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Meeting the Minimum Standards of the Palermo Protocol: The case of South Africa

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Abstract


This research is aimed at evaluating the adequacy and effectiveness of the legal framework dealing with human trafficking in South Africa. To achieve this purpose, a comprehensive overview of the punishment, prevention of human trafficking in South Africa was looked into as well as victim protection.

An overview of the history of slavery and an analysis of the modern conceptualisation of human trafficking indicate that human trafficking is a highly complex concept, and that there are various approaches to the understanding of the concept of human trafficking. There are various definitions of trafficking found in international instruments of which the most important has been identified as that contained in the Palermo Protocol. The definitions vary also because trafficking is closely related to the phenomena of migration, slavery and smuggling of humans. The study further identifies some significant root causes of trafficking

The research concedes that although common-law crimes, statutes and transitional legislation can be utilized to challenge some trafficking elements, these offences are not comprehensive enough to amply deal with the crime's complexities and provide only a fragmented approach to combating the crime. The study shows that South Africa has adopted specific legislation, namely the Trafficking Act.

The research further establishes also that international, regional and sub-regional instruments on trafficking and related aspects of trafficking provide guidelines for developing effective strategies to deal with trafficking within the region. The counter-trafficking strategies as found in treaties, protocols, declarations and resolutions, which focus specifically on combating trafficking and those with a human-rights focus, obliges States to prosecute traffickers, protect those who are vulnerable to trafficking as well as those already trafficked and establish measures for prevention. This research further highlighted the importance of preventing human trafficking which starts with government but non- governmental organisations play a vital role in this element as well.

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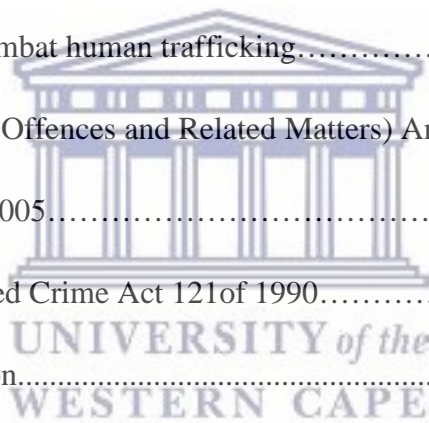
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CHAPTER 1

Introduction

1.1 Introduction

Human trafficking has become, over the past three decades, a subject of considerable concern for the international community as well as governments around the world.¹ In 2010, the United Nations indicated that trafficking in humans was the second most lucrative crime globally, next to the drug trade, making it the fastest-growing cause of revenue for organised criminal operations worldwide.² Human trafficking is a tremendously profitable business for many individuals and organised crime syndicates as it is a high-profit low-risk crime.³

In an attempt to combat the trade in human cargo, the international community has adopted a wide array of international standards to combat the trade in humans. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) is the most significant of the international instruments dealing with human trafficking. Adopted in 2000, the Palermo Protocol calls upon states to eliminate the transnational and internal trade in human beings.⁴ The specific goal of the Protocol is to adopt “effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking.”⁵ It aims to support national efforts with the goal of creating domestic criminal offences that would support capable international cooperation in investigating and prosecuting trafficking in person’s cases.⁶ In

¹ Pharoah R *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) 75.

² United Nations Global Initiative to Fight Human Trafficking (UNGIFT) ‘500 Miles in Chains to End Modern Day Slavery’ available at <http://www.ungift.org/ungift/en/stories/500-miles-in-chains-to-end-modern-day-slavery.html> (accessed 25 June 2017).

³ Horn W *The Challenge of Child Trafficking: South Africa’s Legal Compliance with Its International Obligations in Respect of Child Trafficking* (2010) 10.

⁴ General Assembly Resolution 55/25 of 15 November 2000 United Nations Conventions against Transnational Organised Crime para 6.

⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

short , the Palermo Protocol seeks to provide preventive, protective as well as prosecution-focused responses to human trafficking.

South Africa is one of many States; globally that has waged a fight against human trafficking. However, the absence of legislation, which deals directly with human trafficking, has resulted in human trafficking offences being prosecuted and punished in terms of a variety of existing common-law crimes such as kidnapping, rape, abduction, assault, and more recently, statutory crimes such as money laundering and racketeering.⁷ The introduction of an encyclopaedic legislation to cover every aspects of human trafficking became a chief priority in order to protect persons vulnerable to trafficking and punish traffickers.⁸ In spite of noteworthy efforts made by the South African government in order to combat trafficking in persons, which includes the ratification of the Palermo Protocol and advancements made on emerging a national plan to deal with the problem, South Africa was placed in 2008 on the “Tier 2 Watch List” by the US Department of Trafficking in Persons.⁹ It was placed on the “Tier 2 Watch List” partly because it was unsuccessful in providing evidence showcasing increasing efforts to combat severe forms of trafficking. Furthermore, the South African government was castigated for providing insufficient data on trafficking crimes investigated and/or prosecuted as well as on resulting convictions or sentences.¹⁰

In 2013, South Africa enacted the Prevention and Combating of Trafficking in Persons Act, which is aimed at assisting and protecting victims of trafficking within its borders.¹¹ The Trafficking Act, like the Palermo Protocol, includes provisions which offer rehabilitation,

⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 3.

⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 3.

⁹ US Dept of State *Trafficking in Persons Report 2008* (2008) 227-229. The placement on this list refers to countries whose governments do not fully meet the TVPA’s minimum standards, but are making significant efforts to meet those standards. It also means that the absolute number of victims of severe forms of trafficking is increasing significantly. Furthermore, there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or the determination that a country is making significant efforts to meet the minimum standards was based on commitments by the country to take additional future steps over the next year.

¹⁰ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 5.

¹¹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

therapeutic services as well as education and skills development as options for adult victims.¹² The purpose of this paper is to critically analyse the human trafficking legislation that South Africa has adopted, by examining the adequacy and effectiveness of the legal framework dealing with human trafficking.

1.2 Research question

The study seeks to investigate whether South Africa has put in place appropriate and effective strategies for addressing human trafficking. This will be done by examining whether the Act meets the standards set out in the Palermo Protocol. More specifically, it seeks to determine whether South Africa has met the three minimum standards, namely to provide preventive, protective as well as prosecution-focused responses to human trafficking.

1.3 Significance of the study

The study could be of practical significance to additional African countries that are in the process of drafting anti-trafficking legislation favourable to the African context. The African countries may well find guidance by bearing in mind the road travelled by South Africa in the search for comprehensive anti-trafficking legislation. Furthermore, the study could provide valued contribution to research on combating human trafficking in South Africa from a legal perspective.

1.4 Scope of the study

This study provides a critical and comprehensive account of the crime of trafficking in persons and the combating thereof in South Africa. The scope of the study is, however, limited to examining whether South Africa has met the three minimum standards set out in the Palermo Protocol .

1.5 Methodology

This study will comprise a review of the jurisprudence on human trafficking. Several primary sources, such as international and regional human rights instruments, will be used together with national laws of South Africa. In addition, the study will also make use of secondary sources such as books, articles and reports that have been written on the topic.

¹² The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s26 (1) (b).

1.6 Literature Review

Literature on efforts to combat human trafficking at the global, regional and national levels is increasing.¹³ Truong and Angeles examined the Palermo Protocol and concluded that it is the most important international attempt aimed at combating human trafficking.¹⁴ Their conclusion appears to be based on the criminalisation of all forms trafficking as well as methods of recruitment in the Protocol.¹⁵ Furthermore, despite legislation criminalising human trafficking provides a broad definition of the problem, Lee argues that it averts complications with respect to policy making.¹⁶ Milovojevic suggests that the international instrument has not delivered an exact guideline for the identification of victims of human trafficking.¹⁷

Kruger notes, the first standard encompasses the Palermo Protocol's requirement that the essence of the human trafficking definition as it is formulated in the protocol be included in domestic responses.¹⁸ Jansson concludes that State signatories to the document are to criminalize trafficking in human beings in their national legislations and to establish proper penalties for this offence.¹⁹

The signatories are to offer protection and assistance to the victims of human trafficking.²⁰ Victim protection is extended to offer government assistance, including service and

¹³ Laczko F 'Human Trafficking: The Need for Better Data' available at <http://www.migrationpolicy.org/article/human-trafficking-need-better-data> (accessed 22 August 2017).

¹⁴ Truong T & Angeles M.B 2005 Searching for the Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children, UNESCO 17.

¹⁵ Truong T & Angeles M.B 2005 Searching for the Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children, UNESCO 17.

¹⁶ Lee M *Trafficking and Global Crime Control* (2011) 20.

¹⁷ Milivojevic S & Segrave M 'Evaluating Responses to Human Trafficking : A Review of International, Regional and National Counter- Trafficking Mechanisms' in Winterdyk J. Perrin B & Reichel P *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* 9 ed (2012) 233-257.

¹⁸ Kruger B 'Combating Human Trafficking: The South African Legal Context' available at http://fsi.stanford.edu/.../combating_human_trafficking_the_south_african_legal_context (accessed 28 June 2017).

¹⁹ Jansson D A *Comparative Study of the Definition of Trafficking in Persons* (2015).

²⁰ Shoaps L 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' (2013) 17.3 *Lewis & Clark Law Review* 933.

rehabilitative facilities, to victims of human trafficking.²¹ If the victims are willing to cooperate in the investigation and prosecution of traffickers, they are granted unique non-immigrant status, justly differentiating victims of trafficking from illegal aliens.²² A new civil action was created that allows victims of human trafficking to sue their traffickers in federal district court.²³ The confiscation of documents, a common coercion tactic used by traffickers, is also penalized.²⁴

The Palermo Protocol further provides that States shall undertake social and economic initiatives to prevent and combat trafficking in persons and that States shall take or strengthen measures to alleviate the factors that make persons especially women and children vulnerable to trafficking.²⁵ States must also adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons that leads to trafficking.²⁶ Yet, the Protocol does not stipulate the initiatives and measures to be assumed by states.²⁷ Mollema argues that this permits States to govern what measures to undertake, in accordance with each state's domestic legislation and policies as well as to each state's financial and human resource abilities. On the other hand, this contradicts the sense of urgency surrounding human trafficking and provides States with grounds for delays in realizing anti-trafficking legislation and policies.²⁸

While international literature on the topic has been growing exponentially, only a small portion of these studies have concentrated on Africa and an even smaller portion on southern

²¹ Aransiola J & Zarowsky C 'Human trafficking and human rights violations in South Africa: Stakeholders' perceptions and the critical role of legislation' (2014) 14 *African Human Rights Law Journal* 512.

²² Jansson D A *Comparative Study of the Definition of Trafficking in Persons* (2015).

²³ Jansson D A *Comparative Study of the Definition of Trafficking in Persons* (2015).

²⁴ Jansson D A *Comparative Study of the Definition of Trafficking in Persons* (2015).

²⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9.

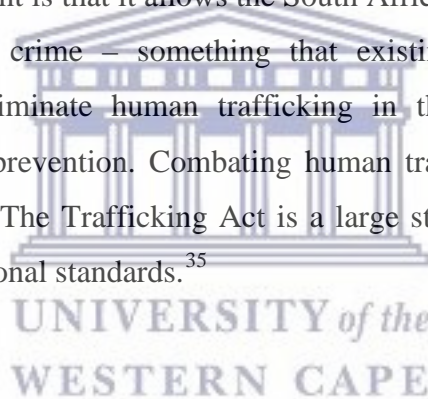
²⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9.

²⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 43.

²⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 43.

Africa.²⁹ Due to the minimal information, which is known about the extent of trafficking in the South African context, there is a desperate need for more research.³⁰ Additional research would assist in the contribution of valuable information for those in the field as well as help to comply with international laws and protocols which call for states to develop trafficking prevention strategies.³¹ These designs would help to address victim vulnerabilities and circumstances.

Cave suggests that perhaps the impending enactment of the Prevention and Combating of Trafficking in Persons Act indicates that South Africa is taking steps to fulfil international standards.³² Najemy concludes that the Trafficking Act is fairly wide-ranging, and has been praised as a vital step forward in South Africa's efforts at combating human trafficking.³³ In many respects, the Trafficking Act reflects the Protocol, and it delivers an exhaustive list of definitions regarding the elements of human trafficking.³⁴ Cave argues that what makes this piece of legislation so important is that it allows the South Africa to specifically target human trafficking as a stand-alone crime – something that existing laws do not allow. The Trafficking Act seeks to eliminate human trafficking in three primary ways: through prosecution, protection, and prevention. Combating human trafficking in these three ways underpins a holistic strategy. The Trafficking Act is a large step-forward in South Africa's drive to comply with international standards.³⁵



²⁹ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at <http://https://pmg.org.za/files/docs/100324tsireledazni.pdf> (accessed 29 June 2017).

³⁰ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at <http://https://pmg.org.za/files/docs/100324tsireledazni.pdf> (accessed 29 June 2017).

³¹ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at <http://https://pmg.org.za/files/docs/100324tsireledazni.pdf> (accessed 29 June 2017).

³² Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 4.

³³ Najemy L 'South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation' (2010) 9 *Global Studies Law Review* 171.

³⁴ Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 4.

³⁵ Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 6.

The research will contribute to the identification and understanding of the three standards set out in the Palermo Protocol by critically examining South Africa's response to these three standards.

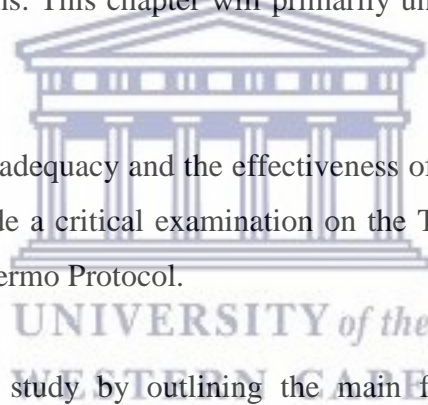
1.7 Structure

Chapter Two provides a historical background to the phenomenon of trafficking. It provides a time-line of human trafficking and explains current forms of trafficking. It explains the different approaches to the understanding of the concept of human trafficking and closely related phenomena such as migration, slavery and smuggling of humans. The chapter touches on the causes of trafficking

The primary purpose of Chapter Two is, however, to analyse international provisions regarding trafficking in persons. This chapter will primarily unpack the Palermo Protocol to which South Africa is a party.

Chapter Three focuses on the adequacy and the effectiveness of the measures put in place by South Africa. This will include a critical examination on the Trafficking Act in light of the minimum standards of the Palermo Protocol.

Chapter Four concludes the study by outlining the main findings of the research and providing recommendations.



CHAPTER 2

Human Trafficking and International Law: A critical analysis of the Palermo Protocol

2.1 Introduction

Human trafficking has become a fast-growing global criminal activity, and it affects just about every country in the world.³⁶ Human trafficking involves the recruitment, movement and exploitation of an individual. The initial consent by an individual is immaterial if the consent was attained through fraud, deception or coercion.³⁷ Further, a minor cannot consent to being trafficked, consequently, transporting a minor into exploitative circumstances simply results in trafficking. Trafficking in persons should therefore be understood as a process rather than as a single offence. Trafficking need not involve crossing of borders; it can occur within a country.³⁸

In this chapter, the focus is on analysing international provisions regarding trafficking in persons. The specific objective of Chapter 2 is to determine whether the Palermo Protocol provides sufficient guidelines to combat human trafficking. With this objective in mind, the chapter will primarily unpack the Palermo Protocol to which South Africa is a party, with specific reference to the prevention of human trafficking, the prosecution of those involved in human trafficking and the protection of human trafficking victims.

2.2 Defining Human Trafficking

Initially, the definition of “trafficking in persons” was restricted to the abduction of females into forced prostitution.³⁹ Alternative versions of trafficking were not entertained in international conventions and, as a result, several governmental and non-governmental organisations adopted individual specific definitions which were formulated for their

³⁶ Joshi A ‘The Face of Human Trafficking’ (2002) 13(1) *Hastings Women’s Law Journal* 31.

³⁷ Act to Prevent Trafficking ‘Human Trafficking: An Introduction’ available at <https://www.aptireland.org/apt-human-trafficking-tool-kit/> (accessed 10 February 2018).

³⁸ Act to Prevent Trafficking ‘Human Trafficking: An Introduction’ available at <https://www.aptireland.org/apt-human-trafficking-tool-kit/> (accessed 10 February 2018).

³⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 31.

respective purposes.⁴⁰ That necessitated a new and all-encompassing operational definition of human trafficking.

The Palermo Protocol boldly outlined the definition of human trafficking for the international community and, by doing so, it framed the notion of what a human trafficking victim looks like.⁴¹ The Palermo Protocol defines trafficking in persons as “consisting of the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.⁴²

On the basis of the above definition, it is clear that trafficking in persons comprises of three essential elements. The first element refers to the act, namely what is being done. This refers to the recruitment, transportation, transfer, harbouring or receipt of persons.⁴³ The second element refers to the means of trafficking and focuses on how it is done. Accordingly, trafficking is done by either threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim.⁴⁴ The third element refers to the purpose itself, namely, the purpose of exploitation. The term “exploitation” is a wide-ranging term, which comprises all forms of exploitation and is habitually interpreted to consist of exploitation that results in some kind of profit for the trafficker.⁴⁵ This may include sexual exploitation, forced labour, slavery or similar

⁴⁰ Pearson E ‘Human traffic, human rights: redefining victim protection’ available at http://www.antislavery.org/wp-content/uploads/2017/01/hum_traff_hum_rights_redef_vic_protec_final_full.pdf (accessed 20 February 2018).

⁴¹ Shoaps L ‘Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act’ (2013) 17.3 *Lewis & Clark Law Review* 936.

⁴² Lutya T & Lanier M ‘An Integrated Theoretical Framework to Describe Human Trafficking of Young Women and Girls for Involuntary Prostitution’ (2012) *Public Health- Social and Behavioural Health* 554.

⁴³ United Nations Office on Drugs and Crime ‘Trafficking in Persons and Migrant Smuggling’ available at <http://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html> (accessed 20 February 2018).

⁴⁴ United Nations Office on Drugs and Crime ‘Trafficking in Persons and Migrant Smuggling’ available at <http://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html> (accessed 20 February 2018).

⁴⁵ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, University of the Free State, 2010) 180.

practices and the removal of organs.⁴⁶ In short, trafficking is a process of enslaving people, coercing them into a situation with no way out, and exploiting them.⁴⁷

Human trafficking comes in different forms which can be differentiated from one another according to the movement, the types of victims and forms of exploitation. Trafficking could be internal or international. In other words, it may involve the transfer of victims across national borders or transfers within national borders. Often the two are related.⁴⁸

Generally, human trafficking concerns both adults and children. Adult trafficking may comprise of the recruitment or movement of an adult individual by a third party with an aim to exploit that person using any form of coercion.⁴⁹ There is a possibility that both adult males and females could be exploited for labour purposes. This includes, “any work or service, which is obtained from a person under the threat of any penalty and for which the trafficked person has not offered him or herself voluntarily.”⁵⁰ It is also known that both genders may be exploited for sexual purposes; studies indicated that the majority of sex-work victims are, however, females.⁵¹

In addition to the special rights guaranteed to children, of course, all children should also enjoy all the rights accorded to all human beings. Article 4 of the Universal Declaration of Human Rights (1948) reminds us that “No-one shall be held in slavery or servitude” and Article 1 is clear that “All human beings are born free and equal in dignity and rights”. By its very nature, child trafficking threatens these rights.⁵²

⁴⁶ United Nations Office on Drugs and Crime ‘Trafficking in Persons and Migrant Smuggling’ available at <http://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html> (accessed 22 February 2018).

⁴⁷ Anti-Slavery ‘What is Human Trafficking?’ available at <https://www.antislavery.org/slavery-today/human-trafficking/> (accessed 22 February 2018).

⁴⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 60.

⁴⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 61.

⁵⁰ International Labour Organisation’s Forced Labour Convention, Article 2 (1).

⁵¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 61.

⁵² International Labour Office ‘Training manual to fight trafficking in children for labour, sexual and other forms of exploitation’ available at https://www.unicef.org/protection/Textbook_1.pdf (accessed 22 February 2018).

Child trafficking refers to the enlistment or movement of individuals below the age of 18, within or across borders by an individual who intends to exploit them.⁵³ The minor's consent is immaterial when deciding whether or not such recruitment or movement is a case of trafficking. In addition, coercion or deception does not need to be present. Children may be trafficked for labour or sexual exploitation, but supplementary motives include illegal adoption, forced marriage, criminal activities, begging, child soldiers, camel jockeys, paedophilia etc.⁵⁴ The Palermo Protocol does not make specific reference to the recruitment of children for dangerous work or illegal adoption. This is, however, dealt with in supplementary binding international-legal instruments, such as the International Labour Organisation's Worst Forms of Child Labour Convention and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoptions. One must add that babies are victims of human trafficking, too. Although the chief motive behind baby trafficking is illegal adoption, babies are also trafficked for sexual exploitation, organ trade and to act as assistants in begging.⁵⁵ Furthermore, children are protected from economic exploitation as well as the use of children for the purpose of the sale of children, child prostitution and child pornography.⁵⁶

Additionally, labour trafficking refers to forms of indentured servitude, contract slavery and domestic servitude. Labour trafficking may take place within any industry; however, this type of trafficking is most predominant in agriculture fisheries, construction, factory work and domestic services. This type of trafficking occurs through the promise of false economic opportunities such as a job abroad.⁵⁷

⁵³ NSPCC 'Child Trafficking: What is child trafficking?' available at <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-trafficking/> (accessed 22 February 2018).

⁵⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 61.

⁵⁵ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 60.

⁵⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

⁵⁷ Sage Publications 'Introduction and History of Human Trafficking and Modern Day Slavery' https://us.sagepub.com/sites/default/files/upm-binaries/86866_Ch_1.pdf (accessed 23 February 2018).

Finally, it is important to distinguish human trafficking from illegal immigration and smuggling.⁵⁸ Human trafficking is frequently confused with people smuggling, a central difference between human trafficking and people smuggling is the purpose of the activity. In the case of human trafficking, the initiative must be carried out for an exploitative purpose, either for purposes of compelled labour or a commercial sex act through the use of force, fraud, or coercion,⁵⁹ whereby the purpose of human smuggling is to facilitate the illegal entry of a person into a State of which that person is not a national or resident, for financial or other material benefit.⁶⁰ Unlike trafficked persons, smuggled migrants are not misguided about the nature of the criminal enterprise. Smuggled migrants contribute freely in the process.⁶¹ An additional distinction is that, in the case of smuggling, there is understanding of consent to be illegally smuggled across an international border by means of paying a smuggler to provide the service, once he or she has successfully reached the desired destination⁶² However, this is not the case of trafficked persons as trafficking involves coercion and victimization.⁶³ International human rights law has always recognized that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which that personal freedom is taken away. This understanding is reflected in the “means” element of the definition of trafficking. As noted by the drafters of the Trafficking Protocol: “once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.”⁶⁴ Furthermore, the trafficking relationship continues after the

⁵⁸ Obokata T ‘Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law’ (2005) 17(2) *International Journal of Refugee Law* 395.

⁵⁹ United States Department of State ‘Human Trafficking & Migrant Smuggling: Understanding the Difference’ available at <https://www.state.gov/j/tip/rls/fs/2017/272005.htm> (accessed 23 February 2018).

⁶⁰ United Nations Office on Drugs and Crime ‘Human Trafficking and Smuggling of Migrants’ available at <https://www.unodc.org/westandcentralafrica/en/newrosenwebsite/TIPSOM/Human-trafficking-and-smuggling-of-migrants.html> (accessed 24 February 2018).

⁶¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 50.

⁶² U.S Department of State ‘Human Trafficking & Migrant Smuggling: Understanding the Difference’ available at <https://www.state.gov/j/tip/rls/fs/2017/272005.htm> (accessed 24 February 2018).

⁶³ Chibba M ‘Human Trafficking and Migration: Concepts, Linkages and New Frontiers’ (2013) *Global Policy Journal* 4.

⁶⁴ United Nations Human Rights Office of the High Commission ‘Human Rights and Human Trafficking’ available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 24 February 2018).

destination is reached,⁶⁵ whereby smuggled persons do not continue the relationship with the smuggler once the final destination has been reached.⁶⁶ In addition, the smuggled individual is, in general, independent of the smuggler. However, with human trafficking, the traffickers have control over their victims.⁶⁷

Notwithstanding the fact that the process of trafficking cannot be regarded outside the context of migration, trafficking must also not be confused with migration. Migration refers to the movement, from one place to another, or from one geographical unit to another across an administrative or political border, with the aim of settling indefinitely or provisionally in a place apart from the place of origin. Migration can take place within a country's borders or be transnational. Unlawful migration can either take the form of illegal migration or trafficking in persons. The distinction is that there is no third-party participation in the case of illegal migrants whereas, in case of trafficking, there is typically a third party involvement such as recruiters, transporters and exploiters.⁶⁸ Migration and human trafficking can be distinguished from one another on the ground that migration is regarded as a choice and trafficking occurs through the use of coercion or deception for purposes of exploitation.⁶⁹ Understanding the association between migration and human trafficking and the motivations and processes involved is thus critical to develop effective counter-trafficking strategies.

In short, the presence of coercive and/ or deceptive features in trafficking results in human rights abuses, unlike in the case of smuggling and illegal immigration where individuals may only be subjected to measures like arrest, detention and deportation.⁷⁰ For that reason, trafficking should be treated independently from smuggling and illegal migration.⁷¹

⁶⁵ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 51.

⁶⁶ McCabe KA *The Trafficking of Persons: National and International Responses* (2008) 6.

⁶⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 52.

⁶⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 53.

⁶⁹ Joshi A 'The Face of Human Trafficking' 2002 13(1) *Hastings Women's Law Journal* 32.

⁷⁰ Gallagher A 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 1000.

⁷¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 47.

2.3 Global efforts to combat human trafficking: A historical detour

The primary model of human exploitation, slavery, has an age-old tradition in Europe and Asia and later between Europe and Africa.⁷² Slavery continued in the second century BC amongst the Romans.⁷³ In Medieval times and later (sixth to fifteenth century AD), the slave trade continued through conflicts in South and East Europe.⁷⁴ In the second half of the nineteenth century, the phenomenon of so-called “white slavery” or the “white slave trade” triggered substantial worry in Europe and the United States.⁷⁵ Back then, white slavery denoted the abduction and transport of white women for prostitution predominantly to Muslim harems.⁷⁶

In response to the “white slave trade”, the League of Nations, the predecessor of the United Nations, drafted, in 1902, the first international anti-slavery agreement.⁷⁷ The International Agreement for the Suppression of the White Slave Trade 1904 addressed the deceitful and abusive enlistment of white women for prostitution.⁷⁸ The agreement calls on State parties to “establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad.”⁷⁹ The agreement refers to “victims of a criminal traffic,” although it does not define this term, and requests that State parties entrust the victims to “public or private charitable institutions, or to private individuals offering the necessary security” prior to their repatriation.⁸⁰ The Act proved to be ineffective, which resulted in its scope being broadened in 1910 to contain the trafficking of women and

⁷² Martens J, Pieczkowski M & Van Vuuren-Smyth B ‘Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa’ available at www.unhcr.org/4d523c689.pdf (accessed 24 February 2018).

⁷³ Copley A *History of Slavery and its Abolition* (1836) 39.

⁷⁴ Copley A *History of Slavery and its Abolition* (1836) 72.

⁷⁵ Goździak E & Collett E ‘Research on Human Trafficking in North America: A Review of Literature’ (2005) 43 *International Migration* 43.

⁷⁶ Doezema J ‘Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women’ (2000) 18 *Gender Issues* 25.

⁷⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 26.

⁷⁸ International Agreement for the Suppression of the White Slave Trade of 1904.

⁷⁹ International Agreement for the Suppression of the White Slave Trade of 1904.

⁸⁰ Amiel A ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’ (2006) 12 *Buffalo Human Rights Law Review* 25.

girls within national borders.⁸¹ In 1921, the trafficking of boys was also merged into the agreement with the adoption of the International Convention for the Suppression of Traffic in Women and Children of 1921.⁸² An additional international instrument, namely the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 was adopted to address slavery and also encompassed trafficking.⁸³ A subsequent convention, the International Convention for the Suppression of the Traffic in Women, condemned recruitment for the purpose of prostitution across international borders.⁸⁴

The preceding four international instruments were merged by the League of Nations to produce the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.⁸⁵ This convention is often viewed as the first united anti-trafficking convention in the world, which also defined the concept of trafficking in persons for the first time.⁸⁶ However, the term trafficking was set aside exclusively for the sexual exploitation of women and children in prostitution.⁸⁷

In the late 1980s and in the 1990s, a revived interest in the trafficking in human beings developed in the international sphere, which was influenced by the migration flows, the feminist movement, the AIDS endemic, prostitution and child sex tourism.⁸⁸ Due to sex tourism in South East Asia and the trafficking of women and girls from poor countries to Western Europe and North America, trafficking in persons attracted the attention of policy-makers and the community. No new agreements were adopted which meant that the 1950

⁸¹ Wijers M & Lap-Chew L 'Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution' available at <http://lastradainternational.org/doc-center/1137/trafficking-in-women-forced-labour-and-slavery-like-practices-in-marriage-domestic-labour-and-prostitution> (accessed 24 February 2018).

⁸² Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 27.

⁸³ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926.

⁸⁴ International Convention for the Suppression of the Traffic in Women of Full Age of 1933.

⁸⁵ Farrior S 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to Its Potential' (1997) 10 *Harvard Human Rights Journal* 213.

⁸⁶ Chuang J 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts' (1998) 11 *Harvard Human Rights Journal* 75.

⁸⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 29.

⁸⁸ Doezeema J & Kempadoo K 'Forced to Choose: Beyond the Voluntary v Forced Prostitution Dichotomy' in Kempadoo *Global Sex Workers: Rights, Resistance and Redefinition* (1998) 34-50.

Convention was still in force.⁸⁹ The problem was that trafficking was outlined as something that is undertaken for the select purposes of prostitution or the sexual exploitation of women.⁹⁰

In November 2000, the UN General Assembly made a major progress by adopting the Palermo Protocol.⁹¹ Five key factors contributed to the development of the Protocol. First, non-governmental organizations (NGOs) across the globe petitioned their governments on behalf of trafficking victims, who had suffered deplorable human rights violations, and did an excellent job exposing the practices of traffickers.⁹² Second, a consensus emerged that the figure of trafficking victims will continue to surge in conjunction with growing migration, and, therefore, it must be controlled.⁹³ Third, nations across the globe started to view trafficking as a human rights issue and as an issue of transnational organized crime that requires a global response.⁹⁴ Fourth, governments struggle with prosecuting human trafficking cases in the lack of trafficking laws.⁹⁵ Finally, the existing body of international trafficking law was inadequate to combat trafficking. The preceding trafficking agreements did not define trafficking and their scope was restricted to the act of enticing or abducting women for prostitution abroad.⁹⁶ With growing incidents of trafficking and insufficient laws

⁸⁹ Kelly L & Regan L 'Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK' available at <https://pdfs.semanticscholar.org/d317/6061bfa7309e63ea21fecf6e4817a4d953cb.pdf> (accessed 24 February 2018).

⁹⁰ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 30.

⁹¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

⁹² In addition, the NGOs raised awareness about victims' physical trauma resulting from beatings and rapes, forced abortions, starvation, forced drug use, 20-hour workdays, and contraction of HIV/AIDS and sexually transmitted diseases.

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

⁹³ According to a U.S. State Department study, approximately 2 million of these migrants are trafficked each year.

⁹⁴ Organized crime syndicates have made trafficking the third most profitable illegal industry, behind drugs and arms. The increasing involvement of organized crime in trafficking shaped a global law enforcement concern that can only be addressed in a global context.

⁹⁵ Hyland K 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 *Human Rights Brief* 30.

⁹⁶ Trafficking extends, however, not only to sexual exploitation but also to forced labour in a comprehensive range of situations including agriculture, domestic servitude, maid service, sweatshops, begging, and marriage.

to combat it, the international environment was ready for the formation of a new agreement governing trafficking in persons.⁹⁷

Global consideration of trafficking is shown by the addition of trafficking as a crime against humanity in the Rome Statute of the International Criminal Court. Trafficking is considered to be a crime against humanity "when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack." According to the Rome Statute, enslavement which occurs "in the course of trafficking in persons, in particular women and children," and "enforced prostitution," are deemed crimes against humanity within such context.⁹⁸

Despite the adoption of global legal framework, human trafficking continues in the 21st century, facilitated by various factors. Trafficking is a complex phenomenon that is often encouraged or influenced by social, economic and cultural factors.⁹⁹ The root causes of trafficking differ from one country to another.¹⁰⁰ Some of the common factors are home-grown conditions within the city which persuade individuals to migrate in search of improved conditions. These conditions include poverty, oppression, lack of human rights, lack of social or economic opportunity, dangers from conflict or instability and similar conditions. Further factors include globalisation and information technology, which have aided trafficking because they allow persons to easily buy, sell and exchange images of trafficking victims. Furthermore, advanced technology permits for concealment in committing the crime.¹⁰¹ The



Moreover, a victim can be a man, woman, or child. Therefore, the focus of trafficking is not limited to certain kinds of labour or victims, but largely on the recruitment stage that comprises some form of coercion, deception, or fraud, and the slavery phase where severe exploitation and human rights violations transpire.

⁹⁷ Hyland K 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 *Human Rights Brief* 30.

⁹⁸ Amiel A 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 *Buffalo Human Rights Law Review* 27.

⁹⁹ Perry K & McEwing L 'How do social determinants affect human trafficking in Southeast Asia, and what can we do about it? A systematic review' (2013) 15 (2) *Health and Human Rights Journal* 2.

¹⁰⁰ Rahman M 'Human Trafficking in the era of Globalization: The case of Trafficking in the Global Market Economy' (2011) 2 *Transcience Journal* 54.

¹⁰¹ Hughes DM 'The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children' 2002 13(1) *Hastings Women's Law Journal* 127 129.

above has given the industry various means of exploiting especially women and children, driving demand and utilising supply.¹⁰²

The problem is that most legal frameworks address trafficking as an act or as a series of acts of violence, with the culprits to be punished and the victims to be protected and re-established into society. Although these responses could account for the culmination of trafficking, they have a tendency to overlook causes, namely the broader socioeconomic conditions that make trafficking possible. It is vital to utilize international human rights law to deliver a conceptual framework in order to address the root causes of trafficking. That is why the Palermo Protocol obliges States to "take or strengthen measures to alleviate the factors that make persons vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity."¹⁰³ Although development policy can provide comprehensive remedies for action on the ground, international human rights law affords an important regulatory framework within which these strategies can be assembled. Undoubtedly, a human rights framework provides legal and political space for the marginalized to begin to claim these needs as rights, and, in so doing, brings the scope of State responsibility into focus.¹⁰⁴

2.4 International law and human trafficking

As a rising international crime, trafficking in persons is on the international agenda. The efforts to address this widespread problem are apparent in the several multilateral responses at the international level. Various instruments which have dealt with human trafficking date back to the eradication of slavery. The list includes the Slavery Convention,¹⁰⁵ the Supplementary Convention on the Abolition of Slavery¹⁰⁶, the Slave Trade, and Institutions and Practices Similar to Slavery¹⁰⁷. Further instruments of international law that include sections against the trafficking of persons include the Universal Declaration of Human

¹⁰² Hughes DM 'Globalization, Information Technology and Sexual Exploitation of Women and Children' (2001) 13 *A Radical Feminist Journal of Discussion and Activism* 1.

¹⁰³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9.

¹⁰⁴ Chuang J 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 *Indiana Journal of Global Legal Studies* 158.

¹⁰⁵ Slavery Convention (1926).

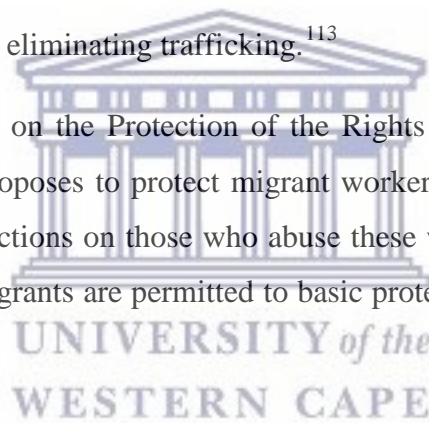
¹⁰⁶ Supplementary Convention on the Abolition of Slavery (1956).

¹⁰⁷ Slave Trade, and Institutions and Practices Similar to Slavery.

Rights¹⁰⁸, the International Covenants on Civil and Political Rights¹⁰⁹, The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹¹⁰ Beginning with the latter, this section briefly explains the relevance of these and other instruments in combatting human trafficking.

The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others decrees that "the traffic in persons for the purpose of prostitution is incompatible with the dignity and worth of the human person".¹¹¹ The Convention stipulates procedures for combating international trafficking for prostitution, including expulsion of offenders. It also disallows the running of brothels and renting accommodation for prostitution purposes. The definition of trafficking of this Convention was departed from in the Trafficking Protocol to the United Nations Convention against Transnational Organized Crime and the Convention on the Elimination of all Forms of Discrimination Against Women¹¹². These instruments laid the groundwork for the present-day conventions and efforts to eliminating trafficking.¹¹³

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families proposes to protect migrant workers by setting out all-inclusive safeguards and to enforce sanctions on those who abuse these workers.¹¹⁴ According to this instrument, undocumented migrants are permitted to basic protection and recognition of their



¹⁰⁸ Universal Declaration of Human Rights (1948).

¹⁰⁹ International Covenants on Civil and Political Rights (1966).

¹¹⁰ United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

¹¹¹ United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

¹¹² Convention on the Elimination of all Forms of Discrimination Against Women (1979).

¹¹³ King L 'International Law and Human Trafficking' (2013) *Topical Research Digest: Human Rights and Human Trafficking* 88.

¹¹⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

rights as human beings.¹¹⁵ This is an imperative provision for human trafficking survivors who are stranded in a foreign country without any legal documents.¹¹⁶

The Convention on the Rights of the Child guarantees the rights of the child and prohibits all forms of child sexual exploitation, including child prostitution, child pornography, including the sale or traffic of children or other unlawful sexual practices.¹¹⁷ The Convention is a valued instrument in the fight against child trafficking as it enjoys unmatched worldwide acceptance of the Convention and given the fact that the Convention encompasses inclusive international legal provisions regarding the prevention of all forms of child exploitation and the punishing of perpetrators of such acts.¹¹⁸ In addition, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography recognizes the surge in international trafficking of children for the purposes of sale, prostitution, and pornography,¹¹⁹ and the vulnerability of female children to sexual exploitation.¹²⁰ It, as a result, aims to eradicate these crimes by adopting a comprehensive approach by addressing the factors which contribute to the crime.¹²¹ An additional Protocol linked to the Convention on the Rights of the Child and that is central to the combatting of child trafficking is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.¹²² It, however, focuses only on one facet of trafficking, which is the use of children in armed conflict. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict intends to ensure that children below the age of 18 are not forced to participate directly in

¹¹⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

¹¹⁶ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 131.

¹¹⁷ United Nations Convention on the Rights of the Child (1989).

¹¹⁸ Fariior S 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to Its Potential' (1997) 10 *Harvard Human Rights Journal* 233.

¹¹⁹ Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* 3rd ed (2002) 475.

¹²⁰ United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000).

¹²¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 136.

¹²² Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).

hostilities.¹²³ Ratifying States must confirm that while their armed forces can agree to take volunteers below the age of 18, they cannot be recruited.¹²⁴

Next to trafficking for purposes of sexual exploitation, trafficking for purposes of forced labour is the next major form of trafficking. The International Labour Organisation's (ILO) Forced Labour Conventions and the Minimum Age Convention deals with human trafficking in relation to forced labour, the abuse of migrant workers and the worst forms of child labour.¹²⁵

The Convention on the Elimination of All Forms of Discrimination against Women recognises that gender and race based discrimination as a crucial factor which renders women predominantly vulnerable to trafficking.¹²⁶ Article 6 obliges States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.¹²⁷ The Declaration on the Elimination of Violence against Women, on the other hand, strives to eliminate, in addition to other forms of violence against women, trafficking in women and forced prostitution.¹²⁸ This is crucial as violence is innate to trafficking especially for sexual exploitation, which often involves demeaning and abusive sexual acts against the victims.¹²⁹ Related to this is the Convention on the Elimination of All Forms of Racial Discrimination which provides for the principle of non-discrimination.¹³⁰ This is essential as many trafficked persons are vulnerable to trafficking for reason of their ethnicity, race, religion or class.

¹²³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002), Preamble, Para 6 & Article 1-3.

There is not a total prohibition on the use of minors less than 18 years in armed conflict. States are required to "take all feasible measures" that they participate in direct hostilities. The OPCC does not cover situations where children under the age of 18 are kidnapped or forced to join an army.

¹²⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).

¹²⁵ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 139.

¹²⁶ United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979).

¹²⁷ United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979).

¹²⁸ Declaration on the Elimination of Violence against Women, Article 2 (b).

¹²⁹ Declaration on the Elimination of Violence against Women (1993).

¹³⁰ Convention on the Elimination of All Forms of Racial Discrimination (1965).

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is an international human rights instrument, requiring States to proscribe torture and take effective measures to prevent torture in any territory under its jurisdiction.¹³¹ Further, it prohibits States from sending persons back to their native country if there are substantial grounds existing that indicate they will be tortured.¹³² The definition of torture illustrates that the term ‘torture’ can only be used where the pain or suffering is initiated by public officials or individuals acting in an official capacity.¹³³ However, in human trafficking, it is usually non-State personnel who torture victims. Nevertheless, it remains that States have an obligation to protect people from human-rights violations by third parties.¹³⁴

The International Covenant on Civil and Political Rights contain unambiguous provisions obliging States Parties to respect and protect human rights within their territories.¹³⁵ The International Covenant on Civil and Political Rights disallows any form of slavery, servitude and forced labour.¹³⁶ It further proclaims that no one shall be held in slavery; slavery and slave-trade, in all their forms, shall be prohibited.¹³⁷ The importance rendered by the ICCPR to the slavery provision is highlighted by its status as a non-derogable right under article

¹³¹ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2.

¹³² Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3.

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity 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.”

¹³³ These acts are described in the CAT as those performed by law enforcement personnel, civil or military, medical personnel, public officials, Article 10.

Those involved in the interrogation practices and arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, Article 11.

¹³⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 149.

¹³⁵ International Covenant on Civil and Political Rights, Article 2(1) states that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹³⁶ International Covenant on Civil and Political Rights, Article 8(2) & 8(3)(a).

¹³⁷ International Covenant on Civil and Political Rights, Article 8(1).

4(2).¹³⁸ Trafficking places victims beyond the protection of the law and reach of law enforcement officers and others who are able to help them as it infringes on their right to recognition as an individual before the law in addition to the right to equal protection before the law.¹³⁹

Several countries are parties to the International Covenant on Economic, Social, and Cultural Rights and therefore have a responsibility to safeguard the protection of economic and social rights. These rights are also extended to trafficked persons.¹⁴⁰ Trafficked women and girls work undocumented in an industry that is largely unregulated; in essence, they do not freely select the work that they perform or the conditions of work.¹⁴¹ Article 7 guarantees the right to just and favourable conditions of work. This provision further provides for remuneration, fair wages, safe and healthy work conditions, rest and decent living, all of which trafficked women in the sex industry do not enjoy or even have the opportunity to negotiate.¹⁴²

It is imperative to contemplate the numerous instruments around trafficking that are not strictly law. These include the following; the Recommended Principles and Guidelines on Human Rights and Human Trafficking; guidelines on child trafficking, issued by the United Nations Children's Fund, and on trafficking and asylum, issued by the Office of the United Nations High Commissioner for Refugees; resolutions adopted by the General Assembly and the Human Rights Council; findings and reports of international human mechanisms such as treaty bodies and special procedures; and non-treaty agreements between countries regarding issues such as the repatriation and reintegration of trafficked persons.¹⁴³ These wide-ranging sources do not directly enforce obligations on States or confer rights on individuals or groups. However, some 'soft law' instruments can form part of the international legal framework by,

¹³⁸ International Covenant on Civil and Political Rights (1966).

¹³⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 158.

International Covenant on Civil and Political Rights, Article 3.

¹⁴⁰ International Covenant on Economic, Social, and Cultural Rights (1966).

¹⁴¹ Fergus L *Trafficking in Women for Sexual Exploitation* (2005)19.

¹⁴² International Covenant on Economic, Social, and Cultural Rights (1966).

¹⁴³ United Nations Human Rights Office of the High Commissioner 'Human Rights and Human Trafficking' available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 27 February 2018).

for example, assisting to identify or authorize a specific legal trend or by contributing to the development of customary international law in relation to a particular aspect of trafficking.

It is widely accepted that human rights violations follows any act of trafficking. In addressing gross human rights violations, international law plays a pivotal role.¹⁴⁴ The enforcement of international law with regards to human trafficking is most practical and efficient when it is made part of domestic legislation. Although human trafficking is a complex issue, the international legal instruments have been implemented to support trafficking victims and to combat this worldwide epidemic.¹⁴⁵

2.5 Specific International Instruments/ Treaties for Protection against Trafficking in Persons

In addition to the general instruments of international human rights law, there are specific international instruments that help to combat trafficking in persons.

2.5.1 The United Nations Convention against Transnational Organized Crime

One such specific instrument is the United Nations Convention against Transnational Organized Crime. This United Nations Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.¹⁴⁶ The importance of these developments should not be underestimated. The Vienna process signifies the first serious effort by the international community to invoke international law in its battle against transnational organized crime.¹⁴⁷

¹⁴⁴ Sveaass N 'Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation' (2013) *European Journal of Psychotraumatology* 1.

¹⁴⁵ King L 'International Law and Human Trafficking' (2013) *Topical Research Digest: Human Rights and Human Trafficking* 88.

¹⁴⁶ United Nations Office on Drugs and Crime 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 28 February 2018).

¹⁴⁷ Gallagher A 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 976.

As part of the process of enforcing these instruments, the UNODC established the United Nations Global Initiative to Fight Human Trafficking in 2007.¹⁴⁸

The United Nations Convention against Transnational Organized Crime is known as the “parent” agreement¹⁴⁹ and is the foremost international instrument in the fight against transnational organized crime.¹⁵⁰ The Convention highlights a progressive step forward in the fight against transnational organized crime and suggests the recognition by Member States of the gravity of the problems posed by it, in addition to the need to heighten international cooperation in order to tackle those problems. States that ratify this instrument bind themselves to take measures against transnational organized crime, including the creation of domestic criminal offences, participation in an organized criminal group, money laundering, corruption and obstruction of justice; the adoption of innovative and comprehensive frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.¹⁵¹

As mentioned above, the Convention is supplemented by, among other protocols, by the Protocol against the Smuggling of Migrants by Land, Sea and Air. This Protocol deals with the escalating problem of organized criminal groups who smuggle migrants which is often at a greater risk to the migrants and at a profit for the offenders. A considerable achievement of the Protocol was that, for the first time in an international instrument, a definition of smuggling of migrants was established and had been agreed upon.¹⁵² The Protocol purposes at preventing and combating the smuggling of migrants, as well as promoting cooperation

¹⁴⁸ King L ‘International Law and Human Trafficking’ (2013) *Topical Research Digest: Human Rights and Human Trafficking* 88.

¹⁴⁹ Gallagher A ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 *Human Rights Quarterly* 977.

¹⁵⁰ United Nations Office on Drugs and Crime ‘United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 28 February 2018).

¹⁵¹ United Nations Office on Drugs and Crime ‘United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 28 February 2018).

¹⁵² United Nations Office on Drugs and Crime ‘United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 28 February 2018).

among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process.¹⁵³

2.5.2 Palermo Protocol

The initial drafts of the Trafficking Protocol were restricted to trafficking in women and children. During the first negotiating session, States, intergovernmental organizations, and NGOs contended that it was unreasonably restrictive and did not take into consideration the fact that men were also trafficked. Following a recommendation of the Ad-Hoc Committee, the General Assembly subsequently agreed to modify the mandate of the Committee's mandate so as to enable that the scope of the proposed protocol be expanded to cover trafficking in persons especially women and children.¹⁵⁴

As an international instrument, which deals expansively with the issue of trafficking in persons, the Palermo Protocol has been applauded as a tool enabling the international community to fight human trafficking.¹⁵⁵ It is the first anti-trafficking agreement adopted by the United Nations that takes a "comprehensive international approach" as it encompasses the first internationally agreed definition of the crime of trafficking in humans.¹⁵⁶

What is interesting about the Palermo Protocol is the mode in which it has attempted to address trafficking in persons; it combines a criminal-law approach with a human-rights approach. This is made clear from the preamble of the Protocol.¹⁵⁷ According to the preamble, the Protocol's specific goal is to adopt "effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes

¹⁵³ The Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly resolution 55/25, entered into force on 28 January 2004.

¹⁵⁴ Gallagher A 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 983.

¹⁵⁵ Shoaps L 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' (2013) 17.3 *Lewis & Clark Law Review* 932.

¹⁵⁶ Shoaps L 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' (2013) 17.3 *Lewis & Clark Law Review* 933.

¹⁵⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking.”¹⁵⁸

In order to achieve the objectives of the Palermo Protocol, State parties were given instructions to domesticate the Palermo Protocols, with the understanding that the incorporation and domestication of the Palermo Protocols will allow states to work together more efficiently and promote the protection of victims’ rights.¹⁵⁹ The Protocol aspires for uniformity in national approaches with regard to making domestic criminal offences that would support proficient international cooperation in investigating and prosecuting trafficking in person’s cases.¹⁶⁰

Generally put, the Palermo Protocol seeks to provide preventive, protective as well as prosecution-focused responses to human trafficking as a means of guaranteeing the human rights of victims.¹⁶¹ In the remainder of the chapter, each element of the Palermo Protocol will be discussed. The next section focuses the preventative element of the Protocol.

2.5.2.1. Prevention

Human trafficking is challenging to police. Undoubtedly, a stern criminal justice response is crucial for any effective global counter-trafficking strategy. Absent meaningful victim protection and long-term prevention measures is only a provisional solution to a continuing and potentially growing problem.¹⁶² Thus, in order to stop the cruel cycle of trafficking, a strategy is required which frames the problem within its broader socioeconomic context and takes seriously the project of pursuing the root causes of this complex issue.¹⁶³ Trafficking thrives as soon as governments fail to protect and promote an individual’s civil, political,

¹⁵⁸ Shoaps L ‘Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act’ (2013) 17.3 *Lewis & Clark Law Review* 933.

¹⁵⁹ Joshi A ‘The Fact of Human Trafficking’ (2002) 13(1) *Hastings Women’s Law Journal* 13.

¹⁶⁰ Horn W *South Africa’s Legal Compliance with its International Obligations in Respect of Child Trafficking* (unpublished LLMV thesis, North- West University, 2009) 41.

¹⁶¹ Aransiola J & Zarowsky C ‘Human trafficking and human rights violations in South Africa: Stakeholders’ perceptions and the critical role of legislation’ (2014) 14 *African Human Rights Law Journal* 512.

¹⁶² Chuang J ‘Beyond a Snapshot: Preventing Human Trafficking in the Global Economy’ (2006) 13 *Indiana Journal of Global Studies* 156.

¹⁶³ Chuang J ‘Beyond a Snapshot: Preventing Human Trafficking in the Global Economy’ (2006) 13 *Indiana Journal of Global Studies* 156.

economic as well as social rights.¹⁶⁴ This makes prevention efforts an important part of the global movement to combat human trafficking. Subsequently, there is a growing body of literature and political will relating to the recognition of prevention as the end goal.

In the context of trafficking in persons, prevention refers to positive measures that States are required to take to prevent future acts of trafficking from taking place.¹⁶⁵ Policies and activities known as prevention are usually those considered to be addressing the causes of trafficking. These are generally agreed to be the factors that increase the vulnerability of victims and potential victims, generate or sustain demand for the goods and services produced by trafficked persons and create or sustain a setting within which traffickers and their accomplices can operate with immunity.¹⁶⁶

The Protocol allocates five provisions to the prevention, cooperation and other measures to combat trafficking in persons. States Parties are required create broad policies, programmes and other measures to prevent and combat trafficking in persons.¹⁶⁷ In addition, States Parties are required to undertake measures, such as information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.¹⁶⁸ The Palermo Protocol provides that policies, programmes and other measures established in accordance with this article shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.¹⁶⁹ In addition to governments

¹⁶⁴ Ross M 'A Diamond in the Rough: The Transitional Duty to Prevent Human Trafficking in the Protocol' (2014) 21 *Duke Journal of Gender Law & Policy* 328.

¹⁶⁵ Gallagher A *The International Law of Human Trafficking* (2010) 414.

¹⁶⁶ Gallagher A *The International Law of Human Trafficking* (2010) 414. Effective prevention efforts address the strategies of human traffickers head on, together with the dispersal of correct and targeted information; communities will be better equipped to respond to the risk of human trafficking. Strategic intervention programs can reach at-risk populations before they are faced with dishonest recruitment practices of those determined on abusing them for labour or commercial sex. Therefore, purposeful partnerships between public and private sectors and civil society can expand awareness, leverage expertise, and facilitate creative solutions. See United States Department of State 'The Three Ps; Prevention, Protection, Prosecution' available at <http://www.state.gov/j/tip> (accessed 28 February 2018).

¹⁶⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9 (1) (a) & (b).

¹⁶⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 2.

¹⁶⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3.

establishing extensive policies and programmes regarding trafficking, in collaboration and cooperation with NGOs, it must also conduct research as it is important in understanding trafficking and developing these policies and responses. It advocates information-sharing between states and the training of experts involved in one capacity or another in the struggle against human trafficking.¹⁷⁰

Article 9 of the Protocol requires States to protect victims, especially women and children from re-victimisation. It is well known that, in some instances, those who have been trafficked and then deported to their country of origin may face the risk of being trafficked again.¹⁷¹ States Parties will attempt to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.¹⁷²

Additionally, policies and programmes ought to include cooperation with non-governmental organizations and other elements of civil society.¹⁷³ States Parties shall take measures to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.¹⁷⁴ Further, States Parties should adopt or strengthen legislative or other measures, such as educational, social or cultural measures to discourage the demand that nurtures all forms of exploitation of persons, especially women and children that leads to trafficking.¹⁷⁵

The two last paragraphs of article 9 supplement each other in preventing trafficking. It is equally important to address the root-causes of trafficking and the demand that sustains

¹⁷⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

¹⁷¹ United Nations Human Rights Office of the High Commission 'Human Rights and Human Trafficking' available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 28 February 2018).

¹⁷² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9 (2).

¹⁷³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9 (3).

¹⁷⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9 (4).

¹⁷⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 9 (5).

trafficking. One interpretation of this paragraph is that the demand for trafficking for the purpose of sexual exploitation could be reduced through addressing the clients of prostitution. Additionally, trafficking for the purpose of labour could be reduced by discouraging the demand for migrant workers.¹⁷⁶

Article 10 focuses on the information exchange between authorities and training of authorities.¹⁷⁷ Law enforcement, immigration and other relevant authorities are required to co-operate with one another by exchanging information, in order to be able to determine whether individuals crossing borders with travel documents belonging to another person or without travel documents are perpetrators or victims of trafficking, the types of documents that are used in crossing an international border for the purpose of trafficking, the means and methods used by organized criminal groups, such as recruitment, transportation, routes and links, and possible measures to detect them.¹⁷⁸ In terms of the training of authorities, States should arrange for training for law enforcement, immigration and further relevant officials in the prevention of trafficking in persons. The training should focus on various measures of prevention, prosecution of offenders and protection of victims. The training should also inspire co-operation with civil society and non-governmental organisations. It is important to note that such training shall take into account human rights aspects and be child- and gender sensitive.¹⁷⁹

Article 11 deals with border measures. Accordingly, State Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.¹⁸⁰ This paragraph calls for a careful balance between freedom of movement and border controls. While States strengthen border control measures to get at traffickers and

¹⁷⁶ Ollus N 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel' available at https://www.unafei.or.jp/publications/pdf/RS_No62/No62_06VE_Ollus1.pdf (accessed 28 February 2018).

¹⁷⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 10.

¹⁷⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 10 (1).

¹⁷⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 10 (2).

¹⁸⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 11.

illegal migrants, it should not happen at the expense of victims' human rights. Article 11 further requires States to adopt measures to prevent transport operated by commercial carriers. States should oblige such commercial carriers or companies to ascertain that all passengers have necessary travel documents and provide for sanctions in case of violations of this obligation.¹⁸¹ These sanctions could include, for example, that the commercial carrier is obliged to return any persons who are found to possess inadequate travel documents.¹⁸² States can also permit the denial of entry or revocation of visas of persons who are known to engage or suspected of engaging in trafficking crimes.¹⁸³ Finally, States shall consider strengthening co-operation among border control agencies by establishing and maintaining direct channels of communication.¹⁸⁴

Article 12 focuses on the security and control of documents, obliging States to ensure that their travel or identity documents cannot easily be misused, falsified or unlawfully altered, replicated or issued as well as to ensure the integrity and security of these documents and to prevent their unlawful creation, issuance and use.¹⁸⁵ Finally, Article 13 of the Protocol refers to the legitimacy and validity of documents. At the request of another State, a State Party shall verify, within a reasonable time, the legitimacy and validity of travel documents that are suspected of being used for trafficking in persons.¹⁸⁶

In short, preventative measures refer to positive measures which State parties to the Protocol must take to halt the act of human trafficking. The Protocol assigns prevention cooperation measures to combat human trafficking. This requires the establishment of policies, programmes to prevent trafficking in persons. In addition, information and mass media

¹⁸¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 11 (2).

¹⁸² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 11.

¹⁸³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 11 (5).

¹⁸⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 11 (6).

¹⁸⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 12.

¹⁸⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 13.

campaigns and social and economic initiatives must take place to prevent trafficking in persons. Governments must work with NGOs as well as conduct research as it is important in understanding trafficking and developing these policies and responses. The prevention efforts are essential in the fight to combat human trafficking. It is important to note that human trafficking thrives as long as governments fail to protect and promote civil, political, economic and social rights. Thus, it is imperative to tackle the root causes of human trafficking.

2.5.2.2 Prosecution

The Palermo Protocol has been described as, “compromising of a strong law enforcement tool”.¹⁸⁷ Several authors are of the view that the Protocol is mainly a law enforcement instrument, rather than a human rights instrument. As a result, criminalisation is considered as the most effective means of combating human trafficking and related crimes. State parties are therefore prescribed to adopt legislation to criminalise activities relating to human trafficking.¹⁸⁸

Signatory countries to the Palermo Protocol are obliged to establish wide-ranging policies, programs, and other measures to prosecute those guilty of trafficking in persons.¹⁸⁹ As such, it is essentially a law enforcement instrument aimed at criminalising trafficking in persons, prosecute wrongdoers, protect victims, and advocate collaboration among States Parties in order to meet those objectives.¹⁹⁰ Member States are, however, permitted to determine the details pertaining to prosecution and victim protection themselves.¹⁹¹

In terms of prosecution, the Protocol obliges signatory countries to criminalize the organization of, assistance with or participation in the trafficking of individuals as defined in

¹⁸⁷ Iroanya R *Human Trafficking as a Security Issue: Selected Case Studies* (unpublished LLD thesis, University of Pretoria, 2014) 206.

¹⁸⁸ Iroanya R *Human Trafficking as a Security Issue: Selected Case Studies* (unpublished LLD thesis, University of Pretoria, 2014) 206.

¹⁸⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

¹⁹⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

¹⁹¹ Askola H *Legal Response to Trafficking in Women For Sexual Exploitation in the European Union* (2007) 123.

article 3(a).¹⁹² The scope of application is contained in article 4 of the Palermo Protocol, which states that it shall apply to the prevention, investigation and prosecution of offences that are transnational in nature and involve an organised criminal group.¹⁹³ The fact that the scope of application of the Protocol is limited to transnational crimes suggests that only cross-border trafficking is considered. Trafficking, however, may also be performed within a country by its nationals. Such offenders could escape liability, relying on the principle of legality.¹⁹⁴ Furthermore, the scope of the crime is limited to an organised criminal group only. This limitation would leave many victims, mostly in developing countries, who are trafficked by individuals who are not part of a criminal group without any reparation.

Article 5 of the Protocol provides for States to prosecute perpetrators of human trafficking in mandatory terms.¹⁹⁵ It 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”.¹⁹⁶ The provision makes it clear that intention, not negligence, is required.¹⁹⁷ Per se, the crime of trafficking will occur if there was intention to traffic a human being for one of the specified exploitative outcomes.¹⁹⁸

Section 5(2) criminalises any attempt to commit the crime, being an accomplice to the offence as well as organising others to commit the offence.¹⁹⁹ In specific settings, trafficked

¹⁹² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).

¹⁹³ Chuang J ‘Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts’ (1998) 11 *Harvard Human Rights Journal* 137.

¹⁹⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 113.

¹⁹⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 5.

¹⁹⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 5.

¹⁹⁷ United Nations Office on Drugs and Crime ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto’ available at https://www.unodc.org/.../crime/legislative_guides/01%20Introduction%20and%20Li... (accessed 28 February 2018).

¹⁹⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 114.

¹⁹⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 115.

persons may have initially agreed to work illegally or to have agreed to travel with deceitful or no documentation. Further, States are mandated to cooperate through information exchange, to bolster law enforcement and border controls, and adopt legislative and other appropriate measures such as sanctions to prevent commercial carriers transporting trafficked persons.²⁰⁰

From the foregoing, it is acknowledged that the criminalisation of human trafficking is the most effective means of combatting human trafficking. State parties are required to adopt legislation, which criminalises activities relating to human trafficking. Article 5 of the Protocol is relied upon to prosecute human traffickers. Further, Article 3 of the Protocol makes it clear that there has to be an intention to traffic an individual. The Palermo Protocol thus makes specific provisions available to be relied upon with regards to the prosecution of offenders.

2.5.2.3 Victim Protection

Those who fall victim to human trafficking are in need of the appropriate and adequate care and support which may provide them with a sense of security.²⁰¹ The Palermo Protocol requires the assistance and the protection of the victims of human trafficking.²⁰²

The Palermo Protocol does not define trafficking victims. The UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines a victim as an individual who “suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse of power”.²⁰³ Victims of trafficking are persons who have felt harm due to their trafficker’s exploitation.²⁰⁴ The Palermo Protocol establishes

²⁰⁰ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 115.

²⁰¹ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 10.

²⁰² Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 21.

²⁰³ Amiel A ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’ (2006) 12 *Buffalo Human Rights Law Review* 27.

²⁰⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 56.

certain minimum standards pertaining to the assistance to and protection of victims, which are provided under articles 6 – 8 of the Protocol.²⁰⁵

Article 6(1) instructs States to protect the victims' privacy and identity in legal proceedings in appropriate cases and to the extent possible under domestic law.²⁰⁶ The public revelation of the individual's identity increases the risk of retaliation by the traffickers.²⁰⁷ States Parties are required to make available all the pertinent information and assistance regarding legal actions,²⁰⁸ which have been taken on their behalf. A vital form of redress for victims of human trafficking is, of course, the effective prosecution of traffickers.²⁰⁹

In addition, both the origin and destination States must provide suitable shelter, counselling, basic medical and mental health care, material assistance and employment, educational and training opportunities for the recovery of trafficked persons from physical, psychological and social traumas.²¹⁰ This is of particular importance since trafficked victims may need treatment in order to properly address post-traumatic symptoms and sufficient recovery time prior to making a decision about partaking in prosecutorial or immigration proceedings or returning home.²¹¹ Section 6(3) grants governments discretionary power in the implementation of the appropriate physical, psychological or social recovery measures.²¹²

²⁰⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 & 8.

²⁰⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (1).

²⁰⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 119.

²⁰⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (2).

Victims of trafficking must be provided with information on relevant court and administrative proceedings. This includes legal advice in their mother language through an interpreter or in writing through a translator. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (3)(b).

²⁰⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 119.

²¹⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (3).

²¹¹ Zimmerman C, Hossain M & Yun K et al 'The Health of Trafficked Women: A Survey of Women Entering Post-Trafficking Services in Europe' (2008) 98(1) *American Journal of Public Health* 58.

²¹² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, s3.

Further factors are required to be taken in account in applying the provisions of this Article, including the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.²¹³ Additionally, State parties to the Protocol shall attempt to provide for the physical safety of victims of trafficking in persons while they are within its territory.²¹⁴

In addition, the Protocol requires member States to guarantee that domestically, the legal system incorporates measures which offer victims the prospect of obtaining compensation²¹⁵ as restitution for damages suffered, regardless of their nationality.²¹⁶ These suitable and applicable remedies strive to correct the consequence of trafficking and to act as a deterrent to traffickers.²¹⁷ Additionally, it serves to show respect for the victim and to publically acknowledge the offender's role in failing to respect basic rights.²¹⁸ The reparation must first and foremost be paid by the traffickers. Article 7 further provides that appropriate consideration to humanitarian and compassionate factors.²¹⁹

In the case of victims of trafficking, countries are obliged to accept the return of any person who is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State.²²⁰ State Parties are to assist and accept the return of nationals or specified permanent residents without unnecessary delay and to confirm

²¹³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (4).

²¹⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (5).

²¹⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6(6).

This provision limits victims to the possibility of obtaining compensation, not the right to seek compensation and restitution for the harm suffered. Compensation is obtained from a government-created victim compensation fund, which could result in much less money than victims could recover directly from the traffickers in a court order to compensate for the harm suffered

²¹⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 6 (6).

²¹⁷ Shelton D *Remedies in International Human Rights law* (1999) 14.

²¹⁸ Obokata T *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (2006) 160.

²¹⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 7.

²²⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 8 (1) (1).

without delay whether illegal migrants in other countries are actually their nationals or residents²²¹ This includes the obligation to issue any essential travel documents such as passports, entry or transit visas.²²²

A major concern with the return of trafficking victims is that it may leave them vulnerable to being trafficked all over again or, in some cases, vulnerable to retaliation from traffickers for having cooperated with law enforcement or prosecution authorities.²²³ Another concern is that, in some cases, victims have been sent home while criminal or other legal proceedings in which they have an interest are still ongoing.²²⁴ To respond to these concerns, the text requires all States Parties involved to have due regard for the safety of the victim and for the status of any ongoing legal proceedings.²²⁵ Returns may be carried out involuntarily, but the text states that the process “shall preferably be voluntary.”²²⁶ This reflects a compromise between concerns that giving victims any concrete formal legal status or right to remain in destination states might provide further incentives and opportunities for traffickers, on one hand, while excessive or rapid returns might unnecessarily expose victims to further hardship and risk, on the other.

Victims of human trafficking are in need of adequate care and support which may provide them with a sense of security. The Palermo Protocol requires both the assistance and protection of victims of human trafficking. This can be found in Articles 6 to 8, which must be accompanied by human rights obligations in additional international instruments. The Protocol requires the privacy and identity of the victim to be protected in legal proceedings. The text requires all States Parties involved to have due regard for the safety of the victim and for the status of any ongoing legal proceedings. Victims are provided legal assistance as

²²¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 8 (1) (3).

²²² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 8 (1) (4).

²²³ United Nations Human Rights Office of the High Commission ‘Human Rights and Human Trafficking’ available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 24 February 2018).

²²⁴ United Nations Human Rights Office of the High Commission ‘Human Rights and Human Trafficking’ available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 24 February 2018).

²²⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 8 (2).

²²⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 8 (2).

well as suitable shelter, counselling, medical care, material assistance as well as employment and education opportunities. The Palermo Protocol further requires that victims have the opportunity of obtaining compensation and restitution for damages suffered. Additionally, countries are obliged to accept the return of any person who is a victim of human trafficking and is a national at the time of the return or who had a right of permanent residence at the time he or she entered the destination State.

2.6. Conclusion

Human trafficking comprises of the recruitment, movement and exploitation of an individual. This made human trafficking too complex to be amenable for an acceptable definition. A major breakthrough came with the adoption of the Palermo Protocol. The Palermo Protocol's definition of human trafficking refers to the act itself, the manner in which it is executed and lastly the purpose thereof. As it is evident from the discussion, the Palermo Protocol deals expansively with the issue of human trafficking, largely focusing on prosecution, protection and prevention.

In terms of prosecution, criminalisation is considered as the most effective means of combating human trafficking and related crimes. State parties are therefore expected to adopt legislation to criminalise activities relating to human trafficking. Signatory countries to the Palermo Protocol are obliged to establish wide-ranging policies, programs, and other measures to prosecute those guilty of trafficking in persons. Additionally, victims of human trafficking are in need of the appropriate and adequate care and support which may provide them with a sense of security. The Palermo Protocol requires the assistance and the protection of the victims of human trafficking. In terms of prevention, the Protocol expects State parties to put in place measures that address the causes of trafficking. These are generally agreed to be the factors that increase the vulnerability of victims and potential victims, generate or sustain demand for the goods and services produced by trafficked persons and create or sustain a setting within which traffickers and their accomplices can operate with immunity.

In short, the chapter has provided a comprehensive overview of human trafficking. Now that the minimum requirements of the Palermo Protocol have been established, the next chapter moves to the main focus of this study and examines whether South Africa successfully meets the requirements under the Palermo Protocol.

CHAPTER 3

Examining South Africa's compliance with the Palermo Protocol

3.1 Introduction

South Africa is a member State to the Palermo Protocol. As indicated in the previous chapter, the Protocol obliges member States to prosecute offenders of human trafficking, protect the victims of human trafficking as well as take measures to prevent human trafficking.²²⁷ The objective of this chapter is to examine, with respect to each element, whether South Africa has fully complied with the Protocol. The chapter will first look at the prosecution of human traffickers. This will be followed by a discussion on victim protection. It concludes the discussion by focusing on the prevention of human trafficking.

3.2 Prosecution

Under South African law, human traffickers may be prosecuted for their crimes under the common law or various pieces of legislation, which will be discussed below. The general framework is provided under the Constitution.²²⁸

3.2.1 The Constitutional Framework

In addition to its international and regional commitments, the Constitution of the Republic of South Africa provides for provisions that reinforce the international commitment of South Africa to combat the trafficking of persons. Sections 231, 232 and 233 of the Constitution deal explicitly with the use of international law in South Africa. In terms of section 231 of the Constitution, an international agreement binds South Africa; however, it only becomes law once it is accordingly enacted into law by national legislation.²²⁹ Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.²³⁰ Section 233 of the Constitution furthermore prescribes that when a court interprets any legislation, the court must prefer any reasonable interpretation of law that is consistent with international law over any alternate

²²⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000).

²²⁸ In terms of sections 28, 231, 232 and 233 of the Constitution, international law has persuasive authority in the courts, not binding authority, unless passed into domestic law.

²²⁹ The Constitution of the Republic of South Africa, s231.

²³⁰ The Constitution of the Republic of South Africa, s232.

interpretation that is contrary with international law.²³¹ This firmly entrenches the international commitment of South Africa to combat human trafficking.

Furthermore, the Constitution provides for national human rights commitments that are relevant to combat human trafficking.²³² One such commitment is the protection of the rights of children, enshrined in chapter 2 of the Constitution, which provides for the Bill of Rights.²³³ Every child enjoys the same protection in the Bill as his or her adult counterpart.²³⁴ Section 28 of the Constitution specifically protects the rights of children, as it offers what many children's rights activists view as the foundation for developing specific legislation which prohibits trafficking in persons, particularly children.²³⁵

3.2.2 Common Law

With regard to common law, subject on the circumstances of each case, there are a number of options that are available for the prosecutor to charge a suspected trafficker.²³⁶ In the absence of recognized trafficking legislation or in situations where all elements of the trafficking offence cannot be established, the crime of kidnapping remains an option that can be taken against perpetrators.²³⁷ Rape charges can be laid against offenders and clientele who compel individuals to have sexual intercourse against their will. Traffickers can be charged as accessories to rape, if they purposely further the commission of the crime by way of accommodating clients with the chance to commit rape.²³⁸ Additionally, charges of common assault, assault with the intent to do grievous bodily harm, and indecent assault may

²³¹ The Constitution of the Republic of South Africa, s233.

²³² Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, University of the Free State, 2010) 415.

²³³ The Constitution of the Republic of South Africa, Chapter 2.

²³⁴ Robinson JA 'Children's Rights in the Constitution' 6 *Potchestroom Electronic Law Journal* (2003) 16.

²³⁵ The Constitution of the Republic of South Africa, s28.

²³⁶ These charges include, amongst others, slavery, sexual assault, rape, assault with the intent to do grievous bodily harm, murder; attempted murder, culpable homicide, kidnapping, abduction, extortion and conspiracy to commit any of these offences. See Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 408.

²³⁷ South African Law Reform Commission *Report on Trafficking in Persons* (2008)14.

²³⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 411.

well be laid against perpetrators by a victim of trafficking.²³⁹ Assault with intent to commit grievous bodily harm is especially pertinent to the crime of human trafficking, as victims are frequently subjected to intentional and harmful assault by their captors.²⁴⁰ The trafficking of a minor for the aim of forced marriage or sexual intercourse may be punished by the common-law crime of abduction.²⁴¹ An additional common-law crime, which may be used to combat trafficking, is extortion.²⁴² Victims of trafficking are habitually threatened or intimidated with harm against their own self or revenge against their families as a means of compelling them to submit to the demands of perpetrators.²⁴³

Although common-law crimes may be used to challenge some trafficking elements, these offences are not broad enough to sufficiently deal with the intricacies of human trafficking. The good news is that there are existing statutes that may perhaps be utilized in such and other cases. These statutes are the focus of the next section.

3.2.3 Legislation that helps to combat human trafficking

As South Africa is a signatory to the Palermo Protocol, the sections of the Protocol set the groundwork of the interpretation of domestic legislation that are relevant in combatting human trafficking.²⁴⁴ The signing and ratification of the Palermo Protocol has moreover placed a responsibility on the South African government to ensure its domestic laws and policies are in line with the principles set by the Protocol.²⁴⁵ Some of the relevant domestic laws are examined below.

²³⁹ *S v Amien Andrews* Case No 27/50/98 (Unreported)

²⁴⁰ Snyman CR *Criminal Law* 5th ed (2008) 461.

²⁴¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 409.

²⁴² Snyman CR *Criminal Law* 5th ed (2008) 426.

²⁴³ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 414.

²⁴⁴ Pithey B 'Do new crimes need new laws? Legal provisions available for prosecuting human trafficking' (2004) 9 *South African Crime Quarterly* 8.

²⁴⁵ Horn J A *Critical Analysis of Human Trafficking for Sexual Exploitation* (unpublished DLitt et Phil thesis, University of South Africa)123.

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

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act 2007) sought to carefully review and amend all existing laws relating to sexual offences. The new provisions intend to ensure that prosecutions relating to sexual offences are handled as quickly and as successfully as possible.²⁴⁶ These new offences can be utilised to address the various acts of sexual abuse that trafficking victims may face.

Several sections of the Amendment Act are pertinent to trafficking in persons. Part 6 of the Act, and specifically Section 70(1) of the Act, makes it clear that the interim measures in the Act relating to the trafficking in persons for sexual purposes are provided for temporarily in “partial compliance of our international obligations and to deal with this rapidly growing phenomena globally”.²⁴⁷ Section 70(2) sets out a definition of trafficking:

Trafficking includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of— (i) a threat of harm; (ii) the threat or use of force, intimidation or other forms of coercion; (iii) abduction; (iv) fraud; (v) deception or false pretences; (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and ‘trafficks’ and ‘trafficked’ have a corresponding meaning.’

²⁴⁶ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁴⁷ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s70 (1).

Section 71(1) of the Amendment Act states that an individual who trafficks another without their consensus is guilty of the offence of trafficking in persons for sexual purposes.²⁴⁸ Section 71(2) further states that any person who contributes or participates in any way in the trafficking of another is guilty of an offence of involvement in trafficking in persons for sexual purposes.²⁴⁹ Further, an individual who has themselves been trafficked will not be liable to stand trial for any wrongdoings which were committed as a direct result of being trafficked.²⁵⁰

Although it is not clear on how many people in South Africa are trafficked for purposes of sexual bondage, the Act may well be used in such cases.²⁵¹ Commercial carriers can, too, be prosecuted under this Act for their part in the transportation of a trafficked person without legal travel documents, who either enter or depart from the country.²⁵² There is, however, exceptions to this offence when, for example, the carrier reasonably believed that the documents held by the trafficked person are lawful for travel into or out of South Africa.²⁵³

(b) The Children's Act 38 of 2005 (Children's Act 2005)

Consistent with the standard that children are entitled to special care and assistance as provided for in the 1948 Universal Declaration of Human Rights,²⁵⁴ the Children's Act regulates the care and protection of children. An important aim of the Children's Act is to give effect to certain rights of children as contained in the Constitution.²⁵⁵ Trafficking in children violates the essential rights of children, including the right to family or parental care, or to appropriate alternative care when removed from the family environment, the right to be

²⁴⁸ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s71 (1).

²⁴⁹ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s71 (2).

²⁵⁰ May C 'Trafficking of Persons: A South African Legislative Perspective' available at www.probono.org.za/Manuals/Refugee.../2011_12_14_LRC_HumanTrafficking.pdf (accessed 3 March 2018).

²⁵¹ May C 'Trafficking of Persons: A South African Legislative Perspective' available at www.probono.org.za/Manuals/Refugee.../2011_12_14_LRC_HumanTrafficking.pdf (accessed 3 March 2018).

²⁵² The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s71 (6).

²⁵³ May C 'Trafficking of Persons: A South African Legislative Perspective' available at www.probono.org.za/Manuals/Refugee.../2011_12_14_LRC_HumanTrafficking.pdf (accessed 3 March 2018).

²⁵⁴ See Article 25(2) of this Declaration.

²⁵⁵ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010)448.

protected from maltreatment, neglect, abuse or degradation and to be protected from exploitative labour practices.²⁵⁶ Child trafficking causes both physical and psychological harm to the children involved.²⁵⁷

The Children's Act, in particular, focuses on trafficking offences that are committed against children. Section 284 of Chapter 18 unambiguously disqualifies the consent of the child or that of the child's parents or guardians as a defence in a trafficking prosecution.²⁵⁸ Furthermore, an individual will be guilty of child trafficking even if the planned exploitation or adoption secured by illegal means did not occur.²⁵⁹ This makes the prosecution and punishment of perpetrators more effective. This is assisted by Section 305 of the Act, which deals with enforcement, and makes it an offence if an owner, lessor, manager, tenant or occupier of a premises gains information of the commercial sexual exploitation of a child on that premises and fails to promptly take reasonable steps to report the occurrence to the South African Police Service.²⁶⁰

Section 291 broadens the scope of application of the Children's Act 2005 to other territories, provided that the offence is committed by a South African citizen or persons permanently residing in South Africa.²⁶¹ This extra-territorial jurisdiction offers the benefit of mutual legal assistance. It also allows for a more effective prosecution of South African trafficking offenders, who commit child trafficking in a country where it is not a crime, as long as the act would have constituted an offence if it was committed in South Africa.²⁶²

²⁵⁶ Fitzgibbon K 'Modern-Day Slavery? The Scope of Trafficking in Persons in Africa' (2003) *African Security Review* 86.

²⁵⁷ Bevilacqua E 'Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?' (1998-1999) *ILSA Journal of International and Comparative Law* 172.

²⁵⁸ The Children's Act 38 of 2005, s284 (2) (a).

²⁵⁹ The Children's Act 38 of 2005, s284 (2) (b).

²⁶⁰ The Children's Act 38 of 2005, s305.

²⁶¹ The Children's Act 38 of 2005, s291.

²⁶² Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 435.

It is likewise imperative to note that the most severe penalty established in the Act is for the offence of human trafficking. Other offences are punishable with a fine or imprisonment for a maximum period of ten years, or both, and second time offenders are liable to a fine or prison sentence of a maximum of twenty years, or both. In the case of trafficking offences, the Act, however, imposes a fine or imprisonment for a maximum of twenty years, or both, in addition to the sentence for any other offence of which an offender may be convicted.²⁶³

Although the Children's Act 2005 has been acclaimed as an advanced piece of legislation, in practice, the Act is not always achieving its aims. It has been argued that the justice and social-development role players interpret the Act in dissimilar ways, which has led to confusions in determining the best course of action for a specific child, often to the detriment of the child. It is also contended that Chapter 18 of the Children's Act is not a trafficking in persons law as such and merely provides for temporary measures in anticipation of more specific legislation.²⁶⁴

(c) The Prevention of Organised Crime Act 121 of 1998

Organised criminal groups are gradually associated with human trafficking, mainly in order to secure exorbitant illegal profits. The increased involvement of organised criminal groups in human trafficking presents a considerable threat to victims as well as to national and international security and stability. It is difficult to combat organised crime because of the experienced organisation of these criminal groups and because of their criminal expertise, resourcefulness and their well-organized use of the latest technology.²⁶⁵ That is also why, as noted by Ackerman in *NDPP and Another v Mohamed and Others*,

“[it] is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. It is now widely accepted in the international community that criminals should be stripped of the

²⁶³ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 435.

²⁶⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 435.

²⁶⁵ Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 1.

proceeds of their crime, the purpose being to remove the incentive for crime, not to punish them.”²⁶⁶

It is the same approach that has been adopted by the Prevention of Organised Crime Act (POCA). The Act aims at eliminating the organisation and the proceeds of crime rather than punishing only the individual criminal.²⁶⁷ With the main aim of restricting the scourge of organised crime, the Act covers several issues associated to organised crime activities, such as racketeering, gang-related offences, money-laundering and asset forfeiture.²⁶⁸ This Act proscribes organised crime activities and defines a “criminal gang” extensively to include the following: “any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”²⁶⁹

If used properly, the Prevention of Organised Crime Act may well be used as an instrument to tackle money-laundering and criminal gang and racketeering activities in human trafficking cases.²⁷⁰ In the pioneering case of *S v Sayed and Another*, the prosecution was able to secure a conviction on charges of supervising an enterprise,²⁷¹ money laundering,²⁷² and obtaining, using or possessing the proceeds of illegal activities²⁷³ in terms of this Act.

²⁶⁶ *NDPP and Another v Mohamed and Others* 2002 (2) SACR 196 (CC):203-204 paragraphs 15-16

²⁶⁷ Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 1.

²⁶⁸ Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 8.

Burchell JM *Principles of Criminal Law by J Burchell and J Milton* 3rd ed (2005) 973.

²⁶⁹ The Prevention of Organised Crime Act 121 of 1998, s1.

²⁷⁰ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010) 415.

²⁷¹ The Prevention of Organised Crime Act 121 of 1998, s2(1).

²⁷² The Prevention of Organised Crime Act 121 of 1998, s4.

²⁷³ The Prevention of Organised Crime Act 121 of 1998, s6.

The conviction is connected to trafficking related activities where Thai women were recruited in Thailand to work as sex workers at a brothel in South Africa.²⁷⁴

Additionally, the Act may also be used to remove the profit out of human trafficking. This can be attained by recovering the profits of unlawful activities, as well as by the civil forfeiture of criminal assets that have also been used to commit an offence or are the proceeds of such an offence.²⁷⁵ An example of this is, the brothel or building, which was used for accommodating the persons trafficked into forced prostitution, is an instrumentality of the offence of keeping a brothel and may be surrendered in terms of this Act.²⁷⁶

Human trafficking is motivated by the trafficker's desire for large financial profits. As such, money-laundering offences are plentiful in their organizations. Money laundering and associated forfeiture provisions criminalize the transfer of money, which resulted from human trafficking and nearly all related criminal offences, into supposedly legitimate channels, in an effort to conceal the origin of the funds.²⁷⁷

The significance of POCA is that it affords an effective mode to target the asset bases of criminal initiatives. Trafficking in persons may be combated by eradicating the organisation and the proceeds of crime, rather than merely punishing the individual criminal, who may be only one of the many role players in the criminal chain.²⁷⁸

²⁷⁴ *S v Sayed and Another*, unreported case no. 041/2713/2008:5

²⁷⁵ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010) 453.

The Act provides for various restraint orders (section 26), confiscation orders (section 18) and realisation orders (sections 30-33), as well as for civil preservation (sections 38-39) and forfeiture orders (section 50) for the recovery of property;

²⁷⁶ The Sexual Offences Act 23 of 1957, s2.

²⁷⁷ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 438.

²⁷⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 438.

2.2.4 Miscellaneous Legislation that can help to combat trafficking

In addition to the statutes discussed above, additional pieces of municipal by-laws may be employed as serious tools in immobilizing human traffickers and disassembling their support structures. Pertaining to municipal by-laws, the crimes of trade, performing a sexual activity, nudity, loitering, prohibiting any person from causing distraction of street users by walking, running, standing, sitting, or lying in a way that generates inconvenience to other road users can be of use.²⁷⁹ While it would appear that imposing these laws would be detrimental to prostitutes and their activities, it may well serve as a measure to guarantee that young women and girls forced into prostitution are identified and rescued from human traffickers.²⁸⁰

Research has however shown that when prostitutes are caught performing the activities listed above, they are seldom charged and prosecuted.²⁸¹ Police also regard the monitoring of prostitution as a trivial activity in contrast to the more severe, violent crimes in South Africa. Municipal by-laws and policies should therefore be established to react explicitly to human trafficking, similar to drug-trafficking and drug abuse by-laws already established.²⁸²

(a) The Immigration Act 13 of 2002

In circumstances where persons are trafficked across international borders, the provisions of the Immigration Act 13 of 2002 (Immigration Act) are often violated. This Act regulates entry into, and departure from, South Africa.²⁸³ Traffickers who enter, remain in, or depart from South Africa in violation of this Act may consequently be prosecuted. The maximum term of imprisonment for this offence is only three months.²⁸⁴

²⁷⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 462.

²⁸⁰ Lulya T 'Epi- Criminological Responses to Human Trafficking of Young Women and Girls for Involuntary Prostitution in South Africa' (2009)10 (2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 59 72.

²⁸¹ Gould C & Fick N 'Report to the South African Law Commission: Preliminary Research Findings or Relevance to Combat Trafficking in Persons and Legislation Pertaining Adult Prostitution' available at <https://oldsite.issafrica.org/uploads/SWEATISSUBJUN07.PDF> (accessed 29 March 2018).

²⁸² Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010) 462.

²⁸³ The Immigration Act 13 of 2002, s49.

²⁸⁴ The Immigration Act 13 of 2002, s49 (1) (a).

Traffickers frequently help their victims to illegally enter, remain in, or depart from, a country.²⁸⁵ This above conduct, according to the Act, is a criminal act. However, the maximum term of imprisonment is only one year.²⁸⁶ Moreover, trafficking agents who consciously employ an illegal foreigner or a foreigner in violation of this Act may, upon conviction, be imprisoned for up to one year.²⁸⁷ The offence of assisting and helping foreigners, the penalty is a maximum of 18 months' imprisonment.²⁸⁸ Arguably, such lenient sanctions for these offences are inadequate to deter offenders. The literature stresses that rigorous sentences are needed to deter traffickers.

Corrupting and bribing officials with the intention of executing the trafficking crime is frequently part of the technique of traffickers.²⁸⁹ This type of illegal conduct often includes bribing or threatening officials in order to acquire a passport or to cross borders without a passport. Such acts can be prosecuted under the Immigration Act.²⁹⁰ The Act further encompasses numerous provisions criminalising illegal conduct related to passports and other documents, conduct which traffickers are regularly guilty of.²⁹¹ There have been reports that fictitious or forged travel documents are used when traffickers themselves or their victims cannot cross international borders legally.²⁹² The Immigration Act criminalises the use of fabricated or falsified passports for the aim of crossing the South African border or aiding a victim to do so.²⁹³ An additional provision prohibits a person from being in possession of another person's travel or identity document or of a blank, falsified or fabricated passport.²⁹⁴

²⁸⁵ Harrold MM 'A New Kind of Traffic(king) Cop on the International "Beat" of Human Trafficking' (2006) 1 *Charleston Law Review* 101.

²⁸⁶ The Immigration Act 13 of 2002, s49 (2).

²⁸⁷ The Immigration Act 13 of 2002, s49 (3).

²⁸⁸ The Immigration Act 13 of 2002, s49 (6).

²⁸⁹ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010) 441.

²⁹⁰ The Immigration Act 13 of 2002, s49 (10).

²⁹¹ The Immigration Act 13 of 2002, s49 (15).

²⁹² Stuurman L 'Anti-trafficking Legislation Can No Longer Be Delayed' (2004) *Eye on Human Trafficking* 5.

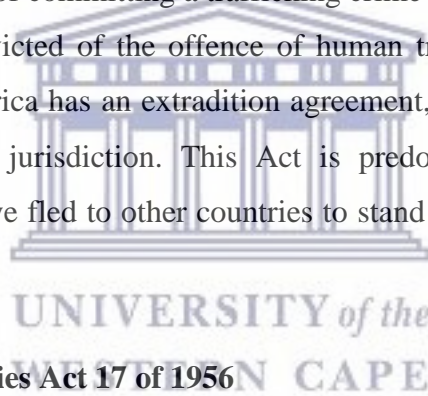
²⁹³ The Immigration Act 13 of 2002, s49 (15) (a).

²⁹⁴ The Immigration Act 13 of 2002, s49 (15) (b).

Notably, this provision may be utilized where perpetrators make use of false travel documents or where they keep the travel or identity documents of their victims as a mechanism for controlling them.²⁹⁵ For such offences, imprisonment of up to four years may be imposed.²⁹⁶

The major concern with the Act is that it does not “deal with related issues, such as the protection of victims of trafficking or the confiscation, or destruction, of their travel and identity documents”.²⁹⁷ Hence, more complete legislative measures are required to address criminal acts typically committed during the trafficking cycle.

The Extradition Act 67 of 1962 affords for the extradition of those accused or convicted of certain crimes. The Act makes human trafficking an extraditable offence. This means that South Africa may appeal to countries with which it has extradition agreements to submit persons accused or convicted of committing a trafficking crime within its jurisdiction.²⁹⁸ If an individual is accused or convicted of the offence of human trafficking and is located in a country with which South Africa has an extradition agreement, the country shall be liable to surrender the person to the jurisdiction. This Act is predominantly beneficial to track trafficking offenders, who have fled to other countries to stand trial for their crimes in South Africa.²⁹⁹



(b) The Riotous Assemblies Act 17 of 1956

Trafficking acts necessitate the collusion of two or more persons. This means a charge of conspiracy to commit some underlying offence is a successful means to prosecute and hold

²⁹⁵ Haynes DF ‘Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers’ (2004) *Human Rights Quarterly* 226.

Gajic-Veljanoski O & Stewart De ‘Women Trafficked into Prostitution: Determinants, Human Rights and Health Needs’ (2007) 44 (3) *Trans-cultural Psychiatry* 339 .

²⁹⁶ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, 2010) 443.

²⁹⁷ Stuurman L ‘Anti-trafficking Legislation Can No Longer Be Delayed’ (2004) *Eye on Human Trafficking* 5.

²⁹⁸ The Extradition Act 67 of 1962, s2 (1) & S3.

²⁹⁹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 442.

all culpable parties responsible.³⁰⁰ If a trafficker colludes with another person to assist the undertaking of a crime against a victim of trafficking or motivates another person to commit an offence against the person of a victim of trafficking, he or she could be charged in terms of the Riotous Assemblies Act.³⁰¹ The problem is that section 18(2) of the Act does not criminalise conspiracies entered into in South Africa to commit crimes exceeding the borders of South Africa.³⁰² As a result, the application of this Act in prosecuting trafficking offenders who commit their crimes abroad is limited.

(c) The Intimidation Act 72 of 1982

In order to ensure their illegal profit, it is important for traffickers that trafficked victims obey their exploitative commands. If a victim is not willing to comply, traffickers usually force them to submit to the exploitation by intimidating them through assault or threats of harm to themselves or to their loved ones.³⁰³ Numerous provisions of the Intimidation Act 72 of 1982, as amended, criminalises acts of intimidation that may be used in a broad set of circumstances, including but not restricted to intimidating a person into various trafficking situations.³⁰⁴ A trafficker, who threatens a victim to the extent that the victim harbours the necessary fear, regardless of the trafficker's intent or of whether the victim had reason to harbour the fear, will be guilty of this crime.³⁰⁵ Equally, even if it was likely for the conduct to have caused fear, but no fear had in fact been felt by the victim or planned by the trafficker, the crime is committed. This would also find application where a trafficker

³⁰⁰ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 444.

³⁰¹ The Riotous Assemblies Act 17 of 1956, s18 (2) (b); In *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) the majority judgment found that a client of a prostitute commits an offence under s 18(2)(b) of the Riotous Assemblies Act. The unlawful and intentional pressure to procure the commission of the offence can be applied in terms of any crime such as drug- or weapon-smuggling.

³⁰² *S v Basson* [2000] 3 All SA 59 (T) 75 (b)-(d)

³⁰³ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, University of the Free State, 2010) 472.

³⁰⁴ The Intimidation Act 72 of 1982, s1 (1) (a).

³⁰⁵ *S v Cele and Others* 2009 (1) SACR 59 (NPD) 63d-64a. In this case, 3 prison wardens became involved in a verbal altercation with 2 of their superiors, during the course of which one of them had allegedly uttered the words 'we will crucify you.' They were found guilty of contravening s 1 of the Intimidation Act, but the convictions and sentences were set aside on appeal.

threatens one victim to startle another victim.³⁰⁶ This Act provides in s 1(1)(a) that “any person who without lawful reason and with intent compels or induces another person or persons to do or refrain from doing any act, or assaults or injures that person, threatens to kill, assault or injure that person is guilty of the offence of intimidation.”³⁰⁷ The deliberate committal of a certain intimidating act is criminalised in section 1(1)(a) whereas section 1(1)(b) criminalises the causing of a certain threatening condition in the absence of any requirement of intention and in which the victim may not have been in fact intimidated. All that is required is for the accused person’s conduct to either had certain consequences or that it could reasonably be expected to have those consequences.³⁰⁸

Punishment is given in a form of a fine, which does not exceed R200, 000, or imprisonment for a maximum of ten years, or both.³⁰⁹ Section 1(1)(b) provides the equivalent punishment for the very expansive defined offence where a person intimidates another, either verbally or written, so that the person fears for his own safety or that of his family and property or the security of his livelihood.³¹⁰

(d) The Prevention and Combating of Corrupt Activities Act 12 of 2004

Corrupt activities are typically part of human trafficking offences.³¹¹ In the beginning, or recruitment phase, corruption is most likely to occur by purchasing the silence of government officials in order to safeguard the recruitment agents. In the following transit phase, corruption is most likely to occur at border crossings if international travel is involved, or by bribing companies in order to use their transport vehicles in the domestic scenario.³¹² In the final, or exploitation stage, police and other officials are bribed to turn a blind eye to the

³⁰⁶ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 446.

³⁰⁷ The Intimidation Act 72 of 1982, s1 (1) (a).

³⁰⁸ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 445.

³⁰⁹ The Intimidation Act 72 of 1982, s1 (1) (a).

³¹⁰ The Intimidation Act 72 of 1982, s1 (1) (b).

³¹¹ Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, University of the Free State, 2010) 454.

³¹² Corruption Watch ‘Corruptions Role in the Grim Trade of Humans’ available at <http://www.corruptionwatch.org.za/corruptions-role-in-the-grim-trade-of-humans/#top> (accessed 1 April 2018).

situation, so that the brothel owner or employer of trafficked persons can stay in business. Corruption can occur at any stage of trafficking.³¹³ In short, corruption provides a breeding ground for organized crime, amid which human traffickers can be found.

In South Africa, bribing someone or accepting a bribe is a criminal offence under the Prevention and Combating of Corrupt Activities Act 12 of 2004.³¹⁴ The Act constructs the all-encompassing offence of corruption. The general offence of corruption is formulated in section 3 of the Act.³¹⁵

In most trafficking-related cases concerning corruption, the trafficker offers a gratification to another party who agrees to take it as inducement to act in a certain way. The recipients of the gratification may be law-enforcement officers, borders officials, or any other person the trafficker seeks to influence. The gratification could take the form of money, a gift, or any favour or benefit of any description, which includes non-patrimonial benefits such as sexual services.³¹⁶ Trafficking cases where public officials are persuaded or bribed by the trafficker results in the contravention of section 4 of the Corrupt Activities Act.³¹⁷

(e) The Films and Publications Act 65 of 1996

Perpetrators taking part in sex trafficking may well distribute or own child pornography, which includes the storing thereof on a computer or by way of an electronic data medium such as a memory stick or a compact disc.³¹⁸ Perpetrators may also make use of trafficked persons to produce child pornography in publications, in films or on the internet in order to

³¹³ Corruption Watch 'Corruptions Role in the Grim Trade of Humans' available at <http://www.corruptionwatch.org.za/corruptions-role-in-the-grim-trade-of-humans/#top> (accessed 1 April 2018).

³¹⁴ The Prevention and Combating of Corrupt Activities Act 12 of 2004.

³¹⁵ The Prevention and Combating of Corrupt Activities Act 12 of 2004, s3: which makes it an offence for anyone that either accepts any gratification from any other person, or gives any gratification to any other person in order to act in a manner that amounts to the illegal exercise of any duties.

³¹⁶ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 447.

³¹⁷ The Prevention and Combating of Corrupt Activities Act 12 of 2004, s4.

³¹⁸ The Films and Publications Act 65 of 1996, s1.

market the services their victims provide. Such conduct can be effectively prosecuted under the Films and Publications Act 65 of 1996.³¹⁹

The purpose of the Films and Publications Act was to include the protection of children from the display of pornographic and other damaging materials, and from being exploited in child pornography productions.³²⁰ Among the offences provided for are the production, possession and distribution of prohibited publications which must encompass XX-rated visual presentations. Any child and adult-abuse images produced by traffickers shall fall under this prohibition. An individual who is convicted of producing child-abuse images or who is in possession of or distribute child pornography can be sentenced to a maximum of ten years of imprisonment.³²¹ Such conduct committed by sex traffickers can be effectively prosecuted under this Act.

3.2.5 The Trafficking Act 7 of 2013

From the foregoing, it is clear that statutes are an important but insufficient method to deal with trafficking in persons as they could only be used to prosecute crimes associated with human trafficking. Admittedly, there was substantial progress when “child trafficking” and “trafficking for sexual exploitation” was criminalised in the Children's Act, no 38 of 2005, and Criminal Law (Sexual Offences and Related Matters) Amendment Act, no 32 of 2007 respectively. However, these have proven to be insufficient in defining human trafficking in all its several components.³²² Consequently, Parliament passed the Prevention and Combating of Trafficking in Persons Act 7 of 2013, which specifically addresses trafficking in persons and does so comprehensively.

In terms of Article 5(1) of the Protocol, State parties, as indicated in the proceeding chapter, are obliged to criminalise the crime of trafficking in persons when committed purposely.³²³

³¹⁹ The Films and Publications Act 65 of 1996,s1.

³²⁰ The Films and Publications Act 65 of 1996,s2 (b).

³²¹ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 451.

³²² Buthelezi S ‘Human Trafficking and the New Legal Framework in South Africa: Intervention needed for the Law to reach vulnerable girls and woman’ (2015) 29 *Agender* 155-164.

³²³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 5(1).

State parties are further required by Article 5(2) to criminalise an effort to commit the crime of trafficking, the partaking as an accomplice in the crime trafficking, and organising and leading other persons to commit the crime of trafficking.³²⁴ Domestically, States may commit themselves to a wider scope of criminalisation.³²⁵

The Act embraces a broad definition of human trafficking. According to the Act, “a person will be guilty of human trafficking if he or she delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of South Africa, through various means, including the use of force, deception and coercion, aimed at the person or an immediate family member for the purpose of exploitation.”³²⁶ Furthermore, a person who adopts a child, assisted through legal or illegal means or arranges a forced marriage with another person, for the purposes of exploitation of the child or individual is guilty of an offence under the Act in terms of s 4(2).³²⁷ Further offences include debt bondage, possessing/destroying or tampering with travel documents, and using services of victims of trafficking.³²⁸

The Combating of Trafficking in Persons Act criminalises several acts that constitute or concern trafficking in persons and enforces strict penalties for violations. Trafficking in persons is punishable by a maximum of life imprisonment.³²⁹ Further, engaging in conduct that causes an individual to enter into debt bondage is punishable by up to 15 years’ imprisonment. Any benefit gained from services of a trafficking victim is punishable by up to 15 years’ imprisonment³³⁰ and the assistance of trafficking in persons is punishable by up to 10 years’ imprisonment.³³¹ However, imprisonment is not the only punishment which the Act

³²⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 5(2).

³²⁵ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 113.

³²⁶ The Combating of Trafficking in Persons Act 7 of 2013, s4 (1).

³²⁷ The Combating of Trafficking in Persons Act 7 of 2013, s4 (2).

³²⁸ The Combating of Trafficking in Persons Act 7 of 2013.

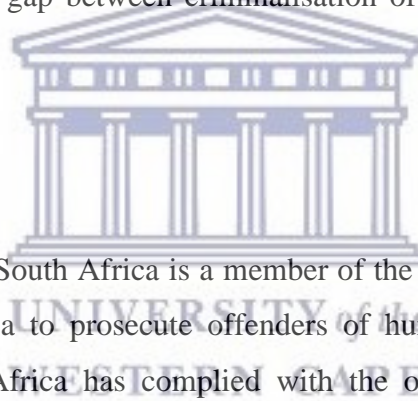
³²⁹ The Combating of Trafficking in Persons Act 7 of 2013.

³³⁰ The Combating of Trafficking in Persons Act 7 of 2013.

³³¹ The Combating of Trafficking in Persons Act 7 of 2013.

provides for. The Act also inflicts severe fines and permits the State to seize the assets of traffickers. This legislation will assist in prosecuting suspects and will guarantee that victims of human trafficking are supported by a protective structure involving various role-players.³³²

In terms of prosecution, the government convicted two sex trafficking offenders and began five prosecutions in 2012. This pales in comparison to 2010 when it introduced 22 prosecutions and convicted nine offenders. The Pretoria regional court sentenced a convicted trafficker, discovered in February 2008 to have trafficked three Mozambican girls into commercial sex, to life imprisonment. Furthermore, in February 2012, Mitchell's Plain magistrate's court sentenced a Cape Town man to 23 years' imprisonment, 15 years on the human trafficking charge for the sex trafficking of a Swazi woman after fraudulently offering her a job. A number of cases, however, remain pending from previous reporting periods and prosecution efforts continued to focus largely on sex trafficking cases.³³³ The selected cases mentioned above illustrates a gap between criminalisation of human trafficking and actual cases which were prosecuted.



3.2.6 Conclusion

In summary, as stated above, South Africa is a member of the Palermo Protocol. This places an obligation on South Africa to prosecute offenders of human trafficking. This chapter investigated whether South Africa has complied with the obligations under the Palermo Protocol.

The Constitutional framework lays the legislative foundation. As mentioned earlier, the Constitution is the supreme law and thus South Africa cannot embrace any inconsistent laws. Furthermore, under the prosecutorial element of this chapter, a number of laws were examined. This was further divided into two separate discussions. The first discussion placed focus on specific legislation which may be relied upon when seeking to prosecute an offender of human trafficking. This revealed that the Children's Act may be relied upon, however, this is limited to child victims of human trafficking. Secondly, the Criminal Law (Sexual

³³² Goliath P 'Protecting victims of human trafficking- is South Africa doing enough?' available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 10 April 2018).

³³³ African National Congress 'Discussion Paper on Gender Violence' available at <http://www.anc.org.za/docs/discuss/genderz> (accessed 13 April 2018).

Offences and Related Matters) Amendment Act may be relied upon and is intended to ensure that prosecutions relating to sexual offences are handled as quick and successful as possible.

In addition to the statutes discussed above, various other pieces of municipal by-laws may be utilized as critical tools in disabling human traffickers and dismantling their support structures. This refers to the Immigration Act 13 of 2002, the Extradition Act 67 of 1962, the Riotous Assemblies Act 17 of 1956, the Intimidation Act 72 of 1982, the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Films and Publications Act 65 of 1996. The aforementioned statutes may be relied upon, however are not human trafficking specific which led to the focus of the Trafficking Act. The Trafficking Act is a human trafficking focused statute which South Africa has enacted to ensure that the country is on par with the obligations as set out in the Palermo Protocol.

Concerning the transitional trafficking provisions in the Sexual Offences Act 2007 and the Children's Act, the number of arrests, prosecutions, and convictions remain very low in South Africa. The low number of arrests and convictions does not necessarily reflect the inadequacy of the system, but the complexity of these types of cases for effective law enforcement. Common-law crimes or related statutes are still being employed for transgressions which include a number of strong indicators consistent with trafficking in persons. Despite the low number of convictions, current law enforcement measures have value in that it exposes exploitative practices and ensure that these offenders are held accountable for their actions. The underground nature of trafficking in persons as well as the multi-jurisdictional nature of many of these cases makes law enforcement challenging and consumes significant resources. It is argued that even if convictions may increase significantly, it is uncertain that this will have the desired deterrent effect.

In prosecuting alleged trafficking cases, South Africa follows a typical law enforcement centred approach. Whilst useful to combat the crime as it is modelled on the assumption that criminal-law sanctions provide a deterrent effect and will prevent further exploitation, exclusive reliance on this type of approach overlooks the fact that law enforcement has limited deterrence value and cannot achieve the ultimate unified goal of prevention and protection of potential victims. If not undertaken with the victim in mind, law enforcement risks further traumatising of already severely injured victims.

3.3.1 Prevention: Introduction

Although the procedures used to facilitate trafficking in persons have progressed over time, the traditional features of the crime include recruitment by force or deception, and movement or transportation of people against their will, for the purposes of exploitation. However, human trafficking remains underreported.³³⁴ If a country seeks to adopt more comprehensive anti-trafficking legislation, prosecution alone is not adequate to combat trafficking. It is vital to address the root causes of trafficking in persons to adequately combat this multifaceted problem.³³⁵ This would require an assessment of socio-economic issues, border and immigration control, combatting violence against women and children and ensuring proper implementation of legislation. Therefore, it is submitted that an integrative approach is necessary to make an impact in combatting human trafficking which entails a global response from governments and civil society.³³⁶ That is why the Palermo Protocol, as discussed in the preceding chapter, requires States Parties to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in.³³⁷

As discussed in Chapter Two, the Palermo Protocol expects States Parties to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. Policies, programmes and other measures established should include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.³³⁸ In addition, the Palermo Protocol provides States Parties to take or strengthen measures to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.³³⁹ It requires, States Parties to adopt or

³³⁴ Goliath P 'Protecting victims of human trafficking- is South Africa doing enough?' available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 13 April 2018).

³³⁵ Goliath P 'Protecting victims of human trafficking- is South Africa doing enough?' available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 13 April 2018).

³³⁶ Goliath P 'Protecting victims of human trafficking- is South Africa doing enough?' available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 20 April 2018).

³³⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9.

³³⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9.

³³⁹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9.

strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.³⁴⁰

The Prevention and Combatting of Trafficking in Persons Act states that the Director General of the Department of Justice and Constitutional Development, the National Commissioner of South African Police Service, the National Director of Public Prosecutions, and the Directors General of Home Affairs, Labour and Social Development “must each develop training courses to ensure that all police officials, prosecutors and other functionaries are able to deal with matters relating to trafficking in persons in an appropriate, efficient and sensitive manner.”³⁴¹ The Act requires that the courses include “training, also incorporating social context training, on the national instructions or directives and provide for and promote the use of uniform norms, standards and procedures.”³⁴²

Under the Prevention and Combatting of Trafficking Persons Act, the Director General of the Department of Justice and Constitutional Development, in consultation with various other organs of the government, is tasked with “establishing public awareness programmes or other measures for the prevention and combating of trafficking in persons.”³⁴³ The type, purpose and design of the programs would vary depending on the target audience. For instance, programs designed for the general public and those who are vulnerable to trafficking would include information on common recruitment techniques used by traffickers, practices used to keep victims of trafficking in exploitative situations, the forms of abuse to which victims of trafficking may be subjected, and organizations, institutions or law enforcement agencies that may be approached for assistance or information.³⁴⁴

³⁴⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9.

³⁴¹ The Prevention and Combatting of Trafficking in Persons Act 7 of 2013, S44 (10) (b).

³⁴² The Prevention and Combatting of Trafficking in Persons Act 7 of 2013, S44 (10) (a).

³⁴³ The Prevention and Combatting of Trafficking in Persons Act 7 of 2013, S 44 (1) (d).

³⁴⁴ Goitom H ‘Training Related to Combating Human Trafficking: South Africa’ available at <https://www.loc.gov/law/help/human-trafficking/southafrica.php> (accessed 25 April 2018).

Programs designed for victims of trafficking would include information on “their rights as victims, legal or other measures in place to ensure their safety, recovery, return and repatriation, and organisations, institutions or law enforcement agencies that may be approached for assistance of information.”³⁴⁵ However, no specific public awareness programs developed in compliance with the provisions of the Prevention and Combatting of Trafficking of Persons Act were identified.³⁴⁶

Article 9 of the Palermo Protocol sets out that States Parties shall establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons³⁴⁷ and to protect victims of trafficking in persons, especially women and children, from re-victimization.³⁴⁸ South Africa has responded by establishing an anti-human trafficking initiative. The Tsireledzani Programme, led by the National Prosecuting Authority (NPA), together with crucial international and local parties including the International Labour Organisation, the International Organisation for Migration, the United Nations Office on Drugs and Crime, the United Nations Children’s Fund, the Human Sciences Research Council and non-governmental organizations with aid provided by the European Commission. The aim of the initiative includes making sure South Africa complies with the Palermo Protocol through research, training and awareness-raising.³⁴⁹

Workshops have been planned to make sure that the five government departments, which have been identified, develop the ability to train social workers, health, law enforcement, immigration, labour and justice officials on the prevention of human trafficking.³⁵⁰ The

³⁴⁵ Goitom H ‘Training Related to Combating Human Trafficking: South Africa’ available at <https://www.loc.gov/law/help/human-trafficking/southafrica.php> (accessed 25 April 2018).

³⁴⁶ Goitom H ‘Training Related to Combating Human Trafficking: South Africa’ available at <https://www.loc.gov/law/help/human-trafficking/southafrica.php> (accessed 25 April 2018).

³⁴⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (1) (a).

³⁴⁸ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (1) (b).

³⁴⁹ National Prosecuting Authority ‘Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa’ available at <http://https://pmg.org.za/files/docs/100324tsireledazni.pdf> (accessed 3 May 2018).

³⁵⁰ Goitom H ‘Training Related to Combating Human Trafficking: South Africa’ available at <https://www.loc.gov/law/help/human-trafficking/southafrica.php> (accessed 3 May 2018).

training content conveys basic awareness and an intermediary level of capability for NGO workers, to identify, protect and directly assist trafficked persons.

Additionally, a multi-sectoral Provincial Task Team led by the Government was established in the Kwa-Zulu Natal Province. This Programme principally aims to ensure that South Africa complies with its obligations in terms of the Palermo Protocol as well as the Convention Against Organized Crime. The Programme aims to make people less vulnerable to human trafficking, to rescue more victims and better protect them, and to track, disrupt, convict and rehabilitate perpetrators more successfully.³⁵¹

Further, an important development is the establishment of the Human Trafficking Desk. Established in 2003, the Human Trafficking Desk is part of the Organized Crime Unit of the South African Police Service.³⁵² The purpose of the Human Trafficking Desk is to: manage all trafficking-in-persons matters received from the provinces, project inquiries and the offices of the National Commissioner and the Minister for Safety and Security, counsel the head of the Organised Crime Unit on affairs concerning to trafficking in persons. Additional functions include; providing advice to the provinces and organised crime units on intricate matters arising from trafficking in persons' investigations, provide training to members of organised crime units charged with investigating human trafficking cases and to communicate with appropriate counterparts within the South African Police Service on a national, provincial and local level along with external role-players. Further functions are to refer investigations to provinces and observe such investigations through once-a-month progress reports and to monitor and appraise whether the Organised Crime Unit efficiently addresses organised crime involving the trafficking of persons.³⁵³

Additionally, the South African government put in place a Trafficking in Persons Intersectoral Task Team (Task Team). The Task Team encompasses stakeholders from various government departments: the Sexual Offences and Community Affairs Unit of the

³⁵¹ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at [http:// https://pmg.org.za/files/docs/100324tsireledazni.pdf](http://https://pmg.org.za/files/docs/100324tsireledazni.pdf) (accessed 3 May 2018).

³⁵² National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at [http:// https://pmg.org.za/files/docs/100324tsireledazni.pdf](http://https://pmg.org.za/files/docs/100324tsireledazni.pdf) (accessed 4 May 2018).

³⁵³ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at [http:// https://pmg.org.za/files/docs/100324tsireledazni.pdf](http://https://pmg.org.za/files/docs/100324tsireledazni.pdf) (accessed 5 May 2018).

National Prosecuting Authority, the South Africa Police Service's Border Police and Organised Crime Unit, the Department of Home Affairs, the Department for Social Development, the Department of Labour. The Task Team includes the following international organisations, the International Organisation for Migration (IOM), the United Nations Office on Drugs and Organised Crime and the NGO Molo Songolo. The Sexual Offences and Community Affairs Unit, accordingly is authorized to deal with the prevention of violence against women and children, was selected to chair and undertake a secretariat function for the Task Team and Consultative Forum. Its task is to assist a multi-sectoral response to the advancement and implementation of a National Action Plan to prevent trafficking in persons, to support victims of trafficking and to prosecute traffickers.³⁵⁴

The Palermo Protocol further provides that States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.³⁵⁵

In this regard, it is important to note the works South Africa has done in cooperation with the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants to which South Africa is a party to and which aims to help the selected countries in developing and implementing comprehensive national counter-trafficking and counter-smuggling responses. A dual prevention and protection approach has been adopted and includes six key responses linked to the following objectives.³⁵⁶ Firstly, to work with countries to develop strategies and policies to address trafficking in persons. In addition, to work with governmental authorities to safeguard that domestic legislative frameworks meet international standards for criminalizing trafficking in persons. Moreover, to work with governmental authorities to develop the capacity and knowledge of criminal justice practitioners to combat trafficking in persons and assist in protecting victims. Additionally, to promote cooperation and information exchange with law enforcement officials on the identification, investigation and prosecution of offences related to trafficking in persons. Also

³⁵⁴ African National Congress 'Discussion Paper on Gender Violence' available at <http://www.anc.org.za/docs/discuss/genderz> (accessed 5 May 2018).

³⁵⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (2).

³⁵⁶ United Nations Office on Drugs and Crime 'Global Action against Trafficking in Persons and the Smuggling of Migrants' available at <https://www.iom.int/sites/default/files/about-iom/GLOZ67-ProjectSummary-EN-2016.pdf> (accessed 17 May 2018).

to work with government authorities and civil society organizations to develop assistance and support programmes for victims of trafficking.³⁵⁷

In order to respond to the needs of criminal justice practitioners concerned in the response to Trafficking in Persons, the Global Action against Trafficking in Persons and Smuggling of Migrants assisted a workshop on Trafficking in Persons. A vital objective of this workshop was to ensure a regulated training manual that comprises social context and case law ought to be developed in order to assign training programmes for South Africa.³⁵⁸ In an additional workshop held in Pretoria, one of the key results of the information sharing workshop was that a shortage of practical training and capacity building was acknowledged as one of the key challenges to the successful implementation of the Prevention and Combatting of Trafficking in Persons Act in South Africa.³⁵⁹ Furthermore, it was agreed upon that there was a need to develop a standardized trafficking in persons guide for criminal justice practitioners, compatible within the South African setting. In order to address these challenges, the Global Action against Trafficking in Persons and Smuggling of Migrants with the Department of Justice and Constitutional Development facilitated, on 12 July 2017, the primary working meeting of the recently established national inter-sectoral training committee on trafficking in persons in South Africa.³⁶⁰

Furthermore, the Palermo Protocol states that policies, programmes and other measures shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.³⁶¹ In response to the Palermo Protocol, various non-governmental organizations in South Africa have come forth in the fight against human

³⁵⁷ United Nations Office on Drugs and Crime ‘Global Action against Trafficking in Persons and the Smuggling of Migrants’ available at <https://www.iom.int/sites/default/files/about-iom/GLOZ67-ProjectSummary-EN-2016.pdf> (accessed 20 May 2018).

³⁵⁸ United Nations Office on Drugs and Crime ‘GLO.ACT facilitates unique information sharing workshop on human trafficking for key stakeholders in South Africa’ available at <http://www.unodc.org/unodc/en/human-trafficking/glo-act/information-sharing-workshop-on-human-trafficking-for-key-stakeholders-in-south-africa.html> (accessed 27 May 2018).

³⁵⁹ United Nations Office on Drugs and Crime ‘Global’ available at <http://www.unodc.org/unodc/en/human-trafficking/glo-act/countries.html#southafrica> (accessed 27 May 2018).

³⁶⁰ United Nations Office on Drugs and Crime ‘Global’ available at <http://www.unodc.org/unodc/en/human-trafficking/glo-act/countries.html#southafrica> (accessed 30 May 2018).

³⁶¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (3).

trafficking. The Salvation Army is a global faith based association working with men, women and children and has established an anti-human trafficking task team. The team works together with the International Organisation for Migration research and report on human trafficking.³⁶² Their anti-trafficking awareness messages have been received on radio and television.³⁶³ A 24-hour toll free helpline (0800-RESCUE) has been launched as a joint initiative between the Salvation Army and BE HEARD, which is a 24 hour disclosure service established by Quiver Corporate Solutions.³⁶⁴

In addition, A21 is a non-profit organisation which operates in South Africa and various countries globally.³⁶⁵ A21 works meticulously with law enforcement to support raids, identify victims, aid in the prosecution of traffickers, appear on behalf of survivors in court proceedings, and join forces with governments and other NGOs to eliminate slavery at every level. In addition, A21 provides those in their care with access to housing, medical treatment, counselling, education, employment, and repatriation.³⁶⁶

The Tshwane Counter-Trafficking Coalition for 2010 was launched on 11 August 2009. The combination of Pretoria faith-based organisations, local government and civil society, strived to address the concern of human trafficking in Pretoria ahead of the 2010 World Cup. However, they extended their efforts beyond the event. The initiative consists, inter alia, of educational programmes, developing outreach teams that will target areas which are susceptible and to ensure proper care and counselling of victims.³⁶⁷

³⁶² The Salvation Army 'News, Events and Media' available at <http://salvationarmy.org.za/media-campaigns-2/> (accessed 1 June 2018).

³⁶³ The Salvation Army 'Anti- Human Trafficking' available at <http://salvationarmy.org.za/anti-human-trafficking/> (accessed 1 June 2018).

³⁶⁴ The Salvation Army 'Anti- Human Trafficking' available at <http://salvationarmy.org.za/anti-human-trafficking/> (accessed 1 June 2018).

³⁶⁵ A21 'Human Trafficking' available at <http://www.a21.org/content/who-we-are/gnihwoo> (accessed 3 June 2018).

³⁶⁶ A21 'Human Trafficking' available at <http://www.a21.org/content/south-africa/gnr2js?permcode=gnr2js> (accessed 3 June 2018).

³⁶⁷ National Prosecuting Authority 'Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa' available at [http:// https://pmg.org.za/files/docs/100324tsireledzani.pdf](http://https://pmg.org.za/files/docs/100324tsireledzani.pdf) (accessed 5 June 2018).

The Red Light 2010 Campaign was an initiative of a group of regional organizations, working together to combat human trafficking and the exploitation and abuse of women and children in southern Africa.³⁶⁸ The objective of the initiative was to create widespread awareness about the risks of trafficking around the World Cup, the recruitment methods and channels used by traffickers, as well as prevention, referral and other mechanisms for protecting the rights of women and children. The primary beneficiaries are women and girls in the SADC region. The campaign was a joint initiative of Women and Law in Southern Africa, the Southern Africa Network against Trafficking and Abuse of Children and Johannesburg Child Welfare.³⁶⁹

The Palermo Protocol calls for States Parties take or strengthen measures to reduce the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.³⁷⁰ South Africa has strived to address poverty and inequality with an extensive range of initiatives; these include making use of financial policy to fund redistributive measures. The social wage, which refers to the government's investment in education, health services, and social development together with social assistance to susceptible households and individuals as well as contributory social security, public transport, housing, has been a prominent role in the government's determination to ease poverty and inequality. Such efforts can be traced as far back to the 1993 Reconstruction and Development Program which recognized the reduction of poverty as a fundamental goal. Various policies have sustained such effort and the most recent of these, the National Development Plan 2030: Our Future—Make It Work (2012) seeks to eliminate poverty and diminish inequality and acknowledges high poverty, inequality, and unemployment as foremost challenges for the country.³⁷¹

In addition to the above, the Palermo Protocol provides that “States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures,

³⁶⁸ Red Light Campaign ‘Red Light Campaign’ available at <http://www.redlightcampaign.org/> (accessed 5 June 2018).

³⁶⁹ National Prosecuting Authority ‘Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa’ available at <http://pmg.org.za/files/docs/100324tsireledzani.pdf> (accessed 5 June 2018).

³⁷⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (4).

³⁷¹ US Department of State *Trafficking in Persons Report* 2018 (2018)

including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”³⁷² The Provincial Trafficking in Persons Task Team held school dialogues and an awareness campaign at Kwaaiman in Mqanduli. The area was chosen based on the acknowledgment that many of the victims of trafficking in persons, in particular children are trafficked from rural areas into towns with deceitful possibilities of jobs and an improved life as the traffickers abuse the condition of poverty that many of the rural communities find themselves in.³⁷³

3.3.2 Conclusion

As already indicated, the Palermo Protocol places a duty on member States to take positive steps to prevent human trafficking. It is important to understand what causes human trafficking to flourish. Understanding the reasons why people become involved in trafficking is of the utmost importance for governments if they are to develop effective legislation and policies to combat it.

The foregoing discussion has demonstrated that South Africa, in compliance with the Palermo Protocol, has responded with this obligation in various ways. It has established comprehensive policies, programmes and other measures to prevent and combat trafficking in persons, such as the Tsireledzani Programme, which aims to ensure that South Africa complies with the Palermo Protocol through research, training and awareness-raising programmes. Further programmes include the Human Trafficking Desk, which manages trafficking-in-persons matters received as well as to provide advice to the provinces and organised crime units on intricate matters arising from trafficking in persons’ investigations. Additionally, the South African government has put in place a Trafficking in Persons Intersectoral Task Team, which assists a multi-sectoral response to the advancement and implementation of a National Action Plan to prevent trafficking in persons, to support victims of trafficking and to prosecute traffickers.

As per the Palermo Protocol, South Africa is required to undertake measures such as research, information, mass media campaigns and social and economic initiatives to prevent

³⁷² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 9 (5).

³⁷³ National Freedom Network ‘School Dialogues- Eastern Cape’ available at <http://nationalfreedomnetwork.co.za/event/awareness-campaign-eastern-cape/> (accessed 7 June 2018).

and combat trafficking in persons. In response, South Africa has joined the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants which has held numerous workshops in South Africa, focusing on the prevention of human trafficking. The Provincial Trafficking in Persons Task Team held school dialogues and an awareness campaign at Kwaaiman in Mqanduli. In compliance with the Palermo Protocol, South Africa has also cooperated with non-governmental organization and other relevant elements of the civil society. The Salvation Army, A21, the Tshwane Counter-Trafficking Coalition and the Red Light Campaign are some of the few non-governmental organizations that are contributing towards the fight against trafficking in persons.

It is evident from the above that South Africa has indeed taken positive steps towards the fight against human trafficking. On many levels South Africa has responded to the Palermo Protocol. However, South Africa is yet to successfully eradicate the many factors which contribute to the cause of human trafficking. It is submitted that as long as South Africa is riddled with crime, poverty, high employment and corruption, the prevention steps that have been taken are unlikely to bring about the desired result.

3.4 Protection: Introduction

In an effort to curtail human trafficking, South Africa has enacted the Prevention and Combating of Trafficking in Persons Act.³⁷⁴ South Africa is a state member to the Palermo Protocol. As indicated in the previous chapter, the Protocol obliges member states to prosecute offenders of human trafficking, protect the victims of human trafficking as well as take measures to prevent human trafficking.³⁷⁵ The objective of this section is to examine whether South Africa has fully complied with the Protocol with respect to victim protection. The discussion begins with the issue of victim identification.

3.4.1 Victim Identification

Persons who fall victim to human trafficking are in need of suitable and acceptable care and support which may provide them with a touch of security.³⁷⁶ Mindful of this, the Palermo

³⁷⁴ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

³⁷⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

³⁷⁶ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 10.

Protocol requires the assistance and the protection of the victims of human trafficking.³⁷⁷ The task commences with identifying victims. The Protocol makes reference to a victim of human trafficking. However, the duty to define who a victim is placed on States which have ratified the Palermo Protocol when domesticating human trafficking legislation.³⁷⁸

In South Africa, the Department of Social Development provides for the National Policy Guidelines for Victim Empowerment which defines a victim as “any person who has suffered hard, including physical and mental injury; emotional suffering; economic loss or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of criminal law.”³⁷⁹ One can infer that a victim, as defined above, is consistent with the Palermo Protocol as it refers to an individual who has experienced all the elements of trafficking that are set forth in Article 3 of the Palermo Protocol.³⁸⁰

According to the Trafficking Act, a victim of trafficking is a child who is found to be a victim of trafficking after an assessment of Section 18 (6).³⁸¹ Section 18 (6) states that the “provincial Department of Social Development must without delay in the prescribed manner, assess whether the child referred to in subsection 5 is a victim of human trafficking, after taking into account the prescribed information obtained from the South African Police Service.”³⁸² Subsection 5 is a reference to the Children’s Act for procedures prescribed therein.³⁸³ Similarly, a victim under the Trafficking Act also refers to an adult person who has been issued with a letter of recognition as provided for in Section 19 (10). Section 19 (10)

³⁷⁷ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 21.

³⁷⁸ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 22.

³⁷⁹ Department of Social Development ‘National Policy Guidelines for victim empowerment’ available at http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&grid=84&Itemid=3 (accessed 10 June 2018).

³⁸⁰ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 3.

³⁸¹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s18 (6).

³⁸² The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s18 (6).

³⁸³ The procedure provided for in section 110 (5) to (8) of the Children’s Act applies in respect of a child who has been dealt with in terms of subsection (4) (b) or who has been referred in terms of section 22 (2) (b) or section 33 (b) (iv).

necessitates the Head of the provincial Department of Social Development's head to issue a letter of recognition if it is content that the assessment done, as set out in subsection 8,³⁸⁴ is in line with the matter having been reported to the police who concludes that the person is in need of care and has then referred the person to an accredited organisation.³⁸⁵ The determination process of an individual's status is conducted by queries that the victim is expected to answer, as stipulated in Form 2 of the Regulations by the Department of Social Development.³⁸⁶ Information required for Form 2 includes personal information such as personal details, the individual reporting the incident, the form of exploitation, the degree of physical signs of abuse or maltreatment observed, motive for suspecting abuse, action taken by the police and the details of the police station and the officer who received the said individual.³⁸⁷

The South African Trafficking Act places the obligation to identify a victim with the South African Police Service as the point of first contact.³⁸⁸ Any information collected by SAPS is fundamental as it informs the status and protection necessary to assist the victim.³⁸⁹ In addition, when a police official has the knowledge or ought to have reasonably known or suspected that an adult person is a victim of trafficking, the police official must deliver this individual to an accredited organisation as well as contact the Department of Social Development.³⁹⁰

However, the problem is that the reliance on the protection from law enforcement officers does not provide the assurance many victims require. Often, trafficking victims do not pursue

³⁸⁴ The provincial department of social development which has been notified as provided for in subsection (5) (b), or to which an adult person has been referred as provided for in section 22 (2) (b) or section 33 (b) (v), must without delay, in the prescribed manner, assess whether the person concerned is a victim of trafficking, after taking into account the prescribed information obtained from the South African Police Service.

³⁸⁵ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s19 (10).

³⁸⁶ Reg 3. Regulations by the Department of Social Development.

³⁸⁷ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 23.

³⁸⁸ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

³⁸⁹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s19; Reg 3. Regulations by the Department of Social Development.

³⁹⁰ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s19 (5) (b).

help due to the mistreatment or prospective safety risks. The South African 2013 Human Rights Report has acknowledged cases of torture, assault and rape by police officers, notwithstanding the constitutional prohibition of the violation of human rights.³⁹¹

Another problem has to do with the fact that human trafficking is often confused with people smuggling. As indicated in the previous chapter, it is vital to differentiate human trafficking from illegal immigration and smuggling.³⁹² One of the problems surrounding the issue of victim identification in South Africa is, however, that the Trafficking Act does not define smuggling and illegal immigration. This omission is problematic because smuggling and trafficking may overlap as individuals who consented to being smuggled may themselves be victims of trafficking as they may well be subjected to exploitation once they have arrived at the destination country.³⁹³ In contrast to smuggling persons, human trafficking victims require protection and not penalties that are often associated with illegal migration. Thus, the authorities must be able to depict between the two crimes if a foreign person is found without identification and not capable of explaining their presence in South Africa.³⁹⁴ The failure of authorities to properly identify between victims of trafficked persons and smuggled persons results in the arrest, detention and deportation of victims thought to be illegal migrants. The inability to distinguish victims is often observed in South Africa. Law enforcement usually fails to screen women and LGBT persons in prostitution for trafficking indicators, often charging them with prostitution and other violations.³⁹⁵

The International Organization for Migration (IMO), which works with South Africa, cautions on categorizing identification of victims as each case and individual is unique who have gone through different forms of exploitation and react differently to situations after being rescued. As a result, it emphasises that it is imperative to tread carefully where

³⁹¹ United States Department of State 'Trafficking in Persons Report 2015' available at <https://www.state.gov/j/tip/rls/tiprpt/2015/> (accessed 10 June 2018).

³⁹² Obokata T 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 17(2) *International Journal of Refugee Law* 395.

³⁹³ United Nations Office on Drugs and Crime 'Issue Paper: Organized Crime involvement in trafficking in persons and smuggling of migrants' available at https://www.unodc.org/documents/...trafficking/FINAL_REPORT_06052010_1.pdf (accessed 12 June 2018).

³⁹⁴ Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013) 51.

³⁹⁵ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

individuals identified as victims are involved.³⁹⁶ The principles and guidelines are unambiguous whereby accurate identification of a victim is essential to ensure that the individual's rights are the primary concern and factors connected to harm are considered.

The South African Police Service, the Department of Social Development, the National Prosecuting Authority, the Department of Home Affairs, and Department of Justice had shared formal procedures to identify trafficking victims. Implementation of these procedures varied by department and province; not all officials were aware of referral procedures. The South African Police Service was criticized for not identifying victims. Furthermore, the government occasionally denied foreign nationals protective services, especially if they chose not to participate in an investigation. NGOs reported that front-line officials responsible for receiving referrals were often unreachable and that DSD and SAPS were sometimes not informed of their responsibilities to certify and refer victims, a necessary step before victims could receive care of any kind.³⁹⁷

Furthermore, some police officers regularly failed to follow referral guidelines. Some officials had difficulty identifying labour trafficking victims and differentiating between trafficking and smuggling crimes. The South African Police Services had not consistently screened women and LGBTI persons in prostitution for trafficking indicators thereby officials occasionally charged them with prostitution and other violations. LGBTI persons, mainly transgendered persons, remained particularly vulnerable to trafficking owing to social stigmatization, however, there was one shelter devoted exclusively for victims from the LGBTI community, in the Western Cape. There have been several reports that victims and possible victims were detained or incarcerated during the reporting period.³⁹⁸ In March 2017, immigration officials at the international airport in Johannesburg signed an agreement with an NGO to profile and identify probable trafficking victims prior to deportation. Through this initiative, the government and NGO partner conducted over 100 screenings and referred an unknown number of victims to care.³⁹⁹

³⁹⁶ International Organization for Migration 'The IOM handbook on direct assistance for victims of trafficking' available at <https://publications.iom.int/books/iom-handbook-direct-assistance-victims-trafficking-0> (accessed 12 June 2018).

³⁹⁷ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

³⁹⁸ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

³⁹⁹ US Department of State *Trafficking in Persons Report 2018* (2018) 389

3.4.2 Victim Protection and Assistance

As mentioned in the preceding Chapter, trafficking victims are entitled to certain rights and freedoms based on their victim's status and countries are obliged to conform to these standards as provided for in Articles 6 and 7 of the Palermo Protocol. Some of the obligations are the focus of this section.

3.4.3 Accommodation and material assistance

An adult victim of human trafficking may be referred to an accredited organisation. According to the Trafficking Act, the Minister of Social Development must recommend a system whereby these accredited organisations provide services to victims of human trafficking.⁴⁰⁰ These accredited organisations and the services they offer must focus on the safety of victims, the access to adequate health care, spate facilities for male and female victims of human trafficking, and adequate toilet facilities. Further services include access to refuse disposal services and duty to keep the identity of the victim confidential.⁴⁰¹

An accredited organisation that offers services to adult victims of trafficking, who have children under their care, must provide a safe environment for children, proper care for sick children and safe storage of anything that may be harmful to children.⁴⁰² Furthermore, an accredited organisation must offer a programme aimed at the provision of accommodation as well as therapy to the victim of human trafficking. The programme must be intended at reintegrating victims back into their families and communities. The organisation may well offer a programme aimed at administering rehabilitation and therapeutic services or offering education and skills development training to adult victims of human trafficking. Where an adult victim of human trafficking has a child in his or her care, a programme aiming at the reception, care and development of the child must be offered.⁴⁰³ The Trafficking Act makes it optional to provide rehabilitation, therapeutic services, educational and skills development. This suggests that the extent to which South Africa offers assistance is limited.

⁴⁰⁰ The Prevention and Combating of Trafficking in Persons Act 7 of 2013,s24.

⁴⁰¹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁴⁰² The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁴⁰³ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Government had continued oversight of and partial funding for 14 credited NGO-run multipurpose shelters and continued to oversee 17 NGO-run safe houses which were planned to temporarily shelter victims prior to the transfer to an accredited shelter. Additionally, the government provided a stipend on a per-person, per-night basis to the safe houses. There was only one shelter, in Gauteng, that could afford care for male trafficking victims. The Department of Social Development trained 58 officials who included site verification teams responsible for properly accrediting shelters that provided protective services for victims.⁴⁰⁴ In coordination with an international organization, the Department of Social Development conducted an assessment of all 14 accredited shelters and 12 shelters were upgraded to the minimum standards in order to afford inclusive psycho-social assistance to victims. In addition, government has provided shelters which are accessible to persons with disabilities that provided limited services for victims with disabilities; though, it is uncertain if any victims received these services during the reporting period. Some government-run shelters refused to receive trafficking victims due to security, drug addiction, or cultural concerns.⁴⁰⁵ To remedy this issue, the Trafficking Act makes provision for the establishment of accredited organisations that will cater for the need of victims to be funded by the State.⁴⁰⁶ However, it is noteworthy that due to the lack of shelters, victim's, at times, were placed in shelters assigned to children that have been maltreated and are delinquents.⁴⁰⁷

However, concerns have been raised whereby NGOs without training, expertise, or accreditation from the Department of Social Development, have not screened possible victims before placing them in shelters. The DSD ran a nine-week rehabilitation program focused on the psycho-social well-being of victims and provided funding for victims to receive treatment at rehabilitation centers for overcoming drug addiction. Though, not all provinces had such centers.⁴⁰⁸

⁴⁰⁴ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

⁴⁰⁵ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

⁴⁰⁶ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s24, (2) (b).

⁴⁰⁷ Aransiola J & Zarowsky 'Human Trafficking and Human Rights Violations in South Africa; Stakeholders' Perception and the Critical Role of Legislation' (2014) 14 *African Human Rights Law Journal* 522.

⁴⁰⁸ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

The government operated a network of Thuthuzela Care Centers (TCC), with full service crisis centers to help victims of rape and sexual violence. However, reports document that the 53 TCCs assisted only five victims of trafficking. In accordance with the DSD policy, staff disallowed both adults and children from leaving shelters unaccompanied, allegedly for security reasons. Additionally, response teams encompassed government agencies and NGOs in Gauteng, Mpumalanga, Western Cape, and KZN, which continued to organize protective services, including shelter, for victims.⁴⁰⁹

The DSD, responsible for placing and verifying trafficking victim status, have continuously accepted victims from law enforcement and coordinated their placement in a registered shelter. The protection of the victim's privacy and identity is the primary requirement and domestic law bears responsibility to ensure this.⁴¹⁰ Victims ought to be protected from a setting that could potentially reveal their identity before, during and after the trial. In South Africa, the protection of victim identity and privacy has not been carried out by the government, which resulted in organisations declining to accept victims for fear of exposing other victims for possible danger.⁴¹¹

3.4.4 Compensation and Repatriation of victims of trafficking

With regard to the compensation of victims for damages suffered, the Trafficking Act, in line with the Palermo Protocol, provides for an array of remedies, including compensation for both psychological and physical injuries; damage to property; and remedies for sexually transmitted diseases, if necessary.⁴¹² Under this section the provisions of the Criminal Procedure Act.⁴¹³ The Trafficking Act provides that in a situation where the extent of the damage, injury or loss suffered is significant, an order for compensation a civil action may be instituted by the victim in order to recover excess.⁴¹⁴

⁴⁰⁹ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

⁴¹⁰ United Nations on Drugs and Crime 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto' available at https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#_Full_Version_2 (accessed 14 June 2018).

⁴¹¹ US Department of State *Trafficking in Persons Report 2018* (2018) 389.

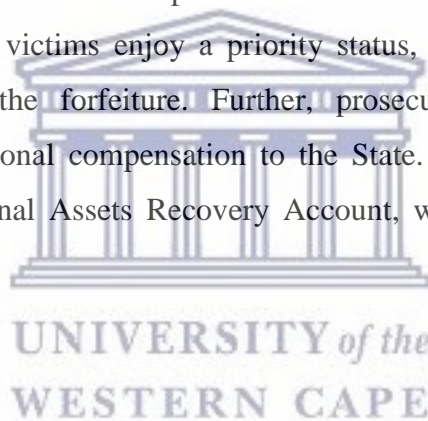
⁴¹² The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁴¹³ The Criminal Procedure Act 51 of 1977, s 300 (1) (a), (2), (3) and (4).

⁴¹⁴ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

Victims may also look to the Children's Act and the Sex Act for compensation.⁴¹⁵ The Children's Act proscribes the trafficking of children only and therefore does not apply to adult victims.⁴¹⁶ Whereas the Sex Act is applicable to children and adults, but it only focuses on trafficking for the purpose of sexual exploitation. That is to say, human trafficking per se is not a crime under the Sex Act. Rather, trafficking must result in a sex crime in order to be statutorily proscribed under the Sex Act.⁴¹⁷ Consequently, many victims are left without legal recourse as the Sex Act departs from the Protocol as it only proscribes human trafficking as it relates to acts that are sexual in nature.⁴¹⁸

An additional compensatory mechanism is available in the Prevention of Organized Crime Act (POCA). Under POCA, victims can claim an interest in the instrumentalities of the primary crime forfeited by the perpetrator. Such instrumentalities include cars, houses, or additional real property that the offender used while carried out the crime.⁴¹⁹ Through POCA, courts can compensate victims from the profits secured from the properties in question. Therefore, under POCA, the victims enjoy a priority status, ahead of the government, in terms of the proceeds of the forfeiture. Further, prosecutors can compel convicted perpetrators to provide additional compensation to the State. Here the perpetrator will be forced to pay into the Criminal Assets Recovery Account, which is a fund that provides compensation for victims.⁴²⁰



⁴¹⁵ Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 12.

⁴¹⁶ The Children's Act 38 of 2005.

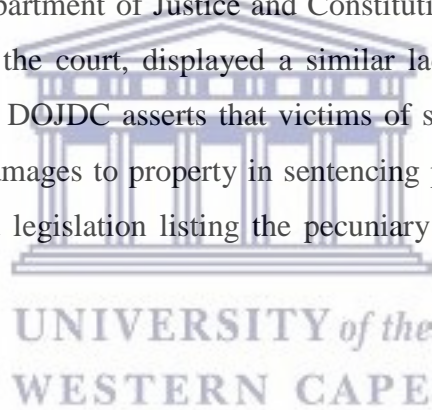
⁴¹⁷ Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 12.

⁴¹⁸ A person ("A") who trafficks any person ("B"), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes. A person who—(a) orders, commands, organises, supervises, controls or directs trafficking; (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or (c) incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking, is guilty of an offence of involvement in trafficking in persons for sexual purposes.

⁴¹⁹ The Prevention of Organised Crime Act 121 of 1998.

⁴²⁰ The Prevention of Organised Crime Act 121 of 1998.

In practice, however, many victims are under-compensated. It has been recognized that it is seldom that the compensation concerns of female victims are satisfactorily addressed.⁴²¹ This has been blamed, partly, on institutionalized gender biases within the judicial and prosecuting agencies.⁴²² Discriminatory compensation mechanisms go against international standards. The United Nations Office on Drugs and Crime declares that “a fair, effective and representative criminal justice system is one that is gender responsive and works to identify and address gender biases.”⁴²³ However, studies have shown that State attorneys, prosecutors, and judges systematically overlook the compensatory concerns of female victims for two discriminatory reasons: first, state officials ignore the specific vulnerabilities of female victims by failing to ensure that proactive measures are in place to address their unique needs. Second, state officials regularly fail to apply available compensation avenues for victims, compensation that would have addressed the gendered financial needs of female victims, including post assault medical care and security and relocation expenses.⁴²⁴ It is also important to note that the Department of Justice and Constitutional Development (DOJCD), the institutional overseers of the court, displayed a similar lack of understanding of these gender-specific needs.⁴²⁵ The DOJCD asserts that victims of sexual violence can only seek compensation for losses or damages to property in sentencing proceedings.⁴²⁶ This conflicts with significant case law and legislation listing the pecuniary and non-pecuniary losses of victims.⁴²⁷



⁴²¹ Greenbaum B *Compensation for victims of sexual violence in South Africa: A human rights approach to remedial criminal compensation provisions* (unpublished LLD thesis, University of Cape Town, 2013) 16.

⁴²² Greenbaum B *Compensation for victims of sexual violence in South Africa: A human rights approach to remedial criminal compensation provisions* (unpublished LLD thesis, University of Cape Town, 2013) 16.

⁴²³ Cave R ‘A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations’ (2016) *The Center for Civil and Human Rights* 14.

⁴²⁴ Cave R ‘A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations’ (2016) *The Center for Civil and Human Rights* 15.

⁴²⁵ Cave R ‘A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations’ (2016) *The Center for Civil and Human Rights* 15.

⁴²⁶ Department of Justice and Constitutional Development ‘Service Charter for Victims of Crimes in South Africa: The Consolidation of the Present Legal Framework Relating to the Rights of and Services Provided to Victims of Crime’ available at www.justice.gov.za/VC/docs/vc/vc-eng.pdf (accessed 14 June 2018).

⁴²⁷ Greenbaum B *Compensation for victims of sexual violence in South Africa: A human rights approach to remedial criminal compensation provisions* (unpublished LLD thesis, University of Cape Town, 2013) 153.

Finally, the Trafficking Act places the onus of deciding whether or not a victim should be compensated on the courts.⁴²⁸ This may not at times be in the favour of the victims as court processes take time and it could result in the victim not wanting anything to do with the trafficker.

3.4.5 The return and reparation of victims

The Principles and Guidelines related to the Palermo Protocol highlight the importance of including the protection of victims within domestic legislation unless safe return can be promised by the country of origin.⁴²⁹ South Africa has, nevertheless, chosen not to adopt sections of the Trafficking Act concerning the provision of assistance to foreign victims.⁴³⁰ This instrument seeks to assist and protect victims of trafficking within its borders. However, not all the provisions of the Trafficking Act came into operation as sections referring to the assistance and protection of foreigners were not adopted, in spite of the characteristic transnational nature of human trafficking and the Palermo Protocol's distinct provisions to assist foreign victims.⁴³¹

With regard to the repatriation of victims from the Republic, the State party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.⁴³² When a State party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be

⁴²⁸ The Prevention and Combating of Trafficking in Persons Act 7 of 2013.

⁴²⁹ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 34.

⁴³⁰ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s15, 16 & 31 (2) (b) (ii).

⁴³¹ Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016) 9.

⁴³² The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (1).

voluntary.⁴³³ At the request of a receiving State party, a requested State party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State party.⁴³⁴ In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State party, of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State party, shall agree to issue, at the request of the receiving State party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.⁴³⁵ This shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State party.⁴³⁶ It shall also be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.⁴³⁷

The Director- General of Social Development may not repatriate a foreign child who is a victim of human trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to certain factors.⁴³⁸ This includes the best interest of child⁴³⁹, the safety of the child during the repatriation process,⁴⁴⁰ the care arrangements and the safety of the child in the country to which the child is to be repatriated⁴⁴¹ and the possibility that the child may be harmed or killed.⁴⁴²

⁴³³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (2).

⁴³⁴ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (3).

⁴³⁵ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (4).

⁴³⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (5).

⁴³⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 8 (6).

⁴³⁸ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (1).

⁴³⁹ The Children's Act 38 of 2005, s7.

⁴⁴⁰ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (1) (b).

⁴⁴¹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (1) (c).

Similarly, the Director- General may not repatriate an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to the safety of the person during the repatriation process⁴⁴³ or in the country to which the person is to be repatriated⁴⁴⁴ and the possibility that the person might be harmed.⁴⁴⁵

In terms of the repatriation of suspected victim of trafficking to Republic, the Director-General of International Relations and Co-operation, in co-operation with the Director-General of Social Development, must assess the risks to the safety and life of a person who is a citizen or permanent resident of the Republic, if he or she is repatriated to the Republic, facilitate the repatriation and advise the Director- General of Home Affairs on measures to secure the reception of the individual at a South African port of entry.⁴⁴⁶

The Director- General of Home Affairs must issue travel documents to enable that person to travel to and enter the Republic.⁴⁴⁷ Further, upon entry into the Republic, a child who is suspected of being a victim of human trafficking, must be referred to a designated child protection organisation or the provincial Department of Social Development.⁴⁴⁸ Additionally, an adult victim is to be referred to the provincial department of social development as well.⁴⁴⁹

Furthermore, an accredited organisation may not return an adult victim to the place within the Republic from where he or she was trafficked, without giving due regard to the safety of the person⁴⁵⁰ and the possibility that the person might be harmed or killed or trafficked again if returned to that place.⁴⁵¹ An accredited organisation must take reasonable steps to find

⁴⁴² The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (1) (d).

⁴⁴³ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (2) (a) (i).

⁴⁴⁴ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (2) (a) (ii).

⁴⁴⁵ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s31 (2) (a) (iii).

⁴⁴⁶ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s33 (1)(a) (i).

⁴⁴⁷ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s33 (1) (b) (i).

⁴⁴⁸ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s33 (1) (b) (iv).

⁴⁴⁹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s33 (1)(b) (v).

⁴⁵⁰ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s34 (1) (a).

⁴⁵¹ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s34 (1) (b).

suitable members to whom a victim can be returned and who are willing to provide assistance, taking into consideration the views of the victim.⁴⁵² If the victim does not have the financial means to travel to the place from where he or she was trafficked, an accredited organisation must facilitate the return of the victim to the place in question.⁴⁵³

3.4.6 Conclusion

As a member State to the Palermo Protocol, South Africa has a duty to protect the victims of human trafficking and those who are vulnerable to human trafficking. As discussed above, the Department of Social Development provides for the National Policy Guidelines for Victim Empowerment, which defines a victim. The South African Trafficking Act makes reference to a child who is a victim of human trafficking; this can be found in section 18 (6) of the Trafficking Act. Additionally, the Trafficking Act also refers to an adult person who has been issued with a letter of recognition as provided for in section 19 (10).

The South African Trafficking Act rests the duty of identifying a victim with the South African Police Service whereby any information collected by SAPS is deemed essential to assist the victim. In addition, when a police official has the knowledge or ought to have reasonably known or suspected that an adult person is a victim of trafficking, the police official must deliver this individual to an accredited organisation as well as contact the Department of Social Development. The issue many victims face is that law enforcement does not provide the victims with the reassurance needed and many victims are deterred from stepping forward due to the mistreatment in the hands of law enforcement officials. Many identification issues are also prevalent. These issues include, but are not limited to, following the procedures set out to identify victims. This results in a lack of differentiating smuggling victims to human trafficking victims. The problem, however, rests in the Trafficking Act itself as the Act does not define smuggling and illegal immigration. The failure to distinguish between these victims leads to detention, deportation and arrest of victims.

As mentioned above, adult victims may be referred to an accredited organisation. These organisations focus on the safety of victim's amongst other offerings. Additionally, an accredited organisation must ensure a safe environment for those victims who have children. Further services may include offering a rehabilitation service and educational and skills

⁴⁵² The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s34 (2) (a).

⁴⁵³ The Prevention and Combating of Trafficking in Persons Act 7 of 2013, s34 (2) (b).

development. This, however, is optional according to the Trafficking Act. In practice, there is a lack of shelters and a lack of proper screening of victims before placing victims in shelters. The Thuthaleza Care Centers are operated to help victims of rape and sexual violence.

The Trafficking Act provides for compensation for psychological and physical injuries and damage to property. The victims may also look to the Children's Act and the Sex Act. As previously mentioned, the Children's Act is limited to children only. The Sex Act, although applicable to children and adult victims, is focused on trafficking for purposes of sexual exploitation. An additional piece of legislation which may be relied upon is POCA. It is noted that in practice many victims are under compensated and studies have suggested that compensatory concerns for female victims are often overlooked.

In conclusion, although the Trafficking Act follows the Palermo Protocol with regard to the protection of victims, it does not fully meet this requirement. This is evident in the lack of shelters and the lack of proper police training. The above issues highlight that many victims may be deterred from coming forward as they are not afforded proper care and protection.



CHAPTER 4

Conclusion and Recommendations

The aim of this min-thesis is to establish whether South Africa successfully meets the standards set out in the Palermo Protocol. To achieve this, a comprehensive overview of human trafficking was provided, followed by an examination of South Africa's legal framework in light of the minimum standards provided in the Protocol. This chapter summarises the major findings of the study and provides some recommendations with regard to the prosecution, protection and prevention of human trafficking.

4.1 Conclusion

This study has highlighted the growing concern of human trafficking for the international community. In attempt to combat the trade in human cargo, the international community has adopted a wide array of international standards to combat the trade in humans. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) is the most significant of the international instruments dealing with human trafficking. The specific goal of the Protocol is to adopt “effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking.”

The efforts to combat human trafficking begins with the definition of trafficking. The study has shown that various definitions of trafficking are provided in international instruments. The most comprehensive definition is provided in the Palermo Protocol. The Palermo Protocol was the first transnational instrument to identify multiple facets of trafficking and was the first treaty to provide a comprehensive definition of trafficking which laid the groundwork for international and domestic laws to be designed to address the issue.

Additionally, it was established that international instruments on trafficking and related aspects of trafficking offer guidance for developing competent strategies to deal with trafficking. The counter-trafficking strategies as found in treaties, protocols, declarations and resolutions, which specifically focus on combating trafficking compel States to prosecute traffickers, protect those who are vulnerable to trafficking along with those already trafficked and produce structures for prevention. The Palermo Protocol is, in particular, designed to

reflect the international community's political will to combat organized crime. The goal of the Palermo Protocol is to adopt "effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking." study focused on the three elements of the Palermo Protocol, namely, the prosecution of human trafficking offenders, the protection of human trafficking victims and the prevention of human trafficking. The Protocol obliges State Parties to establish polices in order to prosecute persons guilty of human trafficking. Additionally, the Palermo Protocol criminalises any attempt to commit the crime, being an accomplice to human trafficking or taking part in the organising of the crime. The Palermo Protocol makes reference to the duties State parties are to undertake with regard to victims of human trafficking. These duties are, but not limited to, providing assistance for legal matters, to provide suitable shelter, basic medical care and employment opportunities. Furthermore, the Palermo Protocol gives discretionary powers to governments to implement physical, psychological or social recovery measures.

The study has also highlighted five provisions with respect to the prevention, cooperation and other measures to combat trafficking in persons. These provisions require States Parties to create policies, programmes to combat trafficking in persons. In addition, States Parties must host information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. The Palermo Protocol provides that policies, programmes shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. In addition to governments establishing extensive policies and programmes regarding trafficking in collaboration and cooperation with NGOs, it must also conduct research as it is important in understanding trafficking and developing these policies and responses. It advocates information-sharing between states and the training of experts involved in one capacity or another in the struggle against human trafficking.

The evaluation of the South African counter-trafficking response with the recognized minimum anti-trafficking standards is made difficult due to the fragmented nature of the present domestic response. With respect to prosecution, the domestic response is not incorporated in a single piece of legislation; it can be categorised in three parts. The first part of the South African legal response is that of current common law and statutory crimes that

may well apply in a number of human trafficking cases in prosecuting trafficking offenders for crimes other than human trafficking. However, the above has no direct effect on human trafficking and does not deal with the trafficking crime sufficiently.

The second part of the domestic response comprises of anti-trafficking provisions in two pieces of legislation. The Children's Act 38 of 2005 which proscribes all forms of trafficking in children. However, the object of the Act is to focus solely on the protection of children, therefore no protection is offered for adults against trafficking or any other abuse. Conversely, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act) criminalises the trafficking of children and adult persons for purposes of sexual exploitation, nevertheless does not criminalise any of the alternative forms of trafficking. Additionally, the Sexual Offences Amendment Act does not provide for the prevention of human trafficking or for the protection and assistance of victims of human trafficking.

The study accepts that although common-law crimes and statutes can be relied upon, they are not comprehensive enough to adequately deal with the complexities of human trafficking and provide only a fragmented approach to combating the crime. As regards to the transitional legislation implemented to prosecute trafficking offenders, it was acknowledged that while the Sexual Offences Act 2007 and the Children's Act 2005 encompasses the crime of trafficking, the crime seems to be limited in both Acts. Trafficking in the Sexual Offences Act 2007 is directed at equally to adults and children on the other hand the offence is restricted to trafficking for sexual purposes. The provisions in the Children's Act confine trafficking offences to those committed against children. The provisions in the Sexual Offences Act 2007 and the Children's Act 2005 consequently do not fully comply with international counter-trafficking standards set out in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

The Combating of Trafficking in Persons Act criminalises several acts that constitute or concern trafficking in persons and enforces strict penalties for violations as follows: Trafficking in persons is punishable by a maximum of life imprisonment. Further, engaging in conduct that causes an individual to enter into debt bondage is punishable by up to 15 years' imprisonment. Any benefit gained from services of a trafficking victim is punishable by up to 15 years' imprisonment and the assistance of trafficking in persons is punishable by up to 10 years' imprisonment. However, imprisonment is not the only punishment which the

Act provides for. The Combating of Trafficking in Persons Act also inflicts severe fines and permits the State to seize the assets of traffickers. This legislation will assist in prosecuting suspects and will guarantee that victims of human trafficking are supported by a protective structure involving various role-players.

With respect to the protection of victims of trafficking, it is noted that there is no definite victim identification guidelines in the Trafficking Act, thus, victims find themselves arrested along with their traffickers because law enforcement officials fail to establish the status of the victim. Additionally, there is a grave lack of shelters and adult victims find themselves placed in children's shelters. This could be due to the economic challenges South Africa faces and the lack of funding needed for consistent provision of programmes necessary for the adequate recovery of victims. South Africa Police Service as a first point of contact undermines the efforts to curb human trafficking due to the general distrust for law enforcement and the failure to adequately identify victims. The Provisions of rehabilitation such as education and skills training are not definite but are optional. What emerges from the Trafficking Act is that it fails to address victim related conditions in relations to foreign nationals.

South Africa, in compliance with the Palermo Protocol has also responded to its obligation to prevent human trafficking. It has established comprehensive policies, programmes and other measures to prevent and combat trafficking in persons, such as the Tsireledzani Programme, the Human Trafficking Desk which manages trafficking-in-persons matters received as well as to provide advice to the provinces and organised crime units on intricate matters arising from trafficking in persons' investigations. Additionally, the South African government put in place a Trafficking in Persons Intersectoral Task Team which assists a multi-sectoral response to the advancement and implementation of a National Action Plan to prevent trafficking in persons. South Africa is also a party to the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants to which South Africa which has held numerous workshops in South Africa focusing on the prevention of human trafficking. Additionally, South Africa has various non- governmental organizations focusing on human trafficking. These include but are not limited to the Salvation Army, A21, the Tshwane Counter-Trafficking Coalition and the Red Light Campaign.

It is clear that South Africa has indeed taken positive steps towards the fight against human trafficking. On many levels South Africa has responded to the Palermo Protocol. However, trafficking has a complex socio-economic and political foundation which is connected to a

greater, global process. It is not merely a social or moral issue to be treated with casual initiatives, as this does not address poverty or related issues of vulnerability and discrimination in strategic or sustainable ways. There needs to be greater relations between trafficking prevention strategies and education, empowerment and poverty relief targeted at vulnerable populations.

4.2 Recommendations

The following recommendations are proposed to ensure South Africa's compliance with the minimum requirements of the Palermo Protocol:

4.2.1 Prosecution

- The role and importance of South Africa's criminal justice system must be elevated to unprecedented heights. This will require considerable financial investments in capacitating prosecutors, interpreters, investigators, law enforcement agencies, social workers and psychologists with essential skills and resources required to investigate and prosecute complex human trafficking cases whilst maintaining a victim-centred approach in prosecution strategies. Important areas for skills development in this sector include trauma-informed care, specialised financial investigations, anti-money laundering, cybercrime, open source- and social media analysis, and responding to the use of cryptocurrencies and the 'dark web' in crimes associated with human trafficking.
- The multi-layered complexities and workload intrinsic to human trafficking investigations and prosecutions necessitates specialisation and dedicated capacity. Proactive, intelligence-led and court-driven investigation strategies must become a standard practice that is paralleled with financial investigations and asset forfeiture.
- Human trafficking as an organised crime demands compulsory integrity testing and vetting of all operational staff, including selected members from civil society and NGOs who participates in operational matters. Mandatory and random drug testing of frontline public officials must be considered, and official complicity in trafficking crimes, including crimes committed against persons in prostitution, must be dealt with decisively. Drug rehabilitation centres and shelters for victims, both men and women, must be properly funded and capacitated.

4.2.2 Protection

- The police should be substantively sensitised on victim handling. This requires comprehensive training and proper understanding on the role they serve. Untrained police officials dealing with human trafficking victims could serve as a deterrent for future victims.
- The Department of Social Development Regulations for the Trafficking Act is not clear with regard to continual after care provisions in cases where victims require long term care. Therefore, in these cases, directives concerning what will happen to victims must form part of legislation to provide clarity and certainty. A long term plan will further ensure that victims do not fall back into circumstances that left them vulnerable to trafficking in the first place.
- The Trafficking Act should state alternatives that would be available to victims who have no home to return to; or if the victim's family members to whom the victim is expected to return were the perpetrators or the accomplices, or if the only place to return to is the place where they have been trafficked.
- Additionally, the State should consider providing long term assistance to victims of trafficking by providing the victim with skills that will enable building a life for themselves. This will prevent them from falling back into the harsh economic realities that they were lured from, thereby also preventing them from being re-trafficked.

4.2.3 Prevention

- Government must prioritize the fight against trafficking in women and children as a political issue that must be part of the governance agenda, given the specificities it entails. This needs to be revisited annually whereby taking into account statistics regarding the root causes of human trafficking.
- Direct Prevention Activities includes education and effective law-enforcement but also involves addressing root causes.
- Direct prevention requires effective partnerships between government, law enforcement and civil society institutions and the clear intent of improving the quality of life of the target groups, namely those vulnerable to human trafficking

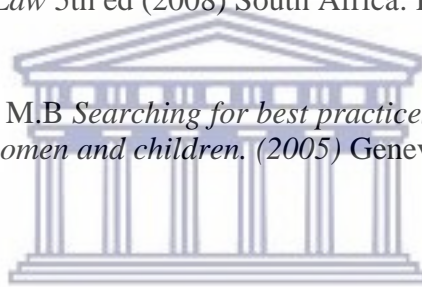
- NGOs, local government institutions and law enforcement personnel must work with community leaders through development committees or other existing structures (men and women) to form partnerships to combat trafficking as a manifestation of insecurity; economic empowerment of women and girls which enhance their access to productive resources and markets and ensure sustainable economic mobility; interventions that include visiting high-risk groups: such as young women in rural areas, migrating women, refugee women, uneducated women; enlisting the support of the media to document the means, actions and outcomes of human trafficking; consistent and persistent support to staff engaged in active border monitoring and investigation to ensure their ready access to information and other resources;
- It will be useful for organisations to work with former ‘victims’ as peer counsellors and spokespersons to support prevention activities. This will give a unique insight on what trafficking practically entails and the consequences thereof.
- Civil society organizations are further encouraged to start community education programmes for the prevention of child abuse and trafficking, whereby children are the main actors of the program. This will consist of awareness-building in schools and other places through arts and culture. By having children play a part in these programs in a manner that they understand, it increases the aim of getting the message across.
- There needs to be thorough, regular, practical training of all elements of the police/judicial system, government officials and border guards. This training will reinforce their capacity to deal efficiently with human trafficking.
- Government needs to develop opportunities and improve access to formal education for women, girls and boys at all levels. Additionally, ensure a link between better education and available job opportunities. The incorporation of gender and human rights concerns like trafficking and awareness and information into informal education activities and into school curricula will further ensure that youth are educated on this issue.

Bibliography

Books

- Askola H *Legal Response to Trafficking in Women For Sexual Exploitation in the European Union* (2007) Oxford: Hart Publishing
- Burchell JM *Principles of Criminal Law by J Burchell and J Milton* 3rd ed (2005) South Africa: Juta
- Copley A *History of Slavery and its Abolition* (1836) London: Houlston & Stoneman
- Fergus L *Trafficking in Women for Sexual Exploitation* (2005) Australia: Australian Institute of Family Studies
- Gallagher A *The International Law of Human Trafficking* (2010) Cambridge: Cambridge University Press
- Hodgkin R & Newell P *Implementation Handbook for the Convention on the Rights of the Child* 3rd ed (2002) Geneva: UNICEF
- Horn W *The Challenge of Child Trafficking: South Africa's Legal Compliance with Its International Obligations in Respect of Child Trafficking* (2010) Saarbrücken: Lambert Academic Publishing
- Jansson D *A Comparative Study of the Definition of Trafficking in Persons* (2015) Brill: Nijhoff
- Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* (2008) South Africa: LexisNexis
- Lee M *Trafficking and Global Crime Control* (2011) SAGE Publications Ltd: London

- McCabe KA *The Trafficking of Persons: National and International Responses* (2008) International Academic Publishers: New York
- Obokata T *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (2006) Boston: Martinus Nijhoff Publishers
- Pharoah R *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa* (2006) South Africa: Institute for Security Studies
- Shelton D *Remedies in International Human Rights law* (1999) Oxford: Oxford University Press
- Snyman CR *Criminal Law* 5th ed (2008) South Africa: LexisNexis
- Truong, T. & Angeles, M.B *Searching for best practices to counter human trafficking in Africa: A focus on women and children.* (2005) Geneva: UNESCO



Chapters in books

- Milivojevic S & Segrave M 'Evaluating Responses to Human Trafficking : A Review of International, Regional and National Counter- Trafficking Mechanisms' in Winterdyk J. Perrin B & Reichel P *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* 9 ed (2012) USA: CRC Press

Case Law

NDPP and Another v Mohamed and Others 2002 (2) SACR 196 (CC)

S v Amien Andrews Case No 27/50/98 (Unreported)

S v Basson [2000] 3 All SA 59 (T)

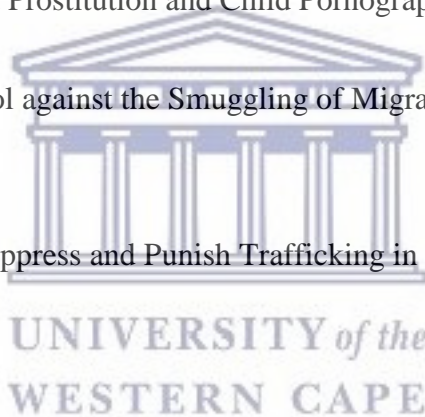
S v Cele and Others 2009 (1) SACR 59 (NPD)

S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC)

International Conventions and Protocols

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
- Declaration on the Elimination of Violence against Women (1993).
- International Agreement for the Suppression of the White Slave Trade (1904).
- International Covenants on Civil and Political Rights (1966).
- International Covenant on Economic, Social, and Cultural Rights (1966).
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).
- International Convention for the Suppression of the Traffic in Women of Full Age (1933).
- International Labour Organisation's Forced Labour Convention (1930).
- International Labour Organisation's Minimum Age Convention (1973).
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002).
- Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (1926).
- Supplementary Convention on the Abolition of Slavery (1956).
- Universal Declaration of Human Rights (1948).

- United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979).
- United Nations Convention on the Rights of the Child (1989).
- United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979).
- United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).
- United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000).
- United Nations Protocol against the Smuggling of Migrants by Land, Sea, and Air (2003).
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000).



Internet References

- A21 'Human Trafficking' available at <http://www.a21.org/content/who-we-are/gnihwoo> (accessed 3 June 2018).
- Act to Prevent Trafficking 'Human Trafficking: An Introduction' available at <https://www.aptireland.org/apt-human-trafficking-tool-kit/> (accessed 10 February 2018).
- African National Congress 'Discussion Paper on Gender Violence' available at <http://www.anc.org.za/docs/discuss/genderz> (accessed 13 April 2018).

- Anti-Slavery ‘What is Human Trafficking?’ available at <https://www.antislavery.org/slavery-today/human-trafficking/> (accessed 22 January 2018).
- Corruption Watch ‘Corruptions Role in the Grim Trade of Humans’ available at <http://www.corruptionwatch.org.za/corruptions-role-in-the-grim-trade-of-humans/#top> (accessed 1 April 2018).
- Department of Social Development ‘National Policy Guidelines for victim empowerment’ available at http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&grid=84&Itemid=3 (accessed 10 June 2018).
- Department of Justice and Constitutional Development ‘Service Charter for Victims of Crimes in South Africa: The Consolidation of the Present Legal Framework Relating to the Rights of and Services Provided to Victims of Crime’ available at www.justice.gov.za/VC/docs/vc/vc-eng.pdf (accessed 14 June 2018).
- Goitom H ‘Training Related to Combating Human Trafficking: South Africa’ available at <https://www.loc.gov/law/help/human-trafficking/southafrica.php> (accessed 25 April 2018).
- Goliath P ‘Protecting victims of human trafficking- is South Africa doing enough?’ available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/> (accessed 13 April 2018).
- Gould C & Fick N ‘Report to the South African Law Commission: Preliminary Research Findings or Relevance to Combat Trafficking in Persons and Legislation Pertaining Adult Prostitution’ available at <https://oldsite.issafrica.org/uploads/SWEATISSUBJUN07.PDF> (accessed 29 March 2018).
- International Labour Office ‘Training manual to fight trafficking in children for labour, sexual and other forms of exploitation’ https://www.unicef.org/protection/Textbook_1.pdf (accessed 22 February 2018).

- International Organization for Migration ‘ The IOM handbook on direct assistance for victims of trafficking’ available at <https://publications.iom.int/books/iom-handbook-direct-assistance-victims-trafficking-0> (accessed 12 June 2018).
- Kelly L & Regan L ‘Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK’ available at <https://pdfs.semanticscholar.org/d317/6061bfa7309e63ea21fecf6e4817a4d953cb.pdf> (accessed 24 February 2018).
- Laczko F ‘Human Trafficking: The Need for Better Data’ available at <http://www.migrationpolicy.org/article/human-trafficking-need-better-data> (accessed 22 August 2017).
- May C ‘Trafficking of Persons: A South African Legislative Perspective’ available at www.probono.org.za/Manuals/Refugee.../2011_12_14_LRC_HumanTrafficking.pdf (accessed 3 March 2018).
- Martens J, Pieczkowski M & Van Vuuren-Smyth B *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* available at www.unhcr.org/4d523c689.pdf (accessed 24 February 2018).
- National Freedom Network ‘School Dialogues- Eastern Cape’ <http://nationalfreedomnetwork.co.za/event/awareness-campaign-eastern-cape/> (accessed 7 June 2018).
- National Prosecuting Authority ‘Tsireledzani: Understanding the Dimensions of Human Trafficking in Southern Africa’ available at <http://https://pmg.org.za/files/docs/100324tsireledazni.pdf> (accessed 29 June 2017).
- NSPCC ‘Child Trafficking: What is child trafficking?’ <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-trafficking/> (accessed 22 February 2018).
- Ollus N ‘The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel’

available at

https://www.unafei.or.jp/publications/pdf/RS_No62/No62_06VE_Ollus1.pdf (accessed 28 February 2018).

- Pearson E 'Human traffic, human rights: redefining victim protection' available at http://www.antislavery.org/wpcontent/uploads/2017/01/hum_traff_hum_rights_redef_vic_protec_final_full.pdf (accessed 20 February 2018).
- Red Light Campaign 'Red Light Campaign' <http://www.redlightcampaign.org/> (accessed 5 June 2018).
- Sage Publications 'Introduction and History of Human Trafficking and Modern Day Slavery' https://us.sagepub.com/sites/default/files/upm-binaries/86866_Ch_1.pdf (accessed 23 February 2018).
- The Law Society of the Northern Provinces 'Newsflash' available at www.northernlaw.co.za/.../NewsFlash%2023%20March%2011.doc (accessed 17 March 2018).
- The Salvation Army 'Anti- Human Trafficking' available at <http://salvationarmy.org.za/anti-human-trafficking/> (accessed 1 June 2018).
- The Salvation Army 'News, Events and Media' available at <http://salvationarmy.org.za/media-campaigns-2/> (accessed 1 June 2018).
- United Nations Global Initiative to Fight Human Trafficking (UNGIFT) '500 Miles in Chains to End Modern Day Slavery' available at <http://www.ungift.org/ungift/en/stories/500-miles-in-chains-to-end-modern-day-slavery.html> (accessed 25 June 2017).
- United Nations Office on Drugs and Crime 'Global Action against Trafficking in Persons and the Smuggling of Migrants' available at

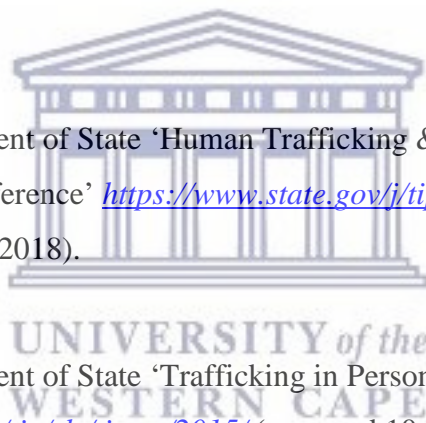


<https://www.iom.int/sites/default/files/about-iom/GLOZ67-ProjectSummary-EN-2016.pdf> (accessed 17 May 2018).

- United Nations Office on Drugs and Crime ‘GLO.ACT facilitates unique information sharing workshop on human trafficking for key stakeholders in South Africa’ available at <http://www.unodc.org/unodc/en/human-trafficking/glo-act/information-sharing-workshop-on-human-trafficking-for-key-stakeholders-in-south-africa.html> (accessed 27 May 2018).
- United Nations Office on Drugs and Crime ‘Global’ <http://www.unodc.org/unodc/en/human-trafficking/glo-act/countries.html#southafrica> (accessed 27 May 2018).
- United Nations Human Rights Office of the High Commission ‘Human Rights and Human Trafficking’ available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf (accessed 24 February 2018).
- United Nations Office on Drugs and Crime ‘Human Trafficking and Smuggling of Migrants’ <https://www.unodc.org/westandcentralafrica/en/newrosenwebsite/TIPSOM/Human-trafficking-and-smuggling-of-migrants.html> (accessed 24 February 2018).
- United Nations Office on Drugs and Crime ‘Issue Paper: Organized Crime involvement in trafficking in persons and smuggling of migrants’ available at https://www.unodc.org/documents/...trafficking/FINAL_REPORT_06052010_1.pdf (accessed 12 June 2018).
- United Nations Office on Drugs and Crime ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto’ available at https://www.unodc.org/.../crime/legislative_guides/01%20Introduction%20and%20Li s... (accessed 28 February 2018).



- United Nations on Drugs and Crime ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto’ available at https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html#_Full_Version_2 (accessed 14 June 2018).
- United Nations Office on Drugs and Crime ‘Trafficking in Persons and Migrant Smuggling’ available at <http://www.unodc.org/lpo-brazil/en/trafico-de-pessoas/index.html> (accessed 20 January 2018).
- United Nations Office on Drugs and Crime ‘United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ available at <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html> (accessed 28 February 2018).
- United States Department of State ‘Human Trafficking & Migrant Smuggling: Understanding the Difference’ <https://www.state.gov/j/tip/rls/fs/2017/272005.htm> (accessed 23 February 2018).
- United States Department of State ‘Trafficking in Persons Report 2015’ available at <https://www.state.gov/j/tip/rls/tiprpt/2015/> (accessed 10 June 2018).
- United States Department of State ‘Trafficking in Persons Report’ available at <http://www.state.gov/j/tip/rls/tiprpt/> (accessed 18 February 2018).
- United States Department of State ‘The Three Ps; Prevention, Protection, Prosecution’ available at <http://www.state.gov/j/tip/> (accessed 12 February 2018).
- Wijers M & Lap-Chew L ‘Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution’ available at <http://lastradainternational.org/doc-center/1137/trafficking-in-women-forced-labour-and-slavery-like-practices-in-marriage-domestic-labour-and-prostitution> (accessed 24 February 2018).



Journal Articles

- Amiel A 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 *Buffalo Human Rights Law Review* 5.
- Aransiola J & Zarowsky C 'Human trafficking and human rights violations in South Africa: Stakeholders' perceptions and the critical role of legislation' (2014) 14 *African Human Rights Law Journal* 512.
- Bevilacqua E 'Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?' (1998-1999) *ILSA Journal of International and Comparative Law* 172.
- Buthelezi S 'Human Trafficking and the New Legal Framework in South Africa: Intervention needed for the Law to reach vulnerable girls and woman' 29 (2015) *Agender* 155 164.
- Cave R 'A Critical Analysis of Human Trafficking in South Africa: Remedies and Recommendations' (2016) *The Center for Civil and Human Rights* 4.
- Chibba M 'Human Trafficking and Migration: Concepts, Linkages and New Frontiers' (2013) *Global Policy Journal* 4.
- Chuang J 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 *Indiana Journal of Global Studies* 156.
- Chuang J 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts' (1998) 11 *Harvard Human Rights Journal* 75.
- Doezema J 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women' (2000) 18 *Gender Issues* 25.

- Fariior S 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to Its Potential' (1997) 10 *Harvard Human Rights Journal* 213.
- Fitzgibbon K 'Modern-Day Slavery? The Scope of Trafficking in Persons in Africa' (2003) *African Security Review* 86.
- Gajic-Veljanoski O & Stewart De 'Women Trafficked into Prostitution: Determinants, Human Rights and Health Needs' (2007) 44 (3) *Trans-cultural Psychiatry* 339 .
- Gallagher A 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 1000.
- Goździak E & Collett E 'Research on Human Trafficking in North America: A Review of Literature' (2005) 43 *International Migration* 43.
- Harrold MM 'A New Kind of Traffic(king) Cop on the International "Beat" of Human Trafficking' (2006) 1 *Charleston Law Review* 101.
- Haynes DF 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers' (2004) *Human Rights Quarterly* 226.
- Hughes DM 'Globalization, Information Technology and Sexual Exploitation of Women and Children' (2001) 13 *A Radical Feminist Journal of Discussion and Activism* 1.
- Hughes DM 'The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children' (2002) 13(1) *Hastings Women's Law Journal* 127.
- Hyland K 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 *Human Rights Brief* 30.

- Joshi A 'The Face of Human Trafficking' (2002) 13(1) *Hastings Women's Law Journal* 13.
- King L 'International Law and Human Trafficking' (2013) *Topical Research Digest: Human Rights and Human Trafficking* 88.
- Lutya T & Lanier M 'An Integrated Theoretical Framework to Describe Human Trafficking of Young Women and Girls for Involuntary Prostitution' *Public Health-Social and Behavioural Health* (2012) 554.
- Lutya T 'Criminological Responses to Human Trafficking of Young Women and Girls for Involuntary Prostitution in South Africa' 10 (2) (2009) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 59.
- Najemy L 'South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation' (2010) 9 *Washington University Global Studies Law Review* 176.
- Obokata T 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 17(2) *International Journal of Refugee Law* 395.
- Perry K & McEwing L 'How do social determinants affect human trafficking in Southeast Asia, and what can we do about it? A systematic review' (2013) 15 (2) *Health and Human Rights Journal* 2.
- Pithey B 'Do new crimes need new laws? Legal provisions available for prosecuting human trafficking' (2004) 9 *South African Crime Quarterly* 8.
- Rahman M 'Human Trafficking in the era of Globalization: The case of Trafficking in the Global Market Economy' (2011) 2 *Transcience Journal* 54.

- Robinson JA 'Children's Rights in the Constitution' 6 *Potchestroom Electronic Law Journal* (2003) 16.
- Ross M 'A Diamond in the Rough: The Transitional Duty to Prevent Human Trafficking in the Protocol' (2014) 21 *Duke Journal of Gender Law & Policy* 328.
- Shoaps L 'Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act' (2013) 17.3 *Lewis & Clark Law Review* 936.
- Stuurman L 'Anti-trafficking Legislation Can No Longer Be Delayed' (2004) *Eye on Human Trafficking* 5.
- Sveaass N 'Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation' (2013) *European Journal of Psychotraumatology* 1.
- Zimmerman C, Hossain M & Yun K et al 'The Health of Trafficked Women: A Survey of Women Entering Post-Trafficking Services in Europe' (2008) 98(1) *American Journal of Public Health* 58.



Legislation

- Children's Act 38 of 2005.
- Constitution of the Republic of South Africa, Act 200 of 1993.
- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
- Criminal Procedure Act 51 of 1977.
- Extradition Act 67 of 1962.
- Films and Publications Act 65 of 1996.

- Immigration Act 13 of 2002.
- Intimidation Act 72 of 1982.
- Prevention and Combating of Corrupt Activities Act 12 of 2004.
- Prevention and Combating of Trafficking in Persons Act 7 of 2013.
- Prevention of Organised Crime Act 121 of 1998.
- Riotous Assemblies Act 17 of 1956.
- Sexual Offences Act 23 of 1957.

Reports

- South Africa Law Reform Commission *Report on Trafficking in Persons* (2008) South Africa.
- US Department of State *Trafficking in Persons Report 2008* (2008) United States.
- US Department of State *Trafficking in Persons Report 2018* (2018)

Thesis

- Greenbaum B *Compensation for victims of sexual violence in South Africa: A human rights approach to remedial criminal compensation provisions* (unpublished LL.D thesis, University of Cape Town, 2013)
- Horn J A *Critical Analysis of Human Trafficking for Sexual Exploitation* (unpublished DLitt et Phil, 2014).
- Horn W *South Africa's Legal Compliance with its International Obligations in Respect of Child Trafficking* (unpublished LLMV thesis, North- West University, 2009).

- Iroanya R *Human Trafficking as a Security Issue: Selected Case Studies* (unpublished LLD thesis, University of Pretoria, 2014).
- Kruger B *Combating Human Trafficking: A South African Legal Perspective* (unpublished LLD thesis, University of the Free State, 2010).
- Mcanyana M *The Legal Framework Regulating the Protection and Assistance of Victims of Human Trafficking: A South African Perspective* (unpublished LLM thesis, University of Pretoria, 2016).
- Mollema N *Combating Human Trafficking in South Africa: A Comparative Legal Study* (unpublished LLD thesis, University of South Africa, 2013).

