To what extent does South Africa's legal framework effectively combat child trafficking and comply with international law obligations?

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ABSTRACT

This thesis conducts a comprehensive critical analysis of South Africa's legislative and policy measures aimed at combatting child trafficking. It commences by presenting and critically examining the international definition of trafficking arising from the Palermo Protocol while also investigating the causes of trafficking. Subsequently, it delves into identifying and exploring South Africa's legal obligations, especially concerning children, as outlined in international and regional treaties. These obligations encompass a multifaceted commitment, including the duty to prevent trafficking, prosecute offenders, and ensure the protection of trafficking victims. Building upon this framework, the thesis critically evaluates South Africa's legal response primarily focusing on the Prevention and Combating of Trafficking in Persons (TIP) Act (7 of 2013) in light of these obligations. Furthermore, it assesses the implementation and effectiveness of the TIP Act. Ultimately, the thesis reaches a nuanced conclusion. It acknowledges that despite some deficiencies in the TIP Act, particularly regarding child trafficking, the legislation predominantly aligns with international and regional standards. However, its effectiveness is hindered by shortcomings in implementation, significantly undermining the TIP Act's potential to combat trafficking comprehensively. In conclusion, the thesis presents recommendations aimed at more effectively combating child trafficking.

LIST OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CTOC	Convention against Transnational Organized Crime
DHA	Department of Home Affairs
DSD	Department of Social Development
FIFA	Fédération Internationale de Football Association
GLO.ACT	Global Action against Trafficking in Persons and Smuggling of Migrants
HTD	Human Trafficking Desk
ILO	International Labour Organization
IOM	International Organization for Migration
NAP	National Action Plan
NAPTIP	National Agency for the Prohibition of Trafficking in Persons
NGOs	Non-Governmental Organizations
NICTIP	National Inter-sectoral Committee on Trafficking in Persons
NPA	National Prosecuting Authority
NPF	National Policy Framework
OAU	Organization of African Unity
OCU	Organized Crime Unit
OHCHR	Office of the High Commissioner for Human Rights
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
SADC	Southern African Development Community
SALRC	South African Law Reform Commission

SAPS	South African Police Service
SOCA	Sexual Offenses and Community Affairs Units
SOPs	Standard Operating Procedures
TIP	Trafficking in Persons
TIPTI	Trafficking in Persons Intersectoral Task Team
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organization
UNICEF	United Nations
UNODC	United Nations Office on Drugs and Crime
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
US	United States (of America)

PART I – INTRODUCTION

1. Introduction

Globally, the harrowing reality of child[1] trafficking casts a pervasive shadow over the promise of a secure and nurturing environment for our youth, undermining their chances for safety and a thriving future. The exponential rise of human trafficking marks it as the most rapidly expanding transnational crime worldwide.[2] It is not only a lucrative business but a grave violation of human rights and continues to afflict societies internationally.[3] Human trafficking exists in various forms, including sex trafficking (exploiting individuals in commercial sex), labour trafficking (forcing or deceiving individuals into exploitative labour conditions), child trafficking (involving minors in both sex and labour exploitation), organ trafficking, and forced marriages.[4] These forms often overlap, subjecting victims to multifaceted exploitation and egregious violations of their rights.[5] Women and children, particularly black women, and foreign migrants, are disproportionately affected due to socio-economic disparities, including limited access to education, economic hardships, and social marginalization, which increases their vulnerability.[6] Traffickers exploit these vulnerabilities, manipulating their circumstances to coerce them into various forms of trafficking, utilizing their desperation for better opportunities or basic necessities.[7] The examination of international legal cases reveals that female victims experience

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[1] According to Article 1 of the Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 [hereinafter CRC] a child is defined as a human being below the age of eighteen years.

[2] Deanna Davy 'Anti–Human Trafficking Interventions: How Do We Know if They Are Working?' (2016) 37(4) *American Journal of Evaluation* 488; UNODC, *Global Report on Trafficking in Persons*, 2022, available at: *https://www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf.*

[3] Job Elom Ngwe and O. Oko Elechi 'Human Trafficking: The modern day Slavery of the 21st Century' (2012) 6 *AJCJS* 104; Preamble of the UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000 [hereinafter Palermo Protocol].

[4] UNESCO, *Human Trafficking in South Africa: Root Causes and Recommendations*, Policy Paper No 14.5 (E), 2007, 8 available at: *https://unesdoc.unesco.org/ark:/48223/pf0000152823*; National Prosecuting Authority (NPA) of South Africa, *Research Report, Tsireledzani: Understanding the Dimensions of Human Trafficking in South Africa*, 2010, 5 [hereinafter NPA Research Report] available at: *https://repository.hsrc.ac.za/bitstream/handle/20.500.11910/4323/6289.pdf?sequence=1&isAllowed=y.*

[5] Ibid.

[6] Moses Morero Motseki 'Justice for Victims of Human Trafficking in Gauteng Province, South Africa' (2022) 28 *TECHNIUM Soc. Sci. J.* 360; US Department of State, *Trafficking in Persons Report*, 2022, 503 [hereinafter US TIP Report 2022] available at: *https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf*.

[7] Richard Obinna Iroanya 'Human Trafficking and Security in Southern Africa: the South African and Mozambican Experience' (2019) 38(1) *Politeia* 2; NPA Research Report op cit (n 4) 95.

physical or severe violence from traffickers at a rate three times higher than males, whereas children face physical or severe violence at nearly double the rate compared to adults.[8] Those who fall victim to trafficking are often misled by deceitful promises of better lives and opportunities in destination countries.[9] Trafficking victims are commonly held in servitude using methods like indebting them, managing their finances, separating them from their families, seizing their identity documents and travel papers, employing intimidations of violence against them or their families, and controlling them through addictive substances.[10] Trafficking in humans is commonly acknowledged as a modern-day form of slavery, representing a serious concern in the 21st century, because it involves one individual exploiting the labour and autonomy of another individual.[11] Its prevalence today surpasses any other period in history, highlighting the pressing need for immediate and concerted action.[12]

Countries involved in trafficking are categorized as countries of origin, transit and destination based on the status of the individuals affected.[13] It is possible for a country to fall into multiple categories simultaneously. Africa, and particularly South Africa, has played a significant role in the global market for trafficking individuals.[14] South Africa, is identified as belonging to all three of the mentioned categories.[15] It serves mainly as a destination country as traffickers trap victims from neighbouring countries through false job opportunities (illegally) into the country, subsequently subjecting them to sex trafficking, forced labour in mining and construction, involvement in criminal activities, and exploitation in agriculture.[16] Additionally, it is recognized as an origin country, as traffickers coerce South African women and children into situations of commercial sex work or drug trafficking in Europe and Asia.[17] The Western Cape province in South Africa is considered an important transit point for people trafficked from Asia and the Middle East with North America as the

[8] UNODC op cit (n 2) XII.
[9] Davy op cit (n 2) 488.
[10] Ibid; US TIP Report 2022 op cit (n 6) 503.
[11] Ngwe and Elechi op cit (n 3) 104.
[12] Susan S. Kreston 'Trafficking in Children in South Africa: An Analysis of Pending Legislation' (2007) 8.1 *Child Abuse Research in South Africa* 35.
[13] Jacob Mofokeng and Adewale Olutola 'Expert Reflections on Challenges experienced to address Human Trafficking in South Africa prior to the Implementation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013' (2014) 1/2014 *Acta Criminologica: African Journal of Criminology & Victimology* 117.
[14] Motseki 2022 op cit (n 6) 360.
[15] Mofokeng and Olutola op cit (n 13); UNESCO op cit (n 4) 10, 20-24.
[16] US TIP Report 2022 op cit (n 6) 503 - 504.
[17] Ibid; UNESCO op cit (n 4) 23.

destination.[18] In East and West Africa, forced or bonded labour represents the most frequently identified type of human trafficking. However, in Southern Africa, most trafficking cases involve sex trafficking, representing 48 percent of cases, most of them being children.[19]

Obtaining precise statistics on human trafficking poses a considerable challenge due to underreporting, the hidden nature of this crime and the inaccessibility of official data. Moreover, the data that has been accessible has often been considered inaccurate and unreliable in the past.[20] Nevertheless, the US Trafficking in Persons (TIP) Report 2023 estimates that in 2022 an astonishing 115,324 individuals were identified as trafficking victims, of which 21,790 were in Africa.[21] Yet, the global number of convictions remains remarkably low, with only 5,577 cases worldwide and only 904 within Africa.[22] Although human trafficking is claimed to be a significant problem in South Africa, the absence of precise statistical data greatly impedes the grasp of its actual extent and prevalence.[23] According to the US TIP Report 2023 South Africa is considered a Tier 2 Watch List country, which means that the situation does not fully comply with minimum standards, but the government is making significant efforts to bring itself into compliance with the international standards.[24] Regarding neighbouring

[18] UNESCO op cit (n 4) 24.
[19] UNODC op cit (n 2) 88-89.
[20] Carol Allais 'The profile less considered: The Trafficking of Men in South Africa' (2013) 44(1) *South African Review of Sociology* 40.
[21] US Department of State, *Trafficking in Persons Report*, 2023, 78, 86 [hereinafter US TIP Report 2023] available at: *https://www.state.gov/wp-content/uploads/2023/09/Trafficking-in-Persons-Report-2023_Introduction-V3e.pdf*.
[22] Ibid.
[23] Paul Oluwatosin Bello 'Long-Term Criminal Justice Response to Human Trafficking in South Africa: An Impossible Mission' (2018) 21.4 *CJR* 480.
[24] The TIP report categorizes countries into four groups: Tier 1, Tier 2, Tier 2 Watch List, and Tier 3. The criteria determining placement in these tiers are: "Tier 1: Countries whose governments fully meet the TVPA's minimum standards for the elimination of trafficking. Tier 2: Countries whose governments do not fully meet the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards. Tier 2 Watch List: Countries whose governments do not fully meet the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards, and for which: the estimated number of victims of severe forms of trafficking is very significant or is significantly increasing and the country is not taking proportional concrete actions; or there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials. Tier 3: Countries whose governments do not fully meet the TVPA's minimum standards and are not making significant efforts to do so." – US TIP Report 2023 op cit (n 21) 71, 85.

countries Botswana, Mozambique and Eswatini are also ranked Tier 2 Watch List, while Namibia, Lesotho and Zimbabwe are listed as Tier 2 countries.[25]

In South Africa, as in numerous other nations, the battle against child trafficking encounters substantial hurdles due to the country's distinctive socio-economic dynamics. Ultimately, child trafficking presents itself as a multifaceted challenge, demanding a comprehensive strategy that encompasses legal frameworks, robust law enforcement, support for victims, and international partnership. Child trafficking has prompted the international, regional, and South African community to establish legal frameworks that aim to prevent and prosecute child trafficking. Nevertheless, the number of identified trafficking victims in South Africa has not declined due to gaps in the implementation of the legal frameworks.[26]

This thesis embarks on a comprehensive investigation into South Africa's legal measures in combatting child trafficking. It thoroughly examines the nation's compliance with its international and regional commitments and obligations concerning child trafficking. The central research question explores the alignment of South Africa's legal response with its legal obligations derived from international and regional law, particularly the Palermo Protocol. The thesis is structured into distinct parts to methodically dissect this complex issue. Part II discusses the international definition of human trafficking while also delving into the multifaceted causes of child trafficking. Part III conducts a critical analysis of the comprehensive international and regional legal obligations concerning child trafficking, providing a nuanced understanding of the legal framework that underpins these responsibilities. Moving forward, Part IV examines South Africa's legal response, focusing primarily on the TIP (Trafficking in Persons) Act,[27] conducting a comprehensive assessment of its implementation and effectiveness within the national context. Part V synthesizes the findings, highlighting that while the legal response appears aligned with international and regional obligations, deficiencies in implementation significantly compromise its effectiveness in combating child trafficking within the country. Finally, the thesis concludes by offering crucial recommendations aimed at remedying these deficiencies and strengthening South Africa's legal approach to combatting child trafficking.

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[25] Ibid 86.

[26] US Department of State, *2023 Trafficking in Persons Report: South Africa*, 2023 [hereinafter US Report South Africa 2023] available at: *https://www.state.gov/reports/2023-trafficking-in-persons-report/south-africa.*

[27] Prevention and Combating of Trafficking in Persons Act 7 of 2013 [hereinafter TIP Act].

2. Objectives

This thesis critically examines South Africa's laws and policies on child trafficking, emphasising a human rights perspective. Despite child trafficking being a severe violation of basic rights, current laws have not effectively curbed this global issue. The study assesses South Africa's obligations under international and regional laws, evaluating existing legislation alongside proposed measures. Additionally, it includes an analysis of the implementation of the TIP Act, concluding deficiencies in its implementation. Recommendations are then proposed to enhance implementation and effectively combat child trafficking. This thesis aims to contribute to the existing knowledge of child trafficking laws in South Africa and foster a deeper understanding of the subject.

3. Significance

There is a significant lack of comprehensive research on human trafficking and efforts to combat it in South Africa from various angles, especially regarding children.[28] This is concerning because more children than adults continue to be detected as victims of trafficking in Sub-Saharan Africa.[29] This study holds significance as it aims to examine South Africa's existing laws and policies concerning child trafficking, critically evaluating their alignment with the country's international and regional commitments. Specifically, it seeks to ascertain if South Africa's proposed legislation meets the prescribed standards outlined in international and regional treaties. Given that the intended purpose behind the TIP Act was to fulfil South Africa's obligations under the Palermo Protocol, this research aims to demonstrate that South Africa's current laws mostly adhere to its international and regional commitments. However, the gap in implementation impacts the effectiveness.

[28] Motseki 2022 op cit (n 6) 360.
[29] UNODC op cit (n 2) 89.

4. Literature review

Existing scholarship on trafficking, including contributions by international Organizations[30] and authors such as Kruger,[31] Pharoah,[32] Mollema[33] and Kreston[34] have extensively explored trafficking worldwide and in South Africa, emphasizing its multifaceted nature and global implications. However, a noticeable lack persists concerning in-depth analyses of child trafficking in South Africa, particularly concerning the newly implemented TIP Act. While broader discussions encompass the complexities of trafficking regarding adults, scholarly attention specifically directed towards the nuances and intricacies of child trafficking and the best interests of the child principle within the South African context, and the implications of the TIP Act in mitigating this issue remains notably limited or only refers to the criminal approach of the problem.[35] This underscores the pressing need for comprehensive research and critical analysis, which this thesis aims to address by also delving into the efficacy of the TIP Act in combatting child trafficking within South Africa's legal framework.

5. Methodology

This thesis is an analytical and descriptive study relying on library resources encompassing international and domestic legal frameworks. It primarily centres on critically evaluating the existing laws and policies within the Republic of South Africa. To delve deeper into this complex subject, secondary sources like scholarly articles, protocols, recommendations, resolutions, online articles, and documented cases will be utilized to offer comprehensive insights and understanding.

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[30] UNODC, *An introduction to Human Trafficking: Vulnerability, Impact and Action,* 2008, available at: *https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf*; IOM, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Survey*, 2003, available at: *https://publications.iom.int/system/files/pdf/mrs_15_2003.pdf*.

[31] HB Kruger and H Oosthuizen 'South Africa – Safe Haven for Human Traffickers? Employing the Arsenal of existing law to combat human trafficking' (2012) 15(1) *PELJ* 283.

[32] Robyn Pharoah, *Getting to Grips with Trafficking – Reflections on Human Trafficking Research in South Africa*, 2006, 37, available at: *https://www.files.ethz.ch/isn/117805/FULLMONO123.pdf*.

[33] Nina Mollema 'Combating human trafficking in South Africa: A critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013' (2014) 77 *THRHR* 246.

[34] Susan S. Kreston 'Human trafficking legislation in South Africa: Consent, coercion and consequences' (2014) 27 *SACJ* 20.

[35] Beatri Kruger 'Towards a sharp prosecution sword to combat human trafficking: comparing the new South African counter-trafficking law with international prosecution standards' (2016) 49 *The Comparative and International Law Journal of Southern Africa* 53.

PART II – DEFINITION AND CAUSES OF CHILD TRAFFICKING

1. Definition

The Palermo Protocol provides a comprehensive definition of human trafficking. Prior to its adoption, there was no definition of "trafficking" in international law, although it was integrated into international legal frameworks combating the exploitation of individuals, particularly women and children.[36] As a result, the international community was convinced of the necessity to complement the United Nations Convention against Transnational Organized Crime[37] with an international instrument specifically targeting the prevention, suppression, and punishment of human trafficking, which was a crucial step forward in understanding trafficking.[38] To date 181 States have ratified the Palermo Protocol.[39]

The Palermo Protocol defines human trafficking in its Article 3 (a).[40] It characterizes trafficking as a crime against humanity driven by the intention to deceive and exploit individuals.[41] Upon careful examination of Article 3 (a), it becomes evident that trafficking is a complex process. As Figure 1 depicts, human trafficking comprises three essential elements: the acts (what), the means (how), and the purpose (why).

[36] Such as UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979 [hereinafter CEDAW] and ILO, Worst Forms of Child Labour Convention, C182, 17 June 1999, C182 [hereinafter ILO Convention on Child Labour].
[37] UN General Assembly, United Nations Convention against Transnational Organized Crime, 8 January 2001, A/RES/55/25 [hereinafter CTOC].
[38] Preamble of the Palermo Protocol.
[39] UN Treaty Collection, *CHAPTER XVIII – PENAL MATTERS, 12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2023, available at: *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18.*
[40] Article 3 (a) Palermo Protocol states: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
[41] Article 7 of UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, last amended 2010.

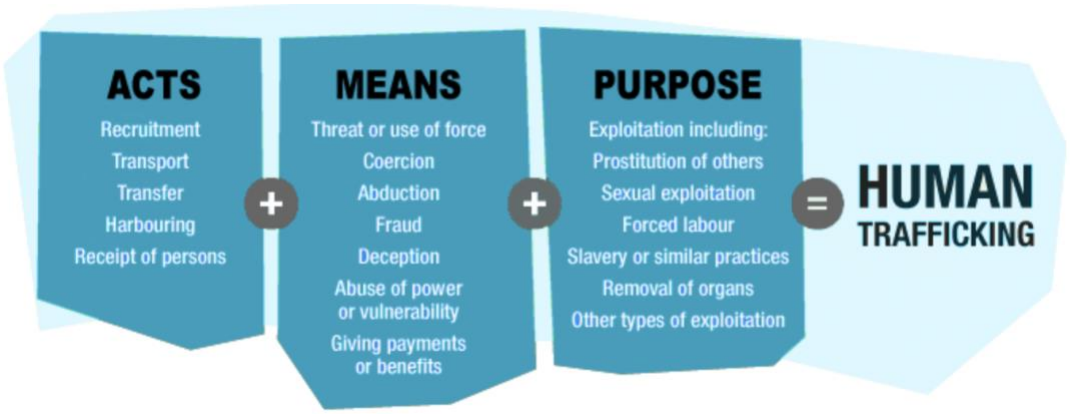

Figure 1: The elements of human trafficking.[42]

The acts entail the recruitment, transportation, transfer, harbouring, or receipt of individuals. By encompassing a wider range of activities that could be classified as trafficking, the Palermo Protocol expands the scope of human trafficking beyond just prostitution.[43] The means include the use or threat of force, deception, coercion, abduction, fraud, abuse of power or vulnerability, or providing payments or benefits to facilitate the acts. The purpose behind trafficking is always the exploitation of victims, which can manifest in various forms such as sexual exploitation, forced labour, slavery, slavery-like practices, or the removal of organs.[44]

The Protocol highlights exploitation as crucial in defining trafficking but fails to provide a definition, thus making it difficult to pinpoint when it begins. This can make it hard for law enforcement officials, especially if they lack proper training and awareness, to determine the responsibility of perpetrators.[45] Furthermore, Article 3 (b) states that the consent of the victim is irrelevant in cases where the mentioned means have been used. The fundamental element in defining trafficking lies in consent. It is the absence of consent that differentiates trafficking from other exploitative forms like labour or sexual exploitation. If an individual willingly accepts conditions, no matter how dreadful, there is no trafficking crime unless the trafficking "means" have been used. Nonetheless, it is essential to stress that consent, once granted, can be revoked. If consent is withdrawn and that person is kept in servitude by psychological or physical

[42] Sourced from TraffickACTS, *What is human trafficking?,* available at: *https://traffickacts.org/the-need-to-know/background/what-is-human-trafficking/*.
[43] UNESCO op cit (n 4) 14.
[44] Article 3 (a) Palermo Protocol.
[45] UNESCO op cit (n 4) 14.

force, they qualify as a trafficking victim and are entitled to the protections and assistance stipulated in the Palermo Protocol and relevant domestic regulations.[46] This is consistent with other legal systems that uphold the invalidity of consent acquired through force and deception.[47]

Article 3 further differentiates between child and adult trafficking. According to Article 3 (c), child trafficking is the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, even if this does not involve any of the "means" outlined in subparagraph (a). Therefore, child trafficking only has two components: the acts and the exploitative purpose.

The definition provided by the Palermo Protocol applies to trafficking that occurs within a country's borders as well as across them. It establishes the legal structure for prosecuting trafficking that is not necessarily part of big, organized crime groups but includes local, spontaneous, or opportunistic instances of trafficking – as is often the case in Africa.[48] Noteworthy in this regard is that human trafficking must be distinguished from human smuggling, which can be challenging. Human smuggling involves helping or facilitating someone's illegal entry into a country where they are not a citizen or permanent resident, usually for financial gain or other material benefits.[49] Furthermore, migrants typically agree to being smuggled, whereas a trafficked individual is compelled into activities against their will or through deception. Additionally, smugglers typically finish their involvement once migrants are transported, while traffickers persist in exploiting the victims. Lastly, smuggling consistently involves crossing borders, while trafficking can take place within a country, even within local communities.[50]

Although the definition of trafficking may seem comprehensive, it falls short in certain aspects and presents weaknesses. It has faced criticism due to its lengthy, ambiguous nature, resulting in complexities experienced in practical application and

[46] Kreston 2014 op cit (n 34) 27.
[47] Anne T. Gallagher 'The International Legal Definition of "Trafficking in Persons": Scope and Application' in Prabha Kotiswaran (ed) *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (2017) 93.
[48] UNESCO op cit (n 4) 15; UNICEF*, Innocenti Research Centre, Trafficking in Human Beings, especially Women and Children, in Africa*, 2005, 3, available at: *https://www.unicef-irc.org/publications/pdf/trafficking-gb2ed-2005.pdf.*
[49] Mofokeng and Olutola op cit (n 13) 116.
[50] Ibid.

research settings.[51] The definition encompasses a wide range of acts and means, which can lead to varying interpretations and inconsistent application across different jurisdictions.[52] This lack of specificity may pose challenges in effectively identifying and prosecuting cases of human trafficking, potentially resulting in the misclassification of related crimes or the failure to recognize certain forms of exploitation as trafficking.[53] Additionally, the definition's emphasis on exploitation as the sole purpose of trafficking may overlook other underlying factors such as migration, vulnerability, and systemic inequalities that contribute to individuals becoming victims of trafficking.[54] Furthermore, there is, as mentioned earlier, no definition of "exploitation" despite it being so important for the definition. The definition further overlooks the fact that exploitation might take place during the whole process of trafficking and does not have to be apparent at the end of the trafficking chain.[55]

2. Causes

The root causes of human trafficking are intricate and interconnected, stemming from various supply and demand factors, which are described as "push" and "pull" factors. The push factors are conditions that prompt trafficking, and the pull factors represent the demand side of trafficking.[56] However, making sweeping generalizations about trafficking worldwide is misleading, as the factors influencing it and their extent vary significantly from country to country. Moreover, a comprehensive analysis of trafficking must consider the constantly evolving landscape that affects both local and global trafficking trends. While discussions often focus on the push factors, they often overlook the equally important pull factors. Addressing both sides is vital for effective measures against trafficking in children.[57] The following outlines the global cross-cutting causes of human trafficking, followed by an exploration of factors specifically relevant to South Africa.

[51] Anne T. Gallagher 'Human Rights and the New UN Protocol on Trafficking and Migrant Smuggling – a Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 986.
[52] Gallagher 2017 op cit (n 47) 94.
[53] Chandré Gould 'Cheap Lives: Countering Human Trafficking - Considerations and Constraints' (2006) 16 *SA crime quarterly* 22.
[54] Ibid, 21.
[55] UNICEF op cit (n 48) 3.
[56] UNESCO op cit (n 4) 32.
[57] Ibid, 5.

2.1 Global

Human trafficking is not only a crime but a lucrative business that operates in multiple regions across the globe, driven by numerous compelling root factors, that are classified into the two mentioned general categories: push and pull factors.[58]

Over the decades, numerous overarching push factors have been identified as driving the phenomenon of human trafficking. These factors, transcending geographic boundaries, include poverty, lack of education, the globalization of the sex industry, a lack of employment opportunities, political instability, and armed conflict in countries of origin, and porous borders.[59] Moreover, gender and racial discrimination, along with instances of police and government corruption, also play significant roles. Other factors that can create conditions where traffickers can exploit the desperation of those affected are the occurrence of diseases and natural disasters.[60]

Additionally, various international pull factors significantly contribute to the ongoing prevalence of human trafficking. These encompass poverty, limited access to, or centralization of, quality education and employment, as well as escalating demand for cheap labour and commercial (online) sexual exploitation, along with growing transnational criminal networks.[61] Furthermore, traffickers may also misuse cultural beliefs and practices to coerce victims into trafficking schemes, while domestic violence and visa acquisition challenges render individuals susceptible to exploitation by traffickers.[62] Global capitalism and the pursuit of profit and exploitation of vulnerable individuals by transnational corporations[63] exacerbate the issue, particularly due to inadequate international efforts in addressing the problem.[64]

2.2 South Africa

In South Africa, a multitude of factors contribute to the prevalence of human trafficking. These factors include persistent effects from the apartheid era, widespread poverty, severe unemployment, and high levels of corruption.[65] According to Bello it is crucial

[58] Osita Agbu 'Corruption and Human Trafficking: The Nigerian Case' (2003) 4.1 *West Africa review* 4.
[59] Louise Shelley *Human Trafficking: A Global Perspective* (2010) 37.
[60] Ibid, 38; Agbu op cit (n 58) 5; Bello 2018 op cit (n 23) 478.
[61] UNICEF op cit (n 48) 5; W. Ejalu 'From home to hell: the telling story of an African woman's journey and stay in Europe' in Beeks, K and Amir, D (eds.) *Trafficking and the Global Sex Industry* (2006) 170; Bello 2018 op cit (n 23) 478.
[62] NPA Research Report op cit (n 4) 93; Bello 2018 op cit (n 23) 478.
[63] Shelley 2010 op cit (n 59) 38.
[64] Bello 2018 op cit (n 23) 478.
[65] NPA Research Report op cit (n 4) 93, 101; Bello and Olutola 2022 op cit (n 270) 12.

to recognize that certain factors are not confined to the domestic context but emanate from neighbouring countries in the Southern African Development Community (SADC) and are influenced by international migration patterns.[66]

The main push factor is poverty. Impoverished and marginalized communities, particularly in rural areas, face heightened vulnerabilities.[67] In addition, South Africa faces ongoing inequity rooted in its apartheid history, which continues to endure. The country experiences a substantial gap between the wealthy and the impoverished.[68] This stark inequality exposes vulnerable individuals, particularly women and children, who lack essential resources like food, shelter, clothing, and means for self-sufficiency, to the exploitative tactics employed by traffickers.[69] Other push factors encompass unequal access to education, particularly for (undocumented) refugees and migrants, lack of employment opportunities, and entrenched traditional practices that condone violence against women.[70] Especially, the misuse of the tradition of *ukuthwala*[71] heights the vulnerability of women, notably in the Eastern Cape and KwaZulu-Natal regions.[72]

Pull factors encompass the expanding informal employment sector that perceives women and children as suitable for intensive and cheap labour, and the demand for child soldiers in armed conflicts.[73] Furthermore, the demand for organs and body parts plays a vital role in human trafficking.[74]

Lastly, evidence suggests that corruption, which can be seen as a push and pull factor, is widespread and deeply rooted in both the public and private sectors in South Africa. It has permeated every aspect of the socio-economic and institutional framework of South Africa, acting as a destructive force.[75] In the context of human trafficking, the erosion of trust undermines the credibility and effectiveness of the South

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[66] Bello 2018 op cit (n 23) 479.
[67] Moses Morero Motseki and Jacob Tseko Mofokeng 'An analysis of the causes and contributing factors to human trafficking: A South African perspective' (2022) 8:1 *Cogent Social Sciences* 3.
[68] Michael Chibba and John M. Luiz 'Poverty, Inequality and Unemployment in South Africa: Context, Issues and the Way Forward' (2011) 30(3) *Economic papers, The Economic Society of Australia* 307.
[69] Bello 2018 op cit (n 23) 481; NPA Research Report op cit (n 4) 95.
[70] UNESCO op cit (n 4) 32-33, 37.
[71] Ukuthwala is a South African cultural practice with historical roots in marriage negotiations but has also been associated with forced, non-consensual marriages, particularly involving underage girls. - DS Koyana and JC Bekker 'The indomitable ukuthwala custom' (2007) 40(1) *De Jure* 139.
[72] US TIP Report 2022 op cit (n 6) 504.
[73] UNESCO op cit (n 4) 38.
[74] NPA Research Report op cit (n 4) 8.
[75] J. Coetzee 'The Impact of Corruption on Development' (2014) 49.3 *Journal of Public Administration* 832; Bello 2018 op cit (n 23) 480.

African Police Service (SAPS) and other related institutions in combating this heinous crime. It creates an environment of impunity, allowing traffickers to operate with minimal fear of being arrested or held accountable.[76]

These interconnected factors create an environment conducive to the exploitation and trafficking of individuals within and across South Africa's borders.

3. Conclusion

In this section, the issue of child trafficking was explained, focusing on the definition provided in the Palermo Protocol, distinguishing it from smuggling. Despite some limitations, the definition is comprehensive enough to address child trafficking, notably in its differentiation between adult and child trafficking. Additionally, the causes, particularly concerning South African circumstances, were briefly discussed showing that addressing the root causes, particularly poverty, inequity and corruption becomes crucial in strengthening the overall response to human trafficking and creating a society free from violence and exploitation.

[76] Adewale A. Olutola and Paul O. Bello 'Community Policing as a Mechanism in Combating Human Trafficking in South Africa: Getting the Priorities Right' (2016) 35.1 *Politeia* 41.

PART III – SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL AND REGIONAL LAW

1. Introduction

Human trafficking, as an escalating worldwide (criminal) issue, has gained prominence on the global stage. Through various collaborative actions and especially legal responses at the international level that directly or indirectly address the issue of child trafficking, the international community has demonstrated its commitment to tackling this widespread prevalent challenge. Determining State responsibility for trafficking can be a challenge due to its complex nature. In general, countries are accountable for their actions or oversights that breach international obligations, including human rights laws. Additionally, States cannot escape responsibility for private individuals' actions if they could have positively influenced the situation. In this context, the responsibility originates from the State's failure to take appropriate actions to prevent.[77] Despite the fact, that some regard anti-human trafficking regulations as part of customary international law,[78] various international and regional treaties establish different obligations concerning child trafficking. These can be described as obligations to prevent, prosecute, protect trafficked persons, and cooperate.[79] Additionally, considering that children are more vulnerable than adults, the obligations towards them are more extensive. For instance, international human rights law places greater and additional responsibilities on States when it comes to recognizing child victims of trafficking and ensuring their immediate and long-term safety and well-being.[80] This fundamental principle originates from the commitments outlined in the CRC, emphasizing that the best interests of the child should always take precedence.[81] This principle is anchored in conventions and must be additionally considered by States. This Part offers a comprehensive review of international and regional human rights treaties concerning human trafficking, relevant to South Africa.

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[77] OHCHR, *Human Rights and Human Trafficking*, *Fact Sheet No. 36,* 2014, 11, available at: *https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf.*

[78] M. Cherif Bassiouni 'Enslavement as an International Crime' (1991) 23.2 *New York University journal of international law & politics* 445.

[79] Article 2, 5, 6, 9 Palermo Protocol.

[80] Article 6 (4) Palermo Protocol.

[81] Article 3 (1) CRC.

2. International legal framework

Due to the multifaceted nature of trafficking, which can be examined from various viewpoints, numerous treaties hold relevance when assessing South Africa's legal obligation to combat child trafficking.

2.1 CTOC

The CTOC is the international community's response to the necessity for a global strategy against transnational organized crime and specifically focuses on crimes that enable organized criminal groups to profit financially.[82] The CTOC has three supplementary protocols that in contrast to the CTOC specifically focus on particular crimes: trafficking in persons,[83] trafficking in firearms,[84] and smuggling of migrants.[85] South Africa signed the CTOC in December 2000 and ratified it in February 2004.[86] The CTOC criminalizes four offences: the participation in an organized criminal group,[87] the laundering of proceeds of crime,[88] corruption,[89] and obstruction of justice.[90] Additionally, it covers "serious crimes," which are defined as offences punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.[91]

Article 3 (1) CTOC requires that offences must meet two criteria: they must be "transnational in nature," and they must involve an "organized criminal group."[92] Both requirements are defined broadly within the treaty and are commonly met in cases of transnational human trafficking.[93] However, to determine if human trafficking fits the criteria of "transnational organized crime" it is essential to differentiate between

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[82] NPA Research Report op cit (n 4) 20; UNODC, *Toolkit to combat trafficking in persons,* 2006, 2 [hereinafter UNODC Toolkit] available at: *https://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf*.
[83] Palermo Protocol.
[84] UN General Assembly, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2001.
[85] UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.
[86] UN Treaty Collection, *CHAPTER XVIII - PENAL MATTERS, 12. United Nations Convention against Transnational Organized Crime,* 2023, available at: *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=_en.*
[87] Article 5 CTOC.
[88] Article 6 CTOC.
[89] Article 8 CTOC.
[90] Article 23 CTOC.
[91] Article 2 (b) CTOC.
[92] Gallagher 2001 op cit (n 51) 979.
[93] Ibid, 978; Article 2 (a) and 3 (2) CTOC.

trafficking that occurs across borders and trafficking confined within a single country. Trafficking across borders commonly complies with the criterion "transnational nature" since various stages of this crime occur in multiple countries. Traffickers recruit victims from the originating country, transport them through transit nations, and eventually exploit them in the country of destination.[94] Trafficking within the borders of one country may comply with the requirement if the trafficking is controlled or prepared in a different country.[95] An "organized criminal group" is defined in Article 2 (c) CTOC.[96] However, recent studies indicate that trafficking may also be organized by individuals.[97]

The CTOC sets out various obligations that States Parties are required to fulfil. Firstly, it contains obligations regarding the criminalization and persecution of trafficking. Ratifying States are obliged to criminalize the participation in an organized criminal group, the laundering of proceeds of crime, corruption, and the obstruction of justice.[98] Furthermore, "the liability of legal persons for participation"[99] must be established. Kruger points out that this provision is important given that human trafficking is frequently perpetrated by entities, such as traffickers working within a corporation or other legal institutions.[100] Other relevant obligations are imposing sanctions that take into account the severity of the offence,[101] confiscation or seizure of the proceeds of crime,[102] and judicial cooperation in this regard.[103] Additionally, State Parties must establish the jurisdiction to investigate, prosecute, and penalize all relevant crimes occurring within their territorial jurisdiction.[104]

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[94] Louise Shelley 'Human trafficking as a form of transnational crime' in Maggy Lee (ed) *Human Trafficking*, 1st ed (2007) 122.
[95] Ibid.
[96] Article 2 (c) CTOC states: "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.
[97] IOM, *Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa*, 2006, 20, available at: *https://publications.iom.int/books/breaking-cycle-vulnerability-responding-health-needs-trafficked-women-east-and-southern*; Amy Farrell and Brianne Kane 'Criminal justice system responses to human trafficking' in J. Winterdyk & J. Jones (eds.) *The Palgrave international handbook of human trafficking* (2019) 1.
[98] Articles 5, 6, 8, 23 and 34 (2) CTOC.
[99] Article 10 (1) CTOC.
[100] Hester Beatrix Kruger 'Combating Human Trafficking: A South African Perspective' (Thesis University of Free State), 2010, 242; SALRC, *Discussion Paper 111, Project 131*, 2006, 11 [hereinafter SALRC Discussion Paper] available at *https://www.justice.gov.za/salrc/dpapers/dp111.pdf.*
[101] Article 11 (1), (6) and 10 (4) CTOC.
[102] Article 12 CTOC.
[103] Article 18 and 26 CTOC.
[104] Article 15 (1) CTOC.

Secondly, Article 31 (1) CTOC calls for State Parties to establish practices and policies aimed at the prevention of transnational organized crimes.

Thirdly, the CTOC includes numerous obligations for the protection of victims of the offences. It is acknowledged that victims have an internationally recognized right to adequate remedies.[105] However, in many cases, victims face challenges accessing this right.[106] Article 25 (2) CTOC recognizes this and provides that each State party "shall establish appropriate procedures to provide access to compensation and restitution for victims." Concerning criminal proceedings Article 25 (3) states that views and concerns of victims must be considered. In addition, Article 24 (1) calls for effective protection from potential retaliation or intimidation for witnesses in criminal proceedings. Jordan emphasizes that this rule enables traumatized or underage witnesses to testify from a different location, avoiding confrontation with or intimidation from their traffickers in court.[107] Kruger points out that this is an important rule, considering that traffickers consistently intimidate trafficked victims and witnesses.[108] Lastly, Articles 18 and 27 CTOC call for international cooperation regarding law enforcement.

According to Gallagher the CTOC has the potential to combat human trafficking, even in situations where a State has not ratified the Palermo Protocol.[109]

2.2 Palermo Protocol

While the CTOC focuses on organized crime in general, the Palermo Protocol supplements the CTOC addressing specifically trafficking in humans as a form of organized crime.[110] South Africa ratified the Protocol on 20 February 2004.[111]

There are several reasons for the significance of the Palermo Protocol in international anti-trafficking law. Firstly, it includes the very first globally accepted

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[105] OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002, Guideline 9 [hereinafter OHCHR Guidelines] available at: *https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf*.

[106] Ibid.

[107] Ann D. Jordan, *The Annotated Guide to the complete UN Trafficking Protocol*, International Human Rights Law Group, 2002, 24, available at: *https://documentation.lastradainternational.org/lsidocs/UN%20Trafficking%20Protocol_Ann%20Jordan.pdf.*

[108] Kruger 2010 op cit (n 100) 246.

[109] Gallagher 2001 op cit (n 51) 979.

[110] Ibid, 981-982; Article 1 (1) Palermo Protocol.

[111] UN Treaty Collection op cit (n 39).

definition of the crime of human trafficking.[112] Secondly, the UN formally acknowledges poverty as a significant contributing element to trafficking.[113]

Unless otherwise stated, the provisions of the CTOC apply, mutatis mutandis, to the Palermo Protocol.[114] The Protocols requirements establish a minimum standard,[115] while domestic law can be broader or stricter.[116] It recognizes that "any human being, regardless of age or gender, could become a victim" and covers all forms of trafficking, while considering the vulnerabilities of women and children.[117] It sets forth several duties that States must adhere to within their national legislation aimed at combating trafficking.[118] These obligations will be discussed further in the following.

2.2.1 Definition

Firstly, States that are party to the Protocol must integrate the core of the Protocol's definition into their domestic laws "using simple and clear language."[119] A detailed analysis of the definition and its different aspects was discussed above.[120]

2.2.2 Criminalization and Prosecution

Secondly, States are required to criminalize and prosecute human trafficking under domestic law.[121] This includes not only intentional conduct but also attempt, participation in and organization of trafficking.[122] To avoid the mistaken assumption that trafficking must only be addressed in situations with a transnational dimension or the involvement of an organized group,[123] Article 4[124] must be read together with Article

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[112] See Part II of this thesis.
[113] Article 9 (4) Palermo Protocol states: States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
[114] Article 1 (2) Palermo Protocol.
[115] UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto*, 2004, para 255 [hereinafter UNODC Guides] available at: *https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf.*
[116] Article 34 (3) CTOC.
[117] UNODC Guides op cit (n 115) para 257; Article 2 (a) Palermo Protocol.
[118] Article 2, 5, 6, 9 Palermo Protocol.
[119] Jordan op cit (n 107) 7.
[120] See Part II of this thesis.
[121] Article 5 (1) Palermo Protocol.
[122] Article 5 (2) Palermo Protocol.
[123] James C. Hathaway *The Rights of Refugees Under International Law* (2005) 11.
[124] Article 4 Palermo Protocol states: This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

34 (2) CTOC.[125] Therefore, the crime of trafficking must be incorporated into the domestic legislation of each State Party, regardless of whether it has a transnational aspect or involves an organized criminal group. Criminalization is also relevant regarding border controls and commercial carriers.[126] Therefore, Article 11 (3) requires States to establish the obligation of commercial carriers to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State. Accordingly, Article 11 (4) calls for sanctions in cases of violation of this obligation. Effective criminalization also requires adequate sanctions. Since the Palermo Protocol is silent on this matter, State Parties must depend on the provisions of the CTOC, namely Articles 10 (4) and 11 (1).

2.2.3 Prevention

Thirdly, States must prevent trafficking as stipulated in Article 9 (1) (a).[127] The obligation to prevent also applies to border controls.[128] As this could potentially result in national anti-trafficking measures with discriminatory outcomes, the implementation and understanding of measures must adhere to "internationally recognized principles of non-discrimination."[129] Furthermore, Article 9 (2) provides that States shall endeavor to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. Furthermore, 11 (2) requires States to prevent the use of commercial transport for trafficking. However, this is not a strictly mandatory requirement because Article 11 (2) states "to the extent possible." In this context, a critical point to note is the vague articulation of the obligations. For instance, phrases like "shall establish," "shall

[125] Article 34 (2) CTOC states: The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.
[126] Article 11 (1) and (2) Palermo Protocol.
[127] Article 9 (1) (a) Palermo Protocol states: 1. States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons.
[128] Article 11 (1) Palermo Protocol states: 1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.
[129] Article 14 (2) Palermo Protocol states: 2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

endeavor to undertake," "shall take measures," and "shall adopt measures" in Articles 9 (3) and 11 (2) make it difficult to pinpoint specific obligations accurately.[130]

2.2.4 Protection

Fourthly, the Palermo Protocol outlines various provisions that focus on victim protection and assistance. Article 6 obliges States to assist and protect victims of trafficking.[131] Article 6 (2) enumerates the actions that a State shall undertake to protect victims, including providing information and assistance as well as allowing them to express their views during legal proceedings. Article 6 (3) refers to provisions for the physical, psychological, and social recovery of victims of trafficking. The provisions in Article 6 (1) - (3) are not mandatory and conditional upon "in appropriate cases," due to the substantial expenses associated with these measures that apply across all States regardless of varying levels of socio-economic development or resource availability.[132] This stance has faced criticism due to its perceived unnecessary limitations because it contradicts international human rights law, which unequivocally stipulates that victims of trafficking should be granted access to sufficient and suitable remedies.[133] Article 6 (4) Palermo Protocol provides enhanced protections for trafficked children and the consideration of their special needs,[134] in line with the principle of the best interests of the child. An essential part of victim protection is reparation. Following their escape from trafficking or the conclusion of legal proceedings in their current location, trafficking victims might desire to return to their home country. Article 8 (1) Palermo Protocol validates victims' entitlement to return to their country of origin or a place of permanent residence and mandates both the home State and the receiving State to facilitate the process of returning. In certain situations, the repatriation of victims to their home country can lead to severe

[130] Jordan op cit (n 107) 2-3.

[131] Article 6 (1) Palermo Protocol states: In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

[132] UNODC Guides op cit (n 115) para 216.

[133] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc. A/AC.254/27, 8 February 2000, 3, available at: *https://digitallibrary.un.org/record/415582*.

[134] Article 6 (4) Palermo Protocol states: Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

repercussions. The victim could potentially be exploited by traffickers as a means of intimidation or retaliation, posing risks of stigmatization and the possibility of being trafficked again. Acknowledging these concerns, Article 8 (2) mandates that any repatriation should prioritize the safety of victims and respect their rights under international law.

Although the protection provisions seem comprehensive, several critical aspects need to be mentioned. A major concern is the wording of the victim protection provisions. Unlike the law enforcement provisions, they are not mandatory, which makes it difficult to set minimum standards and hold ratifying States accountable.[135] Furthermore, Gallagher points out the weakness of the Palermo Protocol in terms of victim identification.[136] Given that "identification of victims is essential for their appropriate access to support and assistance services"[137] the lack of identification mechanisms in the Protocol is regrettable. Additionally, the Protocol does not recognize the fact that victims of trafficking end up undocumented and illegal in destination countries and are imprisoned, fined, and treated as criminals rather than victims.[138] Gallagher highlights the Protocol's failure in this regard to protect victims regarding the prosecution of crimes they have to commit as a direct consequence of the trafficking process.[139]

2.2.5 Cooperation

Article 2 (c) Palermo Protocol states the promotion of cooperation between States Parties as one purpose. Article 9 (4) calls for bilateral or multilateral cooperation in combating trafficking, particularly addressing the root causes to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, explicitly mentioning poverty in this regard. Article 9 (5) includes a similar provision regarding the discouragement of the demand factors. Article 11 (6) calls for cooperation among border control agencies. Unlike the CTOC the Palermo Protocol does not encompass provisions regarding international cooperation on law enforcement. However, given

[135] Gallagher 2001 op cit (n 51) 991.
[136] Ibid, 994.
[137] UN.GIFT, *The Vienna Forum report: a way forward to combat human trafficking*, 2008, para. 176, available at: *https://www.humanrights.ch/cms/upload/pdf/170307_Vienna_Forum.pdf*.
[138] Takiyah R. McClain 'An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act' (2007) 40 *Vanderbilt Journal of Transnational Law* 585.
[139] Gallagher 2001 op cit (n 51) 990.

that the Palermo Protocol supplements the provisions of the CTOC, Articles 18, 26, and 27 of the CTOC are applicable in this context. Furthermore, Article 10 (1) Palermo Protocol calls for national cooperation between law enforcement, immigration and other relevant authorities by exchanging information to prosecute the offences. In addition, Articles 9 (3) and 6 (3) Palermo Protocol call for cooperation with non-governmental organizations.

2.3 CRC

Concerning the legal protection of children, in particular, the CRC encompasses all aspects of children's rights - civil, political, economic, social, and cultural. Additionally, aside from CEDAW, it stands as the only current international human rights agreement that explicitly addresses trafficking.[140] South Africa signed the CRC on 29 January 1993 and ratified it on 16 June 1995.[141]

The CRC contains several provisions and obligations related to child trafficking. In addition to emphasizing the principle of acting in the child's best interests,[142] the Convention safeguards fundamental human rights that are often violated in cases of child trafficking, including the right to life, survival, and maximum development,[143] as well as rights to privacy,[144] freedom,[145] and education.[146] What stands out significantly is the clear provision regarding child trafficking in Article 35, which calls for States Parties to "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". The comprehensive provision to prevent child trafficking, whether it occurs domestically or crosses borders, "for any purpose and in any form," is seen as a crucial safety measure against trafficking.[147] Because Article 35 employs the terminology "any purpose or any form," the prohibition is not solely confined to recruitment for prostitution or sexual exploitation. Rather, it encompasses various scenarios where children are separated

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[140] Article 35 CRC; Anne Gallagher 'The International Legal Framework' in Anne Gallagher *The International Law of Human Trafficking* (2010) 65.
[141] UN Treaty Collection, *CHAPTER IV – HUMAN RIGHTS, 11. Convention on the Rights of the Child*, available at: *https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en*.
[142] Article 3 CRC.
[143] Article 6 (1) and (2) CRC.
[144] Article 16 (1) CRC.
[145] Article 37 (b) CRC.
[146] Article 28 CRC.
[147] UNICEF, *Implementation Handbook for the Convention on the rights of the Child,* 2007, 532 available at: *https://www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf.*

from their surroundings or surrendered for diverse motives, extending beyond mere exploitation. While the focus has predominantly centred on trafficking for sexual exploitation, the responsible Committee has also progressively acknowledged the occurrence of trafficking for the purpose of economic exploitation, encompassing forced labour, as well as trafficking for adoption or forced marriage.[148] Moreover, Article 36 CRC introduces a comprehensive provision mandating States to protect children against "all forms of exploitation prejudicial to any aspects of the child's welfare." Furthermore, Article 34 CRC specifically addresses sexual exploitation, mandating that States Parties must adopt necessary national, bilateral, and multilateral measures to protect children from all types of sexual exploitation and sexual abuse, as well as prevent their exploitative use. Despite this obligation, the CRC does not define "sexual exploitation." The CRC also places obligations on States regarding the separation of children from their parents. Article 9 (1) provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will. Article 10 elaborates further by stipulating that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane, and expeditious manner. Additionally, Article 11 (1) addresses the illicit transfer and non-return of children abroad and does not specifically pertain to a particular form of exploitation. Regarding child trafficking for illegal adoptions, Article 21 imposes several responsibilities on States Parties to ensure that the principle of the child's best interests is upheld in adoption cases. Additionally, Article 19 (1) CRC holds a comprehensive responsibility to protect children from "various types of physical or mental harm, injury, or mistreatment, including neglect, abuse, exploitation, or violence" when under the care of parents or guardians. Regarding the recovery of children Article 39 CRC calls for States Parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of exploitation in an environment which fosters the health and dignity of the child. Furthermore, the CRC incorporates protections against specific forms of exploitation. Concerning labour trafficking,[149]

[148] Gallagher 2010 op cit (n 140) 65; UN Committee on the Rights of the Child, *Concluding Observations: Democratic Republic of the Congo,* UN Doc. CRC/C/COD/CO/2, 10 February 2009, paras. 82–83.

[149] According to Article 3 of the ILO Child Labour Convention, child trafficking is identified as one of the worst forms of child labour, linking child labour directly to child trafficking.

Article 32 (1)[150] protects the child's right to be protected from economic exploitation. Unfortunately, the CRC is silent on the issue of repatriation. In this regard, the only provision in the CTC to rely upon is the best interest of the child principle.

The significance of the CRC in combating child trafficking cannot be understated, especially considering its nearly universal ratification.[151] However, there are certain problematic aspects. Primarily, the Convention lacks sufficient explanations and definitions for key concepts related to human trafficking. Especially the legal terms "abduction," "sale," and "trafficking" are not defined within the CRC.[152] Additionally, the distinction between "sale of" and "traffic in" children is not clarified.[153] In this context, a report of the UN Special Rapporteur states that "the key to the concept of sale is whether the child is exploited."[154] Another issue is that States Parties are solely obligated to prevent the trafficking of children without being required to prosecute and penalize such actions.[155]

2.4 OPSC

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography[156] supplements the CRC, while filling gaps.[157] South Africa ratified the Protocol on 30 June 2003.[158] The OPSC does not specifically address or define child trafficking mentioning trafficking only in its Preamble. Nevertheless, Article 1 OPSC obliges States to prohibit the sale of children

[150] Article 32 (1) CRC states: States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
[151] UN Treaty Collection op cit (n 141).
[152] Gallagher 2010 op cit (n 140) 65.
[153] Kruger 2010 op cit (n 100) 226.
[154] The sale of children is therefore defined as: The transfer of a child from one party (including biological parents, guardians and institutions) to another, for whatever purpose, in exchange for financial or other reward or compensation. - UN Commission on Human Rights, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography,* 6 March 1991, E/CN.4/RES/1991/53, para. 41, available at: *https://www.refworld.org/docid/3b00f0c0f.html.*
[155]Article 35 CRC; Kruger 2010 op cit (n 100) 226.
[156] UN Committee on the Rights of the Child, Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography: list of issues to be taken up in connection with the consideration of the initial report of Argentina (CRC/C/OPSC/ARG/1), 26 March 2010, CRC/C/OPSC/ARG/Q/1, [hereinafter OPSC] available at: *https://www.refworld.org/docid/50b353232.html.*
[157] Preamble of the OPSC.
[158] UN Treaty Collection, *CHAPTER IV – HUMAN RIGHTS, 11. c Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 2023, available at: *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en.*

and clarifies this duty in Article 2 (a) defining "sale of children"[159] which is comprehensive enough to cover most scenarios involving trafficked children.[160] It is important to note that this definition does not solely centre on child exploitation itself; rather, it highlights the steps that could potentially lead a child into an exploitative situation.[161] Although there is a difference between trafficking and the sale of children,[162] the CRC Committee has established the link with its practice.[163] Article 3 (1) (a) calls for the criminalization of offences regarding the sale of children and conduct linked to the sale of children, such as illegal adoptions, child prostitution and child pornography.[164] This also includes the obligation to impose appropriate penalties that consider the offences' grave nature.[165] In comparison to the regulations and State obligations outlined in the CRC, where the language is "shall take all appropriate measures,"[166] the wording in the OPSC appears to be more stringent, mandating States to "prohibit" and "ensure" certain activities, and explicitly mentioning these activities.[167] Regarding criminal proceedings Article 8 (1) OPSC obliges States to protect the rights and interests of child victims, thus recognizing the vulnerabilities and special needs of children. Furthermore, Article 10 requires States to cooperate internationally to prevent the mentioned offences. All in all, the OPSC is seen as a commendable effort to combat child trafficking.[168]

[159] According to Article 2 (a) the sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.
[160] Gallagher 2010 op cit (n 140) 67.
[161] UNICEF op cit (n 48) 3.
[162] While the sale of children and trafficking can overlap when the sale occurs with an exploitative intent, it is important to note that not every instance of child trafficking equates to an act of selling children. – UNICEF op cit (n 48) 4.
[163] Gallagher 2010 op cit (n 140) 67; UN Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, UN Doc. CRC/GC/2005/6, 3 June 2005, para. 2.
[164] Article 3 (1) (a) (i) (c) OPSC.
[165] Article 3 (3) OPSC.
[166] Article 35 CRC.
[167] Articles 1 and 3 (1) OPSC.
[168] Rino Kamidi, A legal response to child trafficking in Africa: a case study of South Africa and Benin, (Unpublished LLM thesis University of Pretoria), 2007.

2.5 CEDAW

CEDAW, which South Africa is party to,[169] makes direct reference to trafficking in its Article 6 obliging States to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." It has a broad spectrum addressing not just trafficking aimed at sexual exploitation but also includes all types of trafficking for various purposes, such as forced labour and forced marriage. Article 16 (2) CEDAW for instance provides that "the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage." This holds significance as trafficking intended for forced marriage qualifies as exploitative and is prevalent globally.[170]

However, the wording of the provision "appropriate measures" is vague and creates challenges in determining the exact scope of obligations for States Parties under this instrument.[171] Gallagher points out another concern arising from the Convention's shortcoming of definitions for "all forms of trafficking in women" or "exploitation of the prostitution of women" especially because the full travaux préparatoires to the Convention are not available.[172] Nonetheless, CEDAW encompasses detailed provisions that enable States to confront trafficking and other forms of exploitation while also addressing the underlying factors that contribute to increased trafficking.[173]

2.6 ILO Convention on Child Labour

According to Article 3 of the ILO Convention on Child Labour, child trafficking is one of the worst forms of child labour. It imposes an obligation on States to adopt all appropriate measures to eliminate it.[174] States shall design and implement programmes of action to eliminate as a priority the worst forms of child labour.[175]

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[169] South Africa ratified CEDAW on 15 December 1995. – UN Treaty Collection, *CHAPTER IV - HUMAN RIGHTS, 8. Convention on the Elimination of All Forms of Discrimination against Women,* 2023, available at: *https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.*

[170] IOM op cit (n 97) 12.

[171] Gallagher 2010 op cit (n 140) 64.

[172] Ibid.

[173] CEDAW, *General Recommendation No. 19: Violence against Women*, 1992, (Contained in Document A/47/38) para. 16.

[174] Article 1 states: Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

[175] Article 6 (1) ILO Convention on Child Labour.

Moreover, measures to provide sanctions shall be taken.[176] It also emphasizes the significance of education in eliminating child labour.[177]

2.7 Intercountry Adoption Convention

South Africa ratified the 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[178] in 2003. The Convention aims to guarantee that intercountry adoptions adhere to legal processes "in the best interest of the child."[179] According to Article 1 (b) of the Convention the purpose is to prevent child trafficking through cooperation. The Convention, however, does not define child trafficking, nor does it criminalize it. Nevertheless, it is an important Convention given the fact that intercountry adoptions can become avenues for human trafficking exploitation.[180]

2.8 Children in Armed Conflict Protocol

South Africa ratified the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,[181] which supplements the CRC in 2009.[182] While this Protocol does not specifically focus on human trafficking, its prohibition of recruiting and utilizing children under 18 in armed conflict in Article 4 (1) applies to situations involving children trafficked for forced military service recognizing the best interest of the child.[183]

2.9 Soft law

In addition to established legal frameworks, there are supplementary instruments and provisions addressing human trafficking, often termed "soft law." Unlike formal legal

[176] Article 7 (1) ILO Convention on Child Labour.
[177] Article 7 (2) ILO Convention on Child Labour.
[178] Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33, [hereinafter Intercountry Adoption Convention].
[179] Article 1 Intercountry Adoption Convention.
[180] Pat Moodley 'Inter-Country Adoptions and Child Trafficking-a Fine Line Indeed' (2006) 20.70 *Agenda* 145.
[181] UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 [hereinafter Children in Armed Conflict Protocol].
[182] UN Treaties Collection, *CHAPTER IV – HUMAN RIGHTS, 11. b Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 2023, available at: *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en.*
[183] M. Happold 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' (2000) XLVII.1 *Netherlands international law review* 27.

frameworks, these soft law instruments do not directly impose obligations on States or confer rights upon individuals or groups. However, they nonetheless have tangible legal influence and contribute to the evolution of customary law.[184]

For example, the obligation outlined in treaties to combat human trafficking has been further clarified through non-treaty tools, such as UNICEF's guidelines on child trafficking.[185] A key feature of these guidelines is their explicit recognition of the rights of trafficked children. They underscore the fundamental necessity of consistently prioritizing the best interests of the child,[186] particularly concerning the repatriation of child victims.[187]

Furthermore, the recommended principles and guidelines on Human Rights and Human Trafficking,[188] or the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children,[189] detail specific and concrete actions required for a significant effort aimed at preventing trafficking.[190]

3. Regional legal framework

Besides the international legal framework, several regional agreements on human trafficking have emerged within different regional human rights systems. Given the focus of this thesis on human trafficking in the context of South Africa, the following addresses African regional treaties concerning child trafficking.

3.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights[191] which South Africa is party to[192] lacks a dedicated provision on human trafficking, but encompasses numerous human rights commonly infringed upon in cases of trafficking. These include the rights to

[184] Gallagher 2010 op cit (n 140) 138-139.
[185] UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, 2006, [hereinafter UNICEF Guidelines] available at: *https://www.unhcr.org/sites/default/files/legacy-pdf/4d9484e39.pdf*.
[186] Ibid, Guidelines 2 and 8.
[187] Ibid, Guidelines 9 and 11.
[188] OHCHR Guidelines op cit (n 105) Guideline 8 outlines special measures for the protection and support of child victims of trafficking.
[189] Ministerial Conference on Migration and Development of the European Union and African States, *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children*, 2006, available at: *https://au.int/sites/default/files/pages/32899-file-3._ouagadougou_action_plan_to_combat_trafficking_en_1.pdf*.
[190] Gallagher 2010 op cit (n 140) 143.
[191] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter ACHPR].
[192] African Union, State Parties to the African Charter, 2023, available at: *https://achpr.au.int/en/states*.

equality, non-discrimination, life, liberty, bodily integrity, security, privacy, dignity, and freedom of movement.[193] Furthermore Article 5 prohibits "all forms of exploitation." Concerning labour trafficking, the ACHPR incorporates the right to engage in work "under equitable and satisfactory conditions."[194]

3.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child[195] complements the global standards of the CRC by adding regional nuances.[196] South Africa ratified this Charter in 2000.[197] The African Children's Charter, similar to the CRC, addresses child trafficking explicitly. Article 29 outlines that "States Parties shall take appropriate measures to prevent the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child." Unfortunately, there is no definition of "traffic of children" provided.

In the context of adoption, Article 24 (4) requires States to adopt all appropriate measures to ensure that, in cases of intercountry adoption, the placement does not lead to trafficking or illicit financial gain for individuals attempting to adopt a child. Concerning labour trafficking Article 15 (1) calls for protection of children from all forms of economic exploitation. In contrast to the provision in the CRC this obligation covers the formal and the informal sector.[198] This holds immense significance as children are frequently trafficked into unregulated, informal sectors for forced labour.[199] When compared to Article 32 (2) CRC, Article 15 (2) African Children's Charter is restricted to appropriate legislative and administrative measures and does not explicitly encompass social and educational measures. However, it is worth noting that educational and other social measures could fall under the umbrella of both legislative and administrative measures.

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[193] Articles 2 - 6 and 12 ACHPR.
[194] Article 15 ACHPR.
[195] OAU, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) [hereinafter African Children's Charter].
[196] Danwood Mzikenge Chirwa 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10.2 *The International journal of children's rights* 157.
[197] African Union, List of Countries (African Children's Charter) available at: *https://au.int/sites/default/files/treaties/36804-sl-AFRICAN_CHARTER_ON_THE_RIGHTS_AND_WELFARE_OF_THE_CHILD.pdf*.
[198] Article 15 (2) African Children's Charter.
[199] UN.GIFT op cit (n 137) 5.

According to Article 16 (1), States Parties commit themselves to take specific measures to protect children from all forms of torture, inhuman or degrading treatment, abuse, neglect, or maltreatment, including sexual abuse. Compared to Article 19 CRC the African Children's Charter calls for "specific" measures. This duty is underscored in Article 27[200] again being more precise than Article 34 CRC in terms of State obligations. Other pertinent regulations prohibit child marriages and the active involvement of children in armed conflict.[201] The African Children's Charter lacks an equivalent provision to Article 39 CRC, but Article 16 (2) African Children's Charter calls for the protection of children against abuse and neglect.

3.3 Maputo Protocol

The Maputo Protocol[202] complements the ACHPR and prohibits discrimination of all forms against women.[203] South Africa ratified the Protocol in 2004.[204] Its Article 4 (2) (g) directly addresses trafficking and stipulates that States Parties shall take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk. Unfortunately, "trafficking in women" is not defined in the Protocol. However, it protects women against all kinds of violence, encompassing a broad definition of violence.[205] Article 3 (3) addresses exploitations and mandates that States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women. Furthermore, it includes various provisions that are relevant in cases of trafficking,

[200] Article 27 African Children's Charter states: States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent; (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.

[201] Article 21 (2) and 22 African Children's Charter.

[202] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003 [hereinafter Maputo Protocol].

[203] Article 2 Maputo Protocol.

[204] African Union, List of Countries (Maputo Protocol) available at*:* *https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf.*

[205] Article 3 (4) and 1 (j) Maputo Protocol.

such as the right to life,[206] the prohibition of child marriages,[207] child labour,[208] and child participation in armed conflict.[209]

3.4 African Youth Charter

The 2006 African Youth Charter[210] was adopted to promote and protect the rights and welfare of the youth,[211] which is defined as "every person between the ages of 15 and 35 years."[212] South Africa ratified this Charter in 2009.[213] Trafficking is directly addressed in Article 23 (l) requiring States to protect girls and young women against trafficking.[214] Since girls and young women are more vulnerable due to many factors, this is well-received.[215] However, Kruger points out rightly, that the exclusion of young males from this protection is regrettable, considering that literature also confirms the trafficking of young boys.[216]

4. Conclusion

As demonstrated, the substantial obligations to combat trafficking are derived from various legal frameworks. Even though these obligations are often formulated vaguely, they can generally be categorized into the following duties: the obligation to prevent trafficking, the obligation to criminalize and prosecute human traffickers, the obligation to protect and assist the victims and the obligation to cooperate. Notably, when it comes to children, there are heightened requirements due to the principle of the best interests of the child.

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[206] Article 4 (1) Maputo Protocol.
[207] Article 6 (a) and (b) Maputo Protocol.
[208] Article 13 (g) Maputo Protocol.
[209] Article 11 (4) Maputo Protocol.
[210] African Union, African Youth Charter, 2 July 2006.
[211] Preamble of the African Youth Charter.
[212] Definitions in the African Youth Charter.
[213] African Union, List of Countries (African Youth Charter) available at: *https://au.int/sites/default/files/treaties/7789-sl-AFRICAN_YOUTH_CHARTER_0.pdf.*
[214] According to Article 23 (l) States shall "Enact and enforce legislation that protect girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography."
[215] Pharoah op cit (n 32) 37.
[216] Kruger 2010 op cit (n 100) 282.

PART IV - SOUTH AFRICA'S LEGAL RESPONSE

1. Legal response

In South Africa, various factors have motivated the government's efforts to combat human trafficking. Among these factors are the ratification of the Palermo Protocol and international pressure, especially through the US's annual TIP Report.[217] The inquiry into investigating human trafficking in South Africa was launched by the South African Law Reform Commission (SALRC) in 2003.[218] Nevertheless, trafficking only became a notable concern in the public eye shortly before the 2010 FIFA World Cup. Anti-trafficking organizations were worried that the Soccer World Cup would increase human trafficking incidents, particularly the sex trafficking of women and children.[219] Initially, the plan was to accelerate the progress of the TIP Bill of 2010 through the parliamentary process before the 2010 World Cup in South Africa. Due to discrepancies, especially regarding the definition, this was postponed.[220] Ultimately, the TIP Act was enacted in 2013, which came into effect in 2015. The following analyses South Africa's legal response, particularly the TIP Act, critically in terms of the legal obligations outlined in Part III of this thesis.

1.1 Applicability of International Law in South Africa

Regarding the applicability of international law, the South African Constitution[221] stipulates in Section 232 that customary international law is typically incorporated into South African law automatically, provided it does not contradict the Constitution or existing South African legislation.[222] Regarding treaties, South Africa adopts a dualist approach. While treaty ratification establishes international commitments for the country, the dualist framework mandates that for these treaty obligations to hold legal weight within the nation, the treaty must undergo incorporation into domestic

[217] South Africa remains a Tier 2 Watch List Country. - US TIP Report 2023 op cit (n 21) 71, 85.
[218] SALRC, Trafficking in Persons, Issue Paper 25, Project 131, 2004 [hereinafter SALRC Issue Paper] available at: *https://www.justice.gov.za/salrc/ipapers/ip25_prj131_2004.pdf*.
[219] Elsje Bonthuys 'The 2010 Football World Cup and the Regulation of Sex Work in South Africa' (2012) 38(1) *Journal of Southern African Studies* 14.
[220] Parliamentary Monitoring Group, Media Briefing, 2010, available at: *https://pmg.org.za/briefing/18806/*; Mofokeng and Olutola op cit (n 13) 118.
[221] Constitution of South Africa, 1996 [hereinafter Constitution].
[222] Section 232 Constitution; Trafficking is considered part of customary law by some. – Bassiouni op cit (n 78) 445.

legislation.[223] With the enactment of the TIP Act, South Africa fulfiled its obligations derived from ratifying the Palermo Protocol.[224]

1.2 Legal situation before the enactment of the TIP Act

Before the enactment of the TIP Act, the South African legal framework concerning human trafficking was fragmented due to the absence of a specific legal framework addressing trafficking in persons directly.[225] Therefore, it was necessary to resort to common and statutory law that could be applied in trafficking cases.[226] This is also because it is generally recognized that human trafficking comprises a spectrum of offences bundled together, rather than constituting a single crime.[227] While there were various pieces of legislation addressing child trafficking before the enactment of the TIP Act, none of them provided a comprehensive framework to bring South Africa into compliance with its international and regional obligations. The Children's Act[228] and the Sexual Offences Act 2007[229] include provisions regarding trafficking, but both are constrained in their scope and only apply to specific trafficking cases, which does not align with international obligations.[230] The Children's Act criminalizes trafficking when it involves children but lacks procedures to identify trafficked children as victims or provisions to prevent them from facing charges for crimes they may have committed due to trafficking.[231] The Sexual Offences Act of 2007 criminalizes trafficking exclusively for the purposes of sexual exploitation but does not take into account that trafficking may serve other purposes.[232] Importantly, neither of these Acts include prevention provisions.[233] Therefore the enactment of the TIP Act was necessary to fulfil the obligations that derived from ratifying the Palermo Protocol. Once the Combating of Trafficking in Persons Bill was passed, the trafficking components of the

[223] J. Dugard 'South Africa' in D. Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 451.
[224] Opening paragraph of the TIP Act.
[225] Mollema 2014 op cit (n 33) 247.
[226] Bronwyn Pithey 'Do New Crimes Need New Laws?' (2004) 9 *SA Crime Quarterly* 7.
[227] UNODC Toolkit op cit (n 82) xx.
[228] Act 38 of 2005.
[229] Act 23 of 1957.
[230] Pithey op cit (n 226) 9.
[231] Kreston 2007 op cit (n 12) 43.
[232] Nina Mollema 'Combating human trafficking in South Africa: A comparative legal study' (Unpublished doctoral dissertation, University of South Africa), 2013, 416.
[233] Kruger 2016 op cit (n 35) 64; Mollema 2014 op cit (n 33) 247.

mentioned Acts were repealed.[234] However, it is important to note that the Children's Act must be considered alongside the TIP Act in cases of child trafficking, particularly because the TIP Act makes references to it.

1.3 The TIP Act

The TIP Act was presented to parliament on 16 March 2010, and President Jacob Zuma officially signed the TIP Act, making it law, in July 2013. This procedure was anteceded by an issue paper[235] and a discussion paper[236] on human trafficking presented by the SALRC. The TIP Act represents a significant step forward in the fight against human trafficking because it takes a comprehensive and all-encompassing approach. It addresses all forms of trafficking and protects trafficked individuals, regardless of their age or gender.[237] The primary motivation behind the TIP Act was to address the aforementioned voids left by common and statutory law provisions and comply with international standards[238] because a fundamental requirement for a criminal justice system response is the presence of laws that allow the prosecution of specific offences.[239] This necessity arose from the reality that, during 2013 and 2014, only four convictions were achieved for sex trafficking charges due to the absence of comprehensive legal measures aimed at effectively prosecuting perpetrators.[240] Furthermore, the government did not initiate any prosecutions or achieve convictions against any perpetrators involved in labour trafficking during the year 2014.[241]

1.3.1 Definition

A crucial issue to consider is whether South Africa's definition of trafficking for child victims aligns with the Palermo Protocol, as a clear definition significantly impacts the ability to identify and prosecute this crime.

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[234] IOM, Regional Office for Southern Africa, *No Experience Necessary: The Internal Trafficking of Persons in South Africa. Report for the International Organization for Migration*, 2008, 23, available at: *https://southafrica.iom.int/sites/g/files/tmzbdl1136/files/documents/SAInternalTraffickingReportOctober2008.pdf.*

[235] SALRC Issue Paper op cit (n 218).

[236] SALRC Discussion Paper op cit (n 100).

[237] Mofokeng and Olutola op cit (n 13) 117.

[238] Pithey op cit (n 226) 9.

[239] Amy Farrell, Colleen Owens, and Jack McDevitt 'New laws but few cases: understanding the challenges to the investigation and prosecution of human trafficking cases' (2014) 61.2 *Crime, law, and social change* 139.

[240] US Department of State, Trafficking in Persons Report, 2015, 309 [hereinafter US TIP Report 2015] available at: *https://2009-2017.state.gov/documents/organization/245365.pdf*.

[241] Ibid, 310.

Similarly, to the definition provided in the Palermo Protocol, which was discussed in Part II of this thesis,[242] Section 4 (1) TIP Act refers to three criteria (acts, means, and purpose) that must be fulfiled for a case of human trafficking to be established and defines trafficking in persons as follows:

> "4. (1) 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."

The definition incorporates the terminology outlined in the Palermo Protocol while expanding its scope. In regard to the prohibited acts, the TIP Act mirrors the acts of human trafficking outlined in the Palermo Protocol.[243] Additionally, the TIP Act broadens these acts to contain the delivery, sale, exchange, and lease of persons. Kruger finds this beneficial, particularly in the context of "delivery," because this expansion means that trafficking agents who are not directly involved in recruiting, transporting, or harbouring victims but are involved in delivering them can now be

[242] See pages 7 – 10.
[243] Which encompass the recruitment, transportation, transfer, harboring, or receipt of persons.

subject to prosecution.[244] Furthermore, the TIP Act also designates the adoption of a child,[245] as well as entering into a forced marriage with another person,[246] whether within or across the borders of South Africa, for the purpose of exploiting that child, as offences.[247] Although this aligns with the international standard it is still concerning that the TIP Act does not provide clear definitions for some crucial concepts and terms, such as "coercion," "transportation," and "exploitation."[248] Kruger believes that the legal ambiguity surrounding their interpretation could significantly hinder successful prosecutions.[249]

The TIP Act's definition is also broader when it comes to the means employed, as it encompasses "a threat of harm," "kidnapping," and "the direct or indirect giving or receiving of payments, compensation, rewards, benefits, or any other advantage."[250] According to Kruger, this is valuable because "threat of harm" does not inevitably overlap with the phrase "threat of force," as "harm" could also be a non-violent threat. This also applies to "kidnapping," as it can occur without the "use of force."[251] Regarding the prohibited exchange of "any other advantage," Mollema suggests that it serves as an all-around phrase that considerably broadens the scope of the means component.[252] Section 4 (1) (c) TIP Act, considers the "abuse of vulnerability," as a "mean" of trafficking, which aligns with the South African socio-cultural situation. David points out that this is positive, as domestic law should reflect the specific realities of the local system.[253] However, the definition has also faced criticism for being overly complex and lengthy because some of the terms within it

[244] Kruger 2016 op cit (n 35) 74.
[245] Section 4 (2) (a) TIP Act.
[246] Section 4 (2) (b) TIP Act.
[247] Kreston 2007 op cit (n 12) 36–37; Ingrid Palmary and Thea de Gruchy, *Changing policy: Lessons from the trafficking in persons act (2013) in South Africa,* Working Paper 39, Migrating out of Poverty Research Programme Consortium, University of Sussex, 2016, 16 available at: *http://www.migratingoutofpoverty.org/files/file.php?name=wp39-palmary-and-de-gruchy-2016-changing-policy-lessons-from-the-trafficking-in-persons-act-(2013)-in-south-africa.pdf&site=354*.
[248] Kruger 2016 op cit (n 35) 77; Dominika Borg Jansson *Modern Slavery, A Comparative Study of the Definition of Trafficking in Persons* (2014) 243.
[249] Kruger 2016 op cit (35) 77.
[250] Section 4 (1) (a), (g) and (j) TIP Act.
[251] Kruger 2016 op cit (35) 76.
[252] Mollema 2014 op cit (n 33) 249.
[253] Fiona David 'Law enforcement responses to trafficking in persons: challenges and emerging good practice' (2007) 347 *Trends & Issues in Crime and Criminal Justice* 2.

appear to duplicate each other.[254] While repetition itself is not problematic, a lengthy definition can be inefficient.

The TIP Act's definition differs from the Palermo Protocol by also addressing domestic trafficking, thereby improving upon the Palermo Protocol's definition, which has faced criticism in this regard.[255] This is significant as research reveals that internal human trafficking is a substantial concern.[256] The TIP Act also broadens the scope of those potentially affected by trafficking to include immediate family members.[257] Mollema suggests this was added to protect trafficked victims' families and friends due to the risk of threat they face.[258]

Regrettably, the TIP Act does not explicitly differentiate between trafficking in adults and trafficking in children, as mandated by the Palermo Protocol. As mentioned in Part II of this thesis[259] the three elements of the human trafficking definition (acts, means, and purpose) apply exclusively to adult trafficking. In cases of child trafficking, the Palermo Protocol necessitates only the prohibited acts and the exploitative purpose. However, "abuse of vulnerability" is part of the definition in the TIP Act.[260] Because "being a child" can also qualify as a case of "abuse of vulnerability,"[261] Kreston suggests defining child trafficking under the TIP Act as "the presence of both the act of trafficking and its purpose, while the victim was subjected to trafficking through the abuse of vulnerability, solely due to their status as a child," thereby making the other means outlined in Section 4 (1) TIP Act irrelevant. The definition of child trafficking could potentially also be constructed using the concept of "abuse of power."[262] Nevertheless, it is crucial to note that despite overlaps, an abuse of

[254] Mollema 2014 op cit (n 33) 249; Pharoah op cit (n 32) 77-78.
[255] See Part II of this thesis, pages 7-9.
[256] UNICEF op cit (n 48) 11.
[257] Section 4 (1) TIP Act which states: "aimed at either the person or an immediate family member of that person or any other person in close relationship to that person."
[258] Mollema 2014 op cit (n 33) 249.
[259] See Part II of this thesis, page 9.
[260] Section 4 (1) (c) TIP Act; Abuse of vulnerability is defined in section 1 TIP Act as: any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from – (a) the person having entered or remained in the Republic illegally or without proper documentation; (b) pregnancy; (c) any disability of the person; (d) addiction to the use of any dependence-producing substance; (e) being a child; (f) social circumstances; or (g) economic circumstances.
[261] Section 1 (e) TIP Act; UNODC, *Issue Paper, Abuse of a position of vulnerability and other "means" within the definition of trafficking in persons*, 2013, 13, available at: *https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf*.
[262] Section 4 (1) (h) TIP Act.

vulnerability can occur independently of an abuse of power.[263] In this regard, Kruger criticizes the TIP Act, suggesting that it could have eliminated any ambiguity by adopting the exact phrasing of Article 3 (c) Palermo Protocol.[264] Kreston shares this viewpoint, adding that Section 11 TIP Act, which deals with consent, would have been unnecessary in that case.[265] Horne accurately points out that the lack of clarity regarding specific terms adds further complexity to research in this already challenging field.[266]

Furthermore, the concept of consent plays an essential role in accurately defining trafficking. As mentioned before,[267] under the Palermo Protocol, child trafficking involves only two components: the acts and the purpose of trafficking. As a result, it excludes consent as a valid defence. In this regard, the TIP Act aligns with the Palermo Protocol by providing in Section 11 (1) that consent obtained from an adult using prohibited means cannot be used as a defence to the offences in Chapter 2. This also applies to individuals who exercise control or authority over a trafficked child.[268]

While it is widely acknowledged that "no legal definition of trafficking, no matter how meticulously crafted, can fully capture the nuances and complexities of the real world,"[269] the definition in the TIP Act largely aligns with international standards and is perceived as strong and conducive to effective investigation and prosecution of human trafficking offences.[270]

1.3.2 Criminalization and Prosecution

An essential aspect of combating human trafficking is the criminalization and effective prosecution of those responsible.[271] Gallagher and Holmes argue that a law that only addresses trafficking for sexual exploitation or focuses solely on trafficking involving certain persons falls short and hampers the ability of national law enforcement to

[263] Kreston 2014 op cit (n 34) 25-26.
[264] Kruger 2016 op cit (n 35) 78.
[265] Kreston 2014 op cit (n 34) 26.
[266] Juanida Horne 'The investigation of human trafficking: An impossible mission without elemental identification of the crime' (2010) 24 (3) *Acta Criminologica: African Journal of Criminology & Victimology* 23.
[267] See Part II of this thesis, page 9.
[268] Section 11 (1) (a) TIP Act.
[269] Gallagher 2010 op cit (n 140) 52.
[270] Paul Oluwatosin Bello and Adewale A. Olutola 'Effective Response to Human Trafficking in South Africa: Law as a Toothless Bulldog' 2022 *SAGE Open* 7; Kruger 2016 op cit (n 35) 74.
[271] Article 5 (1) and (2) Palermo Protocol and Article 5 CTOC.

combat trafficking effectively.[272] The TIP Act clearly defines all types of human trafficking as criminal offences, irrespective of the gender or age of the victims.[273] Furthermore, debt bondage is also included as an additional offence, which is different from the elements of the crime of human trafficking.[274] Making this form of exploitation illegal is important, because debt bondage, is the most common way people are enslaved through labour trafficking.[275] The TIP Act also includes offences such as the possession, destruction, concealment of, and tampering with travel documents[276] and the usage of the services of victims of trafficking[277] and conduct facilitating the trafficking.[278]

Aligning with Article 5 (2) Palermo Protocol,[279] any form of involvement[280] in human trafficking is criminalized under Section 10 (1) TIP Act. Even though the explicit mention of these forms of involvement in the TIP Act itself is not necessarily required because they are considered substantive crimes under the Riotous Assemblies Act,[281] their inclusion is not disadvantageous.[282] However, this extension strengthens the legal framework for prosecuting a broader range of individuals involved in the trafficking network.[283] Unfortunately, the organization of trafficking is not mentioned in either the Riotous Assemblies Act or the TIP Act, which contradicts the requirements of the Palermo Protocol.[284] This is problematic because human trafficking is an organized crime, and organizers can benefit from it without facing prosecution themselves, which creates a gap.[285] However, Kruger correctly points out that organizing can fall under a conduct that facilitates the crime.[286]

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[272] Anne Gallagher and Paul Holmes 'Developing an Effective Criminal Justice Response to Human Trafficking, Lessons From the Front Line' (2008) 18(3) *International Criminal Justice Review* 322.
[273] Section 4 (1) TIP Act.
[274] Section 5 TIP Act, which provides: "Any person who intentionally engages in conduct that causes another person to 45 enter into debt bondage is guilty of an offence."; SALRC Discussion Paper op cit (n 100) 86.
[275] Silindile Buthelezi 'Human trafficking and the new legal framework in South Africa: Intervention needed for the law to reach vulnerable girls and women' (2015) 105/29.3 *Agenda* 158.
[276] Section 6 TIP Act.
[277] Section 7 TIP Act.
[278] Section 8 TIP Act.
[279] Which mandates the criminalization of trafficking itself and any involvement in it, including attempts, participation, and organization.
[280] Such as the attempt to commit trafficking, inciting or encouraging others, and conspiring with any other person to commit the crime.
[281] Act 17 of 1956.
[282] SALRC Discussion Paper op cit (n 100) 74.
[283] Kruger 2016 op cit (n 35) 68.
[284] Article 5 (2) (c) Palermo Protocol.
[285] Kruger 2016 op cit (n 35) 68.
[286] Section 8 TIP Act.

Furthermore, Section 7 TIP Act forbids using services from trafficking victims. This provision is considered controversial because determining a client's good faith is difficult.[287] Engaging in activities related to intentionally advertising, publishing, printing, broadcasting, distributing, or causing such activities that facilitate or promote trafficking in persons through any means, including the use of the internet or other information technology, is also criminalized under the TIP Act.[288] Kruger is correct in pointing out that this provision empowers authorities to prosecute human traffickers who use online advertisement and communication, for actions such as facilitating child sex tourism and broadcasting webcam-based sex shows, especially because modern technology and the internet have created new avenues for human trafficking.[289] Additionally, Section 8 (1) (d) of the TIP Act broadly provides that any person who finances, controls, or organizes the commission of an offence is guilty of trafficking in persons. This is beneficial because, as David suggests, trafficking is "a process involving multiple offenders and crime sites across different jurisdictions."[290] This way, the scope of prosecuting offenders is broader.

In contrast to the Palermo Protocol, the TIP Act does not require intent for human trafficking, but intent is explicitly needed for debt bondage, tampering with documents, and using the services of trafficked victims.[291] Even though Mollema believes that the phrase "for the purpose of" should indicate the need for intent,[292] this would not be harmful, because Jansson rightly points out that State Parties are not prevented from criminalizing negligent conduct.[293] The TIP Act does not require that trafficking occurred within an organized criminal group, which complies with the requirements of the CTOC.[294] This is commendable because it encourages a more comprehensive approach to addressing human trafficking, holding both individual traffickers and organized criminal groups accountable.[295]

[287] Mollema 2014 op cit (n 33) 253.
[288] Section 8 (1) (c) TIP Act.
[289] Kruger 2016 op cit (n 35) 72.
[290] David op cit (n 253) 2.
[291] Sections 5, 6, 7 and 8 (1) (a) TIP Act.
[292] Mollema 2014 op cit (n 33) 252.
[293] Jansson op cit (n 248) 73.
[294] Article 34 (2) CTOC.
[295] Jordan op cit (n 107) 13.

The TIP Act aligns with international standards[296] by holding both individuals and legal entities accountable for human trafficking, defining "person" in Section 1 broadly to include natural persons, juristic persons, and partnerships.[297]

Regarding commercial carriers the TIP Act does not mirror the Palermo Protocol's clauses in Article 11 (2) and (3). Nevertheless, Section 9 (1) TIP Act specifies that a carrier who transports a person within or across the borders of South Africa and knows that the person is a victim of trafficking or should reasonably have known so is guilty of an offence. Kruger accurately notes that the term "carrier" is broader in scope than "commercial carrier" in the Palermo Protocol, thus aligning with the standard set in the Palermo Protocol.[298]

Furthermore, the TIP Act complies with CTOC standards[299] by imposing severe penalties for trafficking offences. Sections 13 and 14 TIP Act allow for fines up to R100 million, life imprisonment, or both, alongside potential compensation obligations to victims. Additionally, Section 14 TIP Act lists aggravating factors that courts are instructed to consider before sentencing the offender.[300]

Since child trafficking does not necessitate the "means" component,[301] it could be presumed that prosecuting child trafficking cases is easier because the State does not need to prove this aspect to convict traffickers. However, the TIP Act does not address this issue due to the lack of distinction between adult and child trafficking. It only states that the "means" component must not be proven only in cases of Section 11 (1) TIP Act.[302] Nonetheless, it remains unclear, whether this solely concerns consent-based defences or is a mandatory element across all child trafficking cases. Kruger criticizes the TIP Act for not using the wording of Article 3 (c) of the Palermo Protocol, which would have clarified the situation and avoided any uncertainty.[303]

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[296] Article 10 (1) CTOC, which states: "Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes."
[297] See also 12 (1) (f) TIP Act.
[298] Kruger 2016 op cit (n 35) 69.
[299] Article 11 (1) and 11 (6) CTOC.
[300] Section 14 TIP Act lists factors such as (a) The significance of the role of the convicted person in the trafficking process; (b) previous convictions relating to the offence of trafficking in persons or related offences; (d) the conditions in which the victim was kept; (g) the physical and psychological effects the abuse had on the victim; (i) whether the victim was a child.
[301] Section 3 (c) Palermo Protocol.
[302] Section 11 (1) (a) TIP Act states that it is no defence to a charge, that the child who is a victim to trafficking has consented to the exploitation even if none of the means have been used.
[303] Kruger 2016 op cit (n 35) 78.

Child victims should not be subjected to criminal proceedings or penalties related to their trafficking situation.[304] Section 22 (3) TIP Act deals with this by providing that "a finding by the provincial department of social development after an assessment referred to in Section 18 (6) that a child is a victim of trafficking serves as a ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking if the prosecutor is satisfied that the offence was committed as a direct result of the person's position as a victim of trafficking." While this may seem sufficient as protection, a clearly formulated prohibition of the prosecution of child victims would have been desirable.[305]

Lastly, the TIP Act allows South African courts to have jurisdiction over crimes committed abroad if those acts would have been offences under the Act if they happened in South Africa. This applies if the offender is a South African citizen or resident, the offence is against a South African citizen or resident, or the offender is present in South Africa after committing the crime.[306] Regarding children Section 291 of the Children's Act is relevant which provides the extraterritorial jurisdiction of child trafficking cases. This provision is crucial considering that child trafficking is a global crime that crosses regional as well as international borders.

Despite acknowledging some shortcomings, the TIP Act generally aligns with international standards in terms of prosecution.

1.3.3 Prevention

To fulfil international obligations, the TIP Act must be strong in its efforts to prevent child trafficking. While the 2010 draft TIP Bill featured a dedicated section titled "Preventing and Combating Trafficking in Persons," the TIP Act has reduced this to Section 41 with limited content. This change is unfortunate, given the importance of proactive measures in the fight against human trafficking.[307] The measures mentioned in Section 41 include the development of a draft National Policy Framework (NPF) "to ensure a uniform, coordinated, and cooperative approach by all government departments and to guide the implementation and administration of the TIP Act."[308]

[304] OHCHR Guidelines op cit (n 105) Guideline 8(3).
[305] Kreston 2014 op cit (n 34) 49.
[306] Section 12 (1) (a) - (c) TIP Act, which aligns with Article 15 CTOC.
[307] Mollema 2014 op cit (n 33) 259.
[308] Sections 40 (1) and 41 (1) (a) TIP Act.

Moreover, they include "the establishment of an integrated information system to facilitate the effective monitoring and implementation" of the TIP Act.[309]

In addition, Section 41 (c) provides for the "development and review of guidelines on the identification of victims of trafficking and traffickers." Furthermore, the TIP Act contains the establishment of public awareness programmes or other measures for the prevention and combating of trafficking in persons.[310] These measures aim to inform the public and victims of trafficking and to prevent trafficking, especially in women and children, by curbing both the demand and the supply factors.[311] Worth mentioning in this regard is the fact that the programmes and measures should be far-reaching to ensure that rural communities are reached as well.[312] Another positive aspect is that Section 41 (2) (a) (ii) outlines that awareness programmes should be delivered in a language comprehensible to whom they are directed. This considerably improves the accessibility and effectiveness of such initiatives. Responsible for the abovementioned tasks is the Director-General of Justice and Constitutional Development.[313]

Unfortunately, unlike the 2010 draft Bill, the TIP Act does not include any economic measures designed to tackle the root causes of trafficking, although such measures are outlined in the Palermo Protocol.[314] Despite the emphasis in the SALRC discussion paper regarding the fact that trafficking in persons originates from the social and economic conditions in the countries of origin, conditions that often render individuals vulnerable to trafficking victimization,[315] and the recognition of the importance of enhancing educational and economic opportunities for those at risk of trafficking, these measures were not incorporated into the TIP Act.[316] This is particularly regrettable due to the undeniable reality that addressing poverty plays a vital role in preventing and combating human trafficking.[317] Although the TIP Act acknowledges certain vulnerabilities, it is concerning that gender-specific vulnerabilities and the unique needs of children are not explicitly addressed in Chapter

[309] Section 41 (1) (b) TIP Act.
[310] Section 41 (d) TIP Act.
[311] Section 41 (d) (i), (ii), (iii) TIP Act.
[312] Section 41 (2) (a) (i) TIP Act.
[313] Section 41(1) TIP Act.
[314] Article 9 (4) and (5) Palermo Protocol.
[315] SALRC Discussion Paper op cit (n 100) 229.
[316] Ibid, 239.
[317] UNESCO op cit (n 4) 11.

9 of the TIP Act.[318] Specifically in the context of child trafficking, the TIP Act falls short in offering a comprehensive strategy for preventing this crime. By neglecting to address the role that systemic misogyny and patriarchal culture play in not only human trafficking but also in all forms of violence against children and women, it misses an important chance to highlight and combat a significant factor contributing to this crime.[319] In contrast to the 2010 draft Bill, the TIP Act does not stipulate the active participation of NGOs in activities such as public awareness and other programmes.[320] Nevertheless, and despite the inadequacies regarding the mentioned aspects, the prevention provisions of the TIP Act represent overall a positive move in the right direction.

1.3.4 Protection

Another crucial aspect in combating trafficking in persons is the protection of victims. Generally, the TIP Act prohibits discrimination against trafficking victims based on factors such as gender, race, religion, and nationality.[321] To ensure the protection of trafficking victims, the crucial first step is their active and accurate identification.[322] Chapter 4 of the TIP Act addresses the identification and protection of trafficking victims. To identify a victim of trafficking, there must be guidelines for assessment. According to Section 1 of the TIP Act, a "victim of trafficking" is defined as:

> "(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)."

Similar to the definition of "victim of trafficking" in the Palermo Protocol, the definition in the TIP Act is not precise enough, which can lead to identification challenges in its implementation.

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[318] Buthelezi op cit (n 275) 155.
[319] Kreston 2007 op cit (n 12) 46; UNESCO, *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*, 2005, 56, available: *https://unesdoc.unesco.org/ark:/48223/pf0000138447.*
[320] Mollema 2014 op cit (n 33) 259.
[321] Ibid.
[322] OHCR Guidelines op cit (n 105) Guideline 2; UNICEF Guidelines op cit (n 184) Guideline 3; Articles 3 (c) and 6 (4) Palermo Protocol.

Chapter 3 of the TIP Act outlines protective measures for foreign trafficked victims during investigations and prosecutions. Section 15 (1) TIP Act grants certified foreign victims of trafficking a visitor's visa in South Africa. This visa allows them to stay for a recovery and reflection period and is limited to three months.[323] The period for recovery and reflection is evaluated case by case acknowledging that certain victims have endured greater levels of trauma than others.[324] If, within 30 days, they are unable or unwilling to assist law enforcement and prosecution in trafficking investigations, their situation must be investigated.[325] Under certain circumstances, the issuance of temporary[326] or permanent[327] residence permits to foreign trafficking victims is possible. The assistance offered to foreign victims is provided in Section 32 TIP Act, which is commendable, especially considering their heightened vulnerability.

Unfortunately, the TIP Act does not mention protective measures specifically tailored to safeguard the rights and best interests of child victims. Chapter 4 of the TIP Act, however, requires individuals who have knowledge or reasonable suspicion of a child being a victim of trafficking to report it to the SAPS for investigation.[328] Those reporting must provide a legitimate justification. Failure to report is considered a crime.[329] A child suspected to be a victim of trafficking must receive prompt support.[330] The SAPS is then required to refer the case to the Department of Social Development (DSD) for assessment.[331] Ultimately, a designated social worker at the DSD assesses whether the suspected victim of trafficking is indeed a victim or not, after considering the required information provided by the SAPS.[332] While this sounds promising, it assumes that the child's well-being will be adequately cared for and that the DSD has the ability and resources necessary to accomplish this. Additionally, Section 39 TIP Act outlines the requirement for the Director-General to submit an annual report

[323] If the investigation is not concluded within this initial timeframe, it may be extended to a maximum of six months.
[324] Mollema 2014 op cit (n 33) 255.
[325] Section 15 (2) TIP Act.
[326] Section 16 (1) TIP Act which requires that the victim is in South Africa and has agreed to cooperate in the investigation and prosecution of a case of trafficking.
[327] Section 17 TIP Act.
[328] Section 18 (1) TIP Act.
[329] Section 18 (3) TIP Act.
[330] Section 19 (1) and 19 (5) TIP Act.
[331] Section 18 (6) TIP Act.
[332] Standard Operating Procedure for Integrated Assistance to Victims of Trafficking: South Africa, Version 1.2: 12/10/2020, 26 [hereinafter SOPs] available at *https://www.dsd.gov.za/index.php/documents?task=download.send&id=479&catid=90&m=0*; Section 18 (6) TIP Act.

concerning all cases of child abuse or deliberate neglect. The question of whether a child needs care and protection is appointed by a social worker of the DSD, who will issue a report to the Children's Court stating that the particular child needs care and protection. If the court concludes that a foreign child victim of trafficking necessitates care and protection, a court order is issued, permitting the child to remain in the Republic.[333] According to this the protection of a child depends on court decisions, which can be contrary to the child's best interests because the duration of court proceedings is long, and considerations of special child needs and vulnerabilities are not always ensured. Regarding other protective measures concerning child victims, the TIP Act refers to the Children's Act.[334] The TIP Act itself has no assistance programme in place to ensure the reintegration of child victims of trafficking, particularly those who have been internally trafficked. Aransiola and Zarowsky criticize the TIP Act in that regard and argue that such programmes are crucial because if the conditions that made the children leave their homes have not changed, returning without support could put them at risk of being trafficked again.[335] While such programmes are mentioned in Section 26 TIP Act, they explicitly apply only to adult victims or the children of adult victims of trafficking. Children as victims of trafficking are not explicitly mentioned. Kreston further points out the absence of measures to safeguard the rights of child victims and ensure their access to those rights.[336] This includes the lack of provisions for appointing a guardian or legal counsel for the child, as well as the absence of procedures for locating the child's family members.[337] Additionally, while there is recognition that some children may not be safe to return to their home country,[338] there are no provisions for the child's transition into South

[333] SOPs op cit (n 332) 27.
[334] For instance, Sections 18 (4), (5), (7) (8), 31 and 36 TIP Act.
[335] Joshua Aransiola and Christina 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* 524.
[336] Kreston 2007 op cit (n 12) 49.
[337] UNICEF Guideline 4 stipulates that a legal guardian shall be assigned to accompany the child. Guideline 8.1 calls for locating family members of separated child victims of trafficking. – UNICEF Guidelines op cit (n 185) Guidelines 4 and 8.1.
[338] Section 33 (a) (i) TIP Act which provides: With due regard to the safety of the person and without delay (a) the Director-General: International Relations and Co-operation must (i) in co-operation with the Director-General: Social Development assess the risks to the safety and life of a person who is a citizen or permanent resident of the Republic and who is suspected of being a victim of trafficking, if he or she is repatriated to the Republic."

Africa.[339] Furthermore, there are no provisions in the TIP Act in place to ensure the privacy and protection of the child's identity.[340] The TIP Act only briefly addresses this issue in Section 23, which refers to a "child in the care of the victim of trafficking." This section criminalizes any unauthorized access to, and disclosure of information related to trafficking victims. The problem lies in the wording "child in the care of the victim of trafficking," as it does not explicitly identify the child as a victim of trafficking. Section 31 (1) TIP Act governs the repatriation of foreign child victims of trafficking and stipulates that repatriation is conditional upon an evaluation of the child's safety. This assessment considers the best interests of the child and the child's safety during the repatriation process and after their return to their home country, considering the potential risk of re-victimization and harm. Mollema accurately observes that the 2010 draft Bill stipulated that if there were concerns about the safety of children returning to their country of origin, South Africa would be obliged to offer a more secure alternative within South Africa. In contrast, the TIP Act does not include such provisions or promises.[341] However, a positive aspect is that before repatriating victims of trafficking to their country of origin, the Director-General of Social Development is required to "take reasonable steps to find suitable family members or an institution or organization that renders assistance to victims of trafficking" in their country of origin.[342] Section 35 TIP Act addresses unaccompanied foreign trafficked minors and provides that the Director-General of Social Development must authorize at State expense to escort the child from the place where the child was found to the place within the Republic from where the child was trafficked or to the child's country of origin or the country from where the child was trafficked if this is considered to be in the best interests of the child.

Chapter 6 of the TIP Act states that victims of trafficking may receive compensation from convicted traffickers. However, this compensation depends on the court's discretion or a request from the victim or prosecutor.[343] While this approach

[339] Kreston 2007 op cit (n 12) 49; UNICEF Guideline 9.1 stipulates that local integration is necessary if the return of the child to its country of origin is not in its best interest. – UNICEF Guidelines op cit (n 185) Guideline 9.1.

[340] UNICEF Guideline 2.6 states that all measures shall be taken to protect the privacy and identity of child victims, guaranteeing the safety and well-being of both the victim and their family. – UNICEF Guidelines op cit (n 185) Guideline 2.6.

[341] Mollema 2014 op cit (n 33) 258.

[342] Sections 31 (2) (b) (i) and 32 (a) TIP Act.

[343] Section 29 (1) TIP Act.

aligns with international standards,[344] it may be more suitable for adult victims. When considering child victims of trafficking, who are particularly vulnerable, this becomes a concern, as the TIP Act entrusts the decision of whether a child should receive compensation to the courts. This can be problematic given the prolonged nature of court proceedings, and the prospect of child victims having to confront their traffickers in court once more, which can be distressing.

Section 21 of the TIP Act ensures that foreign trafficked victims are "entitled to the same public health care services" as South African citizens. Kreston is right in pointing out that this provision is very simple and does not consider children's special needs or offer any special care for child trafficking victims.[345] Under the TIP Act, victims of trafficking who have children are entitled to receive extra support and access to programmes aimed at fostering the child's development.[346] However, these provisions primarily address the needs and consent of the trafficked adult victim who is responsible for the child. The Act does not explicitly recognize the child as a separate victim with specific needs. Section 36 TIP Act deals with parental responsibility for trafficking children. It provides that "if a children's court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child, the court may suspend all the parental responsibilities and rights of that parent, guardian, and place that child in temporary safe care pending an inquiry by a children's court." The provision is clear and aligns with international standards.

All in all, the TIP Act provides a comprehensive framework for the protection of adult victims of trafficking, offering detailed provisions to address their specific needs. However, the Act takes a different approach when it comes to children, deferring to the Children's Act. While this might seem like a logical division of responsibilities, it fails to adequately address the unique needs of child trafficking victims, which can potentially leave child victims without the tailored protection and assistance they require. This omission is critical because it does not fully align with the principle of the best interests of the child, which is a fundamental principle of child protection.

[344] Article 6 (6) Palermo Protocol.
[345] Kreston 2007 op cit (n 12) 48.
[346] Section 26 (3), (4) TIP Act.

1.3.5 Cooperation

Human trafficking is a global crime, and combatting it requires countries to work together internationally and within their borders. Section 37 TIP Act establishes provisions for international cooperation, aligning with international standards regarding cooperation. At the national level, the TIP Act, under Section 40 (1), mandates the approval of a NPF to promote a collaborative strategy for addressing human trafficking issues. Section 41 also acknowledges the need for cooperation between the government and civil society organizations in this regard. Section 44 (1) TIP Act mandates the Director-General of Justice and Constitutional Development to issue directives to relevant functionaries, while the National Commissioner of the SAPS must issue national instructions on listed matters.[347] Regarding the national cooperation Emser and Francis raise the concern that the TIP Act's failure to formally acknowledge the transfer of operations and coordination to the provincial level could result in inadequate budgets for provincial departments and impede the exchange of information among government agencies across different levels.[348]

1.4 Summary

The analysis shows that the TIP Act broadly aligns with international and regional obligations and embodies a positive and significant step in the right direction. It serves as the first legal framework comprehensively addressing and criminalizing human trafficking and all its forms. However, it has notable gaps and shortcomings, particularly concerning child trafficking and the protection of child victims of trafficking. Its failure to adhere to the definition outlined in the Palermo Protocol and differentiate between adult and child trafficking also impacts the question of consent and creates avoidable uncertainties. Additionally, while the Act mentions the underlying causes of human trafficking, it does not emphasize or prioritize them within the framework of prevention. This gives the impression that human trafficking is solely an economic crime, disregarding its traditional criminal aspects and newly recognized causes, such as gender discrimination and the exploitation of children.[349] Furthermore, the TIP Act's failure to explicitly address child trafficking and offer specialized protective measures

[347] Section 44 (2) TIP Act.

[348] Monique Emser and Suzanne Francis 'Counter-Trafficking Governance in South Africa: An Analysis of the Role of the KwaZulu-Natal Human Trafficking, Prostitution, Pornography, and Brothels Task Team' (2017) 35.2 *Journal of contemporary African studies* 193.

[349] Kreston 2007 op cit (n 12) 50.

for child victims is a significant concern, as it leaves child victims without the special support they urgently need. Nonetheless, it is evident that despite their heightened vulnerability, children are still individuals entitled to protection under the provisions of the TIP Act, which represents a significant and necessary step for South Africa in fulfiling its obligations stemming from the ratification of treaties, particularly of the Palermo Protocol.

2. Implementation

As previously outlined, the enactment of the TIP Act, which broadly aligns with international obligations, represents a significant step in the fight against child trafficking. This suggests that child trafficking can be effectively addressed through this legislation. However, while anti-trafficking laws are expected to play a significant role in combatting this crime, there is a consensus that legal measures alone will not suffice.[350] Therefore, it is crucial that the law is effectively implemented. South Africa has taken proactive steps in this regard. The following identifies the regulations, directives, policies and other measures that are relevant to trafficking in persons within the framework of implementation. Additionally, South African jurisprudence on human trafficking will be analysed.

2.1 Regulations

Under Section 43 (3) TIP Act the Minister of Social Development has made regulations.[351] The regulations provide that the DSD must ensure that an assessment is made whether a child referred to in Section 18 (5) TIP Act is a victim of trafficking.[352] If the child is suspected of being a victim of trafficking, the DSD must refer the child to a designated social worker to investigate whether or not the child is a victim of

[350] US Department of State, Trafficking in Persons Report, 2019, 6 [hereinafter US TIP Report 2019] available at: *https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf*; Mollema 2014 op cit (n 33) 262; Paul Oluwatosin Bello and Adewale A. Olutola 'Back to basics: preventing the susceptibility of South African youth and children to human trafficking through basic education' (2019) 16 *African Renaissance* 210; Alberto F. De Toni and Luca Comello, Journey into complexity, 2010, 26, available at: *https://labgest.uniud.it/fileadmin/users/detoni/Pubblicazioni/C._libri-internazionali/C02._Journey_into_complexity/000_Journey-into-complexity_ENG_e-book.pdf;* Bello and Olutola 2022 op cit (n 270) 8.

[351] Republic of South Africa, Department of Social Development, Prevention and Combating of Trafficking in Persons Act: Regulations under Section 43(3), GG 39318, RG 10513, GoN 1006, 23 October 2015 [hereinafter Regulations 23 October 2015] available at: *https://www.justice.gov.za/legislation/notices/2015/20151023-gg39318_rg10513_gon1006_TIP-Regulations.pdf.*

[352] Ibid, Section 2 (1).

trafficking and in need of care and protection in terms of Section 150 of the Children's Act.[353] Based on this assessment the designated social worker must compile a report and present it before the Children's Court, which then determines whether the child needs care and protection and issue an order placing a child in care.[354] This regulation is to be welcomed as it is in line with the best interests of the child, aiming to consider the special needs of children. Furthermore, under Section 43 (1) (a) of the TIP Act the Minister of Justice and Correctional Services has made regulations[355] relating to the Prosecutor's referral of suspected victims of trafficking in persons. According to these regulations a prosecutor, during the criminal prosecution of a person, must without delay refer a person that is suspected of being a victim of trafficking referred to in Section 22 (2) of the TIP Act to the provincial DSD.[356]

2.2 Directives

Regarding directives, the Director-General of Justice and Constitutional Development has, under Section 44 (1) (a) TIP Act issued directives.[357] The directives address several critical aspects related to handling cases of trafficking in persons. They outline procedures for reporting such cases, particularly focusing on situations where foreign victims may not speak any of the official languages of the republic. Additionally, they detail measures to safeguard the safety of trafficking victims and potential witnesses, especially if there is a risk of harm resulting from reporting and subsequent investigations or prosecutions. Furthermore, these directives emphasize the importance of adopting a victim-centred approach by officials being mindful of the vulnerability of children, women, and other marginalized groups.[358] Additionally, all officials must take steps to maintain confidentiality and protect the documentation and

[353] Ibid, Section 2 (3).
[354] Ibid, Section 2 (5) and (6).
[355] Republic of South Africa, Prevention and Combating of Trafficking in Persons Act: Regulations: Prosecutor's referral of suspected victims of trafficking in persons, GG 39119, RG 10485, GoN 737, 21 August 2015, [hereinafter Regulations 21 August 2015] available at: *https://www.justice.gov.za/legislation/notices/2015/20150821-gg39119_rg10485_gon-TIP737.pdf.*
[356] Ibid, Section 2.
[357] Republic of South Africa, Department of Justice and Constitutional Development, Directives in terms of section 44 (1) (a) of the TIP Act, Final TIP Act Directives (3 8 15) [hereinafter Directives] available at: *https://www.justice.gov.za/legislation/acts/2013-007-Directives.pdf*.
[358] Ibid, Section 3.

information concerning trafficking victims. This includes classifying such information as “restricted” or “confidential” to prevent unauthorized access or disclosure.[359]

The directives outlined demonstrate a commendable effort to prioritize the welfare and protection of children who may be victims of trafficking. By acknowledging the vulnerability of children and the need for specialized considerations in their cases, the directives align with the fundamental principle of acting in the best interests of the child.

2.3 NPF

A significant policy measure regarding the inter-sectoral implementation of the TIP Act is the introduction of the NPF.[360] The NPF was introduced on 25 April 2019 by the Department of Justice and Constitutional Development in collaboration with the United Nations Office on Drugs and Crime (UNODC) as part of the Global Action against trafficking in Persons and Smuggling of Migrants (GLO.ACT)[361] and gives effect to Sections 40 and 41 of the TIP Act. It seeks to establish a uniform, coordinated, and comprehensive approach among officials handling matters concerning human trafficking.[362] It includes guidelines for priorities, strategies, and monitoring of the implementation of the NPF.[363] It serves as a crucial tool to increase a better understanding of the issue and to guarantee the effective enforcement of the TIP Act.[364] Since the NPF is also a strategic planning tool, it further aims to ensure financial support and resource allocation.[365]

The structure of the NPF is twofold compromising a strategic and an operational level.[366] The strategy is built upon the foundation of the four key elements of anti-trafficking efforts, often expressed as the 4 Ps: prevention, protection, prosecution, and partnership (cooperation).[367] The Anti-Trafficking National Action Plan (NAP)

[359] Ibid, Section 4 (1) (a).
[360] Republic of South Africa, Department: Justice and Constitutional Development, Prevention and Combating of Trafficking in Persons National Policy Framework, 2019 [hereinafter NPF] available at: *https://www.justice.gov.za/docs/other-docs/2019-TIP-NPF-10April2019.pdf*.
[361] UNODC, South Africa launches Prevention and Combating of Trafficking in Persons National Policy Framework, 2019, available at: *https://www.unodc.org/unodc/en/human-trafficking/glo-act/south-africa-launches-prevention-and-combating-of-trafficking-in-persons-national-policy-framework.html.*
[362] Section 40 (1) (a) TIP Act.
[363] Section 41 (1) (a) TIP Act.
[364] NPF op cit (n 360) 24.
[365] NPF op cit (n 360) 51.
[366] Ibid, 11.
[367] Ibid, 30.

(operational) provides a comprehensive roadmap for accomplishing the goals and objectives outlined in the strategy. It specifies the necessary actions, assigns responsibilities, defines timelines, and outlines resource allocations.[368] The NPF outlines clear goals, carried out through a medium-term three-year plan (2019 - 2022) and subsequent five-year goals to guide the implementation of the TIP Act.[369] It creates a National Inter-sectoral Committee on Trafficking in Persons (NICTIP) along with provincial committees and rapid response teams.[370] NICTIP will utilize this framework to monitor government departments and institutions in implementing anti-trafficking measures.[371]

The NPF outlines three key objectives for preventing human trafficking: raising awareness and promoting education, reducing vulnerability, and conducting research.[372] Incorporating prevention as a core component of nationwide anti-trafficking efforts aligns with the requirements outlined in international legal frameworks. Worth mentioning is the fact that the NPF entrenches a victim-centred approach responding to the needs of victims and includes the best interests of the child principle.[373] It also mentions research to improve knowledge on trafficking in persons.[374] Moreover, it acknowledges that the identification of trafficking victims is crucial and complex. Therefore, it aims to draft guidelines to coordinate the identification of trafficking victims that shall be part of the government's Standard Operating Procedures (SOPs).[375] Importantly, it recognizes the significance of strengthening measures against corruption "as a systematic component of the anti-trafficking strategy."[376]

The introduction of the NPF is a crucial step in the implementation of the TIP Act. There are, however, some shortcomings. While it affirms that the vulnerability of

[368] Ibid, 11, 51.
[369] Section 40 (2) (c) TIP Act.
[370] NPF op cit (n 360) 23-29.
[371] Ibid, 6.
[372] Ibid, 38-40.
[373] Ibid, 13.
[374] The NPF states in this regard: "The NPF will commission multi-disciplinary quantitative and qualitative research to investigate different trafficking in persons related issues, including a public financial management analysis to create baseline knowledge on costs. NGOs will be involved in research-action both to assess the anti-trafficking services and gather information on the trends of the phenomenon. Ethics for researchers and researching in the anti-trafficking field will be adopted to ensure proper investigations. Research findings will be used to design or revise the NPF's goals and measures in order to better fulfil its purpose." – NPF op cit (n 360) 40.
[375] Ibid, 42.
[376] Ibid, 49.

certain groups, especially women and children, needs to be reduced and mentions some root causes for trafficking such as poverty or poor education, the intended measures are very vague and are limited to community and awareness programmes.[377] It remains unclear what exactly will be done to reduce poverty, inequality and unemployment since education and awareness alone will not eliminate the root causes of trafficking. Furthermore, there is no mention of migrants or refugees as vulnerable groups. The NPF further lacks provisions regarding the accountability of the responsible department or State organs. Lastly, the provisions regarding the return and repatriation of trafficking victims are also very vague. While the government intends to "develop special measures for child victims based on their best interests"[378] the planned measures are not clearly identified but are limited to "a personalized plan in close cooperation with social services and NGOs" and "comprehensive return/repatriation SOPs."[379]

2.4 Other measures

Criminal justice institutions have also established institutional frameworks to combat human trafficking. In 2003 the Trafficking in Persons Intersectoral Task Team (TIPTI) was formed under the Sexual Offenses and Community Affairs Units (SOCA), which operates within the NPA. Additionally, SOCA set up Thuthuzela centres to support victims of sexual violence.[380] Furthermore, the SAPS established a Human Trafficking Desk (HTD) under the Organized Crime Unit (OCU).[381]

2.5 Jurisprudence

There are specific instances where the TIP Act was applied by courts, resulting in the classification of the offence as human trafficking, and consequently leading to significant penalties. One landmark case is *Jezile v S and Others*[382] in which the 28-year-old accused married a 14-year-old girl through the practice of *ukuthwala*.[383] The classification of this customary law practice as a form of abduction is subject to

[377] Ibid, 39.
[378] Ibid, 45.
[379] Ibid, 44 - 45.
[380] Bello 2018 op cit (n 23) 475; Bello and Olutola 2019 op cit (n 350) 204; NPA Research Report op cit (n 4) 51.
[381] Bello and Olutola 2022 op cit (n 270) 6.
[382] *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC).
[383] See footnote n 71.

differing assessments.[384] In *Jezile v S and Others* the High Court clearly distinguished between "regular" and "irregular" forms of *ukuthwala* in initiating and concluding a customary marriage and concluded that the accused's actions deliberately avoided obtaining the crucial consent of the young complainant and could not serve as a justification for trafficking.[385] The High Court found the appellant guilty of human trafficking referring to Sections 4 (2), 11 (1) (a) and 13 of the TIP Act, although the TIP Act was not implemented during that time.[386] This decision is significant as it safeguards young girls and specifies the definition of trafficking, emphasizing that alleged consent is irrelevant when the actions constitute trafficking.

Besides this landmark case, there are recent cases that confirm the successful application of the TIP Act by courts. In *State v Gordon Pillay*[387] for instance, the accused was found guilty of various offences including trafficking, sexual exploitation and rape of a child, child abuse, as well as the creation and distribution of child pornography. The court imposed the most severe punishment of life imprisonment and relied on Sections 4 (1), 13, and 14 TIP Act. The favourable outcome resulting from the implementation of Section 4 (1) of the TIP Act is also exemplified in *S v Obono*,[388] where a child was sold to an older man, who sexually exploited her for the purpose of financial gain. The accused was convicted of human trafficking and the court handed down a life imprisonment sentence.

2.6 Effectiveness

The partial success of the TIP Act becomes evident when examining case law as mentioned above. Additionally, throughout the years, there have been a few more

[384] D.Z. Dukada 'Some Thoughts on the 'Ukuthwala' Custom Vis-a-Vis the Common-Law Crime of Abduction' (1984) 1984.200 *De rebus* 359; Lea Mwambene and Julia Sloth-Nielsen 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1; Koyana and Bekker op cit (n 71) 139.
[385] *Jezile v S and Others* op cit (n 382) paras. 70 - 96.
[386] Ibid, para 64.
[387] *State v Gordon Pillay* (CCD39/2019) [2020] ZAKZDHC 69.
[388] *S v Obono* (CC65/2020) [2021] ZAGPPHC 888.

cases of identified,[389] prosecuted,[390] and convicted traffickers in South Africa.[391] This also includes high-ranking government officials complicit in trafficking,[392] which is essential to combat corruption. Nevertheless, according to the US TIP Reports of 2022 and 2023 South Africa remains a Tier 2 Watch List country. This means that South Africa "does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so."[393] These efforts include, besides the mentioned cases of investigating and prosecuting trafficking, the anti-trafficking NPA and increased awareness-raising actions.[394]

However, the annual US TIP Report 2023 further states that South Africa has failed to demonstrate a consistent pattern of heightened efforts in contrast to the preceding reporting period.[395] Given the fact that an estimated 11,077 human trafficking incidents were reported to the SAPS between December 2007 and January 2022[396] and the prevalence of unreported cases, the figure of only 44 prosecuted trafficking cases[397] is remarkably low. Especially the implementation of certain policies and strategies mentioned earlier has proven to be notably lacking.[398] Although SOPs have been utilized to identify trafficking victims in accordance with the TIP Act and the NPF, consistency in their application has been lacking.[399] Insufficient knowledge and inadequate coordination impede effective efforts to combat trafficking.[400] NGOs'

[389] According to the US TIP Report 2022 "The government identified 83 trafficking victims and referred 74 victims to care, compared with identifying 16 victims in the previous reporting period." - US TIP Report 2022 op cit (n 6) 502; According to the US Report South Africa 2023 "The government identified and referred 74 trafficking victims to care, including 42 labor trafficking victims, 23 sex trafficking victims, and nine victims of unspecified forms of trafficking, compared with identifying 83 victims and referring 74 victims to care in the previous reporting period." US Report South Africa 2023 op cit (n 26).

[390] According to the US Report South Africa 2023 in total 44 cases were investigated or prosecuted compared with 27 cases during the previous reporting period. - US Report South Africa 2023 op cit (n 26).

[391] According to the US Report South Africa 2023 "The government convicted 14 traffickers in eight cases, including two forced labor cases, under trafficking or immigration-related charges, compared with convicting 11 traffickers in the previous reporting period. Judges sentenced traffickers from 15 years to life imprisonment." US Report South Africa 2023 op cit (n 26).

[392] According to the US TIP Report 2022 two officials were prosecuted and convicted for child sex trafficking. - US TIP Report 2022 op cit (n 6) 502; According to the US Report South Africa 2023 "The government initiated prosecutions of two South African traffickers for forced labor in agriculture." - US Report South Africa 2023 op cit (n 26).

[393] See also footnote n 24. - US TIP Report 2023 op cit (n 21) 71, 85.

[394] US Report South Africa 2023 op cit (n 26).

[395] Ibid.

[396] Eunice Masson, South Africa struggles to limit human trafficking – USAID report, 2023, available at: *https://mg.co.za/news/2023-02-02-south-africa-struggles-to-limit-human-trafficking-usaid-report/.*

[397] See footnote n 390.

[398] US TIP Report 2022 op cit (n 6) 501; US Report South Africa 2023 op cit (n 26).

[399] US TIP Report 2022 op cit (n 6) 502.

[400] US Report South Africa 2023 op cit (n 26).

reports further suggest that official statistics have not fully captured the extent of trafficking due to institutional shortcomings regarding training, coordination and resources. These challenges were exacerbated during the pandemic.[401] Furthermore, the conflation between trafficking and other exploitative acts (for instance gender-based violence) also makes the identification of victims challenging.[402] The government also unjustly prosecuted victims for offences committed as a direct consequence of being trafficked instead of providing care.[403]

Concerning the provision of care, shelter, food, and transportation for victims, particularly foreign victims, delays were experienced due to inadequate government responsibilities and coordination.[404] The implementation of the NAP as outlined in the NPF fell short due to challenges in coordinating and communicating between national and provincial teams, inconsistent leadership within NICTIP, limited capacity, and notably, insufficient commitment from the government.[405] Regarding migrant children the Department of Home Affairs (DHA) failed to provide them with documentation making access to schools impossible, which intensifies their vulnerability and exposes them to potential trafficking.[406] Additionally, there is a prevailing sense of distrust towards law enforcement. Despite the government's intentions to establish a confidential reporting system, this initiative has yet to be realized.[407] Moreover, Sections 15, 16, and 31 (2) (b) (ii) of the TIP Act, concerning foreign victims and immigration, have not yet been fully implemented.[408]

The findings of the US TIP Reports are also confirmed but various studies assessing the efficacy of the anti-trafficking legal framework. The studies indicate that the enforcement of the law and the efforts to combat human trafficking in South Africa have generally fallen short in terms of effectiveness.[409] A growing concern revolves

[401] US TIP Report 2022 op cit (n 6) 502.
[402] Ibid; US Report South Africa 2023 op cit (n 26).
[403] US Report South Africa 2023 op cit (n 26).
[404] US TIP Report 2022 op cit (n 6) 502 - 503.
[405] US TIP Report 2022 op cit (n 6) 503; Emser and Francis op cit (n 348) 190.
[406] US TIP Report 2022 op cit (n 6) 503.
[407] Ibid, 502.
[408] According to the US TIP Report 2023 they only have been finalized and approved by the Minister of Home Affairs but not yet formally adopted by parliament and promulgated. – US TIP Report South Africa op cit (n 26).
[409] Bello and Olutola 2022 op cit (n 270) 6; Emser and Francis op cit (n 348) 190; Paul Oluwatosin Bello and Adewale A. Olutola 'The enforcement of anti-human trafficking law in South Africa: a case of an aircraft without a pilot' (2018) 19(3) *Police Practice and Research An International Journal* 270.

around the limited ability of law enforcement to effectively combat this problem.[410] Chuang argues that the international legal framework, as outlined in the Palermo Protocol, focuses more on prosecuting traffickers and disrupting trafficking operations, rather than ensuring adequate protection for victims. Moreover, the obligations under the Palermo Protocol are largely aspirational and lack strong enforceability.[411]

A study conducted by Bello and Olutola through interviews with officials and NGO stakeholders in the Limpopo province[412] indicates that "the South African response to human trafficking has not been effective, mainly because an effective response to the crime transcends the enactment of anti-trafficking law."[413] In this recent study several factors were pinpointed as causes, including gaps in enforcement and training, lack of government commitment, socio-economic and cultural influences, coupled with the inadequate enforcement of South African anti-trafficking legislation.[414] Law enforcement, however, plays an essential role in identifying and rescuing trafficking victims, as well as arresting and prosecuting offenders.[415] While efforts were undertaken within the SAPS, taking into account the units they have set up, the study identified insufficient resources and inadequate training as potential barriers to efficient enforcement. It also highlighted work overload and underfunding as factors contributing to ineffective enforcement in both identifying traffickers and victims of trafficking.[416] Furthermore, there is insufficient training and knowledge within law enforcement personnel and other stakeholders engaged in anti-trafficking activities.[417] Even international organizations consistently observe that South Africa lacks sufficiently skilled officials, which exacerbates the increase in human trafficking within the country.[418] The inadequate training inevitably leads to limited knowledge and comprehension of human trafficking. The study also revealed that in many instances, human trafficking is confused or conflated with prostitution, smuggling, and illegal

[410] Bello and Olutola 2019 op cit (n 350) 203; Bello and Olutola 2022 op cit (n 270) 3; Janie Chuang 'Beyond a snapshot: Preventing human trafficking in the global economy' (2006) 13(1) *Indiana Journal of Global Legal* 136; Mollema 2013 op cit (n 232).
[411] Chuang op cit (n 410) 137.
[412] This province is considered appropriate because it borders three SADC countries namely Botswana, Zimbabwe, and Mozambique. - Bello and Olutola 2022 op cit (n 270) 8.
[413] Bello and Olutola 2022 op cit (n 270) 11.
[414] Ibid, 9-11; Farrell et al. op cit (n 239); Bello and Olutola 2018 op cit (n 409) 270.
[415] Horne op cit (n 266) 20; Buthelezi op cit (n 275) 160.
[416] Bello and Olutola 2022 op cit (n 270) 10.
[417] Ibid, 11; NPA Research Report op cit (n 4) 133.
[418] US TIP Report 2019 op cit (n 350) 425.

immigration, because the individuals responsible for handling these matters are unable to distinguish these concepts.[419] Unfortunately, a considerable number of participants noted that law enforcement personnel possess a restricted comprehension of human trafficking. This applies not only to personnel within the criminal justice system but also to the general population.[420]

Another study exposed that the criminal justice system in its current form will be unfeasible to effectively implement long-term strategies against human trafficking.[421] According to this study one of the problems is the ineffectiveness of their current operational approaches, which primarily rely on investigation, prosecution, and imprisonment. This reveals a delay in implementing anti-trafficking legislation in South Africa.[422] This can also be attributed to the Sate's hesitance to demonstrate a resolute dedication to tackling the root factors contributing to human trafficking, which is viewed as a primary barrier in the battle against human trafficking in South Africa.[423]

Lastly, corruption significantly contributes to the growing prevalence of human trafficking. Victims are frequently seized and abducted, even within secure facilities, as government officials collaborate with traffickers.[424] As a result, rescued victims often end up back in the trafficking network after being liberated by law enforcement.[425]

2.7 Conclusion

The implementation of any law is crucial for its effectiveness in combating child trafficking. However, the implementation of South African anti-trafficking laws has proven inadequate, resulting in ineffective anti-trafficking efforts and South Africa remaining a Tier 2 Watch List country on the TIP rankings. Weak law enforcement, inadequate training of personnel, and corruption are among the main factors contributing to this inadequacy. Essentially, combatting trafficking necessitates the

[419] Bello and Olutola 2022 cit (n 270) 9.
[420] Participants in the study expressed the following: "For me, I think the law did not explicitly differentiate between human trafficking, smuggling, and illegal migrants, also between prostitution and sex work. So, it becomes very difficult sometimes for law enforcement officials to assist victims, or arrest offenders for the right offense." - Bello and Olutola 2022 op cit (n 270) 9.
[421] Bello and Olutola 2018 op cit (n 409) 279.
[422] Ibid.
[423] Bello and Olutola 2022 op cit (n 270) 10.
[424] Moses Morero Motseki 'An exploration of corruption and human trafficking: The south african case' (2021) 19(2) *Gender & Behaviour* 17902.
[425] Ibid.

South African State to tackle and rectify the root causes within the nation's political and economic landscape that enable trafficking to occur.

PART V – CONCLUSION AND RECOMMENDATIONS

In this thesis, the definition of human trafficking in the Palermo Protocol was examined, which provides a comprehensive definition distinguishing between adult and child trafficking. Moreover, the causes were explained, highlighting that trafficking is a complex problem with multiple points of attack for intervention. Subsequently, international, and regional obligations were analysed, revealing several obligations: primarily, the need to define trafficking to differentiate it from other crimes, the duty to criminalize and prosecute trafficking, the obligation to prevent trafficking and protect trafficking victims, including their identification, and finally, international cooperation due to trafficking transcending borders and not being a localized issue. The analysis of South Africa's legal response indicated that the TIP Act largely meets these obligations and is even more extensive in some aspects. Although the Act does not differentiate between adult and child trafficking in its definition and does not fully cater to the specific needs of children in terms of protection and prosecution, it can be concluded that the TIP Act aligns with international standards. However, the inadequate implementation due to various factors undermines the effectiveness of both the TIP Act and the fight against trafficking. Therefore, it is imperative for the South African government to consider the following recommendations to combat or at least reduce trafficking in children.

Due to the complicated socio-economic nature of human trafficking, it demands a diverse set of strategies.[426] First of all, an efficient reaction to human trafficking demands a collaborative strategy focused on addressing the underlying causes of this crime. Liebermann and Landman also assert that to combat crime effectively, it is imperative to identify and deal with its underlying causes.[427] While poverty is an essential factor in trafficking, it is not the sole cause. Overemphasizing poverty can be misleading. Trafficking's root causes are multifaceted and extend beyond economic factors.[428] Rather, the government must prioritize addressing the long-standing socio-economic and cultural challenges afflicting the nation, including issues like elevated

[426] Bello and Olutola 2019 op cit (n 350) 203; Bello and Olutola 2022 op cit (n 270) 4.
[427] Bello and Olutola 2022 op cit (n 270) 5; Tinus Kruger, Lizette Lancaster, Karina Landman, Susan Liebermann, Antoinette Louw, Rory Robertshaw, Making South Africa safe, A Manual for Community-based Crime Prevention, 2000, 4, available at*:*
https://www.csir.co.za/sites/default/files/Documents/Making%20South%20Africa%20Safe.pdf.
[428] Bello and Olutola 2022 op cit (n 270) 5; Mollema 2013 op cit (n 232) 75.

unemployment rates, widespread illiteracy, and inequity. Furthermore, the answers to these deep-rooted societal issues transcend the capability and authority of the criminal justice system.[429] In addition, the efforts in providing protection and assistance to victims must be increased, including additional shelters, especially for child trafficking victims as well as programmes for care and food.

As "law enforcement institutions must play a pivotal role in tackling the issue of transnational human trafficking," their education and training are of utmost importance.[430] A solid grasp of human trafficking and its implications, particularly among those involved, is a crucial starting point for an effective response to combat trafficking.[431] A limited understanding of human trafficking and the confusion of trafficking and other exploitative crimes hampers anti-trafficking efforts, especially among key actors.[432] Therefore, resources and training of SAPS need to be increased. The increased training must include training regarding the identification of victims, a trauma-sensitive interviewing approach and knowledge regarding investigations of online exploitation. The unjustified prosecution of trafficking victims due to gaps in identifying them can only be prevented by improving knowledge and training of those responsible.

Additionally, it is essential to provide training and sensitization for judges and prosecutors handling trafficking cases. This training should encompass not only an understanding of the TIP Act and grasping of the intricacies of human trafficking but also incorporate a gender-sensitive perspective, considering that females, particularly young girls, are the primary victims of trafficking.[433]

Furthermore, awareness programmes about human trafficking especially concerning vulnerable populations in rural areas need to be increased. In this regard, it has been proposed for the government to produce a substantial number of copies of the TIP Act and distribute them widely across the nation, especially to police stations, courts, entry points, schools, and other relevant locations, ensuring broad awareness and comprehension of the crime.[434] Conducting public awareness campaigns involving the general public and policymakers can lead to more effective policy

[429] Mollema 2013 op cit (n 232) 262; Farrell and Kane op cit (n 97) 1; Bello 2018 op cit (n 23) 489.
[430] Bello and Olutola 2018 op cit (n 409) 279.
[431] Farrell and Kane op cit (n 97) 2.
[432] Chuang op cit (n 410) 140; US TIP Report 2019 op cit (n 350).
[433] Buthelezi op cit (n 275) 161-162.
[434] Bello and Olutola 2022 op cit (n 270) 9.

development and implementation. The Department of Education can contribute by introducing or integrating the subject of human trafficking and the TIP Act into the curriculum in schools. Focusing on creating awareness about Chapter 4 of the TIP Act, which mandates reporting suspected child trafficking victims, along with other relevant provisions and the wider issue of human trafficking, will significantly promote community-wide engagement and action.[435] Furthermore, study participants proposed the creation of a dedicated agency specialized and skilled in anti-trafficking efforts. This suggestion stems from concerns that introducing countertrafficking responsibilities to the substantial tasks of South African law enforcement agencies, where they may lack the capacity, could potentially lead to reduced effectiveness.[436] For example, Nigeria successfully improved its counter-trafficking efforts by establishing the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) in cooperation with the international community.[437] This highlights the need for a dedicated law enforcement agency to lead anti-trafficking operations in South Africa.

Moreover, South Africa must increase its efforts to address and combat corruption. Officials involved in trafficking must be identified and prosecuted. This requires a comprehensive approach involving stakeholder organizations to combat corruption collectively. Studies suggest implementing more severe penalties for corruption.[438] The TIP Act lacks provisions regarding corruption and the prosecution or the sanctioning of corrupt officials. Nevertheless, corruption is criminalized under the Prevention and Combating of Corrupt Activities Act,[439] which can be applied in such cases. Therefore, investigations into human trafficking cases should involve heightened consideration of the Prevention and Combating of Corrupt Activities Act, in coordination with the TIP Act. Additionally, South Africa needs to establish a confidential reporting mechanism to report individuals complicit in trafficking.

Considering the transnational aspect of human trafficking and its ripple effects on neighbouring States, effective anti-trafficking efforts in South Africa cannot operate independently from these countries, particularly those within the SADC region.[440]

[435] Buthelezi op cit (n 275) 162-163.
[436] Bello and Olutola 2022 op cit (n 270) 11.
[437] Ibid; O. S. Adesina 'Modern day slavery: Poverty and child trafficking in Nigeria' (2014) 12(2) *African Identities* 165.
[438] Motseki 2021 op cit (n 424) 17905.
[439] Act 12 of 2004.
[440] Bello and Olutola 2022 op cit (n 270) 6.

Therefore, collaboration is a crucial component in combating human trafficking. Furthermore, Aransiola and Zarowsky suggest engaging associations representing various transport sectors in the South African Anti-Trafficking Task Team. This would enable better monitoring and oversight of transport providers, including land, air, and sea transport, to prevent the unintentional or deliberate transportation of trafficked victims.[441]

Lastly, the provisions outlined in Sections 15, 16, and 31 (2) (b) (ii) of the TIP Act require implementation.

[441] Aransiola and Zarowsky op cit (n 335) 525.

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