

The legal framework regulating the protection and assistance of victims of human trafficking: A South African perspective

Mini Dissertation by:

Mandisa Sibusiso Mcanyana

14415292

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Supervisor: Professor Annette van der Merwe

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Summary

Human trafficking is a phenomenon often likened to slave trade which has had an adverse impact on victims for centuries. The trade in humans has demoralised society as it transcends boundaries, the callousness of the act cloaked in well-meaning deceit, unknown to those that fall prey to traffickers till it is too late. The victims that are rescued or are able to escape in South Africa and Nigeria have not been accorded the necessary protection and assistance required, most being unaware of the treatment they should be receiving. This research assesses the Prevention and Combating of Trafficking in Persons Act (Trafficking Act) by juxtaposing the rehabilitative and after care provision that existed prior to the Trafficking Act coming into force and further examines the interventions that the Trafficking Act aims to put in place. The contradiction in the provisions of the Trafficking Act and its Regulations call into question the feasibility in the implementation of the legislation. A human rights approach is taken into account as necessitated by the Guidelines and Principles that are in concert with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime. Despite the South African Constitution being progressive legislation as it underpins equality and non-discrimination as its bedrock, human trafficking is rife. Human trafficking is a multifaceted problem that requires cooperation from various sectors.

Mandisa Sibusiso Mcanyana

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DECLARATION

I, MANDISA SIBUSISO MCANYANA, declare that the work presented in this dissertation is original. It has not been presented at any other University or academic institution. Where other people's work has been used, references have been provided and in some cases, quotations made. It is in this regard that I declare this dissertation my own original work. It is hereby presented in partial fulfilment of the requirements for the award of LLM degree in Multidisciplinary Human Rights.

Signature

Date

This examination is submitted for examination with my approval as University Supervisor

Supervisor: Professor Annette van der Merwe

Signature

Date

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ACRONYMS AND ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
HIV	Human Immunodeficiency Virus
IOM	International Organization for Migration
IPID	Independent Police Investigative Directorate
NAPTIP	National Agency for Prohibition of Trafficking in Persons
NGO	Non-Governmental Organisation
SAPS	South African Police Service
TIP	Trafficking in persons
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNODC	United Nations Office on Drugs and Crime

Chapter 1 - Introduction

1.1 Context of the study

The trafficking of human beings is a global problem that has seen millions traded for purposes of exploitation.¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime² (Palermo Protocol) calls upon states to become party to and implement the Protocol in order to eliminate the transnational and internal trade in human beings.³ The Palermo Protocol supplements the United Nations Convention against Transnational Organised Crime (Convention),⁴ in conjunction with other supplementary protocols relating to smuggling of migrants⁵ and trafficking in firearms⁶ to curb related crime.

Despite the Palermo Protocol's existence since 2000 it still contains challenges relating to the absence of a conclusive definition of human trafficking; the absence of a definitive guide in the identification of a victim; and a lack of a mandatory obligation that ensures that victims are afforded immediate protection and assistance.⁷ Despite the existence of these challenges and no obligation for victim assistance and protection, it cannot detract from the immutable fact that the Palermo Protocol calls for governments to prosecute traffickers and protect victims of trafficking.⁸

The Palermo Protocol's shortcoming on the protection of victims resulted in the United Nations Office of the High Commissioner developing the Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR Principles and Guidelines) that would ensure inclusion of the human rights of victims of human trafficking and ensure their protection by proper identification as victims, whether national or foreign, to how they

¹ International Organization for Migration *Capacity building and training* Pretoria (2009) South Africa 1.

² 2000.

³ General Assembly Resolution 55/25 of 15 November 2000 United Nations Convention against Transnational Organised Crime para 6.

⁴ 2000.

⁵ Protocol against Smuggling of Migrants by Land, Sea and Air, 2000.

⁶ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, 2001.

⁷ AT Gallagher 'Two cheers for the Trafficking Protocol' (2015) 4 *Anti-Trafficking Review* 14.

⁸ As above.

should be treated and that adequate training should be provided for relevant authorities.⁹ These assertions are founded on the ‘four pillars: 1) the primacy of human rights, 2) the prevention of trafficking by addressing root causes, 3) the extension and assistance to all victims, and 4) the punishment of perpetrators and redress of all victims.’¹⁰ The United Nations Office of the High Commissioner for Human Rights further developed the Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking¹¹ that stresses the importance of ensuring that established human rights are promoted and protected.

In order to ensure that states adhere to the Palermo Protocol’s provisions, a model law¹² was drawn up to assist in the implementation and application by specifying mandatory provisions, as well as optional provisions, that member states can elect not to include in their trafficking legislation. These optional provisions¹³ are mainly the victim-centred provisions and imply that the mandatory provisions¹⁴ are of more importance. This is despite the provision in the Palermo Protocol that clearly states that victim assistance and protection will be ‘with full respect for their human rights.’¹⁵ Assistance and protection afforded to victims cannot be said

⁹ United Nations Office of the High Commissioner for Human Rights 2002. Recommended Principles and Guidelines on Human Rights and Human Trafficking. <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> (accessed 2 February 2015) ‘The Recommended Principles and Guidelines on Human Rights and Human Trafficking were presented as an addendum to the High Commissioner’s report to the Economic and Social Council (E/2002/68/Add.1). They are all-encompassing of the aspects of human trafficking such as the prevention; the prosecution and punishment of traffickers; and the protection and assistance of victims all centred on human rights based approach.’

¹⁰ N Pillay ‘Human rights based approach to trafficking’ 29 November 2011. <http://www.ohchr.org/EN/NewsEvents/Pages/HumanRightsbasedapproachtotrafficking.aspx> (accessed 10 March 2016).

¹¹ UN Office of the High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary’ New York and Geneva, 2010 http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf (accessed 17 October 2015).

¹² United Nations Office on Drugs and Crime Model law against trafficking in persons https://www.unodc.org/documents/human-trafficking/Model_law_against_TIP.pdf (accessed 8 October 2014) The UNODC Model Law against Trafficking in Persons was developed by the United Nations Office on Drugs and Crime (UNODC) in response to the request of the General Assembly to the Secretary-General to promote and assist the efforts of Member States to become party to and implement the United Nations Convention against Transnational Organized Crime and the Protocols thereto. It was developed in particular to assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention.

¹³ Include, among others, punishment of the trafficked victim, identification of victims, the provision of basic benefits and services to victims of trafficking in persons, relocation of witnesses, and temporary or permanent residence.

¹⁴ Criminalisation of the elements of trafficking (action, means and purpose) and persons involved directly or indirectly.

¹⁵ Article 2 (b) on the statement of purpose.

to be comprehensive if due regard is not given to the rights of the victims, taking into consideration the long term effects these crimes have on the victims.¹⁶

In its endeavour to curb human trafficking, South Africa enacted the Prevention and Combating of Trafficking in Persons Act¹⁷ (Trafficking Act), which is an instrument that should assist and protect victims of trafficking within its borders. However, not all the provisions of the Trafficking Act came into operation as sections pertaining to the assistance and protection of foreigners were not adopted,¹⁸ despite the characteristic transnational nature of human trafficking and the Palermo Protocol's distinct provision to assist foreign victims. The Trafficking Act, like the Palermo Protocol, has provisions¹⁹ that offer rehabilitation, therapeutic services, education and skills development as options for adult victims: the option is distinguished by the use of 'may' as opposed to an unambiguous 'must' evident in the provision of accommodation, counselling and reintegration of victims.²⁰

A contrary view is, however, stated in the Prevention and Combating of Trafficking in Persons Act: Regulations by the Department of Social Development²¹ (Regulations) that calls for the accreditation of organisations²² that must provide rehabilitation, therapeutic services, education and skills development.²³ These are important components in rebuilding the lives of survivors of trafficking in order to prevent re-trafficking.²⁴ Education and skills development

¹⁶ United Nations Office on Drugs and Crime (UNODC) *Victim Assistance and Witness Protection* <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html> (accessed 6 March 2014).

¹⁷ Act 7 of 2013 came into force 9 August 2015.

¹⁸ Specifically secs 15, 16 and 31(2)(b)(ii). Government Gazette: Proclamation R. 32 Prevention And Combating Of Trafficking In Persons Act (7/2013): Commencement Government Gazette 39078. Sec 15 relates to the protective measures for purposes of investigation and prosecution in respect of trafficking; sec 16 is on the facilitation of police investigation or prosecution in case of foreign witnesses; sec 31 provides for the repatriation of victims of trafficking from South Africa – Sec 31(2)(b)(ii) specifically relates to informing the victim of arrangements made in the country where the victim would be repatriated to.

¹⁹ Sec 26 (1) (b) provides 'An accredited organisation –

(b) may offer a programme aimed at –

(i) the provision of rehabilitation and therapeutic services to adult victims of trafficking; or

(ii) the provision of education and skills development training to adult victims of trafficking.'

²⁰ Sec 26(1)(a) provides that accredited organisations must offer the mentioned services.

²¹ Prevention and Combating of Trafficking In Persons Act (7/2013): Regulations by the Department of Social Development. Gazette Number: 39318 Notice Number: 1006 Regulation Number: 10513 Gazette Date: 2015-10-23.

²² Defined in Sec 1 as '...an organisation, including a government institution, accredited in terms of sec 24 to provide serviced to adult victims of trafficking'. Sec 24 specifies the requirements of accredited organisations in terms of providing care for victims.

²³ Regulation 9.

²⁴ C Adams 'Re-trafficked victims: how a human rights approach can stop the cycle of re-victimization of sex trafficking victims' (2011) 43 *George Washington International Law Review* 208.

are necessary to help curb trafficking, although the educated also fall victim, the majority of victims are the unemployed and uneducated.²⁵

South Africa is not unique with its difficulty in grappling with the problem of human trafficking. Nigeria is a source, transit and destination country that is plagued by the scourge of human trafficking.²⁶ Despite the legislation that exists on trafficking in both countries' victims do not receive adequate protection and assistance.²⁷ The shelters provided in Nigeria do not afford adequate protection and assistance as victims can only be there for 6 weeks unless special circumstances necessitate longer stay.²⁸ This does not allow the victim adequate time with which to recover, but if more time is needed victims are transferred to an NGO based shelter that is also not adequately funded.²⁹ Similarly Nigeria has had cases of victims detained by law enforcement before they were correctly identified as human trafficking victims.³⁰

All victims of trafficking, despite the form of exploitation – sexual, labour, slavery, servitude, debt bondage, organ removal – require ‘appropriate and adequate care and support’ which may give them a sense of security and assist in the successful arrest of the criminals.³¹ This would be in accordance with Article 6(1) of the Palermo Protocol that proposes that the identity of the victim be protected, which unfortunately is not mandatory as it is conditioned on ‘the extent possible under ... domestic law.’

The reliance on protection from law enforcement does not provide assurance as most victims dread seeking help due to the ‘mistreatment, deportation and potential risks to their safety.’³² Police officers have acquired a reputation of being unscrupulous, uncaring and amenable to bribery and as a result have lost the trust of the ones that need it most – the victims.³³

²⁵ International Organization for Migration (n 1 above) 12.

²⁶ United States Department of State *2015 Trafficking in persons report* <http://www.state.gov/j/tip> 266 (accessed 9 November 2015).

²⁷ US TIP report 2015 (n 26 above) Nigeria: 265 & South Africa: 310.

²⁸ United States Department of State, *2014 Trafficking in Persons Report - Nigeria*, 20 June 2014. <http://www.refworld.org/docid/53aab9be2a.html> (accessed 6 August 2015).

²⁹ As above.

³⁰ As above.

³¹ UNODC *Victim Assistance and Witness Protection* (n 16 above).

³² As above.

³³ UNESCO *Human trafficking in South Africa: root causes and recommendations* (2007) Policy Paper Poverty Series No 14.5 3. <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf> (accessed 20 June 2014).

The challenges victims face are further intensified by the absence of an autonomous committee established under the Palermo Protocol that will monitor the proper implementation and enforcement of trafficking legislation globally in the battle against trafficking.³⁴

The efforts to curb human trafficking in South Africa will be juxtaposed with the Nigerian anti-trafficking efforts.³⁵ Nigeria was chosen because of the prominent Boko Haram insurgents that have abducted females and males alike, with a few rescued.³⁶

1.2 Research Questions

1. What is the nature of human trafficking?
2. What are South Africa's obligations stipulated in the Palermo Protocol that protect and assist victims; and are they reflected in the legal framework currently in place in South Africa?
3. Are victims provided with the necessary protection and assistance once they are rescued?
4. Are there similarities in the treatment of victims in Nigeria and South Africa; how effective are the laws in place given the international obligation to protect and assist victims?

1.3 Purpose of the study

The purpose of this research is to analyse the trafficking legislation that recently came into force juxtaposed with the conditions human trafficking victims have had to endure and particularly how the legislation aims to improve the maltreatment of victims. A scrutiny of the extent of alignment of the Trafficking Act with the Palermo Protocol and The Office of the United Nations High Commissioner for Human Rights 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking³⁷ as well as the United Nations

³⁴ Gallagher (n 7 above) 16. There are lacunae in the implementation and monitoring of trafficking legislation. In most international instruments there will be reporting mechanisms put in place to affirm that states are complying with that particular law, for instance the Convention on the Elimination of all forms of Discrimination against Women, 1979 has Article 18 that requires state reporting periodically on implementation of the Convention.

³⁵ This will assess how the victims are treated.

³⁶ K McNally *Boko Haram - Selling schoolgirls into modern day slavery* (2015) <https://ublawjil.files.wordpress.com/2015/02/mcnally-katy.pdf> (accessed 12 June 2015).

³⁷ OHCHR Principles and Guidelines (n 9 above).

Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary³⁸ will be carried out. In essence the purpose is to examine if South Africa is providing protection and assistance to trafficking victims. The focus will solely be on the treatment of trafficked persons post-trafficking. Nigeria will also be considered given that both South Africa and Nigeria are in the same bracket which consists of countries that have not fully integrated the human trafficking requirements but endeavour to do so.³⁹

1.4 Definitions of Terms

The Palermo Protocol defines trafficking in persons⁴⁰ as,

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

Trafficking of children⁴¹ by the Palermo Protocol is defined as,

The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons”...

Trafficking in persons⁴² is ‘customised’ by the Trafficking Act to mean,

Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of – (a) a threat of harm; (b) the threat or use of force or other forms of coercion; (c) the abuse of vulnerability; (d) fraud; (e) deception; (f) abduction; (g) kidnapping; (h) the abuse of power; (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage; aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

³⁸ Commentary on principles and guidelines (n 10 above).

³⁹ US TIP report (n 26 above) 47.

⁴⁰ As defined in Art 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol).

⁴¹ Article 3(c).

⁴² Sec 4 of the Trafficking Act.

‘Victim of trafficking’⁴³ in the Trafficking Act is not defined although the UNODC model law defines a victim as

any natural person who has been subject to trafficking in persons, or whom [the state] reasonably believe is a victim of trafficking in persons, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.

1.5 Methodology

This study adopted a qualitative approach through the use of available literature on the Palermo Protocol, international human rights law on human trafficking and domestic human trafficking legislation. In obtaining this information, academic journals, decided cases on human trafficking, internet research, and published articles and manuals from different sources were referred to.

1.6 Structure

This study consists of five chapters. Chapter 1 consists of the overview of the protection and assistance of victims of human trafficking as provided for by the Palermo Protocol and the Trafficking Act. Chapter 2 sets out the nature of human trafficking and accordingly Chapter 3 investigates the extent to which victims are protected and assisted by the state as provided for in international instruments, and the legal framework that applies in South Africa. Chapter 4 provides an alternative view from Nigeria to establish effectiveness of its legislation pertaining to the protection and assistance of victims of trafficking. Chapter 5 concludes the research and recommends approaches for provision of protection and assistance to victims of human trafficking in South Africa.

⁴³ UNODC Model law (n 12 above) 21.

Chapter 2 - The nature of human trafficking

2.1 Introduction

South Africa, as a ‘source, transit and destination country for men, women and children’, grapples with both internal and cross-border trafficking.⁴⁴ South Africa is regarded as an optimal market for persons trafficked globally as the diversity and the seemingly available opportunities for employment and education are alluring to victims.⁴⁵

The reality is that South Africa is plagued by insurmountable challenges regarding the provision of socio-economic rights that leads to upheavals from its citizens.⁴⁶ The inequality in wealth has led to inadequacies in the realisation of socio-economic rights, as provided for in the Constitution,⁴⁷ for mainly the black nationals.⁴⁸ This has resulted in poverty for a large number of South Africans who ‘lack the means to satisfy their basic needs’⁴⁹ and consequently are susceptible to trafficking. The Commentary on the Recommended Principles and Guidelines stresses the need to alleviate the poverty and socio-economic factors that ‘increase vulnerability to trafficking.’⁵⁰ This view is shared by the Special Rapporteur on trafficking in persons⁵¹ who makes reference to the need to consider the inextricable link between human trafficking and a poor economy in order to prevent human trafficking.

The enactment of the Trafficking Act was essential to ensure that victims are protected from lucrative schemes used to lure unsuspecting individuals.⁵² South Africa provides an ideal market for people who are eager for an outlet from poverty and current status quo that they throw caution to the wind and accept any opportunity that avails itself; and those lured into

⁴⁴ US TIP report 2015 (n 26 above) 308.

⁴⁵ As above.

⁴⁶ O Fuo & A Du Plessis ‘In the face of judicial deference: taking the “minimum core” of socio-economic rights to the local government sphere’ (2015) 19 *Law Democracy and Development* 12.

⁴⁷ Constitution of the Republic of South Africa, 1996. Socio-economic rights in the Constitution include rights to the environment; property; housing; health care, food, water and social security; children’s rights; and education contained in secs 24 to 29, respectively.

⁴⁸ O Fuo & A Du Plessis (n 46 above) 9.

⁴⁹ As above.

⁵⁰ Principle 5 supplemented by Guideline 7.

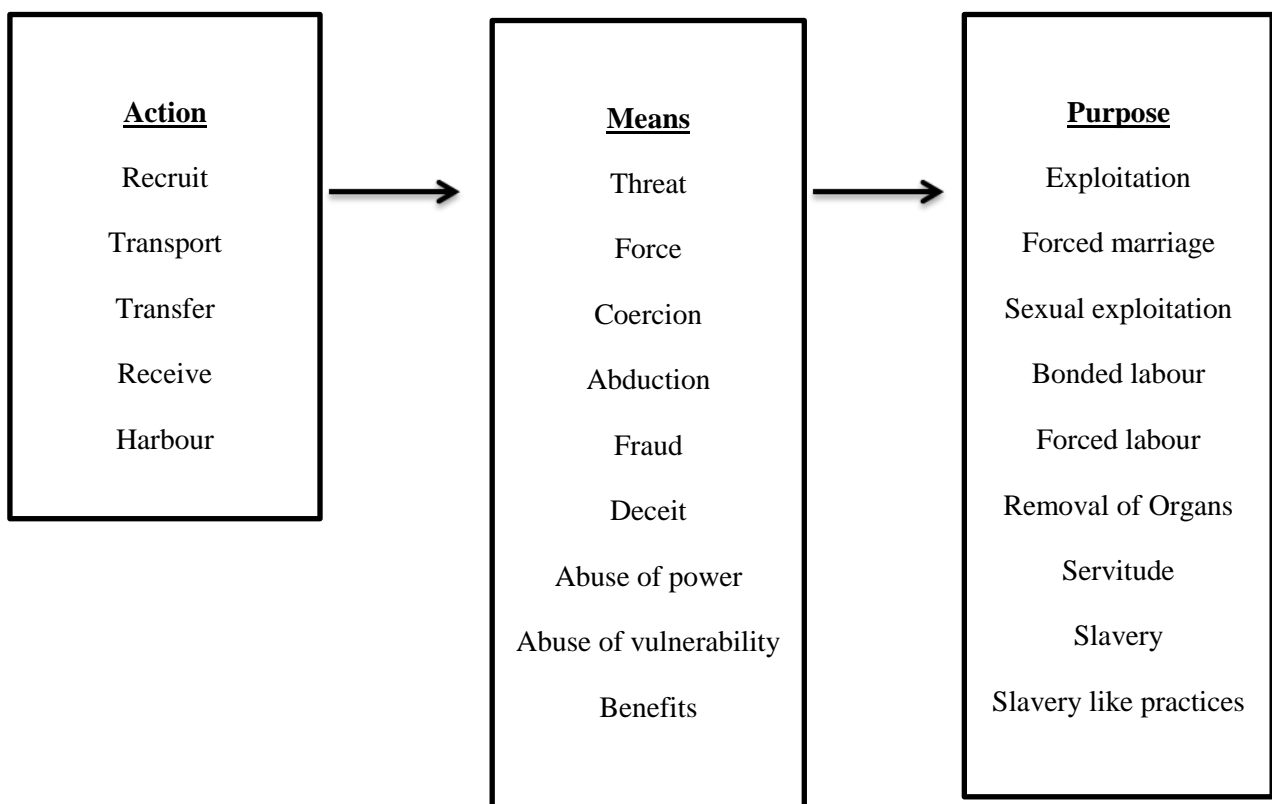
⁵¹ UN Human Rights Council, Report of the Special Rapporteur on trafficking in persons, especially women and children, 31 March 2015. 15 A/HRC/29/38 <http://www.refworld.org/docid/5577e9f34.html> (accessed 02 February 2016).

⁵² International Organization for Migration (n 1 above) 3.

the country may invariably not receive any assistance from the government since provisions relating to the assistance of foreign victims have not come into force.⁵³

2.2 Components of the crime of human trafficking in terms of the Palermo Protocol

The definition as stated by the Palermo Protocol outlines the elements that should be present for a situation to be deemed human trafficking - the action; means to achieve the action; and the purpose.⁵⁴ This is illustrated in the diagram below.



Components of human trafficking in terms of Article 3 of the Palermo Protocol

⁵³ n 18 above.

⁵⁴ Article 3(a).

2.2.1 The action phase

The action phase, one of the elements of trafficking, refers to the movement of people from one place to another during which they are harboured, sold, exchanged and received, across borders or internally.⁵⁵ The movement through various countries where victims are re-trafficked and/or exploited is called the transit phase. The victims then find themselves situated in the destination country or in a different area of the country.⁵⁶ It has been argued by some scholars that the movement that the Palermo Protocol refers to relegates victims of trafficking who have not been transferred nor transported but simply harboured and are in situations that does not meet the definition of trafficking.⁵⁷ Actual movement was also stated by the United Nations Human Rights Office of the High Commissioner as inconsequential in determining the act of human trafficking.⁵⁸

The different modes of transportation (by land, sea, or air), add to the already existing difficulties for immigration officers to identify traffickers, and is further compounded by the corruption of some officials. The effect of these problems is the consequential failure to arrest traffickers.⁵⁹ Victims may knowingly enter the country illegally through passports forged by the perpetrators who promise them a better life.⁶⁰

There may be a single person orchestrating the trafficking process or different role players that play different roles; victims may find themselves sold or exchanged within a particular territory or moved to an entirely different country by different people or the same people.⁶¹ The victims of trafficking may, at times, find themselves involved in crimes committed by traffickers and may be mistakenly considered accomplices and can be charged for perpetrating the crime.⁶²

⁵⁵ UNESCO (n 33 above) 7.

⁵⁶ International Organization for Migration (n 1 above) 5.

⁵⁷ M Wijers 'Purity, victimhood and agency: fifteen years of the UN Trafficking Protocol' (2015) 4 *Anti-trafficking Review* 70.

⁵⁸ United Nations Human Rights office of the High Commissioner 'Human rights and human trafficking' Fact Sheet No. 36 2014. file:///K:/HUMAN%20RIGHTS%20AND%20HUMAN%20TRAFFICKING.PDF (accessed 29 February 2016).

⁵⁹ Wijers (n 57 above).

⁶⁰ As above.

⁶¹ HB Kruger 'Combating Human Trafficking: a South African legal perspective' unpublished LLD thesis, University of the Free State, 2010 45.

⁶² As above.

2.2.2 The means phase

Traffickers employ various methods to lure victims, usually targeting the vulnerable, unemployed and poor.⁶³ The primary motive for the trafficking of people is mainly profit, and it appears the demand is ever increasing.⁶⁴ The traffickers target people that can be effortlessly controlled by preying on their desires of a better life through promises of employment, education or marriage to affluent people.⁶⁵ The process of recruitment can be through varying degrees of pressure applied to the victim. It has been grouped into a distinction that groups the type of means that are stipulated in the Palermo Protocol, namely strong coercion and weak coercion.⁶⁶ The delineation lies in the wording of the Palermo Protocol which refers to ‘threats and use of force and other forms of coercion’⁶⁷ as ‘direct means’: this is linked to the compelling nature of the acts as opposed to ‘indirect means’ that include deception and fraud.⁶⁸ Article 3(b) of the Palermo Protocol states that consent is immaterial in cases where the means that are set out in Article 3(a) are applied. The consent aspect applies to both adult and child victims, though in the case of child victims the means element is redundant, only the action and exploitation elements apply.⁶⁹

As mentioned, traffickers will target the vulnerable⁷⁰ members of society, all centred on characteristics such as ‘age, gender, physical and mental state, disability, belonging to indigenous communities or minorities, displaced persons and poverty’ who find it difficult to exercise their rights before a justice system.⁷¹ The ‘specific definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development.’⁷²

⁶³ UNESCO (n 33 above) 7.

⁶⁴ As above.

⁶⁵ As above.

⁶⁶ P Kotiswaran ‘Protocol at the Crossroads: rethinking anti-trafficking law from an Indian labour law perspective’ (2015) 4 *Anti-trafficking Review* 42.

⁶⁷ Art 3.

⁶⁸ United Nations Office of Drugs and Crime ‘Issue Paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons’ (2013) www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf 17 (accessed 10 May 2014).

⁶⁹ S Kreston ‘Human trafficking legislation in South Africa: consent, coercion and consequences’ (2014) 1 *South African Journal of Criminal Justice* 27.

⁷⁰ UNODC ‘Issue Paper: Abuse of a position of vulnerability (n 68 above)14.

⁷¹ As above.

⁷² As above.

2.2.3 The exploitation phase

The exploitation of victims occurs in numerous forms, most of which result in ‘trauma, neglect, abuse, illness, disease, displacement and in some cases, death.’⁷³ Exploitation, not adequately defined in the Palermo Protocol, simply refers to acts that purport to exploitation. Exploitation is understood to mean it ‘shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’⁷⁴ Victims may thus be exploited physically, psychologically and sexually – sexual exploitation being the most common form.⁷⁵

The Palermo Protocol has no definition for exploitation of the prostitution of others and sexual exploitation, as these were ‘intentionally left undefined’ for domestic legislation to address.⁷⁶

The Trafficking Act aims to rectify this lacuna by providing a definition of sexual exploitation as -

... the commission of -

- a. any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act;⁷⁷ or
- b. any offence of a sexual nature in any other law.

The above section broadens the definition of sexual exploitation within the South African context as it includes blatant acts of sexual violation by one or more perpetrators, as well as, inciting others.⁷⁸

In addition, the cultural practice, known as ‘ukuthwala’, is included in the Trafficking Act as a form of human trafficking.⁷⁹ This was done despite fierce objection by traditionalists who

⁷³ E Araujo *The need for human trafficking policy* (2011) Asia Policy Brief No 37 Africa Institute of South Africa 1.

⁷⁴ Art 3(a) Palermo Protocol.

⁷⁵ UNESCO (n 33 above) 37.

⁷⁶ Wijers (n 57 above) 67.

⁷⁷ Sec 1 of the Trafficking Act. Sexual offences referred to include rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault.

⁷⁸ As above.

⁷⁹ Sec 4(2)(b) of the Trafficking Act provides that ‘Any person who concludes a forced marriage with another person within or across the Republic, for the purpose of the exploitation of that child or other person in any form

defended it as an African cultural practice. Since ‘ukuthwala’ prejudices women and children (mostly the girl-child), in the form of forced marriages,⁸⁰ it has been observed by human rights advocates as an unsuitable practice violating human rights.⁸¹ The ‘ukuthwala’ process usually involves an actual or staged abduction that is prearranged with or without the female’s knowledge or consent.⁸² Though commonly observed as an aggressive practice, it has been highlighted by different scholars that there are various forms of ‘ukuthwala’ and that some do not involve unwarranted force. This may for instance occur when a woman or girl is aware of and consents to the act; or she may be informed of the arranged marriage that would take place and she would be given time to get accustomed to the imminent nuptials.⁸³

The children that are married off are usually subjected to all the forms of exploitation – they are forced to have sexual intercourse with, usually, much older men who impregnate them despite that their bodies are not fully developed to carry a child; they may be forced into domestic labour; or slavery where they are treated as the property of the older men.⁸⁴

This practise, that is still accepted in some parts of South Africa, is a direct violation of the child’s rights as stipulated in the Constitution, a child should be protected from maltreatment, abuse or degradation⁸⁵ and should not be ‘subjected to social, cultural and religious practices which are detrimental to his or her well-being.’⁸⁶

The exclusion of forced marriage as a form of exploitation in the Palermo Protocol was deliberate as the drafters felt it would be absorbed by the other forms of exploitation listed, accordingly the inclusion of ‘at a minimum’ would allow additions by the different state parties.⁸⁷

or manner, is guilty of an offence.’ See *S v Jezile (National House of Traditional Leaders and others as amici curiae) [2015] 3 All SA 201 (WCC); S v Jezile 2015 (2) SACR 452 (WCC)* in this regard.

⁸⁰ L Davids ‘Female subordination starts at home: consequences of young marriage and proposed solutions’ (2007) 5 *Regent Journal of International Law* 299.

⁸¹ M van der Watt & M Ovens ‘Contextualising the practice of ukuthwala within South Africa’ (2012) 13(1) *Child Abuse Research: A South African Journal* 12.

⁸² As above.

⁸³ L Mwambene & J Sloth-Nielsen ‘Benign accommodation? Ukuthwala, forced marriage and the South African Children’s Act’ (2011) 2.1 *Journal of Family Law and Practice* 5.

⁸⁴ As above.

⁸⁵ Sec 28(1)(d).

⁸⁶ Children’s Act Sec 12(1).

⁸⁷ UNODC *The concept of ‘exploitation’ in the Trafficking In Person’s Protocol* Issue Paper (2015) Vienna 25. https://www.unodc.org/documents/humantrafficking/2015/UNODC_IP_Exploitation_2015.pdf (accessed 12 February 2016)

Women and children have fallen victim to sexual exploitation, but there are no accurate and consistent statistics available that specify the number of women and children, nor are there any statistics available that have a close estimate of survivors of human trafficking.⁸⁸

Labour exploitation also proves difficult to identify⁸⁹ despite the existence of multitudes of labourers found in sectors such as the mining sector.⁹⁰ The problem lies in the determination of conduct concerning ‘bad working conditions’ from exploitation of workers.⁹¹

The type of exploitation victims endure differs from trafficker to trafficker, females are usually forced into prostitution⁹² and forced labour. Though there is very little information available on the trafficking of males they have been found to be trafficked mainly for forced or bonded labour purposes the extent of which is unknown.⁹³

The term ‘human trafficking’ is synonymous with modern day slavery,⁹⁴ which essentially means the ownership of another human being. Though long abolished with slave trade laws it appears this practise is still observed and evidenced by the continuing trade in humans.⁹⁵

2.4 Conclusion

The research, as explored in this chapter, reveals that the nature of human trafficking is perpetuated by instilling fear in victims that allows traffickers to exercise mental and physical power over them. Some form of exploitation inevitably follows.

⁸⁸ M van der Watt *Human Trafficking in South Africa: an elusive statistical nightmare* 16 July 2015 <http://theconversation.com/human-trafficking-in-south-africa-an-elusive-statistical-nightmare-43949> (accessed 12 October 2015).

⁸⁹ UNODC *The concept of ‘exploitation’* (n 87 above) 7.

⁹⁰ South African Human Rights Commission *Unregulated artisanal underground and surface mining activities (2015)* 23.

⁹¹ UNODC *The concept of ‘exploitation’* (n 87 above) 10.

⁹² Wijers (n 57 above) 58.

⁹³ C Allais ‘The profile less considered: the trafficking of men in South Africa’ (2013) 44 (1) *South African Review Sociology* 43.

⁹⁴ Sec 1 of the Trafficking Act defines slavery as ‘...reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person.’

⁹⁵ Allais (n 93 above) 42.

Chapter 3 – Victim protection and assistance provided in South Africa set against the Palermo Protocol

3.1 Introduction

The requirement to assist and protect victims of human trafficking presents challenges in instances where the Palermo Protocol and domestic trafficking legislation fail to provide, firstly, definite guidance on the identification of a victim, secondly, appropriate definitions and procedures to facilitate adequate safeguarding of victims. In addition, the extent of protection and assistance that should be afforded to victims is not understood in its entirety.⁹⁶

This chapter will explore South Africa's observance of equality, non-discrimination and the full enjoyment of rights for all human beings on the grounds of gender, age, disability, ethnicity, culture and religion⁹⁷ which are integral in the protection and assistance of victims.

Critical issues that this chapter will focus on include the existence and extent of victim protection and assistance in South Africa. Of particular importance is that prior to protection and assistance, victims should be appropriately identified as victims of trafficking.⁹⁸

3.2 Victim identification

The dictionary definition of a victim is 'a person who has been attacked, injured or killed as the result of a crime, a disease, an accident, etc.'⁹⁹ The National Policy Guideline for Victim Empowerment¹⁰⁰ defines a victim as 'any person who has suffered harm; 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.'

⁹⁶ Gallagher (n 7 above) 19.

⁹⁷ Art 2 of the Universal Declaration of Human Rights, 1948 has the non-discrimination clause with the grounds on which rights should be interpreted. The clause is found in national Constitutions and all human rights instruments.

⁹⁸ Guideline 2.

⁹⁹ Oxford advanced learner's dictionary.

¹⁰⁰ Department of Social Development National Policy Guidelines for victim empowerment http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=84&Itemid=3 (accessed 30 November 2015).

The failure to provide an explicit definition that will enable the unambiguous identification of a victim of trafficking is one of the criticisms levelled against the Palermo Protocol.¹⁰¹ The Palermo Protocol continually makes reference to a victim of trafficking but the onus to define who a victim is rests on states that have ratified the Palermo Protocol when domesticating human trafficking legislation. States that are party to the Palermo Protocol have great latitude on, *inter alia*, definitions; additions and deletions; timeframes; and sanctions.¹⁰² A problem that arises in cases where there is no clear distinction of who constitutes a victim of trafficking is the resultant exposure to criminal sanctions, as opposed to a clearly identified victim who would be entitled to protection and assistance.¹⁰³

One can then deduce that a victim is an individual who has endured all the elements of trafficking that are detailed in Article 3 of the Palermo Protocol (as highlighted in para 1.4 above), with the exception of children whose status as a victim does not require proof of how they were persuaded; only the act and exploitation elements have to be proven.

In South Africa, the Trafficking Act provides that a victim of trafficking¹⁰⁴ means –

- (a) A child who is found to be a victim of trafficking after an assessment in terms of Section 18(6); or
- (b) An adult person who has been issued with a letter of recognition as provided for in Section 19 (10).

Guideline 2 of the Recommended Principles and Guidelines emphasises the need for proper identification of a victim of trafficking ‘as the failure to identify a trafficked person correctly is likely to result in a further denial of the person’s rights.’¹⁰⁵

¹⁰¹ Gallagher (n 7 above) 16.

¹⁰² UNODC Model law (n 12 above).

¹⁰³ UNODC *The concept of ‘exploitation’* (n 87 above) 15.

¹⁰⁴ Sec 1 on definitions of terms does not provide a detailed definition but instead refers to Sec 18(6) which states ‘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.’ Subsection 5 is a reference to the Children’s Act for procedures prescribed therein. Sec 19 (10) requires the provincial department of social development’s head to issue a letter of recognition if satisfied that the assessment to done, provided for in subsection (8), is in line with the matter having been reported to the police who then concludes that that person is in need of care, then referred to an accredited organisation. This reference to sec 19(10) furthermore includes identification of a victim during criminal proceedings and through entry into the Republic.

¹⁰⁵ For the purposes of this research primary focus will be on the Principles and Guidelines pertaining to victim protection and assistance.

The South African Trafficking Act, akin to the Protocol, has no exact definition of victims of trafficking, but the responsibility to identify a victim lies with the South African Police Service (SAPS), as first point of contact.¹⁰⁶ The information gathered by the SAPS, through the first officials that will question and assess the individual, is most crucial as it will inform the status of and protection required to assist the victim.¹⁰⁷ Further, a 24 hour period is prescribed within which a ‘police official who knows or ought reasonably to have known or suspected that an adult person is a victim of trafficking’ must refer such person to an accredited organisation and alert the Department of Social Development.¹⁰⁸

The process of determining an individual’s status is grounded on the victim’s cooperation and guided by questions that the victim is expected to respond to, stipulated in Form 2¹⁰⁹ of the Regulations. Information required for Form 2 comprises personal information such as personal details, the person reporting the ‘incident’, the type of exploitation, extent of physical signs of abuse or maltreatment observed, reasons for suspecting abuse, action taken by the police and the particulars of the police station and officer who received the said individual.¹¹⁰

3.2.1 SAPS as first point of contact in view of reported cases of abuse

A tremendous amount of reliance has been placed on the SAPS which may not augur well since the citizens’ trust in the SAPS is moribund, mainly due to the daunting degree of SAPS’ corruption.¹¹¹ Police officers have been entrusted to handle and decipher cases that involve trafficking victims and no guidance¹¹² is specified by the Regulations.

¹⁰⁶ Sec 19.

¹⁰⁷ Sec 19; Reg 3. Regulations by the Department of Social Development.

¹⁰⁸ Sec 19 (5) (b).

¹⁰⁹ Provided for under Social Development Reg 3.

¹¹⁰ Requirements for Form 2.

¹¹¹ The Independent Police Investigative Directorate (IPID) is entrusted with oversight over the South African Police Service (SAPS) and the Municipal Police Services (MPS), and to conduct impartial investigations of identified criminal offences allegedly committed by members of the SAPS and MPS, and make appropriate recommendations.

http://www.icd.gov.za/documents/report_released/annual_reports/2014/IPID%20ANNUAL%20REPORT%20LATEST.pdf (accessed 8 May 2015).

¹¹² M Emser *Factors inhibiting the identification and investigation of human trafficking cases.*

<http://africlaw.com/2015/02/20/factors-inhibiting-the-identification-and-investigation-of-human-trafficking-cases/> (accessed 3 June 2015).

Of particular importance is the possible treatment that may be accorded to these victims by police at police stations, given the documented police violence.¹¹³ Victims of trafficking that have not been identified as such may find themselves re-victimised in police holding cells in instances where they are apprehended for the crimes their traffickers forced them to commit.¹¹⁴

The South Africa 2013 Human Rights Report (Human Rights Report) documented cases of torture, assault and rape by police officers despite the constitutional prohibition of the infringement of human rights.¹¹⁵ The Human Rights Report further states that a warrant officer from the Mamelodi Police Station was arrested for the rape of a 13 year old girl, after this officer had earlier been charged with raping two other girls (an eight year old and 12 year old girl) for ‘which he [had been] granted bail and continued to work without suspension at the Mamelodi Police station.’¹¹⁶

Incidents of police harassment are further recounted with regard to migrant sex workers.¹¹⁷ It is asserted that the ‘police and criminals kill some sex workers...’¹¹⁸ and that they ‘face too many challenges because of the police harassment and violence.’¹¹⁹ Sex workers state that ‘police will come to our [work] place demanding [a] bribe, sex for bail or spraying me with pepper spray if I say I don’t have money. They can [even] beat me.’¹²⁰ The sex workers referred to are cognisant of the illegality of soliciting sexual intercourse but that does not condone the treatment they receive from the police as it is said that the ‘police...rape, take our money and force us to pay bribe[s] by threatening ... arrest’¹²¹

These are clear illustrations of abuses faced by women that may lead to preconceived notions that women who have been subjected to sexual exploitation may re-encounter the sexual

¹¹³ United States Department of State *South Africa 2013 human rights report* Country Reports on Human Rights practices for 2013 1 <http://www.state.gov/documents/organization/220371.pdf> 3 (accessed 6 February 2015).

¹¹⁴ US TIP report 2015 (n 26 above) 310.

¹¹⁵ United States Department of State *South Africa* (n 114 above) 1.

¹¹⁶ United States Department of State *South Africa* (n 114 above) 4.

¹¹⁷ Sisonkhe Sex Worker Movement *Volume 44: A participatory photography project with migrant sex workers* 2014. A collaborative project by Sisonkhe, African Centre for Migration and the Market Photo Workshop that ‘aims to document the under-represented voices and experiences of South African and foreign-born individuals engaged in the sex industry in South Africa.’

¹¹⁸ Sisonkhe (n 117 above) 24. This assertion was made by Skara a Zimbabwean girl who came to Johannesburg knowing that she would be a sex worker with no immediate prospects for any other form of employment but to work there.

¹¹⁹ Sisonkhe (n 117 above) 74. Teresa, a participant from Musina.

¹²⁰ Sisonkhe (n 117 above) 88.

¹²¹ Sisonkhe (n 117 above) 141.

violence if they find themselves in police stations.¹²² These testimonials further prove that the sole reliance on police officers will undermine the pursuit of assistance. It is exacerbated by reports such as the Independent Police Investigative Directorate (IPID) (2013-2014 Annual report) confirming that a sentence of two life terms and 284 years imprisonment was handed down by the Johannesburg High Court for a series of rapes perpetrated by a Randburg Constable.¹²³ The report highlights the violations on 121 victims of rape perpetrated by police officers of which 19 were cases of rape while in police custody.¹²⁴ IPID, in the report, expressed its concern with the “punishment ’meted out to the offending officers, as some were given ‘written warnings’ and ‘final written warnings.’¹²⁵

The reported cases of abuse by members of the SAPS are atrocious as unequivocally expressed in the case of *Nogqala v Minister of Safety and Security*¹²⁶ where it was held:

Rape must rank as the most violent intrusion to the bodily integrity and dignity of a woman. Moreover, the plaintiff’s position is worsened by the fact that she was raped by a policeman at a police station. It was committed through an extreme abuse of authority and facilitated by the attendant control over the incarcerated plaintiff... The act of a policeman raping an incarcerated person defies the norms of society which the police are charged to protect. These include society’s values, fundamental rights and imperatives contained in the Constitution of South Africa.

3.2.2 Difference in victims

The International Organization for Migration (IOM) cautions on typecast identification as victims are different individuals who have experienced different forms of exploitation and respond differently to situations; once rescued therefore it is important to tread with care where individuals identified as victims are involved.¹²⁷

¹²² S Kreston ‘Trafficking in children in South Africa: an analysis of pending legislation’ (2007) 8 (1) *Child Abuse Research in South Africa* 38.

¹²³ IPID (n 111 above) 4.

¹²⁴ IPID (n 111 above) 30 Table 2: Intake per province and per category – 2013/14.

¹²⁵ IPID (n 111 above) 54 Table 34: Details of disciplinary convictions.

¹²⁶ 2013 SAECGHC 59 para 37.

¹²⁷ International Organization for Migration ‘The IOM handbook on direct assistance for victims of trafficking’ 2007 327.

The tribulations experienced by victims may be exacerbated by secondary victimisation that results in ‘undoubted shock, trauma, humiliation, distress and a negative effect on... [one’s]...dignity.’¹²⁸

The principles and guidelines are explicit in their stance that proper identification of a victim is necessary to ensure that the individual’s rights are of primary concern and all factors pertaining to harm are considered.¹²⁹ To guarantee this, authorities that are competent in handling trafficking cases should be constantly available to protect the victims and safeguard their rights.¹³⁰ This assertion is supported by Guideline 7.8¹³¹ which would provide critical deterrence to traffickers as a preventative measure.

Competence in dealing with human trafficking cases is critical as the experiences and consequences of victims may differ vastly; this differentiation brings to the fore the omission of the definition of smuggling from the Trafficking Act.¹³² Smuggling, as opposed to human trafficking, entails an agreement between the smuggler and the person to be smuggled therefore as defined by the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime¹³³ it is defined as

‘...the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’

These two crimes may overlap or morph into the other; persons who consented to being smuggled may find themselves victims of trafficking as they may then be subjected to exploitation on arrival at the destination country.¹³⁴ Human trafficking victims as opposed to

¹²⁸ *Nogqala v Minister of Safety and Security* (n 126 above) para 4.

¹²⁹ Guideline 2.

¹³⁰ Guideline 5.

¹³¹ ‘Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.’

¹³² N Mollema ‘Combating human trafficking in South Africa: a critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013’ unpublished LLD thesis, University of South Africa 2013 468.

¹³³ 2000 Art 3 (a). http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf (accessed 25 January 2015).

¹³⁴ United Nations Office on Drugs and Crime ‘Issue Paper: Organized Crime involvement in trafficking in persons and smuggling of migrants’ 2010 https://www.unodc.org/documents/humantrafficking/FINAL_REPORT_06052010_1.pdf (accessed 4 August 2014).

smuggling persons require protection and not penalties related to illegal migration, consequently the authorities must be able to delineate between the two crimes if a foreign person is found without identification and unable to explain their presence in South Africa.¹³⁵

This failure to differentiate victims has occurred in South Africa; men and boys who migrate into the country find themselves exploited under forced labour conditions and debt bondage.¹³⁶ The failure of authorities to properly identify and delineate between victims of trafficking and smuggled persons results in the arrest, detention and deportation of victims thought to be illegal migrants.¹³⁷

3.2.3 Cases of human trafficking in South Africa reported in the media

Cases of human trafficking are prevalent in South Africa.¹³⁸ In the period between December 2013 and December 2014, Lexis Nexis, through its awareness raising index, compiled media statements revealing a number of South African cases of sexual exploitation. They included the following: children from Mozambique ranging from ages 10 -16 were harboured and repeatedly raped by a 62 year old man (they had been deceitfully brought to South Africa for an education, and were found half-naked and starving); girls from Port Elizabeth were forced into prostitution in Sunnyside Pretoria by Nigerian traffickers; a man was found missing his genitalia and brain; massage therapists from Thailand were confined in prison-like conditions after being lured with employment opportunities, only to have their passports confiscated and made to work long hours to pay off their debt; an Indian sex worker was beheaded for ‘muti’,¹³⁹ and stabbed 195 times with the brain, ear, nose, flesh and skin removed from the face (two men and three minors pleaded guilty to luring the Indian woman as they had been offered two million rand by a traditional healer).¹⁴⁰

The report also mention other incidents, including, that a 16 year old was married off to a 67 year old in order to bear his heir; two adults charged with five counts of rape involving three

¹³⁵ Mollema (n 132 above) 51.

¹³⁶ US Tip report 2015 (n 29 above) 310.

¹³⁷ As above.

¹³⁸ LexisNexis *Human Trafficking Awareness Index* www.lexisnexis.co.za/ruleoflaw (accessed 4 May 2015). Index report on the cases of human trafficking reported over a 12 month period from January to December 2014

¹³⁹ Described by the Oxford Dictionary as African medicines or magic charms.

¹⁴⁰ LexisNexis (n 138 above).

children between the ages of 12 and 13 for three months – one of the children was the accused’s daughter; 14 Thai prostitutes arrested along with their two traffickers and two clients, after their passports had been confiscated and them expected to pay off a debt to their traffickers – the traffickers were granted bail and released but the prostitutes were denied because they did not have passports moreover some were in the country illegally; and an 11 year old was exploited for a meagre financial benefit by her mother, step-father, and 3 other adults.¹⁴¹

These reports reveal the wide-ranging forms that trafficking assumes.

3.3 Victim protection and assistance

Adequate protection and assistance afforded to victims may galvanise people into reporting trafficking cases they may witness.¹⁴² One cannot make direct reference to the Palermo Protocol outside of domestic law on trafficking, but since South Africa as a signatory¹⁴³ to the Palermo Protocol, it is obligated to ensure adequate safety of the victim. The Protocol, however, as earlier mentioned falls short in making it mandatory for States to protect and assist the victim, as it does in criminalising trafficking.

3.3.1 International legal framework

The Palermo Protocol as a supplementary protocol to the United Nations Convention against Transnational Organized Crime,¹⁴⁴ despite its shortfalls concerning guidance on definitions, provides guidance on the how human trafficking can be confronted.¹⁴⁵ Through inclusion within its provisions, the attention put on a number of forms of exploitation brings into focus a variety of international instruments that support the movement towards the alleviation of human trafficking.¹⁴⁶ This can be seen in cases of debt bondage, domestic servitude and forced labour where the application of the Protocol to Supplement the Forced Labour

¹⁴¹ LexisNexis (n 138 above) 6.

¹⁴² J Aransiola & C Zarowsky ‘Human trafficking and human rights violations in South Africa: stakeholders’ perceptions and the critical role of legislation’ (2014) 14 *African Human Rights Law Journal* 510.

¹⁴³ Ratified 2004.

¹⁴⁴ 2000.

¹⁴⁵ Allais (n 93 above) 41.

¹⁴⁶ Gallagher (n 7 above) 15.

Convention¹⁴⁷ has been debated. Some members of a tripartite group of experts were of the view that, despite the similarities and the overlap, forced labour within a human trafficking context cannot be equated to forced labour under labour laws.¹⁴⁸ A contrary view by other experts in the field of labour was that forced labour falls within the trafficking realm.¹⁴⁹

Women's subjugation and their vulnerable position, in consequence, made them the most common victims of trafficking. This occurs notwithstanding their protection by the Convention on the Elimination of Discrimination against Women¹⁵⁰ on an international level. It appears as if this Convention has not deterred the apparent perpetual suppression of women.¹⁵¹

The United Nations Convention on the Rights of Children¹⁵² provides for the protection of children against trafficking¹⁵³ and these provisions are adopted and domesticated in national laws that seek to protect the child by safeguarding the best interests of the child.¹⁵⁴

However, the focus on the protections and assistance of victims was largely side-lined and the focus was mainly on the criminalisation of the act of trafficking by organized criminal groups, identified as consisting of 'three or more persons.'¹⁵⁵ This was broadly criticised for the exclusion of reference to one or two people who can execute the act of trafficking and the disregard for the human rights of victims.¹⁵⁶

The Office of the High Commissioner for Human Rights, on observing this problem, produced the Recommended Principles and Guidelines on Human Rights and Human Trafficking with the intention to have human rights in the fore regarding the protection and

¹⁴⁷ Protocol to the Forced Labour Convention, 1930, Adopted by the Conference at its 103rd Session, Geneva, 11 June 2014, http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meeting_document/wcms_248900.pdf (accessed 6 February 2015).

¹⁴⁸ Kotiswaran (n 66 above)37.

¹⁴⁹ Kotiswaran (n 66 above) 37.

¹⁵⁰ 1979.

¹⁵¹ C Parkes 'The Trafficking Protocol has advanced the global movement against human exploitation: the case of the United Kingdom' (2015) 4 *Anti-trafficking Review* 155.

¹⁵² 1989.

¹⁵³ Art 35. 'States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'

¹⁵⁴ Constitution of the Republic of South Africa sec 28.

¹⁵⁵ A Schloenhardt 'Prevented, suppressed and punished!? Twelve years of the Trafficking in Persons Protocol' (2012) *Human Trafficking Working Group* University of Queensland 7 www.law.uq.edu.au/humantrafficking (accessed 5 February 2016).

¹⁵⁶ Schloenhardt (n 155 above) 7.

assistance offered to victims of human trafficking.¹⁵⁷ The inclusion of a ‘rights-based approach’ spells out the rights that should be afforded to victims and the provision of proper care through the various levels of protection and assistance.¹⁵⁸

The reference to a ‘structured group’ was, however, included in the drafting history of the Convention to say that it should not be considered when determining the crime of trafficking.¹⁵⁹ The Trafficking Act has no definition of what constitutes a trafficker nor does it make reference to a structured group but instead the definition may be deduced from the definition of trafficking and the consequential actions carried out by that individual or individuals.¹⁶⁰

3.3.2 Stipulated protection and assistance

Trafficking victims are entitled to certain rights and freedoms based on their victim status and countries are obliged to conform to these standards as provided for in Articles 6 and 7 of the Palermo Protocol. In addition, in its preamble, one of its declarations refer to the purpose to protect and assist the victims of trafficking through the fulfilment and respect for their rights.¹⁶¹ These protections relate to the well-being of the victim and they include accommodation and material assistance; legal assistance and access to courts; the immigration status of victims; and the return and repatriation of victims.¹⁶²

3.3.2.1 Accommodation and material assistance

The protection of the victim’s privacy and identity is the foremost requirement and domestic law has the responsibility to ensure this.¹⁶³ Victims should be protected from any setting that may disclose their identity before, during and after the trial.¹⁶⁴ The protection of victim identity and privacy has not been followed through by the government of South Africa, thus

¹⁵⁷ Gallagher (n 7 above) 20.

¹⁵⁸ Gallagher (n 7 above) 20.

¹⁵⁹ Schloenhardt (n 155 above) 7.

¹⁶⁰ Sec 4 (1) of the Trafficking Act.

¹⁶¹ Art 2(b).

¹⁶² Schloenhardt (n 155 above) 11.

¹⁶³ United Nations on Drugs and Crime *Legislative Guides for the implementation of the United Nations Convention against Transnational Organised Crime and the Protocol thereto* (2004) 283.

¹⁶⁴ As above.

leading to organisations refusing to accept victims for fear of exposing other victims to potential danger.¹⁶⁵

The presence of syndicates from Nigeria, Zimbabwe; Czech; and the Chinese Mafia and Russian Mafia necessitate the full implementation of Guideline 6, which dictates the protection of victims against ‘harm, threats and intimidation by traffickers’ through the provision of safe shelters. It is reported that shelters in South Africa are scarce, under-staffed and lack the necessary resources to house victims.¹⁶⁶ To rectify this problem the Trafficking Act does, however, make provisions for the establishment of accredited organisations¹⁶⁷ that will cater for the needs of victims, be funded by the State¹⁶⁸ and that a victim’s identity should be kept confidential by accredited organisations.¹⁶⁹ The lack of shelters has seen victims, at times, placed in shelters allocated to children that have been abused and are delinquents.¹⁷⁰

The provision of shelters in rural areas, in comparison to urban areas, is imbalanced as rural areas are sometimes overlooked despite widespread internal trafficking present there.¹⁷¹ Reports show that victims are predominantly stigmatised in rural areas and most trafficked persons usually migrate from the rural areas to cities with the hope of finding better opportunities.¹⁷²

Due to the harrowing experiences most victims undergo, physical safety is a crucial factor.¹⁷³ It is worthy to note that some victims are blind to their status of victimhood as opposed to when exposed to blatant sexual violence.¹⁷⁴ These victims include those exploited for labour, children placed in wealthy homes after deceitfully promised an education, and females subjected to forced marriages.

¹⁶⁵ US TIP report 2015 (n 26 above) 310.

¹⁶⁶ National Prosecuting Authority *Tsireledzani: understanding the dimensions of human trafficking in Southern Africa* (2010) 63.

¹⁶⁷ Sec 24 & Reg 9.

¹⁶⁸ Sec 24 (2)(b) & Reg 13.

¹⁶⁹ Sec 25(1)(g)(ii).

¹⁷⁰ Aransiola & Zarowsky (n 142 above) 522.

¹⁷¹ Human rights report (n 113 above) 27.

¹⁷² As above.

¹⁷³ IOM ‘Guidelines for assisting victims of human trafficking in the East African region’ (2011) 17

http://publications.iom.int/bookstore/free/GuidelinesforAssistingVictims_EN_A5.pdf (accessed 4 March 2015).

¹⁷⁴ As above.

Furthermore, the extent to which South Africa offers assistance is limited considering that the Trafficking Act¹⁷⁵ makes it optional to provide rehabilitation, therapeutic services, educational and skills development; all of which are necessary for independence, as mentioned above. Children that are denied normal development through exploitation and have their right to education violated, consequently find themselves subjected to inhumane conditions.¹⁷⁶

The aftercare of victims is a necessary requirement which begins with the fulfilment of the constitutional right to health.¹⁷⁷ This is the primary concern as the prolonged perils they encounter embrace psychological, physical and emotional health.¹⁷⁸ The physical injuries may be minor or serious and victims may have a high possibility of contracting diseases.¹⁷⁹ HIV infection is widespread but the assistance provided differs depending on whether the victim is a national or a foreigner.¹⁸⁰

3.3.2.2 Legal assistance and access to courts

The re-victimisation of rescued victims can be witnessed in cases where victims, who are terrified to voice the reasons and extent of their participation, are subsequently thought to have been accomplices to the crime perpetrated by the traffickers and may consequently, find themselves denied justice.¹⁸¹

The foremost fear migrant or foreign victims have is the arrest and the prosecution that may result from reporting the crime.¹⁸² In one particular situation two Yugoslavian nationals found in South Africa were debt-bonded at a massage parlour, the traffickers were able to use the court as an apparatus of the state to issue an interdict that would prevent them from leaving the state until their debt to the ‘institution’ was paid.¹⁸³

¹⁷⁵ Sec 26.

¹⁷⁶ *S v Jezile* (n 79 above) para 3.

¹⁷⁷ Sec 27(1)(a).

¹⁷⁸ IOM (n 173 above) 88.

¹⁷⁹ Aransiola & Zarowsky (n 142 above) 522.

¹⁸⁰ National Prosecuting Authority (n 166 above) 152.

¹⁸¹ Aransiola & Zarowsky (n 142 above) 520.

¹⁸² Aransiola & Zarowsky (n 142 above) 518.

¹⁸³ As above.

In order to ensure recovery, victims of trafficking require assistance from the state and all actors relevant to the rehabilitation.¹⁸⁴ The assistance encompasses victim participation in the criminal justice process; provision of information; compensation and other remedies; and victim recovery.¹⁸⁵ These components are important because in some cases a trafficker is released after 48 hours due to lack of evidence from the victims as they are incapable of giving evidence at that time.¹⁸⁶

The sensitisation of all relevant officials for the proper identification of victims is a necessity as this would allow for proper investigation into the matter. A multitude of cases such as these fall through the cracks and victims have no redress and police investigations are lengthy.¹⁸⁷

Foreign victims are prejudiced against by the Trafficking Act as section 16 on the facilitation of police investigation or prosecution in case of foreign witnesses is not part of the Act.¹⁸⁸ This section, if applied in South Africa, would allow the foreign victim temporary residence in South Africa pending investigation. The United States Trafficking in Persons report¹⁸⁹ contrarily states that trafficked foreign victims have in fact been provided with long-term care conditional on their participation in investigations and prosecution of traffickers.

3.3.2.3 The immigration status of victims

The immigration status of victims in South Africa is bleak, particularly due to South Africa's election not to assist foreign victims, evidenced by the waiver to the sections that apply to foreigners.¹⁹⁰ The assistance that should be rendered to foreign victims is unclear as the sections that were excluded from the Trafficking Act imply that foreigners' rights to protection are waived but a contrary view is stipulated in section 17 which allows foreigners to apply for permanent residence within South Africa. A further problem that exists is an inaccurate reference in the Trafficking Act to section 31(2)(b) of the Immigration Act 13, 2002 that should assist in the application of permanent residency; section 31(2)(b) of the

¹⁸⁴ Palermo Protocol Art 6.

¹⁸⁵ Palermo Protocol Art 6.

¹⁸⁶ US TIP report 2015 (n 26 above) 310.

¹⁸⁷ As above.

¹⁸⁸ It was excluded when the Act came into operation.

¹⁸⁹ US TIP report 2015 (n 26 above) 310.

¹⁹⁰ Secs 5, 16, 31 (2)(b)(ii).

Immigration Act makes no reference to either a foreign national nor permanence but instead to the appointment of immigration officers. The section in the Immigration Act that rightly refers to foreign nationals is section 30 and addresses applications for residency. There is a repeated use of ‘illegal foreigner’ with no reference to a victim in the Immigration Act.

3.3.2.4 Compensation

The Trafficking Act places the onus of deciding whether or not a victim should be compensated on the courts; it may not be to the victims favour as at times court processes take time and by then the victims may not want anything to do with their traffickers.¹⁹¹

3.3.2.5 The return and repatriation of victims

Foreign victims may be deported if found in the country illegally, this is the case with most migrants who find themselves in South Africa, with the language barrier and lack of documentation intensifying their detriment.¹⁹² Migrants find themselves in unfortunate circumstances whereby they are apprehended and deported to their country of origin where re-victimisation may occur.¹⁹³

The principles and guidelines as a supplement to the Palermo Protocol stress the importance of including the protection of victims within domestic legislation unless safe return of the victim can be pledged by the country of origin.¹⁹⁴ South Africa has, however, elected not to adopt sections of the Trafficking Act relating to assistance of foreign victims.¹⁹⁵

Section 15 which relates to the protective measures for purposes of investigation and prosecution in respect of trafficking does not protect foreign victims of trafficking found in South Africa; if during the investigation into their circumstances and during the allowance of a reflection period that person is ‘unable to cooperate with law enforcement or

¹⁹¹ Sec 29.

¹⁹² US TIP report 2015 (n 26 above) 310.

¹⁹³ As above.

¹⁹⁴ Principle 11 and Guideline 4.6.

¹⁹⁵ Secs 15, 16 & 31(2)(b)(ii).

prosecution.¹⁹⁶ Without stating how foreign victims can get assistance, South Africa has detached itself from assisting, through repatriation, any foreign victims.¹⁹⁷

The lack of cooperative will is shown clearly in light of section 31(2)(b)(ii) which specifically relates to informing the victim of arrangements made in the country where the victim would be repatriated to. It is clearly in breach of ensuring the safety of a trafficking victim, which is one of the cornerstones of protection and assistance of victims of trafficking.¹⁹⁸

3.4 Conclusion

South Africa's evident disregard for the care and safety of foreign victims proves detrimental to their welfare. This goes against the principles and guidelines' core focus on the protection of the victim and the transnational nature of trafficking. This is particularly true if one bears in mind that South Africa is viewed by most as a country that is full of opportunities that are considered pull factors.

¹⁹⁶ Sec 15(2).

¹⁹⁷ Sec 31(2)(ii).

¹⁹⁸ Principle 11 and Guideline 4.6.

Chapter 4 – Application of the Palermo Protocol in Nigeria - a specific focus on assistance and protection of Nigerian victims

4.1 Introduction

Nigeria is a densely populated country that had a population of approximately 140 million people in 2005, and rose to a little over 178 million in 2015.¹⁹⁹ The populous nature of Nigeria allows for the sourcing and transit of human beings and serves as the eventual destination for victims, with countless reported to be trafficked mainly for commercial sexual exploitation and domestic servitude.²⁰⁰ Women and children are primarily at the forefront of exploitation in Nigeria.²⁰¹ Nigeria, plagued with societal and economic hardships, is fraught with profit-producing exploitation that encompasses humans of all ages - from babies sold in illegal adoptions to the sale of women to other continents.²⁰²

Research indicates that women in Nigeria with unwanted pregnancies are housed at locations that have authorised premises where children born there are sold off at a high fee and the mothers are given a fraction of the profit made.²⁰³ Children also suffer in various ways: they are also exposed to child placement, children from impoverished homes are sent to wealthier relatives and/or sold to wealthier counterparts who abuse them; and in some instances children are made to beg on the street in order to support their ‘masters’, thereby denying them their basic human right to education, healthcare and early childhood development.²⁰⁴ Women are lured by others who, at times, do not disclose that they earn the money they boast about through commercial sexual activities.²⁰⁵

Women, being a vulnerable group that has suffered the most in human trafficking cases, are pliant prey for Boko Haram.²⁰⁶ Highly publicised incidents of mass kidnappings by Boko

¹⁹⁹ Population 2015 <http://countrymeters.info/en/Nigeria> (accessed 4 May 2015).

²⁰⁰ P Adepelumi ‘The root causes of human trafficking in Nigeria’ 13th United Nations Crime Congress, Doha, Qatar 13 April 2015.

²⁰¹ As above.

²⁰² NS Okogbule ‘Combating the “new slavery” in Nigeria: an appraisal of legal and policy responses to human trafficking’ (2013) 57 (1) *Journal of African Law* 5.

²⁰³ As above.

²⁰⁴ As above.

²⁰⁵ O A Gbadamosi ‘International perspectives and Nigerian laws on human trafficking’ (2006) Network for Justice and Democracy Nigeria 130.

²⁰⁶ A Nees ‘New development: Boko Haram: a textbook case for designation as a terrorist organisation and terroristic threat to international religious freedom’ (2013) 14 *Rutgers Journal of Law and Religion* 498.

Haram, an insurgent group, led to women and girls being married off, sold and impregnated - with a fraction of them rescued or become escapees.²⁰⁷ The insurgent group has kidnapped girls²⁰⁸ from schools that teach Christianity, recruited men and boys as soldiers to be part of their group and left hundreds murdered.²⁰⁹ Most of the girls that have been captured since the establishment of this group have not been rescued.²¹⁰ Studies show that, owing to the weak military Nigeria is reported to have, minimal rescue efforts have been witnessed from the government.²¹¹

4.2 Nigeria's application of the Palermo Protocol

A ranking system has been developed by the United States government to track the implementation of trafficking legislation by governments in different countries, and these rankings are published annually in a report, called the *Trafficking in Persons*.²¹² Nigeria is placed on tier 2, which consists of countries that are working towards the elimination of human trafficking within their territories, though fall short.²¹³ Nigeria ratified the Palermo Protocol and other international human rights instruments such as the United Nations Slavery Convention,²¹⁴ the Convention on the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others,²¹⁵ the ILO Forced Labour Convention,²¹⁶ the ILO Abolition of Forced Labour Convention,²¹⁷ and the ILO Worst Forms of Child Labour Convention.²¹⁸

²⁰⁷ McNally *Boko Haram* (n 36 above). A terrorist cell group that was founded in 1995 is a radical Islamic group aimed at persecuting all non-Muslim worshippers, specifically Christian based groups.

²⁰⁸ LexisNexis (n 138 above).

²⁰⁹ As above.

²¹⁰ Nees (n 206 above).

²¹¹ Nees (n 206 above).

²¹² US TIP report 2015 (n 26 above) 45. The report has information on trafficking from countries and how these incorporate the three Ps –Prevention, prosecution and protection within their territories then ranked according to tiers. These tiers are ranked from the cooperative to the non-cooperative, and are detailed as follows: tier 1 - countries that have recognised that human trafficking is a problem and are striving towards eliminating the problem by enacting legislation that prohibits and sanctions the exploitation of humans and further provides the victim assistance and protection through prevention and prosecution measures; tier 2 is divided into two sections, the first section consists of countries that have not fully integrated the minimum standards required but are endeavouring to do so; the second section of tier two countries are on a watch list as they have a substantial number of victims with no provision of concrete proof of undertakings that that country is trying to curb trafficking; tier 3 consists of countries that are not trying hard enough to curb trafficking.

²¹³ As above.

²¹⁴ 1927.

²¹⁵ 1949.

²¹⁶ 29 of 1930.

²¹⁷ 105 of 1957.

²¹⁸ 182 of 1999.

These laws all focus on the exploitative factors that result from trafficking in persons and to the human rights aspect that is incorporated in them for victims.²¹⁹ In its constant efforts to stem human trafficking within its territory, Nigeria has enacted the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 that repeals the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003.²²⁰ This new legislation, in keeping with the Palermo Protocol, is said to be more effective in making it a criminal offence to remove organs, prohibiting child employment and labour exploitation and providing harsher punishments for defiling a child.²²¹

4.4 Domestic legislation in Nigeria

The legislation in Nigeria frowns upon the exploitation of its citizens.²²² As early as 1960 the Criminal and Penal Codes were enacted to curb trafficking in humans with specific reference to slavery and sexual exploitation but due to ineffective implementation by successive governments, and further compounded by the federal nature of the country, the crimes still persist.²²³ The federal nature allows each state to enact laws on criminal matters within its particular territory, while some states see fit to enact these laws and some decline.²²⁴

The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act²²⁵ (TIP Act) was mainly motivated by non-governmental organisations within Nigeria due to the upsurge of trafficking cases witnessed.²²⁶ The very progressive legislation took into account the activities that constitute trafficking. They encompass the transportation, the procurement of humans especially children, acts leading up to or advance prostitution, travelling that results in the unlawful detention and defilement of any person by threats, fraud, drugs or kidnapping.²²⁷

²¹⁹ The International Movement Against All Forms of Discrimination and racism *Human Trafficking in Nigeria: Briefing Paper for the Special Rapporteur on trafficking in persons, especially in women and children* (2015) 3.

²²⁰ National Agency for the prohibition of Trafficking in Persons Press Release: President Goodluck Jonathan signs the new Anti-trafficking Act <http://www.naptip.gov.ng/tiplaw2015.html> (accessed 5 March 2016).

²²¹ As above.

²²² Okogbule (n 202 above) 8.

²²³ As above.

²²⁴ As above.

²²⁵ 2003.

²²⁶ Gbadamosi (n 205 above) 138.

²²⁷ Secs 11 -24.

The TIP Act made provisions for the establishment of a National Agency for Prohibition of Trafficking in Persons and other related matters (NAPTIP)²²⁸ that is mandated to provide facilities and shelters for the rehabilitation of victims. The NATIP has been widely criticised as being solely established to rescue children and largely excluding adults.²²⁹

The TIP Act, stringent in the conviction of traffickers, had a double jeopardy clause that states that persons arrested for trafficking persons on foreign land should be convicted on foreign land; and when deported to Nigeria they will further serve another sentence that aims to rehabilitate them.²³⁰ The rehabilitation that the Nigerian government presents is for the benefit of the offender in a victim centred approach.²³¹

It is worth noting that that the TIP Act did not make specific reference to the prohibition of forced marriages which might imply that this type of exploitation has been integrated with other forms of exploitation listed within the TIP Act.²³²

4.3 How traffickers control their victims

Human trafficking is rife in Nigeria despite the fact that the Constitution of Nigeria²³³ prohibits slavery and servitude. A common problem that most trafficking victims exhibit is the lack of knowledge that they are being trafficked, which is made worse by contracts that they are made to sign by their traffickers.²³⁴ These contracts are invalid according to the law of contract, as they are not fully aware of the transaction they are entering into.²³⁵ They are signed under the guise of safeguarding their interests of a refund for debts incurred by the victims for their travel expenses and assurance not to divulge the identity of the traffickers.²³⁶ A ‘*juju* oath’ is taken by the victims and their families to ensure that they do not reveal the nature of the transaction. This also instils fear of the perilous ramifications that might befall them and ensure security among traffickers.²³⁷ These acts, coupled with the corruption of

²²⁸ Sec 25.

²²⁹ Okogbule (n 202 above) 10.

²³⁰ As above.

²³¹ As above.

²³² Okogbule (n 202 above) 10.

²³³ 1999.

²³⁴ Okogbule (n 202 above) 5.

²³⁵ As above.

²³⁶ As above.

²³⁷ As above.

officials that facilitate cross border trafficking, have an unfavourable effect on victims.²³⁸ Victims are exposed to a number of health risks such as HIV/AIDS, sexually transmitted diseases, psychological effects, unwanted pregnancies and emotional stress.²³⁹

4.5 How victims are assisted

The research above reveals that despite the provisions provided in Nigeria to curb trafficking and the NAPTIP establishment, the shortage and lack of protection and assistance of victims is a problem in Nigeria. The common criticism is that the programmes established to protect and assist victims of trafficking are inept as they never stay the course.²⁴⁰ These programmes are launched by first ladies of the vice presidents and once the term of office of the husband is completed they will abandon the programmes, which defeats the purpose as the victims are left to fend for themselves with no medical care provided.²⁴¹ Other shortcomings brought to the fore include the mismanagement of these programmes as they are said to be used by the wives for financial gain from the funding received.²⁴²

4.6 Conclusion

NAPTIP has been highly acclaimed for the work done with regard to the rescue and safety afforded to victims, by providing protection and assistance to victims for medical attention, through hospital care and given extended stay where necessary.²⁴³ Nigeria has been hailed for sensitising the competent authority on the problem of trafficking.²⁴⁴

Though some advancement has been seen in Nigeria's efforts to curb human trafficking through their progressive laws, the crime has penetrated and taken over most of the country - from children to Cabinet members. The sale of human beings in Nigeria proves to be an adverse profitable enterprise that has even corrupted mothers who sell their unborn children into modern day slavery.

²³⁸ As above.

²³⁹ As above.

²⁴⁰ Okogbule (n 202 above) 12.

²⁴¹ As above.

²⁴² As above.

²⁴³ Nigeria: Office To Monitor and Combat Trafficking in Persons 2015 Trafficking in Persons Report <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243505.htm> (accessed 2 June 2015).

²⁴⁴ As above.

Chapter 5 – Conclusion

5.1 Introduction

The primary objective of this research was to investigate the implementation of the Palermo Protocol within the South African context, with particular reference to the protection and assistance of victims of human trafficking. The integration of human rights is impressive on paper but falls short on implementation.²⁴⁵ The Trafficking Act in South Africa, having recently come into force, contains several provisions that aim to assist and protect the victim. However, the identification of victims is left in the discretion of the SAPS with no set out criteria on the determining factors that would enable procedural guidance in properly identifying victims.

Nigeria also faces challenges in complying with the Palermo Protocol. The research conducted in this dissertation shows that the problems encountered by victims in South Africa are the same problems encountered by victims in Nigeria. The provision of shelter and the accompanying duties and assistance that should be afforded to victims are not met. The number of people reported to be trafficked is very minimal considering the exploitation that takes place and the population in the country. In 2014²⁴⁶ it was reported by the government and NGOs that 777 trafficking victims were identified within Nigeria. This seems to be a gross miscalculation which further reveals the lack of trust victims may have towards authorities designated to assist and protect victims. The US TIP report²⁴⁷ states that the South African government ‘convicted three sex traffickers and initiated prosecutions of 19 additional suspected sex traffickers’. These efforts also appear slight considering that South Africa, as stated earlier, has syndicated human trafficking rings within its territory.

5.2 Summary of findings

The research shows that trafficking of humans is a trade that has reached inconceivable proportions and requires dedicated personnel to curb this torment on humans, especially because the perpetrators are usually known to the victims.

²⁴⁵ US TIP report 2015 (n 26 above) 311.

²⁴⁶ United States Department of State, *2014 Trafficking in Persons Report – Nigeria* (n 28 above)

²⁴⁷ US TIP report 2015 (n 26 above) 310.

The findings are detailed below:

- a) There are no definite detailed victim identification guidelines within the Trafficking Act, thus victims find themselves arrested with their traffickers because law enforcement officials fail to establish the status of the victim.
- b) There is a grave lack of shelters and adult victims find themselves placed in children's shelters. This is a problem that is seemingly faced by most developing countries as economic challenges include the lack of funding needed for consistent provision of programmes necessary for the adequate recovery of victims.
- c) The time frames given for the aftercare for victims is inadequate given the extensive treatment required for victims. It appears to be based on the victim's cooperation.
- d) Women are the ones that bear the brunt; they are primarily the victims of trafficking despite the laws enacted and human rights instruments that have been ratified by South Africa to protect them. The patriarchal nature of the South African landscape has abetted the trafficking of women for marital purposes as a part of culture, with these practices tenaciously protected despite the detrimental effect on the girls that fall victim to this atrocity.
- e) SAPS as a first point of contact undermines the efforts to curb human trafficking due to the general distrust for law enforcement and failure to adequately identify victims.
- f) The provisions of rehabilitation such as education and skills training are not definite but optional.
- g) The level of inequality, hence poverty in South Africa, needs to be corrected through education and other programmes that are inclusive of crimes that occur and the eradication of stigma.
- h) It was noted during the research that data on the trafficking of males in South Africa, as well as subsequent provision of protection and assistance, are limited.
- i) Negligible literature exists on victims of organ harvesting in most African countries as this can be equated to *muti* killings.
- j) There is no information available on victims with a disability in South Africa.

5.3 Conclusion

Not only is South Africa a member state of numerous human rights conventions, but the South African Constitution is also a progressive piece of legislation that underpins equality and non-discrimination as its bedrock. Slavery and torture are further prohibited internationally, and reiterated in the Constitution of South Africa.²⁴⁸ First stipulated in the Universal Declaration of Human Rights,²⁴⁹ the prohibition on slavery and torture was reinforced by prohibiting the cruel, inhuman or degrading treatment of anyone.²⁵⁰ These rights are violated in cases where the victims find themselves re-trafficked or subjected to police brutality or stigmatisation by members of the community and their families.

The protection and assistance of victims in most African countries are wanting, the level of crimes that relate to the trafficking in persons is an ever-increasing challenge that requires strict implementation of trafficking legislation and training of authorities mandated to enforce the law and handle cases involving trafficking victims.

South Africa has made efforts to curb human trafficking through the enactment of the Prevention and Combating of Trafficking in Persons Act and its accompanying Regulations. However, gaps remain evident in these efforts.

What emerges from the Trafficking Act is that it fails to address victim-related conditions in relation to foreign nationals. In addition, the trafficking challenge is a multifaceted problem that transcends social and legal boundaries. Various disciplines are involved, namely criminal, migration, human rights, health and labour. The sensitisation on human trafficking matters for authorities in these sectors is essential to enable a broad approach in tackling the issue.

²⁴⁸ Sec 13.

²⁴⁹ 1948.

²⁵⁰ Art 5.

5.4 Recommendations

Based on the findings above the following recommendations are made:

- a) The Police as first point of contact with trafficking victims should be substantively sensitised on victim handling. The situation also necessitates extensive advocacy and sensitisation in communities, competent authorities and the judiciary.
- b) The Department of Social Development Regulations for the Trafficking Act are neither conclusive nor clear with regard to continual after care provision in cases where victims require long term care. Instruction as to what will happen to victims must form part of legislation since psychological care and accommodation may not always be a short term intervention.
- c) The legislation 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 accomplices; or if the only place to return to is the place where they had been trafficked (and would most likely be terrifying for the victim). Currently the Regulations state that a victim should be provided with transportation or the victim should make their own way back to 'where the victim was trafficked.'²⁵¹
- d) 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 being re-trafficked.
- e) The provisions relating to protection and assistance of foreign victims should come into force as the transnational nature of human trafficking prescribes the provision of assistance to victims within the territory of another country.
- f) State intervention, taking into account the Palermo Protocol and the OHCHR's Principles and Guidelines, is crucial in ensuring that victims are adequately protected.

²⁵¹ Regulation 18 (4).

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