²¹⁸United Nations Human Rights Office of the High Commissioner 2014 ‘Human Rights and Human Trafficking’ Human Rights Fact Sheet No. 36 page 1.

²¹⁹Human Rights Fact Sheet No. 36 (n 228).

²²⁰Slavery is firstly prohibited under Article 3 (a) of the Palermo Protocol and is also prohibited under Article 1 (1) of the 1926 Slavery Convention.

²²¹Human Rights Fact Sheet No. 36 (n 228) 5.

²²²United Nations Human Rights Office of the High Commissioner 2014 ‘Human Rights and Human Trafficking’ Human Rights Fact Sheet No. 36.

3.2.1 Slavery, servitude and related practices in relation to human trafficking

Slavery in general terms is an institution based on a relationship of dominance and submission, whereby one person is the property of and is wholly subject to another. The precise definition of slavery is outlined in Article 1 of the 1926 Slavery Convention as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”.²²³ This definition is extended by the 1956 Supplementary Slavery Convention²²⁴ to include the prohibition of practices and institutions of debt-bondage,²²⁵ serfdom,²²⁶ servile marriage²²⁷ and child labour²²⁸ as discussed in chapter 2. Slavery is also defined under the Rome Statute to mean “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.”²²⁹ From all these definitions, an element that is consistent is “the powers attaching to the right of ownership” and it is the same element that has been contested by authors²³⁰ and court decisions.

For instance, there are a few cases that have assisted in interpreting what enslavement actually means with the focus on what “the power attaching to the right of ownership” entails. One of those cases is the *Prosecutor v Kunarac*²³¹ case, which was the very first case of enslavement, brought before the International Criminal Tribunal for the former Yugoslavia.²³² The defendants were charged with enslavement of two girls who

²²³Article 1 (1) of the 1926 Slavery Convention.

²²⁴Supplementary Slavery Convention Article 1.

²²⁵For definition see Article 1 (a) of the 1956 Slavery Convention.

²²⁶For definition see Article 1 (b) of the 1956 Slavery Convention.

²²⁷For definition see Article 1 (c) (i-iii) of the 1956 Slavery Convention.

²²⁸For definition see Article 1 (d) of the 1956 Slavery Convention.

²²⁹Article 7(2)(c) of the Rome Statute.

²³⁰Authors such as Bales, Hathaway, Rassam and Gallagher. For further details on these authors and their stance with regards to slavery refer to Chapter 2 paragraph 2.3 of this dissertation.

²³¹*Prosecutor v. Kunarac*, Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23-A (12 June 2002) (Appeals Chamber).

²³²In this case the court referred to the Slavery Conventions (both the 1926 and 1956 Conventions), the Forced Labour Convention, the Nuremberg Charter and case law, decisions of the European Court of Human Rights, and the work of the UN International Law Commission. ²³² Article 1 (1) of the 1926 Slavery Convention.

²³²Supplementary Slavery Convention Article 1.

were kept in a house for several months, treated like personal property, did all household chores, and were forced to comply with all sexual demands. To determine whether these girls were enslaved the court determined elements of control and ownership to be indicators of enslavement.²³³ These elements entail the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and the accruing of some gain to the perpetrator.²³⁴ Further indications determined by the court include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.²³⁵ The defendants in this case were found guilty of enslavement as a crime against humanity.²³⁶ However, with regards to proving enslavement, the element of ownership seems to be controversial. For instance, in the *Kunarac* case the defendants argued that the Prosecutor had failed to prove the element of ownership, but the Appeals Chamber accepted the Trial Chamber's definition of enslavement. On the other hand, in the *Siliadin v France*²³⁷ case the court found that the treatment suffered by the applicant amounted to servitude and forced or

²³²For definition see Article 1 (a) of the 1956 Slavery Convention.

²³²For definition see Article 1 (b) of the 1956 Slavery Convention.

²³²For definition see Article 1 (c) (i-iii) of the 1956 Slavery Convention.

²³²For definition see Article 1 (d) of the 1956 Slavery Convention.

²³²Article 7 (2) (c) of the Rome Statute.

²³²Authors such as Bales, Hathaway, Rassam and Gallagher.

²³²*Prosecutor v. Kunarac*, Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23-A (12 June 2002) (Appeals Chamber).

²³²In this case the court referred to the Slavery Conventions (both the 1926 and 1956 Conventions), the Forced Labour Convention, the Nuremberg Charter and case law, decisions of the European Court of Human Rights, and the work of the UN International Law Commission.

²³³For the definition of enslavement the Trial Court consulted the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29 concerning Forced or Compulsory Labour (forced labour).” Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996) (text adopted by the ILC at its 48th Session in 1996). See *also*, International Labour Office 2009 ‘Forced labour and trafficking: a casebook of court decisions: a training manual for judges, prosecutors and legal practitioners’ 20.

²³⁴*Kunarac* case (n240). See *also*, International Labour Office training manual.

²³⁵International Labour Office training manual *ibid*.

²³⁶*Kunarac* was sentenced to 28 years’ imprisonment. And the other two defendants were sentenced to 20 years’ and 12 years’ imprisonment.

²³⁷*Siliadin* case. The applicant, an eighteen years old Togolese national, was made to work as a domestic servant fifteen hours a day without a day off or pay for several years.

compulsory labour and not slavery on the basis that there was no genuine right of legal ownership over the applicant. It is therefore safe to conclude that in order to prove that a victim of trafficking has been subjected to slavery; one must be in a position to prove that the trafficker had a genuine right of *legal ownership* over the victim.²³⁸

The Rome Statute of the International Criminal Court (ICC)²³⁹ characterizes “*enslavement*” among the 11 acts as a crime against humanity falling within the jurisdiction of the Court and further makes reference to human trafficking in Article 7 under the enslavement provision of the Statute.²⁴⁰ This then means enslavement as a crime forms part of international customary law.²⁴¹ For a rule to be considered as customary international law, it must show two things: first, the general practice of states and second, what states have accepted as law. However, the biggest challenge faced by the ICC in the prosecution of human trafficking cases in the context of slavery is the lack of a precise and accurate definition of trafficking. The definition of trafficking in the Rome Statute is limited to the attachment of ownership over a person or deprivation of liberty, which is not lucid in the Statute.²⁴² Even though the 1926 and 1956 Slavery Conventions provide the definition of trafficking, the ICC has not adopted that definition.²⁴³

²³⁸As already discussed in chapter 2 paragraph 2.3.

²³⁹Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) U.N. Doc. A/CONF.183/9. The 1998 Rome Statute came into force on 1 July 2002 and established the International Criminal Court (ICC) in terms of Article 5 (1) and the court became the first permanent international court with jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

²⁴⁰Article 7 (1) provides that: “crime against humanity” means 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.

²⁴¹In terms of Article 38 (1) (b) of the Statute of the International Court of Justice international customary law means “evidence of a general practice accepted as law”.

²⁴²Aston JN and Paranjape VN ‘Human trafficking and its Prosecution: Challenges of the ICC’ 12 electronic copy.

²⁴³Aston and Paranjape *ibid*.

These prohibitions set out in the 1926 Convention and the Supplementary 1956 Convention also received significant legal support in terms of Declarations and Conventions adopted such as the UDHR²⁴⁴ and the International Covenant on Civil and Political Rights (ICCPR).²⁴⁵ The UDHR provides that everyone is born free, with equal dignity and rights and prohibits holding a person in slavery or servitude and slave trade and these prohibitions are also contained in the ICCPR.²⁴⁶ This means the aforementioned international human rights treaties may be enforced in a trafficking case involving slavery. However, both Conventions do not provide definitions of what slavery and servitude means. Because it has been established what slavery means, with regards to *servitude* in the light of the *Siliadin* case, the Court found that servitude means an obligation to provide one's service that is imposed by the use of coercion, and is to be linked with the concept of "slavery". Given the victim's situation, the Court was of the opinion that she was held in servitude within the meaning of Article 4 of the European Convention²⁴⁷ on Human Rights. According to the Recommended Principles and Guidelines on Human Rights and Trafficking although *servitude* is not defined by the UDHR and ICCPR, it is argued that servitude as a term is generally seen to be

²⁴⁴This declaration spells out individual rights and freedoms and is said to be the pillar of human rights law due to the fact that when the United Nations adopted the UDHR there were already plans of adopting an International Covenant on Human Rights which will be accompanied by measures of implementation. Eighteen years later in 1966 the UN General Assembly adopted the two covenants, one on civil and political rights and the other on economic, social and cultural rights. Both treaties came into in 1976 and cover almost the entire rights enshrined in the UDHR.

²⁴⁵Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 May 1976) 999 UNTS 171 (CCPR).

²⁴⁶ Article 4 of the UDHR. See *also*, Article 8 (1), (2) and (3) of the ICCPR.

²⁴⁷Article 4 on prohibition of slavery and forced labour of the European Convention provides that: No one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labour. However, forced labour does not include any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community; and any work or service which forms part of normal civic obligations.

broader than slavery in that it refers to “all conceivable forms of domination and degradation of human beings by human beings.”²⁴⁸

The United Nations came to the realization that legislation was limited in addressing the issue of slavery and trafficking, and as such came up with other means and ways of assisting victims of these crimes. For instance, the United Nations Voluntary Fund on Contemporary Forms of Slavery was established by the United Nations.²⁴⁹ This fund is given to organisations that extend humanitarian, legal and financial aid to individuals whose human rights have been violated due to contemporary forms of slavery. In addition, funding is made available to victims and organisations assisting victims to a maximum amount of US\$ 15,000. One of the activities of the Voluntary Fund included provision of funding in 1999 for an amount of US\$ 7,000 to WaoAfrique, Togo and in 2002 for an amount of US\$ 7,000 to a project assisting girl victims of trafficking for sexual and economic exploitation, which helped 55 girls in 1999 and 400 in 2002. The organization provided medical aid, food, shelter and vocational training for four to six months, especially in hairdressing and tailoring. Those wishing to return to school were helped to obtain birth certificates; essential for registering in Togolese schools.²⁵⁰

3.2.2 Forced and child labour in relation to human trafficking

Human trafficking often violates a person’s right not to be subjected to forced labour. In terms of the Global Report on Trafficking in Persons, trafficking for purposes of forced labour is the second most identified form of human trafficking making up 18% of the various forms of trafficking.²⁵¹ The use of forced labour has been condemned by the international community and in order to curb it, the UN has tasked the International

²⁴⁸United Nations Human Rights Office of the High Commission 2010 ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ Commentary at 35.

²⁴⁹The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was established in 1991 (General Assembly resolution 46/122).

²⁵⁰The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was established in 1991 (General Assembly resolution 46/122) page 6.

²⁵¹United Nations Office on Drugs and Crime 2009 ‘Global report on trafficking in persons’ page 6.

Labour Organization (ILO) with the principal responsibility of combating the crime.²⁵² The ILO thereafter adopted various ILO conventions to address issues of forced labour,²⁵³ child labour²⁵⁴ and minimum age of employment.²⁵⁵ It is the very same instruments that should be used to combat human trafficking. However, it is important to establish firstly what is meant by forced labour and to also establish what child labour is in the context of human trafficking.

Article 2 of the Forced Labour Convention No. 29 defines *forced labour* as

“All work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

In 2007 the ILO Expert Committee conducted a General Survey in which the definition of forced labour was interpreted.²⁵⁶ In terms of this survey, *work or services* must be distinguished from cases in which an obligation is imposed to undergo education or training such as vocational training due to the fact that this principle of compulsory education is recognized by other international instruments as a means of securing the right to education.²⁵⁷ With regards to work exacted *under the menace of any penalty* according to the Expert Committee this should be understood to mean that the penalty does not refer only to penal sanctions, but also includes a loss of rights or privileges.²⁵⁸

²⁵²The International Labour Organisation (ILO) is a United Nations agency dealing with labour issues. The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.

²⁵³The Forced Labour Convention, 1930 (No. 29) Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932) Adoption: Geneva, 14th ILC session (28 Jun 1930) and the Abolition of Forced Labour Convention, 1957 (No. 105) Convention concerning the Abolition of Forced Labour (Entry into force: 17 Jan 1959) Adoption: Geneva, 40th ILC session (25 Jun 1957).

²⁵⁴The Worst Forms of Child Labour Convention, 1999 (No. 182) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Entry into force: 19 Nov 2000) Adoption: Geneva, 87th ILC session (17 Jun 1999).

²⁵⁵Minimum Age Convention, 1973 (No. 138) Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun 1976) Adoption: Geneva, 58th ILC session (26 Jun 1973).

²⁵⁶International Labour Conference 2007 'General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105): Report III (Part 1B)' International Labour Conference 96th Session, 2007 page 19.

²⁵⁷Article 26 (1) of the Universal Declaration of Human Rights and Article 13 (2) (a) and 14 of the International Covenant on Economic, Social and Cultural Rights.

²⁵⁸International Labour Conference (n 256). According to the Expert Committee this would apply where for instance, a person refuses to perform voluntary labour with a chance of losing certain rights, advantages

In respect of the *voluntary offer* the Committee outlined that the external constraint or indirect coercion interfering with a worker's freedom to "offer himself voluntarily" not only results from an act of authorities, but can also result from an employers practice in instances where employers induce workers by deceit, false promises and retention of identity documents in order to forcefully keep the worker.²⁵⁹ In light of the aforementioned, in the case of *Siliadin v France*²⁶⁰ as discussed under "Slavery", the European Court of Human Rights (ECtHR) apart from slavery also had to examine whether the victim was subjected to forced or compulsory labour. The court used the 1930 Forced Labour Convention's definition of forced labour and found that although the victim was not threatened by a "*penalty*", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat and that she was not given any choice but to work. Thus, the Court considered that the victim was subjected to forced labour within the meaning of Article 4 of the European Convention on Human Rights.

The ILO Expert Committee further considered the definition of human trafficking outlined in the Palermo Protocol and noted that the element in the definition namely *exploitation* is crucial on the basis that it includes forced labour in its various forms of exploitation.²⁶¹ As such, this allows for a link to be established between the Palermo Protocol and ILO Convention No. 29. This then means where the victims of trafficking being any woman, man or child is compelled to work in deplorable and unsafe conditions or engage in sexual acts under threat of punishment without pay, the traffickers may be prosecuted under the ILO Conventions or the Palermo Protocol.

The Convention No.29 also provides certain exceptions for forced labour such as in respect of military service, work of prisoners convicted in a court of law, work in

or privileges, in a situation when such rights, privileges or other benefits (e.g. promotion, transfer, access to new employment, the acquisition of certain consumer goods, housing or participation in university programmes) depend on the merits that have been accumulated and noted in the worker's work book.

²⁵⁹International Labour Conference (n 256) 20.

²⁶⁰Siliadin case.

²⁶¹Article 3 of the Palermo Protocol and see also the International Labour Conference (n 256) at paragraph 77 page 41.

emergency situation such as wars and minor communal services.²⁶² However, it is safe to say that even under these exceptions, forced labour may still occur. This is highlighted in *Prosecutor v Krnojelac* case,²⁶³ where the lead defendant was charged with several counts, two of them being for enslavement as a crime against humanity for having participated in subjecting detainees to forced labour.²⁶⁴ In order to establish the allegation that detainees were subjected to forced labour involuntarily, the court held that it was a factual question which had to be considered in light of all the relevant circumstances which may include, absence of consent or free will of the victim; the consent is rendered impossible due to the threat or use of force or other coercion; fear of violence, deception or false promises; the abuse of power, the victims position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.²⁶⁵ After consideration of these factors, the Trial Chamber acquitted Krnojelac of enslavement and slavery on the basis that there was no direct evidence that individual detainees who were unwilling to work were forced to do so.²⁶⁶ However, during the appeal at the Appeals Chamber the prosecutor argued that the Trial Chamber erred by acquitting Krnojelac on the count of persecution based on forced labour on the basis that there was insufficient evidence that the labour was involuntary.²⁶⁷ The Trial Chamber allowed the Prosecutions ground of appeal and reversed Krnojelac's acquittal of the persecution as a crime against humanity based on the forced labour imposed upon the detainees and vacated the 7½-year sentence handed down by the Trial Chamber and re-sentenced him to 15 years for subjecting the detainees to forced or compulsory labour.²⁶⁸

²⁶²Article 2 (2) of the ILO Forced Labour Convention No.29.

²⁶³*Prosecutor v. Krnojelac*, Case No. IT-97-25 (15 March 2002) and Case No. IT-97-25-A (17 September 2003) (Appeals Chamber). Milorad Krnojelac ("Accused") is charged under the third amended indictment ("Indictment"), dated 25 June 2001, with 12 counts outlined from paragraph 1-11 page 4-6.

²⁶⁴Krnojelac case paragraph 10.

²⁶⁵Krnojelac case paragraph 359.

²⁶⁶He was sentenced to 7½ years in prison on the other counts.

²⁶⁷*Prosecutor v. Krnojelac*, Case No IT-97-25-A (17 September 2003) (Appeals Chamber) paragraph 3 page 7.

²⁶⁸*Prosecutor v. Krnojelac*, Case No IT-97-25-A (17 September 2003) (Appeals Chamber) at 114 and 115.

The ILO Convention No. 29 is further supplemented by the Labour Convention No. 105 which builds on the foundation laid down by Convention No.29. While Convention No. 29 calls for the general abolition of forced or compulsory labour in all its forms, Convention No. 105 requires the abolition of any form of forced or compulsory labour only in the five specific cases listed in Article 1 of that Convention.²⁶⁹ Both the ILO Convention No. 29 and ILO Convention No. 105 apply to work or service exacted by governments or public authorities as well as to forced labour exacted by private bodies and individuals, including slavery, bonded labour and certain forms of child labour.²⁷⁰

In the case of child labour, throughout the continent, the incidence of child labour is high and this may be attributed to factors such as high rates of poverty, civil conflicts and the weak rule of law that has facilitated the abduction and forced recruitment of labour, particularly in children.²⁷¹ There is a plight of children working under terrible conditions in the cocoa industry, farms, on fishing vessels, or as domestic workers and others forced into being child soldiers.²⁷² Therefore, The ILO has a strong focus on the issue of child trafficking within the context of child labour and this is seen by the adoption of the two ILO Conventions for purposes of curbing child labour. The worst forms of child labour may be addressed under the ILO Convention No. 182 and the ILO Convention No. 138.²⁷³ These two ILO Conventions are regarded as the most relevant treaties adopted by the ILO in the field of child labour and they both supplement the Convention

²⁶⁹Article 1 of the ILO Convention No.105 provides that State Parties must undertake to suppress and not make use of any form of forced labour: as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilising and using labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; as a means of racial, social, national or religious discrimination. See also, International Labour Conference (n 256) paragraph 142 at 77.

²⁷⁰Weissbrodt D and Anti-Slavery International (n 115) 13.

²⁷¹Koettl J 2009 'Human Trafficking, Modern Day Slavery, and Economic Exploitation:A Discussion on Definitions, Prevalence, Relevance for Development, and Roles for the World Bank in the Fight against Human Trafficking' SP Discussion paper NO. 0911 page 14.

²⁷²Koettl (n 276).

²⁷³Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Entry into force: 19 Nov 2000)Adoption: Geneva, 87th ILC session (17 Jun 1999) C182 and Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun 1976) Adoption: Geneva, 58th ILC session (26 Jun 1973) C138.

of the Rights of the Child (CRC)²⁷⁴ and its Protocols.²⁷⁵ However, before discussing the relevant conventions, one has to establish what is meant by a child.

In terms of article 1 of the Convention on the Rights of the Child, “a child means every human being below the age of 18 years”. Whereas in terms of the ILO Minimum Age Convention No. 138 it has set 15 years as the general minimum age for employment.²⁷⁶ Consequently, any work that involves a child below the age of 15 years is in violation of Convention No.138 and that work is considered illegal child labour.²⁷⁷ According to the ILO and the United Nations Children’s Fund (UNICEF)²⁷⁸ not all forms of work performed by children have to be abolished because some type of work that is age appropriate may in actual fact assist those children in gaining a sense of responsibility, skills and contribute to the welfare of the family.²⁷⁹ This may include activities, such as helping their parents care for the home and the family, assisting in a family business or earning pocket money outside school hours and during school holidays which contributes to children’s development and provides them with skills, attitudes and experience, and helps to prepare them to be useful and productive members of society

²⁷⁴Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49. In terms of Article 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form and Article 32 (1) provides that children must be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.

²⁷⁵Optional Protocol to the Convention on the Rights of the Child on the sale of children, = child prostitution and child pornography Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

²⁷⁶Article 2 (3) of the Convention concerning Minimum Age for Admission to Employment (Entry into force: 19 Jun 1976) Adoption: Geneva, 58th ILC session (26 Jun 1973) C138. However, in terms of the Article 2 (4) notwithstanding the provisions of paragraph 3 of the Convention No. 138, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.

²⁷⁷Chaubey J, Perisic M and Perrault N *et al* 2007 ‘Child labour, education and Policy’ UNICEF Working Paper at 1.

²⁷⁸The United Nations Children’s Fund formerly known as the United Nations International Children’s Emergency Fund (UNICEF) was created by the UN General Assembly in 1946. It is a driving force that helps build a world where the rights of every child are realized. It received a Nobel Peace Prize in 1965.

²⁷⁹Scarpa (n 106) 130.

during their adult life.²⁸⁰ However, the ILO also acknowledges that there are instances where child labour is exploitative and illegal. In terms of Article 3 of the ILO Convention No. 182 the worst forms of child labour include:

All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children”.²⁸¹

Girls are usually trafficked for forced labor and domestic work and often end up sexually exploited by their employers. Besides the demand from certain types of men for sex with children, there is the demand for sexual services linked to tourism development. There is also a myth that men who prefer younger girls believe that they are less likely to be infected by HIV/AIDS or that AIDS can be cured by sex with a virgin. Due to such beliefs, demand for girls younger than 10 or 11 has increased.²⁸² With regards to boys, it was found that they are forced to beg for corrupt religious teachers for instance in Koranic schools, some are subjected to forced labour in illegal drug production and transportation in the UK and Mexico while others are victims of sex trafficking.²⁸³ It is obvious from the aforesaid that forced labour imposed on children who are victims of trafficking constitute one of the most serious forms of infringement of the ILO Conventions. Hence, the ILO NO.203 recommendation obliges countries to take initiatives to address child labour and promote educational opportunities for children, both boys and girls, as a safeguard against children becoming victims of forced or compulsory labour.²⁸⁴

²⁸⁰International Labour Office 2002 ‘Eliminating the worst forms of child labour: A practical guide to ILO Convention No.182’ Handbook for Parliamentarians NO. 3 2002 page 15.

²⁸¹ILO Convention No. 182.

²⁸²Sr Melanie O’ Connor HF ‘Human Trafficking and the Church’s Response’ page 2.

²⁸³United States Department Of State 2013 ‘Civilian Security, Democracy, And Human Rights: Male Trafficking Victims’ Office to Monitor and Combat Trafficking in Persons Washington, DC.

²⁸⁴Recommendation on supplementary measures for the effective suppression of forced labour Adoption: Geneva, 103rd ILC session (11 Jun 2014) - Status: Up-to-date instrument.

Despite the ILO Conventions, the CRC is the first Convention that made direct reference to child trafficking in Article 35 and obliges State Parties to take all appropriate legislative measures to prevent the abduction of, the sale or traffic in children for any purpose.²⁸⁵ There are other provisions also relevant to child trafficking in the CRC, which as a result broaden the scope of application of Article 35. These provisions include those addressing the transfer and non-return of children,²⁸⁶ protection of children from all forms national or inter-country adoptions,²⁸⁷ sexual exploitation and, any other exploitation²⁸⁸ and trafficking of narcotic drugs and psychotropic substances.²⁸⁹ Contrary to the ILO Convention No 29 and ILO Convention No 105 concerning Forced Labour, the ILO Convention No 182 considers prostitution as a worst form of child labour, which then means exploitation of children has to be prohibited even when the child victim was not forced into prostitution.²⁹⁰

With regards to implementation of the of Convention No. 182 countries are obliged to design and implement programmes of action to eliminate as a priority the worst forms of child labour.²⁹¹ The programme of action referred to in Article 6 of the Convention No.182 in terms of the Worst Forms of Child Labour Recommendation No. 190²⁹² must aim at promoting all factors listed in Article 2 (a)-(e).²⁹³ In addition, just recently in 2014, a Protocol to ILO Convention 29 on Forced labour was adopted and it is aiming to

²⁸⁵Article 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

²⁸⁶Article 11 of the CRC.

²⁸⁷Article 21 (d) of the CRC.

²⁸⁸Article 19; 34 and 36 of the CRC.

²⁸⁹Article 33 of the CRC.

²⁹⁰Graig G 2010 *Child Slavery Now: A Contemporary Reader* 25.

²⁹¹Article 6 of the Worst Forms of Child Labour Convention No.182.

²⁹²Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour Adoption: Geneva, 87th ILC session (17 Jun 1999) R190.

²⁹³Those factors to be considered are identifying and denouncing the worst forms of child labour; preventing the engagement of children in or removing them from the worst forms of child labour, protecting them from reprisals and providing for their rehabilitation and social integration through measures which address their educational, physical and psychological needs; giving special attention to younger children; the girl child; the problem of hidden work situations, in which girls are at special risk; other groups of children with special vulnerabilities or needs; identifying, reaching out to and working with communities where children are at special risk; and informing, sensitizing and mobilizing public opinion and concerned groups, including children and their families.

advance prevention, protection and compensation measures against forced labour. According to David Garner, President of the Conference's Committee on Forced Labour this Protocol is meant to complement and strengthen existing international law, in particular the UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children.²⁹⁴

From the entire discussion on forced and child labour, it is observed that there are a number of Conventions that could be utilised in the prosecution of traffickers in context of forced labour from the CRC to the Palermo Protocol and ILO Conventions. However, the Committee advises that, where a country in question has ratified the Child Labour Convention No. 182, as well as the other Conventions, the country should rather rely on the Convention No. 182 on the basis that child labour is examined more specifically under this Convention and it further requires ratifying States to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.²⁹⁵ However, one tends to agree with UNICEF who advocates for a comprehensive child protection system rather than measures that focus narrowly on trafficking. This means, not one Convention is more important than the other, but instead a holistic approach that encompasses both the criminal and human rights approach is needed. For instance, where a criminal approach lacks in the protection of victims, a human rights treaty may close that gap such as the CRC and as a result the interests of the child will be upheld as per the Special Rapporteurs Report on human trafficking.²⁹⁶

The United Nations Voluntary Fund on Contemporary Forms of Slavery also funded Bandhuwa MuktiSamiti in India with US\$ 10,000. This money was used on a project to identify and release bonded labourers' working in the carpet industry, stone quarries and agricultural sectors. A wide-scale awareness raising campaign about bonded labour

²⁹⁴UN News Centre 'Un agency adopts treaty advancing global efforts to tackle forced labour'.

²⁹⁵International Labour Conference (n 256) paragraph 85 page 46-47.

²⁹⁶United nations general assembly 2011 'report of the special rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' Distr.: General 13 April 2011 A/HRC/17/35 paragraph 19 page 26.

led directly to the liberation and release of 350 victims and made the public aware of the illegality of this practice thanks to the funding.²⁹⁷

3.2.3 Gender-based violence in relation to human trafficking

While trafficking targets everyone from women, men and children in some instances certain factors make an individual, a social group or a community more vulnerable to trafficking and related exploitation. These factors include poverty, inequality and human rights violations such as discrimination and gender-based violence all of which contribute to the successful operations of traffickers and exploiters.²⁹⁸ Gendered-based violations of human rights, particularly against women and girls, are one of the root causes of trafficking and a key feature of the trafficking process. The latter acknowledgment is made taking into account that there is a very real plight of trafficked men, which is not being minimized at all who may also be subjected to gender-based violence for instance, for being gay.

Major human rights instruments prohibit discrimination on a number of grounds such as race, sex, language, religion, property, birth, nationality, ethnic or social origin, or other status.²⁹⁹ In terms of Article 1 of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) discrimination particularly against women means:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

In terms of the General Recommendation No. 25, discrimination as defined in Article 1, goes beyond the concept of discrimination used in many international instruments on the basis that while such instruments prohibit discrimination on the grounds of sex and

²⁹⁷The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was established in 1991 (General Assembly resolution 46/122) page 8.

²⁹⁸OHCHR 2014 'Human Rights and Human Trafficking' Fact Sheet No.36 at 39.

²⁹⁹Article 2(1) and 26 of the ICCPR; Article 2(2) of the ICESCR, Article 5 of the CERD; and Article 2(1) of CRC.

protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the CEDAW Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.³⁰⁰ As such, the Committees view is that States have an obligation to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination.³⁰¹ Although, discrimination is defined in CEDAW, the Treaty does not have a provision on violence against women. However, this gap was closed in 1992, when the CEDAW Committee, the body responsible for monitoring the implementation of CEDAW, adopted General Recommendation No. 19 on Violence against Women, which for the first time defined what is meant, by gender-based violence.³⁰² In terms of Recommendation No. 19, gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.³⁰³ The Committee further notes that, even though violence against women is not expressly provided for in CEDAW, gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.³⁰⁴ In the main, gender-based violence that impairs or nullifies the enjoyment

³⁰⁰General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures at paragraph 5.

³⁰¹In terms of the recommendation No. 25 "indirect discrimination" against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women and "direct discrimination" occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground. See *also*, Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) at paragraph 10 (a) and (b).

³⁰²UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992. This Recommendation requires national reports to the Committee to include statistical data on the incidence of violence against women, information on the provision of services for victims, and legislative and other measures taken to protect women against violence in their everyday lives such as harassment at the workplace, abuse in the family and sexual violence.

³⁰³UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 1.

³⁰⁴UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 6.

by women of human rights and fundamental freedoms³⁰⁵ under general international law or under human rights conventions is discrimination within the meaning of article 1 of the CEDAW Convention.³⁰⁶ In 1993, the General Recommendation No.19 was further followed by the adoption of the UN Declaration on the Elimination of Violence against Women (DEVAW), which defines what violence against women is.³⁰⁷ The declaration encompasses all forms of gender-based violence against women such as physical, sexual and psychological violence regardless of context they occur in.³⁰⁸ In actual fact, the CEDAW General Recommendation No.19 and DEVAW explicitly encompass violence perpetrated by either, state officials or private persons such as family members, acquaintance or employers.³⁰⁹ In doing so, an important gap is closed under international human rights law with regards to the fact that initially human rights agenda excluded the so-called private sphere in which many women's rights violations occur.³¹⁰

Discrimination and gender-based violence can be linked to human trafficking on the basis of Article 9 of the Palermo Protocol, which requires State Parties to take or strengthen their national measures in order to alleviate the factors that make persons, especially women and children, vulnerable to human trafficking, such as poverty, underdevelopment and lack of equal opportunity between men and women as highlighted above.³¹¹ In addition, even its parent Treaty, the UN Convention against Organised Crime, also requires States to address the adverse social and economic

³⁰⁵Those human rights and fundamental freedoms include the right not to be subject to torture or to cruel, inhuman or degrading treatment; the right to equal protection according to humanitarian norms in time of international or internal armed conflict; the right to liberty and security of a person; the right to life; and the right to just and favourable working conditions amongst others. *See also*, CEDAW General Recommendation No. 19 at 7. *See also*, Article 3 of United Nations General Assembly 1993 Declaration on the Elimination of Violence against Women (DEVAW) A/RES/48/104 Distr. GENERAL 20 December 1993.

³⁰⁶UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 7.

³⁰⁷Article 1 of the United Nations General Assembly 1993 Declaration on the Elimination of Violence against Women (DEVAW) A/RES/48/104 Distr. GENERAL 20 December 1993.

³⁰⁸Article 2 of the United Nations General Assembly 1993 Declaration on the Elimination of Violence against Women (DEVAW) A/RES/48/104 Distr. GENERAL 20 December 1993.

³⁰⁹A resource package 'Strengthening Health System Responses to Gender-based Violence in Eastern Europe and Central Asia'.

³¹⁰ A resource package (n 309).

³¹¹Article 9 (4) of the Palermo Protocol.

conditions believed to contribute to the vulnerability of victims of trafficking.³¹² Another link between human trafficking and human rights violations against women lies in the fact that CEDAW itself explicitly provides for the prohibition of trafficking of women. CEDAW in Article 6 imposes an obligation on States Parties to take all *appropriate measures*, inclusive of legislation in order to suppress all forms of traffic in women. The Committee in Recommendation No. 19 emphasized the fact that poverty and unemployment are some of the factors that increase human trafficking particularly in those cases where women find themselves forced into prostitution.³¹³ And further acknowledged new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals.³¹⁴

With regards to Article 6 of CEDAW, Gallagher argues that the provision is vague in that, the term “*appropriate measures*” makes it difficult to ascertain the precise nature of States obligations.³¹⁵ She continues to argue that an additional difficulty is presented by the failure of the Convention to define “all forms of traffic in women” or “exploitation of the prostitution of women”.³¹⁶ The CEDAW Committee has however interpreted “all forms of traffic” to cover trafficking for other typical end purposes, such as forced labour or forced marriage as well as forced prostitution.³¹⁷ Furthermore, according to the Committee on Economic, Social and Cultural Rights³¹⁸ the phrase “by all appropriate means” must be given its full and natural meaning. This in turn means, State Parties should decide for themselves the most appropriate means under the countries circumstances. Therefore, State Parties reports should indicate not only the measures

³¹²Article 31 (7) of the UN Convention against Organised Crime. See *also*, OHCHR 2014 ‘Human Rights and Human Trafficking’ Fact Sheet No.36 page 40.

³¹³UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 13-16.

³¹⁴UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 at paragraph 14.

³¹⁵Gallagher (n 11) 64.

³¹⁶Gallagher *ibid*.

³¹⁷Gallagher (n 11) 65.

³¹⁸Committee on Economic, Social and Cultural Rights, U.N.Doc.E/1991/23 at paragraph 4.

that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. The obvious hindrance of this Convention when it comes to combatting human trafficking as a whole is the fact that it only caters for women’s rights.

There is also a Committee on the Elimination of Discrimination against Women (the Committee) that is responsible for interpreting the provisions of the Convention and monitoring the progress of the Convention’s implementation by the State Parties.³¹⁹ Furthermore, the Committee also makes recommendations on any issue affecting women to which it believes the States Parties should devote more attention.³²⁰ One of the issues that have received much attention has been human trafficking, which the Committee believes constitutes gender discrimination.³²¹ To tackle this issue, the Committee adopted the General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, which recommended on the basis of Article 6 of CEDAW that State Parties should prevent, prosecute and punish traffickers and further adopt policies inclusive of bilateral and or regional agreements with the aim of combatting human trafficking in women who find themselves in positions of vulnerability to exploitation and trafficking due to conflict.³²²

In order to ensure that human trafficking victims find redress should the State Parties not take the Committees recommendations with regards to discrimination, gender-based violence and trafficking seriously, the UN General Assembly adopted the Optional Protocol to the CEDAW. This Protocol established mechanisms designed to enable individuals or groups of individuals to seek redress for violations of their human rights by making use of the two distinct procedures being the communications or petition procedure and an enquiry.³²³ However, the Protocol consists of provisions that

³¹⁹The United Nations Committee on the Elimination of Discrimination against Women is an expert body established in 1982 as per Article 17 of CEDAW and composed of 23 experts on women’s issues.

³²⁰UN Women 2000-2009 ‘Convention on the Elimination of All Forms of Discrimination against Women’.

³²¹UN 2013 General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations Distr: General 18 October 2013.

³²²General recommendation No. 30 (n 282) paragraph IV (B) (2).

³²³Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 10 December 1999, entered into force 20 December 2000).

may be to the disadvantage of the complainants. For instance, in terms of Article 3 a communication may be taken into consideration only if it concerns a violation committed by a State that is a party to both the CEDAW and to the Protocol. This then implies that those State Parties who are parties to the CEDAW and not to the Protocol will be exempted from obligations outlined in the Protocol and this may hamper with the proper implementation of the CEDAW at the regional and national levels. Moreover, communications will not be considered if all available domestic remedies have not been exhausted which may result in trafficked victims not receiving assistance in due time and traffickers not being prosecuted. One also has to question what happens in circumstances where there are no domestic remedies to exhaust. The aforementioned was highlighted in the *Zhen Zhen Zheng v. the Netherlands* case in which a Chinese national, was trafficked to the Netherlands for the purposes of prostitution.³²⁴ She submitted a communication to the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in 2007 in which she claimed that the Netherlands had violated her rights in article 6 of (CEDAW). A majority of the CEDAW Committee determined that ZZZ had failed to exhaust all domestic remedies and, on that basis, declared the communication inadmissible under article 4(1) of the Optional Protocol. On the other hand, three of the Committee members issued a dissenting opinion in which they determined that the communication was admissible and qualified as a violation of article 6 of CEDAW. It is clear from this case that the requirement of exhaustion of local remedies is problematic in that victims of human trafficking are at times not afforded the legal assistance they need expediently and as such may be susceptible to re-victimisation by the same perpetrators.

Another way perhaps of trafficking victims finding redress is by States investigating and prosecuting violence against women. In terms of the thematic report of the Special Rapporteur on violence against women, it was noted that an essential part of States obligation is a legal duty to provide just and effective remedies to women subjected to

³²⁴Simonecusack 2012 'Trafficking Communication Inadmissible (*Zhen Zhen Zheng V. The Netherlands*)' Communication No. 15/2007, UN Doc. CEDAW/C/42/D/15/2007 (26 October 2009).

such violence.³²⁵ And it should be noted that the modality of reparation must be proportional to the gravity of the violation and the harm suffered as provided for by the Basic Principles and Guidelines.³²⁶

With regards to assisting women subjected to trafficking, the United Nations Voluntary Fund on Contemporary Forms of Slavery gave the Third World Movement against the Exploitation of Women, in Philippines US\$ 10,000 in 2001 and US\$ 7,000 in 2002 to assist some 2,000 victims of sexual slavery by establishing drop-in centres and shelters offering numerous facilities, such as counselling, legal, medical and financial aid, literacy and numeracy classes, and vocational training in sewing, nursing and computing. Women who stayed in their centres for three to six months were empowered to start afresh.³²⁷

3.2.4 Migrant workers and freedom of movement in relation to human trafficking

Many people live and work in a country other than that of their birth or citizenship and many of them are migrant workers. In terms of the Migrant Workers Convention, a migrant worker is a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State that is not his or her hometown.³²⁸ As such, it means people move from their countries or within their countries for better job opportunities, which is a clear indication that migration is involved and therefore, it is imperative to first distinguish between trafficking and migration in terms of the means used and the

³²⁵United Nations General Assembly 2010 'Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo' Fourteenth session, Distr.: General 23 April 2010 A/HRC/14/22 . Currently, Ms. Rashida Manjoo has been nominated to lead and ensure that complaints from individuals are received, undertake country visits and submit annual reports to the Human Rights Council. She is a South African lawyer, advocate of the High Court of South Africa and academic in the field of human rights. She was appointed by the United Nations Human Rights Council for an initial period of three years at the 11th session of the Human Rights Council in June 2009.

³²⁶Paragraph IX at Article 15 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

³²⁷The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was established in 1991 (General Assembly resolution 46/122) page 6

³²⁸Article 2 of the Migrant Workers Convention.

purposes of people's movement.³²⁹ According to the Special Rapporteur on trafficking,³³⁰ the definition of trafficking provided in the Palermo Protocol clarifies the fact that victims of trafficking are deceived or forced by either threat or coercion to move for the purpose of exploitation. This then means, although trafficking in persons and migration share the same "migratory space", as both involves the movement of people, trafficking differs in a sense that it involves movement by fraudulent means for exploitative purposes.³³¹

Migrant workers fall under the category of those most likely to be trafficked due to the fact that they are more susceptible to discrimination and intolerance, based on their race, ethnicity, nationality, statelessness and being the members of minority groups.³³² For instance, The Working Group on Contemporary Forms of Slavery at its 1996 session heard evidence about the extreme vulnerability of migrant workers in that confiscation of passports by employers and non-remuneration for months was a significant way of imposing control on them.³³³ From the aforementioned, it is clear that migrant workers are vulnerable to intersectional and multiple-discrimination. Consequently, this resulted in the UN adopting the Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, which is aimed at preventing and eliminating the exploitation of all migrant workers and their families.³³⁴

³²⁹United Nations General Assembly 2010 'Report of the Special Rapporteur on Trafficking in Persons, especially women and children' Distr.: General 9 August 2010 Sixty-fifth session page 7.

³³⁰Special Rapporteur on Trafficking in Persons, especially women and children' is a United Nations investigatory mechanism or "special procedure" charged with monitoring, advising and publicly reporting on a human rights situation in a specific country (country mandate) or on a particular issue (thematic mandate).

³³¹United Nations General Assembly 2010 'Report of the Special Rapporteur on Trafficking in Persons, especially women and children' Distr.: General 9 August 2010 Sixty-fifth session, paragraph 24 page 7.

³³²United Nations Human Rights Office of the High Commissioner 2014 'Human Rights and Human Trafficking' Fact Sheet No. 36 page 41.

³³³UN Economic and Social Council 1996 'Report of the Working Group on Contemporary Forms of Slavery on its twenty-first session' Distr. General E/CN.4/sub.2/1996/24 19 July 1996 at paragraph F (71), page 28.

³³⁴International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) UN Doc. A/RES/45/158. This Convention reinforces and completes a series of other provisions under the main United Nations human rights treaties. Many of the provisions of such treaties in fact provide for the protection of migrants. Particularly relevant in this regard are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the

However, it is important to first establish what fuels the demand of these trafficking victims and how their freedom of movement is limited.

With regards to factors that fuel the demand of migrant workers, it is noted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) that migration is increasingly undertaken due to economic globalization, armed conflicts, the break-down or reconfiguration of states and the transformation of political boundaries. The OHCHR further notes that those migrants in an irregular situation are more likely to be victimized by traffickers and unscrupulous employers due to the fact that, not only are they in a new country, they also do not have the basic understanding of the language, culture, and legal, social and political structures of the States to which they are going.³³⁵ And all these factors make them even more susceptible to racism, xenophobia and discrimination.³³⁶ In an attempt to protect migrant workers from being subjected to violations such as racism and xenophobia, the UNGA adopted the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which is aimed at tackling issues of race and xenophobia.³³⁷ It was also noted in the Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001 that the transatlantic slave trade in particular is among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and Asians as well as indigenous peoples were victims of these acts and continue to be victims of their consequences.³³⁸

With regards to freedom of movement of migrants, immigration policies have become increasingly restrictive, particularly for people with low skills, despite the demand for

Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

³³⁵United Nations Human Rights Office of the High Commissioner 2014 'Human Rights and Human Trafficking' Fact Sheet No. 36 page 57.

³³⁶United Nations High Commissioner for Human Rights 'Committee on Migrant Workers - Frequently Asked Questions (FAQs)

³³⁷Roth V 2011 *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* page 140.

³³⁸UNGA 2001 'Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (31st August-8 September 2001), UN Doc. A/CONF.189/12.

their labour in many industrialised countries.³³⁹ Those restrictive immigration policies end up being counterproductive as many prospective migrants are not deterred by them, but instead would rather rely on intermediaries to facilitate their entry to destination countries through informal and clandestine channels.³⁴⁰ This in turn, leaves those people vulnerable to trafficking and that desire to move at any cost creates a lucrative market condition for traffickers.³⁴¹

What is unique about the Migrants Convention is the fact that it not only protects the migrants alone, it also protects their families without distinction of any kind and this is seen throughout the provisions of the Convention³⁴² Add to that, persons who qualify as migrant workers under its provisions are entitled to enjoy rights regardless of their legal status.³⁴³ However, there is a lot of criticism laid against the Migrants Convention. For instance, the Convention is said to be over inclusive on the basis that it was unnecessary to include human trafficking.³⁴⁴ Secondly, it is criticized for leaving vague the quantum and working hours that might qualify a worker for protection³⁴⁵ and the decision taken by the drafters of the Convention to provide explicit protection for unauthorized workers and their undocumented family members in the Convention.³⁴⁶ In response to these criticisms, Lyon³⁴⁷ argues that it is not inappropriate to include the issue of trafficking in the Migrant Worker Convention on the basis that protecting migrant worker rights and reducing human trafficking are mutually supportive efforts. One tends to agree with Lyon because in terms of the human rights approach, a holistic approach is promoted and besides that, any gaps in the Migrant Workers Convention

³³⁹United Nations General Assembly 2010 'Trafficking in persons, especially women and children' sixty-fifth session, Distr.: General 9 August 2010 A/65/288 paragraph 24 page 8.

³⁴⁰United Nations General Assembly 2010 *ibid.*

³⁴¹United Nations General Assembly 2010 *ibid.*

³⁴²Articles 1-24 for instance of the Migrant Workers Convention.

³⁴³United Nations Enable 'International norms and standards relating to disability: Part V. Persons with disabilities and multiple discrimination-Rights of Special Groups.

³⁴⁴Lyon B 2010 'The unsigned United Nations Migrant Worker Rights Convention: an overlooked opportunity to change the "brown collar" migration paradigm' 389 (42) *International Law And Politics* page 474.

³⁴⁵Lyon *ibid.*

³⁴⁶Lyon *ibid.*

³⁴⁷Lyon *ibid.*

may easily be closed by the Palermo Protocol and vice versa. With regards to not specifying the quantum and working hours, in defense of the Convention one may argue that, it is in that fashion in order to give countries the discretion of deciding on those issues as opposed to imposing and it may just be used as a guideline and countries can then include their own specifics just like the Palermo Protocol.

In addition to the Migrant Workers Convention, there is the Migrant Smuggling Protocol³⁴⁸ which prohibits “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident” and requires States parties to criminalize the smuggling of migrants and other related offences.³⁴⁹ This Protocol includes a number of provisions that seek to protect the rights of smuggled migrant, including safeguards found in international humanitarian law, human rights law and refugee law.³⁵⁰ However, the Protocol according to anti-slavery international³⁵¹ is limited in two ways. First, it is only applicable in cases of international smuggling involving an organized crime group, and second, victims are afforded very few protections or remedies. One tends to agree with the organisations on the basis that, this then means, the Protocol does not acknowledge situations that involve an individual or individuals who are not part of an organized group and victims are susceptible to re-victimization, which defeats the whole point of rescuing victims in the first place.

In 1999 the Commission on Human Rights created the mandate of the Special Rapporteur on the Human Rights of Migrants which covers all countries, irrespective of whether a State has ratified Migrant Workers Convention or not. Furthermore, the Special Rapporteur does not require the exhaustion of domestic remedies to act which

³⁴⁸UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000. This Protocol supplements the United Nations Convention against Transnational Organised Crime and must be interpreted together with the Convention.

³⁴⁹Article 3 and 6 Migrant Smuggling Protocol.

³⁵⁰Migrant Smuggling Protocol these articles include: Article 4; 5; 9 (1); 16 (1); 16(2); 16(3); 16(4) and 19(1).

³⁵¹Anti-Slavery International is an international human rights non-governmental organization which is based at the UK and works at local, national and international levels to eliminate all forms of slavery around the world.

is totally different from the conventional mechanisms of addressing victims of trafficking.³⁵²

3.2.5 Torture in relation to human trafficking

They beat me with a metal rod. They dripped molten plastic onto my back. They beat the soles of my feet and then they forced me to stand for long periods of time, sometimes for days. Sometimes they threatened to kill me and put a gun to my head. They hung me from the ceiling so my legs couldn't reach the floor and they gave me electric shocks. One person died after they hung him from the ceiling for 24 hours. We watched him die.³⁵³

This is a story given during an interview conducted by Human Rights Watch³⁵⁴ by a 23-year-old Eritrean man kidnapped by traffickers near Sudans Shagarab refugee camp in March 2012. The prohibition against Torture was first introduced in the UDHR and is specifically laid down in article 5 that 'no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment'. This provision is also found in the ICCPR³⁵⁵ and in the CRC³⁵⁶. In 1948 the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³⁵⁷ This Convention resulted from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the General Assembly on 9 December 1975.³⁵⁸ In terms of Article 1 of CAT, torture is defined as

³⁵²OHCHR 'Special Rapporteur on the human rights of migrants'.

³⁵³Human Rights Watch 2014 "I Wanted to Lie Down and Die" Trafficking and Torture of Eritreans in Sudan and Egypt'.

³⁵⁴Human Rights Watch is an international non-governmental organization that that conducts research and advocacy on human rights.

³⁵⁵Article 7 of the ICCPR provides that: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

³⁵⁶Article 37 of the CRC provides that: a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

³⁵⁷UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) Assembly resolution 39/46.

³⁵⁸Danielius H 2008 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' page 1 available at http://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf.

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

For the very first time in 2008 Manfred Nowak³⁵⁹ the head of the then UN Special Rapporteur in his report specifically focused on three forms of violence that may constitute torture and human trafficking was one of them. He noted that in some cases and under certain conditions, trafficking can amount to torture and ill-treatment.³⁶⁰ As in the case of the 23-year-old Eritrean man referred to above it is noted in the report that victims of human trafficking are abducted or recruited in the country of origin, transferred and then exploited in the destination country, where they are forced into forced, sexual or other forms of exploitation.³⁶¹ Consequently, those victims end up suffering from psychological problems such post-traumatic stress disorder, depression, loss of self-esteem, dissociation and anxiety amongst other things.

Unfortunately, a closer look at the definition reveals that the only people that can be held liable for torture are public officials or other people acting in an official capacity and as such, an individual will not be prosecuted under this protocol. However, Manfred notes that just like in the case of *Siliadin v France* in which the European Court of Human Rights found that the State failed to live up to the positive obligation to have in place a criminal law system to prevent, prosecute and punish non-State actors involved in domestic slavery, States may also be held accountable for failing to provide appropriate protection to victims of human trafficking subject to torture under CAT.³⁶² In addition, although CAT does not contain measures dealing specifically with human

³⁵⁹Manfred Nowak is an Austrian human rights lawyer and a former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. His term was from 2004 to 2010.

³⁶⁰United Nations General Assembly 2008 'Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development' Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak Disrt.: GENERAL 15 January 2008 A/HRC/7/3 page 13.

³⁶¹United Nations General Assembly (n 360) 19.

³⁶²United Nations General Assembly (n 360) 20.

trafficking, but, as with the Convention on Racial Discrimination, its Committee deals with the issue of human trafficking.³⁶³ Just recently on 25 June 2013, Maria Grazia Giammarinaro who is the OSCE's³⁶⁴ Representative and Co-ordinator for Combating Trafficking in Human Beings launched a ground-breaking research paper that connects human trafficking and torture and other forms of ill-treatment.³⁶⁵ She trusts that, the research paper shows the extent to which trafficking in human beings is associated with violence and human suffering; such that human trafficking can be compared to torture and even be considered to be a form of torture. It is therefore safe to say that victims of trafficking are often subjected to acts similar to torture such as deprivation of sleep or nutrition as well as physical and sexual violence such as being burnt with cigarettes and beaten with hot irons or penetrating the victims' private parts with crushed, red hot pepper.³⁶⁶

There is also the Committee against Torture, which is made up of 10 independent experts who are tasked with monitoring the implementation of CAT by its States Parties. The latter is achieved by examining each report and addressing concerns that the Committee has and thereafter giving recommendations to the State party in the form of "concluding observations".³⁶⁷ Parties must initially report one year after acceding to the Convention and then every four years. Although the Convention against Torture does not specifically make reference to human trafficking, the Committee made reference to the issue of human trafficking in its recommendations to States Parties to the Convention. In 1996, the Committee was concerned with human trafficking in South Africa and noted the lack of effective specific measures to combat the crime. As a result, South Africa was advised to adopt legislation and other effective measures, in order to adequately prevent, combat and punish human trafficking, especially that of

³⁶³Scarpa (n 106) 111.

³⁶⁴The Organization for Security and Co-operation in Europe's (OSCE).

³⁶⁵The paper was launched at the 13th Alliance against Trafficking in Persons conference, Vienna, 25 June 2013. (OSCE/Alfred Kueppers). See also, OSCE 2013 'conference in Vienna on inequality, globalization and trafficking'.

³⁶⁶Organization for Security and Co-operation in Europe 2013 'Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment' Occasional Paper Series No. 5 page 20.

³⁶⁷United Nations Human Rights 'Committee against Torture'.

women and children.³⁶⁸ Due to this intervention by the Committee of CAT and its recommendations, South Africa in 2013 adopted the Prevention and Combatting of Trafficking in Persons Act.³⁶⁹

The United Nations has the Voluntary Fund for Victims of Torture used to assist individuals whose human rights have been severely violated as a result of torture.³⁷⁰ This is achieved by supporting projects with a clear victim-centered focus, through annual grants of between US\$20,000 and US\$80,000, awarded on a competitive basis. For instance, Haiti's BAI/IJDH was awarded US\$26,500 for 2015 who represents torture victims in the case brought against former President Duvalier.³⁷¹ In addition, an emergency grant of \$20,000 in 2014 was awarded to SYNERGIE, to provide social assistance to women and young girls who have been victims of sexual violence in Northern Kivu, DRC.³⁷²

3.2.6 Trafficking in persons under the Palermo Protocol

In addition to all the Conventions described above one finds the most reputable and recent instrument of international law that has set the course for how to define, prevent, and prosecute human trafficking and it is the Palermo Protocol together with its Interpretative Notes (*Travaux Préparatoires*). This Protocol supplements the United Nations Convention against Transnational Organised Crime (CTOC) and as such must be interpreted together with its parent Convention.³⁷³ Therefore, a brief discussion of the Convention is given before unpacking the Palermo Protocol itself.

The CTOC adopted by the General Assembly resolution 55/25 of 15 November 2000 is the main international instrument in the fight against transnational organized crime. The

³⁶⁸UN Committee against Torture: Conclusions and Recommendations, 'Conclusions and Recommendations: South Africa' (2006) UN Doc CAT/C/ZAF/CO/1.

³⁶⁹The Prevention and Combatting of Trafficking in Persons Act, Act No. 7 of 2013.

³⁷⁰It was established in 1981 by the General Assembly as per resolution 36/151.

³⁷¹OHCHR UN Voluntary Fund for Victims of Torture.

³⁷²OHCHR UN Voluntary Fund (n 371).

³⁷³United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, in accordance with article 36. See also, article 37 (4) of the Convention against Transnational Organised Crime and article 1 (1) of the Palermo Protocol.

Convention is supplemented with protocols on specific issues of relevance, which go into greater detail about the scope of the obligations of the States Parties of the Convention.³⁷⁴ The UN Trafficking Protocol is one of the three Protocols to the CTOC and is the most relevant for this study because its main focus is on human trafficking whereas the two remaining protocols address the smuggling of migrants, and the illicit manufacturing and trafficking of firearms.

In terms of the CTOC a crime is transnational in nature if it is committed in more than one State.³⁷⁵ That is to say, if it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;³⁷⁶ or if it is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State;³⁷⁷ or if it is committed in one State but has substantial effects in another State.³⁷⁸ Consequently, the Palermo Protocol also applies only to the offence defined as trafficking where they are transnational in nature. This then means that internal human trafficking is disregarded by the Palermo Protocol. It is one of Hathaway's principal objections to the international legal definition of trafficking.³⁷⁹ In contrast, Gallagher contends that Hathaway's interpretation fails to capture accurately the nature of State Party obligations under the instrument as a whole.³⁸⁰ She argues that, the umbrella instrument being the Convention against Transnational Organized Crime requires every State party to establish as a crime human trafficking in their national laws independently of its transnational nature or the involvement of an organized criminal group.³⁸¹

The CTOC further consists of provisions, which outline measures designed to prevent, investigate and prosecute four offences. The latter offences are: the participation in an organized criminal group or the 'organizing, directing, aiding, abetting, facilitating or

³⁷⁴Fitzpatrick J "Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking." (24) *Michigan Journal of International Law*. page1148.

³⁷⁵Article 3 (2) (a) of the United Nations Convention against Transnational Organised Crime.

³⁷⁶Article 3 (2) (b) of the CTOC.

³⁷⁷Article 3 (2) (c) of the CTOC.

³⁷⁸Article 3 (2) (d) of the CTOC.

³⁷⁹Gallagher (n 114) 812.

³⁸⁰Gallagher *ibid*.

³⁸¹Gallagher *ibid*.

counselling the commission of a serious crime involving an organized criminal group;³⁸² the laundering of proceeds of crime;³⁸³ corruption of public officials or of international civil servants;³⁸⁴ and obstruction of justice.³⁸⁵ From the aforementioned offences, several terms that are associated with human trafficking have been defined. For instance, the term ‘organised group’ has been defined to mean “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the CTOC, in order to obtain, directly or indirectly, a financial or other material benefit”.³⁸⁶ ‘Organised criminal groups’ is linked to human trafficking due to the transnational nature of human trafficking which requires a network of people working together in transporting and selling or keeping of trafficked victims. The term ‘serious crime’ relates to human trafficking considering the fact that it is regarded as a crime against humanity and is also multi-faceted. The term ‘structured group’ is also linked to human trafficking on the basis that the process of human trafficking may not take place under the category of organised crime always, but is unlikely to involve a single person, and as a result may involve a structured group.³⁸⁷ The aforesaid therefore shows again why the Palermo Protocol only applies to the offences defined as trafficking where they involve a criminal group and not an individual perpetrator. The definition of human trafficking in the Palermo Protocol entails three key elements that must be present for a situation to be that of trafficking in persons as outlined in chapter 2 being the *acts*, *means* and *purpose*.³⁸⁸

With regards to the *means* it is imperative to note that with regards to children the “means” element is not required which then means it is not necessary to establish

³⁸²Article 5 of the CTOC.

³⁸³Article 6 and 7 of the CTOC.

³⁸⁴Article 8 and 9 of the CTOC.

³⁸⁵Article 23 of the CTOC.

³⁸⁶Article 2 (a) of the CTOC.

³⁸⁷Article 2 (c) of the CTOC. See *also* the Travaux Préparatoires which contains the interpretative notes that were discussed by the Ad Hoc Committee on the Elaboration of the CTOC and its protocols. It provides some clarification on the use of the term ‘structured group’.

³⁸⁸See paragraph 2.4.2 of Chapter 2 of this dissertation.

whether or not the child victim was forced or coerced before he/she was subjected to some “act” such as recruitment for a purpose of exploitation of that child.³⁸⁹

With regards to the *purposes* only the purposes of the exploitation of the prostitution of others, sexual exploitation and the removal of organs is discussed due to the fact that the other exploitative purposes such as forced labour and slavery have already been discussed above.³⁹⁰ It is imperative to note that in terms of the Palermo Protocol it is not required for the intended exploitation to actually take place. This then means the intention to subject another person to one of the forms of exploitation is sufficient. With regards to terms such as “exploitation of prostitution of others or other forms of sexual exploitation” It is interesting to note that in the Palermo Protocol these terms are intentionally left undefined. Add to that unfortunately, the latter term is not defined in international law just like “exploitation of the prostitution of others” and “trafficking” are not defined in the 1949 Convention.

The terms slavery, forced labour, practices similar to slavery or servitude, which are not defined in the Palermo Protocol, are at least defined in international law³⁹¹ and as a result those definitions can be incorporated into domestic legislation.³⁹² However, in the case of the Palermo Protocol it means governments regionally and nationally would have to develop clear definitions of their legislations dealing with human trafficking.³⁹³ If the term is not defined or it is defined unclearly, then convictions will be difficult to

³⁸⁹Article 3 (c) of the Palermo Protocol.

³⁹⁰See paragraphs 3.2.1 of this chapter.

³⁹¹Article 1 of the 1927 Slavery Convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised;” the 1930 ILO Forced Labour Convention defines forced labour as “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily;” and the 1957 Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1957 refers to the institutions and practices of debt bondage, serfdom, servile forms of marriage and exploitation of children which are all held to be similar to slavery.

³⁹²Gallagher A 2001 “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis” (23) Human Rights Quarterly 987.

³⁹³Jordan AD 2002 *The Annotated Guide to the Complete UN Trafficking Protocol* 7.

achieve, because prosecutors will not know what they have to prove from the term sexual exploitation.³⁹⁴

In terms of the Palermo Protocols provisions, it is made clear that States preventative measures must address both the supply and demand.³⁹⁵ In order to successfully address those needs and demands, Guidelines on the necessary preventative measures are provided for in the guideline 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking.³⁹⁶

In the Trafficking Protocol's preamble, it is specified that effective action to prevent and combat trafficking in persons, requires a comprehensive international approach in the countries of origin, transit and destination inclusive of measures to prevent trafficking, to punish traffickers and to protect the victims of such trafficking inclusive of the protection of their internationally recognized human rights. Therefore, not only is human trafficking a transnational organized crime, it also gives rise to human rights violations whenever it is committed and principles of international law are violated as well.³⁹⁷ Therefore, human trafficking can be approached from a variety of perspectives from the criminal, or human rights approach. Many actors, such as non-governmental organizations and governments around the world, are currently paying immense attention to the problem of human trafficking and trying to establish how an all-inclusive response to curb human trafficking can be achieved.

It is however clear that the trafficking Protocol resulted from a criminal law framework with a primary concern of combating transnational organized crime syndicates. The very fact that the trafficking Protocol is a protocol to the Convention on Transnational Organized Crime is evidence of that criminal law focus.³⁹⁸ Therefore, State Parties are

³⁹⁴Jordan A D (n 393) 7.

³⁹⁵Article 9 of the Palermo Protocol.

³⁹⁶Office of the High Commission for Human Rights 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' see Guideline 7 page 9-10.

³⁹⁷Farriour S 1997 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential' (10) *Varv. Hum. R.H.J* 213.

³⁹⁸Todres J 2011-2012 "Widening our Lens: Incorporating Essential Perspectives in the Fight against Human Trafficking (33) *Mich.J.Int'l L.* 63.

required to criminalize human trafficking as per article 5 of the Protocol, which is a central and mandatory provision of that protocol.³⁹⁹ The aim of this approach is to introduce more effective ways of investigation, prosecution and punishment of trafficking in persons and it further aims at intensifying police and judicial co-operation in order to facilitate prosecution of international criminal groups that organise human trafficking. Although the Trafficking Protocol is meant to be both expressive (of human rights concerns) as well as regulatory (in order to solve the crime problem of trafficking) the core of it lies in criminalizing trafficking. This in turn leaves the protocol open to criticism.⁴⁰⁰ For instance, Gallagher is of the view that the discretionary nature of the protocols victim protection and human rights provisions is not in line with international human rights law.⁴⁰¹ article 11 (2) of the protocol makes use of weak language such as 'States shall undertake *to the extent possible...*' which has been criticised by international organisations such as the Special Rapporteur on Violence against Women and the International Labour Organisation for being unnecessarily restrictive. Therefore, the criminal law approach is necessary, but insufficient.

In respect of human rights approach, a number of institutions and conventions associated with the United Nations and regional bodies⁴⁰² regard trafficking as fundamentally linked to human rights violations because it involves the severe exploitation of an individual.⁴⁰³ Trafficking has been conceptualised within a human rights framework. A number of international declarations and human rights instruments and regional conventions have addressed the right of an individual not to be

³⁹⁹Article 5 of the Palermo Protocol provides that: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article. See also, Gallagher (n 11) 79.

⁴⁰⁰Ollus N The United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children: a Tool for Criminal Justice Personnel 17.

⁴⁰¹Gallagher (n 392) 990.

⁴⁰²The Organisation for Security and Cooperation in Europe, the Council of Europe, the North Atlantic Treaty Organisation.

⁴⁰³Lee (n 45) 21.

trafficked.⁴⁰⁴ Furthermore, there are international bodies that have shown immense interest in the issue of human rights as they relate to human trafficking such as the United Nations, the International Organization for Migration (IOM) and the United Nations Children's Fund (UNICEF). However, the Palermo Protocol drafters adopted a more criminal approach, which has left victims with insufficient protection provisions. This then means, the Palermo Protocol's preventative measures falls short when it comes to addressing human rights violations in the context of trafficking.

In 2002 for instance, Anti-Slavery International prepared a document⁴⁰⁵ which was aimed at strengthening the human rights protection of those vulnerable to trafficking and the Council of Europe Convention on Action against Trafficking in Human Beings in 2005, declared that human trafficking constitutes first and foremost 'a violation of human rights'.⁴⁰⁶ Add to that, violations of human rights have been seen by the United Nations High Commissioner for Human Rights as both a cause and a consequence of trafficking. Therefore, this approach to trafficking recognises that empowering individuals by guaranteeing their human rights is likely to reduce their susceptibility to being trafficked and exploited. It further recognises that when countries adopt anti-trafficking legislation they must consider the reasons why some people are trafficked and others not; why people are prepared to take dangerous migration decisions and others are not and why some people are more readily exploited than others and in different ways.⁴⁰⁷

The advantage of this approach is that it is designed to address vulnerability and can assist in addressing the root causes of human trafficking such as denial of economic and social rights, discrimination, and poverty, which are not addressed comprehensively

⁴⁰⁴The UN Universal Declaration of Human Rights 1948 and European Convention on Human Rights and Fundamental Freedoms 1950, include the right to life and security of person; right to be free from slavery or servitude; right to freedom of movement; right to be free of torture or cruel, inhuman and degrading treatment; right to health; and right to free choice of employment. See also, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 (Article 6), the UN Convention on the Rights of the Child, 1989 (Articles 11 and 35), the International Covenant on Civil and Political Rights, 1966 (Article 8), and the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (Article 3).

⁴⁰⁵The document is entitled: Human Trafficking, Human Rights: Redefining Victims' Protection.

⁴⁰⁶Pearson (n 140). See also, Lee (n 45).

⁴⁰⁷OHCHR 2014 'Human Rights and Human Trafficking' Fact Sheet No. 36 at 40.

by the criminal approach. However, when trafficking and its array of associated practices belonged exclusively to human rights during the entire 20th century, states could not even agree on a definition, much less on specific legal obligations.⁴⁰⁸

There is a need for the combination of the criminal and human rights framework. The Palermo Protocol although consisting of human rights provisions, the protection offered to a trafficked person too often prioritises the needs of law enforcement over the rights of that victim of human trafficking. Furthermore, the Protocol has been serving as a model for regional and national legislations on human trafficking and provides mandatory minimum standards upon which States can build their own response.⁴⁰⁹

3.3 Regional Legal Framework on Human Trafficking

The CTOC and its protocol (the Palermo Protocol) imposed a duty upon states to not only ratify the conventions, but to further adopt regional and national treaties in order to curb human trafficking.⁴¹⁰ With the rise in the number of bilateral, regional and global agreements,⁴¹¹ it is clear that governments regionally and nationally have realized that a transnational crime like human trafficking must be addressed through international cooperation. As a result, government's efforts can be seen through the adoption of regional and national agreements. For this section of the chapter, the focus is mainly on the European, Inter-American and African regions efforts in combating human trafficking.

3.3.1 *The European Framework*

The EU got involved with the issue of human trafficking from the mid-ninety nineties.⁴¹² Measures to combat human trafficking were initiated in 1996 by the European

⁴⁰⁸Gallagher (n 392), see also, Gallagher (n 114).

⁴⁰⁹Shatsari (n 211) 97.

⁴¹⁰Article 5 of the Palermo Protocol.

⁴¹¹A few examples: the 1969 African Charter Governing Specific Aspects of the Refugee Problem in Africa; the 1990 African Charter on the Rights and Welfare of the Child; the 1998 Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights; and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women; African Union 'Operationalizing the Ouagadougou Action Plan to Combat Trafficking in Human Beings.

⁴¹²Gallagher (n 11) 96.

Parliament and in 1997 a detailed Joint Action on human trafficking was released.⁴¹³ In the 1996 Communication of the 20th of November, the Commission proposed a multidisciplinary and cross-pillar approach as a means of mobilising all instruments available to the European Union by virtue of the Treaties; and in the 1998 text of the 9th of December it suggested the development of measures to cover every link in the chain of organised crime and to involve all actors combating the phenomenon.⁴¹⁴ Therefore, it is clear that the focus was on the implementation of counter-trafficking strategies and policies that were holistic in nature as opposed to establishing human trafficking solely as a criminal offence, which is what the Palermo Protocol has been criticised for.⁴¹⁵ This resulted in the adoption of the European Convention on Human Rights (ECHR).

The European Convention on Human Rights was signed in Rome in the framework of the Council of Europe on 4 November 1950.⁴¹⁶ It established an unprecedented system of international protection for human rights, whereby individuals received the possibility of applying to the courts for the enforcement of their rights, which rendered it one of the most significant human rights treaties. Although the ECHR does not specifically refer to human trafficking reference is made to the prohibition of slavery; servitude and forced or compulsory labour.⁴¹⁷ In Article 3, a person's right not to be subjected to torture or to inhuman or degrading treatment or punishment is protected. Furthermore, everyone's right to liberty and security is also protected as per Article 5 of the ECHR.

The ECHR established the European Court of Human Rights and the court opened in 1959. In 1998, Protocol No. 11 was adopted by the Member States of the Council of

⁴¹³Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children [Official Journal L 63 of 04.03.1997].

⁴¹⁴European Parliament 2005 Trafficking in Human Beings.

⁴¹⁵Moog M S and Koch M A 2012 'Do the EU Directives to Combat Human Trafficking Ensure the Observance of Victims' Rights? A Case Study on Germany' Paper presented at the UACES Conference Exchanging Ideas on Europe 2012, Old Borders – New Frontiers Panel Immigration, Migration and Asylum II page 3.

⁴¹⁶European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entered into force 3 September 1953.

⁴¹⁷European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, entered into force 3 September 1953

Europe, thus amended the ECHR by replacing the original two-tier structure compromising the Court and Commission on Human Rights, and as a result enabled applicants to bring their cases directly before the Court.⁴¹⁸ The latter is supported by provisions of the ECHR, which gives authority to the European Court to receive inter-state complaints and individual complaints of those claiming the violation of one of the rights contained in the Convention or in the Protocols. However, in respect of individual applications, the individuals have to exhaust local remedies before approaching the Court.

The European Court of Human Rights in its 2010 judgment in the case *Rantsev v. Cyprus and Russia* ruled that trafficking in human beings, as defined in the UN Trafficking Protocol and the Council of Europe Convention on Action against Trafficking is prohibited by Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms without the need to determine whether it should be qualified as slavery, servitude or forced labour.⁴¹⁹ The latter case has been considered as a historic judgment in respect of cross border human trafficking in Europe. So far the Court has issued two important judgments on the issue of human trafficking the first one being the *Siliadin* case and the second being the *Rantsev* case.

The Council of the European Union adopted a Framework Decision on Combatting Trafficking in Human Beings in 2002 18 months after it was first proposed by the European Commission.⁴²⁰ This Council Framework Decision takes a criminal approach to combating human trafficking and lays down the minimum requirements that States have to adopt in order to achieve set out objectives on a European level.⁴²¹ For instance, Member States are required to “take measures” to criminalise human trafficking in terms of Article 1 of the Framework and to further provide appropriate punishments for such offences, including a maximum penalty of a prison sentence of at

⁴¹⁸Article 33-35 of the ECHR.

⁴¹⁹ECtHR, 10 *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010. See also, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach 2011 Prevent, Combat, Protect Human trafficking.

⁴²⁰Council Framework Decision 2002/629/JHA, 19 July 2002 on Combatting Trafficking in Human Beings. See also, Gallagher (n 11) 96.

⁴²¹Preamble of the Council Framework Decision 2002/629/JHA.

least eight years as per Article 3. Moreover, State Parties are required to criminalise human trafficking by legal persons⁴²² and to establish jurisdiction over human trafficking offences as provided for in Article 6. The Framework Decision contains an article titled “Protection of and assistance to victims,” and in it, it is provided that investigations into or prosecutions of human trafficking offences should not be dependent on the accusation made by a trafficked person, and further provides that trafficked children ought to be considered as particularly vulnerable, and as a result appropriate assistance should be granted to the child and his or her family.⁴²³

However, the 2002 Framework Decision has been criticised on the basis that provisions with respect to victims are both weak and narrow.⁴²⁴ It does not contain any provisions, which cater for victim repatriation, prevention of trafficking or even remedies available for victims.⁴²⁵ Further, the Framework Decision does not provide for an anti-discrimination clause that would accommodate refugee law and human rights already established under international law.⁴²⁶ In March 2009, after the review of the implementation of the 2002 Framework Decision, the Commission adopted and submitted to the Council a new framework decision, intended to replace the 2002 Decision, aiming to improve and expand the existing human trafficking instruments, which is the 2011 Directive.⁴²⁷ In comparison to the 2002 Framework Decision, the 2011 Directive adopts a broader concept of what should be considered human trafficking and adds additional forms of exploitation such as forced begging and trafficking for the purpose of the removal of organs.⁴²⁸ In addition, in order to ensure effective prosecution of international criminal groups whose centre of activity is in a Member State and which carry out human trafficking in third countries, jurisdiction should be established over the

⁴²²Article 4 and 5 of the Council Framework Decision 2002/629/JHA.

⁴²³Article 7 (2) and 3 of the Council Framework Decision 2002/629/JHA.

⁴²⁴Gallagher (n 11) 96.

⁴²⁵Gallagher *ibid*.

⁴²⁶Gallagher *ibid*.

⁴²⁷Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

⁴²⁸Article 2 of the 2011 Directive. In terms of the 2011 Directive, forced begging ought to be understood as a form of forced labour as defined in the ILO Convention No. 29.

offence of trafficking and vice versa. Non-nationals in Europe are also protected against trafficking and this is seen through the Council Directives adopted by the EU.

The Directive 2004/81/EC was adopted by the Council of Ministers on 29 April 2004.⁴²⁹ This Directive introduced a residence permit intended for non-European Union (EU) nationals who are victims of human trafficking or (optionally) the subject of an action facilitating illegal immigration. The main aim of the residence permit is to encourage non-EU nationals to cooperate with the competent authorities.⁴³⁰

In Article 6 of the Directive it is stipulated that third-country nationals trafficked into the EU should be given a reflection period to allow them to make an informed decision as to whether or not to cooperate with authorities, during which time they shall receive assistance and protection. In addition to the latter provision, once the reflection period is over and if the trafficked person meets a set of criteria, including cooperation with authorities and severing all ties with his or her trafficker, article 8 provides that he or she may be granted a temporary residence permit and receive assistance and protection while under the residence permit. The latter provision has been subjected to criticism by international organisations such as the UN High Commissioner for Human Rights; the UN High Commissioner for Refugees and non-governmental organisations⁴³¹ on the grounds that victims of trafficking are only granted temporary residence permits on condition that they co-operate with the authorities if not they face the risk of being expelled as per Article 13 and 14 of the Directive.⁴³² To supplement these Directives, there is a Convention that can be utilised to combat trafficking as seen below.

⁴²⁹Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

⁴³⁰Article 1 of the Council Directive 2004/81/EC.

⁴³¹Non-governmental organisations such as the Human Rights Watch (HRW) and Save the Children.

⁴³² Scarpa (n 106) 188.

The Committee of Ministers in 1991 adopted the first Council of Europe instrument dealing with human trafficking which is the Recommendation No (91) 11.⁴³³ The latter instrument deals with the sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults.⁴³⁴ Member States to the latter instrument are required to adopt measures that will assist in fighting the phenomenon, which would include the supervision of adoption agencies, the protection of trafficked victims, the introduction of rules pertaining to extra-territorial jurisdiction, the exchange of information between countries using EUROPOL and the creation of a European register of missing children.⁴³⁵ In 1999, a committee of experts on protecting children against sexual exploitation was established and was tasked with revising Recommendation No. (91)11.

Nine years later, the Committee of Ministers adopted two instruments the first in the year 2000, which focused on trafficking for sexual exploitation.⁴³⁶ The second instrument was adopted in 2001 and focused on the protection of children against sexual exploitation through trafficking amongst other things.⁴³⁷ These instruments recommended that Member States guarantee victim assistance and protection, prosecution of and punishment of traffickers through the introduction of penal sanctions and further organise information campaigns based on a gender approach and prevent sex tourism.⁴³⁸

Due to all the aforementioned efforts, the Council of Europe started negotiations on the Convention on action against trafficking in human beings in 2003 and was formally adopted by the Council of Ministers at its 925th meeting, on May 3 and 4th 2005. One of

⁴³³Council of Europe 'Recommendation No R (91) 11 of the Committee of Ministers to Member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults' 9 September 1991.

⁴³⁴Council of Europe 'Recommendation No R (91) 11 *ibid.*

⁴³⁵Scarpa (n 106) 142.

⁴³⁶Council of Europe 'Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation' 19 May 2000.

⁴³⁷Council of Europe 'Recommendation Rec (2001)16 of the Committee of Ministers to member states on the protection of children against sexual exploitation' 31 October 2001.

⁴³⁸Council of Europe Convention on action against trafficking in human beings 925 Meeting, 3 and 4 May 2005 CM(2005)32add1finalE. See also, Scarpa (n 106) 142.

the reasons for adopting the 2005 Council of Europe Convention is to enhance the 2000 Palermo Protocol, particularly in terms of placing the human rights provisions on a level equal to the criminal aspect.⁴³⁹ In terms of this Convention, human trafficking is defined as:

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 purposes 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.⁴⁴⁰

Firstly, the aim of the Europe Convention is to prevent and combat trafficking and guarantees gender equality, to protect human rights of victims and to promote international cooperation.⁴⁴¹ Secondly, unlike the Palermo Protocol, this Convention explicitly applies to all forms of trafficking whether internal or cross-border and whether or not it is connected with organised crime.⁴⁴² The definition however is identical to the one in the Palermo Protocol.⁴⁴³ State Parties are obliged to adopt legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness. The Palermo Protocol has been criticised for failing to achieve the aforementioned. Furthermore, the Council of Europe Convention is stronger on civil and political, as well as economic and social rights than the Palermo Protocol, which may be attributed to the fact that reaching consensus on a small scale (within Europe) than on a larger scale (internationally) is much easier. The 2005 Convention has also reinforced the 1949 Convention and the Palermo Protocol by also criminalising participation in the process of human trafficking.⁴⁴⁴ However, unlike the 1949 Convention and the Palermo Protocol it defines the term “victim,” as “any

⁴³⁹Preamble of the 2005 Council of Europe Convention.

⁴⁴⁰Article 4 of the Council of Europe Convention.

⁴⁴¹Article 1 of the Council of Europe Convention.

⁴⁴²Article 2 of the Council of Europe Convention.

⁴⁴³Article 4 of the Council of Europe Convention.

⁴⁴⁴Article 18 of the 2005 Council of Europe Convention.

natural person who is subject to trafficking in human beings. Add to that, the Convention prohibits prosecution of trafficked victims in Article 26.

Most importantly, unlike the Palermo Protocol, the 2005 Convention established a monitoring body that is tasked with supervising its implementation by its State Parties. The latter is composed of two bodies being, the Group of Experts on Action against Trafficking in Human Beings (GRETA),⁴⁴⁵ and the Committee of the Parties.⁴⁴⁶ The mandate of GRETA comprises of State visits, preparation of draft reports, adoption of reports and conclusions; and requesting of information from civil society.⁴⁴⁷ The Committee of the Parties thereafter may adopt recommendations addressed to State Parties concerning both the measures that need to be taken to implement the conclusions of GRETA and the co-operation that needs to be established to guarantee the proper implementation of the Convention.⁴⁴⁸ In the main, this Convention goes beyond the definition in the Palermo Protocol by articulating the principle of non-discrimination and including safeguards for the protection of rights and the provision of assistance of victims.⁴⁴⁹

Furthermore, the Convention does not affect the rights and obligations derived from other international instruments to which State Parties have subscribed as per article 40 (1) and this Convention is open to ratification by States that are not members of the Council of Europe.⁴⁵⁰

In order to effectively combat human trafficking at a regional level, the Council Act of 1995⁴⁵¹ was adopted and it established the European Police Office (EUROPOL) tasked with improving police cooperation between Member States in order to combat crimes

⁴⁴⁵GRETA is a technical body made up of highly qualified experts.

⁴⁴⁶Committee of the Parties is political body made up of representatives of all the States Parties to the 2005 Convention.

⁴⁴⁷Article 38 of the 2005 Council of Europe Convention.

⁴⁴⁸Article 38 (7) of the 2005 Council of Europe Convention.

⁴⁴⁹HSRC 2010 'Tsireledzani: understanding the dimensions of human trafficking in South Africa' Report commissioned by the National Prosecuting Authority 34-35.

⁴⁵⁰HSRC *ibid*.

⁴⁵¹Council Act of 26 July 1995 drawing up the convention based on Article k.3 of the Treaty on European Union, on the establishment of an European Police Office (Europol Convention).

such as human trafficking. Member States are tasked with setting up national units to liaise between Europol and the national authorities responsible for fighting crime because unlike the police services of Member States, Europol does not have executive powers.⁴⁵² It cannot detain individuals, nor can it conduct home searches because its tasks are to facilitate the exchanges of information, analyse intelligence and coordinate operations involving several Member States.⁴⁵³ As part of police cooperation between Member States, Europol further notifies the competent authorities of Member States without delay via the national units of information concerning them and of any connections identified between criminal offences; aids investigations in Member States; maintains a computerised system of collected information; helps Member States train their competent authorities; and facilitates technical assistance between Member States.⁴⁵⁴ In practice States use Europol as a facilitator by sending relevant data to it. Then Europol drafts reports on organised crime threat assessment regularly including those of human trafficking which are then sent to the Commission and the Commissioner indicating that they are taken seriously and that such reports based on the threat and risk assessment must be implemented by Member States. The Member States police will have to allocate resources and start with investigations.⁴⁵⁵ In 2013, 2542 ongoing human trafficking cases were referred to Europol for their support. In addition to the EUROPOL, there is also the European Union's Judicial Cooperation Unit (EUROJUST), which is an agency of the European Union dealing with judicial co-operation in criminal matters. The main role of EUROJUST is to solve jurisdictional conflicts in instances where there are different countries that start prosecutions concerning human trafficking.⁴⁵⁶ The agency, plays a coordination role between the countries involved and ensures that an agreement is reached about which country will take action that will result in a prosecution.⁴⁵⁷ In the past, there have been indications

⁴⁵²Article 1 (2) of the Europol Convention.

⁴⁵³Article 3 (1) and (2) of the Europol Convention.

⁴⁵⁴Article 3 (3)-(6) of the Europol Convention.

⁴⁵⁵Great Britain: Parliament: House of Commons: Home Affairs Committee 2009 *The Trade in Human Beings: Human Trafficking in the UK, Sixth Report of Session 2008-09, Vol 2: Oral and Written Evidence* Question 333.

⁴⁵⁶Great Britain: Parliament: (n 456) 339.

⁴⁵⁷Great Britain: Parliament: (n 456) 333.

that EU countries are more than willing to use its resources. For instance, in 2006 EUROJUST was involved in 32 cases and 71 cases in 2007.⁴⁵⁸ In 2014, five people were sentenced to a total of 36 years' imprisonment for involvement in a UK/Hungarian sex trafficking organised crime group.⁴⁵⁹ EUROJUST facilitated and partially funded a joint investigative team between Hungarian and UK authorities and that is what led to the successful apprehension of one of the convicted traffickers.⁴⁶⁰

According to statistics provided by the European Commission, between the period of 2010 and 2012 EU countries registered 30 146 human trafficking victims, with 8 551 of prosecutions against traffickers across the EU.⁴⁶¹ It was found that 80% of victims of trafficking were females while over a 1000 were children who were trafficked for purposes of sexual exploitation.⁴⁶²

3.3.2 The Inter-American Framework

The Organization of American States (OAS) brings together democratic countries of the Western Hemisphere to strengthen cooperation in order to advance common interests. It was founded in 1948 by the United States and 20 Latin American nations to serve as a forum for addressing issues of mutual concern. Its main objectives are democracy promotion, human rights protection, economic and social development, and regional security cooperation just like the African Union.⁴⁶³ The Inter-American region does not have a specific human trafficking treaty that caters for everyone but instead it has a Convention on International Trafficking in Minors.

⁴⁵⁸Great Britain: Parliament: (n 456) 339.

⁴⁵⁹EUROJUST 2014 'Human trafficking gang sentenced in the UK' Press release, The Hague, 3 July 2014. The traffickers were convicted for recruiting 120 women, ranging in age from 18 to 45 in Hungary and trafficked them to London with the promise of legitimate work as babysitters, cleaners and office workers. Upon arrival, their passports were seized by gang members. The women were forced into prostitution using threats or actual acts of violence against them.

⁴⁶⁰European Commission Press Release 'Trafficking in Human Beings 2010-2014: eradicating the slave trade' Brussels, 17 October 2014.

⁴⁶¹European Commission Press Release *ibid*.

⁴⁶²European Commission Press Release *ibid*.

⁴⁶³Meyer P J 2014 Organization of American States: Background and Issues for Congress page1.

a) *The Inter-American Convention on International Trafficking in Minors (Inter-American Convention)*

The Inter-American Convention on International Trafficking in Minors (Inter-American Convention) was adopted at Mexico on 18 March 1994, at the Fifth Inter-American Specialized Conference on Private International Law.⁴⁶⁴ The main objective of this Convention is the prevention and punishment of the international traffic in minors. Consequently, State Parties are therefore required to ensure the protection of minors in consideration of their best interests; to institute a system of mutual legal assistance among the States Parties, dedicated to the prevention and punishment of the international traffic in minors, as well as adopt related administrative and legal provisions to that effect; and to ensure the prompt return of minors who are victims of international traffic to the State of their habitual residence.⁴⁶⁵ The Convention further gives definitions for terms such as "International traffic in minors" which means the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means.⁴⁶⁶ Interestingly, States that are not party to this Convention are also obliged to take part in prohibiting the traffic in minors by notifying the competent authorities of the State who is party to the Convention.⁴⁶⁷

State Parties are further obliged to adopt effective measures, under their domestic law, to prevent and severely punish the international traffic in minors.⁴⁶⁸ However, it then means that all States have the discretion of deciding on what severe punishment is.

b) *The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para)*

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para)⁴⁶⁹ defines violence against

⁴⁶⁴Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, OEA/Ser.K/XXI.5, CIDIP V/doc.36/94 rev. 5, 79 O.A.S.T.S., 33 I.L.M. 721 (1994).

⁴⁶⁵Article 1 of the Inter-American Convention.

⁴⁶⁶Article 2 (b) of the Inter-American Convention.

⁴⁶⁷Article 4 of the Inter-American Convention.

⁴⁶⁸Article 7 of the Inter-American Convention.

women as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.⁴⁷⁰ Reference to human trafficking is contained in Article 2 in its definition of ‘violence against women’. Chapter 2 of the Convention deals with protected rights of women such as the right to life and not to be subjected to torture.⁴⁷¹

In order to protect the right of every woman to be free from violence, the States Parties are required to include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence, as well as on any difficulties they observe in applying those measures, and the factors that contribute to violence against women.⁴⁷²

There are many resolutions adopted for instance, the Inter-American Commission for Women adopted resolution AG/RES 1948 (XXXIII-O/03) “Fighting the Crime of Trafficking in Persons, especially Women, Adolescents, and Children” in April 2002 and it obliged Member States to take action against trafficking, through “multidimensional actions” under their national laws. Furthermore, national, bilateral and multilateral coordination mechanisms must be established by Member States. Based on the latter resolution, on the 8th of June 2004 the GA of the OAS adopted a similar-named resolution AG/RES 2019 (XXXIV-O/04) at the 4th plenary session wherein State Parties are required to adopt the necessary measures to enhance their legal, judicial and administrative systems to combat human trafficking. Further, two resolutions the “Fighting Transnational Organized Crime in the Hemisphere” AG/RES 2026 (XXXIV-O/04) and “Fighting the Crime of Trafficking in Persons” AG/RES 2118 (XXXV-O/05) were also adopted at the 4th plenary session. In May 2006, a draft resolution on “Hemispheric Efforts to Fight Trafficking in Persons” (CP/CG-1675/06 rev 5) was proposed by the OAS. It is comprehensive and recognises that trafficking “violates the

⁴⁶⁹Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 33 I.L.M. 1534 (1994), entered into force March 5, 1995.

⁴⁷⁰Article 1 of the Convention of Belem Do Para.

⁴⁷¹Article 4 of the Convention of Belem Do Para.

⁴⁷²Article 10 of the Convention of Belem Do Para.

human rights of victims and affects society at large". It requires governments to respect the human rights of trafficked persons and to strengthen international cooperation. State Parties are also requested, "to adopt an integrated and cross-cutting approach to the matter of trafficking in persons." However, no permanent resolution was yet adopted.

3.3.3 The African Framework

The African Framework to human trafficking entails both legislative and non-legislative measures as discussed below.

a) Legislative framework adopted by the AU to combat human trafficking

In Africa, the African Union (AU) is the principal organization for the promotion of regional integration and the co-operation of member states in their international relations. In order to supplement the international framework, the African (Banjul) Charter on Human and Peoples' Rights 1981⁴⁷³ was adopted. From the latter Charter came The Protocol on the African Charter on the Rights of Women in Africa⁴⁷⁴ and the African Charter on the Rights and Welfare of the Child (ACRWC).⁴⁷⁵ These Conventions and Protocols adopted at the regional level are needed for curbing human trafficking and promoting cooperation amongst SADC Member States. Furthermore, bilateral and multilateral agreements are also imperative in combating and eliminating trafficking, as it is a crime that is transnational in nature. Regionally and sub-regionally Member States are increasingly entering into cooperation agreements, such as the Bali Process and the Economic Community of West African States (ECOWAS) Joint Plan of Action against Trafficking in Persons, Especially Women and Children in West and Central Africa to name a few. However, for purposes of this study the main SADC regional conventions

⁴⁷³The African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982) entered into force Oct. 21, 1986. It has been ratified by all 53 member states of the AU.

⁴⁷⁴Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sep. 13, 2000); reprinted in 1 *Afr. Hum. Rts. L. J.* 40, Entered into Force Nov. 25, 2005.

⁴⁷⁵The African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

will be discussed below including bilateral and multi-lateral agreements adopted in order to combat this crime.

The African (Banjul) Charter on Human and Peoples' Rights was adopted on 27 June 1981 and came into effect force in October 1986.⁴⁷⁶ Although the Banjul Charter does not make specific reference to human trafficking, it does explicitly outlaw slavery and related activities as provided for in Article 5. All SADC Member States have ratified the Charter and as a result are therefore required to protect the human rights of all people, which can be interpreted as including victims of human trafficking.⁴⁷⁷ For instance, all human beings are inviolable and shall be entitled to respect for his life and the integrity of his person as per Article 4. Add to that, Article 6 states that 'every individual shall have the right to liberty and to the security of his person. The Banjul Charter also recognizes the rights of women by requiring in Article 18 Member States to eliminate discrimination against women and to ensure the protection of their rights as stipulated in international declarations and conventions.

The African Charter as provided for by Article 30 established the African Commission on Human and Peoples' Rights, which came into force in October 1986 after its adoption in Nairobi (Kenya) in 1981. The Commission is tasked with ensuring the promotion and protection of human and peoples' rights throughout the continent as well as the protection, promotion and interpretation of the African Charter.⁴⁷⁸ Furthermore, the Commissions function includes the collection of documents, conducting of research on African problems in the field of human and peoples' rights, organizing of conferences, dissemination of information, encouraging national and local institutions concerned with human and peoples' rights and, giving of recommendations to governments.⁴⁷⁹ However, due to the fact that recommendations are mere recommendations and are not as binding, this then means State Parties are under no obligation to comply with those

⁴⁷⁶African [Banjul] Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3.

⁴⁷⁷African Commission on Human and Peoples' Rights 'Ratification Table: African Charter on Human and Peoples' Rights'.

⁴⁷⁸Article 45 (2) (3) of the Banjul Charter.

⁴⁷⁹Article 45 (1) of the Banjul Charter.

recommendations which in turn weakens States compliance with international standards.

In order to meet international standards and to curb the crime of human trafficking at the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted by the former Organisation of African Unity (OAU), now the African Union (AU), in July 1990 as an endorsement of the CRC. The ACRWC is known as the first regional treaty on children's rights, and it builds on the 1979 Declaration on the Rights and Welfare of the African Child,⁴⁸⁰ but most of its provisions are modeled after those of the CRC.

The ACRWC refers specifically to human trafficking in Articles 24 and 29. Article 24 deals with the adoption of children and requires State Parties to provide for the establishment of competent authorities to ensure that the adoption is carried out in conformity with applicable laws and procedures. In addition to the latter, State Parties are further required to specifically 'take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child'. Therefore, State Parties must promote, where appropriate, the objectives of Article 24 by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.⁴⁸¹ In terms of Article 29 State Parties are obliged take appropriate measures to prevent the abduction, the sale of, or trafficking in children for any purpose or in any form, by any person including parents or legal guardians of the child. The latter provision is unique considering that the CRC does not entail such a provision and this shows how the CRC does not elaborate on specific regional issues of children's rights.

⁴⁸⁰African states adopted the Declaration on the Rights and Welfare of the African Child (African Children's Declaration) 67 in 1979 at the 16th ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in Liberia, Monrovia.

⁴⁸¹Article 24 of the ACRWC.

All SADC Member States have ratified the ACRWC and as a result are now, in terms of Article 1,⁴⁸² obliged to recognize the rights afforded to children in the Charter and to undertake the necessary legislative and other measures to give effect to its provision. The ACRWC is also supplemented by a Protocol.

In 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the African Women's Protocol) was adopted in order to expand the rights set out in the Charter, with particular reference to Article 18(3).⁴⁸³ The Protocol on the African Charter on the Rights of Women in Africa⁴⁸⁴ has specific provisions on human trafficking unlike the parent Charter (Banjul Charter). Article 4 of the Women's Charter imposes obligations on State Parties to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk. Some provisions of the Protocol even though not human trafficking specific cater for the crime. For instance, Article 3 of the Charter speaks of the general rights of women to dignity, the right not to be subjected to exploitation or degradation, and the right to protection from all forms of violence, particularly sexual and verbal. All the aforementioned issues are applicable in relation to human trafficking, although indirectly. It is therefore clear that the Women's Charter is indeed in line with the international standards laid down in the Palermo Protocol even though it is not gender neutral.

b) *Non-legislative measures adopted by the AU to Combat Human Trafficking*

Ouagadougou Action Plan (OAP)

At the AU level, Ministers of Foreign Affairs, Migration and Development from Africa and the European Union met in 2006 at the Africa-EU Ministerial Conference on Migration

⁴⁸²Member States of the Organisation of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

⁴⁸³HSRC (n 450) 38.

⁴⁸⁴Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sep. 13, 2000); reprinted in *1 Afr. Hum. Rts. L. J.* 40, Entered into Force Nov. 25, 2005.

and Development, held in Tripoli in the framework of the Africa-EU Partnership on Migration, Mobility and Employment and adopted the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children”.⁴⁸⁵ The main aim of this plan is to provide specific recommendations that are expected to be implemented by Regional Economic Communities (RECs) and relevant Member States based on a three-pronged implementation strategy, which is on prevention of trafficking, protection of victims of trafficking and prosecution of traffickers.⁴⁸⁶

With regards to prevention of trafficking in terms of the Plan of Action, Member States are expected to raise awareness of the existence of this crime and have a range of activities and interventions aimed at preventing human trafficking. For instance, this can be achieved by educating and training relevant people in particular training and capacity building of those in key positions such as police officials.⁴⁸⁷ Also, they must provide viable employment opportunities for youth which will empower girls and women and mobilise support of families, NGO's, local communities and other members of civil society in order to combat human trafficking.

With regards to victim protection and assistance, the Action Plan provides that States are required to base their policies, programmes and other measures for victim protection and assistance on international human rights instruments that will enable them to identify victims. Furthermore, they must find and adopt appropriate measures to ensure protection and assistance to victims of trafficking, especially for children and their families to avoid criminalisation of victims and stigmatisation that might lead to re-victimisation of those victims. Most importantly, States are instructed to consider adopting legislative or other appropriate measures that will permit victims of trafficking

⁴⁸⁵Ouagadougou Action Plan To Combat Trafficking In Human Beings, Especially Women And Children As Adopted By The Ministerial Conference On Migration And Development, Tripoli, 22-23 November 2006.

⁴⁸⁶Summary of Regional and Sub-Regional Structures and Initiatives to Counter Trafficking in Persons of 2010 page 2. This summary is based on submissions received from regional mechanisms in response to questionnaire of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, the Special Rapporteur's 2010 Report to the Human Rights Council and more recent submissions.

⁴⁸⁷Ouagadougou Action Plan, Chapter I: Prevention and Awareness Raising, page 9.

to remain in their territory, temporarily or permanently, and give appropriate consideration to humanitarian and compassionate factors.⁴⁸⁸

In respect of prosecuting traffickers, States are required to encourage victims of trafficking to testify in the investigation and prosecution of cases of trafficking. However, States are also required to give due consideration to the safety and security of victims and witnesses at all stages of legal proceedings, in particular with regard to children.⁴⁸⁹

The OAP further consists of Chapter 3, which mainly focuses on the legislative framework, policy development, and law enforcement that must be adopted by Member States when developing their national laws. In respect of the legislative framework, States are requested to sign, ratify and fully implement the CTOC, the Palermo Protocol and other relevant regional instruments, which must be accompanied by the adoption of legislation, policies and programmes that will enable states to implement these instruments. National legislation must define the trafficking and cover all aspects of human trafficking.

In respect of policy development, States are called upon to improve their data collection in respect of human trafficking and further develop national action plans in each respective country with the addition of establishing multi-disciplinary National Task Teams. With regards to law enforcement, States must ensure that there's a specialisation of police services such as strengthening joint border patrols and establish joint investigation units.⁴⁹⁰

In 2010 in Abuja, Nigeria, a workshop on operationalising the Ouagadougou Action Plan (OAP) was held with the aim of sensitizing regional economic communities (RECs) and Member States and fostering effective methods for networking, cooperation and

⁴⁸⁸Ouagadougou Action Plan, Chapter II: Victim Protection and Assistance, page 10

⁴⁸⁹Ouagadougou Action Plan, Chapter II: *ibid.*

⁴⁹⁰Ouagadougou Action Plan, Chapter III: Legislative Framework, Policy Development and Law Enforcement, page 11.

coordination among RECs, member states and partners to address trafficking in persons in Africa in a more strategic and pragmatic manner.⁴⁹¹

The major concerns about the Ouagadougou Plan of Action lie in the fact that it is just a plan of action, and as such is not a legally binding document. Furthermore, the directives and proposals outlined in the plan are non-specific and very broad with no implementation procedures given. In addition, there is no formal system of oversight and accountability, nor is there a clear proposal for developing a formal monitoring and evaluations system.⁴⁹²

AU.COMMIT Campaign

The AU Commission Initiative against Trafficking (AU.COMMIT) campaign is the AU Commission's Initiative against Trafficking that is aimed at raising awareness on the Ouagadougou Action Plan across the African continent, which will in turn propel its implementation.⁴⁹³ The implementation of the AU.COMMIT Campaign was designed to be implemented in a three pronged implementation strategy that is in line with the OAP that focused on prevention in and response to trafficking in 2009-2010; protection of victims in 2010-2011 and prosecution of traffickers in 2011-2012.⁴⁹⁴

With regards to prevention, in addition to the provisions in the OAP, the AU.COMMIT Campaign entered in partnership with several United Nations agencies with the aim of curbing both the supply and demand for human trafficking. In the area of protection of

⁴⁹¹Summary of Regional and Sub-Regional Structures and Initiatives to Counter Trafficking in Persons of 2010 page 3. This summary is based on submissions received from regional mechanisms in response to questionnaire of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, the Special Rapporteur's 2010 Report to the Human Rights Council and more recent submissions.

⁴⁹²Gallineti (n 56) 51.

⁴⁹³Background Paper 'Enhancing Trafficking in Persons (TIPs) criminal investigation, prosecution and victim and witness protection among African and European countries' page 1.

⁴⁹⁴Summary of Regional and Sub-Regional Structures and Initiatives to Counter Trafficking in Persons of 2010 page 3. This summary is based on submissions received from regional mechanisms in response to questionnaire of the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, the Special Rapporteur's 2010 Report to the Human Rights Council and more recent submissions.

victims, the specific measures that have to be adopted by States have been laid out in the OAP thus already discussed above.

In order to raise awareness on the OAP The Campaign included the production of television advertisements, the distribution of 1,000 copies of the Ouagadougou Action Plan, of 1,000 T-shirts with the slogan “AU.COMMIT: Stop Trafficking” and of 1,000 copies of pamphlets, pins, posters, etc.

3.4 Conclusion

A crucial element of the definition of trafficking is its purpose, namely, exploitation, which is specifically defined to include forced labour or services, slavery or similar practices, servitude and various forms of sexual exploitation. The link between all these mentioned exploitative elements as discussed indicates that a lot of human rights violations do in actual fact constitute human trafficking such as torture. Therefore, different conventions can be used to either prosecute those human rights violations concurrently with the Palermo Protocol or with the specific human rights conventions independently. Furthermore, even though the guidelines and reports of special rapporteurs are not discussed in detail it has been seen in this chapter that they are very important, particularly, in how useful they have been in the development of international and regional legal instruments.

From regional efforts discussed in this chapter Europe seems to be leading in combating human trafficking through both its legislative and non-legislative measures.

First, the European region implemented counter-trafficking strategies and policies that are holistic in nature as opposed to establishing human trafficking solely as a criminal offence like the Palermo Protocol. As such, the regions efforts are centred on victim protection. Secondly, the European Court has been instrumental in combating human trafficking and receives complaints from both inter-state and individual complaints which enables and promotes prevention of trafficking and protection of victims. Whereas the African Court has not to date entertained a case of human trafficking. The successful prosecution of traffickers in Europe is also assisted by the EUROPOL AND EUROJUST

enforcement agencies, which results in coordinated country efforts at curbing human trafficking. Thirdly, the human trafficking definition is expanded in the 2011 Directive to include other forms of exploitation to accommodate the regions forms of exploitation that are not accommodated by the Palermo Protocol. This is indicative of the fact that the Palermo Protocol was used as a guideline to drafting a Europe specific definition of what trafficking entails in the region,

In addition, the region has a high rate of prosecution and convictions of traffickers due to the fact that jurisdiction of one country (say the sending country) is established in another country (receiving country) that is a Member State and as such traffickers do not have a safe haven. The 2005 Convention established a monitoring body that is tasked with supervising the implementation of the 2005 Convention by its State Parties. Supervision by GRETA entails, State visits, preparation of draft reports, adoption of reports and request of information from civil societies. This strategy is effective in assessing countries efforts and gaps that still need to be filled to efficiently combat trafficking and allows the region to identify the extent of the crime and which groups are more vulnerable to trafficking.

CHAPTER 4

RESPONSES TO COMBAT HUMAN TRAFFICKING IN SOUTHERN AFRICA: AN ANALYSIS OF INSTITUTIONAL AND NORMATIVE FRAMEWORK IN SADC

4.1 Introduction

As a point of departure as established in the previous chapter the African Union does not have any Protocol that specifically caters for human trafficking compared to the United Nations which adopted the Palermo Protocol, and the European region which adopted the Council of Europe Convention. Due to the fact that Southern Africa as a region is addressing human trafficking through the Southern African Development Community, it makes it imperative to analyse SADCs efforts in combating human trafficking.

This chapter analyses those protocols that either address human trafficking or can potentially be utilised to address this crime. Particular emphasis is placed on the SADC Gender Protocol, as it is the only Protocol in SADC that addresses and defines human trafficking. Further emphasis is on the Ten Year SADC Strategic Plan of Action (Plan of Action) which was adopted specifically to combat human trafficking. This is done in order to establish to what extent SADC as an institution addresses human trafficking problems and whether measures adopted by SADC are effective in combating this crime. This in turn will indicate what the legal and institutional constraints are that impact on the proper combating of human trafficking in SADC.

4.2 Historical background on SADC as an institution

In Africa, there are currently over 14 Regional Economic Groupings (RECs) of different compositions and sizes. Only eight of these are recognized by the AU as building blocks of the African Economic Community and SADC is one of the eight.⁴⁹⁵ The reason for

⁴⁹⁵The eight groupings are: Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS);

SADC's recognition by the AU is due to the fact that SADC alongside EAC and ECOWAS have engaged more actively in respect of human rights issues within their respective institutional frameworks.⁴⁹⁶ However, due to the limitations of the study as discussed in chapter 1 only SADC is discussed as an institution with regards to addressing human trafficking.⁴⁹⁷

The Southern African Development Co-ordinating Conference (SADCC) is the predecessor of the Southern African Development Community (SADC). SADCC came into being on the 1st of April 1980 in Lusaka, Zambia when the Lusaka Declaration "Towards Economic Liberation" was signed by nine states being the governments of the Front line States and governments of Malawi and Swaziland.⁴⁹⁸ Those founding Member States are Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The principal objectives that brought about the formation of SADCC were reduction of Member State dependence, particularly, but not only, on apartheid South Africa; forging of linkages to create genuine and equitable regional integration; mobilisation of Member States' resources to promote the implementation of national, interstate and regional policies; and concerted action to secure international cooperation within the framework of the strategy for economic liberation.⁴⁹⁹ However, on 17 August 1992, Heads of Government of the region agreed to transform SADCC into the Southern African Development Community (SADC), with the focus on integration of economic development and this was achieved by signing the SADC Declaration and Treaty at a Summit held in Windhoek, Namibia.

Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC). See also, Eborah S T 2010 'Human rights developments in African sub-regional economic communities during 2009' *African Human Rights Law Journal* 234.

⁴⁹⁶Eborah *ibid*.

⁴⁹⁷See chapter 1 under 'delineation and limitation of study' paragraph 1.10 of this dissertation.

⁴⁹⁸From 1977, there were active consultations undertaken by representatives of Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe, working together as Frontline States. In May 1979 there was a meeting of Foreign Ministries of the Frontline States in Gaborone, Botswana, which called for a meeting of ministers responsible for economic development. That meeting was subsequently convened in Arusha, Tanzania in 1979 and led to the birth of the Southern African Development Co-ordination Conference (SADCC) in 1980. See also, Southern African Development Community.

⁴⁹⁹Southern African Development Community.

Its Member States expanded to include the Democratic Republic of Congo, Madagascar, Mauritius, Seychelles, Namibia and South Africa.⁵⁰⁰ SADC was therefore established under Article 2 of the SADC Treaty.⁵⁰¹ In terms of this Treaty, SADC's main objectives apart from complementing the role of the AU is to promote and defend peace and security, to achieve complementarity between national and regional strategies and programmes and to alleviate poverty and advance the standard and quality of life of the people of Southern Africa through regional integration.⁵⁰² In order to achieve the latter objectives, member States must coordinate, rationalize and harmonise their overall political and socio-economic policies, strategies and programs.⁵⁰³ This can be achieved due to the fact that SADC is given jurisdiction to cooperate in the area of prevention, investigation and suppression of offences in Article 1 of the SADC Treaty,⁵⁰⁴ and SADC Member States have agreed to cooperate in the area of politics, diplomacy, international relations and peace and security amongst other areas.⁵⁰⁵ Article 22 of the SADC Treaty further authorises Member States to conclude, if need be, Protocols in any area of cooperation.

Human trafficking is a crime that not only interferes with the peace and security of SADC countries, but needs complementarity between national and regional legislation and programmes adopted by SADC countries and alleviation of poverty and other root causes which play a role in perpetuating this crime. In recent years, there have been indications that trafficking in persons is reaching alarming proportions and is becoming more organized and profitable.⁵⁰⁶ In SADC particularly, the rise in this crime may be

⁵⁰⁰South Africa became the 11th member in 1994, Mauritius in 1995, Democratic Republic of Congo and Seychelles in 1998 and Madagascar in 2005.

⁵⁰¹The Treaty of the Southern African Development Community (SADC Treaty) was adopted in 1992 and entered into force in 1993 and was modified by the 2001 Agreement Amending the Treaty of SADC.

⁵⁰²Article 5 (1) (c) and (e) of SADC's Treaty.

⁵⁰³Article 5 (2) (a) and Article 21 (2) of SADC's Treaty.

⁵⁰⁴In terms of this provision, Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefits.

⁵⁰⁵Article 21 (3) (g) of the SADC Treaty.

⁵⁰⁶Caraway N 2006 'Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse' (14) *TUL. J. INT'L & CMP. L.* 295 (reporting an "almost fifty percent" increase in the incidence of trafficking from 1995 to 2000); see also, Gallagher A and Holmes P 2008 'Developing an

attributed to the fact that traffickers have been capitalising on the vulnerabilities faced by citizens of SADC countries, such as war, endemic poverty, minimal access to health and education, gender inequality, unemployment, and a general lack of opportunities, particularly for women just to name a few (push factors).⁵⁰⁷ For instance, in Madagascar thousands of Malagasy women have been trafficked to the Middle East in recent years due to the country's on-going political and economic instability and in the Democratic Republic of Congo in most instances trafficking is internal and much of it is perpetrated by armed groups.⁵⁰⁸ Two thirds of the population in SADC lives below the international poverty line of US\$2 per day and the levels of unemployed are high in the region ranging between 25% in Botswana for instance and above 80% in Zimbabwe.⁵⁰⁹ Furthermore, Southern Africa is also the region that is hardest hit by HIV and AIDS, resulting in many widows and orphaned children with many child-headed households; often teenagers who must provide for a number of younger siblings.⁵¹⁰ Traffickers are always ready and present to exploit and capitalize on the vulnerabilities created by the aforementioned conditions by trafficking victims mainly for prostitution, pornography, domestic servitude, forced marriages, forced labour, begging, criminal activity (including drug trafficking), and trafficking for the removal of body parts (which in most instances those body parts are used for *muti*) as per the Tshireledzani report.⁵¹¹

Due to the fact that most countries in the region have no reliable statistics in this regard the figures used in this study as indicated in chapter one should rather be considered as statistical information illustrating as a guideline of the existence of the problem.⁵¹² With that being said, the fact remains that human trafficking is a problem in SADC and complementarity in terms of legislation and efforts at both the national and sub/regional

Effective Criminal Justice Response to Human Trafficking: lessons from the front line' (18) *International Criminal Justice Review* 319.

⁵⁰⁷10 Year SADC Strategic Plan of Action on Combatting Trafficking in Persons, Especially Women and Children (2009 – 2019).

⁵⁰⁸Policy Brief (n 29). See also, Trafficking in Persons Report 2014 'Country Narratives: Democratic Republic of Congo' United States of America, 139.

⁵⁰⁹10 Year SADC Strategic Plan of Action (n 508).

⁵¹⁰10 Year SADC Strategic Plan of Action (n 508) 2.

⁵¹¹HSRC (n 450) 16.

⁵¹²Trafficking in Persons, particularly of women and children, in West and Central Africa page 19.

level are imperative. Therefore, there is a need to examine SADC's normative framework in addressing this crime. As shown in chapter 3, there is currently no single, comprehensive, binding instrumenting for purposes of combating human trafficking regionally under the AU and the same applies sub-regionally in SADC. However, provisions of certain instruments address human trafficking. Consequently, the provisions of these instruments are analysed and discussed, together with other instruments that do not necessarily address human trafficking, but may be potentially used to combat this crime.

4.3 SADC's response to human trafficking through its normative framework

Based on the brief trafficking problems above, it is clear that there is a need to examine the normative framework of SADC in order to assess whether this institution has adequate measures to address the trafficking problem. Since the adoption of the Palermo Protocol at the international level, there have been a lot of efforts by SADC to address human trafficking sub-regionally. These efforts include the adoption of binding and non-binding instruments intended to combat human trafficking. One such binding instrument is the SADC Gender Protocol, which has provisions on human trafficking, and the Ten Year Plan of Action, which is non-binding, but adopted solely for purposes of addressing this crime provisions of which are analysed and discussed below. In addition, SADC has adopted other binding instruments such as the SADC Protocol on Mutual Assistance, the SADC Protocol on Extradition and SADC Protocol against Corruption. These instruments do not necessarily address human trafficking. It is however argued that they have potential use for and can be of major assistance in addressing human trafficking until such a time SADC adopts a single, comprehensive Protocol to address this crime.

Before the adoption of the Gender Protocol in 2008 and the Action Plan in 2009 and during the deliberations on the possible adoption of the Palermo Protocol, the Migration Dialogue for Southern Africa (MIDSA) programme was initiated by IOM and its

partners⁵¹³ in 1999. MIDSA was established for senior SADC officials to discuss migration issues of common concern.⁵¹⁴ In 2001, a need to make an assessment on trafficking in the SADC region was agreed upon. This resulted in a six-month Research Study on Trafficking in SADC conducted by the IOM's Regional Office for Southern Africa which among other things recommended different measures including,⁵¹⁵ implementation of the Palermo Protocol by SADC countries, adoption of national legislation dealing specifically with human trafficking, data collection and information sharing as well as adopting regional and bi-lateral agreements aimed at preventing trafficking, and protecting the rights and dignity of trafficked persons.⁵¹⁶ This was followed by two research workshops, one held in Mozambique and the other in Blantyre, Republic of Malawi.⁵¹⁷ The recommendations made in both workshops were similar to those of the very first workshop, except for the recommendation made in Blantyre for SADC governments to develop national legislation that specifically criminalises trafficking and to further consider harmonising such legislation throughout the region and where possible, ensure that such legislation has applicability.⁵¹⁸ Furthermore, the parties involved recommended that SADC member states work towards the drafting and adoption of a SADC Protocol on Trafficking in Persons and Migrant Smuggling.⁵¹⁹ These recommendations were given emphasis in the summary report compiled at the

⁵¹³The Southern African Migration Project (SAMP); International Migration Programme (IMP); and United States' Immigration and Naturalization Service.

⁵¹⁴International Organization for Migration (IOM) (n 1) 18.

⁵¹⁵International Organization for Migration *ibid*.

⁵¹⁶International Organization for Migration (IOM) (n 1) 133-135.

⁵¹⁷MIDSA Workshop Report: Trafficking in Persons, held on the 7-9 October 2002, Maputo, Republic of Mozambique. See also, MIDSA Workshop Report: Trafficking and Migrant Smuggling held on the 20 – 22 September 2004, Blantyre, Republic Of Malawi. In this workshop the governments of Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe as well as observers from the UN High Commission for Refugees (Malawi), UNICEF (Malawi), the US Embassies in Malawi and Pretoria, the African Union, the UNODC, the UK and Northern Ireland High Commission (Pretoria, South Africa), the Royal Norwegian Embassy (Malawi), UNFP (Malawi), and the University of South Africa (UNISA) were represented.

⁵¹⁸MIDSA Workshop Report: Trafficking and Migrant Smuggling, held on the 20 – 22 September 2004, Blantyre, Republic Of Malawi.

⁵¹⁹MIDSA Workshop Report *ibid*.

2008 workshop held in South Africa.⁵²⁰ It is therefore argued that, the recommendations made during all the MIDSA workshops led to the adoption of both the Gender Protocol and the Ten Year SADC Action Plan. The question that remains is whether these instruments are sufficient in addressing human trafficking and the question is answered in the discussion below.

4.3.1 SADC Gender and Development Protocol

Before the revision of the SADC Treaty, human trafficking amongst other issues was not an integral part of SADCC policies and programmes as shown above.⁵²¹ Instead, Member States adopted a framework of cooperation by way of establishing protocols in areas such as use of natural resources, regional solidarity and security and regional equitable economic development.⁵²² However, this changed with the adoption of the SADC Gender and Development Protocol adopted in 2008.⁵²³ This Protocol developed from the 1997 Declaration on Gender and Development supplemented by a 1998 Addendum dealing with violence against women, which called for states to consider the drafting of a legally binding instrument on the prevention of violence against women and

⁵²⁰MIDSA Workshop Report: Regional Protection Mechanisms for Victims of Human Trafficking in Southern Africa held on the 23-25 April 2008, Durban, South Africa. The workshop participants in their recommendations highlighted that in order to afford victims of trafficking protection, development and implementation of comprehensive anti-trafficking laws is of necessity.

⁵²¹Refer to paragraph 4.1 above of this chapter wherein SADC's main objectives are outlined. Other issues that were not part of SADCC policies and programmes include for instance poverty alleviation, gender mainstreaming and HIV/AIDS. See, Warioba CM and Luhanga AM "SADC initiative aimed at combating gender-based violence" in Centre for Human Rights *Gender based violence in Africa: Perspectives from the continent* 32-34.

⁵²²Article 5 (1) and 21 (3) of the SADC Treaty before the addition of the three final objectives being HIV/AIDS, poverty eradication and mainstreaming of gender issues. See *also*, Warioba CM and Luhanga AM (n 522) 32-34.

⁵²³What lead to the adoption of the SADC and Gender Development Protocol (herein after the Gender Protocol) was the reform of SADC as an institution and the inspiration drawn from international precedents, such as the Beijing Declaration and Platform of Action, the SADC Declaration on Gender and Development and its Addendum followed by the setting up of a Gender Unit to promote gender equality and to advise SADC structures on matters pertaining to gender as per the commitment of the SADC Member States in the Declaration on Gender and Development. See also, Viljoen F 2012 *International Human Rights Law in Africa* 486 and Warioba CM and Luhanga AM (n 522) 34-39.

children.⁵²⁴ Therefore, in the main, the Protocol deals with gender based violence against women. As shown in chapter 3, gendered-based violations of human rights, particularly against women and girls, are one of the root causes of trafficking and a key feature of the trafficking process.⁵²⁵ As such, it is not unexpected that the Gender Protocol has provisions on human trafficking. Furthermore, it differs from most existing binding instruments particularly those already discussed in chapter 3 such as the Palermo Protocol and the African Women's Protocol in that it consists of a number of practical provisions that entail clear requirements and 28 time-bound targets in compliance with one of its objectives.⁵²⁶ Whereas the Palermo Protocol and the African Women's Protocol left it upon member states to decide how and when they will adopt mechanisms to curb human trafficking.⁵²⁷ Therefore, it is imperative to analyse how and to what extent the Gender Protocol differs from the Palermo Protocol and the African Women's Protocol in order to establish which instrument is better suited in addressing this crime.

The Gender Protocol has been ratified by 13 of the 15 SADC countries and as such came in force in September 2012.⁵²⁸ It is the only binding instrument in SADC that addresses human trafficking and defines the crime as:

“the recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of amongst other things, sexual and financial exploitation”.⁵²⁹

There are certain similarities between the Gender Protocol and Palermo. First, the definition of human trafficking in the Gender Protocol also consists of three constitutive elements being an action, means and purpose. Second, the Gender Protocol also fails

⁵²⁴Paragraph 26 of an Addendum to the 1997 Declaration on Gender and Development, adopted at Grand Baie, Mauritius on 14 September 1998. See also, HSRC (n 450) 37.

⁵²⁵Refer to paragraph 3.2.3 of chapter 3 of this dissertation.

⁵²⁶Article 3 (d) of the SADC Gender Protocol.

⁵²⁷Compare article 4 (2) of the African Women's Protocol and article 5 and 6 of the Palermo Protocol with article 20 (5) of the SADC Gender Protocol.

⁵²⁸Morna C L, Dube S and Makamure L 2015 'SADC Gender Protocol Barometer 2015: Chapter 5, Gender Based Violence' Tracking table GBV in the SADC region 2009-2015 page 179.

⁵²⁹Article 1 (2) of the SADC Gender Protocol.

to define concepts like sexual exploitation. Third, there is also a non-exhaustive list of unclear language and general concepts like “for the purpose of” *amongst other things...*

Though it is clear that the reason behind the failure to define sexual exploitation in the Palermo was without prejudice, in order to afford member states an opportunity to address issues like prostitution in their domestic laws,⁵³⁰ it is argued that SADC countries missed an opportunity to define and clarify the concept. This definition would have played two key roles. Firstly, it would have ensured that when the Gender Protocol is translated into domestic criminal law, the principle of legality (*nullum crimen sine lege*) is complied with and that the offence is clearly defined in law. This in turn will enable the person committing a criminal offence to know from the wording of the relevant provision what acts or omissions will make him/her liable for trafficking a victim for purposes of sexual exploitation.⁵³¹ Secondly, SADC countries will have a uniform definition of what sexual exploitation entails at the sub-regional level, which can also assist Member States in their quest to deal with this problem, which is trans-national, and a common problem in many SADC countries. SADC Member States could have also referred to the Annotated Guide to the Trafficking Protocol, which is mainly aimed at assisting legal practitioners in the development of a human rights framework for national anti-trafficking laws.⁵³²

With regards to the African Women’s Protocol, although the Gender Protocol is primarily on gender and the African Women’s Protocol is primarily on women’s rights, both these protocols outline the definition of human trafficking which therefore makes it imperative

⁵³⁰United Nations General Assembly 2000 ‘Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’ A/55/383/Add.1 para 64 in page 12.(Gallagher and as per the *travaux préparatoires*).

⁵³¹In terms of the Max Planck Encyclopedia of Public International Law the principle of legality means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached. See *also*, ICRC ‘Rule 101. The Principle of Legality’ Customary IHL Database.

⁵³²Jordan A D (n 393) 13. In terms of this Guide sexual exploitation may be defined to mean the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud.

to test the definitions against each other to see to what extent the Gender Protocol differs or is similar to the Women's Protocol. The Women's Protocol obliges State Parties to prevent and condemn trafficking only in relation to 'women', whereas the Gender Protocol refers to 'persons' which means its definition is broader despite it being gender focused.⁵³³ Furthermore, the Gender Protocol provides for the protection of girls from economic exploitation, trafficking and all forms of abuse including sexual abuse.⁵³⁴ Whereas the African Women's Protocol provides for the protection of the girl child from all forms of abuses, without going into details in relation to human trafficking.⁵³⁵ Therefore, as rightly stated by Forere and Stone, the Gender Protocol is an important development in children's rights in that it has brought the realisation of child trafficking at the sub-regional level.⁵³⁶

As stated above, the Gender Protocol consists of time frames for achieving its objectives and for that reason it can be said to be a rather unique and ambitious instrument compared to other instruments. The first target in respect of human trafficking requires member states to enact and adopt specific legislative provisions to prevent human trafficking and to provide holistic services to survivors by 2015.⁵³⁷ As Viljoen correctly states, by identifying precise and tangible indicators, the Gender Protocol has raised the bar of expectations and has increased the accountability potential of the state reporting process.⁵³⁸ This is proven by the fact that in terms of the Gender Protocol Barometer⁵³⁹ between 2008 and 2015, 12 of the 15 SADC countries

⁵³³Article 4 (1) (g) of the African Women's Protocol.

⁵³⁴Article 11 (1) (d) of the SADC Gender Protocol.

⁵³⁵Article 12 (1) (c) of the African Women's Protocol.

⁵³⁶Forere M and Stone L 2009 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights' (9) *African Human Rights Law Journal* 448.

⁵³⁷Article 20 (5) (a) of the SADC Gender Protocol.

⁵³⁸Viljoen F 2009 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 *Wash. & Lee J. Civil Rts. & Soc. Just.* 11 page 28.

⁵³⁹The Gender Protocol Barometer benchmarks progress made by SADC countries towards achieving targets of the SADC Gender Protocol by 2015. The first Barometer was published in 2009 by Gender links and it has since been published every year till to date.

adopted human trafficking laws,⁵⁴⁰ and only three do not have specific legislation on trafficking,⁵⁴¹ as such, the majority of SADC countries have complied with Article 20 (5) (a) of the Gender Protocol. With regards to providing holistic services to survivors, the SACTAP programme was initiated by the International Organisation of Migration has been able to assist SADC countries in trying to meet targets outlined in Article 20. For instance, this counter-trafficking programme covers most of the SADC countries and is based on four key components of counter-trafficking intervention⁵⁴² and one of them is victim assistance.

In terms of the second target, Member States are required to put in place mechanisms by which all relevant law enforcement authorities and institutions may eradicate human trafficking networks operating nationally, regionally and internationally.⁵⁴³ Another organisation that has been able to assist the region in complying with Article 20 is the Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO),⁵⁴⁴ which became known as the primary force for the prevention and fighting of cross-border crime in Southern Africa when it was formed in 1995, by 11 SADC Member States.⁵⁴⁵ This organisation is aimed at, amongst other things, carrying out regular reviews of joint crime management strategies in view of changing national and regional needs and priorities; ensuring efficient operation and management of criminal records and efficient joint monitoring of cross-border crime taking full advantage of the relevant facilities available through INTERPOL; and to make relevant recommendations to

⁵⁴⁰Those countries are Botswana, DRC, Lesotho, Madagascar, Mauritius, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe, see, Morna C L, Dube S and Makamure L (n 529) 182.

⁵⁴¹Malawi, Namibia and Angola do not specific legislation on human trafficking. However, Namibia has a draft bill which parliament is yet to pass. Therefore, Namibia and Malawi combats trafficking under its existing legislation.

⁵⁴²The SACTAP programme covers South Africa, Angola, Botswana, Lesotho, Madagascar, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. See also, UNESCO 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper No 14.5 (E) page 51. See also, International Organisation for Migration 2011 'Counter-trafficking' 31 Jan 2011.

⁵⁴³Article 20 (5) (b) of the SADC Gender Protocol.

⁵⁴⁴The SARPCCO was formed in 1995 in Zimbabwe and this regional organisation is supported by the Sub-Regional Bureau of INTERPOL in Harare which coordinates its activities and programmes.

⁵⁴⁵Namely Angola, Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe and were later joined by the Democratic Republic of Congo and the Seychelles.

governments of member countries in relation to matters affecting effective policing in the Southern African region.⁵⁴⁶

The third target requires Member States to put in place harmonized data collection mechanisms to improve data collection and reporting on the types and modes of trafficking to ensure effective monitoring.⁵⁴⁷ Another key component of SACTAP includes research and data collection for statistical purposes and to know the extent of trafficking in the region.⁵⁴⁸ The SARPCCO organization is also involved in preparing and disseminating relevant information on criminal activities as may be necessary to benefit SADC members to contain crime in the region.

The fourth target requires Member States to enter into bilateral and or multilateral agreements to combat human trafficking amongst countries of origin, transit and destination countries.⁵⁴⁹ In 1997 the SARPCCO Multilateral Cooperation Agreement on Combating Crime within the Region was signed by SARPCCO members,⁵⁵⁰ being 13 of the 15 SADC countries and came into effect in 1999. In the agreement there are expected commitment and objectives⁵⁵¹ some of which are outlined under the discussion of the third target. The Agreement allows for police officers of the region to enter countries of other Member States, with the authority to do so, in order to conduct police investigations.

In terms of the last target, member states are required to assist law enforcement officials by ensuring that they put in place capacity building, awareness raising and

⁵⁴⁶Southern African Development Community: Police (SARPCCO) 2012.

⁵⁴⁷Article 20 (5) (c) of the SADC Gender Protocol.

⁵⁴⁸UNESCO (n 543) 51. See also, International Organisation for Migration (n 543).

⁵⁴⁹Article 20 (5) (d) of the SADC Gender Protocol.

⁵⁵⁰Namely Angola, Botswana, Lesotho, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe and were later joined by the Democratic Republic of Congo and the Seychelles.

⁵⁵¹The objectives are to promote, strengthen and perpetuate cooperation and foster joint strategies for the management of all forms of cross-border and related crimes with regional implications to formulate systematic regional training policies and strategies taking into account the need and performance requirements of the regional police services/ forces and to carry out any such relevant and appropriate acts and strategies for purposes of promoting regional police cooperation and collaborations as regional circumstances dictate.

sensitisation campaigns.⁵⁵² SACTAP has also been involved in information and awareness raising, capacity building of law enforcement agencies and NGO service providers.⁵⁵³ Since its inception, SACTAP has played a major role in SADC on the basis that it was able to establish a national toll free Trafficking helpline in South Africa, Zambia and Zimbabwe.⁵⁵⁴ There has been over 3000 government officials and members of the civil society that have been trained in the region and MIDSA workshops conducted for high level officials who are involved in legislative policy and development.⁵⁵⁵

Moreover, the SADC Gender Protocol Alliance adopts the SADC Gender Protocol Barometer, which is used as a yearly benchmark of progress towards achieving the 28 targets of the SADC Gender Protocol.⁵⁵⁶ In respect of human trafficking, since the adoption of the very first barometer in 2009 to date, the only results captured on human trafficking is in respect of the number of SADC countries that have adopted human trafficking specific legislation. For instance, the 2015 Barometer shows that there has been an increase in the adoption of human trafficking laws as indicated above as compared to 2009 when it was only three countries.⁵⁵⁷ With regards to provision of services to human trafficking victims, the 2015 Barometer shows that South Africa has been able to provide shelter in particular to the human trafficking survivors through the

⁵⁵²Article 20 (5) (e) of the SADC Gender Protocol.

⁵⁵³UNESCO (n 543). *See also*, International Organisation for Migration (n 543).

⁵⁵⁴For instance, in South Africa the 24hour toll free helpline is known as BLOW THE WHISTLE: 0800 555 999, *See*, EYE on Human Trafficking 2006 'A Bulletin of News, Information and Analysis on Trafficking in Persons in Southern Africa' Trafficking International Organization for Migration Pretoria South Africa, Issue 11/2006.

⁵⁵⁵International Organisation for Migration (n 543).

⁵⁵⁶The SADC Gender Protocol Alliance is a "network of civil society networks" which was formed in 2005 and was involved in campaigning for the adoption, and now the implementation of the SADC Gender Protocol. Since 2009 Gender Links has led the Alliance to conduct research, monitor and evaluate the campaign and governments' progress towards implementation of the key provisions of the Protocol, in the annual SADC Gender Protocol Barometer. *See*, Gender Links 2015 "Southern Africa Gender Protocol Alliance: About the Alliance".

⁵⁵⁷Those three countries which had human trafficking laws in 2009 are Madagascar, Mozambique and Zambia. *See*, Morna C L, Dube S and Makamure L (n 529) 181 and 182.

Saartjie Baartman Centre.⁵⁵⁸ The Barometer also indicates that in 2009, nine of the SADC countries had accessible, affordable and specialised services, including legal aid to survivors of Gender Based Violence, and in 2015, there are 14 of SADC countries with such services for survivors.⁵⁵⁹ With that being said, it is argued that the latter information on services provided to survivors is given in a vague manner. In that, one is not certain whether this refers to survivors of domestic abuse, lesbians or human trafficking victims and as such makes it difficult to rely on this data without knowing for sure that it specifically refers to human trafficking victims. It is therefore argued that, in terms of the 2015 Barometer South Africa is the only country with services for human trafficked victims. Apart from this gap, one finds another gap, which lies in the fact that, the Barometers has no indication of any prosecutions with regards to human trafficking offences, especially in those SADC countries with trafficking laws.

The question then becomes, what hinders SADC countries in achieving the targets outlined in the Gender Protocol? The Gender Alliance notes in its 2015 Barometer that the difficulty in meeting targets of the Gender Protocol is caused by a lack of political commitment and limited resources.⁵⁶⁰ It has been further noted by the Chair of the Gender Protocol Alliance that another concern lies in the variable performance between SADC countries, which may be attributed to the fact that SADC countries vary greatly in size and performance and that is why some countries have come close to reaching certain targets, while others still lag behind.⁵⁶¹ It is therefore safe to conclude that not all the five human trafficking targets have been met by all SADC countries.

⁵⁵⁸The Saartjie Baartman Centre in Cape Town is the first multi-disciplinary service (one stop) centre for abused women and children and assists victims of domestic violence, human trafficking, lesbian and gay, bisexuals, transgender and intersex (LGBTI) persons. See, Morna C L, Dube S and Makamure L (n 529) 211.

⁵⁵⁹In 2009 those countries are: Angola, Lesotho, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Zambia and Zimbabwe. In 2015 the additional countries are: Botswana, DRC, Malawi, Swaziland and Tanzania. See, Morna C L, Dube S and Makamure L (n 529) 182.

⁵⁶⁰Morna C L, Dube S and Makamure L (n 529) 181.

⁵⁶¹Statement by the Chair of the SADC Gender Protocol Alliance, Emma Kaliya, at the Task Team meeting to review the SADC Gender Protocol.

It is also important to note that although human trafficking is expressly provided for in the Gender Protocol, the provisions dealing with human trafficking in particular have not been invoked by the African Commission and the African Court as far as the research conducted is concerned. Furthermore, as shown above, even though there are organisations that have been addressing human trafficking in the region there are protocols such as the SADC Protocol on Extradition and the SADC Protocol on Legal Mutual Assistance, which have not, been utilised in addressing this transnational crime. Therefore, what follows below is an analysis of how these protocols can be utilised by SADC countries and to what extent they would be beneficial in addressing this crime.

4.3.2 SADC Protocols on Mutual Assistance in Criminal Matters of 2002

From the previous chapters and what has been discussed above it is clear that human trafficking is also transnational in nature. This is further confirmed by the 2014 TIP Report, which notes that Malawian victims of sex and labor trafficking for instance have been identified in Mozambique, South Africa, Zambia, Tanzania, and Europe. According to Watney what is concerning is the fact that, in cases of transnational trafficking, investigations and prosecutions of the crime are still confined to the borders of the state.⁵⁶² Furthermore, traffickers according to Kahombo have been able to take advantage of national border barriers and the differences of the judicial systems of the different SADC countries and their reluctance to cooperate with each other, in order to escape prosecutions.⁵⁶³ Therefore, considering the fact that SADC comprises of 15 countries, the question becomes how these countries can ensure that perpetrators are indeed investigated and convicted in cases where the perpetrator committed the crime outside the borders of his/her state in which the crime was committed or where the effect of the crime was felt without interfering with each other's state sovereignty and territorial integrity.⁵⁶⁴ To answer the latter question it is therefore imperative to define

⁵⁶²Watney M 2012 'A South African perspective on mutual legal assistance and extradition in a globalisation world' Vol. 15 No. 2 PER/PELJ page 292/569.

⁵⁶³Kahombo B 2010 "Judicial cooperation in criminal matters based on the ECCAS, COMESA and SADC Treaties" Konrad Adenauer Stiftung, Volume 5 African Law Study Library. See chapter 5 of this dissertation for the discussion on the different legal systems found in SADC countries.

⁵⁶⁴Watney (n 563) 293/569.

what is meant by mutual legal assistance, and to establish whether the SADC Protocol on Mutual Assistance can be used as the legal basis for international cooperation amongst SADC countries in order to combat human trafficking.

The Protocol on Mutual Assistance in Criminal Matters is a Protocol that sets the framework for mutual legal assistance between the State Parties of the SADC region.⁵⁶⁵ The Protocol defines mutual legal assistance as any assistance given by the requested state in respect of investigations, prosecutions or proceedings in the requesting state in a criminal matter, irrespective of whether the assistance is sought or is to be provided by a court or some other competent authority.⁵⁶⁶ By criminal matters, it is meant investigations, prosecutions or proceedings relating to offences concerning transnational organised crime (which is inclusive of human trafficking), corruption (which is one of the factors enabling the successive continuation of human trafficking), taxation, custom duties and foreign exchange control.⁵⁶⁷ Therefore, this Protocol can be utilised in a large number of cases involving trafficking in persons whereby national authorities need the assistance of other States for the successful investigation, prosecution and punishment of offenders.⁵⁶⁸ In turn, the ability to assert jurisdiction and secure the presence of an accused offender in the State's territory will and can accomplish an important part of the task, even though it might not complete it.⁵⁶⁹

In terms of this Protocol, assistance to be provided by the requested state includes locating and identifying persons, providing all necessary information, search and seizure, taking of evidence and ensuring the availability of detained persons in assisting in possible investigations amongst other things.⁵⁷⁰ This assistance is to be provided without regard to whether the conduct ((in this case human trafficking) which is the subject of investigation, prosecution, or proceedings in the requesting state also

⁵⁶⁵Protocol on Legal Assistance in Criminal Matters signed on the 3rd of October 2002 in Luanda, Angola and came into force on the 1st of March 2007 (herein after referred to as the MLA Protocol).

⁵⁶⁶Article 2 (2) of the Protocol on Mutual Assistance in Criminal Matters.

⁵⁶⁷Article 2(3) of the Protocol on Mutual Assistance in Criminal Matters.

⁵⁶⁸Gallineti (n 56) 46.

⁵⁶⁹Gallineti *ibid*.

⁵⁷⁰Article 2 (5) of the SADC Protocol on Mutual Legal Assistance.

constitutes an offence under the laws of the requested state.⁵⁷¹ The only time this Protocol will not apply is when a trafficker is detained with a view of extraditing him/her, or the trafficker in custody is transferred to serve sentences, or when there is enforcement of criminal judgments in the requested state that are imposed in the requesting state.

One example to illustrate how the SADC MLA Protocol could have been utilised is with regards to the Malawi situation involving the detainment of two men at the Karonga border transporting 25 girls and four boys as noted in the 2014 Trafficking in Persons Report.⁵⁷² The civil societies involved in the investigation of the incident speculated that those children were being trafficked for purposes of early marriage and forced labour under the pretense of receiving religious education in Tanzania.⁵⁷³ Unfortunately, charges against one suspect were dropped (reasons are unknown), while the second suspect fled after being granted bail and currently remains at large.⁵⁷⁴ It is clear from the information given in this report that those children were being trafficked to Tanzania, the arrest happened in Malawi, and as such, Malawi in this case would have been a requesting state requesting Tanzania to assist with the investigation and prosecution of the men who were arrested. Secondly, although Malawi has not yet adopted anti-trafficking legislation and Tanzania has adopted anti-trafficking legislation known as the 2008 Anti-Trafficking in Persons Act the Protocol could still be utilised because regard is not given to whether this crime constitutes an offence under the laws of both countries.⁵⁷⁵ Therefore, if Tanzania and Malawi in this instance had utilized the SADC MLA Protocol; chances are that the suspect whose charges were dropped would have been successfully prosecuted if there was concerted effort in the investigation and sharing of information between the two countries. In respect of the suspect that fled, he would have not found a safe haven in either Malawi or Tanzania because both countries would have been on the lookout for him, particularly because his identity, nationality and

⁵⁷¹Article 2 (4) of the SADC Protocol on Mutual Legal Assistance.

⁵⁷²Trafficking in Persons Report 2014 "Country Narratives: Malawi" United States of America.

⁵⁷³Trafficking in Persons Report 2014 "Country Narratives: Malawi" United States of America.

⁵⁷⁴Trafficking in Persons Report 2014 "Country Narratives: Malawi" United States of America.

⁵⁷⁵In Malawi Stakeholders have drafted a human trafficking bill but parliament has not yet passed it.

location of the suspect who was the subject of the investigation, prosecution or proceedings as per provisions of the MLA Protocol would have been shared amongst the two countries.⁵⁷⁶

Currently, the only thing that would prevent Malawi and Tanzania from utilising the Protocol is the status of ratification of the instrument. The Malawian government has only signed the SADC MLA Protocol and it is yet to ratify it, whereas Tanzania has ratified the Protocol.⁵⁷⁷ However, it is argued that due to the fact that, the Malawian government has signed the Protocol, the government is therefore obliged to refrain from acts that would defeat or undermine the Protocols objective and purpose, in the same breath, the government could then have utilised the Protocol to achieve its objective and purpose.⁵⁷⁸

Some of the SADC countries have entered into bilateral agreements on mutual assistance such as the Mozambican and South African governments in respect of cooperation and mutual assistance in the field of crime combating.⁵⁷⁹ However, there is no proof in my research that indicates that this agreement or any of the agreements have been utilised in a human trafficking case.

Considering the fact that the main purpose of mutual legal assistance is different from extradition, in that the SADC Protocol on Mutual Assistance does not apply when a trafficker is detained with a view of extraditing him/her, there is a need to also make use of the SADC Protocol on Extradition in order to fill the gap that exists in the Mutual Assistance Protocol. Therefore, see the discussion below of the SADC protocol on Extradition and to what extent it would be beneficial in addressing human trafficking.

⁵⁷⁶Article 3 (a) and 5 (a) of the SADC Protocol on Mutual Assistance.

⁵⁷⁷Ministry of Foreign Affairs and International Cooperation 2013 'Republic of Malawi'. Tanzania ratified the SADC Protocol on Mutual Assistance on the 20th of August 2004.

⁵⁷⁸UNICEF 2014 'Convention on the Rights of the Child'.

⁵⁷⁹Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa in respect of cooperation and mutual assistance in the field of crime combating concluded on the 28 of February 1995 in Cape Town, entered into force on 28 February 1995, No 45783.

4.3.3 SADC Protocol on Extradition of 2002

In general terms, as indicated above, mutual legal assistance entails a process of intergovernmental legal cooperation involving the investigation, prosecution and punishment of criminal offenders examples of which are discussed above and the same can be said with regards to extradition. However, although somewhat similar, these concepts have different meanings. They differ in that, mutual legal assistance refers to the cooperation of two or more countries regarding investigation, prosecution and judicial proceedings in relation to crimes, while extradition refers to a formal process by which a person is surrendered by one state to another. The latter explains why the SADC MLA Protocol does not accommodate extradition of criminal offenders.

Extradition finds application with regards to human trafficking in that, perpetrators of this crime may be sought for prosecution or may have been convicted and now sought for the enforcement of a sentence in the prosecuting state. The aforementioned may be achieved by SADC countries by utilising the SADC Protocol on Extradition in cases where a trafficker needs to be extradited to another country,⁵⁸⁰ which is in line with Article 15 of the AU Convention that deals with Extradition.

The SADC Extradition Protocol does not provide the offences in respect of which extradition may be granted, but instead provides that extraditable offences are offences that are punishable under the laws of both involved countries.⁵⁸¹ Furthermore, human trafficking will have to be punishable under the laws of both State Parties involved by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty.⁵⁸² This refers to dual criminality, which is intended to ensure each state that it can rely on corresponding treatment. In terms of the Protocol, extradition may be refused in a number of circumstances which include, a situation where the offence for which extradition is requested is of a political nature, if the person whose extradition is requested has, under the law of either State Party, become immune

⁵⁸⁰Protocol on Extradition signed on 3 October 2002 in Luanda, Angola, entered into force on 1 September 2006.

⁵⁸¹Article 3 (1) of the SADC Protocol on Extradition.

⁵⁸²Article 3 (1) of the SADC Protocol on Extradition.

from prosecution or punishment for any reason, including lapse of time or amnesty and if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment amongst other factors.⁵⁸³

To illustrate how this Protocol may be utilised with regards to human trafficking cases, if X (trafficker) is from South Africa and he/she traffics Y (victim) to Mozambique for forced labour. X then traffics 10 girls below the ages of 14 from Mozambique to South Africa for purposes of sexual exploitation. X is then arrested in South Africa and in the meantime, the victims in Mozambique are rescued and it is found that X was involved in the trafficking of those victims. Mozambique can therefore request South Africa to extradite X to Mozambique for human trafficking. This is possible because both countries have human trafficking laws in their countries. Furthermore, In South Africa traffickers may be subject to a fine not exceeding R100 million or imprisonment (including life imprisonment) without an option of a fine or both.⁵⁸⁴ In Mozambique, the Act provides a penalty of imprisonment of 16 to 20 years.⁵⁸⁵ Both countries have also ratified the SADC Protocol on Extradition. This shows that the Protocol could easily find application.

However, there have been a few shortcomings of the extradition process noted in the UNODC manual on mutual assistance and extradition which include, the different legal systems found in different countries as well as the different traditions for creating and incorporating international law as discussed below under the non-treaty section.⁵⁸⁶ These challenges are applicable in both extradition and mutual legal assistance processes.

Furthermore, SADC countries are encouraged to conclude bilateral and multilateral agreements in order to enhance the effectiveness of extradition.⁵⁸⁷ This has been seen

⁵⁸³Article 4 of the SADC Protocol on Extradition.

⁵⁸⁴Section 4(1) and (2) of the Trafficking in Persons Act of 2013.

⁵⁸⁵Article 10 of the Law NO. 6/2008.

⁵⁸⁶UNODC 2012 *Manual on Mutual Legal Assistance and Extradition* page 12.

⁵⁸⁷Article 9 (9) of the SADC Protocol on Extradition.

with some SADC countries like South Africa that has extradition agreements with Botswana, Lesotho, Malawi and Swaziland.⁵⁸⁸ However, in terms of this research there is no evidence found indicating that these agreements have been used in human trafficking cases.

As indicated above, the successful operation of transnational trafficking is fuelled by certain factors such as corruption, which if not addressed will continue to undermine any efforts made by SADC to combat human trafficking. It is therefore imperative to discuss the SADC Protocol against Corruption in order to establish how it finds application with regards to human trafficking as discussed below.

4.3.4 SADC Protocol against Corruption of 2001

Corruption like human trafficking is known for its effects on development, economy and well-being of populations, while human trafficking effects include extensive violations of human rights as outlined in the previous chapters. Corruption has different definitions ascribed to it, but for purposes of this study, the definition used will be that of the SADC Protocol against Corruption.⁵⁸⁹ In terms of this Protocol, corruption includes amongst other activities bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors, which violates their duties for their own benefit.⁵⁹⁰ Efforts to combat trafficking and corruption in most conducted research concentrates on these crimes independently from each other.⁵⁹¹ However, recent

⁵⁸⁸International Legal Relations 2010 'Extradition and Mutual Legal Assistance in criminal matters treaties' Department of Justice and Constitutional Development.

⁵⁸⁹Corruption is defined by the World Bank as "the abuse of power for private benefit" see, The World Bank Report 1997 'Helping countries combat corruption: the role of the World Bank' report compiled by this report was compiled by the Poverty Reduction and Economic Management (PREM) Network of the World Bank. See also, the definition of corruption by the Transparency International which defines it as "the abuse of entrusted power for private gain".

⁵⁹⁰Article 1 and 3 of the SADC Protocol against Corruption signed on 14 August 2001 in Blantyre, Malawi and entered into force on 6 August 2003 (Hereinafter referred to as the Protocol against Corruption).

⁵⁹¹United Nations Office on Drugs and Crime 2011 'Issue Paper: The role of corruption in trafficking in persons' page 4.

research conducted by scholars⁵⁹² and international organisations⁵⁹³ have increasingly cited corruption as a key reason that facilitates human trafficking in a number of ways.

According to Kendall, the Anti-Corruption Research Network and Transparency International corruption comes into play at any stage of trafficking.⁵⁹⁴ They show this by examining the three main phases (elements) of trafficking. They contend that in the recruitment phase, traffickers employ various methods and individuals such as agencies and middle-men to recruit victims. In this phase, corruption involves traffickers paying bribes to public agents or organisations to purchase permits for fake recruitment agencies, and buying the silence of government officials in order to protect the recruitment agents.⁵⁹⁵ In the transit phase, corruption most likely happens at border crossings if international travel is involved. Traffickers procure falsified passports and visas and bribe consular staff; airline personnel and border control officers to smuggle trafficked persons across borders.⁵⁹⁶ In addition, some traffickers bribe companies or taxi and bus drivers for the use of their transport vehicles in the internal trafficking. In the exploitation phase when the victim reaches the destination, police and other officials are bribed to turn a blind eye, so that the brothel owner or employer of trafficked persons can stay in business. In cases where a raid or arrest happens, corruption may be used to pay off police, prosecutors, or magistrates to have the charges dropped.⁵⁹⁷ In instances where trafficked workers do not have funds to bribe the officials, they are abused and deported.

From the above, a link between corruption and human trafficking is successfully and clearly shown. Add to that, the political will of SADC countries to combat corruption is

⁵⁹²Scholars such as Kendall V M, Holmes L, Jan Van Dijk and Fanny Klerx-Van Mierlo.

⁵⁹³United Nations on Drugs and Crime Regional Office for Southern Africa, Anti-Slavery and Transparency International and corruption watch.

⁵⁹⁴Kendall V M 2011 "Greasing the Palm: An Argument for an Increased Focus on Public Corruption in the Fight against International Human Trafficking" Vol. 44 *Cornell International Law Journal*, page 35.

⁵⁹⁵Kendall (n 595) 35-36. See also, Transparency International 2011 'Working Paper: Corruption and Human trafficking' TI Working Paper # 03/2011. See also, Tremblay M 2014 'Human Trafficking and the Anti-Corruption Agenda' The Anti-Corruption Research Network.

⁵⁹⁶Van Dijk J and Klerx-Van Mierlo F 'Indicators of corruption: further explorations of the link between corruption and implementation failure in anti-trafficking policies' page 17. Kendall (n 595) 35.

⁵⁹⁷Van Dijk J and Klerx-Van Mierlo F (n 597) 17. Kendall (n 595) 36. See also, Tremblay (n 596).

also shown by the adoption of the Corruption Protocol which covers all the corruption acts stated above. The latter is evidenced by the terminology used in Article 1 of the Protocol such as “...bribery or *any other behavior...*” which highlights the fact that the list of the acts of corruption covered by the Protocol is not exhaustive. This then means the Corruption Protocol may be used to prosecute any person who is found to have been directly or indirectly involved in corruption activities to further trafficking of persons.

However, the successful use of the Corruption Protocol will depend on some challenges being overcome by SADC. For instance, even though African governments have been under the spotlight of Transparency International since its inception in 1993, the level of corruption associated with African governments is still high as per the Transparency International Corruption Perception Index of 2014.⁵⁹⁸ Therefore, fighting human trafficking under high levels of corruption hinders efforts taken by governments at large. Another challenge as argued by Kendall and other authors and international organisations lies in the fact that, although research have shown that the perpetuation of this trade is strongly linked to corruption, this link is still not fully taken into account when anti-trafficking policies and strategies are drawn up, rendering them less effective.⁵⁹⁹ For instance, this is evidenced by the fact that, the African Women’s Protocol, the Gender Protocol and the Ten Year SADC Action Plan do not have a single provision on corruption, which means, there is no specific Protocol that caters for trafficking in which corruption has been infused. Moreover, it is difficult to find data, if any exists, that indicates that the Corruption Protocol has been utilised in cases of trafficking.

⁵⁹⁸The Corruption Perceptions Index measures the perceived levels of public sector corruption worldwide. Not one single country gets a perfect score and more than two-thirds score below 50, on a scale from 0 which indicates that the country is highly corrupt to 100 which indicates those countries are very clean. In sub-Saharan Africa 92% of countries score below 50 out of 100 in terms of the 2014 Corruption Perceptions Index. Onuoha B 2011 ‘The state human trafficking and human rights issues in Africa’ (14) *Contemporary Justice Review* pg. 159.

⁵⁹⁹Kendall (n 595) 35. See also, Corruption Watch 2014 Corruption’s role in the grim trade of humans.

Concluding remarks:

With the analysis of the SADC Protocols discussed above, it is clear that SADC only has one instrument being the Gender Protocol that addresses human trafficking. It is further clear that SADC countries have not been able to meet the five targets set out for combating human trafficking. The biggest impediment as indicated lies in the fact that SADC has been struggling in respect of implementing its protocols due to serious constraints such as public awareness, political will, institutional and governance capacity at regional and national levels.⁶⁰⁰ Moreover, SADC has a number of frameworks as discussed above that could be utilised to combat human trafficking which have never been utilised. Although the proposition is for SADC to use these Protocols in combating human trafficking, due to their number and scope, their contents need to be consolidated rather into one, comprehensive document. With all these challenges, SADC continues in its efforts to combat human trafficking through its 10-Year SADC Action Plan as discussed below.

4.4 Non-legislative means to Combat Human Trafficking in SADC: Ten Year SADC Strategic Plan of Action on Combating Trafficking in Persons

Apart from the adoption of Protocols, SADC has also adopted non-legislative regional instruments such as declarations, memorandum of understanding, and action plans, which are all important sources of guidance in determining the substantive content of treaty-based rights and obligations.⁶⁰¹ As 'soft law', these instruments can also help to contribute to the development of new legal norms and standards. In the area of human trafficking within SADC, the most significant non-legal instrument is the Ten Year SADC

⁶⁰⁰To date none of the Protocols mentioned have been implemented. See also, Coscione, S Minega, C. E and Cistac, G. 2012 'Proceedings of the First International Conference on Regional Integration and SADC Law' (1) in *Regional Integration, Rule of Law and Development: Lessons from SADC Experiences* Universidade Eduardo Mondlane 20.

⁶⁰¹UNODC 2010 *Asean handbook on international legal cooperation in trafficking in persons cases* page 16.

Strategic Plan of Action on Combating Trafficking in Persons (PoA) which was adopted on 28 May 2009 in Maputo, Mozambique during a Ministerial Meeting on Trafficking.⁶⁰²

The PoA was adopted as a result of the SADC RISDP which was adopted and approved by the SADC Summit in August 2003 and will be implemented over a period of 10 years from 2009 to 2019.⁶⁰³ The focal of the RISDP is thus amongst other things, to deepen regional integration in SADC and to align the strategic objectives and priorities of SADC with the policies and strategies for achieving its long-term goals. It further facilitates monitoring and measurement of progress by setting targets and time frames for goals in the various fields of co-operation. SADC Member States are also committed to the ideals of the AU and the NEPAD programme which identifies democracy and political governance, including amongst other things peace and security, and, the combating of illicit trafficking in arms and related materials, as essential prerequisite.⁶⁰⁴ This is consistent with the approach in the RISDP, which has however, unlike the AU and NEPAD, added trafficking in drugs and human beings to its list.⁶⁰⁵

The purpose of the Plan of Action is firstly aimed at assisting Member States in adopting, and implementing legislative and other mechanisms as well as enhancing their cooperation in combating human trafficking. Secondly, it is aimed at providing a framework for Regional actions for sharing experience, expertise and best practices in order to provide guidance for further developments towards a more effective prevention, suppression and punishing of trafficking in persons, which in turn will result in increased prosecution and conviction of traffickers and adequate support and protection of victims and witnesses. Furthermore, the Action Plan is premised on the principles of a human rights approach to trafficking and the adoption of policies; programmes and policies that

⁶⁰²Record of SADC Ministerial Meeting on Trafficking.

⁶⁰³Southern African Development Community: Regional Indicative Strategic Development Plan.

⁶⁰⁴Southern African Development Community: *ibid*.

⁶⁰⁵Southern African Development Community: *ibid*.

incorporate gender sensitivity; child rights focus; inter-state cooperation; criminalization of trafficking and participation of victims.⁶⁰⁶

The implementation phase of the PoA is divided into a two five year implementation plan, which then means implementation will have taken place between 2009 and 2014. The total estimated budget for the first five years is USD 4,516,000.⁶⁰⁷ The second five-year phase will take place between 2015 and 2019 and it is currently in its first year. The discussion below of this section evaluates how far SADC has gone in complying with the first phase.

With regards to the first Five Year Implementation Matrix (2009-2014) it entails strategic priorities that are specified expansively, including indicators, time frames, responsible partners and the allocated budget (as aforementioned). For instance, the first strategic action is based on Legislation and Policy Measures and required SADC countries to have signed, ratified, domesticated and fully implemented the UNTOC and the SADC Protocol on Gender by 2011.⁶⁰⁸ As of November 2015, all SADC Member States ratified the UNTOC.⁶⁰⁹ In respect of the Gender Protocol as of 2013, 12 of the 15 SADC Member states had ratified the Protocol except Botswana; Madagascar and Mauritius. SADC countries were also expected to have developed regional model legislation in trafficking in persons based on existing international, continental and regional legal instruments.⁶¹⁰ To date, SADC has failed to develop regional model legislation on human trafficking. Furthermore, they had to provide support for the development of harmonized national policies and legislations, based on the Regional Model Legislation, which was impossible to fulfil without the model legislation. This in turn means, without the model legislation SADC Member States will rely on the Action Plans minimum

⁶⁰⁶10 Year SADC Strategic Plan of Action (n 510) 9.

⁶⁰⁷Table 1 of the PoA pg. 2. See also the Plan of Action on pgs. 19-20 the Indicative five year budget: USD 585,000 is allocated for legislation and policy measures; USD 960,000 is for training for skills enhancement and capacity building; USD 900,000 is for prevention and public awareness raising; USD 110,000 is for victim support and witness protection; USD 355,000 is for coordination and regional cooperation; USD 755,000 is for research and information sharing; USD 222,000 is for monitoring and evaluation and USD 627,000 if allocated for resource mobilization.

⁶⁰⁸Strategic Objective number 1 of the PoA under table 2 at 1.1 in page 25.

⁶⁰⁹United Nations Convention against Transnational Organized Crime: Treaty collection.

⁶¹⁰Strategic Objective number 1 of the PoA under table 2 at 1.2 in page 25.

standards⁶¹¹ which are too broad and which may result in Member States interpreting them differently and thus creating different national policies. As a result, the Action Plan's objective of creating a harmonised regional framework in which Member States' national policies and programmes are similar and/or complimentary to one another are defeated. However, it is worth noting in respect of harmonization of laws, policies and programmes that SADC is made up of different legal systems. Some countries have the civil legal systems and others have either the Common Law system or others Roman-Dutch law or a hybrid of the systems.⁶¹² Therefore, such differences need to be considered by SADC and should a situation arise where Member States cannot agree on criminal, penalty or prosecution provisions in respect of their national laws in combating human trafficking then there might be a need to assign the task of prosecuting human traffickers perpetrators to a regional court.

The second strategic action is based on training for skills enhancement and Capacity Building.⁶¹³ Firstly, SADC countries were required to facilitate the development of a Regional Child friendly and gender sensitive comprehensive Training Curriculum on trafficking in persons by 2011.⁶¹⁴ SADC did not manage to draw up a training curriculum that is child friendly and gender sensitive. With regards to facilitating specialised regional training of at least 150 trainers for law enforcement personnel, customs and immigration officials and other departments between 2012 and 2014. Through the SACTAP organisation there has been over 3000 government officials and members of the civil society that have been trained in the region.⁶¹⁵

The third strategic action deals with prevention and public awareness raising. With the SADC Gender Protocol Barometer for instance, SADC countries have been able to

⁶¹¹Minimum standards are prevention, advocacy and awareness raising, protection, rehabilitation, integration, repatriation and investigation and prosecution. See *also*, 10 Year SADC Strategic Plan of Action (n 508) 10.

⁶¹²Mauritius and Seychelles have mixed legal systems based on French civil law and English common law and South Africa, Namibia, Botswana, Lesotho, Swaziland and Zimbabwe make use of common law and/or Roman-Dutch law.

⁶¹³Strategic Objective number 2 of the PoA under table 2 at page 27.

⁶¹⁴Strategic Objective number 2 of the PoA under table 2 at 2.2 in page 27.

⁶¹⁵International Organisation for Migration (n 543).

conduct public awareness campaigns in their countries especially during the human trafficking month.

The last five strategic actions dealing with victim support and witness protection, coordination and regional cooperation, research and information sharing, monitoring and evaluation, as well as, resource mobilization have been partly achieved through organisations such as SACTAP and SARPCCO as discussed above.⁶¹⁶

There is also a provision for an Institutional Framework for Monitoring the PoA. For instance, the SADC Summit of Heads of State and Government are tasked with overseeing policy for the PoA. While the Ministers in charge of Homeland Security; Gender, Children and Youth are tasked with reviewing and monitoring implementation of aspects of the PoA and the Organ on Politics Defense and Security Affairs Unit will coordinate monitoring and evaluation and reporting on progress in the implementation of the PoA.⁶¹⁷ In addition, the PoA makes provision for the establishment of a regional Ministerial Task Force, which will be tasked with overseeing the implementation of the PoA by meeting annually, to review progress in the implementation of the PoA at regional and national levels.⁶¹⁸ One may argue that there seems to be a duplication of functions in that the Ministerial Task Force is doing exactly what Organs on Politics Defense and Security Affairs Unit are tasked to do. Therefore, distinct functions for the different organs should be allocated or it should be decided which of the two bodies will be mandated with monitoring the implementation of the PoA or these bodies can be merged in order to avoid a waste of money and duplication of work.

With the aforementioned, the major setback as highlighted in chapter 1 lies in the fact that the PoA has not yielded much result. To date, of the eight set outputs of the detailed implementation matrix,⁶¹⁹ some of the set outputs have been partly achieved which is again attributed to the fact that the plan is not binding and as such not it is not

⁶¹⁶Refer to 4.3.1 discussion on the SADC Gender Protocol in this chapter.

⁶¹⁷10 Year SADC Strategic Plan of Action page 22-23.

⁶¹⁸10 Year SADC Strategic Plan of Action pages 22-23.

⁶¹⁹10 Year SADC Strategic Plan of Action.

compulsory for SADC countries to comply with it and there are no repercussions for non-compliance. Moreover, there is a low level of commitment of some governments and one wonders how SADC will manage to catch up with its own plan.

4.5 Conclusion

Based on the above analysis, it must be concluded that with the SADC Gender Protocol at least SADC states are legally bound to speed up efforts towards gender equality and combating human trafficking even though the region is already behind with its targets.

Secondly, it is shown how the other SADC Protocols may be of use in addressing human trafficking even though the proposition lies in avoiding a fragmented framework approach by rather combining all the relevant provisions of these Protocols in one comprehensive document. That in turn, will not only ensure clarity of normative expectation, it will also permit the inclusion of and focus on region-specific manifestations of human trafficking. Furthermore, the human trafficking specific Protocol will result in an increased accountability on the part of member states on the issue of human trafficking both domestically and regionally.

Although there is also a PoA in place, it is not binding and SADC is already way behind in reaching its targets. Therefore, even if it were to be converted into a binding Protocol, it would require a lot of amendments in terms of including necessary provisions of the discussed protocols and re-working the time-frames with particular attention to its implementation and change in governments political will to combat this crime.

As things stand as per this chapter's analysis, the absence of a human trafficking specific protocol hinders the fight against this crime.

CHAPTER 5

NATIONAL RESPONSES TO HUMAN TRAFFICKING IN SOUTHERN AFRICA: AN ANALYSIS OF MOZAMBIQUE, SOUTH AFRICA AND THE DEMOCRATIC REPUBLIC OF THE CONGO

5.1 INTRODUCTION

Having discussed initiatives taken at the international, regional and sub-regional level this chapter examines national responses to combat human trafficking undertaken by SADC countries in general and South Africa, Mozambique and the Democratic Republic of the Congo (DRC) in particular. The main aim of this chapter is to evaluate the extent to which trafficking jurisprudence in the three selected SADC countries provide lessons for SADC as an institution and for SADC member states at country level. Therefore, the chapter draws similarities, distinctions and highlights challenges in how these three countries approach human trafficking. The study concludes by indicating whether the models discussed can be used as a model to be used in SADC or as a contrast.

The chapter first begins by giving an overview of prevalent trafficking issues and problems in SADC countries. Secondly, it gives an overview of the status and efforts made in combating trafficking in SADC countries in general and the extent to which they comply with international instruments including the ratification and implementation status of the Palermo Convention. Thirdly, the chapter gives a status of legislative and other national responses adopted by SADC countries in combating trafficking. Fourthly, the chapter reflects on the grading and performance of SADC countries under the Trafficking in Persons (TIP) Report as the only institution that places each country onto one of three tiers based on the extent of their governments' efforts to comply with the "minimum standards for the elimination of trafficking" found in the Trafficking Victims Protection Act (TVPA).⁶²⁰ Although the TIP report has been subjected to criticism for

⁶²⁰Refer to section 108 of the Victims of Trafficking and Violence Protection Act of 2000 (hereinafter referred to as the TVPA).

how it ranks countries into different tiers, the purpose of this chapter is not to agree and/or disagree with criticism leveled against it. Finally, the chapter gives a detailed analysis on the extent to which Mozambique, South Africa and the DRC addresses human trafficking. This section discusses the extent to which each of the three countries prosecutes traffickers; protect victims and other prevention mechanisms available.

5.2 Prevalent Issues of Human Trafficking in SADC Countries

As already shown in the previous chapters, human trafficking victims are subjected to various physical, sexual and emotional abuses. Amongst those abuses, there are specific global types of trafficking as recognised in the provisions of the Palermo Protocol including exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs.⁶²¹ However, in the African region the major trends that have been documented, in addition to those in the Palermo Protocol include street begging, organ trafficking or organ removal for *muti* (traditional medicine); child soldiers, forced marriage; and adoption.⁶²² Furthermore, children in SADC are also trafficked for purposes of involvement in criminal activities such as looting, theft, gambling and drug smuggling in countries such as the DRC, Angola, Zimbabwe, and Zambia,⁶²³ which will be discussed below.

In SADC, the DRC is said to be the only country known for trafficking child soldiers.⁶²⁴ A report by the UN Special Representative for Children and Armed Conflict confirmed that there are 4,200 cases of recruitment of boys and girls by government and rebel forces

⁶²¹Article 3 (a) of the Palermo Protocol.

⁶²²Britton H. E and Dean L. A (n 55) 308.

⁶²³Britton H. E and Dean L. A (n 55) 309.

⁶²⁴Britton H. E and Dean L. A (n 55) 310.

between 2010 and 2013.⁶²⁵ One third of the cases involved children below the age of 15, with more than 900 of those children being subjected to sexual violence.⁶²⁶

With regards to the trafficking of body parts, the Southern African Anti-Trafficking Trust (SAAHTT) distinguishes between two types, namely: trafficking for purposes of the removal of body parts and trafficking in organs or body parts.⁶²⁷ This then means there is trafficking of organs for organ transplant and secondly trafficking organs and body parts for purposes of making *muti* and for harmful traditional practices, particularly witchcraft.⁶²⁸ In the SADC region, many of the cases reported in the media have shown that body parts are transported in bags, wrapped in leaves, and hidden in boxes of meat, all which are methods not conducive for transplant.⁶²⁹ For instance, a number of murder and body part removal cases have been reported in the Chiradzulu area in Southern Malawi, including the infamous *R v Bokhobokho and Another* case that dealt with the murder of six women.⁶³⁰ The women were either stabbed or strangled and had their body parts removed such as their private parts, breasts, intestines and in some cases the abdomens were opened while in some the eyes were gorged out.⁶³¹ Unfortunately, even though the appellants were found guilty of these murders in the High Court, the second appellant's conviction was set aside by the Supreme Court of Appeal while the first appellant's appeal failed, and was dismissed.⁶³² In Mozambique, a

⁶²⁵Snyder P 2014 'Recruitment of child soldiers persists in DRC: UN report' see jurist.org/paperchase/2014/07/recruitment-of-child-soldiers-persists-in-drc-un-report.php (accessed: 13 December 2015).

⁶²⁶Snyder P 2014 (n 630).

⁶²⁷HSRC (n 450) 8.

⁶²⁸The SAAHTT is an organization that was established and registered in 2009 with the main aim of preventing and combating trafficking in persons in Southern Africa. See, Bakare S 2010 'Trafficking body parts in Zimbabwe (the call for action)' Southern African Anti-Human Trafficking Trust's Official Blog.

⁶²⁹Bakare *ibid*.

⁶³⁰*Bokhobokho and Jonathan v the Republic of Malawi*, MSCA Criminal Appeal No. 10 of 2000 (hereinafter referred to as the Bokhobokho case). The two appellants, jointly with three others, were charged with six counts of murder in the High Court sitting at Chiradzulu. Even though they all pleaded not guilty, the two appellants were found guilty of those charges and were sentenced to death. Of the three others, one died while awaiting trial, the other was discharged and the third one was acquitted. The six women who were murdered were Elube Tambala, Veronica Joseph Chiwalo, Mary Muononga, Apuna Kashoti, Enelesi Njerero and Rose Chituta Mataya.

⁶³¹Refer to the judgment handed down by Mtegha, JA in the Bokhobokho case.

⁶³²Refer to the judgment handed down by Mtegha, JA in the Bokhobokho case.

local NGO known as the Human Rights League recorded a case in 2008 where a 10-year-old boy's body was found at the Tsatsimbe River in Magude.⁶³³ In terms of the post mortem conducted, the child was without the head, heart, liver, penis and testicles. The community was convinced that the body parts were transported to South Africa.⁶³⁴ However, there is no information regarding this case indicating whether it went to court and if so, what the verdict was.

In addition to the trafficking of body organ/parts, children in Southern Africa are also being married off before they are 18 years of age and this was acknowledged by the Southern African parliamentarians at the 37th Plenary Assembly.⁶³⁵ This is also confirmed in Okondo's paper that every year 14 million girls are married off before the age of 18 years; with 15 out of 20 countries with the highest prevalence of child marriages being in Africa.⁶³⁶ Of these 15 countries with the highest rates, three are in the SADC region and they are Mozambique, Malawi and Zambia.⁶³⁷ Zambia has one of the highest child marriage rates in the world with 42% and Malawi has over 50% prevalence of child marriage.⁶³⁸ Although child marriages in South Africa are not as high compared to the aforementioned countries, the manipulation of the cultural practice known as *ukuthwala* has resulted in families selling their daughters, as young as 12-years-old to older men who subject those children not only to physical and sexual exploitation, but to forced labour as seen in *Mvuleni Jezile v the State* case.⁶³⁹ In this case, a young girl aged 14 was abducted and forcibly married to a man twice her age in

⁶³³Bakare S (n 629).

⁶³⁴Bakare *ibid*.

⁶³⁵New Era Staff Reporter 2015 'We must end child marriages in SADC, Katjavivi'.

⁶³⁶Okondo H 'World YWCA' Paper presented at the SADC Regional Parliamentary Dialogue on Child Marriage Laws, page 1.

⁶³⁷Okondo *ibid*.

⁶³⁸Okondo *ibid*.

⁶³⁹In this case the appellant (Jezile) was sentenced to 10 years' imprisonment on the human trafficking count, 20 years' imprisonment on the 3 rape counts (which were taken together for purposes of sentence), 6 months' imprisonment on the count of assault with intent to cause grievous bodily harm, and 30 days imprisonment on the count of common assault in 2014. See, *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31 (hereinafter referred to as the Jezile case).

the Eastern Cape.⁶⁴⁰ The appellant (Jezile) raised as one of his defenses and grounds of appeal the *ukuthwala* practice.⁶⁴¹ However, the court rejected this defense.

Even though the Palermo Protocol makes mention of the removal of organs as one of the exploitative means, it appears that trafficking for the removal of organs as well as *other body parts*; is not recognised by the Palermo Protocol, it is only the removal of a person's organs that is criminal according to the Palermo Protocol.⁶⁴² Furthermore, the concept of using body parts for purposes other than transplants has not been considered in the human trafficking definition. In addition, cultural practices such as *ukuthwala* are also not recognised in the Palermo Protocol. It is therefore clear that in Africa there are cultural, economic and geopolitical factors that contribute to trafficking problems in SADC countries but are not accommodated under the Palermo Protocol.

5.3 Trafficking in Persons report (TIP) and Grading of SADC Countries

The US Department of State (USDOS) has been releasing the annual Trafficking in Persons (TIP) Report for the past 14 years through its Office to Monitor and Combat Trafficking in Persons (OMCTP).⁶⁴³ The main aim of the report is to place 188 nations among three tiers by basing its evaluation not on international standards, but instead on the individual country's compliance with the minimum standards of the United States' Trafficking Victims Protection Act (TVPA).⁶⁴⁴ As already stated in the introduction of this

⁶⁴⁰Jezile case in paragraph 5-6.

⁶⁴¹Jezile case in paragraph 51.

⁶⁴²Article 3 (a) of the Palermo Protocol.

⁶⁴³Lawrance B N and Andrew R P 2011 'A "Neo-Abolitionist Trend" in Sub-Saharan Africa? Regional Anti-Trafficking Patterns and a Preliminary Legislative Taxonomy' 2(9) *Seattle Journal for Social Justice* 599.

⁶⁴⁴Section 108 of the Trafficking Victims Protection Act: "minimum standards" of the Act: (1) the government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault. (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that sufficiently stringent to deter and that adequately reflects the heinous nature of the offense and (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons. See also, Kraemer J 2013 'Anti-Human Trafficking Legislation in Tanzania and 6 Countries around the World' Avon Global Center for Women and

chapter, criticisms leveled against the TIP report is not discussed due to the limitation of the study and word count. The focus is on the information contained therein that sheds light on existing national legislative responses to trafficking in the SADC region.

Tier one indicates that the country's government fully complies with the TVPA minimum standards and none of the SADC countries are placed in Tier one in terms of the 2015 report.⁶⁴⁵ Tier two indicates that the country's government does not fully comply with the minimum standards, but is making "significant efforts" to comply with the standards. In 2014 there were seven SADC countries placed in this tier, but in 2015 the number increased to eight due to improvements with governments of Angola and Madagascar, even though Mauritius dropped to tier two watch lists.⁶⁴⁶ The "Tier two Watch List" applies to a country where the government does not fully comply with the minimum standards due to the fact that either the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing and/or there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year. Six of SADC countries are placed in 'Tier two Watch List' with the DRC improving from tier 3 in 2014 to this tier in 2015.⁶⁴⁷ Tier 3 applies to countries whose governments do not fully comply with the minimum standards and are not making "significant efforts" to comply and the only SADC country placed in this tier in 2015 is Zimbabwe. Consequently, Zimbabwe may be subject to economic sanctions as is not making much effort to comply with the minimum standards.⁶⁴⁸ This means that Zimbabwe will not receive non-humanitarian and non-trade-related aid from the United States. The US President may further direct the U.S. executive director of each

Justice page 5 available at
<http://www3.lawschool.cornell.edu/AvonResources/MemorandumTraffickingInPersons.pdf>.

⁶⁴⁵Trafficking in Persons Report 2015 "Tier Placement" United States of America, page 53.

⁶⁴⁶SADC countries that are ranked in tier two are: Angola, Madagascar, Malawi; Mozambique; Seychelles; South Africa; Swaziland and Zambia see, Trafficking in Persons Report 2015 "Tier Placements" United States of America, page 54. See also, Trafficking in Persons Report 2014 "Tier Placement" United States of America, page 58.

⁶⁴⁷SADC countries that are ranked in "tier two watch list" are: Botswana; DRC; Lesotho; Mauritius; Namibia and Tanzania see Trafficking in Persons Report 2015 "Tier Placement" United States of America, page 54. See also, Trafficking in Persons Report 2014 "Tier Placement" United States of America, page 58.

⁶⁴⁸Shoaps L L 2013 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' 3 (17) *Lewis & Clark Law Review* 962.

multilateral development bank and the International Monetary Fund to vote against giving humanitarian, non-trade-related and non-human rights related assistance to Zimbabwe and also forbid the country from receiving funding for government employees' participation in education and cultural exchange programs even though the TVPA is not legally binding on SADC countries.⁶⁴⁹ The fourth tire deals with special cases countries and none of the SADC countries are placed there.

5.4 Status of Compliance with the Palermo Protocol and National Responses by SADC countries

A countries commitment to addressing a crime such as human trafficking can be demonstrated in a number of ways. In the case of SADC's Member States' their commitment to human trafficking is demonstrated through accession to and ratification of conventions, treaties, policies and other consensus agreements that prohibit and protect trafficking victims' human rights such as the Palermo Protocol and other frameworks adopted by SADC as discussed in chapter 4 and this chapter . Further, such commitment can be clear from trafficking specific legislation, policies and other initiatives introduced at country level to curb trafficking. .

The CTOC was adopted by General Assembly in 2000 and came into force in 2003 as outlined in chapter 3.⁶⁵⁰ All 15 SADC countries have ratified the CTOC and as such are legally bound in terms of this Treaty to address human trafficking. It is however worth noting that South Africa is the only SADC country with a reservation with regards to the provisions of Article 35(2) of the Treaty which provides for the compulsory jurisdiction of

⁶⁴⁹CRS Report for Congress 2006 "Trafficking in Persons: The U.S. and International Response" page 14.
See also, Shoaps L *ibid*.

⁶⁵⁰United Nations Treaty collection 'United Nations Convention against Transnational Organized Crime'. The CTOC consists of provisions which outline measures designed to prevent, investigate and prosecute four offences which are: the participation in an organized criminal group or the 'organizing, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group; the laundering of proceeds of crime; corruption of public officials or of international civil servants; and obstruction of justice.

the International Court of Justice.⁶⁵¹ This then means South Africa does not consider itself bound by the said provision of the Treaty.

The Palermo Protocol was adopted by resolution 55/25 in the year 2000 and came into force in 2003.⁶⁵² All SADC countries have ratified this Protocol and as such are therefore bound by the provisions of this Protocol. However, South Africa and Zimbabwe made a reservation not to be bound by the provision of article 15 (2) of the Palermo Protocol in case there is a dispute and it is referred to the International Court of Justice.⁶⁵³ The Palermo Protocol makes provision for such reservations to be made by Member States.⁶⁵⁴ An argument can therefore be raised that when an instrument makes provision for such reservations and declarations it promotes non-compliance and makes enforcement difficult if not impossible.

Both the CTOC and the Palermo Protocol imposes a duty upon states to not only ratify the conventions, but to further adopt regional and national treaties in order to curb human trafficking.⁶⁵⁵ As results, 12 of the 15 SADC Member States adopted trafficking specific legislation between 2007 and 2015. The 12 countries are Botswana⁶⁵⁶ Lesotho,⁶⁵⁷ Madagascar,⁶⁵⁸ Malawi,⁶⁵⁹ Mauritius,⁶⁶⁰ Mozambique,⁶⁶¹ Seychelles,⁶⁶²

⁶⁵¹In terms of article 2 (d) of the Vienna Convention on the law of treaties (with annex), Concluded at Vienna on 23 May 1969 “reservation” means a unilateral statement made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State. See also, United Nations Treaty collection ‘United Nations Convention against Transnational Organized Crime’.

⁶⁵²United Nations Treaty collection ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’.

⁶⁵³In terms of Article 15 (2) of the Palermo Protocol: Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

⁶⁵⁴Article 15(3) of the Palermo Protocol.

⁶⁵⁵Article 5 of the Palermo Protocol.

⁶⁵⁶Botswana adopted the Anti-Human Trafficking Act, 2014 (Act No. 32).

⁶⁵⁷Lesotho has the Anti-Trafficking in Persons Act, which came into effect in January 2011.

⁶⁵⁸Madagascar has the Anti-Trafficking Law No. 2007-038.

⁶⁵⁹Malawi has the Trafficking in Persons Act, 2015.

South Africa,⁶⁶³ Swaziland,⁶⁶⁴ Tanzania,⁶⁶⁵ Zambia⁶⁶⁶ and Zimbabwe.⁶⁶⁷ Angola amended its 1886 penal code in 2014 to include human trafficking provisions and the Namibian government has draft anti-trafficking legislation.⁶⁶⁸ The DRC is the only country in SADC, which does not have a trafficking specific legislation. This means that 2/ 3 of SADC countries still use a fragmented approach to trafficking cases. It is clear that all SADC countries address and approach human trafficking at different paces, with different efforts and governmental commitments.

5.5 Rationale for a comparative approach adopted

As much as it is ideal to discuss the different approaches adopted by all the SADC countries in as far as addressing human trafficking is concerned, this will be impractical. As a result, the remainder of this chapter will restrict the discussion to a comparative analysis of only three SADC countries being Mozambique, South Africa and the DRC. The analysis is limited to the extent to which each selected country prosecutes traffickers; protect victims of trafficking as well as prevention mechanisms available. These countries are selected as case studies mainly because; Mozambique is one of the few countries in SADC that adopted /enacted anti-trafficking legislation earlier than the rest of other SADC countries, in 2008, while other countries such as Malawi; Seychelles; and Botswana adopted anti-trafficking laws in 2014 and 2015.⁶⁶⁹ It would therefore be difficult to draw lessons from countries with such recent laws. Though Madagascar was, the first SADC country to enact trafficking legislation in 2007 as

⁶⁶⁰Mauritius has the Combating of Trafficking in Persons Act of 2009.

⁶⁶¹Mozambique has the Law on Preventing and Combating the Trafficking of People which was enacted in 2008.

⁶⁶²Seychelles has the Prohibition of Trafficking in Persons Act of 2014.

⁶⁶³South Africa has the Prevention and Combatting of Trafficking in Persons Act, Act No. 7 of 2013.

⁶⁶⁴Swaziland has the People Trafficking and People Smuggling (Prohibition) Act of 2009.

⁶⁶⁵Tanzania has the Anti-Trafficking in Persons Act of 2008.

⁶⁶⁶Zambia has the Anti-Trafficking Act of 2008.

⁶⁶⁷Zimbabwe has the Trafficking in Persons (TiP) Act of 2014.

⁶⁶⁸The inter-ministerial committee responsible for drafting anti-trafficking legislation completed its initial draft of the bill in 2013, which is still awaiting a review by the Attorney General see, Trafficking in Persons Report 2015 "Country Narratives: Namibia" United States of America, page 256.

⁶⁶⁹The other two countries that enacted ant-trafficking laws in 2008 are Tanzania and Zambia. Refer to the countries acts.

amended in 2014 it investigated 187 cases of trafficking with only 6 prosecutions which led to only one conviction.⁶⁷⁰ Therefore, in practice when it comes to prosecutions and convictions it is lacking. Jurisprudence indicate that in 2014 Mozambique prosecuted 44 suspected traffickers and convicted 32 under its trafficking law which is an increase from the conviction of 24 traffickers in 2013. Mozambique leads all the SADC countries in as far as prosecutions and convictions of trafficking offenders are concerned.

The performance of all the SADC countries in as far as investigation of trafficking cases, prosecution and conviction of trafficking offenders is concerned for the year 2013/2014 can be summarized as follows:

- Mozambique recorded a conviction of 24 traffickers in 2013 and 32 in 2014;⁶⁷¹
- Tanzania and Madagascar both with anti-trafficking legislation recorded one conviction;⁶⁷²
- Seven SADC countries with anti-trafficking legislation have recorded no prosecutions and convictions at all;⁶⁷³
- Namibia, which has anti trafficking draft bill, prosecuted 2 suspected sex traffickers, but did not convict any trafficker during the same period.⁶⁷⁴
- South Africa, which currently has anti-trafficking legislation, which came into operation in august 2015, recorded three convictions using its fragmented and piecemeal approach.⁶⁷⁵

⁶⁷⁰Trafficking in Persons Report 2015 “Country Narratives: Madagascar” United States of America, page 231.

⁶⁷¹Trafficking in Persons Report 2014 “Country Narratives: Mozambique” United States of America 284.

⁶⁷²Trafficking in Persons Report 2015 “Country Narratives: Tanzania and Madagascar” United States of America.

⁶⁷³The six SADC countries without prosecutions and convictions during the reporting period are: Zambia; Swaziland; Mauritius; Lesotho; Seychelles; Botswana and Zimbabwe. See, Trafficking in Persons Report 2015 “Country Narratives: Madagascar” United States of America. It is worth indicating that trafficking legislation in four of the mentioned countries has been in existence for about six years, except for Seychelles and Botswana, which only adopted legislation in 2014.

⁶⁷⁴Trafficking in Persons Report 2013 “Country Narratives: Namibia” United States of America, page 273-275.

⁶⁷⁵South Africa relied on different Acts such as the Children’s Act 38 of 2005; Prevention of Organised Crime Act 121 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 amongst others. Namibia relies on the 2009 Prevention of Organized Crime Act (POCA) and the

- Angolan, which incorporate trafficking in the penal code, and the DRC, which does not have a trafficking legislation, did not report investigating; prosecuting and conviction on any trafficking cases during 2013/14.⁶⁷⁶

Mozambique best serves as a useful and important comparator on how to best deal with trafficking cases in SADC based on the high rate of investigation, prosecutions and convictions recorded and its legislation is tried and tested. On the other hand, South Africa only adopted the South African Trafficking Act in 2013, which came into operation in 2015.⁶⁷⁷ However, it managed to convict three sex traffickers and initiated prosecutions of 19 suspected sex traffickers with its then piece meal approach. Therefore, South Africa is best used as a case study, which has evolved from using a piecemeal approach to trafficking, and a test case of how the new legislation is likely to change the landscape in as far as dealing with trafficking offences is concerned. Both Mozambique and South Africa are classified as tier two as explained earlier. The DRC has no anti-trafficking legislation however; it addresses the crime through its fragmented approach. Despite the absence of anti-trafficking legislation, the DRC was upgraded from tier 3 to Tier Two Watch List indicating that it is making significant progress.⁶⁷⁸

Even though Mozambique adopted its anti-trafficking law in 2008, South Africa in 2013 and the DRC is still without any anti-trafficking law the difference in the years of enactment of trafficking laws will reveal whether anti-trafficking legislation is important for addressing trafficking and whether because a country adopted legislation that automatically translates to compliance. Furthermore, these three countries have different legal systems, capacity and are at different developmental stages and as such

recently enacted Child Care and Protection Bill. See also Trafficking in Persons Report 2015 "Country Narratives: South Africa" United States of America, page 311-312.

⁶⁷⁶Trafficking in Persons Report 2013 "Country Narratives: Angola and the DRC" United States of America, page 71 and 136.

⁶⁷⁷Proclamation R. 32 *Government Gazette* 39078 of 7 August 2015.

⁶⁷⁸The three countries are Namibia; Lesotho and Tanzania. Though they are still on tier Two Watch List, they were supposed to have been downgraded to tier 3 due to bad performance however were granted a waiver to remain on the same grade. Tier 3 simply means that the governments of such countries do not do not fully comply with the minimum standards and are not making "significant efforts" to comply. For details, see "Trafficking in Persons Report 2015 "Country Narratives: A-Z" United States of America.

have different challenges in addressing human trafficking. Finally, one can establish whether any of the three countries national responses to trafficking particularly legislative, can be used as a legislative model for SADC countries and/or at the sub-regional level in SADC. This is done in the following discussion of the extent to which each selected country prosecutes traffickers; protect victims and prevention mechanisms that are available in each country.

5.6 Human Trafficking in Mozambique

Mozambique is a source and possibly a destination country for men; women and children trafficked for the purposes of forced labour and sexual exploitation.⁶⁷⁹ Girls are often exploited as prostitutions in bars, roadside clubs, and restaurants in border towns and overnight stopping points along Mozambique's southern transport corridor that links Maputo, Swaziland, and South Africa.⁶⁸⁰ The Mozambican government ratified both the CTOC and the Palermo Protocol on 20 September 2006.⁶⁸¹ By ratifying both these instruments, Mozambique became obliged to adopt comprehensive domestic legislation that specifically criminalises human trafficking.⁶⁸² Due to the fact that Mozambique has a monist constitutional framework, international law does not need to be translated into national law.⁶⁸³ This then means that the CTOC and Palermo Protocol entered into force in the Mozambican legal order and thus became legally binding in the country as per provisions of the Mozambican Constitution.⁶⁸⁴

⁶⁷⁹Gallinetti (n 56) 7.

⁶⁸⁰Trafficking in Persons Report 2014 "Country Narratives: Mozambique" United States of America 283.

⁶⁸¹United Nations Treaty Collection 'United Nations Convention against Transnational Organized Crime'. See also, United Nations Treaty Collection 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.

⁶⁸²United Nations Treaty Collection 'United Nations Convention against Transnational Organized Crime'. See also, United Nations Treaty Collection 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.

⁶⁸³SALC Litigation Manual Series 2013 "Dismantling the Gender Gap: Litigating Cases Involving Violations of Sexual and Reproductive Health Rights: Chapter 2" page 9.

⁶⁸⁴Article 18 of the Constitution of the Republic of Mozambique provides as follows: "Validly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once

Despite the application of international law directly, Mozambique adopted an anti-trafficking legislation, the *Law on Preventing and Combating the Traffic in People* (Mozambican Law 6/2008) on 19 April 2008, which criminalises all forms of human trafficking. Prior to the adoption of this law, trafficking cases were dealt with based on laws on kidnapping, corruption of minors, child labour and immigration.⁶⁸⁵ The Act defines human trafficking as:

Recruitment of persons or harboring persons in order to obtain illicit monetary profit or smuggling of person across country borders to the same end, by resort to threats or use or force, or any other form of coercion, kidnapping, fraud, deception, forced marriage, abuse of authority or vulnerability, or rendering or accepting payment or advantages in order to obtain consent of a person holding authority over another, for purposes of exploitation, which includes prostitution or other forms of sexual exploitation, forced marriage, extraction of human organs, forced labor, slavery or similar practices, as well as servitude.⁶⁸⁶

This definition is consistent with the definition of trafficking in the Palermo Protocol and applies to men, women and children. However, the discussion of the text of the legislation follows to establish to what extent it is similar to the provisions of the Palermo Protocol in terms of prosecution, protection and prevention measures.

5.6.1 Prosecution of Traffickers in Mozambique

In terms of prosecution of traffickers, just like the Palermo Protocol, the Mozambican Act criminalises the recruitment, transportation, harboring or receiving of persons for purposes of human trafficking.⁶⁸⁷ Also false promises of employment, deception and facilitation of adoption of persons for purposes of forced labour, forced marriage, slavery, debt servitude and pornography amongst others are criminalized.⁶⁸⁸ Unlike the

they have been officially published and while they are internationally binding on the Mozambican State. Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received”.

⁶⁸⁵The United Nations Office on Drugs and Crime (UNODC) and the Southern African Development Community (SADC) 2007 ‘A 2005 situational assessment of human trafficking in the SADC region: A survey of South Africa, Zimbabwe and Mozambique’ page 37 and 41.

⁶⁸⁶Article 1 of the Mozambican Law No. 6/2008.

⁶⁸⁷Article 10 of the Mozambican Law no. 6/2008.

⁶⁸⁸Article 10, 11 and 12 of the Mozambican Law no. 6/2008.

Palermo Protocol that only caters for transnational trafficking, the Mozambican Act criminalises human trafficking domestically and internationally.⁶⁸⁹ Although the Act equally criminalises trafficking for purposes of sexual exploitation, unlike the Palermo Protocol it provides a clear definition of what sexual exploitation entails.⁶⁹⁰ In addition, the Palermo Protocol establishes the culpability of only an organized criminal group, whereas the Mozambican Act establishes the culpability of natural and legal persons.⁶⁹¹

The Mozambican Act further goes beyond the Palermo Protocol by providing cases that should be treated as “aggravated circumstances”. An aggravated circumstance occurs where the victim of trafficking falls under the most vulnerable groups in the society such as children, women and the disabled who are incapable of protecting themselves against exploitation.⁶⁹² An aggravated circumstance further occurs when trafficking is committed by the victim’s relative, a person holding a position of authority such as an educator, public authority, an organized crime syndicate, or where the victim is a person in asylum or the victim contracts diseases such as HIV/AIDS.⁶⁹³ In order to effectively prosecute traffickers, different penalties apply for different types of trafficking in Mozambique. For instance, the Act provides a penalty of imprisonment of 16 to 20 years in four cases. Firstly, the penalty applies where a person is trafficked by any means such as under pretext of domestic work in order to subject the person to forced labour, slavery and debt servitude.⁶⁹⁴ Secondly, the penalty applies in cases where a person is trafficked for money or any other advantage for purposes of marriage or selling the person for involvement in pornography and sexual exploitation amongst other things.⁶⁹⁵ Thirdly, it applies in cases of adoption for illicit purposes such as sexual exploitation. Lastly, it applies where a person is transported or kidnapped through threats for

⁶⁸⁹Article 3 of the Mozambican Law no. 6/2008.

⁶⁹⁰In terms of Article 1 and the annexed glossary of the Mozambican Law no. 6/2008 sexual exploitation refers to the involvement of a person in prostitution or production of pornographic material under duress, threat, deception, coercion, abandonment, use of force, abuse of authority, debt servitude, fraud or through abuse of vulnerability.

⁶⁹¹Article 4 of the Mozambican Law no. 6/2008.

⁶⁹²Article 5 (a) of the Mozambican Law no. 6/2008.

⁶⁹³Article 5 (b) to (i) of the Mozambican Law no. 6/2008.

⁶⁹⁴Article 10 of the Mozambican Law no. 6/2008.

⁶⁹⁵Article 11 of the Mozambican Law no. 6/2008.

purposes of removing or selling the internal organs of said person.⁶⁹⁶ The Act also provides a penalty of imprisonment of 8 to 12 years for the acts of those who lease their premises for the promotion of trafficking and those who knowingly benefit financially or otherwise or subject a person to involuntary servitude, forced labor or slavery.⁶⁹⁷ Furthermore, the Act provides a penalty of imprisonment of 2 to 8 years for acts involving the advertisement, printing, transmitting or distribution of material that promotes trafficking as well as for those acts involving the confiscation or destroying of travel documents or personal belongings of trafficked persons to prevent them from leaving the country or seeking help from competent authorities.⁶⁹⁸

With regards to victims of trafficking specifically, the Mozambican courts are authorized to order payment of damages to the victim including compensation for harm or damage caused which is in line with the provisions of the Palermo Protocol.⁶⁹⁹ Where a person is involved in destroying or persecuting informers, witnesses or social activists who report trafficking, the said person shall be subject to imprisonment of up to 1 year and fined for up to 6 months.⁷⁰⁰ Apart from the penalties discussed above, the Act further provides for supplementary penalties, which include the prohibition of commercial activity, if the trafficker conducts such activities for a period of 5 to 10 years and the winding-up of the company, establishment or closure of site where the trafficking occurred for a period of 2 to 6 years.⁷⁰¹ In addition, the trafficker's license to conduct business may be confiscated and cancelled, including prohibition of new activities that, due to their nature, might facilitate trafficking.

In terms of the 2015, TIP Report Mozambique continued to make strong anti-trafficking law enforcement efforts. The latter is supported by the fact that, in 2012, the government managed to secure 23 convictions and in 2013 managed to convict 24

⁶⁹⁶Article 12 and 13 of the Mozambican Law no. 6/2008.

⁶⁹⁷Article 14 and 17 of the Mozambican Law no. 6/2008.

⁶⁹⁸Article 15 and 16 of the Mozambican Law no. 6/2008.

⁶⁹⁹Article 19 (2) (f) of the Mozambican Law no. 6/2008 and article 6(6) of the Palermo Protocol.

⁷⁰⁰Article 25 and 26 of the Mozambican Law no. 6/2008.

⁷⁰¹Article 19 (b) and (c) of the Mozambican Law no. 6/2008.

traffickers and only two defendants were acquitted using the trafficking Act.⁷⁰² All imposed sentences included prison terms ranging from 10 months to 19 years. For instance, in one case, the Judicial Court of the City of Maputo sentenced one convicted offender for transporting his two grand-daughters to South Africa for the purpose of prostitution to 19 years in prison.⁷⁰³ During 2014, the government further initiated investigation of 27 trafficking cases and began prosecution of 44 suspected traffickers and 32 traffickers were successfully convicted.⁷⁰⁴

5.6.2 Protection of Trafficked Victims in Mozambique

The Palermo Protocol requires that in appropriate cases and to the extent possible, State Parties must under its domestic law give assistance to and protection of victims of trafficking.⁷⁰⁵ As such, the Mozambican Act broadened the scope of the Palermo Protocol by not only providing protection to trafficking victims, but by further providing protection to informers and witnesses and social activists.⁷⁰⁶ Before investigations and prosecutions can take place, the identification of victims of trafficking is important. The Act unlike the Palermo Protocol that has no provisions for victim identification, provides that the victim himself or herself or a third party such as citizens, employees of immigration services, border police and doctors all have a duty to file a complaint to the relevant authorities when suspecting that a person is a victim of trafficking.⁷⁰⁷ The police authorities themselves can thereafter independently or through reports of the aforementioned people initiate the investigative process necessary to prosecute the suspected traffickers.⁷⁰⁸ Considering the fact that victims are often afraid to approach the relevant authorities due to their illegal status, fear of deportation to their countries and fear of prosecution for participating in illegal acts during the trafficked period, the

⁷⁰²Trafficking in Persons Report 2014 “Country Narratives: Mozambique” United States of America 284.

⁷⁰³Trafficking in Persons Report 2014 “Country Narratives: Mozambique” *ibid*.

⁷⁰⁴Trafficking in Persons Report 2015 “Country Narratives: Mozambique” United States of America 254.

⁷⁰⁵Article 6 of the Palermo Protocol.

⁷⁰⁶Chapter III of the Mozambican Law no. 6/2008.

⁷⁰⁷Article 8 and 9 (1) of the Mozambican Law no. 6/2008.

⁷⁰⁸Article 9 (2) of the Mozambican Law no. 6/2008.

Act clearly recognizes that the support of every Mozambican is important to effectively deal with the high rates of unreported trafficking cases and to combat this crime.

It is important to note that special protection is assured by the Act in certain cases contrary to the Palermo Protocol such as when the victim has illegally entered the country undocumented, is pregnant, has a disability or has contracted HIV or AIDs or any other sexually transmitted disease resulting from being trafficked.⁷⁰⁹ Furthermore, victims are not criminally liable for the commission of trafficking-related acts they are coerced into, whether or not they consent to participating.⁷¹⁰ Therefore, the victims' consent may not be used as a ground of defense against the crime of trafficking. The Act further entitles victims of trafficking to witness protection when undergoing judicial proceedings in order to protect their identities during and after those criminal proceedings and legal representation should be free and they must be duly informed of their rights.⁷¹¹ In order to ensure that those identified victims are assisted in terms of recovering, accessing rehabilitation facilities and re-integrating them into society under this Act they are entitled to emergency shelters and other appropriate accommodation, medical assistance, psychological monitoring, counseling, vocational education and training as well as state implemented supervision, follow up of whether or not the victim is successfully recovering, is rehabilitated and re-integrated into society.⁷¹² When foreign victims have to be repatriated to their home countries, the government has to ensure that certain conditions are cumulatively met such as safety of that person during the repatriation process, their safety in the country they are being conveyed to and ensure that there are minimal risks of that victim being re-trafficked amongst other things.⁷¹³ Temporary residence permits are issued to foreign victims of trafficking under the certain conditions, such as when the victim is located in Mozambique, agrees to cooperate with the authorities in investigations and prosecutions conducted and is in

⁷⁰⁹Article 20 of the Mozambican Law no. 6/2008.

⁷¹⁰Article 18 and 20 of the Mozambican Law no. 6/2008.

⁷¹¹Article 20, 21 and 22 of the Mozambican Law no. 6/2008.

⁷¹²Article 21 of the Mozambican Law no. 6/2008.

⁷¹³Article 23 of the Mozambican Law no. 6/2008.

custody of relief organisations.⁷¹⁴ The Protection offered to informers, witnesses and social activists include that they may not be subjected to disciplinary action, have their professional careers affected or be persecuted for reporting trafficking.⁷¹⁵

While the letter of the Mozambican Act is clear on measures afforded to victims of trafficking, the implementation of such provisions still remain a problem. According to the 2015 TIP Report, the Mozambican government still lacked formal procedures for identifying potential victims of trafficking and failed to provide detailed information on the number identified and assisted during the year. This is based on the fact that the multi-sectorial care mechanism approved in 2012 to coordinate referral and protection for female victims remains inoperative to date.⁷¹⁶ Furthermore, with regards to victim assistance, the government officials continued to rely on NGOs to provide shelter, counseling, food, and rehabilitation to victims, and only limited in-kind government support was offered to those NGO's. For instance, in 2013, two victims repatriated from South Africa received care at an NGO-run shelter.⁷¹⁷ In 2013, the Ministry of Justice drafted an action plan, which is aimed at guiding the efforts of the Central Office for the Protection of Victims and outlining implementation of the 2012 Law on the Protection of Witnesses and Victims of All Crimes. However, the action plan remains incomplete and has not yet been implemented to date.⁷¹⁸

5.6.3 Prevention of Trafficking in Mozambique

It is the Mozambican government's responsibility to promote, coordinate and undertake actions that tends to prevent and combat trafficking in persons, either directly or through the provisions of legislation applicable to partnerships between the State and civil society.⁷¹⁹ These include awareness campaigns, through mass media or any other

⁷¹⁴Article 24 of the Mozambican Law no. 6/2008.

⁷¹⁵Article 25 and 26 of the Mozambican Law no. 6/2008.

⁷¹⁶Trafficking in Persons Report 2015 "Country Narratives: Mozambique" United States of America page 255.

⁷¹⁷Trafficking in Persons Report 2014 "Country Narratives: Mozambique" United States of America

⁷¹⁸Trafficking in Persons Report 2015 "Country Narratives: Mozambique" United States of America page 255.

⁷¹⁹Article 27 of the Law 6/2008.

proven effective, on recruiting techniques used by traffickers, strategies employed to keep victims subdued, and forms of abuse the victims are subject to, as well as on the relevant authorities, organizations and bodies that may render assistance or convey information.⁷²⁰ This is in addition to protection and social reinsertion of victims and investigation and data collection on victims, especially women and children at the communities where they reside as well as coordination with local government including community authorities for combat against situations of vulnerability.⁷²¹ The Government is also under an obligation to provide specialist training for immigration, border patrol and customs officers.⁷²²

Mozambique has initiated various preventative mechanisms to deal with trafficking. For instance, in 2013, the Attorney General's office partnered with provincial governments in order to sponsor the establishment of inter-ministerial "reference groups" in seven provinces which consists of provincial officials, police, border guards, social workers, NGOs, and faith-based organizations.⁷²³ The reference groups coordinated regional efforts to address trafficking, domestic violence, and child abuse crimes. In addition, these reference groups organized awareness campaigns in Nampula, Xai-Xai, and Ressano Garcia, with prosecutors and police participating in marches through the regional capitals, which successfully reached hundreds of community members.⁷²⁴ Furthermore, the Ministry of Interior's Women and Children Victim Assistance Units (GAMC) formed trafficking interest groups in select schools in Maputo in order to carry out awareness activities for more than three-thousand five hundred teachers, students, and parents on how to prevent trafficking in persons.⁷²⁵ The 2015 TIP Report indicate that the government officials and NGO's conducted an awareness campaign for 150 members of a transportation association on how to identify trafficking victims.⁷²⁶ In addition 7 anti-trafficking lectures for 600 government and civil sector personnel were

⁷²⁰Article 27 (a) to (d) of the Law 6/2008.

⁷²¹Article 27 of the Law 6/2008.

⁷²²Article 28. of the Law 6/2008.

⁷²³Trafficking in Persons Report 2014 "Country Narratives: Mozambique" United States of America 285.

⁷²⁴Trafficking in Persons Report 2014 "Country Narratives: Mozambique" *ibid.*

⁷²⁵Trafficking in Persons Report 2014 "Country Narratives: Mozambique" *ibid.*

⁷²⁶Trafficking in Persons Report 2015 "Country Narratives: Mozambique" United States of America 255.

hosted by the government.⁷²⁷ Despite such preventative mechanisms, the government was however unable to reduce the demand for commercial sex acts during the year of 2013.⁷²⁸ It is clear that Trafficking legislation of Mozambique covers all aspects addressed in the Palermo Protocol but also goes further to cover areas not adequately addressed by the Protocol. For instance, it covers concepts not defined in the Palermo like the inclusion of both inter and intra-trafficking; criminalisation of both natural and legal persons as well as protection of not only victims of human trafficking but also of witnesses, informers and social activists amongst other. This is thus a broader and inclusive definition of human trafficking than what the Palermo Protocol provides for

5.7 Human Trafficking in South Africa (SA)

South Africa is often referred to as the economic giant of Africa and is seen as a source, main destination and transit country for human trafficking within the SADC region.⁷²⁹ South Africa also has an added problem of porous borders, which makes border control difficult as it shares borders with six other countries.⁷³⁰ South Africa has 72 official ports of entry and a number of unofficial ports of entry where people come in and out without being detected.⁷³¹ In addition, the South African economy is still one of the most vibrant in the region, thereby attracting immigrants who are looking for better employment opportunities. Hence, human traffickers are equally attracted to the country.⁷³²

South Africa ratified both the CTOC and Palermo Protocol on 20 February 2004 thereby committing itself to adopting legislation that will criminalise and combat human trafficking.⁷³³ Although South Africa ratified these instruments, it cannot directly apply

⁷²⁷Trafficking in Persons Report 2015 “Country Narratives: Mozambique” United States of America 255.

⁷²⁸2014 TIP Reprint.

⁷²⁹ACP 2011 “Global phenomenon, invisible cases: human trafficking in sub-Saharan Africa, the Caribbean and the Pacific” Background note ACPOBS/2011/BN01 page 8.

⁷³⁰South Africa shares borders with Botswana, Lesotho, Mozambique, Namibia, Swaziland and Zimbabwe.

⁷³¹Sr Melanie O’ Connor HF (n 282) 2.

⁷³²The United Nations Office on Drugs and Crime (UNODC) and the Southern African Development Community (SADC) 2007 ‘A 2005 situational assessment of human trafficking in the SADC region: A survey of South Africa, Zimbabwe and Mozambique’ page 7.

⁷³³United Nations Treaty Collection ‘United Nations Convention against Transnational Organized Crime’. See also, United Nations Treaty Collection ‘Protocol to Prevent, Suppress and Punish Trafficking in

international law due to the fact that it has a dualist constitutional framework. Therefore, international law needs to be first translated into national legislation before it can be applied by national courts. The South African Constitution provides that an act of incorporation by parliament is required in order for an international agreement to become law in the country.⁷³⁴ It is therefore argued that the CTOC and the Palermo Protocol have been incorporated into domestic law on the basis that the SA government adopted the Prevention of Organised Crime Act and the Prevention and Combatting of Trafficking in Persons Act 7 of 2013, which give effect to the standards of international instruments dealing with trafficking.⁷³⁵

Prior to 2013, South Africa used a fragmented approach either common law or various statutory provisions to address human trafficking and prosecute human traffickers.⁷³⁶ For instance, in order to prosecute any trafficker under common law, he/she had to be charged with rape; sexual assault, slavery, kidnapping, abduction and murder or attempted murder just to name a few.⁷³⁷ With regards to statutory provisions various statutes were used for prosecuting traffickers. For instance, the Criminal Law (Sexual Offenses and Related Matters) Amendment Act which prohibits the sex trafficking of children and adults and prescribes punishments of up to 20 years' imprisonment for such offenses.⁷³⁸ The Basic Conditions of Employment Act of 1997 (BCEA) which prohibits forced labor with a maximum imprisonment of 3 years. The Children's Amendment Act which prescribes penalties of 5 years' to life imprisonment or alternatively fines for the use, procurement, or offer of a child for slavery, commercial sexual exploitation, or to commit crimes.⁷³⁹ Furthermore, the Prevention of Organized Crime Act of 1998 which was sometimes used to supplement the Sexual Offences Act

Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.

⁷³⁴Section 231 of the Constitution of the Republic of South Africa of 1996.

⁷³⁵The Prevention of Organised Crime Act 121 of 1998 and the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 (hereinafter referred to as the TIP Act).

⁷³⁶Kruger HB and Oosthuizen H 2012 "South Africa - safe haven for human traffickers? Employing the arsenal of existing law to combat human trafficking" (15) *Potchefstroom Electronic Law Journal*.

⁷³⁷Kruger HB and Oosthuizen H *ibid*.

⁷³⁸Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 Of 2007.

⁷³⁹The Basic Conditions of Employment Act 75 of 1997.

to add additional charges such as money laundering, racketeering, and criminal gang activity in order to create more stringent penalties against trafficking offenders.⁷⁴⁰

A number of cases indicate how both common law and legislation was successfully used in such cases. For an example, in *National Director of Public Prosecutions v Phillips and Others*, the accused was charged with common law or statutory crimes of human trafficking.⁷⁴¹ In this case, charges were laid against Phillips both under the Sexual Offences Act 23 of 1957 for keeping a brothel and living of the proceeds of prostitution and under the Aliens Control Act 96 of 1991 for unlawfully employing illegal immigrants to have sex with clients.⁷⁴² Unfortunately, in this case the focus was mainly on a restraint order previously granted in terms of the Prevention of Crime Act against Phillips and various companies and close corporations owned by him. In the case of *Mvuleni Jezile v the State* discussed in detail above,⁷⁴³ the court charged the accused with rape, assault with intent to cause grievous bodily harm, common assault and human trafficking using the Children's Act and Sexual Offences Act amongst other instruments. These are some of the cases that indicate how South African courts handled trafficking cases using different approaches in the absence of a unified trafficking legislation.

On 30 July 2013, the *Prevention and Combating of Trafficking in Persons Act* (TIP Act) was signed into law and came into effect on 9 August 2015.⁷⁴⁴ South Africa now has a single trafficking statute that gives effect to the country's obligation under Palermo Protocol and caters for human trafficking holistically and comprehensively.⁷⁴⁵ The TIP Act defines human trafficking as:

⁷⁴⁰The Prevention of Organised Crime Act 121 of 1998.

⁷⁴¹*National Director of Public Prosecutions v Phillips and Others* 2002 4 SA 60 (W); *Phillips and Others v National Director of Public Prosecutions* 2003 6 SA 447 (SCA) (hereinafter referred to as *NDPP v Phillips*).

⁷⁴²*NDPP v Phillips* in paragraph 5.

⁷⁴³Refer to paragraph 5.2 in page 133 to 136 of this chapter.

⁷⁴⁴Government Gazette 36715 of 29 July 2013 and Proclamation R. 32 Government Gazette 39078 of 7 August 2015.

⁷⁴⁵SA News 2013 'Human trafficking bill signed into law' SA news.gov.za. See also, the Prevention and Combating of Trafficking in Persons Act No. 7 of 2013.

Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of a threat of harm; the threat or use of force or other forms of coercion; the abuse of vulnerability; fraud; deception; abduction; kidnapping; the abuse of power; the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons. Any person, who adopts a child, facilitated or secured through legal or illegal means; or concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any form or manner, is guilty of an offence.⁷⁴⁶

The definition of trafficking contained in the TIP Act reflects and is in line with the definition of trafficking in the Palermo Protocol. In that, both instruments apply to men, women and children. Similar to the situation in Mozambique, the TIP Act indicate some similarities as well as differences with the Palermo Convention with regards to offences associated with trafficking, prosecution, protection and prevention measures which are discussed in detail below.

5.7.1 Prosecution of Traffickers in South Africa

The TIP Act in its definition criminalises the recruitment, transportation, harboring or receiving of persons for purposes of human trafficking just like the Palermo Protocol. Also false promises of employment, deception for purposes of forced labour, slavery, debt servitude and prostitution amongst others are criminalized. However, the TIP Act expands the Palermo Protocol's definition in various ways. First, the TIP Act is broadened to include *delivery, procurement, capture, removal, sale, exchange, lease or disposal of a person*, or the *adoption of a child through legal or illegal means*.⁷⁴⁷ Second, the TIP Act also includes *threat of harm, debt bondage and kidnapping* as a means by which a person can be trafficked.⁷⁴⁸ Third, Unlike the Palermo Protocol the TIP Act defines "exploitation" to also include the impregnation of a female person

⁷⁴⁶Section 4 (1) and (2) of the TIP Act.

⁷⁴⁷Section 4 of the TIP Act. See also, LRC 2011 "Trafficking of Persons: A South African Legislative Perspective" page 21.

⁷⁴⁸Section 4 (1) of the TIP Act. See also, LRC (n 748).

against her will with the sole purpose of selling the child after birth and further gives the definition of what sexual exploitation entails.⁷⁴⁹ The TIP Act also caters for both domestic and international trafficking, which is contrary to the Palermo Protocol⁷⁵⁰ In addition, the TIP Act is not limited to the culpability of only an organized criminal group like the Palermo Protocol.

Both the TIP Act and the Palermo Protocol indicates that consent of a victim of trafficking is irrelevant and cannot be used as a defense. . Therefore the fact that a child who is a victim of trafficking or a person having authority over the child has consented to the intended exploitation or the intended exploitation did not occur even if *none of the means* referred to in both instruments of the trafficking definition *have been used*.⁷⁵¹ In respect of adult victims of trafficking, both instruments consider consent irrelevant only if *any of the means* set out in these instruments have *been used*.⁷⁵²

To ensure effective prosecution of traffickers the Act offers different penalties for different types of trafficking in South Africa ranging from life imprisonment to as a maximum sentence to five year imprisonment as well as a fine. Firstly, a trafficker who delivers, recruits, transports, sells another person by using one or more of the various means as well as a person who is involved in the adoption of a child or forced marriage for purposes of exploitation may be subject to a fine not exceeding R100 million or imprisonment (including life imprisonment) without an option of a fine or both.⁷⁵³ Secondly, a person who intentionally engages in conduct that causes another person to enter into debt bondage, or a person who intentionally benefits financially or otherwise from the services of a trafficking victim or any person who allows an unauthorized person to gain access to and discloses a trafficking victims information shall be liable to a fine or imprisonment for not more than 15 years or both.⁷⁵⁴ Thirdly, any person who

⁷⁴⁹Section 1 of the TIP Act. In terms of this Act sexual exploitation means the commission of any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law.

⁷⁵⁰Section 4 of the TIP Act.

⁷⁵¹Section 11 (1) (a) of the TIP Act and article 3 (c) of the Palermo Protocol.

⁷⁵²Section 11 (1) (b) of the TIP Act and article 3 (b) of the Palermo Protocol.

⁷⁵³Section 4(1) and (2) and 13 of the TIP Act.

⁷⁵⁴Section 5, 7, 13 and 23 of the TIP Act.

has in his/her possession, or intentionally destroys, confiscates or conceals the identity document, passport or travel document of a trafficking victim or any conduct that facilitates trafficking in persons such as leasing of premises, shall be liable for a fine or imprisonment not exceeding 10 years or both.⁷⁵⁵ Finally, an electronic communications service provider which fails to comply with the provisions of the act or a carrier who transports a person in or outside the republic and knows, suspects or fails to comply with the provisions of this act or a person who knows or ought to have known or suspects that a person is a child victim of trafficking or any person who knows or ought to have known or suspects that a person is an adult victim of trafficking and fails to report it is liable to a fine or imprisonment for a period not exceeding 5 years or both.⁷⁵⁶ In sentencing the perpetrators, the TIP Act further list a number of aggravating factors that a court imposing the sentence must take into account. For instance, factors like the significance of the role of the convicted person in the trafficking process; whether the convicted person is responsible for the victim becoming addicted to substance abuse; the condition in which the victim was kept and whether the victim was a child amongst are some of such factors.⁷⁵⁷

What is most unique about the TIP Act is the fact that it gives South African courts extra-territorial jurisdiction to prosecute acts of trafficking committed outside the country. This then means that a suspected trafficker can be prosecuted in South Africa regardless of whether or not trafficking constitutes an offence in the country where it was committed.⁷⁵⁸ This will only happens if the person to be charged is a South African citizen; is ordinarily resident in South Africa; has committed the offence against a SA citizen or a person who is ordinarily resident in the country; if present in SA after the commission of the offence; is for any reason not extradited by SA or there is no

⁷⁵⁵Section 6, 8 (1) and 13 of the TIP Act.

⁷⁵⁶Section 8 (3), 9, 18 (9), 19 (13) and 13 of the TIP Act.

⁷⁵⁷Section 14 of the TIP Act: other “aggravating factors” include, whether the victim suffered abuse and the extent thereof; the physical and psychological effects the abuse had on the victim; whether the offence formed part of organized crime; the period of captivity of the victim; the nature of the relationship between the victim and the convicted person; the state of the victims mental health; and whether the victim had any physical disability.

⁷⁵⁸Section 12 of the TIP Act.

application to extradite that person or is a juristic person or a partnership registered in terms of any law in SA.⁷⁵⁹

Though the TIP Act is a recent legislation, which has not been tried and tested, and only came into effect August 2015, there is hope that trafficking offenders will be prosecuted successfully. This is as a result of the past performance of the SA government to prosecute offenders using a fragmented approach. South Africa was able to initiate 22 prosecutions and convicted 9 offenders in 2010.⁷⁶⁰ For instance, in 2013, the government initiated prosecutions of twelve suspected sex traffickers and two suspected labor traffickers and eventually managed to convict three traffickers.⁷⁶¹ In July 2011 the Pretoria Regional Court convicted a trafficker (Aldina de Santos) and sentenced him/her to life imprisonment for trafficking three Mozambican girls for commercial sex in 2008.⁷⁶² In February 2012 the Mitchell's Plain Magistrates Court sentenced a man to a 15 year imprisonment for the sex trafficking of a Swazi woman after fraudulently offering her a job.⁷⁶³ In *S v Mabuza and Chauke* case, the first accused who is a prominent businessman was convicted by the Graskop Magistrate's Court for the sex trafficking of the Mozambican girls and was sentenced to 8 life terms and by far this has been the most severe penalty ever applied in a trafficking case in South Africa.⁷⁶⁴ The second accused Chauke who is a Mozambican citizen received a sentence of 20 years, suspended for 5 years and was handed to Home Affairs for deportation back to Mozambique.⁷⁶⁵ In March 2015, the Western Cape High Court upheld an appeal of one Mvumeleni Jezile who was found guilty by the Wynberg Regional Court for the trafficking and rape of a 14 year-old girl. The accused was sentenced to 22 years in prison under both rape and trafficking charges for the

⁷⁵⁹Section 12 of the TIP Act.

⁷⁶⁰Trafficking in Persons Report 2012 "Country Narratives: South Africa" United States of America.

⁷⁶¹Trafficking in Persons Report 2014 "Country Narratives: South Africa" United States of America page 349.

⁷⁶²Trafficking in Persons Report 2012 "Country Narratives: South Africa" United States of America.

⁷⁶³Trafficking in Persons Report 2012 "Country Narratives: South Africa" United States of America.

⁷⁶⁴*S v Mabuza and Chauke* SHG 9/13 21 November 2013 (unreported case) refer to InfoUpdate-Recent Judgments. Magistrate Courts. See also, Trafficking in Persons Report 2015 "Country Narratives: South Africa" United States of America page 309.

⁷⁶⁵*S v Mabuza and Chauke* SHG 9/13 21 November 2013 (unreported case) refer to InfoUpdate-Recent Judgments. Magistrate Courts.

purchase, exploitation, and abuse of the girl under the pretext of *ukuthwala* tradition of arranged marriages.⁷⁶⁶

5.7.2 Protection of Trafficked Victims in South Africa

The TIP Act sets out various obligations and requirements that must be complied with by all SA citizens, the government and institutions aimed at protecting victims of trafficking. While the Palermo Protocol gives no specific guidance as to the special measures that should be undertaken by governments to provide for victims of trafficking, the TIP Act distinguishes between three types of victims: foreign victims, child victims and adult victims. With regards to foreign victims the Director-General of Home Affairs may grant a foreign victim a visitor's visa in order to enable the victim to make informed decisions regarding his or her cooperation with law enforcement and prosecuting authorities in the investigation and prosecution of a trafficking case with a reflection period not exceeding 3 months.⁷⁶⁷ Should the foreign victim after a period of 30 days decide not to cooperate with law enforcement, that victim may be repatriated which then implies that this provision is conditional.⁷⁶⁸ Repatriation is done subject to certain considerations such as the safety of that person in the country to which he/she is repatriated and that the state should take reasonable steps to find suitable family members or an institution that renders assistance to victims of trafficking in that country.⁷⁶⁹ The main problem with this clause lies in the fact that it appears as though foreign victims will not be afforded protection and relevant services as long as they are not willing to cooperate with the relevant authorities.

With regards to child victims the TIP Act provides that, any person who or organisation that knows or ought to have reasonably known or suspects that a child is a victim of trafficking is obliged to immediately report to a police official in order for investigations to be conducted.⁷⁷⁰ That police official must deal with the child in terms of certain

⁷⁶⁶*Jezile v S and Others* (A 127/2014) [2015] ZAWCHC.

⁷⁶⁷Section 15 (1) of the TIP Act.

⁷⁶⁸Section 15 (2) of the TIP Act.

⁷⁶⁹Section 31 and 32 of the TIP Act.

⁷⁷⁰Section 18 of the TIP Act.

provisions of the Children's Act and may place that child in temporary safe care. If a finding is made that, an illegal foreign child is a victim of human trafficking and is in need of care and protection that will serve as authorisation for allowing the child to remain in the country for the duration of the children's court order.⁷⁷¹ Should any person fail to comply with all these provisions they are deemed guilty of an offence.⁷⁷²

In respect of adult victims any person who or organisation that knows or ought to have reasonably known or suspects that an adult person is a victim of trafficking is obliged by this Act to immediately report to a police official in order for investigations to be conducted.⁷⁷³ A police official, to whom the police report was made, must where necessary and as a measure of last resort take the adult person to protective custody after obtaining that person's written consent first in order to protect that person from an immediate threat. Other alternatives are to place that adult victim in temporary safe care or an accredited organisation with a valid certificate of accreditation.⁷⁷⁴ The requirement that organisations must be accredited is excellent for the proper protection of victims and ensuring that they receive all the help, they can get as per governmental standards. However, it also creates a challenge for those organisations such as churches and NGO's that might have contact with adult victims and want to provide temporary shelter for those victims because by law it means they are not allowed to accommodate those victims at all unless they are accredited.

So far South Africa has been doing well regarding the provision of shelter for victims even in the absence of trafficking legislation. For instance, the Department of Social Development funded 13 accredited multipurpose shelters, which hosted 80 foreign victims and 13 South African adult trafficking victims.⁷⁷⁵ This is an increase from the accommodation of 59 victims in 2011 and 87 victims in 2012.⁷⁷⁶ However, in 2015, the

⁷⁷¹Trafficking in Persons Report 2014 "Country Narratives: Mozambique" United States of America.

⁷⁷²Section 18 (9) of the TIP Act.

⁷⁷³Section 19 of the 2013 Trafficking Act.

⁷⁷⁴Section 19 and 24 of the TIP Act.

⁷⁷⁵Trafficking in Persons Report 2014 "Country Narratives: South Africa" United States of America 350.

⁷⁷⁶Trafficking in Persons Report 2014 "Country Narratives: South Africa" *ibid*.

DSD funded shelters, which only managed to host 41 victims, which is a significant decrease from the 93 victims assisted in 2013.⁷⁷⁷

The DSD further continued oversight of 17 NGO-run safe houses designed to temporarily shelter victims before they reach an accredited shelter inclusive of a nine-week rehabilitation program that was run to address the psycho-social well-being of victims with all expenses paid for the stay of victims at rehabilitation centers for overcoming drug addiction.⁷⁷⁸

In addition to these provisions, the Justice and Constitutional Department issued directives pertaining to the TIP Act.⁷⁷⁹ These directives, instruct certain governmental departments such as the South African Police Service (SAPS), members of the Prosecuting Authority and Home Affairs, Labour and Social Development officials on how to carry out functions related to the TIP Act. Those functions include following a victim centered approach, confidentiality, reporting duties in terms of the act, taking into account the manner in which trafficking cases must be reported, the vetting of interpreters, attributes of interpreters, telephone interpretation and measures to protect victims and witnesses when necessary.⁷⁸⁰ The directives also have annexures that include a reporting statement, oath or affirmation, guidelines for interpreters and guidelines for contingency plans to ensure safety of victims and witnesses.⁷⁸¹

South Africa's immigration laws have also undergone an intense revision particularly regulations concerning travelling with children to and out of the country. The minister of Home Affairs adopted these regulations in May 2014. These regulations have been introduced with the main aim of curbing child trafficking amongst other things. For instance, Regulation 6 (12) provides that where parents are travelling with a child, such parents must produce an unabridged birth certificate of the child reflecting the

⁷⁷⁷Trafficking in Persons Report 2015 "Country Narratives: South Africa" United States of America 310.

⁷⁷⁸Trafficking in Persons Report 2015 "Country Narratives: South Africa" *ibid*.

⁷⁷⁹Department of Justice and Constitutional Development "Directives in terms of section 44(1)(A) of the Prevention and Combating of Trafficking in Persons Act, 2013" (hereinafter referred to as DoJ & CD directives).

⁷⁸⁰Refer to DoJ & CD directives page 2 to 15.

⁷⁸¹Refer to DoJ & CD directives page 16 to 28.

particulars of both the parents of the child.⁷⁸² In the case of one parent travelling with a child, he or she must produce an unabridged birth certificate and produce an affidavit from the other parent giving authorization to him or her to travel with the child. In respect of a legal guardian, a court order granting full parental responsibilities and rights or legal guardianship in respect of the child must be granted and where applicable, a death certificate of the other parent registered as a parent of the child on the birth certificate must be furnished.⁷⁸³ The DHA has provided a grace period to allow children to travel without unabridged certificates, which ended on 1 June 2015.⁷⁸⁴ However, the effectiveness of these changes in regulations is questionable given the fact that in the past they were existing requirements for instances where parents were children however, traffickers were still able to traffic children successfully. Perhaps if government dealt with the issue of corruption and porous borders then these changes would stand a better chance of addressing this crime.

Despite the success in combating and preventing trafficking in South Africa, there have also been hurdles that continue to inhibit progress in providing justice and protection for victims of trafficking. For instance, there is still a lack of language interpretation for foreign victims of trafficking which impedes on the investigation of trafficking cases, prosecution of suspected offenders and screening of victims, but with the DoJ & CD directives there might be change on the basis that the directives provide for measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic. These include, keeping a list of interpreters, vetting them, checking their attributes and in some instances making available telephonic interpretation services.⁷⁸⁵ Furthermore, the failure of government to provide

⁷⁸²Regulation 6 (12) (a) and (b) of the Immigration Regulations R. 413 *Government Notice* 37679 of 22 May 2014.

⁷⁸³Regulation 6 (12) (a) and (b) of the Immigration Regulations *ibid*.

⁷⁸⁴Immigration Regulations R. 413 *Government Notice* 37679 of 22 May 2014 Immigration Directive No. 11 of 2014: Children travelling without unabridged birth certificates.

⁷⁸⁵Directive 7 of the Department of Justice and Constitutional Development "Directives in terms of section 44(1) (A) of the Prevention and Combating of Trafficking in Persons Act, 2013".

adequate security for victims at places of safety has resulted in some organisations refusing to accept trafficking victims.⁷⁸⁶

5.7.3 Prevention of Trafficking in South Africa

The South African government in terms of the 2014 TIP Report have increased efforts to prevent human trafficking through awareness-raising campaigns in schools. They further put in place efforts to coordinate national anti-trafficking policies and planning. The Department of Justice particularly coordinated interdepartmental policy development to ensure that the department is prepared for the eventual implementation of the anti-trafficking legislation and to further provide funding for local awareness and training events.⁷⁸⁷ For instance, the DOJ supported awareness-raising efforts by including events at malls and door-to-door campaigns in high-risk trafficking areas such as Northwest and Mpumalanga provinces, which reached 13,000 residents. Between 2012 and 2013, the government spent an equivalent of approximately \$270,000 in trafficking awareness-raising and training initiatives.⁷⁸⁸ Add to that, according to the 2014 TIP Report the NPA, DoJ, SAPS, and Thuthuzela staff held 26 awareness-raising campaigns at high schools, which related to topics such as sexual offenses, children's rights, victim identification, and how to report abuses. These latter sessions reached approximately 10,100 students. In May 2013 and February 2014, the DOJ organized a two week-long strategy session, where government stakeholders developed and reviewed implementing regulations and worked with civil society partners to develop an updated national action plan the draft of which was released for interagency and NGO comment in February 2014.⁷⁸⁹ The TIP Act covers all aspects of the Palermo Protocol but also goes further to broaden the definition of trafficking and address some of the areas not adequately addressed by the Protocol. For instance, the TIP Act, extend the definition of trafficking to include both inter and intra-trafficking, criminalises both natural

⁷⁸⁶Trafficking in Persons Report 2014 "Country Narratives: South Africa" United States of America 350.

⁷⁸⁷Trafficking in Persons Report 2014 *ibid.*

⁷⁸⁸Trafficking in Persons Report 2015 "Country Narratives: South Africa" United States of America 311.

⁷⁸⁹Trafficking in Persons Report 2014 "Country Narratives: South Africa" United States of America 350.

and legal persons and further classify victims of human trafficking in different categories for effective and proper protection.

5.8 Human Trafficking in the Democratic Republic of Congo (DRC)

The DRC is a source, destination and possibly a transit country for men; women and children trafficked mainly for forced labour and sexual exploitation.⁷⁹⁰ According to a report conducted in 2012 in the DRC sex trafficking was found to take place on a large scale and seems related to the extraction of minerals from mines and it is done by armed groups or national armies who forcibly remove young civilian girls and women from homes to yield labor related to the mines and also sexual favors related to those guarding and operating the mines.⁷⁹¹ In terms of the 2015 TIP report some Congolese women are forcibly prostituted in brothels or informal camps, including in markets, bars, and bistros in mining areas, by loosely organized networks, gangs, and brothel operators.⁷⁹² Other prevalent types of human trafficking in the DRC include forced marriages whereby young girls are married without their consent, many times by their own families.⁷⁹³ In addition to the latter, some cultural practices such as “le vat” are performed and it is practiced when the husband dies and the brother inherits his sister-in-law irrespective of her consent.⁷⁹⁴ According to some scholars, the DRC is the only country in SADC known for trafficking child soldiers.⁷⁹⁵

The DRC acceded to both the CTOC and the Palermo Protocol on 28 October 2005 and as such, the country has an obligation to ensure that human trafficking specific

⁷⁹⁰Gallinetti (n 56) 5. See *also*, Trafficking in Persons Report 2015 “Country Narratives: DRC” United States of America 126.

⁷⁹¹Richard H. 2012 “Preliminary Assessment of Trafficking in the Democratic Republic of Congo (DRC)” A Report by the Sanela Diana Jenkins Human Rights Project at UCLA page 2 and 4 available at http://iccforum.com/media/sdj_human_rights_project/201203_SDJ_Human_Rights_Project_at_UCLA_Report-Trafficking_in_the_DRC.pdf.

⁷⁹²Trafficking in Persons Report 2015 “Country Narratives: DRC” United States of America 126.

⁷⁹³Richard H (n 792) 5.

⁷⁹⁴Richard H (n 792) 6.

⁷⁹⁵Britton H. E and Dean L. A (n 55).

legislation is adopted in order to comply with its international obligations.⁷⁹⁶ Due to the fact that the DRC has a monist legal regime, international law does not need to be translated into national law. This then means that the CTOC and Palermo Protocol entered into force in the DRC legal order and thus became legally binding in the country as per provisions of the DRC Constitution.⁷⁹⁷ To date, the Congolese government has not adopted a comprehensive anti-trafficking law, but continues to address human trafficking using a fragmented approach. Those provisions addressing human trafficking as a crime are found within the Law 06/018 amending the Penal Code, the Labour Code and the Law 09/001 on the Protection of the Child.

5.8.1 Prosecution of traffickers in the DRC

Prosecution and convictions of traffickers in the DRC has been difficult and the question remains on whether this may be attributed to the lack of anti-trafficking legislation or not. However, due to a lack of data and literature on trafficking in the DRC most of the information relied on is from the Trafficking reports. The government has initiated a number of cases relating to human trafficking, the offenders are sometimes released and criminal cases abandoned. For instance, in 2011, 11 suspected trafficking offenders were arrested for child labour; however, all those suspects were conditionally released pending trial.⁷⁹⁸ In 2012 at the Juvenile Court of Pointe-Noire 8 of the alleged labour trafficking offenders were released, and the courts also suspended the hearing of the civil case and failed to open a criminal investigation in this case in 2013.⁷⁹⁹ In May 2013, authorities arrested four offenders suspected of the trafficking and subsequent kidnapping of four previously identified trafficking victims; however, officials later

⁷⁹⁶ United Nations Treaty Collection 'United Nations Convention against Transnational Organized Crime'. See also, United Nations Treaty Collection 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.

⁷⁹⁷ Article 215 of the Democratic Republic of the Congo's Constitution of 2005 with Amendments through 2011 provides that "the international treaties and agreements, regularly concluded, have, on their publication, an authority superior to that of the laws, under reserve for each treaty and agreement, of its the application by the other party".

⁷⁹⁸ Trafficking in Persons Report 2012 "Country Narratives: DRC" United States of America.

⁷⁹⁹ Trafficking in Persons Report 2014 "Country Narratives: DRC" United States of America 143.

released the offenders without charge.⁸⁰⁰ In 2014, the government also did not prosecute or convict anyone for committing any form of trafficking, including trafficking crimes involving child soldiers, which contributed to placing the country in the Tier 3 placement.⁸⁰¹ Failure to prosecute and convict cannot just be attributed to the absence of anti-trafficking legislation, as other countries in SADC like South Africa were able to prosecute and convict trafficking offenders using a fragmented approach explained above.

To curb the deficiency in the system, the Congolese government may resort to using different approaches like the use of various legislative provisions of the Child Protection Act of 2010; Labour Code and the Penal Code. For instance, article 60 of the Child Protection Act prohibits the trafficking, sale, trading and exploitation of children while article 115 of the same Act prescribes penalties of hard labor for an undefined period of time. Further, article 68 of the Act prohibits the worst forms of child labor, including the forced labor and prostitution of children, for which while Article 122 prescribes penalties of three months' to one year's imprisonment or fines between approximately \$110 and \$1,080.⁸⁰² In terms of the countries' Labor Code, article 4 prohibits forced or compulsory labor, and imposes fines of approximately \$1,300 to \$1,900.⁸⁰³ There is also the Penal Code, which prohibits forced prostitution that may be used to prosecute sex trafficking offences involving adults considering the fact that the Child Protection Code affords protection for children only. What may be the shortcomings and inadequacy of such an approach is the fact that none of these penalties are sufficiently stringent and will not address and combat trafficking effectively. This will be contrary to standard set by international conventions. For instance, the CTOC provides that for serious crimes such as trafficking in persons, the offence must be punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty and none of

⁸⁰⁰Trafficking in Persons Report 2014 "Country Narratives: DRC" United States of America 143.

⁸⁰¹Trafficking in Persons Report 2014 "Country Narratives: DRC" United States of America 139.

⁸⁰²Trafficking in Persons Report 2015 "Country Narratives: DRC" United States of America 130.

⁸⁰³Trafficking in Persons Report 2015 *ibid*.

the penalties meet this threshold.⁸⁰⁴ Unfortunately, the Palermo Protocol lacks such a provision of minimum penalties to be given. The DRC may also amend its Penal Code like Angola in order to ensure that bonded labour or the recruitment, harbouring or transport of a person for forced labour is also outlawed and the penalties are stringent enough. Furthermore, certain provisions may also be added in the penal code that will adequately define, prohibit and penalise human trafficking in a holistic and comprehensive manner.

During the 2015, reporting period there seemed to be an improvement shown by the DRC and this is based on the fact that the DRC was upgraded from Tier 3 to Tier 2 Watch List based on certain actions taken by the government between 2014 and 2015.⁸⁰⁵ For instance, the DRC managed to secure conviction of certain government officials involved in human trafficking, arrested an armed group commander for recruiting children and cooperated with the UN and other child protection organisations.⁸⁰⁶ Even though in July 2013 the government was able to complete the draft of the anti-trafficking legislation and finalised it in 2014, the anti-trafficking legislation has still not been enacted.⁸⁰⁷

5.8.2 Protection of trafficked victims in the DRC

The NGO sector has played a pivotal role in ensuring that victims of human trafficking are assisted. NGOs have provided the vast majority of the limited number of shelters, legal, medical and psychological services to trafficking victims.⁸⁰⁸ For instance, an NGO working with trafficking victims in eastern DRC managed to provide assistance to 121 victims of human trafficking, including 77 victims of forced labour, 38 of sex trafficking and six children separated from armed groups.⁸⁰⁹

⁸⁰⁴In terms of article 2 (b) of the CTOC “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

⁸⁰⁵Trafficking in Persons Report 2015 “Country Narratives: DRC” United States of America.

⁸⁰⁶nBE 2015 “United State praises DRC for fighting human trafficking” published in governance.

⁸⁰⁷Trafficking in Persons Report 2015 “Country Narratives: DRC” United States of America 129.

⁸⁰⁸Trafficking in Persons Report 2014 “Country Narratives: DRC” United States of America 141.

⁸⁰⁹Trafficking in Persons Report 2014 *ibid*.

In 2013 government signed a new National Disarmament, Demobilization and Reintegration Plan (DDR III) which makes provision for both male and female child soldiers to be transferred immediately to UNICEF for processing and services.⁸¹⁰ During the latter process, the National Demobilization Agency, in cooperation with United Nations Organization Stabilization Mission in the DR Congo (MONUSCO) and UNICEF, continue to separate and transport identified children to NGO-run centres' for temporary housing, care, and vocational training prior to returning them to their home communities when it is deemed safe for reintegration. However, reintegrated child soldiers remained vulnerable to re-recruitment, due to the fact that, there is a lack of adequate rehabilitation services for children suffering the most severe psychological trauma which enables several armed groups to continuously recruit those children.⁸¹¹

5.8.3 Prevention of trafficking in the DRC

The DRC government did not show evidence of encouraging victims to assist in investigations against their traffickers in actual fact, the public widely viewed civil courts as corrupt and believed outcomes were determined based on the relative financial means of the parties to the lawsuit and no legal alternatives are offered to the removal of foreign victims to countries in which they may face hardship or retribution.⁸¹² Although the DRC government does not have a coordinated mechanism aimed at preventing human trafficking, there has been progress in other areas. For instance, in 2013, the government implemented a UN-backed action plan signed by the Ministry of Defense in 2012 which aims at ending recruitment and use of child soldiers, sexual violence, and other serious child rights violations in the armed forces.⁸¹³ Furthermore, the Ministry of Defense and the national intelligence agency also issued two directives which explicitly stated how severe sanctions would be levied against Congolese national army (FARDC) members found guilty of recruiting or using children; detaining, torturing, or mistreating children because of their involvement with an armed group; killing, engaging

⁸¹⁰Bafilemba F, hall A and Muller T 2014 "Crafting a Viable DDR Strategy for Congo" The enough project, page 2 and 3.

⁸¹¹Trafficking in Persons Report 2014 "Country Narratives: DRC" United States of America 141.

⁸¹²Trafficking in Persons Report 2014 *ibid*.

⁸¹³Trafficking in Persons Report 2014 *ibid*.

in sexual violence, including underage marriage attacking schools or hospitals; kidnapping children, including for forced marriage; and impeding humanitarian access to children.⁸¹⁴ It is clear that the main focus has been on children who are involved in armed groups than on issues like forced child labour. It is therefore difficult to adequately measure the government's efforts to meet the international standards imposed by Palermo. What is clear is that the country has weak law enforcement; victim protection mechanisms and lacks political will to prosecute and convict offenders using a fragmented approach available at its disposal.

5.9 Best Practice or model for combating trafficking from the comparative analysis

The chapter made a general analysis of efforts and means made by SADC countries in combating human trafficking. The chapter was premised on the evaluation of how each of the three countries Mozambique, South Africa and the DRC have implemented international obligations imposed by the various UN treaties ratified, in particular Palermo Convention. It also analysed how each of the three countries address the issue of prosecution of trafficking offenders; protection of victims and preventative mechanisms offered by each country. This was done in order to extract best practices and models from the countries discussed as well as lessons, shortcomings in the different legal systems. It is clear from the analysis above that while South Africa and Mozambique served as the best comparators, the DRC on the other hand was used as a contrast. The study depicted a lot of similarities between the Mozambican and South African anti-trafficking legislation. In summary, both countries' are in line with the Palermo Protocol and have provisions dealing with the prosecution of traffickers, protection of victims and the prevention of trafficking. Further, legislation of the two countries also holds both legal and natural persons liable and addresses trafficking internally and internationally. Also, both Acts have extended the definition of trafficking to cater for the nature of human trafficking experienced in each country and defined "sexual exploitation" not defined by the Palermo Protocol.

⁸¹⁴Trafficking in Persons Report 2014 "Country Narratives: DRC" United States of America 141-142.

In as far as, victims of trafficking are concerned, the Mozambican and South African legislations are clear that at no stage can the victims be used as a ground of defense and also exempt victims of trafficking from any criminal prosecutions for crimes committed during the trafficking period. In addition, the Act also makes provision for legal assistance and, shelter to victims of trafficking as well as compensation for damages suffered under certain circumstances.⁸¹⁵

Despite the similarities noted, there are also differences in how both Mozambique and South Africa address certain issues. In defining trafficking, the South African legislation has a broader and all-encompassing definition more than its Mozambican counterpart. For instance, trafficking in South Africa includes aspects like *adoption of child whether secured through legal or illegal means* if the sole purpose is for exploitation as well as *the impregnation of a female person against her will for the purpose of selling that child after birth*. Although both Acts speak of the removal of body parts and forced marriages, the SA Act provides unlike the Mozambican Act provides a definition of what these concepts entail. In actual fact, the SA Act provides a far more detailed list of definitions for concepts used in the Act unlike the Mozambican Act which consists of nine concept definitions. When coming to penalties, both Acts have penalties that are stringent enough to curb this crime although South Africa has the most stringent and severe punishment. For instance, with regards to a person who is trafficked by any means under the Mozambican Act, or is trafficked for money or any other advantage for purposes of marriage or selling the person for involvement in pornography and sexual exploitation or in cases of adoption or the removal of body parts there is a penalty of 16 to 20 years and no fine. The TIP Act on the other hand provide for a fine not exceeding R100 million or imprisonment, including life imprisonment without an option of a fine or both in similar instances. Where any person benefits financially from the services of a trafficking victim, the Mozambican Act imposes a penalty of 8 to 12 years without a fine and the TIP Act imposes a fine and imprisonment for not more than 15 years or both while for the leasing of premises to use for trafficking the Mozambican Act gives a

⁸¹⁵Refer to paragraphs 5.6.1; 5.6.2 and 5.7.1 with 5.7.2 of this chapter.

penalty of 8 to 12 years imprisonment and no fine, but for the same act the TIP Act has a fine or imprisonment not exceeding 10 years or both. More similar differences can be noted in other offences relating to advertisement of material that promote trafficking; interference with witnesses and disclosure of information.⁸¹⁶ The South African Act appears to have more stringent penalties, particularly because it can impose both fines and imprisonment including life imprisonment.

The other notable difference between both Acts is the role of “aggravating factors or circumstances” taken into account before conviction/sentencing. The Mozambican Act is broader and more specific in that it among others it outlines the type of suffering the victim must have undergone such as mutilation or contracting of HIV/AIDS and sexually transmitted diseases and further outlines specific people such as an educator, mentor, custodian of the victim or public authority who will render the acts as aggravating circumstances. The SA TIP Act on the other hand is vague and states that the nature of the relationship between the victim and the convicted person must be established. The last major difference relates to the issue of extra-territorial jurisdiction, which only finds application in South Africa. The TIP Act grants the South African courts extra-territorial jurisdiction to prosecute acts of trafficking committed outside the country on condition that certain specified requirements are met.⁸¹⁷ In Mozambique, the courts do not have extra-territorial jurisdiction and as such this grants South Africa broader jurisdictional capacity in that it can exercise jurisdiction nationally and trans-nationally.

5.10 Conclusion

This chapter has indicated the shortcoming in the definition of trafficking in Palermo Protocol. The definition excludes some of the key drivers of human trafficking in Southern Africa such as organ trafficking or organ removal for *muti* (traditional medicine) and forced marriages (misused cultural practices such as *ukuthwala*). The chapter secondly indicated the purpose and rationale behind the grading of SADC

⁸¹⁶Refer to paragraph 5.6.1 and 5.7.1 of this chapter.

⁸¹⁷Section 12 of the TIP Act and for further details refer to paragraph 5.7.1 of this chapter.

countries by the annual TIP into different tiers. More than anything, this grading has indicated the extent to which SADC countries address human trafficking and meet their commitment and obligation under international law. This grading, further show that SADC countries deal with human trafficking different paces with different efforts. Though 12 of the SADC countries have anti-trafficking legislation it is evident that having legislation does not automatically translate to compliance with international standards based on the fact that, none of the SADC countries have been or are graded in Tier 1 which indicates compliance with the Trafficking Victims Protection Act. Furthermore, of the SADC countries have zero convictions despite the presence of anti-trafficking legislation and need to amend their laws and expand on the definition of trafficking in order to comply with the Palermo Protocol.

The comparative analysis between Mozambique, South Africa and the DRC highlights that the presence of anti-trafficking legislation makes a huge difference in addressing and combatting trafficking. This is proven by the number of prosecutions and convictions Mozambique has and the fact that even though SA used a fragmented approach prior to 2013, the government still saw a need in combining all the relevant provisions dealing with human trafficking into one piece of comprehensive legislation. The DRC has proven to be progressing slowly and struggling with prosecutions and convictions in using a piece meal approach. The comparative analysis also indicated that the TIP Act came out stronger in a number of issues like; the broader definition of trafficking, conceptual clarification; penalties for different forms of offences; compensation for victims of trafficking as well the courts ability to prosecute internally and transnationally. It can therefore be argued that the DRC proved to be contrast, which cannot be emulated by any of the SADC countries. On the other hand, both Mozambique and South Africa offer some positive lessons as well as best practices that can be emulated by other SADC countries including SADC as an institution.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

“No country can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error.”⁸¹⁸

6.1 Introduction

This study was mainly undertaken in view of the fact that human trafficking has been flourishing internationally, regionally and nationally despite the adoption of the UN Palermo Protocol which aims to combat human trafficking in all its forms. Notwithstanding its rising profile globally and within Southern Africa, the study has demonstrated that the SADC region remains a fertile ground for traffickers who take advantage of economic, social and political conditions. This has been the case despite the adoption of legislative and other measures by southern African countries. In keeping with the aim of this study, namely to determine whether there is a need for an effective regional response to human trafficking in SADC it became imperative to investigate the measures taken within the SADC region to address human trafficking both at the national and regional levels and to conduct a comparative study between different regions and between selected SADC countries. This chapter summarises and integrates the key findings of the study and offers some recommendations, which may assist SADC as an institution and SADC countries in addressing and combating human trafficking effectively.

6.2 Summary of the key findings

In Chapter one, the study departed on asking the key question of whether the current measures adopted by SADC and its Member States is adequate to address and combat human trafficking in the sub-region. To answer that question completely the following

⁸¹⁸Gallagher A and Holmes P (n 507) 318.

questions were posed at the beginning: How has human trafficking evolved from its conceptualization as slavery to its contemporary form? How has international law and other regional systems including SADC addressed this crime and to what extent are the measures adopted effective to combat human trafficking? What measures have SADC countries in general taken to address and combat human trafficking and in particular how have these measures been implemented in the three selected countries (Mozambique; South Africa and DRC). Are the current measures adequate and effective? Is there perhaps a need for legal and institutional reform in SADC or SADC countries and what is an effective way to combat human trafficking in SADC and its member states?

In Chapter two the study used a historical approach to trace the origin and development of human trafficking and its conceptualization as slavery to its evolution as human trafficking. The study further elaborated on the meaning and development of the concept “human trafficking” as captured by international agreements from the 1904 White Slave Traffic Agreement to the 1956 Supplementary Convention on the Abolition of Slavery before the adoption of the Palermo Convention in 2004. This section also argues that even though the pre-Palermo conventions had major setbacks, those conventions set the platform for future international and regional human rights laws to be used in addressing human trafficking.

Chapter three set out the framework developed and used under the United Nations Framework to combat human trafficking through the use of conventions and non-conventional measures. While it has been indicated that Palermo brought light and broadened human trafficking and serves as a guideline and framework for combating human trafficking at states level, it still has shortcomings and weaknesses that are not sufficiently addressed. The Chapter also focuses on and draws on a comparative analysis of how other regional platforms like the European and Inter-America systems addresses issues of human trafficking. Throughout the discussion, it became clear that the AU is lagging behind in as far as combating human trafficking is concerned, except for the specific provisions of the Women’s Protocol which are in line with the provisions of Palermo.

Chapter four appraises SADC's responses in addressing human trafficking and argues that in the absence of any human trafficking specific convention, the SADC Gender Protocol supplemented by its other Protocols may be one of the mechanisms that can be used to speed up efforts on combating human trafficking. The weakness of this approach is that it leaves a fragmented and piecemeal method of addressing the problem.

Drawing from the experience of comparative analysis in chapter five of the study, it is revealed that SADC countries respond in various ways to combat human trafficking such as ratification of Palermo; enactment of anti- trafficking legislations as well as a fragmented and piecemeal approach to address trafficking. The key findings of the study are summarised below.

6.2.1 Conceptual clarification of human trafficking

First, the definition of human trafficking in Palermo has proven to be narrower in comparison to the definitions adopted by some of the SADC countries such as South Africa and Mozambique. The anti-trafficking legislation in these two countries as explained in chapter five is broader and includes concepts such as “sexual exploitation” among others. Secondly, the Palermo Protocol lacks mechanisms and guidelines in as far as protection of victims is concerned. Palermo does not make provision for the protection of victims of trafficking from prosecution for any acts they were coerced into committing by the traffickers. Further, under article 6, 7 and 8 of Palermo victim assistance is discretionary. Thirdly, having reviewed texts and relevant jurisprudence in SADC countries, the nature of human trafficking differs. For instance, some of the key drivers of human trafficking experienced in SADC countries include organ trafficking or organ removal for *muti* (traditional medicine) purposes and forced marriages (misused cultural practices such as *ukuthwala*). Therefore, the requirement that regional and national anti-trafficking legislation should be in line with the Palermo Protocol proves to be problematic, as it will exclude certain aspects of human trafficking that are not covered in Palermo.

The study therefore take the view that though Palermo set the framework of addressing and combating human trafficking, it cannot sufficiently and adequately combat human trafficking in SADC countries as it is.

6.2.2 Conventional and Institutional Weaknesses of the AU and SADC

Chapter three of the dissertation revealed that at the regional level, the AU lacks proper mechanisms and guidelines on human trafficking. At the conventional level, though some of the AU treaties and protocols may be used to combat human trafficking, such a fragmented approach is problematic. For instance, the African Charter outlaws slavery but does not make specific reference to human trafficking. Though the ACRWC makes reference to trafficking, the Protocol only affords protection to children which render it narrow in scope. Further, the African Women's Protocol has provisions that condemn trafficking in women, provides for the prosecution of the perpetrators and protection of women who are most at risk. However, the Women Protocol only affords this protection to a narrower category, women and thus exclude men as well as other forms of trafficking. Accordingly, in the absence of a human trafficking AU treaty that provides for combating human trafficking and offers protection to all victims of human trafficking a piecemeal approach is relied upon.

At the institutional level, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights and the Committee on the African Charter on the rights of the Child has made no pronouncement or decided cases on human trafficking since their inception. Consequently, there is no evidence of how the different treaties can be interpreted to address human trafficking. Though the African Commission is tasked with giving recommendations to governments amongst other things, its major setback is that such recommendations are not binding on States. This weakens the enforcement of those recommendations at state level and states' compliance with international standards. Consequently, these institutional weaknesses

of the AU clearly show that victims of trafficking have no guarantee of recourse, because not all victims are afforded protection by relevant Conventions.

Chapter four analysed and discussed in detail, the efforts to address the problem of human trafficking in SADC. Among others, SADC adopted a Gender and Development Protocol that has a provision on human trafficking though it is mainly aimed at curbing gender based violence against women. Three SADC countries have not ratified this treaty and as such are not bound by it. The implementation of this Protocol at state level has also been problematic due to constraints such as lack of public awareness, political will and inadequate resources. Chapter four also highlighted that the Ten Year SADC Strategic Plan is not sufficient. Its major set-back lies on the fact that it is non-binding and therefore it is not compulsory for SADC countries to comply with its PoA and there are no repercussions for non-compliance. Furthermore, in terms of the implementation matrix in the PoA, there have been challenges in successfully implementing the first phase of the Plan, which automatically means the set goals for the implementation of the second phase will be delayed and probably not achieved. Furthermore, SADC currently lacks a regional court or tribunal and as such, SADC countries cannot seek redress for violation of any of the treaties.

6.2.3 Inadequacies in measures to address human trafficking in SADC countries

In Chapter five, the study discussed efforts made by Southern African countries in general and the DRC, Mozambique and South Africa in particular in as far as human trafficking is concerned. The study reviewed anti trafficking legislations and other relevant sources on human trafficking. 12 SADC countries have trafficking specific legislation while the remaining 3 countries (Namibia, Angola and DRC) do not have. Six of these 12 countries adopted anti-trafficking legislation between 2007 and 2009 and four of these countries (Seychelles; Swaziland; Zambia and Zimbabwe) need to review or amend this anti-trafficking legislation, as it is not aligned with Palermo Protocol. The other six countries have recent legislation adopted between 2010 and 2015.

Having reviewed texts and relevant jurisprudence in SADC countries, the study came to the conclusion that countries like Swaziland, Tanzania, Zambia and Zimbabwe have

been struggling with prosecutions and convictions of offenders and as such their enforcement mechanisms is weak. The main reasons can be attributed to the following: Firstly, lack of regulations and directives for implementation of anti-trafficking legislations in various SADC countries as is the case in Botswana and Lesotho. So far, only South Africa has adopted regulations while Tanzania and Swaziland are in the process of reviewing such regulations. Secondly, budgetary constraints play a major role. In countries like Zambia the government allocated 570,000 kwacha (\$89,400) for its anti-trafficking budget, a significant decrease from the previous year's budget of 1,358,700 kwacha (\$213,000). Thirdly, lack of political will to not only ratify treaties, but ensure their implementation contribute to the *status quo* in many SADC countries. However, it is important to note that in some instances, even though there is political will to curb human trafficking lack of resources, budgetary constraints and infrastructure contribute to the lack of implementation. Fourthly, some countries only adopted anti trafficking legislation recently and as such the law has not been implemented and it is difficult to trace progress. For instance, Malawi adopted its anti-trafficking legislation in 2015 and though South Africa adopted the legislation in 2013, the Act was only implemented in August 2015. This means that the laws of these countries have not been tried and tested. Fifthly, another major setback when it comes to enforcement of laws especially with regards to international instruments lies in the "reservation" and "declaration" provisions found in these instruments. For instance, South Africa and Zimbabwe made reservations not to be bound by article 15 (2) of the Palermo Protocol which gives the International Court of Justice authority to adjudicate on matters involving a dispute amongst SADC Member States on request. The implication of this reservation is that the rest of the SADC countries are prevented from seeking recourse from the ICJ if the dispute involves these two countries. This therefore contributes to compliance problems and defeats the purpose of ratifying a treaty if some countries will not want to be bound by certain provisions of those treaties. Finally, human trafficking is both transnational and intra-national in nature, which means at times the crime involves different states, which may view and punish the crime differently. Therefore, it is easier for perpetrators of the crime to go unpunished as a result of lack of uniformity of the laws.

Drawing from the experience of comparative analysis in the DRC, Mozambique and South Africa Chapter five revealed that the implementation of anti-trafficking legislation in Mozambique and SA proved to be successful while the DRC which has no legislation is placed at the bottom. On one hand, Mozambique has effective and adequate enforcement mechanisms. Among SADC countries, it has high investigations, prosecutions and convictions rates. For instance, in 2014 the country investigated 27 cases of human trafficking, prosecuted 44 suspected traffickers and convicted 32 traffickers under its anti-trafficking Act. South Africa on the other hand, proved to be stronger in terms of a broader conceptual clarification of trafficking, a victim centered approach to trafficking, it also has more stringent and severe punishment that includes both imprisonment and fines and the countries courts have a broader jurisdictional capacity on the basis that they have extra-territorial jurisdiction in as far as human trafficking is concerned.

6.3 Recommendations

The contention throughout the study has been that despite the fact that all 15 SADC countries adopted the Palermo Protocol and 70% of these countries have anti-trafficking legislation, most SADC countries struggle with compliance and implementation mechanisms. This shows that mere passing of legislation does not automatically translate to compliance. The central question left open is whether there is a need for a human trafficking treaty at the SADC level or reform of anti-trafficking legislation by SADC countries and the extent to which either approach may address human trafficking problems and the implementation problems. In light of the above key findings, the study proposes that in order to effectively prevent, and combat human trafficking in SADC a number of options can be explored. This study does not offer a blueprint solution but contribute towards the development of a model that will better be suited to address human trafficking problems at the SADC level.

Firstly, SADC may opt to adopt a sub-regional anti-trafficking treaty that broadens the concept of Palermo Protocol provisions. After a survey of various models in SADC, the South African approach and legislation offers useful lessons in this regard. This treaty

must broaden the concept “human trafficking” and have provisions that are adapted to the nature of trafficking that occurs in the SADC region such as forced marriages (*ukuthwala*) and trafficking of body parts for *muti* murders. It must further include non-discretionary victim protection measures akin to those in the South African anti-trafficking legislation. In addition, to the victim protection measures, there must be some kind of standard operation procedures that will supplement this treaty for all role players to ensure the proper running of the system particularly in terms of victim identification and placement of those victims. The treaty must also be gender neutral and ensure that all victims of trafficking whether male, female or children are afforded protection. Furthermore, this treaty must also refrain from including provisions relating to “reservations” and “declarations” which has a tendency of weakening compliance. This will ensure that once a country ratifies the treaty, it will be bound by all provisions of the treaty to ensure proper enforcement. In as far as enforcement measures are concerned and taking into account that SADC itself has been battling with compliance and enforcement problems, the Mozambican approach offers useful lessons. The latter approach involves efforts based on the principles of prevention, protection, support, and prosecution. These efforts further include the involvement of extensive collaboration with governments and international organisations and local NGOs accompanied by the creation of public awareness, which are non-legal means. It has been demonstrated in chapter five how Mozambique managed to investigate, prosecute and convict perpetrators of human trafficking. One of the challenges, in as far as SADC is concerned is the lack of a SADC court or tribunal, therefore there is need for a development of a court that will not only ensure that SADC countries can get redress, but will also give binding decisions that will ensure that SADC countries comply. All the above will ensure uniformity in relation to concepts, prosecutions, and penalties and further prevent traffickers from using some of the countries without legislation as safe havens. Furthermore, the treaty will curb the issue of countries addressing this crime at different paces with different efforts; instead, there will be one single treaty that will address all human trafficking complexities in SADC. Alternatively, SADC can opt to convert the SADC PoA into a binding instrument and taking into account all the recommendations indicated above.

The second option is for SADC countries to align their anti-trafficking legislation with the South African TIP Act. However, due to the fact that the TIP Act is recent and has not been tried and tested it must be merged with the enforcement and compliance provisions of the Mozambican Act. However, this option might take longer to implement taking into account the fact that it will still be up to SADC countries to do this at their own pace which has not been working due to a number of reasons listed in the key findings. If this model is adopted, the countries should also ensure that in addition to legislative reforms, they develop regulations, directives and policies on what is expected of various role players and governmental departments.

Thirdly, in the meantime in the absence of option one and two above Seychelles; Swaziland; Zambia and Zimbabwe need to review or amend their anti-trafficking legislation to align it to the Palermo Protocol to at least meet international standards, but must also draw lessons from the SA TIP Act and Mozambican Act. Secondly, the three SADC countries that lack anti-trafficking legislation must adopt such legislation in order to comply with the principle of legality and ensure that traffickers do not find a safe haven in any of the SADC countries. Angola for instance by addressing this crime through a penal code misses an opportunity of addressing the pre and post effects of trafficking. Namibia with its draft law remains with a piecemeal approach as well as the DRC that has no legislation at all and rated as one of the worst performing countries in SADC by the TIP report and as shown by the comparative analysis conducted in this study misses the opportunity of curbing this crime with immediate effect.

Whatever option is followed, the Southern African Regional Police Chiefs Organisation (SARPPCO) and Interpol must be utilized by SADC in order to ensure regional cooperation in managing trafficking and to enhance regional cooperation.

Finally, countries need to intensify their awareness campaigns and educational public outreach programmes in as far as human trafficking is concerned. NGO's, UN agencies and civil societies must work together with governments through projects such as the AU.COMMIT for purposes of creating trafficking awareness and to reach out to millions of people worldwide and particularly in Africa. Furthermore, Information, education and

communication programmes should be developed and shared to inform and make the public aware of the crime especially through social platforms. Those social platforms should also be utilised to name and shame traffickers as a deterrent to other traffickers. Most importantly, the educational curriculum at primary, high school and university levels must be transformed to include human trafficking as a basic course. Programmes at universities or community engagement projects should be utilized to inform the public.

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