

## Human Trafficking in Africa

### *Opportunities and Challenges for the African Court of Justice and Human Rights*

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#### 1. INTRODUCTION

Human trafficking is a serious problem in Africa. It is a major region of origin for victims, who are trafficked into other parts of the world such as Western Europe and the Middle East.<sup>1</sup> Domestic or intra-regional trafficking are also common in certain areas, particularly in Sub-Saharan Africa.<sup>2</sup> A large number of those victimized in Sub-Saharan Africa are women and children<sup>3</sup> who are subsequently exploited in a variety of sectors such as agricultural and domestic work, prostitution and even military (e.g. child soldiers).<sup>4</sup> It has been estimated that 3.7 million people in Africa are in slavery and forced labour at any given time, and the annual profits generated from these amount to \$13.1 billion in this region alone.<sup>5</sup> Many traffickers are known to the victims and include close family members, relatives and friends.<sup>6</sup> Interestingly, 50% of these traffickers in Africa are female,<sup>7</sup> dispelling a myth that it is a male-dominated crime. The involvement of sophisticated organized criminal groups has also been

<sup>1</sup> See, for instance, Country Narratives on Human Trafficking in U.S. Department of States, *Trafficking in Persons Report 2016*.

<sup>2</sup> United Nations Office of Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (2014), at 83.

<sup>3</sup> *Ibid.*, at 82.

<sup>4</sup> International Organization for Migration (IOM), *Human Trafficking in Eastern Africa* (2008), at 12.

<sup>5</sup> International Labor Organization, *Profits and Poverty: The Economics of Forced Labor* (2014), at 7 and 13.

<sup>6</sup> *Ibid.*, at 27.

<sup>7</sup> UNODC, note 2, at 81.

recognized,<sup>8</sup> and this makes the trafficking operation more sophisticated and dangerous. What is evident from this brief synopsis is that human trafficking is widespread and endemic in Africa.

The complex and transnational nature of human trafficking in this continent requires an integrated response, and the role of regional organizations becomes very important as they can contribute to the strengthening of both individual as well as collective actions against this crime. The purpose of this chapter is to explore some opportunities and challenges facing one of the key regional organizations, the African Court of Justice and Human Rights (African Court), in combating human trafficking. It is placed in a unique position as it can address not only State responsibility, mainly through the relevant human rights instruments, but also individual criminal responsibility when the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014 (Amendments Protocol) comes into force in the future, as it has included an offence of human trafficking over which criminal jurisdiction can be exercised. The potential of the African Court in facilitating a more effective action against this crime in Africa therefore merits a closer analysis.

The chapter begins by exploring the historical development of international law on human trafficking, starting from the early instruments on white slave traffic, to the most important treaty in the contemporary world, the Protocol to Prevent, Suppress and Punish Trafficking in Persons 2000<sup>9</sup> (Trafficking Protocol), attached to the UN Convention against Transnational Organized Crime<sup>10</sup> (UNTOC). It then identifies key elements of the offence of human trafficking by analyzing the definitions of this crime stipulated under the Trafficking Protocol as well as the Amendments Protocol. The chapter continues with an examination of State responsibility, with particular reference to the core obligations of prohibition/prosecution, protection, and prevention. Finally, it analyses the potential of the African Court in prosecuting and punishing human trafficking through its exercise of criminal jurisdiction. The main conclusion is that there will be ample opportunities for the African Court to enhance individual and collective responses to human trafficking through articulation of State responsibility. However, a number of challenges exists particularly in relation to the exercise of criminal

<sup>8</sup> United Nations Educational, Scientific and Cultural Organization, *Human Trafficking in South Africa: Root Causes and Recommendations* (2007), at 27–8; and U.S. Department of State, *Trafficking in Persons Report 2015*, at 265.

<sup>9</sup> 2237 UNTS 319.

<sup>10</sup> 2225 UNTS 209.

jurisdiction, and these are likely to limit the ability of the African Court as a criminal justice institution.

## 2. HISTORICAL DEVELOPMENT

International regulation of human trafficking has gradually developed since the early Twentieth century. One of the early legal instruments was the International Agreement for the Suppression of the White Slave Traffic 1904.<sup>11</sup> This instrument was adopted as a response to the growing sale of white women into prostitution in Europe, which was partially facilitated by the stagnant economic climate at that time.<sup>12</sup> There are some important aspects to be mentioned in relation to this Agreement. First, it applied only to 'white women.' This meant that women of other ethnic backgrounds, as well as men, were excluded. Second, the instrument was designed to regulate procurement of women or girls for immoral purposes abroad. Therefore, its emphasis was upon sexual exploitation of white women and girls and their trafficking outside of their States of origin. Finally, this Agreement lacked strong crime prevention provisions as it did not oblige States to prosecute and punish the white slave traffic at the national level and facilitate mutual legal assistance in criminal matters. Consequently, this legal instrument was not really effective in suppressing this practice.<sup>13</sup>

The next treaty was the International Convention for the Suppression of the White Slave Traffic 1910.<sup>14</sup> While an emphasis was still placed upon trafficking of white women and girls for sexual exploitation abroad, a degree of improvement could be seen in this instrument as Articles 1 and 3 clearly obliged State Parties to prohibit the practice at the national level. It is also worth noting that, unlike the 1904 Agreement, the 1911 Convention facilitated international cooperation. For instance, it obliged States to communicate with each other about national legislation and the records of conviction, and to make traffic an extraditable offence.<sup>15</sup> The scope of application, however, was limited for the same reason as the 1904 Agreement (non-applicability to women of other ethnicities and men/boys). It was also not designed to address the end purpose of trafficking, prostitution, as this was regarded as a matter of

<sup>11</sup> 1 LNTS 83.

<sup>12</sup> N. Demleitner, 'Forced Prostitution: Naming an International Offence,' 18 *Fordham International Law Journal* (2000), 163–96, at 167.

<sup>13</sup> *Ibid.*, at 168.

<sup>14</sup> 8 LNTS 278.

<sup>15</sup> Arts 4–6.

domestic jurisdiction.<sup>16</sup> For this reason, this instrument was also criticized as being ineffective.<sup>17</sup>

After the World War I, the League of Nations, which recognized the seriousness of trafficking, adopted two more treaties. The first was the International Convention for the Suppression of the Traffic in Women and Children 1921.<sup>18</sup> This instrument incorporated the description of trafficking under the 1910 Convention,<sup>19</sup> once again emphasizing prostitution and sexual exploitation. The main difference, however, was that it applied to women of all ethnicities as well as both male and female children. In addition, criminal justice measures were enhanced. For instance, it provided for prohibition of so-called inchoate offences in addition to the act of trafficking itself.<sup>20</sup> Article 4 also made it clear that States were to extradite those who commit the offence specified in the Convention. The second treaty was the International Convention for the Suppression of the Traffic in Women of Full Age 1933.<sup>21</sup> This treaty was quite similar to its predecessors in terms of its nature and scope of application, except that it applied to adult women. Once again, the major issue with these two instruments was that they did not address the end purpose of trafficking, prostitution.

The United Nations was established after the World War II, and another treaty, the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949,<sup>22</sup> was adopted. It is the consolidated version of the earlier treaties, but some discrepancies can be recognized. For instance, it specifically refers to exploitation of prostitution. Having said this, the 1949 Convention is gender-neutral, thereby recognizing that men and boys can be victimized. However, this treaty was criticized, among other things, for not obliging States to criminalize prostitution itself while criminalizing acts associated with prostitution such as running or keeping brothels.<sup>23</sup> One reason for this was that the drafters of the Convention feared that 'prohibition would drive prostitution underground, and that laws designed to punish both clients and prostitutes, in practice, would be selectively enforced

<sup>16</sup> T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Leiden: Martinus Nijhoff Publishers, 2006), at 15.

<sup>17</sup> J. Chuang, 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts,' 11 *Harvard Human Rights Journal* (1998) 65–198, at 74–5.

<sup>18</sup> 9 LNTS 415.

<sup>19</sup> Art. 1.

<sup>20</sup> Art. 3.

<sup>21</sup> 150 LNTS 431.

<sup>22</sup> 96 UNTS 271.

<sup>23</sup> Art. 2.

only against prostitutes.<sup>24</sup> Further, it did not take other forms of sexual exploitation, such as sex tourism, into consideration.<sup>25</sup> Finally, the 1949 Convention did not expand upon the provisions for mutual assistance in legal matters. Because of these and other reasons, the effectiveness of the 1949 Convention was also called into question.

While the international legal development relating to action against human trafficking has gone into hiatus after the 1949 Convention, this changed at the turn of the twenty-first century with the adoption of the UNTOC, and more importantly, the Trafficking Protocol. The key aims of this Protocol are to (1) prevent and combat trafficking, (2) protect the victims and (3) facilitate international cooperation. In order to achieve these objectives, this instrument as well as the UNTOC impose a variety of obligations designed to enhance national and international actions against human trafficking. One striking feature of the Trafficking Protocol is that it not only applies to prostitution and sexual exploitation, but also to other forms of exploitation, thereby expanding its scope of application.<sup>26</sup> This is important as the international community has recognized that victims are trafficked and exploited in non-sex sectors.

Aside from the aforementioned instruments, international human rights law has made important contributions to addressing this crime. This makes us realize that human trafficking is not only a crime, but also a violation of victims' human rights. The terms 'traffic' or 'trafficking' are specifically mentioned in some international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW),<sup>27</sup> the Convention on the Rights of the Child 1989 (CRC),<sup>28</sup> and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.<sup>29</sup> Regionally, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2000,<sup>30</sup> the African Charter on the Rights and Welfare of the Child 1990,<sup>31</sup> the Council of Europe

<sup>24</sup> Demleitner, note 12, at 177.

<sup>25</sup> Report of the Special Rapporteur on Violence against Women (Trafficking in Women, Women's Migration and Violence against Women), E/CN.4/2000/68 (February 2000), at 22 and 23.

<sup>26</sup> See below of the international definitions of human trafficking and exploitation.

<sup>27</sup> Art. 6; 1249 UNTS 13.

<sup>28</sup> Art. 35, 1577 UNTS 3.

<sup>29</sup> 2171 UNTS 227.

<sup>30</sup> Art. 4, CAB/LEG/66.6 (2000).

<sup>31</sup> Art. 29, CAB/LEG/24.9/49 (1990).

Convention on Action against Trafficking in Persons 2005,<sup>32</sup> and the Inter-American Convention on Traffic in Minors 1994<sup>33</sup> are pertinent. The key benefit of international human rights law is that it encourages States to adopt a human rights approach thereby putting the welfare of the victims at the forefront of an overall action against this crime. As will be shown below, certain guidance on State responsibility are gradually emerging under this branch of international law.

In relation to other treaties, human trafficking can also be dealt with through the instruments relating to slavery and forced labour. One example is the Slavery Convention 1926.<sup>34</sup> This treaty was later strengthened by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956,<sup>35</sup> which has expanded the coverage of exploitation to include practices such as debt bondage and serfdom. In relation to forced labour, the ILO Forced Labour Convention 1930 (No. 29)<sup>36</sup> is important. These instruments have further been supplemented by international and regional human rights treaties. Article 8 of the International Covenant on Civil and Political Rights 1966<sup>37</sup> (ICCPR) provides for the prohibition of slavery, servitude as well as forced labour, and similar provisions can be seen in the European Convention on Human Rights 1950,<sup>38</sup> the American Convention on Human Rights 1969<sup>39</sup> and the African Charter of Human and Peoples' Rights 1980.<sup>40</sup> While human trafficking and slavery or exploitation are not necessarily synonymous as will be discussed below, it has been recognized that it can be dealt with under these provisions relating to slavery/forced labour<sup>41</sup> under certain circumstance, and therefore various obligations established by these human rights treaties will be relevant to this crime. In summary, international law on human trafficking has evolved to a great extent by shifting its traditional focus on prostitution of white women, to all people who experience a wide variety of exploitation.

<sup>32</sup> ETS No. 197.

<sup>33</sup> 33 ILM 721 (1994).

<sup>34</sup> 60 LNTS 254.

<sup>35</sup> 226 UNTS 3.

<sup>36</sup> 39 UNTS 55.

<sup>37</sup> 999 UNTS 171.

<sup>38</sup> ETS No. 5.

<sup>39</sup> 1144 UNTS 123.

<sup>40</sup> 1520 UNTS 217.

<sup>41</sup> *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (2010), para 281.

### 3. KEY ELEMENTS OF THE CRIME OF HUMAN TRAFFICKING

One of the important contributions made by the Trafficking Protocol is the adoption of the international definition of human trafficking. According to Article 3(a):

Trafficking in persons shall mean the recruitment, transportation, transfer, harboring 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.

There are three key elements in this definition: (1) act, (2) means and (3) purpose. The first element refers to the main conduct of trafficking, that is, recruitment, transportation, transfer, harboring or receipt of trafficked people. The second element explains how these victims are transported. Traffickers use coercion and/or deception to traffic people from one place to another. This suggests that there is no genuine consent on the part of victims. The second element is closely interlinked with the first as they both constitute the *actus reus* of trafficking. Finally, the third 'purpose' element refers to the reasons as to why people are trafficked. Traffickers transport victims for them to be exploited in sex and non-sex industries. Article 3(a) continues in this regard that '(e)xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.' Once again, the shift from the earlier instruments on trafficking is apparent.

It is important to stress here that it is not necessary that victims actually are exploited for an act to be classified as trafficking. This is so because the purpose element relates to the *mens rea*, ulterior intention in particular, rather than the *actus reus*.<sup>42</sup> A good analogy can be made in relation to the offences of housebreaking and burglary in Africa. Under Section 308 of the Kenyan Penal Code, for instance, anyone who breaks and enters any building with intent to commit a felony is guilty of housebreaking (burglary when committed at night). The wording of this provision suggests that this offence is complete as soon as one enters a building even when a felony is not actually committed. These are generally known as ulterior intent offences and are also

<sup>42</sup> This is of course in addition to direct intention to traffic people.

recognized in other jurisdictions in Africa.<sup>43</sup> By analogy, the above definition of trafficking suggests that the offence is established when a trafficker moves people from one place to another with intention to exploit them later or with full knowledge that they will be exploited by others at their destinations. When trafficked victims are actually exploited, that would technically be regarded as a separate offence of slavery or forced labour, or alternatively as an aggravating factor which would increase the level of punishment for human trafficking.

This point also becomes clear in looking at the definitions of slavery and forced labour. According to the Slavery Convention 1926 mentioned above, slavery is defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'<sup>44</sup> The key factors in determining its existence include, but are not limited to, the control of one's movement and physical environment, the use or threat of force, subjection to cruel treatment, and forced labour.<sup>45</sup> The reduction of the status of a person to a mere object was also regarded as an important characteristic.<sup>46</sup> However, a mere ability to buy, sell, trade or inherit a person or his/her labour is not in itself an example of slavery,<sup>47</sup> suggesting that human trafficking and slavery are not necessarily synonymous, and that something more than transportation may be needed for an act to amount to slavery. It would perhaps be easy to treat trafficking as slavery simultaneously when people are exploited afterwards by the same traffickers who transported them, as this ensures the continuous exercise of ownership.<sup>48</sup> However, where victims are exploited by those other than traffickers after reaching their destinations, then ownership is transferred to them, and such an instance might be regarded as a separate offence of slavery. In this regard, it has been emphasized that 'the duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.'<sup>49</sup>

In relation to forced labour, Article 2(1) of the Forced Labour Convention define this as '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

<sup>43</sup> See, for instance, criminal trespass under s. 304 of the Eritrean Penal Code; unlawful entry under s. 152 of the Ghana Criminal Code; housebreaking/burglary under s. 309 of the Malawi Penal Code; and housebreaking/burglary under s. 294 of the Tanzanian Penal Code.

<sup>44</sup> Art. 1(1).

<sup>45</sup> *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T (February 2001), para 543.

<sup>46</sup> *Siliadin v. France*, Application No. 73316/01 (2006), para 122.

<sup>47</sup> *Prosecutor v. Kunarac et al.*, note 45, para 543.

<sup>48</sup> Obokata, note 16, at 20.

<sup>49</sup> *Prosecutor v. Kunarac et al.*, note 45, para 542.



voluntarily.’ The term ‘forced’ connotes physical or mental constraints.<sup>50</sup> While the examples of exploitation listed under the Trafficking Protocol certainly fit under this definition, it is clear simultaneously that it does not contain the act element of human trafficking (i.e. recruitment, transfer, harboring or receipt of people). In view of these, it seems reasonable to conclude that subsequent exploitation is a sufficient, but not necessary, element of human trafficking.

It is useful at this stage to explore the definition of human trafficking as contained in the Amendments Protocol. According to Article 28J,

1. “Trafficking in persons” means 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.
2. Exploitation shall include 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 removal of organs.

It becomes immediately clear that the definition is identical to the one provided by the Trafficking Protocol. This demonstrates the willingness of a regional organization to abide by the international standards. Consequently, the key elements of this offence should be understood similarly in Africa in order for the African Court to be able to facilitate a more integrated or unified approach to this crime regionally as well as internationally.

The State practice at the national level, however, reveals that human trafficking has been defined differently in reality. Although a number of States<sup>51</sup> have already adopted the definition of human trafficking in line with the Trafficking Protocol and the Amendments Protocol, a degree of variation

<sup>50</sup> *Van der Mussel v. Belgium*, Application No. 8919/80 (1983), para 34.

<sup>51</sup> These States include, but are not limited to, Botswana under the Anti-Human Trafficking Act 2014; Burkina Faso under the Law No. 029-2008/AN on the Fight against Trafficking in Persons and Similar Practices; Djibouti under the Law No. 210/AN/07/5 Law on the Fight Against Trafficking in Human Being 2007; Egypt under the Law No. (64) of 2010 regarding Combating Human Trafficking; Equatorial Guinea under the Law No. 1/2004 on the Smuggling of Migrants and Trafficking in Persons; Gambia under the Trafficking in Persons Act 2007; Ghana under the Human Trafficking Act 2005; Kenya under the Counter-Trafficking in Persons Act 2010; Lesotho under the Anti-Trafficking in Persons Act 2011; Liberia under the Act to Ban Trafficking in Persons 2005; Malawi under the Trafficking in Persons Act 2015; Mauritania under the Law on Suppression of Trafficking in Persons (No. 25) 2003; Mauritius under the Combating of Trafficking in Persons Act 2009; Namibia under the Prevention of

is recognized in others.<sup>52</sup> Another interesting aspect is that the notion of exploitation also varies among African States. In some States such as Angola,<sup>53</sup> Comoros<sup>54</sup> and the Democratic Republic of Congo,<sup>55</sup> human trafficking is associated with prostitution and/or sexual exploitation only, while others cover a variety of exploitation such as forced marriage,<sup>56</sup> harmful sports,<sup>57</sup> and involvement in armed conflicts.<sup>58</sup> The perceptions of crimes, including human trafficking, are inevitably influenced by social, cultural, political and legal traditions of each States, and therefore the existence of discrepancies is inevitable. The practical implication, however, is that these variations can lead to fragmented approaches in combating human trafficking in Africa and make regional law enforcement cooperation more difficult. Further, States without sufficient legislative frameworks will become more vulnerable to human trafficking as criminals will naturally concentrate their activities in jurisdictions where law enforcement is weak. In order to facilitate more effective national and regional actions, therefore, the African Court will have an important task of promoting a uniform understanding by encouraging those States which have yet to do so to amend their national legislation and adopt the definition of human trafficking in line with the Trafficking Protocol as well as the Amendments Protocol.

Further, human trafficking is not to be confused with 'migrant smuggling.' In accordance with the Protocol against the Smuggling of Migrants by Land,

Organized Crime Act 2004; Nigeria under the Trafficking in Persons (Prohibition), Enforcement and Administration Act 2015; Senegal under the Act No. 2005-06 on the Fight against Human Trafficking and Similar Practices and the Protection of Victims; Seychelles under the Prohibition of Trafficking in Persons Act 2014; Sierra Leone under the Anti-Human Trafficking Act 2005; South Africa under the Prevention and Combating of Trafficking in Human Beings Act 2013; Uganda under the Prevention of Trafficking in Persons Act 2009; Zambia under the Anti-Human Trafficking Act 2008; and Zimbabwe under the Trafficking in Persons Act 2014.

<sup>52</sup> Burundi under the Criminal Code, arts 242 and 243; Cameroon under the LAW No 2011/024 Relating to the Fight against Human Trafficking in Persons and Slavery, s. 2; Eritrea, note 43, arts 297, 315 and 316; Ethiopia under the Penal Code, art. 597; Gabon under Law 09/04 Concerning the Prevention and the Fight Against the Trafficking of Children in the Gabonese Republic; Mozambique under Law No. 6/2008 on Preventing and Combating the Trafficking of People; Rwanda under the Penal Code, art. 50; Somalia under the Penal Code, arts 456-7; South Sudan under the Penal Code, arts 278-9, and 282; and Tanzania under the Anti-Trafficking in Persons Act 2008.

<sup>53</sup> Penal Code, arts 177 and 183.

<sup>54</sup> Penal Code, arts 310, 311, and 323.

<sup>55</sup> Law 06/018 on Sexual Violence.

<sup>56</sup> Equatorial Guinea and Kenya, note 51.

<sup>57</sup> Rwanda, Rwanda, note 52.

<sup>58</sup> Sierra Leone and Uganda, note 51.

Sea and Air 2000,<sup>59</sup> another instrument attached to the UNTOC, smuggling is defined as:

(t)he procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident<sup>60</sup>

It is evident that these two acts differ in some important respects. For instance, there is no 'means' element for smuggling. This suggests that those smuggled willingly take part in this process. It is also the case that the smuggling definition does not entail the 'purpose element,' meaning that smuggling ends as soon as migrants reach their destinations, and that smugglers do not have intention to exploit them or have no knowledge that they will be exploited by others. The lack of these two elements in the smuggling definition is likely to encourage African States to treat it as a simple immigration offence of facilitating illegal entry as opposed to a gross violation of human rights. This in turn may justify tougher enforcement actions such as detention and deportation for smuggled migrants, while protection will be high on the agenda for trafficked victims.

It is important to remember, however, that a clear distinction between trafficking and smuggling cannot be drawn in many cases. The latter can be the beginning of the former, and many migrants experience a wide variety of abuses during their journey. Physical and/or sexual violence as well as loss of life (e.g. drowning at sea) are some of the clear examples of this. Therefore, smuggling can equally raise a number of human rights issues in practice. It is unfortunate that the Amendments Protocol does not include the offence of smuggling, and this suggests that the African Union and its Member States did not think it to be as important as human trafficking. That being said, this can in turn provide an opportunity for the African Court to demonstrate creativity in interpreting the trafficking definition or relevant provisions of the African Charter of Human and Peoples' Rights and other instruments in order to ensure that those who have suffered during the smuggling process are equally protected.

#### 4. STATE RESPONSIBILITY OVER HUMAN TRAFFICKING

As the main subjects of international law, States have the primary obligation to combat human trafficking. An important task of the African Court then will be

<sup>59</sup> 2241 UNTS 507.

<sup>60</sup> Art. 3(a).

to elaborate upon the nature and the extent of relevant obligations for them to follow. As the exercise of criminal jurisdiction under the Amendments Protocol is concerned with criminal responsibility of those who commit human trafficking, a starting point is to treat this crime as a violation of human rights. An increasing number of opinions in relation to human trafficking have been expressed by international human rights bodies, and these can be used by the African Court as a basis for further elaboration, particularly in interpreting the relevant provisions such as Article 5 (prohibition of slavery and the slave trade) of the African Charter on Human and Peoples Rights 1981, Article 4(g) (trafficking in women) of the Protocol on the Rights of Women in Africa 2000 and Article 29 (sale, trafficking and abduction) of the African Charter on the Rights and Welfare of the Child 1990.

There are mainly three key obligations imposed upon a State. The first obligation is to prohibit and prosecute human trafficking. To begin with, this means that States must have a sufficient legislative framework.<sup>61</sup> The desirability of enacting a specific law on human trafficking, which include a comprehensive definition in line with the Trafficking Protocol, has been repeatedly expressed by human rights bodies.<sup>62</sup> It should be highlighted in this regard that many African States, particularly those which are partially or wholly based on the common law tradition, have done so.<sup>63</sup> For others which are influenced by the civil law tradition and/or rely on general Penal Codes, certain aspects of trafficking such as enslavement, prostitution, sale/purchase of slaves are covered.<sup>64</sup> However, these are not always in line with the international standards as mentioned above, and this will provide an opportunity for the African Court to encourage them to make necessary amendments and facilitate a more integrated response across the region.

The existence of legislative frameworks relating to human trafficking on its own is not sufficient unless they are properly enforced by the relevant law

<sup>61</sup> *Rantsev v. Cyprus and Russia*, note 41, para 284.

<sup>62</sup> Concluding Observations of the Human Rights Committee for Namibia, CCPR/C/NAM/CO/2 (April 2016), para 26 and Burundi CCPR/C/BDI/CO/2 (November 2014), para 16; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Eritrea, CEDAW/C/ERI/CO/5 (March 2015), para 23; and Concluding Observation of the Committee on Migrant Workers for Morocco, CMW/C/MAR/CO/1 (October 2013), para 48.

<sup>63</sup> These include Botswana, Cameroon, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia and Zimbabwe, notes 51 and 52.

<sup>64</sup> See for instance, Angola, note 54, arts. 178 and 183; Burundi, note 52, arts 242 and 243; Cape Verde under the Penal Code, art. 271; Comoros, note 54, arts 310 and 311; Eritrea, note 43, s. 297; and Somalia note 52, arts 456 and 457.

enforcement authorities. Another important obligation, then, is provision of sufficient resources and training to frontline officers so that they are able to investigate, prosecute and punish human trafficking.<sup>65</sup> In addition, in order to deter traffickers from committing this crime in the future, the punishment regime should be sufficiently stringent to serve as effective deterrence. Once again, the State practice varies in this regard in Africa. Human trafficking attracts between five to ten years' imprisonment in Burkina Faso,<sup>66</sup> the Central African Republic<sup>67</sup> and Equatorial Guinea,<sup>68</sup> whereas the punishment is much higher in Gabon,<sup>69</sup> Kenya<sup>70</sup> and South Africa.<sup>71</sup> Although these variations are understandable, a major problem from the point of view of law enforcement is that these discrepancies can lead to concentration of human trafficking in States where punishments are weak, as stressed above.

A related point is the role of organized criminal groups in human trafficking. While trafficking is facilitated by those known to the victims such as immediate family members, relatives or friends in Africa,<sup>72</sup> the involvement of African and international criminal groups has also been recognized.<sup>73</sup> Their participation makes trafficking operations more successful due to their sophisticated *modus operandi*. They also employ risk-averting tactics such as bribery, intimidation and violence in order to avoid law enforcement. Therefore, it is essential that African States designate their involvement as an aggravating factor which would automatically increase the level of punishment. It is encouraging to see that some States, such as Kenya,<sup>74</sup> Liberia,<sup>75</sup> Malawi,<sup>76</sup>

<sup>65</sup> Concluding Observation of the Committee on the Rights of the Child for Tanzania, CRC/C/TZA/CO/3–5 (March 2015), para 77; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Gambia, CEDAW/C/GMB/CO/4–5 (July 2015), para 25; and Concluding Observation of the Committee on Migrant Workers for Ghana, CMW/C/GHA/CO/1 (September 2014), para 45.

<sup>66</sup> Note 51, art. 4.

<sup>67</sup> The Penal Code, art. 151.

<sup>68</sup> Note 51, art. 3.

<sup>69</sup> 40 years' imprisonment, note 52.

<sup>70</sup> 30 years to life imprisonment, note 51.

<sup>71</sup> Life Imprisonment, *ibid*.

<sup>72</sup> Note 4, at 55.

<sup>73</sup> U.S. Department of State, note 1, at 160 (Egypt), 163 (Equatorial Guinea), 165 (Eritrea), 401 (Zambia), and 405 (Somalia); K Fitzgibbon, 'Modern-Day Slavery?' 12 *African Security Review* (2003) 81–9, at 88; T Raviv, 'Migrant Smuggling and Human Trafficking,' In D Picarelli (ed.), *International Organized Crime: An African Experience* (Milan: ISPAC, 2011), 100–1; and HM Government, *Serious and Organized Crime Strategy 2013*, at 39.

<sup>74</sup> Note 51, s. 10 (life imprisonment).

<sup>75</sup> *Ibid.*, s. 6 (20 years' imprisonment).

<sup>76</sup> *Ibid.*, s. 6 (21 years' imprisonment).

Seychelles,<sup>77</sup> and Zambia,<sup>78</sup> have recognized the need to combat organized criminal groups and increased the penalties for their involvement in human trafficking. However, many others have not done so as yet, and the African Court will be in a position to address this in the future.

The second key obligation is protection of the victims of human trafficking.<sup>79</sup> This is particularly important from a human rights perspective. The Trafficking Protocol provides certain guidance as to what this should entail. For instance, Article 6 touches upon protection of their privacy, assistance during criminal proceedings, and protection of their physical and mental well-being through, among others, provision of accommodation, medical/psychological assistance, and compensation. Article 7 further provides for the possibility of issuing temporary or permanent residence arrangements. These are necessary so that victims can recover from their ordeals and decide whether or not to co-operate with the law enforcement authorities to prosecute and punish traffickers. It is therefore clear that the obligation to protect victims is closely interlinked to the first obligation to prohibit trafficking.

Under international human right law, the obligation to protect the victims of human trafficking derives from a general duty to secure, ensure or restore rights as well as to provide remedies. The ICCPR in this regard imposes a duty on States to ‘ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.’<sup>80</sup> The UN Human Rights Council explicitly acknowledged that this provision applies to the victims of trafficking,<sup>81</sup> and the Special Rapporteur on Trafficking in Persons also emphasized that the right to an effective remedy is a fundamental human right of all persons, including the victims of trafficking.<sup>82</sup> Although a similar wording cannot be found in the African Charter on Human and Peoples’ Rights 1981, Article 1 obliges States to give effect to the enshrined rights, and this can be interpreted as placing an obligation to protect the victims of trafficking.

<sup>77</sup> *Ibid.*, s. 5 (25 years’ imprisonment).

<sup>78</sup> *Ibid.*, s. 3 (25–35 years’ imprisonment).

<sup>79</sup> *Rantsev v. Cyprus and Russia*, note 41, para 285.

<sup>80</sup> Art. 2.

<sup>81</sup> Resolution 20/1, Trafficking in Persons, Especially Women and Children: Access to Effective Remedies for Trafficked Persons and Their Right to an Effective Remedy for Human Rights Violations, A/HRC/20/L1 (June 2012).

<sup>82</sup> Trafficking in Persons, Especially Women and Children: A Note by the Secretary General, A/66/238 (August 2011), at 12.

In terms of protection measures, although international and regional human right instruments do not provide for a specific list, certain guidance is being developed by human rights bodies as part of the prohibition of slavery or other relevant provisions, and the African Court can follow suit in the future. First and foremost, provision of protection and assistance is conditional upon proper identification of victims. States therefore should put in place an effective mechanism for this purpose.<sup>83</sup> Public and law enforcement officials must also be trained sufficiently in order for identification to be effective. Once victims are identified, measures such as shelter, medical/psychological assistance and other tailored support, including rehabilitation/reintegration and compensation, should be provided.<sup>84</sup> In order to enhance transparency and accountability, it is desirable that protection measures are established through legislation.<sup>85</sup> Although some States, such as Botswana,<sup>86</sup> Ghana,<sup>87</sup> Lesotho,<sup>88</sup> Mauritius,<sup>89</sup> Mozambique,<sup>90</sup> South Africa,<sup>91</sup> Tanzania<sup>92</sup> and Uganda<sup>93</sup> have statutory provisions on protection, many others do not. This leaves large protection gaps in this region, and the African Court could, and should, take a proactive role in addressing these.

Another important aspect of protection is the observance of *non-refoulement*. In the context of trafficking, States cannot return victims to their States of origin if there is a risk of them or their close family experiencing torture,

<sup>83</sup> Concluding Observation of the Committee on the Rights of the Child for Burkina Faso, CRC/C/OPSC/BFA/CO/1 (July 2013), para 35; Concluding Observation of the Committee on the Elimination of Discrimination against Women for Tanzania, CEDAW/C/TZA/CO/7–8 (March 2016), para 25; and, Report of the Special Rapporteur on Trafficking in Persons: Visit to Seychelles, A/HRC/26/37/Add.7 (June 2014), para 69; and Report of the Special Rapporteur on Trafficking in Persons: Visit to Morocco, A/HRC/26/37/Add.3 (April 2014), para 83.

<sup>84</sup> Concluding Observation of the Human Rights Committee for Sierra Leone, CCPR/C/SLE/CO/1 (April 2014), para 24; Concluding Observation of the Committee on the Rights of the Child for Tanzania, *supra* note 65; Concluding Observation of the Committee on the Rights of the Child for Guinea-Bissau, CRC/C/GNB/CO/2–4 (July 2013), para 67; and Concluding Observation of the Committee on the Elimination of Discrimination against Women for Liberia, CEDAW/C/LBR/CO/7–8 (November 2015), para 27.

<sup>85</sup> Concluding Observation of the Committee on Migrant Workers for Algeria, CMW/C/DZA/CO/1 (May 2010), para 39.

<sup>86</sup> Note 51, pts IV and V.

<sup>87</sup> *Ibid.*, ss. 14–19.

<sup>88</sup> *Ibid.*, pt. IV.

<sup>89</sup> *Ibid.*, ss. 4, 6, 7, 8, and 9.

<sup>90</sup> Note 52, ch III.

<sup>91</sup> Note 51, chs 4–6.

<sup>92</sup> Note 52, pt IV.

<sup>93</sup> Note 51, pt III.

inhuman or degrading treatment,<sup>94</sup> re-trafficking<sup>95</sup> or enslavement,<sup>96</sup> even when these are committed by non-State actors<sup>97</sup> such as traffickers when States concerned are unwilling or unable to provide sufficient protection.<sup>98</sup> *Non-refoulement* also applies extraterritorially, in that removing victims outside a State's own territory may be regarded as breaching this principle.<sup>99</sup> This is particularly relevant when victims are trafficked by sea where States may not have exclusive criminal jurisdiction. In this regard, the Inter-American Commission on Human Rights held that the practice of the United States to interdict and return Haitian refugees on the high seas constituted a breach of their human rights.<sup>100</sup> More recently, the European Court of Human Rights reached a similar conclusion in *Hirsi and Others v. Italy*.<sup>101</sup> In any event, unless victims have given an explicit and informed consent to return to their States of origin voluntarily, they should be allowed to remain and States should make appropriate arrangements, including issuing temporary or even permanent residence permits depending on the individual circumstances. It is should be highlighted here that the relevant national legislation of Lesotho,<sup>102</sup> Mauritius,<sup>103</sup> Mozambique,<sup>104</sup> Seychelles,<sup>105</sup> South Africa,<sup>106</sup> and Zambia<sup>107</sup> provides for temporary and/or permanent residence permits, and these are examples of good practice which should be followed by other African States.

The third obligation is prevention of human trafficking.<sup>108</sup> The nature and extent of this obligation depends on whether a State is the origin or

<sup>94</sup> See *Soering v. United Kingdom*, Application No. 114038/88 (1989), on the general principle.

<sup>95</sup> General Comment No. 6 of the Committee on the Rights of the Child on Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 (September 2005), para 53.

<sup>96</sup> *Barar v. Sweden*, Application No. 42367/98 (1999).

<sup>97</sup> *Dawood Khan v. Canada*, Communication No. 1302/2004, CCPR/C/87/D/1302/2004 (August 2006), para 5,6; and *H.L.R. v. France*, Application No. 11/1996/630/813 (1997), para 40.

<sup>98</sup> *Omo-Amenaghawon et al. v. Denmark*, CCPR/C/114/D/2288/2013 (September 2015), which concerned Nigerian victims of human trafficking who faced deportation in Denmark.

<sup>99</sup> G.S. Goodwin-Gill and J. McAdam, *The Refugees in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007), at 385.

<sup>100</sup> *Haitian Center for Human Rights v. United States*, Case 10.675, Report No. 51/96, Inter-Am. C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev, paras 156–8, and 171.

<sup>101</sup> Application No. 27765/09 (2012).

<sup>102</sup> Note 51, ss. 30 and 31.

<sup>103</sup> *Ibid.*, s. 7.

<sup>104</sup> Note 52, art. 24.

<sup>105</sup> Note 51, s. 16.

<sup>106</sup> *Ibid.*, ss. 15 and 17.

<sup>107</sup> *Ibid.*, ss. 34 and 35.

<sup>108</sup> The African Charter on Children, art. 29; and Protocol on Women in Africa, art. 4(g).



destination. In relation to States of origin like the most of the African States, the core obligation is to prevent their people from being trafficked in the first instance. In other words, they have to address 'push factors' of this crime such as poverty, gender/racial discrimination and humanitarian crises which compel them to move. In the context of Africa, it has also been pointed out that the traditional cultural and/or religious practices such as juju, voodoo, and child marriage serve as catalysts for this crime.<sup>109</sup> As to States of destination, predominantly wealthy Western States but also include some African ones such as Kenya and South Africa, they have to deal with so-called 'pull factors,' things which attract trafficked victims, such as the demand for trafficked people in sex and a variety of labour sectors.

These obligations are stipulated in the Trafficking Protocol, but can also be articulated through a human rights framework. For instance, the role of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)<sup>110</sup> in poverty eradication has clearly been recognized as it imposes an obligation to ensure the minimum levels of each of the rights set out in this instrument, such as rights to food, healthcare, basic shelter or housing to name a few.<sup>111</sup> States should also guarantee access to employment and technical/vocational training to everyone, but particularly to marginalized and vulnerable groups,<sup>112</sup> who are more vulnerable to human trafficking. These obligations are complemented by other relevant instruments designed to eliminate discrimination such as the CEDAW, the CRC, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990,<sup>113</sup> as well as the African instruments mentioned above. In terms of other obligations relating to prevention of human trafficking, international human rights bodies have stressed the importance of

<sup>109</sup> M. Ikelloa, 'The Role of African Traditional Religion and 'Juju' in Human Trafficking: Implications for Anti-Trafficking,' 17 *Journal of International Women's Studies* (2016) 1–18; C.S. Baarda, 'Human Trafficking for Sexual Exploitation from Nigeria to Western Europe: The Role of Voodoo Rituals in the Functioning of a Criminal Network,' 13 *European Journal of Criminology* (2016) 257–73; E. Warner, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls,' 12 *Journal of Gender, Social Policy & the Law* (2011) 233–71; and International Centre for Missing and Exploited Children, *Child Marriage in the Middle East and North Africa* (2013).

<sup>110</sup> 993 UNTS 3.

<sup>111</sup> General Comment No. 3: The Nature of State Parties' Obligations, E/1991/23 (December 1990), para 10; and Poverty and the International Covenant on Economic, Social and Cultural Rights, E/CN.12/2001/10 (May 2001).

<sup>112</sup> General Comment No. 18: The Right to Work, E/C.12/GC/18 (February 2006), paras 31 and 44.

<sup>113</sup> 2220 UNTS 3.

implementing measures which include, but are not limited to, awareness-raising,<sup>114</sup> comprehensive research/data collection,<sup>115</sup> demand reduction,<sup>116</sup> and elimination of discriminatory practices experienced by certain populations such as women.<sup>117</sup> A complex issue in the context of Africa perhaps is the traditional cultural or religious practices which encourage human trafficking as mentioned earlier. Addressing these may not always be easy due to the possible resistance by local communities of African States under the veil of cultural relativism. This, however, can be regarded as an opportunity for the African Court, as its judges are familiar with the cultural specificity of Africa, and States are more likely to pay attention to the decisions made by them, compared to those delivered by remote international human rights bodies and mandates located elsewhere.

Finally, international cooperation to tackle human trafficking is an overarching obligation applicable to all three mentioned above. The Trafficking Protocol clearly states in this regard that promotion of international cooperation is one of the key aims of this instrument.<sup>118</sup> International human rights law also supplements this obligation to co-operate. In relation to the causes of human trafficking such as poverty, the ICESCR emphasizes international assistance and cooperation for progressive realizations of rights enshrined within.<sup>119</sup> This means that wealthy Western States should assist African States to be able to address these causes. International law enforcement cooperation is another important aspect, which is recognized by the UNTOC,<sup>120</sup> the

<sup>114</sup> Concluding Observation of the Human Rights Committee for Benin, CCPR/C/BEN/CO/2 (November 2015), para 15, and for Mozambique, CCPR/C/MOZ/CO/1 (November 2013), para 17; Concluding Observation of the Committee on the Rights of the Child for Mauritius, CRC/C/MUS/CO/3-5 (February 2015), para 66; and Concluding Observation of the Committee on the Elimination of Discrimination against Women for Cape Verde, CEDAW/C/CPV/CO/7-8 (July 2013), para 21.

<sup>115</sup> Concluding Observation of the Committee on the Elimination of Discrimination against Women for Swaziland, CEDAW/C/SWZ/CO/1-2 (July 2014), para 25, and for Central African Republic, CEDAW/C/CAF/CO/1-5 (July 2014), para 30; and Concluding Observation of the Committee on the Rights of the Child for Burkina Faso, note 83.

<sup>116</sup> Concluding Observation of the Committee on the Elimination of Discrimination against Women for Cameroon, CEDAW/C/CMR/CO/4-5 (February 2014), para 21; and Concluding Observation of the Committee on the Rights of the Child for Gabon, CRC/C/OPSC/GAB/CO/1 (June 2016), para 21.

<sup>117</sup> Concluding Observation of the Committee on the Elimination of Discrimination against Women for Malawi, CEDAW/C/MWI/CO/7 (November 2015), para 25.

<sup>118</sup> Art. 2(c).

<sup>119</sup> Art. 2(1).

<sup>120</sup> See for instance, Arts 16 (extradition) and 18 (mutual legal assistance).

Trafficking Protocol,<sup>121</sup> as well as the Amendments Protocol.<sup>122</sup> In addition to these, a pertinent legal instrument in Africa is the African Union Convention on Cross-Border Cooperation 2014, which stipulates the areas of cooperation which include, but are not limited to security, crime prevention, and socio-economic development.<sup>123</sup> The African Court will have jurisdiction over cases relating to this instrument and be in a position to facilitate meaningful and proactive regional cooperation against human trafficking. In summary, the nature and the extent of obligations in relation to human trafficking are still being clarified, and the African Court will be able to make an important contribution by elaborating on them, and more importantly, developing relevant regional standards which amply reflect African culture, morality and sensitivity.

#### 5. INDIVIDUAL RESPONSIBILITY OVER HUMAN TRAFFICKING

The crime of human trafficking has been included in the Amendments Protocol as noted earlier, and there are some good reasons for allowing the African Court to exercise criminal jurisdiction over it. For instance, it can step in when African States are unwilling or unable to investigate, prosecute and punish human trafficking effectively at the national level.<sup>124</sup> This will send a strong message that the African Union takes human trafficking seriously and ensure that traffickers are punished one way or another. States may also be able to avoid retaliation and obstruction of justice in the forms of bribery and intimidation carried out by traffickers. National governments are more susceptible to these practices as it might be easier for traffickers, particularly organized criminal groups, to exert strong influence over them. Being an independent court with judges consisting of different nationalities and having no personal interests or opportunities for illicit gain, the African Court may be able to combat trafficking more effectively. In addition, the possibility of intervention by the African Court can put an additional pressure on States in the region to fulfil key obligations explored earlier and enhance their capacity to tackle this crime at the national level as they may not want to be seen as incapable by the rest of the world.

Aside from these general issues, another important aspect of the exercise of criminal jurisdiction by the African Court is corporate liability. In addition to

<sup>121</sup> Art. 2(c).

<sup>122</sup> Art. 46L.

<sup>123</sup> Art. 3.

<sup>124</sup> Arts 46(3) and (4).

individual and organized criminal groups, corporate entities such as employment agencies as well as local, national and international businesses may be involved in the trafficking process one way or another by exploiting victims. If the crime is committed intentionally, then it is right that these corporate entities are punished. Article 46L in this regard establishes corporate criminal liability, which is in line with Article 10 (liability of legal persons) of the UNTOC. As it is not possible to imprison a legal person, the punishment will be restricted to fines or forfeiture of criminal proceeds. While the deterrence effect may not be as strong as imprisonment, these measures will have symbolic significance at least for legitimate corporations or businesses, particularly multinational ones, who want to be seen as doing ethical business with the local communities.

Despite these positive aspects in exercising criminal jurisdiction over human trafficking, there are a number of issues and practical difficulties which will affect the ability of the African Court to successfully prosecute and punish this crime. For instance, a very large number of traffickers, including organized criminal groups, commit this crime in Africa, and it is doubtful whether the African Court will have sufficient financial, human and other resources to conduct effective investigations and prosecutions, bearing in mind other crimes it will have to deal with. The Court will be required to prioritize, and the extent to which human trafficking will come before others is not clear. It may well decide to address it through State responsibility instead, as that will encourage Member States to respond more proactively at the national level. The same reasoning is applicable to the number of victims. If they are to take part in criminal proceedings against traffickers, the African Court must be able to provide sufficient support such as witness protection, legal assistance, translation and/or interpretation and any other assistance which may be required by them. As the victims of a heinous crime, they should also be entitled to compensation. In the end, it may not be an effective use of its limited resources for the African Court to exercise criminal jurisdiction over human trafficking.

One way to address this resource issue is to make use of criminal proceeds. A large amount of profits is generated from human trafficking as noted, and the African Court can use these to support its criminal investigations and to protect victims and witnesses. This will also send a message to traffickers that they are not able to benefit from this crime. It should be mentioned in this regard that Article 43A(5) of the Amendments Protocol allows the Court to order forfeiture of any property, proceeds, or any asset acquired unlawfully. Under Article 45(2), the Court can also order a convicted trafficker to pay reparations to victims, including restitution, compensation and rehabilitation.

In addition, Article 46M envisages an establishment of a Trust Fund to be utilized for legal aid, assistance and for the benefit victims and their families, and the African Court can additionally order confiscated proceeds to be transferred into this pot. These are undoubtedly innovative aspects of the exercise of criminal jurisdiction.

However, several points should be highlighted in relation to confiscation of criminal proceeds. For instance, the timing of issuing a forfeiture order is not clear. Normally confiscation of criminal proceeds is ordered after one is convicted of a criminal offence.<sup>125</sup> In this sense, confiscation may be regarded as an additional form of punishment. Nevertheless, criminal proceeds may have already been laundered by the time a criminal conviction is handed down by the African Court, and this may necessitate it to take action sooner rather than later. In order for the entire process to be as transparent and accountable as possible, detailed rules or guidance must be developed by the Court in due course. Also, successful confiscation largely depends on cooperation from Member States.<sup>126</sup> A problem can arise when they do not have sufficient legislative frameworks and capability to confiscate criminal proceeds effectively. Consequently, the ability of the African Court can once again be restricted. In addition, while there might not be an issue in confiscating proceeds from organized criminal groups, human trafficking is also committed by individuals such as family members who are driven by poverty, inequality, and other factors with no other alternatives to sustain themselves economically. There is therefore a risk of further marginalization of these individuals if confiscation is to be strictly enforced, and the African Court must carefully balance the competing interests of all those involved.

Further, the usefulness of corporate criminal liability can be called into question. In the context of human trafficking, corporations or legal persons can be held liable only if they take part in recruiting, transporting, transferring, harboring or receiving trafficking victims. While this can certainly apply to recruitment agencies, trafficking and exploitation are not necessarily synonymous as explained earlier. Therefore, while many local or national employers may exploit victims in sex, labour and other sectors, they may not always take part in trafficking itself. It is unfortunate that the Amendments Protocol did not include stand-alone offences of slavery and forced labour, which could have been used against these employers. It is true that enslavement is included

<sup>125</sup> See for instance, Botswana under the Proceeds of Serious Crime Act 1990; Kenya under the Proceeds of Crime and Anti-Money Laundering Act 2009; South Africa under the Proceeds of Crime Act 1996; and Tanzania under the Proceeds of Crime Act 1991.

<sup>126</sup> The Amendment Protocol, art. 46)bis.

as part of a crime against humanity under Article 28C(1)(c). However, there is a high threshold attached to this crime as will be shown below, and therefore its applicability will be limited.

In view of these and other issues which may arise in the future, the most viable option would be for the African Court to try a limited number of cases on human trafficking, the most serious ones in particular. These instances could include trafficking carried out by organized criminal groups or terrorists, as their involvement will make the trafficking operations more dangerous, sophisticated, and successful. Large-scale operations involving particularly vulnerable victims (e.g. children or disabled people) or heinous instances (e.g. systematic sexual or physical abuses and causing deaths) could also justify the intervention of the African Court. Certain guidance can be obtained from the State practice whereby aggravating factors have been incorporated into respective domestic legislation. Trafficking of children,<sup>127</sup> human organ trafficking,<sup>128</sup> involvement of organized criminal group<sup>129</sup> and public/law enforcement officials,<sup>130</sup> HIV/AIDS infection,<sup>131</sup> as well as harmful rituals and human sacrifices<sup>132</sup> have been identified as such, and the African Court should closely examine these and others which it deems appropriate, in order to determine whether it should intervene.

In addition to addressing human trafficking under Article 28J of the Amendments Protocol, this offence may be elevated to the status of international crime, strengthening the justification for involvement by the African Court. It has, for instance, been argued that human trafficking can amount to a crime against humanity, enslavement in particular.<sup>133</sup> The International Criminal Tribunal for the Former Yugoslavia has hinted at this possibility,<sup>134</sup> and Article 28C(2)(c) of the Amendments Protocol specifically mentions human trafficking.<sup>135</sup> Other conducts included under the crimes against humanity, such as forced pregnancy or sexual slavery, as well as enforced disappearance could also resonate well with human trafficking. However, in order for trafficking to

<sup>127</sup> B. Faso, note 51, art. 5; Cameroon, note 52, s. 5; Egypt, note 51, art. 6; Eritrea, note 52, art. 316;

<sup>128</sup> Malawi, note 51, s. 16; Senegal, *ibid.*, art. 1; and Zambia *ibid.*, s. 3.

<sup>129</sup> Djibouti, *ibid.*, art. 8; South Africa, *ibid.*, s. 23;

<sup>130</sup> E. Guinea, *ibid.*, art. 10; Seychelles, *ibid.*, s. 5;

<sup>131</sup> Lesotho *ibid.*, s. 7; Mozambique, note 52, art. 5; and Zimbabwe note 51, s. 3.

<sup>132</sup> Uganda, *ibid.*, s. 4.

<sup>133</sup> T. Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System,' 54 *International and Comparative Law Quarterly* (2005) 445–58.

<sup>134</sup> *Prosecutor v. Kunarac et al.*, note 45, para 542.

<sup>135</sup> See also art. 7 of the Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.

be regarded as any of these crimes, the relevant criteria (e.g. widespread or systematic nature, knowledge of the attack, and being part of an organizational policy) must be proven,<sup>136</sup> and this will inevitably limit the scope of its application in practice.

Another possibility is conscripting/enlisting child soldiers under the age of 15 as a war crime. This is specifically prohibited under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court 1998, as well as Articles 28D(b)(xxvii) and 28D(e)(vii) of the Amendments Protocol. Conscripting includes ‘any acts of coercion such as abduction or forced recruitment,’<sup>137</sup> and is in line with the actus reus of human trafficking explored earlier. Indeed, the Special Rapporteur on Trafficking in Persons recently expressed a view that forced recruitment of child soldiers falls under the international definition of human trafficking.<sup>138</sup> While the term ‘enlistment’ connotes a degree of voluntariness,<sup>139</sup> the trafficking definitions make it clear that consent is irrelevant in relation to child trafficking<sup>140</sup> and therefore enlistment can still be regarded as part of the trafficking process. However, it should be highlighted that the relevant provisions do not apply to children between 16 and 18, as well as adults, thereby leaving clear protection and accountability gaps, and this will require the African Court to interpret other provisions creatively. In summary, while the exercise of criminal jurisdiction can be useful when States are unable or unwilling to prosecute and punish human trafficking at the national level, the African Court is likely to limit itself to a few cases bearing in mind various practical problems it could encounter in practice.

## 6. CONCLUSION

This chapter has explored the opportunities as well as challenges for the African Court of Justice and Human Rights to combat human trafficking. It is not only a criminal offence, but also a violation of human rights. Under

<sup>136</sup> Obokata, note 133, at 451–3; and H. Van Der Wilt, ‘Trafficking in Human Beings, Enslavement, Crime against Humanity: Unravelling the Concepts,’ 13 *Chinese Journal of International Law* (2014) 297–334, at 306.

<sup>137</sup> *Situation in the Democratic Republic of Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04/06 (March 2012), para 608; and *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T (May 2012), para 441.

<sup>138</sup> Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, A/HRC/32/41 (May 2016), para 47.

<sup>139</sup> *Lubanga* Case, para 607; and *Charles Taylor* Case, para 442, note 137.

<sup>140</sup> Art. 3(c) of the Trafficking Protocol and art. 28J (4) of the Amendments Protocol.

international law, this results in the establishment both States responsibility and individual criminal responsibility. The uniqueness of the African Court is that it will be able to address both of these. In relation to State responsibility, jurisprudence and guidance on the nature and extent of obligations are still emerging particularly in the field of international human rights law, and the African Court can make an important contribution to their development together with other international and regional human rights bodies. An additional benefit of the African Court is the exercise of criminal jurisdiction over individual criminals and legal persons who commit human trafficking, a function which does not exist for other regional and international organizations. While there are certain advantages in using the Court to prosecute and punish human trafficking directly, it has been demonstrated that a number of problems exist, and these are likely to encourage it to take on a limited number of cases.

A preliminary conclusion to be drawn from the present analysis, then, is that it might be a better use of its limited resources to focus on state responsibility for the time being. The African Court should become instrumental in setting regional standards on enhancing individual action against human trafficking to begin with, as the African States have the primary obligation to combat this crime. It has been shown that there is much scope for improvement at the national level, and the African Court can encourage them to develop and implement a more effective strategy. It should also play a leading role in facilitating regional cooperation. The transnational nature of human trafficking means that domestic responses alone are not sufficient. African States should show solidarity through joint regional efforts, and the African Court can certainly assist them in achieving an integrated approach to combat this crime. Finally, it is clear that human trafficking is multi-faceted, and a simple criminal justice response is not sufficient. Therefore, African States, the African Union and the Court should work together to devise a holistic approach capable of tackling wider issues such as the causes and consequences of human trafficking. Unless these are taken seriously and put into action, human trafficking unfortunately will continue to exist in Africa.