

# **A Critical Assessment of the Legal and Policy Frameworks for Combating Child Trafficking in the Southern African Development Community**

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws  
(LLD) in the Faculty of Law at the University of Fort Hare

by

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16 SEPTEMBER 2022

## DECLARATION ON PLAGIARISM

I, Roseline Rumbidzai Muvhevhi (student number 201104296) declare that this thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or qualification. Except where otherwise indicated, this thesis is entirely my work.



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I, Roseline Rumbidzai Muvhevhi, student number 201104296, hereby declare that I am fully aware of the University of Fort Hare's policy on research ethics and have taken every precaution to comply with the regulations. I confirm that my research constitutes an exemption to Rule G17.6.10.5 and an ethical certificate with a reference number is not required.



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## ABSTRACT

Child trafficking is a longstanding problem which affects victims and communities in various ways and therefore requires stern action both at the global and regional level. In the Southern African Development Community (SADC) region, the crime is closely connected to the existing socio-economic challenges such as poverty; underdevelopment; lack of equal economic opportunities; HIV/AIDS; and human rights violations. As a result, SADC States are fertile sources, transit zones and destinations for child trafficking. It is internationally recognised that it is States such as those in the SADC region that require a comprehensive approach to prevent and prosecute the crime while simultaneously ensuring victim protection. To this effect, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children is the primary instrument that seeks to provide such a comprehensive approach to child trafficking. Therefore, the current regional and national responses to child trafficking in most SADC States, are influenced by this Protocol. Despite these legislative and policy efforts to combat the crime, statistics show that in recent years child trafficking has been rapidly increasing in SADC. Thus, this research seeks to investigate why child trafficking remains prevalent in the region despite a plethora of measures against the crime. The research, therefore, assesses the effectiveness of the legal and policy measures taken by the SADC States to combat child trafficking using a qualitative approach involving analysis and interpretation of relevant legislation and policies. The primary focus is on the Trafficking Protocol as the main child trafficking instrument at the international level. The role of non-child trafficking instruments in the absence of a community instrument against the crime in SADC is also analysed. This research observes that the increasing child trafficking problem in the region is not mainly because of a lack of adequate legislation or policies but the lack of effective implementation of measures. Without a regional comprehensive and coordinated implementation approach, these measures remain weak and inadequate to fully combat child trafficking in the region. To this end, numerous legislative, policy, institutional and operational reform mechanisms to strengthen the subsisting measures against child trafficking in the region and areas for further research are recommended.

**Keywords:** *Child trafficking, Human rights, Intra-SADC Child trafficking, Trafficking Protocol, Sexual exploitation*

## ACKNOWLEDGEMENTS

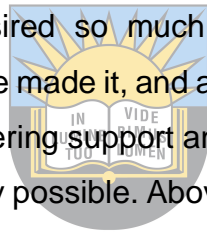
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## ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
AUABC	African Union Advisory Board on Corruption
AUCIL	African Union Commission on International Law
BNC	Bi-National Commissions
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
EALA	East African Legislative Assembly
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
GAATW	Global Alliance Against Traffic in Women
HIV	Human Immunodeficiency Virus
ICT	Information and Communication Technologies
ILO	International Labour Organization
IOM	International Organization for Migration
JPCDS	Joint Permanent Commissions on Defence and Security

MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
NEPAD	New Partnership for Africa's Development
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPDSC	Organ on Politics, Defence and Security Cooperation
PROMIS	Protection of Migrants
PTSD	Post-traumatic Stress Disorder
RISDP	Regional Indicative Strategic Development Plan
SADC SPA	SADC 10 Year Strategic Plan of Action to Combat Trafficking in Persons, Especially Women and Children 2009-2019
SADC	Southern African Development Community
SARPPCO	Southern African Regional Police Chiefs Co-operation Organization
SDG	Sustainable Development Goal
SIPO	Strategic Indicative Plan for the Organ
STD	Sexually Transmitted Disease
TBP	Time-Based Plans
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTOC	United Nations Convention against Transnational Organized Crime
UNGA	United Nations General Assembly

UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNODC ROEA	United Nations Office on Drugs and Crime Regional Office for Eastern Africa
WACAP	West African Network of Central Authorities and Prosecutors



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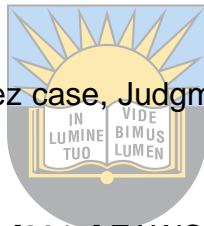
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### **Botswana**

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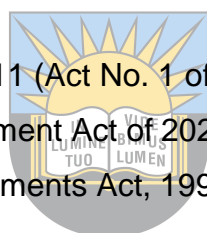
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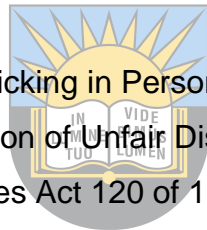
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International Covenant on Economic, Social and Cultural Rights of 1966



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Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000

Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime 2000

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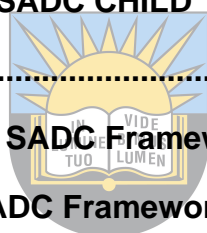
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# CHAPTER 1

## INTRODUCTION

### 1.1 Background

Child trafficking is not of recent origin.<sup>1</sup> This practice has a close relationship with slavery,<sup>2</sup> a phenomenon that dates back thousands of years.<sup>3</sup> However, attempts to regulate child trafficking were introduced much later only with the regulation of white slave traffic.<sup>4</sup> The rise in white slave traffic led to a series of international conferences;<sup>5</sup> and agreements that were crucial to the regulation of child trafficking.<sup>6</sup> While these international conferences and agreements led to some international cooperation, significant differences remained among States over the causes of white slave traffic and the most effective strategies for ending it.<sup>7</sup>

The International Conference on the White Slave Traffic, which was held in Paris in 1902, sought to resolve these differences and was therefore a milestone in providing insight into the dynamics of child trafficking and why the practice should be



- <sup>1</sup> Obi N I Ebbe, 'Introduction: An Overview of Trafficking in Women and Children' in Obi N I Ebbe and Dilip K Das (eds), *Global Trafficking in Women and Children* (CRC Press 2008) 6.
- <sup>2</sup> For a discussion on the nexus between slavery and trafficking in Africa See Benjamin N Lawrence and Richards L Roberts (eds), *Trafficking in Slavery's Wake: Law and Experience of Women and Children in Africa* (Ohio University Press 2012) vii.
- <sup>3</sup> Both victims of slavery and child trafficking were subjected to physical and sexual exploitation. However, human trafficking was not always considered from an exploitation point of view until much later. See Kristiina Kangaspunta, 'A Short History of Trafficking in Persons' (2008) 1 *Freedom from Fear* 38-41.
- <sup>4</sup> The regulation of white slave traffic and the development of anti-white slave traffic instruments provides a basis to crucial aspects of what is now understood as modern-day slavery or human trafficking. This includes the various terms which find their way into the current definition of trafficking. The UN Commission on the Status of Women adopted the term and classified the trafficking of women and children as a form of slavery. The term modern day slavery is an umbrella term that describes the exploitation of people. See Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) *Journal of Trafficking and Human Exploitation* 1.
- <sup>5</sup> These conferences include the first International Conference on the White Slave Traffic (Diplomatic Conference) July which was held in Paris in 1902 and later the International Conference for the Suppression of the White Slave Traffic (Diplomatic conference) which was also held Paris in 1910.
- <sup>6</sup> Both the 1904 International Agreement for the Suppression of the White Slave Traffic ('1904 Agreement') and the 1910 International Convention for the Suppression of the White Slave Traffic ('1910 International Convention') were negotiated in substance at the 1902 International Conference on the White Slave Traffic.
- <sup>7</sup> Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) *Journal of Trafficking and Human Exploitation* 1, 4. See also Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (Cambridge University Press 2017) 8.

criminalised.<sup>8</sup> The outcomes of the Conference later became the foundation of the International Agreement for the Suppression of the White Slave Traffic (1904)<sup>9</sup> and the International Convention for the Suppression of the White Slave Traffic (1910),<sup>10</sup> which were enacted to fight forced prostitution and transportation of women from State to State.<sup>11</sup>

Even though the International Convention for the Suppression of the White Slave Traffic addressed key challenges surrounding the white slave traffic, the Convention had its shortcomings. The most glaring of these shortcomings was that the Convention was gender specific in that it only focused on the exploitation of girls and women.<sup>12</sup> The specific mention of women and girls therefore automatically excluded boys. Subsequent amendments to the Convention later broadened the scope of the law to specifically protect minors of both genders.<sup>13</sup>

The above-mentioned amendments are crucial in understanding the evolution of modern-day trafficking with specific reference to trafficking related to sexual



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<sup>8</sup> It had been noted that the causes of white slave traffic were imbedded in the impunity of the crime and the absence of a specific offence and penalty. This was exacerbated by the absence of legislation that would regulate the crime. It was for that reason that States sent delegations to London for International Congress on the White Slave Trade, in 1899. The conference was the first of its kind and it was hosted by the National Vigilance Society. Among other issues, the delegates discussed how the crime of procuring women would be punished as well as suitable penalties for the offence. See Questions Submitted to the Consideration of the Conference, Correspondence respecting the International Conference on the 'White Slave Traffic', held in Paris, July 1902, House of 12 Commons Parliamentary Papers (United Kingdom), Miscellaneous No. 3 (1905), Cd. 2667, 6.

<sup>9</sup> UN General Assembly, Transfer to the United Nations of the functions exercised by the French Government under the International Agreement of 18 May 1904 and the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications, 3 December 1948, A/RES/256.

<sup>10</sup> *ibid.*

<sup>11</sup> Articles 2 and 3 of the International Agreement for the Suppression of the White Slave Traffic (1904) and Articles 1 and 2 of the International Convention for the Suppression of the White Slave Traffic (1910).

<sup>12</sup> Article 1 of the 1910 Convention states that; 'Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl underage, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different States'.

<sup>13</sup> The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others which was approved by General Assembly resolution 317 (IV) of 2 December 1949 with respect to the suppression of the traffic in women and children noted that the prostitution of others as well as trafficking for sexual exploitation violated the right to dignity and welfare of the individual, the family as well as the community. See Preamble and Article 1 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

exploitation and its criminalisation.<sup>14</sup> The amendments also give insight into the link between trafficking in persons, the exploitation of others, and human rights.<sup>15</sup>

The increase in cases of exploitation of others and serious disregard for human rights and the need for a common standard to secure universal and effective recognition and observance of human rights, also significantly inspired further regulation.<sup>16</sup> Therefore, instruments such as the Universal Declaration of Human Rights (1948) (UDHR)<sup>17</sup> and the International Covenant on Civil and Political Rights (1966) (ICCPR),<sup>18</sup> International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)<sup>19</sup> as well as the Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW)<sup>20</sup> complement each other in providing a solid foundation for human rights promotion and protection against trafficking.<sup>21</sup>

However, even such instruments were not adequate to address issues of child trafficking,<sup>22</sup> which were largely camouflaged by umbrella concepts of slavery, migrant smuggling, forced labour, or sexual exploitation.<sup>23</sup> This conflation of the criminalisation

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<sup>14</sup> Kristiina Kangaspunta, 'A Short History of Trafficking in Persons' (2008) 1 *Freedom from Fear* 38, 39.

<sup>15</sup> *ibid.*

<sup>16</sup> The Preamble to the Declaration of Human Rights (1948) notes that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind and there is need for a common understanding of rights and freedoms. To this end the General Assembly, proclaimed the Universal Declaration of Human Rights as a common standard of achievement and realisation of these rights for all peoples and all nations.

<sup>17</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>18</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>19</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>20</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>21</sup> John Tobin and Florence Seow, 'Article 34. Protection from Sexual Exploitation and Sexual Abuse' in *The UN Convention on the Rights of the Child: A Commentary* (Oxford 2019) 1310. Also see Afroz Kaviani Johnson and Julia Sloth-Nielsen, 'Safeguarding Children in the Developing World—Beyond Intra-Organisational Policy and Self-Regulation' (2020) 9 (98) *Soc. Sci* 1, 7.

<sup>22</sup> See Preamble of the Trafficking Protocol which noted that the variety of international instruments which were in existence at that time there was still need for a universal instrument that addresses all aspects of trafficking in persons.

<sup>23</sup> The legal definition of slavery is found at Article 1 (1) of the 1926 Slavery Convention, which reads: 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. League of Nations, Convention to Suppress the Slave Trade and Slavery, 25 September 1926, 60 LNTS 253, Registered No. 1414. See also Jean Allain and Kevin Bales, 'Slavery and Its Definition' (2012) 14 (2) *Global Dialogue* 1, 8. See also Article 3 (a) of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air of 2000 which defines human smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident". Article 2 of the Forced labour Convention defines forced labour as, 'For the

of child trafficking and other crimes, particularly the abolition of the slave trade, has been a subject of great debate over the years.<sup>24</sup> The major bone of contention is that the inclusion of child trafficking in issues of slavery downplays the significant differences between the two and the need for specific regulatory mechanisms.<sup>25</sup> Therefore, although the two crimes may be similar in some respects, they are not the same.<sup>26</sup>

The subsequent recognition of children's rights through enactments of instruments such as the Convention on the Rights of the Child (1989) (CRC),<sup>27</sup> and later the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)<sup>28</sup> among others, is a recognition of the need to specifically address challenges of human exploitation based on age.<sup>29</sup>

The development and enactments of instruments that specifically protect children should however not be viewed in isolation from other key milestones around human rights protection. To this end, the General Assembly resolution 49/159 of 24 February

purposes of this Convention the term 'forced', or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. See also Article 2 of the Forced Labour Convention, 1930 (No. 29).

<sup>24</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) *The American Journal of International Law* 609, 623.

<sup>25</sup> Hathaway argues that; "there has really been no fundamental, overarching criticism of the effort to stamp out human trafficking as a worthy objective and, more specifically, as an appropriate focus of international law". See James C Hathaway, 'The Human Rights Quagmire of "Human Trafficking"' (2008) 49 (1) *Virginia Journal of International Law* 1, 2. Vernier also questions the basis for criminalizing act of complicity instead of the end result- slavery. Cf. Johanne Vernier, 'French Criminal and Administrative Law Concerning Smuggling of Migrants and Trafficking in Human Beings: Punishing Trafficked Persons for Their Protection?' in Elspeth Guild and Paul Minderhoud (eds), *Immigration and Criminal Law in the European Union: The Legal Measure and Social Consequences of Criminal law in Member States on Trafficking and Smuggling in Human Beings* (Martinus Nijhoff Publisher 2002) 7. See also Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (Cambridge University Press 2017) 8.

<sup>26</sup> *ibid* 2.

<sup>27</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>28</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001, A/RES/54/263.

<sup>29</sup> Such recognition was also highly dependent on international monitoring and review of human rights instruments as well as on the national actions of the governments who have ratified them. See Laura Lundy, Ursula Kilkelly and Bronagh Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' (2013) 21 (3) *International Journal of Children's Rights* 442, 442. See also Article 4 of the CRC which states that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation'.



1995,<sup>30</sup> noted the increase and geographical expansion of organised crime in its different types and how it affected the quality of life, human rights, and fundamental freedoms. The General Assembly resolution 53/111 of 9 December 1998 then established an intergovernmental *ad hoc* committee for developing a wide-ranging international convention on transnational organised crime which gave birth to the United Nations Convention against Transnational Organised Crime (2000)<sup>31</sup> and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)<sup>32</sup> which are important instruments in the combating of child trafficking across national boundaries.

These instruments promote the recognition of children's rights and the establishment of mechanisms to protect children from barbarous acts such as child trafficking.<sup>33</sup> Yet, despite all this regulatory effort, the scope of what constitutes child trafficking remains unclear and its impact is difficult to comprehend.<sup>34</sup> There is, however, no particular, authoritative, and single definition of child trafficking.<sup>35</sup> Child trafficking is now described as 'one of the greatest human rights violations of our time'.<sup>36</sup> It can best be understood as a derivative of trafficking in persons, a crime defined under the Trafficking Protocol as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

<sup>30</sup> Naples Political Declaration and Global Action Plan against Organised Transnational Crime adopted by the World Ministerial Conference on Organised Transnational Crime, held at Naples, Italy, from 21 to 23 November 1994.

<sup>31</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25.

<sup>32</sup> 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.

<sup>33</sup> See paragraph 2 to the Preamble to the Universal Declaration of Human Rights (1948). See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>34</sup> The ILO has pointed out that child trafficking is a result of the negative impact of Globalisation. See ILO, 'Global Estimates of Modern Slavery: forced labour and forced marriage' (2017) 1-25. See also Philip Hunter, 'Human Trafficking & Global Supply Chains' A Background Paper Prepared for the expert meeting convened by the UN Special Rapporteur on trafficking in persons, especially women and children, Ms. Joy Ngozi Ezeilo (Ankara, Turkey November 12th – 13th 2012) 1-46.

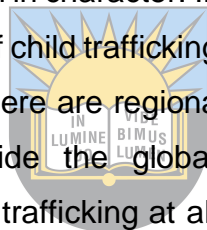
<sup>35</sup> Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European law* (Cambridge University Press 2017) 2.

<sup>36</sup> UN Press Release, Secretary-General calls Human Trafficking 'One of the Greatest Human Rights Violations of Today', 2 August 2002 <<https://www.un.org/press/en/2002/sgsm8323.doc.htm>> accessed 15 January 2022. See also President B Obama, 'Presidential Proclamation-End Human Trafficking' (Clinton Global Initiative, September 2012) <[www://obamawhitehouse.archives.gov/node/230831](http://www://obamawhitehouse.archives.gov/node/230831)> accessed 25 December 2021.

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.<sup>37</sup>

Child trafficking is, therefore, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.<sup>38</sup> Even if the means set out in article 3 (a) above have not been used to obtain the victim, the act still constitutes trafficking in persons where such a victim is a child.<sup>39</sup> Thus, the Trafficking Protocol, at least, provides some basic framework of the aspects relating to what constitutes child trafficking.<sup>40</sup>

Although the Trafficking Protocol, seeks to address child trafficking at a global level, the phenomenon is not necessarily global by its nature as it can be transnational, regional, cross-border, and national in character. In the Southern African Development Community (SADC), the problem of child trafficking is as prevalent among the Member States as it is globally.<sup>41</sup> Hence, there are regional and other non-global approaches to combat child trafficking outside the globalised legal framework. All these approaches seek to address child trafficking at all levels of international cooperation be it national, regional, continental, or multilateral.



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<sup>37</sup> Article 3 (a) 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.

<sup>38</sup> *ibid* Article 3 (c).

<sup>39</sup> A child is defined in terms of Article 3 (d) of the Trafficking Protocol as any person under the age of 18.

<sup>40</sup> It is argued that rigid adherence to the principle of the irrelevance of consent has enables courts widen the scope of what really constitutes child trafficking. See Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 *Anti-Trafficking Review* 14, 29. Furthermore, because the Trafficking Protocol does not define what constitutes exploitation, the ambit is extended to include practices such as illegal adoptions; commercial surrogacy; begging; prostitution/pornography; involvement in criminal activities; use in armed conflict or religious rituals; and kidnapping for purposes of extortion or political terrorism. See Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, 'Forms of exploitation not specifically mentioned in the Protocol', UN Doc. CTOC/COP/WG.4/2013/4, 2013.

<sup>41</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016), i <[https://www.sadc.int/files/3514/7505/0085/SADC\\_Baseline\\_Report\\_Low\\_Resolution.pdf](https://www.sadc.int/files/3514/7505/0085/SADC_Baseline_Report_Low_Resolution.pdf)> accessed 4 June 2022.



It has often been suggested that the most effective way of dealing with trafficking is at a regional level.<sup>42</sup> In particular, this is most relevant among the neighbouring African States with their porous borders and largely unaccounted movement of persons.<sup>43</sup> Regional communities in Africa, therefore, present unique and localised trafficking challenges that are best dealt with at the regional level. Specific mention can be made of conditions in some regions that are more fertile for child trafficking than others. In this case, it has been suggested that regions, where there is armed conflict, political instability and a lack of human rights protection, may present more peculiar and magnified circumstances for child trafficking.<sup>44</sup> This is particularly true for the States in SADC consisting of: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini,<sup>45</sup> Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe.<sup>46</sup>

Thus, States in the SADC region, as the most affected need to rise above these highlighted challenges and put in place measures to combat child trafficking. Apart from the highlighted global enforcement challenges brought about by the broad definition of trafficking in persons under the Trafficking Protocol that makes child trafficking difficult to combat, the crime of child trafficking ("the crime") has no

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<sup>42</sup> In a statement addressing the issue of non-punishment of victims of child trafficking, the Special Rapporteur on trafficking in persons made recommendations that in keeping in line with the goals of the trafficking Protocol, international efforts must be backed by regional as well as domestic measures to counter the crime. The role of regional instruments being very crucial in ensuring a unified regional approach to the crime that guarantees victim identification, protection and successful prosecution of criminals. See Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' United Nations Human Rights Special Procedures 1-12 available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> accessed 4 June 2022.

<sup>43</sup> UNODC, *Border Control* <https://www.unodc.org/westandcentralafrica/en/newrosenwebsite/TOC/border-control.html> accessed 4 June 2022.

<sup>44</sup> Ewolina Ochab, 'Human Trafficking Is A Pandemic Of The 21st Century' *Forbes* (26 July 2018) <https://www.forbes.com/sites/ewelinaochab/2018/07/26/human-trafficking-is-a-pandemic-of-the-21st-century/?sh=478537796195> accessed 22 December 2021.

<sup>45</sup> Swaziland was officially renamed to Eswatini in terms of Legal Notice 80 of 2018 which was published in the Gazette of 11 May 2018 and became effective 19 April 2018. In line with this name change any reference to Swaziland in any written law, international agreement or legal document shall be read and construed as a reference to Eswatini.

<sup>46</sup> The Declaration and Treaty establishing the Southern African Development Community (SADC) were signed by Heads of States or Governments on the 17<sup>th</sup> of August 1992 in Windhoek, Namibia. The Union of Comoros became the 16th SADC Member State in 2017. See also SADC, 'The Union of Comoros becomes the 16th SADC Member State' SADC (20 August 2017) <https://www.sadc.int/news-events/news/union-comoros-becomes-16th-sadc-member-state/> accessed 4 June 2022.

independent measures that specifically regulate it.<sup>47</sup> As a result, the trafficking of children for exploitation continues to increase worldwide.<sup>48</sup>

The trafficking of children for exploitation is exacerbated by the widespread demand for cheap goods and labour.<sup>49</sup> Global trends show that the impoverished African States are mostly the sources of victims of child labour or commercial sexual exploitation.<sup>50</sup> In 2016, the United Nations Office on Drugs and Crime (UNODC) reported that between 2012 and 2014, more than five hundred different human trafficking flows were identified worldwide.<sup>51</sup> Of these, 78% were children from Africa. Of all the victims, 79%, (of which 30% were women and children) were trafficked for sexual exploitation and 18% for forced labour.<sup>52</sup> In addition, the International Labour Organisation (ILO) and Walk Free Foundation also reported that of an estimated figure of 24.9 million victims of trafficking in persons, 50% were children. Of these, 16 million (64%) were trafficked for labour exploitation, 4.8 million (19%) for sexual exploitation, and 4.1 million (17%) in state-imposed forced labour.<sup>53</sup>

Although these statistics show a global prevalence of child trafficking, no region is immune to child trafficking.<sup>54</sup> The United Nations (UN) has reported concerning figures



<sup>47</sup> There are various ILO conventions that contribute to the fight against child trafficking for exploitation. These include, among others, the Worst Forms of Child Labour Convention, 2000 (No. 182), Abolition of Forced Labour Convention, 1957 (No.105), and the Forced Labour Convention, 1930 (No. 29).

<sup>48</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (UNODC 2018) 23.

<sup>49</sup> *ibid.*

<sup>50</sup> Gabriel Wold, 'Root Causes and Solutions to Human Trafficking in Ethiopia' (2014) 3 (8) *International Journal of Science and Research* 1578, 1580.

<sup>51</sup> UNODC, *Report on Human trafficking* (UNODC and the UN Global Initiative to fight Human Trafficking 2009) 6.

<sup>52</sup> Unfettered internet access exposes children to the danger of sexual exploitation, particularly in the context of an unprecedented increase in demand in child pornography and other related crimes. It also attracts them to the supposed good life abroad, thereby making it easy for perpetrators to use promises of a better life as bait. In Mpumalanga, South Africa, two girls were trafficked to Malawi in the pretext that they were being taken to UK to further their studies. See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 42. See also International Organisation for Migration (IOM), *Breaking the Cycle of Vulnerability: Responding to the health needs of trafficked women in East and Southern Africa* (Pretoria South Africa, 2006) 22.

<sup>53</sup> ILO, 'Global Estimates of Modern Slavery: Forced Labour and Forced Marriage' Geneva 2017 1-25 <[https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575540.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575540.pdf)> accessed 17 November 2020. See also Human Rights First, 'Human Trafficking by Numbers' (7 September 2017) <<https://www.humanrightsfirst.org/resource/human-trafficking-numbers>> accessed 8 January 2021.

<sup>54</sup> UN, 'Secretary-General calls Human Trafficking 'One of the Greatest Human Rights Violations of Today'', 2 August 2002 <<https://www.un.org/press/en/2002/sgsm8323.doc.htm>> accessed 20 January 2019. United Nations Office on Drugs and Crime, 'Human Trafficking: People for Sale' <<https://www.unodc.org/toc/en/crimes/human-trafficking.html/>> accessed 3 December 2021.

showing the prevalence of trafficking in the SADC region.<sup>55</sup> In 2018, about 46% of the overall victims of detected trafficking in persons were children from low-income States, most of which are found in the SADC region.<sup>56</sup> This is an 18% increase, within a period of 2 years from the 28% reported in 2016.<sup>57</sup>

Child trafficking has become a widespread challenge in the SADC region in the past decade due to a cocktail of socio-economic factors, which increase the demand for commercial sex and cheap labour.<sup>58</sup> In essence, the driving force behind the crime is the need for the economic exploitation of others where humans are treated as commodities to be traded or abused for personal gain.<sup>59</sup> States in the SADC region are fertile ground for trafficking due to poverty, underdevelopment, and lack of equal economic opportunities.<sup>60</sup> Weak human rights protection in the SADC States also significantly contributes to the vulnerability of children in the region.<sup>61</sup>

In addition to the above factors, internet abuse,<sup>62</sup> and unrestricted movement in the region due to free cross-border movement and porous borders have increasingly rendered children vulnerable to trafficking.<sup>63</sup> As a result, children are trapped and sold

<sup>55</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 55.

<sup>56</sup> These children would be used for criminal activities and labour. See UNODC, *Global Report on Trafficking in Persons 2020*, 9. See also International Labour Organisation, Organisation for Economic Co-operation and Development, International Organisation for Migration and United Nations Children's Fund, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chain* (ILO, the OECD, IOM and UNICEF 2019) 7-17.

<sup>57</sup> Text to n 41 in ch 1.

<sup>58</sup> United Nations, 'Human Trafficking in Lesotho: Root Causes and Recommendations' UN Policy paper No.146 (E)/2007, 30- 31.

<sup>59</sup> Frances P Bernat and Tatyana Zhilina, 'Human Trafficking: The Local Becomes Global' (2010) 20 (1-2) Women & Criminal Justice1, 9. See also Clayton H Vhumbunu, 'Combating Human Trafficking in the Southern African Development Community: Strategies, Challenges, and Opportunities' (2020) 42 (2) Strategic Review for Southern Africa 179, 178.

<sup>60</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 42. See also European Commission, *'Trafficking in Women – The Misery Behind the Fantasy: from Poverty to Sex Slavery, A Comprehensive European Strategy'* (European Commission 2001) <[http://europa.eu.int/comm/employment\\_social/equ\\_opp/index\\_en.htm](http://europa.eu.int/comm/employment_social/equ_opp/index_en.htm) > accessed 12 July 2020.

<sup>61</sup> Adepoju Aderanti, 'Review of Research and Data on Human Trafficking in Sub-Saharan Africa' (2005) 43 International Migration 75, 78. See also Clayton H Vhumbunu, 'Combating Human Trafficking in the Southern African Development Community: Strategies, Challenges, and Opportunities' (2020) 42 (2) Strategic Review for Southern Africa 179, 188-192.

<sup>62</sup> Trafficking syndicates often use online platforms to further their trafficking practices. OHCHR, 'Sexual exploitation of children and Information and Communication Technologies (ITCs)' (March 2015) <[www.ohchr.org/EN/Issues/Children/Pages/ICT.aspx](http://www.ohchr.org/EN/Issues/Children/Pages/ICT.aspx)> accessed 5 April 2020. See also Internet World Stats, Internet Users Statistics for Africa (Africa Internet Usage, 2021 Population Stats and Facebook Subscribers) <https://www.internetworldstats.com/stats1.htm> accessed 23 December 2021.

<sup>63</sup> OHCHR, 'Sexual exploitation of children and Information and Communication Technologies (ITCs)' (March 2015) <[www.ohchr.org/EN/Issues/Children/Pages/ICT.aspx](http://www.ohchr.org/EN/Issues/Children/Pages/ICT.aspx) > 'accessed 5 April 2021.

into exploitation. Often, these children cannot escape from these exploitative circumstances.

Thus, in response to the scourge of trafficking in persons in general, the majority of SADC Member States have enacted legislation and policies specifically designed to address the problem.<sup>64</sup> These measures are anchored on the prevention of the crime, protection of victims, and prosecution of offenders.<sup>65</sup> To this end, SADC Member States have national strategic frameworks and action plans to combat child trafficking.<sup>66</sup> In addition, SADC States are party to the African Charter on the Rights and Welfare of the Child, (1990),<sup>67</sup> African Charter on Human and Peoples' Rights, (1981) (Banjul Charter)<sup>68</sup> and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003),<sup>69</sup> among other instruments that seek to criminalise child trafficking and promote children's rights.

It is noteworthy that, aside from the above instruments, SADC has no stand-alone child trafficking legislation.<sup>70</sup> The problem of child trafficking is dealt with as a component of trafficking in persons, a term that encompasses all forms of human trafficking irrespective of age or gender. Child trafficking is partially regulated by the SADC Protocol on Gender and Development (2008),<sup>71</sup> which addresses trafficking in persons as a type of gender-based violence.<sup>72</sup> Furthermore, the Protocol on Extradition (2002)<sup>73</sup>

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<sup>64</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 2.

<sup>65</sup> See Articles 6-10 of the Trafficking Protocol.

<sup>66</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 5.

<sup>67</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>68</sup> 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).

<sup>69</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

<sup>70</sup> The SADC Summit only adopted and signed the Protocol against Trafficking in Persons in August 2022.

<sup>71</sup> SADC Protocol on Gender and Development (2008) signed 17 August 2008 <<https://www.sadc.int/document/protocol-gender-and-development-2008>> accessed 31 August 2022.

<sup>72</sup> Article 20 (5) of the SADC Protocol on Gender and Development 2008 as amended, stipulates that State Parties shall put in place mechanisms for the social and psychological rehabilitation of perpetrators of gender-based violence. Article 20 (5) (a) - (e) outlines the obligations of State Parties thereof.

<sup>73</sup> SADC Protocol on Extradition (2002) Signed 03 October 2002 <<https://www.sadc.int/document/protocol-extradition-2002-0>> accessed 31 August 2022.

and the Protocol on Mutual Legal Assistance in Criminal Matters (2002)<sup>74</sup> also contribute significantly to the regional framework against child trafficking.<sup>75</sup>

To supplement the above instruments, SADC Member States, from time to time, establish plans of action to assist with the implementation of international as well as regional measures regulating child trafficking. In this regard, the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) and the 10 Year SADC Strategic Plan of Action to Combat Trafficking in Persons, Especially Women and Children 2009-2019, are the main regional plans of action against child trafficking.<sup>76</sup> The 10-Year SADC Strategic Plan of Action on Combating Trafficking in Persons (2009-2019) was reviewed in 2016 and the Revised Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2016-2019) was developed. The SADC Ministerial Committee of the Organ on Politics, Defence and Security Cooperation (OPDSC) only approved the revised plan a year later in 2017.<sup>77</sup>



To the extent that these regional efforts recognise the need to address child trafficking in the region, the current instruments and mechanisms are a step in the right direction. However, despite the presence of some regulatory framework, there is also a glaring lack of coordination, implementation, consistent application, enforcement, and lack of capacity to interpret the existing laws.<sup>78</sup> It can be argued that implementation of their respective domestic laws and policies is still a challenge because of the lack of resources and training of relevant personnel, among other hurdles.<sup>79</sup> For most SADC Member States it can also be argued that being party to key human rights instruments alone is not in itself addressing the scourge of child trafficking. There has to be a

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<sup>74</sup> SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002) signed 03 October 2002 <<https://www.sadc.int/document/protocol-mutual-legal-assistance-criminal-matters-2002>> accessed 31 August 2022.

<sup>75</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 34.

<sup>76</sup> The SADC policy framework is highly informed by the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children of 2006, AU Commission Initiative against Trafficking (AU COMMIT) 2009.

<sup>77</sup> SADC, *Revised SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2016-2019)* (SADC Secretariat 2017).

<sup>78</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 2.

<sup>79</sup> Clayton H Vhumunu, 'Combating Human Trafficking in the Southern African Development Community: Strategies, Challenges, and Opportunities' (2020) 42 (2) *Strategic Review for Southern Africa* 179, 188.



practical application and enforcement of the instruments at the national level in a coordinated manner. Otherwise, this may explain the lack of a co-relationship between the legislative efforts and the continued increase in child trafficking challenges in the SADC region. Invariably, it is prudent to suggest that the continued increase in child trafficking cases in the region is indicative of an inadequate framework for combating child trafficking. It is on this basis therefore that this study critically assesses the legal and policy frameworks for combating child trafficking in the SADC region.

## 1.2 Research Problem

The SADC legislative and policy framework to combat trafficking in persons appears to be inadequate to address child trafficking in the region.<sup>80</sup> Statistics show that child trafficking is prevalent in the SADC region despite the availability of some national and international instruments aimed at addressing the problem.<sup>81</sup> The ineffectiveness and inadequacy of this existing framework are manifest in the rise in forced child labour, sexual exploitation, and disregard for human rights.<sup>82</sup>

Unfortunately, the regulatory framework for child trafficking in the SADC States is compromised by other socio-economic considerations that hinder effective regulation.<sup>83</sup> Despite the noted increase in child trafficking cases in the region, SADC States still do not have legislation specifically dealing with child trafficking.<sup>84</sup> At best, this problem is addressed within umbrella instruments addressing trafficking in persons in general, despite the peculiarities associated with child trafficking that trafficking in persons, in general, does not adequately address.<sup>85</sup> Even those States that have taken steps to address child trafficking by imposing strict regulations on the cross-border

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<sup>80</sup> This refers to *inter alia*, the Trafficking Protocol; the Protocol on Gender and Development; SIPO and the 10-year SADC Strategic Plan of Action to Combat Trafficking in Persons, Especially Women and Children (2009-2019). See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 3.

<sup>81</sup> UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report* (2014-2016) 4.

<sup>82</sup> International Labour Organisation, Organisation for Economic Co-operation and Development, International Organization for Migration and United Nations Children's Fund, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chain* (ILO, OECD, IOM and UNICEF 2019) 7-17. See also ILO and Walk Free Foundation, *Global Estimates of Modern Slavery* (ILO and Walk Free Foundation 2017).

<sup>83</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 57.

<sup>84</sup> *ibid* 2.

<sup>85</sup> In particular, the United Nations Convention Against Transnational Organised Crime (2000) and the Protocols thereto.

movement of children have also since backtracked on account of economic considerations.<sup>86</sup> This hinders the possibility of effectively implementing measures taken or successfully dealing with the factors of child trafficking.<sup>87</sup>

Therefore, without a consistent, comprehensive, and coordinated approach, implementation of measures remains weak, leading to a major obstacle in fully combating child trafficking in the region.<sup>88</sup> It is not enough that all SADC Member States have ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, or are party to other relevant international instruments. There is still a need to adhere to the obligation for State Parties to adopt legislative and practical policy measures to specifically deal with child trafficking. Furthermore, without legislative development aimed at addressing the key factors of child trafficking, it will be difficult to remedy the inefficiency of the already existing legislative and policy framework. This also includes taking steps to better understand the nature and trends of the crime of child trafficking as well as its intensity in the region.<sup>89</sup> Otherwise, a false panacea is created whilst the problem grows. As it is, the reality of child trafficking in the region is at the risk of being buried under a façade of policies and strategies that are either not feasible or hardly implemented.

This research aims to critically assess the adequacy of the SADC legal and policy frameworks for combating child trafficking. It brings to the fore the inadequacies of the frameworks which need to be addressed. This is important to foster a coordinated approach which would in turn reduce duplication of actions and initiatives without any significant improvement to best address the problem.<sup>90</sup> Furthermore, the assessment

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<sup>86</sup> David Cogswell, 'South Africa Relaxes Entry Restrictions on Minors' *Travel Market Report* (3 January 2019) <<https://www.travelmarketreport.com/articles/South-Africa-Relaxes-Entry-Restrictions-on-Minors>> accessed 3 January 2022. Also see Roseline Muvhevi, 'South Africa's 2015 Immigration Regulations and the Controversy Concerning the Rights of the Child Traveller' (Master of Philosophy in Human Rights Thesis, University of Fort Hare 2016).

<sup>87</sup> *ibid.*

<sup>88</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 1.

<sup>89</sup> The SADC Secretariat commissioned research in 2014 which showed data gaps on trafficking in persons. It was confirmed that women and girls are the most vulnerable group to trafficking in persons in the SADC region other factors include poverty, unemployment, and lack of income-generating opportunities. See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 2.

<sup>90</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 58.

highlights possible solutions to improve the implementation and development of child trafficking specific legislation and policies in the region.

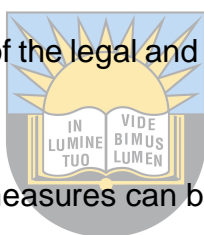
### 1.3 Research Questions

The main research question addressed is:

- How effective are the legal and policy measures taken by SADC States to combat child trafficking?

Subsidiary questions for research are:

- What international instruments address the issue of child trafficking?
- What legislative measures and policies have SADC States put in place to address child trafficking?
- What are the shortcomings of the legal and policy framework for combating child trafficking in SADC?
- What additional new legal measures can be developed to address any existing shortcomings?



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### 1.4 Research Methodology

Statistics show that there is an increase in child trafficking in the SADC region despite the availability of national, regional, and international instruments aimed at addressing the problem.<sup>91</sup> Thus, this research assesses the effectiveness of the legal and policy measures taken by SADC States to combat child trafficking. Furthermore, the research identifies the shortcomings of the legal and policy framework for combating child trafficking in the SADC region and the possible solutions to address these shortcomings.<sup>92</sup> To achieve this, the research employs qualitative methods of research.

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<sup>91</sup> United Nations Office on Drugs and Crime (UNODC), 'Trafficking in Persons in the SADC Region: A Statistical Report' (2014-2016).

<sup>92</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 57.



By description, qualitative methods of research involve the processes of collecting, analysing, interpreting, and writing the results of a study. Qualitative research is:

multimethod in focus, involving an interpretive, naturalistic approach to its subject matter. This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meanings people bring to them.<sup>93</sup>

This is the most suitable approach to addressing the research problem in that it enables a multifaceted approach to the problem to reach an informed conclusion. Furthermore, qualitative research has also been praised for forming the foundation of legal understanding within a short period.<sup>94</sup> In addition, because of its focus on the sources of jurisprudence, established research is more manageable and results more predictable.<sup>95</sup>

Thus, in evaluating the SADC legal and policy frameworks for child trafficking, the reform-oriented research methodology is used to evaluate the adequacy of existing rules and recommend necessary changes.<sup>96</sup> This research evaluates the adequacy of the existing international, regional as well as national frameworks in addressing child trafficking.<sup>97</sup> This responds to the questions that the research seeks to address regarding effectiveness and shortcomings and how they may be addressed.<sup>98</sup>

Furthermore, this methodology implies knowledge of legal development and institutions in the law that must be reformed; in which case the overall question of the research would be to ascertain: what needs to be done by legal reforms to accomplish a given task?<sup>99</sup> In the context of this research, the question would be: what measures should be put in place to address the problem of child trafficking in the SADC region?

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<sup>93</sup> Norman Denzin and Yvonna Lincoln, *Handbook of Qualitative Research* (SAGE 1994) 2. See also Karin Hammarberg, Maggie Kirkman, Sheryl de Lacey, 'Qualitative research methods: when to use them and how to judge them' (2016) 31 (3) *Human Reproduction* 498, 500.

<sup>94</sup> Adilah Razak, *Understanding Legal Research*, (Integration and Dissemination 2011) 21.

<sup>95</sup> Salim Ibrahim Ali, Zuryati Mohamed Yusoff, Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) 4 (1) *International Journal of Trend in Research and Development* 1.

<sup>96</sup> Leon E Trakman, 'Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research and Education in Law' (1983) 3 (21) *Osgoode Hall Law Journal* 554, 560.

<sup>97</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016).

<sup>98</sup> See para. 1.3 *Research Questions*, above.

<sup>99</sup> Warren Du Plessis, *A Self Help Guide: Research Methodology and Dissertation Writing* (NWU 2007) 30.

It has been argued that reform-oriented type of research is a form of doctrinal research.<sup>100</sup> However, the difference is that while pure doctrinal research identifies and analyses the current law, reform-oriented research goes beyond that and suggests ways by which the law could be amended or the philosophy, processes, or administration of the law improved.<sup>101</sup> Thus, to the extent that it differs from a doctrinal approach, a reform-oriented approach becomes the most suitable approach to the research problem in that the research then assesses previous child trafficking legislation and how the framework has evolved over the years into what is currently used to regulate the crime in the SADC region.<sup>102</sup> Such an assessment assists in effective legislative development.

Secondary methods of data collection are used to obtain information on child trafficking.<sup>103</sup> Statistics are obtained from various credible sources and websites including but not limited to the publications and official documents from the World Stats; Stats SA; UN Statistical Database; SADC; UNESCO Institute for Statistics; ILO; World Bank and UNICEF. These statistics are crucial in understanding the global trends of child trafficking which in turn assists in determining the various factors of child trafficking. Such information helps in developing policies and measures that adequately address the problem. The above-mentioned sources of information are the custodians of information related to children, trafficking in general, child exploitation, and the factors thereof.

Therefore, reports of UN Agencies and treaty bodies as well as Resolutions of the UN General Assembly were major sources of information for this research.<sup>104</sup> In addition to these sources, textbooks published scholarly articles, law reviews, and journals as well as decided cases were also used in support of various points of view.

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<sup>100</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review 130, 138.

<sup>101</sup> *ibid.*

<sup>102</sup> Qualitative methods differ from the way quantitative research is done in that qualitative research involves an interpretive, naturalistic approach to its subject matter. See Norman Denzin and Yvonna Lincoln, *Handbook of Qualitative Research* (SAGE 1994) 2.

<sup>103</sup> Secondary analysis of data involves the use of already existing data that was collected by someone else. This is the most suitable type of data analysis for researchers who do not have sufficient time and resources. See Melissa P Johnston, 'Secondary Data Analysis: A Method of which the Time Has Come' (2014) 3 Qualitative and Quantitative Methods in Libraries (QQML) 619, 619.

<sup>104</sup> The Trafficking Protocol; the Protocol on Gender and Development; SIPO and the 10-year SADC Strategic Plan of Action to Combat Trafficking in Persons, Especially Women and Children (2009-2019) on child trafficking in SADC will be the major points of reference.

After gathering data on child trafficking from the above sources, for instance, the number of children being trafficked worldwide as well as the number of children trafficked from SADC States, such information is then analysed together with relevant legislation, hard and soft law alike, starting with international law, then regional law and lastly national law. This helps in understanding whether there is enough regulation of the crime. By so doing, the research questions are responded to in that the legislative shortcomings and gaps are identified, and recommendations are made.

## 1.5 Limitations

Generally, one of the limitations of using the qualitative method of research is that case studies are drawn from a limited area because of the time and costs involved. Thus, the problem of adequate validity or reliability is a major criticism. Limited previous studies on child trafficking legislation in SADC States and limited access to data were the main challenges faced in conducting this research.

Notwithstanding that there are a lot of previous studies on trafficking in persons in general, there are very few studies that specifically address the problem of child trafficking in SADC States. This research uses the availability of a plethora of data on the broader concept of trafficking in persons as an illustration of how child trafficking is yet to get attention as a stand-alone phenomenon requiring specific legislative and policy measures to counter it.

When it comes to ascertaining the actual statistics of child trafficking in the SADC region, there are glaring inconsistencies, depending on the availability of research resources in the respective States.<sup>105</sup> As a result, the findings of this research are not purely based on statistics but a critical assessment of child trafficking legal and policy frameworks.

Accordingly, this research relies on UN reports on child trafficking in SADC to corroborate the little information available on child trafficking in the respective

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<sup>105</sup> Guri Tyldum and Annete Brunovskis, 'Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking', (2005) 43 (1-2) *International Migration* 1, 18. See also Conrad J Masabo, Marobe Wama and Tekla P Mlyansi, 'The Role of Regional Integration in Fighting Crime and Terrorism: The Case of the Africa Union's (AU's) Initiatives, 1999-2014' (2014) *Peace and Conflict Monitor* 1.

States.<sup>106</sup> Where actual figures are used to illustrate the extent of the problem, data is obtained from different credible organisations and websites such as World Stats; Stats SA, UN Statistical Database, SADC, UNESCO Institute for Statistics, ILO, World Bank, UNICEF, and CTDC, among others.<sup>107</sup>

However, even where statistics are verified to be accurate, the other challenge faced was that with time and as a result of the evolving nature of child trafficking, the figures also kept changing and would therefore require to be constantly updated. This also alludes to the urgency that should be given to matters concerning addressing the problem of child trafficking.

Be that as it may, this research has managed to form the foundation for legal understanding and practicality of the child trafficking legal and policy frameworks in SADC.<sup>108</sup> Furthermore, because of its focus on sources of jurisprudence, the research was manageable and results more predictable, thus paving way for future studies on child trafficking legislative reforms.<sup>109</sup>

Future studies on child trafficking should possibly be on selected States to allow for research to be completed within a shorter period. This would enable recommendations to be quickly considered and implemented as fast as the phenomenon also evolves.

The information contained in this thesis includes facts up to 31 August 2022.

## 1.6 Structure of Thesis

The thesis has six chapters as follows:

Chapter 1 provides an overview of the thesis. The chapter outlines the research problem, research questions, aims, methodology, and limitations of the study.

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<sup>106</sup> Ruby Andrew and Benjamin N Lawrance, 'Anti-Trafficking Legislation in Sub-Saharan Africa: Analyzing the Role of Coercion and Parental Responsibility' (Fourth Annual Interdisciplinary Conference on Human Trafficking, Lincoln, NE, 12 October 2012).

<sup>107</sup> The Counter Trafficking Data Collaborative Global Data Hub on Human Trafficking <https://www.ctdatacollaborative.org/> accessed 26 December 2020.

<sup>108</sup> Adilah Razak, *Understanding Legal Research* (Integration and Dissemination 2011) 21.

<sup>109</sup> Salim Ibrahim Ali, Zuryati Mohamed Yusoff, Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal' (2017) (1) International Journal of Trend in Research and Development 1, 5.

Chapter 2 discusses the causes of child trafficking in the SADC region as well as the socio-economic impact of child trafficking.

Chapter 3 provides an overview of the international regulatory framework.

Chapter 4 discusses the influence of the international framework against child trafficking on the sub-regional and national frameworks. It also identifies the gaps in the regional frameworks and how they may be bridged.

Chapter 5 is a critical analysis of the SADC legal and policy frameworks and identifies the challenges of effective implementation of measures against child trafficking.

Chapter 6 concludes and makes recommendations for policy and further research.



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## CHAPTER 2

# CHILD TRAFFICKING IN THE SADC REGION: CAUSES AND IMPACT

### 2.1 Introduction

Child trafficking is increasing in the SADC region despite the availability of some national and international instruments aimed at addressing the problem.<sup>1</sup> Statistics show a fluctuating increase in child trafficking victims over a sustainable period. The United Nations Office on Drugs and Crime's *Global Report on Trafficking in Persons* (2016) showed that children constituted 27%, 34%, and 28% of identified victims of trafficking in persons in 2009, 2011 and 2014 respectively.<sup>2</sup> The latest report shows that about 46% of the overall detected trafficking victims were children from low-income States.<sup>3</sup> This alludes to the fact that the causes of child trafficking in the region transcend legislative challenges.

This chapter discusses the causes of child trafficking ("the crime") in the SADC region as well as the impact of the crime on the victims and society. The United Nations (UN) has reported that child trafficking in the SADC region is driven by demand for cheap goods; commercialised sex and cheap labour.<sup>4</sup> It has been suggested that child

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<sup>1</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 2.

<sup>2</sup> The SADC Executive Secretary confirmed the increase in child trafficking numbers in a statement in 2018 on the World Day against Trafficking. See Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 April 2021.

<sup>3</sup> These children would be used for criminal activities and labour. See UNODC, *Global Report on Trafficking in Persons 2020* (United Nations 2020), 9. See also International Labour Organisation, Organisation for Economic Co-operation and Development, International Organisation for Migration and United Nations Children's Fund, *'Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chain'* (ILO, the OECD, IOM and UNICEF 2019) 7-17.

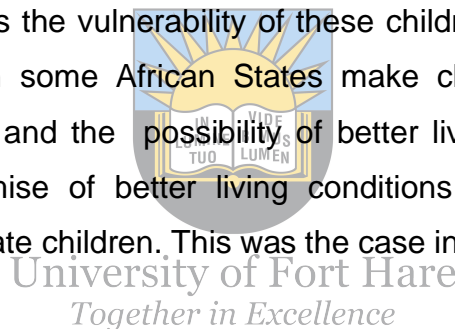
<sup>4</sup> United Nations, 'Human Trafficking in Lesotho: Root Causes and Recommendations' UN Policy paper No.146 (E). See also Fatma M Abdullah, 'Legal and Ethical Aspects beyond Commercial Surrogacy: Modern Form of Human Trafficking' (2019) 22 (1) Journal of Legal, Ethical and Regulatory Issues 1, 6.

trafficking is a lucrative illegal business because children have fewer demands and can work longer hours.<sup>5</sup>

A discussion of the causes of child trafficking in the SADC region, in this chapter, lays the foundation for an investigation into whether current policies and legislative measures are adequate to deal with child trafficking in the region. Furthermore, the discussion of the impact of child trafficking on the victims assists in formulating measures that can be implemented to alleviate the impact of the crime on the victims as well as positively alter society's perception of the victims.<sup>6</sup>

## 2.2 Causes

The vulnerability of minors to trafficking in the SADC region is a result of many factors. These factors include but are not limited to civil unrest and economic deprivation, and the increase child-headed families consequent to the HIV/AIDS pandemic and armed conflict which exacerbates the vulnerability of these children to trafficking.<sup>7</sup> Also, the conditions of hardship in some African States make children vulnerable to false promises of employment and the possibility of better living conditions elsewhere.<sup>8</sup> Traffickers use the promise of better living conditions in foreign States to lure unsuspecting and desperate children. This was the case in a Zimbabwean case of *S v*



<sup>5</sup> Children trafficked for labour particularly those who end up as farm workers tend to get little sleep, have very long days of hard labour. See Erica Polakoff, 'Globalisation and Child Labour: Review of the Issues' (2007) 23 (1-2) *Journal of Developing Societies* 259, 269. Also see ECPAT, 'The trafficking of children for sexual purposes: One of the worst manifestations of this crime' (6 August 2018 ECPAT) <https://ecpat.org/trafficking-the-third-largest-crime-industry-in-the-world/> accessed 23 December 2021. See also 'Human Trafficking by Numbers' (*Human rights first* 8 September 2017) <<https://www.humanrightsfirst.org/resource/human-trafficking-numbers>> accessed 8 January 2021.

<sup>6</sup> Clayton H Vhumbunu, 'Combating Human Trafficking in the Southern African Development Community: Strategies, Challenges, and Opportunities' (2020) 42 (2) *Strategic Review for Southern Africa* 179, 188.

<sup>7</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 April 2021.

<sup>8</sup> Noël Busch-Armendariz, Maura Nsonwu, and Laurie Cook Heffron, 'Understanding Human Trafficking: Development of Typologies of Traffickers PHASE II' (Annual Interdisciplinary Conference on Human Trafficking, Nebraska, October 2009) 6. Also see Tsireledzani, *Understanding the dimensions of Human Trafficking in Southern Africa* (Research Report Human Sciences Research Center 2010) 7.



*Munyanyi*;<sup>9</sup> three accused persons allegedly trafficked four Mozambican juveniles by transporting them to Zimbabwe for employment opportunities that did not exist.<sup>10</sup>

Importantly, the above case is also an illustration of the traffickers' *modus operandi*, which is highly enabled by the interconnectedness of States as well as porous borders in the region.<sup>11</sup> Border controls are, amongst other factors, weakened by corrupt border officials who facilitate the illegal movement of victims. Where official ports of entry are not used, border smugglers assist traffickers to evade the police. At the Beitbridge border post, which is the border between Zimbabwe and South Africa, border smugglers commonly known as *Gumaguma* or *Malaisha* assist trafficking syndicates to evade the police and illegally cross the border with victims.<sup>12</sup> In other words, porous borders enable traffickers to successfully operate throughout the region without any serious challenge or consequence. This, therefore, increases the demand for children for exploitation.

Since syndicates can easily move victims across borders, the demand for commercial sex and cheap labour is consistently met.<sup>13</sup> As a result, child trafficking numbers have increased over the years.<sup>14</sup> The UN has reported that for Zimbabwe alone between



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<sup>9</sup> *S v Munyanyi and Others* (8046/17) (2013) ZWHHC 51 (25 January 2013).

<sup>10</sup> The victims had met the three accused persons in Chipinge. The accused had told them that they would be taken to Harare where they will be employed by the mother of the second accused. Furthermore, the victims were promised salaries of USD 25 for the job. The court had to determine whether the accused persons had contravened section 3(i)(a)(ii) of the Trafficking in Persons Act Chapter 9:25. Section 3 (1)(A)(ii) of the Trafficking in Persons Act makes an offence to traffic any individual by transporting him or her into, outside, or within Zimbabwe voluntarily for an unlawful purpose. All the State must prove is that the individual was: (a) Transported (trafficked) (b) Into, outside or within Zimbabwe (in this case it is within Zimbabwe) (c) Voluntarily – as in this case (d) For an unlawful purpose – in this case, employing minors is a known offence and employing an undocumented immigrant is a known offence – therefore an unlawful purpose.

<sup>11</sup> UNODC, 'UNODC & Malawi Launch New Measures to Combat Human Trafficking Among Refugees' (2021) <<https://www.unodc.org/unodc/en/frontpage/2021/April/unodc-and-malawi-launch-new-measures-to-combat-human-trafficking-among-refugees.html>> accessed 4 June 2021.

<sup>12</sup> Zosa De Sas Kropiwnicki, *Wolves in Sheep's skin A Rapid Assessment of Human Trafficking in Musina, Limpopo Province of South Africa* (IOM 2010) 1. Also see UNODC, 'UNODC and Mozambique discuss Strategic Roadmap against Transnational Organized Crime, Drugs and Terrorism' (UNODC 18 September 2019).

<sup>13</sup> United Nations 'Human Trafficking in Lesotho: Root Causes and Recommendations' UN Policy paper No.146 (E). Also see Abigail Domingo, 'Supply and Demand: Human Trafficking, stop Human trafficking now' (United Nations July 2017) <<https://encstophumantrafficking.org/supply-demand-human-trafficking/>> accessed 8 January 2021.

<sup>14</sup> A sharp increase has been noted in child trafficking statistics. See recent statistics on child trafficking at; Child Trafficking Statistics <<https://arkofhopeforchildren.org/child-trafficking/child-trafficking-statistics>> accessed 17 April 2021.

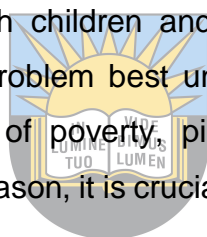


February to July in 2016, the State had an estimated 200 victims trafficked to Kuwait.<sup>15</sup> This is not an isolated incident but is symptomatic of the rise in demand for exploitation and the prevalence of child trafficking in the region which requires both national and regional measures to combat the problem.<sup>16</sup>

An analysis of the causes of child trafficking in the region shows that while demand for exploitation plays a major role in child trafficking;<sup>17</sup> socio-economic challenges in the SADC region continue to put children at the risk of trafficking.<sup>18</sup> Combined, these factors create a vicious trafficking cycle in that economic instability results in a lack of employment opportunities and poverty. It is therefore important to consider how these factors including demand for exploitation play a significant role in the prevalence of child trafficking in SADC and how they may be addressed.<sup>19</sup>

### 2.2.1 Poverty

The effects of poverty make both children and adults vulnerable to trafficking.<sup>20</sup> However, poverty is a complex problem best understood in a particular context.<sup>21</sup> Without identifying the elements of poverty, pinpointing its causes and possible solutions is a challenge. For this reason, it is crucial to first define poverty to determine how it influences child trafficking.



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<sup>15</sup> Nqobile Bhebhe, '200 Zimbabwean women trafficked to Kuwait' *the Africa Report* (16 March 2016) <https://www.theafricareport.com/1763/200-zimbabwean-women-trafficked-to-kuwait/> accessed 5 November 2021. See also U.S Department of State, '2021 Trafficking in Persons Report: Zimbabwe' (2021) 1 <https://www.state.gov/reports/2021-trafficking-in-persons-report/zimbabwe/> accessed 23 December 2021.

<sup>16</sup> In response to the increase in cases of child trafficking, the Government of Zimbabwe launched its Trafficking in Person National Plan of Action (NAPLAC) and adopted the Blue Heart Campaign. The launch was a step towards implementation of the country's obligations under the Trafficking Protocol. See UNODC, 'Zimbabwe Launches the Trafficking in Persons National Plan of Action and adopts the Blue Heart Campaign' <<https://www.unodc.org/southernafrica/en/ht/zimbabwe-launches-the-trafficking-in-persons-national-plan-of-action-and-adopts-the-blue-heart-campaign.html>> accessed 4 June 2020.

<sup>17</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 15.

<sup>18</sup> Laura Gauer Bermudez, 'No experience necessary' The internal trafficking in persons in SA (2008) International Organisation for Migration (IOM) Regional Office for Southern Africa 12.

<sup>19</sup> Nina Mollema 'Combating Human Trafficking in South Africa: A Comparative Study' (LLD Thesis, University of South Africa 2013) 75.

<sup>20</sup> UNODC, *Global Report on Trafficking in Persons* (2020) 9.

<sup>21</sup> Frances Stewart, Ruhi Saith, Barbra Harris-White, *Defining Poverty in the Developing World* (Palgrave Macmillan 2007) 3.

There are various approaches to understanding poverty.<sup>22</sup> There is a monetary approach which<sup>23</sup> identifies poverty with a shortfall in consumption or income. In such instances, one will not have enough money for basic needs, including food, clothing, and shelter.<sup>24</sup> On the other hand, there is the capability approach, which defines poverty as the deprivation in the space of capabilities or failure to achieve certain minimum or basic capabilities. This approach rejects monetary income as a measure of well-being.<sup>25</sup> Another approach is the participatory approach, which allows people in poverty situations to describe what it is like to be poor.<sup>26</sup>

Apart from these three approaches, there is also a social exclusion approach which defines poverty as a state where individuals or groups are excluded from full participation in the society in which they live.<sup>27</sup> However, this approach does not clearly define what poverty really is. Therefore, the approach is susceptible to many interpretations that make it difficult to apply the approach across the globe.<sup>28</sup> All these approaches consider poverty from different angles.<sup>29</sup>

It has been noted that in Africa, particularly in the SADC region, poverty is also a result of stunted economic growth,<sup>30</sup> and recently, it is exacerbated by effects of climate

<sup>22</sup> Stephen Bass, Hannah Reid, David Satterwaite and Paul Steel (eds), *Summary of the Regional Indicative Strategic Plan* (Earthscan Publications Limited 2005) 29. Also see Frances Stewart, Ruhi Saith, Barbra Harris-White, *Reducing Poverty and Sustaining the Environment: The Politics of Local Engagement, Defining Poverty in the Developing World* (Palgrave Macmillan 2007) 1.

<sup>23</sup> Amartya Sen, *Commodities and Capabilities* (Oxford University Press 1985).

<sup>24</sup> Economic and Social Inclusion Corporation, 'What is Poverty' <[https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what\\_is\\_poverty.html](https://www2.gnb.ca/content/gnb/en/departments/esic/overview/content/what_is_poverty.html)> accessed 17 April 2021. See also Frances Stewart, Ruhi Saith, Barbra Harris-White, *Defining Poverty in the Developing World* (Palgrave Macmillan 2007) 3.

<sup>25</sup> Frances Stewart, Ruhi Saith, Barbra Harris-White, *Defining Poverty in the Developing World* (Palgrave Macmillan 2007) 15.

<sup>26</sup> However, this method has been criticised for not having real and manageable development plans. See Dublin Europe Foundation, 'European Foundation for the Improvement of Living and Working Conditions (1995) Public Welfare Services and Social Exclusion: The Development of Consumer Oriented Initiatives. Furthermore, it has been criticised for the great influence of NGOs and under-representation of the poor, who are the affected people. See Frances Stewart, Ruhi Saith, Barbra Harris-White, *Defining Poverty in the Developing World* (Palgrave Macmillan 2007) 24.

<sup>27</sup> The social exclusion approach has however since been extended to developing States. See Dublin Europe Foundation, 'European Foundation for the Improvement of Living and Working Conditions (1995) Public Welfare Services and Social Exclusion: The Development of Consumer Oriented Initiatives.

<sup>28</sup> *ibid.*

<sup>29</sup> Michèle A Clark, 'Vulnerability, Prevention and Human Trafficking: The Need For A New Paradigm' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UN.GIFT 2008) 69-78.

<sup>30</sup> Juana M Coetzee and Mustaqeem De Gama, 'Harmonisation of Sales Law: An International and Regional Perspective' (2006) 10 (15) *Vindobona Journal of International Commercial Law and Arbitration* 26. Also see Tapiwa Shumba, *Harmonising the law of Sale in SADC: An Analysis of Selected Models* (Nomos 2015) 4.

change and Covid-19.<sup>31</sup> Poverty is also a result of low per capita income, which makes it very difficult for African nations to save and invest.<sup>32</sup> The World Bank has reported that more than half of the extreme poor live in Sub-Saharan Africa. The number of poor people in the region has since increased by 9 million in three years, from the 413 million people surviving on not more than US\$1.90 a day.<sup>33</sup> This is more than all the other regions combined.<sup>34</sup> Furthermore, it is anticipated that the Sub-Saharan Africa region will remain the poorest region with the highest percentage of population below the poverty line for the 2020 and 2030 projections.<sup>35</sup>

According to projections that were made by the International Futures (IFs) modelling platform, hosted by the Frederick S Pardee Centre for International Futures at the University of Denver, Sub-Saharan Africa would account for roughly 60% of the global population living in poverty in 2020.<sup>36</sup> Nevertheless, it appears, there was a marginal reduction in numbers from the 2015 figures. However, the IFs and World Data Lab 2030 projections point to a reversal of the current trend of declining poverty.<sup>37</sup> Due to various factors, including the global 'economic roller coaster' worsened by the impact of the Covid-19 pandemic,<sup>38</sup> the number of people living in poverty in Africa is forecasted to double over the next ten years.<sup>39</sup> Furthermore, population growth in the region absorbs any possible increases in per capita real income, thereby negating any possibility of breaking out of the poverty cycle.<sup>40</sup>

<sup>31</sup> World bank, 'Poverty and Shared Prosperity 2020' <https://www.worldbank.org/en/publication/poverty-and-shared-prosperity> accessed 28 December 2020. See also Statement by the UNSG Antonio Guterres, 'Statement made on World Day Against Trafficking in Persons', (30 July 2021) <<https://www.unodc.org/unodc/en/endht/sgs-message-on-world-day-against-trafficking-in-persons.html>> accessed 12 July 2022.

<sup>32</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 78, 79.

<sup>33</sup> World Bank, 'Poverty and Shared Prosperity 2020: Reversals of Fortune' para. 1.

<sup>34</sup> *ibid.*

<sup>35</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 78, 80.

<sup>36</sup> Zachary Donnerfeld, 'What is the Future of Poverty in Africa' (2020) Institute for Security Studies <https://issafrica.org/iss-today/what-is-the-future-of-poverty-in-africa> accessed 23 December 2021.

<sup>37</sup> *ibid.*

<sup>38</sup> Flourish, 'The Impact of COVID-19 on Extreme Poverty, by Region' 30 November 2020 <<https://public.flourish.studio/visualisation/4517134/>> accessed 27 December 2020. See also World Bank, 'Poverty and Shared Prosperity 2020: Nowcast of the Global Poverty Rate at the \$1.90 Line, 2015–21' <<https://www.worldbank.org/en/publication/poverty-and-shared-prosperity>> accessed 27 December 2020.

<sup>39</sup> World Bank, 'Poverty and Shared Prosperity 2020: Reversals of Fortune' 8.

<sup>40</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 78, 80.

The SADC International Conference on Poverty and Development noted that poverty affects vulnerable groups such as rural and peri-urban households of the region, including child-headed families due to the impact of the AIDS pandemic.<sup>41</sup> These communities are characterised by poor housing; poor security; lack of employment opportunities; lack of education for the children and poor sanitation, which affects their health.<sup>42</sup> As a result of these conditions, children in these communities are willing to accept any offer of better living conditions.<sup>43</sup> Unfortunately, in child trafficking cases, these better living conditions never materialise.<sup>44</sup>

The causal nexus between poverty and child trafficking is that poverty imposes a cognitive burden on individuals, which makes it difficult for them to think deliberately and therefore, become susceptible to deception and manipulation.<sup>45</sup> Children in poverty-stricken communities become desperate for better living conditions and are unable to discern acts of kindness from manipulative ones.

Furthermore, some of the people in positions of power tend to have cruel indifference to human rights and basic needs and take advantage of the desperation of poor people.<sup>46</sup> Therefore, poverty becomes the root cause of child trafficking.<sup>47</sup> The *ratio decidendi* in the Lesotho case of *Rex v Joalane Tsoana*<sup>48</sup> is an example of how poverty increases vulnerability and how such vulnerability is ignored by those in positions that would, otherwise be key in ensuring safety. In this case, through deception and abuse of power by taking advantage of the victim's vulnerability, the accused who was a teacher, recruited and subsequently transported the victims to South Africa for sexual

<sup>41</sup> Katy Barwise, Barbara Rijks and Jerotich Seii Houlding, *Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa* (IOM 2006) 22.

<sup>42</sup> Effects of Poverty on Health, Children & Society: The Impact of a Safe & Decent Home <<https://www.habitatforhumanity.org.uk/what-we-do/building-and-renovating-homes/effects-of-poverty/>> accessed 6 May 2021.

<sup>43</sup> The victim in the case of *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis*, was made to believe that she had found an opportunity to earn a better salary from the same job in Lesotho, but that turned out not to be the case.

<sup>44</sup> Fanny Bassutil, 'Child Trafficking: Fight Against Child Trafficking' (2011) Humanium 1 <<https://www.humanium.org/en/child-trafficking/>> accessed 3 May 2021.

<sup>45</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 78, 79.

<sup>46</sup> Children in Conflict: Child soldiers <<http://www.child-soldier.org/child-soldiers-in-drc>> accessed 23 February 2017. Also see Afroz Kaviani Johnson and Julia Sloth-Nielsen, 'Safeguarding Children in the Developing World—Beyond Intra-Organisational Policy and Self-Regulation' (2020) 9 (98) Soc. Sci 1, 2.

<sup>47</sup> Ian Bryne, *The Human Rights of Street and Working Children: A Practical Manual for Advocates* (Intermediate Technology Publications 1998) 19.

<sup>48</sup> *Rex v Joalane Tsoana* (unreported), (CIV/T/46/06) (1990) LSHC 372/12 (2 February 1990).

exploitation. The court held that the act or conduct of the accused was in contravention of Lesotho's Anti-Trafficking in Persons Act 1 of 2011 which prohibits and punishes all forms of trafficking.<sup>49</sup>

Another example of how poverty pushes children into the hands of traffickers, is found in the Namibian case of *S v Lukas*.<sup>50</sup> In this case, the accused lured two young girls into sexual exploitation by taking advantage of their poor backgrounds. The accused was subsequently charged with contravening section 15 read with section 1 of the Prevention of Organised Crime Act 29 of 2004, among other charges.<sup>51</sup> The court noted that poverty makes children, especially young girls, vulnerable to exploitation and held that:

[T]he poverty of a child must never become a license for others to exploit them for financial greed or for other's sexual gratification. The poor in our society, especially children, need our empathy and support, not to feed greed and sexual deviance.<sup>52</sup>

The judgment sought to emphasise that poverty does not justify child trafficking.<sup>53</sup> Instead, the poor and the vulnerable of the community must be protected and not exploited.

However, such incidents are not unique to Namibia or Lesotho. Similar cases happen in poverty-stricken SADC States, albeit with no convictions.<sup>54</sup> Most people living in these States are trapped in poverty and are susceptible to all sorts of criminality. It is,

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<sup>49</sup> Anti-Trafficking in Persons Act 1 of 2011, Section 5 (1). The accused was subsequently charged with 4 counts of contravening that provision among other charges.

<sup>50</sup> (CC 15/2013) [2015] NAHCMD.

<sup>51</sup> Section 15 states that, any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the Convention, in Namibia or across the border to and from foreign States commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 50 years.

<sup>52</sup> *State v Lukas* (CC 15/2013) [2015] NAHCMD 124 (2 June 2015).

<sup>53</sup> Norotiana Ramboarivelo Jeannoda, 'Trafficking in Persons Report Heroes' (2015) US Department of State Diplomacy in Action <<https://www.state.gov/j/tip/rls/tiprpt/2015/243365.htm>> accessed 10 January 2021.

<sup>54</sup> An analysis of the causes of child trafficking in the SADC region shows that while demand plays a major role, there are other factors such as armed conflict, political instability and human rights violations that magnify conditions of hardship and insecurity thus creating fertile conditions for child trafficking. Still, the impact of poverty, high unemployment rates; poor standards of living; family disintegration; internet abuse and poor border controls cannot be understated. See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 34. Ewolina Ochab, 'Human Trafficking Is A Pandemic Of The 21st Century' (Forbes, 26 July 2018). accessed 8 January 2021. See also 'Human Trafficking by Numbers' (*Human Rights First* 8 September 2017). See also Janie Chuang, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006) 13 (1) *Indiana Journal of Global Legal Studies* 137.

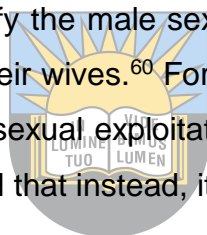


therefore, up to the respective governments to ensure that children from the affected areas are protected from the danger of trafficking. Furthermore, governments have an inherent responsibility to ensure that children are not treated as merchandise or used as bait during economic and political crises.<sup>55</sup>

Since poverty is fundamentally linked to all other factors of child trafficking,<sup>56</sup> it is, therefore, crucial to eradicate poverty as a way of dealing with child trafficking.<sup>57</sup> It is probable that once the basic standard of living is attained, children in SADC States will not easily fall into the trap of traffickers.<sup>58</sup>

### **2.2.2 Demand**

The consideration of demand as a cause of child trafficking is closely associated with white slave traffic which describes a phenomenon where women were sold across borders for sexual exploitation.<sup>59</sup> During the period of white slave traffic, the basic purpose of trafficking was to satisfy the male sexual desire during war or situations where they would be away from their wives.<sup>60</sup> For this reason, it has been suggested that men created the demand for sexual exploitation and prostitution.<sup>61</sup> In rebuttal of this suggestion, it has been argued that instead, it was the prohibition or regulation of



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<sup>55</sup> Norotiana Ramboarivelo Jeannoda, 'Trafficking in Persons Report Heroes' (2015) US Department of State Diplomacy in Action <<https://www.state.gov/j/tip/rls/tiprpt/2015/243365.htm>> accessed 10 January 2021.

<sup>56</sup> Fanny Bassutil, 'Child Trafficking: Fight Against Child Trafficking' (2011) Humanium 1 <<https://www.humanium.org/en/child-trafficking/>> accessed 3 May 2022.

<sup>57</sup> Jaap Doek, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 2006) 4.

<sup>58</sup> However, perhaps it is as Bales suggests that there are more factors to trafficking in persons than economic circumstances. Traffickers also consider age and health among other factors. Therefore, invalids, the old, those without nutritious food and physically impaired and not on high demand. This group of people is considered to be of insufficient value therefore incapable of generating high profits. In essence, it is not necessarily only poverty that caused trafficking. Demand determines the extent to which the different vulnerable groups may be affected. See Kevin Bales, *Disposable People: New Slavery in the Global Economy* (3<sup>rd</sup> edn, University of California Press 2004) 5.

<sup>59</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 35.

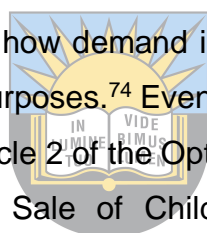
<sup>60</sup> Michèle A Clark, 'Vulnerability, Prevention and Human Trafficking: The Need For a New Paradigm' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UN.GIFT 2008) 69-78.

<sup>61</sup> Melanie Phillips, *The Ascent of Woman. A History of the Suffragette Movement and the Ideas Behind it* (Abacus 2004) 209.

prostitution that encouraged the demand for sexual exploitation which in turn caused the trafficking of girls and women.<sup>62</sup>

Practices like white slavery are prevalent nowadays in SADC States, with children being deceived, coerced or forced to take part in sexual activities.<sup>63</sup> An illustration of this is the South African case of *State v Eze*.<sup>64</sup> The accused was charged with offences related to trafficking of two victims for sexual exploitation.<sup>65</sup> The charges comprised of two counts of trafficking in persons for sexual purposes,<sup>66</sup> two counts of rape,<sup>67</sup> and two counts of supply of drugs.<sup>68</sup> The charges also consisted of single counts of knowingly living, wholly or in part, on the earnings of prostitution,<sup>69</sup> keeping of a brothel,<sup>70</sup> and illegally remaining in the Republic of South Africa.<sup>71</sup> The accused had taught the victims how to prostitute, and the money they would earn was used to buy more drugs.<sup>72</sup> As a result, the victims had impaired judgment and were susceptible to control by the accused.<sup>73</sup>

The above case clearly illustrates how demand in the sex industry has fuelled child trafficking for sexual exploitation purposes.<sup>74</sup> Even though the use of a child for sexual exploitation is prohibited under article 2 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child



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<sup>62</sup> Edward J Bristow, *Prostitution and Prejudice. The Jewish Fight against White Slavery 1870-1939*, (Schocken Books 1983) 85.

<sup>63</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016).

<sup>64</sup> 14/546/2013 or UNODC No: ZAF015.

<sup>65</sup> The victims had been exposed to drugs at a very young age and met the accused who accommodated them. The victims never returned home and were used by the accused for sexual exploitation as payment for food and drugs. The Court held that it is common that prostitutes and drug addicts are the most vulnerable to trafficking in persons.

<sup>66</sup> Sexual Offences Act, 32 of 2007 Section 71 (1)-read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, No. 105 of 1997, as amended.

<sup>67</sup> See Section 3 of the Sexual Offences Act, 32 of 2007.

<sup>68</sup> See Section 5 (b) of the Drugs and Drug Trafficking Act, No 140 of 1992.

<sup>69</sup> Sexual Offences Act, No. 23 of 1957 Section 20.

<sup>70</sup> See Section 2 of the Sexual Offences Act, No. 23 of 1957.

<sup>71</sup> Section 49 (6) read with section 1, 36, 38-46 of the Immigration Act 13 of 2002.

<sup>72</sup> It is common for to groom children for exploitation particularly online sexual exploitation. See Laura C N Wood, 'Child Modern Slavery, Trafficking and Health: A Practical Review of Factors Contributing to Children's Vulnerability and the Potential Impacts of Severe Exploitation on Health' (2020) 4 BMJ Paediatrics Open 1, 4.

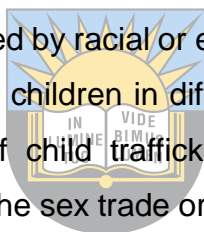
<sup>73</sup> The Court used the reasoning in the case of *S v Van der Meyden* 1999 (1) SACR 447 (WLD) at 449h-450b to assess the principle of reasonable doubt.

<sup>74</sup> Linda Smith, Samantha H Vardaman, 'The Problem of Demand in Combating Sex Trafficking' (2010) 81 (3-4) 607 Éres 1.

Pornography,<sup>75</sup> children in the SADC region continue to be trafficked for sexual exploitation.<sup>76</sup> This is despite the fact that more than half of the SADC States are party to this Protocol which indicates that the problem of child trafficking in SADC transcends existing legislative frameworks.<sup>77</sup>

Another factor is the rise in demand for cheap labour that promotes child trafficking for labour exploitation. Trafficked children are forced to work for no payment at all or where they are paid, they are underpaid. The working conditions in such circumstances are always not conducive.<sup>78</sup> In the Malawi case of *Republic v Masautoso Banda*,<sup>79</sup> under age children were trafficked from Mchinji to Dedza for the purpose of labour exploitation, the accused was charged in terms of section 21,<sup>80</sup> and section 24 of the Malawi Employment Act of 2000, for employing under-aged persons.<sup>81</sup> The accused was subsequently sentenced to a fine of MWK5,000 as well as MWK1,500 to each victim for suffering.<sup>82</sup>

The demand for cheap labour fuelled by racial or ethnic and national hierarchies which place groups of men, women, and children in different forms of potentially exploitive labour, also increases the risk of child trafficking. For example, disproportionate preference for women of colour in the sex trade or their implied resilience and strength



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<sup>75</sup> See article 2 of the UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001, A/RES/54/263.

<sup>76</sup> Sexual exploitation includes *inter alia*; prostitution; working in brothels; escort agencies; forced marriages; phone sex lines, internet chat rooms and child pornography. UN Committee on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article (2) (c) defines child pornography as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual part of a child for primary sexual purposes.

<sup>77</sup> For the list of ratifications and dates See United Nations Treaty Collection available at < [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11-c&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&clang=en)> accessed 17 June 2022.

<sup>78</sup> Anti-Slavery International, 'What is forced labour' <<https://www.antislavery.org/slavery-today/forced-labour/>> accessed 17 April 2020.

<sup>79</sup> (2005) MWHC 347.

<sup>80</sup> Section 21 (1) states that "Subject to subsection (2) no person under the age of fourteen shall be employed or work in any public or private agricultural, industrial or non-industrial undertaking or any branch thereof".

<sup>81</sup> Section 24 provides that, "Any person who contravenes any provision of this Part shall be guilty of an offence and liable to a fine of K20.000 and to imprisonment for five years".

<sup>82</sup> This case is an illustration of how the absence of child trafficking legislation in a State may lead to less stringent punishment for perpetrators. As noted by the Malawi Law Commission, the Malawi Employment Act, although broad enough to include trafficking related offences, does not adequately punish perpetrators of trafficking in persons or child trafficking. See Malawi Law Commission, Report of the Malawi Law Commission on the Development of Anti-Trafficking in Persons Legislation (2009).



in the youth for hard labour which increases the risk for trafficking for exploitation.<sup>83</sup> The SADC Baseline Report in 2016 noted that most child trafficking victims found in Mozambique were being exploited in tobacco farms. Children trafficked to Tanzania were being used in the fishing industry,<sup>84</sup> while those in South Africa were mostly in the domestic sector,<sup>85</sup> and disabled children were subjected to forced begging.<sup>86</sup> Those children trafficked outside the continent were subjected to similar ordeals; for instance, in South Asia, children are maimed so that they may attract more money when begging.<sup>87</sup> Subsequent reports by the SADC Secretariat show that children continue to be similarly exploited in the above sectors globally.<sup>88</sup>

Be that as it may, the main hindrance in dealing with demand as one of the causes of child trafficking, is the lack of understanding of trafficking demand.<sup>89</sup> The wording of trafficking in persons legislation and policies suggests that demand in for child trafficking is similar to how goods or commodities are sold.<sup>90</sup> Thus, in a nutshell, demand describes the need to buy goods or services coupled with the ability to buy such commodity or service.<sup>91</sup>

According to Gallagher, demand in the context of trafficking refers to the demand for cheap and exploitable labour by employers.<sup>92</sup> In the SADC context, demand is influenced by various stakeholders including recruiters, brokers or transporters.<sup>93</sup> In all



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<sup>83</sup> Stephanie Limoncelli, 'Human Trafficking: Globalisation, Exploitation, and Transnational Sociology' (2009) 3 (1) Sociology Compass 72, 73.

<sup>84</sup> It is important to note that there is increasing awareness and pressure on States to expose the prevalence of child trafficking particularly in the fishing industry. See Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 26. Also see ILO, 'Caught at Sea- Forced labour and Trafficking in Fisheries' (International Labour Conference, May 2013).

<sup>85</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 23.

<sup>86</sup> *ibid* 98.

<sup>87</sup> *ibid* 8.

<sup>88</sup> SADC Secretariat, *Preventing and Combating Trafficking in Persons: lessons from the SADC region* (2017) 1.

<sup>89</sup> The United Nations High Commissioner for Human Rights has noted the need to address demand, but also acknowledged that it is difficult to do so without a proper definition. OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking. Commentary. Geneva: United Nations Office of the High Commissioner for Human Rights (2010).

<sup>90</sup> Margaret Ruiz, 'An Interdisciplinary Study of Modern-Day Slavery: Human Trafficking' 5 (1) Syracuse University Honors Program Capstone Projects 198, 206.

<sup>91</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 14.

<sup>92</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 432.

<sup>93</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 23.

this, corrupt public officials and business owners,<sup>94</sup> play a significant role in creating demand and benefit from child trafficking.<sup>95</sup>

Perhaps when dealing with child trafficking a detailed definition for demand is not what is required. What is essential is a common direct or indirect approach to effectively address demand. This should be combined with the willingness of States to implement, monitor and evaluate the measures to counter the increased demand for labour and sexual exploitation.<sup>96</sup> Albeit, this would not be easy in the absence of a working understanding of demand in the context of child trafficking.<sup>97</sup>

It may be submitted further that the existing inconsistencies in understanding demand are a result of the differences in approaches to counter child trafficking.<sup>98</sup> In order to address these differences, it is imperative that there be a common approach to demand in the context of child trafficking.<sup>99</sup> As it is, there appears to be a general acceptance of demand as a major contributory factor to child trafficking and that there is an urgent need for it to be dealt with. This is shown in the Trafficking Protocol, which obliges State Parties to discourage demand.<sup>100</sup> The Trafficking Protocol encourages State Parties to:

[A]dopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking.<sup>101</sup>

<sup>94</sup> For example, in the entertainment, tourism and travel industries.

<sup>95</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 432.

<sup>96</sup> Inter-Agency Coordination Group against Trafficking in Persons, 'A toolkit for guidance in designing and evaluating counter-trafficking programmes: Harnessing accumulated knowledge to respond to Trafficking in Persons' (2014) 8.

<sup>97</sup> Rogers Brubaker and Frederick Cooper, 'Beyond "identity"' (2000) 29 (1) *Theory and Society Journal* 1, 47.

<sup>98</sup> Rhacel S Parreñas; Maria C Hwang, and Heather R Lee, 'What is Human Trafficking? A Review Essay' (2012) 37 (4) *Signs Journal for women in culture and society* 1015. Also see Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 13.

<sup>99</sup> Margaret Ruiz, 'An Interdisciplinary Study of Modern-Day Slavery: Human Trafficking' 10. See also Kevin Bales, 'Disposable People: New Slavery in the Global Economy' (3<sup>rd</sup> edn, University of California Press 2004) 5.

<sup>100</sup> Article 9 (5) of the Trafficking Protocol.

<sup>101</sup> Article 9 (5) of the Trafficking Protocol.

It is noteworthy that even in the Trafficking Protocol, demand is not defined, presumably because it is not a legal term.<sup>102</sup> Beyond this, there is no clear strategy in the Trafficking Protocol on how to completely deal with rising demand.

A resolution for dealing with demand was passed by the UN Commission on the Status of Women.<sup>103</sup> The Commission encourages governments to take measures aimed at eradicating the demand for women and girls for all forms of exploitation.<sup>104</sup> Eradicating exploitation is a key element to combating trafficking.<sup>105</sup> Furthermore, UNGA Resolution 49/2 calls upon governments to take all appropriate measures to address the root factors of trafficking in women and children, including poverty and gender inequality, as well as other external factors for commercial sexual exploitation or child marriages.<sup>106</sup> Yet again, the challenge remains that it is not clear what demand really entails in the context of child trafficking.<sup>107</sup>

Another way of dealing with the issue of demand is tackling it from a moral perspective. A moral approach criminalises all forms of prostitution as sex trafficking, thus constituting harmful treatment. The starting point would be criminalising the procurement of prostitutes, thereby cutting the source of demand.<sup>108</sup> This suggestion is based on the consideration of prostitution from a moral perspective and the act of prostitution of others constituting a moral and health hazard. This approach is widely described as the Neo-abolitionist approach to sex trafficking whereby the regulation of prostitution largely deals with punishing the buyer of the sex and not necessarily the one selling it.<sup>109</sup> Furthermore, this approach is promoted by radical feminists who consider prostitution and sex trafficking as a form of gender-based violence.<sup>110</sup>

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<sup>102</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 13.

<sup>103</sup> UN Commission on the Status of Women Resolution 49/2 of 11 March 2005 <https://undocs.org/pdf?symbol=en/E/2005/27> accessed 16 January 2021.

<sup>104</sup> Article 1 (a) of the Trafficking Protocol.

<sup>105</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 77.

<sup>106</sup> UN Commission on the Status of Women Resolution 49/2 of 11 March 2005 <https://undocs.org/pdf?symbol=en/E/2005/27> accessed 16 January 2021.

<sup>107</sup> Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 432.

<sup>108</sup> *ibid.*

<sup>109</sup> Gillian Wyllie and Ellis Ward, *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism* (Routledge 2017) 5.

<sup>110</sup> *ibid.*

On the other hand, Gallagher argues that dealing with demand does not fully address matters of sexual exploitation, particularly prostitution.<sup>111</sup> Yet, Bristow argues that the regulation of prostitution encouraged demand for white slavery, as a result, the regulation of prostitution caused trafficking of young girls and women.<sup>112</sup> In other words, to address the demand for trafficking for exploitation, prostitution should not be regulated.

It has been further argued that there is a connection between the failure to deal with the demand for sexual exploitation and the non-punishment of trafficking victims.<sup>113</sup> Supporters of this view argue that these 'victims' have enough free will and should be equally liable for the consequences of their actions.<sup>114</sup> However, free will or consent is irrelevant in child trafficking cases.<sup>115</sup>

Be that as it may, this research suggests that both issues of demand and non-criminalisation of victims are of utmost importance and need to be emphasised as this helps in prosecuting syndicates.<sup>116</sup> Therefore, the framework needs to be adjusted to address both issues while paying attention to the evolving nature of the crime.

In sum, the link between demand and child trafficking emanates from the fact that traffickers take advantage of situations of desperation to supply the demand for exploitation. In other words, demand feeds on unfavourable conditions created by, among other factors, race, poverty, unfair cultural practices, and conflict. Areas plagued by such conditions are sources and sometimes destinations for child trafficking victims.<sup>117</sup> Dealing with demand, therefore, requires a comprehensive approach that considers all the factors as discussed above. A piecemeal fashion approach may be inadequate.<sup>118</sup>

<sup>111</sup> Anne T Gallagher, 'Human Rights and Human Trafficking Quagmire or Firm Ground' (2009) 49 (4) Virginia Jour Int Law 789, 814.

<sup>112</sup> Edward J Bristow, *Prostitution and Prejudice. The Jewish Fight against White Slavery 1870-1939* (Schocken Books 1983) 85.

<sup>113</sup> Non-criminalisation of child trafficking victims shall be discussed in detail in chapter 4.

<sup>114</sup> Edward J Bristow, *Prostitution and Prejudice. The Jewish Fight against White Slavery 1870-1939* (Schocken Books 1983) 85.

<sup>115</sup> See Article 3 (b) of the Trafficking Protocol.

<sup>116</sup> See discussion in Ch 4.

<sup>117</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 26.

<sup>118</sup> Harry J van Buren, Judith Schrempf-Stirling, and Michelle Westermann-Behaylo, 'Business and Human Trafficking: A Social Connection and Political Responsibility Model' (2021) 60 (2) SAGE 341, 350.

### 2.2.3 Conflict

The UN Special Rapporteur on trafficking in persons, especially women and children, stated that there is a link between child trafficking and conflict.<sup>119</sup> Therefore, conflict zones are either the origins, transit zones or destinations for victims of child trafficking.<sup>120</sup> In essence, child trafficking is a systematic consequence of conflict.<sup>121</sup> The Special Rapporteur also noted that children in areas of conflict are the most vulnerable, for a number of reasons.<sup>122</sup> Firstly, they are exposed to the danger of internal trafficking. Secondly, it is easy to lure them using promises of safety and a good standard of living in other States.<sup>123</sup>

Conflict perpetuates trafficking in that it weakens and destroys families and communities which would otherwise shield children from the risk of child trafficking.<sup>124</sup> The disruption of this protective framework makes women and children vulnerable to exploitation.<sup>125</sup> Such exploitation often involves sexual violence, which is often deliberately employed as a war strategy.<sup>126</sup> Consequently, in the 2020 report, the Special Rapporteur noted the increased risk of trafficking during conflict for women and children.<sup>127</sup> However, the report emphasised the need to move from victimhood



<sup>119</sup> UNGA, A/HRC/44/45, Human Rights Council Forty-fourth session 15 June–3 July 2020 Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Trafficking in persons, especially women and children Report of the Special Rapporteur on trafficking in persons, especially women and children. 6 April 2020 <[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_44\\_45\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_44_45_E.pdf)> accessed 28 December 2020.

<sup>120</sup> UNHCHR, Remarks of the Director-General to 'tri-partite plus process' target-oriented meeting on trafficking in human beings, 13 February 2003. Also see Tobias Flessenkemper, Trafficking in Human Beings: A Case for Human Rights Protection in Post-Conflict Southeastern Europe, (M.A Dissertation, European University 2003).

<sup>121</sup> UNGA, A/HRC/44/45, Human Rights Council Forty-fourth session 15 June–3 July 2020 Agenda item 3. 6 April 2020 <[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_44\\_45\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_44_45_E.pdf)> accessed 28 December 2020.

<sup>122</sup> UNODC, *Trafficking in Persons in the Context of Armed Conflict* (United Nations 2018) 19.

<sup>123</sup> IOM, *Breaking the cycle of vulnerability: Responding to the health needs of trafficked women in East and Southern Africa* (IOM 2006) 22.

<sup>124</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 26.

<sup>125</sup> Michèle A Clark, 'Vulnerability, Prevention and Human Trafficking: The Need For a New Paradigm' an *An Introduction to Human Trafficking: Vulnerability, Impact and Action* 69-78.

<sup>126</sup> Susan Martin and Amber Callaway, 'Human Trafficking and Smuggling' (2011) Global Migration Governance 1, 9.

<sup>127</sup> UNGA, A/HRC/44/45, Human Rights Council Forty-fourth session 15 June–3 July 2020 Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Trafficking in persons, especially women and children Report of the Special Rapporteur on trafficking in persons, especially women and children. 6 April 2020 <[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_44\\_45\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_44_45_E.pdf)> accessed 28 December 2020.



to agency in the way that women and children are viewed.<sup>128</sup> In addition to that, there is also a need to adopt a human rights approach in addressing child trafficking during conflict.<sup>129</sup>

Children living in conflict zones are not only subjected to forced labour, but are also at an increased risk of being used as soldiers.<sup>130</sup> Although the number of trafficked children who end up as child soldiers is not clear, there is a pattern of trafficking found in States in conflict.<sup>131</sup> There are rampant cases of abduction of children by both government and rebel militias.<sup>132</sup> For instance, there were reports of child soldiers in the Democratic Republic of Congo (DRC).<sup>133</sup> DRC is believed to be one of the States with the highest number of child soldier recruits. The UN believes that 15 to 30% of DRC army recruits are children under the age of 18.<sup>134</sup>

Furthermore, the UN Global Trafficking in Persons Report released some data on the forced recruitment of children into armed forces based on reports from the United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo



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<sup>128</sup> Sometimes women in conflict zones become agents of child trafficking as was the situation in the case of *The People v Maputa Muzara SSV/111/2014*. The accused was a woman of from Congo origin also living in Zambia on account of the war in Congo, who migrated five orphaned children from conflict ravaged Congo, from her relatives. When she took them, she promised the relatives that the children would be given better education in Zambia. Instead, they were forced to work for the accused. In order to effectively conclude the case, there was engagement with various stakeholders such as IOM, Social Welfare department and the police. The matter was speedily resolved in court, within two weeks. The accused was found guilty and sentenced to 15 years imprisonment in the magistrate court and the case is awaiting confirmation in the high court. The children were given counselling and their relatives in Congo were traced. They were given temporary travel documents to enable them to return to Congo.

<sup>129</sup> UNGA, A/HRC/44/45, Human Rights Council Forty-fourth session 15 June–3 July 2020 Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Trafficking in persons, especially women and children Report of the Special Rapporteur on trafficking in persons, especially women and children. 6 April 2020 <[https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_44\\_45\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_44_45_E.pdf)> accessed 28 December 2020.

<sup>130</sup> UNODC, *Trafficking in Persons in the Context of Armed Conflict* (United Nations 2018) 19. Also see SOS Children's village United Kingdom, 'Children in Conflict: Child soldiers' <<http://www.child-soldier.org/child-soldiers-in-drc>> accessed 23 February 2022.

<sup>131</sup> Elisha Jasper Dung and Augustine Avwunudiogba, (ed), *Human Trafficking: Global History Perspectives and History* (Lexington Books 2021) 3.

<sup>132</sup> UNODC, *Trafficking in Persons in the Context of Armed Conflict* (United Nations 2018) 19.

<sup>133</sup> SOS Children's village United Kingdom, 'Children in Conflict: Child soldiers' <<http://www.child-soldier.org/child-soldiers-in-drc>> accessed 23 February 2020.

<sup>134</sup> UNODC, *Trafficking in Persons in the Context of Armed Conflict* (United Nations 2018) 19.

(MONUSCO).<sup>135</sup> MONUSCO had reported that children were being widely exploited in war zones.<sup>136</sup> The report states that:

268 child recruits (221 male and 47 female), some as young as 10 years old, were separated from armed forces between December 2013 and March 2014. In the period between March and June 2014, 21 children (17 boys and four girls), eight of them under the age of 15, used as porters, cooks, escorts and fighters were rescued.<sup>137</sup>

Even though the government of DRC has taken measures to end the use of child soldiers, its anti-trafficking measures are negligible and do not fully meet the minimum standards for addressing trafficking.<sup>138</sup> The United States Department of State noted that lack of an anti-trafficking framework, among other factors, hinders any anti-trafficking efforts in the State.<sup>139</sup> Therefore, the number of child recruits remains high.<sup>140</sup>

DRC, like other SADC States, ratified the CRC and is, therefore, obliged to take measures to prevent the use of children during conflict. In line with article 38 of CRC, States Parties undertake to respect rules of international humanitarian law that are applicable to children in armed conflict and to take measures to ensure that minors do not participate in hostilities and are protected and cared for.<sup>141</sup>

In the same vein, the Convention's Optional Protocol on the Involvement of Children in Armed Conflict<sup>142</sup> and ILO Convention 182 on the Worst Forms of Child Labour<sup>143</sup> also regulate the recruitment of children into armed forces. Article 3 of the Protocol

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<sup>135</sup> Trafficking in conflict zones increases because of the demand for sexual exploitation for money and recruitment of child soldiers. See UNODC, 'More action needed to stop human trafficking, exploitation in armed conflict: UNODC launches latest Global Report on Trafficking in Persons' <[https://www.unodc.org/unodc/en/frontpage/2019/January/more-action-needed-to-stop-human-trafficking--exploitation-in-armed-conflict\\_-unodc-launches-latest-global-report-on-trafficking-in-persons.html?ref=fs2](https://www.unodc.org/unodc/en/frontpage/2019/January/more-action-needed-to-stop-human-trafficking--exploitation-in-armed-conflict_-unodc-launches-latest-global-report-on-trafficking-in-persons.html?ref=fs2)> accessed 11 January 2021.

<sup>136</sup> UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report* (2016) 25.

<sup>137</sup> *ibid* 113.

<sup>138</sup> U.S Department of State, *2018 Trafficking in Persons Report - Congo, Democratic Republic of Congo* (United States Department of State 2018) 15.

<sup>139</sup> *ibid*.

<sup>140</sup> Michèle A Clark, 'Vulnerability, Prevention and Human Trafficking: The Need For a New Paradigm' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UN.GIFT 2008) 24.

<sup>141</sup> For a discussion on the challenges that children in areas of armed conflict face see Steven Hick, 'The Political Economy of War-Affected Children' (2001) 575 (1) *Annals of the American Academy of Political and Social Science* 106-121.

<sup>142</sup> 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.

<sup>143</sup> International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, C182, 17 June 1999, C182.

provides extended protection to article 38 of CRC in ensuring that children are adequately protected. Despite such regulation,<sup>144</sup> the recruitment of displaced children by national armed forces and/or militias continues.<sup>145</sup>

The highly volatile environment in conflict zones is a result of weak law enforcement which results in lawlessness and criminality. When combined with general social disintegration, the environment becomes conducive for trafficking and children continue to be at risk.<sup>146</sup> Furthermore, the rise in demand for sexual exploitation sometimes is linked to the deployment of peace support missions.<sup>147</sup> Traffickers and local authorities in post-conflict regions exploit this lucrative market and acquire women and girls for sexual exploitation.<sup>148</sup>

Thus, the increased connection between international peacekeeping personnel and child trafficking for sexual exploitation is a cause for global concern.<sup>149</sup> However, women and children still have not yet been adequately protected by the international human rights frameworks, outside post conflict instances.<sup>150</sup> Only major incidents get public attention, yet practices that constitute child trafficking and sexual exploitation are an everyday occurrence in war times.<sup>151</sup>

There is no doubt that addressing child trafficking in war zones is a multifaceted challenge. One of the main challenges is that the available resources are often channelled towards peacekeeping programs rather than the attendant child trafficking problems.<sup>152</sup> As a result, there are insufficient resources for awareness campaigns,

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<sup>144</sup> Article 4 Optional Protocol on the Involvement of Children in Armed Conflict and ILO Convention 182 on the Worst Forms of Child Labour 2002, 1.

<sup>145</sup> Susan Martin and Amber Callaway, 'Human Trafficking and Smuggling' (2011) 8 Global Migration Governance 1, 9.

<sup>146</sup> UNODC, 'More Action Needed to Stop Human Trafficking, Exploitation in Armed Conflict: UNODC Launches Latest Global Report on Trafficking in Persons'. Also See Susan Martin and Amber Callaway, 'Human Trafficking and Smuggling' (2011) 8 Global Migration Governance 1, 10.

<sup>147</sup> A comparison may be drawn from this increase in sexual exploitation with the demand for sex slaves and sexual exploitation in army camps during the white slave traffic era.

<sup>148</sup> *ibid.*

<sup>149</sup> United Nations Office on Drugs and Crime, *Human Trafficking a Crime that Shames Us All. An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC 2016) 98.

<sup>150</sup> Child trafficking is also a huge concern in States sharing borders with conflict zones. These States become sources and destination for the victims. See UNODC, *Trafficking in persons in the SADC Region: Policy Brief* (2016) 3. Also see Sarah Dillion, 'What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children' (2008) 17 (1) UCLA Law Women 121, 153.

<sup>151</sup> UNODC, *Trafficking in Persons in the Context of Armed Conflict* (United Nations 2018) 5.

<sup>152</sup> International Committee of the Red Cross (ICRC), 'Children Affected by Armed Conflict and Other Situations of Violence', Geneva, 14-16 March 2011.



among other anti-trafficking initiatives. In the end, it is lack of awareness that promotes child trafficking as children unwittingly become victims of the crime. Therefore, lack of awareness is one of the causes of child trafficking.

#### **2.2.4 Lack of Awareness**

Access to information and awareness are fundamental elements of problem-solving.<sup>153</sup> The widespread lack of awareness of the prevalence child trafficking by community members in SADC States is considered as one of the risk factors contributing to child trafficking.<sup>154</sup> The trickling efforts by SADC States to create awareness about the crime,<sup>155</sup> do not address the problem with the urgency that it requires. The lack of rigorous awareness campaigns is among other factors, due to poverty and unavailability of resources. Some communities have no access to information media. In States such as Zimbabwe, there are massive power cuts whereby load shedding lasts at least 18 hours a day.<sup>156</sup> This means that the citizens essentially have no adequate access to the radio or televised information. Furthermore, there is limited funding to conduct educational workshops on child trafficking.<sup>157</sup> Caregivers and guardians are often not well informed to guard against the crime. As a result, there are cases whereby guardians willingly give up their children to traffickers with the belief that they are being assisted.<sup>158</sup>

Notably, the lack of awareness does not only affect communities or victims. Law enforcement agencies also lack an adequate understanding of what the crime constitutes.<sup>159</sup> As a result, law officials are unable to properly identify and protect the

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<sup>153</sup> Jay Liebowitz, Lyle C Wilcox, (eds), *Knowledge Management and its Integrative Elements* (CRC Press 1997) 194.

<sup>154</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 9.

<sup>155</sup> However, such efforts are not being made with the required urgency. For instance, Zimbabwe only launched its Trafficking in Persons National Plan of Action in 2016 despite reported cases of unprecedented rise in child trafficking in the State. See UNODC, 'Zimbabwe Launches the Trafficking in Persons National Plan of Action and Adopts the Blue Heart Campaign' <<https://www.unodc.org/southernafrica/en/ht/zimbabwe-launches-the-trafficking-in-persons-national-plan-of-action-and-adopts-the-blue-heart-campaign.html>> accessed 4 June 2021.

<sup>156</sup> Business Tech, 'Load Shedding in Zimbabwe Lasts More Than 18 Hours a Day' (Business Tech, 18 December 2019) <<https://businesstech.co.za/news/energy/362608/load-shedding-in-zimbabwe-lasts-18-hours-at-a-time/>> accessed 5 February 2020.

<sup>157</sup> Fanny Bassutil, 'Fight Against Child Trafficking' <<https://www.humanium.org/en/child-trafficking/>> accessed 6 May 2021.

<sup>158</sup> This was the case in *The People v Muzara SSV/111/2014*; where the children were left in the hands of traffickers who had convinced their guardian that they would get better education in Zambia.

<sup>159</sup> Elizabeth Araujo, 'The Need for Human Trafficking Policy', (2011) 37 AISA Policy Brief 1, 3.

victims.<sup>160</sup> This lack of awareness subsequently affects the number of victims rescued and the successful prosecution of cases.<sup>161</sup> For instance, in the Lesotho case of *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis*,<sup>162</sup> the issue was whether by their conduct, the accused had contravened the provisions of the Anti-Trafficking in Persons Act, 2011 (Lesotho). The court reasoned that the accused had hired, transported, and received the victim by means of deception for exploitative purposes. The victim was later used for forced labour and domestic servitude. The elements of what transpired suggested that a crime of child trafficking had been committed.<sup>163</sup> It was, therefore, warranting that the accused be charged in terms of the Anti-Trafficking in Persons Act.<sup>164</sup> Notwithstanding the above reasoning, the accused were found not guilty of the crime of human trafficking since the accused provided food and clothing, among other things to the victim.<sup>165</sup>

The outcome in the case of *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* is an illustration of how lack of awareness and understanding of the elements of the crime of child trafficking (“the crime”), particularly for law officials, often leads to miscarriage of justice. Victims are not properly identified, and children continue to be at risk. As a result, the extent of child trafficking dynamics in the region remains vague.<sup>166</sup> Thus, the UNODC in Malawi noted a lack of awareness of the elements of child trafficking by law officials as a factor to the increase in trafficking, especially in refugee camps in that State.<sup>167</sup>

<sup>160</sup> Stephanie L Mace, Child trafficking: A Case Study of the Perceptions of Child Welfare Professionals in Colorado School of Education (DPhil thesis, Colorado State University 2013) 37.

<sup>161</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region Policy Brief* (SADC 2016) 50.

<sup>162</sup> *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* (unreported), (2001) EHC (21 August 2001).

<sup>163</sup> Article 3 of the Trafficking Protocol.

<sup>164</sup> Section 5 (1) of the Anti-Trafficking in Persons Act, 2011.

<sup>165</sup> See commentary of UNODC of *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* (unreported), (2001) EHC (21 August 2001) para 8 available at [https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/lso/2012/rex\\_v.\\_yoseph\\_girmay\\_tesfagaber\\_adanech\\_beru\\_woldegioregis.html](https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/lso/2012/rex_v._yoseph_girmay_tesfagaber_adanech_beru_woldegioregis.html) accessed 1 June 2022.

<sup>166</sup> There are many challenges and limitations when it comes to determining the actual extent of child trafficking. These are largely due to definitional issues and other socio-economic challenges in the region. See Lisa Fedina and Bruce R De Forge, ‘Estimating the Trafficked Population: Public-Health Research Methodologies May Be the Answer’ (2017) 3 (1) *Journal of Human Trafficking* 21-38.

<sup>167</sup> UNODC, ‘UNODC & Malawi Launch New Measures to Combat Human Trafficking Among Refugees’ (2021) <<https://www.unodc.org/unodc/en/frontpage/2021/April/unodc-and-malawi-launch-new-measures-to-combat-human-trafficking-among-refugees.html>> accessed 4 June 2021.

Understanding child trafficking and the typologies of traffickers can be useful in conducting successful investigations and prosecutions; developing appropriate services for victims and survivors; preventing the crime; and increasing community awareness.<sup>168</sup> However, due to a lack of resources, SADC States have no capacity to conduct meaningful mapping and situation analysis as an essential tool for improving the effectiveness of any action against child trafficking. Mapping is vital for ensuring that there is no repetition of measures and irresponsible resource allocation and use. This also includes obtaining data on children at risk as well as trafficking syndicates.<sup>169</sup> All these assists in improving the prosecution of the crime.

The number of prosecutions has been very low in the previous years, in 2016, there were only 14 894 prosecutions and 9 071 convictions for trafficking, globally.<sup>170</sup> The prosecution and convictions in SADC contribute a meagre proportion to these figures. There is a reported increase in child trafficking, yet worryingly, few prosecutions in the region.<sup>171</sup> For example, between 2008 and 2014, South Africa had only 41 prosecutions of the crime, while other SADC States had fewer or no prosecutions at all.<sup>172</sup> Furthermore, because the officials lack an understanding of the elements of child trafficking, they are unable to distinguish between child trafficking and other similar crimes. For example, the lack of clarity surrounding the distinction between child trafficking and migrant smuggling tends to impede the prosecution of child trafficking in the region.<sup>173</sup> As shall be discussed later in chapter 5 poor victim identification also affects adequate victim protection and assistance.

The difference between migrant smuggling and child trafficking is premised on an individual's ability to consent.<sup>174</sup> Such a distinction may only be made if the law officials

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<sup>168</sup> Noël Busch-Armendariz, Maura Nsonwu, and Laurie Cook Heffron, 'Understanding Human Trafficking: Development of Typologies of Traffickers PHASE II' (Annual Interdisciplinary Conference on Human Trafficking, Nebraska, October 2009).

<sup>169</sup> *ibid.*

<sup>170</sup> Human Rights First, Human Trafficking by Numbers, Fact Sheet September 2017 <<https://www.humanrightsfirst.org/sites/default/files/TraffickingbytheNumbers.pdf>> accessed 25 April 2021.

<sup>171</sup> SADC Secretariat, *Trafficking in persons in the SADC Region: A Baseline Report* (2016) 6.

<sup>172</sup> *ibid.*

<sup>173</sup> Mike Dottridge, 'Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Levels', in *An Introduction to Human Trafficking: Vulnerability, Impact, and Action* 103 -110.

<sup>174</sup> Samuel Vincent Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45 Indiana Law Review 483, 488.

are aware of the elements of each crime.<sup>175</sup> In this case, the absence or presence of consent is a determining factor.

As highlighted above, the importance of distinguishing between smuggling and child trafficking has a bearing on the issue of criminal liability of the victims.<sup>176</sup> If this distinction is not made, trafficked persons may not be protected from prosecution for offences they would have been forced to commit or committed because of trafficking.<sup>177</sup> Moreover, the traffickers may be acquitted or given a lesser charge. Incidentally, the option of a lesser charge or the option of a fine in lieu of imprisonment, is one of the factors that is promoting impunity and affecting the efficiency of the child trafficking frameworks in SADC States.

Be that as it may, the Court of Appeal (England and Wales) in the case of *R v O* highlighted the need for prosecutors and defense practitioners to take all the necessary steps to identify victims of trafficking and be thorough when making enquiries before prosecuting or acquitting the perpetrators.<sup>178</sup> The same is applicable to law officials in SADC States who must, despite a scarcity of resources, take initiative to educate themselves of the intricacies of child trafficking. If such steps and initiatives are not undertaken, not only will perpetrators go unpunished, but there is also a possibility that more children in the SADC region will be at risk of child trafficking.

### **2.2.5 Culture**

The *10-Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019)*, which is the guiding regional response to child trafficking notes that women and girls are vulnerable to child trafficking because of the inequalities entrenched in custom and patriarchal systems.<sup>179</sup>

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<sup>175</sup> UNODC, 'Preventing and Combatting Smuggling of Migrants through Strengthened Capacity to Examine Security Documents' < <https://www.unodc.org/southernafrica/en/aml/som.html> > accessed 4 June 2021.

<sup>176</sup> UNODC, *Toolkit to Combat Trafficking in Persons' Global Programme Against Trafficking in Human Beings* (UNODC 2008) 24-25.

<sup>177</sup> *ibid.*

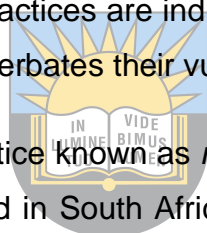
<sup>178</sup> [2008] EWCA Crim 2835.

<sup>179</sup> The status of Patriarchal societies portrays males as having control over property and the lives of women and children of women and children is therefore entrenched by this tradition. See Thomas W Bennet, *Human Rights and African Customary Law* (Juta and Co Ltd 1999) 80. Also see SADC Executive Secretary, 'Children in the spotlight as the World commemorates the Day against

The task of making a distinction between the right to cultural practice and violation of human rights is complex and human traffickers often take advantage of the opportunities this presents. It may be noted that in some parts of Africa, social practices with elements of child trafficking perpetuate the crime.<sup>180</sup> The diversity of cultural practices, coupled with the lack of a clear understanding of child trafficking in Southern Africa continues to put children, particularly girls at the risk of child trafficking.<sup>181</sup>

One example of a cultural practice that is closely related to child trafficking is the prevalence of *kuripa ngozi* and other practices that involve forced or coerced marriage of girls and young women in Zimbabwe and other African States.<sup>182</sup> Cases of *kuripa ngozi* involve murder, which prompts demand for compensation in the form of a virgin by the aggrieved family.<sup>183</sup> The practice is, therefore, based on the perpetrator's family giving a virgin to the aggrieved family in order to atone for a wrongdoing.<sup>184</sup> Although condoned in many States, such practices are indicative of the oppressive perception of women and children which exacerbates their vulnerability to trafficking.<sup>185</sup>

Zimbabwe also has a cultural practice known as *musenga bere*,<sup>186</sup> which is similar to the custom of *ukuthwala*, practised in South Africa as well as in the other Southern



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Trafficking in Persons' <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 18 April 2021.

<sup>180</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 8.

<sup>181</sup> *ibid* 1.

<sup>182</sup> Phyllis Kachere, 'Religion and Poverty Force Girls into Early Marriages' (2009) Inter Press Service News Agency (IPN), 9 April, <http://ipsnews.net/africa/nota.asp?idnews=46447> accessed 6 May 2022.

<sup>183</sup> Country Advice, 'Zimbabwe – ZWE37447 –kuripa ngozi (virgin pledging) – Customary marriage – Women – State protection – Police – Bantus – Domestic violence – Sexual assault –HIV/AIDS – Legal provisions' (2010) Australian Government Refugee Tribunal 1 <[https://www.ecoi.net/en/file/local/1301040/2016\\_1305124379\\_zwe37447-1.pdf](https://www.ecoi.net/en/file/local/1301040/2016_1305124379_zwe37447-1.pdf)> accessed 5 June 2022.

<sup>184</sup> Equality Now, Submission to the UN Human Rights Committee, 62<sup>nd</sup> Session, March 1998, Zimbabwe.

<sup>185</sup> Country Advice, 'Zimbabwe – ZWE37447 –kuripa ngozi (virgin pledging) – Customary marriage – Women – State protection – Police – Bantus – Domestic violence – Sexual assault –HIV/AIDS – Legal provisions' (2010) Australian Government Refugee Tribunal 3 <[https://www.ecoi.net/en/file/local/1301040/2016\\_1305124379\\_zwe37447-1.pdf](https://www.ecoi.net/en/file/local/1301040/2016_1305124379_zwe37447-1.pdf)> accessed 5 June 2022.

<sup>186</sup> *Musenga bere* is a Shona cultural practice whereby a man would ambush the young girl whom he fancies but has failed to convince her to marry him. The man would drag the young girl to his home even against her wish. That young girl would then automatically become his wife. However, the Zimbabwe Domestic Violence Act of 2007 prohibits forced marriages a harmful cultural practice that discriminates against women. See Canisius Mwandayi, 'Towards a Reform of the Christian Understanding of Shona Traditional Marriages in Light of Ancient Israelite Marriages' (2017) 43 (3)



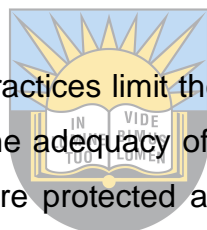
African States under different terms.<sup>187</sup> This practice has been described as the ‘culturally-legitimated abduction’ of a young girl by a man and his friends or relatives, to force her family to agree to marriage negotiations.<sup>188</sup> Koyana and Bekker provide a more elaborate description of how the practice unfolds and state that:

The intending bridegroom, with one or two friends, will waylay the intended bride in the neighbourhood of her home, quite late in the day, towards sunset or at early dusk, and they will “forcibly” take her to the young man’s home.<sup>189</sup>

It is important to note that, when abused, the cultural practice of *ukuthwala* may lead to abductions and kidnappings of women and girl children.<sup>190</sup> The South African Law Reform Commission noted that:

in recent times the practice has been used to legitimize and validate criminal abduction and the infliction of gender-based violence against minor girl children. Abuses of *ukuthwala* have clearly been perpetrated without the girl’s consent...<sup>191</sup>

To the extent that these cultural practices limit the volition on the part of young girls, some scholars have questioned the adequacy of the existing legislation in ensuring that children, especially girls,<sup>192</sup> are protected and that their best interest remains



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Studia Historiae Ecclesiasticae 1, 5. See also Ngonidzashe Marongwe, Fideli Thomas, Munyaradzi Mawere, *Violence, Peace and Everyday Modes of Justice and Healing in Post-Colonial Africa*, (African Books Collective 2019) 89. See also Rumbidzai Dube, ‘Till Death Do us Part? Marriage in Zimbabwe’ Research and Advocacy Unit <http://researchandadvocacyunit.org/system/files/Marriage%20In%20Zimbabwe.pdf>. Accessed 5 June 2022.

<sup>187</sup> South African Law Reform Commission, ‘Project 138: The Practice of Ukuthwala’ Discussion Paper 132 (2014) 1, 5 <<https://www.justice.gov.za/salrc/dpapers/dp132-ukutwala.pdf>> accessed 2 June 2022.

<sup>188</sup> Leah Mwambene and Julia Sloth-Nielsen, ‘Benign Accommodation? Ukuthwala, Forced Marriage and the Children’s Act 38 of 2005’ (2011) 11 (1) African Human Rights Law Journal 1, 3.

<sup>189</sup> Digby S Koyana, Jan C Bekker, ‘The Indomitable Ukuthwala custom’ (2007) (40) 1 De Jure 139-144.

<sup>190</sup> See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 2. See also South African Law Reform Commission, ‘Project 138: The Practice of Ukuthwala’ Discussion Paper 132 (2014) 1, 7 <<https://www.justice.gov.za/salrc/dpapers/dp132-ukutwala.pdf>> accessed 2 June 2022.

<sup>191</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC 2016) 2. See also South African Law Reform Commission, ‘Project 138: The Practice of Ukuthwala’ Discussion Paper 132 (2014) 1, 7 <<https://www.justice.gov.za/salrc/dpapers/dp132-ukutwala.pdf>> accessed 2 June 2022.

<sup>192</sup> The court in the case of *Mudzuru v Another* noted that there is need to fully acknowledge that a child’s gender can detrimentally affect the realisation of his or her right. For a more detailed discussion on gender inequalities in the CRC see Jewel Amoah, ‘The World on Her Shoulders: The Rights of the Girl–Child in the Context of Culture & Identity’ (2007) 2 (2) Essex Human Rights Review 1, 15. Amoah concludes that, “The failure to make specific reference to the girl– child and conditions that

paramount.<sup>193</sup> The inadequacy may be noticed at the international level with instruments such as the CRC, which SADC States have ratified.<sup>194</sup> The CRC has been heavily criticised for not containing an explicit provision on child marriages. This is because the convention does not define the age of the majority and essentially leaves girls vulnerable to child marriages.<sup>195</sup>

In addition to this observation on the lack of stipulation of the acceptable age of marriage, Askari also argues that the CRC has an indirect bias in favour of boys. This argument is premised on the observation that the CRC deals at length with the issue of child soldiers, which greatly affects boys and does not dwell much on the issue of child marriages which presumably mostly affect the girl child.<sup>196</sup> This comparison is made despite the fact that the wording in the CRC is not gender-specific.<sup>197</sup> Perhaps, by leaving out the definition of age of majority in relation to marriages, the Convention sought to leave room for legislative development at domestic level.



However, despite the existence of relevant domestic legislation and provisions,<sup>198</sup> abuse of cultural practices such as *kuripa ngozi* or *ukuthwala* is still prevalent in SADC

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exacerbate her vulnerability is itself a form of discrimination against her ... It is not enough that the language simply be gender-neutral, but where there are specific gendered human rights abuses, then these, must be directly addressed”.

<sup>193</sup> For a discussion on whether statutes such as South Africa’s Children’s Act sufficiently protect the girl child, See Leah Mwambene, Julia Sloth-Nielsen, ‘Benign accommodation? Ukuthwala, forced marriage and the Children’s Act 38 of 2005’ (2011) 11 (1) African Human Rights Law Journal 1, 3. See also section 12 (1) and (2)(a) and (b) of the Children’s Act 38 of 2005. Mwambene and Sloth-Nielsen debate whether the wording in these sections aligns with the concept of *ukuthwala*, which emphasises the “taking of girls” (whether by force or collusion). They also discuss other definitional issues in terms of the Act. See also South African Law Reform Commission, ‘Project 138: The Practice of *Ukuthwala*’ Discussion Paper 132 (2014) 1, 13 <<https://www.justice.gov.za/salrc/dpapers/dp132-ukutwala.pdf>> accessed 2 June 2022.

<sup>194</sup> Ratification Status for CRC - Convention on the Rights of the Child <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en)> accessed 20 August 2022.

<sup>195</sup> Article 1 of the CRC. See also Elizabeth Warner, ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls’ (2004) 12 (2) Art 1 Journal of Gender, Social Policy & the Law 233, 251.

<sup>196</sup> Ladan Askari, ‘The Convention on the Rights of the Child; The Necessity of Adding a Provision to Ban Child Marriages’ (1998) 5 ILSA Journal of International and Comparative Law 121, 123.

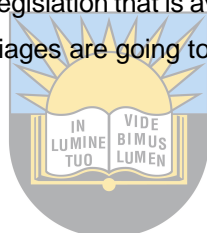
<sup>197</sup> See article 4 of the CRC.

<sup>198</sup> For example, Section 28(1) (d) of the Constitution of South Africa stipulates that; “every child has the right to be protected from maltreatment, neglect, abuse or degradation; and section 28 (2) states that a child’s best interests are of paramount importance in every matter concerning the child. See also Section 3 of the Recognition of Customary Marriages Act 120 of 1998. There is also the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which prohibits unfair discrimination against any person on the ground of gender, including: (a) gender-based violence; and (b) any practice, including traditional, customary or religious practice, which impairs the dignity of women

States. Such practices often result in child marriages and violations of human rights which also makes children vulnerable to child trafficking.<sup>199</sup> Thus, where the abduction of a young girl for marriage is accepted as a norm, it is easy for perpetrators of child trafficking to harbour victims without raising alarm. For this reason, cultural practices are a contributory factor to internal child trafficking in SADC States.<sup>200</sup>

Perhaps these cultural practices continue despite the existence of domestic legislation due to the lack of implementation and enforcement of measures. The Court in the case of *Mbhamali v S* emphasised that the lack of implementation of measures increases vulnerability and concluded that:

The unwillingness of the concerned States to put in place and legislate on the enabling instruments to protect these young girls is worrisome. In States like Zimbabwe and Malawi, the reasons proffered for such failure is a big concern. It suggests that as long as the powers that be are reluctant to implement the legislation that is available to them, despite all the conventions that are in place, these child marriages are going to continue unabated.<sup>201</sup>



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and undermines equality between women and men, including undermining the dignity and wellbeing of female children, under section 8".

<sup>199</sup> For example, in the case of *Rex v Joalane Tsoana*, five unemployed young women aged between ages of 17 to 27 were brought into South Africa from Lesotho under the guise that they would be working as domestic workers in Bloemfontein. Instead, the victims were married off to men. See *Rex v Joalane Tsoana* (CIV/T/46/06) (1990) LSHC 372/12 (2 February 1990) (unreported).

<sup>200</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region Policy Brief* (SADC 2016) 3 <[https://www.sadc.int/files/8414/7505/0081/SADC\\_TIP\\_Policy\\_Brief\\_-\\_English\\_FINAL.pdf](https://www.sadc.int/files/8414/7505/0081/SADC_TIP_Policy_Brief_-_English_FINAL.pdf)> accessed 2 June 2022.

<sup>201</sup> See discussion in *Mbhamali v S* (AR579/2019) [2021] ZAKZDHC 35; 2021 (2) SACR 627 (KZD); [2022] 1 All SA 488 (KZD) (12 October 2021) para 64. See also *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016). Among other international instruments that SADC States have ratified, CEDAW requires Member States to take all appropriate measures to: "(a) modify the social and cultural patterns of conduct of men and women, in order to eliminate prejudices and discriminatory customary and other practices (art 26); (b) implement legislation to suppress all forms of trafficking in women (art 5); (c) eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure, on the basis of equality of men and women, the same right to enter into marriage with free and full consent (art 16(1))." The CRC also has the same provisions under Articles 24 (3); 34 and 35 respectively. The ACRWC also prohibits child marriage or betrothal under Article 21 (2); and sexual exploitation under Article 27 and urges. Member States must take all appropriate measures to prevent the abduction, sale or trafficking of children for any purpose, in any form, and by any person including parents or legal guardians of a child under Article 29. Also see the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which prohibits the sale of children and defines the crime under Article 2.

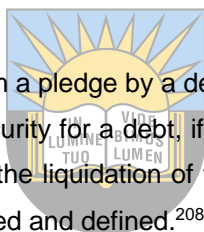


Reference may also be made to the case of *Jezile v S*<sup>202</sup> which involved internal child trafficking.<sup>203</sup> In this case, the appeal court upheld a conviction for child trafficking and rape.<sup>204</sup> In its submissions to the court, the Women's Legal Centre Trust, acting as *amicus curiae*, noted the potential risk that is created by the practice of the custom of *ukuthwala* when abused.<sup>205</sup> They submitted that:

the practice of *ukuthwala* has in recent years received considerable public attention and is the subject of much public debate, inasmuch as its current practice is regarded as an abuse of traditional custom and a cloak for the commission of violent acts of assault, abduction and rape of not only women but children as young as eleven years old by older men. These practices – under the guise of custom - have been described by several organisations as a “harmful cultural practice”.<sup>206</sup>

However, harmful cultural practices do not only constitute child marriages. In Mozambique, there is a common practice of debt bondage.<sup>207</sup> Debt bondage is defined as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.<sup>208</sup>



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<sup>202</sup> *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) (23 March 2015).

<sup>203</sup> The facts of the matter were that the Appellant had gone to his home village in the Eastern Cape with the specific intention of finding a girl to marry in accordance with the *ukuthwala* custom. He took interest in the complainant who was at that time 14 years of age and living with her grandmother since her mother was away working and her father was late. The Appellant and the complainant had neither met nor spoken to each other before. Despite the complainant's resistance, lobola was negotiated and paid and thereafter the Appellant and complainant left for Cape Town. The complainant later managed to escape a couple of months after their arrival in Cape Town and reported the case to the police.

<sup>204</sup> See 199 para 106.

<sup>205</sup> This case has most of the factors that increase the vulnerability of children to trafficking. Family disintegration and economic challenges in that the minor child had to live with her grandmother because her father was deceased. In addition, the only surviving parent she had could only visit once a month because she has to work somewhere else in order to provide for her family. See also *Mbhamali v S* (AR579/2019) [2021] ZAKZDHC 35 para 63.

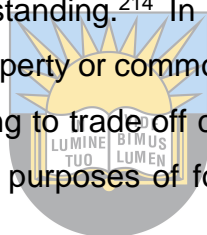
<sup>206</sup> See the record submission made by the second *amicus curiae*, 652, para 12 with reference to their submission made to the South African Law Commission (SALC) – November 2009. See also South African Law Reform Commission, 'Project 138: The Practice of Ukuthwala' Discussion Paper 132 (2014) 1-62 <<https://www.justice.gov.za/salrc/dpapers/dp132-ukutwala.pdf>> accessed 2 June 2022.

<sup>207</sup> UNODC, *Global Report on Trafficking in Persons 2020* (United Nations publication, Sales No. E.20.IV.3) 194 <[https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP\\_2020\\_15jan\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf)> accessed 2 June 2022.

<sup>208</sup> Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

In the Mozambican case of *State v Muiambo and Mahvahve*,<sup>209</sup> involving a minor child who had been used to settle a debt, the Court had to decide whether a crime of child trafficking had been committed. The First Defendant Samson Chale Magona Muiambo, a religious healer had received an 11-year-old girl from her father, John Thaunde Mahvahve, the Second Defendant as security for a loan of R 7000, which he had to repay at an interest rate of 100%.<sup>210</sup> Both Defendants were subsequently charged with contravening Article 10 of the Trafficking in persons Act of 2008.<sup>211</sup> However, at the time when the matter was heard, there was no judicial precedence on child trafficking despite cases of exchange of children, especially for money, being common practice in the State. Accordingly, this case became the first known case of a conviction for the crime in that State.<sup>212</sup>

Harmful cultural practices in most African communities are perpetuated by patriarchal systems which, by their nature, do not view women and men as equal.<sup>213</sup> Women and children have a very low social standing.<sup>214</sup> In some social settings, children are regarded as symbols of wealth, property or commodities for exchange.<sup>215</sup> Accordingly, caregivers and guardians are willing to trade off children at a price.<sup>216</sup> If not sold into slavery, children are trafficked for purposes of forced marriages,<sup>217</sup> or as a way of



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<sup>209</sup> *S v Muiambo and Mahvahve* (2014) MOZHC 001 (unreported).

<sup>210</sup> *ibid.*

<sup>211</sup> Article 10; 'All those who recruit, transport, give shelter to, supply or receive a person, by any means, including under pretext of domestic work, or work abroad, training or apprenticeships, forced labour, slavery, indentured servitude or debt servitude will be punished by 16 to 20 years of imprisonment.'

<sup>212</sup> The Defendants' actions constituted trafficking in persons. It further constituted the harbouring and receipt of a persons for the purpose of exploitation. The Court held that the second defendant, John Thaunde Mahvahve, had clearly breached the duty of reasonable care over his daughter by selling her to the first defendant in exchange for money. However, he received a reduced sentencing because he had confessed to the crime. The first defendant was found guilty of the charge of trafficking in persons and sentenced to 7 years imprisonment. On the same crime, the second defendant was also found guilty but got a lesser sentence of 6 years. See *S v Muiambo and Mahvahve* (2014) MOZHC 001 (unreported).

<sup>213</sup> SADC Secretariat, *Trafficking in persons in the SADC Region Policy Brief* (SADC 2016) para 2.2. Also see Henry J Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics and Morals* (2<sup>nd</sup> edn, Oxford University Press 2000) 457.

<sup>214</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region Policy Brief* (SADC 2016) para 2.2.

<sup>215</sup> Godwin Makaudze, 'Great Zimbabwe University Women, Wealth Generation and Property Ownership in Traditional Shona Culture in Zimbabwe' (2014) 30 (2) 18 *Latin American Report* 1, 24.

<sup>216</sup> *ibid.*

<sup>217</sup> Liz Kelly, 'You Can Find Anything You Want': A Critical Reflection on Research on Trafficking in Persons within and into Europe' (2005) 43 (1/2) *IMO* 1, 2.

settling tribal disputes and debts.<sup>218</sup> It is such systems and insufficient protection by the law which promote criminality and leave children vulnerable to trafficking.<sup>219</sup>

Perhaps, this is an opportunity for legislatures in SADC States to take a positive step toward law reforms that breach the gap that has been left by the international and regional frameworks in so far as providing adequate protection to children, regardless of gender, from harmful cultural practices. Effective prevention and elimination of harmful practices require the establishment of well-defined, rights-based and locally relevant holistic strategies which include supportive legal and policy measures as well as social measures backed by political commitment and accountability.<sup>220</sup> In this regard, lessons may be taken from the Zimbabwean Constitutional Court which was commendable in its ruling in the Case of *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs N.O.* which struck down:

s22 (1) of the Marriage Act [Chapter 5:11] or any law, practice or custom authorising a person under eighteen years of age to marry or to be married is inconsistent with the provisions of s 78(1) of the Constitution and therefore invalid to the extent of the inconsistency.<sup>221</sup>

The effect of the ruling was that persons under the age of 18 regardless of gender could not enter any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite.<sup>222</sup>

<sup>218</sup> Nina Mollema 'Combating Human Trafficking in South Africa: A Comparative Study' (LLD thesis, University of South Africa 2013) 75.

<sup>219</sup> Askari in an article titled "The Convention on the Rights of the Child; The Necessity of Adding a Provision to Ban Child Marriages" criticizes the CRC for not applying to girls and boys equally in that it does not give due consideration to particularly harmful situations that may be specific to either girls or boys. Much consideration is not given to matters affecting girls such as child marriages. See Ladan Askari, 'The Convention on the Rights of the Child; The Necessity of Adding a Provision to Ban Child Marriages' (1998) 5 ILSA Journal of International and Comparative Law 121, 123. See also the case of *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016) for a discussion of child marriages and child trafficking.

<sup>220</sup> See recommendations made by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have a common mandate to prevent respond to and eliminate harmful practices affecting women and children, primarily girls. Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices para 33, 10.

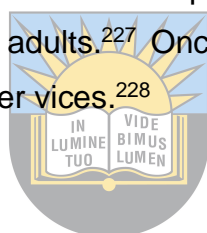
<sup>221</sup> See ruling in *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016).

<sup>222</sup> *Mudzuru & Anor v Ministry of Justice, Legal & Parliamentary Affairs N.O. & Ors* (Constitutional Application 79 of 2014, CC 12 of 2015) [2016] ZWCC 12 (20 January 2016).

It is, therefore, important for SADC States, in line with this recommendation, to have legislation in place that protects children from harmful practices as part of their continued effort to combat child trafficking.<sup>223</sup> Furthermore, they should also ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women and children's right to equality before the law and to equal enjoyment of all rights.<sup>224</sup> In essence, therefore, cultural practices need to be consistent with fundamental protections afforded to children in order to combat child trafficking.

### 2.2.6 Family Disintegration

'The family is the nucleus of civilization and the basic social unit of society'.<sup>225</sup> It plays a major role in the development of each family member in line with the norms and values of a society.<sup>226</sup> However, once the family unit is disrupted, children will not be able to receive decent moral education. They prematurely become assertive and independent and distance themselves from the protection that a family set-up would have provided until they become adults.<sup>227</sup> Once exposed, such children become vulnerable to trafficking among other vices.<sup>228</sup>



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<sup>223</sup> An example of such legislation is South Africa's Prevention and Combating of Trafficking in Persons (Act 7 of 2013). Although the act does not explicitly identify *ukuthwala* as a practice, it outlaws forced marriages which in some instances, are a result of child trafficking. Section 4 (2) (b) of the Prevention and Combating of Trafficking in Persons (Act 7 of 2013) states that a person who concludes a forced marriage with another person within or across the borders of the Republic, for the purpose of the exploitation of that child or other person in any manner is guilty of an offence. Article 5 makes it an offence to engage or cause another person to enter into debt bondage.

<sup>224</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21 Right of everyone to take part in cultural life (art.15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights), Forty –Third Session 2-20 November 2009.

<sup>225</sup> William Bennett, 'Stronger Families, Stronger Societies' *The New York Times* (24 April 2012) <https://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/stronger-families-stronger-societies>> accessed 23 June 2022.

<sup>226</sup> Maxeo Constantine, 'The Role of the Family in African Society in Economic Development' <[https://www.academia.edu/8954854/The\\_Role\\_of\\_the\\_Family\\_in\\_African\\_Society\\_in\\_economic\\_development](https://www.academia.edu/8954854/The_Role_of_the_Family_in_African_Society_in_economic_development)> accessed 8 May 2022.

<sup>227</sup> Eershad Muhammad Guness, 'What are the causes of disintegration of the family unit?' <<https://www.scribd.com/document/306127420/What-are-the-causes-of-family-disintegration>> accessed 7 May 2022.

<sup>228</sup> The 2020 Global Report on Trafficking Persons reported that; "Criminals trafficking children target victims from extremely poor households, dysfunctional families or those who are abandoned with no parental care. In low-income States, children make up half of the victims detected and are mainly trafficked for forced labour (46 per cent). In higher income States, children are trafficked mainly for sexual exploitation, forced criminality or begging." See UNODC, *Global Report on Trafficking in Persons* (2020) 9.

It is crucial to note that family disintegration does not only refer to cases of divorce and separation, but it also refers to families where conflict is constantly present.<sup>229</sup> Domestic violence often causes feelings of alienation or neglect in children. This gives rise to juvenile delinquency, which causes great harm to the society.<sup>230</sup> Although it is not the main factor of child trafficking, children from disintegrated families are more susceptible to trafficking and are easily drawn to any possibility of better living conditions. In the case of *Fana Fakudze v Dumsani Mkhonta*, which was heard before the then Swaziland High Court,<sup>231</sup> the minor child had been exposed to constant domestic violence and ended up as a victim of intrafamilial sexual abuse and trafficking.<sup>232</sup> The minor child thought she would be safer with her stepfather whose marriage to her mother had broken down and was going to South Africa. The child had requested to go with the stepfather despite being sexually abused by him since the age of 12.<sup>233</sup> However, while they were in South Africa, she was subjected to further sexual abuse by her stepfather and eventually fell pregnant.<sup>234</sup>

Despite the absolution from the instance granted by the High Court, the accused was convicted by the regional court sitting in Durban, South Africa, of one count of trafficking in persons in contravention of section 4(1) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, among other charges. In deciding the case, the Court considered aggravating factors as set out in section 14 of the Prevention of Trafficking in Persons Act.<sup>235</sup> Although the trafficking charges were set aside on

<sup>229</sup> Lona Tabu, 'Causes of Family Breakdown and its Effects on Children'(2009) Academia 1, 19 <[www.academia.edu/15312786/Causes\\_of\\_family\\_breakdown\\_and\\_its\\_effects\\_on\\_Children](http://www.academia.edu/15312786/Causes_of_family_breakdown_and_its_effects_on_Children)> accessed 7 May 2022.

<sup>230</sup> Eershad Muhammad Guinness, 'What are the Causes of Disintegration of the Family Unit?' 2 <<https://www.scribd.com/document/306127420/What-are-the-causes-of-family-disintegration>> accessed 7 May 2022.

<sup>231</sup> *Fakudze v S* (AR410/2018) [2019] ZAKZPHC 32 (7 June 2019).

<sup>232</sup> Musiwa suggests that there is a link between intrafamilial child sexual abuse and child trafficking. Perhaps this is because both have no clear causes but are a result of a conglomeration of factors. See Anthony Shuko Musiwa, 'Intrafamilial Child Sexual Abuse: A Unique Silent Epidemic. Perspectives of Victim-Friendly Court Professionals in Marondera District, Zimbabwe' (2019) 28 (7) Journal of Child Sexual Abuse 860, 863.

<sup>233</sup> Based on the provisions of the Trafficking Protocol, the State did not have to prove the means element of trafficking in persons since the provision states that if the victim is a child consent is irrelevant. See Article 3 (c) of the Trafficking Protocol.

<sup>234</sup> The Court had to decide whether the crime of child trafficking for sexual exploitation had been committed; and whether the accused unlawfully and intentionally committed an act of sexual penetration with the victim. See Section 11 (1) (a) of the Prevention and Combating of Trafficking in Persons Act, 2013.

<sup>235</sup> The Court considers the following factors; (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



appeal, the case remains an example of how family disintegration may make children more vulnerable to trafficking.<sup>236</sup> It is also evidence of the different interpretations of the crime of child trafficking in the respective SADC States.

Apart from the type of family disintegration portrayed in the above case, in some instances, families are disintegrated because of poverty which forces guardians as well as children to look for means to survive in different places. The vicious cycle of poverty plays a big role in the breaking up of a family. The pressure of having to meet the entire family's daily needs often results in parental 'negligence' in caring for their children.<sup>237</sup> It is common to find parents working two jobs or working long hours and as a result, lose constant parental contact with their children.<sup>238</sup> This lack of constant parental guidance and monitoring makes children vulnerable to child trafficking.<sup>239</sup> On the other hand, some children are also forced to leave their homes in search of jobs. In the case *Dos Santos v S*, the victims were impoverished minors from Mozambique looking for means to better their lives.<sup>240</sup> They had been offered jobs at the accused's hair salon in Pretoria. However, upon arrival in South Africa their passports were confiscated, and the minor children were subjected to prostitution.<sup>241</sup>

The above discussion shows how family dynamics contribute significantly to the factors that increase child trafficking. Family disintegration creates conditions that are fertile for trafficking that range from lack of parental care and guidance; neglect of

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related offences; (c) whether the convicted person caused the victim to become addicted to the use of a dependence producing substance; (d) the conditions in which the victim was kept; (e) whether the victim was held captive for any period; (f) whether the victim suffered abuse and the extent thereof; (g) the physical and psychological effects the abuse had on the victim; (h) whether the offence formed part of organised crime; (i) whether the victim was a child; (j) the nature of the relationship between the victim and the convicted person; (k) the State of the victim's mental health; and (l) whether the victim had any physical disability.

<sup>236</sup> *Fakudze v S* (AR410/2018) [2019] ZAKZPHC 32 (7 June 2019).

<sup>237</sup> Emma Elsworthy 'Half of parents spend less than an hour a day of quality time with their children' *Mirror* (29 January 2018) <http://www.mirror.co.uk/news/uk-news/half-parents-spend-less-hour-11933959> accessed 16 April 2021.

<sup>238</sup> Carolyn J Heinrich, 'Parents' Employment and Children's Wellbeing (2014) 24 (1) 121, 121. See also UNICEF, *The Children's Act Explained* (UNICEF 2009) 13.

<sup>239</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC 2016) 31.

<sup>240</sup> (A26/2014) [2017] ZAGPPHC 641.

<sup>241</sup> The variety of evidence that was considered in this case included; deception, force, threats of force and of prosecution as the victims were illegal immigrants; abuse of a position of vulnerability; bad living and working conditions a climate of fear with constant threats, forcing the victims to use cannabis, which is a method of control prevalent in the region. The Court therefore referred to the UNCTOC and the Trafficking Protocol in deciding the accused's case. See *Dos Santos v S* (A26/2014) [2017] ZAGPPHC 641; 2018 (1) SACR 20 (GP) (7 September 2017).

children; juvenile delinquency; poor living standards and child-headed homes among others. The family is therefore an important pillar in combating child trafficking.<sup>242</sup>

### 2.2.7 HIV/AIDS

The SADC region remains one of the areas most affected by the HIV pandemic with about 13.4 million people living with the virus.<sup>243</sup> It is noteworthy that, HIV/AIDS is resulting in high levels of adult deaths in the region.<sup>244</sup> This in turn increases the number of orphans and impacts negatively the number of child trafficking cases in the region.<sup>245</sup>

HIV/AIDS significantly contributes to the increase in child-headed families,<sup>246</sup> which are more susceptible to child trafficking.<sup>247</sup> Traffickers target these vulnerable child-headed families and expose them to elements of trafficking that include; forced criminality drug trading, pickpocketing, bag snatching, selling of counterfeit goods and at times, social welfare fraud.<sup>248</sup> HIV/AIDS creates a fertile ground for child trafficking in that it creates vulnerable and weak societies affected by poverty and gender inequality.<sup>249</sup>

Misconceptions associated with the cure of HIV/AIDS in some African communities also contribute significantly to the abduction and trafficking of young girls. There is a popular belief that having sexual intercourse with a young girl reduces the risk of

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<sup>242</sup> UNODC, *Global Report on Trafficking in Persons* (UNODC 2020) 67.

<sup>243</sup> Southern African Development Community (SADC), 'HIV & AIDS' <<https://www.sadc.int/issues/hiv-aids/>> accessed 4 May 2022.

<sup>244</sup> Statista has noted that SADC States have the highest rates of HIV. See John Elflein; 'Ranking of States with the Highest Prevalence of HIV in 2000 and 2020' *Statista* (30 September 2021) <<https://www.statista.com/statistics/270209/states-with-the-highest-global-hiv-prevalence/>> accessed 5 January 2021.

<sup>245</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 April 2021.

<sup>246</sup> Julia Sloth-Nielsen, 'Too Little? Too Late? The Implications of the Grootboom Case for State Responses to Child- Headed Households' (2003) 1 *Law, Democracy and Development* 113, 115.

<sup>247</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC 2016) 31.

<sup>248</sup> Social welfare fraud takes place when exploiters falsely apply for tax credits and other welfare benefits using the victims' details. This type of criminality is common between South Africa and Eswatini. Traffickers exploit the historic ethnic and social ties between South Africa and Eswatini, so they use fraudulent documents to claim benefits. SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 98.

<sup>249</sup> Southern African Development Community (SADC), 'HIV & AIDS' <<https://www.sadc.int/issues/hiv-aids/>> accessed 4 May 2022.

contracting HIV/AIDS.<sup>250</sup> Those who already have the virus believe having intercourse with a young virgin cures them.<sup>251</sup> This misconception is most common in some parts of Southern Africa and has increased the demand for young sex workers. The number of unscrupulous scammers who profit from trafficking young girls to those States has also increased.<sup>252</sup>

These misconceptions have dire consequences in that those perpetrators who believe that having intercourse with a virgin is a cure, continue to have unprotected sex with other unsuspecting partners.<sup>253</sup> Furthermore, the victim used for 'curing', and is also possibly infected, will often continue to be exploited. Thus, HIV/AIDS is not just a cause of child sex trafficking but also a consequence as the disease is spread exponentially by the victims and perpetrators.

Essentially, child trafficking thrives in areas of poverty, low income, and limited employment opportunities.<sup>254</sup> As such, HIV/AIDS can also be identified as a catalyst for child trafficking. Therefore, addressing the consequences of HIV/AIDS is also critical in the fight against child trafficking. This includes as Sloth-Nielsen suggests, 'first and foremost, attending to the basic survival needs of children who have lost, or are in the process of losing, their adult caregivers'.<sup>255</sup>

### **2.2.8 Globalisation and Porous Borders**

Globalisation has been defined as:

<sup>250</sup> Laura Murray and Gilbert Burnham, 'The Myth of the Virgin Rape Myth' (2009) 374 (9699) *The Lancet* 1419, 1420.

<sup>251</sup> This practice of 'sex for cure' may be linked to ritual abuse of young girls. See Johanna Schröder, Susanne Nick, Hertha Richter-Appelt, et al. 'Psychiatric Impact of Organized and Ritual Child Sexual Abuse: Cross-Sectional Findings From Individuals Who Report Being Victimized' (2018) 15 *Int J Environ Res Public Health* 1, 1–3.

<sup>252</sup> Aderanti Adepoju, 'Review of Research and Data on Human Trafficking in Sub-Saharan Africa' (2005) 43 (1/2) *International Migration* 75, 84.

<sup>253</sup> In addition, children who contract HIV as a direct result of their status as victims of sex trafficking, also unknowingly and unintentionally spread HIV to customers who seek their services after becoming infected. See Amanda Kloer, 'Sex Trafficking and HIV/AIDS: A Deadly Junction for Women and Girls' (2010) 37 *American Bar Association* 1, 1.

<sup>254</sup> Southern African Development Community (SADC), 'HIV & AIDS' <<https://www.sadc.int/issues/hiv-aids/>> accessed 4 May 2019. See also Antonio Guterres, 'Statement made on World Day Against Trafficking in Persons', (30 July 2021) <<https://www.unodc.org/unodc/en/endht/sgs-message-on-world-day-against-trafficking-in-persons.html>> accessed 12 July 2022.

<sup>255</sup> Julia Sloth-Nielsen, 'Too Little? Too Late? The Implications of the Grootboom Case for State Responses to Child- Headed Households' (2003) 1 *Law, Democracy and Development* 113, 135.



The irrevocable integration of markets, nation-states and technologies ... in a way that is enabling individuals, corporations and nation-states to reach around the world further, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation-states further, faster deeper and cheaper than ever before.<sup>256</sup>

In essence, globalisation creates the need and involves an increased movement of people across national borders. Thus, it has been suggested that an increasingly integrated world economy enables child trafficking to thrive.<sup>257</sup> As the world evolves into a global community, the transfer of people, both voluntarily and coerced, is becoming more prevalent.<sup>258</sup> Among other factors, it is because of globalisation that child trafficking has become such a lucrative illegal business. As some scholars point out, it is the 'underside of globalisation'.<sup>259</sup>

In the global era child trafficking is increasing worldwide, especially in impoverished SADC States that have become sources, transit zones or destinations for victims who are transported to distant States and enslaved through labour or commercial sexual exploitation.<sup>260</sup> Some scholars have coined this problem 'global apartheid' because it is from continually impoverished communities that child trafficking victims are drawn.<sup>261</sup>

It is noteworthy that globalisation makes the fight against child trafficking difficult since by nature, it promotes state linkages for trade and commerce.<sup>262</sup> Some scholars believe that 'the comparative advantage in goods and cheap labour in developing States has played a significant role in objectifying and exploiting humans for economic

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<sup>256</sup> Thomas L Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Harper Collins 2000) 9.

<sup>257</sup> Kevin Bales, 'Expendable People: Slavery in the Age of Globalisation' (2000) 53 (2) *Journal of International Affairs* 461, 467.

<sup>258</sup> Devin Brewer, 'Globalisation and Human trafficking: the Collision of Worlds' (2009) *Topical Research Digest: Human Rights and Human Trafficking* 1, 46.

<sup>259</sup> Kathleen Fitzgibbon, 'Modern-day Slavery? The Scope of Trafficking in Persons in Africa' (2003) 12 (1) *African Security Review* 81, 84. Also see Madevi Sun-Suon, *Human Trafficking and the Role of Local Governments* (UNITAR 2021) 9.

<sup>260</sup> In SADC, South Africa is a primary destination for Trafficked Persons in the region and is also an origin or transit State for those trafficking towards Europe and North America. See UNODC, 'GLO.ACT at the forefront in the fight against the scourge of Trafficking in Persons (TIP) and Smuggling of Migrants in South Africa' <<https://www.unodc.org/southernafrica/en/aml/forefront.html>> accessed 11 January 2021.

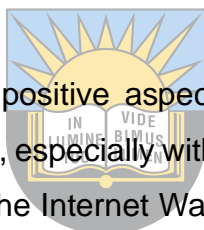
<sup>261</sup> Erica Polakoff, 'Globalisation and Child Labour: Review of the Issues' (2007) 23 (1-2) *Journal of Developing Societies* 262.

<sup>262</sup> Devin Brewer, 'Globalisation and Human trafficking: The Collision of Worlds' *Topical Research Digest: Human Rights and Human Trafficking* (2009) 1, 46.

ends'.<sup>263</sup> With reference to SADC States, children are left unskilled and uneducated, such that they cannot fairly compete in the labour market. As a result, they are susceptible to exploitation and trafficking.<sup>264</sup>

An important aspect of globalisation as a factor of child trafficking is the role of the internet in the global era. The internet is an important vehicle for creating linkages among people in different countries. The UNICEF Innocenti Research Centre has noted an increase in usage of the internet and other related information and communication technologies (ICTs) over the years.<sup>265</sup> Unfortunately, the internet is also heavily abused by perpetrators and is used as a tool to lure unsuspecting victims into trafficking.<sup>266</sup> It is estimated that 76% of transactions for sex with underage girls start on the internet.<sup>267</sup> In 2015, of the 21% of people that had access to the internet in Africa, a third were children.<sup>268</sup> Over the years, children have had internet access at increasingly younger ages.<sup>269</sup> Mostly, these children have unfettered internet access on their mobile phones.<sup>270</sup>

While access to the internet has positive aspects, it also exposes children to the danger of online sexual exploitation, especially with the increase in demand in the child pornography industry.<sup>271</sup> In 2017, the Internet Watch Foundation had 78,589 internet web pages under surveillance for child abuse content. The number of such pages



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<sup>263</sup> Devin Brewer, 'Globalisation and Human trafficking: The Collision of Worlds' Topical Research Digest: Human Rights and Human Trafficking (2009) 1, 46.

<sup>264</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 60.

<sup>265</sup> UNICEF Innocenti Research Centre, 'Sexual Abuse and Exploitation of Children Through the Internet And Other Information and Communication Technologies' <https://www.unicef-irc.org/research/sexual-abuse-and-exploitation-of-children-through-the-internet-and-other-information/> accessed 23 June 2022.

<sup>266</sup> Devin Brewer, 'Globalisation and Human trafficking: The Collision of Worlds' (2009) Topical Research Digest: Human Rights and Human Trafficking 47.

<sup>267</sup> Child trafficking statistics US and International <<https://arkofhopeforchildren.org/child-trafficking/child-trafficking-statistics>> accessed 17 April 2021.

<sup>268</sup> Internet world stats, 'Internet usage statistics the big picture' <[www.internetworld.stats.com/stats.htm](http://www.internetworld.stats.com/stats.htm)> accessed 5 May 2020.

<sup>269</sup> General Assembly, Promotion and protection of the rights of children Rights of the child, A/61/299 para 46 < <https://undocs.org/A/61/299>> accessed 30 December 2020. See also Committee on the Elimination of Discrimination against Women general recommendation No. 19, para 11, and Committee on the Rights of the Child general comment No. 13, para 29.

<sup>270</sup> ECPAT, 'Online child sexual exploitation: An Analysis of Emerging and Selected Issues' (2017) 12 (5) ECPAT.

<sup>271</sup> Kemal Veli Acar, 'Child Abuse Materials As Digital Goods: Why We Should Fear New Commercial Forms' Discussion Paper No. 2017-15 March 28, 2017 <<http://www.economics-ejournal.org/economics/discussionpapers/2017-15>> accessed 17 April 2020.

increased by 32% the following year.<sup>272</sup> The Internet Watch Foundation noted that every seven minutes, a child was being sexually abused.<sup>273</sup> The report shows an increase, in younger victims of severe abuse, with about 28% of the victims younger than 10 years of age.<sup>274</sup>

The increase in younger victims is a result of various factors. The abuse of the internet and the increase in online sexual abuse have been intrinsically linked to child sex trafficking.<sup>275</sup> Human traffickers use sophisticated technology to identify and control their victims, especially children.<sup>276</sup> Children have become more vulnerable to trafficking because of the unprecedented challenges that were created by the Covid-19 pandemic such as extended closures of schools which exacerbates the risk of online sexual abuse.<sup>277</sup>

Another factor is the rising popularity of bitcoin and other cryptocurrencies. These financial instruments have been identified as equally perpetuating child trafficking.<sup>278</sup> The anonymity provided by the bitcoin currency promotes online sexual crimes as it is difficult to trace offenders.<sup>279</sup> All of this makes child trafficking difficult to combat, thereby encouraging perpetrators to continue committing child trafficking since the chances of being apprehended are low.<sup>280</sup>

Cryptocurrencies are not the only way that perpetrators evade 'the long arm of the law', porous borders in the SADC region are also a major contributory factor. Notwithstanding that there are laws and measures in place to minimise the impact of

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<sup>272</sup> Internet Watch Foundation, Annual Report 2017 <<https://annualreport.iwf.org.uk/>> accessed 30 December 2020.

<sup>273</sup> *ibid.*

<sup>274</sup> Human Rights Council Forty-third session 24 February–20 March 2020 Agenda item 3.

<sup>275</sup> Elly Hanson, 'Losing Track of Morality': Understanding Online Forces and Dynamics Conducive to Child Sexual Exploitation' in Jenny Pearce (ed), *Child Sexual Exploitation: Why Theory Matters* (Bristol: Policy Press 2019) 96-97.

<sup>276</sup> Antonio Guterres, 'Statement made on World Day Against Trafficking in Persons', (30 July 2021) <<https://www.unodc.org/unodc/en/endht/sgs-message-on-world-day-against-trafficking-in-persons.html>> accessed 12 July 2022.

<sup>277</sup> Afrooz Kaviani Johnson and Julia Sloth-Nielsen, 'Child protection, Safeguarding and the Role of the African Charter on the Rights and Welfare of the Child: Looking Back and Looking Ahead' (2020) 20 African Human Rights Law Journal 643, 665.

<sup>278</sup> ECPAT, 'Online Child Sexual Exploitation: An Analysis of Emerging and Selected Issues' (2017) 12 (5) ECPAT.

<sup>279</sup> *ibid.*

<sup>280</sup> Between 2008 and 2014, South Africa had only 41 prosecutions of the crime, while other SADC States had fewer or no prosecutions at all. See SADC Secretariat, *Trafficking in persons in the SADC Region: A Baseline Report* (2016) 6.

unrestricted cross-border movement on child trafficking, it is apparent that child trafficking penetrates borders.<sup>281</sup> Where borders or points of entry or exit are mismanaged, they are a gateway that is easily manipulated by trafficking syndicates. For example, in the case of *People v Saidi Hamidu Mustaph*,<sup>282</sup> the accused entered Zambia through the Mwami border with 45 Malawian nationals who included children under the guise that they were travelling to the Zambian town of Chipata for a religious ceremony. The immigration officer cleared the accused although 22 people in this group did not have passports. Upon interception and apprehension by the police, it was later established that the accused was transporting the victims to South Africa via Chirundu Border Control, for exploitative labour on farms.<sup>283</sup>

Corrupt border post officials in the SADC region make transportation of victims easy, and this explains the increase in cross-border trafficking.<sup>284</sup> It would help to alleviate child trafficking if SADC States had tighter border controls.<sup>285</sup> Not only will it control the number of illegal immigrants, but it would also ensure that minors do not travel without parental consent.<sup>286</sup>

The requirement of parental consent for child travellers sparked a lot of controversy in South Africa in 2015 when Immigration Regulations were introduced. The requirements were that a child traveller should be in possession of an unabridged birth certificate as well as supporting affidavits or consent from parents or guardians.<sup>287</sup> It

<sup>281</sup> Devin Brewer, 'Globalisation and Human trafficking: The Collision of Worlds' (2009) Topical Research Digest: Human Rights and Human Trafficking 1, 48.

<sup>282</sup> *The People v Saidi Hamidu Mustaph* 2SP/179/2009 (unreported).

<sup>283</sup> The accused had attempted to commit the crime of trafficking in persons in terms of section 12 of the Anti- Human Trafficking Act of 2008 (Zambia). The accused was found guilty of the charge of attempting to commit trafficking in persons and was sentenced to 15 years imprisonment. Also see UNODC, 'The Government of Zambia and UNODC launch new UK-funded project on trafficking in persons' <<https://www.unodc.org/unodc/en/human-trafficking/webstories2018/the-government-of-zambia-and-unodc-launch-new-uk-funded-project-on-trafficking-in-persons.html>> accessed 14 May 2021.

<sup>284</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC 2016) 32.

<sup>285</sup> It is important for SADC States to prioritise strengthening of border controls as a way of addressing child trafficking in the region. There are already instruments which SADC Member States are party to that create obligations for Member States in this regard. See Article 11 (1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air and Article 11 (1) of the Trafficking Protocol.

<sup>286</sup> UNODC acknowledges the need to strengthen border controls as a way to curb trafficking persons however, it also acknowledges that this is highly political and contentious. See United Nations Office on Drugs and Crime (UNODC), *Human Trafficking a Crime that Shames Us All. An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC 2016) 89. Also See Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 Anti-trafficking Review 15, 19.

<sup>287</sup> South Africa Immigration Act 13 of 2002 Immigration Regulations.

was envisaged that this requirement would assist in curbing the abduction and kidnapping of children, sometimes even by one of the parents, in addition to the issue of child trafficking.<sup>288</sup> However, although the Regulations were not received well by the people,<sup>289</sup> it may be argued that the Regulations have, to a certain extent, deterred the unauthorised movement of children into or through South Africa.

It is noteworthy that in addition to weak border post-security in the region, corrupt border officials make child trafficking worse by allowing undocumented minors entry into a State.<sup>290</sup> For instance, there are many reported cases of illegal entries into South Africa from Zimbabwe or from Malawi to Zambia and then into South Africa, as was the case in the above-mentioned case of *People v Saidi Hamidu Mustaph*.<sup>291</sup> Habitually, border post officials are paid to facilitate illegal entry which makes transporting victims easy for child trafficking syndicates.<sup>292</sup> Also, illegal immigrants from Congo to Zambia, upon refusal of entry at the border post, walk and use alternative illegal entry points.<sup>293</sup>

In essence, globalisation coupled with porous borders creates an environment more conducive for child trafficking. Globalisation enables a much-unrestricted movement of people which plays into the hands of traffickers. It is exacerbated by porous borders in regions such as SADC. Where strong border controls exist, there can be a good deterrent and safeguard against organised crime particularly international child trafficking. Therefore, regulated movement of persons and strong border controls are important factors in dealing with child trafficking.

<sup>288</sup> For a detailed discussion of the Regulations see the overview of the new immigration laws and regulations and their implications, by Home Affairs Director-General Mkuseli Apleni, at the information session for Members of Parliament: Parliament, 23 April 2015.

<sup>289</sup> Phephelaphi Dube, 'The 'Undesirable' Immigration Regulations 2014' (2014) *Polity* <https://www.polity.org.za/article/the-undesirable-immigration-regulations-2014-2014-06-10> accessed 27 December 2021.

<sup>290</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 58. Also see *The People v Saidi Hamidu Mustaph* 2SP/179/2009 (unreported).

<sup>291</sup> UNODC, 'UNODC & Malawi Launch New Measures to Combat Human Trafficking Among Refugees' (2021) <https://www.unodc.org/unodc/en/frontpage/2021/April/unodc-and-malawi-launch-new-measures-to-combat-human-trafficking-among-refugees.html> accessed 4 June 2021.

<sup>292</sup> Farai Machamire, 'SA warns Zim Border jumpers' *Daily News Live* (7 January 2017) <https://www.dailynews.co.zw/articles/2017/01/07/sa-warns-zim-border-jumpers> accessed 9 October 2021.

<sup>293</sup> See the case of the *People v Maputa Muzara* SSV/111/2014. The accused, together with children she had trafficked were refused entry at the first border post between Congo and Zambia. They walked and illegally entered Zambia through another entry.



### 2.2.9 Human Rights Violations

Child trafficking is a phenomenon that is intertwined with human rights violations in that human rights violations occur where root causes of child trafficking such as poverty, conflict and general insecurity are prevalent.<sup>294</sup> On that basis, the Organisation for Economic Cooperation and Development (OECD) identifies the relationship between child trafficking and human rights as three-tiered.

Firstly, it identifies poverty, discrimination, general insecurity and violence as human rights issues and an indication that child trafficking is most likely to thrive.<sup>295</sup> More than half of the population in SADC lives way below the poverty line.<sup>296</sup> These people have no access to basic needs such as food, housing, clothing and medical care.<sup>297</sup> A simple promise of a better life makes people in poor communities vulnerable to trafficking.<sup>298</sup> In Malawi, children fall into this trap in an endeavour to improve their living conditions.<sup>299</sup> The case of the *Republic of Malawi v Veronica Bulla* is an example of how underaged girls are lured into trafficking in the hope of either getting jobs or better education.<sup>300</sup> In this case, the victims were young girls aged 12 and 13 who were deceived into believing that they got jobs as housemaids in Blantyre. However, that was not the case since the girls had been trafficked for the purpose of sexual exploitation as sex workers.<sup>301</sup> Such incidents are a common occurrence in many SADC States because people are desperate for better living conditions.<sup>302</sup> This is despite the obligation on States to ensure that everyone has an adequate standard of living in terms of article 11 of the International Covenant on Economic, Social and

<sup>294</sup> UNESCO, 'Human Trafficking in Mozambique: Root Causes and Recommendations' (2016) Policy Paper Poverty 2016 Series X6 14.1 (E) Paris UNESCO.

<sup>295</sup> OECD Governance and Democracy Division, 'Trafficking in Persons as a Human Rights Issue' (2008) 1, 1-2.

<sup>296</sup> The World Bank <http://www.worldbank.org/en/topic/poverty/overview> accessed 12 April 2022.

<sup>297</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 78, 79.

<sup>298</sup> UNODC Global Initiative to fight Human Trafficking, 'An introduction to Human Trafficking: Vulnerability, Impact and Action: Background paper' (2008) UNODC 1, 98.

<sup>299</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 29.

<sup>300</sup> *Republic v Bulla and Others* (36 of 2007) MWHC 91 (9 August 2007).

<sup>301</sup> Henry Mhango, 'Malawi Children falling victim to human traffickers' *The Guardian* (16 July 2012) <<https://www.theguardian.com/global-development/2012/jul/16/malawi-children-victim-human-traffickers>> accessed 23 June 2022.

<sup>302</sup> Africa Press, 'Dozens Of Trafficked Zimbabweans Stuck In Turkey' *Africa Press* (23 June 2022) <<https://www.africa-press.net/zimbabwe/all-news/dozens-of-trafficked-zimbabweans-stuck-in-turkey>> accessed 24 June 2022.



Cultural Rights of 1966.<sup>303</sup> Failure by governments to satisfy these standards of living for their people subsequently pushes them into the hands of traffickers.<sup>304</sup>

Secondly, the OECD propounds that the process of child trafficking constitutes a violation of human rights, particularly the right to security of persons, the right to freedom from servitude or slavery, the right not to be subjected to cruel, inhumane, or degrading punishment, and the right to freedom of movement.<sup>305</sup> The increase in child trafficking numbers invariably means an increase in the number of children whose rights are being violated.<sup>306</sup>

Thirdly, child trafficking is a result of human rights violations consequent to political instability.<sup>307</sup> Political instability coupled with repressive legislation shuts down the space for civil society and human rights defenders to do their legitimate work.<sup>308</sup> This perpetually leaves people vulnerable and susceptible to all forms of abuse. Addressing issues of human rights violations requires political will.<sup>309</sup> Such political will has been lacking in African States.<sup>310</sup>

In cases of human rights violations related to trafficking in persons, governments seemingly resort to policies that advocate for policies that favour the arrest and detention of victims as opposed to protection and non-criminalisation.<sup>311</sup> A good example of this is when a trafficking victim is arrested for prostitution, he or she is



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<sup>303</sup> All SADC States are party to the International Covenant on Economic Social and Cultural Rights 1966. See ratifications to the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>304</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science' 78, 79.

<sup>305</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 1.

<sup>306</sup> *ibid* 29-33.

<sup>307</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 28.

<sup>308</sup> Alfredo Tjiurimo Hengari, 'SADC is failing to protect human rights' *Business Live* (30 August 2016) <https://www.businesslive.co.za/bd/opinion/2016-08-30-sadc-is-failing-to-protect-human-rights/> accessed 26 January 2021.

<sup>309</sup> Simon Allison, 'Southern Africa's Human Rights Problem' *Mail & Guardian* (18 January 2018) para 5 <<https://mg.co.za/article/2018-01-18-southern-africas-human-rights-problem>> accessed 26 September 2021.

<sup>310</sup> Governments are always reluctant in such instances particularly where there is no political prerogative. See Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 *Anti-trafficking Review* 15, 25.

<sup>311</sup> United Nations Office on Drugs and Crime (UNODC), *Human Trafficking a Crime that Shames Us All. An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC 2016) 1.

initially not viewed as a victim but a law breaker.<sup>312</sup> It is because of such cases that the fight against child trafficking has been intrinsically linked to the prostitution of women and children.<sup>313</sup> This adversely affects the requirement for non-criminalisation of victims as shall be extensively discussed in the following chapters.

Arguably, it is because of this criminalisation and punishment of victims, that human rights violations are said to be both a cause and consequence of child trafficking.<sup>314</sup> Therefore, it is important to prioritise human rights when taking measures to prevent and end trafficking.<sup>315</sup> Furthermore, to mitigate the impact of child trafficking on the victims, policies should advocate for their protection as opposed to their arrest for ancillary crimes.<sup>316</sup> Thus, anti-trafficking measures should not unfavourably affect the human rights and dignity of victims.<sup>317</sup>

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<sup>312</sup> This is most common for child trafficking victims who would have become victims during migration. Young illegal migrants have increasingly become victims of child trafficking, particularly for sexual exploitation. The reasoning is that migrants consent to be moved and cannot therefore be considered as victims but should be held accountable for any criminal activities thereof. See AU, Migration, Labour & Employment <<https://au.int/en/migration-labour-employment>> accessed 7 January 2021. With the influx of migrants, child trafficking has been on the rise. As a result of this connection, prostitution has been coined 'migrant criminality'. However, considering child trafficking as migrant criminality suggests that the crime is like illegal migration. Dudley argues that such an approach results in trafficking victims not being protected since they will be regarded and treated as illegal immigrants. Not only does this approach affect victim protection, but it also affects the successful prosecution of child trafficking matters. Trafficked persons are less likely to report if they are aware that they will be treated as criminals, not victims. Schuyler Dudley, 'Human Trafficking in the Middle East and North Africa Region' Topical Research Digest: Human Rights and Human Trafficking 1. Hyland argues that if the environment is such that victims are most likely to be treated as criminals, trafficking syndicates may use this possibility to further manipulate their victims by using threats of arrests should they decide to report. Furthermore, she notes this as a weakness of the Trafficking Protocol in that it has failed to deliver on victim protection as one of its core principles. In other words, while being strong on the criminalisation of child trafficking, the Trafficking Protocol does not lay down clear measures to ensure victim protection post trafficking, particularly from crimes committed during trafficking. See Kelly Hyland, 'Ten Years After the Protocol: Where Are the Protections for Human Trafficking Victims?' (2010) 18 (1) Human Rights Brief 2-5. See also Adepoju Aderanti 'Review of Research and Data on Human Trafficking in Sub-Saharan Africa' (2005) 43 International Migration 75, 85. See also Sikka Anette, 'Trafficking in Persons: How America Exploited the Narrative of Exploitation' (2019) 55 (1) Texas international law journal 1, 6.

<sup>313</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 65.

<sup>314</sup> President Obama, 'Presidential Proclamation-End Human Trafficking' (Clinton Global Initiative, September 2012) <[www.obamawhitehouse.archives.gov/node/230831](http://www.obamawhitehouse.archives.gov/node/230831)> accessed 25 January 2020.

<sup>315</sup> UN Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights and Human Trafficking' (2014) 36 4.

<sup>316</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 1.

<sup>317</sup> Recommended Principles on Human Rights and Human Trafficking 1-3 <<https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf>> accessed 14 September 2022.

## 2.3 Impact

By its nature, trafficking in persons may be described as ‘a horrific assault on human dignity’.<sup>318</sup> For this reason, child trafficking has been described as a modern form of the oldest and most barbaric type of slavery.<sup>319</sup> Its true nature may be articulated in the words of the former US President, Barack Obama, in an address to the Clinton Global Initiative in 2012. He said:

It ought to concern every person because it is a debasement of our common humanity. It ought to concern every community because it tears at our social fabric. It ought to concern every business because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name - - modern slavery.<sup>320</sup>

The negative impact of child trafficking on victims is far-reaching. This ranges from physical and mental health challenges, to diminished chances of survival and development. An analysis of the impact of child trafficking on the victims is important to expose its ‘atrocious’ nature.



### 2.3.1 Impact on the Physical and Mental Health of the Victims

Factors that lead to child trafficking are said to be the same factors that exacerbate mental health problems for trafficking victims.<sup>321</sup> Research has shown that beyond mental illness and poor health induced by the traumatic experience during trafficking, child trafficking also increases the victims’ vulnerability to mental disorders.<sup>322</sup> These disorders are influenced by traumatic experiences such as pre-trafficking abuse, duration of exploitation, violence and restriction of movement during trafficking. This

<sup>318</sup> President Donald Trump, ‘Proclamation on National Slavery and Human Trafficking’ <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-national-slavery-human-trafficking-prevention-month-2021/> accessed 27 December 2021.

<sup>319</sup> President Obama, ‘Presidential Proclamation-End Human Trafficking’ (Clinton Global Initiative, September 2012) <[www://obamawhitehouse.archives.gov/node/230831](http://www://obamawhitehouse.archives.gov/node/230831)> accessed 25 January 2021.

<sup>320</sup> President Obama, ‘Presidential Proclamation-End Human Trafficking’ (Clinton Global Initiative, September 2012) <[www://obamawhitehouse.archives.gov/node/230831](http://www://obamawhitehouse.archives.gov/node/230831)> accessed 25 January 2021.

<sup>321</sup> Yvonne Rafferty, ‘The Impact of Trafficking on Children: Psychological and Social Policy Perspectives’ (2008) 2 (1) Society for Research in Child Development 13-18.

<sup>322</sup> Lemma Derseh Gezie, Alemayehu Worku Yalew, Yigzaw Kebede Gete, Telake Azale, Tilman Brand, and Hajo Zeeb, ‘Socio-Economic, Trafficking Exposures and Mental Health Symptoms of Human Trafficking Returnees in Ethiopia: Using a Generalized Structural Equation Modelling’ (2018) 12 International Journal for Mental Health System. 1, 62.

often results in schizophrenia and psychotic disorders.<sup>323</sup> According to experts on trauma:

The essence of trauma is that it overwhelms the victim's psychological and biological coping mechanisms. This occurs when internal and external resources are inadequate to cope with the external threat.<sup>324</sup>

Invariably, the pre-trafficking living conditions of victims contribute to how badly the experience of trafficking affects them as well as how they can cope with the trauma afterwards. Thus, the impact of child trafficking varies significantly from one victim to the other.

Symptoms of trauma and mental health problems in child trafficking victims include, but are not limited to: post-traumatic stress disorder (PTSD); depression; suicidal thoughts; guilt; shame; emotional withdrawal; anxiety; mood swings; and paranoia.<sup>325</sup> However, it is unfortunate that mental health issues are usually given very low priority in health service policies in Africa.<sup>326</sup> Although it may be insufficient to resolve the challenge, South Africa is one of the few States that have been vigorously raising awareness of mental health issues.<sup>327</sup> This is also because, in some parts of Africa, people's understanding of mental health problems is influenced by traditional beliefs such as witchcraft and traditional remedies.<sup>328</sup> This often leads to those with mental health problems being shunned upon.<sup>329</sup>

<sup>323</sup> Sukran Altun, Melanie Abas, Cathy Zimmerman, Louise M. Howard, and Sian Oram, 'Mental Health and Human Trafficking: Responding to Survivors' Needs' (2017) 14 (1) *British Journal of Psychiatry International* 21, 23.

<sup>324</sup> UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 3 Psychological Reactions of Victims of Trafficking in Persons* (UNODC 2009) 2. See also Jose Saporta and Bassel A. van der Kolk, *Psychobiological consequences of trauma, in Torture and its consequences: Current treatment approaches*, Metin Basoglu (ed), (Cambridge University Press 1992).

<sup>325</sup> UNODC Global Initiative to fight Human Trafficking, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action: Background paper' (2008) 9.

<sup>326</sup> Crick Lund, 'Mental Health in Africa: A Neglected Link in the Development Chain' (2018) *Africa Policy Review*, <<http://africapolicyreview.com/mental-health-in-africa-a-neglected-link-in-the-development-chain/>> Accessed 8 May 2019. Also see 'Why Africa Needs to Focus on the Neglected Issue of Mental Health' <<http://theconversation.com/why-africa-needs-to-start-focusing-on-the-neglected-issue-of-mental-health-91406>> accessed 7 May 2021.

<sup>327</sup> SACAP, 'The Shocking State of Mental Health in South Africa in 2019' (21 August 2019) <<https://www.sacap.edu.za/blog/counselling/mental-health-south-africa/>> accessed 7 February 2020.

<sup>328</sup> Roger O A Makanjuola, 'Yoruba Traditional Healers in Psychiatry. I. Healers' Concepts of the Nature and Etiology of Mental Disorders' (1987) 16 (2) *African Journal of Medicine and Medical* 53, 55.

<sup>329</sup> Digby Tantam, Louis Appleby, Alice Duncan (eds), *Psychiatry for the Developing World*, (Gaskell Press 1996). See also Oye Gureje and Ayorinde Alem, 'Mental Health Policy Development in Africa' (2000) 78 (4) *Bulletin of the World Health Organization* 475, 476.

As already established, children are trafficked for exploitation, either sexual or labour. Sex trafficking causes critical health issues that need to be addressed by healthcare providers.<sup>330</sup> The court in *Fakudze* noted that child trafficking victims who are subjected to sexual abuse are often kept in conditions of sexual servitude to the perpetrators and raped on several occasions. Some of them are treated as wives and mothers despite being of tender age.<sup>331</sup> Undoubtedly, this experience has a psychological effect on the victims. Based on their young age, the experience is frightening, humiliating and traumatic for the victims.<sup>332</sup>

Children who are trafficked for sexual exploitation are at high risk of sexually transmitted diseases.<sup>333</sup> Victims of sexual exploitation generally lack access to health information and services. They are at more risk of STDs and HIV infections, and subsequently spread the same in their communities.<sup>334</sup> However, poor health care systems coupled with the stigmatisation of minors suffering from sexually transmitted diseases or who are pregnant, delay any prospects of good and adequate health support for child trafficking victims in SADC.<sup>335</sup> This creates problems in those communities themselves have not yet acquired the necessary knowledge on HIV/AIDS. Therefore, infected trafficking victims continue to be stigmatised.<sup>336</sup>

Sex trafficking victims are the most vulnerable to the above mental health effects, particularly because in most SADC States, prostitution is a social stigma. This often leads to low self-esteem, deep-rooted anger and frustration.<sup>337</sup> Victims of the sex trade are often not aware of the psychological effect the ordeal has on them and do not seek

<sup>330</sup> Tailin Hampton, 'Sex Trafficking: Impact on Victim's Mental & Physical Health' (2017) Medium Corporation US 5.

<sup>331</sup> *Fakudze v S* (AR410/2018) [2019] ZAKZPHC 32 (7 June 2019).

<sup>332</sup> *Rex v Joalane Tsoana* (unreported), (CIV/T/46/06) (1990) LSHC 372/12 (2 February 1990).

<sup>333</sup> SEAMEO Secretariat, 'Impact of Child Trafficking on the Children and their Communities' (2000) <<http://www.seameo.org/vl/combat/7chap.htm>> accessed 1 October 2021.

<sup>334</sup> UNODC, *Global Report on Trafficking in Persons 2016* (UNODC 2016) 45.

<sup>335</sup> Andre' Janse van Rensburg; Pieter Fourie, 'Health Policy and Integrated Mental Health care in the SADC Region: Strategic Clarification Using the Rainbow Model', (2016) *International Journal of Mental Health Systems* 1.

<sup>336</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC Secretariat 2016) 45.

<sup>337</sup> Livia Ottisova, Peter Smith P, Shetty H, Stahl D, Downs J, Oram S, 'Psychological Consequences of Child Trafficking: A Historical Cohort Study of Trafficked Children in Contact with Secondary Mental Health Services' *Plos Journal* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5843209/>> accessed 17 April 2020.



help.<sup>338</sup> Many victims hide their past and withdraw or isolate themselves from the society.<sup>339</sup> It is also important to note that some child trafficking victims continue to be emotionally abused by trafficking agents who repeatedly persuade them into the same abusive conditions.<sup>340</sup> This was illustrated in the above-discussed case of *State v Eze*,<sup>341</sup> where the accused repeatedly tracked down the victim and lured her back into criminality by use of threats and creating a situation of perpetual indebtedness. Thus, to deal with the prevention of re-trafficking and re-victimisation, there is a need to address social and cultural exclusions.<sup>342</sup> According to the United Nations:

Social exclusion describes a state in which individuals are unable to participate fully in economic, social, political and cultural life, as well as the process leading to and sustaining such a state.<sup>343</sup>

The result of social exclusion is that those who do not fall in preference groups have no access to education, housing, food, employment opportunities and other social services, including health care, which invariably makes them even more susceptible to trafficking.<sup>344</sup> The solution to this challenge is encompassed in the concept of social inclusion, which is aimed at improving social participation, particularly for people who are disadvantaged. This participation may be enhanced by creating equal opportunities for all. In other words, the realisation of the Sustainable Developments Goals (SDGs) may be key.<sup>345</sup> However, the concept of social inclusion is broad, and the SDGs may not adequately address the multiple dimensions of the concept, especially if the goals are individually applied.

<sup>338</sup> Sian Oram, Mosharraf Khondoker, Melanie Abas, Marianne Broadbent, Louise Howard, 'Characteristics of Trafficked Adults and Children with Severe Mental Illness: A Historical Cohort Study' (2015) NCBI <<https://www.ncbi.nlm.nih.gov/pubmed/26489912>> accessed 17 April 2021.

<sup>339</sup> Maria Cary, Sian Oram, Louise Howard, Kylee Trevillion, Sarah Byford, 'Human Trafficking and Severe Mental Illness: An Economic Analysis of Survivors' Use of Psychiatric Services' (2016) BMC Health Serv Res. <<https://www.ncbi.nlm.nih.gov/pubmed/27430338>> accessed 18 April 2021.

<sup>340</sup> UNODC Global Initiative to fight Human Trafficking, 'An introduction to Human Trafficking: Vulnerability, Impact and Action: Background Paper' (2008) UNODC 9.

<sup>341</sup> 14/546/2013 or UNODC No: ZAF015.

<sup>342</sup> The term social exclusion was first used in 1974 by the former French Secretary of State for Social Action, René Lenoir. He used the term to refer to certain groups of people whom he considered to comprise a certain percentage of the population. These people included, 'the mentally and the physically handicapped, suicidal people, aged invalids, abused children, drug addicts, delinquents, single parents, multi-problem households, marginal, asocial persons, and other 'social misfits'. See United Nations, 'Identifying social inclusion and exclusion' (2016) United Nations 17.

<sup>343</sup> *ibid.*

<sup>344</sup> Michèle A Clark, 'Vulnerability, Prevention and Human Trafficking: The Need for a New Paradigm' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UN.GIFT 2008) 69-78.

<sup>345</sup> United Nations, 'The 17 Goals' <<https://sdgs.un.org/goals>> accessed 18 January 2021.



The mental and physical health impact of child trafficking on the victims significantly affects their right to health care.<sup>346</sup> United Nations Committee on Economic, Social and Cultural Rights General Comment 14 on the Right to the Highest Attainable Standard of Health, explains that the right to health is closely related to and dependent upon the realisation of other human rights, as contained in the International Bill of Rights.<sup>347</sup> This means that the non-realisation of this right also leads to a violation of other rights through the denial of dignity and autonomy, including forced treatment or institutionalisation, and disregard of individual legal capacity to make decisions.<sup>348</sup> The Constitution of the World Health Organisation (WHO) defines health as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’.<sup>349</sup> Consequently, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without discrimination.<sup>350</sup>

The ICESCR also recognises that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>351</sup> This means that even victims of child trafficking have an inherent right to immediate and quality health care. However, understanding health as a human right creates a legal obligation on States to ensure access to such healthcare.<sup>352</sup> A human rights-based approach to health care would be based on principles of accountability, equality and non-discrimination, participation and universality and indivisibility.<sup>353</sup>

<sup>346</sup> Alicia Ely Yamin, ‘The Right to Health Under International Law and Its Relevance to the United States’ (2005 95 (7) 1156 Am J Public Health. 1161. Also see UNHCHR, ‘The Right to Health’ Fact Sheet 31 (2008) WHO <<https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> accessed 7 February 2020.

<sup>347</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant).

<sup>348</sup> WHO, ‘Human Rights and Health’ (2017) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> accessed 7 February 2020.

<sup>349</sup> The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946.

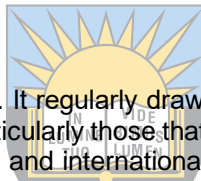
<sup>350</sup> UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131, <<https://www.refworld.org/docid/3b00f09554.html>> accessed 7 February 2020. See also International Convention on the Elimination of All Forms of Racial Discrimination (1965) Article 5.

<sup>351</sup> Article 12. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>352</sup> WHO, ‘Human Rights and Health’ (2017) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> accessed 7 February 2020.

<sup>353</sup> The Special Rapporteur on trafficking in persons, especially women and children as part of its mandate, emphasises the importance of the human rights-based approach to trafficking particularly

The Trafficking Protocol encourages but does not make it mandatory for States to provide medical assistance for trafficked persons.<sup>354</sup> Nonetheless, States are bound by the core elements of the right to health, which requires them, subject to the availability of resources, to progressively realise the right to healthcare<sup>355</sup> and ensure non-retrogression.<sup>356</sup> Thus, an opportunity is created for practitioners in the health sector to play an instrumental role in the care and referral of trafficked people.<sup>357</sup> It has been suggested that treating the whole person, mind, body, and spirit could be helpful for someone who has suffered complex trauma associated with trafficking.<sup>358</sup> Furthermore, medical practitioners are encouraged to take a non-judgmental, caring approach,<sup>359</sup> which also incorporates cultural, gender and age-appropriate care.<sup>360</sup> In addition, when dealing with victims of child trafficking, it should be appreciated that they are not 'small adults' but children uniquely vulnerable.<sup>361</sup> They may still lack comprehension of the ordeal they would have gone through.




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regarding the prosecution of the crime. It regularly draws Party States' attention to their obligations in terms of the Trafficking Protocol, particularly those that relate to the victims. Under a human rights-based approach, the national, regional and international response to trafficking would be anchored on human rights principles enshrined in international and national instruments. Invariably, the objective of every child trafficking initiative would be based on the protection of the rights of the child. See Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo', UN Doc. A/HRC/26/37/Add.2, 2014. See also, Paul Hunt, 'Interpreting the International Right to Health in a Human Rights Based Approach to Health' (2016) Health and Human Rights Journal 2.

<sup>354</sup> See Article 6 (3).

<sup>355</sup> WHO, 'Human Rights and Health' (2017) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> accessed 7 February 2020.

<sup>356</sup> Meaning they should not allow the existing protection of economic, social, and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure. See WHO, Human Rights and Health (29 December 2017) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> accessed 7 February 2020.

<sup>357</sup> IOM/UNGIFT/LSHTM, 'Caring for Trafficked Persons: Guidance for Health Providers. Geneva, International Organization for Migration', (2009) IOM/UNGIFT/LSHTM. Also see Cathy Zimmerman and Heidi Stöckl, 'Understanding and Addressing Violence Against Women: Human Trafficking' (2012) World Health Organisation 4. Also see Sukran Altun, Melanie Abas, Cathy Zimmerman, Louise M Howard and Sian Oram, 'Mental Health and Human Trafficking: Responding to Survivors' Needs' (2017) 14 (1) BJPsych Int. 21, 23.

<sup>358</sup> Amber Murray and Laureen Smith, 'Implementing Evidence-Based Care for Women Who Have Experienced Human Trafficking', (2019) 23 (2) Nursing for Women's Health 98, 106.

<sup>359</sup> This may also require specialised training for physicians on how to treat victims of child trafficking. See Kristina L Borham, Chelsea Eret, Blaire Bernstein and Shea Rhodes, 'Legislative Perspectives on Human Trafficking Training for Physicians' (2021) Journal of Human Trafficking 1.

<sup>360</sup> Gloria Halverson and Katherine Welch, 'The Physical Health Consequences of Human Trafficking' Christian Medical and Dental Associations (2018) 4. Also see Sarah K Ladd and Laurel Neufeld Weaver, 'Moving Forward: Collaborative Accompaniment of Human Trafficking Survivors by Using Trauma-Informed Practices' (2018) 4 (3) Journal of Human Trafficking 191, 191-212.

<sup>361</sup> United Nations Office on Drugs and Crime, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (United Nations 2008) 71.

On the same note, respective governments should ensure that health care is accessible, available, acceptable and of quality.<sup>362</sup> This should be done in line with the United Nations General Assembly Resolution 70/1 on Sustainable Development Goals, particularly goal 3 which seeks to ensure healthy lives and promote well-being for all, at all ages by 2030.<sup>363</sup>

### *2.3.2 Impact of Child Trafficking on the Right to Survival and Development*

The Convention on the Rights of the Child (CRC)<sup>364</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>365</sup> are closely identical to each other in terms of general principles related to children.<sup>366</sup> These principles include non-discrimination; the right to participate; the best interests of the child and the right to maximum survival and development.<sup>367</sup> What this essentially means is that children should not be prejudiced based on discrimination and any decision concerning them should be in their best interest ensuring maximum survival and development.<sup>368</sup> The duty to ensure that these principles and rights are upheld primarily lies with parents who have the duty and responsibility to care for their children.<sup>369</sup> The State only assists

<sup>362</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

<sup>363</sup> Resolution adopted by the General Assembly on 25 September 2015, 'Transforming Our World: The 2030 Agenda for Sustainable Development'.

<sup>364</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>365</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>366</sup> Gose makes a detailed comparison of the CRC and ACRWC in; Matthew Gose, 'The African Charter on the Rights and Welfare of the Child' (2002) Community Law Centre, University of the Western Cape 1. However, it may be suggested that the ACRWC is possibly a better instrument for addressing problems faced by children in Africa in that it remedies the issues which were omitted during consensus building between States during the drafting process of the CRC. See Afrooz Kaviani Johnson and Julia Sloth-Nielsen, 'Child Protection, Safeguarding and the Role of the African Charter on the Rights and Welfare of the Child: Looking Back and Looking Ahead' (2020) 20 African Human Rights Law Journal 643, 646-647.

<sup>367</sup> Mira Dutschke and Kashifa Abrahams, 'Children's Right to Maximum Survival and Development' (2006) Child Survival Project, Rights in Brief 1,1.

<sup>368</sup> Sloth-Nielsen and Mutsvara are of the view that Pre-Trial detention of children also significantly affects their right to development. Such detention limits their access to, among other rights education which is crucial for their development. The issue of detention is key in child trafficking particularly the protection of children from prosecution particularly for crimes committed during trafficking. See Julia Sloth-Nielsen and Sheena Mutsvara, 'SDG 16 and the Impact of the CCR on Pre-trial Detention of Children in South Africa' (2020) 34 (1) Speculum Juris Journal 1, 6.

<sup>369</sup> This in line with the judgement in the case of Grootboom which suggests that it is principally not the duty of the State to take care of the child. See *The Government of the Republic of South Africa et al v Irene Grootboom et al*, Case CCT/11/00, decided on 4 October 2000, para. 77, 50. For a discussion of the implications of the Grootboom case see Julia Sloth-Nielsen, 48. 'Too Little? Too Late? The

with ensuring the realisation of the afore-mentioned principles and rights in accordance with their obligations as outlined in the CRC and ACRWC.<sup>370</sup>

The CRC recognises the right of the child to survival and development in Article 6 which states that 'State Parties recognise that every child has the inherent right to life' and 'shall ensure to the maximum extent possible the survival and development of the child'.<sup>371</sup> According to the UNHCR, the right to life is a supreme right from which no derogation is permitted even in times of public emergencies that threaten the lives of the nation.<sup>372</sup> Furthermore, for children, the right to life is not limited by the imposition of the death penalty.<sup>373</sup> It also includes the realisation of related social, economic as well as cultural rights of children. This realisation is in line with the Preamble of the African Charter on Human and Peoples' Rights which stresses that:

civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.<sup>374</sup>



Implications of the Grootboom Case for State Responses to Child-headed Households' (2003) 1 Law, Democracy and Development 113-136.

<sup>370</sup> The ACRWC under Article 20 states that; parents or other persons responsible for the child should always act in the best interest of the child. Article 21 states that governments should do what they can to stop harmful social and cultural practices, such as child marriage, which affect the welfare and dignity of children. Article 14 Every child has the right to enjoy the best attainable state of physical, mental and spiritual health. This includes the provision of nutritious food and safe drinking water, as well as adequate health care of the ACRWC and Article 18 (1) 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. and (2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. Article 24 (1) States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. of the CRC. Also see John Charnow, 'The International Children's Emergency Fund' (1947) 21 (2) University of Chicago Press Journals 1, 4.

<sup>371</sup> Also see Article 5 (2) of ACRWC which guarantees the same rights as provided by Article 6 (2) of CRC.

<sup>372</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, <<https://www.refworld.org/docid/45388400a.html>> accessed 30 December 2020.

<sup>373</sup> Article 6 (5) of the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 U NTS 171. See also Article 37 (a) provides that: Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.

<sup>374</sup> 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).

Invariably, this hinges on the need to enhance a child's health and ensure preventative health measures which promote survival and development.<sup>375</sup> The right of the child to development is closely linked to the right of the child to the enjoyment of the highest attainable standard of health, health services, and adequate standard of living.<sup>376</sup>

According to the Office of the High Commissioner for Human Rights (OHCHR) Manual on Human Rights Monitoring:

The promotion of survival and development therefore means to gain another and deeper challenge of self-betterment of the child, ensuring the capacity of developing talents and abilities to their fullest potential, preparing the child for responsible life in a free society and ensuring him or her the essential feeling of belonging to a world made of solidarity where there is no place for indifference or passivity.<sup>377</sup>

Child trafficking is detrimental to all these aspects because it denies the victims a chance to develop fully and freely and thwarts any possibility of educational development. Yet, the right to education is one of the fundamental rights in the development of a child. Article 28 of CRC provides that:

State Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular;

- a) Make primary education compulsory and free to all;
- b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.<sup>378</sup>

<sup>375</sup> Office of the High Commissioner for Human Rights Manual on Human Rights Reporting under Six Major International Human Rights Instruments (1997) HR/ PUB/91/1 (Rev.1).

<sup>376</sup> See the World Declaration on the Survival, Protection and Development of Children and the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children. These Declarations were adopted at the World Summit for Children, which was held at United Nations Headquarters on 30 September 1990. UNICEF, 'Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s' <<http://www.unicef.org/wsc/plan.htm>> accessed 10 February 2020. Also see UNICEF, 'World Declaration on the Survival, Protection and Development of Children' (30-09-1990) UNICEF <<http://www.unicef.org/wsc/declare.htm>> accessed 26 January 2020. Also see Impacted International, 'A Child's Right To Life, Survival And Development' <<http://www.impactd.org/stories/a-childs-right-to-life-survival-and-development-childrensrights/>> accessed 8 February 2020.

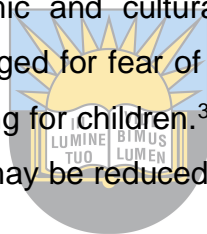
<sup>377</sup> Office of the High Commissioner for Human Rights Manual on Human Rights Reporting under Six Major International Human Rights Instruments (1997) HR/ PUB/91/1 (Rev.1).

<sup>378</sup> Article 28 (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of



In the same vein, the ACRWC reiterates that every child has the right to education.<sup>379</sup> It has been noted already that most trafficked children are from families with difficult economic backgrounds and little opportunity to go to school.<sup>380</sup> Those who go to school sometimes are forced to quit so that they can support their families. Some stopped going to school post-trafficking because they are not allowed to continue with school.<sup>381</sup> In some instances, educational facilities or establishments are used to further trafficking. For example, in West Africa, traffickers pose as Koranic schoolteachers and force young students to beg for food and money instead of allowing them to gain an education.<sup>382</sup> In some cases, teachers use schools to lure victims or advertise for scam opportunities. Such disruption or complete lack of basic education is a violation of the children's right to education.

Thus, the CRC urges State Parties to commit to take immediate action aimed toward the realisation of social, economic and cultural rights for children.<sup>383</sup> However, progressive realisation is discouraged for fear of reluctance or outright disregard for the betterment of standards of living for children.<sup>384</sup> With strict compliance with these state obligations, child trafficking may be reduced and its impact cushioned. It would



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drop-out rates. The right to education is also emphasized in the UN Guidelines for Internally Displaced People. The principles reiterate the right of children to an education, which is important both in preventing trafficking for labour exploitation and to help victims gain access to education once rescued from traffickers. See Susan Martin and Amber Callaway, 'Human Trafficking and Smuggling' (2011) 8 Global Migration Governance 1, 14.

<sup>379</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), states that 'Every child has the right to an education, to develop his or her personality, talents and mental and physical abilities to their fullest potential. This education also includes the preservation and strengthening of positive African morals, traditional values and cultures. Governments should also take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community'.

<sup>380</sup> *The People v Maputa Muzara* SSV/111/2014.

<sup>381</sup> Child farm workers tend to get little sleep, have very long days of hard labour; they frequently fall behind in their studies and may eventually drop out of school altogether. See Erica Polakoff, 'Globalisation and Child Labour: Review of the Issues' (2007) 23 (1-2) 259 Journal of Developing Societies 269. In the *People v Maputa Muzara* SSV/111/2014, the children never went to school as promised and worked for their capturer. Even upon rescue and return to their State there was no arrangement that they be sent to school as they should have in the beginning.

<sup>382</sup> Kiera Guilbert, 'Can Senegal Stop Child Begging, trafficking by Islamic teachers?' Reuters (16 November 2016) <<https://www.reuters.com/article/us-senegal-trafficking/can-senegal-stop-child-begging-trafficking-by-islamic-teachers-idUSKBN13B0SU>> accessed 17 April 2021.

<sup>383</sup> Office for the High Commissioner for Human Rights, 'Resources for the Rights of the Child – Responsibility of States' (2007) United Nations Human Rights para. 4 7.

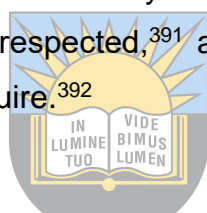
<sup>384</sup> Elain Sutherland, 'The Child's Right to Life, Survival and Development: Evolution and Progress' (2015) 26 (2) Stellenbosch Law Review 272.



also ensure that upon rescue children could get some form of education and a fair opportunity for normal childhood and development.

Furthermore, the CRC identifies child trafficking as a violation of a child's rights in that the crime violates a plethora of children's rights, which include the child's right to safety and to be free from violence such as abuse and exploitation. As a result, the act of trafficking denies children the opportunity to reach their full potential.<sup>385</sup> To this end, Article 35 of the Convention states that '[T]he government should take all measures possible to make sure that children are not abducted, sold or trafficked'.<sup>386</sup>

The rule of thumb in addressing the impact of child trafficking on the victims is that all measures and steps to be taken should be informed by relevant human rights standards and principles that seek to protect and respect children.<sup>387</sup> This means that the best interest of the child should be of paramount importance at all times,<sup>388</sup> and the child should be protected,<sup>389</sup> without any discrimination.<sup>390</sup> This also serves to ensure that the child's views are respected,<sup>391</sup> and the child has access to all the information that he or she may require.<sup>392</sup>



<sup>385</sup> Hannah Gould, 'Child Rights Protect Children from Trafficking: Send the CRC' (*UNICEF*, April 11, 2016) <<https://www.unicefusa.org/stories/child-rights-protect-children-trafficking-send-crc/30227>> accessed 7 February 2020.

<sup>386</sup> Articles 34 and 35 of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>387</sup> UNICEF Guidelines on the Protection of Child Victims of Trafficking (*UNICEF*, 16 September 2006) 10 <https://gdc.unicef.org/resource/guidelines-protection-child-victims-trafficking> accessed 7 February 2021.

<sup>388</sup> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. See Article 3 (1) of the UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>389</sup> A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. See Article 20 (1) of the Convention on the Rights of the Child (1989).

<sup>390</sup> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (2). States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. See Article 2 (1) of the Convention on the Rights of the Child (1989).

<sup>391</sup> States Parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly. See Article 15 (1) of the Convention on the Rights of the Child (1989).

<sup>392</sup> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with

However, it has been noted that the legislative framework for combating child trafficking fails because to a greater extent, it focusses on prosecuting perpetrators rather than on assisting victims.<sup>393</sup> Therefore, there is need to adjust measures towards early intervention rather than later prevention. This requires addressing children's civil, political, economic, social, and cultural rights in a manner that accounts for the co-dependent nature of rights.<sup>394</sup>

### 2.3.3 Other Impacts

Even though being trafficked is not always traumatic for all trafficking victims because trafficking does not always involve the use of force or violence, the adverse conditions that they are exposed to seriously affect them. The experience takes an emotional toll on the victims, from which many never fully recover.<sup>395</sup> As a result, most victims change in behaviour and develop a mistrust of adults.<sup>396</sup> This often leads to dependency on their abuser due to the fear that any other person will expose them to worse forms of exploitation.<sup>397</sup> These victims generally become anti-social and avoid any contact with people for fear of being judged or exploited. They also become individuals with identity issues, full of anger and resentment.<sup>398</sup> Some of them resort to drugs as a coping mechanism.<sup>399</sup> This is a problem because it leads to addiction and condemns them to a life of criminality.<sup>400</sup> Unfortunately, most SADC States have limited rehabilitation resources, and these children are viewed more as criminals than victims.<sup>401</sup> It is such effects that the trafficking in the persons framework in general

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applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence. See Article 9 (1) of the Convention on the Rights of the Child (1989).

<sup>393</sup> Jonathan Todres, 'A Child Rights Framework for Addressing Trafficking of Children' (2020) 22 (2) Michigan State International Law Review 557, 561.

<sup>394</sup> Jonathan Todres, 'A Child Rights Framework for Addressing Trafficking of Children' (2020) 22 (2) Michigan State International Law Review 557, 561.

<sup>395</sup> UNODC Global Initiative to fight Human Trafficking, 'An introduction to Human Trafficking: Vulnerability, Impact and Action: Background paper' (2008) 9.

<sup>396</sup> *ibid* 4.

<sup>397</sup> Center for the Protection of Children's Rights (CPCR), *Rehabilitation of the Victims of Child Trafficking: A Multidisciplinary Approach* (ILO 2006) 30.

<sup>398</sup> *ibid*.

<sup>399</sup> Hanni Stoklosa and Joseph Stoklosa, 'Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing' (2017) 19 (1) AMA Journal of Ethics 23, 26.

<sup>400</sup> Hanni Stoklosa and Joseph Stoklosa, 'Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing' (2017) 19 (1) AMA Journal of Ethics 23, 26.

<sup>401</sup> Kebogile Mokwena, 'Consider our plight': A cry for help from Nyaope users' (2016) 21 (1) Health SA Gesondheid 5.

tries to mitigate by advocating for victim protection.<sup>402</sup> However, a lot still needs to be done in the region to ensure that victims fortunate enough to be rescued get all the necessary help to enable them to lead a normal life.

On the same note, it is unfortunate that even where the victims are willing to assist during the trial, they are rarely afforded the necessary protection, and no formal reintegration process or social service intervention takes place after trial. At most, the victims are just returned to their respective homes without further assistance. Despite the international obligation on governments to reintegrate victims and assist them accordingly, there is not sufficient attention to the post-trial well-being of the victims.<sup>403</sup>

In very rare cases such as *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregi*,<sup>404</sup> steps were taken to reintegrate the victim and assist her through skills development. In this case, the police took the victim to a shelter for trafficking in persons for counselling and skills building in cooking.<sup>405</sup> However, even in rare cases at times victims are released without ensuring their safety or reducing the possibility of re-victimisation. In the case of *State v Eze* the victims were released under unclear circumstances, which arguably increased the risk of their involvement in criminality and/or being trafficked again.<sup>406</sup>

Apart from these, it is also worth mentioning that due to the nature of child trafficking, the crime also has varying effects on foreign policies; regular migration in both source and destination States; and status management of trafficked victims.<sup>407</sup> The impact of child trafficking is clearly destructive both socially and economically.<sup>408</sup>

To avoid all these effects, it is important that child trafficking be curbed. Thus, the Trafficking Protocol encourages State Parties to have trafficking prevention programmes, advocacy, and research projects.<sup>409</sup> This becomes an expense that

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<sup>402</sup> See Article 6 (3) of the Trafficking Protocol.

<sup>403</sup> *Rex v Joalane Tsoana* (unreported), (CIV/T/46/06) (1990) LSHC 372/12 (2 February 1990).

<sup>404</sup> *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* (unreported), (2001) EHC (21 August 2001).

<sup>405</sup> *ibid.*

<sup>406</sup> *S v Eze* 14/546 (2013) ZAGPPHC.

<sup>407</sup> Judith Dixon, 'The impact of trafficking in persons' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (United Nations 2008) 81-100.

<sup>408</sup> UNODC, 'An introduction to Human Trafficking: Background Paper' 4. Also see Cindy Miller-Perrin and Sandy K Wurtele, 'Sex Trafficking and the Commercial Sexual Exploitation of Children' (2016) 40 (1-2) *Women & Therapy* 123, 135.

<sup>409</sup> Article 6 of the Trafficking Protocol.

States are not prepared to meet because of budgetary constraints.<sup>410</sup> However, although this may be seen as discretionary, such programmes are required to show their commitment to addressing the crime of trafficking at the domestic level as well as enforcement efforts against the crime.<sup>411</sup>

## 2.4 Summary

In a nutshell, it can be concluded that poverty; demand; conflict; lack of awareness; culture; family disintegration; HIV/AIDS; porous borders; and human rights violations are all key contributors to the increase in child trafficking in the SADC region.<sup>412</sup> Without a solution to these factors, it is argued that there is little room for successfully addressing the scourge of child trafficking.<sup>413</sup> It has been observed that child trafficking negatively impacts the physical and mental health of the victims.<sup>414</sup> It also negatively impacts the victims' right to survival and development as well as other socio-economic rights.

To alleviate the socio-economic impact of child trafficking, it has been suggested that SADC States should deal with child trafficking in line with their obligations in terms of international law. Even though most international instruments discussed in this chapter are not child trafficking instruments, they address the problem and create obligations for State Parties to alleviate the causes and impact on both the victims and the society. However, despite SADC States being party to these instruments, it appears there is little success in combating child trafficking.

Given the arguments above, it is important to discuss the international regulatory framework for child trafficking primarily as the basis for regulation of trafficking in persons globally and as a pace setter for SADC States. Therefore, to assess the role of international law in SADC efforts to combat child trafficking, chapter 3 critically analyses the international framework for child trafficking.

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<sup>410</sup> Judith Dixon, 'The impact of trafficking in persons' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* 90.

<sup>411</sup> United Nations Office on Drugs and Crime (UNODC), *Human Trafficking a Crime that Shames Us All. An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC 2016) 93.

<sup>412</sup> *ibid.*

<sup>413</sup> See 2.2.5 Culture and 2.3.1 Impact on the Physical and Mental Health of the Victims.

<sup>414</sup> Yvonne Rafferty, 'The Impact of Trafficking on Children: Psychological and Social Policy Perspectives' (2008) 2 (1) Society for Research in Child Development 13-18.

## CHAPTER 3

# THE INTERNATIONAL REGULATORY FRAMEWORK FOR CHILD TRAFFICKING

### 3.1 Introduction

The exploitation of children dates back to time immemorial when children had no rights and were widely viewed as objects or property that could be owned.<sup>415</sup> It is this objectification that perpetuated the trafficking of children.<sup>416</sup> Children were, therefore, vulnerable and susceptible to exploitation and trafficking.<sup>417</sup> International cooperation on children's rights protection in earnest, started with the League of Nations (now United Nations (UN)) when it created a committee for child protection.<sup>418</sup> In 1924 the League of Nations adopted the Geneva Declaration on the Rights of the Child, which was the first international instrument concerning children's rights.<sup>419</sup> The Declaration recognised that: 'mankind owes to the child the best that it has to give' and advocated for social rights for children.<sup>420</sup> The Declaration also notes that:

The child must be given the means requisite for its normal development, both materially and spiritually. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured. The child must be the first to receive relief in times of distress. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow man.<sup>421</sup>

<sup>415</sup> Obi N I Ebbe, 'Introduction: An Overview of Trafficking in Women and Children' in Obi N I Ebbe and Dilip K Das (eds), *Global Trafficking in Women and Children* (CRC Press 2008) 6.

<sup>416</sup> Focus for Health Foundation, 'Child Sex Trafficking and the Hyper-Sexualization of Our Youth. Where's the Line?' <<https://www.focusforhealth.org/child-sex-trafficking-and-the-hyper-sexualization-of-our-youth-wheres-the-line/>> accessed 25 June 2022.

<sup>417</sup> *ibid.*

<sup>418</sup> Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the rights of the child* (Volume 1, United Nations 2007) 3. Also see Declaration of the Rights of the Child League of Nations Official Journal (1924); Records of the Fifth Assembly. Supplement no. 23.

<sup>419</sup> Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 *African Journal of Legal Studies* 120, 121.

<sup>420</sup> Preamble of the Geneva Declaration of the Rights of the Child of 1924.

<sup>421</sup> Declaration on the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp (No. 16) at 19, U.N. Doc. A/4354 (1959). Also see Articles 1- 5 of the Geneva Declaration of the Rights of the Child of 1924.

As time went by, the Second World War in 1939 worsened the social position of children as many of them were left in a dire situation of vulnerability.<sup>422</sup> Many children were left orphaned and subsequently forced into labour.<sup>423</sup> Consequently, this led to an increase in child labour.<sup>424</sup> To address this, the UN created the UN Fund for Urgency for children in 1947, which later became known as the United Nations Children's Fund (UNICEF). The fund was based on the fundamental principle that the primary responsibility for child welfare programmes was with the government.<sup>425</sup>

Consequently, the UN noted the need for consistent enforcement of obligations related to human rights protection.<sup>426</sup> Accordingly, a Commission on Human Rights was established to ensure enforcement and compulsion from all States.<sup>427</sup> In 1989, the UN General Assembly unanimously adopted the Convention on the Rights of the child (CRC).<sup>428</sup> The CRC awarded children civil, political, economic, social and cultural rights.<sup>429</sup> The CRC is based on four fundamental principles of non-discrimination, the best interest of the child, development and child participation in all matters that affect the child.<sup>430</sup> In the event of violations of these principles, the Committee on the Rights



- <sup>422</sup> Mevlude Akbulut-Yuksel, 'War during Childhood: The Long Run Effects of Warfare on Health' (2017) IZA- Institute of Labour Economics 1, 13. See also Linda Shields, Bryan B, 'The Effect of War on Children: The Children of Europe after World War II' (2002) 42 (2) International Nursing Review 87, 88.
- <sup>423</sup> Linda Shields, Bryan B, 'The Effect of War on Children: The Children of Europe after World War II' (2002) 42 (2) International Nursing Review 87, 88.
- <sup>424</sup> Families at war, '*Effects on Children: World War II*' (2014) Families @ War, <https://familiesatwar2014.wordpress.com/2014/03/21/effects-on-children-world-war-ii/> accessed 25 January 2019.
- <sup>425</sup> John Charnow, 'The International Children's Emergency Fund' (2019) 21 (2) University of Chicago Press Journals 1, 2.
- <sup>426</sup> Mevlude Akbulut-Yuksel, 'War during Childhood: The Long Run Effects of Warfare on Health' (2017) IZA- Institute of Labour Economics 1, 7.
- <sup>427</sup> *ibid* 35.
- <sup>428</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. The Convention entered into force on 2 September 1990, in accordance with article 49.
- <sup>429</sup> The CRC has two optional protocols namely the Optional Protocol on the Involvement of Children in Armed Conflict 2000 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000. The incorporation of the provisions of these instruments has significantly improved the lives and realization of children's rights. See Ursula Kilkelly, 'The UN convention on the rights of the child: incremental and transformative approaches to legal implementation' (2019) 23 The International Journal of Human Rights 323-337.
- <sup>430</sup> See General guidelines regarding the form and contents of initial reports to be submitted by State Parties under article 44, para. 1 (a) of Convention on the Rights of the Child, adopted by the Committee on the Rights of the Child at its first session in October 1991. (Official Records of the General Assembly, Forty- Seventh Session, supplement No. 41(A/47/41), Annex III).



of the Child may receive and consider individual communications alleging such violations.<sup>431</sup>

Still, the CRC was not a child trafficking instrument and the need remained for the regulation of child trafficking (“the crime”). That is not to undermine the role of the CRC in fighting child trafficking.<sup>432</sup> There can be no protection of children’s rights where child trafficking is prevalent. A human rights approach to child trafficking helps to ensure that the dignity and worth of the victims are safeguarded.<sup>433</sup> For this reason, human rights instruments such as the CRC, have included provisions on the prohibition of child trafficking and have subsequently formed part of the legal framework. It has become customary to find the criminalisation of child trafficking in non-trafficking instruments.<sup>434</sup>

The previous chapter has discussed the causes of child trafficking and exposed the impact of such trafficking in the SADC region.<sup>435</sup> It has been established that SADC States are increasingly becoming sources, transit zones and in some instances destinations for child trafficking victims.<sup>436</sup> As a result of its transnational nature, child trafficking is a global phenomenon requiring an international response. Hence, various international legislative and policy measures seek to combat child trafficking and alleviate its socio-economic impact.<sup>437</sup> However, state cooperation in implementing these measures is still a huge challenge.<sup>438</sup> Therefore, for SADC States, child trafficking remains an escalating problem as much as it is for the whole world.

This chapter focusses on how international law creates a platform for States to uniformly deal with the problem of child trafficking. Therefore, this chapter discusses

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<sup>431</sup> The Committee also makes sure that children’s rights are enforceable in national legal systems. See UN Committee on the Rights of the Child, General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para 19.

<sup>432</sup> Moshoula C Desyllas, ‘A Critique of Global Trafficking Discourse and U.S Policy’ (2007) 34 (4) The Journal of Social and Social Welfare Western Michigan University 57, 61.

<sup>433</sup> Anne T Gallagher and Nicole Karlebach, ‘Prosecution of Trafficking in Persons Cases: Integrating a Human Rights Based Approach in the Administration of Criminal Justice’ Background Paper 9.

<sup>434</sup> For example, Angola’s Law on Criminalisation of underlying offenses to Money Laundering 3/2014. Article 19 of the Act addresses trafficking in persons. Democratic Republic of Congo has the Child Protection Code, Law 09/001 which includes a chapter on child trafficking. Namibia has the Prevention of Organised Crime Act No. 29 of 2004 which covers trafficking in persons under section 15. As well as the Child Care and Protection Act No. 3 of 2015 which also addresses child trafficking under chapter 14. See also SADC Baseline Report (2009) 5.

<sup>435</sup> Text to section 2.2 and 2.3 ch 2.

<sup>436</sup> UNODC, ‘Trafficking in Persons in the SADC Region’ (2016) Policy Brief UNODC 2.

<sup>437</sup> *ibid* 4.

<sup>438</sup> Madevi Sun-Suon, *Human Trafficking and the Role of Local Governments* (UNITAR 2021) 9.

how the relevant international bodies have significantly influenced the response to the global problem of child trafficking.<sup>439</sup> Importantly, the chapter focusses on how the international legal framework creates an opportunity for regional legislative reforms. It also discusses how the framework has influenced the establishment of multilateral;<sup>440</sup> regional; bilateral,<sup>441</sup> and national initiatives or plans of action to address child trafficking.<sup>442</sup>

### 3.2 Historical Background of the Framework for Child Trafficking

The regulation of child trafficking has its roots in the 1902 International Conference on White Slave Traffic.<sup>443</sup> The conference was held to deliberate on the regulation of the white slave traffic with the objective of protecting women and underaged girls who were being abused.<sup>444</sup> The main objective of the conference was to provide a guideline to governments for the adoption of the draft Convention on White Slave Traffic.<sup>445</sup>

One of the issues raised at the conference was the use of the term 'white slave traffic'. The main concern was that the word 'white' did not apply to the generality of women.<sup>446</sup> Nevertheless, the term was not abandoned since it was supposed that abandoning it would pose some 'inconveniences'.<sup>447</sup> Moreover, the term was considered favourable

<sup>439</sup> UN, *Global Report on Trafficking in Persons 2020* (UN 2020) 10.

<sup>440</sup> Examples of a multilateral agreement to combat trafficking in persons include the Multilateral Cooperation Agreement to Combat Trafficking in Persons, Especially Women and Children in West and Central Africa and the Multilateral Cooperation Agreement to Combat Child Trafficking in West Africa. See United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons* (UNODC 2020) 24.

<sup>441</sup> Bilateral treaties on the other hand are different in that they are generally negotiated through the relevant foreign ministries. See United Nations Office on Drugs and Crime (UNODC), 'Toolkit to Combat Trafficking in Persons' (2<sup>nd</sup> edn, UNODC 2008) 169. Bilateral treaties are common in technical areas relevant to child trafficking, such as extradition and mutual legal assistance. For example, the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes; the Cooperation Agreement to Prevent, Suppress and Punish Trafficking in Persons with an Emphasis on Trafficking in Women and Children between Benin and Nigeria; and the Cooperation Agreement between Mali and Côte d'Ivoire on Combating the Trans-border Trafficking of Children.

<sup>442</sup> Clayton H Vhumunu, 'Combating Human Trafficking in the Southern African Development Community: Strategies, Challenges, and Opportunities' (2020) Strategic Review for Southern Africa, 42 (2) 179. Also see UNICEF, 'Child Trafficking in West Africa: Policy Responses' (2002) UNICEF Innocent Research Centre 8.

<sup>443</sup> See text to n 6 ch 1.

<sup>444</sup> International Agreement for the Suppression of the "White Slave Traffic," 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, entered into force 18 July 1905.

<sup>445</sup> The States were equally desirous of taking the most effective steps for the suppression of the traffic known as the "White Slave Traffic" and therefore resolved to conclude a Convention with this object. See Preamble of the International Convention for the Suppression of the White Slave Traffic (1910).

<sup>446</sup> Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) Journal of Trafficking and Human Exploitation 1, 7.

<sup>447</sup> *ibid.*

at that time because it described the type of traffic which was intended to be suppressed.<sup>448</sup>

Historian, Marlene Beckman provided a description of public attitudes on the use of the term 'white slavery' at that time and noted that:

The Progressive Era reformers who supported [antislavery legislation] had used the words 'white slavery' to promote the vision of women held in bondage against their will, of mysterious drugging and abductions of helpless young girls, and of unexplained disappearances of innocent and naïve immigrants forced into lives of prostitution and vice.<sup>449</sup>

It is noteworthy that during that period white slave trade was characterised by its continuity and ability to penetrate through borders.<sup>450</sup> It was thus necessary to have laws that were far-reaching for justice to be duly served.<sup>451</sup> It was also important at that time to have a clear distinction between women and girls for the purposes of regulating trafficking. Thus, there were deliberations on the distinction between women and girls and the Legislative Commission then proposed that:

1. Severely punished will be any person who, to satisfy the passions of another, shall have procured, enticed or led astray, even with her consent, an under-age girl, with immoral intent.
2. Equally will be punished any person who by violence, threats, abuse of authority, compulsion or fraud will have procured, enticed, or led astray a woman or a girl over age, with immoral intent.<sup>452</sup>

The draft Convention was therefore applicable to women and underage girls only. However, States could only punish those who supplied girls to meet the demand or to satisfy the passions of others. This partial regulation of the crime did not fully address

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<sup>448</sup> Preamble of the Agreement for the Suppression of White Slave Traffic, '...being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the criminal traffic known under the name of trade in white women'.

<sup>449</sup> Marlene D Beckman, 'The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women' (1984) 72 GEO. L.J. 1111, 1111.

<sup>450</sup> Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) Journal of Trafficking and Human Exploitation 1, 9.

<sup>451</sup> National Vigilance Association, 'Transactions of the International Congress on the White Slave Trade' (London: National Vigilance Association, 21-23 June 1899).

<sup>452</sup> Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) Journal of Trafficking and Human Exploitation 1, 10.

the problem of white slave traffic and more adjustments to the regulations and measures were imminent.

The results of the 1902 deliberations would later be seen in the International Agreement for the Suppression of the White Slave of Traffic 1904. The Agreement formalised these discussions and called for the centralisation of all information related to the prostitution of women.<sup>453</sup> The Agreement required that all transport stations be closely monitored to identify victims as well as perpetrators.<sup>454</sup>

Still, the Agreement was not without its problems. Some scholars have pointed out that only the victimisation of white women and girls was targeted at the exclusion of the exploitation of non-white women.<sup>455</sup> Thus, the racialised nature of the fight against the trafficking of women and girls contributed to the ineffectiveness of the international instruments adopted at that time. This is because it seemed to combat the sexual exploitation of a single racial group.<sup>456</sup>

The Agreement was also criticised for its lack of definition of the key terms. In its preamble, the Agreement expressed the desire to:

[A]ssure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the criminal traffic known under the name of trade in white women.<sup>457</sup>

The Agreement also did not define 'criminal traffic', nor did it state what constituted 'trade in white women'. Furthermore, the Agreement referred to 'prostitution'; 'immoral purpose'; and 'immoral life' and did not provide content on what constitutes such

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<sup>453</sup> Article 1 of the International Agreement for the Suppression of the White Slave Traffic, 1904.

<sup>454</sup> Article 2 of the International Agreement for the Suppression of the White Slave Traffic, 1904 states that each of the Governments agrees to exercise a supervision for the purpose of seeking, particularly in the stations, harbours of embarkation and on the journey, the conductors of women or girls intended for debauchery. Instructions shall be sent for that purpose to the officials or to any other qualified persons, in order to procure, within the limits of the laws, all information of a nature to discover a criminal traffic. The arrival of persons appearing evidently to be the authors, the accomplices or the victims of such a traffic will be notified, in each case, either to the authorities of the place of destination or to the interested diplomatic or consular agents, or to any other competent authorities.

<sup>455</sup> Eileen Scully, 'Pre-Cold War Traffic in Sexual Labour and Its Foes: Some Contemporary Lessons' in David Kyle and Rey Koslowski (eds), *Global Human Smuggling: Comparative Perspectives* (2<sup>nd</sup> edn, Johns Hopkins University Press 2011) 86-87.

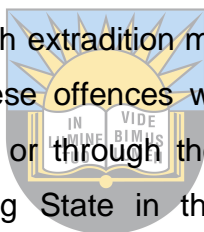
<sup>456</sup> Karen E Bravo, 'The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse' (2011) 9 (2) 3 Seattle Journal for Social Justice 555, 574.

<sup>457</sup> Preamble of the International Agreement for the Suppression of the White Slave Traffic 1904.

actions.<sup>458</sup> Such a lack of definition of key concepts and terms might have led to the ineffectiveness of the Agreement.

Nevertheless, some of these loopholes were later addressed in the subsequent International Convention for the Suppression of White Slave traffic of 1910<sup>459</sup> which had two main objectives. The first was the discussion of the procedural elements of effecting cooperation on criminal matters between States.<sup>460</sup> The second issue is related to the determination of the age of majority.

Even though issues of jurisdiction were clear, there was still a need for unambiguous provisions in relation to issues of procedure. This entailed clear directives on procedures to be followed by States in seeking cooperation from one another. Such procedural aspects, therefore, paved the way for further discussion.<sup>461</sup> Consequently, article 5 of the International Convention for the Suppression of White Slave Traffic, 1910 provided for lawful inclusion of crimes contemplated under article 1,<sup>462</sup> and article 2,<sup>463</sup> in the list of offences for which extradition may be granted. The transmission of Letters of Request relating to these offences was to be by direct communication between the judicial authorities<sup>464</sup> or through the intermediary of the diplomatic or consular agent of the demanding State in the State to which the demand is addressed.<sup>465</sup>



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On the issue of the determination of the age of majority and capacity to consent to exploitation, the Convention criminalised the procurement of women and underage

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<sup>458</sup> Article 1 and Article 2 of the International Agreement for the Suppression of the White Slave Traffic 1904.

<sup>459</sup> International Convention for the Suppression of the "White Slave Traffic," May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20.

<sup>460</sup> Jean Allain, *Slavery in International Law: Of Trafficking and Human Exploitation* (Brill Nijhoff 2012) 340.

<sup>461</sup> *ibid.*

<sup>462</sup> Article 1 of the International Convention for the Suppression of White Slave traffic of (1910) states that whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl underage, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different States.

<sup>463</sup> Article 2 of the International Convention for the Suppression of White Slave traffic of (1910) Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different States.

<sup>464</sup> Article 6 (1) of the International Convention for the Suppression of White Slave traffic, (1910).

<sup>465</sup> *ibid* Article 6 (2).

girls for immoral purposes even with their consent.<sup>466</sup> During this period consent had become fundamental to the issue of trafficking since the practices traditionally associated with the crime such as prostitution,<sup>467</sup> were subject to international regulation.<sup>468</sup> However, consent became wholly irrelevant once the act and purpose had been established.<sup>469</sup> Accordingly, Article 1 stipulates that:

Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl underage, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different States.<sup>470</sup>

As expected, in many cases of trafficking in persons, the issue of volition is always in question, particularly for adults. Thus, the issue of consent is common throughout the development and adoption of the legal framework against child trafficking.<sup>471</sup> Consent and the issues surrounding the age of majority remain intrinsically linked.

The 1910 Convention thus set more securely the age of majority as well as factors that negate any possible consent such as ‘abuse of authority’, ‘fraud’, ‘threats’ and ‘violence’.<sup>472</sup> These terms have been incorporated into the current definition of trafficking in persons and are regarded as means by which consent cannot be obtained.<sup>473</sup>



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However, despite the enactment of both the 1904 and 1910 Conventions, in 1921 the Council of the League of Nations called a Conference which sought to ostensibly secure more completely the suppression of the Traffic in Women and Children.<sup>474</sup>

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<sup>466</sup> Jean Allain, ‘White Slave Traffic in International Law’ (2017) 1 (1) 1 Journal of Trafficking and Human Exploitation 1, 9.

<sup>467</sup> It is important to note that focusing on the issue of volition brought into focus other contentious crimes such as human smuggling and illegal migration, in which case individuals consent to be moved from one State to another. However, even in such cases, one would have to further consent to be prostituted because consent to smuggling is not tantamount to consent to sexual exploitation or any other form of exploitation.

<sup>468</sup> Jessica Elliot, *The Role of Consent in Human Trafficking* (Routledge 2015) 50.

<sup>469</sup> United Nations Office on Drugs and Crime (UNODC), ‘The Role of Consent in the Trafficking in Persons Protocol’ (2014) Issue Paper 1 United Nations 21.

<sup>470</sup> Article 1 of the International Convention for the Suppression of White Slave traffic, (1910).

<sup>471</sup> Article 3 (b) and (c) of the Trafficking Protocol.

<sup>472</sup> Articles 1 and 2 of the 1910 Convention.

<sup>473</sup> Article 3 of the Trafficking Protocol and Article 2 of the 1910 Convention sheds some light on the understanding of the ‘means’ element.

<sup>474</sup> Preamble to the International Convention for the Suppression of the Traffic in Women and Children, (1921).



Based on the recommendations made in this Conference, Contracting Parties agreed to have the International Convention for the Suppression of the Traffic in Women and Children of 1921.<sup>475</sup>

The 1921 Convention has two major developments. These developments include the recognition of males as victims of trafficking,<sup>476</sup> and the provisions of article 5 of the Convention raising the age limit for protection from twenty to twenty-one completed years of age.<sup>477</sup> This could be loosely interpreted to mean that the full age of twenty-one was held to be completed on the day preceding the 21<sup>st</sup> anniversary of birth.<sup>478</sup>

The 1921 Convention also makes provision for the punishment of not only actual offenders but also those who attempted to commit, within legal limits, acts preparatory to the commission of the crime.<sup>479</sup> However, the Convention does not contain any monitoring or enforcing mechanisms and Parties must determine their own implementation measures.<sup>480</sup>

Notwithstanding that the 1921 Convention made a significant contribution to regulating and criminalising child trafficking, it was later supplemented in 1933 by the International Convention for the Suppression of the Traffic in Women of Full Age.<sup>481</sup> The Convention reiterated the punishment of attempts to commit the crime.<sup>482</sup> Additionally, since the



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<sup>475</sup> The International Convention for the Suppression of the Traffic in Women and Children was signed in Geneva on 30 September 1921. See Cherif Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga *et al*, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 *Revue Internationale de Droit Pénal* 417, 437.

<sup>476</sup> Article 2 states that; The High Contracting Parties agree to take all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes and who commit offences within the meaning of Article 1 of the Convention of May 4, (1910).

<sup>477</sup> In paragraph B of the Final Draft of the Convention of 1910, the words 'twenty years of age shall be replaced by the words 'twenty years of age'.

<sup>478</sup> Col William and M Conor, *Against the Will* (University of Virginia 1897) 114. See also John Bouner and Francis Rawle, *Law Dictionary*.

<sup>479</sup> Article 3 stipulates that, "the High Contracting Parties agree to take the necessary steps to secure punishment of attempts to commit, and, within the legal limits, of acts preparatory to the commission of the offences specified in Articles 1 and 2 of the Convention of May 4, (1910)". The concept of punishing attempts is consistent with the criminal attempt doctrine of 1801. The doctrine was applied in the widely recognised case of *R v Higgins and others* [1833] NSWSupC 6 at 272, where the court held that every attempt to commit a crime, whether felony or misdemeanour, is itself a misdemeanour. Also see Lawrence C Becker, 'Criminal Attempt and the Theory of the Law of Crimes' (1974) 3 (3) *Philosophy & Public Affairs* 262, 264.

<sup>480</sup> Cherif Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga *et al*, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 *Revue Internationale de Droit Pénal* 417, 437.

<sup>481</sup> International Convention for the Suppression of the Traffic in Women of the Full Age (1933).

<sup>482</sup> See Article 1 of the 1921 Convention.

crime was a transnational crime, the term 'State' was widened to include colonies and protectorates of the parties concerned, as well as territories under them.<sup>483</sup>

By the year 1937, there were four fragmented Conventions dealing with trafficking and related matters. In 1937 therefore, the League of Nations prepared a draft Convention extending the scope of the above-mentioned instruments and made possible the conclusion of a Convention consolidating the earlier instruments.<sup>484</sup> This led to the conclusion of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Traffic in Persons Convention).<sup>485</sup> This Convention sought to cover all penal clauses of prior conventions by revealing consistency in principle as well as to regulate prostitution.<sup>486</sup>

During the deliberations of the 1949 Traffic in Persons Convention, prostitution was a highly contentious matter, and it was a subject of international activism even after its adoption.<sup>487</sup> The criminalisation of prostitution was a problem for States that legalised it in their domestic law. Invariably, this affected state cooperation because for some States, for them to support the regulation of prostitution, there was a need for altruistic and prestige benefits for them, which at that time did not seem apparent.<sup>488</sup> It must be understood that any disagreements on a proposed norm greatly affected state cooperation and ratification of the Convention.

Be that as it may, the working principles for the 1949 Traffic in Persons Convention were: social causes of prostitution; abolitionism;<sup>489</sup> and victim protection, regardless of

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<sup>483</sup> Article 1 of the 1921 Convention.

<sup>484</sup> International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol by the General Assembly of the United Nations on 3 December 1948; International Convention of 4 May 1910 for the Suppression of the White Slave Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947; International Convention of 11 October 1933 for the Suppression of the Traffic in women of Full Age (1933).

<sup>485</sup> UN General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, A/RES/317.

<sup>486</sup> Megan C Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Working Paper Series No. 71 Refugee Studies Centre 1, 12.

<sup>487</sup> South African Law Commission, 'Sexual Offences: Adult Prostitution' (2012) Sexual offences Issue Paper 19 1,51 available at [https://www.justice.gov.za/salrc/ipapers/ip19\\_prj107\\_2002.pdf](https://www.justice.gov.za/salrc/ipapers/ip19_prj107_2002.pdf) accessed 29 June 2022.

<sup>488</sup> Megan C Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Working Paper Series No. 71 Refugee Studies Centre 1, 13.

<sup>489</sup> The abolitionists who wanted to abolish prostitution completely, on the other hand the regulationists wanted control prostitution through regulations like medical certificates and licensing. See Moshoula C Desyllas, 'A Critique of Global Trafficking Discourse and U.S Policy' (2007) 34 (4) The Journal of Social and Social Welfare Western Michigan University 57, 61.

the offender's motive.<sup>490</sup> The Social Commission acknowledged that the social causes of prostitution were linked to trafficking.<sup>491</sup> The Commission noted that trafficking of women and children was a consequence of prostitution and explained that:

[t]raffic in women and children is deemed to be the procurement and transport for gain to a foreign State of women or girls for the sexual gratification of others. The background for the traffic is the whole problem of prostitution.<sup>492</sup>

It was, therefore considered that to combat trafficking there was a need to abolish tolerated prostitution and take necessary steps to reduce the demand for prostitutes.<sup>493</sup> The 1949 Traffic in Persons Convention, therefore, states that '[T]he Traffic in persons for the purpose of prostitution is incompatible with the dignity and worth of human person'.<sup>494</sup> It goes on to prescribe procedures in article 6 for combating international trafficking for prostitution, including the expulsion of offenders.<sup>495</sup> It also prohibits the running of brothels and renting accommodation for prostitution purposes.<sup>496</sup> As a result of this focus on the prohibition of prostitution and closure of brothels, the 1949 Traffic in Persons Convention contained very few human rights provisions and was essentially not victim-oriented. Furthermore, attention was not given to socio-economic causes of sexual exploitation.<sup>497</sup>

Although the scope of the 1949 Traffic in Persons Convention was expanded, it was still not without fault. Firstly, the 1949 Traffic in Persons Convention did not unequivocally cater for male trafficking. Secondly, save for a mechanism that was later established in 1970 for receiving reports and other information, the Convention had no

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<sup>490</sup> The punishment for trafficking for adult females was previously not provided for in any of the Conventions, unless the victim was taken abroad.

<sup>491</sup> UN Doc. E/CN.5/14 (1947), Social Commission First Session: Note on Prostitution, Traffic in Women and Children and Obscene Publications 12.

<sup>492</sup> *ibid.*

<sup>493</sup> *ibid.*

<sup>494</sup> UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others preamble; Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community.

<sup>495</sup> Article 2 of the Convention of the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949).

<sup>496</sup> *ibid* Article 3.

<sup>497</sup> Roberta Avellino, 'Trafficking in Persons: A Contemporary Threat to Human Dignity' (2011) 1 ELSA Malta Law Review 46, 49.

monitoring body for implementation and enforcement.<sup>498</sup> Although gender imbalances have been cured, the lack of a monitoring body still plagues the current child trafficking framework.<sup>499</sup>

Despite addressing some of the key issues, the 1949 Traffic in Person Convention did not adequately resolve the child trafficking problem. Some scholars have argued that the overall failure of the 1949 Traffic in Persons Convention may be attributed to its inclusion in the international human rights framework.<sup>500</sup> This is because, at that time, States could not agree on a mutual definition of the crime, let alone specific legal obligations.<sup>501</sup> Therefore, including the 1949 Traffic in Persons Convention in the human rights framework at that stage was premature and predestined to fail.<sup>502</sup>

Essentially, the 1949 Traffic in Persons Convention represents a shift from the focus on white slave traffic to a wider and more encompassing approach to regulating child trafficking regardless of race, gender and age.<sup>503</sup> This approach deliberately avoids making discriminatory distinctions between persons.<sup>504</sup> Further, the prohibition of child trafficking also began to take centre stage in human rights protection.

### 3.3 The Current International Framework for Combating Child Trafficking

Before the year 2000, the latest international instrument against child trafficking was the 1949 Traffic in Persons Convention.<sup>505</sup> For about 50 years, therefore, there had not been a revision or review of the then existing instruments.<sup>506</sup> This meant that

<sup>498</sup> United Nations, 'Addressing Trafficking in Persons since 1949' (United Nations 2010) <https://www.unodc.org/unodc/en/human-trafficking/2010/addressing-trafficking-in-persons-since-1949.html>> accessed 29 December 2021.

<sup>499</sup> Cherif Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga *et al*, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 *Revue Internationale de Droit Pénal* 417, 437.

<sup>500</sup> *ibid* 442.

<sup>501</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 14.

<sup>502</sup> *ibid*.

<sup>503</sup> Hebert notes the increased focus on girls and women as the victims of trafficking and discusses the need for a shift from viewing men and boys as perpetrators to victims. See Laura A Hebert, 'Always Victimizers, Never Victims: Engaging Men and Boys in Human Trafficking Scholarship' (2016) 2 (4) *Journal of Human Trafficking* 281, 296.

<sup>504</sup> See Article 3 (c) of the Trafficking Protocol which states that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article".

<sup>505</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949).

<sup>506</sup> Kristiina Kangaspunta, 'A Short History of Trafficking in Persons' (2008) 1 *Freedom from Fear* 1, 38.

because of new developments in the global arena, the instruments that existed had largely become obsolete and ineffective in addressing trafficking in a much more changed society.<sup>507</sup> In particular, the rise in transnational organised crime centred around migrant smuggling;<sup>508</sup> the illicit trade in firearms;<sup>509</sup> and trafficking in persons.<sup>510</sup>

In 2000, the UN adopted the Convention against Transnational Organised Crime.<sup>511</sup> The Convention endeavours to promote cooperation to prevent and combat transnational organised crime more effectively.<sup>512</sup> It establishes the legal framework for international collaboration in combating negative economic and social implications related to organised criminal activities.<sup>513</sup> The Convention is supplemented by three Protocols addressing migrant smuggling,<sup>514</sup> illicit trade in firearms,<sup>515</sup> and trafficking in persons.<sup>516</sup> In this regard, the supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (The Trafficking Protocol), is particularly meant to address child trafficking.<sup>517</sup>

### **3.3.1 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (The Trafficking Protocol)**

Several factors led to the adoption of the Trafficking Protocol. Together with long subsisting factors of human trafficking and slavery, the rising migration necessitated

<sup>507</sup> Cherif Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga *et al*, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century' (2010) 81 *Revue Internationale de Droit Pénal* 417, 450.

<sup>508</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000).

<sup>509</sup> 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 (2001).

<sup>510</sup> 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.

<sup>511</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25.

<sup>512</sup> United Nations Convention against Transnational Organized Crime (2000), Article 1.

<sup>513</sup> See Preamble to the United Nations Convention against Transnational Organized Crime (2000).

<sup>514</sup> The Protocol against the Smuggling of Migrants by Land, Sea and Air, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

<sup>515</sup> The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, G.A. Res.55/25, U.N. Doc. A/RES/55/383 (May 31, 2001).

<sup>516</sup> 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.

<sup>517</sup> *ibid*.



some form of regulation to eradicate the exploitation and trafficking of persons.<sup>518</sup> It was widely projected that if left unregulated, more people would be at risk of trafficking.<sup>519</sup> As trafficking in persons gained momentum worldwide, not only as a human rights issue but also as a transnational organised crime that required combined national efforts and a global response,<sup>520</sup> trafficking victims sought the assistance of various non-governmental organisations to petition their governments to regulate trafficking in persons.<sup>521</sup> The petitions were in light of serious human rights violations that the victims were perpetually exposed to by traffickers and sought to urge authorities to take stern action.<sup>522</sup>

Moreover, in the absence of effective trafficking laws, governments were struggling with prosecuting trafficking cases.<sup>523</sup> This lack of prosecution was mainly due to a lack of a common definition of what really constituted human trafficking which was, in itself, a problem and hindrance to combating the crime.<sup>524</sup> Coupled with this were incessant differences of opinion between various stakeholders particularly concerning 'the ultimate end result of trafficking, its constitutive acts, their relative significance, the relationship between trafficking and related phenomena such as prostitution and irregular migration'.<sup>525</sup> These differences could only be resolved by a unified understanding of trafficking in persons.<sup>526</sup>

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Although there was a subsisting framework for combating human trafficking prior to the Trafficking Protocol, it was apparent that the framework was inadequate.<sup>527</sup> It was recognised that in order to successfully deal with the crime there was a need to improve

<sup>518</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 19.

<sup>519</sup> Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 Anti-trafficking Review 15, 17.

<sup>520</sup> United Nation Human Rights Office of the High Commissioner, 'Human Rights and Human Trafficking' <[https://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS36_en.pdf)> accessed 7 June 2019.

<sup>521</sup> Kevin Bales, *Ending Slavery: How we free today's slaves* (University of California Press 2008) 6.

<sup>522</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) 12 Human Rights Brief 30-31, 37.

<sup>523</sup> Heather J Clawson, Nicole Dutch, Susan Lopez, Suzanna Tiapula, Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices (ICF International 2008) 4.

<sup>524</sup> Christina A Seideman, 'The Palermo Protocol: Why It Has Been Ineffective in Reducing Human Sex Trafficking' (2015) 9 (5) Global Tides Journal of Arts and Science 1, 5.

<sup>525</sup> Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 Anti-Trafficking Review 14, 16.

<sup>526</sup> The Trafficking Protocol thus sought to reflect a modern concept of trafficking that would combine the traditional trafficking and slavery definitions. See Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

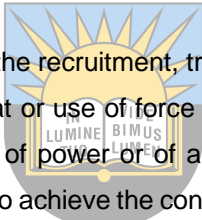
<sup>527</sup> *ibid.*



international laws and encourage national cooperation as well as establish comprehensive measures to deal with the crime.<sup>528</sup> In light of this, the United States of America proposed a Resolution on the development of a Protocol on trafficking in women and children under the UN Convention against Transnational Organised Crime.<sup>529</sup> The Trafficking Protocol was then subsequently adopted by General Assembly Resolution 55/25 and became the first globally binding and comprehensive international anti-trafficking agreement with an agreed-upon definition of trafficking in persons.<sup>530</sup> It also contains law enforcement and victim protection provisions, which is a remarkable improvement from the 1949 Traffic in Persons Convention.<sup>531</sup>

### 3.3.1.1 *The Definition of Child Trafficking in terms of the Trafficking Protocol*

Prior to 2000, the lack of a unified definition for trafficking in persons had been one of the challenges to effectively combating the crime.<sup>532</sup> This was subsequently remedied by article 3 (a) of the Trafficking Protocol which states that:


  
 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.<sup>533</sup>

However, when it comes to children, article 3 (c) stipulates that the means used in the commission of trafficking are irrelevant when determining whether the crime of child trafficking has taken place.

<sup>528</sup> Amy Farrell, Jack McDevitt, Rebecca Pfeffer, Stephanie Fahy, Colleen Owens Meredith Dank, William Adams, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases* (National Institute of Justice 2012) 224.

<sup>529</sup> See the April 1998 Session of the UN Commission for Crime Prevention and Criminal Justice.

<sup>530</sup> See Preamble to the Trafficking Protocol which states that; "...*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children...".

<sup>531</sup> Article 6 of the Trafficking Protocol.

<sup>532</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

<sup>533</sup> Article 3 of the Trafficking Protocol.

The above definition for trafficking in persons and child trafficking has been adopted by 190 countries that are party to the Trafficking Protocol, of these, 15 are SADC States.<sup>534</sup> The Trafficking Protocol has therefore provided several States, including those in SADC, a framework for the development of national legal systems.<sup>535</sup>

In essence, the definition of trafficking in persons includes three elements. Firstly, the act of procurement which includes recruitment, transportation and harbouring, or receipt of persons, which relates to the way the act of trafficking was undertaken. Secondly, how the act of trafficking was undertaken which includes the use of force, fraud, or coercion. And lastly, the purpose for which the act of trafficking was undertaken is specifically exploitation.<sup>536</sup>

The act of recruitment, harbouring or receipt of a person during trafficking has been a point of debate on the conflation of child trafficking with forced labour.<sup>537</sup> The importance of 'movement' has been lauded by the ILO as a major distinguishing factor for different categories of victims.<sup>538</sup> The TIP Office argues that harbouring incorporates forced labour, not movement within the scope of the trafficking definition.<sup>539</sup> Thus, the separation of child trafficking and forced labour is difficult since the two crimes are almost inseparable particularly because many child trafficking victims are sexually exploited after they have been exposed to forced labour.<sup>540</sup>

The second leg of the definition deals with the means used.<sup>541</sup> The phrase 'means used' is intrinsically linked to consent. Invariably, the presence or absence of consent

<sup>534</sup> 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.

<sup>535</sup> Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 Anti-Trafficking Review 14, 23.

<sup>536</sup> Article 3 (a) of the Trafficking Protocol.

<sup>537</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609, 612.

<sup>538</sup> International labour office, ILO Global Estimate of Forced Labour (2012) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_182004.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf)> accessed 7 July 2022.

<sup>539</sup> *ibid.*

<sup>540</sup> Panudda Boonpada and June Kane, 'Unbearable to the Heart: Child Trafficking and Action to Eliminate it' (2002) ILO, IPEC 1, 15. See also Sangeetha Manavalan, 'The Global Problem of Sex Trafficking in Women: A Comparative Legal Analysis of International, European and National Responses' (Dphil Thesis, Queen Mary University of London 2017) 124.

<sup>541</sup> Article 3 (a) of the Trafficking Protocol.

becomes an integral part in trials concerning trafficking in person.<sup>542</sup> This is because characterising certain conduct as trafficking has significant and wide-ranging consequences for the alleged perpetrators and victims, respectively.<sup>543</sup> This is particularly important for sex trafficking victims who are likely to be charged with prostitution or illegal migrants who would have consented to be moved.<sup>544</sup>

Therefore, defining what constitutes consent in the context of child trafficking evokes a wide spectrum of issues around autonomy and self-determination.<sup>545</sup> Ultimately, the inclusion of consent in the Trafficking Protocol was meant to establish trafficking for prostitution.<sup>546</sup> However, Gallagher argues that ‘States only agreed to sacrifice their individual views on prostitution to the greater goal of maintaining the integrity of the distinction between trafficking and migrant smuggling’.<sup>547</sup>

Nevertheless, article 3 (c) of the Trafficking Protocol states that a victim’s consent is irrelevant for the crime of child trafficking to be established. In any case, the presence of consent is not an indication of freedom, nor is its absence the primary indicator of exploitation.<sup>548</sup> In fact, ‘consent to oppression or an apparent will to be objectified is a

<sup>542</sup> See the case of *Fakudze v S* (AR410/2018) [2019] ZAKZPHC 32 (7 June 2019) where the accused’s defence was that there was no crime of child trafficking which had been committed because the victim, who was his stepdaughter, had requested to go with him and therefore given her consent.

<sup>543</sup> United Nations Office of Drugs and Crime, ‘The Role of Consent in the Trafficking in Persons Protocol’ (2014) Issue paper UNODC 6.

<sup>544</sup> Human smuggling and illegal migration have also been linked to child trafficking in recent years in Africa which has recorded increased migratory movements. It has been noted further that migration in Africa is a result of several socio-economic factors, most of which are similar to those of child trafficking. This increase in irregular migratory flows is reflected in the increase in cases of child trafficking. See AU, Migration Policy Framework for Africa and Plan of Action (2018–2030) 50-53. Young illegal migrants have increasingly become victims of child trafficking, particularly for sexual exploitation. With the influx of migrants, child trafficking has been on the rise. As a result of this connection, prostitution has been coined ‘migrant criminality’. See Sikka Anette, ‘Trafficking in Persons: How America Exploited the Narrative of Exploitation’ (2019) 55 (1) Texas international law journal 1, 6. However, not all migrants are victims of trafficking. Equally, child trafficking victims should not be unfairly seen as illegal migrants. Schuyler Dudley, ‘Human Trafficking in the Middle East and North Africa Region’, Topical Research Digest: Human Rights and Human Trafficking 1, 9. The main distinguishing factor is the issue of volition. Victims of child trafficking are deprived of their right to exercise free will and are essentially forced into slavery-like conditions or involuntary servitude. See also Bridget Anderson, ‘Where is the Harm in That? Immigration Enforcement, Trafficking and Protection of Migrants’ Rights’ (2012) 56 (9) American Behavioral Scientist 1241, 1244.

<sup>545</sup> Laura Lowenkron, ‘Consent and vulnerability’ (2015) (45) SciElo 226, 230.

<sup>546</sup> Megan C Brand, ‘International Cooperation and the Anti-Trafficking Regime’ (2010) Working Paper Series No. 71 Refugee Studies Centre 1, 28.

<sup>547</sup> Anne T Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, (2001) 23 (4) Human Rights Quarterly 975, 986.

<sup>548</sup> Norbert Cyrus, ‘The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century’ (2015) European Union’s Seventh Framework Programme for Research, Technological Development and Demonstration 1, 61.

condition of oppression and never a state of freedom'.<sup>549</sup> Furthermore, for victims exposed to crimes that are not compatible with the dignity and worth of a human person such as prostitution, it can be argued that no one agrees to be prostituted or to have their person violated.<sup>550</sup>

In the olden days, the primary defence of consent to criminal liability, *volenti non fit injuria* operated as a complete barrier to prosecution.<sup>551</sup> It meant that to a willing person, injury is not done and if someone willingly places themselves in a position where harm might result, then they have no claim.<sup>552</sup> The modification to this principle applies to cases involving serious bodily harm as well as in child trafficking.<sup>553</sup> The reasoning is that no one freely consents to self-harm.

A shift from the *volenti non fit injuria* principle can be noted in preliminary international agreements on trafficking in persons.<sup>554</sup> The agreements suggested that the element of consent in trafficking needed to be weakened by the actions of the exploiter in one way or the other.<sup>555</sup> The current position in child trafficking matters is that the consent of the victim should not be an issue.<sup>556</sup> Accordingly, the Trafficking Protocol unequivocally rejects the relevance of consent to the offence of child trafficking.<sup>557</sup> Hence, child trafficking is not proven by the consent of the child, but by the fact of an 'act' and its exploitative purpose.<sup>558</sup>

Whilst consent is irrelevant in determining child trafficking, it is used to determine the intention of the accused and the purpose for trafficking, which is the third leg of the

<sup>549</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 61.

<sup>550</sup> Moshoula C Desyllas, 'A Critique of Global Trafficking Discourse and U.S Policy' (2007) 34 (4) The Journal of Social and Social Welfare Western Michigan University 57, 59-61.

<sup>551</sup> Vera Bergelson, 'The Right to Be Hurt-Testing the Boundaries of Consent' (2000) 75 (2) George Washington Law Review 165, 174.

<sup>552</sup> Charles Warren, "*Volenti Non-Fit Injuria*" in Actions of Negligence' (1895) 8 (8) Harvard Law Review 457, 459.

<sup>553</sup> United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons Global Programme Against Trafficking in Human Beings' (2008) UNODC 21.

<sup>554</sup> The 1902 International Conference on the White Slave Traffic; The 1904 International Agreement for the Suppression of the White Slave Traffic and the 1910 International Convention for the Suppression of the White Slave Traffic.

<sup>555</sup> International Convention for the Suppression of the Traffic in Women of the Full Age (1933).

<sup>556</sup> United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons Global Programme Against Trafficking in Human Beings* (UNODC 2008) 27.

<sup>557</sup> Article 3 (c) of the Trafficking Protocol.

<sup>558</sup> United Nations Office of Drugs and Crime, 'The Role of Consent in the Trafficking in Persons Protocol', (2014) Issue paper UNODC 7.

definition of trafficking in persons.<sup>559</sup> Trafficking in persons is rooted in the need for either labour exploitation or sexual exploitation, which is mainly related to prostitution.<sup>560</sup> The nature of exploitation that trafficking victims are exposed to is such that there is a fine line between willingness to be exploited and exploitation against one's will. Thus, the definition of trafficking in persons in the Trafficking Protocol includes the use of force and deception as distinguishing factors between voluntary and forced exploitation particularly for prostitution. This distinction is a departure from the 1949 abolitionist approach to prostitution.<sup>561</sup> Nowadays the abolitionist approach to prostitution focusses on the demand side of the crime and separates the victims from the perpetrators. It seeks to protect victims and ensure that they are protected and not criminalised.<sup>562</sup> Thus, any supposed criminal life of the victims<sup>563</sup> or consent to be exploited should not have a bearing on the determination of victimhood.<sup>564</sup>

The expansion of the previously narrow category of actions that constitute child trafficking to include more forms of exploitation such as labour and crime,<sup>565</sup> is expressed in what Janie Chuang has coined the 'exploitation creep'.<sup>566</sup> The exploitation creep concept entails that, all forced labour is trafficking even if there is no movement and that all trafficking is slavery.<sup>567</sup> While it is apparent that the demand for exploitation in any form perpetuates child trafficking, the conflation of policies regulating sexual, labour, and organ trafficking overlook major differences between these practices,

<sup>559</sup> United Nations Office on Drugs and Crime, 'Toolkit to Combat Trafficking in Persons' Global Programme Against Trafficking in Human Beings' (2008) UNODC 1, 9.

<sup>560</sup> Article 3 (a) of the Trafficking Protocol.

<sup>561</sup> Moshoula C Desyllas, 'A Critique of Global Trafficking Discourse and U.S Policy' (2007) 34 (4) The Journal of Social and Social Welfare Western Michigan University 57, 63.

<sup>562</sup> Janie A Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy' (2010) 158 (6) University of Pennsylvania law review 1655, 1658.

<sup>563</sup> In the unreported case of *Republic v Ruth Lourenco, Case number 150 of 1999) MLMCL 1 (unreported)* the Malawian Court had to decide whether the actions of the accused contravened section 140(d) of the Penal Code of Malawi.<sup>563</sup> The accused was acquitted on the grounds that the victims were already prostitutes before they got into contact with the accused.

<sup>564</sup> Determining whether a child is a 'crime victim' or 'crime perpetrator' is at present a complex challenge. For a discussion of these challenges See Laura C N Wood, 'Child Modern Slavery, Trafficking and Health: A Practical Review of Factors Contributing to Children's Vulnerability and the Potential Impacts of Severe Exploitation on Health' (2020) 4 BMJ Paediatrics Open 1, 4. Also see Kelly Allen, 'Prostitution vs. Human Trafficking: Understanding Exploitation' *Exodus Road* (5 March 2021) <<https://theexodusroad.com/prostitution-vs-human-trafficking-understanding-exploitation/>> accessed 29 December 2021.

<sup>565</sup> Moshoula C Desyllas, 'A Critique of Global Trafficking Discourse and U.S Policy' (2007) 34 (4) The Journal of social and social welfare Western Michigan University 57, 63.

<sup>566</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609, 610.

<sup>567</sup> *ibid.*



which invariably affects successfully addressing them.<sup>568</sup> Afrat identifies the three major differences as the 'social' status and political influence of the perpetrators, the precision of norms and their resonance with audiences, and the costs of enforcement. He also notes that since the inception of the Trafficking Protocol, trafficking in persons for sexual exploitation has received considerable attention while labour exploitation has less recognition and trafficking for organs is absent in social sciences research.<sup>569</sup>

Be that as it may, to a certain extent the Trafficking Protocol has facilitated a unified approach to child trafficking despite criticisms of some aspects of the definition.<sup>570</sup> It is possible that the broad wording of the definition of trafficking in persons has led to different interpretations of the crime as State Parties are more inclined to interpret the definition of trafficking in persons to suit their national laws and circumstances.<sup>571</sup> The result of this is a narrow and at times, a broad interpretation of the crime by respective national legislations.<sup>572</sup> For example, the non-definition of 'exploitation of the prostitution of others leaves the interpretation subject to state domestic laws.<sup>573</sup> Invariably, some scholars have argued that:

Leaving this important aspect of the convention undefined and subject to state interpretation means a potentially disjunctive application of principles in the anti-trafficking regime but allows States to ratify with the knowledge that they can interpret and apply the terms according to their interests.<sup>574</sup>

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Arguably, this flexibility and inconsistencies in interpretations of the provisions are what is causing the Trafficking Protocol's inefficiency in addressing child trafficking.

<sup>568</sup> Asif Afrat, 'Global Efforts against Human Trafficking: The Misguided Conflation of Sex, Labour, and Organ Trafficking' (2016) Lauder School of Government, Diplomacy and Strategy and Institute for Policy and Strategy Interdisciplinary Center (IDC) Herzliya, Forthcoming, International Studies Perspectives.

<sup>569</sup> *ibid* 5.

<sup>570</sup> Elżbieta M Goździak and Kathleen M Vogel 'Palermo at 20: A Retrospective and Prospective', (2020) 6 (2) Journal of Human Trafficking 109, 111.

<sup>571</sup> Natalia Ollus, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice personnel' 122<sup>nd</sup> International Training Course Resource material series 62, 22 <[https://www.unafei.or.jp/publications/pdf/RS\\_No62/No62\\_06VE\\_Ollus1.pdf](https://www.unafei.or.jp/publications/pdf/RS_No62/No62_06VE_Ollus1.pdf)> accessed 20 January 2021.

<sup>572</sup> *ibid*.

<sup>573</sup> UN Doc. A/55/383/Add.1 (2000), Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

<sup>574</sup> Megan C Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Working Paper Series No. 71 Refugee Studies Centre 1, 12.



Marcel van der Walt and Amanda Westhuizen argue that while a wide definition enables the criminal justice system to charge traffickers with some aspects of the crime, it also makes it difficult to identify actual victims of child trafficking.<sup>575</sup> This inevitably affects data collection on the trends of both internal and international child trafficking.<sup>576</sup> Scholars have further argued that poor data collection and lack of information is what has been impeding any prospects of fully combating the crime since it is imperative to understand the trends of crime first before drafting policies or measures.<sup>577</sup> It, therefore, appears that for as long as there is a gap in data, any endeavours to curb the crime will remain fruitless.<sup>578</sup>

In a nutshell, articles 3 (a) and (c) of the Trafficking Protocol echo sentiments of the 1949 Traffic in Persons Convention's prohibition of the enticement and deception of victims as well as the exploitation and slavery-like practices from traditional slavery and forced labour.<sup>579</sup> It also sparks a lot of controversy and debate around the issues of consent. However, the main bone of contention is the lack of clarity, in the definition or anywhere else in the Trafficking Protocol, of what constitutes key elements such as demand, particularly in child sexual exploitation.

### 3.3.1.2 *The Trafficking Protocol and Human Rights*

As previously highlighted, human rights violations are regarded as both a cause and a consequence of child trafficking.<sup>580</sup> Child trafficking goes to the heart of what human rights law seeks to prevent.<sup>581</sup> The entire body of human rights law rejects the practices

<sup>575</sup> Marcel van der Watt, Amanda van der Westhuizen '(Re)Configuring the criminal justice response to human trafficking: A complex systems perspective' (2017) 18 (3) *Police Practice and Research* 218, 219.

<sup>576</sup> Dave Holness, 'Introduction to Human Rights Law' in A Govindjee and PHG Vrancken (eds), (Lexis Nexis 2009) 18.

<sup>577</sup> Noël Busch-Armendariz, Maura Nsonwu, and Laurie Cook Heffron, 'Understanding Human Trafficking: Development of Typologies of Traffickers PHASE II' (Annual Interdisciplinary Conference on Human Trafficking, Nebraska, October 2009). See also Frank Laczko 'Human Trafficking: The need for better data' (2002) 1 (11) *Migration Policy Institute Online Journal* 1, 5.

<sup>578</sup> Sanja Milivojevic and Marie Segrave, 'Evaluating Responses to Human Trafficking: A Review of International, Regional, and National Counter-Trafficking Mechanisms' in John Winterdyk, Benjamin Perrin and Philip Reichel (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (Routledge 2012) 233-263.

<sup>579</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) *Human Rights Brief* 30-31, 38.

<sup>580</sup> President B Obama, 'Presidential Proclamation-End Human Trafficking' (Clinton Global Initiative, September 2012) <[www://obamawhitehouse.archives.gov/node/230831](http://www://obamawhitehouse.archives.gov/node/230831)> accessed 25 January 2021.

<sup>581</sup> Anne T Gallagher, 'Human Rights and Human Trafficking Quagmire or Firm Ground' (2009) 149 *Virginia Journal of International Law* 1, 61.

and consequences of child trafficking.<sup>582</sup> Thus, it is crucial to prioritize human rights protection in any measures taken to prevent and end child trafficking.<sup>583</sup> Without this, there can be no synergy between human rights protection and anti-trafficking measures which is important for successfully addressing child trafficking.

In recent years, child trafficking has increasingly been linked to human rights violations.<sup>584</sup> The crime has been portrayed as an organised criminal activity which is detrimental to the wellbeing of innocent women and children,<sup>585</sup> hence, the aggressive criminalisation approach to the crime in the Trafficking Protocol.<sup>586</sup> However, Gallagher has noted that despite the Trafficking Protocol's emphasis on criminalisation and border protection, it is nowhere near being a human rights treaty.<sup>587</sup> For instance, there is no explicit protection for victims from prosecution for acts they would have been forced to perform.<sup>588</sup> This is probably because, at the conception of the Trafficking Protocol, arguments for human rights protection were limited to their instrumental value as opposed to justice priorities.<sup>589</sup>

Consequently, child trafficking victims only get minimal protections within the Trafficking Protocol.<sup>590</sup> The side-lining of human rights advocacy in the Trafficking Protocol saw the conception of a soft law instrument in the form of the UN Trafficking Principles and Guidelines.<sup>591</sup> These Guidelines, even though they are non-binding on

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<sup>582</sup> Anne T Gallagher, 'Human Rights and Human Trafficking Quagmire or Firm Ground' (2009) 149 Virginia Journal of International Law 1, 61.

<sup>583</sup> See Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 1 para 1 <[https://www.ohchr.org/sites/default/files/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Commentary_Human_Trafficking_en.pdf)> accessed 7 June 2022. See also James C Hathaway 'The Human Rights Quagmire of 'Human Trafficking' (2008) 49 (1) Virginia Journal of International Law 1. Hathaway submits a contrary view that trafficking in persons is only a subset of the real Human Rights Problems and focusing on it only, unfairly disadvantages the promotion and protection of other rights. Essentially, this submission suggests that there is no need to combine the fight against child trafficking and human rights violations.

<sup>584</sup> Laboratory to combat Human Trafficking, 'Human Trafficking: Human Rights Violations' (2008) <<https://combathumantrafficking.org/2018/12/human-trafficking-human-rights-violation/>> accessed 10 June 2021.

<sup>585</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609, 650.

<sup>586</sup> See article 5 of the Trafficking Protocol.

<sup>587</sup> Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 Anti-Trafficking Review 14, 14.

<sup>588</sup> Marjan Wijers, 'Purity, Victimhood and Agency: Fifteen Years of the UN Trafficking Protocol' (2015) 4 Anti-Trafficking Review 56, 62.

<sup>589</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) 609 The American Journal of International Law 609, 611.

<sup>590</sup> *ibid.*

<sup>591</sup> UNODC, 'Global Report on Trafficking in Persons' (2016) 104.

States, are an interpretive tool to the Trafficking Protocol from a human rights perspective.<sup>592</sup> The Guidelines help to clear out any ambiguities and help States to identify or confirm legal developments around the trafficking problem.<sup>593</sup>

Still, the lack of a treaty monitoring body for the Trafficking Protocol makes it difficult to evaluate the effectiveness of any measures taken by State Parties.<sup>594</sup> Unlike human rights treaties, the Trafficking Protocol does not have a body that deals with interpretive disputes and the assessment of individual state compliance with the Protocol obligations.<sup>595</sup> The Trafficking Protocol depends on the United Nations Office on Drugs and Crime (UNODC) which provides research assistance; technical and legislative guidance, but still it is not tailor-made to address trafficking problems.<sup>596</sup>

It is one of the Trafficking Protocol's objectives to protect and assist the victims of trafficking in persons with full respect for their human rights, but no provision is made in the Protocol for the attainment of that objective.<sup>597</sup> Perhaps if there was a monitoring body that ensures adherence with the Protocol, housing; counselling; medical assistance; employment; educational; and training opportunities would be guaranteed for victims.<sup>598</sup> While Gallagher concurs that the Trafficking Protocol is not strong on enforcement mechanisms, she submits that the impact of that weakness is cushioned by external compliance mechanisms.<sup>599</sup> However, even these external mechanisms heavily depend on individual state capacity and willingness to comply and cooperate.

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<sup>592</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 20.

<sup>593</sup> Andrew T Guzman, 'Against Consent', (2012) 52 (4) Virginia Journal of International Law 751. See also UNODC, 'Global Report on Trafficking in Persons' (UNODC 2016) 104.

<sup>594</sup> Cherif Bassiouni, Daniel Rothenberg, Ethel Higonnet, Cynthia Farenga *et al*, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21<sup>st</sup> Century' (2010) 81 Revue Internationale de Droit Pénal 417, 437.

<sup>595</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) The American Journal of International Law 609, 610.

<sup>596</sup> UNODC, 'Twentieth Anniversary of the United Nations Convention Against Transnational Organized Crime' <<https://www.unodc.org/unodc/en/untoc20/index.html>> accessed 8 July 2022.

<sup>597</sup> UNODC, 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' <<https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>> accessed 31 January 2019.

<sup>598</sup> Article 6 (7) of the Trafficking Protocol.

<sup>599</sup> Anne T Gallagher, 'Two Cheers for the Trafficking Protocol' (2015) 4 Anti-Trafficking Review 14, 14.

### 3.3.1.3 *The Impact of the Trafficking Protocol*

The impact of the Trafficking Protocol is bitter-sweet. On one hand, the Trafficking Protocol is credited for its influence on the anti-trafficking legislation wave in the SADC region.<sup>600</sup> It is not disputed that the respective domestic legislations have taken a leaf from the Trafficking Protocol and have, through the interpretive guidelines of UN instruments, developed what would otherwise be a comprehensive framework. On the other hand, while it has managed to provide some sort of guideline on what constitutes child trafficking,<sup>601</sup> its shortcomings have a detrimental effect on States that do not have the capacity to compliment the provisions of the Trafficking Protocol with effective domestic measures. Therefore, though much celebrated internationally, the Trafficking Protocol has also faced criticism for its weaknesses.<sup>602</sup> Perhaps, due to the reliance of the SADC legislative frameworks on the Trafficking Protocol, the frameworks are also encumbered by these weaknesses and systematic limitations as well as interpretation challenges.<sup>603</sup>

The broad definition of trafficking in persons in the Trafficking is the root of all the confusion surrounding what really constitutes child trafficking. The Trafficking Protocol was adopted against a background of the absence of a unified definition of trafficking in persons.<sup>604</sup> The result was an overreaching definition which gave rise to a series of serious problems. Dillion notes that the definition of trafficking in persons, as provided for in Article 3, has led to concept fatigue.<sup>605</sup> In trying to address all the possible angles of the crime, it has weakened and confused the understanding of child trafficking. Essentially, what is now being understood to be child trafficking is any act of illegal migration that involves other crimes.<sup>606</sup> A similar challenge is found in the description

<sup>600</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 22.

<sup>601</sup> Article 3 (c) of the Trafficking Protocol.

<sup>602</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 14-32.

<sup>603</sup> Anne T Gallagher and Rebecca Surtees, discuss the main challenges to effective evaluations of a criminal justice response in detail in Anne T Gallagher and Rebecca Surtees, 'Measuring the Success of Counter-Trafficking Interventions in the Criminal Justice Sector: Who Decides-and How?' (2012) 1 Anti-Trafficking Review 1, 10.

<sup>604</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 15.

<sup>605</sup> Sarah Dillion, 'What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children' (2008) 17 (1) UCLA Law Women 121, 163.

<sup>606</sup> Dumienski, Zbigniew, 'Critical Reflections on Anti-human Trafficking: The Case of Timor-Leste', (2011) 05/2, Singapore: RSIS Centre for Non-Traditional Security (NTS) Studies for NTS-Asia.

of child trafficking, as constituting the worst forms of child labour in the ILO Convention.<sup>607</sup> Such a description is too broad and entails some of the most inexcusable forms of economic exploitation of children.<sup>608</sup>

Apart from defining the crime of trafficking in persons, the Trafficking Protocol lays out the rights and obligations as well as the standard of behaviour for State Parties.<sup>609</sup> It may be noted that the Trafficking Protocol does not use an iron fist approach in creating obligations for State Parties. This aspect has over the years given rise to consistent criticism and is labelled as a weakness, particularly around victim assistance and protection. For instance, the primary obligation for State Parties in terms of articles 6 and 7 is to implement domestic policies that are in line with the international anti-trafficking principles.<sup>610</sup> The non-binding wording of article 6 is widely considered a spanner in the works in that it gives States room to slack. Although the permissive language in this provision may have been necessary to gain state cooperation to combat trafficking in persons beyond their borders, its non-binding language makes enforcement and implementation difficult since much of it is left to the respective States' discretion. The wording: 'shall consider' in article 6 (3) for example, indicates that there is no binding obligation but rather an encouragement. Such wording does not inspire confidence that the provisions will be implemented to the benefit of those who require assistance.<sup>611</sup>

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Be that as it may, efforts towards making the provision of protection and assistance mandatory were clamped down by concerns over the cost of such mandatory requirements on developing States. This, however, may invariably lead to 'a race to the bottom'. The absence of mandatory obligations provides States, particularly

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<sup>607</sup> Article 3 of the ILO Convention 182.

<sup>608</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 32.

<sup>609</sup> Megan C Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) Working Paper Series No. 71 Refugee Studies Centre 12.

<sup>610</sup> See article 6 (1)– (6) of the Trafficking Protocol.

<sup>611</sup> Gallagher argues that that the failure of the Trafficking Protocol to "clearly specify certain rights, such as the right to immediate protection and support and the right of access to an effective remedy, implied that such rights did not in fact exist. A similar inference could be made of the Protocol's failure to articulate certain critical obligations such as the obligation to proactively identify victims." See Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 19.

developing States, with a justification for taking the barest minimum measures. This is a hinderance to the object of combating child trafficking.<sup>612</sup>

Furthermore, even though the Trafficking Protocol outlines the services that are meant to assist and protect victims of trafficking, it does not contain provisions for reintegration or assistance after repatriation.<sup>613</sup> Thus, there is a gap in what happens post-repatriation.

The Trafficking Protocol is like an early warning system for States facing the threat of child trafficking. Its purpose is to enable threatened communities to prepare and act accordingly to reduce its impact. The Trafficking Protocol creates awareness of what child trafficking is and stipulates standards on how the possible risk of the crime may be alleviated and how those already affected may be assisted. However, despite having enough risk knowledge, States in the SADC region are unprepared to counter the ever-increasing problem of child trafficking. Seemingly, SADC States have focussed on criminalisation, yet much more still needs to be done to reduce the factors of child trafficking. The Trafficking Protocol has assisted in addressing only a fraction of the problems created by child trafficking. The remainder requires cooperation and implementation mechanisms that are tailor-made and feasible for the Southern Africa region, without which SADC States remain ill-equipped to adequately address the child trafficking phenomenon.

All these issues around interpretation and subsequent enforcement challenges discussed above, have the undesired effect of reducing prosecutions. To address this, perhaps individual State Parties should take steps to increase the effectiveness of their measures against child trafficking by highlighting their dissatisfaction with the current position of the Trafficking Protocol so that it can be improved, instead of merely signing the Protocol and thereafter struggle to implement it.

Highlighting any dissatisfaction with the Trafficking Protocol combined with a better understanding of child trafficking trends provides SADC States, which are State Parties, with an unprecedented opportunity for the renewal and growth of a legal

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<sup>612</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

<sup>613</sup> *ibid.*



system that protects children from exploitation.<sup>614</sup> The SADC Executive Secretariat in its statement in 2018 commemorating the World Day against Trafficking in Persons, stated that;

The SADC region recognises the need to develop and implement dedicated interventions to prevent and combat trafficking in persons, with a special focus on children, taking into account that “measures against trafficking in persons require thoughtful consideration of how to protect children’s rights.”<sup>615</sup>

Such interventions may be in the form of a localised child trafficking instrument which would provide a legal and institutional framework for deepening regional as well as international integration in the social, economic, and political aspects of the crime.<sup>616</sup> However, given that SADC has not yet developed a regional instrument on the matter, children are not adequately protected, and efforts are impaired by a lack of mutual understanding of the crime itself.

### **3.3.2 Other Instruments Regulating Child Trafficking**

The Convention on the Rights of the Child (CRC) is the primary instrument for the protection of children’s rights.<sup>617</sup> As such, it addresses matters concerning the rights and welfare of children. The CRC is pivotal in the fight against child trafficking because it reaffirms children’s rights and clearly articulates persons who are classified as children. In terms of article 1 of the CRC, ‘a child is every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier’.<sup>618</sup>

Although the CRC is not a child trafficking convention, it addresses all issues that affect children and, in some instances, these issues are what make children highly susceptible to child trafficking. In other words, the CRC is premised upon the principle

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<sup>614</sup> Anne T Gallagher, ‘Human Rights and Human Trafficking Quagmire or Firm Ground’ (2009) 149 Virginia Journal of International Law 1, 61.

<sup>615</sup> See Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons (30 July 2018) <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 3 June 2022.

<sup>616</sup> Nina Mollema ‘Combating Human Trafficking in South Africa: A Comparative Study’ (LLD Thesis, University of South Africa 2013) 75.

<sup>617</sup> Ursula Kilkelly and Ton Liefwaard, ‘Legal Implementation of the UNCRC: Lessons to be Learned from the Constitutional Experience of South Africa’ (2019) De Jure Law Journal 521, 521.

<sup>618</sup> Article 1 of the CRC.

of protecting and doing what is in the best interest of the child.<sup>619</sup> This means that in all decision-making and policy making, cognisance should be given to how the child would be affected.

Child trafficking is a crime that involves the separation of a child from his or her family.<sup>620</sup> In this regard, the CRC seeks to ensure that children are not separated from their parents against their will.<sup>621</sup> This provision is based on the notion that if such separation is permitted, children would be denied their right to a normal childhood with parental guidance.<sup>622</sup> Separation also includes instances of child trafficking. Article 11 of the CRC urges parties to take measures to combat the illicit transfer and non-return of children abroad. To this end, State Parties are urged to promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.<sup>623</sup>

Cultural practices that perpetuate child trafficking are also prohibited by the CRC.<sup>624</sup> Although the CRC contains religious and cultural rights for children, it must be noted that in line with the best interest of the child principle, such rights should not be without limitation.<sup>625</sup> States should ensure that children do not suffer due to adverse cultural practices. These include, but are not limited to, cultural practices that perpetuate child marriages, debt bondages or abusive practices like the South African culture of *ukuthwala*,<sup>626</sup> or the practice of *kuripa ngozi*,<sup>627</sup> in Zimbabwe as discussed in the previous chapter.<sup>628</sup>

<sup>619</sup> The same principle is found in the ten principles of the UN Declaration of Children's Rights 1959 available at <<https://archive.crin.org/en/library/legal-database/un-declaration-rights-child-1959.html>> accessed 8 July 2022.

<sup>620</sup> Article 3 (c) of the Trafficking Protocol.

<sup>621</sup> Article 9 of the CRC.

<sup>622</sup> *ibid* Article 5.

<sup>623</sup> Article 11 (1) and (2) of the CRC.

<sup>624</sup> Compare with Article 21 of ACRWC which considers this right in the African context. Gose makes a detailed comparison of the CRC and ACRWC in; Matthew Gose, 'The African Charter on the Rights and Welfare of the Child' (2002) Community Law Centre, University of the Western Cape 1, 51.

<sup>625</sup> Article 14 of the CRC.

<sup>626</sup> Department of Justice and Constitutional Development, 'Ukuthwala' <[www.justice.gov.za/brochure/ukhutwala.html](http://www.justice.gov.za/brochure/ukhutwala.html)> accessed 20 November 2021. Also see Lea Mwambene, Julia Sloth-Nielsen, 'Benign accommodation? Ukuthwala, forced marriage and the Children's Act 38 of 2005' (2011) 11 (1) African Human Rights Law Journal 1-22.

<sup>627</sup> Country Advice Zimbabwe – ZWE37447 –*kuripa ngozi* (virgin pledging) – Customary marriage – Women – State protection – Police – Bantus – Domestic violence – Sexual assault –HIV/AIDS – Legal provisions 16 September 2010 Australian Government Refugee Tribunal, <<https://www.refworld.org/pdfid/4d9998442.pdf>> accessed 6 May 2021.

<sup>628</sup> See text to n 183 and n 184 ch 2.

In recent years, online child pornography has been linked to the increase in child trafficking and child pornography.<sup>629</sup> It is common practice that due to the rise in demand in the sex industry, children are coerced to engage in unlawful sexual activities. However, it is unlawful under the CRC to use children for all forms of sexual exploitation and sexual abuse.<sup>630</sup> Therefore, there is a need for State Parties to, 'protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare'.<sup>631</sup>

In all the above endeavours by the CRC to protect children, the responsibility for taking measures to avoid child trafficking is placed clearly on the State. The Convention calls on State Parties to 'take all appropriate national, bilateral, and multilateral measures to prevent the abduction, sale, or traffic in children for any purpose or in any form'.<sup>632</sup> However, should a state fail to prosecute offenders, international bodies may intervene.

Invariably, the CRC does not apply in isolation as far as children's rights protection is concerned. The Convention is in line with the principles of care, as outlined in some of the pioneer instruments such as, *inter alia*, the Geneva Declaration of the Rights of the Child,<sup>633</sup> the ICESR and ICCPR.<sup>634</sup> Principle 9 of the Geneva Declaration of the Rights of the Child states that:

the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form. The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.<sup>635</sup>

In the same vein, article 10 (3) of ICESR states that:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children

<sup>629</sup> Devin Brewer, 'Globalisation and Human trafficking: The Collision of Worlds' (2009) Topical Research Digest: Human Rights and Human Trafficking 46, 47.

<sup>630</sup> Article 34 of the CRC. Also see Article 27 of ACRWC.

<sup>631</sup> Article 36 of the CRC.

<sup>632</sup> *ibid* Article 35.

<sup>633</sup> The Declaration is 'the first serious attempt to describe in a reasonably detailed manner' a catalogue of the rights of the child. See Jane Fortin, *Children's Rights and the Developing Law* (2<sup>nd</sup> edn, LexisNexis 2003) 35.

<sup>634</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>635</sup> Principle 9 of the Geneva Declaration of the Rights of the Child.

and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.<sup>636</sup>

Although these are not particularly anti-trafficking child trafficking instruments, they uphold the protection of children and the need to ensure that the lives and development of children are guaranteed without discrimination or favour. Moreover, these human rights instruments are against the exploitation of children for any purpose whatsoever.

Notably, since most factors of child trafficking affect children's rights, it is, therefore, feasible that there be a link between instruments that expressly prohibit child exploitation, such as the ILO Convention and the CRC, in trying to eradicate the exploitation of children.<sup>637</sup> For example, Article 32 (1) of the CRC urges State Parties to protect children from economic exploitation.<sup>638</sup> It, therefore, follows that the best way to eradicate the exploitation of children is to reduce factors that make them vulnerable.

The CRC is supplemented by the **Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC)** and is based on the principles of non-discrimination; best interest of the child; right to survival and development; and the right to express opinions freely in matters affecting him/her and have those views taken into consideration.<sup>639</sup> The OPSC provides an outline for ending sexual exploitation and abuse of children. This includes requirements for protecting children from being sold for sexual exploitation, especially pornography, forced labour, illegal adoption, and organ donation.<sup>640</sup>

The OPSC defines offences of sale of children child prostitution and child pornography and states that:

- (a) 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;

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<sup>636</sup> Article 10 (3) of ICESR.

<sup>637</sup> Jaap Doek, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 2006) 5.

<sup>638</sup> Article 32 (1) of the OPSC.

<sup>639</sup> See Articles 2; 3; 6 and 12 of the CRC.

<sup>640</sup> *ibid* Article 34 and 35.

- (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
- (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.<sup>641</sup>

The Committee on the Rights of the Child that deals with matters of compliance with the CRC and the OPSC were at pains to stress that although trafficking and sale of children are similar concepts, they are not identical, and national legislation must satisfy their obligations as provided by both the CRC and the OPSC.<sup>642</sup> Accordingly, article 35 of the CRC obliges State Parties to take measures to prevent both crimes. This means that it is also important for States to prohibit the sale of children not related to trafficking, and these acts include temporary marriages as well.

Furthermore, governments have an obligation in terms of the OPSC to criminalise and punish activities related to the sale of children and sexual exploitation. Such obligation also includes punishing perpetrators as well as those who procure children for the services prohibited under the Protocol.<sup>643</sup>

However, it is noteworthy that like other international instruments, the OPSC does not provide a definition for sexual exploitation. Nonetheless, in the context of the OPSC, the requirement is that there should be sale or compensation for sexual services for a practice to fall within the scope of the OPSC. This is despite the fact that practices such as sexual slavery and sexual relations with a minor without compensation, also generally fall within the description of sexual exploitation.<sup>644</sup> All these practices are prohibited by the CRC and are a violation of a child's rights.<sup>645</sup>

The Protocol also protects the rights and interests of child victims and urges governments to provide legal and other support services to child victims.<sup>646</sup> This obligation includes considering the best interest of the child during any interaction with

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<sup>641</sup> Article 2 of the OPSC.

<sup>642</sup> UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF 2009) 20.

<sup>643</sup> Article 3 of the OPSC.

<sup>644</sup> UNICEF, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF 2009) 10-11.

<sup>645</sup> Article 34 of the CRC.

<sup>646</sup> Preamble of the Optional Protocol on the Sale of Children Child Prostitution and Child Pornography (2000).

the criminal justice system.<sup>647</sup> Further, the Protocol provides that children must be supported with necessary medical, psychological, logistical, and financial support to aid their rehabilitation and reintegration.<sup>648</sup>

In essence, the full application of the CRC and the OPSC has the potential to eventually break the vicious cycle of child trafficking for sexual exploitation and victimisation of children. Furthermore, the objective of both instruments to prohibit the exploitation of children for sexual purposes is complemented by the prohibition of child labour in the ILO Convention. Together, these instruments have the potential to put an end to the prolonged violation of children's rights by exploitation.

The ILO's approach to trafficking distinguishes between forced labour victims and trafficking victims. The ILO has reported that 21 million people are victims of forced labour and trafficking accounts for 20% of all forced labour worldwide.<sup>649</sup> The ILO made that distinction by looking at whether there was any movement involved. It concluded that trafficking includes the movement of the victim by the perpetrator into a situation of forced labour. Furthermore, the report stated that merely maintaining a person in forced labour would be considered non-trafficked forced labour.<sup>650</sup> The 1930 ILO Forced Labour Convention defines forced labour as 'work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.<sup>651</sup>

However, because of mounting pressure from various stakeholders, the ILO has abandoned the demarcation between non-trafficked forced labour victims and victims of trafficking.<sup>652</sup> The Organisation has avoided all definitional interpretations and has

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<sup>647</sup> Preamble of the Optional Protocol on the Sale of Children Child Prostitution and Child Pornography (2000).

<sup>648</sup> Article 9 (3) of the Optional Protocol on the Sale of Children Child Prostitution and Child Pornography (2000).

<sup>649</sup> ILO, 'Statistics on forced labour, modern slavery and human trafficking' <<http://ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>> accessed 18 January 2021.

<sup>650</sup> International labour office, ILO Global Estimate of Forced Labour (2012) <[https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_181921/lang--en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_181921/lang--en/index.htm)> accessed 9 June 2021.

<sup>651</sup> The Convention Concerning Forced or Compulsory Labour, 1930 (No.29).

<sup>652</sup> International labour office, ILO Global Estimate of Forced Labour (2012) <[https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_181921/lang--en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_181921/lang--en/index.htm)> accessed 9 June 2021.



only stated that except for trafficking of organ removal, 'trafficking' is covered by the ILO Forced Labour Convention.<sup>653</sup>

The ILO, however, conceded that child trafficking constitutes the worst form of child labour, and most activities that the victims are exposed to are prohibited under the Convention. The phrase 'worst forms of child labour' comprises of elements of child exploitation which are also prohibited under the CRC and the OPSC. It is described as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) use, procuring or offering of a child for prostitution for the production of pornography or for pornographic performances;
- (c) use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties and;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.<sup>654</sup>

One of the driving forces behind the increase in child trafficking is the rise in demand for cheap goods, cheap labour and exploitation.<sup>655</sup> The purpose of child trafficking thus is to supply the need for exploitation for labour or sexual purposes.<sup>656</sup> However, it is important to note that historically, forced labour was not discussed in terms of demand and supply because free labour markets did not exist or simply did not work. Instead of being influenced by demand, forced labour was imposed by the command of colonial or totalitarian powers.<sup>657</sup>

To address the exploitative use of children, the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999, forbids the use of children for any form of labour exploitation.<sup>658</sup> Child

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<sup>653</sup> International Labour Organisation, *Profits and Poverty: The Economics of Forced Labour* 3–4 (2014) <[https://www.ilo.org/global/topics/forced-labour/publications/profits-of-forced-labour-2014/lang--en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/profits-of-forced-labour-2014/lang-en/index.htm)> accessed 9 June 2021.

<sup>654</sup> Article 3 of the Labour Convention.

<sup>655</sup> United Nations, 'Human Trafficking in Lesotho: Root Causes and Recommendations' UN Policy paper No.146 (E).

<sup>656</sup> Article 3 (a) of the Trafficking Protocol.

<sup>657</sup> Norbert Cyrus, 'The Concept of Demand in Relation to Trafficking in Human Beings. A Review of Databases Since The 19<sup>th</sup> Century' (2015) European Union's Seventh Framework Programme for Research, Technological Development and Demonstration 1, 45.

<sup>658</sup> ILO Convention No. 138 on the Minimum Age (for work) (1997).

labour may be described as work performed by children who are under the minimum age legally specified for that type of work, or work which, because of its detrimental nature or conditions, is considered unacceptable for children and is prohibited.<sup>659</sup>

Article 1 of the ILO Convention calls for Member States to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.<sup>660</sup> Having taken heed of this call, several States have adopted regional cooperation agreements or concluded multilateral or bilateral memoranda of understanding to reduce the flow of children being trafficked across borders and allow for an exchange of information to monitor the actions of traffickers.<sup>661</sup> For example, Member States of the Economic Community of West African States (ECOWAS) undertook a project to mobilise sub-regional policy-makers and improve sub-regional cooperation for the elimination of the worst forms of child labour.<sup>662</sup>

Lastly, the ILO, Worst Forms of Child Labour Convention C182 (1999) recognises the importance of basic education and the protection of children from abuse.<sup>663</sup> It provides for the need for social rehabilitation and integration of victims while addressing the needs of their families.<sup>664</sup> The protection of children and enjoyment of these rights should not be influenced by issues of race or colour. To aid with the implementation of measures, the ILO designed a system of Time-Bound Programmes (TBPs), as a tool for ILO Member States to translate into practice the ILO Worst Forms of Child Labour Convention (No.182) and Recommendation No.190.<sup>665</sup> In relation to forced labour, TBPs are generally a set of tightly integrated and coordinated policies and programmes to prevent and eliminate a State's worst forms of child labour within a defined time frame.<sup>666</sup>

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<sup>659</sup> ILO, What is child Labour <<https://www.ilo.org/ipec/facts/lang--en/index.htm>> accessed 25 August 2022.

<sup>660</sup> Article 1 of the ILO Convention.

<sup>661</sup> ILO, 'Tackling Child Labour from commitment to action; International Labour Organization, International Programme on the Elimination of Child Labour (IPEC)', (2012) (1) 14 Geneva ILO 1.

<sup>662</sup> ILO, 'Giving globalisation a human face, International Labour Conference' (2012) 101st Session 205.

<sup>663</sup> Article 7 of the Worst Forms of Child Labour Convention 1999 (No. 182).

<sup>664</sup> Preamble to the ILO Convention.

<sup>665</sup> Panudda Boonpada and June Kane; 'Unbearable to the Heart: Child Trafficking and Action to Eliminate it' (2002) ILO, IPEC 36.

<sup>666</sup> Afrooz Kaviani Johnson and Julia Sloth-Nielsen, 'Safeguarding Children in the Developing World—Beyond Intra-Organisational Policy and Self-Regulation' (2020) 9 (98) Soc. Sci 1, 9-10.

The International Convention on the Elimination of all Forms of Racial Discrimination of 1966 (ICERD) condemns racial discrimination, and State Parties undertake to pursue, by all appropriate means and without delay, a policy of eliminating racial discrimination in all its forms.<sup>667</sup> To this end, the ICERD is significant in the fight against child trafficking because it helps to ensure that trafficking victims, among other groups of vulnerable persons, get the protection and support they require without being discriminated against.

Non-discrimination is crucial in victim protection and assistance because child trafficking is a transnational crime that affects all races.<sup>668</sup> Of importance is article 5 of ICERD which unequivocally prohibits the discrimination in the enjoyment of fundamental civil and economic rights, as stipulated in the Convention.<sup>669</sup> It is, therefore, important that there be access to justice and health care for all victims where needed, without any insinuations of a seemingly peculiar and more superior race. To some extent, this also solves all the actual and implied racial injustices of the past trafficking conventions and measures.<sup>670</sup> For example, there were insinuations and implications of the 'white slave traffic' instruments that appeared to favour white women and girls.<sup>671</sup> Incidentally, State Parties to the ICERD undertake to:

Prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin; to equality before the law.<sup>672</sup>

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<sup>667</sup> Article 2 of the International Convention on the Elimination of all Forms of Racist Discrimination 1966 (ICERD).

<sup>668</sup> Sanja Milivojevic and Marie Segrave, 'Evaluating Responses to Human Trafficking: A Review of International, Regional, and National Counter-Trafficking Mechanisms' in John Winterdyk, Benjamin Perrin and Philip Reichel (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (Routledge 2012) 233-263.

<sup>669</sup> See Article 5 (d) of ICERD.

<sup>670</sup> International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol by the General Assembly of the United Nations on 3 December 1948; International Convention of 4 May 1910 for the Suppression of the White Slave Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947; International Convention of 11 October 1933 for the Suppression of the Traffic in women of Full Age, etcetera.

<sup>671</sup> See text to n 35 ch 3.

<sup>672</sup> Article 5 of the International Convention on the Elimination of all Forms of Racist Discrimination (1966).

In the same vein, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)<sup>673</sup> seeks to ensure non-discrimination based on gender. Generally, women and children are identified as vulnerable and issues that affect them are combined. It is on this basis that the provisions of CEDAW are crucial in addressing child trafficking.<sup>674</sup>

Among other factors that have been discussed in the previous chapter, armed conflict, human rights violations, and oppressive cultural practices intensify discrimination and inequality for women and girls which increases their risk of trafficking.<sup>675</sup> These factors limit the full enjoyment of rights for victims. Thus, there is a need for international responses that address these factors and protect the vulnerable members of the community. Against this backdrop, CEDAW became the 'women's Bill of Rights'.<sup>676</sup> The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations.<sup>677</sup> It acknowledges that despite various instruments, extensive discrimination against women continues to exist.<sup>678</sup>

Invariably, the overall theme of the Convention is the non-discrimination of women and brings sexual exploitation into the trafficking legal framework, thus tasking States with the responsibility of punishing those exploiting women.<sup>679</sup> In this regard, article 1 sums up the entire Convention on the prohibition of discrimination as not only based on sex, but any practices that result in disproportionately hindering the enjoyment of rights by women.<sup>680</sup>

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<sup>673</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>674</sup> *ibid.*

<sup>675</sup> Thomas W Bennet, *Human Rights and African Customary Law* (Juta and Co Ltd 1999) 80.

<sup>676</sup> Article 2 of the Convention Against All Forms of Discrimination Against Women (1979). Also see Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleithner (eds), *Human Rights of Women: International Instruments and African Experiences* (Zed Books Ltd 2002) 12. See also UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>677</sup> See Preamble; Article 2 and Article 5.

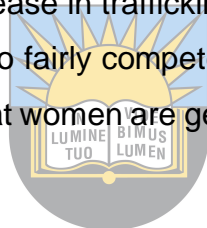
<sup>678</sup> *ibid.*

<sup>679</sup> Benjamin Maiangwa and Ndubuisi Ani, 'Victimized and Forgotten: Examining the Nature and Human Rights Implication of Nigeria's Sex-Trafficking Ring' (2014) 24 JENdA: A Journal of Culture and African Women Studies 1530, 1535.

<sup>680</sup> Article 1 of UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

Andrew Brynes argues that the focus is, 'not just on the formal, *de jure* enjoyment by women of equality, but on the *de facto* situation, the extent to which women enjoy those rights'.<sup>681</sup> To change this perception of women, there is a need to reverse the traditional role of men.<sup>682</sup> In that case, culture becomes a factor which limits the complete enjoyment of those rights. Cultural practices that are oppressive to women and children contribute largely to child trafficking.<sup>683</sup> Such practices make children vulnerable and targets for perpetrators of trafficking.<sup>684</sup> The Convention, therefore, urges State Parties to take appropriate measures to ensure that women are not, in any way, prejudiced by cultural patterns based on the idea of the inferiority of women.<sup>685</sup>

Furthermore, unequal employment opportunities for women increase the risk of trafficking for women and children.<sup>686</sup> According to the ILO, approximately half of the total population of current international migrant workers is made up of women.<sup>687</sup> This invariably means that there is a subsequent increase in unmonitored minors who fall victim to child trafficking or an increase in trafficking in persons in general, particularly targeting women who are eligible to fairly compete for employment. This presumption is greatly premised on the belief that women are generally the primary caregivers when it comes to children.



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<sup>681</sup> Andrew Brynes, *Human Rights of Women: International Instruments and African Experiences* Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleithner (eds), (Zed Books Ltd 2002) 124.

<sup>682</sup> Henry J Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics and Morals* (2<sup>nd</sup> edn, Oxford University Press 2000) 179.

<sup>683</sup> Phyllis Kachere, 'Religion and Poverty Force Girls into Early Marriages' Inter Press Service News Agency IPN (2009), <http://ipsnews.net/africa/nota.asp?idnews=46447> accessed 6 May 2021. See also Country Advice Zimbabwe – ZWE37447 –kuripa ngozi (virgin pledging) – Customary marriage – Women – State protection – Police – Bantus – Domestic violence – Sexual assault –HIV/AIDS – Legal provisions 16 September 2010 Australian Government Refugee Tribunal, <<https://www.refworld.org/pdfid/4d9998442.pdf>> accessed 6 May 2021.

<sup>684</sup> Women and children are commonly combined in the trafficking in persons circles. This is because both are generally considered to be weak. In an African context, this is a result of patriarchal systems which view women as intellectually weak and immature just like children. In these societies, women and children lack sound judgement. See Thomas W Bennet, *Human Rights and African Customary Law* (Juta and Co Ltd 1999) 80.

<sup>685</sup> Article 5 (a) of UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>686</sup> For example, the accused in the case of *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* had offered the victim, a job as their domestic worker in Lesotho for a much better wage than she was earning at the time. Once, in Lesotho, she was subjected to working conditions that were slave-like and due to the language barrier, the victim could not seek for assistance anywhere else.

<sup>687</sup> International Labour Office of the Director-General, (18 December 2008) <https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2008/migrants.pdf> accessed 14 February 2021.

Furthermore, having noted that women are the most vulnerable to human trafficking, article 6 of the Convention encourages State Parties to ‘take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women’. Together with the CRC, CEDAW is the only other mainstream international human rights convention with specific reference to trafficking-related exploitation.<sup>688</sup> It is because of this provision that CEDAW is considered to be one of the pillars of the human rights approach to child trafficking.<sup>689</sup> Although the Convention does not explicitly refer to violence against women or children, it seeks to restore the liberty, dignity as well as any other human rights that are violated consequent to human trafficking and gender-based violence.<sup>690</sup>

However, one criticism against CEDAW is its emphasis on non-discrimination and equality for women and children as a vulnerable group. It is argued that CEDAW guarantees to women, ‘those things which men are entitled under existing androcentric human rights’.<sup>691</sup> Furthermore, the issue of cultural disparities sparks debates around issues of cultural realism and cultural relativism.<sup>692</sup> This contentious side of the Convention shall be discussed in the next chapter from an African continent perspective.

Overall, CEDAW does not apply in isolation; it is applied together with instruments such as the Convention on the Protection of the Rights of all Migrant Workers and their families of 1990 (CRMW). The nexus between the two Conventions is the ‘migrant criminality’ view of trafficking in persons as well as the use of women for prostitution.<sup>693</sup>

<sup>688</sup> Article 35 of the CRC.

<sup>689</sup> Sangeetha Manavalan, ‘The Global Problem of Sex Trafficking in Women: A Comparative Legal Analysis of International, European and National Responses’ (Dphil Thesis, Queen Mary University of London 2017) 44.

<sup>690</sup> Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleither (eds), *Human Rights of Women: International Instruments and African Experiences* (Zed Books Ltd 2002) 13.

<sup>691</sup> Andrew Brynes, *Human Rights of Women: International Instruments and African Experiences* Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleither (eds), (Zed Books Ltd 2002) 125.

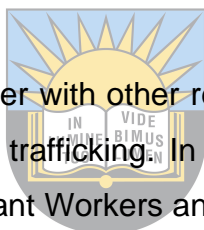
<sup>692</sup> Cultural relativism refers to the idea that the values, knowledge, and behaviour of people must be understood within their own cultural context. Nicki Lisa Cole, ‘What is Cultural Relativism?’ <<https://www.thoughtco.com/cultural-relativism-definition-3026122/>> accessed 12 July 2021. Realism is the idea that what is true and real exists independently of the mind. This distinction between realism and relativism is informed by the work of Immanuel Kant. See Immanuel Kant, ‘Critique of Pure Reason. Cultural Relativism’ (1788) <<https://www.ebscohost.com/uploads/imported/thisTopic-dbTopic-1247.pdf>> accessed 12 July 2021.

<sup>693</sup> Bridget Anderson, ‘Where is the Harm in That? Immigration Enforcement, Trafficking and Protection of Migrants Rights’ (2012) 56 (9) SAGE 1241, 1242.



The UN Secretary-General Antonio Guterres acknowledged that migrants make up more than 50% of trafficked persons in the world.<sup>694</sup> As a result of such high numbers and to address the migrant-trafficking crisis, the CRMW draws on principles and standards included in the UDHR<sup>695</sup> and subsequently adopted human rights conventions and treaties, including labour law conventions.<sup>696</sup> It sets minimum standards for migrant workers and members of their families, with a focus on eliminating the exploitation of workers in the migration process.<sup>697</sup>

However, in recent years, women migrant workers have dominated several job sectors. Due to the invisible and unregulated nature of these jobs, women and children are at an increased risk of human trafficking and violence. According to the Committee on the Elimination of All Forms of Violence against Women, General Recommendation No. 26, 5 December 2008, ‘women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate’.<sup>698</sup>



For this reason, the CRMW together with other relevant conventions urges States to device measures to combat child trafficking. In this regard, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is appointed to oversee States Parties' implementation of these measures. It requires States to report within one year of ratification, and thereafter every 5 years.

<sup>694</sup> Antonio Guterres, 'Statement made on World Day Against Trafficking in Persons' (30 July 2021) <<https://www.unodc.org/unodc/en/endht/sgs-message-on-world-day-against-trafficking-in-persons.html>> accessed 12 July 2022.

<sup>695</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>696</sup> These include the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, CEDAW, CRC, the International Convention on the Elimination of All Forms of Racial Discrimination, the Vienna Convention on Consular Relations, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the UNCTOC and the protocols thereto..

<sup>697</sup> Joshua Cooper, 'Convention on the Protection of the Rights of all Migrant Workers and their Families' (June 2017 Cultural Survival Quarterly) <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/convention-protection-rights-all-migrant-workers-and-their>> accessed 11 July 2022.

<sup>698</sup> See para 1 of the Guidelines for the Periodic Reports to be submitted by States Parties under Article 73 of the Convention, para 5 (j) and (k) available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/421/36/PDF/G0842136.pdf?OpenElement>> accessed 11 July 2022.

According to the CMW General Reporting Guidelines, Parties are supposed to give an update for each reporting period. State Parties should also provide an update on:

- j. Legislation and practice providing for mechanisms to monitor the situation of migrant women, including those employed as domestic workers, and safeguards and guarantees to protect them from exploitation and violence;
- k. Procedures assisting victims of trafficking, especially women and children.<sup>699</sup>

Victim assistance is particularly important in child trafficking because despite being exposed to gruesome experiences during the trafficking process and subsequent involvement in criminal activities, they are children who are well deserving of care and protection.

Apart from migrant workers, there is also a link between child trafficking and refugees in that the refugee movement has also been identified as a breeding ground for trafficking in persons.<sup>700</sup> As Guterres accurately described the problem, '[T]he more people who are displaced and the more refugees who migrate across borders, the greater the pool of potential victims of human trafficking'.<sup>701</sup> An example of this situation is the Malawi Refugee Camp in Dzaleka which has more than 48 000 refugees fleeing genocide, violence and wars in Burundi, Rwanda and the Democratic Republic of Congo. Traffickers are reported to be operating within the camp and luring children into trafficking.<sup>702</sup> Such criminality is prevalent despite the existence of legislation such as the UN Refugee Convention of 1951.<sup>703</sup>

<sup>699</sup> Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, Guidelines for the Periodic Reports to be submitted by States Parties under Article 73 of the Convention, para 5 (j) and (k) available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/421/36/PDF/G0842136.pdf?OpenElement>> accessed 11 July 2022.

<sup>700</sup> Sara McGeough, 'Ukraine Crisis: The Connection Between Human Trafficking and Refugees' (*The Exodus Road*, 9 March 2022) <https://theexodusroad.com/human-trafficking-and-refugees/> accessed 12 July 2022.

<sup>701</sup> Antonio Guterres, 'Statement made on World Day Against Trafficking in Persons', (30 July 2021) <<https://www.unodc.org/unodc/en/endht/sgs-message-on-world-day-against-trafficking-in-persons.html>> accessed 12 July 2022.

<sup>702</sup> UNODC, 'UNODC & Malawi Launch New Measures to Combat Human Trafficking Among Refugees' (2021) <<https://www.unodc.org/unodc/en/frontpage/2021/April/unodc-and-malawi-launch-new-measures-to-combat-human-trafficking-among-refugees.html>> accessed 4 June 2021.

<sup>703</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 <<https://www.refworld.org/docid/3be01b964.html>> accessed 11 July 2022.

Even though the UN Refugee Convention of 1951 is not a child trafficking instrument, it seeks to protect people residing in foreign States and who cannot or will not return to their States of origin because of genuine fear of persecution. The Convention plays a significant role in the protection of trafficking victims in that, persons who have been trafficked across an international border, in transit or at destination, may need international protection as refugees.<sup>704</sup>

However, the Guidelines on International Protection: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, still does not clearly outline how the problem of child trafficking among refugee seekers may be addressed. The Guidelines simply note that children, as well as women, are the most vulnerable to trafficking. In line with that observation, the Guidelines make a blanket recommendation that cases of child trafficking should be carefully examined and handled with special consideration of the best interest of the child.<sup>705</sup>

While not all victims of trafficking are refugees, some victims of trafficking qualify for refugee status depending on their circumstances. UNHCR's Guideline on International Protection Number 7 sets the instances where the 1951 Convention refugee definition applies to victims of trafficking and persons at risk of being trafficked. Invariably, the protection granted to victims of child trafficking as refugees is in line with the function and mandate of the UNCTOC and its supplementary Protocols. These instruments:

[S]eek to define criminal activities and guide States as to how best to combat them. In doing so, they nevertheless provide helpful guidance on some aspects of victim protection and therefore constitute a useful starting point for any analysis of international protection needs arising as a result of trafficking.<sup>706</sup>

Despite the protection offered to child trafficking victims by the Convention, one of the challenges that the victims face is that they often have no access to asylum-seeking

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<sup>704</sup> See Article 1A (2) of the UN Refugee Convention of 1951.

<sup>705</sup> UNHCR Guidelines on Formal Determination of the Best Interests of the Child, provisional release April 2006; UN Children's Fund (UNICEF).

<sup>706</sup> UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 7: The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked' (7 April 2006) HCR/GIP/06/07, <<https://www.refworld.org/docid/443679fa4.html>> accessed 28 January 2022.

systems.<sup>707</sup> This adds to the fear that many victims of trafficking have of stigmatisation, deportation by the authorities or retaliation by their traffickers should they report that they have been or are being trafficked.<sup>708</sup>

However, efforts to combat child trafficking should not affect an individual's right to access asylum.<sup>709</sup> Neither should a person's race affect their right to protection. Although the Refugee Convention is not purely a trafficking Convention, some of its provisions when applied together with the provisions of the Trafficking Protocol and the Guiding Principles on Internal Displacement, may effectively safeguard the interests of child trafficking victims. The latter outlines in detail the kind of measures that are required to protect and assist IDPs especially those displaced by traffickers.<sup>710</sup>

The Guiding Principles also make suggestions for long-term solutions such as repatriation or alternatively integration.<sup>711</sup> In this regard, the Principles urge States to protect IDPs from trafficking, gender-based violence, forced prostitution, slavery (including forced marriage, sexual exploitation, and forced labour of children) and recruitment of displaced children to take part in hostilities.<sup>712</sup>

Consequently, the African Union adopted a Convention for the Protection and Assistance of IDPs in Africa in 2009 which also advocates for assistance and protection during displacement.<sup>713</sup> Together, the Refugee Convention, the Trafficking Protocol and the Convention for Protection and Assistance of IDPs make a good normative framework for protecting trafficked persons, but these instruments still lack strong legal enforcement mechanisms.

In summary, beyond the Trafficking Protocol, there are other instruments and mechanisms rooted in human rights, labour, and movement of persons, which seek to

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<sup>707</sup> The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'Trafficking in Persons and Refugee Status' Brief issue number 3 15.

<sup>708</sup> *ibid.*

<sup>709</sup> See Article 14 (1) of the Trafficking Protocol.

<sup>710</sup> OCHA, Guiding Principles on Internal Displacement <<https://www.unhcr.org/43ce1cff2.pdf>> accessed 11 July 2022.

<sup>711</sup> OCHA, Guiding Principles on Internal Displacement <<https://www.unhcr.org/43ce1cff2.pdf>> accessed 11 July 2022.

<sup>712</sup> Susan Martin and Amber Callaway, 'Human Trafficking and Smuggling' (2011) Global Migration Governance 1, 13.

<sup>713</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* ("Kampala Convention"), 23 October 2009, available at: <<https://www.refworld.org/docid/4ae572d82.html>> accessed 11 July 2022.

regulate the issue of child trafficking directly or indirectly. Although these other instruments are not tailor-made to deal primarily with child trafficking, they add to the body of law and provide other avenues through which child trafficking can either be curtailed or combatted. This is because child trafficking is related to various other spheres of human life and is caused and affected by other socio-economic factors.

### 3.4 Summary

In a nutshell, the international regulatory framework for child trafficking has significantly evolved over the years, albeit, with no distinction between the general trafficking in persons and child trafficking. Hence, most of the international instruments only refer to the overall crime of trafficking in persons. This is oblivious to the fact that child trafficking on its own requires specific measures to address the factors and impact of the crime on the victims.

Currently, the main instrument in the regulation of child trafficking is the Trafficking Protocol.<sup>714</sup> The Trafficking Protocol follows a century of various attempts to address trafficking mainly influenced by the historical circumstances of the time. Importantly, the Trafficking Protocol is a milestone to the extent that it deals with various issues lingering from the previous instruments that were adopted before it. Moreover, it addresses child trafficking from a modern-day perspective. However, the Trafficking Protocol has not managed to create adequate enforcement and monitoring mechanisms to ensure implementation among other challenges.

Other instruments in this area which seek to either directly or indirectly address issues related to child trafficking have also been pointed out. Despite their complimentary effect, they are not fully equipped to address the lingering challenges concerning child trafficking. Therefore, it has been illustrated that there remains a strong need to come up with more effective and adequate mechanisms to combat child trafficking. This is supported by the increase in bilateral and multilateral instruments against child

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<sup>714</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 18.

trafficking despite the presence of the Trafficking Protocol and other instruments discussed above.<sup>715</sup>

Therefore, Chapter 4 discusses how the international policy and legislative framework have influenced and stimulated regional and sub-regional measures against child trafficking. This is done by discussing key regional instruments such as the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC),<sup>716</sup> the African Charter on Human and Peoples' Rights of 1981 (The Banjul Charter),<sup>717</sup> and the Protocol to the African Charter on the Rights of Women in Africa 2003, as instruments that play a significant role in regulating practices that perpetuate child trafficking in Africa.<sup>718</sup>



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<sup>715</sup> United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (2<sup>nd</sup> edn, UNODC 2008).

<sup>716</sup> The Charter has been signed by 44 and ratified by 49 African States <<https://treaties.au.int/>> accessed 13 August 2022.

<sup>717</sup> The Charter has been signed by 45 and ratified by 54 African States <<https://treaties.au.int/>> accessed 13 August 2022.

<sup>718</sup> The Charter has been signed by 49 and ratified by 42 African States <<https://treaties.au.int/>> accessed 13 August 2022.



## CHAPTER 4

# SUB-REGIONAL AND NATIONAL FRAMEWORKS FOR COMBATING CHILD TRAFFICKING

### 4.1 Introduction

The harmonisation of anti-trafficking legislation is a prerequisite for effectively dealing with child trafficking in a regional context.<sup>1</sup> It is also important that such legislation be synchronised with the international regulatory framework against trafficking in persons.<sup>2</sup> The previous chapter has shown how the international regulatory framework has set the tone for the regulation of child trafficking (“the crime”) globally.<sup>3</sup> It is clear that, though at a trickling pace, there is an increase in national efforts to counter child trafficking in Africa. These efforts are anchored on an international regulatory framework,<sup>4</sup> albeit, with no modification to suit regional circumstances. Nevertheless, an effective approach to combating child trafficking requires both global and subregional harmony.<sup>5</sup>



To fill the lacuna left by the international framework and the absence of a regional instrument on child trafficking, key instruments such as the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC),<sup>6</sup> the African Charter on Human and Peoples’ Rights of 1981 (The Banjul Charter),<sup>7</sup> and the Protocol to the African Charter

<sup>1</sup> Sangeetha Manavalan, ‘The Global Problem of Sex Trafficking in Women: A Comparative Analysis of International, European and National Responses’ (DPhil Thesis, Queen Mary University of London 2017) 12.

<sup>2</sup> See Chapter 3, Subsection 3.3 The Current International Framework Combating Child Trafficking

<sup>3</sup> United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons* (2<sup>nd</sup> edn, UNODC 2008).

<sup>4</sup> Gallagher argues that the pace of development of the trafficking in persons framework since 2000 would have been very different without the impetus and foundation provided by the Trafficking Protocol. See Anne T Gallagher, ‘Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)’ (2015) 4 Anti-Trafficking Review 14, 18.

<sup>5</sup> Sangeetha Manavalan, ‘The Global Problem of Sex Trafficking in Women: A Comparative Analysis of International, European and National Responses’ (DPhil Thesis, Queen Mary University of London 2017) 12.

<sup>6</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>7</sup> 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).

on the Rights of Women in Africa of 2003,<sup>8</sup> are very crucial and contribute significantly towards regulating practices that perpetuate child trafficking in Africa.<sup>9</sup> In the absence of child trafficking-specific instruments, the role of these and other sub-regional instruments cannot be ignored.<sup>10</sup>

For the purposes of trafficking in persons, UNODC has 10 sub-regions namely Western and Southern Europe; North America; North Africa; the Middle East Central and South-Eastern Europe; Sub-Saharan Africa; East Asia and the Pacific South America Eastern Europe and Central Asia Central America and South Asia. Although there are various sub-regional efforts to combat child trafficking, this research focusses on Africa, specifically the SADC region. Thus, this chapter only focusses on the SADC policy and legislative framework.<sup>11</sup> Reference is made to other sub-regions as supporting legislative and policy frameworks from which SADC draws lessons and inspiration. Lastly, the chapter also highlights national efforts to combat child trafficking by SADC States.



## 4.2 SADC Legal and Policy Framework

The SADC Secretariat, in 2014, commissioned research on trafficking in persons which noted the need to strengthen legislation and policy measures against the crime. As a result, SADC has been developing a regional protocol that specifically deals with the issues of human trafficking as well as Guidelines on Monitoring and Reporting on trafficking in persons.<sup>12</sup> Accordingly, the SADC Summit recently adopted and signed the Protocol against Trafficking in Persons. This was after a protracted process which was exacerbated by the Covid-19 Pandemic.<sup>13</sup>

<sup>8</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

<sup>9</sup> Text to n 302, 303 and 304 ch 3.

<sup>10</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 22.

<sup>11</sup> Karen E Bravo, 'The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse' (2011) 9 (2) 3 Seattle Journal for social Justice 555, 574.

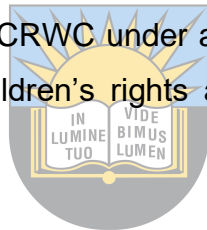
<sup>12</sup> The call to develop the TIP protocol was made by the SADC Ministerial Committee of the Organ on Politics, Defence and Security Cooperation during its meeting held in July 2017 in Dar es Salaam, Tanzania.

<sup>13</sup> Nyarai Kampilipili, 'SADC developing protocol on trafficking in persons' SANF 20 no 29 (14 August 2020) <<https://www.sardc.net/en/southern-african-news-features/sadc-developing-protocol-on-trafficking-in-persons/>> accessed 6 August 2022.

Before this, the ACRWC<sup>14</sup> has been holding the front in the fight against child trafficking in the regions since it pays attention to peculiar circumstances of African children that make them vulnerable and inevitably more susceptible to child trafficking.<sup>15</sup> However, just like the CRC, it neither defines nor describes what constitutes child trafficking.<sup>16</sup>

Article 1(3) of ACRWC discourages any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained therein. Accordingly, the ACRWC prohibits discrimination,<sup>17</sup> promotes the best interest of the child,<sup>18</sup> and upholds children's rights such as the right to a name and nationality,<sup>19</sup> education and freedom of association among other rights.<sup>20</sup>

It is important to note that, the main purpose of child trafficking is exploitation, be it for labour or sexual exploitation.<sup>21</sup> Although exploitation is not gender specific, boys are more likely to be used for labour and to assist during armed conflict whereas girls are prone to sexual exploitation and child marriages.<sup>22</sup> All these forms of exploitation are prohibited by the Charter.<sup>23</sup> The ACRWC under article 21 prohibits harmful practices common in Africa that violate children's rights as guaranteed by the CRC.<sup>24</sup> This



<sup>14</sup> Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>15</sup> Para 3 of the Preamble of the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>16</sup> Dakshan Kassan, 'Trafficking in children' In CJ Davel and Ann Skelton (eds.) *A Commentary on the Children's Act 38 of 2005* (Juta and Co Ltd 2007) 35.

<sup>17</sup> Article 3 of the African Charter on the Rights and Welfare of the Child, (1990).

<sup>18</sup> There is a slight difference in the formulation of the best interest of the child principle in Article 4 (1) of ACRWC and Article 3 (1) of CRC in that in the Charter, the best interest of the child shall be 'the primary consideration', while in the Convention it is 'a primary consideration'. This suggests that in terms of the Convention, other consideration may be taken into account. See Matthew Gose, 'The African Charter on the Rights and Welfare of the Child' (2002) Community Law Centre, University of the Western Cape 1, 25-26.

<sup>19</sup> See Article 6 of Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>20</sup> Article 11 of the ACRWC.

<sup>21</sup> United Nations, 'Human Trafficking in Lesotho: Root Causes and Recommendations' UN Policy paper No.146 (E) 32.

<sup>22</sup> UNODC, 'Global Report on Trafficking in Persons' (United Nations 2016) 21.

<sup>23</sup> Article 15 (1) Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. (2) State Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children.

<sup>24</sup> The CRC is based on four core principles namely, non-discrimination; the best interest of the child; the right to life, survival and development; and respect for the views of the child.

includes practices such as child marriages and the betrothal of girls and boys.<sup>25</sup> However, child marriages are still very common, with cases of trafficking victims being married off to the highest bidders.<sup>26</sup> This is not to suggest that all cases of child marriages or child soldiers are a result of child trafficking.<sup>27</sup> However, despite the ratification of various instruments and solemn commitments by SADC States to eliminate harmful practices, women and children continue to be victims.<sup>28</sup> These practices are, in fact, being perpetuated by child trafficking.<sup>29</sup>

Therefore, the ACRWC, in line with the CRC, prohibits the trafficking of children.<sup>30</sup> Article 29 of the Charter explicitly states that:

State Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; (b) the use of children in all forms of begging.<sup>31</sup>

The use of children for begging is very common in Africa.<sup>32</sup> In Uganda, it is estimated that more than 15 000 children between the ages of 7 and 17 live and work on the



<sup>25</sup> See article 21(2) of the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>26</sup> Ajwang' Warria, 'Forced child marriages as a form of child trafficking', (2017) 79 Children and Youth Services Review 274, 274. UNICEF has linked child marriages and trafficking in the sense that child marriages are premised on the exchange of money for a girl thus facilitating the trade in women as cheap labour.

<sup>27</sup> However, that is not to say that children are not actually being recruited to be child soldiers or that the practice has been successfully combatted. See Anne-Lynn Dudenhoefer, 'Understanding the Recruitment of Child Soldiers in Africa' (2016) African Centre for the Constructive Resolution of Disputes (ACCORD) <https://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/> accessed 1 January 2020. Therefore, the ACRWC urges State Parties to take all necessary measures to ensure that no child takes direct part in hostilities and refrain, from recruiting children. See article 22 (2) of the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>28</sup> Preamble to the 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).

<sup>29</sup> Anne-Lynn Dudenhoefer, 'Understanding the Recruitment of Child Soldiers in Africa' (2016) African Centre for the Constructive Resolution of Disputes (ACCORD) <https://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/> accessed 1 January 2020.

<sup>30</sup> Article 35 of CRC and Article 29 of Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). See Dejo Olowu, 'Protecting children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', (2012) The International Journal of Children's Rights Kluwer Law International 127, 130. For a detailed discussion and comparison of the CRC and ACRWC on the issue of child trafficking see Matthew Gose, 'The African Charter on the Rights and Welfare of the Child' (2002) Community Law Centre, University of the Western Cape 1, 65-66.

<sup>31</sup> Article 29 (a) and (b) of the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

<sup>32</sup> Ebenezer Owusiu-Sekyere, Enock Jengre, Aliasu Alhassan, 'Begging in the City: Complexities, Degree of Organisation and the embedded Risks' (2018) Child Development Research 1, 2.

streets of Kampala, Jinja, Mbale and Iganga.<sup>33</sup> Furthermore, in recent years, it has been established that traffickers have been using children for begging or for forced criminality.<sup>34</sup> Article 29, therefore, promotes the need to alleviate the risk and chance of trafficking for children.

Be that as it may, among the factors discussed in Chapter 2 as significantly contributing to child trafficking, family disintegration because of divorce has been increasing the risk of children to trafficking.<sup>35</sup> For instance, in South Africa, it has been noted that the divorce rate is higher for couples with children under the age of 18.<sup>36</sup> This is not to suggest that all children from separated families end up being victims of child trafficking, but there is a link between divorces and the separation of children from their parents to the popularity of illegal adoptions<sup>37</sup> and trafficking.<sup>38</sup> This is why State Parties to the ACRWC are required to ensure that instances of child removal and movement do not result in trafficking. These instances include inter-State adoptions and placements.<sup>39</sup>



<sup>33</sup> Terre Des Hommes, Child Trafficking in Uganda: From Promises to Begging' <https://www.terredeshommes.nl/en/child-trafficking-uganda-promises-begging> accessed 7 July 2019.

<sup>34</sup> Laura CN Wood, 'Child Modern Slavery, Trafficking and Health: A Practical Review of Factors Contributing to Children's Vulnerability and the Potential Impacts of Severe Exploitation on Health' (2020) 4 BMJ Paediatrics Open 1, 2.

<sup>35</sup> See Chapter 2, 2.2.6 Family disintegration.

<sup>36</sup> This is despite the reported decrease in the divorce rate by Stats SA. In the 2021 report, they were 23,710 divorces in 2019 which was significantly lower than the 25 390 recorded in 2018. See StatsSA, Statistical Release P0307 Marriages and Divorces 2018, 20 <http://www.statssa.gov.za/publications/P0307/P03072018.pdf> accessed 3 June 2022.

<sup>37</sup> In 2017, the Special Rapporteur on the sale and sexual exploitation of children Maud de Boer-Buquichio noted that illegal adoptions are a result of crimes such as abduction and sale of and trafficking in children. Such adoptions violate multiple children's rights, norms and principles, including the best interests of the child, and must be criminalised. See Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, 'Forms of exploitation not specifically mentioned in the Protocol', UN Doc. CTOC/COP/WG.4/2013/4, 2013. See also OHCHR 'Tackling Illegal Adoptions and Addressing the Rights of Victims' <<https://www.ohchr.org/EN/Issues/Children/Pages/Illegaladoptions.aspx>> accessed 24 February 2020.

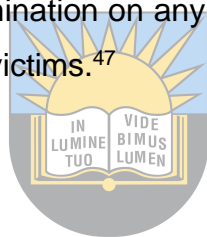
<sup>38</sup> Illegal adoptions fit into the scope of child trafficking consequent to the lack definition for exploitation in the context of trafficking in the Trafficking Protocol. See Conference of the Parties to the UNTOC, Working Group on Trafficking in Persons, 'Forms of exploitation not specifically mentioned in the Protocol', UN Doc. CTOC/COP/WG.4/2013/4, 2013. See also OHCHR 'Tackling Illegal Adoptions and Addressing the Rights of Victims' <<https://www.ohchr.org/EN/Issues/Children/Pages/Illegaladoptions.aspx>> accessed 24 February 2020.

<sup>39</sup> Article 24 (d) of the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).



In accordance with the provisions of article 1 of the ACRWC, Member States have been adopting non-trafficking but human rights instruments that significantly contribute to the fight against child trafficking.<sup>40</sup> This is in addition to the already existing instruments such as the African Charter on Human and Peoples' Rights (1981) (The Banjul Charter) which SADC States have adopted.<sup>41</sup>

The Banjul Charter signifies a regional effort to protect human rights. However, that notion has been contested by scholars who argue that the Charter is a product of 'geopolitical realities' of the previous years.<sup>42</sup> Although the Banjul Charter makes no specific reference to child trafficking, it out-laws slavery and related activities.<sup>43</sup> The Banjul Charter becomes part of the framework by virtue of its prohibition of the slavery of others, a concept which has, over the years, been linked to trafficking in persons.<sup>44</sup> Furthermore, the Banjul Charter calls for the protection of human rights, a role equally played by the UDHR<sup>45</sup> in the international framework.<sup>46</sup> Both instruments emphasise human rights for all without discrimination on any basis. These human rights are also extended to trafficking in persons victims.<sup>47</sup>



<sup>40</sup> Article 1 states that Member States shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

<sup>41</sup> 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).

<sup>42</sup> Makau wa Mutua, 'The African human rights system in a comparative perspective: The need for urgent re-formulation' (1992) 44 Nairobi Law Monthly 27. Also see Henry Onoria, *Human Rights of Women: International Instruments and African Experiences* Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleithner, (eds) (Zed Books Ltd 2002) 231.

<sup>43</sup> Article 5 of the 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) states that, every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

<sup>44</sup> *ibid.*

<sup>45</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>46</sup> The African Commission on Human and Peoples' Rights which was established to promote human and peoples' rights and ensure their protection in Africa, draws inspiration from the provisions of the Universal Declaration of Human rights as well as other instruments adopted by the United Nations and by African States in the field of human and peoples' rights. See Article 60 of the 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).

<sup>47</sup> Universal Declaration of Human Rights preamble paragraph 1; 'Whereas recognition of the inherent dignity and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...' See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).



Article 4 of the Banjul Charter corroborates the human rights approach to combating trafficking in persons. It states that; 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.<sup>48</sup> This human rights approach to trafficking respects the dignity of a person and explicitly prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhumane, or degrading punishment and treatment.<sup>49</sup>

A recurring principle in all trafficking in persons regulations is the protection of women and children as the most susceptible people to the crime.<sup>50</sup> It is therefore not surprising that the Banjul Charter also makes provision for the non-discrimination and protection of women.<sup>51</sup> It stipulates that:

The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>52</sup>

However, the combination of women and children in the trafficking in persons framework, as victims of violence, has been criticised for its possible condescending implication that women are children.<sup>53</sup> Nevertheless, the Banjul Charter has formed a basis for African States to recognise women's rights. Albeit, without the specificity of CEDAW which is dedicated to the protection of women's rights.<sup>54</sup> Be that as it may,

<sup>48</sup> Article 4 of the 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).

<sup>49</sup> The Universal Declaration of Human rights makes provision for these rights in articles 3; 4; and 5. See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>50</sup> It is important to note that during the 19<sup>th</sup> century, this apparent bias towards women and children was a cause for concern in that it resulted in the negligence of males in the trafficking framework. The focus on women and children as victims was informed by the belief that generally men were the perpetrators of violence. However, the recognition of human rights and equal protection for both men and women resulted in the shift from such bias and males are equally included in the trafficking in persons framework. See, Jean-Pierre Murray, 'Beyond the 'Women-and-children' Bias in Human Trafficking: A Study of Haitian Migrants in the Dominican Republic' Oxford Monitor of Forced Migration <<https://www.oxfordmigration.com/post/beyond-the-women-and-children-bias-in-human-trafficking>> accessed 6 January 2022.

<sup>51</sup> Article 18 of the 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).

<sup>52</sup> *ibid* article 18 (3).

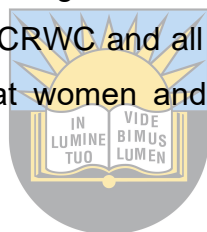
<sup>53</sup> Henry Onoria, *Human Rights of Women: International Instruments and African Experiences* Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleither (eds), (Zed Books Ltd 2002) 233.

<sup>54</sup> However, some scholars are of the view that CEDAW unfairly guarantees to women what everyone should have regardless of gender. See Sindiso Ngaba, 'CEDAW: Eliminating Discrimination against Women' (1995) 27 Agenda: Empowering Women for Gender 81–89.

African States undertake to ensure that their national laws and policies protect the rights of women and children and that oppressive cultural practices are discouraged.

In this context, the Protocol to the African Charter on the Human and People's Rights on the Rights of Women in Africa of 2003 seeks to ensure the fair treatment and protection of African women.<sup>55</sup> Just like CEDAW, it is elaborative and clear on the protection of women's rights.<sup>56</sup> The Protocol focusses on the trafficking in women as a form of gender-based violence.<sup>57</sup> Notably, the prohibition of gender-based violence has evolved into a principle of customary international law.<sup>58</sup> However, in Africa, action on violence against women is negated by biased traditions and ideologies.<sup>59</sup>

Girls are also protected under this Protocol by virtue of Article 1(k) which defines women as persons of the female gender, including girls, thus extending the provisions of the Protocol to include protection for girl children.<sup>60</sup> The Protocol reiterates all the women's rights that have been recognised in instruments such as the UDHR;<sup>61</sup> ICCPR;<sup>62</sup> ICESCR;<sup>63</sup> CEDAW;<sup>64</sup> ACRWC and all the other international and regional instruments that acknowledge that women and children's rights are inalienable.<sup>65</sup>



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<sup>55</sup> The Protocol was adopted by the Conference of Heads of State and Government in Maputo, Mozambique, in July 2003 and came into force in November 2005.

<sup>56</sup> Henry Onoria, *Human Rights of Women: International Instruments and African Experiences* Wolfgang Benedek, Esther M Kisaakye and Gerd Oberleithner (eds), (Zed Books Ltd 2002) 238.

<sup>57</sup> Article 4 (2) (g) of the Protocol to the African Charter on the Human and People's Rights on the Rights of Women in Africa.

<sup>58</sup> UN Committee on the Elimination of Discrimination against Women 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (14 July 2017) UN Doc CEDAW/C/GC/35 (General Recommendation 35).

<sup>59</sup> *ibid* para. 7. For a discussion on how culture affects the implementation of law see Ramadimetja S Mogale, Kathy Kovacs Burns, and Solina Richter, 'Violence Against Women in South Africa: Policy Position and Recommendations' (2012) 18 (5) SAGE 580–594.

<sup>60</sup> Protocol to the African Charter on the Human and People's Rights on the Rights of Women in Africa of (2003), Article 1 (k).

<sup>61</sup> However, the UDHR does not expressly mention or prohibit trafficking in persons. See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>62</sup> See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>63</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>64</sup> CEDAW's contribution to the fight against women and children is found in its description of trafficking in women as a form of gender-based violence. The Convention therefore urges State Parties under Article 6 to: 'take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.

<sup>65</sup> Protocol to the African Charter on the Human and Peoples' on the Rights of Women in Africa, (2003), Preamble para. 5.

Furthermore, the prohibition of exploitation in any form is also found in the Protocol under Article 3.<sup>66</sup>

In addition to the above instruments, the Protocol to the African Charter on the Rights of Women in Africa of 2003<sup>67</sup> also deals with issues that are related to child trafficking such as the right to dignity,<sup>68</sup> the right not to be subjected to exploitation or degradation, and the right to protection from all forms of violence, particularly sexual and verbal.<sup>69</sup> Violation of these rights has often been seen as both a cause and consequence of child trafficking.<sup>70</sup> Article 4 (2) (g) deals more specifically with trafficking of women and requires State Parties to 'prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'.<sup>71</sup>

Also relevant to the fight against trafficking in persons are a number of instruments adopted at the regional level, which may be instrumental in addressing child trafficking, SADC has several Protocols that may also assist in preventing child trafficking in the region. One of these Protocols is the SADC Protocol on Legal Affairs of 2002 which seeks to guide the work of the Legal Affairs Unit in the region. In relation to child trafficking, the Protocol may assist with the various interpretation and implementation problems.

The proliferation of interpretations of the definition of child trafficking as provided for by article 3 of the Trafficking Protocol would not be a problem if the structures created by

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<sup>66</sup> Article 3 (3) of the Protocol to the African Charter on the Human and People's Rights on the Rights of Women in Africa, (2003) states that: 'States Parties shall adopt and implement appropriate measures to prohibit any exploitation or degradation of women.'

<sup>67</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

<sup>68</sup> In relation to the dignity of the child, Kruuse and Sloth-Nielsen contend that 'the elaboration of a children's right to dignity holds considerable promise as a tool for future legal interpretation...it provides a more concrete and authoritative (sophisticated) basis for adjudicating the complex interplay of competing rights where children are concerned by comparison to the more simplistic and a-contextual so-called 'balancing' of rights that courts allude to practicing.' See Julia Sloth-Nielsen and Helen Kruuse 'A maturing manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012' (2013) IJCR 646, 669. However, Sloth-Nielsen suggests that legislatures are yet to fully utilise this opportunity and dignity is interpreted in terms of other rights. See Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20-Year Retrospective' (2019) De Jure Law Journal 501, 518.

<sup>69</sup> The rights to dignity; life, integrity, security of person, and elimination of harmful practices against women are contained in Articles 3; 4 and 5 respectively.

<sup>70</sup> United Nations Human rights Office of the High Commissioner, Human Rights and Human Trafficking Fact Sheet No. 36 (2014) IV.

<sup>71</sup> Article 4 (2) (g) of the Protocol to the African Charter on the Human and Peoples' on the Rights of Women in Africa 2005.

the Protocol on Legal Affairs are fully utilised. However, reports of child trafficking cases being treated as human smuggling cases, or any other similar crime is proof that this Protocol is under-utilised in this regard.<sup>72</sup>

Apart from the interpretive aspect of the Protocol, the other key objectives that may be of assistance in addressing child trafficking in the SADC region include the promotion of mutual legal agreements in criminal matters; facilitation of harmonised implementation of multilateral agreements; promotion of state cooperation as well as the development of strategies to address issues affecting SADC States.<sup>73</sup> Furthermore, the functional institutions outlined under article 3 would greatly facilitate the legal response to child trafficking.<sup>74</sup> Other areas of relevance to child trafficking are attached to these respective institutions and may therefore be applicable.

The Trafficking Protocol recognises the need for mutual assistance and cooperation between States to successfully eradicate child trafficking. However, for that to happen, there is a need for a unifying instrument or governing rules when it comes to addressing the crime. The SADC Protocol on Mutual Legal Assistance in Criminal Matters may be used in this regard.<sup>75</sup> The Protocol calls for the cooperation of Member States in various priority areas affecting the region.<sup>76</sup> Therefore, based on this mandate, the Protocol seeks to ensure the adoption of common rules in the area of mutual assistance in criminal matters.<sup>77</sup>

Although not specifically mentioned under crimes that fall under the scope of the Protocol, child trafficking is a form of trans-organised crime.<sup>78</sup> Protocol on Mutual Legal Assistance in Criminal Matters under Article 2 (3) indicates that trans-organised crime

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<sup>72</sup> In recent years, child trafficking and human smuggling have increasingly been described as border security challenges. See Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 Anti-trafficking Review 15, 17.

<sup>73</sup> Article 2 of the SADC Protocol on Legal Affairs (2000).

<sup>74</sup> The institutions established for the implementation of the Protocol are the committee of Ministers of Justice/ attorney General; the Committee of Legal Experts and the Legal sector coordinating Unit. Areas of facilitation would include, but not limited to, guidance and coordination of projects that are of legal nature. Articles 3 (2); (3); (4) and (5) of the SADC Protocol on Legal Affairs (2000).

<sup>75</sup> The Protocol was adopted in 2002 in terms of Article 21 of the SADC Treaty.

<sup>76</sup> SADC Protocol on Mutual Legal Assistance in Criminal Matters, (2002), Article 21.

<sup>77</sup> SADC Documents and Publications, <<https://www.sadc.int/documents-publications/show/807>> accessed 6 October 2021.

<sup>78</sup> See article 3 (c) of the Trafficking Protocol.

falls under the ambit of the criminal activities regulated under the Protocol. It states that:

Criminal matters include investigations, prosecutions or proceedings relating to offences concerning transnational organised crime, corruption, taxation, custom duties and foreign exchange control.<sup>79</sup>

Therefore, child trafficking has been linked to all the above-mentioned elements. In recent years, child trafficking has been strongly linked to corruption.<sup>80</sup> The OECD has suggested that corruption has a symbiotic relationship with the crime.<sup>81</sup> In other words, child trafficking would not flourish if not for the leverage provided by corruption.<sup>82</sup> Corruption indirectly weakens the strong institutions meant to fight against child trafficking.<sup>83</sup>

In general, the functionality of the Protocol on Mutual Legal Assistance in Criminal Matters is that a State, dubbed the requesting state, may ask for assistance from another State, the requested state.<sup>84</sup> The assistance sought may be any one of the various spheres and stages of the criminal justice process as outlined under article 2 (5). The assistance includes *inter alia*, locating and identifying persons, property, objects and items;<sup>85</sup> serving documents including seeking the attendance of persons and providing returns of such service;<sup>86</sup> providing information, documents and

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<sup>79</sup> Article 2 (3) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002).

<sup>80</sup> UNODC, 'The country we would like to live in: A call for stronger anti-corruption actions in South Africa' [https://www.unodc.org/southernafrica/en/stories/the-country-we-would-like-to-live-in\\_-a-call-for-stronger-anti-corruption-actions-in-south-africa.html](https://www.unodc.org/southernafrica/en/stories/the-country-we-would-like-to-live-in_-a-call-for-stronger-anti-corruption-actions-in-south-africa.html)> accessed 4 June 2021.

<sup>81</sup> OECD, Trafficking in Persons and Corruption, Breaking the Chain (2016) OECD Public Governance Reviews 33-39.

<sup>82</sup> OECD, Trafficking in Persons and Corruption, Breaking the Chain (2016) OECD Public Governance Reviews 34.

<sup>83</sup> For example, efforts to curb illegal entry into South Africa through the Beitbridge Border Post were thwarted when the tender to construct a fence was awarded to an incompetent company. See Jason Felix, 'SIU Set to Freeze Bank Accounts of Companies Involved in Beitbridge Border Fence Fiasco' News24 (6 October 2020) <https://www.news24.com/news24/southafrica/news/siu-set-to-freeze-bank-accounts-of-companies-involved-in-beitbridge-border-fence-fiasco-20201006> accessed 4 June 2021.

<sup>84</sup> Article 1 of the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002).

<sup>85</sup> *ibid* Article 2 (5) (a).

<sup>86</sup> *ibid* Article 2 (5) (b).

records;<sup>87</sup> providing objects and temporary transfer of exhibits<sup>88</sup> as well as search and seizure.<sup>89</sup>

The application of the Protocol on Mutual Legal Assistance in Criminal Matters where assistance is sought in prosecuting a crime is not limited by the non-criminalisation of the conduct under investigation by either one of the States involved.<sup>90</sup> In other words, article 2 (4) would apply to the investigation and prosecution as well as other relevant criminal justice processes related to child trafficking, even if child trafficking is not considered a crime in all the States involved.<sup>91</sup> Nevertheless, even if the provision required mutual criminalisation, child trafficking matters would not be affected since the conduct is criminalised in the various legislative instruments in the respective SADC States.

Overall, the Protocol is key in the prosecution of child trafficking since it promotes information sharing and other measures of prosecuting trans-organised crime as encouraged by the UNCTOC as well as the Trafficking Protocol.<sup>92</sup> Prosecution is also one of SADC's Plan of action priority areas. Moreover, the Protocol on Mutual Legal Assistance in Criminal Matters in the very least enables the location, restraint, seizure, freezing or forfeiture of the proceeds from trafficking in persons.<sup>93</sup> However, how the proceeds will later be dealt with after such seizure or forfeiture depends on the laws of the requesting State. Perhaps the proceeds could be directed towards training and research related to child trafficking. It may also be used to fund community development programs such as skills development training for the youth. Such initiatives make more youths economically competitive thereby reducing their susceptibility to criminal activities and risk of trafficking.

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<sup>87</sup> Article 2 (5) (c) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002).

<sup>88</sup> *ibid* Article 2 (5) (d).

<sup>89</sup> Article 2 (5) (e) of the SADC Protocol on Mutual Legal Assistance in Criminal (2002). Assistance to be provided also includes taking evidence or obtaining statements or both; authorising the presence of persons from the requesting state at the execution of requests; ensuring the availability of detained persons to give evidence or to assist in possible investigations; facilitating the appearance of the witness or the assistance of persons in investigations and taking possible measures for location, restraint, seizure, freezing or forfeiture of the proceeds of the crime. See Article 2 (5) (f)-(j) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002).

<sup>90</sup> Article 2(4) of the SADC Protocol on Mutual legal Assistance in Criminal Matters (2002).

<sup>91</sup> *ibid*.

<sup>92</sup> Articles 26-28 of the UNCTOC and article 10 of the Trafficking Protocol.

<sup>93</sup> Article 2 (5) (j) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002).



The nature of child trafficking is such that it necessitates the extradition of offenders should the need arise. Invariably, the SADC Protocol on Extradition (2000)<sup>94</sup> becomes very instrumental since it facilitates such extradition between Member States. The Protocol on Extradition's main objective is to deal with the escalation of crime at both national and transnational levels. This is regardless of the nature of the crime.

The increase in criminal activities in the SADC region has been attributed to the unregulated cross-border movement which enables offenders to escape arrest, prosecution, conviction, and punishment.<sup>95</sup> This is because child trafficking takes advantage of porous and weak border controls.<sup>96</sup> Unfortunately, the problem of porous borders continues to be a SADC problem since the economic situations of many SADC States remain dire.

The unregulated movement of people across States requires a collective response. However, due to differences in the capacity to improve border controls for SADC States, porous borders remain a huge factor to trans-organised crime.<sup>97</sup> South Africa had taken steps towards increasing border security at the Beitbridge border post, but the project failed dismally. Among the 115 breaches found by the South African Special Investigating Unit, it was discovered that the South Africa government had paid R17 million more than the market-related cost for the construction of the fence dividing South Africa and Zimbabwe. Furthermore, the fence was substandard and subsequently vandalized less than a year later.<sup>98</sup> The success of such a project would

<sup>94</sup> SADC Protocol on Extradition (2000) available at <[https://www.sadc.int/sites/default/files/2021-12/Protocol\\_on\\_Extradition.pdf](https://www.sadc.int/sites/default/files/2021-12/Protocol_on_Extradition.pdf)> accessed 6 September 2022.

<sup>95</sup> Preamble to the Trafficking Protocol.

<sup>96</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 32.

<sup>97</sup> The UNODC-SADC Regional Programme holds annual review meetings to reflect on progress in tackling crime and drugs. In 2017, representatives from Angola, Botswana, Lesotho, Malawi, Mauritius, Namibia, Eswatini, Tanzania, Zambia, Zimbabwe, and the SADC Secretariat as well as UNODC's Regional Office for Southern Africa (ROSAF) made several recommendations in the areas of countering illicit trafficking and organized crime. The recommendations also included possible interventions to address illicit trafficking and to strengthen border controls. See UNODC, 'UNODC-SADC Regional Programme holds annual review meeting to reflect on progress in tackling crime and drugs' UNODC (21 July 2017) <<https://www.unodc.org/southernafrica/en/stories/unodc-sadc-regional-programme-holds-annual-review-meeting-to-reflect-on-progress-in-tackling-crime-and-drugs.html>> accessed 11 January 2021.

<sup>98</sup> eNCA, 'Beitbridge Fence Under Scrutiny' eNCA (Tuesday 21 April 2020) <<https://www.enca.com/news/beitbridge-fence-under-scrutiny>> accessed 4 June 2021. Also See Jason Felix, 'SIU Set to Freeze Bank Accounts of Companies Involved in Beitbridge Border Fence Fiasco' News24 (6 October 2020) <https://www.news24.com/news24/southafrica/news/siu-set-to-freeze-bank-accounts-of-companies-involved-in-beitbridge-border-fence-fiasco-20201006> accessed 4 June 2021.

have greatly contributed towards the fight against child trafficking in that informal crossing areas which traffickers use would be closed off.

Another aspect related to the transnational nature of child trafficking is the issue of extradition. In this case, the SADC Protocol on Extradition is instrumental. It should be noted that the overall ethos of the SADC Protocol on Extradition is in line with the provisions of the 1949 Traffic in Persons Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,<sup>99</sup> to which most SADC States are party. Article 8 of the 1949 Convention provides that the trafficking of persons shall be regarded as an extraditable offence in any extradition treaty which has been or may thereafter be concluded between any of the Parties to the Convention. This clause entrenches the application of the SADC Protocol to child trafficking offences. Furthermore, articles 9 and 10 of the 1949 Convention are echoed by the provisions of article 5 of the Protocol on Extradition.<sup>100</sup> Article 5 lists instances where extradition may be refused. However, the nature of child trafficking is such that it does not fall under these grounds and thus extradition in child trafficking cases is possible.<sup>101</sup>

Furthermore, the importance of state cooperation in dealing with child trafficking has been emphasised since the advent of trafficking in persons regulation.<sup>102</sup> It may be anticipated that, with the help of such a Protocol which encourages state cooperation, extradition of child trafficking offenders, prosecution and conviction would significantly improve. By nature, the Protocol on Extradition ensures the agreement by State Parties to extradite any wanted persons within its jurisdiction, in accordance with the Protocol and respective domestic law.<sup>103</sup>

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<sup>99</sup> UN General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, A/RES/317.

<sup>100</sup> See Article 9: "In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in articles 1 and 2 of the present Convention shall be prosecuted in and punished by the courts of their own State. This provision shall not apply if, in a similar case between the Parties to the present Convention, the extradition of an alien cannot be granted". Article 10; "The provisions of article 9 shall not apply when the person charged with the offence has been tried in a foreign State and, if convicted, has served his sentence or had it remitted or reduced in conformity with the laws of that foreign State".

<sup>101</sup> Article 5 of the Protocol on Extradition (2002).

<sup>102</sup> Megan C Brand, 'International Cooperation and the Anti-Trafficking Regime' (2010) 71 Refugee Studies Centre 1, 12.

<sup>103</sup> Article 2 of the Protocol on Extradition (2002).

It cannot be overemphasized that this extradition relationship between States would be effective in countering child trafficking if there is a common understanding of the crime across the region. In the absence of a SADC community law on child trafficking, the SADC Gender and Development Protocol is currently the closest instrument there is which provides a definition for human trafficking and contains provisions for child trafficking.<sup>104</sup> It defines child trafficking as:

The recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of amongst other things, sexual and financial exploitation.<sup>105</sup>

Based on this definition, the Gender and Development Protocol is, arguably the closest possible regional instrument against child trafficking.

Furthermore, by virtue of trafficking in persons being identified as a form of gender-based violence,<sup>106</sup> the Gender Protocol may be used in regulating child trafficking. Gender-based violence has been defined as:

[a]ll acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.<sup>107</sup>

The Gender Protocol aims to end gender-based violence by enacting and enforcing legislation prohibiting the same by 2015.<sup>108</sup> However, this target has not been met. In 2016, The protocol was revised so that its objectives are aligned to various global targets and emerging issues. Among these are the UN Sustainable Development

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<sup>104</sup> The Gender Protocol was amended at the implementation of the Beijing Platform for Action 2014-2019 meeting. See Parliamentary Monitoring Group, Beijing+25 County Report; Amended SADC Protocol on Gender and Development Women, Youth and Persons with Disabilities Meeting report. <https://pmg.org.za/committee-meeting/28775/> accessed 16 October 2021.

<sup>105</sup> Article 1 of the SADC Gender and Development Protocol (2008).

<sup>106</sup> SADC Executive Secretary, Statement on the 16 days of activism against gender based violence, 28 November 2018 <<https://www.sadc.int/news-events/news/sadc-statement-16-days-activism-against-gender-based-violence-executive-secretary/>> accessed 9 September 2021.

<sup>107</sup> Article 1 of the SADC Gender and Development Protocol (2008).

<sup>108</sup> Article 20 of the Trafficking Protocol.

Goals (SDGs), the African Union Agenda 2063, and the Beijing Declaration and Platform for Action.

However, regardless of these amendments, just like child trafficking, gender-based violence is on the rise.<sup>109</sup> The 2018 SADC Gender Protocol Barometer reported, among other issues, the proportions of women experiencing and men perpetrating gender-based violence.<sup>110</sup> The survey was done for Zambia, Zimbabwe, Lesotho, Seychelles, South Africa, Botswana and Mauritius and the statistics for women experiencing gender-based violence were 86%, 77%, 68%, 58%, 50%, 37% and 24%, respectively. The results of the survey for the same States showed that men perpetrating gender-based violence constituted 41%, 66%, 46%, 43%, 39%, 30% and 23%, respectively.<sup>111</sup>

The SADC Gender Protocol in line with the provisions of CEDAW, CRC and the ACRWC calls upon States to address issues of child trafficking as well as violence against women and children as the most vulnerable members of the society.<sup>112</sup> In addition, article 11 (d) of the Gender Protocol encourages State Parties to adopt laws, policies and programmes that ensure the development and protection of the girl child by protecting girls from economic exploitation, trafficking and all forms of violence, including sexual abuse and to ensure that,

Girls enjoy the same rights as boys and are protected from harmful cultural attitudes and practices in accordance with the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>113</sup>

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<sup>109</sup> SADC Executive Secretary, Statement on the 16 days of activism against gender based violence, 28 November 2018 <<https://www.sadc.int/news-events/news/sadc-statement-16-days-activism-against-gender-based-violence-executive-secretary/>> accessed 9 September 2021.

<sup>110</sup> SADC Gender Protocol 2018 Barometer, Chapter 5 Gender Based Violence, Article 20-25, p153 <<https://genderlinks.org.za/wp-content/uploads/2018/08/Chap5-Baro-2018-GBVfin.pdf>> accessed 16 October 2021. Also see WHO, 'Violence against women' WHO (9 March 2021) <<https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women>> accessed 11 January 2021.

<sup>111</sup> UNODC, 'UNODC supports Namibia Police in addressing Violence against Women and Children' and UNODC, 'The police Gender-based Violence Protection Unit in Windhoek gets more than 200 reports of cases under the Domestic Violence Act monthly' <<https://www.namibian.com.na/83236/read/Police-record-200-GBVcases--per-month>> accessed 5 April 2021.

<sup>112</sup> Article 11 of the Trafficking Protocol.

<sup>113</sup> Article 11 (c) of the SADC Gender and Development Protocol (2008).

Since the Gender Protocol creates a connection between child trafficking and gender-based violence an opportunity is therefore created to define sexual exploitation through the lens of the Protocol which already describes sexual harassment as:

Any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another whether or not such sexual advance or request arises out of unequal power relations.<sup>114</sup>

However, all these efforts need an effective method of implementation. It is commendable that SADC had the 10-Year SADC Regional Strategic Plan Against Trafficking in Persons 2009-2019 (SPA) which provided a roadmap for fighting child trafficking. Continuing with the programs already started under the SPA would be very instrumental in implementing all the above-suggested measures to enhance victim protection and successful prosecution of the crime.<sup>115</sup>

Other areas covered by the SPA which relate to the need for state coordination and participation may also be improved through the Joint Permanent Commissions on Defence and Security (JPCDS) which has the mandate to table discussions around peace and security in the SADC region. This mandate is in line with the provisions of the SADC Protocol on Politics, Defence and Security Cooperation,<sup>116</sup> which promotes regional coordination and cooperation on security and defence matters.<sup>117</sup>

Consequently, Bi-National Commissions (BNCs) exist among SADC Member States, whereby heads of state engage to address common interests in various sectors.<sup>118</sup> In addition, SADC Member States have bilateral arrangements through the JPCDS where they cooperate on issues that are linked to child trafficking.<sup>119</sup> Examples of these

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<sup>114</sup> Article 1 of the Trafficking Protocol.

<sup>115</sup> SADC Secretariat, Preventing and Combating Trafficking in Persons: Lessons from the SADC Region, (2017) Gaborone, SADC Secretariat <[https://www.sadc.int/files/1115/0953/7902/EN\\_TIP\\_Lessons.pdf](https://www.sadc.int/files/1115/0953/7902/EN_TIP_Lessons.pdf)> accessed 2 November 2021.

<sup>116</sup> Article 2 (2) (d) The specific objectives of the Organ shall be to: promote regional co-ordination and co-operation on matters related to security and defence and establish appropriate mechanisms to this end.

<sup>117</sup> Communique of the 30th Session of the Zimbabwe-Botswana Joint Permanent Commission on Defence and Security, Elephant Hills Resort, Victoria Falls, Zimbabwe, 22nd to 26th February 2016 27 <<http://www.gov.bw/en/News/30th-session-of-the-zimbabwe-botswana-joint-permanent-commission-on-defence-and-security-/>> accessed on 2 August 2021.

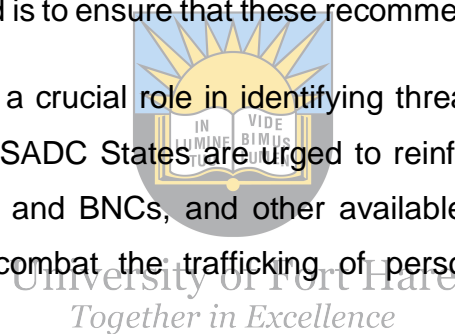
<sup>118</sup> For example, collaborations such as those between South Africa and Botswana, South Africa and Mozambique, and South Africa and Zimbabwe.

<sup>119</sup> SADC Secretariat, 'Preventing and Combating Trafficking in Persons: Lessons from the SADC Region' (2017) Gaborone, SADC Secretariat 1, 25.

Commissions include, but are not limited to, the Commission for South Africa and Mozambique. The States have a cooperative relationship in the different sectors of defence, State, and public security.<sup>120</sup> South Africa also has the same relationship with Namibia and Zimbabwe. In its 5<sup>th</sup> session with the latter held in 2010 in Durban South Africa, the Commission was tasked with the enhancement of cross-border operations to stop transnational crime between South Africa and Zimbabwe. The Commission also received reports on cross-border patrol which outlined factors that threatened border security.<sup>121</sup>

The 30<sup>th</sup> Commission between Botswana and Zimbabwe also discussed border controls as well as the establishment of effective communication links.<sup>122</sup> It was further noted in the same commission that trans-organised crime was increasingly becoming a major problem in the region and beyond.<sup>123</sup> Thus, the Commission called for parties to cut the supply and demand for commodities that fuel trans-organised crime.<sup>124</sup> What would therefore be needed is to ensure that these recommendations are put into action.

These Commissions play a crucial role in identifying threats to national security and trans-organised crime.<sup>125</sup> SADC States are urged to reinforce their efforts within the framework of the JPCDS and BNCs, and other available bilateral arrangements to effectively prevent and combat the trafficking of persons particularly vulnerable



<sup>120</sup> Leon Engelbrecht, 'SA, Mozambique Satisfied with Defence Security Relations' *Defence Web* (01 December 2008) <<https://www.defenceweb.co.za/joint/diplomacy-a-peace/sa-mozambique-satisfied-with-defence-security-relations/>> accessed 29 October 2021.

<sup>121</sup> All Africa, 'Defence Commission Hails Nation's Security Sector' *The Herald Zimbabwe* (7 December 2010) <<https://allafrica.com/stories/201012070039.html>> accessed 30 October 2021.

<sup>122</sup> The session was held at Elephant Hills Resort, Victoria Falls, in Zimbabwe on 22-26 February 2016. See All Africa, 'Zimbabwe: 30th Session of the Zimbabwe-Botswana-Joint Permanent Commission' <<https://allafrica.com/stories/201603011993.html>> accessed 12 January 2022.

<sup>123</sup> UNODC, 'Botswana Joins International Efforts to Curb Trafficking in Persons' <<https://www.unodc.org/southernafrica/en/stories/botswana-joins-international-efforts-to-curb-trafficking-in-persons.html>> accessed 24 September 2020.

<sup>124</sup> 30<sup>th</sup> Session of the Zimbabwe-Botswana Joint Permanent Commission on Defence and Security, Elephant hills resort, Victoria falls, Zimbabwe 22-26 February 2016 <<https://www.gov.bw>> accessed 30 October 2021.

<sup>125</sup> Zoe Gillard, 'Special Rapporteur on Trafficking urges human rights approach and integration with the WPS agenda' *London School Of Economics* (30 November 2018) <<https://blogs.lse.ac.uk/wps/2018/11/30/special-rapporteur-on-trafficking-urges-human-rights-approach-and-integration-with-the-wps-agenda/>> accessed 30 October 2021.



children.<sup>126</sup> To this end, cooperation by SADC Member States on peace and security matters is crucial if the SADC peace and security agenda is to be achieved.<sup>127</sup>

All the above measures require enforcement. It has also been noted that the police among other enforcement agents are ill-trained to deal with child trafficking. At the regional level, the Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO) may be handy in addressing child trafficking as a cross-border crime.<sup>128</sup> In the fight against child trafficking, SARPCCO should include provisions that focus on the investigation of child trafficking, given the nature of its objectives.

The objectives of SARPCCO are to promote, strengthen and perpetuate co-operation and foster joint strategies for the management of all forms of cross-border and related crimes with regional implications; to prepare and disseminate relevant information on criminal activities as may be necessary to benefit members in their attempts to contain crime in the region; to carry out regular reviews of joint crime management strategies in light of changing national and regional needs and priorities; to ensure the efficient operation and management of criminal records and the efficient joint monitoring of cross-border crime.<sup>129</sup> For example, SARPCCO is already doing commendable work related to child trafficking through 'Operation Batho' which seeks to address the problem of trafficking between Malawi and South Africa. In 2018, the initiative reported more than 21 suspected traffickers, rescued 87 victims and 1 conviction for trafficking crimes.<sup>130</sup>

In a nutshell, Protocols, Policies and Commissions among other institutions that may be used to fight child trafficking, provide a solid bridge between policy and action.<sup>131</sup> Therefore, strengthening these structures coupled with consistent implementation of measures enhances the effectiveness of the SADC legal and policy framework in

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<sup>126</sup> SADC Secretariat, 'Preventing and Combating Trafficking in Persons: Lessons from the SADC Region' (2017) Gaborone, SADC Secretariat 1, 28.

<sup>127</sup> SADC Organ on Politics Security and Defence, <<https://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/>> accessed 3 October 2021.

<sup>128</sup> *ibid.*

<sup>129</sup> Frank Msulu, 'Responses to Organised crime in SADC: Interpol and SARPCCO', in Charles Goredema (ed.) *Organised Crime in Southern Africa, Assessing Legislation, Monograph* (Institute for Security Studies 2001) 56.

<sup>130</sup> UNODC, '87 Victims of Human Trafficking Rescued in Joint Operation Among Law Enforcement Authorities in the Southern Africa Region' <<https://www.unodc.org/southernafrica/en/aml/review.html>> accessed 5 May 2021.

<sup>131</sup> Patrick Mhlana, 'Success of SADC Gender Protocol lies in Evaluation', Cape Times (23 July 2007).

addressing child trafficking.<sup>132</sup> To achieve this, SADC States need to strengthen their approach to child trafficking by adopting a holistic approach to ensure effective prevention and prosecution of the crime as well as the protection of victims. This will be instrumental in mitigating the impact of child trafficking on the victims, especially where there is systematic reintegration and rehabilitation of victims as well as non-criminalisation of victims.

In the absence of a regional instrument against trafficking in persons or child trafficking, the role of the above-discussed instruments is very important. It is also important to note that policies and plans of action in the SADC region have been very instrumental in setting the tone on how issues of child trafficking should be addressed. These include guidelines by the AU as well as plans of action adopted from other regions in the continent. As part of its vision, SADC seeks to ensure and promote the security of the people of Southern Africa.<sup>133</sup> This vision feeds into the African Union's objective and primary focus on the promotion of peace, security and stability on the continent as a prerequisite for the implementation of its development and integration agenda.<sup>134</sup> Even with the absence of child trafficking provisions in the vision and object of both the AU and SADC, programmes<sup>135</sup> and initiatives by both institutions may be utilised to address and prevent child trafficking.<sup>136</sup>

  
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<sup>132</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 46.

<sup>133</sup> Article 5 of the Treaty of the Southern African Development Community (1992).

<sup>134</sup> African Union Youth Division, Objectives of the African Union, <<http://www.africa-youth.org>> accessed 2 August 2021.

<sup>135</sup> These include programmes such as the New Partnership for Africa's Development (NEPAD) which endeavours to address the current economic and social challenges faced by African States. These challenges also contribute to the increase in child trafficking. These include but not limited to increasing poverty, underdevelopment and the continued marginalisation of Africa and African States. Thus, by addressing these challenges, NEPAD becomes instrumental in the fight against child trafficking.

<sup>136</sup> The Peace and Security Council (PSC); the Pan-African Parliament; the Economic, Social and Cultural Council (ECOSOCC), The Court of Justice. Some specialised technical committees that address sectoral issues may also be applicable in trafficking in persons matters. These are the Committee on Trade, Customs and Immigration Matters; The Committee on Health, Labour and Social Affairs; the Committee on Education, Culture and Human Resources. The following Portfolios of the Commission may have relevance for child trafficking: Political Affairs (Human Rights, Democracy, Good Governance, Electoral; Institutions, Civil Society Organisations; Humanitarian Affairs, Refugees, Returnees and Internally Displaced Persons) Social Affairs (Health, Children, Drug Control, Population, Migration, Labour and Employment, Sports and Culture) Human Resources, Science and Technology (Education, Information Technology Communication, Youth, Human Resources, Science and Technology) Trade and Industry (Trade, Industry, Customs and Immigration Matters); Economic Affairs (Economic Integration, Monetary Affairs, Private Sector Development, Investment and Resource Mobilisation).

#### **4.2.1 The 10-Year SADC Regional Strategic Plan Against Trafficking in Persons 2009-2019 (SPA)**

An attempt at a harmonised approach to trafficking in persons in SADC was made after an extensive discussion on the crime by Member States in 2009. The discussions in Mozambique saw the conception of the 10-Year Regional Strategic Plan Against Trafficking in Persons which would become the subregion's key plan for addressing trafficking. The 10-Year SADC Regional Strategic Plan Against Trafficking in Persons 2009-2019 (SPA) prioritises the adoption and enactment of policy and legislative measures. It was envisaged that these measures would counter the factors of trafficking in persons in the SADC region such as weak security and border mechanisms, among other transnational factors.<sup>137</sup>

In addition, SPA also prioritises training for skills enhancement and capacity building which will, in turn, feed into the issue of raising public awareness.<sup>138</sup> These priority areas seek to address the limited awareness on trafficking in persons in the region.<sup>139</sup> Hence, SPA emphasises the need to develop and disseminate regional public awareness on trafficking in persons and conduct awareness campaigns on the crime.<sup>140</sup> All this requires coordination and regional cooperation by improving communication channels and sharing of trafficking in persons information between various stakeholders at all levels.<sup>141</sup> SPA also proposes the development of a Trafficking in Persons Regional Management Information System and documentation of effective practices on trafficking in persons as key activities.<sup>142</sup>

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<sup>137</sup> UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report (2014-2016)* 5.

<sup>138</sup> UNODC, 'GLO.ACT trains police officers in South Africa on combating human trafficking' <<https://www.unodc.org/unodc/en/human-trafficking/glo-act/glo-act-trains-police-officers-in-south-africa-on-combatting-human-trafficking.html>> accessed 2 January 2021.

<sup>139</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region Policy Brief* (SADC 2016) 50.

<sup>140</sup> For example, Zambia' initiative to create awareness by encouraging children to be heard. The campaign also sought to bring to light issues to trafficking and drug abuse. This was done on the international day against drug abuse and illicit Trafficking. See UNODC Southern Africa, 'Children in focus as Zambia marks the International Day Against Drug Abuse and Illicit Trafficking' <<https://www.unodc.org/southernafrica/en/children-in-focus-as-zambia-marks-international-day-against-drug-abuse-and-illicit-trafficking.html>> accessed 4 June 2021. See also 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019), 11-15. Also see UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report (2014-2016)* 5.

<sup>141</sup> Article 10 of the Trafficking Protocol.

<sup>142</sup> 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019), 11-15.

The Trafficking Protocol emphasizes the need for victim support and protection.<sup>143</sup> Similarly, SPA also prioritises physical, psychological, and social support to victims as well as witness protection.<sup>144</sup> Notwithstanding the stringent penalties in some jurisdictions, the legislative framework against trafficking in persons in SADC is not necessarily strong on the prosecution and victim protection front.<sup>145</sup> This is due to a lack of resources among other factors as shall be discussed in the next chapter. Thus, SPA also advocates for resource mobilisation to enable the implementation of measures that address the noted priority areas.<sup>146</sup> The availability of resources ensures that measures are sustainable and effectively address the problem of child trafficking in the region.

Furthermore, SPA calls for monitoring and evaluation of measures against trafficking in persons. It suggests regional monitoring, evaluation and reporting on the implementation of SPA as a way of tracking progress in the Plan's implementation.<sup>147</sup>

Commendably, over the years, some of these key priority areas, as outlined by the plan of action, have managed to yield positive results and address some of the key issues of child trafficking.<sup>148</sup> This has been achieved through various collaborative efforts.<sup>149</sup> In 2014, the collaboration between SADC and the UNODC resulted in the Regional Trafficking in Persons Database which was deployed in South Africa in 2019.<sup>150</sup> The database was established as a direct response to the absence of reliable

<sup>143</sup> Chapter II, Article 6 of the Trafficking Protocol.

<sup>144</sup> UNODC, Trafficking in Persons in the SADC Region: A Statistical Report (2014-2016) 5.

<sup>145</sup> Laura Gauer Bermudez, 'No experience necessary: The internal trafficking in persons in SA' (2008) International Organization for Migration (IOM) Regional Office for Southern Africa 1, 12.

<sup>146</sup> 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019), 11-15.

<sup>147</sup> 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019), 11-15.

<sup>148</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 October 2021.

<sup>149</sup> The joint EU-UNODC initiative, the Global Action to Prevent and Address Trafficking in Persons and the Smuggling of Migrants (GLO.ACT), which was launched in 2016 in partnership with the International Organization for Migration (IOM) and the United Nations Children's Fund (UNICEF) is an example of such collaborations. See UNODC, 'GLO.ACT South Africa hosts a first of its kind information sharing workshop for all role players involved in the response to trafficking in Persons' <<https://www.unodc.org/southernafrica/en/tp/glo-act-south-africa-hosts-a-first-of-its-kind-information-sharing-workshop-for-all-role-players-involved-in-the-response-to-trafficking-in-persons-.html>> accessed 4 June 2021.

<sup>150</sup> SADC, 'Launch of Regional Statistical Report on Trafficking in Persons for the SADC Region' inAfrica24.com <<http://inafrica24.com/recent-news/south-africa/launch-of-regional-statistical-report-on-trafficking-in-persons-for-the-sadc-region/>> accessed 3 October 2021. See also UNODC, 'SADC Regional Trafficking in Persons Data Collection System Deployed' accessed 4 June 2021.

statistics, which continues to obstruct regional and national responses to the crime. Thus, the objectives of the database include the facilitation of collection, management, and dissemination of reliable statistics on trafficking in persons in the SADC region; provision of reliable data for informed responses to the crime; provision of regular analytical reports on the scope and trends of trafficking in persons in the SADC region and to facilitate information sharing on the crime.<sup>151</sup>

However, the Regional Trafficking in Persons Database is not without its problems. The data submitted by the respective States at times cannot be readily ascertained due to varying factors. For instance, because of a lack of understanding of the elements of child trafficking, the crime is often confused with migrant smuggling.<sup>152</sup> Consequently, the data is usually a conflation of both crimes and therefore not a true reflection of the extent of child trafficking in the region.<sup>153</sup> Furthermore, due to the sensitive nature of child trafficking, victims are often afraid to report it. Therefore, there is insufficient data recorded on the crime.

However, to address the above limitations, where available, the Regional Trafficking in Persons Database obtains data from national trafficking in persons reports and court judgments. Thereafter the information captured in the database is backed by real cases identified and reported by the Member States.<sup>154</sup> Even though it is believed that the data would have been verified, the bottom line remains that data collection is not easy in the region, and measures to attain 'near accurate' data are far from solving the problem of lack of information on child trafficking in the SADC region.

After the mid-term review of the SPA in 2016, it was noted that despite a few successes, the SPA was still lacking in some of its priority areas. Therefore, adjustments were made and approved in 2017.<sup>155</sup> The Revised SPA acknowledges

<sup>151</sup> SADC Secretariat, Preventing and Combating Trafficking in Persons: Lessons from the SADC Region, (2017) Gaborone, SADC Secretariat <[https://www.sadc.int/files/1115/0953/7902/EN\\_TIP\\_Lessons.pdf](https://www.sadc.int/files/1115/0953/7902/EN_TIP_Lessons.pdf)> accessed 2 November 2019.

<sup>152</sup> UNODC, GLO.ACT at the forefront in the fight against the scourge of Trafficking in Persons (TIP) and Smuggling of Migrants in South Africa' <<https://www.unodc.org/southernafrica/en/aml/forefront.html>> accessed 11 January 2020.

<sup>153</sup> This apparent lack of clarity may be attributed to the fact that most trafficking in persons legislations in respective States are recent and law enforcement officials are not yet fully equipped to deal with the crime. See SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (SADC 2016) 21.

<sup>154</sup> UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report* (2014-2016) 15-17.

<sup>155</sup> *ibid* 5.

progress in the harmonisation and operationalisation of laws in the region. This was achieved by developing legislation criminalising trafficking in persons as well as alignment of the national laws with regional and international legislative instruments on trafficking in persons.<sup>156</sup>

However, a closer look at the revised version reveals that capacity building and training remain a priority considering the insignificant progress. No tangible solution has been recommended to remedy the implementation problem. The same can be said for public education and awareness raising, as the revised version simply regurgitates its predecessor.<sup>157</sup>

Victim support and witness protection, coordination, and regional cooperation as well as research and information sharing constantly remain weak links in establishing a sound framework for trafficking in persons in the region. Save for the 2014 Regional Database on trafficking in persons discussed above,<sup>158</sup> there is still a lot more to be done to improve counter-trafficking measures in the region.

However, more than ten years later, there is no significant progress in terms of successfully combating child trafficking. Apart from the respective national efforts to include the criminalisation of trafficking in persons in domestic laws, the different legal systems in the respective domestic jurisdictions are problematic as far as harmonisation is concerned.<sup>159</sup> SADC States represent at least three main legal systems, namely, the Common law, Roman-Dutch law, and Civil law. Therefore, each State 'has its own legal traditions, legal thought, method of law-making and its own process of judicial determination of disputes'.<sup>160</sup>

Thus, the main problem is that there is no real harmonisation of SPA and anti-trafficking legislation, which is a prerequisite for effective cooperation in combating child

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<sup>156</sup> UNODC, Trafficking in Persons in the SADC Region: A Statistical Report (2014-2016) 5.

<sup>157</sup> *ibid* 10-15.

<sup>158</sup> UNODC, Trafficking in Persons in the SADC Region: A Statistical Report (2014-2016) 15-17.

<sup>159</sup> Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) 60 Cornell Law Faculty Publications 195, 197.

<sup>160</sup> Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) 60 Cornell Law Faculty Publications 195, 196. See also Lawrence Church, 'The Common Law in Zambia' in Muna Ndulo (ed), *Law in Zambia* (East African Publishing House Ltd 1984) 1- 47 for a discussion on legal systems of most African States.



trafficking.<sup>161</sup> SPA's term has lapsed, and one can only hope for a continuation and successful implementation of the initiatives that were started in terms of the Plan.<sup>162</sup> Without implementation, SPA just becomes proof that SADC States set goals and standards that they have no political will to implement.<sup>163</sup>

Furthermore, outside SPA, the SADC region remains without a solid regional framework for child trafficking save for the international instruments that the respective States have acceded to.<sup>164</sup> As shall be discussed in the next chapter, SADC States are still trying to address the general crime of trafficking in persons without paying attention to the peculiar nature of child trafficking. The ever-rising statistics of child trafficking in the region are evidence that the above-mentioned instruments, even when coupled with the various non-trafficking but related conventions,<sup>165</sup> have failed to guarantee state cooperation for the successful elimination of the crime.<sup>166</sup> Africa has reported considerably less progress in fighting child trafficking than all the other regions, yet it is also the largest source of victims globally.<sup>167</sup> Seemingly, when it comes to child trafficking in Africa, without extraordinary measures and serious implementation of the existing legislation and policies, everything becomes 'much ado about nothing'.<sup>168</sup>

#### **4.2.2 Other Key Sub-Regional Instruments and Institutions**

The SADC legal and policy framework may be described as a cocktail of non-trafficking in persons regional instruments that contain provisions regulating the crime. For that

<sup>161</sup> Ndulo acknowledges that the difference in legal systems in SADC Member States is always a challenge when trying to implement measures in response to a regional problem which requires a harmonized approach. See Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) 60 Cornell Law Faculty Publications 195, 197.

<sup>162</sup> SADC Human Trafficking Communique (2009) <<http://www.sadc.int/index/browse/page/531>> accessed 8 July 2021.

<sup>163</sup> Albert Einstein, Neil Berger and Maurice Solovine, *Letters to Solovine* (Philosophical Library Open Road 1951).

<sup>164</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 April 2019.

<sup>165</sup> Child Trafficking Statistics <<https://arkofhopeforchildren.org/child-trafficking/child-trafficking-statistics>> accessed 17 April 2022.

<sup>166</sup> These include the SADC Regional Protocol on Extradition; SADC Regional Protocol on Mutual Legal Assistance in Criminal Matters; SADC Regional agreement on trafficking in persons; and the SADC Protocol on Gender and Development.

<sup>167</sup> Innocenti Insight, *Trafficking in Human Beings, Especially Women and Children, in Africa* (2<sup>nd</sup> edn, UNICEF 2005) 26.

<sup>168</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 April 2022.

reason, it is crucial, therefore, to understand the role of the various sub-regional frameworks from which SADC draws lessons. This section thus lays a foundation for recommendations on how to strengthen the SADC framework in the next chapter.

The AU is the pinnacle of African States' cooperation and integration.<sup>169</sup> Therefore, responses to issues that affect the African continent start at that level.<sup>170</sup> Among other objectives, the AU seeks to encourage international cooperation, taking due account of the Charter of the UN<sup>171</sup> and the UDHR,<sup>172</sup> to promote and protect human and peoples' rights in accordance with the Banjul Charter and other relevant human rights instruments that promote peace, security, and stability on the continent.<sup>173</sup>

The AU Constitutive Act and Protocols have established a significant number of structures, both at the level of major organs and through a range of technical and subsidiary committees. Although none of them deals specifically with child trafficking in the continent, some of them, in their functions, address issues that are pertinent to the crime.<sup>174</sup> The African Commission on Human and Peoples' Rights (ACHPR), African Court on Human and Peoples' Rights (AfCHPR), AU Commission on International Law (AUCIL), AU Advisory Board on Corruption (AUABC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) also form part of these organs.<sup>175</sup>



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The ACERWC established the 'Agenda 2040: Fostering an Africa fit for children in 2016'. The Agenda's main objective is to restore the dignity of the African child by

<sup>169</sup> Faizel Ismail, 'Advancing Regional Integration in Africa through the Continental Free Trade Area (CFTA)' (2010) 10 (1) Law and Development Review 119, 138.

<sup>170</sup> African Union, *Silencing the Guns: Creating Conducive Conditions for Africa's Development* (African Union 2020) 18. Also see Conrad J Masabo, Marobe Wama and Tekla P Mlyansi, 'The Role of Regional Integration in Fighting Crime and Terrorism: The Case of the Africa Union's (AU's) Initiatives, 1999-2014' (2014) 1 Peace and Conflict Monitor 3.

<sup>171</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>172</sup> See UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>173</sup> Article 3 of the Constitutive Act of the African Union 2003. The functions of the AU are based and informed by its Charter as well as the Treaty Establishing the African Economic Community (1991).

<sup>174</sup> These structures include the Judicial, Human Rights and Legal Organs, which were established to support the implementation of good governance and respect for human rights. See African Union, *Silencing the Guns: Creating Conducive Conditions for Africa's Development* (African Union 2020) 15.

<sup>175</sup> AU, Democracy, Law and Human rights <<https://au.int/en/democracy-law-human-rights>> accessed 3 January 2021. For a detailed discussion of the role of ACERWC in safeguarding the rights and welfare of children see Julia Sloth-Nielsen, 'Regional Frameworks for Safeguarding Children: The Role of the African Committee of Experts on the Rights and Welfare of the Child' (2014) 3 Soc. Sci 948–961.

assessing the achievements and challenges faced by children. Agenda 2040 aims for effective implementation of the African Children's Charter among other aspirations.<sup>176</sup> For instance, Aspiration 7 seeks to protect children from exploitation.<sup>177</sup> Its aim is that by 2040, no child would be exposed to any form of violence, including gender-based violence in the public or private sphere and that children would be free from physical and psychological abuse, sexual violence and exploitation, as well as sex trafficking.<sup>178</sup> However, as rightfully noted by Johnson and Sloth-Nielsen, 'without supportive social norms and adequate financial and human resources for national and local child protection systems', the achievement of Agenda 2040 is unlikely.<sup>179</sup>

Previous chapters have discussed how the socio-economic challenges faced by SADC States have exacerbated child trafficking in the region.<sup>180</sup> The AU has also noted the increase in irregular migration related to human trafficking.<sup>181</sup> Such an increase calls for the protection of women and children as the vulnerable group. Within the migration framework, the AU's Migration Policy Framework for Africa (MPFA) provides guidelines in several key areas, including irregular migration.<sup>182</sup> It recommends strategies around identification, protection, and assistance of trafficked persons with special attention given to child victims.<sup>183</sup> The MPFA recommends that all efforts to protect and prevent child trafficking must prioritise the best interest of the child.<sup>184</sup>

The MPFA further recommends that in addressing trafficking in persons, lessons be taken from the 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children.<sup>185</sup> However, the Ouagadougou Action Plan

<sup>176</sup> ACERWC, Agenda 2040 <https://www.acerwc.africa/agenda-2040/> accessed 3 January 2021.

<sup>177</sup> African Union, *Africa's Agenda for Children 2040 Fostering an Africa Fit for Children* (AU 2019) 16.

<sup>178</sup> *ibid.*

<sup>179</sup> Afrooz Kaviani Johnson and Julia Sloth-Nielsen, 'Child Protection, Safeguarding and the Role of the African Charter on the Rights and Welfare of the Child: Looking Back and Looking Ahead' (2020) 20 *African Human Rights Law Journal* 643, 663.

<sup>180</sup> See Chapter 2 above, 2.2 *Causes*.

<sup>181</sup> African Union, *AU Migration Policy Framework for Africa and Plan of Action (2018 – 2030)* (AU 2018) 51.

<sup>182</sup> *ibid.*

<sup>183</sup> The issue of victim identification is increasingly becoming important in fighting child trafficking. See For a good overview, see Anette Brunovskis and Rebecca Surtees, 'Identifying Trafficked Migrants and Refugees along the Balkan route. Exploring the Boundaries of Exploitation, Vulnerability and Risk' (2019) 72 (1) *Crime, Law and Social Change* 73, 74.

<sup>184</sup> African Union, *AU Migration Policy Framework for Africa and Plan of Action (2018 – 2030)* (AU 2018) 50.

<sup>185</sup> The Plan of Action was adopted by the Ministerial Conference on Migration and Development on the 22<sup>nd</sup> and 23<sup>rd</sup> of November 2006 in Tripoli.

provides wide-ranging direction on addressing trafficking in persons in general and nothing comprehensive related to child trafficking. Be that as it may, the Ouagadougou Action Plan also reaffirms Member States' commitment to various international and regional instruments aimed at protecting children's rights and combating child trafficking.<sup>186</sup>

The African Union Commission Initiative Against Trafficking (AU.COMMIT) 2012 and the AU Horn of Africa Initiative 2014, significantly contributed to popularising the Ouagadougou Action Plan and ensuring that some of the set goals were implemented or at the very least, steps were taken towards realisation.<sup>187</sup> Its efforts were boosted by the UN General Assembly's adoption of the 2030 Agenda for Sustainable Development, which is coined 'Transforming our world: the 2030 Agenda for Sustainable Development'.<sup>188</sup> The 2030 Agenda has 17 Sustainable Development Goals (SDGs). Of these, only Goals 5 and 8, respectively, contribute to the fight against child trafficking. SDG 5 endeavours to achieve gender equality and empower all women and girls.<sup>189</sup> Among others, goal 5 also seeks to, "eliminate all forms of violence against all women and girls in the public and private spheres including trafficking and sexual as well as other types of exploitation."<sup>190</sup> SDG 8 on the other hand, seeks to promote sustained, inclusive and sustainable economic growth, full and productive

  
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<sup>186</sup> These include, but not limited to; the Universal Declaration of Human Rights (1948); The UN Convention on the Elimination of all Forms of Discrimination against Women (1979); The Beijing Declaration and Platform of Action (1995); The UN convention on the Rights of the Child (1989); The UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000); The Declaration of the World Summit for Children (1990); ILO Convention on worst form of child labour (1999); A World Fit for Children- UN General Assembly Special Session on Children (2002); The Constitutive Act of the African Union (2002); The African Charter on Human and Peoples Rights (1981) and its Protocol relating to the Rights of Women (2002); The African Charter on the Rights and Welfare of the Child (1990); The African Common Position on Children (Declaration and Plan of Action 2001); The African Common Position on Migration and Development (2006).

<sup>187</sup> AU Commission Initiative against Trafficking (AU. COMMIT) Campaign 1.

<sup>188</sup> United Nations General Assembly, Resolution 70/1, Transforming our World: The 2030 Agenda for Sustainable Development (2015). Also see Finn Kjaerulf, Mitchell B Lee, Harris L Cohen, James P Donnelly, Jonathan S Turner, Alexander R Davis, Tanaka A Realini, Moloney-Kitts M, Brett R Gordon, Vanessa G Lee, Christopher J Gilligan, 'The 2030 Agenda for Sustainable Development: A Golden Opportunity for Global Violence Prevention' (2016) 61 (8) International Journal of Public Health 863-864.

<sup>189</sup> Sustainable Development Goal 5: Achieve gender equality and empower all women and girls. See United Nations, 'Sustainable Development Goals: Goal 5 Gender Equality' <<https://www.un.org/sustainabledevelopment/gender-equality/>> accessed 1 January 2022.

<sup>190</sup> See Goal 5.2 of SDG 5.

employment and decent work for all.<sup>191</sup> Lack of employment opportunities for the youth and other economic challenges have been identified as some of the factors that have been increasing the risk of child trafficking in the region.<sup>192</sup> Therefore, achieving full and productive employment and decent work for young people in terms of SDG 8 is a necessary step toward addressing the problem of child trafficking.<sup>193</sup>

Due to this contribution toward fighting child trafficking and reducing the youth unemployment rate, a link may thus be created between Agenda 2030 and AU Agenda 2063.<sup>194</sup> Agenda 2063 seeks to refocus the agenda towards inclusive social and economic development, continental and regional integration, democratic governance and peace and security, amongst other issues.<sup>195</sup> Thus, consistent with SDGs 5 and 8, Aspiration 6 of Agenda 2063 calls for, ‘an Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children’.<sup>196</sup> Furthermore, Agenda 2063’s First 10 Year Implementation Plan calls for efforts aimed at empowering women, youth and children and ending child labour exploitation, marriages and trafficking by 2023.<sup>197</sup>

It is from these Agendas and Plans of action that the SADC region has been drawing inspiration to improve its framework to better tackle the problem of trafficking in persons. It can only be hoped that in time child trafficking will also find a place in this framework as a growing concern requiring an immediate and effective response. This largely depends on how the respective SADC States respond to the call made by the various instruments discussed above, to enact anti-trafficking legislation.

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<sup>191</sup> Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all <<https://unric.org/en/sdg8/#:~:text=Goal%208%3A%20Promote%20inclusive%20and,and%20endangered%20the%20global%20economy>> accessed 3 June 2022.

<sup>192</sup> See Chapter 2, Poverty 2.2.2.

<sup>193</sup> See Goal 8.5 of SDG 8.

<sup>194</sup> AU, Agenda 2063: The Africa We Want <<https://au.int/en/agenda2063/overview>> accessed 3 June 2022.

<sup>195</sup> AU, 50<sup>th</sup> Anniversary Solemn Declaration, <[https://au.int/sites/default/files/documents/36205-doc-50th\\_anniversary\\_solemn\\_declaration\\_en.pdf](https://au.int/sites/default/files/documents/36205-doc-50th_anniversary_solemn_declaration_en.pdf)> accessed 3 January 2021.

<sup>196</sup> AU, Flagship Projects of Agenda 2063 <<https://au.int/en/agenda2063/flagship-projects>> accessed 3 January 2021.

<sup>197</sup> AU, Youth Development, <<https://au.int/en/youth-development>> accessed 3 January 2021. See also The First-Ten Year Implementation Plan <<https://au.int/en/agenda2063/ftyip>> accessed 3 January 2021.



### 4.2.3 National Efforts to Combat Child Trafficking

Child trafficking in Southern Africa is driven by several factors ranging from gross human rights violations, and sexual and labour exploitation to poverty.<sup>198</sup> For this reason, most national legislations to combat the crime are anchored on the alleviation of these factors. However, child trafficking is regulated under the main banner of trafficking in persons.<sup>199</sup> Although the region has no regional instrument to specifically combat child trafficking, States have been making individual efforts to fight trafficking in persons in one way or the other.

In terms of anti-trafficking legislation, Mozambique was one of the first States in the region to have trafficking in persons specific legislation. It enacted the Anti-Human Trafficking Act in 2008. (Law No. 6 of 2008).<sup>200</sup> Mozambique also had the draft National Action Plan to assist with the implementation of measures.<sup>201</sup> However, the National Plan remains unfinalized.<sup>202</sup> The State also uses provisions of its Penal Code to address trafficking in persons.

In the same year, Zambia<sup>203</sup> and Tanzania<sup>204</sup> also enacted their Anti-Trafficking in Persons legislation, followed by Mauritius in 2009 with its Combating of Trafficking in Persons Act, 2009 and Eswatini's People Trafficking and People Smuggling (Prohibition) Act, No 7 in the same year.<sup>205</sup> In 2011, Lesotho enacted the Anti-Trafficking in Persons Act and thereafter in 2021 enacted the Anti-Trafficking in

<sup>198</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A baseline Report* (SADC 2016) 57.

<sup>199</sup> Article 3 of the Trafficking Protocol.

<sup>200</sup> U.S Department of State, Office to monitor and combat trafficking in persons, '2021 Trafficking in Persons Report: Mozambique' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/mozambique/>> accessed 19 July 2021.

<sup>201</sup> UNODC and SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2014-2016) 7, 40-46.

<sup>202</sup> UNODC, 'UNODC and Mozambique discuss Strategic Roadmap against Transnational Organized Crime, Drugs and Terrorism' <<https://www.unodc.org/unodc/en/frontpage/2019/September/unodc-and-mozambique-discuss-a-comprehensive-strategic-roadmap-against-transnational-organized-crime--drugs-and-terrorism.html?ref=fs1>> accessed 9 January 2021.

<sup>203</sup> Anti-Trafficking Act No. 11 of 2008.

<sup>204</sup> Anti-Trafficking Act No. 6 of 2008.

<sup>205</sup> In 2015 Eswatini launched the Victim Identification Guidelines and Referral Mechanism for Assisting Victims of Human Trafficking. The Guidelines and the referral mechanism targeted areas of: Identification of presumed victims of human trafficking; Protection and provision of psycho-social support; Documentation of victims; Investigation and prosecution of crime; Integration and family reunification; and Repatriation. For the steps that Eswatini has taken to counter trafficking in persons see UNODC, 'Swaziland launches Victim Identification Guidelines and Referral Mechanism for assisting Victims of Human Trafficking' <<https://www.unodc.org/southernafrica/en/stories/swaziland-launches-victim-identification-guidelines-and-referral-mechanism-for-assisting-victims-of-human-trafficking.html>> accessed 20 December 2021.



Persons Amendment Act of 2021, which amended the definition of trafficking to criminalise all forms of sex trafficking and removed the option of a fine *in lieu* of imprisonment for trafficking offences.<sup>206</sup> In 2013, South Africa enacted the Prevention and Combating of Trafficking in Persons. Provisions in the Criminal Law (Sexual Offences and related matters) Amendment Act of 2007 are also instrumental in criminalising the sex trafficking of children and adults in the State.

In 2014, Zimbabwe also enacted its Trafficking in Persons Act;<sup>207</sup> the same year in which the Madagascar Anti-Trafficking in Persons Law,<sup>208</sup> and Botswana's Anti-Human Trafficking Act, were also enacted.<sup>209</sup> Malawi's Trafficking in Person's Act was enacted in 2015,<sup>210</sup> and Namibia, enacted the Combating of Trafficking in Persons Act 1 of 2018 after a protracted period of regulating trafficking in persons through the Prevention of Trans-organised Crime Act.<sup>211</sup>

Although Angola and DRC are still behind in terms of having trafficking in persons legislation, these States also prohibit the crime in alternative instruments. Angola has the Anti-Terrorism and Money Laundering Law (2014), which addresses trafficking in persons under Article 19.<sup>212</sup> DRC has the Law on Protection of the Child (2009), which has a whole chapter dedicated to child trafficking.

In essence, all SADC States have some sort of framework that deals with trafficking in persons in general. As shall be discussed in the next chapter, it is through the instrumentality of these various frameworks that respective SADC States address the fundamental aspects of child trafficking related to prevention, prosecution and victim

<sup>206</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Lesotho' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/lesotho/>> accessed 19 July 2021.

<sup>207</sup> Trafficking in Persons Act, No 4 of 2014.

<sup>208</sup> Anti-Trafficking in Persons Law No.40 of 2014.

<sup>209</sup> Anti-Human Trafficking Act, No.32 of 2014.

<sup>210</sup> Malawi also has comprehensive legislation against child labour. This was used to regulate the crime prior the Act.

<sup>211</sup> Section 15 of POCA, act 20 of 2004 state that; "Any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the [United Nations] Convention [against Transnational Organised Crime], in Namibia or across the border to and from foreign States commits an offence is liable to a fine not exceeding N\$1,000,000 (approximately US\$ 72,400) 3 or to imprisonment for a period not exceeding 50 years".

<sup>212</sup> Law no. 34/11 of December 12th, the Anti-Money Laundering and Countering Financing of Terrorism Law.

assistance. Still, it remains unclear whether these frameworks are adequate to counter the fast-growing crime of child trafficking.

### 4.3 Summary

In sum, this chapter has shown how the international framework for trafficking in persons has influenced regional and sub-regional responses to child trafficking. There seems to be a positive movement toward national efforts to regulate child trafficking, albeit, at a very slow pace. However, the crime has been on the rise regardless.

The chapter has also brought to light the challenges faced by SADC States which are related to the enforcement of measures. It has also been established that a lot still needs to be done in terms of implementation and harmonisation of efforts across the region. This is particularly important for responses aimed at protecting victims, preventing the crime as well as the successful prosecution of those accused of child trafficking. Hence chapter 5 is built on this premise and focuses on the challenges faced by SADC States in implementing the legal and policy measures discussed in this chapter.



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## CHAPTER 5

# A CRITICAL ANALYSIS OF THE SADC CHILD TRAFFICKING FRAMEWORK

### 5.1 Introduction

The previous chapters have identified the major factors of child trafficking and noted the legislative gaps in the regulation of child trafficking (“the crime”). As a response to these gaps as well as factors of child trafficking, States in the SADC region have done considerably well by adopting and enacting national legislation regulating trafficking in persons, which also caters for child trafficking.<sup>1</sup> However, the policy and legislative responses to the crime have not adequately addressed the key areas that are necessary to combat child trafficking.<sup>2</sup>

Whereas a legislative response to child trafficking is expected to ease the sting of the crime in the region, it is concerning that even though the respective SADC States have some form of regulation of the crime, there is still no significant reduction of child trafficking numbers.<sup>3</sup> Furthermore, measures related to key areas such as prevention of the crime, victim protection and assistance as well as prosecution of child trafficking offences, are not being effectively implemented across the region. A critical analysis of the SADC frameworks for child trafficking shows that despite the noted efforts, implementation of the legal and policy measures remains a big challenge.

Thus, this chapter is a diagnostic precursor to the conclusions and recommendations on how the SADC legislative and policy frameworks may be improved to better address the increasing problem of child trafficking in the region. This is achieved by a critical analysis of the policy measures that have been taken by SADC States to counter child trafficking thus far. This includes identifying the key challenges of implementation and how they may be addressed.

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<sup>1</sup> Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 15 October 2020.

<sup>2</sup> Nina Mollema, ‘Combating Human Trafficking in South Africa: A Comparative Study’ (LLD Thesis, University of South Africa 2013) 75.

<sup>3</sup> United Nations Office on Drugs and Crime (UNODC), *Trafficking in Persons Global Report*, (United Nations 2018) 23-24.

## 5.2 A Critical Analysis of the SADC Frameworks

SADC recognises efforts by States to combat child trafficking through national legislation on trafficking in persons.<sup>4</sup> These efforts are a positive response to the call by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) for State Parties to take legislative and policy measures to address child trafficking.<sup>5</sup> However, key issues of demand still need to be addressed as much as victim protection and assistance. Whether the subsisting measures taken by SADC States against the broader crime of trafficking in persons, are also a panacea for the fast-spreading child trafficking plague, remains a matter of great concern. Therefore, is important to assess whether these efforts by SADC States meet their commitment in terms of the Trafficking Protocol to address the '3Ps' namely prevention of the crime, protection of victims, and prosecution of offenders.<sup>6</sup>

### 5.2.1 Preventative Measures for Child Trafficking in SADC

The nature of possible preventative measures for child trafficking is that they are resource-based. Thus, a State's efforts can only go as far as its budget can take it. The alleviation of the factors of child trafficking in the SADC region discussed in chapter 2 which include lack of awareness of the crime and porous border posts in the region among other factors require resources for them to be effectively implemented.<sup>7</sup> Notably, efforts have been made to address these factors by all SADC States, but such efforts are always thwarted by poor economic situations which manifest as a lack of resources and funding.<sup>8</sup>

<sup>4</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region Policy Brief* (SADC 2016) 15.

<sup>5</sup> Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000).

<sup>6</sup> The "3P" paradigm – prosecution, protection, and prevention is a global standard used to combat human trafficking. This paradigm is reflected in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol) to the *United Nations Transnational Organized Crime Convention* (UNTOC). The U.S. Department of State's Office to Monitor and Combat Trafficking in Persons (TIP Office) employs a range of diplomatic and programmatic tools to advance the 3P paradigm worldwide. A possible rationale for the 3Ps is that States should do everything possible to ensure that the crime is prevented. However, if children are trafficked anyway such victims should be protected, and efforts be made to apprehend and prosecute offenders. See U.S. Department of State's Office to Monitor and Combat Trafficking in Persons, '3Ps: Prosecution, Protection and Prevention' <<https://2009-2017.state.gov/j/tip/3p/index.htm>> accessed 19 July 2022.

<sup>7</sup> See Chapter 2 para 2.2 Causes.

<sup>8</sup> Francois I Kabuya, 'Fundamental Causes of Poverty in Sub-Saharan Africa' (2015) 20 (6) IOSR Journal of Humanities and Social Science 1, 79.

External funding, therefore, goes a long way in facilitating the prevention of child trafficking. For example, the UNODC Global Programme against Trafficking in Persons, in collaboration with the UNODC Regional Office for Southern Africa is funded by the United Kingdom to assist States in implementing their national plans against trafficking in persons.<sup>9</sup> As part of this Programme, Zambia was able to train 25 criminal justice practitioners to become trainers against trafficking in persons in 2019.<sup>10</sup> Although this is a positive step in the right direction in that this project contributes to the implementation of the 2030 Agenda for Sustainable Development Goals (SDGs) and in particular SDG 16 on Peace, Justice and Strong Institutions, still the number of people who were trained is insignificant and would be inundated with creating awareness across the entire State.<sup>11</sup> Beyond this, the government of Zambia still has not provided further anti-trafficking training even to its diplomatic personnel.<sup>12</sup>

For those States that have the capacity to implement some regulatory measures to prevent child trafficking such as South Africa, there are other factors that incumber successful implementation of such measures. An example of a good initiative but the ill-conceived effort is the introduction of Immigration Regulations by South Africa in 2014,<sup>13</sup> which sought to, among other objectives, decrease cases of child trafficking.<sup>14</sup> The Regulations required that all travelling minors should have unabridged birth certificates and parental consent.<sup>15</sup> Although the Regulations were made, presumably

<sup>9</sup> UNODC, 'UNODC trains 25 Zambian Criminal Justice Practitioners to become Trainers against Trafficking in Persons' <<https://www.unodc.org/unodc/en/human-trafficking/Webstories2019/unodc-trains-25-zambian-criminal-justice-practitioners.html>> accessed 4 June 2021.

<sup>10</sup> *ibid.*

<sup>11</sup> UNODC, 'UNODC trains 25 Zambian Criminal Justice Practitioners to become Trainers against Trafficking in Persons' <<https://www.unodc.org/unodc/en/human-trafficking/Webstories2019/unodc-trains-25-zambian-criminal-justice-practitioners.html>> accessed 4 June 2021.

<sup>12</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Zambia' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/zambia/>> accessed 19 July 2021.

<sup>13</sup> Immigration Regulations (2014) read with the Immigration Act Amendments 13 of 2007 and 2011.

<sup>14</sup> DHA, 'Home Affairs encourages parents to get unabridged birth certificates for children' 12 June 2014 available at <<http://www.dha.gov.za/index.php/statements-speeches/475-home-affairs-encourages-parents-to-get-unabridged-birth-certificates-for-children>> accessed 3 June 2022.

<sup>15</sup> Regulation 6 (12) of the Immigration Regulations 2014 states that; (12)(a) Where parents are travelling with a child, such parents must produce an unabridged birth certificate of the child reflecting the particulars of the parents of the child. (b) In the case of one parent travelling with a child, he or she must produce an unabridged birth certificate and – (i) Consent in the form of an affidavit from the other parent registered as a parent on the birth certificate of the child authorising him or her to enter into or depart from the Republic with the child he or she is travelling with; (ii) A court order granting full parental responsibilities and rights or legal guardianship in respect of the child, if he or she is the parent or legal guardian of the child; or (iii) Where applicable, a death certificate of the other parent registered as a parent of the child on the birth certificate; Provided that the Director-General may,

in good faith and with the best interest of children in mind, they were considered to be undesirable and were faced with a lot of backlash and challenges.<sup>16</sup>

Firstly, the Regulations came only a year after the South African Department of Home Affairs had started issuing unabridged birth certificates for new-born babies.<sup>17</sup> This was after the Department's review of the Birth and Death Registration Act of 1992,<sup>18</sup> and the Citizenship Act of 1995<sup>19</sup> which culminated in the South African Citizenship Amendment Act of 2010.<sup>20</sup> This meant that parents needed to reapply for birth certificates yet, there were not enough centres at that time. Furthermore, the Regulations did not take into consideration the position of children with absent parents. Secondly, the process of getting guardianship letters and Court Orders was a taxing ordeal that not so many guardians were prepared to embark on.<sup>21</sup> As a result of all these and other challenges, the government could not and still have not promulgated the implementation of these Regulations.<sup>22</sup>



where the parents of the child are both deceased and the child is travelling with a relative or another person related to him or her or his or her parents, approve such a person to enter into or depart from the Republic with such a child. (c) Where a person is travelling with a child who is not his or her biological child, he or she must produce: (i) A copy of the unabridged birth certificate of the child; (ii) An affidavit from the parents or legal guardian of the child confirming that he or she has permission to travel with the child; (iii) Copies of the identity documents or passports of the parents or legal guardian of the child; and (iv) The contact details of the parents or legal guardian of the child, Provided that the Director-General may, where the parents of the child are both deceased and the child is travelling with a relative or another person related to him or her or his or her parents, approve such a person to enter into or depart from the Republic with such a child. (d) Any unaccompanied minor shall produce to the immigration officer- (i) Proof of consent from one of or both his or her parents or legal guardian, as the case may be, in the form of a letter or affidavit for the child to travel into or depart from the Republic.

<sup>16</sup> See Immigration Regulations (2014) read with the Immigration Act 13 of 2002. See also Phephelaphi Dube, 'The 'undesirable' immigration regulations 2014' (2014) *Polity* <https://www.polity.org.za/article/the-undesirable-immigration-regulations-2014-2014-06-10> accessed 27 December 2021.

<sup>17</sup> DHA, 'Home Affairs encourages parents to get unabridged birth certificates for children' 12 June 2014 available at <<http://www.dha.gov.za/index.php/statements-speeches/475-home-affairs-encourages-parents-to-get-unabridged-birth-certificates-for-children>> accessed 3 June 2022. See also Nthambeleni Gabara, 'First unabridged birth certificate issued' (SA News Agency 4 March 2013) <<https://www.sanews.gov.za/south-africa/first-unabridged-birth-certificate-issued>> accessed 3 June 2022.

<sup>18</sup> South Africa: Act No. 51 of 1992, Births and Deaths Registration Act [South Africa], 6 May 1992.

<sup>19</sup> South Africa Citizenship Act, 1995.

<sup>20</sup> South African Citizenship Amendment Act 2010 [South Africa], 3 December 2010.

<sup>21</sup> See the case of *In re Ndala Review* Case No: 14/1/2-19/2010 for a practical example of the process and requirements for an application for guardianship at court.

<sup>22</sup> This is with reference to the implementation of regulations in Sections 15, 16, and 31(2)(b)(ii) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.



On account of a better functioning economy than its SADC counterparts,<sup>23</sup> South Africa seemed to be ahead of other SADC States in terms of taking deliberate steps to counter child trafficking, but it has since reneged in some of its commitments.<sup>24</sup> The U.S Department of State reported in 2021 that South Africa lacked coordination in the implementation of its anti-trafficking efforts which has resulted in the State being downgraded to Tier 2 Watch List.<sup>25</sup> Other States have also been downgraded to Tier 2 Watch List for inadequate measures against trafficking in persons.

Perhaps a more practical plan for those States with limited resources to formulate and implement measures for combating child trafficking would be taking into consideration the prevention recommendations of the Office of the High Commissions for Human Rights.<sup>26</sup> The OHCHR recommends addressing the root causes of trafficking through strategies aimed at preventing trafficking.<sup>27</sup> Furthermore, States and intergovernmental organisations are encouraged to ensure that their interventions address the factors that

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<sup>23</sup> South Africa has the largest GDP in SADC. See, SADC Facts & Figures < <https://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> accessed 4 June 2022. See also SADC Selected Economic and Social Indicators 2019 < [https://www.sadc.int/files/2916/0102/7136/Selected\\_Indicators\\_2020\\_September\\_11v2.pdf](https://www.sadc.int/files/2916/0102/7136/Selected_Indicators_2020_September_11v2.pdf)> accessed 30 May 2022.

<sup>24</sup> These efforts include the implementation of the Immigration Regulations related to child trafficking among other efforts. The government of South Africa also removed the chair of National Intersectoral Committee on Trafficking in Persons, which directed all governmental trafficking efforts and the framework. This has affected the coordination of the provincial task teams. See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2022-trafficking-in-persons-report/south-africa/> accessed 19 July 2021.

<sup>25</sup> The Trafficking Victims Protection Act (TVPA) places each country into a tier based on its government's efforts to satisfy the TVPA's minimum standards for the elimination of human trafficking. Tier 1 is the highest ranking a country can receive. Tier 2 comprises of States that do not fully meet the minimum standards for the elimination of trafficking but are making significant efforts to bring themselves into compliance with these standards. Tier 3 States whose do not fully meet the minimum standards for the elimination of trafficking and are not making significant efforts to bring themselves into compliance. See Martina Anderson, 'A Look Inside the 2021 Trafficking in Persons Report' *Anti-Trafficking International* (31 July 2021) < [https://preventht.org/editorial/a-look-inside-the-2021-trafficking-in-persons-report/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=a-look-inside-the-2021-trafficking-in-persons-report](https://preventht.org/editorial/a-look-inside-the-2021-trafficking-in-persons-report/?utm_source=rss&utm_medium=rss&utm_campaign=a-look-inside-the-2021-trafficking-in-persons-report)> accessed 25 August 2022. See also U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2022-trafficking-in-persons-report/south-africa/> accessed 19 July 2021.

<sup>26</sup> The recommendations were presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1). Available at <https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf>> accessed 19 July 2022.

<sup>27</sup> See Guidelines 4 - 6 on Preventing trafficking. See Recommended Principles on Human Rights and Human Trafficking < <https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf>> accessed 19 July 2022.

increase vulnerability to trafficking which include inequality, poverty<sup>28</sup> and all forms of discrimination.<sup>29</sup> Additionally, it is recommended that States exercise due diligence in identifying and eradicating public sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking should face the full wrath of the law.<sup>30</sup>

In sum, while all the States in SADC have some sort of plan of action aimed at preventing trafficking in persons, there is no tangible result on successfully preventing child trafficking in the region. Despite the low numbers that have been reported on child trafficking in recent years, evidence is there in other States of increasing victims from SADC States. Victims from Sub-Saharan Africa are especially identified in regions with enhanced national capacities to detect, record and report data on trafficking victims.<sup>31</sup> This is a problem in that it shows a lack of understanding, by SADC States, of the extent of the crime that they, on paper, are trying to prevent. Crucially, apart from Mozambique which emphasizes on discouraging the demand that cultivates the exploitation of women and children,<sup>32</sup> there is no serious effort across the region, to address the issue of demand, particularly in child trafficking for sexual exploitation.<sup>33</sup>

### **5.2.2 Victim Protection and Assistance**

Part two of the Trafficking Protocol contains State Parties' obligations with regard to victim protection.<sup>34</sup> Using the roadmap provided by the UN Recommended Principles and Guidelines to interpret the provisions of the Trafficking Protocol,<sup>35</sup> SADC States

<sup>28</sup> See the discussion of poverty as a factor for child trafficking in Chapter 2, sub section 2.2.1 Poverty.

<sup>29</sup> See Chapter 2, subsection 2.2.9 Human rights violations para 2.

<sup>30</sup> Guideline 7: Protection and Assistance. See Recommended Principles on Human Rights and Human Trafficking <<https://www.ohchr.org/sites/default/files/Documents/Publications/Traffickingen.pdf>> accessed 19 July 2022.

<sup>31</sup> UNODC, *Global Report on Trafficking in Persons 2018* (UNODC 2018) 9.

<sup>32</sup> Such emphasis is based on the historic use of forced labour in fisheries and sexual exploitation of women abroad or use of children for domestic work and begging in other SADC States. See UNODC, *Global Report on Trafficking in Persons 2018* (UNODC 2018) 9.

<sup>33</sup> U.S Department of State, Office to monitor and combat trafficking in persons, '2021 Trafficking in Persons Report' <<https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf>> accessed 19 July 2022.

<sup>34</sup> Articles 6-8 which outlines the obligations for the protection of victims of trafficking in persons.

<sup>35</sup> UN Recommended Principles and Guidelines state that Trafficked person shall not be detained, charged or prosecuted for the illegality of their entry into or residence in States of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care and have access to adequate physical and psychological care. Such protection

have legislation aimed at, among other things, victim protection.<sup>36</sup> Such protection entails non-punishment of victims; victim identification; assistance in legal proceedings as well as their re-integration and rehabilitation. However, for various reasons, including the vague construction of the protection clause in the Trafficking Protocol, which influences these policies,<sup>37</sup> many SADC States have inadequate victim protection efforts and children continue to be vulnerable.<sup>38</sup>

Furthermore, there are disparities in approaches to victim protection in SADC States, which is further proof of a lack of a unified approach against child trafficking. Although in principle the measures for victim assistance are the same, the differences in interpretation and execution always create a weakness in the overall regional framework.<sup>39</sup> It may be argued that the provision of assistance is voluntary and is always resource- based.<sup>40</sup> However, lack of specificity of the kind of protection and/or assistance to be given to victims always results in non-implementation of the provisions by States, which has a negative impact on the victims.<sup>41</sup> In any event, even in



and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permit to victims and witnesses during legal proceeding. Children who are victims of trafficking shall be identified as such. Their best interest shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs. Safe (and to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation would pose a serious risk to their safety and/or to the safety of their families.

<sup>36</sup> Text to n 3 above.

<sup>37</sup> On reflection, by creating few mandatory obligations on States, perhaps the drafters of the Trafficking Protocol sought to entice States into cooperating. Nevertheless, it may have created more harm than the initially intended good. See Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 14.

<sup>38</sup> Monique Emser, The Politics of human Trafficking in South Africa: A case study of KwaZulu Natal Inter-sectorial task team and South African Counter Trafficking Governance' (Dphil Thesis University of KwaZulu Natal 2013) 135.

<sup>39</sup> Tsireledzani, *Understanding the Dimensions of Human Trafficking in Southern Africa* (Research Report, Human Sciences Research Council 2010) 17.

<sup>40</sup> Janie A Chuang, 'Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy', (2010) 158 University of Pennsylvania Law Review 1655, 1663.

<sup>41</sup> Article 20 of the Anti-Human Trafficking Act of Mozambique does not provide any recourse to the victims against their traffickers and makes compensation to victims a discretionary matter to be decided by the court. The Act also seeks to hold corporations accountable for trafficking but does not specify how that would be done. (Article 22).

international law, there is no mandatory obligation for States to provide assistance to victims.<sup>42</sup>

Be that as it may, there are three major legs to victim protection and assistance. These start with victim identification and screening. This process helps in ensuring that the victims are correctly identified and adequately assisted or referred to relevant shelters. The shelters are the custodians of the second leg which involves re-integration and rehabilitation of the victims. This leg also deals with the repatriation of victims where necessary and appropriate. The last leg deals with the non-criminalisation of victims which at times also involves restitution and compensation. However, there is no record of victims who have received or have been awarded compensation in SADC States.<sup>43</sup>

### 5.2.2.1 Victim Identification

‘A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights’.<sup>44</sup> Likewise, incorrect identification of victims or non-identification often leads to the conflation of child trafficking with related crimes such as migrant smuggling.<sup>45</sup> The obligation to identify victims of trafficking is implied in all legal instruments that provide victim protection and support.<sup>46</sup> Despite having such legislation and national manuals on practical steps on trafficking in persons victim identification, SADC States largely rely on NGOs and civil societies to assist with victim identification.<sup>47</sup> It may therefore be concluded that without such assistance many victims would remain unidentified. For instance, in 2021, the government of Zimbabwe

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<sup>42</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 83.

<sup>43</sup> Article 20 of the Anti-Human Trafficking Act of Mozambique does not provide any recourse to the victims against their traffickers and makes compensation to victims a discretionary matter to be decided by the court. The Act also seeks to hold corporations accountable for trafficking but does not specify how that would be done. See Article 22 of the Anti-Human Trafficking Act.

<sup>44</sup> See Guideline 2 of the UN Recommended Principles and Guidelines.

<sup>45</sup> U.S Department of State, Office to monitor and combat trafficking in persons, ‘2021 Trafficking in Persons Report: Zambia’ <https://www.state.gov/reports/2021-trafficking-in-persons-report/zambia/> accessed 19 July 2021.

<sup>46</sup> United Nations Office of the High Commissioner, Human Rights and Human Trafficking: Fact Sheet 36 (United Nations 2014) 12 available at [https://www.ohchr.org/sites/default/files/Documents/Publications/FS36\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/FS36_en.pdf) accessed 20 July 2022.

<sup>47</sup> See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, ‘2021 Trafficking in Persons Report’ <https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf> accessed 27 August 2022.

reported that there were no victims of trafficking in persons, but 91 victims were identified by NGOs of which, 67 were children.<sup>48</sup>

Perhaps, governments in SADC States struggle with proper victim identification because there is a lack of adequate screening procedures for vulnerable people. The government of Tanzania despite drafting standardised forms for identification of victims, has made no effort to increase victim screening among refugees, asylum seekers and children as the most vulnerable members of the community.<sup>49</sup>

Where victims are not properly identified, the ancillary obligation to assist the victims may not be satisfactorily fulfilled. It follows that if a State does not have clear and systematic measures for victim identification, that same State will most likely not have guidelines for referral of victims to shelters for assistance. Angola, Botswana and Mozambique are examples of States that have no clear guidelines for referrals. Yet, there is South Africa on the other hand, which has guidelines, but the officials do not follow them,<sup>50</sup> or Zambia which has inconsistent screening and referral of child trafficking victims.<sup>51</sup>

Given that the notable efforts to identify and screen child trafficking victims in SADC States are attributable to donor funds and NGOs, it could be that the hindrance to effective implementation is a lack of resources. It is one thing to identify the victims, but it is another to ensure that the victims are assisted with the relevant rehabilitation or any other assistance that they may require thereafter. That is where the ball is dropped.

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<sup>48</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Zimbabwe' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/zimbabwe/>> accessed 19 July 2021.

<sup>49</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Tanzania' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/tanzania/>> accessed 19 July 2022.

<sup>50</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2022 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2022-trafficking-in-persons-report/south-africa/> accessed 20 August 2021.

<sup>51</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2022 Trafficking in Persons Report: Zambia' <<https://www.state.gov/reports/2022-trafficking-in-persons-report/zambia/>> accessed 19 August 2022.



#### 5.2.2.2 Victim Re-integration and Rehabilitation

Child trafficking victims require adequate assistance in terms of their social wellbeing because of the impact that the trafficking ordeal has on them.<sup>52</sup> Due to being trafficked and experiencing exploitation, abuse and humiliation, victims can suffer from numerous consequences leading to a complexity of needs.<sup>53</sup> Hence the needs of a victim may require a greater number of services and the support provided will need to be specific to that individual.<sup>54</sup> For this reason, it is important for legislative and policy frameworks to have strong screening mechanisms so that victims may be appropriately assisted.

The challenge that is common across SADC is that due to financial constraints, there are no shelters specifically designed for the victims of trafficking in persons. Shelter is provided in common safe houses on a temporary basis. The provision of temporary shelters is problematic in States where victims, who are often undocumented cannot look for employment.<sup>55</sup> Yet, these victims do not have the means or funds to renew or process immigration papers. So, once they are released from such shelters or deported to their States of origin for unlawful immigration-related issues,<sup>56</sup> they are prone to re-trafficking. This is also exacerbated by the absence of legal alternatives to repatriation such as regularisation of stay.<sup>57</sup>

Despite provisions in various domestic anti-Trafficking legislation for establishment of shelters very few States have such specialised shelters. Zimbabwe for instance, has no counselling, rehabilitation and integration centres in all 10 provinces in the State.<sup>58</sup>

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<sup>52</sup> Text to section 2.3.1 ch 2.

<sup>53</sup> *ibid.*

<sup>54</sup> Camille Ruiz, Danijela Stiplošek, Emilien Tortel, Jitka Machova and Nives Vudrić, *The Identification of Victims of Human Trafficking in Transit And Destination States in Europe: A Practical Guideline for Frontline Workers* (2019) 53 <[https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines\\_FINAL\\_pages.pdf](https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines_FINAL_pages.pdf)> accessed 22 July 2022.

<sup>55</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2022-trafficking-in-persons-report/south-africa/> accessed 21 July 2021.

<sup>56</sup> In Angola immigration related benefits are contingent on criminal investigations and testimony during trial. Therefore, outside that, assistance is not guaranteed.

<sup>57</sup> States such as DRC, Mauritius; Zambia and Malawi do not have alternative plans and there is no option to regularise the stay of the victims in their respective States. See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report' available at <<https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf>> accessed 22 July 2022.

<sup>58</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Zimbabwe' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/zimbabwe/>> accessed 21 July 2021.



Namibia on the other hand, has no shelters or services specifically for trafficking victims, but the government and NGOs jointly provide shelter, psycho-social services, medical care, and provision of other basic needs to victims of trafficking, gender-based violence, and child abuse.<sup>59</sup> Those States that have shelters, such shelters are sub-standard and under-stuffed, and any efforts for improvement are stifled by a lack of resources.<sup>60</sup>

It is commendable, however, that despite not having specialised shelters, some governments have been providing some sort of funding to assist the victims. The Namibian government has been funding programs at such shelters. Lesotho is reported to have funded victim assistance initiatives in its State once and Botswana, though the government has been providing funding, has significantly reduced its budget for victim assistance. Malawi has also been funding victim repatriation and capacity building for protection service providers since 2018.<sup>61</sup> South Africa provides NGOs with stipends.<sup>62</sup> Similarly, the government of Tanzania has been doing well in implementing victim assistance measures and in January 2021 identified, referred to care, and reintegrated into their home communities 38 disabled victims exploited in forced begging in Dar es Salaam. In addition to these, 42 child trafficking victims were also reunited with their families.<sup>63</sup>

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Moreover, in 2020, the Tanzanian government finalised and launched the National Guidelines for Safe Houses. The identified victims who were referred to these safe houses were thereafter provided with psychosocial counselling, family tracing and reunification, and temporary shelter. Furthermore, the Tanzanian government

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<sup>59</sup> States often rely on external funding to implement measures. UNODC, 'The Government of Zambia and UNODC Launch New UK-Funded Project on Trafficking in Persons' <<https://www.unodc.org/unodc/en/human-trafficking/webstories2018/the-government-of-zambia-and-unodc-launch-new-uk-funded-project-on-trafficking-in-persons.html>> accessed 1 January 2020.

<sup>60</sup> Mozambique has care facilities for child trafficking victims but there is no funding thus shelter is provided on a temporary basis.

<sup>61</sup> See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report' available at <<https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf>> accessed 22 July 2022.

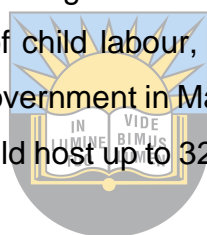
<sup>62</sup> *ibid.*

<sup>63</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report Tanzania' available at <<https://www.state.gov/reports/2021-trafficking-in-persons-report/tanzania/>> accessed 22 July 2022.

approved the Anti-Trafficking Fund in 2019 with the hope that more victims would benefit from the Fund.<sup>64</sup>

Be that as it may, the challenge with the lack of specialised shelters for victims of child trafficking is that the victims are occasionally not accepted at regular shelters for security reasons.<sup>65</sup> Child trafficking victims are often associated with criminality<sup>66</sup> and considered to be a danger or of negative influence on others. This notion coupled with a lack of resources leaves a lot of victims unassisted.<sup>67</sup>

Unlike the rest of SADC States, Madagascar and Mauritius have done well in prioritising the social wellbeing of child trafficking victims even in shelters that accommodate different categories of victims.<sup>68</sup> The Ministry of Population in Madagascar coordinates more than 700 child protection networks across the State which refer victims to international organisations and NGOs for assistance. Through such referrals, about 876 children (487 girls and 389 boys), including victims of sexual exploitation and the worst forms of child labour, both including child trafficking were assisted in 2021.<sup>69</sup> Similarly, the government in Mauritius operates a shelter for female child sex trafficking victims that could host up to 32 children. Children at this facility can



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<sup>64</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report Tanzania' available at <<https://www.state.gov/reports/2021-trafficking-in-persons-report/tanzania/>> accessed 22 July 2022.

<sup>65</sup> U.S Department of State, Office to monitor and combat trafficking in persons, '2021 Trafficking in Persons Report: South Africa' <https://www.state.gov/reports/2021-trafficking-in-persons-report/south-africa/> accessed 19 July 2021.

<sup>66</sup> The link between child trafficking and illegal migration patterns often lead to confusion between victims of trafficking and illegal migrants. In addition, victims of sexual and drug exploitation are easily viewed as criminals by the nature of the kind of exploitation they are exposed to. See Bridget Anderson, 'Where is the Harm in That? Immigration Enforcement, Trafficking and Protection of Migrants Rights' (2012) 56 (9) SAGE 1241, 1242.

<sup>67</sup> Zimbabwe is reported to have had 350 children involved in sex trafficking near Mazowe mines and 38 involved in drug trafficking. Had it not been for NGO intervention, these children would not have been assisted. Yet, even with such figures, the government report no cases of child trafficking for the same period. See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Zimbabwe' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/zimbabwe/>> accessed 19 July 2021.

<sup>68</sup> Child protection networks across Madagascar protect children from various forms of abuse and exploitation, as well as to ensure access to medical and psychological services for victims of crime, including trafficking.

<sup>69</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report Madagascar' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/madagascar/>> accessed 22 July 2022.

leave the shelter to attend school and receive medical and psychological assistance.<sup>70</sup> All this is a commendable effort to reintegrate and rehabilitate the victims.

However, re-integration and rehabilitation are only possible where sound screening procedures are in place. Not only does sound screening procedures help to ensure that victims of child trafficking get adequate assistance, but they also ensure that victims are not unjustifiably punished for crimes they would have been compelled to commit by perpetrators.

#### 5.2.2.3 Non-criminalisation of Victims

The other side of victim protection involves non-punishment for crimes committed as a result of trafficking.<sup>71</sup> The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.<sup>72</sup> Accordingly, States are encouraged not to detain, charge or prosecute trafficking victims.<sup>73</sup> This means that the victims' right not to be detained and charged is invoked at the earliest stage of the investigation. Guideline 8 of the OHCHR Principles recommends States to consider 'ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons'.<sup>74</sup>

In that context of non-punishment of victims, provisions have been made at the international, regional, and domestic levels.<sup>75</sup> At the domestic level, efforts are made

<sup>70</sup> U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report Mauritius' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/mauritius/>> accessed 22 July 2022.

<sup>71</sup> The Council of Europe Convention on Action Against Trafficking in Human Beings (2005), C.E.T.S. No. 197, entered into force 1 February 2008 and was the first treaty to contain a legally binding provision on non-punishment. Article 26 identifies non punishment with the possibility of "not imposing penalties" on trafficking victims to the extent that they have been compelled to engage in unlawful activities.

<sup>72</sup> Camille Ruiz, Danijela Stiplošek, Emilien Tortel, Jitka Machova and Nives Vudrić, *The Identification of Victims of Human Trafficking in Transit and Destination States in Europe: A Practical Guideline for Frontline Workers* (2019) 8 <[https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines\\_FINAL\\_pages.pdf](https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines_FINAL_pages.pdf)> accessed 22 July 2022.

<sup>73</sup> The Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002) Principle 7.

<sup>74</sup> For a commentary on the discussion of prosecution of children for crimes committed as a direct result of trafficking see, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' United Nations Human Rights Special Procedures 1-12 available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> accessed 4 June 2022.

<sup>75</sup> *ibid* 4.

to provide immunity to victims from prosecution for crimes that are consequent to trafficking.<sup>76</sup> Such immunity encourages victims to come forward and report or even agree to testify during trial without fear of prosecution.<sup>77</sup> However, it is encouraged that individual States ensure that such immunity is available at detention so that the victims are adequately protected from the onset.<sup>78</sup> Crucially, in line with the Trafficking Protocol, these non-punishment provisions should be aimed at granting trafficking victims the protection they are legally entitled to, and preventing re-trafficking while at the same time ensuring the punishment of perpetrators.<sup>79</sup>

However, that does not seem to be the case as victims are often not guaranteed such protection. Victimisation of victims during the legal processes is a consequence of a lack of understanding of the elements of the crime of child trafficking. The U.S Department of State in its latest report stated that several SADC States punish victims for crimes they would have been compelled to commit by traffickers.<sup>80</sup> This in essence is double jeopardy for the victims who would have endured trafficking and subsequently get punished for crimes they would have been forced to commit.<sup>81</sup> Thus, many victims

<sup>76</sup> Article 20 (1) and (2) of the Mozambique Anti-Human Trafficking Act, (2008). Section 71 (5) of South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. See also Section 24 (1) of the Anti-Human Trafficking Act of Zambia, (2008).

<sup>77</sup> Patrick Twomey, 'Europe's other Market: Trafficking in People' (2000) European Journal of Migration and Law 1, 2. Another option would be to give the victims temporary permits. See South Africa's Prevention and Combating of Trafficking in Persons Act (2013).

<sup>78</sup> Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The Importance of Implementing the Non-Punishment Provision: The Obligation to Protect Victims' United Nations Human Rights Special Procedures 9 para.31 available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> accessed 4 June 2022.

<sup>79</sup> See the goals set out by the Preamble of the Trafficking Protocol. See also, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' United Nations Human Rights Special Procedures 7 para 4 available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> accessed 4 June 2022.

<sup>80</sup> There were reports in Madagascar that the government arrested or punished trafficking victims for unlawful acts traffickers compelled them to commit; police would sometimes arrest girls for prostitution without screening or identification as trafficking victims See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report Madagascar' available at <<https://www.state.gov/reports/2021-trafficking-in-persons-report/madagascar/>> accessed 22 July 2022. See also Camille Ruiz, Danijela Stiplošek, Emilien Tortel, Jitka Machova and Nives Vudrić, *The Identification of Victims of Human Trafficking in Transit and Destination States In Europe: A Practical Guideline for Frontline Workers* (by Asylum, Migration and Integration Fund of the European Union 2019) 12 [https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines\\_FINAL\\_pages.pdf](https://pscentre.org/wp-content/uploads/2022/05/STEP-Indicators-guidelines_FINAL_pages.pdf)> accessed 9 August 2022. See also Directive 2011/36/UE of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims.

<sup>81</sup> Seychelles has weak measures for protection from prosecution for compelled crimes and unlawful entry into the State.

do not report because of fear of further victimisation by traffickers should it be known that they reported.<sup>82</sup>

In a nutshell, it is noteworthy that, where victim assistance is continuously unequally yoked with criminal justice, victims remain at the suffering end. Assistance is often not guaranteed for those victims who do not participate in investigations or for those who are unwilling to testify.<sup>83</sup> Thus to the extent that adequate assistance is linked to cooperation, victims are prejudiced. Yet sometimes even that expected cooperation is not easy because of various reasons including language barriers, especially in areas where interpreters are not easily accessible.<sup>84</sup>

### **5.2.3 Prosecution of Child Trafficking in the SADC Region**

It is commendable that SADC States have complied with the requirements of Article 5 of the Trafficking Protocol to adopt legislative and other measures to provide for criminal offences for the conduct set forth in article 3.<sup>85</sup> Taking into consideration the seriousness of the crime of trafficking in persons, domestic laws tend to impose the steepest sentence possible for the crime and sometimes its elements.<sup>86</sup> However, despite these measures, the number of convictions for child trafficking remains low in SADC States compared to other regions.<sup>87</sup> Successful prosecution and conviction in the region are mostly affected by the lack of uniformity in sentencing and punishable elements of the crime among other things.

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<sup>82</sup> Mary K Twis, 'Predicting Different Types of Victim-Trafficker Relationships: A Multinomial Logistic Regression Analysis' (2021) 6 (4) *Journal for Human Trafficking* 450. Also see WHO, *Guidelines for Medico-legal Care for Victims of Sexual Violence* (WHO 2002) 9.

<sup>83</sup> The Mozambican Anti-Human Trafficking Act provides for the protection of witnesses and states that the identities of witnesses be protected during and after criminal proceedings. See United States Department of Labour's Bureau of international labour Affairs, Mozambique Minimal Advancement <https://www.refworld.org.pdf> accessed 29 September 2020.

<sup>84</sup> Interpreters are far below the hierarchy of needs where there is scarcity of resources for personnel to attend to child trafficking matters. For example, in Lesotho, responders are only situated in one town and are at times unable to respond to all trafficking matters. See U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Lesotho' available at <<https://www.state.gov/reports/2021-trafficking-in-persons-report/lesotho/>> accessed 22 July 2022.

<sup>85</sup> Although the Trafficking Protocol does not prescribe penalties, Member States have a subsisting obligation in terms of Article 11 of the United Nations Convention Against Trans-Organised Crime.

<sup>86</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 80.

<sup>87</sup> UNODC, *Global Report on Trafficking in Person: Trafficking in Persons a Crime that Shames us all*, (UN. GIFT 2009) 39. See also UNODC, *Global Report on Trafficking in Persons 2018* (UNODC 2018) 23 [https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf) accessed 22 July 2022.



Firstly, the crime of trafficking attracts varying penalties, in the respective States depending on the purpose. The Mozambican Act provides a prison sentence of between 16 and 20 years.<sup>88</sup> It also imposes the same sentence for transporting and kidnapping, and a sentence of 8 to 12 years for leasing and subleasing property for trafficking purposes.<sup>89</sup> In Zambia, in terms of the Anti-Human Trafficking Act, if the trafficking is for the purpose of engaging the victim in the worst forms of labour or child labour, the term of imprisonment is between 25 and 35 years.<sup>90</sup> However, in instances where the victim is trafficked for sexual exploitation purposes or where the victim is grievously harmed or dies as a result of the trafficking, the term is imprisonment for life.<sup>91</sup> These terms are significantly higher than those imposed in Mozambique, possibly as a deterring measure.<sup>92</sup>

The provision of steep penalties for offenders in domestic legislation is expected to deter criminals. However, that does not seem to be the case since, in some jurisdictions, such penalties are watered down by the option of a fine as an alternative to imprisonment.<sup>93</sup> For instance, South Africa prescribes penalties of up to life imprisonment,<sup>94</sup> a fine of up to R100 million or both.<sup>95</sup> for sex and labour trafficking. Botswana prescribes penalties of up to 25 years' imprisonment, a fine of 500,000 or both.<sup>96</sup> Botswana criminalises inducing, coercing, or encouraging a child to engage in prostitution, and prescribed penalties of two to five years' imprisonment or a fine of 50,000 pula, or both.<sup>97</sup> It is important to note that, by allowing for a fine *in lieu* of

<sup>88</sup> Article 10 of the Mozambique Anti-Human Trafficking Act (2008).

<sup>89</sup> Article 10-14 of the Mozambique Anti-Human Trafficking Act (2008).

<sup>90</sup> Section 3 (4) of the Mozambique Anti-Trafficking Act (2008).

<sup>91</sup> Section 3 (3)- (6) of the Mozambique Anti-Trafficking Act (2008).

<sup>92</sup> The 2008 Law on Preventing and Combating the Trafficking of People criminalised sex trafficking and labour trafficking and prescribed penalties of 16 to 20 years' imprisonment. These penalties were sufficiently stringent and, with respect to sex trafficking, commensurate with those prescribed for other serious crimes, such as rape.

<sup>93</sup> The court in the case of *Republic v Ruth Lourenco*, noted that penalties of alternative provisions are not always appropriate with the level of criminality associated with child trafficking. Furthermore, the offence requires a clear articulation of all its elements if accused persons are to be prosecuted successfully.

<sup>94</sup> This is subject to Section 51 of the Criminal Law (Sexual Offenses and related matters) Amendment Act of 2007.

<sup>95</sup> Section 13 (a) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

<sup>96</sup> Section 57 of the Children's Act 8 of 2009.

<sup>97</sup> This is similar to the provision in South Africa's Children's Amendment Act of 2005 which prescribes penalties of five years to life imprisonment or fines for the use, procurement, or offer of a child for slavery, commercial sexual exploitation, or to commit crimes. See also U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Botswana' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/botswana/>> accessed 19 July 2021.



imprisonment, these penalties are not commensurate with penalties for other serious crimes, such as rape.<sup>98</sup> However, Lesotho has addressed this challenge in its Anti-Trafficking in Persons Amendment Act of 2021, which removed the option of a fine *in lieu* of imprisonment for trafficking offences.<sup>99</sup>

These variances in sentences are reflective of the different procedures implemented in the context of different legal systems.<sup>100</sup> Consequently, the volume and form of investigations, prosecutions or convictions also reflect each State's legal and procedural system.<sup>101</sup> This in essence creates a fragmented and diverse approach to a common and universal problem. In a regional context, uniformity may be desirable.

However, such uniformity is difficult to attain since SADC States have been constantly amending their anti-trafficking laws to suit their peculiar domestic circumstances. Angola has recently amended its Penal Code to revoke previous anti-trafficking legislation as well as to increase sentences.<sup>102</sup> In line with these amendments, article 178 of the Code now criminalises labour trafficking for both adults and children and prescribes penalties of 4 to 10 years' imprisonment. Article 196 criminalises child sex trafficking and prescribes penalties of 5 to 15 years' imprisonment.

However, the problem with constant amendments is that with time, they significantly widen the differences in the approach to the crime of trafficking across the region. For instance, by amending its law, Angola no longer criminalises all forms of sex trafficking.<sup>103</sup> Yet, Lesotho has amended the definition of trafficking to criminalise all

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<sup>98</sup> Zimbabwe on the other hand prescribe penalties of 10 years to life imprisonment, which are sufficiently stringent and commensurate with penalties for other serious crimes, such as rape. See, U.S Department of State, Office to Monitor and Combat Trafficking in Persons, '2021 Trafficking in Persons Report: Zimbabwe' <<https://www.state.gov/reports/2021-trafficking-in-persons-report/zimbabwe/>> accessed 19 July 2021.

<sup>99</sup> See Lesotho Anti-Trafficking in Persons Act, (2011) and (Amendment) Act, 2021.

<sup>100</sup> Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) 60 Cornell Law Faculty Publications 195, 196. See also Lawrence Church, 'The Common Law in Zambia' in Muna Ndulo (ed), *Law in Zambia* (East African Publishing House Ltd 1984) 1- 47 for a discussion on legal systems of most African states.

<sup>101</sup> UNODC, '87 Victims of Human Trafficking Rescued in Joint Operation Among Law Enforcement Authorities in the Southern Africa Region' <<https://www.unodc.org/southernafrica/en/aml/review.html>> accessed 4 April 2021. Also see UNODC, *Global Report on Trafficking in Person: Trafficking in Persons a Crime that Shames us all* (UN. GIFT 2009) 26.

<sup>102</sup> Laws 38/20 and 39/20 revoked the prior anti-trafficking legislation, the 2014 Law on the Criminalisation of Infractions Surrounding Money Laundering, slightly increasing the penalties for some trafficking offenses.

<sup>103</sup> It removed "sexual exploitation" as a purpose of a trafficking crime in Article 178.

forms of sex trafficking offences.<sup>104</sup> Mozambique does not establish the use of force, fraud, or coercion as an essential element of trafficking in persons and is looking into amending its definition.<sup>105</sup> On the other hand, Zimbabwe is without comprehensive prohibitions of trafficking crimes. Its anti-trafficking legislation defines trafficking in persons as a movement-based crime and does not adequately define exploitation.<sup>106</sup> All this alludes to a fragmented approach to a regional problem that requires a unified response.

These constant amendments to the elements of the crime of child trafficking to cater for a wide spectrum of criminal elements in respective national legislations could have been a positive human rights approach to the crime.<sup>107</sup> However, such an approach is only effective when applied by a collective of the Member States. It is not that SADC States are without the capability to adopt a unified approach against child trafficking, there are other aspects that these States already agree on. One such aspect is the definition of sexual exploitation, which is undefined in the Trafficking Protocol. Zambia, as well as the other SADC States, has managed to define sexual exploitation as;

[T]he participation of a person in prostitution or other sexual acts, or production of pornographic material as a result of being subjected to threat, force, intimidation or other forms of coercion or any other practice in terms of which it cannot be said that the person acted voluntarily.<sup>108</sup>

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Such a definition of sexual exploitation is comprehensive and is in line with the spirit and object of the Trafficking Protocol's definition of trafficking in persons in general,<sup>109</sup> as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which prohibits child pornography.<sup>110</sup> It also acknowledges the role of

<sup>104</sup> Anti-Trafficking in Persons Amendment Act of 2021.

<sup>105</sup> The government is still working on amendments to the Act so that it is in line with international standards.

<sup>106</sup> See Section 3 of Trafficking in Persons Act [Chapter 9:25].

<sup>107</sup> Anne T Gallagher, *The International Law of Human Trafficking*, (Cambridge University Press 2010) 70–71. See also Anne T Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009) 49 *Virginia Journal of International Law* 789-841.

<sup>108</sup> Section 2(1) Anti Human Trafficking Act of Zambia. The Act also defines servitude and includes more elements in the definition than those in the original trafficking definition such as the criminalization of control mechanisms used by traffickers. Chapter 1 of South Africa's Prevention and Combating of Trafficking in Persons Act of 2013. See also trafficking in persons legislation in other SADC States which define the crime in similar terms.

<sup>109</sup> Article 3 of the Trafficking Protocol.

<sup>110</sup> Child pornography is any representation, by whatever means, of a child engaged in any real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. Article 2 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

consent and coercion as determining factors for the presence or absence of trafficking.<sup>111</sup> Importantly, it makes a distinction between trafficking in persons, which also includes children and smuggling of human beings.<sup>112</sup>

Unfortunately, these few positive aspects are not enough to camouflage the disparities in approach to the prosecution of child trafficking across the SADC region. The statistical inconsistencies relating to the number of child trafficking cases, prosecutions, and the number of victims of trafficking from SADC States found in other regions, are indicative of a region crippled by the inability of the respective domestic criminal justice systems to detect child trafficking-related criminal activities.<sup>113</sup> It remains unclear across the region, what really constitutes child trafficking. Therefore, the crime continues undetected by national authorities. As a result, compiling criminal justice statistics across States is highly problematic as there is no accurate projection of the crime.<sup>114</sup>

#### 5.2.3.1 Analysis of the Prosecution Problem

In the absence of a regional child trafficking instrument, the Trafficking Protocol takes precedence and makes provision for the training of officials for effective prosecution of the offence.<sup>115</sup> However, the prosecution is still a challenge in the SADC region as a result of various factors. These include, *inter alia*, lack of implementation of measures; lack of state capacity and resources; domestic constraints; lack of

<sup>111</sup> Coercion means violent psychological coercion and other forms of non-violent psychological coercion such as (a) a threat of serious harm to a person or another person; (b) any scheme, plan or pattern; or (c) the abuse or threatened abuse of the legal process; intended to cause a person to believe that, if the person does not perform labour or provide a service, the person or another person will suffer serious harm.

<sup>112</sup> The UN Protocol against smuggling of Migrants by Land, Sea and Air defines human smuggling as the facilitation, transportation, or procurement of the illegal entry of a person or persons across an international border.

<sup>113</sup> Marianne Wade, 'Prosecution of Trafficking in Human Beings Cases', in John Winterdyk, Benjamin Perrin and Philip Reichel (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (Routledge 2012) 92.

<sup>114</sup> UNODC, *Global Report on Trafficking in Person: Trafficking in Persons a Crime that Shames us all* (UN. GIFT 2009) 19.

<sup>115</sup> Article 10 (2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) states that; "States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society."

monitoring mechanisms as well as the proliferation of legal and policy measures against trafficking in persons, which are never fully executed.<sup>116</sup>

The root cause of the above-mentioned challenges to prosecution is linked to poor justice delivery systems in the region. Imposing the responsibility of addressing child trafficking on the criminal justice system presumes that the system is efficient. This is a problem in most SADC States where capacity constraints among other factors dog justice delivery.<sup>117</sup> Ideally, once a crime is reported, it must speedily be investigated, and due process followed to bring the alleged crime to finality.

However, the trend in most SADC States is of particular concern. For example, in Lesotho, in the case of *Rex v Joalane Tsoana*,<sup>118</sup> there was sufficient evidence and willing witnesses, but the matter was never pursued.<sup>119</sup> There are also instances where there is a miscarriage of justice because the presiding officers themselves could not understand the elements of the crime, which results in misdirected judgements.<sup>120</sup>

In *Republic v Ruth Lourenco*,<sup>121</sup> it was observed by the Malawi Commission that the provisions of the Penal Code of Malawi did not adequately capture the nature of trafficking in persons. As a result, this arguably led to the prosecutors' inability to prosecute traffickers or secure convictions.<sup>122</sup> It was also noted that penalties of alternative provisions are not always appropriate with the level of criminality associated with child trafficking. As such, it was concluded that: '[t]he nature of trafficking in persons as an offence requires a clear articulation of all its elements if accused persons are to be prosecuted successfully'.<sup>123</sup>

In some cases, a matter is fully investigated, and the accused is sentenced but never gets to serve the term. This was the situation in the Zambian case of *The People v*

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<sup>116</sup> UNODC, 2018 Trafficking in Persons Global Report, (2018) 84.

<sup>117</sup> Wade M Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' (2015) 69 International Organisation 445.

<sup>118</sup> CR:372/12.

<sup>119</sup> *ibid.*

<sup>120</sup> *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis* (unreported) (2001) EHC (21 August 2001).

<sup>121</sup> Criminal case no. 150 of 1999 alternatively UNODC No.: MLW001.

<sup>122</sup> Malawi Law Commission, Report of the Malawi Law Commission on the Development of Anti-Trafficking in Persons Legislation (2009).

<sup>123</sup> The University of Queensland Human Trafficking Working Group, In Re Republic v Ruth Lourenco, Criminal Case No. 150 of 1999 (unreported) <https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/mwi/lourenco.html> accessed 15 August 2022.

*Saidi Hamidu Mustaph*<sup>124</sup> where the accused was found guilty of the charge of attempting to commit trafficking in persons and sentenced to 15 years imprisonment. The matter was referred to the High Court for review, but the case file could not be located for three years. Since the file could not be found, the High Court could not confirm the sentence. The accused was later released and deported to Malawi.<sup>125</sup>

These examples are proof that there is an absence of an agreed-upon set of standards that defines a successful counter-trafficking criminal justice response. This negatively impacts efforts to address child trafficking in the region. Different criminal jurisdictions have different approaches toward child trafficking. Some dismiss cases of child trafficking on the basis that there was no cross-border movement and thus, child trafficking could not have occurred.<sup>126</sup> In others, accused persons get acquitted merely because the assailants provided the victims with food and housing. Further, some cases have been dismissed on the basis that the victims themselves led criminal lives before being trafficked.<sup>127</sup>



Even where national laws try to mimic the international approach to counter child trafficking, institutional constraints on a domestic level are often a barrier to implementation particularly in making the necessary changes to domestic legal systems.<sup>128</sup> It is apparent that in drafting national and regional responses to child trafficking, the international framework is used as a roadmap.<sup>129</sup> However, incorporating provisions of these instruments is often met with scepticism and domestic legislative red-tapes.<sup>130</sup>

Furthermore, even the facilitation of the development of child trafficking policies is difficult because of the lack of sufficient empirical data.<sup>131</sup> Therefore, without

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<sup>124</sup> 2SP/179/2009.

<sup>125</sup> *Rex v Joalane Tsoana* (unreported), (CIV/T/46/06) (1990) LSHC 372/12 (2 February 1990).

<sup>126</sup> *ibid.*

<sup>127</sup> *Republic v Ruth Lourenco* (Criminal Case number 150 of 1999) [1999] MLMCL 1 (unreported). Also see *Rex v Yoseph Girmay Tesfagaber, Adanech Beru Woldegioregis*.

<sup>128</sup> Paul C Szasz, 'Improving the International legislative Process' (1979) 9 GA. J. Int'L & Comp.L 519, 531.

<sup>129</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 16.

<sup>130</sup> Samuel Araujo, 'The Need for Human Trafficking Policy' (2011) Briefing No. 37, Policy Brief Africa Institute of South Africa (AISA) 3.

<sup>131</sup> Christopher Nshimbi, 'Human trafficking legislation in the Southern African development region: An overview' (2016) *Journal of Trafficking, Organised Crime and Security* 159. Also see Samuel Araujo, 'The Need for Human Trafficking Policy' (2011) Policy Brief Africa Institute of South Africa (AISA) 3.

information, policy responses are bound to be speculative and not fact-based. This means that it is difficult to formulate sound policies that will effectively deal with child trafficking. The development of the SADC 10-Year Strategic Plan of Action to Combat Trafficking in Persons, especially women and children (2009–2019), was an attempt to fill this gap.<sup>132</sup> One of its priorities is research and information sharing. The Plan requires Member States to collect data, conduct research and continuously share information on the crime.<sup>133</sup>

Remarkably, the SADC Regional Trafficking in Persons Data Collection System, a combined effort between the SADC Secretariat and the UNODC realises some of the Plan's priority areas.<sup>134</sup> Its focus is to support Member States to collect data at the national level in a manner that highlights the nature and extent of the crime; profile traffickers and victims; facilitate decision-making and policy formulation and implementation.<sup>135</sup>

In 2016, the SADC Secretariat in its regional report attributed the lack of adequate information in the region to a lack of resources and the fact that most legislation was new at that time.<sup>136</sup> This significantly affects the officials' capacity to detect victims.<sup>137</sup> All these factors compound the prosecution problem.<sup>138</sup> Therefore, implementation of any existing measures or the possibility of improving or creating new measures is a futile exercise where the existing ones are not clearly understood.<sup>139</sup>

Consequent to the lack of understanding of the intricacies of child trafficking by law officials, victims are often viewed as law breakers and are therefore denied the protection that should be given to them. This misunderstanding has an implication on the way provision of assistance is understood. It, therefore, means that helping

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<sup>132</sup> The strategic plan of action underwent a mid-term review to align it to emerging challenges in the region. The Revised Strategic Plan of Action covering the period from 2016 to 2019, was approved by the SADC Ministerial Committee of the Organ (MCO) on Politics, Defence and Security Cooperation in July 2017.

<sup>133</sup> See text under 4.2.1 ch 4.

<sup>134</sup> UNODC was mandated by the United Nations General Assembly, through the Global Plan of Action to Combat Trafficking in Persons.

<sup>135</sup> UNODC, *Trafficking in Persons in the SADC Region: A Statistical Report 2014-2016* 80.

<sup>136</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A baseline Report* (SADC 2016) 17.

<sup>137</sup> SADC Secretariat, 'Preventing and Combating Trafficking in Persons: Lessons from the SADC region' (2017) 38.

<sup>138</sup> UNODC, *Trafficking in Persons Global Report* (UNODC 2018) 84.

<sup>139</sup> *ibid.*



'victims' is a sign of weakness.<sup>140</sup> However, there is no evidence to show that victim protection negates rather than supports effective law enforcement.<sup>141</sup>

The downside of neglecting victims is that there will be no incentive for victims to come forward and report, let alone testify against perpetrators. The fear is that they will be arrested upon reporting. To make matters worse, the police have, in some cases, claimed that arresting and prosecuting sex workers is intended to help them escape from trafficking.<sup>142</sup> It is this approach that validates the assumption that child trafficking is only a criminal activity and not necessarily a human rights issue.<sup>143</sup> All this ultimately affects prosecution, and without strong victim protection, the battle against child trafficking is constantly a losing one.<sup>144</sup>

### 5.3 Key Challenges of the SADC Frameworks

The conception of the United Nations Convention against Transnational Organised Crime (UNTOC)<sup>145</sup> was based on the idea of an effective tool and necessary legal framework for international cooperation in combating trans-organised crime.<sup>146</sup> However, the success of the UNTOC and its subsequent protocols largely depended and still relies on various complex factors. These factors include the initial willingness of the signatories to rapidly ratify the UNTOC and thereafter their ability to effectively implement its provisions. This involves not only making necessary changes to domestic legal systems but also ensuring that law enforcement officials are aware of and are properly trained to enforce the law. Crucially, the strength of the UNTOC

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<sup>140</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

<sup>141</sup> *ibid.*

<sup>142</sup> See Ben Chapman-Schmidt, 'Sex Trafficking' as Epistemic Violence' (2012) The Anti-Trafficking Review 8. In 2019, the UN General Assembly published the report of the global study on children's deprivation of liberty. Also see United Nations General Assembly, Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty" (2019) for a discussion on the impact of detention on children.

<sup>143</sup> Thomas Pankratz and Hanns Matiassek, 'Understanding Transnational Organised Crime. A Constructivist Approach Towards a Growing Phenomenon SIAK' (2012) 2 SIAK-Journal – Journal for Police Science and Practice 41, 45.

<sup>144</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

<sup>145</sup> UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25.

<sup>146</sup> *ibid* Preamble.

hinges on the consistent and continuous application of its provisions which *mutatis mutandis* apply to its protocols.<sup>147</sup>

Further, the ratification of the Trafficking Protocol by SADC Member States was a positive step towards ensuring the eradication of one aspect of trans-organised crime which is the illicit trade in human beings.<sup>148</sup> The Trafficking Protocol is the pinnacle of the regulation of child trafficking world-wide.<sup>149</sup> Its influence is also evident throughout all legislative and policy efforts to combat the trafficking of human beings by SADC States.<sup>150</sup>

However, despite all this effort child trafficking is still a problem in the SADC region as much as it is to the whole world.<sup>151</sup> This shows that the goal should not only be to adopt anti-trafficking legislation but also to ensure effective implementation of the various anti-trafficking instruments. Thus, the prevalence of child trafficking, despite various legislative measures, is indicative of a serious implementation problem as a result of several factors, as shall be extensively discussed below.

### **5.3.1 Lack of Political Will to Implement Measures**

A legislative response to a problem should not only be limited to drafting rules and regulations. There is a need for acceptance and enforcement of those rules and regulations by Member States. In general, many international instruments are drafted but never see the light of day because of the lack of adoption by States. Further, some are adopted but never fully enforced to be effective. In the case of the UNCTOC and its Trafficking Protocol, despite widespread acceptance and adoption by UN Member States,<sup>152</sup> proper and full implementation remains the critical challenge facing these instruments.<sup>153</sup>

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<sup>147</sup> Stefano Betti, 'The European Union and the United Nations Convention against Transnational Organised Crime' (2001) European Parliament Civil Liberties Series 1, 4.

<sup>148</sup> UNICEF, 'Reversing the trend: Child trafficking in East and Southeast Asia' <<https://www.unicef.org>> accessed 18 August 2022.

<sup>149</sup> Text to n 116 ch 3.

<sup>150</sup> Text to n 121 ch 3.

<sup>151</sup> UNODC Regional Office for Southern Africa, 'Trafficking in Persons Report' <https://www.unodc.org/southernafrica/> accessed 11 January 2021.

<sup>152</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 21.

<sup>153</sup> Paul C Szasz, 'Improving the International legislative Process' (1979) 9 GA. J. Int'L & Comp.L 519, 523.

In the case of African States, the reluctance to implement measures is a result of various factors including a general lack of capacity and negative sentiments about Western Supremacy.<sup>154</sup> The 'African solutions to African problems' mantra to a certain extent also perpetuates the reluctance of States to implement provisions of international instruments which they would have signed and/or ratified.<sup>155</sup> The effect of this is that even with legislation in place, the problem of child trafficking continues to increase.

As part of their obligations in terms of the Trafficking Protocol, State Parties are required to adopt such legislative and other measures as may be necessary to address trafficking in persons in general. However, institutional constraints at the domestic level are often a barrier to implementation, particularly in making the necessary changes to domestic legal systems.<sup>156</sup> African States are not always willing to incorporate 'Western notions' into their domestic laws.<sup>157</sup> In many African States, the adoption of international law is widely understood as succumbing to colonial rule and as such, any suggestion of changing national laws to fit international standards is not readily welcomed.<sup>158</sup>



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<sup>154</sup> Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 AJLS 120, 127.

<sup>155</sup> Serekebrhan Figueariam, 'African Solutions to African Problems' *Direct Conflict Prevention Programme, ISS Addis Ababa* (18 September 2008).

<sup>156</sup> Paul C Szasz, 'Improving the International legislative Process' (1979) 9 GA. J. Int'L & Comp.L 519, 531.

<sup>157</sup> The debate between universalists and relativists concerning the appropriateness of a western-inspired ideology for non-western societies has not escaped the notice of African and Africanist scholars. See Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 AJLS 120, 127. Shivji argues that the human rights discourse is 'less sophisticated than that of African social scientists.' See Issa G Shivji, *The Concept of Human Rights in Africa* (Dakar Codesria 1989) 11. On the applicability of human rights to African communities Asante rejects 'the notion that human rights concepts are peculiarly or even essentially bourgeois or western, and without relevance to Africans. Such notions confuse the articulation of the theoretical foundations of human rights with the ultimate objective of any philosophy of human rights. Human rights quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual. This is an eternal and universal phenomenon, and it is also true to Nigerians and Malays as to Englishmen and Americans. See Hurst Hannum, 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis' (1979) 1 (2) *Universal Human Rights* 1, 15.

<sup>158</sup> Thomas W Bennet, *Human Rights and African Customary Law* (Juta and Co Ltd 1999) 80. Also see Lee Muthoga, 'Analysis of International Instruments for the Protection of the Rights of the Child' in Community Law Centre (ed) *International Conference on the Rights of the Child: Papers and Reports of a Conference Convened by the Community Law Centre* (Cape Town, Community Law Centre 1992) 123.

In essence, the lack of political will to harmonise international laws with national legislation is a major setback in trying to eradicate child trafficking.<sup>159</sup> However, it should be noted that historical circumstances or prejudices of the past are not sound enough reasons for reluctance to comply with obligations, especially where such obligations concern the rights of the vulnerable.

In addition, African States are generally reluctant to adopt and implement measures that seemingly go against their beliefs or culture.<sup>160</sup> As illustrated in chapter 2, misuse of cultural practices is one of the major factors that contribute significantly to child trafficking in SADC States. International law unequivocally prohibits cultural practices that are contrary to human rights. For example, male supremacy or dominance is not really considered as a human rights issue in most African States. Therefore, where an instrument purports to fundamentally change the way African societies generally function, such measures are simply not implemented. Where they ratify such instruments regardless, they do so with reservations.<sup>161</sup> A reservation purports to limit a state's obligation under a Treaty or Convention.<sup>162</sup> Of all the conventions that criminalise trafficking in persons, CEDAW has the most noted reservations from Islamic States particularly concerned with the non-discrimination of women.

Furthermore, States are always determined to reduce their international obligations. They are not always keen to commit to obligations, particularly those related to the oppressed and exploited.<sup>163</sup> Victims of child trafficking fall into that category and thus

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<sup>159</sup> Some scholars have argued that the anti-trafficking frameworks developed by a number of States have more to do with political prerogatives than the legal obligations created by the Trafficking Protocol. As a result, there is no real effort to ensure that national efforts are in sync with international standards. See Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 Anti-trafficking Review 15, 25.

<sup>160</sup> Still, deliberate steps must be taken to ensure that issues of children's rights should be aligned with the realities of human rights and universally understood and accepted. See Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 AJLS 120, 129.

<sup>161</sup> Oliver Dörr, Kirsten Schmalenbach, 'Article 21. Legal Effects of Reservations and of Objections to Reservations,' in Oliver Dörr, Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties*. (Springer, Berlin, Heidelberg 2012) 1413. Also See Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 AJLS 120, 125.

<sup>162</sup> According to article 2 (1) (d) of the Vienna Convention on the law of Treaties (1969) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

<sup>163</sup> Anne T Gallagher, 'Human Rights and Human Trafficking Quagmire or Firm Ground' (2009) 149 (4) Virginia Journal of International Law 1, 61.

require assistance.<sup>164</sup> Essentially, the non-implementation of measures designed to ensure victim protection and prevention of the crime is the reason why the child trafficking problem is increasing in the SADC region.

### **5.3.2 Lack of Systematic Monitoring Mechanisms**

A reporting system is an essential tool for States to assess their progress in terms of implementation of the obligations created by international treaties they would have acceded to. Generally, better results are achieved where there are monitoring mechanisms. An example of such mechanisms may be found in those created by the constitutions of ILO and WHO. The mechanisms require periodic reporting which helps to overcome implementation challenges.<sup>165</sup> However, even where instruments require periodic reporting, such reports are rarely submitted in time.<sup>166</sup> States tend to submit overdue reports, that is if they submit at all.<sup>167</sup> Therefore the method of reporting as a way of measuring the implementation and effectiveness of policies, though important, becomes redundant, especially when dealing with a fast-evolving crime such as child trafficking.



### **5.3.3 Differences in Interpretation and Application of Provisions**

The nature and number of stakeholders in the international legislative process are such that differences in understanding and interpretation of certain terms are unavoidable at the implementation stage. The process of drafting an international instrument is a very intense exercise mainly because it is an engagement involving

<sup>164</sup> Article 6 of the Trafficking Protocol containing provisions relating to assistance to and protection of victims of trafficking in persons.

<sup>165</sup> Constitution of the International Labour Organisation *adopted* 9 October 1946, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, Article 19(5); Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185, *as amended* 26 U.S.T. 990, T.I.A.S. 8086, Article 20. Also see Paul C Szasz, 'Improving the International legislative Process' (1979) 9 GA. J. Int'L & Comp.L 519, 532.

<sup>166</sup> Just like the reporting mechanism for ICERD, it requires States to report within one year of ratification, and thereafter every 5 years. According to the CMW General Reporting Guidelines, parties are supposed to give an update for each reporting period.

<sup>167</sup> For instance, in 2006, Nigeria submitted a report that was 8 years over-due. See Mapping State obligations for corporate acts: An examination of the UN Human Rights Treaty System Report No. 1: International Convention on the Elimination of All Forms of Racial Discrimination Prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises With the support of The Office of the United Nations High Commissioner for Human Rights December 2006 <https://www.business-humanrights.org/sites/default/files/media/bhr/files/State-Obligations-Corporate-Acts-CERD-18-Dec-2006.pdf> accessed 28 January 2019.

different States with different ideologies.<sup>168</sup> It, therefore, means that having a common understanding takes a lot of effort. In the case of the legislative process for the regulation of trafficking in persons, the differences in opinion and understanding are reflected in the minutes on the debates on what should be contained in a convention and what to exclude and subsequently, the acceptance of those provisions by the participating States.<sup>169</sup>

In the case of child trafficking, such intensity is in the debates surrounding what constitutes human exploitation and slavery in the context of trafficking in persons. It was contended that if practices such as debt bondage or forced marriage are considered as exploitation, then they are slavery.<sup>170</sup> On the other hand, there were debates on the aspect of what constitutes prostitution in the context of trafficking, cognizant of the fact that there are States that legalise prostitution.

All this culminates into the lack of comprehensive definitions of key elements, and this subsequently affects the implementation of measures. In the context of child trafficking, international law does not define what human exploitation entails. The Trafficking Protocol only outlines a non-exhaustive list of what constitutes exploitation.<sup>171</sup> In terms of the Trafficking Protocol, it includes: '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'.<sup>172</sup>

Chapter 2 has discussed extensively how the grey areas surrounding the concept of exploitation are convoluted in instances where cultural practices are conceived as being exploitative and thereby perpetuating child trafficking in the region. It is difficult to criminalise practices which are otherwise recognised as cultural and acceptable.

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<sup>168</sup> Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> edn, Oxford University Press 2008) 517-518.

<sup>169</sup> Jean Allain, 'White Slave Traffic in International Law' (2017) 1 (1) *Journal of Trafficking and Human Exploitation* 1, 10.

<sup>170</sup> Jean Allain, *Slavery in International Law: Of Trafficking and Human Exploitation* (Brill Nijhoff 2012) 340. The U.S. government defines a bond or debt as "a form of coercion" and as a "threat of financial harm" if not repaid. See U.S Department of State (2012) 34. On the other hand, the International Labour Organization (ILO) considers "bonded labor" a form of "forced labour". See Ronald Weitzer, 'New Directions in Research on Human Trafficking' (2014) 653 *The ANNALS of the American Academy of Political and Social Science* 6 8.

<sup>171</sup> Jean Allain, *Slavery in International Law: Of Trafficking and Human Exploitation* (Brill Nijhoff 2012) 340.

<sup>172</sup> Article 3 (a) of the Trafficking Protocol.



Invariably where concepts are not clearly defined or adjusted to suit the African context, implementation is always a huge challenge.

Moreover, apart from the conflict between international human rights and African cultural practices, law enforcement officers in most African States are barely knowledgeable enough to decipher child trafficking from related crimes and local practices. As illustrated by various cases in preceding chapters, it is difficult for law enforcers to comprehend how it may be illegal that a parent or guardian gave away a child for servitude in exchange for food or money.<sup>173</sup> It is such problems that lead to the exposure of children in such communities to child trafficking. This also speaks to the issue of capacity.

#### **5.3.4 Lack of Capacity to Implement Measures**

Despite significant efforts, developing States lack the necessary capacity to combat child trafficking. To start with, most States in the Southern African region barely have enough money to hold meaningful awareness campaigns.<sup>174</sup> As a result, a lack of knowledge of the crime has been noted as a factor in the prevalence of child trafficking in the region. Furthermore, there are not enough resources to conduct research on the crime, yet fully combating the crime is rooted in knowing its full intensity in order to implement measures that can fully address the crime in all its forms.<sup>175</sup> Such a lack of resources is said to have hampered progress in Malawi. The government of Malawi has no capacity to fully investigate the alleged child trafficking in the State.<sup>176</sup>

The aspect of capacity to implement legal and policy measures to combat child trafficking in the SADC region is two-faceted. First, the capacity to conduct necessary research about the crime and second, the capacity to create awareness and training of law enforcers. There is no doubt that there is a need to create awareness in SADC States around the issue of child trafficking. Caregivers, children, and all relevant

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<sup>173</sup> *S v Muiambo and Mahvahve* (2014) MOZHC 001 (unreported).

<sup>174</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 27.

<sup>175</sup> Elizabeth Araujo, 'The Need for Human Trafficking Policy' (2011) Policy Brief Africa Institute of South Africa (AISA) 1.

<sup>176</sup> Thus in 2017, the Government of Malawi launched its National Plan of Action against Trafficking in Persons (NPATIP) under the theme "Accelerating sustainable partnership; A key to Malawi Action against Trafficking in Persons", as the guiding and resource mobilization tool for all stakeholders. See UNODC, 'Malawi launches National Plan of Action against Trafficking in Persons' (2017) UNODC 1. Also see SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 37.

stakeholders need to be conscientized on what to guard against when it comes to child trafficking. However, the lack of capacity to implement measures aimed at creating such awareness is a challenge.

The general lack of understanding of the elements of the crime by the law officials in SADC States makes implementation of any measures difficult.<sup>177</sup> There are generally limited resources to create awareness, and this affects the implementation of measures particularly those adopted from international instruments.<sup>178</sup> This results in the conflation of crimes or general confusion pertaining to what really constitutes child trafficking.<sup>179</sup> It thus becomes difficult to develop further measures for a crime that is barely understood or at the very least implement those available.<sup>180</sup>

Consequent to the lack of understanding of the intricacies of child trafficking by law officials, victims are often viewed as law breakers and are denied the protection that should ordinarily be given to them.<sup>181</sup> This misunderstanding affects the interpretation of victim assistance in that helping 'victims' is then misconstrued as incentivising criminal activity and behaviour.<sup>182</sup> However, Hyland is of the view that; '[V]ictim protections are not in conflict with tough law enforcement'.<sup>183</sup> In fact, the implementation of proactive victim identification, funded victim services, and alternatives to detention and deportation is indicative of respect for human rights.<sup>184</sup> Any other view presupposes that child trafficking is a criminal activity and not

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<sup>177</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 21.

<sup>178</sup> The Telegraph, 'Human Trafficking a challenge in SADC' *The Telegraph* (23 March 2017) <<http://www.sundaystandard.info/human-trafficking-challenge-sadc>> accessed 6 August 2021.

<sup>179</sup> Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 (4) *The American Journal of International Law* 609, 623.

<sup>180</sup> UNODC, *Global Report on Trafficking in Persons* (2018) 84.

<sup>181</sup> *Republic v Ruth Lourenco* (Criminal Case number 150 of 1999) MLMCL 1 (unreported).

<sup>182</sup> Rebecca Miller and Sebastian Baumeister, 'Managing Migration: Is Border Control Fundamental to Anti-Trafficking and Anti-Smuggling Interventions?' (2013) 2 *Anti-trafficking Review* 15, 28.

<sup>183</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) *Human Rights Brief* 30-31, 38.

<sup>184</sup> Gallagher notes the weakness of the Trafficking Protocol in this regard in that the Protocol fails to clearly articulate Party States' obligation to proactively identify victims of trafficking. See Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 *Anti-Trafficking Review* 14, 19.

necessarily a human rights issue.<sup>185</sup> Without implementing victim protection measures, the battle against child trafficking is constantly a losing one.<sup>186</sup>

The other aspect of creating awareness involves the training of officials. Training and awareness programs require funding.<sup>187</sup> Therefore, without adequate research which also requires money training becomes speculative and not informed by facts on the ground. Child trafficking is a highly complex transnational crime which cannot be blindly tackled.<sup>188</sup> In order to plan, it is important to understand its adaptive and manipulative nature which links it to related phenomena such as the changing migration patterns.<sup>189</sup>

Thus, the lack of capacity to create awareness around child trafficking and how it differs from illegal migration as well as the capacity to conduct necessary research makes the development of new measures and implementation of any existing measures difficult. The Global Alliance Against Traffic in Women submitted that statistics on trafficking in persons cannot be ascertained because they usually include and refer to the number of migrant or domestic workers. Thus, it is even more difficult to obtain the exact number of children affected by child trafficking. This lack of information and verifiable statistics and trends of child trafficking in the SADC region makes it even more difficult to motivate for funding outside the UN framework, which is also donor funded.<sup>190</sup>

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<sup>185</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 19.

<sup>186</sup> Kelly E Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 (2) Human Rights Brief 30-31, 38.

<sup>187</sup> South Africa had a 3-day workshop for National Prosecuting Authority and the Department of Corporative Governance and Traditional Affairs; the Commission for Gender Equality; the Department of Justice and Constitutional Development; "amaKhosi" traditional leaders and UNODC's project implementing partners. The workshop was aimed at training all the stakeholder on key trafficking in persons issues such as victim protection and identification, prosecution and definition or interpretation of key concepts. See UNODC, 'UNODC GLO.ACT breaks ground in facilitating the first training on Trafficking in Persons for the "amaKhosi" traditional leaders in KwaZulu Natal' <<https://www.unodc.org/southernafrica/en/aml/amakhosi.html>> accessed 4 June 2021.

<sup>188</sup> UNODC, *Global Report on Trafficking in Persons* (2018) 23.

<sup>189</sup> Michael Chibba, 'Human Trafficking and Migration: Concepts, Linkages and New Frontiers' (2013) 12 (4) Global Policy Journal 1.

<sup>190</sup> UNODC, 'UNODC & Malawi Launch New Measures to Combat Human Trafficking Among Refugees' (2021) <<https://www.unodc.org/unodc/en/frontpage/2021/April/unodc-and-malawi-launch-new-measures-to-combat-human-trafficking-among-refugees.html>> accessed 4 June 2021.

The limited information or lack of verifiable statistics thereon, is used by pessimists to support the non-existence of child trafficking.<sup>191</sup> They argue that it is not sufficient to use this deficiency or gap in accurate statistical information as evidence of victimisation and reluctance to report by victims, whereas, in fact, it means there is no trafficking at all.<sup>192</sup> This argument though highly controversial may be sustained because accurate figures of child trafficking cannot be ascertained since there are not enough resources to conduct research and investigations. However, research by the UN has shown a prevalence of child trafficking worldwide.<sup>193</sup> Statistics of child victims from different States in foreign nations indicate that child trafficking is taking place and needs to be urgently addressed.<sup>194</sup>

Gallinetti has observed that investigation and research form an important part of combating child trafficking.<sup>195</sup> However, measurable, and ascertainable results are always preferable. In the context of SADC States, the lack of necessary resources to embark on such an exercise for a continued period<sup>196</sup> creates the risk of using any available data without regard to how it affects subsequent measures to address the projected problem.<sup>197</sup> As a result, an environment is created where even bad data is considered better than no data at all.<sup>198</sup> Blindly addressing the crime does not yield the desired outcome of fully combating child trafficking.

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In fact, the main challenge is not so much about the development of new measures, but the implementation of the current measures that need to be improved. Technically, SADC Member States have been fulfilling their obligations in terms of the Trafficking

<sup>191</sup> Marcel van der Walt, 'Human Trafficking in South Africa: An Elusive Statistical Nightmare' *Thursdays in Black*, (2016). Also See Melissa Gira Grant, 'The Truth about Trafficking: It's Not Just About Sexual Exploitation' *The Guardian* (24 October 2012) <<https://www.theguardian.com>> accessed 20 August 2017.

<sup>192</sup> Melissa Gira Grant, 'The Truth about Trafficking: It's Not Just About Sexual Exploitation' *The Guardian* (24 October 2012) <<https://www.theguardian.com>> accessed 20 August 2017. Also see United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (UNODC 2018) 8. Also see Amy Farrell, 'Understanding the Determinants of Police Identification of Human Trafficking Cases' (2009) First Annual Interdisciplinary Conference on Human Trafficking, Paper 19, 10.

<sup>193</sup> UNODC, *Global Report on Trafficking in Persons* (2018) 8.

<sup>194</sup> UNODC, *Global Report on Trafficking in Persons: Human Trafficking A Crime that Shames us All* (UN.GIFT 2009) 14.

<sup>195</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 22.

<sup>196</sup> SADC Secretariat, *Trafficking in Persons in the SADC Region: A Baseline Report* (2016) 21.

<sup>197</sup> Jacqueline Gallinetti, 'Child Trafficking in SADC States. The Need for a Regional Response' (2008) 32 ILO Sub-Regional Office for Southern Africa 1, 32.

<sup>198</sup> Anne Gallagher, Caroline Robinson, Rebecca Napier-Moore and Alfie Gordo (eds), *Anti-Trafficking Review* (Global Alliance Against Traffic in Women 2012) 10.

Protocol as far as establishing legislative and other measures to prevent child trafficking is concerned.<sup>199</sup> Some States have gone as far as imposing stringent penalties for the crime as a deterring mechanism.<sup>200</sup> For example, the Seychelles government increased prescribed penalties for sex trafficking and labour trafficking to up to 14 years' imprisonment and a fine of up to 500,000 Seychelles rupee.<sup>201</sup> In cases involving children, a maximum of 25 years' imprisonment and a fine of up to 800,000 Seychelles rupee.<sup>202</sup> Similarly, the Namibian Prevention of Organised Crime Act (POCA) of 2004 prescribes penalties of up to 50 years' imprisonment or a fine not exceeding 1 million Namibian dollars for sex and labour trafficking.<sup>203</sup>

However, despite these stringent penalties, child trafficking is still increasing in the region because of lax law enforcement. During the period between 2014 and 2017, the UN reported that not a single State in the Sub-Saharan region recorded more than 50 convictions.<sup>204</sup> It would be expected that after the criminalisation of child trafficking by all SADC States, there would be a significant decrease in cases of trafficking and an increase in prosecution. Unfortunately, that has not been the case. Few criminals are being convicted yet child trafficking numbers continue to escalate.<sup>205</sup> The lack of implementation of measures and the high degree of impunity serves as an incentive for syndicates to carry out child trafficking.<sup>206</sup>

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In summary, the child trafficking problem in the SADC region is really a legislative and policy quagmire in that on paper SADC States have done enough to regulate child trafficking yet in practice, a lot still needs to be done. SADC States are party to key international regional instruments regulating child trafficking. How then, child

<sup>199</sup> Article 9 of the Trafficking Protocol. See also SADC Secretariat, 'SADC Makes Commendable Progress In Fighting Human Trafficking' (April 2017) <<https://www.sadc.int/news-events/news/sadc-makes-commendable-progress-fighting-human-trafficking/>> accessed 6 August 2019.

<sup>200</sup> The deterrence theory suggests that criminal laws are passed with well-defined punishments to discourage individual criminal defendants from becoming repeat offenders and to discourage others in society from engaging in similar criminal activity. See Legal dictionary <<https://legal-dictionary.thefreedictionary.com/deterrence>> accessed 31 October 2019. See also Kevin C Kennedy, 'A Critical Appraisal of Criminal Deterrence Theory' (1983-1984) Dick. L. Rev. 1, 88.

<sup>201</sup> Seychelles Prohibition of Trafficking in Persons Act of 2014.

<sup>202</sup> U.S Department of State, Trafficking in Persons Report (2019) 411 <<https://www.state.gov/reports/2019-trafficking-in-persons-report/>> accessed 5 October 2021.

<sup>203</sup> *ibid* 399.

<sup>204</sup> UNODC, *Global Report on Trafficking in Persons* (2018) 83.

<sup>205</sup> The Africa-EU Partnership, Irregular Migration <<https://www.africa-eu-partnership.org/en/our-action/migration-mobility-and-employment/irregular-migration>> accessed 6 August 2019.

<sup>206</sup> UNODC, *Global Report on Trafficking in Persons* (2018) 23.



trafficking, which is a 'child crime' of the broader trafficking in persons seems to increase regardless is the major problem facing SADC.

The summary of the key challenges faced by SADC States in implementing the existing measures against the crime is that, firstly, even at the international level focus is on the broader crime of trafficking in persons without addressing the peculiar elements of child trafficking. Most significantly, with a history of limited recognition of children's rights, Article 3 (c) of the Trafficking Protocol and other soft law instruments drafted by the UN cannot be all there is when it comes to child trafficking specifically.<sup>207</sup> Certainly, the increase in numbers of child trafficking world-wide and in SADC States points to a legislative and policy oversight.

Hence, there are instances where even judges misdirect themselves by dismissing cases of child trafficking simply because the child was fed or looked after. Even in cases where there is no cross-border movement or where consent by guardians would have been granted, the absence of force has created an acceptable defence in some jurisdictions. Even worse, there are cultural practices that exacerbate the risk of trafficking for children, which are recognisable as common practice and it is inconceivable, for law enforcers, how these practices can suddenly become criminal. Unfortunately, it is people who are tasked with the implementation of the measures against child trafficking, that neither understand nor know how to implement such measures. Furthermore, the capacity for creating awareness and training is scarce and that added to the general reluctance by States to implement measures and assume responsibility, the problem of child trafficking remains unsolved.

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<sup>207</sup> These guidelines include, but are not limited to, the UNHCR, 'Guidelines on International Protection: Gender-related persecution within the context of article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, the Office of the High Commissioner for Human Rights (OHCHR) "Recommended Principles and Guidelines on Human Rights and Human Trafficking". The HCHR provides guidelines on human rights and trafficking. These are the primacy of human rights; the prevention of trafficking; the protection and assistance of victims, and the criminalization, punishment and redress. The HCHR elaborates on these through various guidelines, namely: the promotion and protection of human rights; the identification of trafficked persons and traffickers; research, analysis, evaluation and dissemination; ensuring an adequate legal framework; ensuring an adequate law enforcement response; protection and support for trafficked persons; preventing trafficking. Special measures for the protection and support of child victims of trafficking; access to remedies; obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel and co-operation and co-ordination between States and regions. These guidelines were presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights, E/2002/68/Add. 1, 20 May 2002, <<http://www.ohchr.org/english/about/publications/docs/trafficking.doc>> accessed 20 July 2021.

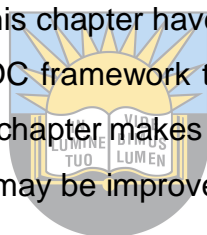


## 5.4 Summary

In short, the key challenges faced by SADC States in implementing measures against child trafficking are institutional constraints, lack of capacity to create awareness, conduct training for officials and research on child trafficking. In addition, the lack of a regional instrument with a provision for a monitoring mechanism of measures against the crime, makes it difficult to assess whether the subsisting measures are effective or not.<sup>208</sup>

Importantly, this chapter has shown that having anti-trafficking legislation is not an end in itself. There are other areas of priority that are crucial in fighting child trafficking, and focus should also be given to them. These areas include improvement of border controls, information collection and sharing, alleviation of child trafficking factors as well as re-integration and rehabilitation of victims.

The various issues addressed in this chapter have brought to light the key issues that need to be addressed for the SADC framework to effectively combat the problem of child trafficking. Therefore, the last chapter makes recommendations on how the SADC approach towards child trafficking may be improved and made effective.



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<sup>208</sup> Anne T Gallagher, 'Two Cheers for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)' (2015) 4 Anti-Trafficking Review 14, 23.

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Summary of the Findings

Child trafficking is an endemic problem facing the whole world with most of the overall detected victims being children from low-income States in the SADC region.<sup>209</sup> Despite legislative and policy measures to counter trafficking in persons in general, the problem of child trafficking (“the crime”) in SADC States continues to rise unabated. Therefore, this research set out to assess the adequacy of the legal and policy frameworks for combating child trafficking in SADC.

As one of the aims of the research, chapter 2 investigated the reason why SADC States are increasingly becoming the sources, transit zones and destinations for child trafficking victims.<sup>210</sup> It is one of the findings that SADC States continue to be fertile ground for child trafficking due to numerous socio-economic challenges that the region has been, for years, battling to address. The factors that contribute to child trafficking include poverty; demand for exploitation; conflict; lack of awareness; culture; family disintegration; HIV/AIDS; porous borders; and human rights violations.<sup>211</sup> Therefore, as long as these factors remain unresolved, child trafficking remains a challenge and its impact on victims and communities at large may result in further widespread and long-term socio-economic challenges.

The discussion of the causes and impact of child trafficking in Chapter 2 brought to the fore the fact that the crime negatively affects the basic human rights, and physical and mental wellbeing of the victims.<sup>212</sup> The research finds that beyond mental illness and poor health induced by the traumatic experience during trafficking, child trafficking also increases the victims’ vulnerability to mental disorders.<sup>213</sup> These disorders are influenced by traumatic experiences such as pre-trafficking abuse, duration of exploitation, violence and restriction of movement during trafficking. Furthermore, child trafficking also negatively affects the victims’ right to survival and development among

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<sup>209</sup> Text to n 3 ch 2.

<sup>210</sup> Text to n 257 ch 2.

<sup>211</sup> For a detailed discussion refer to Chapter 2, 2.2 *Causes*.

<sup>212</sup> Text to n 409 ch 2.

<sup>213</sup> Text to n 319 ch 2.

other fundamental children's rights.<sup>214</sup> The crime essentially violates the fundamental principles governing the protection of children's rights which are: non-discrimination; the right to participate; the best interest of the child and the right to maximum survival and development.<sup>215</sup>

Since child trafficking is a SADC problem as much as it is a global crisis, Chapter 3 establishes the role of the international regulatory framework for child trafficking as crucial. In this regard, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol) is the main international instrument against child trafficking. It addresses the modern forms of trafficking as well as outstanding issues from the instruments that were adopted before it. While a unified definition of child trafficking provided by the Trafficking Protocol enabled the criminalisation of child trafficking across the globe, its overarching nature also made it difficult to identify actual victims of child trafficking.<sup>216</sup> This has also resulted in the conflation of crimes in that issues of child trafficking, illegal migration, child labour, sexual exploitation and children's rights have become intertwined.<sup>217</sup> Such conflation has necessitated the regulation of child trafficking in non-trafficking human rights instruments. It is the finding of this research that despite their complimentary effect, these instruments are not themselves fully equipped to address the unique challenges associated with the global trends of child trafficking.<sup>218</sup>

Be that as it may, this international policy and legislative framework has greatly influenced regional and sub-regional responses to child trafficking. A discussion of the sub-regional and national frameworks for combating child trafficking in Chapter 4 shows that, in conjunction with the international framework, instruments such as the African Charter on the Rights and Welfare of the Child, the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women in Africa as well as related SADC Protocols, play a significant role in addressing factors

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<sup>214</sup> Refer to the Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990) and the Convention on the Rights of the Child.

<sup>215</sup> Text to n 362 ch 2.

<sup>216</sup> See Article 3 (a) and (c) of the Trafficking Protocol.

<sup>217</sup> Text to n 151 ch 3.

<sup>218</sup> See Chapter 1 para 4 for a discussion of the role of non-trafficking in persons instruments in the regulation of child trafficking.

of child trafficking in Africa.<sup>219</sup> However, despite SADC States being party to these instruments, there is little success in effectively combating child trafficking in the region. Evidently, even the respective national legislative frameworks for child trafficking in SADC States are compromised by other socio-economic considerations that hinder the effective implementation of measures.<sup>220</sup> The research has found that while it is commendable that all SADC States have anti-trafficking legislation and policies, the differences in interpretation and application of provisions affect a uniform approach to the crime. This is further exacerbated by the lack of a SADC instrument on child trafficking.

In the absence of a community instrument on child trafficking chapter 5 critically analysed the adequacy of the existing SADC frameworks with a special focus on prevention, victim protection and assistance as well as prosecution of child trafficking. It is the finding of this research that the multifaceted implementation challenge is what is crippling the effectiveness of the anti-trafficking measures. At the national level, there is a lack of political will by Member States to implement measures. Largely this is influenced by the scarcity of resources and lack of capacity to create awareness, conduct training for officials and research on child trafficking.<sup>221</sup> In addition to that, there are no systematic methods of monitoring the implementation of measures. What SADC presently has is an ineffective, inconsistent, noncomprehensive, and uncoordinated approach to child trafficking. This has resulted in a legislative compost in the SADC region which does not yield any desired result. Without fixing the gaps created by the non-implementation of anti-trafficking measures, attempting to solve the child trafficking problem in the SADC region is as good as filling a colander with water, it just never gets full.

Accordingly, this research makes recommendations for SADC as well as relevant stakeholders for the improvement of the framework for effective implementation of the existing measures as 'Hail Mary' attempts to salvage the critical child trafficking dilemma in the region.<sup>222</sup> In the face of the never-ending economic hardships in the

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<sup>219</sup> Text to n 299 ch 3.

<sup>220</sup> Text to n 67 ch 1.

<sup>221</sup> Text to para 4 under section 2.2.2 ch 2.

<sup>222</sup> UNODC, 'UNODC continues to combat gender-based violence, meets SADC to strengthen cooperation on criminal justice' <<https://www.unodc.org/southernafrica/en/stories/unodc-continues-to-combat-gender-based-violence--meets-sadc-to-strengthen-cooperation-on-criminal-justice.html>> accessed 4 June 2021.

SADC region, these recommendations seem farfetched but are a necessity if child trafficking is to be combated.

## **6.2 Recommendations**

The escalating statistics of child trafficking in the SADC region require urgent attention and action from all Member States and stakeholders. Therefore, anti-child trafficking measures can only be effective if implementation, monitoring and evaluating mechanisms are put in place. This also includes remedying inadequacies of past measures and fostering new ones to better address the problem. In this regard, the following recommendations are made.

### **6.2.1 Recommendations on Alleviation of Factors of Child Trafficking**

#### *6.2.1.1 Direct Action to Ease Economic Pressure*

As a solution to the limited employment opportunities and poverty, this research recommends direct action to ease economic pressure. This can be in the form of skills development and training. If SADC States promote such initiatives, youths may not only wait for formal employment but will be well equipped to be enterprising and innovative. In return, this will assist in alleviating poverty and susceptibility to trafficking for exploitation. Furthermore, this also improves the opportunity for the youth to be economically competitive for the benefit of their communities, States, and region at large.

#### *6.2.1.2 Multiple-pronged Approaches to Addressing Demand in the Context of Child Trafficking*

There is no single definition for demand in the context of child trafficking. Therefore, the issue of demand for exploitation remains unresolved. The starting point would be for SADC States to agree on a single working definition for demand. The definition should cater for the dynamic nature of child trafficking taking into consideration the demand for cheap labour and sexual exploitation.<sup>223</sup> This would be complimented by a moral approach which criminalises all forms of prostitution as sex trafficking, thus

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<sup>223</sup> Text to n 92 and n 93 ch 2.

constituting harmful treatment as well as criminalising all forms of child labour as child trafficking.

Cognizant of the fact that child trafficking is a transnational crime direct and indirect approaches to child trafficking may be what is needed to fully combat the crime and the growing demand for the exploitation of children. Such indirect approaches include tight border controls; stringent migrant laws; and information collection and sharing among Member States. This also requires a coordinated approach to alleviate other factors of child trafficking such as poverty and HIV/AIDS among others.

More directly, the foundation has already been laid by initiatives such as the 10-Year SADC Regional Strategic Plan Against Trafficking in Persons 2009-2019; New Partnership for Africa's Development; Southern African Regional Police Chiefs Co-operation Organization, Joint Permanent Commissions on Defence and Security and Bi-National Commissions; among others which are already taking tremendous strides towards addressing the problem of transnational organised crime. Furthermore, institutions created by regional instruments can also play a pivotal role in assisting the implementation of child trafficking measures. These include the African Commission on Human and Peoples' Rights (ACHPR), African Court on Human and Peoples' Rights (AfCHPR), AU Commission on International Law (AUCIL), AU Advisory Board on Corruption (AUABC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).<sup>224</sup> These institutions can work in collaboration with the United Nations Office on Drugs and Crime which is a governing body which provides technical and legislative guidance and research on transnational organised crime.

#### *6.2.1.3 Legislative Reforms to Counter Adverse Cultural Practices*

Children are vulnerable to trafficking because of the inequalities entrenched in customs and patriarchal systems. It is difficult to make a distinction between the right to cultural practices and violations of human rights, and human traffickers take advantage of the opportunities this presents. Thus, an opportunity is created for legislatures in SADC States to take a positive step toward law reforms that breach the

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<sup>224</sup> AU, Democracy, Law and Human Rights <<https://au.int/en/democracy-law-human-rights>> accessed 3 January 2021.



gap that has been left by the international and regional frameworks in so far as providing adequate protection to children, regardless of gender, from harmful cultural practices. It is recommended that strategies be put in place for effective prevention and elimination of harmful practices. Such strategies must be holistic, well-defined, rights-based, and locally relevant. However, for them to work they must also include supportive legal and policy measures as well as social measures backed by political commitment and accountability.

#### *6.2.1.4 Mapping and Situation Analysis to Counter Lack of Resources and Awareness*

One of the noted hurdles of combating child trafficking is a lack of understanding of the child trafficking trends. Thus, this research recommends mapping and situation analysis as essential tools for improving the effectiveness of any action against child trafficking. Mapping is also vital for the purposes of avoiding duplication and wasting of resources. This includes not only mapping of the problem of trafficking itself but also disaggregated data on children at risk, trafficked children, mechanisms, and exploiters.

In this regard, the mapping will also include focusing on responses by governments and other initiatives, law enforcement and judicial action including investigations, prosecutions, sentences, and rehabilitation programmes.<sup>225</sup> This will help in determining resources available and identifying sources of funds as well as potential funders and promoters in the form of NGOs and other implementing agencies and experts.

Rehabilitation programmes would need to be informed by outcomes of a situation analysis of child trafficking in the SADC region. Such an analysis is necessary to analyse the situation of trafficked children in the region. This includes assessing the factors that make them vulnerable to re-trafficking so as to structure rehabilitation programmes in a manner that addresses the possibility of any such re-trafficking or victimization.

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<sup>225</sup> Collaborative efforts in combatting child trafficking by law enforcer in the SADC region may help to significantly reduce the problem of child trafficking. See UNODC, '87 victims of human trafficking rescued in joint operation among law enforcement authorities in the Southern Africa Region' <<https://www.unodc.org/southernafrica/en/aml/review.html>> accessed 20 December 2021.

### *6.2.1.5 Community Outreach and Mobilization*

To deal with the lack of awareness of child trafficking in the region, this research recommends community outreach programmes and mobilisation. Door-to-door campaigns would ensure that those without access to television or radio may have access to accurate useful information about child trafficking,

It has been noted in this research that the internet has been used to facilitate child trafficking and promote online sexual activities. To counter this, it is recommended that SADC Member States in their outreach programs focus on increasing social media presence. It may be helpful to take advantage of the increase in social media addiction among the youth to conscientize them on the risks of child trafficking and how or where to report should one find themselves in such situations.

### **6.2.2 Recommendations for Easing the Impact of Child Trafficking on The Victims**

#### *6.2.2.1 Skills Development and Training for Victims of Child Trafficking*

Skills development and training post-trafficking is also an effective tool for empowering rescued victims to be economically independent. This would be an effective way to rehabilitate and reintegrate victims into society without them necessarily being viewed as a burden or threat.

#### *6.2.2.2 Encourage Multi-Sector and Trans-National Cooperation*

There is a need to combine efforts by state and non-state organisations<sup>226</sup> to ensure that victims are protected.<sup>227</sup> This will strengthen the capacity of government, NGO

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<sup>226</sup> Given that most SADC States rely on donor funds to carry out initiatives, inclusion of non-governmental organisations is crucial. These organisations also have an indirect obligation to comply with children's treaty-based rights. See Afroz Kaviani Johnson, Julia Sloth-Nielsen, 'Safeguarding Children in the Developing World—Beyond Intra-Organisational Policy and Self-Regulation' (2020) 9 (98) Soc. Sci 1, 15.

<sup>227</sup> The SADC Protocol on Gender and Development under article 20 (5) in a nutshell stipulates all that is necessary to counter trafficking in persons and states that; States Parties shall, by 2015: (a) enact and adopt specific legislative provisions to prevent human trafficking and provide holistic services to survivors, with the aim of re-integrating them into society; (b) put in place mechanisms by which all relevant law enforcement authorities and institutions may eradicate national, regional and international human trafficking networks; (c) put in place harmonised data collection mechanisms to improve data collection and reporting on the types and modes of trafficking to ensure effective programming and monitoring; (d) establish bilateral and multilateral agreements to run joint actions

and trade union partners to provide multi-disciplinary prevention, rescue and rehabilitation programmes, for example in health care, counselling, education and training, social integration, and provision of alternatives for children at risk and their parents. The efforts would be targeted at tackling some of the key factors of trafficking such as HIV/AIDS.<sup>228</sup>

Furthermore, there is a need to reduce the impact of trafficking on the victims, particularly those exploited for sexual purposes. This can be done by advocating for sexual and reproductive health facilities for women and girls. Donor aid, and volunteers' efforts, among other efforts, when combined, would ensure that the impact of child trafficking is lessened. The two groups of entities are not mutually exclusive and can effectively be each other's check and balance, with one complementing the other for the benefit of victims.

In addition, it has been established that the crime of child trafficking yields high profits for syndicates.<sup>229</sup> Instead of leaving it to the discretion of the respective States to determine what happens to the proceeds from child trafficking, this research recommends that any confiscated goods and/or money be used to fund and facilitate anti-child trafficking projects, as well as rehabilitation programmes for the victims.

#### 6.2.2.3 Strengthening the '3Ps'

The implementation challenge in SADC is multifaceted. At the national level, there is a lack of political will by Member States to implement measures against child trafficking. Largely this is influenced by the scarcity of resources and lack of capacity to create awareness, conduct training for officials and research on child trafficking. In addition to that, there are no systematic methods of monitoring the implementation of measures.<sup>230</sup>

Nevertheless, this is an opportunity for strengthening the regional framework to better tackle the problem of child trafficking. To achieve this, SADC States need to

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against human trafficking among origin, transit and destination States; and (e) ensure capacity building, awareness raising and sensitisation campaigns on human trafficking are put in place for law enforcement officials.

<sup>228</sup> Text under section 2.2.7 ch 2.

<sup>229</sup> Without robust criminal justice responses, child trafficking will remain a low risk, high profit activity for criminals.

<sup>230</sup> Text to para 4 under section 2.2.2 ch 2.

strengthen their approach to child trafficking by adopting a holistic approach. A holistic approach is a more effective way of ensuring the effective prevention and prosecution of the crime as well as the protection of victims. This will be instrumental in mitigating the impact of child trafficking on the victims, especially where there is systematic reintegration and rehabilitation of victims as well as non-criminalisation of victims. Therefore, SADC States need to train all relevant agencies to proactively identify trafficking victims by screening for trafficking indicators among vulnerable populations, including individuals involved in commercial sex, migrants and former refugees, and refer all trafficking victims to appropriate services. They should also collaborate with NGOs and international organizations to increase the government's capacity to provide shelter and protective services to more trafficking victims, including adult males and foreign nationals.

#### *6.2.2.4 Adopting a Holistic Approach to Child Trafficking*

Nevertheless, seeing that on its own the criminal justice approach has not been able to yield the desired outcome of combating child trafficking in the region, it may be high time that SADC States adopt a holistic approach. Such an approach would combine the criminal justice and human rights approaches to the crime. It would not only focus on criminalisation but also endeavour to protect the rights of the victims.<sup>231</sup> These rights are already contained in treaties and other instruments particularly relevant to child trafficking.<sup>232</sup> Coupled with the various regional instruments as well as non-treaty instruments relevant to child trafficking, they formulate a strong human rights

<sup>231</sup> These include children's rights as provided in the various instruments discussed in preceding chapters. Human rights most relevant to trafficking include the prohibition of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, the right to life, the right to liberty and security, the right not to be submitted to slavery, servitude, forced labour or bonded labour, the right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment, the right to be free from gendered violence, the right to freedom of association, the right to freedom of movement; the right to the highest attainable standard of physical and mental health, the right to just and favourable conditions of work, the right to an adequate standard of living, the right to social security, and the right of children to special protection. All these rights are infringed at the various stages of child trafficking. See chapter 3. Also see Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, (2001) 23 (4) Human Rights Quarterly 975-1004.

<sup>232</sup> This includes, *inter alia*, the UNTOC and the Trafficking Protocol, CEDAW, CRC and its Optional Protocol on the sale of children, child prostitution and child pornography, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ICCPR and ICESCR.

foundation for child trafficking victims as far as prevention and protection are concerned.

To enhance the human rights approach to child trafficking in the SADC region, measures would be implemented through the functionality of already existing bodies such as the SADC Tribunal. Despite the situation at the SADC Tribunal,<sup>233</sup> there is no doubt that such a judicial body with jurisdiction over human rights issues would be fundamentally important, particularly in transnational cases of child trafficking. The SADC Tribunal as a supranational judicial body may assist in creating uniformity of interpretation of child trafficking instruments and contentious provisions. It will also act as a court of first instance where national systems do not make adequate provisions or create adequate remedies for human rights-related issues of child trafficking. The Tribunal may therefore assist in mitigating the shortcomings of national systems in dealing with child trafficking.

### **6.2.3 Recommendations to Address the Conflation of Child Trafficking and other Related Crimes**

#### **6.2.3.1 Harmonisation of Legislation, Policies, and Strategies**

Given that there is a plethora of trafficking in persons policies, legislation, and campaigns across the region, all that essentially becomes 'much ado about nothing' without a common approach to specifically address child trafficking. Harmonisation of these measures brings uniformity and improves the chances of successfully combating not just trafficking in persons in general, but child trafficking as a major concern. It should be realised that a piecemeal fashion has since failed to combat child trafficking. It is recommended that SADC Member States should harmonise national legislation, policies, strategies, and programmes with relevant regional and international instruments related to children's rights as well as child trafficking.<sup>234</sup> To achieve this, SADC States need to urgently ratify the SADC Protocol against

<sup>233</sup> The Southern African Development Community Tribunal was established under of the Treaty of the Southern African Development Community (SADC) in 1992. The Tribunal but was only inaugurated in November 2005 with the mandate to ensure Member States' compliance with the SADC Treaty and subsidiary instruments. The SADC Tribunal also had competence to hear individual complaints of alleged human rights violations. However, its exercise of this competence led to an SADC-ordered review of the Tribunal's role and functions in 2010, resulting in the suspension of its activity.

<sup>234</sup> This includes taking advantage of the opportunity created by the Covid-19 pandemic to identify the cracks in the legal and policy framework as far as child protections are concerned.

Trafficking in Persons, which provides a framework of cooperation between Member States in combating trafficking in persons and associated transnational organised and cross-border crimes in the Region.<sup>235</sup>

#### *6.2.3.2 Promote Bilateral and Multi-Lateral Agreements to Boost Prosecution*

It is crucial for SADC States to have a unified approach to child trafficking. It is, therefore, the recommendation of this research that more bilateral and multi-lateral agreements be encouraged between States. Such agreements will place obligations on parties regarding the apprehension and prosecution of offenders. This will significantly boost prosecution across the region and ensure fully functional justice systems across the SADC region.

#### *6.2.3.3 Training of Relevant Officials*

It has been noted that law officials lack the required training which enables them to deal with child trafficking. It is therefore recommended that to address the conflation of child trafficking with other related crimes, training for police, immigration officials, prosecutors, and judges on investigating and prosecuting trafficking crimes should be expanded. Furthermore, officials should investigate and prosecute human trafficking crimes, separate them from other related crimes, and sentence convicted traffickers to adequate penalties. Most importantly, respective SADC States should appoint investigators with specialised training on child trafficking investigation.

It has also been noted that language is sometimes a barrier to effective criminal investigations and interpreters are not always readily available.<sup>236</sup> It is the recommendation of the research that SADC States establish a network of interpreters to ensure provision of interpretation services for foreign victims to deliver comprehensive legal and protective services.

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<sup>235</sup> The Protocol was adopted and signed at the 42<sup>nd</sup> Ordinary Summit of the Heads of State and Government of the Southern African Development Community (SADC) was held on 17th August 2022, in Kinshasa, the Capital City of the Democratic Republic of the Congo. See Communiqué of the 42<sup>nd</sup> Ordinary Summit of SADC Heads of State and Government, page 6, para 25 available at <<https://www.sadc.int/speeches-communications>> accessed 19 August 2022.

<sup>236</sup> Text to n 90 ch 5.



## **6.2.4 Recommendations to Address the Implementation Challenges**

### **6.2.4.1 Establish Implementation, Monitoring and Evaluation of Measures**

Implementation, monitoring, and evaluation mechanisms are still lacking in the SADC framework. Thus, it is recommended that measures be put in place to assess the effectiveness of some of the pilot training initiatives, awareness campaigns as well as other initiatives that were initially done just after the Trafficking Protocol came into effect.

It has been noted that where reporting structures have been set, progress is hampered by challenges such as delays in the submission of reports, non-reporting, and duplication of reporting requirements among treaty bodies. Thus, it is recommended further that focus be given to improving the effectiveness of the human rights treaty system as an ongoing project.<sup>237</sup> This can be done through constant monitoring of key strategies and policies starting rigorously at the national level. Thereafter, there should be a submission of structured reports by relevant stakeholders. Such a system will contribute to the overall regional report on child trafficking, which may be done yearly. The reports may be in the form of targeted priority areas and not general information.

Lastly, an evaluation of all the measures taken will help to inform any warranting changes or improvements. These submissions would be made to a SADC Trafficking in Persons Committee, which may be created in terms of the SADC Protocol against Trafficking in Persons, if it comes to fruition.

Importantly, there should be some form of accountability to ensure diligence of Member States. This is in light of the fact that states require persuasion and are reluctant to commit to obligations. In the end, the journey towards an effective legal and policy framework against child trafficking is one that requires commitment and consistency.

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<sup>237</sup> UNHRHC, 'Effective Implementation of International Human Rights Instruments: Development of the human rights treaty system' <<https://www.ohchr.org/EN/HRBodies/Pages/DocumentsSystem.aspx>> accessed 11 November 2021.

#### **6.2.4.2 Time-bound National Plans and Programmes**

To aid with the implementation of measures, it is recommended that SADC Member States adopt a system of Time-Bound Programmes (TBPs). These would be a set of tightly integrated and coordinated policies and programmes to prevent and eliminate child trafficking within a defined time frame. This may be achieved by adopting comprehensive, strategic, and time-bound coordinating frameworks for child caregiving and protection.<sup>238</sup> Committees such as the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child may oversee the plans by ensuring that they are costed and have measurable targets and budget allocations.

### **6.3 Recommendations for Further Research**

There are several gaps in the available information concerning child trafficking in the SADC region. Accordingly, the benefit could be derived from further research aimed at bridging these gaps. SADC should encourage academic and research institutions in Africa to research more on transnational organised crime, particularly child trafficking. Such research would be one way of creating awareness and interest in legislative development and growth. Thus, recommendations for further study and research are made as follows:

#### **6.3.1 A Critical Analysis of the International Framework for Child Trafficking**

A critical analysis of the international framework for child trafficking would be helpful, especially seeing that the international framework sets the pace and tone for regional, sub-regional as well as national responses to transnational organised crime. Further research might examine the effectiveness of the Trafficking Protocol in addressing child trafficking given that in its current state, the Protocol defers further elaboration and comprehensive approaches to tackle the crime to institutions.

#### **6.3.2 Research on Methodological Ways to Data Capturing**

The lack of adequate data is the main impediment to effectively combat child trafficking. With adequate resources, further studies on how data capturing particularly

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<sup>238</sup> Text to n 251 and 252 ch 3.

on the impact and extent of child trafficking in the region would greatly advance the fight against the crime.

### **6.3.3 A Quantitative Study of the Child Trafficking Problem in SADC**

It would also be helpful to capture quantitatively the experiences and perspectives of victims and communities most affected by child trafficking. This will assist in improving preventative and protection measures that have been put in place. Further research may include experiences of marginalised and seldom-heard groups of people.

### **6.3.4 Review of SADC Strategic Plans of Action**

A relatively narrow but important area of further study relates to the evaluation of action plans after they have run their term. This research has noted that the 10-Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019) had several recommendations and plans against child trafficking. Further research on the impact of the plan of action or similar initiatives is necessary to determine whether such initiatives in fact contribute to the fight against child trafficking, or they create a false panacea without remedying the problem.

In conclusion, to effectively combat child trafficking in the region, SADC Member States must be willing to commit to the establishment and implementation of measures against child trafficking as well as make resources available for victim protection and assistance. Thus, the region must move towards having legislation specifically addressing child trafficking not merely as a subset of trafficking in persons. This should be supported by multilateral and bilateral agreements between Member States aimed at the effective implementation and monitoring of such legislative measures. Such legislation would also define demand in the context of child trafficking. In essence, governmental, and non-governmental entities in the SADC region should work together to strengthen the SADC legal and policy framework to adequately address the concerning problem of child trafficking in the region.

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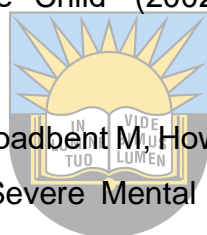
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