



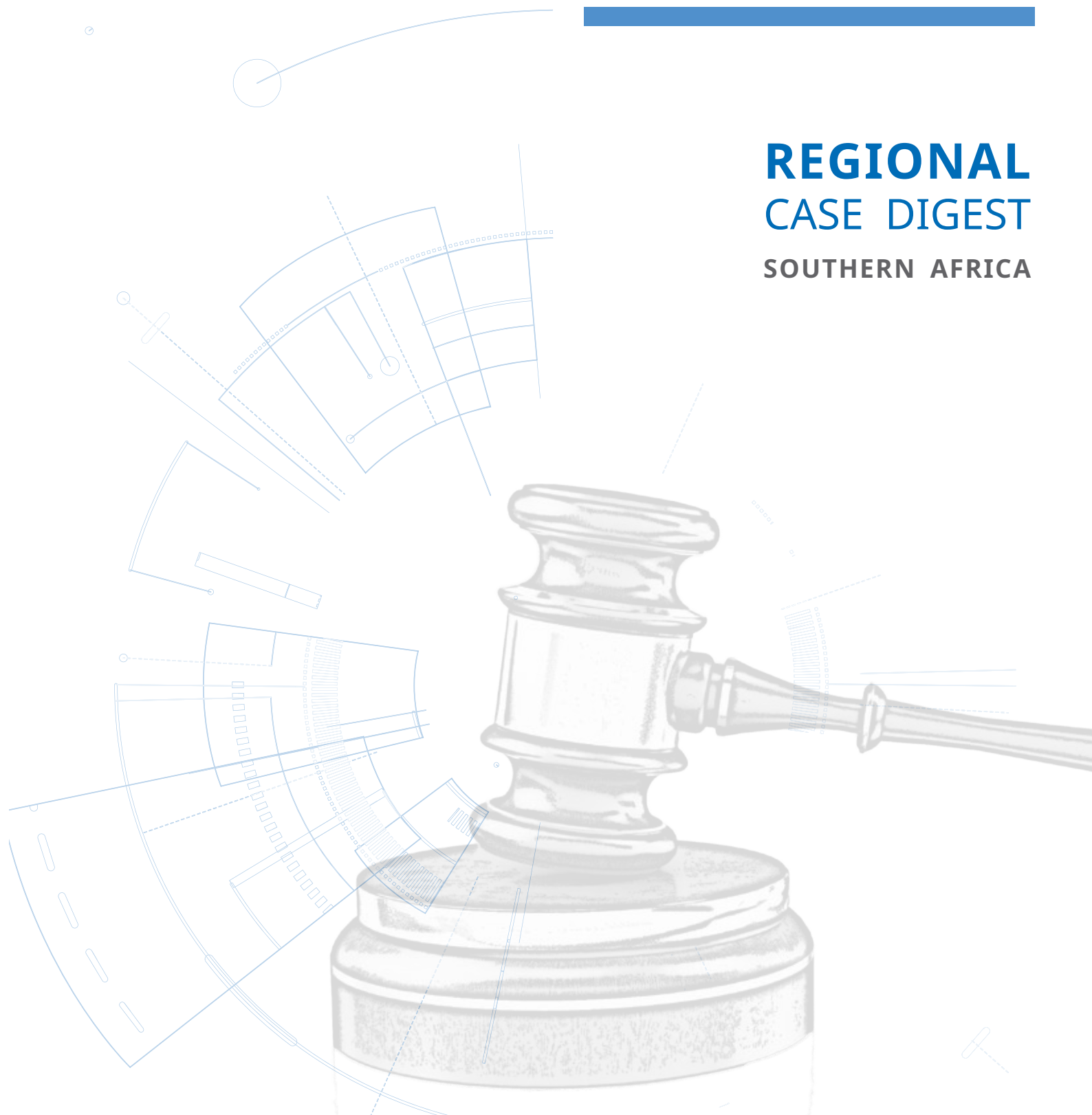
UNODC

United Nations Office on Drugs and Crime

TYPICAL ISSUES IN **TRAFFICKING IN PERSONS CASES**

REGIONAL CASE DIGEST

SOUTHERN AFRICA



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

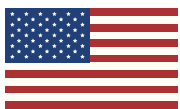
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Foreword

Every day, in every country of the world, human traffickers exploit people for profit. The poor and the vulnerable are most at risk. Over 70 per cent of detected trafficking victims are women and girls, while nearly one third are children.

The COVID-19 pandemic amplified this complex phenomenon even more - the loss of jobs, growing poverty, school closures and a rise in online-based interactions are factors that foster the development of further vulnerabilities and open opportunities for organized criminal groups to thrive. The crisis has also overwhelmed social and public services, impacted the work of law enforcement and criminal justice systems, and made it harder for victims to seek help.

UNODC, as the guardian of the United Nations Convention against Transnational Organized Crime (UNTOC) and its supplementing key international instrument on addressing trafficking in persons: The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is the only entity with a global mandate, working on the criminal justice component of human trafficking.

Criminal Justice Practitioners play a key role in stopping this serious crime. To aid this honorable but arduous work, UNODC in partnership with Criminal Justice practitioners and researchers in the region, developed this Regional Case Digest.

This Digest is the first of its kind, containing an analysis of 80 groundbreaking adjudicated cases from Southern Africa and 23 from the rest of the world. The Digest also contains a significant analysis of emerging issues that are relevant to Southern Africa, including the nexus of (harmful) cultural practices with trafficking in persons and labour exploitation. The Digest has a continuous tenet, a victim-centred and gender-sensitive approach, which is key to build a comprehensive anti-human trafficking response.

It is our hope that this Southern Africa Trafficking in Persons Case Digest will serve as an independent tool to assist practitioners in the region and beyond to make our global community safer from the trafficking in persons and labour exploitation.

It is an honour for us to present this Digest, which enhances UNODC's commitments as advanced in the Palermo Protocol and under the UNODC – SADC joint Regional Programme 2013-2023 - *Making the Southern African Development Community (SADC) Region Safer from Crime and Drugs*.

Marco Teixeira
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In addition, particular thanks are extended to the following UNODC experts who contributed to the present publication: Silke Albert, Samantha Irikidzai Munodawafa and Maxwell Matewere.

Since this digest relies heavily on the spirit and structure of UNODC's publication on "Evidential issues in trafficking in persons cases", we express our gratitude to all the experts who contributed to that publication as well.

Finally, we extend our heartfelt gratitude to Judge Dr. Andries Albertus Lamprecht of blessed memory, who served on the bench of The Regional Court for the Regional Division of Mpumalanga at Graskop, **South Africa**. His painstaking analysis, originality and courage permeate many of the sections of this digest.

Above and beyond these dedicated professionals, we extend all our gratitude, appreciation and respect to the victims who had the courage to testify. Without their help, this digest would not have been possible.

Note to the reader

This regional case digest relies upon 80 cases from the Southern African region and has profited from the contributions of experts from the various States.

The need for a case digest emanates from the complexity of trafficking cases. Not only do these cases require proof by means of a number of elements, but each element, in itself, can require a constellation of circumstances to prove it. Moreover, the covert nature of the crime and the vulnerabilities of its victims make for typical evidential difficulties which can lead to wholesale exonerations, if not well understood.

It is to meet this challenge that UNODC initiated a case digest on “Evidential issues in trafficking in persons cases” (global case digest)¹ which culls issues from cases across the world, and it is for this reason that UNODC Southern Africa Regional Office conceived the idea to design this regional case digest, to draw upon cases from the Southern African region.

The guiding idea behind both case digests is to select, from a sample of cases, typical issues which arise in cases of trafficking in persons, and to present the ways that courts have addressed them. In view of this similarity, the regional case digest draws on the ideas and structure of the global case digest.

However, despite the undoubted value of the global case digest, which has proved of great utility to practitioners, it cannot fully reflect the particular issues and patterns present in every region of the globe. In addition, practitioners from a given region may feel more comfortable relying upon cases from their own region, rather than regions less familiar to them. Moreover, cases from the Southern African region are particularly rich and have much to teach world - wide. It is for these reasons that it was deemed important to design a regional case digest in addition to the global case digest.

This regional case digest can serve as an independent tool to assist practitioners in the region and beyond. However, it can also be used alongside the global case digest, with one enriching the other, as certain issues and patterns occur globally, as well as regionally.

Because of the close connection between the global case digest and this regional digest, the table of contents closely follows that in the global case digest. This facilitates the use of both tools when addressing a particular issue. However, the regional case digest also focuses on certain issues which are not discussed or not highlighted in the global case digest, due to their importance in the region.

One of the most important insights derived from both case digests is that there are certain typical issues which arise in trafficking cases on a global and regional scale, due to the covert nature of the crime and the characteristics of its victims. This helps practitioners to realize that they are not alone in addressing these issues and that courts across the region, or indeed the world, can provide an arsenal of tools to assist them.

Like the global case digest, the regional case digest, does not aim to provide a conclusive answer to each question, but rather to raise awareness to typical issues and to open the minds of practitioners so that they can find their way to solutions. Sometimes, the reader will find that a given question has been answered in different ways by different courts, and it will be up to him or her to choose among the solutions or to use them to arrive at an original solution.

¹ Available at https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf

A thread running through this digest is that trafficking cases require in depth analysis rather than arriving at decisions by means of a checklist of weaknesses. No trafficking case is devoid of weaknesses and the key to addressing them is by understanding as clearly as possible the full range of circumstances, before, during and after the trafficking process. These circumstances may include victims' vulnerabilities, traffickers' control methods, and the cultural background on which the trafficking takes place.

Such an understanding can yield the insight that seeming weaknesses in a case, are actually strengths. Thus, contradictions among witnesses may prove that they did not fabricate their evidence; the victim's failure to seek help or flee at the first opportunity may reflect the strength of the trafficker's control; the victim's seeming consent to his or her exploitation may show how vulnerable he or she was.

Moreover, such an understanding may reveal that certain evidential building blocks may function differently in different cases. Thus food may be a method of control, both if the trafficker withholds it from the victim and if he offers it to entice him or her; a cell phone in the hands of a victim may either be a sign that he or she had options to contact help or a tool by which the trafficker exercises supervision; while a lock on the door may function as a restriction of freedom, the absence of a lock may violate the privacy of the victim and expose him or her to constant searches and supervision on the part of the trafficker. While defence claims have been raised in some cases by which the previous prostitution of a victim points to her consent to trafficking, such previous experience may also be viewed as a vulnerability.

Another thread running through cases is the importance of understanding victim behaviour in terms of psychology and culture. Thus, cases across the region show the psychological consequences of being in a trafficking situation: the confusion, the impairment of memory, the loss of trust in the world. By the same token, they show how cultural practices and beliefs can strengthen the trafficker's control over his or her victims.

Like the global case digest, this regional case digest may assist an array of practitioners: criminal justice practitioners, legislators, researchers, students and lecturers, service providers and all law enforcement practitioners who may come into contact with trafficking situations. These include front line responders who may meet victims at various junctures, where better understanding of victim behaviour may lead to their identification and ultimate rescue.

Most of the cases analyzed in this Digest were received from experts in the various States and some were drawn from UNODC's Human Trafficking Case Law Database.² It is hoped that the greater part of them will be available via this tool in future.

We conclude with a quote from a **South African** case which places the rules of evidence in context:

*"One must recognize that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice."*³

² Available at <https://sherloc.unodc.org/cld/v3/https/cldb/index.html?lng=en>

³ Case No: A150/2015 Mabuza v. The State, In the High Court of **South Africa**, Gauteng Division, Pretoria, para. 36, quoting R v. L (DO) 18CRR (2d) 257 SCC (1003) at 276-7.

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1. BACKGROUND

I note that this section draws heavily on section 1 of UNODC’s “Case digest on evidential issues in trafficking in persons cases” (global case digest),⁴ both conceptually and in its language. This is so because many of the issues addressed in both case digests are similar. We are grateful to have had the global case digest as a model and an inspiration.

1.1. The international and regional setting and its complexity

The Southern African regional case digest (the regional case digest or the digest) was developed on the background of international and regional sources which define trafficking in persons. The central international source is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Protocol). The central regional sources are the respective national legislations of the States in the region: the Republic of **Angola**, the Republic of **Botswana**, the Union of the **Comoros**, the **Democratic Republic of the Congo** (DRC), the Kingdom of **Eswatini**, the Kingdom of **Lesotho**, the Republic of **Madagascar**, the Republic of **Malawi**, the Republic of **Mauritius**, the Republic of **Mozambique**, the Republic of **Namibia**, The Republic of **Seychelles**, the Republic of **South Africa**, the United Republic of **Tanzania**, the Republic of **Zambia** and the Republic of **Zimbabwe**.⁵

All the States in the region have ratified or acceded to the Protocol, and among those which have drafted specific trafficking in persons legislation, most have relied upon the Protocol. Hence, it is important to summarize the Protocol’s basic tenets, as regards the definition of “trafficking in persons”.

The Protocol defines trafficking in persons by means of three elements: an ‘**action**’; a ‘**means**’ by which that action is achieved; and a ‘**purpose of exploitation**’. Each element is further clarified by a list explaining what is meant. These full lists appear in the box below.

The Protocol also includes two explicit statements on particular situations. The first, addresses the consent of the victim to the exploitation. Such consent is irrelevant if ‘means’ have been used. The second addresses child trafficking which requires only two elements, namely, an ‘action’ and a ‘purpose of exploitation’. Unlike adult trafficking, no ‘means’ are required.

⁴ Available at https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf

⁵ We refer the reader to Appendix 1 for the specific names of the Trafficking Acts of the various States. For simplicity’s sake, this digest will use the names of the various States without prefaces like “the republic of”, “the united republic of”, “the kingdom of”, or “the union of”.

Elements of trafficking in persons according to the Protocol

The definition

Article 3(a) of the Protocol adopts a three pronged definition of the trafficking in persons crime:

1. ACTION (recruitment, transportation, transfer, harbouring or receipt of a person);
2. MEANS by which the act is achieved (threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability and the giving or receiving of payments or benefits to achieve consent of a person having control over another person);
3. PURPOSE of EXPLOITATION (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).

Elements of child trafficking

According to Article 3(c) of the Protocol, in the case of child trafficking, the definition does not include the element of MEANS, but only the ACT and PURPOSE OF EXPLOITATION.

The irrelevance of victim consent

According to Article 3(b) of the Protocol, where MEANS are present, the consent of the victim to the intended exploitation is irrelevant.

UNODC Case Digest on Evidential Issues in Trafficking in Persons Cases, Vienna (2017), par. 1.1.

This is a complex definition, requiring proof of three elements. Moreover, each of the three elements may require a constellation of circumstances in order to prove it. Thus, a ‘purpose of exploitation’ like “slavery” or “forced labour” may require detailed proof of living and working conditions. In addition, the Protocol does not define the terms used in its definition, thus leaving them open to interpretation. Examples are terms like “coercion”, “abuse of a position of vulnerability”, “slavery”, “practices similar to slavery”, and “forced labour or services”.

Evidential issues abound in trafficking in persons cases. Not only is the definition complex, requiring proof of an array of circumstances, but the crime is often covert, so that the most important evidence may hinge on a traumatized and vulnerable victim whose behaviour may not accord with what is considered reasonable by law enforcement and courts. This problem is hinted at in the Protocol’s explicit statement on ‘consent’ which assumes that there are cases where the victim consents to his or her exploitation.

These complexities present law enforcement bodies and courts with a multitude of challenges, which may lead to the failure of trafficking cases. This can happen because prosecutorial bodies may choose to indict on charges other than trafficking which are easier to prove, or because courts may tend to exonerate in view of the case’s many weaknesses.

It is on this background that an analysis of cases may yield great benefits. Such an analysis may open the eyes of practitioners to the insight that certain evidential problems are typical to trafficking cases, and are not limited to the particular case before them; it may reveal to them how courts in other jurisdictions addressed these problems; it may alert them to the deeper causes of seemingly irrational victim behaviour.

It is for this reason that UNODC initiated a global case digest which culls issues from cases across the world, and it is for this reason that UNODC Southern Africa Regional Office conceived the idea to design this regional case digest to draw upon cases from the Southern African region.

1.2 The aims of the regional case digest

Like the global case digest, this regional case digest strives to present practitioners with cases which include typical issues, and to describe how courts in different jurisdictions addressed these issues. This is intended to create a community of legal minds across time and space, who can think together about troubling problems. While the digest focuses on evidential issues, it does touch on some substantive issues as well.

It is hoped that by drawing on cases, criminal justice practitioners will arrive at the realization that the issues which face them are typical of trafficking cases, and gain insight as to why the nature of the crime and the characteristics of its victims lend themselves to such issues. It is also hoped that drawing on different courts' approaches will provide practitioners with an arsenal of tools with which they can approach a case. Finally, it is hoped that reading case analysis will open practitioner' minds so that they can work their way to original solutions of central issues.

Like the global case digest, this regional case digest does not aim to give one categorical answer to a given question. It rather strives to present a wealth of approaches so that practitioners can choose the one which best fits their case and legal culture. Thus, sometimes the digest will describe two cases where courts reached opposite conclusions or it will highlight the different approaches of a court of first instance and an appeals court, and it will be up to practitioners to decide which approach to adopt.

This digest can also benefit criminal justice practitioners by helping them to build a case. Thus, the kinds of evidence which have led to convictions in other cases may give practitioners ideas as to which evidence to gather. By the same token, the kinds of challenges which have arisen regarding various kinds of evidence may enable them to better prepare their case. For example, knowing that cell phone records have made the difference between conviction and exoneration in other cases may heighten awareness of their importance; learning that a victim's failure to flee at the first opportunity has been considered a serious weakness in other cases, can lead practitioners to ascertain what circumstances led to this behavior on the part of a victim, so as to better prepare him or her for cross examination.

Most importantly, this digest can give criminal justice practitioners the backing to dare to present new approaches to the issues which beset trafficking cases. This potential is present because a reliance upon actual cases tends to be more persuasive than claims based on legal reasoning alone. Even if a case from another jurisdiction does not have the weight of precedent, it can still be a source of guidance.⁶

⁶ There is evidence that a reliance upon case law from other States is already prevalent in the region. Thus, some of the cases in this digest rely upon cases from other jurisdictions, aside from the State in which the court sits. Examples are: **Namibian** cases which rely on **South African** cases, including those which interpret evidential rules: See *State v. Jonas*, Case No. CC 14/2017 [2019] NAHCMD262 (31 July 2019); *State v. Johanna Lukas*, sentence CC 15/2013 [2015] NAHCMD 124 (2 June 2015); *State v. Dragon Vujicin*, SKW-CRM-1000/2016, conviction on trafficking affirmed on appeal *Vujicin v S* (HC-MD-CRI-APP-CAL-2020-00062) [2020] NAHCMD 551 (1 December 2020) (1). See also the **Zimbabwean** case, *State v. Maroobza*, Case No. R674/18, in the Regional Eastern Division, Harare, July 10, 2020 where the court used the Protocol and a **South African** case; **Eswatini's** *King v. Shongwe* Case No. HLU 60/2016 before subordinate court district Shiselweni and *Agrippa Makhiligi Shongwe vs The King* [166/19] [2020] SZHC 113 (24 June 2020) which draws on two **South African** trafficking cases (*Veeran Palan and Dos Santos*). See also *State v. Mabuza and Chauke*, Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop which draws on a **Zimbabwean** case about evaluating child testimony. In addition, see *State v. MMF*, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in *Fakudze v State* Case no: AR410/2018 in the High Court of **South Africa** KwaZulu-Natal Division, Pietermaritzburg, June 7, 2019, where the first instance judge cites the duty of **South African** courts to bring into account international sources; see also the **Seychelles** sentencing ruling in *The Republic v. M.L. CrS 63/19* [2019] SCSC (17 April 2020) in the Supreme Court of **Seychelles** which relies on cases from the region and beyond (**South Africa**, Kenya, Australia, and United Kingdom).

Although the digest clearly aims to assist criminal justice practitioners, it can also be of use to other professionals like legislators, researchers, students and lecturers, service providers and all law enforcement practitioners who may come into contact with trafficking situations, including front line responders who may derive benefit from better understanding typical forms of victim behaviour.

1.3 The added benefit of a regional case digest

While the global case digest has undoubtedly been valuable to practitioners across the world, it cannot fully reflect the particular issues and patterns present in every region of the globe. In addition, practitioners from a given region may feel more comfortable relying upon cases from their own region, rather than regions less familiar to them. Moreover, cases from the Southern Africa region are particularly rich and have much to teach world-wide. It is for these reasons that it was deemed important to design a regional case digest in addition to the global case digest.

This regional case digest can serve as an independent tool to assist practitioners in the region and beyond. However, it can also be used alongside the global case digest, with one enriching the other, as certain issues and patterns occur globally, as well as regionally.

Because of the close connection between the global case digest and this regional digest, the table of contents closely follows that in the global case digest. This facilitates the use of both tools when addressing a particular issue. However, the regional case digest also focuses on certain issues which are not discussed or not highlighted in the global case digest, due to their importance in the region. These include special kinds of testimony like child testimony; particular principles of evidential analysis; certain particularly difficult issues such as child trafficking or baby selling and trafficking in the context of labour exploitation; and victim protection issues which can impact on the fabric of proof.

1.4 Content

This digest, like the global case digest, focuses on evidential issues, because experience has shown that these represent the central hurdles which impede convictions. However, unlike the global case digest, this digest also touches upon several substantive topics which have proven to be problematic in cases across the region, although it does not address them exhaustively.

The digest does not cover every evidential issue which arises in cases, but rather only those typical to trafficking cases. Thus, analyses of issues like accomplice testimony or the rules on hearsay evidence do not appear, whereas issues germane to the crime are analysed, and for example, how to prove the chain of trafficking or the place of vulnerability in proving the crime

The digest includes trafficking cases which revolve around an array of exploitative purposes including sexual exploitation, trafficking in the context of labour exploitation and removal of organs. However, like the global case digest, the digest also includes cases revolving around allied crimes like slavery, forced labour, child selling, abduction, living conditions against human dignity, child protection violations, severe prostitution crimes, and rapes or other sexual exploitation crimes. This approach reflects the reality that not every State in the region has

legislated a law which addresses trafficking in persons specifically,⁷ although actual cases may reflect trafficking situations. It also reflects the fact that the values underlying these crimes are similar to those which form the basis of the prohibition on trafficking, namely: the protection of freedom, autonomy and dignity.⁸

The regional case digest includes exonerations as well as convictions, as it is felt that practitioners can learn from these as well, and for example, about potential weaknesses in cases and how to better address them. The digest also includes an analysis of the different approaches of courts of first instance and courts of appeals, where these differ, in order to present the fullest picture and allow practitioners to gain in depth understanding of the issues involved.

While the emphasis of the digest is on regional cases, sometimes international cases are used in order to enrich the discussion of an issue. This is especially true of the issues addressed in section 4 on *particularly difficult challenges*.

⁷ While most States in the region have specific, comprehensive laws on trafficking, **Angola** and **Comoros** do not. However, certain forms of trafficking are criminalized in these states. Thus, in **Angola**, the New Penal Code criminalizes sex trafficking and labour trafficking. In addition, Article 18 criminalizes slavery and servitude, as well as the buying and selling of a child under 14 years of age for adoption or for slavery and Article 19 criminalizes the trafficking of adults and children for the purpose of sexual exploitation, forced labor, or trafficking in organs. In **Comoros**, while there is no specific section on adult trafficking, there are specific sections on child trafficking (see Articles 8 and 13 of the 2014 Law to Combat Child Labor and Trafficking in Children which criminalized all forms of child labor trafficking and some forms of child sex trafficking). In addition, Article 323 of the penal code criminalized forced prostitution of adults and Articles 2.1 and 260 of the **Comoros** Labor Code criminalized forced or compulsory labor of adults.

⁸ See for example, the **Tanzanian** case of John s/o Mjwanga v. Republic, Criminal Appeal No. 124 of 2016 in the High Court of **Tanzania** 30 December 2016: *“The spirit of the Parliament and the Government of Tanzania of enacting the specific law on trafficking in person was to cure the mischief of increased number of victims of trafficking and exploitation esp. vulnerable groups such as children which degraded and infringed human dignity and human rights contrary to the constitution of the United Republic of Tanzania, 1977 and the relevant International Legal Instrument...”*

See also the **Malawian** sentencing ruling in The State v. Bandawe and others, Criminal Case Number 213 of 2017 in the Senior Resident Magistrate Court Sitting at Lilongwe, conviction June 30, 2017; sentence July 26, 2017. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No.MWI003). The court notes that trafficking is a clear violation of people’s right to dignity among many other rights. A similar statement is made by a **Malawian** court in the sentencing ruling in The State v. Chiyenda, Criminal Case No. 30 of 2018, in the Senior Resident Magistrate Court Sitting at Lilongwe; conviction and sentence, January 19, 2018. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MWI004).

See also the **Zimbabwean** case of The State v. Maroodza, Case No. R674/18 in the Regional Eastern Division, Harare, July 10, 2020, where the court notes that the victims were deprived of their human rights, particularly the right to movement, to association and freedom of choice.

See also the **South African** case of State v. O.B. Abba et al, Case No. CC 41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria) where the court uses the Protocol and the **South African** constitution to talk about values of dignity, freedom of movement and security of the person.

See also the **South African** case S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017, the words of the court of first instance: *...‘trafficking in persons’ is nothing else than a modern day version of ‘slavery’ and ‘slave trading’..jus cogens...While the way in which enslavement is practiced today has taken on a more nuanced appearance, since one does no longer see forceful capture and removal of slaves in chains that are publicly sold, what happens today and which is described as ‘trafficking’ remains slavery, albeit in a more modern form.”*

See also a similar approach to trafficking as modern slavery in the **Eswatini** case of King v. Shongwe Case No. HLU 60/2016 before Subordinate Court district Shiselweni; Shongwe vs The King [166/19] [2020] SZHC 113 (24 June 2020), the words of the court of first instance.

1.5 Challenges⁹

The regional case digest presents both theoretical and practical challenges.

The central challenge is theoretical, as was the case in drafting the global case digest. First of all, case law follows on legislation which varies among States in terms of the elements of the crime and various substantive, evidential and procedural laws.

Moreover legal systems may vary in ways which impact upon evidence. Across the region, there are civil law, common law and mixed legal systems which have different approaches in terms of the role of the judge, principles of admissibility, and preferences for oral or written evidence.

These differences may limit what States can learn from one another. For example, a civil law court will more readily admit the written statement of a witness than will a common law court; a civil court will allow the judge more latitude in questioning witnesses than will a common law court.

However, as the *table of Southern African legislation* in Appendix 2 to this digest shows, the similarities among States' Trafficking Acts are more numerous than are the differences, as most are modeled on the Protocol's normative framework which provides a unified terminology and conceptual basis which allow States to learn from one another. Even when States do not copy the Protocol as is, certain terms and issues are common to all. Moreover, even when a Trafficking Act is very different from the Protocol, the Protocol provides a jumping off point to analyse both legislation and cases.¹⁰

Moreover, at least in regard to civil and common law systems, there seems to be a broad consensus that with time, there has been a convergence between them, along with the development of mixed systems with elements of each.¹¹ In view of this, a hermetically sealed distinction between the systems is no longer grounded in reality.¹² In addition, clearly, learning can take place regarding patterns found in certain kinds of evidence and substantive issues across jurisdictions. Moreover, the patterns of the crime too tend to repeat themselves across jurisdictions. Finally, many of the solutions courts have found to address weaknesses in the evidence of a case can conform to different legal systems.

Another challenge relates to the nature of court rulings which sometimes focus on substantive, rather than evidential issues. Even when cases do address evidential issues, the analysis may be brief and non – specific. Moreover, when only the appeals case is available, sometimes the grounds for appeal are narrow and it is unclear how the court of first instance evaluated the totality of the evidence.

Nevertheless, even in cases which do not abound in extensive evidential analysis, it may be valuable for practitioners to form an impression regarding the kinds of evidence submitted and the evidential patterns which recur.

On a practical level, case gathering encountered a multitude of problems and for example:

⁹ Parts of this section draw heavily on Section 1.3 of the global case digest. While we have already noted our use of the global case digest at the beginning of the section on "Background", in this subsection, it is particularly far reaching.

¹⁰ See footnote 6 for a list of cases where States in the region relied upon cases from other Southern African States.

¹¹ See Lundmark, *Charting the Divide between Common and Civil Law* (Oxford University Press 2012) p. 37

¹² Thus, while civil law systems do not ascribe conclusive force to precedent, judges and lawyers still use other cases in order to support their claims; while civil law systems do not exclude hearsay testimony, its weaknesses may be taken into account by the judge in evaluating its weight.

1. *Limited case availability:*

Often trafficking in persons cases are adjudicated in courts of first instance which do not always record or transcribe rulings unless they are appealed. Moreover, even when rulings are recorded, they may not be electronically saved, thus requiring practitioners to sift through physical archives to find cases, sometimes to no avail. It was particularly difficult to embark on the process of examining paper archives during the COVID pandemic, which also created difficulties in terms of expeditious resolution of cases. Moreover, some States publish and disseminate judgments only when they have been edited, and this may require extensive periods of time, thus limiting their availability.

In addition, sometimes only appeals cases were available which tend to provide fewer details than do cases in courts of first instance.

On a more substantive level, sometimes cases are prosecuted as allied crimes rather than trafficking in order to facilitate convictions.

We note that many of these problems occur worldwide.

2. *Situations which necessitate relying on summaries:*

Sometimes there was no choice but to rely upon summaries rather than full rulings. This happened when a judgment was delivered *ex tempore* and handed down orally by the court, rather than in writing. Similarly, difficulties were sometimes encountered in receiving a transcription of the court's ruling, which obliged us, on occasion, to rely on a practitioner's summary.

3. *Situations where only sentences were available:*

Sometimes only sentences were available, and the substantive judgments could not be located. While these provided some valuable details, there were also limitations, as it was not clear how the court had applied the elements of the crime and what weight had been given to various pieces of evidence.

4. *Technical difficulties:*

The protocol of a case, including the court's ruling may be recorded entirely in handwriting, thus making it difficult to read. Moreover, in some non – English speaking jurisdictions, it was necessary to rely upon translations, which may suffer from inaccuracies.

5. *Uneven representation:*

Sometimes cases were obtained only from certain areas in a State where our contact was particularly helpful, but not from other areas, thus incurring the risk of a skewed picture of issues and patterns.

6. *Differences in the amount of detail:*

The cases gathered differ in regard to the amount of detail provided. While some describe the testimonies of the witnesses in detail, others merely summarize what was learned from them. While some rulings address the elements of the crime in detail, some are more laconic.

These difficulties impeded our ability to provide a comprehensive arsenal of cases with a maximal wealth of detail. However, given these challenges, there is still much to be learned from the cases collected. There are a fair amount of cases which provide detailed descriptions of the evidence, along with an analysis of the elements of the crime. Moreover some cases include first instance rulings along with appeals court rulings, thus serving to highlight important issues. Even cases which are less detailed are valuable in that they provide information on trafficking patterns.

1.6 Methodology

The methodology of case analysis follows that of the global case digest and takes into account the challenges described above.

The digest is not limited to explicit court rulings on evidential issues, but also includes cases which describe the pieces of evidence which led to convictions or exonerations, or note typical evidential issues and patterns. It is felt that this too can be of value, by giving practitioners a broad view of typical issues and patterns, and thus revealing to them that the problems they are experiencing are part of a broad pattern present in the region in general.

Thus, like the global case digest, the regional case digest makes use of the following kinds of cases:

1. Cases which explicitly analyse evidential issues.
2. Cases which describe the pieces of evidence used to convict or exonerate without discussing the legal issues raised by them. Sometimes these pieces of evidence are mentioned as part of the mosaic of evidence which led to conviction or exoneration, without commenting on them, and sometimes the court briefly comments on their admissibility or relevance.
3. Cases where a piece of evidence is mentioned tangentially, and it is not clear if it formed part of the mosaic of evidence which led to the conviction or exoneration.

The digest attempts to note how each piece of evidence was used by the court so as to give practitioners the clearest picture of its place in the mosaic of evidence. It also notes if a piece of evidence was connected to a particular element of the crime or if it was connected to the conviction or sentence in general.

As said, the digest includes exonerations as well as convictions and takes particular pains to describe the different approaches of trial and appeals courts. This is done in order to present as full a picture as possible and to open the minds of practitioners to the possible solutions.

1.7 Structure of the digest¹³

The regional case digest closely follows the structure of the global case digest, as can be seen by comparing the tables of contents in both publications. This is done to facilitate the use of both tools in order to allow for the richest analysis.

Like the global case digest, this digest too is built like lego and can be used to find material on a specific topic or read in its entirety. Thus, if a practitioner is troubled by the seeming consent of the victim, he can immediately turn to section 4.4 on *how to handle the subject of victim consent*; if he is wondering how to address the lies or inconsistencies in victim testimony, he can turn to section 2.2.1.1 on *inconsistent statements and outright falsehoods*; if he is wondering how to handle good treatment of the victim on the part of the accused or suspect, he can examine both section 3.2.4.1 on *gradual grooming/seasoning exploitation with good treatment* and section 3.3.5 on *good treatment of victim by the perpetrator*.

Finally, like the global case digest, this digest too uses boxes to highlight quotes from international conventions and national laws, insights of practitioners, controversies, important quotes from cases and professional literature, and summaries of material in various sections.

The digest is divided into several sections:

¹³ This subsection draws heavily on section 1.5 of the global case digest. Although we have noted our reliance on the global case digest at the beginning of the section on “background”, it is particularly far reaching in this subsection.

- It commences with a **note to the reader**, which summarizes the aims of the digest and its relationship to the global case digest. It also includes important general insights which emerge from the digest, and for example: that what may appear to be weaknesses in a case may actually be viewed as strengths.
- **Section 1** concerns **general background** and relates to matters like the aims of the digest, its added value, the challenges faced, the methodology used and the structure.
- **Section 2** relates to **kinds of evidence** used in cases, like testimony, documents, objects and special investigative techniques. This section is of particular importance in assisting practitioners to build a case. It also includes an analysis of various principles which courts in the region have used to analyse the evidence in a case, such as the principle by which courts address the totality of the evidence, rather than each piece of evidence in isolation.
- **Section 3** analyses the **mosaic of evidence** which means the content of the evidence, as reflected in the circumstances which surround the crime and which have contributed to convictions or exonerations. Examples of circumstances which can contribute to convictions are vulnerabilities, restrictions of freedom, use of coercion or deception. Examples of circumstances which can contribute to exonerations are the victim's behaviour during the course of the trafficking such as failure to flee or seek help at the first opportunity.
- **Section 4** addresses an analysis of **particularly difficult challenges**, including the chain of trafficking; how to prove trafficking if the exploitation has not yet transpired; the issue of victim consent; issues which arise in cases of labour exploitation, child trafficking and child selling and adoption.
- **Section 5** addresses various victim protection issues, although it does not purport to provide an exhaustive analysis.
- **Section 6** provides an in-depth analysis of two cases in an effort to illustrate how the digest can assist practitioners to analyze specific cases.
- **The appendices to the digest:**
 - **Appendix 1** contains the full names of regional State Trafficking legislations which are not cited in the digest.
 - **Appendix 2** contains a table of Southern African trafficking legislation which compares the elements of the crime as they appear in the Protocol with the various States' trafficking legislation, in the hopes that this will give practitioners an easy way of focusing on their own Trafficking Acts.
 - **Appendix 3** contains a glossary of terms, largely particular to the region, in the hopes that it will be of use to practitioners outside the region.
 - **Appendix 4** includes the citations of all the regional and international cases used in the digest. In view of this index, cases are fully cited only the first time they appear in the digest.
 - **Appendix 5** includes a list of UNODC materials used in the digest, in the hopes that practitioners will find them useful.

In order to facilitate an understanding of the structure of the digest, we draw on a helpful metaphor used in the global case digest. The case digest strives to assist practitioners to build a solid trafficking case. In this sense, it can be likened to a manual on how to build a house. The “kinds of evidence” are like the tools used to build houses, like hammers or awls; the “mosaic of evidence” is like the building materials which contribute to the building of the house, like mortar, cement, metal, bricks. While not all the materials are of the same weight, each is important in erecting the house. The section on victim protection hones in on the most important tool in the building of the house – the victim. The in-depth analysis of cases at the end shows how tools and materials work together to produce the house itself.

It is hoped that this digest will prove as useful in building cases as a construction manual is in building houses.

NOTES

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This image shows a full page of blank, lined paper. It features approximately 20 evenly spaced horizontal blue lines across its entire width. The paper is otherwise completely empty, with no margins, text, or other markings.

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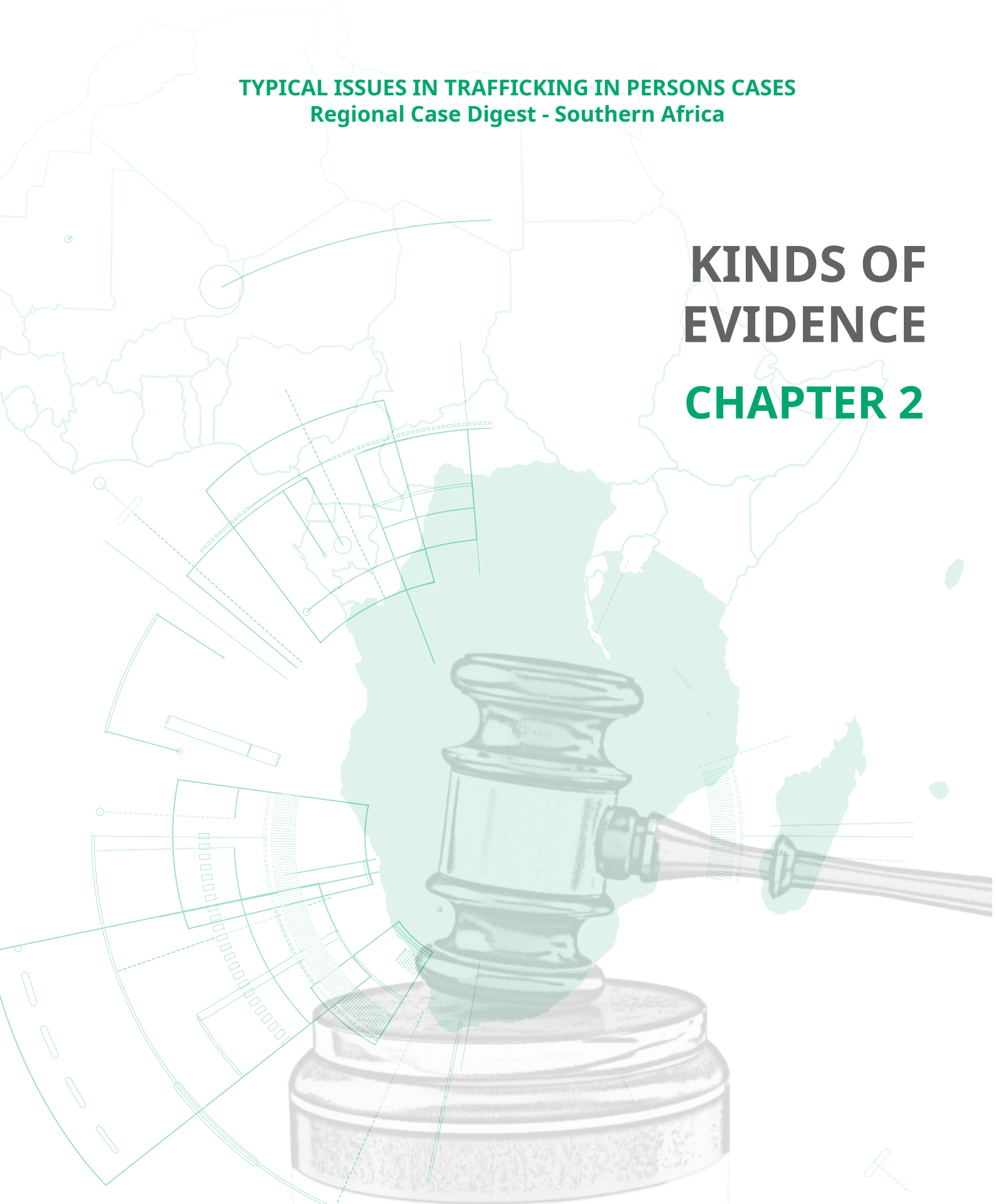


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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES
Regional Case Digest - Southern Africa

**KINDS OF
EVIDENCE**
CHAPTER 2



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

KINDS OF EVIDENCE

CHAPTER 2



UNODC

United Nations Office on Drugs and Crime

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2. KINDS OF EVIDENCE

2.1 Introduction

Trafficking in persons cases rely on different kinds of evidence, as do other cases. The central ones are testimonies, documents and “real” or physical evidence. In addition, sometimes out of court statements are admitted in evidence and sometimes special investigative techniques like “stings” are used to gather evidence.

Testimonies can be given by any number of persons who witnessed parts of the story relevant to the case. These can include victims, accused persons, police officers, neighbours, taxi drivers, customers, family members and more.

Particular kinds of testimony, important in some cases, are **expert testimony**, **child testimony** and **single testimony**. Expert testimony is given by a person who is an expert in a field relevant to the case, and for example, medical experts, clinical psychologists, cultural experts, and even experts on patterns of trafficking. **Child testimony** is given by witnesses under the age of 18 about events that they have witnessed. Unfortunately, many of the child witnesses in the sample of cases which forms the basis of this digest were victims of trafficking in persons. **Single testimony** concerns situations in which there is only one witness to a crime or to part of a crime. These kinds of testimony are addressed separately, because they raise special issues.

Documentary evidence encompasses any document relevant to a given case. These can include birth certificates, cell phone records, contracts, receipts and more. **“Real” or physical evidence** can encompass any object relevant to the case. These can include condoms, photographs, drugs, DNA traces and more. Interestingly, **sometimes the lack of a certain document or object at a crime scene may be evidence of trafficking**. For example, if a victim does not have his passport, this may be evidence of its confiscation by the trafficker; if investigators examine the refrigerator in premises in which victims are found, and do not discover any food, this may be evidence of traffickers starving victims.

Due to its centrality, a sizable subsection is devoted to victim testimony and its typical weaknesses during the investigation and court process (subsection 2.2). We note that the topic of weaknesses in victim behaviour during the trafficking process is addressed in Section 3.3.8.

This section of the digest is of particular importance in assisting practitioners to build a case and in opening their eyes to kinds of evidence which have been important to convictions or exonerations. It can also help them to address typical challenges which arise in regard to various kinds of evidence, and enlighten them as to creative ways in which courts have addressed these issues.

2.2 Victim Testimony

Victim testimony is, in general, the central piece of evidence in trafficking in persons cases across the region. While there are cases which have yielded convictions despite the absence of victim testimony, they are the exceptions. As a rule, even when there is other evidence, victim testimony is required in order to explain it and put it in context. Thus, while a neighbour may testify that a victim was seen to enter the defendant's residence on the day of the alleged crime, often the only witness of what took place there is the victim. While a medical doctor may testify regarding injuries on the victim's body, usually, his or her testimony will be necessary to explain how they were perpetrated and by whom.

Despite the centrality of victim testimony, it is also prey to typical weaknesses. Victims' testimony may be inconsistent or false; it may contradict other credible witnesses' testimonies or be characterized by omissions; victims may experience memory gaps or distortions; their testimony may seem implausible; their emotional reactions may seem inappropriate; victims may fail to report the crime or delay reporting it; there may be no corroborating evidence or the victim may not be available for testimony.

How a practitioner addresses these weaknesses will often be the hinge on which a case will rise or fall. The following subsections will describe how courts in the region have dealt with such weaknesses in creative ways.

The most important tool used by courts is a **holistic analysis** of the entire evidential picture, in distinction from isolating any one weakness and automatically ruling that the witness is not credible. In this context, they seek **corroboration** to the victim's story and take pains to **analyze the nature of the weaknesses**, in order to assess if they are substantive or marginal. In addition, courts use an array of tools to understand the victim's behavior. These include an understanding of **psychological processes** which may lead to a loss of trust, flaws in memory, desensitization, identification with the accused or fear of the accused, a feeling of helplessness, or confusion. Key to understanding these weaknesses are the **vulnerabilities** of victims which may impact on their ability to testify in a coherent and persuasive way or lead to misunderstandings as a result of language and cultural barriers.

Experienced practitioners in the field of trafficking have stressed the importance of realizing that a victim's world may be very different from ours. It follows that in order to understand his or her behaviour, we must step outside our own experience.

Practitioner's advice regarding weaknesses in victim testimony

"Vulnerable people do not behave like you and me; one must understand their situation in order to understand their behaviour."

Regional Colloquium on Trafficking in Persons for Regional Court Magistrates, held in Johannesburg, **South Africa** (August 22 – 24, 2018). The quote emanated from a **Namibian** judge.

"Whereas in other cases, it is a challenge to find the weaknesses in a case, in trafficking cases, it is a challenge to find the case in the weaknesses."

UNODC Expert Group Meetings on the global case digest (6-8 May 2014)

This does not mean that we should ignore weaknesses in victim testimony and behaviour. All it means is that we should do our best to understand them in the context of the victim's situation, and avoid making checklists of weaknesses.

Still, sometimes there will be exonerations on the basis of a series of such weaknesses, or courts may caution themselves in view of them and require corroboration in order to convict.

2.2.1 Typical weaknesses in victim testimony

2.2.1.1 Inconsistent statements and outright falsehoods

Often, victims of trafficking in persons make inconsistent statements or tell outright falsehoods during the investigation or court process. Indeed, seasoned practitioners from around the world see this as a chronic problem:

Victim inconsistencies and falsehoods as a chronic problem: ¹

"I have never seen a trafficking case where a victim did not contradict himself or tell outright falsehoods."

"Victim inconsistencies are normal in a trafficking context."

UNODC Expert Group Meetings on the global digest (6-8 May 2014) and on the draft issue paper on the 'role of consent in the trafficking in persons protocol (17-18 February 2014).

The inconsistencies may arise in the testimony of the victim itself, between the testimony of the victim and a police statement made by him or her, or between the victim and other witnesses.

While inconsistencies or falsehoods are, in general, barometers of a witness' credibility, in trafficking cases, they may emanate from causes other than lack of credibility. The cases that follow illustrate how courts across the regions have addressed this particular weakness.

Several courts in the region note that in analyzing discrepancies and lies, contradictions per se do not lead to the rejection of a witness' evidence. They may simply be indicative of an error and not every error affects credibility. The court takes into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. This approach is espoused in **Matini (South Africa)**,² a case revolving around the trafficking for sexual exploitation of 2 mentally disabled minors³ and several young women, some of whom were minors, and **Mabuza (South Africa)**,⁴ a case revolving around the trafficking for sexual exploitation of a number of children.

In analyzing several cases in depth, we arrive at a more detailed analysis which focuses on the special attributes of trafficking in persons cases.

Thus, in **Lukas (Namibia)**⁵ the accused was convicted of the trafficking of two minor girls for sexual exploitation. During the course of the revelation of the crime, and the initial investigation, both girls told falsehoods to the school authorities and there were contradictions in their testimonies. Nevertheless, the court did not impugn the credibility of the girls, but rather analyzed

¹ Some of these quotes are drawn from the global case digest, section 2.2.1.1 on "inconsistent statements and outright falsehoods".

² State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage - Conviction 27/10/2017, sentence 8/2/2018.

³ The first girl was born in October 1996 and was trafficked in July of 2012, so that she was 15 years old when the trafficking took place. It is not clear when the second mentally disabled girl was born, but she was a schoolmate of the first one, thus leading to the probable conclusion that she too was a minor. Moreover, many prosecution witnesses called both girls "children" and they were assessed as being 9 and 10 years old in terms of mental capacity.

⁴ State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017.

⁵ State v. Lukas, (CC 15-2013) [2015] NAHCMD 124 (2 June 2015)

these weaknesses **holistically**, in terms of the entire evidential picture and found explanations for the contradictions and falsehoods.

One such explanation was an analysis of the **psychological motivations** of the girls. Thus one wished to continue the relationship with the abuser, as she considered him her boyfriend and was interested in continuing to receive money from him. The court notes the process of desensitization to horrific sexual molestation which this girl underwent. The other girl was ashamed of her involvement in the sexual relations and was in a state of “*childish confusion*”. In addition, the court analyzed the **stage of the contradictions and falsehoods** and the nature of the victims’ testimony afterwards, and reached the conclusion that the contradictions and falsehoods had transpired during the initial stage of the investigation, and that after this stage, the girls’ stories were coherent and logical. Finally, the court found **corroboration** in the “*proven falsehoods of the accused*” and in the cell phone records submitted by the prosecution.

As in many trafficking cases, the court notes the **vulnerabilities of the victims** who were minors of 13 and 14 years of age, from “*less privileged homes*” in the **DRC** community in **Namibia**. In addition, one resided in a Catholic hostel for underprivileged girls. While the court does not directly explain the behavior of the girls in the light of their vulnerabilities, it is a subtext in the ruling, as is the case in many cases worldwide.

In a similar case, **Ntonga and others v. State (South Africa)**,⁶ revolving around the sexual exploitation of two minor girls of 11 and 15 years of age, one of the girls **contradicted** a reliable witness about the details relating to her first encounter with that witness. This court, like that of **Lukas**, expressly stated that this contradiction cannot be viewed in isolation, but must be analyzed **holistically** in the framework of the entire evidential picture. In addition, the court found an explanation for this contradiction in **psychological processes** i.e. “*the trauma attendant upon the rape*”, which transpired right before the appearance of the credible witness whom the victim contradicted, in the house where the rape occurred. In addition, the court seemed to feel that this **contradiction was not material**, terming it “*this tittle of evidence*”.

An additional weakness in victim testimony was that one of the victims told a **falsehood** in her statement to the police, in that she said she had reported the rape to another witness named Analisa, whereas she later admitted that she had not done so. The court does not expressly address this falsehood as such, but rather focuses on the issue of not reporting the rape at the first opportunity and explains it by means of the victim’s **vulnerability**, in that she was young and had undergone a difficult ordeal.

In addition, the court finds **corroboration** to the victims’ testimony in the weaknesses of the accused’s defence, in the testimony of another witness and in medical evidence. In view of the **entire evidential picture**, the accused persons were convicted of trafficking for sexual exploitation.

Another interesting facet of the case is that the Court recognizes that sometimes “*an innocent person may furnish untruthful answers for fear that the truth may appear implausible.*” While this is said in regard to the accused’s lies, it may also be important in cases where the victim lies.⁷

The court in **Matini (South Africa)**, a case revolving around the sexual exploitation of two mentally disabled minors and several young women, some of whom were minors, makes a similar point in addressing lies, and notes that a lie might sound more acceptable than the truth or that

⁶ Ntonga and Others v. S, CA 159 2012 (1) (2013.08.22) before High Court of **South Africa** (Eastern Cape, Grahamstown)

⁷ See section 2.2.1.3 on “*seemingly implausible testimony*”.

the lie may proceed from fear. This point is also made in **Dos Santos (South Africa)**,⁸ a case revolving around trafficking for sexual exploitation.

Interestingly, the court in **Matini** also gives weight to **cultural and sociological factors**. Thus, it notes that in analyzing discrepancies between police statements and testimony, the court should bear in mind the language barriers and cultural differences between the witness and the person who took down the statement. In addition, the court notes that **South African** culture teaches children that adults know best and that they should be polite towards them and not contradict them, which cultural background ill prepares child victims for the ordeal of testimony.

Another case which includes lies told by the victim is **Esther Phiri (Zambia)**,⁹ revolving around the abduction of a 14 year old minor for child labour. The child lies to her great uncle on the phone, and subsequently to the police about being raped. She explains these lies by telling the court of her **fear**, as this was her first time in the capital of Lusaka and she was afraid of the accused's sister. In addition, she tells the court that she was **coached by the accused** as to what to tell her great uncle. While the court does not explicitly analyze these lies, it does report her **explanations** and in addition, notes her **vulnerabilities** as a "double orphan" who lost both parents. The court also notes the victim's testimony about being isolated from what she knew, when she was taken from her home to Lusaka, which is a great distance away, and where she knew no one besides the accused and her sister.

Another case which includes contradictions and omissions by the victims is **Veeran Palan (South Africa)**¹⁰ which revolves around the trafficking of two young women for sexual exploitation. The court, like other courts, stresses the importance of "*an integrated approach based on the evidence and its totality*." The court explains the contradictions by means of the **time that elapsed** between the events and the testimony, namely, one year's time. It also relies on **psychological processes** by which a person may prefer to forget harrowing experiences and on the fading of memory with time. In addition, it evaluates the **nature of the contradictions and omissions** and reaches the conclusion that they were **non substantive**, but rather about "*specifics and details*" and that "*nothing really turned on that*." Finally, the court finds **corroboration** in that the victims' stories corroborated each other and were also corroborated by independent sources like the police officer who observed their relief at being rescued.

As in many trafficking cases, the court mentions the **vulnerabilities** of the victims, though it does not explicitly say that these directly influenced their behavior. Thus, both victims were unemployed, with children to support and one was a single mother.

A central case which presents a **psychological analysis** of inconsistencies is **Allima (South Africa)**¹¹ which concerns a 16 year old girl, abducted from her hometown for the purpose of sexual exploitation, who experiences a loss of memory about her identity. Among the inconsistencies in her testimony and between her testimony and her police statement are details about the time

⁸ Dos Santos v. State, Case no. A26/2014 in the High Court of **South Africa**, Gauteng Division, Pretoria – Conviction Affirmed. We note that due to a fire in the courthouse, much of the protocol of the first instance court was destroyed. However, the High Court ruled that there remained enough material to enable it to pass judgment: the Magistrate's full judgment on sentence; evidence presented after conviction by the State and appellant, including a written psycho – social report compiled by a probation officer; the evidence of the appellant. The court also noted that most of the evidence by which the accused was convicted was circumstantial, so that the incomplete record was not so serious.

⁹ People v. Esther Phiri, Case No. IXD/12/2018 in the Subordinate Court of the First Class for the Chadiza at Chaidza, Judgment 28 December 2018, sentence 8 January 2019.

¹⁰ State v. Veeran Palan and other, Case No. RCD 13/14, Regional Court of KwaZulu-Natal, 12 June 2015.

¹¹ State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (26 June 2014).

frame, her actions during rapes, the question if she was drugged and when she finally recognized her family members. The court relied heavily upon the **testimony of a clinical psychologist** who explained that the victim may have been experiencing a dissociative disorder, where a person separates himself from the harrowing experiences that he is undergoing. A fuller analysis of these psychological processes is offered in section 2.2.1.2 on *memory gaps and distortions*.

The court also took under consideration the **peripheral nature of the contradictions**, noting that the inconsistencies were “*very irrelevant and of no value and of no use*”. In addition, the court considered the **coherence of the victim’s testimony and her demeanour**, in that that the she gave “*clear and unshaken evidence*” and her evidence was “*very clear and detailed*”. The court used a **holistic analysis** of the evidence and took into account the circumstances under which the versions were made; the proven reasons for the contradictions; the actual effect of the contradictions with regard to the reliability and the credibility of the witness; the question if the victim was given a sufficient opportunity to explain the contradictions; the quality of the explanations; the connection between the contradictions and the rest of the witness’ evidence. Consequently, the court ruled that the victim’s testimony was credible, despite the inconsistencies.

In addressing the seeming contradictions of the minor victims, trafficked for sexual exploitation, the courts of first instance and appeals in **Mabuza (South Africa)** narrow the scope of what is seen as a contradiction.

The court of first instance stresses that the child witnesses did not contradict themselves or each other in any **material respect**. However, it also adds a comment by which **seeming contradictions** are not always genuine contradictions, but rather may be a function of individual ways of observing:

“...and one should here remember that they are only children, with different powers of observation and emotions, some not as resilient as the others, and who remember different things in accordance to what they find important.”

State v. Mabuza and Chauke, Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop

In the same spirit, the Court of Appeals in **Mabuza** adds that often, what appeared to be contradictions, arose from a **misunderstanding** of the questions put to the victims, due to **complicated questioning**. These misunderstandings were clarified by means of the interventions of the court of first instance. This court also adds that it is imperative to distinguish between a proved deliberate falsehood and an honest mistake. In addition, it stresses that common sense dictates that our **standards of credibility** for adult witnesses should not be imposed on **child witnesses**, especially regarding **peripheral matters** like time and location. Thus inconsistencies should be seen in the **context of the age and development of the child**.¹² The Court of Appeals ruling is most instructive in its approach, as it views the inconsistencies as a strength, rather than a weakness in the case, thus:

“...the contradictions between the evidence of the child witnesses are not material. Rather they indicate that the child witnesses did not fabricate their evidence.”

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of appeals.

¹² See section 2.5.3 on “*child witnesses*” for greater elaboration.

Similarly, in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled minors and several young women, some of whom were minors, the court notes that the contradictions among prosecution witnesses point away from the conspiracy theory advanced by the accused number 1.

This approach calls to mind the case of **Urizar (Canada)**¹³ in which the court saw in the omissions, lapses of memory, exaggerations, contradictions, moments of hesitation and inconsistencies of the victim, support for the victim's testimony, rather than a weakening of it.

"It would be illusory to think that a young person who had just lived through...so much physical, verbal, emotional and sexual abuse, would be able to recount all of this in detail and in chronological order; indeed it would be worrisome if they were able to do so."

R v Urizar File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), 13 August 2010pp. 18-19, 20-23.

Conversely, in cases across the region, accused persons often claim that the victims colluded in order to falsely charge them, due to bias or ill feeling. Examples of such defence claims appear in **Mabuza (South Africa)** and **Matini (South Africa)**. By and large courts dismiss these claims as baseless, after analysis. However, they take them seriously enough to address them, and in **Matini**, the court even accepted that one witness (though not a victim) did indeed harbour ill feelings towards accused number 1, but found her credible nonetheless, as her evidence was supported by her husband and other witnesses, and she was firm under cross examination, despite her bias.

A number of additional cases across the region include inconsistencies in the testimony of the victims, but nevertheless the courts convicted the accused persons of trafficking. Among these are **Alam (Seychelles)**¹⁴ where four Bangladeshi men were trafficked to **Seychelles** for forced labour. One of the victims succeeded in **explaining a seeming inconsistency** between his police statement and testimony in court, regarding the exact sum that he paid the accused, in that at first he was speaking of the recruitment fee alone, whereas on the other occasion he was addressing other expenses.

As can be seen in the in depth analyses above, courts often evaluate the credibility of victim's testimonies by checking if their testimony is **corroborated**.

One example is **Koch (Namibia)**¹⁵ which revolves around the trafficking for sexual exploitation of five minor girls. The court notes "*serious and unexplained contradictions*", but though these lead to an exoneration on charges of rape, the court convicts on trafficking for sexual exploitation. These contradictions arise in each minor victim's testimony, among their testimonies and between their testimonies and their police statements, and concern material topics such as: was the door of the accused's residence locked or just hooked? Did the accused threaten the girls with a knife? On how many occasions did the accused sexually exploit the girls? The court does not explicitly address the different weight accorded to these inconsistencies as regards the rape and trafficking charges, but stresses that as far as the elements of trafficking, there was ample

¹³ R v Urizar File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), 13 August 2010, and Urizar v. R., No. 500-10-004763-106, Court of Appeal, Quebec, 16 January 2013. The trial court case is available in the UNODC Human Trafficking Case Law Database ([UNODC Case No. CAN005](#)).

¹⁴ R. v. Alam (CO 67/2016) [2018] SCSC 946 (19 October 2018) in the Supreme Court of **Seychelles**, sentence CO 67/2016 [2018] SCSC 1074, (14 November 2018). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. SYC010).

¹⁵ S. v. Bertus Koch (CC 20/2017) [2018] NAHCMD 290 (18 September 2018), High Court of **Namibia** main Division, Windhoek; sentence (11 October 2018). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. NAM002).

corroboration, including in the testimony of the accused himself. The court also found support in the fact that the children were testifying about events which a child would not normally know, which enhanced their credibility.

Another example of the importance of corroboration in the face of inconsistencies, is the **Jonas (Namibia)** case¹⁶ which revolves around the trafficking of a young woman for sexual exploitation. Despite the inconsistencies in the victim's testimony, the court felt that she was a credible witness whose testimony was corroborated by other independent witnesses. Another example is the **Ogochukwu (South Africa)** case¹⁷ revolving around trafficking for sexual exploitation. The judge draws a line between non-credible aspects of the victim's testimony and credible aspects which are corroborated by independent witnesses. Yet another example is the **Dragon (Namibia)**¹⁸ case, revolving around the trafficking for sexual exploitation of a number of children, which included inconsistencies among the minor children who testified. The court did not impugn their testimony, taking into account that they corroborated one another on material points and were able to describe what was done to them with the aid of anatomy dolls.

The question if the inconsistency is **material** or not is often important in these cases, as can be seen in the in-depth analyses above, and in additional cases such as **Mjwanga (Tanzania)**¹⁹. When referring to discrepancies as to dates in a case of child sale, the court says:

"Even if there were such minor discrepancies but did not affect the trail and did not lead to miscarriage of justice."

John S/O Mjwanga v. Republic Criminal Appeal 124 of 2016 in the High Court of **Tanzania** at Mbeya, 30 December 2016.

As seen above, in the in depth analyses, the importance of the **coherence of the victim's testimony and his or her demeanour** are often relied upon by courts. Additional examples appear in **Obi (South Africa)**²⁰ and **Eze (South Africa)**,²¹ both of which revolve around trafficking for sexual exploitation on the background of drugs addicted victims. In the Eze case the court notes that though one victim's testimony spanned a number of years, her testimony was impressive:

¹⁶ S. v. Jonas (CC14/2017) [2019], High Court of **Namibia** Main Division, Windhoek, conviction (31 July 2019); sentence (3 December 2019). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. NAM003).

¹⁷ The State v. Ogochukwu, Case No: SS14/201 in the High Court of **South Africa**, Gauteng Local Division, Johannesburg (28 February 2017).

¹⁸ S. v. Dragon Vujicin, SKW-CRM-1000/2016, conviction on trafficking affirmed on appeal Vujicin v S (HC-MD-CRI-APP-CAL-2020-00062) [2020] NAHCMD 551 (1 December 2020). The case will be called (Dragon (Namibia)).

¹⁹ John S/O Mjwanga v. Republic Criminal Appeal 124 of 2016 in the High Court of **Tanzania** at Mbeya, 30 December 2016.

²⁰ The State v. Obi and others, Case No: CC40/2018, in the High Court of **South Africa**, Gauteng Division, Pretoria. Only the sentence was available (25 January 2020).

²¹ State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

"...her unprompted recall of events, of names and of places was insightful and impressive... She gave detailed testimony in an intelligent and lucid manner and was subjected to lengthy and gruelling cross examination."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

In most cases, courts bring into account, both the demeanour of the victim and the coherence and steadfastness of his or her testimony, in evaluating credibility in the face of inconsistencies. However, interestingly, in the case of **Milinga (Tanzania)**,²² the court places more emphasis on the coherence of the witness' testimony, than on his or her demeanour. In the court's view, demeanour complements the coherence of the testimony. It goes on to say that: *"Evidence that is not worth believing cannot be made good by excellent demeanour."* Nevertheless, this ruling was delivered under special circumstances, where the first instance Magistrate did not himself hear the victims testify, as he succeeded to the case after it was initially heard by another judge.

Tools to evaluate victims' testimony when they contradict themselves or lie

1. The nature of the inconsistency or lie: is it material or peripheral? Is it a genuine or seeming inconsistency?
2. Is the testimony otherwise coherent, logical, plausible? Does the demeanour of the victim support his or her credibility?
3. What does a holistic evaluation of the evidence yield? Is there corroboration to the testimony?
4. Is there an explanation for the inconsistencies or lies? (The time that elapsed since the crime? The fading of memory? The natural process of wishing to forget harrowing experiences? Fear? A desire to placate the lawyers examining the victims? Obscure or unclear questions by defence counsels? Another explanation offered by the victim?)
5. Can psychological processes explain the inconsistencies and lies? (What are the psychological motivations of the victims? Are they suffering from confusion or shame? How might trauma be affecting them?)
6. How are vulnerabilities affecting victims? (Children may be taught not to contradict adults; victims who are isolated may be subject to fear; should the standards for child testimony be different than for adult testimony?)²³
7. Can the inconsistencies actually point to the credibility of victims, in that they were clearly not coached? Conversely, does the victim have a motive to lie?
8. Can the lie or inconsistency proceed from the fear that the truth will seem implausible?
9. Is it possible that the contradictions emanate from different individual powers of observation among different victims?
10. Are the falsehoods or contradictions limited to an early stage of the investigation?
11. Are cultural or sociological factors at play? (The different backgrounds of police and victims which may lead to misunderstandings? Language barriers?)

2.2.1.2 Memory gaps or distortions

As a rule, the ability of a witness to recall events accurately is a sign of credibility, whereas gaps or distortions in his or her memory may tend to impugn that credibility. However, gaps and distortions in memory are common phenomena in trafficking in persons cases and may proceed from a range of reasons other than lack of credibility.

²² Milinga and others v. Republic, Crim. App. 33 of 2018 in the High Court of the United Republic of **Tanzania** (Dar Es Salaam District Registry), February 27, 2019 and 13 March 2019.

²³ For an elaboration of this issue see section 2.5.3.2 on different approaches towards child testimony.

The most extreme form of memory gaps occur when crucial parts of events are not recalled. This may arise due to psychological processes emanating from trauma or due to substances like drugs and alcohol.

The most central case reflecting an extreme form of memory gap is **Allima (South Africa)**. This case concerns a 16 year old girl who is abducted by a female accused person from her small hometown to Durban, a large city 240 kilometres from her home. On the way to the library, she encounters the accused with two males who are carrying a big bag, one of whom says he loves the victim. The accused takes out a container of juice, but the victim observes that it contains a brown fluid, and when she steps over it, she becomes dizzy. She finds herself in a taxi with the accused who is telling others that her name is other than it is. She does not protest because she is sleepy and dizzy. She then finds herself in another taxi and the two males she previously saw are in it.

On arrival in Durban, she is taken to a room where she is raped by three men. The third rapist, named Bila, is represented to her as her “husband” by the accused. She lives with him for awhile and then he returns her to the accused.

The accused tells the victim that her name is Amanda Smith, rather than her real name, and that the accused is her mother. The victim believes this and does not remember her real name or family. The accused sends the victim to a progression of men in order to engage in sexual relations, and gets paid, at least, sometimes. She also drugs her or causes her to drink alcohol (in one case the victim falls asleep but wakes up naked, not knowing what happened; in another the accused sends her to a bar where she becomes drunk, falls asleep and wakes up undressed, without knowing what happened). Ultimately, the accused gets the victim a job in a phone shop and tells her to care for a 3 year old child named Kenny who is the accused’s child.

The victim is recognized by her aunt in the phone shop, but when the aunt calls her by name, the victim tells her that her name is Amanda Smith, and when the police arrive, she tells them that she wishes to call the accused who she represents as her mother. She does not seem to recognize her aunt. Only some time afterwards, does she begin to recognize her own family members.

Throughout the course of the evidence, it is never clear what happened during the abduction, if the victim was drugged, or perhaps believed superstitiously, that stepping over a juice container thrown down by a stranger would cause her harm.²⁴

As can be seen by this bare rendition of the facts, there are several layers of loss of memory in this case. The central layer is the victim’s loss of memory concerning her true identity, including a belief that her name is other than it is and that the accused is her mother. The secondary layer of loss of memory concerns waking up naked after being drunk or perhaps drugged, and not knowing what happened to her. In addition, her testimony reveals distortions as regards time. For example, in her examination in chief, the victim says she stayed with Bila for days, but during her cross examinations she maintains that she was with him for months. Moreover, she has no idea how long she was in Durban and also says: *“I didn’t know how many days I spent there because I didn’t know even the days as to whether it’s a Monday or a Tuesday”*.

In order to understand the victim’s memory gaps, the court relied heavily on the testimony of a clinical psychologist, who testified that the victim had symptoms of post trauma and explained the probable causes of the loss of memory, as a function of a dissociative disorder where the person uses psychological defence mechanisms in order to separate himself from horrendous conditions:

²⁴ See section 2.5.2 on expert testimony.

"You depersonalize...move out of yourself, as if you are looking at yourself in a mirror and you can use different voices to explain yourself...The change of the position is the running away from fear in order to feel safe which is a mental process that is created by the situation...she was actually taken away from the environment that she was used to and she was taken to a strange environment... In the new environment which is a strange, terrifying environment even an adult...it is as good as subjecting somebody in a concentration camp where you actually drill in a new information under fear...If anything is done in fear the mind will alter and that is why in dissociative disorders you will find people changing their identity and implying that they are other people..."

There's a strong possibility to change your identity because of trauma. To change your name. The name in fact is just a label by which people knows a person and under trauma that can change...

We are not talking of forgetting but of a psychological mechanism which takes the person out of the situation he fears – a forced functioning of the memory to remove the physical and mental body from the experience. So the fear is what is causing this...the child was in another place...what is clear is that there was a fear from one towards many...²⁵

State v. Allima, RC92/13 (1 April 2014) in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma

Interestingly, when asked how the victim's memory could be relied upon to describe the accused's actions, in view of her massive loss of memory as to her identity, the psychologist replied as follows:

"The fact that she couldn't remember her name, because brainwashed, doesn't mean she couldn't remember what happened to her. She was not psychotic. She could give the 'logic of facts'. She was not confused. When she was asked the question at the time when she came to the court, there was no drug in her mind..."

I can tell you even in Zulu if you do something wrong to me now, you might forget me but I will not forget you. That is simple logic that talks to memory, exposure, the picture and the interpretation of the picture from the mind and the fact that it comes back, you will have flashes of those...If you look at the chronological story that she gave, she identified the individuals before she was traumatized..."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (26 June 2014).

In ruling that the victim was credible, despite her loss of memory about her identity, the court relied heavily upon the clinical psychologist's testimony which led it to conclude that the victim's loss of memory is quite possible when a person is confronted with a fearful situation. Moreover, the court accepted that it was possible to distinguish between loss of memory regarding identity, and memory about events that transpired during that loss of identity.

Other cases across the region also describe situations of failures of memory, although none of them is as far reaching as the above case.

A case which includes a blotting out of memory, due to too much alcohol consumption is **Mboo (Zambia)**,²⁶ a case revolving around trafficking for removal of organs. Here, the brother in law of the victim attempted to traffic him and sell his organs to a buyer. In preparation for doing so, he encouraged the victim to drink a great deal of beer, to the extent that he could hardly walk. The prospective buyer involved the police, who apprehended the accused on the night of the

²⁵ The mistakes are in the original and probably a function of mistypes.

²⁶ People v. Sitali Mboo, Case No 1U/117 in the Subordinate Court of the First Class for the Sesheke District at Sesheke.

attempted sale. The victim was initially declared to be a hostile witness, because when he first testified, he said that he did not remember anything. When he returned to testify, he clarified that he had no idea that the accused was going to sell him, because he was drunk and doesn't know how he ended up at a cell in the police station. Despite this failure of memory, the court was able to convict on the basis of other testimonies, namely, the buyer who participated in the police sting and police officers who were present at the attempted sale. All these witnesses confirmed the sale and were able to observe how drunk the victim was on the night in question. Thus the credibility of the victim's testimony was confirmed, although this meant that he could not contribute to the conviction.

Another example of a memory gap can be found in **Ntonga (South Africa)**. In a case of trafficking for sexual exploitation of a minor, the victim testified that she was locked in the accused's bedroom throughout the time when she was in his house, whereas a reliable witness testified that he saw her watching television outside of the bedroom. The court did not impugn her credibility on this basis, but rather tried to understand her testimony by means of psychological processes:

"Her failure to recall having watched television or that the door was ajar does not warrant the inference that she was untruthful. There was nothing to gain by manufacturing this tittle of evidence. She had in chief readily admitted Raath's²⁷ presence in the house..."

V's confusion can no doubt be attributed to the trauma attendant upon the rape immediately prior to Raath's appearance...Closing the door became fixated in her mind which led to her forgetting the door was ajar. It is inconceivable that accused 2 would have not closed the bedroom door when he led V there given the presence of employees in the workshop who would occasionally come to the kitchen. The closing of the door, given her age and the trauma she had been subjected to, no doubt became fixated in her mind to the extent that she could have forgotten that when accused number 2 exited the bedroom, the door remained ajar."

Ntonga and others v. State CA 159/2012 (1) High Court of **South Africa**, (Eastern Cape, Grahamstown) (22 August 2013).

An example of a minor memory gap can be found in **Esther Phiri (Zambia)** where the 14 year old victim could not remember the name of the bar where she was taken, even though she was there a few times. While the court does not explicitly address this weakness, it does mention her **vulnerabilities** as a "double orphan" who lost both her parents and was transported to a big city far off from her home, where she knew no one but the accused and her sister. It is also doubtful that the court viewed the nature of the gap as anything more than a **peripheral matter**.

Another example of a failure of memory can be found in **Dragon (Namibia)**. One of the child victims of trafficking for sexual exploitation could not remember the dates during which the exploitation happened. A clinical psychologist clarified why this can happen:

"...normal to forget final details because even adults forgets final details what they want to erase from their minds."

S. v. Dragon, SKW-CRM-1000/2016 – Conviction + Sentence, conviction on trafficking affirmed on appeal in Vujicin v S (HC-MD-CRI-APP-CAL-2020-00062) [2020] NAHCMD 551 (1 December 2020) (1)

We note that a similar lack of detail respecting dates appears in **Koch (Namibia)**, an additional case which revolves around the sexual exploitation of several children. The court notes a lack of particularity in the testimony of the victims, none of whom could remember a specific month

²⁷ Raath was the reliable witness who testified that he saw the victim watching television outside the bedroom.

or date when the crimes were committed. The court noted that this placed the accused at a disadvantage and for example, in providing an alibi or in identifying exculpatory witnesses. This was one of the reasons that the court exonerated the accused from charges of rape, though it convicted him on charges of trafficking, as there was corroboration of the facts which constitute this crime.

As to explanations which can be relevant to failures of memory, we can draw upon what was said in cases like **Veeran Palan (South Africa)** in regard to inconsistencies. In this case and others, the court explains contradictions by means of the **time that elapsed** between the events and the testimony. It also relies on **psychological processes** by which a person may prefer to forget harrowing experiences and on the fading of memory with age. These explanations can be equally relevant to failures of memory.

Tools for practitioners concerning memory gaps or distortions

1. Is the forgotten fact material or peripheral?
2. How pervasive is the memory gap or distortion?
3. Is it possible to distinguish between the victim's memory gap and other memory based testimony? (By means of objective circumstances like mind altering substances? Psychological processes?)
4. Can the memory gap or distortion be explained by objective circumstances? (Consumption of alcohol or drugs? The lapse of time?)
5. Can it be explained by traumatic psychological processes (dissociation? The desire to forget harrowing events?)
6. Could the evidential picture be clarified with the help of expert psychological testimony?

2.2.1.3 *Seemingly implausible testimony*

Implausible testimony may be a sign of lack of credibility. However, when addressing a heinous crime like trafficking in persons, what seems implausible and inconceivable, may be true nonetheless. Our unwillingness to accept terrible realities may proceed from our lack of experience with such horrific behaviour, and our lack of understanding of the vulnerabilities which feed it.

This kind of common reaction to horrific crimes is analyzed in a book entitled "Trauma and Recovery" by Dr. Judith Herman²⁸:

Dr. Judith Herman on the tendency to deny atrocities

"The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word unspeakable."

"To study psychological trauma is to come face to face...with the capacity for evil in human nature. To study psychological trauma means bearing witness to horrible events..."

Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997), p. 1, 3.

Hints of such tendencies to deny extreme stories appear in cases across the region. Examples can be found in cases where police did not take victims' stories seriously, such as **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs. At one point, despite a report about the abuse, the police returned one victim to her abuser. Another example can be found in **Veeran Palan (South Africa)**, another case of trafficking for sexual exploitation, where a female police woman faced opposition to investigating the case as one

²⁸ Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997), pp. 1, 3.

of trafficking, and needed to protect the victims from police officers who were reluctant to allow the investigation to continue.

A further hint as to the reasons which may lie behind the disbelief which shadows the stories of victims, can be found in cases where the court recognizes that vulnerable people may behave differently from others. Thus in **Veeran Palan (South Africa)**, in discussing the demeanour of one victim, the court says:

"...a court should not lose sight of the social dynamic, of the fact that a witness might be of a different culture, class and race whose life experience differed from that of the trier of fact."

State v. Veeran Palan and other, Case No. RCD 13/14, Regional Court of KwaZulu-Natal, (12 June 2015).

So when examining if a victim's testimony is plausible, it must be borne in mind that there may be things in heaven and earth beyond our own experience.²⁹

The following are a number of examples of seemingly implausible victim testimony.

Perhaps the most seemingly implausible story comes from **Allima (South Africa)**. As described above, the victim testified that she became dizzy and weak after she stepped over a juice container with brown liquid which was thrown in her way by the accused. She then found herself with the accused in a series of taxis en route to Durban, without trying to flee or seek help. Once there, she underwent a number of episodes of severe sexual exploitation. Throughout the course of the case, we never fully understand why the throwing of the container of juice produced such grave consequences. Were there drugs in the container? Was there a prevalent superstition that if a stranger throws something in your way, it can harm you? Both options were presented by the expert clinical psychologist who testified, but no one answer is given. Moreover, the victim underwent a loss of memory respecting her true identity during the trafficking process. She believed that the accused was her mother and that her name was other than it was. She did not recognize her aunt when the aunt appeared and called her by her true name. Seemingly, this story is implausible. However, the court did not impugn the victim's credibility, but rather made use of the clinical psychologist's testimony to understand the dissociative reaction the victim developed in order to separate herself from the horrific circumstances of abduction and repeated sexual exploitation.

Similarly, in **Ntonga (South Africa)**, the defence raised a claim of implausibility in regard to the testimony of one of the victims who claimed that the exploiter stopped raping her when she cried out. The defence maintained that this was "*highly improbable*". The court did not impugn the victim's credibility on this basis, but rather explained why the victim's testimony was, in fact, plausible, by relying on the testimony of the accused himself who said that he initially thought the victim was a prostitute. The court concluded that given this assumption, when the victim cried out during the rape, the accused might have realized that she was a virgin, and not a prostitute, and stopped the rape due to this realization. Given this evidential picture, the victim's testimony on this point was not inherently unreasonable.

Another case which presents us with behavior which seems implausible on the face of it is **Veeran Palan (South Africa)**. There, one victim was unable to direct the police to the home of the accused where she had been held and both victims were not sure of their location. The court explicitly says that this is not implausible, but rather "*a most common scenario where the victim is lured away with a job offer from surrounds that are familiar to her and kept in surrounds where she does not know the place or anyone.*"

²⁹ This is a paraphrase of a quote from Shakespeare's Hamlet: "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." -Hamlet (1.5.167-8).

Conversely, courts often note that the victim's story is not implausible when they evaluate credibility. Examples are **Mabuza (South Africa)**, **Veeran Palan (South Africa)**, and **Matini (South Africa)**, all of which revolve around trafficking for sexual exploitation.

On the other hand, in **Ogochukwu (South Africa)**, a case revolving around trafficking for sexual exploitation, the court analyzes the victim's testimony painstakingly and concludes that two claims made by her are implausible. Firstly, she claimed that the accused came to collect her at Pretoria, after she was abducted and prostituted, but the court questioned how the accused would have known she was there. Secondly, she claimed that the accused's friends always supervised her, but didn't explain how he colluded with them. Despite these implausible details, the court found most of the victim's testimony credible, especially in view of corroboration by independent sources. Once again, as seen in the section on "*memory gaps and distortions*,"³⁰ the court was able to distinguish between different parts of the victim's testimony.

2.2.1.4 *Delayed complaints/absence of complaints/reluctance to testify*

In general, courts take into account delayed complaints, absence of complaints or reluctance to testify, when evaluating the credibility of a witness, under the assumption that a person who was wronged would naturally complain at the first opportunity.³¹ However, like inconsistencies and outright falsehoods, this kind of behaviour too, is a chronic part of trafficking in persons cases and may arise due to an array of reasons, including fear, coaching by the accused, trauma, loss of trust in the world in general and law enforcement in particular, and acute vulnerabilities.

In general, courts adjudicating trafficking cases do not impugn credibility on this basis alone, but rather view it in the context of the entire evidential picture. However, in some cases it may contribute to an exoneration.

Alam (Seychelles) is an example of this pattern. It concerns four workers from Bangladesh, deceived by the accused, who arranged for their travel to **Seychelles**, and living and working under difficult conditions. Nevertheless, they did not complain to the authorities about their plight, although some did complain partially to other persons.³² One victim explained that he did not want to be deported to Bangladesh, in which case he would be unable to provide for his family. He also said that he was **afraid** to complain. Another worker said that he was afraid, and that the accused had told him not to complain. The workers' **vulnerabilities** come into play as well, as all of them were illegal in the country, because the accused did not obtain legal visas for them. In addition, they were from impoverished backgrounds, most were the sole breadwinners for their families and they had incurred debts in order to pay the recruitment fees. They were also unfamiliar with the culture and language of **Seychelles**. It is also of note that the victims corroborated one another's stories and that there was additional supporting evidence. The court does not explicitly address the issue of the delayed complaints, but it convicts the accused of trafficking in persons for forced labour, thus leading to the conclusion that it found the victims credible, despite their failure to complain.

In **Koch (Namibia)**, although the accused exploited the minor girls sexually on five occasions, they complained only when the aunt of one of them asked what they were doing in the accused's place. One explained that their failure to complain emanated from fear of harm by the accused who had threatened them.

³⁰ Section 2.2.1.2 on "*memory gaps and distortions*".

³¹ See Cross and Tapper, *On Evidence*, 12th ed., (Oxford University Press, 2010), pp. 259, 301ff, 406-410, delineating the legal rules around delayed complaints.

³² Some entered into a mediation process regarding non-payment of their salaries, some complained about their accommodations, and some told the employers to whom they were sub-contracted at least some aspects of their plight. For greater detail, see section 2.2.1.5 on "*partial complaints/telling the story like the peeling of the onion*".

Similarly, in **Dragon (Namibia)** the minor girls did not report the sexual exploitation. One explained that she was afraid that her mother would beat her, and later on said that she was afraid of the trafficker and his son.

In **Eze (South Africa)** one of the victims of sexual exploitation was abused by the accused for four years, but did not report him to the authorities. When asked why she had omitted to complain, she explained that on a former occasion the police raided the premises, but though she complained, they returned her to the abuser. The following was her reaction, as reported by the court:

"This made her lose all faith and hope in their ability to help her."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

In the end, she did tell the judge in the Children's Court of her plight and he reported to the police, who arrested the accused.

In the **Mndzbele (Eswatini)** case,³³ a minor victim from an impoverished family was sexually exploited for close to a year by a pastor who offered to pay her school fees. During that period she did not tell her parents, although the accused did not forbid her to see them or contact them. In the end she reported the crime to two schoolmates and then to the school principal. When asked why she had not reported to her parents or to the authorities, she said the following:

"I could not report the matter to anyone because of fear. My fear was induced by the fact that the accused stood as a parent to me as he paid for my school fees. I feared that perhaps if I reported the matter he would stop paying for my fees. I ended up overcoming that fear as I was not comfortable with what the accused was doing to me. I am now 18 years old... I was afraid..."

"My parents trusted the accused too much. I felt that they would not believe me. That is why I opted for my friends...I was afraid...the house belonged to the accused and all odds were stacked against me as my home was far and the accused was my parent then who gave me food and paid for my fees."

The King v. Mndzebele, Court Case No. SDV 51/15 in Subordinate court for the District of Manzini

The court exonerated the accused from trafficking in persons, because it could not rule out that at the time he brought the victim to his home, his intentions were innocent. However, the court convicted him of rape. Since the exoneration from trafficking was not based on the victim's lack of credibility, we can still profit from the victim's explanation of her delayed complaint, which is a composite of her **vulnerabilities** (he was like a father to her, she was dependent on him for food and school fees and she was far from home in his house); her **fear** that he would stop paying for her school fees; and her **apprehension** that her parents would not believe her.

Additional examples of a failure to complain occur in **Mahuni (Zimbabwe)**,³⁴ a case of procurement for prostitution, where the victims explained that they were afraid to complain, as the accused told them that her boyfriend was the head of police; **Esther Phiri (Zambia)**, a case of child trafficking, where the minor victim did not tell her great uncle of her situation because she was afraid, as she was far from home and in the capital city of Lusaka for the first time in her life, and because the accused told her not to tell him anything.

³³ The King v. Phatsakahle Mike Mndzebele, Court Case No. SDV 51/15 in Subordinate court for the District of Manzini

³⁴ State v. Mahuni, CRB No. 1657/14 before court in Harare, January 8, 2016.

Matini (South Africa) too includes a failure to complain on the part of the sister of a sexually exploited minor called Mareeza. Her words, as reported by the court, are particularly powerful, revealing the sisters' lack of options in life:

"She did not complain as both of them were without refuge. They needed a place to stay."

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage - Conviction 27/10/2017, sentence 8/2/2018.

This victim also mentioned that she feared the accused and her son.

A good illustration of significant delay in reporting a crime and reluctance to testify appears in **Mabuza (South Africa)**. One of the minor girls, sexually exploited, only told the prosecutor about her rape after the other victims had revealed what happened to them. This was at a late stage of the proceedings when the prosecutor had decided to indict the accused persons, but before their pleas. The delay transpired, though this minor was previously approached by the principal of her school, a social worker and an investigating officer. When asked why she had not spoken before, she told the prosecutor that she did not believe anyone would have helped her. The following are her words, as reported by the court of first instance:

"...she said she was afraid and ashamed to tell them. She trusted no one, not even Alcinda³⁵ because she did not help her...The reason that she advanced for this late disclosure was that when she saw that the other children were free to disclose what had happened to them, and when she saw she could trust the prosecutor, she disclosed her ordeal in detail".

S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed **Mabuza v. State** Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the ruling of the court of first instance.

However, even after this victim's complaint was lodged, she was still reluctant to testify. The court enumerates a number of reasons for this: firstly, she was afraid and did not trust anyone; secondly, she had not seen her mother for a very long time and when called to testify, she became aware of the fact that her mother was in court, but was not permitted to see her before she testified. The court notes that this made her cry often and hold back; finally, when informed that her evidence could not be finalized in one day, she cried and was unwilling to continue to testify. However, despite these weaknesses, the court found her evidence to be clear and credible.

Yet another case illustrating a delayed complaint is **Fakudze (South Africa)**.³⁶ Here a minor, 13 years old, was sexually exploited by her stepfather for a number of months until she fell pregnant. Despite the fact that she was permitted to go to school, she did not report the exploitation until she fell pregnant and was taken to the hospital. The court of first instance does not address this weakness explicitly, but dwells on her credibility at length:

³⁵ Alcinda was the wife of an employee of accused number1 who took this victim into her home in order to rescue her from the exploitation. However, the victim did not get along with one of Alcinda's children and fled from her home.

³⁶ State v. MMF, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in **Fakudze v State** Case no: AR410/2018 in the High Court of **South Africa** KwaZulu-Natal Division, Pietermaritzburg, June 7, 2019. NOTE: This case will be referred to as **Fakudze (South Africa)** in this digest.

"The complainant, despite her youthfulness, gave a clear logical and chronological account of what happened to her. She made a good impression on the court. Although she went through a very traumatic experience, she was able to tell the court exactly what had happened to her. The court finds that she is a credible witness and despite being thoroughly cross – examined, remained steadfast. The Court cannot find that she was trying to falsely implicate the accused or exaggerate her story. She could have told the court for example that the accused threatened or forced her to go with him, but she did not."

State v. MMF, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017 sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in *Fakudze v State* Case no: AR410/2018 in the High Court of **South Africa** KwaZulu-Natal Division, Pietermaritzburg, June 7, 2019.

As in many other cases, though the court does not explicitly connect the delayed complaint with the victim's **vulnerabilities**, it does note them. She was a young child, illegal in a foreign country, wholly dependent on the accused for food and shelter and looking upon him as a father. Although the court of appeals reversed the court of first instance's conviction on trafficking, it was not on the basis of the victim's delayed complaints, as shown by its confirming his conviction on rape.

Another case of a delayed complaint is **Ntonga (South Africa)** in which the victim did not report her rape at the first opportunity. The court notes this omission and explains it by means of her **vulnerability** thus: *"On the contrary, her reluctance to speak is, given her age, understandable, given the ordeal she had been subjected to."*

An example of a reluctance to testify appears in **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)**,³⁷ a case revolving around trafficking in the context of domestic servitude. Here, the prosecutor describes in detail, the difficulties he encountered in persuading the victim to tell her story:

"At first it was very difficult to gain her confidence. She clamped up and would not speak, as she was not sure who she could trust."

Rex v. Yoseph Girmay Testagaber, Adanech Beru Woldegioregis, CR:07/12, before the Magistrates Court for the District of Maseru, verdict 17/12/2012.

The prosecutor took pains to gain the victim's confidence, but on the first day of trial, when she saw the accused, she froze and could barely say a word. The prosecutor was forced to request a postponement to reassure her again. Even when the case resumed, she testified with difficulty. The court exonerated the defendants from a charge of trafficking.

³⁷ Rex v. Yoseph Girmay Testagaber, Adanech Beru Woldegioregis, CR:07/12, before the Magistrates Court for the District of Maseru, verdict 17/12/2012. Case summary available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO003). We did not have access to the full case, as the verdict was rendered ex tempore (on the spot) and information on it was supplied by the investigating officer and prosecutor.

Tools to help evaluate failure to complain and delayed complaints

1. Is there an explanation for the victim's behaviour? (Fear of harm or deportation, shame, lack of trust in the authorities or the world at large, lack of options, dependence on the accused, coaching by the accused, unfamiliar environment, family relationship with the accused, other vulnerabilities?)
2. Is the victim otherwise credible? (Is there corroboration? Is her account coherent and steadfast?)
3. How can the prosecutor encourage a victim to testify?

2.2.1.5 Partial complaints/telling the story like the peeling of the onion

As a rule, not telling the whole story immediately can be considered a sign of lack of credibility, under the assumption that if the whole story were true, it would be natural to tell it immediately. However, in cases of trafficking in persons, partial complaints are prevalent, and may be due to an array of reasons other than lack of credibility: the fear that part of the story will seem implausible, shame at the victim's own behaviour, lack of trust in the authorities, trauma, and the victim's own vulnerabilities. For these reasons, often victims initially reveal only the tip of the iceberg and focus on non-payment of salary, leaving out facts which seem far more glaring, such as violence, restrictions of freedom, degrading treatment. Only little by little, often as a function of the trust practitioners succeed in establishing, do victims tend to reveal more and more – like the peeling of an onion.

The global case digest includes a quote on this phenomenon, which is so important, that we reproduce it here³⁸:

The partial delayed complaint: a practitioner's explanation

"I often see a formula that arises, particularly in cases of adult trafficking. The trafficker identifies the victim's vulnerability, targets the victim, creates a hope for the victim and offers to fulfil the hope, thereby creating a dependency which can be as simple as the promise of a job. This is the tactic employed by the trafficker to ensure that the victim has had a hand in his or her own fate which often impacts on the victim's willingness to disclose the whole story, as the trafficker knows. The 'mistakes' the victims make profoundly affect their confidence, identity and self-esteem to the extent that they often want to block out the parts of the story for which they blame themselves, concentrating on the peripheries (such as loss of wages) which have less of a destructive influence on their sense of self. This applies to men and women. Men often do not want to expose their physical or mental ill-treatment, fearing that they will be seen as weak, but are certainly willing to say that they have not been paid, as that is not a reflection of who they are but of what someone else has done wrong."

This explanation was given by an expert from the United Kingdom

This pattern can be seen in **Alam (Seychelles)**. This was a case where the accused brought four persons from Bangladesh to work for him in **Seychelles**. They were the sole breadwinners for their families who lived in impoverished conditions, and borrowed large sums of money to pay recruitment fees. They were deceived as to their salaries, the nature of their work, and the hours of work; were not paid salaries for months; were housed in inhuman accommodations; forced to work around the clock; not given safety equipment; and not supplied with adequate food. Instead of working in one place, they were farmed out to private employers who paid the accused. In addition, the accused threatened to kill them, to harm their families and to deport them if they complained. He also claimed that he had connections in the police. He did not obtain legal visas for them and detained their passports. They were in a foreign country with which they were not familiar and experienced language difficulties.

³⁸ See global case digest, section 2.2.1.2, on "delayed complaints/absence of complaints/reluctance to testify", on page 19 of the English version.

All the victims entered into a mediation process which concerned only non-payment of salaries and in the end received only 2 months salary instead of 4. Two workers also complained to the Ministry of Employment about their accommodations. In addition, some of the victims informed one private employer of non-payment of their salaries and another private employer of more details of their plight: non-payment of their salaries, their hunger and the threats they faced. When one of the private employers turned to the police, a worker refused to talk to them.

The whole story came out only in the course of the investigation. Here, it is of note that the investigating police officer made arrangements with the Immigration Department to place the workers who had been exploited in different accommodations, as the present ones were not proper, and to prevent intimidation by the accused. He also made arrangements for an interpreter in order to properly interview the workers. This kind of treatment may very well have built trust and encouraged the victims to tell the whole story. The accused was convicted of trafficking for practices similar to slavery and forced labour.

Another interesting case in this regard is **Mujee (Botswana)**,³⁹ which revolves around the trafficking for sexual exploitation of a 16 year old girl. In her testimony, the girl tells of her deceptive recruitment by the accused, under the guise of helping her to obtain a job as a maid, and the series of rapes which ensued. She also mentions the accused's control methods, including restrictions of freedom, threats and isolation. However, she does not mention that the accused assaulted her with a stick, something which is attested to by another prosecution witness and by the accused herself. The court does not note this lapse, finds the victim to be credible nonetheless and convicts the accused of trafficking for sexual exploitation.

2.2.1.6 *Seemingly inappropriate emotional reactions/individual reactions*

Credibility does not depend only on the coherence and logical rendition of testimony, but rather also on the demeanour of the witness. Part of that demeanour includes emotional reactions. Police, prosecutors and judges evaluate these reactions in order to gage if they are in tune with the witness' story. If they are not, this may raise doubts about the witness' credibility. For example, crying when telling a story about violence against one seems appropriate, whereas seemingly laughter does not.

Moreover, we tend to expect that victims who have experienced a trafficking situation together, will react in similar ways. If they react differently, we may conclude that some of them are not credible.

These intuitive conclusions are a function of evaluating victim behaviour in terms of our own experiences. We tend to ask ourselves how *we* would have reacted to such a situation, and if a victim's reaction departs from this "norm", we tend to doubt his or her credibility. Sometimes this is a reliable measure of credibility, but in trafficking in persons cases, there may be reasons other than lack of credibility when victims react in seemingly inappropriate ways. These may be a function of psychological processes connected to trauma or a release of long pent up tension. Moreover, individuals may react to the same situation in different ways.

In a book entitled "Trauma and Recovery" by Dr. Judith Herman, she addresses this topic:

³⁹ The State v. Sarudzai Mujee, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021; sentence 14 July 2021

Dr. Judith Herman on victim emotional reactions

"People who have survived atrocities often tell their stories in a highly emotional, contradictory, and fragmented manner which undermines their credibility...traumatized people alternate between feeling numb and reliving the event..."dissociation." it results in protean, dramatic, and often bizarre symptoms of hysteria..."

Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997) pp. 1,2.

This description seems to perfectly fit the behaviour of the victim called Harmse in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two addicted young women. Harmse alternated between laughter and uncontrollable crying. On the night of her rescue, Harmse told police that she had just been raped by the accused. The court describes the testimony of one of the police officers who participated in the rescue:

"She described Harmse's condition as being in a state of shock, disoriented and mostly incoherent. It appeared as if she was drunk or on drugs and was laughing for no reason...She had to assist the victim to the car as she had trouble walking."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria 27 November 2017

However, during the trial, shortly after commencing testimony by close circuit television, Harmse started to cry uncontrollably and the parties agreed to postpone the hearing. Subsequently, she testified in court via an intermediary, because although she was 19 years of age when she testified, her mental age was estimated at between 14 and 18 years of age, and it was thought that undue mental stress or suffering would be caused if she testified directly before the accused.⁴⁰

Although the court did not explicitly address Harmse's emotional reactions during her rescue and on the stand, as problematic in terms of her credibility, it noted them, and concluded nevertheless, that she was a credible witness. In view of her mental age, the court did exercise caution, but noted that she presented her evidence in explicit detail, and in a logical and coherent way. The court added that both she and the other victim impressed the court as truthful witnesses. Their versions remained unshaken under cross examination; there were no material contradictions between them; their evidence was unequivocal, clear and satisfactory; it was supported by independent witnesses.

In a number of cases across the region, we encounter individual reactions of victims who underwent a trafficking situation together, during the investigation and court process. In none of them does the court impugn their credibility because of these differences. This calls to mind the approach of an experienced practitioner regarding victims in general:

Practitioner's approach to individual differences in victim reactions

"Victims come in many shapes and sizes"

UNODC Expert Group Meetings on the global digest (6-8 May 2014) and on the draft issue paper on the 'role of consent in the trafficking in persons protocol' (17-18 February 2014).

Such a scenario unfolds in **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, where the court noted that in terms of demeanour on the stand, the victims demonstrated different emotional reactions. Two were angry and desperate, and one was very emotional and cried. Although the court did not explicitly address the differences in these emotional reactions as problematic in terms of credibility, it did note them and yet

⁴⁰ These are the conditions of allowing a witness to testify via an intermediary, rather than directly, as set forth in Section 170A(1) of The Criminal Procedure Act 51 of 1977 of **South Africa** which addresses testimony via an intermediary. For the full text of this provision see section 5.2 on victim protection steps undertaken by police, prosecutors and judges.

convicted the accused of trafficking in persons for forced labour. Here it should be noted that the victims corroborated one another and that there was supporting evidence in photographs of their accommodations, various testimonies and labour documents.

A similar pattern can be found in **Lukas (Namibia)** where two minors were trafficked for sexual exploitation. In their testimony before the court, one minor girl testified that she viewed the sexual molester as her boyfriend and wanted the relationship to continue in order to continue to receive monetary benefits. The court viewed her as desensitized to the horrific sexual exploitation she had undergone. On the other hand, the other minor girl was ashamed of her part in the sexual encounter and filled with “*childlike confusion*” when she testified before the court. Though there is no explicit discussion of this aspect of the case, the court did not impugn the credibility of either girl due to their very different emotional reactions, and convicted the accused of trafficking for sexual exploitation.

Similarly, in **Veeran Palan (South Africa)**, which revolved around the trafficking for sexual exploitation of two young women, one victim, named Candice, was upset and outspoken when rescued, whereas the second victim, named Samantha, cried a great deal when questioned and her full statement could not be taken down. This calls to mind the **Alam (Seychelles)** case described above where some victims were angry, whereas one cried incessantly.

Although the court does not explicitly refer to these individual emotional reactions as problematic in terms of credibility, it views the two victims as credible witnesses despite them. The court analyzes the victims’ credibility holistically, in an effort to contextualize it on the background of the totality of the evidence, rather than by analyzing each piece of evidence in isolation.

In **Eze (South Africa)**, the two victims of trafficking for sexual exploitation had different emotional responses in the aftermath of the trafficking. As seen above, Harmse alternated between laughter at the time of her rescue, and uncontrollable crying, when testifying on the stand. On the other hand, the second victim, Els, is never described as laughing, and she testified in an intelligent and lucid manner, despite being subjected to lengthy and grueling cross examination. Although the court did not explicitly address the ramifications of these widely different emotional reactions on the credibility of the victims, it viewed both of them as credible witnesses. This conclusion was strengthened by the fact that each corroborated the other and that their testimony was supported by other independent witnesses.

2.2.2 Cases with partial or no victim testimony

As said, in general, the central “piece of evidence” in a trafficking in persons case is the victim. Even if there are supporting witnesses, documents and “real” or physical evidence, as a rule, the victim’s testimony is necessary in order to explain the context. As a result of this reality, there are very few convictions where victims did not testify, or where there was only partial victim testimony. Sometimes the prosecutor withdraws the case before it comes to trial, and sometimes, the court’s exonerates.

Despite this general rule, there are cases in which the court convicted an accused of trafficking in persons, either without victim testimony or with only partial victim testimony. This can happen if victims cannot be traced, have died, were under the influence of alcohol or drugs during the events, or are not competent to testify. Often in these cases, the court relies on other witnesses and on victim statements before the trial commenced. Naturally, a reliance on victim statements is easier in civil law jurisdictions which do not have exclusionary rules, than in common law systems which espouse the rule against the admission of hearsay evidence. However, as we will see, there is at least one case in a common law jurisdiction, in which victim statements were admitted and formed part of the foundation for the conviction of the accused persons.

In **Criminal Judgment No 45-CO of April 25, 2019 (Madagascar)**,⁴¹ the case revolved around a brother and sister who deceived a young woman about a job opportunity in China, whereas they knew that she would be forcibly married to a Chinese man and her children taken from her. This was part of a *modus operandi* by the perpetrators whereby they colluded in this way in respect of a number of young women. As a rule, the sister, who was married to a Chinese national, operated in China to ensure the general organization, and the brother's role was limited to the preparation of the girls' papers in **Madagascar** and the sending of the girls to China. However, in this case, since the sister was in **Madagascar**, she prepared the papers, organized the trip, and accompanied the victim to China, whereas the brother only provided transportation to the airport and participated in his sister's lies to convince the victim to go to China. The brother received a sum of money from his sister for his part in the transaction. The young woman was taken to China and the complaint was submitted by her mother.

The only testimony in the case was that of the brother who was one of the accused persons. The victim did not testify, because she was still in China and could not be heard or questioned. Yet the court convicted both the accused persons of trafficking for forced marriage, apparently in view of the brother's admissions. Since the case does not analyze the evidential picture in detail, many questions are left unanswered and for example: Was there evidence of the actual forced marriage, of the intent that the husband and his family forcibly remove a child? The court seems to assume these facts, but the evidential basis is not clear. Was there a statement from the victim before the court respecting this exploitation? Did the brother testify regarding this? We do not know. We note that **Madagascar** has a civil law system, which facilitates the admission of victim statements, compared to common law systems.

Another case in which there was a conviction despite the victims' failure to testify is **Martinet (Mauritius)**.⁴² The case revolves around the trafficking of two minors for sexual exploitation. The two minors were not brought to testify. Rather the conviction rested on the testimony of a police officer and admissions made by the accused number 1 who later denied the charges in court. The police officer saw the minors trying to escape from the accused number 1's premises. They were later brought to the police station and an enquiry was held with them. Subsequently a reconstruction exercise was held at the premises of the accused number 1.

The accused number 1, in her unsworn statement before the police, said that she was poor and in order to earn money would visit a bus station, where she would offer accommodation to girls in financial difficulties. She would then lead them to prostitute themselves. In this case, the first minor was a homeless girl, 13 years of age, who was recruited at the bus station and then made to prostitute. The second minor, 14 year of age, was her cousin who was also experiencing family and financial problems and was recruited by the first minor.

The court convicted the accused number 1 of child trafficking on the basis of these pieces of evidence and the birth certificates of the minors, and noted that the accused number 1 did not challenge what she had said in her statement to the police.

This case leaves unanswered the question of why the minors were not brought to testify. Perhaps it was considered injurious to their well-being to have them relive their exploitation, or perhaps they were unable to testify. However, these are only guesses.

⁴¹ Criminal Judgment No 45-CO of April 25, 2019 in the Supreme Court of **Madagascar**. We note that there were two accused and that there was a default judgment in respect of one of them.

⁴² Police v. Martinet C G and others, Cause Number 672/09, 2009 INT 253. A summary is available in the UNODC Human Trafficking Case Law Database (MUS002).

Similarly, in **Mutwale (Zambia)**,⁴³ a case revolving around the child trafficking of five minors from the **Democratic Republic of the Congo**, the children themselves did not appear as witnesses for reasons that remain unclear. Perhaps the prosecution did not wish to bring them to court because of their young ages (they ranged from 10 years old to 8 years old), or perhaps language difficulties were experienced in communicating with them, as noted in the case. The conviction relied on the testimony of a woman who claimed that she was their grandmother and the testimony of police and immigration investigators.

Matini (South Africa) presents us with several kinds of victims who did not testify. The case revolves around the trafficking for sexual exploitation of a number of victims, some of whom were minors including two mentally disabled minors. While some testify, others did not.

A victim ruled incompetent to testify: Two central victims were mentally disabled. However, only one of these testified. The court ruled that the other, named Sibahle, was not competent to testify because she could not distinguish between the concepts of truth and lies. The court notes: *“She was a silent person, not really able to converse.”* Nevertheless, the court convicted the accused persons of trafficking Sibahle, although her testimony was not heard. In doing so, it found ample proof in the testimony of her friend, who told about Sibahle’s abduction and exploitation. In addition, the court noted the testimonies of numerous other witnesses, who saw both mentally disabled victims at the dominant accused person’s residence. Moreover, the second accused’s brother testified specifically about an incident reflecting Sibahle’s exploitation, and said that a man named Akhona arranged to take Sibahle and gave the accused 1 280R to buy food as payment for the girl. He also noted that Sibahle was crying when she was taken by this man, and that both she and her fellow victim were returned to the first accused’s residence the next morning at 5 a.m.

Deceased victims: The court convicted the accused persons of trafficking a victim, named Amanda Hans, who did not appear in court because she was deceased. Her statement in the police was admitted as proof. In addition, several witnesses, including fellow victims, testified as to her plight. We note that the court in this case is a **common law jurisdiction** which generally excludes hearsay evidence such as victim’s statements recorded outside the courtroom. For this reason, the court embarks on a lengthy analysis of the exceptions to the rule against hearsay and concludes that this victim statement should be admitted. In doing so the court stresses the unavailability of the victim to testify, the crucial nature of the evidence and the fact that its reliability is ensured by the corroboration of witnesses who testified before the court.

On the other hand, the court did not allow the admission of a statement given by another victim, named Mareeza, although she had been stabbed and killed. The court’s reason for not admitting this statement is that it was not taken down according to the proper procedure for authentic police statements, which meant that its reliability was suspect.

In **Kapinga (Malawi)**,⁴⁴ the case revolves around a charge of child abduction where a 7 year old child is sold to work in a maize mill. In the sentencing verdict the court notes that the child is still missing after 7 years and is presumed dead. The main testimony against the two accused buyers is the seller, who was previously convicted of the crime. However, the court convicts, despite these evidential weaknesses and rules that the seller is a credible witness, although it cautions itself in view of his connection to the crime.

Similarly, in **Mjwanga (Tanzania)**, a case which revolves around child selling, the child victim, 10 years of age, was not available for testimony. The accused was apprehended by means of a

⁴³ People v. Mutwale, Case No. IU/130 in subordinate court of the first class for the Sesheke District at Sesheke [Criminal Division] 25 February 2016.

⁴⁴ Kapinga v. The Republic, Criminal Appeal No. 22 of 2015, in the High Court of **Malawi**, January 4, 2017

sting carried out by four parties, one of whom posed as the buyer. The High Court affirmed the court of first instance's conviction despite the absence of victim testimony and affirmed the admissibility of the victim's statement instead. In doing so, the court stressed that efforts had been made to find the victim to no avail, that there is no law that requires that the victim testify and that the other witnesses brought by the prosecution were credible. We note that **Tanzania** is a common law system as regards evidentiary rules, which necessitated categorizing the victim's statement as an exception to the rule against hearsay evidence.⁴⁵

Mboo (Zambia) presents us with an example of a victim who testifies before the court, but does not add any relevant information to substantiate the charge.

The case revolves around an attempt of the victim's brother in law to traffic him for removal of organs. At the time of the crime, the victim has come to visit the accused with his child, after losing his wife. On the night of the planned sale, the brother in law encourages the victim to drink much beer, to the extent that he can hardly walk. The person approached to buy the organs informs the police of the intended sale, and they witness the attempted transaction, arrest the accused person and rescue the victim. The victim is taken to the police station and put in a cell. When he first testifies, he says that he does not remember anything and is declared a hostile witness. Subsequently, he returns to testify and explains that he was plied with beer and does not know anything about the plan to sell his organs, since he was drunk and did not know how he ended up in a police cell.

The court convicted the accused brother in law of trafficking for removal of organs, on the basis of the testimony of the police officers and the person approached to buy the victim's organs, who participated in the sting. It stressed, in particular, the importance of the buyer's testimony as an independent witness. This witness testified that the accused advertised the sale of a human being and sold the victim in his presence, after having made him drunk and offering to kill him for his tongue, heart and private parts. The court also noted a partial confession made by the accused and the weakness of his explanations.

Vulnerability as a subtext: In all the above cases, though the court does not explicitly connect the crime with the vulnerability of the victim who fails to testify, it notes their vulnerabilities. For example, in **Martinet**, the victims are minors of 13 and 14 years of age with financial and family problems and one is homeless; in the **Madagascar case**, the victim is a young woman who is deceived and taken to a foreign place where she does not know the language or culture; in **Matini**, 1 victim who did not testify is a mentally disabled minor and the other is a young woman who desperately needed a job and is now deceased; in **Kapinga**, the victim is a child of 7 years; in **Mboo**, the victim is a young man who has just lost his wife and has been left to care for their child. In addition, the trafficker is a trusted family member, thus creating an emotional vulnerability. Moreover the victim is encouraged to drink until he can hardly stand. It is possible that these vulnerabilities contributed to the failure of these victims to testify.

⁴⁵ See Bahame Tom Nyanduga and Christabel Manning, "Guide to **Tanzanian** Legal System and Legal Research", Hauser Global Law School Program, available at <https://www.nyulawglobal.org/globalex/Tanzania.html>

Tools to assist courts in the absence of victim testimony

1. Why does the victim fail to testify? (Is he or she deceased? Is it impossible to trace him or her? Is he or she in a foreign country? Is he or she mentally or emotionally unable to testify? Incompetent to testify? Otherwise unavailable?)
2. Do the victim's vulnerabilities provide an explanation of his failure to testify?
3. What other evidence supports the charge? Is it reliable? Sufficient? (Testimonies of independent witnesses? Confessions or admissions of accused persons? Documents? Real or physical evidence?)
4. Can the victim's statements be admitted as evidence? What are the safeguards to ensure their reliability?

2.3 Testimonial evidence of persons other than victims

2.3.1 Introduction

While victim testimony is usually central to trafficking in persons cases, other testimonies can either support it, or serve as sufficient bases to convict, even without it. Cases around the region illustrate the wealth of testimonies which can help to build a case, and for example: taxi drivers, customers, landlords of premises, neighbors, employers, law enforcement personnel, relatives of the victim or the accused person. Conversely, such testimonies may help to exonerate the accused person.

It is especially important to seek out reliable sources of information, other than victims, in view of the typical weaknesses of victim testimony and behaviour,⁴⁶ which may require the support of corroborating testimony. Sometimes courts criticize the quality and sufficiency of the investigation if it relies solely on victim testimony. One example is **Koch (Namibia)**, a case revolving around the sexual exploitation of several children, where the court notes that the quality of the evidence is very poor, as only the minor victims are brought to testify and they contradict one another.

This section can be particularly useful to practitioners trying to build a trafficking in persons case, by providing ideas as to possible sources of important information. We note that the following is not an exhaustive list of such testimonies.

2.3.2 Police officers or investigators from regulatory bodies

Police officers testify in almost every case of trafficking in persons (although some courts emphasize the importance of independent witnesses as distinguished from police⁴⁷). In addition, though less prevalent, investigators from regulatory bodies like Immigration Ministries or Ministries of Employment sometimes provide useful testimony.

There are any number of important facts that police officers or other investigators can point to, and for example:

- *Emotional state of victims when rescued:*

This information can help to establish a victim's credibility or lack thereof.

Thus, in **Veeran Palan (South Africa)**, a case revolving around trafficking for sexual exploitation, the police officer who participated in the rescue of the two victims from a bar testified that: "*The two were very scared, looked around furtively and urged him to take them away from there.*" The police officer who was present at the interviews of the two victims at the police station

⁴⁶ See sections 2.2.1 regarding *typical weaknesses in victim testimony* and section 3.3.8 regarding *victim behaviour in the course of the trafficking process*.

⁴⁷ For example, in the **Mboo (Zambia)** case, which revolves around trafficking for the removal of organs, the main witnesses were two police officers and the person approached to buy the organs. The court stresses the importance of the prospective buyer's testimony, as he is an independent witness.

testified that: “Candice was upset and outspoken but Samantha cried a great deal when questioned and her full statement could not be taken down.” These emotional reactions seem to denote that the victims underwent a harrowing experience.

In **Matini (South Africa)**, a case revolving around the sexual exploitation of a number of victims in a systematic way, the police officer who met the mentally disabled minor victims after their rescue said that “*The children complainants were in a bad state and they were referred to Kwanobuhle outreach centrum for counselling.*” This evidence too, seems to point to a difficult experience that the victims experienced.

In **Eze (South Africa)**, a case revolving around the sexual exploitation of two young women, a police officer who participated in the rescue of the victim Harmse, described her state of shock, disorientation and incoherence and told of her talking loudly and laughing, even though she had just told the police of her rape. Though this is a seemingly inappropriate reaction to rape, it may denote the trauma she was laboring under.⁴⁸

In **Allima (South Africa)**, a case revolving around the sexual exploitation of a minor, a police officer who accompanied the victim to the accused’s residence testified that when the victim identified the accused she seemed angry. Once again, this reaction is appropriate to the victim’s story that she was abused.

In **Mabuza (South Africa)** a case revolving around the trafficking for sexual exploitation of several children, a police officer noted that the minor girl who was reluctant to cooperate was uneasy and uncooperative in making full disclosure of what happened.

In **Alam (Seychelles)** an investigator from the Ministry of Employment testified that when he tried to interview the victims to understand what had happened, they seemed afraid to respond and told him to call accused. This fear can be seen to corroborate the victims’ story that they lived in a climate of fear, fraught with threats of harm and of deportation.

- *Physical appearance of persons or premises*

Police testimony can also be important in order to describe the appearance of persons like the victims or the accused and of the premises in which the victims of trafficking were held. These details can serve to support or refute victims’ descriptions of their ordeal.

For example, in **Mabuza (South Africa)** police who participated in the rescue reported that the minor victims were in a bad shape, clothes in tatters and dirty, their hair unkempt and in dreadlocks, and they were also clearly very hungry. This served to support the children’s stories about the conditions under which they were held.

Another example can be found in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs. The police who participated in the rescue noted that the refrigerator in the accused’s residence was empty, thus confirming the victims’ account that they were denied regular meals. They also noted white powder on the toilet seat which was taken to a laboratory and proved to be cocaine, thus confirming the victims’ testimony that the accused regularly gave them drugs. They also noted the appearance of the victim Harmse who was in a scanty negligee, whereas the accused was naked except for a pair of pants. This provided some support for the victim’s claim that sexual relations had occurred between her and the accused a short time before the rescue.

Interestingly, in this case a police officer also testified that the two victims underwent drug withdrawal symptoms at the safe house to which they were transferred. This served to support their stories about the accused’s manipulation of them via drugs.

Similarly, in **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, a police officer testified that the victims looked “thin”, and that there was barely any food in the refrigerator, which supported the workers’ story that they were denied

⁴⁸ See analysis in section 2.2.1.6 on “*seemingly inappropriate emotional reactions*”.

adequate food. In addition, an investigator from the Ministry of Employment noted that the accommodations of the victims were dilapidated and dangerous to their health, and for example no electricity or floor tiles, a soak pit in the front of the house, leaking water, a broken washing basin and lack of essential storage facilities like refrigerators. This supported the victims' testimony about problematic accommodations.

In **Jezile (South Africa)**,⁴⁹ a case revolving around trafficking for sexual exploitation in the context of forced marriage, a police officer described the physical appearance of the victim right after her escape from the accused. According to him she limped and had a deep wound on her thigh which was starting to heal and a bruise on her back. This served to support her claims that the accused had beaten her.

- *The reactions of victims or accused persons at early stages of the investigation*

Sometimes police officers testify as to the reactions of accused persons or victims during an early stage of the investigation. Whereas consistent reactions can serve to support a version, inconsistent reactions at different stages of the investigation and testimony can serve to impugn credibility.

Thus, in **Jezile (South Africa)**, a police officer noted that at the police station, the victim said that she was hit by the accused and that she did not want to be married to him, but rather wished to be with her mother and return to school. In **Matini (South Africa)**, a case revolving around trafficking for sexual exploitation, a police officer testified that the statements of the accused before magistrates, at an early stage of the investigation, included admissions.

In **Alam (Seychelles)**, an investigator from the Ministry of Employment testified that workers told him that they had not been given enough food and had to work overtime and that one paid a heavy recruitment fee to the accused and his brother, later confirmed by their testimonies in court.

In **Mutwale (Zambia)**, a case which revolved around the trafficking of a group of children via **Zambia**, the police investigator noted that the children did not respond to the names given to them by the accused, and an immigration officer testified that the children did not speak **Zambian** languages and that the false passport of the accused included names which the children did not respond to. This information raised suspicions of an attempt to traffic the children.

In **Mujee (Botswana)** the police officer who rescued the victim notes that when asked if she had undergone sexual exploitation, her response was "yes".

2.3.3 Relatives and romantic partners of the accused

In various cases, relatives or romantic partners of the accused provide important testimony.

The most prominent example is **Mahuni (Zimbabwe)**, a case which revolves around procurement for prostitution. The **niece of the accused** not only confirmed the victims' story, but also helped to rescue them. In her testimony, she told of a meeting convened by the accused in which she emphasized to the two victims that they were now in a foreign country with different rules, and confiscated their phones and passports. She also testified that the victims told her that the accused was bringing men to her house for the purpose of sexual intercourse with them. In addition, on a number of days she herself saw men leaving the house where the victims slept. In the end, this niece assisted the two victims to escape without passports.

In **Jonas (Namibia)**, a case which revolves around the recruiting of a victim for sexual exploitation by a succession of men, the **cousin of the accused**, who had also been victimized by her and recruited to be sexually exploited, confirmed the pattern of sexual exploitation in the victim's testimony. She also allowed the victim to stay with her at one point and provided a refuge for

⁴⁹ Jezile v. State, HCC No. A 127/2014, High Court of **South Africa** (Western Cape Division, Cape Town) (23 March 2015), available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF011).

her. In addition, the **boyfriend of the accused** confirmed the pattern of the accused giving girls to men as ‘wives’ for payment. Finally, the **sister of the accused** confirmed that she gave the accused her birth certificate, in order to be used as identification for the victim at roadblocks, as the victim did not have a birth certificate. This confirmed the accused’s use of fraudulent documents in pursuit of her criminal purpose.

In **Matini (South Africa)**, the case revolves around the systematic sexual exploitation of several victims, some of whom were minors, including two mentally disabled children. A number of relatives of the less dominant accused (accused 2), confirm the victims’ stories in their testimonies. The **brother of accused number 2** confirms the victims’ story as to the sexual exploitation of the mentally disabled children by men who paid the accused number 1. In addition, the **stepfather of accused number 2** confirms the pattern of accused number 1 bringing girls to her house for the purpose of sexual exploitation by men who paid her with food and other comestibles. He also confirms seeing that a number of men were seen with the two mentally disabled children. **Accused 2’s mother** also confirms the pattern whereby accused number 1 brought new girls to her house and received payment for their sexual exploitation. In addition, she confirms that this pattern applied to the two mentally disabled children, whose sexual exploitation was paid for by soup packs and other food items.

2.3.4 Relatives and romantic partners of the victims

Relatives and romantic partners of victims often testify in cases of trafficking in persons. The most prevalent relatives are mothers⁵⁰ and grandmothers⁵¹ of victims, but other relatives like great uncles,⁵² great aunts,⁵³ husbands,⁵⁴ boyfriends,⁵⁵ uncles⁵⁶ also provide valuable information. Often, these testimonies support the facts told by the victim and also shed light on the emotional state of the victims during and after the trafficking process.

A few examples illustrate how much these testimonies can contribute.

In **Veeran Palan (South Africa)**, the case revolves around the sexual exploitation of two vulnerable young women. The mother of Candice, one of the victims, confirmed her story as to the recruitment process via the accused number 2; the request of accused number 1 that she buy Candice a cell phone so that he could maintain contact with her; the calls Candice made to her which revealed that she was being asked to prostitute herself; and the fact that the accused number 1 threatened Candice not to contact home again, which threat she heard by phone, because Candice did not end the conversation when they finished speaking.

In **Jezile (South Africa)**, the case revolves around trafficking for sexual exploitation, in the context of the forced marriage of a minor. The victim’s mother provides important support to the testimony of the child victim. She testifies that neither she nor the girl ever consented to the marriage; that the girl told her that she wanted to return to school rather than marry; that the girl made an effort to flee her “husband”; that she was made to travel with him to Cape Town. The mother describes the girl’s emotional state when she met her after she had fled as hysterical,

⁵⁰ See for example, Veeran Palan (**South Africa**); Ogochukwu (**South Africa**); Chiyenda (**Malawi**); Mndzebele (**Eswatini**); Koch (**Namibia**); Dragon (**Namibia**), Lukas (**Namibia**); Jezile (**South Africa**).

⁵¹ See for example, Matini (**South Africa**).

⁵² See Esther Phiri (**Zambia**).

⁵³ Ibid.

⁵⁴ See for example, Veeran Palan (**South Africa**).

⁵⁵ Ibid.

⁵⁶ Ibid.

crying uncontrollably. She also testifies that the girl's emotional state was so difficult at one point that she feared that she would take her own life. She maintained contact with the girl while she was in Cape Town and testifies that the girl told her that the accused is a violent man. Moreover, she testifies that the accused person called her and admitted that he had hit the victim with a mop handle and that the victim had disappeared.

This testimony derives from her contact with the victim when she fled the marriage and the phone conversations she carried on with her and with the accused when the victim was made to travel to Cape Town.

In **Mndzebele (Eswatini)**, the case revolves around the sexual exploitation of a young girl of 16 from an impoverished family by a pastor who promised to pay her school fees if she came with him to his home.

The mother of the victim testifies about the recruitment process by the pastor and about the subsequent refusal of the girl to return to him. Although the girl does not divulge what is happening to her, she is clearly in a difficult emotional state when she tells her mother that she cannot go back. When her mother asks her why she cannot tell her the reason for her refusal, she starts crying hysterically and saying that she will never trust someone who calls himself a pastor. When her mother questions her further, she cries even more and the mother says that she could not control her. The mother pleads with her to return to the pastor so as to continue with her education, but the girl tells her that something evil is being done to her by the accused, though she does not reveal what that is. The girl tells her it would be better for her to die than to go back.

Clearly this testimony supports the victim's story of a series of sexual exploitation. Although the accused was exonerated from charges of trafficking in persons, this was not on the basis of lack of credibility, but rather because the court was not certain that the accused had intended to sexually exploit the girl when he first recruited her. In the end, he was convicted of rape, which shows that the victim was considered a credible witness, which credibility was enhanced by the testimony of her mother.

In **Matini (South Africa)**, one of the mentally disabled minor victims of trafficking for sexual exploitation lived with her grandmother who provides important supporting testimony to the case against the accused. She tells of the mental disability of her granddaughter; of the accused number 2's appearance in her house on the day of the abduction; of the search that was conducted when the children disappeared; and of the bad state of both victims when they returned home, both physical and emotional. Moreover, she testifies that her granddaughter underwent a total character change in the wake of her abduction, from an obedient girl to an angry and disobedient one. Although the granddaughter does not testify in court because she is ruled to be incompetent to differentiate between truth and falsehood, the grandmother's testimony provides support to the testimony of the other victims in the case.

Besides these cases, there are many others which include the testimonies of relatives of the victims and for example: **Dragon (Namibia)**, a case revolving around the sexual exploitation of several children, where the mothers of all the victims testified as to the relationship between the children and the accused and how he would often take them in his car and give them sweets. One also testified as to how the abuse was discovered. In addition, the brother of one victim testified as to the sexual exploitation he witnessed and the aunt of one victim testified as to how the abuse was exposed. See also **Allima (South Africa)** where the aunt of the victim identified her at the shop where she was working, confirmed that the victim did not seem to know her, and set into motion her rescue.

2.3.5 Accomplices

In a fair number of cases across the region, the testimony of accomplices provides important support to victims' stories or supplies the only proof of a crime in the absence of victim testimony. Courts caution themselves in regard to this kind of evidence, as the accomplice may have a natural tendency to minimize his own role in the crime or to color his testimony so as to secure leniency for himself⁵⁷ However, since this kind of testimony can be of importance, in general, it is not excluded, but rather evaluated in order to assess if it is frank and honest.⁵⁸

Examples of accomplice evidence which provided important support to victims' stories, or served to support a conviction in the absence of victim testimony appear in the following cases:

In **Kapinga (Malawi)**, the case concerns a charge of child trafficking, revolving around the selling of a 7 year old child to work in a maize mill. The seller, who was previously convicted of the crime, provides the central testimony against the buyers. While the court cautions itself about relying on such uncorroborated testimony, it deems the seller to be credible. The seller-accomplice's testimony is crucial to the conviction, as the child has disappeared and is presumed dead.

In **Ogochukwu (South Africa)**, the case revolves around the trafficking for sexual exploitation of a minor. Her minor friend who recruited her, was the accused's girlfriend and knew that he was prostituting girls and dealing in drugs. The court was aware of the dangers of accomplice evidence but came to the conclusion that the witness answered questions frankly and honestly. Her evidence supported the victim's story that the accused was employing girls in prostitution and dealing in drugs, although there were contradictions between them and although she left the accused before the events which yielded the conviction on the trafficking of the victim.

In **Matini (South Africa)** the case revolved around trafficking for sexual exploitation of a number of victims, some of whom were minors, including two mentally disabled children. The court found corroboration to the victims' stories in the testimony of one Scooter, who participated in the sexual exploitation of at least one victim, for whom he paid the accused number 1. He confirmed the pattern attested to by other witnesses, whereby the accused number 1 sold girls to men for sexual exploitation and received food and other things as payment. He also confirmed that he saw the two mentally disabled persons in the accused number 1's residence.

In **Msweli (South Africa)**⁵⁹ the case revolved around the selling of a 6 month old baby for slavery. One of the central witnesses was the woman who bought the baby and had previously pleaded guilty to charges of corruption. She provided details of the sale, thus corroborating the testimony of other witnesses, and in the words of the court, made a clean breast of her part and did not waste the court's time. Her testimony was especially important, because her maid, who had initiated the process and acted as a go between, disappeared and could not be traced.

2.3.6 Other testimonies

Besides the kinds of testimonies analyzed in depth, above, cases of trafficking in persons present an array of varied testimonies.

⁵⁷ See B.B.F., "The Definition of Accomplice Witnesses in Criminal Prosecutions", *Virginia Law Review*, Vol. 25, No. 2 (Dec., 1938), pp. 203-210.

⁵⁸ See section 204 of the **South African** Criminal Procedure Act which addresses "incriminating evidence for witness for prosecution" and does not exclude such evidence.

⁵⁹ The State v. Msweli, Case No RC 465/2015, in the Regional Court for the Regional Division of KwaZulu-Natal at Pinetown, conviction 13 March 2017, sentence 27 September 2017. We note that we have only a handwritten summary of the judgment prepared by the prosecutor; the sentence, the charges, and the State's Heads of Argument on the conviction and sentence.

Examples are: friends of the victim,⁶⁰ taxi drivers⁶¹, social workers⁶², the matron of a hostel⁶³, educators⁶⁴, a person who rode in a car with a victim and the accused⁶⁵, an acquaintance of the exploiter who entered the house, purportedly after the rape of the victim,⁶⁶ the manageress of a hotel and a real estate agent,⁶⁷ a client of sexual services,⁶⁸ security guards who witnessed symptoms of prostitution in a hotel or residence,⁶⁹ a gambler who testified about prostitution in a hotel,⁷⁰ neighbors⁷¹, the wife of an employee of the accused who rescued one of the victims,⁷² employers of the victims,⁷³ fellow workers⁷⁴ a cleaning person in the guest house where the alleged victims were staying,⁷⁵ a church member who observed the victim's prostitution and offered help⁷⁶ a representative of an embassy in foreign parts;⁷⁷ a girl who was staying in one of the rooms rented by the accused.⁷⁸

⁶⁰ See for example, Ogochukwu (**South Africa**); Esther Phiri (**Zambia**).

⁶¹ See Lukas (**Namibia**), Mujee (**Botswana**), Rex v. Zhen Shu Xhian CR 139/2011, before Magistrates Court, verdict 27 January 2012; conviction reversed in High Court of **Lesotho** CRI/APN/129/12. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO002).

⁶² See Lukas (**Namibia**), Mabuza (**South Africa**), where the social worker was employed in the school of the victims.

⁶³ See Lukas (**Namibia**).

⁶⁴ The principal of a school in Lukas (**Namibia**); a teacher who taught the victim in Esther Phiri (**Zambia**).

⁶⁵ See Ntonga (**South Africa**).

⁶⁶ Ibid.

⁶⁷ See Veeran Palan (**South Africa**); Dragon (**Namibia**), where the landlady of the accused testified for him.

⁶⁸ See Veeran Palan (**South Africa**).

⁶⁹ See Zhen Shu Xhian (**Lesotho**); O.B. Abba (**South Africa**); where an owner of a security company for the premises of the accused and a security guard in those premises testified.

⁷⁰ See Zhen Shu Xhian (**Lesotho**).

⁷¹ See Rex v. Adigwe Dike and other, Case No. 33/2012 in the High Court of Swaziland, judgment from 30th of April 2014. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. SWZ001). We note that this case ended in an exoneration, but this did not derive from the lack of credibility of this witness. See also Matini (**South Africa**), where 2 neighbours testified, one of whom saw the children with the accused and saw signs of blood on the clothes of one victim. See also Dragon (**Namibia**), where the neighbour was also the grandfather of one victim and testified that the accused shared food with the victims.

⁷² Mabuza (**South Africa**).

⁷³ See for example, Jonas (**Namibia**); Alam (**Seychelles**).

⁷⁴ See Shongwe (**Eswatini**) where a fellow herder of the victim testified as to the lack of adequate food.

⁷⁵ See People v. Nyassa Nicole Mulumbilwa and others, 2U/24/2017, in The Subordinate Court of the First Class for Sesheke (Criminal Jurisdiction), 24 January 2018; verdict reversed Nyasa Nicole Mulumbilwa and others vs. The People, Caz Appeal No. 154/155/156/157/2018 in the Court of Appeal for **Zambia** at Lusaka (Criminal Jurisdiction), 28 June 2019. A summary is available at UNODC Human Trafficking Case Law Database (UNODC No. ZMB004). We note that the Court of Appeals reversed the conviction and exonerated the accused persons.

⁷⁶ See Ogochukwu (**South Africa**).

⁷⁷ See State v. Maroodza Case No. R674/18, in the Regional Eastern Division, Harare, July 10, 2020, where young women were trafficked for labour exploitation to Kuwait and managed to escape from their employers. They fled to the **Zimbabwe** embassy and a representative of the embassy testified that most of the ladies who approached the Embassy did not have their travel documents which had been confiscated. In view of this, they had to stay at the embassy for some time whilst the government of **Zimbabwe** obtained temporary travel documents.

⁷⁸ See Mujee (**Botswana**).

2.3.7 Defence witnesses

In the majority of the cases which form the basis of this digest, the accused persons did not call upon defence witnesses other than themselves.⁷⁹ While in some cases these witnesses corroborated the accused's version of events, in some cases they actually confirmed the victims' testimony. For example:

In **Dragon (Namibia)**, a case of sexual exploitation of a number of minors by a 63 year old man, the accused called his landlady to give testimony. She testified that the child victims initiated visiting the accused and jumped on his car, and that he was kind to them. She further testified that the children jumped on the boundary wall if the accused was asleep and would open the door of his house and peep through the window, at which point the accused would emerge from the house upset while wrapped in a towel. She also testified that the children could peep at the accused through a hole and that she herself would chase the children away and told their parents to keep the children from the yard. However, under cross examination, she admitted that she never saw the children entering the house to perform duties for the accused, as he claimed, because she was at work most of the time and was at home only during weekends.

In **Jezile (South Africa)**, a case revolving around the sexual exploitation of a minor who was forced to marry the accused, he called his sister in law to testify. She was called upon to describe what happened when the accused brought the victim to Cape Town, to live with his brother and sister in law. The sister in law contradicted the victim's version regarding her unhappiness in the marriage and the violence and restrictions of freedom she experienced, and claimed that she did not notice any problems between the accused and the victim. Moreover, unlike what the victim maintained, she testified that the victim told her that she did not wish to return to school because she hated it. She admitted that the victim had a wound on her leg, but claimed that she blamed herself for it and that the sister in law took her to the doctor. She admitted that the victim told her that she fled the accused when first married, but quoted her as giving another reason for this than that given by the victim: that she was interested in having a good time as a single woman. She also quoted the victim saying that subsequently she changed her mind and decided to remain married. The court found the victim credible and the accused and his sister in law patently false.

In **Ntonga (South Africa)**, the accused called a man who had been at his house on the morning of the alleged rape to testify. The court considered this man a reliable and consistent witness who did not appear to give a slanted account. For this reason, the court addressed seriously a contradiction between this witness' testimony and that of the victim. Whereas the witness claimed that he had seen the victim watching television outside of the accused's bedroom on the morning in question, the victim claimed she was locked in the bedroom. The court did not impugn the credibility of the victim on this basis, but rather understood the victim's testimony as a function of the trauma attendant on the rape she had undergone.⁸⁰

In **Lukas (Namibia)** the accused called both a friend and her cousin to testify. However, both testimonies were detrimental to the accused in the end. Thus the accused's friend testified that a woman named Felicity told her of a welfare agency run by a white man named Martin for the benefit of **DRC** children, which conformed to the accused's defence claim that she took one victim to the sexual exploiter, whose name was Martinus, in order to obtain benefits for her from his welfare organization. However, this witness also testified that during her visit to the holding cells, the accused told her that she and a woman named Felicity used to take girls to a white man, thus undermining the accused's version that she went only once to the white man's house and that she did not take girls to him on a regular basis.

⁷⁹ In many cases, the accused both remained silent and did not call witnesses.

⁸⁰ See section 2.2.1.2 on "*memory gaps and distortions*".

The cousin too, confirmed several points in the State's case against the accused. Thus, she confirmed that she met both victims on separate occasions at the accused's house. She also confirmed that one of the victims told her that she had a boyfriend who worked in a mine, thus corroborating this victim's version that she viewed Martinus Pretorious, who engaged in sexual relations with her, as a boyfriend. She also testified that she met the other victim several times at the Catholic Hostel and at the house of the accused. She confirmed the victim's version that late one day, the accused was with the victim and talked of returning her to the hostel.

In **Mndzebele (Eswatini)**, a case which revolves around the sexual exploitation of a minor by a pastor who pays for her school fees, the accused called upon a boy whose school fees he paid in order to confirm his version of the facts. This boy testified that he lived in the accused's house with other children and that they all had a good life there. He further testified that all the children were permitted to be in regular contact with their parents and to visit them. He also confirmed the accused's version as to a specific event described differently by the victim. He claimed that on a certain occasion, the accused's child entered his room without knocking and the accused berated him, since he and his wife were bathing. Unlike the victim's version, by which she was in the accused's room at the time, he claimed that she was with him and the other children, and that he saw the accused and his wife leave the house together, whereas the victim testified that the accused's wife went to work much earlier than the accused.

Testimonial Evidence of Persons besides the Victim or the Accused

While the testimony of the victim and the accused are usually of central importance, the victim's testimony may be characterized by typical weaknesses, whereas the accused person may choose not to testify.

There is a wide array of other testimonies which may provide important information and for example:

- Police officers and investigators from regulatory agencies
- Relatives of accused persons
- Relatives of victims
- Accomplices
- Neighbours and acquaintances
- Employers
- Customers
- Taxi drivers
- Security guards
- Landlords
- Members of the public
- Professionals like educators and social workers

These witnesses may be called by the prosecution or the defence.

2.4 How courts evaluate the credibility of witnesses

2.4.1 Introduction

Naturally, all cases require courts to evaluate the credibility of witnesses, and equally naturally, courts in trafficking cases use many of the same modes of evaluation used in other cases. However, a number of such measures of evaluation are particularly important in trafficking cases due to the nature of the crime and the profile of its victims. We wish to dwell on a few of these which have been widely used in cases in the region.

2.4.2 The totality of the evidence

As a rule, courts do not impugn the credibility of testimony on the basis of one weakness, but rather place it in the context of the totality of the evidence. This emphasis appears explicitly in **Veeran Palan (South Africa)**, **Lukas (Namibia)**, **Mabuza (South Africa)**, **Dos Santos (South Africa)**, **Eze (South Africa)**, **Ntonga (South Africa)** and **Kapinga (Malawi)**.

Thus in **Veeran Palan (South Africa)**, a case revolving around the sexual exploitation of two vulnerable young women, the court says:

"...the assessment of credibility, based as a piecemeal, self-contained and insular analysis of the evidence of each witness who has testified at the trial may tend to distort reality. What is required is an integrated approach, based on the evidence and its totality."

S. v. Veeran Palan and other, Case No. RCD 13/14, Regional Court of KwaZulu-Natal, 12 June 2015

The totality of the evidence can include the demeanour of the witness; the coherence, plausibility and logic of his or her testimony and sources of corroboration. Thus in **Jonas (Namibia)**, a case which revolves around trafficking for sexual exploitation of a young woman, the court considered the victim's demeanour and the corroboration her story received by means of a series of other witnesses who testified that the accused sought for young women to be 'girlfriends' of men. The court also brought into account the weakness of the accused's testimony which included only bare denials and unfounded theories that all the witnesses were her enemies.

Similarly in **Mujee (Botswana)**, the court took into account the demeanour of the victim and the coherence of her testimony, the corroboration provided by a girl who rented a room on the premises where the victim was sexually exploited and the accused's own version which did not deny the girl's recruitment and which in other respects was viewed as untruthful. The court's impression of the victim's credibility is worth quoting.

"...I find the evidence of the complainant to have been credible, honest and truthful. She was unshaken under cross examination and testified very persuasively that from the onset of their meeting the accused person was able to prey on their vulnerabilities and convinced her and her parents that she should go with her as she was going to find a job for her. The accused person did not gainsay this fact in her testimony..."

There is in my view no reason proffered in whatsoever why the complainant would make such a serious and compelling allegation against her.

In the light of the complainant's detailed evidence and the corroboration by PW2, I am satisfied that the complainant is a credible witness and I accept her testimony as true."

State v. Mujee, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021, sentence 14 July 2021, paragraphs 30, 36, 37.

As can be seen in **Jonas and Mujee**, in analyzing the totality of the evidence, courts take into account, not only the victim's testimony and the corroboration of it by means of objective facts or state witnesses, but also the accused's defence. When an accused's defence is weak, when he or she corroborates the victim on important points, or when he or she chooses not to testify, even when the prosecution case requires a response - these weaknesses can form a part of the totality of the evidence which serves to convict.

Thus the accused persons' falsehoods contributed to their conviction in **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation of two minors. By the same token,

the accused persons' failure to testify, when the prosecution case required a response, contributed to the convictions in **O.B. Abba (South Africa)**,⁸¹ and **Veeran Palan (South Africa)**, cases revolving around the trafficking for sexual exploitation of vulnerable young women. Courts stress that the accused's silence, in itself, does not add to the evidence of the prosecution. However, when the foundation of prosecution evidence is such that it requires a response, the accused's silence leaves that evidence, as is, and the court may conclude that it is sufficient in the absence of an explanation.⁸²

2.4.3 The relevance of vulnerability

In most of the trafficking cases across the region, the victims' vulnerabilities are mentioned and even dwelt upon, and in some cases these vulnerabilities are used explicitly to explain weaknesses in victim testimony or behavior.

The vulnerabilities include: poverty⁸³, unemployment (sometimes exacerbated by having children to provide for)⁸⁴, low level of education⁸⁵, gender⁸⁶, young age⁸⁷, foreignness⁸⁸, illegality

⁸¹ State v. OB Abba et al, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria).

⁸² See **Veeran Palan (South Africa)** for example.

⁸³ See for example, **Lukas (Namibia)**, which concerns victims who were from poor backgrounds, one of whom resided in a hostel for poor children; **Jonas (Namibia)**; **Veeran Palan (South Africa)**, where the two victims were unemployed young women with children to support.

⁸⁴ See for example, **Veeran Palan (South Africa)**.

⁸⁵ See cases with minors who had not completed their education like **Jezile (South Africa)**; **Ntonga (South Africa)**; **Lukas (Namibia)**; **Esther Phiri (Zambia)**.

⁸⁶ Most of the sample of cases which form the foundation of the digest concern victims who are women. Examples are **Veeran Palan (South Africa)**; **Jonas (Namibia)**; **Martinet (Mauritius)**.

⁸⁷ See for example cases which revolve around minors like: Criminal Judgment No 76-CO of 6 June 2019 before Supreme Court of **Madagascar** where the victim was a child of below 3 years; **Rex v. Jeremiah Musa Dlamini**, Case No. BH350/19 in the Magistrates' Court of **Eswatini**, held at Pigg's Peak, 21.08.20; an extract of the ex tempore judgment was made available, where one victim was a minor of 14; **Lukas (Namibia)**, where the victims were minors of 13 and 14 years of age; **Jezile (South Africa)**, where the victim was a minor of 14; **Ntonga (South Africa)**, where the victim was a minor of 11; See also **Luzama Kavula**, in the Court of Peace, Kinkole Court of the Commune of Nsele, city of Kinshasa, **Democratic Republic of the Congo**; reported by the Territorial Police. In addition, see cases where the victims were young women: **Mahuni (Zimbabwe)**, **Dos Santos (South Africa)**, **Eze (South Africa)**, where one victim was in her twenties and one was nineteen years of age but her mental age was assessed as between 14 and 18 years of age.

⁸⁸ See for example, **Mabuza (South Africa)**, where the victims were children from **Mozambique** transported to **South Africa**; **Alam (Seychelles)**, where the victims were from Bangladesh working in **Seychelles**.

in the country⁸⁹, unfamiliarity with a new place⁹⁰, language barriers⁹¹, lack of parents or parent⁹², isolation⁹³, recruitment or exploitation by family⁹⁴ or friends⁹⁵, addiction to drugs⁹⁶. As can be seen, some of these vulnerabilities are part of the victims' profile, whereas some, like isolation, illegality in the country and transportation to unfamiliar surroundings can be vulnerabilities created by the trafficker.

An example of a vulnerability used to explain a weakness in victim behavior can be found in Ntonga (**South Africa**), where the court explains one victim's failure to immediately report the rape, by her age and the ordeal she had undergone. Another example appears in Lukas (**Namibia**) where the Court explains one victim's falsehood and inconsistencies by means of her "*childish confusion*".

Yet another example occurs in **Veeran Palan (South Africa)**, where the court uses the unfamiliarity of the victims with the place to which they have been taken to partially explain their not seeking help from members of the public with whom they come in contact. This is done explicitly in respect to the charge of kidnapping, though not in regard to the crime of trafficking. In addition, when addressing one victim's failure to explicitly refuse to prostitute herself on the first day, the court mentions her explanation that the victims were penniless, unfamiliar with the place and anyone in it and felt helpless.

⁸⁹ See Mabuza (**South Africa**) where the minor victims were transported into **South Africa** without valid travel documents; Shongwe (**Eswatini**) where the victim is illegally transported into **Eswatini**; Fakudze (**South Africa**), where the minor victim from **Eswatini** is illegal in **South Africa**; Mahuni (**Zimbabwe**), where the **Zimbabwe** victims are illegal in **Angola**; Alam (**Seychelles**) where the Bangladeshi victims are illegal in **Seychelles**, as the accused does not properly arrange their legal status.

⁹⁰ See State v. Mponda Criminal Case Number 352 of 2017, in the Senior Resident Magistrate Court sitting at Lilongwe. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MWI006), where the victims were taken from rural areas to the capital; Veeran Palan (**South Africa**), where the victims were not sure of their location because they were transported from their homes to another city, Jezile (**South Africa**), where the victim was transported from her village to the city of Cape Town; Esther Phiri (**Zambia**) and Allima (**South Africa**) where the minor was transported a distance from their homes.

⁹¹ See Veeran Palan (**South Africa**), where the Court mentions that the victims did not have good command of English; See also Yoseph Girmay Testagaber, Adanech Beru (**Lesotho**), where the Ethiopian victim in **Lesotho** needed an interpreter in court (though this was a case with an exoneration). See also Mabuza (**South Africa**), where the court of first instance mentions the language barrier between the children victims from **Mozambique** and **South Africa**, where they were taken and Shongwe (**Eswatini**) where a language barrier is mentioned by the court.

⁹² See for example: Jezile (**South Africa**) where the victim does not have a father and her mother does not reside with her; Fakudze (**South Africa**), where the victim's mother abandoned her (though the High Court exonerated the accused from trafficking). See also Eze (**South Africa**), where one victim was placed in an orphanage from the age of 6 months because her father had raped her and her mother was in prostitution.; Esther Phiri (**Zambia**), where the victim is a "double orphan", raised by her great uncle and aunt.

⁹³ See Mabuza (**South Africa**), where a group of children are isolated in a remote lumberjack village; Eze (**South Africa**), where both victims are isolated from others by the accused.

⁹⁴ See Jezile (**South Africa**), where the victim's uncles took part in the forced marriage and where other family members to whom the victim fled refused to accept her; Mabuza (**South Africa**), where the children were recruited or abducted by a person who was the aunt of one of them and knew the families of the others; Jeremiah Musa Dlamini (**Eswatini**), where the accused was the father of one victim and the uncle of another.

⁹⁵ See Ogochukwu where a friend of the victim introduces her to the accused who later sexually exploits her; Veeran Palan, where the recruiter is a schoolmate of one victim.

⁹⁶ See Eze (**South Africa**); O.B. Abba (**South Africa**); Ogochukwu (**South Africa**).

Similarly, in **Fakudze (South Africa)** the court of first instance uses the victim's vulnerabilities (young age, abandonment by her mother, nowhere to go) to explain why she requested the accused person to take her with him to **South Africa**, though he had previously abused her.⁹⁷

Such an explicit connection between vulnerabilities and victim behaviour is also made by the court in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs. The court explains why the victims did not escape from the trafficker, at least partially, by means of their vulnerabilities, and quotes the testimony of the expert clinical psychologist who said the following:

"The complainants....were both, due to a number of developmental factors and traumas, and their abuse of substances, vulnerable to becoming victims of human trafficking...Neither complainant wished to remain in the environment that they were in, but believed they...lack of other viable alternatives."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

Even when courts do not explicitly use vulnerabilities to explain specific victim behavior, they uniformly mention the vulnerabilities and some even dwell upon them. An example is **Lukas (Namibia)** where it is stressed that both sexually exploited minors come from the **DRC** population in **Namibia**, are from poor backgrounds and one resides in a hostel for underprivileged children, although only the young age of one of them is used to explicitly explain particular weaknesses in her testimony.

So, it can be said that even when the victim's vulnerabilities are not used by the court to explicitly explain a particular form of victim behaviour, still, vulnerability is a strong subtext in all the cases analyzed.

2.4.4. The importance of psychological processes

Courts in the Southern African region display an awareness of various psychological processes among victims, and use them to explicitly explain weaknesses in victim testimony and behaviour. These include: a lack of trust in the world, inability to think clearly or confusion as a result of trauma, shame, a desire to forget harrowing experiences, viewing the exploiter as a boyfriend, fearing the trafficker, a feeling of helplessness, substance addiction.

Thus, lack of trust is called upon to explain victim behaviour like not seeking help or not reporting the crime, not fleeing the abuser or submitting a delayed complaint.⁹⁸ Inability to think clearly is used to explain why the victims did not try to escape though they could have.⁹⁹ Confusion is called upon to explain contradictions, falsehoods or impaired memory.¹⁰⁰ The trauma of rape is

⁹⁷ Though the Court of Appeals reversed the conviction on trafficking in persons, it did so on the basis of doubts as to the accused person's intention to exploit and did not contest this explanation.

⁹⁸ See **Veeran Palan (South Africa)**, where this is one of the victims' explanations of why they did not escape, even though they had the chance to. See also **Mabuza (South Africa)**, where one girl told the police about her rapes only when other victims testified and after she had developed trust in the prosecutor, whereas before this she had no trust in anyone. See also **Eze (South Africa)**, where the court mentions that one victim had complained to the police at one point, but they returned her to the trafficker which caused her to lose faith and hope in their ability to help her. In that case the other victim did not actively resist the rape because she felt no one cared.

⁹⁹ See **Veeran Palan (South Africa)** where victims mention their confusion as relevant to their failure to escape; **Allima (South Africa)**, where confusion is used to explain the victim's failure to seek help when in public; and **Eze (South Africa)**, where the impaired judgment of the victims is mentioned as a consequence of their addictions to cocaine.

¹⁰⁰ See **Ntonga (South Africa)**, where the victim's confusion is used to explain why she contradicted a reliable witness, and **Lukas (Namibia)**, where one victim's childish confusion was used to explain why she lied to school authorities.

used to explain why the victim contradicted the testimony of a reliable witness whom she had seen just after her rape, **Ntonga (South Africa)**. Fear of the trafficker is used as one explanation of why victims did not seek help at the first opportunity.¹⁰¹ A desire to want to forget harrowing experiences is used to explain victim inconsistencies.¹⁰² Lack of trust in the world, shame and fear are used to explain a delayed complaint.¹⁰³ A feeling of helplessness is used by one victim to explain why she did not refuse to prostitute herself on the first day.¹⁰⁴ A feeling of powerlessness is used by another victim to explain why she did not seek help.¹⁰⁵

In **Allima (South Africa)**, the victim of trafficking for sexual exploitation underwent a loss of memory about her identity and assumed an identity given to her by the accused. The testimony of a clinical psychologist was crucial to the accused's conviction. While the evidence of the clinical psychologist has been described in detail in section 2.2.1.2 on "*memory gaps and distortions*" and will be addressed in section 2.5.2 on "*expert testimony*", it is worthy of note that the court relies upon it heavily in order to understand the victim's behaviour, in respect of her loss of memory, her failure to escape or seek help, and the impact of fear upon her.

The psychologist's answer to a question about the victim's failure to escape or seek help when in public at a taxi rank, is particularly instructive:

"We all know that very few rape cases end up reported, the reason being the perpetrators will threaten you. Because of the threat, the intensity of the threat, she was highly unlikely to try and escape. And further on, she has indicated to us that she was confused and we do not know the degree of the confusion...even though it appeared in the public where she could even scream or where she could even run, the question is if she started running, who was going to be the first person to catch her..."

In fact if there is any trauma, you carry the trauma in your physical body and it doesn't move away without in depth psychoanalysis...already in her system, fear was there and therefore possibilities are that to try and escape was more dangerous rather than to succumb...Fear is generalized to see danger in everything."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma, (26 June 2014).

It is doubtful if without this testimony, the court could have convicted the accused person, as the story, of such a massive loss of memory, on the face of it, seemed implausible and even incomprehensible.

Another case which relies heavily on expert psychological testimony is **Eze (South Africa)**, which revolves around two young women trafficked for sexual exploitation, whose addiction to drugs allowed the accused to control them. The court accepts the expert clinical psychologist's explanation that the accused's control over the victims extended beyond mere physical control to the expansive grip of **psychological control**, and that by doing so, the accused kept his victims in a web of trafficking. The court explains the trafficker's control methods thus:

¹⁰¹ See Veeran Palan (**South Africa**); Allima (**South Africa**); Mabuza (**South Africa**) first instance where one complaint was markedly delayed, partially because of fear.

¹⁰² See Veeran Palan (**South Africa**).

¹⁰³ See Mabuza (**South Africa**) and Eze (**South Africa**), where one victim complains to the police, but is returned to the trafficker by them, causing her to lose faith and hope in their ability to help her.

¹⁰⁴ See Veeran Palan (**South Africa**).

¹⁰⁵ See Allima (**South Africa**).

“By keeping the complainants in an altered state of consciousness, by employing fear and the threat of harm and by exploiting their addiction, gave the accused the power over their vulnerability to the extent that the complainants were inhibited from indicating their unwillingness or resistance to being trafficked... In this context one understands why Els repeatedly returned to her captor and why she did not avail herself to the many avenues of seeking help or fleeing. The addiction had ruined their lives and left them no apparent alternative.”

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

2.5 Special kinds of testimony

2.5.1 Introduction

In cases across the region, there are several kinds of testimony which seem particularly prevalent and important, and tend to raise specific issues. They are: expert testimony, child testimony, and single testimony.

Expert testimony aims at providing courts with tools to analyze cases, deriving from the professional experience of experts. Experts can come from many fields, and for example: medicine, psychology, social work, anthropology and even trafficking in persons. In many cases across the region such expert testimony has been crucial to the court’s ability to understand various key issues. However, this kind of testimony may also raise questions, and for example, about the fields which are appropriate for such testimony and its scope and goals.¹⁰⁶

Child testimony too, is prevalent in cases across the region. This derives from the vulnerability of children, which facilitates targeting them for exploitation. This reality means that often, child victims must testify of their ordeal before courts. Moreover, sometimes they are the only direct witnesses of the trafficking process. This raises questions as to children’s capacity to testify and how courts should evaluate their testimony.

Single testimony is yet another prevalent form of testimony across the region. Since trafficking is a covert crime, often the only witness of the entire course of events is the victim. In such cases, while courts must approach such single testimony with caution, they need to find ways to evaluate its credibility.

2.5.2 Expert testimony

Although the rules for submitting expert testimony may differ among States in the region, it seems that most States allow such testimony, whether in written or oral form, and whether submitted by the parties to the case or requested by the judge. The ease with which such testimony is admitted may differ among civil law systems, which do not have exclusionary rules, and common law systems, which may condition admissibility on the fulfilment of certain conditions before they admit such testimony.¹⁰⁷ However, the widespread use of expert testimony reflects the reality that courts may need assistance in understanding issues outside the realm of their experience. As a rule, the fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge.¹⁰⁸

¹⁰⁶ See section 2.5.2 on *expert testimony*.

¹⁰⁷ See for example United States Federal Rule 702 of the Federal Rules of Evidence as analyzed in Grimm, “*Challenges Facing Judges Regarding Expert Evidence in Criminal Cases*”, 86 Fordham Law Review, issue 4, 1601,

¹⁰⁸ See analysis of United States Federal Rule 702 “*Testimony by Expert Witnesses*”, Federal Rules of Evidence at https://www.law.cornell.edu/rules/fre/rule_702

The experts who testified in the sample of cases which form the basis of this digest, include medical personnel, clinical psychologists, social workers, experts on customary law, on drugs, and an expert on trafficking in persons.

Examples of typical issues which arise regarding expert testimony include: the need to preserve the distinction between the task of the expert and that of the court. Thus, it is well accepted that the goal of expert testimony is to assist the court, but not to provide a conclusion to the issue before the court.¹⁰⁹

Another issue which arises is in regard to the **utility of “soft science” expert testimony**. The global case digest presents opposing views of practitioners regarding this issue.¹¹⁰ Some practitioners feel that since victims come in many shapes and sizes, and since not everyone from a given culture behaves in the same way, there is limited value to the generalizations of psychologists, victimologists and anthropologists. Moreover, they maintain that such testimony merely opens the door to the defence to produce opposing expert opinions, and thus obscures the main issues. On the other hand, there are those who maintain that such testimony may be crucial, in that it can reveal the psychological mechanisms used by traffickers and serve as a window to victim vulnerabilities and reactions. In addition, sometimes the meaning of certain behaviour, can only be understood on the background of cultural mores.

2.5.2.1 Medical testimony

Cases across the region use medical testimony for a number of purposes: to assess the age of a victim; to report the results of a gynaecological examination in order to evaluate if rape or sexual exploitation has taken place; to perform a physical examination when victims claim they were beaten; even to testify as to the emotional state of a victim.

Cases where medical testimony is used **to evaluate the age of the victims** are often important in ascertaining if a charge of child trafficking or abduction fits the facts.

Thus in **Munyanyi (Zimbabwe)**,¹¹¹ a case revolving around the trafficking of 4 minors from **Mozambique** within **Zimbabwe** for child labour, a doctor assessed the ages of the 4 minors to be 17, 15, 14, and 14 respectively. Interestingly, the court noted that some of the minors looked younger than this assessment. This analysis emphasizes that the final decision as to issues before the court, is in the hands of the judge, not the expert.

In **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a minor, a doctor and obstetrician assessed the age of the victim to be between 13 and 15 years of age at the time the alleged crimes were committed, and most probably 14 years old. The court noted that the expert’s assessment was based on the Tanner stages of development,¹¹² which evaluate the breasts, genitals, molars, armpit hairs, height and weight. The court was satisfied that the doctor’s assessment was independent and accepted his conclusions.

Similarly in **Mabuza (South Africa)** a doctor testified as to the ages of the child victims of sexual exploitation, which testimony conformed to what the children themselves maintained in regard to their ages.

¹⁰⁹ Ward T. (2014) “*Expert Witnesses: Role, Ethics, and Accountability*”, in Bruinsma G., Weisburd D. (eds) *Encyclopedia of Criminology and Criminal Justice*. Springer, New York, NY., available at https://doi.org/10.1007/978-1-4614-5690-2_231

¹¹⁰ See global case digest, section 2.6 on “*expert or professional testimony*”, page 39 of the English version.

¹¹¹ State v. Munyanyi and others Case No. MSVP804 - 6/17 in the Magistrates Court for the Province of Masvingo, 13 June 2017? (NOTE: the date of the judgment is unclear, as it was arrived at from the court stamp which was faded.)

¹¹² For more information on the Tanner stages of development see Rena Goldman, “*The Stages of Puberty: Development in Girls and Boys*” at <https://www.healthline.com/health/parenting/stages-of-puberty>

In some cases, a **gynaecological examination** was performed in order to evaluate if sexual exploitation or rape had taken place. The following cases provide illustrations of this kind of testimony:

In **Mndezebele (Eswatini)** a minor of 16 claimed that a pastor, who offered to pay her school fees, raped her serially when she resided in his home. A medical examination was performed by a gynaecologist, and his report was admitted in evidence, as he himself was no longer available for testimony. However, a fellow gynaecologist, who worked with the drafter of the report, appeared in court to explain certain medical terms which appeared in the report. The court relied on this report as corroboration of the victim's version that she was raped, because it confirmed that there had been penetration of the victim.¹¹³

Similarly in **Mabuza (South Africa)**, the case revolved around the trafficking for sexual exploitation of 4 children. The court found corroboration of the children's testimony in the expert testimony of a registered nurse and a doctor who specialized in dealing with the examination of victims and especially children in sexual assault cases. Both experts adduced evidence of sexual penetration and in the case of the doctor, in addition, lesions on the private parts of some of the children which could attest to forcible penetration. While this evidence did not prove that rape had transpired, it did strengthen the children's evidence as to the sexual relations they had undergone at such early ages (from 11 - 13 years of age).

In other cases across the region, though a gynaecological examination was performed, it was inconclusive, whether because the lapse of time between the examination and the alleged crime was too long, or because the results could have pointed to possibilities other than rape by the accused. Thus, In **Lukas (Namibia)**, **Koch (Namibia)**, and **Fakudze (South Africa)**, all of which revolved around the sexual exploitation of minors, too much time had elapsed between the crime and the medical examination to provide persuasive evidence, and, especially in **Fakudze**, where pregnancy and birth had intervened. Similarly in **Jonas (Namibia)** which revolved around the sexual exploitation of a young woman, the gynaecological examination was conducted a long time after the alleged rapes. The gynaecologist testified that even if there had been any scar, injury or trauma, it could have healed.

In other cases, the medical examination was non-conclusive because other explanations could not be ruled out. Thus, in **Koch (Namibia)** which revolved around the sexual exploitation of 5 minors, not only had a long time elapsed between the alleged crimes and the examination, but the gynaecological evidence focused on the question if penetration had occurred, as the accused was charged with rape, as well as trafficking. In addressing the rape charge, the court noted that the medical evidence raised a *possibility* that the victims were exposed to penetrative sex, but noted that for the crime of rape to be proven, the prosecution must prove that the accused, and not someone else, had such sexual contact with the victims. In its analysis of the crime of trafficking, the court did not focus on this medical evidence.

Similarly, in **Lukas (Namibia)**, where two minors were trafficked for sexual exploitation, over and beyond the time that elapsed between the alleged crimes and the medical examinations, the gynaecologist testified that he could not determine when the sexual contact had occurred, whether recently as alleged, or a long time ago.

Another similar case is **Eze (South Africa)**, revolving around the trafficking for sexual exploitation of two young women. One of the young women, named Harmse, was examined by a gynaecologist in the wake of her alleged rape. The gynaecologist concluded that the examination

¹¹³ We note that this case yielded a conviction on rape but an exoneration on trafficking charges, as the court could not rule out that the accused had not harboured guilty intent when he recruited the victim.

did not yield conclusive results as to her rape by the accused, as she had 10 sexual partners, other than the accused, in the seven days before the examination.

Medical testimony about **a victim's physical state** was used corroborate the testimony of a minor who claimed that the accused had beaten her. This occurred in **Jezile (South Africa)**, a case which revolves around the trafficking for sexual exploitation of a child of 14 in the context of forced marriage. The doctor testified as to a huge gaping wound on the lower thigh of the victim that had become septic, two healing abrasions on the left forearm and a bad bruise on her toe. From this physical examination the doctor concluded that the leg wound was consistent with the victim's claim that she was assaulted with the handle of a mop or broom and that the arm and foot injuries were consistent with her claim that she was assaulted with a belt.

Interestingly, in some cases doctors also testified as to the **emotional state of victims**. Thus in **Jezile (South Africa)** a medical doctor testified that the victim seemed traumatized, fearful and tearful when he examined her and that he consequently referred her to a social worker. Similarly, in **Fakudze (South Africa)** an obstetrician testified that he was impressed with the victim's emotional stability and coping skills as a teenage mother. While these observations were not part of these doctors' expertise, they were still admissible.¹¹⁴

2.5.2.2 Clinical psychologists

The testimonies and reports of clinical psychologists proved important in several cases in the region. This evidence may be used in order to evaluate why the victim behaved in a certain manner; to assess the mental age of the victim; and to describe the psychological effects of traffickers' methods of control. One court also noted that a clinical psychologist helped the minor victims to testify. Naturally, it is of the essence that the expert testifying should have the requisite professional training and experience.¹¹⁵

A particularly important case in this respect is **Allima (South Africa)**. This case revolves around the trafficking of a minor for sexual exploitation, during which she loses all memory of her identity and assumes a new identity designed by the accused. While the evidence of the clinical psychologist has been described in detail in section 2.2.1.2 on "*memory gaps and distortions*", it is worthy of note that the court relies upon it heavily in order to understand the victim's behaviour, in respect of her loss of memory, her failure to escape or seek help, and the impact of fear upon her.

It is doubtful if without this testimony, the court could have convicted the accused person, as the story, of such a massive loss of memory, on the face of it, seemed implausible and even incomprehensible. We refer to section 2.2.1.2 on "*memory gaps and distortions*" as regards the clinical psychologist's explanation of the victim's loss of identity and her conclusion that the victim was nonetheless capable of recalling what was done to her. The following is the clinical psychologist's testimony as to the observations which led her to conclude the victim was suffering from post-trauma, and the long term impact of her fear upon her.

¹¹⁴ See for example section 2.3 on "*testimonial evidence of persons other than victims*".

¹¹⁵ One **South African** prosecutor, in a UNODC Seminar on the Prosecution of Trafficking in Persons Cases, held on July 19 and 20 2021, stressed that attention should be paid to the difference between counselling psychologists and forensic psychologists.

"My observation were the following symptoms. They are both psychological symptoms as well as psychiatric and medical symptoms...One is fear which is often indicated by either shaking or trembling. Two the person will be depressed which is the show of low of energy and you will find that the person becomes agitated. In their agitation, the observation will be looking around, indicating the past – traumatic stress disorder symptoms. In those symptoms you find a person reliving the incident ...she was heavily traumatised....

Remember that we are born on this earth and we do not move to heaven once we are born, we still stay with the human beings which are two legged and we still stay with the faces that can remind us of our past. And therefore if we are reminded because of certain conditions, the fear comes back. " 116

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (26 June 2014).

In **Eze (South Africa)** the case revolves around the trafficking for sexual exploitation of two young women who were addicted to drugs. Here too, the court relies heavily on the testimony of a clinical psychologist to explain the **psychological mechanisms used by the trafficker and the behaviour of one of the victims** who kept returning to the abuser:

"The many connections between prostitution and drug addiction are well documented. An addiction to drugs or alcohol is often an integral aspect of prostitution. Prostitution like the illegal drug trade is big business for traffickers. Major Stollarz¹¹⁷ alludes to this in her expert testimony...Her research shows that victims who are addicted to substances are easier to control and manipulate and are less likely to attempt to run away... Many pimps are also drug dealers and may initially attract and lure girls with free drugs. This includes...girls who are already addicted...In her addicted state a victim is experiencing overwhelming cravings for the drug and will do what she must do to satisfy them...drug addiction helps pimps keep prostitutes virtually enslaved."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

As shown by the court's words above, the expert psychologist testimony assisted the court to understand both the accused person's control mechanisms, and the victim's behaviour.

In **Dragon (Namibia)** the case revolved around the trafficking for sexual exploitation of several young children. A clinical psychologist interviewed one of the victims, albeit four years after the crimes had been committed. Her conclusions, submitted in a written report, may have assisted the court to understand, both the accused person's grooming behaviour and the victim's reactions, although the court does not rely upon them explicitly in its ruling.

Thus, the psychologist explained that the victim's denial that she had invited the other children to the accused person's house, proceeded from her feeling of blame which led her to block out her part in the abuse, in order to protect herself. She also explained that it is common for child abusers to groom victims by buying nice things for them and in that way gain their trust. The court in this case, also notes that the children were able to testify with the assistance of a clinical psychologist.

In **Matini (South Africa)** the case revolves around the trafficking for sexual exploitation of a number of victims, some of whom were minors, including two mentally disabled children. Here, a clinical psychologist's report assessed the mental age and statuses of the two disabled minors at

¹¹⁶ We note that what seem like mistakes in this quote appear in the original and are probably a function of technical mistakes in recording the testimony.

¹¹⁷ Major Stollarz was the clinical psychologist who testified in the case.

the time of the trial and came to the conclusion that their mental ages were between 9 and 10 years of age. This allowed the court to order that they testify by means of an intermediary.¹¹⁸

In view of the importance of the clinical psychologists' testimony in the above cases, and in particular, **Allima (South Africa)** and **Eze (South Africa)**, it seems that the region has much to contribute to the global debate on the value of "soft science" testimony. Clearly, in those cases, clinical psychologists assisted the court to reach its verdict, and provided insights not generally part of courts' experience.

2.5.2.3 Social workers

Social workers can be of value in a number of ways. They may testify about their impressions of victims after interviewing them; or they may have expert knowledge of certain relevant issues, such as the nature of trafficking and its effects on victims.

In **Lukas (Namibia)** the case revolved around the sexual exploitation of two minor girls with widely different reactions. A social worker, employed by the Ministry of Gender Equality and Child Welfare, interviewed the two victims after the commission of the crimes. She testified before the court regarding her impressions of the victims and what they told her.

Thus, one victim impressed the social worker as very streetwise and impressionable. She considered herself to be the sexual exploiter's 'girlfriend' and was 'in love' with him. She told the social worker that she was upset that she did not get her last payment from him, and maintained that she had visited his house at least five times in a matter of two months.

The other victim struck the social worker as more reserved and quiet, and seemed dominated by the first victim during the interview. She told the social worker that she was first taken to the female accused person by the first victim and that she went to the sexual exploiter's house only once.

While the court does not explicitly rely upon the social worker's evidence in its verdict, in its sentencing ruling, it seems to espouse the social worker's impression of the first victim. The court notes that this victim was desensitized, which caused her to relate what are otherwise despicable acts of sexual depravity as if they were mundane, so as to make the most hardened adult shudder. This conforms to the social worker's impression, but may have been a function of the court's own impression after hearing this victim's testimony.

Similarly, in **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of a 16 year old minor, a social worker employed by the Tlokweng District Council testified that she interviewed the victim on numerous occasions and reached the conclusion that the girl had been "*physically and emotionally traumatized by different men who also raped her...*" The court used this testimony as an aggravating factor during sentencing, noting that the social worker's report showed that the girl would carry the experience for the rest of her life.¹¹⁹

Expert social worker testimony is also adduced in **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young woman. However this testimony is rendered during the sentencing deliberation, rather than before conviction, in order to support the prosecution's claims regarding aggravating circumstances. Interestingly, the social worker testifies as to the **general effects** of trafficking on victims; she does not rely on interviews with the particular victim in this case, but **applies her general knowledge to the facts of the case**.

¹¹⁸ This is a specific arrangement under **South African** law. See section 2.2.1.6 on *seemingly inappropriate emotional reactions* and section 5.2 on victim protection steps on the part of police, prosecutors and judges for more detail.

¹¹⁹ See paragraph 5 of the sentence, delivered on 14 July 2021.

Thus, she testifies that, in general, traffickers operate by taking victims from familiar surroundings where they have support systems to unfamiliar surroundings where they do not; that there is usually an imbalance of power; that victims are normally dependent on the trafficker for survival; that the victim loses his or her sense of self and starts to see the world through the lens of the trafficker.

In applying these generalities to the particular facts of the case, and after reading the court proceedings and judgment, she testifies that the trafficker took the victim out of school and that the victim was exposed to health risks of sexually transmitted diseases. She also notes that the accused threatened the victim.

2.5.2.4 Expert on drugs

Several cases in the region concern the use of drugs as a method of controlling victims. One of these cases, namely **O.B. Abba (South Africa)**, revolves about the trafficking for sexual exploitation, slavery and servitude of two vulnerable young women, encouraged to use rock cocaine by the accused. A report was submitted on the effects of this drug by a police expert on drugs.

According to the report, this drug causes euphoria, increased confidence and stamina, alertness and energy; increased libido and decreased inhibitions and self-control. It also creates an intense craving for re-use to obtain a similar state of euphoria and avoid withdrawal symptoms.

While the court does not explicitly rely on this report, it shows awareness of the vulnerability created by the victims' drug dependency and of the accused persons' encouragement of this dependency by giving them rock cocaine, both when they woke and in the evening, in order to energize them to engage in prostitution with clients. It is probable that the expert report assisted the court to understand this use of the drug.

2.5.2.5 Trafficking in persons expert

In **O.B. Abba (South Africa)**, a case of trafficking for sexual exploitation, slavery and servitude, where the accused persons used drugs as a control method, the prosecution called a trafficking expert to testify. The defence objected to this testimony, as it claimed that the expert was usurping the court's function. The court decided to hear the testimony and rule on its value afterwards.

The expert testified as to the push and pull factors in trafficking cases and about control methods employed by perpetrators in cases of trafficking for sexual exploitation, including the use of drugs. He went on to describe how drugs help traffickers to maintain control over victims, by causing them to become totally dependent on perpetrators, and how this often leads to coercion, violence, threats and manipulation. He also stressed that trafficking is a business from which the trafficker desires to reap the most benefit. The expert's evidence concerned general patterns of trafficking, rather than the details of this particular case.

After hearing the testimony, the court deemed it valuable in the following ways: It assisted the court to understand the process and context within which the offence occurs, as well as the dynamics of the relationship between a trafficker and a victim. It also provided a helpful context within which the court could proceed to determine whether the two women were victims of trafficking.

This case is of particular interest, because it reflects the added value of trafficking experts in court cases, even when they do not hear the evidence of witnesses or interview them personally. The court stresses that this evidence was nonetheless useful to assist the court in understanding the process of human trafficking and the dynamics at play, as these insights could then be applied to the facts of the particular case.

2.5.2.6 Evidence on cultural practices and beliefs

Two cases reflect the importance of evidence as to cultural beliefs and practices on the upshot of a trafficking case.

In **Allima (South Africa)**, which revolves around the sexual exploitation of a minor of 16, she tells a strange story of encountering the accused person and two males in her hometown. The accused takes out a container of juice, but it is filled with a brown fluid. She then throws it in the victim's way. After the victim steps over it, she feels dizzy and is next conscious of where she is, in a taxi rank with the accused. She travels with the accused to Durban where she is made to engage in sexual relations with men and loses memory of her own identity. It is never fully clarified why the incident with the juice container had such far reaching effects.

The clinical psychologist who testified in the case provided two alternative explanations. One is that drugs were used;¹²⁰ the other is that the victim's reaction was a function of her belief in a superstition by which if a stranger throws something in your way, it may harm you. She says that any person who understands Zulu tradition knows that there are magical things that can happen to you if there's a physical obstacle that has been planned to alter your state of mind.

The court relied heavily on this explanation when ruling that the case shows an abuse of power which includes "superstitious power", thus:

"A person who believes in superstition will easily believe such and such a thing will happen. Here I take the example of a person who will step over something and then he believes, sincerely believes what I stepped over is something with magic power, it will influence me. He may get influenced when other people are not yet influenced. "

"The victim comes from a rural area town, Ulundi, where there may be so many superstitious powers. So it maybe that after walking over this container her mind said to her oh, I've walked over this container thrown down by this foreign woman ...I will suffer something...that is superstitious power because she believed in superstition and got influenced by the power of the superstition. Then she got confused and after confusion anything could have happened to her. That is why at times her mind becomes lucid, she recognizes what is happening and then she falls asleep, she's in a blackout, on and off like that because of the confusion."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma s(26 June 2014).

Another case which relies heavily on evidence as to cultural practices and beliefs is **Jezile (South Africa)**, revolving around the sexual exploitation of a minor girl of 14 in the context of a forced marriage. In defence, the accused maintained that he contracted a customary marriage with the girl and genuinely believed he was following time tested custom. He also claimed that her attempts to escape can be understood in the framework of such a tradition, as modesty decrees that the bride should pretend to object.

The court called upon various groups¹²¹ to submit amicus curiae briefs as to customary marriage. In addition, the accused called upon an expert in customary marriage to testify on his behalf.

The expert who testified for the accused maintained that the process the accused person undertook was in accordance with traditional custom, although he did not comply with the provisions of the Recognition of Customary Marriages Act 120 of 1998. He added that historically women and girls could be forced into these marriages. He confirmed that there is a tension between traditional practices and constitutional imperatives and that various legislative measures have been implemented to safeguard against these occurrences.

¹²⁰ However, the psychologist admits that she is not an expert on drugs, although she knows of certain drugs which can cause far reaching effects.

¹²¹ These groups included state institutions, organizations and experts on customary marriage.

The court relied heavily on the amicus curiae briefs¹²² as to the requirements of customary marriages, and reached the conclusion that the accused had violated the norms of customary marriage, in that the girl and her mother did not consent to the marriage. While there was some lack of clarity in the briefs regarding the question if there is a minimum age required in customary marriage, there was agreement as to the requirement of consent. In the emphasis on consent, the court concluded that the rules of customary marriage conform to the **South African** Constitution and its Recognition of Customary Marriages Act.

Since in this particular case, the girl and her mother did not consent to the marriage, the court considered the marriage to be an aberrant form of customary marriage, and the accused's defence claim fell. However, since the court was convinced that the accused genuinely believed that he was entering into a customary marriage, it mitigated his sentence and did not impose life imprisonment.

Both this case and the **Allima (South Africa)** case reflect the importance of cultural evidence in trafficking in persons cases and make a contribution to the global debate on the utility of "soft science" evidence.

2.5.3 Child Testimony

2.5.3.1 Introduction

A fair number of the cases in the sample on which this digest is based, involve child testimony, and most of them present an additional problem, in that the children are often single witnesses of what they experienced.

All the courts in the sample, before whom children testified, cautioned themselves as to the possible pitfalls in child testimony, but stressed that no corroboration is strictly necessary,¹²³ and that common sense must be used in evaluating such testimony.

Among the pitfalls of such testimony, courts mention the following: children have inchoate social, emotional and intellectual abilities; they are suggestible and imaginative; they may have a limited capacity to accurately observe, remember, recollect and relate events and experiences; their appreciation of the duty and importance of being truthful is not always fully developed;¹²⁴ and they may sometimes not entirely comprehend the often complex matters on which they are required to testify. See for example **Koch (Namibia)** and **Mujee (Botswana)**.

The younger a child is, the more pronounced these concerns become, and the greater the measure of care required from the court in assessing the reliability of the evidence. Courts must also pay

¹²² The following groups submitted briefs: National House of Traditional Leaders (a statutory body with objective of representing and advancing aspirations of traditional leaders and their rural communities at a national level); The Woman's Legal Centre Trust (an NGO legal advocacy and litigation organization with the object to protect the human rights of all women and girls in **South Africa** and especially those suffering from disadvantage and discrimination); The Centre for Child Law (a registered law clinic protecting the constitutional rights of children); The Commission of Gender Equality established under the Constitution; The Rural Women's Movement (an NGO advocating for women's independent land, housing, inheritance and property rights and policy reform for rural women); Masimanyane Women's Support Centre (a non-profit international women's organization with focus and expertise on application of the Convention to End Discrimination against Women); The Commission for the Promotion and Protection of the Cultural, Religious and Linguistic Communities (a state institution established under the Constitution).

¹²³ There may be some jurisdictions which do require corroboration, but the courts cited do not come from those jurisdictions.

¹²⁴ See for example, **Matini (South Africa)**, where one of the mentally disabled minors was viewed by the court as incompetent to testify because she could not distinguish between the concepts of truth and lies.

special attention to aspects and circumstances which accentuate the risk of the child's evidence having been influenced in some way, or having been the product of a child's fertile imagination.¹²⁵

Examples of courts which stress these dangers include: **Koch (Namibia)**; **Dragon (Namibia)**; **Lukas (Namibia)**; **Ntonga (South Africa)**.

2.5.3.2 *Different approaches towards child testimony*

While all courts hearing child testimony **caution themselves** regarding its dangers, but enjoin the use of common sense in evaluating the testimony, there are differences in approaches among various courts as to the weight which should be attached to such dangers.

The more cautious view is reflected in **Dragon (Namibia)** where the court stresses that child testimony should be viewed "*with care amounting perhaps to suspicion*". We note that in this case the children were particularly young when the crimes were committed – between 7 and 9 years of age. A similar appreciation of the risks appears in **Koch (Namibia)** where the children were respectively 9, 11, 12, and 13 years of age when the crimes were committed; **Ntonga (South Africa)** where the minor was 11 years old at the time the crimes were committed; **Fakudze (South Africa)**, where the minor was 14 years old at the time of the commission of the crimes;¹²⁶ and **Mujee (Botswana)** where the victim was 16 years of age when she was trafficked.

On the other hand, in **Mabuza (South Africa)**, where the ages of the four victims, trafficked for sexual exploitation, ranged from 11 to 13 at the beginning of the abuse, the courts of first instance and appeals express a more liberal view.

While the court of first instance cites precedents whereby child testimony should be viewed with caution, the judge leaves room for another view, by which **children are not necessarily or generally untrustworthy witnesses**, and cites cases which stress that children generally do not fantasize over things that are beyond their own direct or indirect experience. Nor are they capable of sustaining consistent perjury. The court adds that **recent advances in psychology** can assist in the assessment of child evidence, meaning that courts should not simply reject children's evidence under the cautionary rules, just because courts and jurists in the past have viewed them as inherently untrustworthy. Nevertheless, the court stresses that it will still approach the children's testimony with due caution, but will not allow itself to go overboard and reject their version, on the basis of any "slender" criticism.

The Court of Appeals in **Mabuza** also espouses a progressive approach towards child witnesses. The court stresses that the rules of evidence are not constitutional principles to be construed restrictively, but rather common sense rules whose purpose it is to seek truth and justice. Thus, **tests of credibility may need to be different for children than for adults**, and the rules of evidence do not require courts to impose the same exacting standards on them as is the case for adults. For example, the presence of inconsistencies, and especially as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events.

¹²⁵ Ibid.

¹²⁶ While the conviction on trafficking was reversed in the High Court, it confirmed the conviction on rape.

“In the case at hand, in the determination of what is fair, one must bear in mind, the rights and capabilities of children. As McLachlin recognized in R. v. W...: ‘It may be wrong to apply adult tests for credibility to the evidence of children.’ Wilson J. expressed a similar view in R. v. B. (G):... ‘it seems to me that he was simply suggesting that the judiciary should take a common-sense approach when dealing with the testimony of young children and not imposed the same exacting standards on them as it does on adults.’”

Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, (30 August 2017), par. 36,

The differences of approach between most of the courts cited above and **Mabuza (South Africa)** may seem unimportant, as the first instance judge in **Mabuza** stresses that he will still view child testimony with caution, but clearly both the first instance and appeals court proceed from a different starting point than do the other courts: that child testimony is not inherently untrustworthy. This leads to a more flexible evaluation of such testimony.

2.5.3.3 How courts evaluate child testimony

In practice, courts tend to evaluate child testimony in the context of the **totality of the evidence**, which may include the demeanour of the children, the plausibility and internal logic of their stories and the corroborating evidence. As we have seen,¹²⁷ this mode of evaluation is espoused by courts across the region in regard to trafficking in persons cases in general, but it is adopted in cases of child trafficking as well. Thus, the court of first instance in **Mabuza** maintains:

“The court must furthermore, not look at each witness’ demeanour and the evidence of each side in isolation, but must look at the evidence holistically...”

S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

Koch (Namibia) provides a practical example of how this evaluation is carried on. The court evaluates the **inherent plausibility** of the children’s testimony and comes to the conclusion that they **could not have been coached**, as they testify about things that children do not usually know. For example, the children of 9 and 11 years of age testified, not only that the accused put on a condom, but that a white substance came out of the his male genital. In addition one child testified that the accused asked her to lick his genitals after he put a plastic wrapping for bread over them. This is such a unique feature that it is not easily fabricated..

In addition, the court finds **corroboration** of the victims’ stories. This corroboration is found in the testimony of the accused, who admitted that the children came to his house on a certain date relevant to one of the crimes. Additional corroboration is found in the testimony of the victims, all of whom testify that the accused solicited them to engage in indecent conduct with them. Further corroboration is found in that each victim independently made a report that she was in the accused’s company in his home at some point during the period and that he, at the very least, sought to have sexual relations with her.

In view of the **totality of the evidence**, the court convicts the accused of trafficking for sexual exploitation, although it exonerates him from rape.

Similarly in **Mabuza (South Africa)** the court undertook a detailed analysis of the testimonies of the children, both in themselves, and in terms of corroboration.

¹²⁷ See section 2.4.2 on “The totality of the evidence”.

The court analyzed the children's testimony for **plausibility and coherence** and came to the conclusion that it showed signs of credibility. Firstly, the testimony related to **details that a normal child does not know** and for example, that the accused number 1 smeared their private parts with cream before raping them, and that on one occasion he injected himself with a chemical taken from the refrigerator, before the rape. One child also testified that accused number 1 used a condom. These are details with which children are not normally familiar and could not be expected to fabricate. Secondly, the child victims **did not exaggerate**, and for example, one testified that she did not know if her sister had been raped; they testified that accused 2 had not always been involved in preparing them for accused number 1 to exploit, but rather her sister Juliet; one of the children who had only been raped once did not claim several assaults; they did not claim that the accused number 1 ever hit or hurt them except for the pains of sexual penetration. Thirdly, the children's **demeanour** in court was good. The court noted that they conducted themselves quite well and that their testimony was easy to follow and **not inherently improbable**. Fourthly, the children had **no motivation to lie**, as they did not previously know the accused persons. Nor did their relatives have problems with accused number 1. Moreover they did not initiate the process which led to charging the accused persons.

The court then turned to corroboration and found much support for the children's testimonies in:

- **Objective corroboration:** Objective details mentioned by the children were found to be correct, and no explanation was given by the accused number 1 as to their knowledge of them, as he claimed he had never met the children. Examples were the color of his Jeep and the company name on the Jeep; the description of his house, and in particular the bedroom with en-suite bathroom; his possession of a firearm.
- **Expert testimony:** The court found corroboration of the children's testimony in the expert testimony of a registered nurse and a doctor who specializes in dealing with the examination of victims and especially children in sexual assault cases. Both experts addressed evidence of sexual penetration and in the case of the doctor, in addition, lesions on the private parts of some of the children which could attest to forcible penetration. In addition, the doctor testified as to the ages of the child victims which accorded with their own testimony. While this evidence did not prove that rape had transpired, it did strengthen the children's evidence as to the sexual relations they had undergone at such early ages.
- **Additional testimonies:** The policeman who reached the plantation confirmed the difficult conditions under which the children were living, as did the wife of the employee who rescued one of the children.
- **The accused's version:** the accused's testimony, in which he claimed that he did not know the child victims,, provided no explanation for their familiarity with various details regarding him or for their complaint against him.
- **The children's stories were largely consistent:** The various children's testimonies were largely consistent with one another and in themselves.

This mode of analysis was affirmed by the Court of Appeals and used to justify the court of first instance's approach to contradictions, which need not lead to the rejection of the evidence of a witness.

Similarly, in **Dragon (Namibia)**, which revolved around the sexual exploitation of young children between 7 and 9 years of age, the court cautioned itself, but found the children largely credible, in view of the fact that they were able to narrate what had happened to them a few years after the occurrences, with the assistance of a clinical psychologist. Though the case rested mainly on the testimony of the young victims, the court took into account that each victim corroborated the other on material aspects of the crimes. Their testimony was further strengthened by the use of anatomy dolls with which they were able to demonstrate what had happened.

We note that in **Jonas (Namibia)**, although there was proof that the victim had been below the age of 18 when the crimes were committed, the court treated her as a young adult, rather than a child, since child trafficking had not been charged.

As mentioned, in many of these cases, the children were also single witnesses of what occurred. However, since adults too can serve as single witnesses, we will address this issue in the next section.

Issues in regard to child testimony

1. The dangers requiring caution: suggestibility, imaginativeness, limited capacity to accurately observe and remember, lack of full appreciation of the importance of truthful testimony.
2. The strong points: children do not fantasize beyond their experience; they are not capable of consistent perjury.
3. The standards for evaluating credibility: should they be different for children than for adults? Should peripheral inaccuracies regarding time and location be less important in the case of children?
4. What tools are useful in evaluating child testimony?
 - The inherent plausibility and coherence of the testimony (are they testifying about events that children do not usually know about? Do they exaggerate? Is their demeanour truthful? Is their story plausible?)
 - Corroboration (do objective facts corroborate their story? Do they corroborate each other? Do other witnesses corroborate their story? Is there expert corroboration? Does the accused corroborate parts of their story?)
 - Do they have a reason to lie?
 - Does the accused provide an adequate response to their story?

2.5.4 Single testimony

2.5.4.1 Introduction

Single testimony can occur in various contexts. There may be only one witness to a crime, with no corroborating evidence. On the other hand, single testimony may be corroborated in various ways: there may be a few witnesses to the accused's criminal behaviour, with each witnessing only one part; there may be only one witness to criminal activity, whose testimony is corroborated by documentary or physical evidence or by other evidence which does not directly implicate the accused. In all such cases, most courts across the region caution themselves, due to the enhanced risks of **inaccuracy or bias**, in the absence of other directly incriminating evidence.¹²⁸ It is for this reason that corroborating evidence is so important in cases of single testimony.

In the cases which form the basis of this digest, courts do not *require* corroboration to single testimony,¹²⁹ but corroborating evidence clearly assists to achieve convictions.

¹²⁸ See G.L. Peiris, "Corroboration in Judicial Proceedings: English, South African and Sri Lankan Law on the Testimony of Accomplices Compared", *The International and Comparative Law Quarterly*, Jul., 1981, Vol. 30, No. 3 (Jul., 1981), pp. 682-716

¹²⁹ There may be jurisdictions which require corroboration of single testimony or some forms of single testimony, such as accomplice testimony. However, in the context of the cases which form the basis of this digest, this was not found to be the case.

2.5.4.2 *Single testimony with no corroboration*

An example of single testimony which does not seem to be substantiated by any other evidence occurs in **Criminal Judgment No 45-CO of April 25, 2019 (Madagascar)**.¹³⁰ The case revolved around a brother and sister who deceived a young woman about a job opportunity in China, whereas they knew that she would be forcibly married to a Chinese man and her children taken from her. The brother received a sum of money from his sister for his part in the transaction. The young woman was taken to China and the complaint was submitted by her mother.

The only testimony in the case was that of the brother, who was one of the accused persons. The victim did not testify, because she was still in China and could not be heard or questioned. Yet the court convicted both the accused persons of trafficking for forced marriage, apparently in view of the brother's admissions before the court. Since the case does not analyze the evidential picture in detail, many questions are left unanswered, and first and foremost, if there was further evidence before the court, over and beyond the brother's testimony.

2.5.4.3 *Single witness who is not an eyewitness*

A case in which there was a conviction on the basis of a single police testimony, corroborated by the accused's admissions is **Martinet (Mauritius)**. The case revolves around the trafficking of two minors for prostitution. The two minors were not brought to testify. Rather the conviction rested on the testimony of a police officer and admissions made by the accused 1 in a statement before the police. This accused person later denied the charges in court. The police officer saw the minors trying to escape from the accused 1's premises. They were later brought to the police station and an enquiry was held with them. Subsequently a reconstruction exercise was held at the premises of the accused 1.

The accused 1, in her unsworn statement before the police, said that she was poor and that in order to earn money, she would visit a bus station, where she would offer accommodation to girls in financial difficulties. She would then lead them to prostitute themselves. In this case, the first minor was a homeless girl, 13 years of age, who was recruited at the bus station and then made to prostitute. The second minor, 14 year of age, was her cousin who was also experiencing family and financial problems and was recruited by the first minor.

The court convicted the accused 1 of child trafficking, on the basis of these pieces of evidence and the birth certificates of the minors which proved their ages, and noted that the accused 1 did not challenge what she had said in her statement to the police. The case leaves unanswered the question of why the minors were not brought to testify.

2.5.4.4 *Sole victims as single witnesses*

Even when victims testify, their testimony may be single testimony in terms of the incriminating events which they witness. This is particularly problematic in cases where there is **only one victim**.

A case which rested heavily on victim testimony, with only slight corroboration, is **Chiyenda (Malawi)**,¹³¹ which revolves around the trafficking of a minor of 15, who is told that she will be married to the brother of the accused in **South Africa**. The prosecution case relied, almost

¹³⁰ Criminal Judgment No 45-CO of April 25, 2019 in the Supreme Court of **Madagascar**, I note that there were two accused and that there was a default judgment in respect of one of them.

¹³¹ The State v. Chiyenda, Criminal Case No. 30 of 2018, in the Senior Resident Magistrate Court Sitting at Lilongwe, January, 2018

entirely on the testimony of the minor girl. The **corroborating** evidence came from her mother's testimony, who told the court that she had never been asked if the accused could take the child to **South Africa**, and who confirmed the victim's age, and from the victim's passport, which had visibly been doctored by the accused. The court convicted the accused person of trafficking in persons.

A similar picture emerges in **Mndzebele (Eswatini)**, a case revolving around the sexual exploitation of a minor of 16 by a pastor who offered to pay her school fees. The main incriminating evidence proceeds from the victim, with some **corroboration** from her mother, who confirmed that she did not want to return to the accused and claimed that something evil was happening there; from a schoolmate of the victim, who observed the victim's sadness, read her diary and testified as to what he found there; and from a gynecological examination which showed that there had been penetration of the victim.

The court convicted the accused of rape, but exonerated him of trafficking for sexual exploitation. However, the exoneration had nothing to do with the victim's credibility, but rather with the difficulty to prove the accused's intention when he first brought the alleged victim to his home. The court noted that the victim was a **trustworthy witness** who gave her evidence with utmost clarity and successfully answered all the questions posed to her in cross examination. The court also noted that it applied the principle of the **totality of the evidence** and found that the victim told the truth and that she had **no reason to lie** against the accused person, who played the role of a messiah to her. As such, she had no reason to fabricate a story against the accused. On the other hand, the **accused was considered non-credible**.

A further example of a case where the main incriminating facts were testified to only by one victim is **Jonas (Namibia)**. This case revolves around the trafficking for sexual exploitation of an 18 year old young woman,¹³² whom the accused deceived with offers of a job. The victim was transported to a distant town where the accused made clear to her that she was expected to be a 'girlfriend' to men who had paid the accused for this service. When the victim refused, the accused threw her out of the house, on several occasions, with all her possessions. The victim had nowhere to go and was forced to seek shelter with a succession of men.

Whereas the detailed incriminating facts, are testified to by the victim alone, numerous other witnesses provide at least partial **corroboration** and for example: of the pattern whereby the accused tried to recruit young women to serve as 'girlfriends' to men; of the fact that in specific cases, witnesses saw the accused being paid for this service, or themselves paid for this; of the case of another young woman who was trafficked in this way, but agreed to be a 'girlfriend'. The court also took into account that the victim appeared to be a credible witness, and that the accused's defence was based on "bare denials".

Similarly, in **Mujee (Botswana)** the victim was the only witness who could testify as to the main facts of the case: her deceptive recruitment by the accused; the accused's control methods; the sexual exploitation which ensued after she was harboured by the accused. However, there was another witness who rented a room in the accused's premises, who corroborated that on a certain night, she saw a man called Charles enter the victim's room, thus corroborating the victim's claim that this man (who she claimed was introduced to her by the accused) raped her one night. The court cautioned itself respecting the fact that the victim was a single witness, but noted that there was partial corroboration, that the victim was credible and that the accused's version was not truthful.

¹³² The court notes that the victim was a bit under 18 years old when the crimes were committed, but since the prosecution did not charge child trafficking, the court looked upon her as a young adult.

2.5.4.5 *A few victims as single witnesses*

A number of other cases present a group of minors trafficked for sexual exploitation, where there is scanty corroboration, except for the minors supporting each other's testimony.

One example is **Dragon (Namibia)** which revolves around the sexual exploitation of 4 minors between 7 and 9 years of age. The main testimonies of what transpired come from the minors themselves, rather than from independent witnesses. Moreover, the minors contradict themselves and one another on various points. Nevertheless, the court convicts the accused of trafficking for sexual exploitation.

In doing so, the court takes into account that the victims' testimonies **corroborate** one another on material facts and that their description of the sexual acts is consistent; that the accused corroborates their testimony partially and for example about their visits to his home; that photos taken at the premises reveal pornographic pictures; that the child victims are able to depict the crimes by means of anatomy dolls. The verdict of the court of first instance was recently affirmed by the Court of Appeals as regards the trafficking conviction.

A similar scenario can be found in **Koch (Namibia)**, which revolves around the trafficking for sexual exploitation of 5 minor girls. The court notes that "*the quality of evidence is very poor*" and that there is no evidence of the crimes except the victims' statements and testimony, showing that no effort was expended to gather additional evidence. Nevertheless the court convicts the accused of trafficking for sexual exploitation, although it exonerates him from rape charges.

In doing so, the court takes into account that there is some measure of **corroboration**: on the part of the accused, who testified that at least some of the minors came to his home on one of the dates when crimes are claimed to have occurred, and that all of the minors were often in his house; on the part of the victims one to another, who all testified that the accused, at the very least, solicited them to engage in indecent and immoral conduct with him for his sexual gratification. In addition, the court notes that the victims made independent reports of the accused's actions.

2.5.4.6 *An accomplice as a single witness*

A particularly thorny problem faces courts where the single witness is an accomplice to the crime, and there is no corroboration, as in **Kapinga (Malawi)**. Above and beyond the caution courts exercise towards single testimony in general, they caution themselves, in particular, in regard to accomplice testimony. This derives from the special dangers presented by accomplice testimony, as the accomplice may have a natural tendency to minimize his own role in the crime or to color his testimony so as to secure leniency for himself. However, since this kind of testimony can be of importance, in general, it is not excluded, but rather evaluated in order to assess if it is frank and honest.¹³³

The case revolves around a charge of child trafficking, where a 7 year old child is sold to work in a maize mill. In the sentencing verdict the court notes that the child is still missing after 7 years and is presumed dead. The main testimony against the two accused buyers is the seller, who was previously convicted of the crime. However, the court convicts despite these evidential weaknesses and rules that the seller is a credible witness, although it cautions itself in view of his connection to the crime.

The Appeals Court affirms the Magistrate Court's reliance on the testimony of this single witness, although there was no corroboration. The Appeals Court states that the magistrate understood and appreciated what evidence law says about this and "*rightly warned herself on the danger of convicting on the uncorroborated testimony*". The Appeals Court further maintains that the court was entitled to dispense with corroboration, because it was convinced of the witness' credibility, according to the principle of the totality of the evidence.

¹³³ See section 2.3.5 on accomplice.

2.5.4.7 An exoneration on the basis of single testimony

An example of an exoneration, due to the risks of single testimony, can be found in **Shebe (Tanzania)**.¹³⁴ The case revolves around trafficking for debt bondage. The alleged victim testifies that the accused person deceived him, claiming that he was sending him to get a large amount of money in Pakistan, whereas in reality he was being trafficked for bondage. On arrival, his travel documents and cell phone were confiscated and he was kept in bondage until he succeeded in escaping. While the victim's sister also testified for the prosecution, apparently her testimony was only tangentially relevant.¹³⁵

The court exonerated the accused person, because the victim was a single witness who had not submitted any **corroborating evidence**, including travel documents proving that he had travelled to Pakistan, an additional witness whom he claimed had assisted him, and the cell phone number that he claimed he used to communicate with the perpetrator in Pakistan. However, above and beyond the lack of corroboration, the court also found the victim's testimony to be **non-credible in itself**. It also found a possible **reason for the accused and his sister to lie**, which was that the sister was the divorced wife of the accused and that therefore she and the alleged victim could not "*wish the accused any good in this world*".

Tools to evaluate single testimony

1. The need to exercise caution to address the risks of lack of accuracy or bias
2. The factors which help to allay the risks: corroboration, credibility, lack of a reason to lie.
3. Factors which highlight the risks: lack of corroboration and a possible reason to lie.
4. How the accused's evidence may affect the results: Did he or she choose not to testify when there was evidence requiring a response? Was the testimony mere bare denials?
5. The importance of the principle of the totality of the evidence in evaluating the witness' testimony
6. The special issues raised by single accomplice testimony.

2.6 Out of Court Statements

2.6.1 Introduction

Out of court statements are part of the foundation of evidence in some of the cases in this digest. Naturally, civil court jurisdictions more easily admit such statements than do common law jurisdictions with exclusionary rules, and especially the rule against hearsay evidence. However, as we will see, three cases which admitted such evidence come from a common law jurisdiction, namely **South Africa**.¹³⁶ The statements were admitted under exceptions to the rule against hearsay, and include statements of victims, witnesses who testified regarding the accused's pattern of sexual exploitation, a businessman who rebutted the accused person's claim that he worked with him and "formal witnesses" who testified about tangential facts.

¹³⁴ Republic v. Shebe, Criminal Case No. 192 of 2017 in the Resident Magistrate's Court of Dar Es Salaam at Kisutu, 29 August 2018.

¹³⁵ The court views the victim as a single witness despite mentioning that his sister testified. It is not clear what the nature of her testimony was.

¹³⁶ **South Africa** follows common law principles in terms of criminal and civil procedure and evidence, although some areas of the law are influenced by Roman – Dutch law, such as the laws of contracts and torts. See for example; **South African** Law Commission, "*Review of the Law of Evidence*", Issue Paper 26 (2008) at <https://www.justice.gov.za/salrc/ipapers/IP26.pdf>

A particular kind of statement admissible in common law jurisdictions, as well as civil law jurisdictions, is the accused person's statement before the police, if it includes a confession or an admission of inculpatory facts, even if partial.

2.6.2 Out of court statements of witnesses, including victims

It should be no surprise that civil law jurisdictions do not impede the submission of out of court statements of witnesses, in the absence of exclusionary rules. However, this digest supplies us with three cases from **South Africa**, where courts admitted statements of witnesses in evidence, despite the fact that this State follows common law principles in terms of criminal procedure and evidence. All three cases allowed the admission of the statements, in the framework of exceptions to the rule against hearsay. In an additional case from **Botswana**, the court admitted the out of court statement of the victim's father with the agreement of the defence.

The most in depth analysis of this topic can be found in **Matini (South Africa)**, a case which revolves around the trafficking for sexual exploitation of a number of young women, some of whom were minors, including two mentally disabled children. The court admitted five witness statements under exceptions to the rule against hearsay evidence.

All the statements pertained to witnesses who had died or could not be traced. Among the statements admitted, one was given by a **victim who died**; two were given by **men who could not be traced and knew of the accused's pattern** of providing girls to men for sexual exploitation. One of these men was even interested in one of the girls, but did not have enough money to pay for her. Another statement was given by the **grandmother of one of the disabled girls who died** and was termed a "**formal witness**" by the court. She told of the girls' disappearance, of what her granddaughter told her when she returned home, and of her impression as to the bad state of both girls when they returned and were subsequently referred for counselling. The fifth statement was given by another witness termed a "**formal witness**" who died. He testified that he received the mentally disabled victims from the police after they were dropped off and that he heard them telling of their ordeal.

The court used a number of criteria in order to admit these statements. The persons who had given the statements were unavailable for testimony; the probative value of the statements was high; the reliability of some of them (those given by the victim and the two men who could not be traced) was assured by corroboration by witnesses who testified before the court; the others were largely formal testimonies which were not about questions in dispute, and did not prejudice the accused.

Interestingly, the court did not admit the statement of an additional victim who had been stabbed and killed, because it was not taken before the Commissioner of Oaths, and hence did not have the stamp of reliability.

An additional case where a court admitted a witness statement, in the absence of testimony in court, is **Eze (South Africa)**, which revolves around the trafficking for sexual exploitation of two young women addicted to drugs. According to the prosecution case, the accused received payment for the prostitution of the two women. However, he claimed that his income derived from his work in a reputable business. The court admitted a statement by a Nigerian man who owned the business where the accused claimed he had worked, and which contradicted this claim. However the court does not analyze why this statement was admitted, despite the rule against hearsay evidence, and it is not known why this witness could not testify in court.

Msweli (South Africa), a case of trafficking for slavery of a baby, presents another example of the admission of a witness statement. The witness, who served as a middleman between the accused persons who sold the baby, and the buyers of the baby, disappeared and could not be traced. Unfortunately, the judgment was not transcribed and only a summary recorded by the

prosecutor was available, which did not include an evidential analysis of this decision. However, the admission of this statement probably fell under an exception to the rule against hearsay, in that the witness was unavailable for testimony; the probative value of the statement was high; and its reliability was supported by the corroboration of other witnesses who did testify before the court.

In addition, in **Mujee (Botswana)** the court admitted an out of court statement by the father of the victim who resided in **Zimbabwe**, with the agreement of the defence. The content of the statement was that the victim had requested permission from him to accompany the accused to **Botswana**, as the accused had promised to find work for her as a housemaid. He added that he consulted the victim's mother and that they consented to the request. Thus, this statement corroborated the victim's version of the steps that led to her recruitment by the accused.

2.6.3 Accused persons' out of court confessions or admissions

The accused person's out of court statements are admissible, in general, even in common law jurisdictions, if they include confessions or admissions.¹³⁷ However, in common law jurisdictions, as a rule, these statements must fulfill certain conditions in order to be admissible, such as having been given freely and voluntarily.¹³⁸

In the sample of cases which form the foundation of this digest, there are a number of cases which explicitly refer to the accused's admissions as admitted in evidence. However, it is reasonable to assume that such statements were admitted in additional cases, though not explicitly addressed. In some cases the accused's statements are crucial to the case, whereas in others, there is a wealth of other evidence, so that the statements are less important.

In **Martinet (Mauritius)**, a case which revolves around the sexual exploitation of two minor girls, the court relied heavily on the out of court admissions of the accused. In her unsworn statement before the police, the accused said that she was poor and that in order to earn money she would visit a bus station, where she would offer accommodation to girls in financial difficulties. She would then lead them to prostitute themselves. Since the minors themselves were not brought to court to testify, the only evidence before the court was the admissions of the accused and the testimony of the police officer who had found the minors when they fled from the accused's premises, and brought them to the police station where an enquiry was held. Subsequently this police officer also undertook a reconstruction exercise at the accused's premises in her presence.

Another case in which the court explicitly relied upon the accused's out of court admissions is **Fawza (Mauritius)**¹³⁹, a case which revolves around the selling of a baby by its own mother.¹⁴⁰ In this case the accused's statements were central to the conviction, as the court relied mainly on the accused's two out of court statements in its ruling. Although the court notes that there were

¹³⁷ See **the South African case of S v Lekhwani and Others** (SS 073/2015) [2016] ZAGPJHC 155 (16 May 2016) which differentiates between confessions, in which the accused admits all the elements of the crime, and admissions, which are 'a statement or conduct that is adverse to the person from whom it emanates, but do not necessarily include a full confession of guilt.

¹³⁸ See for example, section 219A of the Criminal Procedure Act 51 of 1977 of **Namibia**. According to it, the court must be satisfied that the statement had been made freely and voluntarily and without undue influence. Furthermore, the court must be satisfied that accused had been properly advised of his rights to legal representation which include the right to apply for legal aid. The court must be further satisfied that the accused made the admissions whilst he was in his sound and sober senses. See *S v Khaxab* (CC 02/2015)[2017] NAHCMD 7 (17 January 2016). See also **the South African case of S v Lekhwani and Others** *ibid.*, which summarizes the **South African** law on the admissibility of the accused's confessions or admissions, both of which must fulfill the condition that they were made freely or voluntarily.

¹³⁹ *Police v. Fawza*, Cause Number 1330/13, 2017 INT, in the Intermediate Court of **Mauritius**.

¹⁴⁰ We note that the accused was convicted of a violation of the Child Protection Act, which does not require an intent to exploit, unlike the Trafficking Act.

flaws in the first statement, it also notes that the second statement confirmed it, and that there was no objection made to its admissibility. The court then went on to rely on the presumption of regularity to assume that the statements were given voluntarily.

These statements were of central probative value. In them, the accused admitted that she sold her baby girl to a woman, against a promise to give her a house in **Mauritius** and a trip to the U.K., and allowed the baby to be taken to U.K. by a man who had falsely declared that he was the father of the child. We note that while the court mentions that there were prosecution witnesses, we do not know who they were or the content of their testimony.

The accused's out of court admissions are also mentioned explicitly, as part of the foundation of evidence, in three **South African** cases.

In **Fakudze (South Africa)**, a case which revolves around the sexual exploitation of a minor by her stepfather, prosecution evidence included the testimony of the victim, expert testimony by the obstetrician, which was inconclusive as to rape, but included an age assessment of the victim, DNA evidence as to the accused's paternity in regard to the baby of the victim and the accused's out of court admissions about the rape of the victim and his illegal stay in the country. The accused confirmed in court that his statements were true, but did not testify. However, the statements addressed only the rape and illegal stay charges and not the trafficking charge. The accused was convicted of all the charges by the first instance court, but the trafficking conviction was overturned by the appeals court. His admissions were an important part of the evidential picture in both instances.

In **Eze (South Africa)**, a case revolving around the sexual exploitation of two young women addicted to drugs, there was a wealth of prosecution evidence including the testimony of the two victims, testimonies of two police officers, the testimony of an expert clinical psychologist and medical testimony which was inconclusive as to rape. In addition, the accused's warning statement, which included a charge of rape, was submitted in evidence. While the court does not explicitly address the content of this statement, it enumerates the facts not in dispute between the parties, which may be drawn from the accused's statement, as well as from his court testimony. These undisputed facts include that both victims resided with the accused at some stage; that they were addicted to hard drugs; and that they were in prostitution to pay for drugs.

In **Matini (South Africa)**, a case revolving around the sexual exploitation of a number of young women, some of whom were minors, including two mentally disabled children, the prosecution submitted a wealth of evidence, including the testimonies of victims, neighbours, men who had observed the pattern of exploitation, family members of one accused, and police officers. The court also admitted statements of witnesses who could not be traced or who had died. The court notes that two kinds of accused statements were submitted: warning statements and statements before magistrates. It notes that the main accused's statement before the magistrate was self-serving, but also included some admissions. While this accused person testified, the second accused did not. The court explicitly takes into account the admissions which corroborate certain points in the prosecution case. However, it does not address the content of the admissions.

2.7 In court confessions

While a fair number of cases include pleas of guilty,¹⁴¹ one case includes a confession made by the accused while cross examining a witness for the prosecution. In **Mboo (Zambia)** where the accused trafficked his brother in law for removal of organs, he did not plead guilty and claimed that he was only trying to buy a canoe. Nevertheless, the court notes that while cross examining

¹⁴¹ Examples are **Mwewa (Zambia)** and *State v. Phiri et al*, Criminal Case No. 109 of 2018, in the High Court of **Malawi** [Criminal Division] Lilongwe District Registry, sitting at Dowa, conviction 13 June 2019, sentence 29 November 2019.

the potential buyer, the accused confessed that he wished to sell a person.¹⁴² The court relies upon this confession, along with other evidence, when it convicts the accused of trafficking for removal of organs.

2.8 Documentary evidence

2.8.1 Introduction

Over and beyond testimonial evidence, in trafficking cases, like in other cases, courts admit various kinds of documents which form part of the foundation of evidence in a case. This section of the digest presents examples of various documents which have formed the basis of trafficking cases, whether to support the prosecution or defence cases. It is hoped that this will prove particularly valuable for practitioners who are building a case.

As in many areas of the law of evidence, there is a difference between common law and civil law systems in regard to documentary evidence. While both systems allow both oral and written testimony, the common law has a clear preference for oral testimony, under the assumption that the witness' demeanour in court allows the judge (and jury) to more easily evaluate his or her evidence. On the other hand, civil law systems exhibit a preference for written documents, in recognition of the inaccuracies which can attend witness testimony. In accordance with this difference, common law systems tend to require a witness to attest to the circumstances under which a document was drafted or obtained. In addition, they tend to limit the admissibility of documents in various ways.¹⁴³ A common law case which analyses such admissibility constraints is **Matini (South Africa)**, a case revolving around the sexual exploitation of a number of young women, some of whom were minors, and two mentally disabled children.

In assessing the importance of a particular document in the evidentiary edifice, naturally, attention must be paid to the other evidence in the case. We also note that sometimes the **absence of a document** can furnish evidential proof of a fact claimed by a party, and for example, the absence of a passport may support a victim's claim that the perpetrator confiscated it. The following are a number of examples of documents or the absence of documents, which contributed to the evidentiary foundations of cases.

2.8.2 Cell phone records and internet data

In cases across the region, cell phone records and internet data provide evidentiary support for prosecution cases.

One example is **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation of two minor girls. One of the accused persons, charged with recruiting the girls, claimed that she had only sporadic, short-term contact with the other accused, who sexually exploited the victims. The cell phone records were crucial in refuting this claim, as they showed a massive 1360 calls between the two accused persons.

¹⁴² The accused words, as quoted by the court were: “*I told PW2 [prosecution witness 2 who was the potential buyer] I will find people from Silowana for him to sell, so that I could buy a car, may be PW2 knew the buyers*”

¹⁴³ See for example, Lundmark, Charting the Divide between Common and Civil Law and John Capowski, “*China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*” published in Vol. 47 Texas International Law Journal, volume 47, 455 (2012).

Another example occurs in **Chama (Zambia)**,¹⁴⁴ a case revolving around the attempted trafficking of 6 Indian males who were deceived into believing that they would be employed as welders in **Zambia**, when in reality they were to be trafficked to **South Africa**. Besides the testimony of two victims and a witness, who testified regarding passports which were to be given to the accused for the Indian victims, the police performed an electronic surveillance of the cell phones of the perpetrators in order to establish the connections between them.

In **M.L. (Seychelles)**,¹⁴⁵ the case revolved around the child trafficking for sexual exploitation of a number of minors, one of whom was contacted by means of social media. The accused falsely represented himself as a female model and would get in touch with girls, as young as 10, to invite them to be models. He would then ask them for photographs, including nude photographs, and offer to pay for them. Eventually he would ask them for sexual favours and when refused, would threaten them with the publication of their nude photos. Each time he would promise them that if they engaged in sexual relations with him or his friends, their photos would be deleted and each time he would violate his promise.

The prosecution case relied on the testimony of three victims, on videos of the accused persons engaging in sexual relations with young girls and on texts and images on several electronic devices: external hard drives, pen drives, mobiles and laptops. In view of the fact that only the sentencing ruling was before us, it is not certain that this is the full evidential picture.

In **Msweli (South Africa)**, a case which revolves around the selling of a baby for slavery, the evidentiary picture included a cell phone record, analyzed from one of 3 cell phones confiscated from accused number 1, which showed contact between the middleman to the sale and the accused, who allegedly sold the baby. The SMS content included messages about the baby in question, and messages with the identity numbers of the buyers, in order to facilitate ordering a new immunization card for the baby, based on the buyers as his parents.

These documents supported a wealth of other evidence, including other documents, seven testimonies, and a witness statement of the middleman who had disappeared.

In **Eze (South Africa)**, a case revolving around the sexual exploitation of two young women addicted to drugs, the prosecution case relied on a number of testimonies, including by the victims, police officers and expert testimonies, and on a number of documents. Among them were cell phone data and internet data which included ads, receipts for ads and deposit slips relating to placement of advertisements for sexual services. This data supported the victims' testimonies that they were given cell phones so that clients could contact them and that ads were placed on the internet advertising their sexual services.

Similarly, in **Milinga (Tanzania)**, a case where the exploitation, though intended, did not transpire, 10 young women were apprehended on a bus on the way to Nairobi. The testimonies of some of them established that the 2 appellants had offered them jobs in massage parlors, bars and saloons in Nairobi and that these appellants had arranged their travel and had been in contact with persons in Nairobi. Their testimonies were supported by cell phone records which established that one appellant had been in contact with a person in Nairobi, to whom the young women were to be transferred, and that he had transferred their photographs to him via whatsapp, which fact was proven by the phone records. The conviction of the appellants on trafficking in persons charges was affirmed by the High Court.

¹⁴⁴ *People v. Chama*, 2SP/E//198/09, Magistrate's Court Maseru, verdict confirmed in High Court (April 2010), available at UNODC's Human Trafficking Case Law Database (ZMB002). NOTE: Only a summary was available on the basis of an interview with the investigating officer and prosecutor involved in the case, as the judgment was *ex tempore*.

¹⁴⁵ *The Republic v. M.L. and others* CrS 63/19 [2019] SCSC (17 April 2020) before the Supreme Court of **Seychelles**. We note only the sentence was available.

2.8.3 Official documents like birth certificates, passports, court records

A number of cases rely on official documents, and for example, birth certificates, death certificates, passports, identification documents, health documents, school records, licenses, records of judicial proceedings.

As a rule, *birth certificates* are used to base charges of child trafficking. This can be seen in *Martinet (Mauritius)*, *Sonah (Mauritius)*,¹⁴⁶ *Mujee (Botswana)* and *Allima (South Africa)* in all of which the birth certificates established the ages of minors trafficked for sexual exploitation.

A *death certificate* can be submitted in order to justify an application to admit a witness' statement, rather than his or her testimony. This occurred in *Matini (South Africa)*, a case revolving around the trafficking for sexual exploitation of a number of victims, some of whom were minors, including two mentally disabled children.

Passports or travel documents may be relevant to prove fraudulent and corrupt behaviour by the accused, and thus support the conclusion that she or he intended to exploit the victim. Such evidence is of particular importance in cases where the victims were rescued before the exploitation transpired.

Such a scenario occurs in *Bandawe (Malawi)*,¹⁴⁷ where a number of trafficked victims were deceived that they were to be transported to Kenya. They were rescued before the exploitation transpired. The victims' passports were submitted in evidence, and testimonies established that the passports were processed by the accused and that the victims only appeared in person at Immigration Offices in order to have their photographs taken. This was not the normal procedure, thus pointing to fraudulent intent by the accused and possible corruption of immigration officials.

A similar use of passports occurs in *Chiyenda (Malawi)*, where a girl of 15 years was persuaded by a friend of her mother's to travel to **South Africa** in order to marry the accused's brother. The passport process was undertaken by the accused alone, with the victim appearing in the Immigration Offices only to have her photograph taken. The passport, submitted in evidence, had three misrepresentations: the victim's age was misrepresented as 16 instead of 15; the victim's last name was misrepresented; in the passport picture she is wearing a wig to make her look older. This fraudulent behaviour assisted the court to conclude that the accused had intended to traffic the victim, although in the end, she was rescued before the exploitation transpired.

Similarly, in *Mutwale (Zambia)*, a case revolving around the trafficking of five young children to **Namibia**, forged **Tanzanian** passports on the children's names were submitted in evidence, in order to contribute to proof of the accused's intention to exploit the children. Here too, the children were rescued before the exploitation had transpired, so that this evidence contributed to the proof of criminal intent.

Another way passports can serve to contribute to a conviction appears in **Judgment 220-CO (Madagascar)**,¹⁴⁸ where the discovery of a number of passports in the accused person's residence supported the testimony of two victims that he had intended to transport them to Saudi Arabia for the purpose of exploitation in domestic servitude.

¹⁴⁶ *Police v. Sonah et al*, Cause Number 949/2010, 2012 INT 192, in the Intermediate Court of **Mauritius**

¹⁴⁷ *The State v. Bandawe*, Criminal Case Number 213 of 2017 in the Senior Resident Magistrate Court Sitting at Lilongwe, conviction June 30, 2017; sentence July 26, 2017. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No.MWI003).

¹⁴⁸ Judgment No. 220-CO from 22 October 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.

Sometimes the **lack of a passport** may support victims' claims that their passports were confiscated by traffickers. Such a situation happened in **Maroodza (Zimbabwe)**, where 6 young women¹⁴⁹ were trafficked for labour exploitation to Kuwait, and managed to escape from their employers. They fled to the **Zimbabwe** embassy and a representative of the embassy testified that most of them did not have their travel documents, which had been confiscated. In view of this, they had to stay at the embassy for some time while the government of **Zimbabwe** obtained temporary travel documents. The temporary travel documents were submitted in evidence and formed part of the evidence which led to the conviction of the accused on trafficking charges.

In other cases, the absence of victims' passports can help to prove their vulnerability, as entering and staying in a State other than their own without passports clearly makes them vulnerable. Such a scenario can be seen in **Mabuza (South Africa)** where 4 children from **Mozambique** were illegally brought to **South Africa** without passports. A similar set of facts occurs in **Hlabi (South Africa)**¹⁵⁰ where the charge sheet charged the accused persons with trafficking 2 children of 14 from **Lesotho** with no travel documents.

Health documents may be relevant to cases in a number of ways. They may support claims as to the fraudulent intent of the accused person. This can be seen in **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young woman who was "given" to several men as a 'wife', one after another, after being deceived that a good job awaited her. The accused fraudulently used an existing health passport for the victim, but changed the names of the victim's parents on the document, as if the accused were her mother, and told the victim to put her name on this passport.

A similar use of health documents occurs in **Bandawe (Malawi)**, a case revolving around the trafficking of a number of victims who were deceived that they were being transported to Kenya. Although the accused person had obtained four yellow fever books for the victims, they denied ever having been vaccinated. The yellow fever books were submitted to support the claims of fraudulent intent and they also raised concerns as to possible corruption among clinic and immigration officials responsible for issuing such documents.

Yet another similar use of health documents occurs in **Msweli (South Africa)**, a case revolving around the selling of a baby for slavery. The prosecution submitted two immunization cards for the baby. Apparently the first was the original immunization card with the names of the baby's biological parents, whereas the second was a fraudulent card with the names of the buyers. Among other pieces of evidence, this served to establish the criminal intent of the accused persons.

Other official documents which can be relevant to a case include *business licenses*, certificates of incorporation or articles of association of a business. These documents were submitted in a case of trafficking for practices similar to slavery and forced labour in **Seychelles**, namely **Alam (Seychelles)**, where these documents supported the claims of the victims and other witnesses that the accused was the employer of the 4 exploited foreign workers and that he had responsibilities towards them.

Similarly in **Maroodza (Zimbabwe)**, a case revolving around the trafficking for labour exploitation of several young women to Kuwait, a *certificate of the company* of the accused person was submitted in evidence, in order to prove that he had no right to recruit workers outside the capital of Harare, and certainly not to send them to foreign parts. This contributed to proof of his intent to commit the crime and to the conviction on trafficking in persons.

¹⁴⁹ We note that this process transpired in regard to 10 young women, but only 6 testified.

¹⁵⁰ The State v. Hlabi Case Number 14/368/19 in the Regional Division of Gauteng in Pretoria. Only the charge sheet and the Main Heads of Argument by the State in an application for discharge in terms of section 174 of the CPA 51/1077 (The State's Heads of Arguments) were available.

Other examples of official documents used in cases are *identification documents*. In **Matini (South Africa)**, a case revolving around the sexual exploitation of several victims, some of whom were minors, including two mentally disabled children, the prosecution submitted the identification document of a victim who had apparently died, in order to justify submitting her statement in evidence. Similarly it submitted an identification document respecting the body of a victim who had died, once again, apparently in an effort to justify submitting her statement in evidence. In **Msweli (South Africa)**, a case revolving around the selling of a baby for slavery, two identification documents were found on the accused and submitted in evidence, one of which was fraudulent. This may have contributed to the proof of the accused's criminal intent, although the summary available to us does not explicitly address this point.

Yet another example of an official document submitted in evidence is the *school attendance record* of a victim in the **Esther Phiri (Zambia)** case. This case revolved around a child of 14 trafficked for exploitation within **Zambia**. Her former teacher submitted the school attendance registers for the period relevant to the crime, when the victim was in grades 6 and 7. Apparently, this document had bearing on her age, and substantiated that the accused had abducted a child who was still in school. Indeed according to one testimony, the accused told the child that school would not get her anywhere.

A particularly interesting official document submitted in evidence, is a *record of judicial proceedings*. In **Eze (South Africa)**, a case revolving around the sexual exploitation of two young women addicted to drugs, the affidavit of a magistrate in the Children's Court and the record of proceedings in this court were submitted in evidence. It was during proceedings in the Children's Court, regarding the children of one victim, that she revealed to the court the circumstances of her exploitation. In the wake of her testimony, the magistrate reported the case to the police which resulted in the rescue of the second victim and the arrest of the accused.

2.8.4 Miscellaneous documents

Among the other documents submitted in the sample of cases on which this digest is based, are also *receipts or bills*. Such documents were submitted in **Eze (South Africa)** to support the claims of the victims that they were advertised on the internet for sexual services. Similarly, in **O.B. Abba (South Africa)** electricity bills for the premises where prostitution was taking place were submitted in order to prove the involvement of a less dominant accused in the crime, as the bills were on her name. In the end, this accused person was exonerated because there was not enough evidence to prove that she knew what was taking place in the premises.

In **Matini (South Africa)** *newspaper clippings* regarding the disappearance of two mentally disabled minor victims were submitted in evidence to support the fact that they were abducted and to confirm the testimony of several witnesses about seeing these clippings and showing them to the dominant accused person who tore them up.

Contracts can be relevant evidence in cases of trafficking. Thus, in **Alam (Seychelles)**, a case revolving around the trafficking for practices similar to slavery and forced labour of several foreign workers, the prosecution submitted contracts by which the accused subcontracted the workers to other employers so as to transfer the responsibility for feeding and housing them to others. In **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation, slavery and servitude of several young women addicted to drugs, the prosecution submitted the lease agreement for the premises where the prostitution was taking place in order to prove the involvement of a less dominant accused, whose name appeared on the lease. In the end, this accused person was exonerated because there was not enough evidence to prove that she knew what was taking place in the premises.

We note that in **Adigwe Dike (Eswatini)**,¹⁵¹ a case revolving around the trafficking for labour exploitation of a young girl, the written agreement between the alleged victim and the alleged perpetrators, is relied upon heavily by the court in deciding to exonerate the accused persons from the charge of trafficking in persons. The court sees in this contract proof that the victim agreed to the conditions of her employment which negates the element of exploitation or intent to exploit. We will have occasion to refer to this case further on in addressing the difficult issue of ‘consent’.

Letters are another kind of document sometimes submitted in evidence. For example, in **Sonah (Seychelles)**, a case revolving around child trafficking for prostitution and exploiting a prostitute, the victims claimed that the accused forced them to sign letters affirming that they knew that they were not permitted to do anything illegal on the premises. They did so in the face of threats that otherwise they would not receive payment. The prosecution submitted the letters in evidence, to round out the testimony of the victims, and to contribute to proof of the accused person’s criminal intent.

In **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, a former shareholder of the company under which the accused worked, confirmed by letter to the Director of Immigration, that the company had ceased to function, and that he would not be held responsible for the accused, who was a foreigner, for staying in **Seychelles**. This letter contributed to proof that the accused was recruiting foreigners illegally without the umbrella of an officially sanctioned recruiting company.

2.9 “Real” or physical evidence

2.9.1 Introduction

“Real” or physical evidence concerns pieces of evidence whose physical appearance or properties are of probative value. It can include incriminating objects like condoms, drugs, firearms or fake money used in a criminal transaction; objects belonging to the accused and found at a crime scene; biological traces linking the crime to the accused; the appearance of persons or premises as captured by the court, or by means of pictures; signs of injuries on persons; direct evidence of crimes as captured by videos or pictures; the demeanour of witnesses in court.¹⁵²

In general, testimony is necessary in order to identify the object or material thing or place it in context. However, “real” evidence still allows the court to form an impression on the basis of its own perception of the object, even if its introduction is supplemented by testimony.¹⁵³ We note that real evidence may be submitted as evidence in court or gathered as a result of an on site visit or “view” on the part of the court.¹⁵⁴

The difference between “real” or physical evidence and documentary evidence is that documents are submitted in evidence due to their **content**, whereas “real” or physical evidence is submitted due to its **appearance or physical attributes**. Thus, paradoxically, sometimes documents are considered to be “real” evidence, if they are submitted in order to prove their appearance, rather than their content.

¹⁵¹ Rex v. Adigwe Dike and Other, Case No. 33/2012 in the High Court of Swaziland, judgment from 30th of April 2014

¹⁵² See for example, the Free Legal dictionary definition at <https://legal-dictionary.thefreedictionary.com/real+evidence>; Cross and Tapper, “On Evidence” 12th edition, Oxford University Press (2010), p. 58.

¹⁵³ Ibid. Cross and Tapper, p. 56.

¹⁵⁴ Ibid. p. 65.

As in documentary evidence, sometimes **the absence of an object** on a crime scene may be incriminating. Examples are the absence of adequate food in a refrigerator on premises where victims were held,¹⁵⁵ or the absence of condoms in premises where prostitution took place, pointing to a lack of care for the safety of victims of trafficking for prostitution.

The following are examples of “real” or physical evidence submitted in the sample of cases on which this digest is based.

2.9.2 Material objects or traces of objects

There are several cases in which material objects or traces were submitted as evidence in order to contribute to the proof of trafficking or allied crimes.

In **Mboo (Zambia)**, a case revolving around an attempt to traffic a person for removal of organs, the person approached by the accused to buy the victim’s organs, informed the police of the intended act and the police prepared **fake money** with serial numbers which was paid to the accused by a policeman posing as a buyer on the night of the transaction. Other police officers hid in the boot of the car and when the accused accepted the money, they were able to arrest him. The fake money was submitted to the court to support the stories of the buyer and the police about the illegal transaction.

In **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of several children, the prosecution submitted a **lubricant** found in the accused’s premises which served to support the victims’ testimony that the accused had them masturbate him and that he rubbed their private parts.

In **Knoetze (South Africa)**,¹⁵⁶ a case revolving around the trafficking for sexual exploitation of a number of children, the police discovered a **lighter** belonging to the accused together with **cigarettes** he purportedly smoked and **used condoms** in a site in the bush pointed out by the victims as the place where they were raped. Since only a summary of this case was available, we do not know which of the above objects was submitted in evidence. However, they are noted, which leads us to the conclusion that at least some of them were submitted to the court.

Traces of cocaine were submitted in evidence in **O.B. Abba (South Africa)** and **Eze (South Africa)**, cases revolving around trafficking for sexual exploitation where drugs are used as control methods by the traffickers. The drugs supported the claim of victims that the accused persons were supplying them with drugs.

Naturally such evidence may not be conclusive if it does not impact on a central question in the case. This is made clear in **Roy (Mauritius)**,¹⁵⁷ where although many condoms, both in their original packages and with no wrappings, were found on the premises of a beauty parlour owned by the accused, they did not rule out that the women working there had initiated engaging in sexual relations with men, without the knowledge of the accused owner. Despite this evidence, the accused was exonerated from charges of keeping a brothel.

2.9.3 Appearance or demeanour of victims in court

Sometimes the appearance of victims is testified to by witnesses, which comes under the heading of “testimony”. However, sometimes, the court receives a direct impression of the appearance of

¹⁵⁵ Examples of such an absence of food occur in **Eze (South Africa)** and **Alam (Seychelles)**. However, in those cases, this absence of food is proved by means of testimony, rather than by means of the court’s direct impressions.

¹⁵⁶ *State v. William Knoetze and other*, Criminal Case No. 73-01-2014 in Stutterheim. Only the decision of the Deputy D.P.P. on the charges and a summary prepared by the prosecutor were available, so that the citation is not full. We were informed that there is no transcription of the judgment, as it was never appealed.

¹⁵⁷ *Police v. Roy Monque Therese*, Cause No: 1529/2004, 2008 INT373 in the Intermediate Court of **Mauritius**.

victims, either by viewing them in court or by means of pictures submitted in evidence. In these cases, we are talking of “real” or physical evidence.

The **appearance** of witnesses or victims is noted in a number of cases. An example can be found in **Munyanyi (Zimbabwe)**,¹⁵⁸ a case revolving around the trafficking of 4 minors from **Mozambique** within **Zimbabwe** for labour exploitation. A doctor assessed the ages of the four minors to be 17, 15, 14, and 14 respectively. However, the court noted that some of the minors looked younger than this assessment, and for example, the two assessed to be 14 and the one assessed to be 15. This ability to form a direct impression enabled the court to evaluate independently that the children were younger and more vulnerable than was assessed by the expert.

Similarly, in **Dragon (Namibia)**, the court describes the physical appearance of the child victims and the brother of one of them who saw part of the sexual exploitation. The court stresses that all the children described appeared to be “*small built*”. Though it is not clear why the court lays stress on this, perhaps this is done to highlight their vulnerability. Not only were they children, but they looked like very young children.

The court’s impression of the **demeanour** of witnesses is another example of how the court uses “real” or physical evidence in order to form a direct impression. Though this doubtless occurs in every court case, the following cases explicitly allude to the importance of demeanour in evaluating the credibility of witnesses.

One is **Fawza (Mauritius)**, a case revolving around the selling of a baby by its own mother. In analyzing the evidence in the case, the court notes that it has taken into account the demeanour of the prosecution witnesses. Another is **Mabuza (South Africa)**, where the court of first instance says that the 4 children conducted themselves quite well under the circumstances, taking into account their language and cultural challenges. Another example is **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of several children, where the court comments that most of the child prosecution witnesses testified easily and freely.

A particularly interesting case addressing demeanour is **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women. In describing the demeanour of one of them, the court emphasizes the importance of viewing demeanour in the context of factors like culture, class and race.

“I did not find her demeanour as a witness to be as poor as claimed because in having regard to the demeanour of a witness, a court should not lose sight of the social dynamic, of the fact that a witness might be of a different culture, class and race whose life experience differed from that of the trier of fact.”

S. v. Veeran Palan and Edwina Norris, Case No. RCD 13/14, Regional Court of KwaZulu-Natal, 12 June 2015

While courts usually take into account both the coherence and logic of testimony and the demeanour of the witness, interestingly, in the case of **Milinga (Tanzania)**, the court places more emphasis on the coherence of the witness’ testimony, than on his or her demeanour. However, this ruling was delivered under special circumstances, since the first instance Magistrate did not himself hear the victims testify, as he succeeded to the case after it was initially heard by another judge.

¹⁵⁸ The State v. Munyanyi et al, Case No. MSVP 804-6/17, in the Magistrates Court for the Province of Masvingo

2.9.4 Pictures or videos of persons or premises

Pictures or videos are other media which allow the court to directly view the physical attributes of persons or premises.

An example of pictures of child victims submitted to the court in order to allow it to form an impression of them is **Mutwale (Zambia)**, a case revolving around child trafficking. The children themselves did not appear as witnesses for reasons that remain unclear, so that it was important that the court be given the tools to form an impression of them. According to the prosecution, the five children ranged from 10 years of age to 8 years of age, and comprised three boys and two girls.

In **Koch (Namibia)**, a case revolving around the sexual exploitation of several children, the prosecution submitted pictures of the accused's room and of the pornographic pictures in it. These served to confirm the children's testimony about the appearance of the room and the pictures in it.

In **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl, the prosecution submitted pictures of two places where the victim claimed she was sexually exploited, in order to allow the court to compare them with the victim's descriptions.

Similarly in **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, the prosecution submitted photographs of the premises in which the victims lived, which were clearly unfit for human habitation. These pictures supported the claims of the victims and the testimony of the two government officials who visited the sites.¹⁵⁹

Sometimes, videos can show the court more than the appearance of a particular victim or premises. In **M L (Seychelles)**, a case revolving around the trafficking for sexual exploitation of several minor victims, the prosecution submitted phone videos. One showed a victim performing oral sex for accused 1, and the rest showed him engaging in sexual relations with young girls during an extended period from 2012 – 2019. Some videos also showed the two other accused persons engaging in group sex with the first accused. These videos contributed to the prosecution's case by showing a crime being committed with one of the minor victims; by showing the accused's pattern of behaviour of engaging in sexual relations with minor girls; and by supporting the claims of victims that the accused recorded sexual relations with them in order to threaten them with exposure if they did not continue with him. We note that only the sentence was available, so that the full evidential picture was not before us.

2.9.5 Site visit or "view"

Another way to allow the court to form a direct impression of premises is by way of a visit to a site or a "view".¹⁶⁰ This transpired in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of several children. The court's visit at the site of the exploitation, a removed lumber plantation, gave it the tools to understand the isolation of the children and their inability to flee or seek help. The court's impressions are so powerful, that they are quoted in section 3.2.7 on *isolation*.

Another example of a site visit occurs in **Shongwe (Eswatini)** which revolves around the trafficking for slavery of a young man from **Lesotho** who was deceived that he would be taken to a good job in **South Africa**, but instead was illegally transported to **Eswatini** where he was employed as a herder under inhuman conditions. The court noted that it had the opportunity to

¹⁵⁹ The official who photographed some of the premises was from the Scientific Support and Crime Record Bureau and an official from the Public Health Services visited the premises.

¹⁶⁰ Cross and Tapper *ibid.* pp 58-59, citing Lord Denning's view that this kind of evidence is a species of "real evidence".

visit the house where the victim was living and observed that it was not fit for human occupation. This conclusion contributed to the conviction on trafficking for slavery.

“During trial the court had an opportunity to see the house in which boy was accommodated. Its state made it equivalent to a shack/hovel not fit for human occupation. The house was a one room made of concrete bricks, not plastered corrugated iron sheets with multiple patches, wall has signs to show that run water pours down the wall whenever it rains. Water stains on the floor to show there are constant drops of water inside home when raining. Door not closed as normal, tied with wire on the wall side, door itself had big crevices for one to see outside when it’s closed. Window covered with scrap metal.”

The King v. Agrippa Makhiligi Shongwe, Case No. HLU 60/2016 in Subordinate Court District of Shiselweni

2.9.6 Biological evidence or traces

Biological evidence or biological trace evidence concerns samples or traces from human bodies which can serve to contribute to the proof of a crime.¹⁶¹ The sample of cases which form the basis of this digest does not include fingerprints, which are a common kind of biological evidence which may serve to identify perpetrators. However, it does include two important kinds of biological evidence: DNA analysis and age assessments.

DNA analysis¹⁶² is part of the foundation of evidence in **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a 14 year old child by her stepfather. The child fell pregnant and a DNA analysis established that the stepfather was the biological father of the baby. The accused did not contest this evidence and although he was exonerated of trafficking for sexual exploitation by the court of appeals, the conviction on rape remained in force.

Another kind of biological evidence used in our sample of cases is **age assessment** analysis, in order to determine if child trafficking or abduction has taken place.¹⁶³ One of the most common ways of doing so is by means of the Tanner stages of development assessment, which takes into account an array of physical attributes relating to the breasts, genitals, molars, armpit hairs, height and weight.¹⁶⁴

Thus in **Munyanyi (Zimbabwe)**, a case revolving around the trafficking of 4 minors from **Mozambique** within **Zimbabwe** for labour exploitation, a doctor assessed the ages of the four minors to be 17, 15, 14, and 14 respectively. Interestingly, the court noted that some of the minors looked younger than this assessment. This emphasizes the importance of the direct perceptions of the court, which enable it to be the final arbiter of the issues before it, including the age of the victims.

In **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a minor, a doctor and obstetrician assessed the age of the victim to be between 13 and 15 years of age at the time the alleged crimes were committed, and most probably 14 years old. The court noted that the expert’s assessment was based on the Tanner stages of development which rely on various physical signs. The court was satisfied that the doctor’s assessment was independent and accepted his conclusions.

¹⁶¹ See UNODC *Anti-human trafficking manual for criminal justice practitioners*, module 7: “Crime scene and physical evidence examinations in trafficking in persons investigations” (2009), pp 4-7, available at https://www.unodc.org/documents/human-trafficking/TIP_module7_Ebook.pdf

¹⁶² Ibid. Page 5.

¹⁶³ See also section 2.5.2 on “Expert testimony”.

¹⁶⁴ For more information on the Tanner stages of development see Rena Goldman, “The Stages of Puberty: Development in Girls and Boys” at <https://www.healthline.com/health/parenting/stages-of-puberty>

Similarly in **Mabuza (South Africa)** a doctor testified as to the ages of the child victims, which testimony conformed to what the children themselves maintained in regard to their ages.

2.9.7 Anatomy dolls

In cases which concern the sexual exploitation of children, often anatomy dolls are used in order to allow children to describe what happened to them in a nonverbal way, “...*especially when limited verbal skills or emotional issues, such as fear of telling or embarrassment about discussing sexual activities, interfere with direct verbal description*”.¹⁶⁵

While the use of such dolls does not make the children’s testimony unnecessary, it is a way of allowing them to communicate on a different, more child friendly level, and has the added plus of allowing the court to form an impression directly, rather than only by means of hearing testimony. In this sense, the use of these dolls can be viewed as a kind of “real” or physical evidence, as it allows the court to form an impression directly without the mediation of testimony.¹⁶⁶

In **Dragon (Namibia)**, a case which revolves around the trafficking for sexual exploitation of several children, anatomy dolls were used in court in order to allow the children to describe what happened to them in a graphic way. All the victims and the brother of one of them, who had seen parts of the sexual exploitation, used the dolls in court. In this way, they showed the up and down movements they made while masturbating the accused and how he inserted his fingers into their vaginas, actions which are not usually familiar to such young children. We note that three of the children were 9 years old when the incidents happened and one was just 7 years old.

When evaluating the credibility of the children, the court noted that they corroborated one another and that they were able to demonstrate what happened by means of anatomy dolls.

We also note that the use of anatomical dolls is mentioned in a prosecution summary of **Balele (South Africa)**¹⁶⁷ where some of the victims of trafficking for sexual exploitation and rape were as young as 8 years old.

2.10 Evidence gathered by special investigative techniques

2.10.1 Introduction

In some jurisdictions, investigators use special investigative techniques in order to strengthen the evidentiary foundation of a case. These can include “stings”, electronic surveillance, or the recording of telephone conversations, reconstruction exercises, or confrontations between the accused and victims. Some of these techniques are particularly useful in gathering evidence in cases where exploitation did not transpire, as they can yield information about the accused persons’ intentions, not otherwise available.

A note of caution is in order, as some jurisdictions do not allow or recognize all these techniques, and among those who do, they may differ as to the rules which govern them.

The following are a few examples of evidence gathered by means of such techniques.

¹⁶⁵ Hlavka, “*The Use of Anatomical Dolls as a Demonstration Aid in Child Sexual Abuse Interviews: A Study of Forensic Interviewers’ Perceptions*”, Journal of Child Sexual Abuse, September 2010.

¹⁶⁶ Ibid.

¹⁶⁷ S. v. Balele, Case No. A331/16 in Gauteng, Pretoria. NOTE: only the charge sheet and 2 prosecutorial summaries were available so that the citation is missing details.

2.10.2 Stings

In a number of cases across the region, the police or the public undertook “stings”. In some cases police or members of the public remained hidden while an illegal transaction was going on; in others they posed as buyers. In some cases the police supplied the bogus buyer with fake money which was identified by serial numbers. While some of these cases yielded convictions, some ended in exonerations, showing that stings do not always bring about the desired result.

A number of such cases occur in **Zambia**. Successful stings, yielding convictions, were undertaken in **Mboo (Zambia)**, which revolved around an attempt to traffic a young man for removal of organs, and **Mushenya (Zambia)**,¹⁶⁸ a case revolving around the attempted sale of a 3 year old child by his parents. In both cases the potential buyer informed the police, who thereupon posed as buyers and paid the accused. Other police investigators hid at the site of the transaction and when the accused persons accepted the money, they arrested them.

Similarly, in **Wiedermeyer (South Africa)**,¹⁶⁹ a case revolving around trafficking for sexual exploitation of addicts, the case was uncovered by means of an undercover operation with trap money which contributed to the conviction. Another example of a sting appears in **M.L. (Seychelles)**, a case revolving around the trafficking for sexual exploitation of minor girls.

Another example of a sting which contributed to a conviction can be found in **Mjwanga (Tanzania)**, a case which revolves around child selling. The accused was apprehended by means of a sting carried out by 4 parties, one of whom posed as the buyer. The High Court affirmed the court of first instance’s conviction despite the absence of victim testimony, and made due with the victim statement, in addition to other testimonies.

Examples of similar stings which ended in exonerations are **Mwewa (Zambia)**,¹⁷⁰ and **Kasonde (Zambia)**,¹⁷¹ both of which revolve around accused persons attempting to sell family members. In **Kasonde**, the potential buyer informed the headman of the village, who suggested that he recruit members of the public to hide on the premises in order to apprehend the accused persons when they had received the money. He did so and the accused persons were handed over to the police subsequently. In **Mwewa** the potential buyer informed the police who posed as buyers, hid on the premises and arrested the accused persons when they had accepted the money.

The exonerations in these cases did not follow from mistakes made during the stings, but rather from the High Court’s analysis of the elements of the crimes which were charged.¹⁷²

Similarly, in **Howaldar (Mauritius)**,¹⁷³ a case revolving around a charge of renting out premises for a brothel, the police posed as clients of prostitutes and paid money for sexual relations. This case too ended in an exoneration, but not due to misuse of the sting procedure, but rather

¹⁶⁸ Mushenya v. The People, Appeal No. 60,61/2020 in the Supreme Court of **Zambia** at Lusaka.

¹⁶⁹ State v. Wiedermeyer and others, case No. 14/255/2015 in Gauteng, conviction 26 September 2017, sentence 27 August 2018. NOTE: Only the charge sheet and handwritten pleas, judgment and sentence were available, so that the citation is missing details and the judgment and sentencing decisions were recorded with no legal reasoning.

¹⁷⁰ People v. Mwewa and others, HRS/29/2020 in the High Court for **Zambia** at Mansa (Criminal Jurisdiction, 19 August 2020.

¹⁷¹ People v. Kasonde, HRS/27/2020, in the High Court for **Zambia** at Mansa (Criminal Jurisdiction), 19 August 2020.

¹⁷² In both cases the prosecution charged advertising connected to trafficking. While the accused persons were convicted by the courts of first instance, the High Court exonerated them because the prosecution had not proved the element of “purpose of exploitation” and because it had not proved that the actions of the accused amounted to an “advertisement”, as they had not given the buyers enough details about the children to be sold, so as to constitute advertisements.

¹⁷³ Police v. Hawoldar, Cause No. 320/312, 2015 INT 349, in The Intermediate Court of **Mauritius**.

because the prosecution did not prove that the accused knew the premises were being used for prostitution.

We note that some of the cases cited above raise questions regarding the difference between child selling and trafficking. This issue will be addressed in section 4.7 of the digest.¹⁷⁴

2.10.3 Electronic surveillance of phone calls/recording phone conversations

Two cases from **Zambia** allude explicitly to phone recordings or electronic surveillance of phone recordings. In this regard, we repeat our note of caution that not every jurisdiction allows these procedures and those who do, may differ as to the rules governing them.

In **Kasonde (Zambia)**, a case revolving around attempted child selling, the police encouraged the potential buyer to record phone conversations carried on with the accused person. He did so and the recordings were submitted to the court. The content of the conversations related to the nature of the illegal transaction.

In **Chama (Zambia)**, a case revolving around the attempt to traffic six Indian males to **South Africa** for labour exploitation, electronic surveillance of the accused's phone conversations was carried out by police. Unfortunately, since only a summary of the case was available, we do not know if any of the recordings provided valuable information to the police or were submitted in evidence.

2.10.4 Other police investigatory techniques (confrontation/reconstruction)

In the sample of cases which form the foundation of this digest, two police techniques are mentioned which are used to elicit information.

One such tool is *confrontation*, a tool used by police in order to bring about the identification of a suspect.¹⁷⁵ This investigative tool is mentioned in **Sonah (Mauritius)**, a case revolving around the child trafficking for prostitution and exploiting prostitution. The police organized a “direct confrontation”, by which the victims identified the accused as the person who recruited and employed them.

Another investigative tool mentioned in one case, is the reconstruction of a crime scene. This tool's aim is to allow police to develop a theory of the crime by examining the scene where it took place.¹⁷⁶ In **Martinet (Mauritius)**, a case revolving around the trafficking for prostitution of two minors, the police performed a reconstruction exercise on the premises of the accused and in her presence, after they had brought the two minor victims to the police station and held an enquiry with them.

¹⁷⁴ See section 4.7 on *issues arising in child selling and adoption cases*.

¹⁷⁵ See Cross and Tapper, page 709.

¹⁷⁶ For an overview of what crime reconstruction means, see Jerry Chisum, “*Crime Reconstruction*” 2nd edition, chapter 3, (Academic Press 2011)

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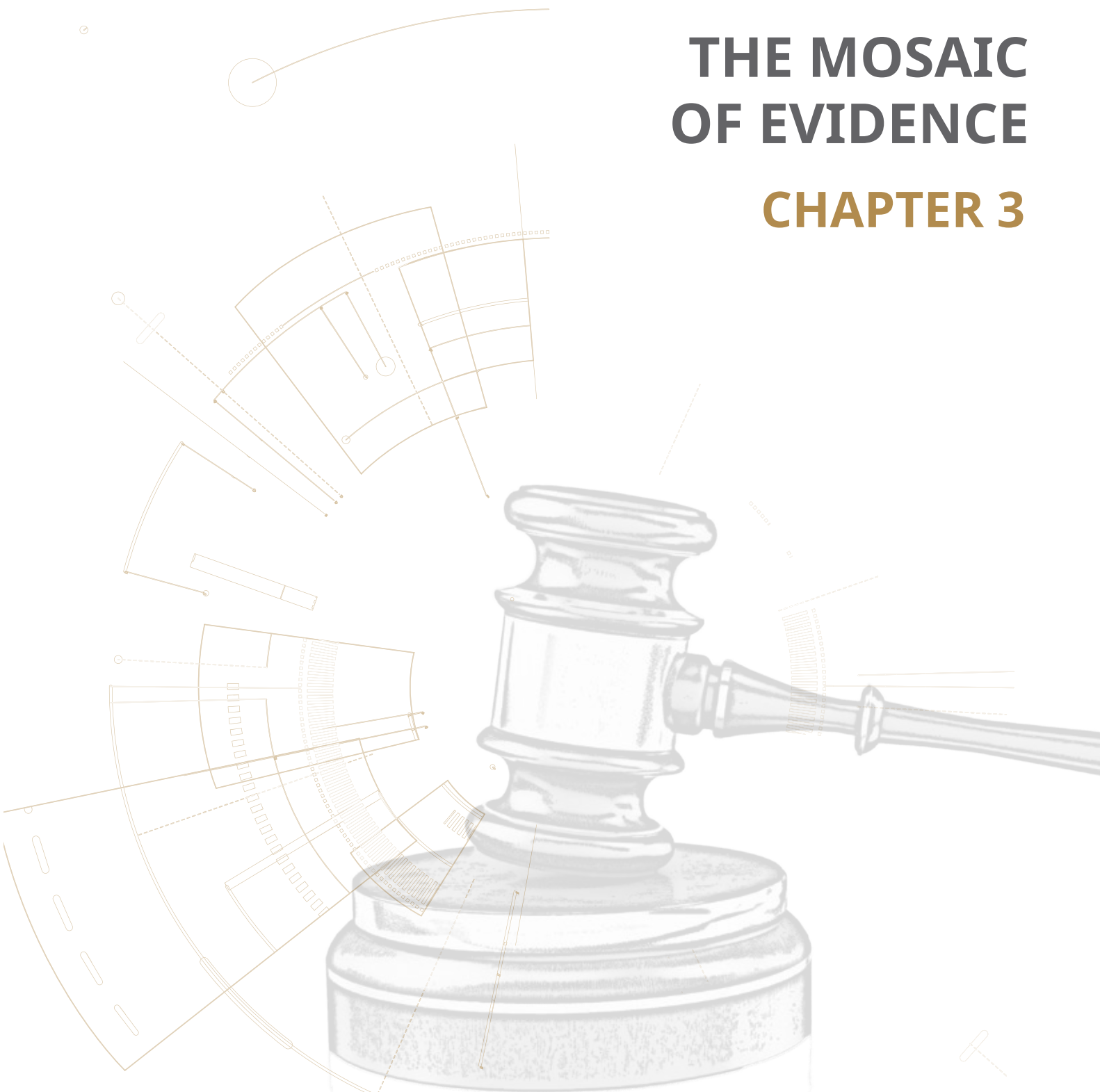
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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES
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THE MOSAIC OF EVIDENCE

CHAPTER 3



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

THE MOSAIC OF EVIDENCE

CHAPTER 3

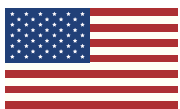


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3. THE MOSAIC OF EVIDENCE

3.1 Introduction

While chapter 2 of this digest addresses **kinds of evidence** submitted in trafficking cases, this chapter addresses circumstances which reflect the **content of the evidence**, which may be proven by means of any of the kinds of evidence described in Chapter 2 (testimony, documentary evidence, “real” or physical evidence, out of court statements and evidence gathered by means of special investigative techniques).

This content may relate to circumstances which contribute to **prove** the crime such as coercion, isolation, restrictions of freedom, lack of payment, difficult working or living conditions. Alternatively, it may relate to circumstances which contribute to seemingly **disprove** the crime, like the victim’s failure to flee or seek help at the first opportunity or the victim’s strong support system.

The metaphor “the mosaic of evidence” reflects the complexity of proof in trafficking cases. Unlike “simple crimes” like grievous injury or assault, a trafficking case requires a **constellation of evidence**, just as a mosaic includes a number of pieces. Like a mosaic, not every piece of evidence in a trafficking case is of the same weight, but all may be important to a conviction or an exoneration.

The complexity of proof arises from the nature of the trafficking crime. Not only does the crime require proof of several elements, but each element may require proof of several circumstances in order to establish it. For example, the ‘purpose of exploitation’ of “forced labour” may require proof of restrictions of freedom, isolation, physical or psychological coercion.

We note that there are differences in the trafficking legislations of States across the region. However, most have been influenced by the model of the Protocol and have adopted its general approach. Thus, most States require the three elements of ‘actions’, ‘means’ and ‘purposes of exploitation’ or at least two of these three elements.¹ We refer to the *table of Southern African legislation* which appears in Appendix 2 to this digest.

Each piece of content addressed in this section may serve as a building block to prove or disprove a case. However, there is not necessarily a one to one correlation between each of them and one or more elements of the crime. One piece of content may be relevant to several elements of the crime and conversely, an element of the crime may require several pieces of content in order to prove it.

¹ Examples of States who have adopted the three element approach of the Protocol are: **Angola, Botswana, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Zambia**. A jurisdiction with two trafficking crimes, each of which includes two elements, is **Zimbabwe**. A jurisdiction which includes many different forms of trafficking, one of which requires the three elements of the Protocol is **Tanzania**.

3.2 Circumstances which can contribute to convictions

The following are circumstances which can serve as building blocks to support a conviction of trafficking in persons or allied crimes. We note that in themselves, they may or may not correlate to an element of the crime. An element of the crime may require several circumstances in order to prove it, and for example, difficult working and living conditions, signs of ownership, and violations of privacy and dignity may contribute to proof of ‘purposes of exploitation’ like “slavery” or “forced labour”. Conversely, a given circumstance may be relevant to prove several elements of the crime, and for example, providing a victim with inadequate food, may contribute to proof of a ‘purpose of exploitation’ like “slavery” or “forced labour”, but may also contribute to prove a ‘means’ like “coercion”.

We also note that often one case will include many of these building blocks, and for example, a combination of ‘means’ such as “violence” “deception”, “threats”, “abuse of a position of vulnerability” and “subtle forms of coercion”.

3.2.1 Violence or force

Violence or force may serve to prove an element of the crime of trafficking in persons or contribute to prove it. In general, States in the region require a ‘means’ as an element of the crime, and in general “force” or “violence” is one of those ‘means’.² However, even in **Zimbabwe**, where one of the two main trafficking crimes does not require ‘means’, violence or force may serve to contribute to proof of a ‘purpose of exploitation’ like “forced labour” or “forced marriage”. Moreover, it may contribute to proof of an ‘act’ like: “holds”,³ “captures”,⁴ or “removes”.⁵

We note that violence or force may encompass both sexual and non-sexual physical forms of violence. Moreover forcing a victim to watch physical or sexual assaults on another victim may be used as a method of control.

3.2.1.1 Physical violence including forcing victims to take drugs

Many cases across the region involve physical violence of the trafficker against the victim. Such violence may be accompanied by other ‘means’ as well.

We also note that in some jurisdictions, the accused persons were charged under previous trafficking laws which required lack of consent of the victim to sexual exploitation. In these cases, in addition to contributing to proof of a ‘means’, the force or violence contributed to prove the lack of consent of the victims.⁶

One example of the place of violence is **Eze (South Africa)**, a case of trafficking for sexual exploitation of two young women addicted to drugs. Here the trafficker used violence as a method of punishment for behaviour prohibited by him. He assaulted one of the victims with fists, open hands, a dog chain and a stick when she left his flat in order to buy drugs. When she tried to escape, he forcefully returned her. In addition, the trafficker withheld drugs from her as a form of punishment.

² Most States in the region mention “force” and **Tanzania** and **Zimbabwe** include, in addition, “violence”. We also note that there are other ‘means’ which may be proven by circumstances of force or violence and for example, **Zambia’s** removal of a passport or immigration document or identification document.

³ See the Trafficking Act of **Eswatini**.

⁴ See the Trafficking Act of **Mauritius**.

⁵ Ibid.

⁶ Examples are **Jezile (South Africa)**, **Eze (South Africa)**, **Dos Santos (South Africa)**, **Mabuza (South Africa)**, and **Koch (Namibia)**.

Another example is **Dos Santos (South Africa)**, a case of trafficking for sexual exploitation of three young women from **Mozambique**. In this case victims were beaten with a whipping chain. In addition, they were forced to smoke drugs.

The pattern of forcing young women to take drugs in order to facilitate their prostitution and cause them to become addicted, recurs in **Obi (South Africa)**, a case of trafficking for prostitution of three teenagers. The dominant trafficker, who was also a drug dealer, maintained a climate of constant assaults and rapes and also forced the girls to take drugs before and after sexual intercourse with men. This pattern also appears in **Uche Odii (South Africa)**,⁷ a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, one of whom is forced to smoke rock cocaine.

Interestingly, just as forcing victims to take drugs can be an effective method of control, so withholding drugs from addicted victims can similarly serve as a control mechanism, as in **Eze (South Africa)**.

In **Jezile (South Africa)**, a case of trafficking for sexual exploitation of a minor of 14, in the context of forced marriage, the trafficker forced the victim into a taxi in order to transport her to Cape Town and once there, assaulted her with a broom or mop handle and a belt, when she refused to engage in sexual relations with him. As a result, she sustained severe injuries: a huge gaping wound on the lower thigh that became septic, two healing abrasions on the left forearm and a bad bruise on her toe. The court mentions this circumstance in its ruling which convicts the accused of trafficking for sexual exploitation and rapes.

In **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation, slavery and servitude of two vulnerable young women, one testified that if she kept any money for herself from prostitution services, one of the accused persons would assault her. On one occasion one accused person did so with a beer bottle; on another occasion he slapped her; on yet another occasion he kicked her because he did not like the cigarettes she brought him. As a rule, he would assault the victims if they were caught outside during daylight hours.

Similarly, in **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old, along with other ‘means’, the accused also beat the victim with a stick. This was attested to by an independent witness and admitted by the accused herself.

In **Shongwe (Eswatini)** a young man, trafficked into **Eswatini** to serve as a cattle herder, was forced to live in difficult conditions, including inhuman accommodations, lack of adequate food, and non-payment of salary after the first month. He was also assaulted by the trafficker who claimed that he was responsible for the death of his cattle during a drought. The accused person was convicted of trafficking for slavery. Interestingly, the court did not convict him on the separate assault charge, because it viewed the assault as part of the exploitation.

The effect of even sporadic violence, is well described by Judith Herman in her book “Trauma and Recovery”:

Dr. Judith Herman on the Effects of Sporadic Violence

“Although violence is a universal method of terror, the perpetrator may use violence infrequently, as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear...”

Fear is also increased by inconsistent and unpredictable outbursts of violence...”

Judith Herman, “Trauma and Recovery”, Basic Books (New York, 1997) p. 77.

⁷ State v. Emmanuel Uche Odii and others, verdict from August of 2012. Only a summary was available, accessible in the UNODC Human Trafficking Case Law Database (UNODC No. ZAF008).

We note that a case which yielded an exoneration on trafficking charges also included the use of violence. In **Adigwe Dike (Eswatini)**, a case revolving around claims of trafficking for labour exploitation, a young Nigerian girl was transported to **Eswatini** in order to work selling wares for the female accused. In return she was promised that she would be enrolled in a tertiary educational institution, a promise which was never implemented. Her living and working conditions were difficult and included a series of serious assaults by the female accused which left her with dark bruises on her face and scratches on her body. One beating took place over the course of an hour or more. While the court convicted the female accused of assault, it exonerated her from trafficking charges, since the prosecution had not proved that the accused never intended to enroll the girl in a tertiary educational institution when she was transported to **Eswatini**. The court also noted that the tasks performed by the girl were agreed tasks, which negated the element of exploitation, but did not explore the question if the assaults and other difficult conditions impacted on the element of exploitation, unlike the court in **Shongwe (Eswatini)** which viewed the assault as part of the exploitation. This case will be more thoroughly analyzed in section 4.4 on *How to handle the subject of victim consent*

3.2.1.2 Sexual violence or force

Across the region, there are numerous cases of forcible rape in the context of trafficking for sexual exploitation, and indeed many of these cases include charges of rape as well as trafficking.

Examples are: **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation and rape of a number of children; **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women and the rape of one of them; **Jezile (South Africa)**, a case revolving around rapes and trafficking for sexual exploitation of a minor in the context of forced marriage; **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl and her rape by several men; **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation and rape of a number of children; and **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation and rape of two minor girls. We note that in some of these cases the court dismisses a defence claim whereby charging rape and trafficking for sexual exploitation is a prohibited duplication of charges. We refer the reader to section 4.6.3.2 on *duplication of charges* in cases of child trafficking.

An example of cases where both rape and trafficking for sexual exploitation were charged but only one charge yielded a conviction are **Koch (Namibia)** and **Fakudze (South Africa)**.

In **Koch (Namibia)**, a case revolving around the sexual exploitation of 5 children, some of the testimonies established that the perpetrator forced or attempted to force some of the minors to engage in sexual relations although they protested or wrestled with him or ducked. The perpetrator was convicted of trafficking for sexual exploitation and violation of the Immoral Practices Act, but exonerated from rape due to credibility issues.

In **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a minor of 14 by her stepfather, the Court of Appeals confirmed the conviction on rape, but exonerated the accused person of the trafficking charges, as it maintained that the prosecution had not proved that the accused had the intention of sexually exploiting the child when he transported her from **Eswatini** to **South Africa**.

A case from the **Democratic Republic of the Congo** also shows forcible sexual exploitation, although the perpetrator was convicted on crimes allied to trafficking. In **Luizon (DRC)**,⁸ revolving around the abduction of a young girl of 15 for forcible sexual exploitation, the perpetrator

⁸ State v. Luizon, in the Court of Peace, Kinkole Court of the Commune of Nsele, city of Kinshasa, reported by the Territorial Police. We note that the full case was not available, and that we relied upon a summary supplied to us.

was convicted of a series of crimes: kidnapping, a form of trafficking (under the constitution of the **DRC**) and forced prostitution.

3.2.1.3 *Forcing the victim to watch or exert violence against others*

In a number of cases across the region, the traffickers forced victims to watch violence perpetrated against others as a method of control. Such a use of force can engender fear for the victim's own well-being and lead him or her to comply with the trafficker's orders so as to avoid being similarly assaulted. It can also lead victims to experience self-hatred, humiliation and demoralization, in that they did not intervene, and consequently lower their incentive to try to escape their situation.⁹

In **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation, slavery and servitude of two vulnerable young women, one victim witnessed accused 3 assaulting the other victim, and for example with an umbrella or another time with his fists. While the case does not explicitly state that the perpetrator intended this series of violent acts to keep the other victim in check, clearly such a climate of violence can have such an effect.

Similarly in **Obi (South Africa)**, a case revolving around the trafficking for prostitution of three teenagers, the perpetrators forced one victim to watch the rape of another victim. In addition a victim was forced to view a pornographic movie.¹⁰

In **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs, one of the victims revealed that in the past, before the present trafficking crimes, when 15 years old, she was tied to a chair and forced to watch her friend being killed, because this friend had supported her complaint to the police. She also witnessed two other girls being killed. She testified as to this past experience in order to explain why she feared to flee her trafficker.

Sometimes, traffickers also force or persuade victims to exert violence towards other victims.¹¹ One example occurs in **D.A and A.M (Israel)**,¹² where the charismatic leader of a cult gathered around him a group of women and children, supervised their movements, controlled every aspect of their lives, sent them to beg and took all the proceeds, humiliated them and beat them. He also persuaded them to exert violence against one another. On the basis of this factual picture he was convicted of holding a person under conditions of slavery. While we did not find this exact pattern in the cases made available to us across the region, it is similar to the cases where traffickers forced victims to view violence against their fellow victims without interceding for them, and it would not surprise us if future cases reveal such a pattern.

Forcing victims to commit crimes may deter them from fleeing or complaining to police. Firstly, they may fear arrest for the crimes they have committed. Secondly, transgressing moral

⁹ See Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997), pp. 83-84. Interestingly, section 22(a) (vi) of **Zambia's** Trafficking Act includes as an indicator of trafficking: "*Forcing the person to witness the beating, rape or murder of another person as a demonstration of what will happen to the person if the person fails to obey the traffickers.*"

¹⁰ Pornography can include violence, though not all pornographic materials are violent. The use of violence in pornography is reviewed in Elise R Carrote et al, "*Sexual Behaviors and Violence in Pornography: Systematic Review and Narrative Synthesis of Video Content Analyses*", *J Med Internet Res*. 2020 May; 22(5): e16702, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7256746/>.

¹¹ See section 3.2.1 of the global case digest – "*the effect on victims of violent abuse of others*", pp. 56-57 of English version.

¹² State of Israel v. D.A. and A.M. Criminal Cases 6749/6774-08-11 in the District Court of Jerusalem; convictions affirmed in Anonymous v. State of Israel, Criminal Appeals 8027 and 8104/13 in the Supreme Court of Israel sitting as a court of appeals for criminal matters, 27.5.2018; Additional Hearing denied in Anonymous v. State of Israel, Criminal Additional Hearing 6022/18 in the Supreme Court, 20.2.2019.

laws may lead to self-hatred and demoralization, thus preventing them from trying to improve their lot.

The self-hatred and demoralization experienced by victims under these conditions is reflected in Judith Herman's book entitled "Trauma and Recovery".

Dr. Judith Herman on Victims Forced to View or Exert Violence against Others

"...the final step in the psychological control of the victim is not completed until she has been forced to violate her own moral principles and to betray her basic human attachments. Psychologically, this is the most destructive of all coercive techniques, for the victim who has succumbed loathes herself. It is at this point, when the victim under duress participates in the sacrifice of others, that she is truly "broken."

Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997) p.83.

3.2.1.4. Violence is not a requirement in trafficking cases

We note that while violence does occur in many trafficking in persons cases, an absence of violence does not, in itself, lead to an exoneration. There are cases across the region where perpetrators were convicted of trafficking in persons or allied crimes, despite an absence of violence. Examples are **Alam (Seychelles)**, a case revolving around the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi workers; **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women; **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of two mentally disabled children¹³ and a number of other minors and young women.

The use of violence and force

Characteristics:

- It can be systematic or sporadic
- It can be physical, sexual or other (examples: forcing victims to take drugs; forcing them to watch or exert violence against other victims)

Motivations of traffickers/effects on victims:

- A mode of punishment to deter victims from violating rules;
- Creating a climate of fear so as to prevent victims from escaping;
- Creating a feeling of degradation and demoralization among victims, thus leading to a failure to flee or complain.

Can contribute to proving cases, but is not required

There are convictions without violence or force

3.2.2. Threats

Threats of force are listed as a 'means' in the Protocol, and most States in the region explicitly include this 'means' in their trafficking laws or sections. However, at least one State, namely **Malawi**, broadens threats beyond the threat of force, to include threats of abuse of a position of vulnerability, threats of abuse of power or position and threats of abuse of law or process. Moreover, even according to **Zimbabwe's** Act which includes one form of trafficking which does not require 'means', threats can serve to contribute to the proof of an "unlawful purpose" such

¹³ The first girl was born in October 1996 and was trafficked in July of 2012, so that she was 15 years old when the trafficking took place. It is not clear when the second mentally disabled girl was born, but she was a schoolmate of the first one, thus leading to the probable conclusion that she too was a minor. Moreover, many prosecution witnesses called both girls "children" and they were assessed as being 9 and 10 years old in terms of mental capacity.

as “forced labour”, “forced marriage” or “debt bondage”. We note that **Angola** narrows this ‘means’ to include only “serious threats”.

Threats can assume many forms: threats of force; threats of deportation; threats of leaving victims without means to survive; threats of publishing demeaning photographs. They may relate to the trafficker’s own actions or those of others (and for example arrest by the police or immigration authorities) or to the trafficker’s connections with powerful people. They may be specific or general. They may be expressed explicitly in words or by behaviour alone. They may be seemingly irrational. They may masquerade as innocent warnings.

In States whose trafficking acts limit threats to threats of force, other kinds of threats may fit into other ‘means’ and for example: “coercion”, “abuse of a position of vulnerability”, or “abuse of power”.

3.2.2.1 Threats of force or withholding drugs

Threats of force are prevalent in cases across the region and often they are also accompanied by the exertion of actual force. Sometimes they are explicit and sometimes expressed by means of behaviour.

There are a number of cases in which threats of force and actual force are employed. One example is **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of a number of children, where the victims testified that the perpetrator threatened to harm them or their families if they did not return to him or if they told others what he was doing to them. Some of the children also testified that he brandished a knife against them, although there were contradictions and delayed testimony on this point. Some of the children also testified that the perpetrator tried to force sexual relations on them. The perpetrator was convicted of trafficking for sexual exploitation.

Similarly, in **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women, not only did the dominant accused person assault the victims, but he also kept them from leaving the premises by means of threats of force. The accused was convicted of trafficking for slavery, sexual exploitation and servitude.

In **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**, not only did one of the perpetrators rape the victims, but three of the children testified that they were threatened by accused number 1 with a firearm should they not do as he said. The accused person was convicted of trafficking for sexual exploitation and rapes.

In **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women who were addicted to drugs, not only did the accused person assault the two victims, but he also threatened to kill one of them if she tried to escape again. He also threatened to withhold drugs if she did not do as he said. The accused was convicted of trafficking for sexual exploitation.

In **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 vulnerable young women from **Mozambique**, along with the actual use of force, the accused also threatened the victims with violence if they should continue to complain. As we will see, this case also includes threats of deportation. The accused was convicted of trafficking for sexual exploitation.

In **Shongwe (Eswatini)**, the case revolves around the trafficking of a 19 year old young man from **Lesotho** who is promised a good job, but forced to serve as a cattle herder under difficult conditions. At a certain point the cattle all over the country are dying due to drought, but the perpetrator blames the boy for the deaths and both exerts force against him and threatens him with bodily harm. The accused was convicted of trafficking for slavery.

Similarly, in **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of a 16 year old impoverished minor, not only did the accused assault the victim with a stick when she complained about her situation, but she also threatened to kill her. The accused was convicted of trafficking for sexual exploitation.

A number of cases display a different pattern whereby no actual violence is exerted, but threats of force serve to control the victims.

One example is **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women. Although no violence was exerted against the victims, they testified that the dominant accused person had a firearm in the back pocket of his pants, that he talked threateningly and that after one victim's mother called her, he threatened her. The accused was convicted of trafficking for sexual exploitation.

In **Alam (Seychelles)**, a case revolving around the trafficking of 4 Bangladeshi men, although no actual violence was exerted against the victims, the accused threatened them with a knife and explicitly told them that he would kill them. He also threatened their families who resided in Bangladesh. The accused was convicted of trafficking for practices similar to slavery and forced labour.

3.2.2.2 *Threats of deportation*

Another prevalent kind of threat across the region is the threat of deportation when the victims are illegally in the country. This kind of threat is very powerful when applied to vulnerable persons who are desperate to earn money.

An example appears in **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 vulnerable young women from **Mozambique**. The court stresses the vulnerabilities of the victims whom it terms "desperate young females" who were desperate for work and an income; illegal in **South Africa**; of tender age. Given these vulnerabilities, the threat of deportation was a particularly strong method of control. The accused was convicted of trafficking for sexual exploitation.

Another example occurs in **Alam (Seychelles)**, a case revolving around the trafficking of 4 workers from Bangladesh. As in **Dos Santos**, the court dwells on the vulnerabilities of the victims: belonging to a low socio economic bracket; having borrowed large sums of money which they were desperate to repay; lack of education; lack of familiarity with the language and culture of **Seychelles**; total financial dependency on the accused who, according to the court, acted more as master than employer. Moreover, the workers were illegal in the country due to the accused person's failure to undertake the proper visa procedures. Under these circumstances, the fear of deportation was amplified. Interestingly, one victim also testified that 2 other workers were sent back to Bangladesh because they complained about not receiving payment.¹⁴ The accused was convicted of trafficking for practices similar to slavery and forced labour.

3.2.2.3 *Threats of abandoning victims without the means to survive*

In several cases across the region, victims are transported from their natural environments to a place with which they are not familiar. When this happens, a threat to abandon them can be a powerful method of control.

A prominent example of such a threat occurs in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique** to **South Africa**. The accused 2's sister threatened them that if they did not engage in sexual relations with the accused number 1, they would be abandoned and would have nowhere to go and no food to eat. This was a powerful threat in view of the situation of the children. Not only were they in a foreign

¹⁴ See the testimony of FC, paragraph 62 of judgment.

country whose language and culture was foreign to them, but they were also taken to an isolated lumber plantation which can be reached only by a series of bad roads. The court's comment was: *"A desolated place indeed, and if a stranger was brought there and chased away, as some of these children were threatened should they not do what they were told, they would literally not have anywhere to go."*¹⁵.

Another example can be found in **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young woman who was given to a series of men for sexual relations. The victim was promised a good job and followed the accused person from her village to a farm in the bush where she knew no one but the accused. On arrival the accused informed her that there was no job for her but that she would be given to a man. When the victim refused, the accused became angry and threw her luggage out of the house, so that she had nowhere to go. In the wake of this, the victim went to the man to whom the accused had referred her and engaged in sexual relations with him. This scenario repeated itself when she left that man and was given to others. The court sees this throwing out of the luggage as a threat on the part of the accused that if the victim does not do as she says, she will remain without shelter. It also understands the strength of this threat in view of the victim's vulnerabilities as a stranger on the farm who knows only the accused. We note that the victim emphasizes how angrily the accused speaks to her, thus intimating that the angry tones too can be considered to be threatening.

3.2.2.4 Threats of shaming

Another kind of threat relates to an action that will be undertaken by the accused to shame the victim in the eyes of people who are important to her. This can be a powerful control mechanism.

This kind of threat appears in **M.L. (Seychelles)**, a case revolving around child trafficking for sexual exploitation. The accused posed as a female model from a modelling agency on the internet and asked a number of children if they wanted to be a model, and if so requested that they send photographs and subsequently, intimate photographs. When the girls complied, he would threaten them to publish the photographs unless they engaged in various kinds of sexual relations including threesome sex, oral sex, and anal and vaginal intercourse.

3.2.2.5 Threats to take away something important to the victim

Sometimes traffickers control victims by threatening to take away something important to them. The object can be objectively important like food or subjectively important like a cell phone to a teenager.

For example, in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children, the sister of accused number 2 told the children that they would be denied food if they did not comply with her request to engage in sexual relations with accused number 1. In view of this and other threats, the children did, by and large, comply. The accused persons were convicted of trafficking for sexual exploitation.

Another example can be found in **M.L. (Seychelles)** where the accused threatened to take away a 14 year old victim's cell phone if she did not engage in oral sex with him. As a result of this threat, the victim complied with his request. The accused was convicted of trafficking for sexual exploitation.

Yet another example occurs in **Shongwe (Eswatini)**, a case revolving around the trafficking for slavery of a young man from **Lesotho**, deceived that the trafficker would obtain a good job for him and subjected to inhuman conditions. The court notes that at one point, the accused person threatened the victim that he would take away his clothes if he insisted on going home. The accused was convicted of trafficking for slavery.

¹⁵ For the full quote, see section 2.9.5 on *site visit* or *"view"*.

3.2.2.6 *Seemingly irrational threats*

Sometimes threats appear to be irrational and it is difficult to understand why the victim was so fearful of them. However, this may be a function of the vulnerabilities and background of the victim, which may be different than our own.

One example appears in the **Esther Phiri (Zambia)** case, revolving around the labour exploitation of a child of 14 who is also sexually exploited in bars. The sister of the accused takes the victim to bars from 16:00 to 21:00 to look after her baby. Sometimes she finds men for the victim to sleep with, and if she refuses, she is sent out of the bar with the child. It is not entirely clear why being sent out of the bar with the child is such a powerful threat, leading the victim to sleep with men. Perhaps she is afraid of being alone outside in the dark or perhaps she is fearful of being left alone with a baby. The case does not clarify this point. However, in trying to understand the victim's behaviour, we would need to evaluate this threat in the context of the victim's situation as a 14 year old orphan, taken to a place distant from where she grew up and to a cultural milieu different from what is familiar to her,¹⁶ and where she knows only the accused and her sister. We also refer the reader to section 4.6.2.2 on *standards of trafficking for labour exploitation: children and adults*.

Another interesting example described in this case is a threat levelled at the accused by community members of the victim, that she will be bewitched and made to go insane if she does not return the child. This is a seemingly irrational threat to people who do not come from cultures which believe in witchcraft, but apparently it is a belief prevalent in some areas of the region and is so powerful that the accused *does* return the child. This kind of threat, based on cultural beliefs, can be found in other international contexts, as highlighted by the global case digest. These cultural contexts may include a belief in witchcraft, curses or spells.¹⁷

3.2.2.7 *Threats relying on the trafficker's powerful connections*

In cases across the region, traffickers tell victims that they are connected to powerful people who can harm them, should they not comply with the trafficker's orders. The intimation is also that the victim's complaints would be fruitless under these circumstances. In other cases, the trafficker himself is a powerful person.

Examples of cases where traffickers represented themselves as connected to powerful people are as follows:

In **Mahuni (Zimbabwe)**, revolving around the sexual exploitation of a number of young women, the accused told both victims that she had a boyfriend called Tony who was the head of police and would arrest them/make them disappear if they played any tricks. The accused was convicted of procuration for prostitution.¹⁸

In **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women, one of the victims explained why she did not flee in a number of ways, one of which was that she believed the dominant accused person to be well connected, thus making complaints futile. While the court does not explicitly say that the accused person gave the victim to understand this, it seems probable. The accused was convicted of trafficking for sexual exploitation.

¹⁶ She was taken from her village to the capital of Lusaka and mentions several times in her testimony that she was fearful because she knew no one in Lusaka. The journey from her village to Lusaka lasts more than 24 hours.

¹⁷ See section 3.2.2 of the global case digest on "threats", subsection on seemingly unreasonable threats on pages 60-62 of the English version. See also Jean Comaroff and John Comaroff, "*Occult Economies and Violence of Abstraction: Notes from the South African Postcolony*", *American Ethnologist*, May 1999, vol. 26, no. 2, pp. 279-303.

¹⁸ At that time, **Zimbabwe** did not yet have a Trafficking Act.

In **Alam (Seychelles)**, a case revolving around the forced labour of 4 victims from Bangladesh, a victim testified that the accused told him that “the police are in his pocket”. The accused was convicted of trafficking for practices similar to slavery and forced labour.

On the other hand, sometimes the trafficker himself is well connected or appears to be particularly respectable, which leads the victims to trust him, thus serving as a subtle means of control, as we will see in section 3.2.4 on *subtle means of coercion and abuse*.

3.2.2.8 *Veiled threats/threats masquerading as warnings*

Sometimes threats may be veiled. This can happen when the threat is hinted at rather than stated explicitly, or when the threat masquerades as an innocent warning.

An example of a veiled threat occurs in **Mahuni (Zimbabwe)**, a case revolving around the sexual exploitation of vulnerable young women from **Zimbabwe** trafficked to **Angola**. Besides other more overt threats, the accused told one victim: “*Now you are in Dos Santos place and not in Mugabe place*”¹⁹ in order to emphasize her foreignness and helplessness. The accused was convicted of procuration for prostitution.²⁰

An example of a threat masquerading as an innocent warning appears in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled children and a number of young women, some of whom were minors. When the children told the dominant accused that an old lady had warned them about her, the accused warned them not to trust anyone or they would be in danger. Seemingly this appears to be a genuine and innocent warning, but it can be seen as a veiled threat.

Similarly in **Mujee (Botswana)**, a case revolving around the trafficking of an impoverished 16 year old minor, the accused cautioned the victim against walking outside in the yard and counselled her to remain in the house, since otherwise she would be arrested by the police, as she did not have a passport. This too, was a veiled threat which aimed at restricting the victim’s freedom of movement and keeping her in the premises where she could be exploited. The accused was convicted of trafficking for sexual exploitation.

¹⁹ At that time, Dos Santos was the president of **Angola** whereas Mugabe was the president of **Zimbabwe**.

²⁰ We again note that the actual charge was “procuring”; as at that time **Zimbabwe** did not yet have a trafficking act.

Threats

Content of threats:

- Threats of force/harm
- Threats of withholding drugs
- Threats of deportation
- Threats of abandoning victims without the means to survive
- Threats of shaming
- Threats to take away something important to the victim

Forms of Threats

- By means of explicit words
- By means of behaviour
- Veiled threats/threats masquerading as warnings
- Specific threats/amorphous threats (such as the trafficker talking in a threatening or angry tone)
- Seemingly irrational threats
- Threats to be carried out by the trafficker/ to be carried out by other powerful people connected to the trafficker
- Threats levelled at the victim/at others close to him or her

3.2.3 Deception

The Protocol includes deception and fraud among the ‘means’ which form an element of the crime of trafficking in persons. Across the region, most States include deception or fraud or both in their list of ‘means’. In addition, **Seychelles’** Trafficking Act clarifies that deception should be understood as *“including any misrepresentation by words or conduct as to financial incentive or promise of reward or gain and other conditions of work”*.

Aside from explicitly including deception or fraud in their lists of ‘means’, some States enumerate other ‘means’ that can include it.²¹ In addition, deception may be part of various ‘actions’²² or ‘purposes of exploitation’, such as debt bondage. Often deception is used along with other ‘means’ such as ‘abuse of a position of vulnerability’.²³

Deception is prevalent in cases throughout the region and may relate to the nature of a job or its conditions; the identity of the trafficker or that of the victim; the purpose for which the victim is asked to accompany the trafficker; the agreement of a parent or guardian to the trip; the reason the victim must agree to the exploitation. Sometimes a trafficker employs more than one kind of deception. Sometimes the trafficker deceives the victim and sometimes he deceives the victim’s family or both.

We note that sometimes the trafficker also forces or persuades the victim to participate in a deception toward the authorities or towards other victims. However, this kind of deception will be addressed in other sections of this chapter.²⁴

²¹ Examples are **Zambia’s** “false or illegal adoption contrary to written law” or “...concealment...of any passport or immigration document or official identification document.” By the same token in those States which follow the Protocol’s list of ‘means’, “abduction” may entail deception.

²² Examples are “captures” which appears in **Mauritius’** Act; or “abducts” which appears as an ‘action’ rather than a ‘means’ in **Tanzania’s** Trafficking Act.

²³ See for example Jonas (**Namibia**).

²⁴ See for example, section 3.2.4 on “subtle means of coercion and abuse”.

The prevalence of deception is a function of the vulnerability of victims which makes it easier for the trafficker to deceive them. The victims in the cases described in this section are young, unfamiliar with the places to which they are taken, in bad family circumstances, poor, or unemployed. They may also be characterized by several such vulnerabilities. Many seek a better life and *want* to believe the traffickers.²⁵ Interestingly, the court in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled children and a number of young women, some of whom were minors, sees an additional connection between deception and vulnerability. It refers to the definition of “deception” in the Travaux Préparatoires,²⁶ according to which this term means tricking the victim *into* a vulnerable or abusive situation. Thus, while vulnerability may facilitate deception, deception may also lead to a vulnerability created by the trafficker.

3.3.3.1 *The nature of a job or its conditions, including status in country of destination*

Often traffickers persuade a victim to accompany them, by deceiving them about the nature of the job offered or its conditions, including their status in the country of destination.

Sometimes a job is offered, but in reality, the victim is sexually exploited or prostituted. This transpired in **Veeran Palan (South Africa)**, a case revolving around the trafficking of two vulnerable young women who were offered jobs as cleaners in a hotel. Upon arrival at their destination, it was made clear to them that they would be expected to prostitute themselves. The accused persons were convicted of trafficking for sexual exploitation.

Similarly, in **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor from **Zimbabwe**, the accused promised to obtain a job as a housemaid for the girl in **Botswana**, whereas in reality, she trafficked her for sexual exploitation by a series of men and was convicted of this charge.

Another example of this pattern occurs in **Jonas (Namibia)**, a case revolving around a young girl who was promised a good job by the accused, but on arrival at the accused’s premises, was given to a series of men for sexual exploitation. This case highlights how the vulnerability of a victim can facilitate her belief in a trafficker’s deception, even when the trafficker has revealed her true plan at some point. According to the testimony of another young girl from the victim’s village, before the victim accompanied the accused, there was a previous incident which clarified the accused’s true intention. The accused approached the witness and 2 other young women, including the victim, and asked them to accompany her in order to be with the accused’s male friends who were looking for girlfriends. They all refused, but sometime after this incident, the victim accompanied the accused to her farm, in the belief that she would be employed in a legitimate job.

Yet another example occurs in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled children and several young women, some of whom were minors. The dominant accused’s modus operandi was to promise the victims jobs, and then give them to men for sexual exploitation. She was convicted of trafficking for sexual exploitation.

Similarly in **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of young women from **Mozambique**, the victims were promised work in the accused’s hair salon, when in reality they were prostituted on arrival in **South Africa**. A similar scenario occurs in **Uche Odii (South Africa)**, where 2 young women were offered jobs cleaning

²⁵ See for example, **Dos Santos (South Africa)** where the court describes the victims as looking for a better life.

²⁶ These reflect the deliberations which preceded the adoption of the Protocol. The full citation is: Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2006)

or taking care of a flat, when in reality, they were expected to prostitute themselves. In both cases, the accused persons were convicted of trafficking for sexual exploitation.

Similarly, in **Mahuni (Zimbabwe)**, young women from **Zimbabwe** were promised work in **Angola**. When they arrived, they were expected to engage in the legitimate job of selling clothes, but were also expected to prostitute themselves. The accused was convicted of procuration for prostitution.²⁷

In some cases, the victims are offered jobs, and are employed on reaching their destinations, but the nature of the job and its conditions are vastly different than what was promised.

One example is **Alam (Seychelles)**, a case revolving around the forced labour of 4 Bangladeshi workers who were deceived about a whole array of circumstances. All the victims testified that they were not paid for a number of months; that they were employed at work different than what had been promised; that the food and accommodations promised to them were inadequate; that the accused provided them with fake visas during the first period of their employment, despite promises to arrange their legal stay in the country; that they were not paid as much as promised; that they worked longer hours than promised and did not receive overtime payments; that payments were transferred to their families in Bangladesh, though they had not agreed to these transfers. The accused was convicted of trafficking for practices similar to slavery and forced labour.

Another example is **Shongwe (Eswatini)**, a case revolving around the trafficking for slavery of a young man from **Lesotho**, residing in **South Africa**. The accused, an **Eswatini** national, told the victim that he would take him to another place in **South Africa** where he would be employed at a good paying job, including food and accommodations. Instead, the young man was taken to **Eswatini**, where he was illegal, and employed as a cattle herder at low pay and difficult conditions, to the extent that he was reduced to foraging for food in the veldt and relying on the charity of a fellow herder to supplement his meagre diet. He was paid only once and housed in inhuman accommodations. The court relies on the deception practiced on him to fulfill the requirement of ‘means’.

Sometimes traffickers tell the victims the truth about the nature of the job, but the conditions are much worse than promised.

This happened in **Maroodza (Zimbabwe)**, a case revolving around the labour exploitation of 6 young women²⁸ who were “desperate job seekers” willing to work as maids. The accused offered the women jobs as housemaids or helpers in Kuwait and told them that they would be paid a salary which was lucrative. They were told that they would not incur living expenses, since they would live at their places of work and would be offered food. On arrival in Kuwait, while they were employed as housemaids or helpers as promised, the conditions were wholly different than those represented to them: they worked more than 15 hours a day; were not given adequate food; were not permitted to leave the premises unless to accompany children to school; were allowed no vacations and were allocated very small rooms. In addition, their passports were confiscated. The accused was convicted of the charge of recruiting the women when he knew or suspected they would be trafficked or likely to be trafficked, or attempting, assisting or conspiring with another for commission of the crime of trafficking.²⁹

²⁷ At the time the crime was committed, **Zimbabwe** did not yet have a Trafficking Act.

²⁸ Though there were 10 victims, only 6 testified.

²⁹ As to the ‘purpose of exploitation’, the judge calls it unfair labour practices and “some slavery and in particular forced labour and bonded labour”. We note that **Zimbabwe’s** Act includes a ‘purpose of exploitation’ of “illegal labour” as well as “forced services” and “debt bondage”.

3.2.3.2 *The identity of the trafficker or the victim*

An interesting kind of deception concerns the identity of the trafficker or his or her victim.

The trafficker's identity was misrepresented in **M.L. (Seychelles)**, a case revolving around the sexual exploitation of minor girls by a man who corresponded with the girls on the internet and pretended to be a female model from a modelling agency. By this deception, he lured children to send him intimate photographs which he then used to blackmail them to engage in sexual acts.

Similarly, in **Msweli (South Africa)**, a case revolving around the selling of a baby for slavery, the accused persons represented themselves as a teacher and a nurse from a hospital and approached the baby's mother, who was living in poverty, with offers to help with groceries and nappies. She believed them and left the baby with one of them while she went out to buy some needed things. Both accused persons were convicted of trafficking for slavery.

A particularly interesting misrepresentation of the victim's identity occurs in **Allima (South Africa)**, a case revolving around the abduction of a 16 year old girl for sexual exploitation. The accused told the victim that her name was other than it was, and that the accused was her mother. The victim believed this lie to the extent that when her aunt identified her in a store, she told her that her name was Amanda, as the accused had told her, and did not answer to her real name which her aunt used. A clinical psychologist explained why the victim believed this lie by testifying that this proceeded from a process of dissociation produced by the fearful circumstances of her abduction and subsequent sexual exploitation. Clearly this lie assisted the accused to control the victim, who was led to believe that she was the daughter of the accused.³⁰ The accused was convicted of trafficking for sexual exploitation.

3.2.3.3 *Other kinds of deception*

The field of possible deceptions is wide, and may include a host of lies.

In **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique** to **South Africa**, the recruiter told the family members of the children that they would be taken to **South Africa** to visit family, after which they would return home or stay in **South Africa** to study in school. Neither of these promises materialized, and the children were not returned home, even when some of them requested this. The same recruiter also told one of the children that her grandmother agreed to the trip, when this was not the case. When the children had already arrived in **South Africa** and complained about being sexually exploited, they were told that they needed to do this in order to obtain money for school uniforms.

In **Obi (South Africa)**, a case revolving around the trafficking for sexual exploitation of teenage girls, one victim was told that she was going to the residence of the dominant accused for a short visit, but on arrival she was locked in the house, forced to consume illegal drugs and prostituted. Two other victims were told that they would accompany the recruiter to visit a family member and would return home the same day. However, on arrival, they too were locked in the house, forced to consume illegal drugs and prostituted. One accused was convicted of trafficking for sexual exploitation and other crimes; the other was convicted of keeping a brothel and other crimes.

In **Mboo (Zambia)**, a case revolving around trafficking for body parts removal, the victim was told that he and the accused were going to a bar in order to sell a canoe, whereas in reality, the accused intended to sell the victim's organs to a buyer that night and was inducing him to drink

³⁰ For a more detailed description of this case, see section 2.2.1.2 on "memory gaps and distortions"; section 2.2.1.3 on "seemingly implausible testimony"; 2.4.4 on "The importance of psychological processes"; section 2.5.2 on "Expert testimony", the subsections on "clinical psychologists and "cultural practices and beliefs".

too much so that he could be easily manipulated. The accused was convicted of trafficking for the removal of body parts.

In **Chiyenda (Malawi)**, the 15 year old victim was enticed by her mother's friend to accompany her to **South Africa** under the pretense that she would be married to her brother. There was circumstantial evidence which proved the deception and for example, that the victim's mother was not asked to give her consent, that the minor never submitted the passport forms, and that the accused doctored the victim's passport so that she appeared to be older than she was and so that her name was different than it actually was. The accused was convicted of trafficking in persons, though the specific 'purpose of exploitation' is not clear.

In **Machawe P Dlamini (Eswatini)**³¹ the 30 year old accused person deceived a young girl under 16 years of age from **South Africa**, that if she travelled to **Eswatini**, he would locate her long lost father for her. Instead he repeatedly sexually exploited her. The accused was convicted of trafficking for sexual exploitation.

3.2.3.4 Exonerations on the basis of failure to prove intentional deception

Several cases resulted in exonerations because in the court's opinion, the prosecution failed to prove that the accused intended to deceive the victim or his family at the moment of recruitment or transport.

One example is **Adigwe Dike (Eswatini)**. The case concerned a Nigerian couple residing in **Eswatini**, who recruited a young Nigerian girl to work in the wife's business of selling wares, without pay, on the condition that she was to be enrolled in a tertiary educational institution after she had done her job for a certain time period. At one point the relationship soured. The girl requested to be enrolled in a tertiary institution as promised, but this was not done. When the girl requested to go home, the female accused told her that there was no money for this. Subsequently, the female accused detained the girl's passport and cell phone, conducted constant searches of her room and sometimes chased her out of the house. Moreover the girl was not given adequate food or clothing and was assaulted several times. The court exonerated the couple from trafficking in persons charges because it entertained a reasonable doubt as to the question if the accused persons had intended to deceive the girl from the moment of the 'actions' of recruitment and transport. The court said there was no clear evidence that the promise to enroll her in a tertiary institution was a ruse, although a strong suspicion was present.

A similar ruling occurs in **Mndzebele (Eswatini)**, a case revolving around a young girl from a poor family who was prevailed upon to live with a pastor who offered to pay her school fees. However, while the pastor did pay her fees, he also raped her repeatedly. The court convicted the accused of rape, but exonerated him from trafficking charges because it could not rule out that at the moment of taking the girl into his home he had a good intention of allowing her to realize her academic dream and did not intend to deceive her.

A similar exoneration occurs in **Fakudze (South Africa)**, where the High Court exonerated the accused from trafficking charges, while confirming his conviction for rape. The case concerns a stepfather who transported his 13 year old stepdaughter from **Eswatini** to **South Africa**, where he repeatedly raped her. The exoneration from trafficking charges, was at least partially due to the court's view that the prosecution had failed to prove that the accused had deceitfully intended to exploit the girl from the moment he transported her to **South Africa**.

We note that a more detailed treatment of the wider topic regarding the simultaneity of 'action' and 'intent' will be analyzed in section 3.3.1 on *difficulties proving the intent of the accused person*.

³¹ Rex v. Machawe P Dlamini, Case No. P207/2017 before Magistrate's Court.

3.2.4 Subtle means of coercion and abuse

The Protocol includes a number of ‘means’ which do not require force and can reflect psychological or emotional methods of control on the part of traffickers. They are: “other forms of coercion”; “abuse of a position of vulnerability”;³² and “abuse of power”.³³ Most States in the region follow the Protocol and include these ‘means’ in their Trafficking Acts.

Thus, most States’ Trafficking Acts include “coercion”,³⁴ and some even define it to include psychological pressure.³⁵ Even in Acts which do not explicitly include this ‘means’, it may be partially covered by other ‘means’.³⁶ Most States in the region also include the ‘means’ of “abuse of a position of vulnerability” and “abuse of power”, or one of them.³⁷

The common denominator among these ‘means’ is that they can encompass the use of subtle, psychological forms of manipulation on the part of traffickers. This is especially important, because modern trafficking is often characterized by psychological pressures exerted by the trafficker, rather than by physical restraint. This occurs, both because psychological pressure may be even more effective than physical force, and because it is easier to employ. The following box reflects practitioners’ opinions on this point.

Practitioners’ insights on the importance of psychological ‘means’

In addressing the centrality of subtle ‘means’ in human trafficking cases, practitioners at the UNODC Expert Group Meeting, convened to review a draft of the global case digest (May 6-8 2014) shared the following insights:

“The use of subtle means is an essential strategy in the business plan of the modern trafficker.”

“The use of violence is resource intensive, necessitating the physical presence of the trafficker and often requiring tools to exert violence. This may lead the trafficker to prefer subtle means.”

In view of the centrality of subtle means, it should not surprise us that cases in the region which do not include the use of physical force, have yielded convictions on trafficking or allied crimes.

One example is **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled children and a number of young women, some of whom were minors. In this case the dominant accused person did not employ force against the victims,

³² We note that kinds of vulnerabilities are analyzed in detail in section 3.2.5.

³³ We note, in addition, that ‘means’ like deception, threats and the giving of receiving of payments to persons who control victims do not require the use of force. However, this section addresses psychological manipulations on the part of traffickers which are best reflected by the ‘means’ of “coercion”, “abuse of a position of vulnerability” and “abuse of power”.

³⁴ Exceptions are **Angola** and **Zimbabwe**.

³⁵ Examples of States which define coercion to include psychological pressure are the **DRC**, **Lesotho**, **Seychelles** and **Zambia**. **Eswatini** too defines this term and includes several forms of coercion, some of which may be interpreted to include psychological pressure, namely: “*threat of serious harm to or physical restraint against a person: (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against the person or any other person; or (c) the abuse or threatened abuse of the legal process*”;

³⁶ Thus, though **Zimbabwe** does not include “coercion”, it does include at least one form of subtle coercion: “*administering drugs to subdue the victim or causing the victim to be addicted to drugs*”. The same goes for **Angola** whose Act does not include “coercion” but does include ‘means’ like “abuse of vulnerability” or “abuse of authority” which may be characterized by coercion other than physical force.

³⁷ **Zimbabwe’s** Act lacks “abuse of a position of vulnerability”, but includes “abuse of power”. **Malawi’s** law includes threat of abuse of a position of vulnerability and threat of an abuse of power.

but rather abused their vulnerabilities and her power vis a vis them. In convicting the accused persons of trafficking for sexual exploitation, the court notes that psychological and financial means can minimize or eliminate the need for physical violence or confinement.

"...trafficking perpetrators control their victims by means of psychological and financial control mechanisms which minimize or eliminate the need for physical violence or confinement..."

Trafficking can occur without the use of force, for example, by threats or the abuse of a position of vulnerability or abuse of power...

Traffickers are particularly skillful in gaining the trust of their victims; befriending them mostly during a time of crisis, supporting them emotionally and financially, and finally luring them with stories of high incomes and material possessions."

State v. Matini, RC 123/13, in the Regional Division of the Eastern Cape, Uitenhage, conviction 27/10/2017; sentence 8/2/2018.³⁸

A similar insight appears in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs. The court relied upon the evidence of the clinical psychologist in convicting the accused person of trafficking for sexual exploitation:

"Neither wished to remain in the environment that they were in, but believed that they were unable to leave due to a number of psychological factors regarding the accused control over them which included their fear of their own, or their families' safety, substance addiction and lack of other viable alternatives... Typical mechanisms used by traffickers to keep their victims in a web of trafficking that extended beyond the mere physical control to the expansive grip of psychological control."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

Subtle means of coercion and abuse can assume a wide array of forms, depending on the 'creativity' of the trafficker and the particular vulnerabilities of the victim.

The examples which will appear in this section are not exhaustive. Moreover, certain specific subtle 'means' of coercion and abuse are addressed separately in other sections of this digest, due to their centrality. These include: controlling the victim by means of his feelings for traffickers who are family members or represent themselves as romantic partners;³⁹ holding the victims in debt bondage;⁴⁰ isolating victims;⁴¹ restricting their freedom (not necessarily by physical means);⁴² difficult living and working conditions;⁴³ violating privacy and dignity;⁴⁴ creating a climate of

³⁸ We note that the quotes in the box, were drawn from various sources which the court used and applied. For example, the first quotation was drawn from The U.S. State Department (June 2008) 'Trafficking in Persons Report: Violence and Health'. Geneva: World Health Organisation and the last quotation was drawn from Mollema M, 'Combating Human Trafficking in **South Africa**: A Comparative Legal Study', (unpublished Doctor of Laws thesis, University of **South Africa**, 2013) at p. 55.

³⁹ See section 3.2.5.13 on *emotional vulnerability/traffickers in positions of trust*.

⁴⁰ See section 3.2.12 on *debt bondage*.

⁴¹ See section 3.2.7 on *isolation*.

⁴² See section 3.2.6 on *restrictions of freedom*.

⁴³ See sections 3.2.8 on *low pay or absence of pay*; 3.2.9 on *difficult working and living conditions*.

⁴⁴ See section 3.2.10 on *violations of privacy or dignity*.

fear.⁴⁵ We also note that these subtle means can be accompanied by other ‘means’ such as threats, deception and force.

The following are a few examples of subtle means of coercion and abuse:

3.2.4.1 Gradual grooming/seasoning exploitation with good treatment

Often, traffickers lure their victims by means of seemingly good treatment in the beginning which gradually gives way to severe exploitation.⁴⁶ By the same token, sometimes traffickers season their exploitative behaviour with small favours which create a sense of thankfulness in victims and make them “willingly” endure exploitation.

One example is **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of a number of children. The accused often shared food with the children before the series of exploitative encounters commenced; offered them sweets before beginning to exploit them; and rewarded them with sweets and various articles after they allowed him to exploit them. The court convicted him of trafficking for sexual exploitation.

In **Dragon (Namibia)**, another case revolving around the trafficking for sexual exploitation of a number of children, the picture is yet clearer. The accused was described by witnesses as acting in a loving way towards the children and spoiling them. He regularly took the children to shops to buy them toys and food. One victim’s mother testified that he treated the children with love. One victim testified that he was a good man. The court convicted the accused of trafficking for sexual exploitation and rapes despite this, recognizing that this was a grooming technique. The court also stressed that the accused succeeded by gradually accustoming the children to his nakedness and to inappropriate behaviour like viewing pornographic movies in their presence.

From court of first instance’s ruling;

“It is quite clear that he gradually to introduce them to his nakedness, he gradually gained their trust by providing and giving them things that they do not have...there is also evidence that he at times watch adult movies and when they [the children] came in, he would watch the movies, that is also an indication that he gradually introduced them to inappropriate behaviours.”⁴⁷

From testimony of the clinical psychologist:

It is common for child abusers to groom victims by buying nice things for them and in that way gain their trust as it is in this specific case.”

S. v. Dragon, SKW-CRM-1000/2016, conviction on trafficking affirmed on appeal Vujicin v S (HC-MD-CRI-APP-CAL-2020-00062) [2020] NAHCMD 551 (1 December 2020) (1)

Another example of the gradual exploitation of a child occurs in **Luzama Kavul (DRC)**.⁴⁸ The parents of a child were impoverished and left the house each day in order to engage in small scale activities to help them survive. The accused was a neighbour of the family who made use of the absence of the parents in order to lure the child into sexual exploitation. He started by asking her to clean his store, claiming that his own children were thieves, and rewarding her with packets

⁴⁵ See section 3.2.13 on *climate of fear*.

⁴⁶ See Judith Herman, “Trauma and Recovery” p. 80. One victim of sexual exploitation is quoted as saying: “*Everything was mild and gradual, one small step and then another...It started in such small ways that I didn’t see the pattern until much later.*”

⁴⁷ The mistakes are in the original ruling and are probably a function of faulty recording.

⁴⁸ State v. Luzama Kavul, in the Court of Peace, Kinkole Court of the Commune of Nsele, city of Kinshasa, **DRC**. We note that only a summary of the case was made available and that this case was reported by the territorial police.

of cookies and some candies. After this had gone on for awhile, he raped her and continued to sexually exploit her. The court found that using the victim's services to keep his store clean, on the grounds that his own children were thieves, was merely bait to lure the victim into sexual exploitation. He was convicted of rape, forced prostitution and submission to degrading treatment in accordance with article 16 of the Constitution of the **DRC**.

Another example occurs in **Jeremiah Musa Dlamini (Eswatini)**⁴⁹ where a father raped a daughter and niece over a period of years. They testified that it started off as sexual touching, brushing, caressing, licking and advanced to rape. They lost count of the number of times and places the accused did this to them. The accused was convicted of trafficking and other offences.

On the other hand, sometimes good treatment or initial good treatment has led courts to exonerate accused persons from trafficking or allied crimes, because it raises a doubt as to criminal intent at the moment of recruitment or transport.

One example is **Mndzebele (Eswatini)**, where a pastor agreed to pay the school fees of an impoverished girl and took her to live with him. At first she slept with his 8 year old daughter in her bedroom, but there then ensued successive stages which led to her sexual exploitation. The first stage occurred when the accused began to sleep with her in that bed. He then arranged for his child to sleep in his bedroom and came to her at night, brushed her whole body and then left. The next stage was when he attempted to penetrate her and failed. The last stage included a series of rapes which transpired frequently during the course of a year. The accused person was convicted of rape, but exonerated from trafficking charges because the court could not rule out that he had recruited and transported the victim with good intentions and that the intent to exploit crystallized only afterwards.

In **Fakudze (South Africa)**, a 13 year old girl, living in **Eswatini**, was abandoned by her mother, and begged her stepfather to take her with him to **South Africa**, although he had previously sexually abused her. At first he refused, but later agreed to have her accompany him. On arrival in **South Africa**, he did not abuse her immediately, but rather waited for a few months, although the exact time frame is not clear.⁵⁰ While the court of first instance convicted the stepfather of trafficking for sexual exploitation and rape, the High Court confirmed the conviction on rape but exonerated the accused from trafficking charges. In doing so, it relied, at least partially, on the time gap between the arrival in **South Africa** and the exploitation, which raised doubts as to the accused's intention at the moment of transporting the girl to **South Africa**.

These exonerations give food for thought, as there are other cases worldwide, where the time gaps between recruitment and exploitation did not yield exonerations. In these cases courts seemed to view the gradual progression, seasoned by initial good treatment, as a ploy to gain the victims' trust, thus making it easier to later exploit them. This pattern is present in cases like **Urizar (Canada)**, **D.A. and A.M. (Israel)**⁵¹ **Campbell (U.S.)**⁵² and a Finnish case where the

⁴⁹ Rex v. Jeremiah Musa Dlamini, Case No. BH350/19 in the Magistrates' Court of **Eswatini**, held at Pigg's Peak, 21.08.20; an extract of the ex tempore judgment was made available.

⁵⁰ The facts of the case reveal that the accused and the victim arrived in **South Africa** in October 2014 and that he began abusing her sometime in 2015.

⁵¹ Criminal Cases 6749, 6774-08-11 in Jerusalem District Court, State of Israel v. D.A. and A.M. issued on 10 September 2013; appeal rejected by Supreme Court in Criminal Appeals 8027,8104/13 on 27.5.2018, request for additional hearing rejected in Request for Criminal Additional Hearing 6022/18 on 14.4.2019.

⁵² 770 F.3d 556, 559 (7th Cir. 2014) cert. denied, 135 S. Ct. 1724 (2015) denied, No. 14-8610, 2015 WL 2340955 (U.S., 18 May 2015), United States of America

expert witness testified that the victims had gradually lost their autonomy.⁵³ These cases yielded convictions, thus presenting us with an alternative way of viewing gradual exploitation.

We also refer the reader to section 3.2.4 of the global case digest on *subtle means of coercion*, which describes the gradual progression from good treatment to exploitation, as an intentional method of control on the part of traffickers, citing some of the cases mentioned above.

3.2.4.2 Using trauma bonding/Stockholm syndrome

Sometimes victims of trafficking and other crimes develop psychological attachments towards perpetrators upon whom they are dependent. This may cause them to identify with the perpetrators and magnify any small benefit conferred upon them. This psychological process is called ‘trauma bonding’ or ‘Stockholm syndrome’⁵⁴ after an actual case of hostage taking in Stockholm, Sweden, where this process was thought to be present. Often perpetrators encourage this process by doling out small benefits interspersed with abusive behaviour.

“In human trafficking cases, the relationship between victim and trafficker may involve trauma bonding, a phenomenon that is beginning to receive increased attention. In research on the topic, trauma bonding is commonly referred to as “Stockholm Syndrome,” and the terms may be used interchangeably. However, there is no medical standard for diagnosis of either, nor any agreed upon definition of trauma bonding. In addition, there is no definitive understanding of trauma bonding’s prevalence within trafficking situations and not all trafficking victims experience it. ...Although definitions vary, the most common meaning of trauma bonding is when a trafficker uses rewards and punishments within cycles of abuse to foster a powerful emotional connection with the victim. Traffickers may take on a role of protector to maintain control of the victim, create confusion, and develop a connection or attachment, which may include the victim feeling a sense of loyalty to or love for the trafficker. This connection, or traumatic bond, becomes especially intense when fear of the trafficker is paired with gratitude for any kindness shown.”

United States State Department Trafficking in Persons Report, 2020

One **South Africa** case explicitly recognizes this phenomenon:

“It is globally accepted that...victims of trafficking...may normally suffer from capture-bonding, also known as the Stockholm syndrome [a psychological phenomenon in which hostages express empathy and sympathy and have positive feelings toward their captors...]”⁵⁵ and therefore find it challenging to accept reclamation from their traffickers. They are also unlikely to accept that they are exploited by third parties and therefore may not have an appreciation of the need for protection. It is for this reason that they are difficult to identify and once identified, to offer the appropriate protection.”

S.L. and others v. The Minister of Home Affairs and others, [2016] ZAGPJHC 47, in the South Gauteng Court, Johannesburg, paragraph 22

⁵³ Helsinki District Court, Judgment R 11/1073. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FIN008). See also section 2.6 of the global case digest on *expert or professional testimony/Expert testimony in the field of psychology in general and victimology in particular*, which describes the testimony of the forensic psychiatrist in the case, according to which the young women underwent a gradual loss of autonomy.

⁵⁴ See also UNODC Anti Human Trafficking Manual for Criminal Practitioners, Module 4, *Control methods in trafficking in persons*, p. 9.

⁵⁵ The definition in the brackets appears in footnote 17 of the ruling.

Other cases in the region are characterized by at least partial descriptions of this phenomenon. Thus, in a few cases the victims express positive feelings towards the traffickers who have exploited them, but also treated them well in some ways.

In **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation of 2 minor girls, one of the sexually exploited girls (D) claimed that she loved the man who exploited her and viewed herself as his girlfriend. In the background is the fact that the end exploiter paid the girl each time she came to him, and fed her fried chicken on one occasion, so that he mixed, what was in her eyes, positive actions with negative ones. In this regard, the court noted that this girl wanted to continue the relationship with the exploiter.

In **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of a number of young children, one victim told the court that the exploiter was a good man, and the mother of another victim noted that the exploiter treated the children with love. As said, this accused person often took the children to buy toys and food and treated them to sweets and other foods, so that the exploitation was sweetened in their eyes.

In **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 young women addicted to drugs, one of the victims, called Harmse, testified that she fell in love with men who prostituted her time after time. Thus, she believed she was in love with a pimp called Charles who sold girls. When he sold her to someone else, she in turn fell in love with him. The case does not clarify what tactics these men used in order to elicit such feelings in her. We can only suspect that they interspersed their exploitation with some benefits. The second victim, called Els, testified that in her loneliness, despite the accused person's abusive behaviour, she decided to make the accused's life happy so that her life could be happy.

Interestingly, in **Veeran Palan (South Africa)** one of the victims, named Samantha describes a classic Stockholm syndrome pattern. She notes that the dominant trafficker treated the girl who recruited them, and who had herself been trafficked for prostitution by him, like a daughter. She also noted that this girl did what the trafficker and his wife expected of her.

However, sometimes it is hard to differentiate between positive actions which proceed from genuine feelings and subtle means of coercion. In **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 mentally disabled children and a number of young women, some of whom were minors, one of the victims, named Mareeza, married an older man who had sexually exploited her, and when questioned about it, answered that the younger men were only abusing her, whereas this man, named Shooter, would take care of her. It seems that there were positive aspects to Shooter's treatment of her which led her to such a conclusion, despite the fact that he, like others, paid to engage in sexual relations with her. However, since Shooter actually married Mareeza, it is also possible that his positive actions were not control mechanisms but rather a product of genuine feelings.

3.2.4.3 *The use of drugs and alcohol*

The region is a treasure trove of cases describing the use of drugs or alcohol by traffickers as a method of control. Interestingly, even the legislation of several countries refers to this behaviour as a 'means' or as a source of vulnerability.⁵⁶

The use of drugs or alcohol in order to give victims the energy to engage in prostitution is mentioned in a wide array of cases, in some of which the traffickers give the victims free morning and evening drugs. This has the added benefit of addicting the victims and thus binding them to the trafficker who supplies them with drugs. Moreover, in some cases, the traffickers are also drug

⁵⁶ See **Zimbabwe's** Act which includes as a 'means': *administering drugs to subdue the victim or causing the victim to be addicted to drugs*. See also **South Africa's** Act which enumerates as a vulnerability: *addiction to the use of any dependence producing substance*.

dealers who sell the victims drugs, thus profiting from them twice over. Sometimes the victims are already addicted when they meet the traffickers and sometimes they become addicted while with the traffickers.

Thus, in **Ogochukwu (South Africa)**, a case revolving around the trafficking for sexual exploitation of a young girl of 15, the victim was not yet addicted to drugs when she met the trafficker. She noted that the trafficker sold her drugs in order to boost her energy and “make her brave” so that she could get more clients and thus acquire more money to buy more drugs from the trafficker. Her friend, who was also prostituted, testified that the drugs gave her the energy to sleep with several men in one day. Both described the vicious cycle of prostitution and drugs, whereby they gave the accused all or part of their earnings so that they could buy drugs from him. The accused was convicted of trafficking for sexual exploitation.

In **O.B. Abba (South Africa)**, a case revolving around a conviction of trafficking for sexual exploitation, slavery and servitude of 2 vulnerable young women, addicted to drugs, the victims were given “free” wake up drugs in the evening in order to allow them to work in prostitution and more drugs in the mornings to allow them to sleep. The drugs thus served as control mechanisms on the part of the trafficker.

In **Eze (South Africa)**, a case revolving around a conviction of trafficking for sexual exploitation of 2 young women addicted to drugs, the trafficker supplied morning and evening drugs free, but the first victim testified that she needed more than those drugs and worked in prostitution only to support her drug habit, paying the accused to sell her more drugs. This case presents an insightful analysis of how traffickers use drugs to control victims:

“The many connections between prostitution and drug addiction are well documented. An addiction to drugs or alcohol is often an integral aspect of prostitution...victims who are addicted to substances are easier to control and manipulate, and are less likely to attempt to run away. Drug or alcohol addiction is a high-risk factor for prostitution. At the street level pimps often use drugs to exert control over prostitutes. Many pimps are also drug dealers and may initially attract and lure girls with free drugs. This includes girls with financial or emotional problems, runaways and girls from dysfunctional families, and girls who are already addicted to drugs. In her addicted state a victim is experiencing overwhelming cravings for the drug and will do what she must do to satisfy them. She has impaired judgment and is susceptible to control by a domineering personality. Drug addiction helps pimps keep prostitutes virtually enslaved. It is a sad fact that many of them become involved in prostitution as an indirect result of addiction. Some people turn to prostitution as a means to finance their addiction. Some turn to prostitution after addiction has ruined their lives and left them no apparent alternative. Some turn to prostitution after fleeing dysfunctional homes and abusive, drug addicted or alcoholic parents...”

By keeping the complainants in an altered state of consciousness, by employing fear and the threat of harm and by exploiting their addiction gave the accused the power over their vulnerability, to the extent that the complainants were inhibited from indicating their unwillingness or resistance to being trafficked, or unwillingness to participate in such an act. This accords with the conclusion reached by the expert, Major Stollarz that these victims were therefore exposed to the typical mechanisms used by traffickers to keep their victims in a web of trafficking that extended beyond the mere physical control to the expansive grip of psychological control. In this context one understands why Els repeatedly returned to her captor and why she did not avail herself to the many avenues of seeking help or fleeing. The addiction had ruined their lives and left them no apparent alternative. Consequently, the accused is found guilty as charged on Counts 1 and 2. ”

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

A number of other cases refer to traffickers' use of drugs to facilitate prostitution. These include **Dos Santos (South Africa)** where the accused forced victims to smoke cannabis and **Uche Odii (South Africa)** where one victim was forced to smoke rock cocaine on arrival and thereafter in order to facilitate her prostitution.

Cases also attest to the use of alcohol by traffickers. Thus in **Lukas (Namibia)**, revolving around a conviction on trafficking for sexual exploitation of two minors, one victim is asked to perform oral sex with the exploiter and feels uncomfortable about it. In order to lower her inhibitions, the recruiter gives her alcohol.

In **Veeran Palan (South Africa)**, a case revolving around convictions on trafficking for sexual exploitation of two vulnerable young women, the recruiter took them to a pub to relax them after their initial sexual exploitation.

In **Mboo (Zambia)**, a case revolving around an attempt to traffic a young man who has just lost his wife, for removal of his body parts, the trafficker intentionally led the victim to drink so much beer, that he could hardly walk, in order to facilitate bringing him to the buyer.

We note that another method of subtle coercion or abuse relates to withholding drugs from addicted persons who have strong cravings for them. This occurs in **Eze (South Africa)** where the accused both threatens to withhold drugs and does so. Thus, one victim testified that the accused threatened that he would deprive her of drugs if she did not do as he said, and the second victim testified that there were times when she was deprived of drugs because the accused would get home late after she fell asleep. While the latter situation may not have been intentional, its effect was to strengthen the victim's sense of dependence on the trafficker and thus to tighten his control over her.

3.2.4.4 Inducing victims to commit illegal acts

Across the region, there are cases where victims are induced by traffickers to commit crimes. While traffickers' motivations differ, this practice may serve, at least partially, as a subtle way of controlling victims and facilitating their exploitation. Clearly it is more difficult for a person who has committed a crime to turn to the police, but beyond this evident result, inducing victims to commit crimes may also erode their sense of worth and thus make them less likely to resist continued exploitation.

Inducing victims to commit crimes to destroy their sense of self worth

"...Traffickers utilize their authoritarian status to retain control over their victims. Social psychological studies have demonstrated that people will behave in ways that are morally offensive to them under the presence of strong enough authority. For example, classic studies on obedience have found that, when instructed by an authority, a majority of people will comply with requests to administer painful electric shocks to another person. Similarly, traffickers utilize their status and authority to influence their victims' behavior, including inducing behavior that may be against a victim's morals or beliefs... Victims lose sense of themselves as people and their ability to trust others, as their natural survival responses slowly break down, leaving them physically, emotionally, and spiritually shattered.

Hopper and Hidalgo, "Invisible Chains: Psychological Coercion of Human Trafficking Victims", 1 Intercultural Human Rights Law Review 185, p. 200.

Naturally, sometimes other motivations are present and for example, traffickers may use victims in illegal activities in order to increase their profits. This may occur when traffickers employ victims to help them in the business of preparing drugs for sale.

The following are examples of cases where traffickers induced victims to commit illegal actions.

In cases like **Eze (South Africa)**, **Obi (South Africa)**, **Ogochukwu (South Africa)**, **O.B. Abba (South Africa)** the victims are induced to take drugs and these drugs are clearly used to create dependence on the trafficker and thus facilitate exploitation. See section 3.2.4.3 on *the use of drugs and alcohol*.

In other cases, courts do not explicitly address the destructive potential of inducing victims to commit illegal acts. However, while the motivations of traffickers may be mixed in these cases, the illegality can also serve to facilitate the exploitation.

Thus, in cases where traffickers cause victims to be illegal in a country of destination, this clearly makes them more dependent on the traffickers and less likely to flee. One example, is **Alam (Seychelles)**, a case revolving around a conviction on trafficking for practices similar to slavery and forced labour of 4 Bangladeshi workers. The accused reneges on his promise to arrange their legal stay, thus making them illegal in the country. Similarly, in **Shongwe (Eswatini)**, a case revolving around a conviction on trafficking for slavery, the accused transports a young man from **Lesotho** into **Eswatini**, where he is illegal, although he had promised to find him a good job in **South Africa** where he resided.⁵⁷

Inducing a victim to carry fraudulent documents may have the same effect. In **Jonas (Namibia)**, a case revolving around a conviction on trafficking for sexual exploitation, the accused induces the victim to carry an identity card which actually belongs to the perpetrator's sister. In addition, she writes the victim's name on a health passport belonging to someone else, thus involving her in another fraudulent representation.

In **Matini (South Africa)**, a case revolving around convictions on trafficking for sexual exploitation of a number of girls, the dominant trafficker induces 2 mentally disabled minor victims to participate in the dominant trafficker's illegal dagga⁵⁸ business.

Cases with the most potential to destroy the victim's sense of self-worth are those where victims are induced to recruit other victims for exploitation. This can be seen in **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation of two impoverished, minor girls. One of the girls is induced to recruit the other to be sexually exploited. Similarly in **Ntonga (South Africa)** and **Martinet (Mauritius)** one victim participates in recruiting the other to be sexually exploited.

By the same token, former victims may become traffickers who recruit new victims or assist the dominant exploiter in other ways. This transpired in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**. The accused number 2, who aids and abets the sexual exploiter, was formerly trafficked by her own sister and sexually exploited by the accused number 1. A similar scenario occurs in **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, where the recruiter tells them that she too was prostituted by the dominant accused and needed to find replacements in order to go free. Similarly in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of victims including 2 mentally disabled minors, the accused number 2 was formerly trafficked for sexual exploitation by the more dominant, accused number 1.

We note that the courts in **Mabuza** and **Matinti** viewed the trafficking for sexual exploitation of these accused persons in the past as a mitigating circumstance in sentencing them, but it did not prevent their being convicted.

⁵⁷ See also section 3.2.5.2 on *vulnerabilities of victims/immigration status*.

⁵⁸ Dagga is a term used for marijuana in **South Africa**.

In respect of former victims who take part in trafficking, we also refer the reader to section 5.5 on *the importance of not criminalizing victims*.

3.2.4.5 Use of financial dependency

Since traffickers often transfer victims to places with which they are not familiar, they are often dependent on the traffickers for basic needs. Traffickers may use this situation to exert psychological control over victims.

Such a method of psychological control can be seen in **Fakudze (South Africa)**, a case dealing with the sexual exploitation of a 14 year old girl by her stepfather. The girl accompanied the accused person from **Eswatini** to **South Africa**, after being abandoned by her mother. Once there, she was expected to run the household, including to care for her half siblings. She was raped on numerous occasions by her stepfather, who continually reminded her that he was supporting her. While the High Court exonerated the accused from trafficking, due to the court's doubts about his intent to exploit the child at the stage when he transported her to **South Africa**, it confirmed his conviction on rape charges, thus recognizing that the child was sexually exploited.

A similar pattern occurs in **Tshiswaka (DRC)**⁵⁹ where a father made use of the absence of his wife to rape his daughter, threatening her that he would not provide food and clothing if she refused.

A similar tactic, whereby the victim is reminded of her financial dependence on the trafficker, occurs in **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl who is transported from her village to a farm where she knows no one but the accused. At one point, the trafficker showed anger towards the victim and told her that she was being supported by the accused's husband, when there were men who could support her. The young girl cried and then the accused threw her luggage out of the house. The victim thereupon accompanied a man called Nico with whom she was forced to engage in sexual relations.

Similarly, in **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, the court notes that the use of control mechanisms like debt bondage, isolation and financial dependence made it unnecessary for the trafficker to employ physical violence.

In **Eze (South Africa)**, case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, addicted to drugs, the court noted that they had no control over the income they earned as prostitutes for the accused and this, in addition to the drug dependence and constant monitoring of their movements tightened the trafficker's control over them.

We also refer the reader to section 3.2.6.3 on *subtle restrictions of freedom/financial dependence*.

3.2.4.6 Changing the identity of the victim

Sometimes traffickers change victims' identities, thus encroaching on their autonomy and selfhood and leading to their inability to muster the energies to find a way out of their situation.

An extreme case illustrating this pattern is **Allima (South Africa)**, a case revolving around the trafficking for sexual exploitation of a 16 year old girl. The trafficker gave this girl a new identity, including a new name and a new mother, namely the trafficker.

This is a worldwide pattern attested to by various sources.

⁵⁹ State v. Tshiswaka in the Court of Peace of **DRC**. We note that only a summary was available.

"During the course of trafficking, the identity of victims and their sense of self are often impacted. In some situations, traffickers have changed victims' names, altering their identity on the most basic level."

Hopper and Hidalgo, "Invisible Chains: Psychological Coercion of Human Trafficking Victims", 1 Intercultural Human Rights Law Review 185, 199

"Prolonged captivity also produces profound alternations in the victim's identity. All the psychological structures of the self... have been invaded and systematically broken down...In concentration camps the captive's name is replaced with a nonhuman designation, a number. In political or religious cults and in organized sexual exploitation, the victim is often given a new name to signify the total obliteration of her previous identity and her submission to the new order."

Judith Herman, "Trauma and Recovery", Basic Books (New York, 1997), p. 93.

3.2.4.7 Making the victim feel worthless: humiliation/verbal abuse/constant anger

Traffickers often make victims feel worthless by humiliating them, treating them angrily on a regular basis and verbally abusing them. This can contribute to the erosion of the sense of self in victims and create an atmosphere of fear and helplessness which results in passive reactions in the face of exploitation.

"Verbal abuse, humiliation, threats, and other forms of psychological abuse "represent deliberate attempts to break down the will of individuals . . . [and] are often used to induce the sense of 'learned helplessness,' that the abuse continues whether or not the victim cooperates."

Hopper and Hidalgo, "Invisible Chains: Psychological Coercion of Human Trafficking Victims", 1 Intercultural Human Rights Law Review 185, 189

A case in which the sense of worthlessness caused by the trafficker is stated explicitly is **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 addicted young women. One victim testified that the accused made her believe that she was worthless.

Examples of regularly angry behaviour and verbal abuse on the part of traffickers occur in a number of cases.

In **Jonas (Namibia)**, a young girl is trafficked for sexual exploitation and given successively to several men one after another. The victim's testimony describes the female trafficker as often talking to her angrily and for example: when the victim asked her why she lied to her; when the accused wanted the victim to live with a man called Johnny; when the victim refused to engage in sex with Johnny; when the victim did not wish to go with a man named Phillip; when the victim did not immediately go with a man named Nico. The accused also shamed the victim by telling her that she was living off the accused's husband, when she could be supported by other men.

Another case in which this behaviour pattern is described is **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women. One of the victims described the dominant accused person as speaking in a threatening way, while the other victim described him getting angry at her when she felt sick the morning after arriving.

In **O.B. Abba (South Africa)**, a case revolving around trafficking for sexual exploitation, slavery and servitude, the dominant accused is described as behaving angrily every time one victim tried to keep back any of the money she had earned. This was followed by his assaulting her.

Another kind of humiliation occurs in cases where the victims are forced to pose in scanty clothing or nude for advertisements of their sexual services, to be publicized on the internet. This occurs in **Obi (South Africa)**, **Veeran Palan (South Africa)**, **Eze (South Africa)**. In **Dos Santos (South Africa)**, the accused also forced a victim to view pornographic movies and watch her engaging in sexual relations with her boyfriend in order to teach her how to prostitute herself. The court calls this “inhumane treatment”. In **Mahuni (Zimbabwe)**, the accused, who deceived young women from **Zimbabwe** by telling them that jobs awaited them in **Angola**, required them to prostitute themselves on arrival. In order to “teach” one of them the “job”, she humiliated both victims, by requiring the one who had just arrived to view another victim engaging in sexual relations with men.

We also refer the reader to section 3.2.13 on *climate of fear*.

3.2.4.8 *Minimization of the exploitation*

Sometimes traffickers try to take the sting out of the exploitation that the victims are experiencing by minimizing it.

This kind of behaviour pattern can be seen in **Mahuni (Zimbabwe)**, a case revolving around the procuring for prostitution of young women from **Zimbabwe** in **Angola**. When the accused told the young women that they must prostitute themselves, she added that since they were not virgins there would be nothing new in what they were being asked to do.

A similar pattern of behaviour occurs in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**. When the children complained about the sexual exploitation, the recruiter told them that they would get used to it.

Similarly, in **Lukas (Namibia)**, the minor victim called D was reluctant to engage in oral sex with the sexual exploiter because she feared it would contaminate her with germs. The accused person who recruited her minimized this concern by telling her that no germs can pass by means of oral sex and that she herself performs oral sex with her boyfriend.

3.2.4.9 *Traffickers' use of education*

In several cases across the region, traffickers convinced victims to come with them or tried to keep them in an exploitative situation, by belittling the value of education or not allowing them to pursue an education.

Thus, in some cases, traffickers told victims that school would not help them, and in other cases, victims were denied the right to go to school, although they wanted to do so. By belittling education or expressing opposition to it, the traffickers keep the victims in a vulnerable position with no outside sources of information and no way to rise from their exploitative situation.

This pattern can be seen in **Esther Phiri (Zambia)**, a case revolving around the trafficking for exploitation of a 14 year old girl. When recruiting her for a job in the capital of Lusaka, the trafficker told her that school will not get her anywhere.

In **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl, she was approached by the accused in her village and told that she should leave school because the accused has a job for her in the town where she resides. The victim believed her and traveled to the town. However, she did so only after she sat for her exams, thus showing that education was important for her.

Jezile (South Africa) highlights the importance of education to a victim and the danger it poses to the trafficker. The 14 year old victim was forcibly married to the accused, a 28 year old man. She made clear that she wished to stay in school and that she did not wish to marry. When she was married against her will, she applied to the accused to allow her to resume her education, but he refused, because he did not want an educated wife.

Conversely, the offer of educational opportunities by traffickers can lure victims who yearn to better themselves. This can be seen in **Dos Santos (South Africa)** where the young women trafficked for sexual exploitation were promised work in the accused person's hair salon and the opportunity to study. They accepted her offer because they wanted a better life. Similarly in **Mabuza (South Africa)**, the families of the children trafficked for sexual exploitation were promised that they would study in school in **South Africa**. This aspect also occurs in **Adigwe Dike (Eswatini)** where a girl is offered enrollment in a tertiary educational institution, although in this case the court exonerated the accused persons because the prosecution had not proven that they did not intend to fulfill their parts of the bargain, at least initially.

3.2.4.10 *Constant moving*

Sometimes traffickers constantly move victims from site to site, making it difficult for them to complain or flee. Such a scenario transpired in **Eze (South Africa)** which revolves around the trafficking for sexual exploitation of two vulnerable, addicted victims. Towards the end of her time with the accused, the victim called Els, testified that the accused kept guard over her and they moved from apartment to apartment.

Similarly, in **Alam (Seychelles)**, a case revolving around the trafficking of 4 Bangladeshi workers, the trafficker constantly moved the victims from one site to another, making it difficult for them to know their address. The accused was convicted of trafficking for practices similar to slavery and forced labour.

Similarly in **Mahuni (Zimbabwe)**, a case revolving around procurement for prostitution, the accused indicated that she and the victims needed to move from the province where they then were because there was no money.

It is not clear if the traffickers deliberately used this movement in a calculated way in the above cases, (although such an intention is clearest in the **Eze** case), but the effect was to make the victims more vulnerable and less able to enlist the aid of the authorities.

3.2.4.11 *Use of victims' initial consent as a means of pressure*

Traffickers sometimes use a victim's initial agreement to exploitation in order to pressure him or her to remain under exploitative conditions. Such a phenomenon can be observed in **Urizar (Canada)** where the accused, who posed as the victim's romantic partner, induced her to work as an exotic dancer. At first she agreed, but at a later stage she wanted to stop, which led him to pressure her to continue by stressing that she had formerly agreed. In her testimony she described this method of control.

"The way he saw it, the first time I said yes, that meant I had to say yes every time. That's the way he thought. And it was like that every time, that's what he'd say, you wanted this, you were the one who wanted this, because the first time, I had said yes."

Urizar v. R., No.500-10-004763-106, Court of Appeal, Quebec, January 16,2013, par. 84

Another example of such a method of control occurs in In LB-2012-63028 (Norway)⁶⁰ where the accused persons interviewed some 50 Filipino women for an au-pair job in Norway and exchanged a series of e-mails and chats with the women while they were still in the Philippines. Most of the chats were conducted by the male accused person and during the course of subsequent e-mails and chats it was made increasingly clear by him that sexual services would be required. Nevertheless, the victims agreed to come to Norway. The first victim arrived six months earlier than the second and was required to have sexual relations with the defendant. The victim testified that although she knew this would happen, she hoped it would not. She was reluctant at first, but the male defendant reminded her that she had agreed. In addition, he hinted that people in the Philippines would find out about what she had agreed to do and that she would have to pay for her return ticket. The accused was convicted of trafficking for sexual exploitation in the district court and the court of appeals confirmed the conviction. As can be seen by this description of the facts of the case, at least part of the pressure exerted on the first victim pertained to the fact that she had agreed.

We did not find this method of control in the cases which form the foundation of this digest. However, we find it worthy of mention, because traffickers' methods of control tend to recur across regions.

The importance of recognizing the right of the victim to withdraw previous consent to exploitation, has led various non-governmental organizations, dealing with protection of victims of sexual assault, to articulate this insight. The following box is a partial reproduction of a poster with this message, prepared by an Israeli N.G.O.:

I AM ALLOWED:

- I am allowed to decide what I like and what I don't like.
- I am allowed to decide what is pleasant and what is not.
- I am allowed to decide what I want and what I don't want.
- I am allowed to say **NO**.
- **I am allowed to say NO even if I already said Yes.**
- **I am allowed to change my mind.**
- I am allowed to not explain my **NO**. (our emphases) ...

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3.2.4.12 Convincing the victim that she has no one to turn to

In **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, illegal in **Botswana**, when the victim told the accused that she intended to report the sexual abuse, the accused told her that no one would believe her, as she was a foreigner in the country.

⁶⁰ Appeals Court Case No. LB-2012-63028, Borgarting Lagmannsrett Judgement (2 April 2013). District Court Oslo Tingrett Judgement (2 February 2012), TOSLO-2011-68460, Norway. See global case digest, section 4.4 on how to handle the subject of victim consent.

"She [the victim] replied by telling the accused that she was going to report the matter. The accused asked her how she was going to report when she was not a Motswana⁶¹ and when no one knew who she was. She also told her that even if she was able to report the matter to the police she would never be detained as the police would believe her story over that of the complainant."

The State v. Mujee, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021; sentence 14 July 2021, paragraph 9.

3.2.4.13 Using the victim's illegal status to create fear of arrest

This kind of subtle means of coercion can be found in **Mujee (Botswana)**⁶² where the accused used the illegal status of a 16 year old minor in **Botswana** in order to create fear of an arrest by police and in that way, succeeded in restricting her freedom of movement.

The following is a summary of subtle means of coercion and abuse, as they arise from the discussion above.

Examples of subtle means of coercion and abuse

- Gradual grooming/seasoning exploitation with good treatment
- Use of trauma bonding or Stockholm syndrome
- Use of drugs and alcohol
- Inducing victims to commit illegal acts
- Use of financial dependence
- Changing the identity of the victim
- Making the victim feel worthless (humiliation, verbal abuse, constant anger)
- Minimizing the exploitation
- Traffickers' use of education
- Constant moving
- Using the victim's initial consent to exploitation as a means of pressure
- Convincing the victim that she has no one to turn to
- Using the victim's illegal status to create fear of arrest

Additional examples which appear in separate sections of the digest:

- Controlling the victim by means of his feelings for traffickers who are family members or represent themselves as romantic partners;
- Holding the victims in debt bondage;
- Isolating victims;
- Restricting their freedom (by non-physical means);
- Difficult living and working conditions;
- Not allowing the victim private space/severe violations of privacy
- Creating a climate of fear by non-physical means.

⁶¹ Motswana is the singular form of Batswana, and may refer to a member of a citizen of **Botswana** of any ethnic background.

⁶² Ibid. paragraph 31.

3.2.5 Vulnerabilities

3.2.5.1 Introduction

As mentioned in section 3.2.4, “abuse of a position of vulnerability” is one of a few subtle means of coercion and abuse which appear in the Protocol and in most of the trafficking Acts of the States across the region.

In section 3.2.4, we noted a number of ways in which such subtle means of coercion and abuse can be used by traffickers in order to control and manipulate their victims. However, we did not explicitly raise issues pertaining to “abuse of a position of vulnerability” in particular.

The first such issue relates to the definition of this term. An explicit definition appears in the Trafficking Acts of **South Africa** and **Zambia**, which rely on an Interpretative Note in the Travaux Préparatoires summarizing the deliberations which preceded the adoption of the Protocol.⁶³ The definition in the **South African** Act is as follows:

“abuse of vulnerability...any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person...”

An alternative suggested definition appears in the Model Legislative Provisions against Trafficking in Persons:⁶⁴

“Abuse of a position of vulnerability” shall mean where a person intentionally uses or otherwise takes advantage of an individual’s personal, situational or circumstantial position of vulnerability.

The second issue relates to the question if it is enough that the trafficker *knows* of the vulnerability and is consequently aware that the person is not in a position to walk away, or if he needs to *take some action* which constitutes abuse. While UNODC’s Guidance Note on ‘abuse of a position of vulnerability’ answers that an abusive act must be present,⁶⁵ States differ as to the answer to this question, as described in the global case digest and UNODC’s Issue Paper on “abuse of a position of vulnerability”.⁶⁶

A number of cases explicitly mention “abuse of a position of vulnerability” or “abuse of power” as a ‘means’. Among them are: **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young woman who is transported to a farm where she knows no one but the accused, who forces her into sexual exploitation by a number of men; **O.B. Abba (South Africa)** where 2 vulnerable young women addicted to drugs are trafficked for sexual exploitation by 2 accused persons. The court explicitly mentions their dependence on drugs and family problems as vulnerabilities which were abused; **Allima (South Africa)**, revolving around the trafficking for sexual exploitation of a minor of 16 where the court explicitly mentions an abuse of power by the accused; **Mabuza (South Africa)** where the court explicitly mentions abuse of vulnerability

⁶³ See Travaux Préparatoires, Interpretative Note at p. 347: *The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.*

⁶⁴ UNODC Model Legislative Provisions against Trafficking in Persons, Chapter II, Article 6 on definitions, available at https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf.

⁶⁵ See *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, section 2.2, available at https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf.

⁶⁶ See global case digest, section 3.2.5, page 69 of the English version and UNODC’s Issue Paper on “*Abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons*”, available at https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf.

and abuse of power in regard to 4 minors from **Mozambique** trafficked to **South Africa** for sexual exploitation.

Conversely, in **Fakudze (South Africa)**, the High Court, who exonerated the accused from trafficking charges and confirmed his conviction on rape, explicitly mentioned that the victim's vulnerabilities were not abused, as she had reasonable alternatives to accompanying the accused.⁶⁷ This raises the question as to why this was relevant, as the alleged victim was a 14 year old minor and child trafficking does not require 'means'.⁶⁸ However, the court's exoneration also rested upon its doubts as to the accused person's intent to exploit at the moment he transported the alleged victim to **South Africa** and began to harbour her.

Whether or not "abuse of a position of vulnerability" appears in a State's trafficking Act, vulnerability is a crucial part of every trafficking case. This is so because courts have a hard time understanding victim behaviour unless they have a full picture of the victim's vulnerabilities. Without this information, courts tend to try to understand the victim's behaviour in the context of their own world and their own rationales. Inevitably this gives rise to questions such as: Why is the victim not behaving as I would behave in this situation? Such a comparison may lead to a finding that the victim has volitionally consented to a so called job opportunity, or alternatively, to a ruling that the victim's story is not credible.

Only if the court understands the victim's peculiar circumstances and vulnerabilities, can it rise beyond this mindset. If the victim's vulnerabilities are revealed, the judge can better understand why his or her behaviour differs from what he thinks his own would have been. The following quote, by a judge from **Namibia**, reflects this reality:

The centrality of vulnerability in trafficking cases

During a Regional Colloquium on Trafficking in Persons for Regional Court Magistrates, convened by UNODC in Johannesburg, **South Africa** between August 22 – 24, 2018. A **Namibian** judge addressed the centrality of vulnerability thus:

"Vulnerable people do not behave like you and me; one must understand their situation in order to understand their behaviour."

S.L. (South Africa),⁶⁹ a case revolving around victim protection issues in regard to Thai women trafficked for prostitution to **South Africa**, explains how vulnerabilities may impact on victim behaviour, Vulnerability may lead people not to view their experience as one of exploitation and may lead them not to view themselves as needing protection. For these reasons, the court recommends that the police and other authorities not rely solely on victims' statements when they evaluate a case.

The meaning of vulnerability is addressed in the **Matini (South Africa)** ruling which explains that vulnerabilities can be both inherent and created by the trafficker:

⁶⁷ As said, **South Africa's** Trafficking Act includes a definition of "abuse of vulnerability" according to which it means: *any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person...*

⁶⁸ We note that this case was adjudicated according to **South Africa's** 2013 Trafficking Act which does not require proof of 'means' in regard to child trafficking.

⁶⁹ *S.L. and others v. The Minister of Home Affairs and others*, [2016] ZAGPJHC 47, in the South Gauteng Court, Johannesburg, paragraph 22.

*“Vulnerability is typically used to refer to those **inherent environmental or contextual factors** that increase the susceptibility of an individual or group to being trafficked...Human rights violations such as poverty, inequality, discrimination and gender based violence all of which contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate. More specific factors commonly cited...include gender, membership of a minority group and lack of legal status...In short, the situation can be **any state of hardship in which a human being is impelled to accept being exploited**...”*

*Traffickers may also transport or transfer victims within a country or across national borders to an unfamiliar or another environment. The purpose of the transport is to alienate the victim so that they **become more vulnerable and thus easier to exploit**.” (our emphases)*

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage, conviction 27/10/2017, sentence 8/2/2018.

A few Trafficking Acts across the region enumerate a non-exhaustive list of vulnerabilities including: illegality in the State, pregnancy, disability, addiction, being a child, social or economic circumstances.⁷⁰ The **S.L. (South Africa)** case enumerates a similar non-exhaustive list: socio-economic status, illegality in the country of destination, Stockholm Syndrome,⁷¹ fear of harm to family members should they report their experiences, approaching their coerced work positively, as it allows them to send money to their families.

We note that a victim may be characterized by one vulnerability - or as is the situation in most cases in the region - by a host of vulnerabilities.⁷² An example which highlights the impact of a host of vulnerabilities is **Allima (South Africa)**. The victim, in her testimony, repeats numerous times that she was powerless in the situation in which she found herself. This powerlessness derived from her vulnerabilities. She was a minor, abducted to a place unfamiliar to her where she knew only the accused, with no financial resources, no support system and severe memory gaps. Moreover, she may have been drugged.

A note of caution is in order: Vulnerability is not a required element of the crime of trafficking in persons.⁷³ Nor is every victim clearly vulnerable. There have been cases of well educated, articulate persons who have fallen victim to trafficking in persons. One example occurs in **Mansaur (South Africa)**,⁷⁴ a case revolving around the trafficking for prostitution of a Thai theatre nurse who also studied English at the university level. This highlights a reality of trafficking: given the right circumstances, any one of us can fall victim.

⁷⁰ See the Trafficking Acts of **South Africa** and **Zambia**. We note that while the **South African** Act explicitly refers to social or economic circumstances, the **Zambian** Act does not.

⁷¹ See section 3.2.4.2 on *trauma bonding/Stockholm syndrome*.

⁷² A sample of examples are Shongwe (**Eswatini**), where the victim was a young man from **Lesotho**, foreign and illegal in **Eswatini**; Mabuza (**South Africa**), where the children trafficked for sexual exploitation were minors, foreign in the country and illegal in it, in an isolated lumber camp, with nowhere to go; Matini (**South Africa**), where 2 children were mentally disabled from impoverished families; O.B. Abba (**South Africa**), where one victim was illegally in the country, addicted to drugs from a poor socio-economic background; Luzama Kavula (**DRC**), where the victim was a minor from an impoverished family; Tshiswaka (**DRC**), in the court of peace of **DRC**, where the victim was the minor daughter of the accused. We note that only a summaries of the **DRC** cases were available, and that the Luvala case was reported by the Territorial Police.

⁷³ It can contribute to the proof of one ‘means’, namely “abuse of a position of vulnerability”, but there are other ‘means’ which can suffice to prove trafficking. Moreover, in most States, child trafficking does not require proof of a ‘means’ at all.

⁷⁴ The State v. Mansaur. The ruling was delivered ex tempore and a summary, based on interviews with the investigating officer and the prosecutor, is available in UNODC’s Human Trafficking Case Law Database (UNODC Case No. ZAF006). We note that the accused pled guilty and committed suicide before the case was decided.

We note that a more detailed treatment of vulnerabilities, appears in the global case digest and other UNODC materials.⁷⁵ We also note that the following are merely examples of different kinds of vulnerabilities and that there are many other sources of vulnerability, such as minority status in a country.

3.2.5.2 Immigration Status

Illegality in a country may make a person vulnerable to arrest and deportation, thus curtailing his or her freedom to complain of his plight to the authorities. For this reason, sometimes traffickers deliberately do not arrange for victims' legal stay in a country. However, even if illegality is not a direct consequence of the trafficker's actions, it can serve him well in limiting the victims' options to change their situation.

Thus in **Alam (Seychelles)**, a case revolving around the trafficking of 4 men from Bangladesh, although the trafficker promised to arrange their legal status in the country, some visas were fake; others were flawed because the victims were working for third parties and not for the accused person, as claimed; some were issued on the basis of work other than that actually done by the victims; and some were tourist visas which did not allow the victims to legally work. This illegality clearly impeded the workers' ability to complain to the authorities, as some were the sole breadwinners for their families and they did not wish to be deported. Their fear of deportation is expressed explicitly in some of their testimonies and in that of an investigator from the Ministry of Employment who interviewed them. The accused was convicted of trafficking for practices similar to slavery and forced labour.

The illegality of victims in the State to which they are taken occurs in many other cases. Examples are **Dos Santos (South Africa)**, where the 3 young women, trafficked for sexual exploitation from **Mozambique** to **South Africa** were illegal in the country; **Mabuza (South Africa)**, where the 4 children trafficked for sexual exploitation from **Mozambique** to **South Africa** had no valid passports and were smuggled across the border; **Hlabi (South Africa)**,⁷⁶ where 2 children were transported across the border between **Lesotho** and **South Africa** without valid passports; **Munyanyi (Zimbabwe)**, where 4 minors from **Mozambique**, illegal in **Zimbabwe**, were trafficked for labour exploitation, although the exploitation did not transpire⁷⁷; **O.B. Abba (South Africa)**, where one of the young women trafficked for sexual exploitation, slavery and servitude was illegally in **South Africa** from **Zimbabwe**; **Mansaur (South Africa)**, where a Thai woman was trafficked for sexual exploitation to **South Africa** and was illegal in the country;⁷⁸ **Shongwe (Eswatini)** where a young man from **Lesotho**, residing in **South Africa**, was told that he would be taken to another place in **South Africa**, but was taken instead to **Eswatini** where he was illegal; **Mujee (Botswana)** where an impoverished 16 year old from **Zimbabwe** was illegal in **Botswana**, without a passport.

In some of these cases the courts explicitly mentions the illegality of the victim as contributing to the conviction. An example is **Mujee (Botswana)** where the court explicitly states that the

⁷⁵ See section 3.2.5 of the global case digest; UNODC Model Legislative Provisions against Trafficking in Persons, Chapter II, Article 6 on definitions, available at https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf.

UNODC Issue Paper on the Key concept of abuse of a position of vulnerability (2012) *ibid*; *Seventh Report of the Dutch National Rapporteur, Trafficking in Human Beings 2009*, p. 410.

⁷⁶ We note that no judgment was available in this case, but rather only the charge sheet and the State's Heads of Arguments respecting an application to discharge the accused due to a lack of evidence with the close of the prosecution's case.

⁷⁷ We note that in **Zimbabwe's** Act, one of the purposes of trafficking is "illegal labour", and others are "forced services" and "debt bondage".

⁷⁸ We note that while the accused pled guilty, he committed suicide before the case was decided.

accused used this vulnerability in order to create fear in the victim and thus restrict her freedom of movement.

"The complainant stated that on several occasions the accused used her illegal immigration status to create fear of an arrest by the police."

The State v. Mjhee, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021, sentence 14 July 2021, paragraph 31.

In **Fakudze (South Africa)**, too, the child victim, raped by her stepfather, was illegal in **South Africa**. The High Court exonerated the accused from trafficking charges while confirming the rape conviction. However, this exoneration did not deny that the girl was vulnerable, but rather ruled that the requirements for the 'means' of "abuse of vulnerability" had not been fulfilled, as the **South African** Act defines this term as requiring that the victim had no reasonable alternative but to submit to exploitation, whereas the court concluded that she had a number of reasonable alternatives.⁷⁹

3.2.5.3 Lack of familiarity with language and culture/distance from home

Even when victims are legally in a country other than their own, they may be unfamiliar with the language and culture, which puts them at a disadvantage in seeking help. This can happen if they are in a foreign country, if they are minorities within their own countries, where the language and culture of the majority are different than their own or if the trafficker is of a different nationality than the victim. Moreover, even when the victim is familiar with the language and culture of the place to which he is taken, his distance from his home may create a vulnerability which impedes his or her ability to escape or seek help. In this sense, transporting a victim to a place far from his home may be classified as a "created vulnerability". We refer the reader to sections 3.2.7.2 on *psychological/emotional isolation* and 3.2.7.3 on *nowhere to go* which give a clearer picture of this form of created vulnerability.

Such a scenario can be seen in **Allima (South Africa)**, a case revolving around the trafficking for sexual exploitation of a 16 year old girl, who was abducted from her small town and taken to the city of Durban in another part of the country, a distance of some 240 kilometers. In addition, in her testimony she notes, that she sometimes did not understand what the accused was saying to other persons, because the accused was from Burundi. This kept her at a disadvantage. Moreover, the testimonies before the court displayed a cacophony of languages, and sometimes the interpreter would intervene in order to clarify to the court what the victim was saying (from Zulu to English).

Another case which reflects this pattern is **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 minors from **Mozambique**. Not only were the children illegal in the country, but they were also at a disadvantage because they spoke a different language when they arrived in **South Africa**. In this regard, the judge also noted that one of them spoke *no South African* language when she arrived. For this reason, the court allowed an intermediary,⁸⁰ who was also an interpreter, to interpret the questions for the

⁷⁹ There is much food for thought in regard to the court's analysis, as in child trafficking, the Protocol and the **South African** Trafficking Act do not require 'means' like "abuse of vulnerability". Moreover, the question remains if the girl's vulnerabilities did not affect the reasonableness of her alternatives from her own subjective standpoint. As to the question if the criterion of "reasonable alternative" is objective or subjective, see UNODC's Issue Paper on "*Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons*" (2012).

⁸⁰ For information about the **South African** legislative arrangement regarding intermediaries, see section 5.2 on *the role of police, prosecutors and judges/victim protection measures*.

children. The children's lack of familiarity with the language and culture of **South Africa** had other ramifications as well. The court noted that there was a language barrier between the children and the social worker who expressed her opinion on their competency to be assisted by an intermediary, so that what she reported that they said was not necessarily accurate. The court expressly recognized these language and cultural challenges, although it maintained that the children "...conducted themselves quite well, taking into account their language and cultural challenges."

Yet another case in which the court mentions language barriers is **Shongwe (Eswatini)**, a case where a young man from **Lesotho** is trafficked to **Eswatini** via **South Africa** for slavery. The court notes, that the victim was vulnerable, not only because of his illegality in the country but also because he could not speak the local language.

We also find hints of such language and cultural barriers in **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women who are trafficked from a small town called Delft in the Western Cape region of **South Africa** to the distant Port Shepstone.⁸¹ One of the victims, named Candice, testified that she was Afrikaans speaking and that her command of English, the language spoken in Port Shepstone, was not too good. However, she also testified that she communicated in English with the police at the station. In addition, the investigating police officer testified that she did not struggle to communicate in English. Given that most people in Port Shepstone speak English, whereas most people in Delft speak Afrikaans, this could have put the two victims at a disadvantage in seeking help, though this is not explicitly said in the case.⁸² As to cultural barriers, interestingly, the judge commented that Candice had one crude outburst but aside from that "*I did not find her demeanour as a witness to be as poor as claimed because in having regard to the demeanour of a witness, a court should not lose sight of the social dynamic, of the fact that a witness might be of a different culture, class and race whose life experience differed from that of the trier of fact.*"

However, whatever the situation of the victims in the above case, in terms of their facility with the English language, there is no doubt that they were transported from their homes in Delft to Port Shepstone, a distance of 1472 kilometers and a place where they knew no one.

Another example of the distance of victims from their homes as a created vulnerability, can be found in **Mponda (Malawi)** where 3 young girls were promised a job selling in a restaurant, whereas the accused meant for them to be sexually exploited by men. They were transported from their village of Mulanje to the capital of Lilongwe, where they knew no one, a distance of some 380 kilometers. The accused person was convicted of trafficking for sexual exploitation.

In **S.L. (South Africa)**, a case revolving around authorities' omissions in a case of possible trafficking for prostitution of Thai women, the court recognizes language barriers and the pitfalls of interpretation as typical problems in trafficking cases. Moreover the court endorses the suspicion that perhaps in this case the interpreter was involved in the case before translating the victims which may have caused him to misrepresent what they were saying. This case highlights

⁸¹ The distance between Delft and Port Shepstone is 1 472 km.

⁸² A 2011 survey revealed that of the three main languages spoken in Delft, 47% of the population spoke Afrikaans, 37.8% spoke Xhosa, and a bare 9.4% spoke English. The opposite situation pertains to Port Shepstone according to a 2011 survey - 55.3% of the population speaks English and a bare 9.3% speak Afrikaans. See https://en.wikipedia.org/wiki/Delft,_Western_Cape https://en.wikipedia.org/wiki/Port_Shepstone#Geography.

the challenges encountered by law enforcement bodies in pursuing cases where the victims are not familiar with majority culture languages.⁸³

3.2.5.4 Socio-economic status

Practically every case included in this digest concerns victims with poor socio-economic status. This is not surprising, because poverty and low status in the community affect a person's life pervasively and limit his freedom to rise from a situation of want. It is for this reason that traffickers target the unemployed, the poor and the homeless who seek some way out of their condition. Poverty has ramifications beyond lack of economic resources. It affects a person's dignity, human rights and political rights.

"Economic deprivation – lack of income – is a standard feature of most definitions of poverty. But this in itself does not take account of the myriad of social, cultural and political aspects of the phenomenon. Poverty is not only deprivation of economic or material resources but a violation of human dignity too.

Indeed, no social phenomenon is as comprehensive in its assault on human rights as poverty. Poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. The same is true of civil and political rights, such as the right to a fair trial, political participation and security of the person."

United Nations Human Rights, Office of the High Commissioner, "Human rights dimension of poverty" at <https://www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Index.aspx>

Due to the prevalence of this form of vulnerability, we will cite only a sample of cases: **Veeran Palan (South Africa)** where two unemployed young mothers are trafficked for prostitution; **Maroodza (Zimbabwe)** where the six victims, recruited so their labour could be exploited⁸⁴ were "desperate job seekers" according to the Prosecution; **Mwewa (Zambia)** where a father tried to sell his daughter and an uncle tried to sell his nephew – due to their poverty; **Martinet (Mauritius)** where one victim of trafficking for sexual exploitation was homeless and the other undergoing financial problems; **Lukas (Namibia)** where the two minor victims, trafficked for sexual exploitation were from an impoverished community; **Msweli (South Africa)** where the mother of the baby who was trafficked for slavery lived in poverty, receiving aid by means of government grants.

Luzama Kavul (DRC), highlights how traffickers target poor and vulnerable persons. The accused was a neighbor of the child victim whom he sexually exploited. The living conditions of the child's parents were difficult due to their poverty. In order to survive, the victim's parents were forced to leave the house every morning for small scale activities that would allow the family to survive. The accused person made use of this situation to offer the child packets of cookies and some candies and ultimately to sexually exploit her.

Similarly in **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of a 16 year old impoverished minor, the accused was aware of the dire straits of the victim's family who could not provide for her daily needs, so that on occasion she could not attend school as the school fees were unpaid. This emerges in the accused's testimony who says that she was told by her sister that the victim had stopped going to school because of the adverse

⁸³ This issue evokes UNODC's Anti Human Trafficking Manual for Criminal Justice Practitioners, Module 10 on "Interpreters in Trafficking in Persons Investigations". Accessible at: https://www.unodc.org/documents/human-trafficking/TIP_module10_Ebook.pdf.

⁸⁴ The judge termed it trafficking for unfair labour practices and "some slavery and in particular forced labour and bonded labour". We note, the **Zimbabwe** Act includes a purpose of "illegal labour" and also "forced services" and "debt bondage".

economic conditions in her home. Here too, clearly the accused targeted the girl due to her economic distress.

3.2.5.5 Age

Age too may be a source of vulnerability. Clearly children are more vulnerable to exploitation than adults, because they are less skilled in the ways of the world, more amenable to persuasion and more likely to believe adults. In addition, in some cultures, children are taught to obey adults. All these characteristics make them more vulnerable to exploitation.

A **South African** case shows an awareness of how culture can teach children to believe that adults know best. While the court lays stress on how this affects their testimony, it can also clearly affect how they react to adults who attempt to traffic them.

"It must be remembered that children are taught from an early age that adults know best, that adults should not be contradicted and that they ought to be polite to strange adults. These are desirable social attributes, but they ill prepare a child for the ordeal of giving evidence in court."

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage, conviction 27/10/2017, sentence 8/2/2018

Cases across the region show the prevalence of child trafficking and highlight how easy it is to lure children by means of food treats and toys.

Examples are **Koch (Namibia)** and **Dragon (Namibia)**, cases revolving around the trafficking for sexual exploitation of a number of minors. In both cases the children were lured by means of food treats like ice cream, powdered baby milk, sweets and articles like toys. Another example is **Luzama Kavul (DRC)**, where the 58 year old accused lured a female minor by means of giving her packets of cookies and some candies and then sexually exploited her.

A bare sample of child trafficking cases is as follows: **Chiyenda (Malawi)** where a female child of 15 was trafficked by her mother's friend; **Martinet (Mauritius)** where a 13 and 14 year old were trafficked for sexual exploitation; **M.L. (Seychelles)** where children were trafficked for sexual exploitation, the youngest being 10 years old; **Munyanyi (Zimbabwe)** where 4 minors from **Mozambique** were trafficked; **Esther Phiri (Zambia)** where a 14 year old was trafficked from her village to the capital of Lusaka; **Mabuza (South Africa)** where 4 children were trafficked for sexual exploitation from **Mozambique** to **South Africa**; **Saidi (Malawi)**⁸⁵ where a day old baby was abducted; **Mujee (Botswana)** where a 16 year old minor was trafficked for sexual exploitation.

However, young people who are not minors may also be vulnerable. This vulnerability derives from lack of life experience which may make young people more willing to believe traffickers' lies, even if they would not seem reasonable to older persons. It may also derive from young persons' over confidence in their own discernment, and unwillingness to seek advice from older people.

Examples of cases in which young persons were trafficked are: **Veeran Palan (South Africa)** where two young women aged 27 and 29 were trafficked for sexual exploitation with promises of work as cleaners in a hotel. Interestingly, one was warned by her boyfriend about his suspicions regarding the recruiter, but she did not listen; **Mahuni (Zimbabwe)**, where two young women, aged 20 and 23 were procured for prostitution in **Angola** by means of promises of work; **Shongwe (Eswatini)** where a young man of 19 from **Lesotho** believed the promises of the trafficker that he would obtain a good paying job for him in another

⁸⁵ The State v. Saidi, Criminal Case Number 208 of 2017 in the Senior Resident Magistrate Court Sitting at Dedza, **Malawi**; sentence May 22, 2017. We note that only the sentence was available.

part of **South Africa**, whereas he was thereupon trafficked to **Eswatini** for slavery; **Eze (South Africa)** where two young women aged respectively 19 and 26 were trafficked for sexual exploitation.

Jonas (Namibia) is particularly interesting in this regard. It concerns an 18 year old girl, trafficked for sexual exploitation, who was persuaded to accompany the accused person by promises of a job. She agreed to this, despite the fact that the accused had previously approached her and other young persons to come with her in order to be girlfriends of men. While the other girls refused to accompany the accused, the victim did so on the second occasion. The court notes that the victim was a bit shy of 18 when first approached but since the prosecution did not charge child trafficking, the court treated the case as if a young person had been trafficked.

Similarly, in **Mponda (Malawi)** while the 3 victims of trafficking for sexual exploitation were minors, the prosecution did not adduce proof of their ages, for which reason, the accused persons were convicted of adult trafficking, rather than child trafficking.

Both the **Jonas** and **Mponda** cases highlight the importance of proving the victims' ages, both to give the court a clearer picture of their vulnerabilities and because this factor can impact on the conviction (as in most jurisdictions child trafficking does not require the element of "means") and sentence (as the penalty for child trafficking is often higher than that for adult trafficking).

Relatively older ages can also be a source of vulnerability, as it may be more difficult to find work at an older age, and such persons might also be more likely to have families dependent on their support. Among the sample of cases which forms the basis of this digest, we did not find any case where the victim was older than 34 years of age.⁸⁶ However, some cases did not specify the age of the victims, which limited our ability to analyze this topic. We note that States outside the region have yielded such cases.⁸⁷

3.2.5.6 *Addiction*

The effects of addiction are well described in cases across the region, where traffickers may create such a vulnerability in order to better control their victims or prey on an existing addiction which renders the victims more vulnerable from the start. In this context, traffickers often give the victims free drugs, both to facilitate their exploitation and to maintain control over them, but in general, they also expect victims to buy further supplies of drugs from them alone.

We refer the reader to section 3.2.4.2 on *use of drugs and alcohol* for a more in depth view of the ways traffickers make use of addictions. For the purpose of this section, we will make due with differentiating between cases where traffickers create an addiction and those where they make use of an existing addiction.

Existing addiction

Various cases concern victims who were addicted when they met the trafficker. One example is **Eze (South Africa)**, where two young women trafficked for sexual exploitation are addicted when they meet with the trafficker. The effect of this addiction is to render them dependent on his supply of drugs. Even when one of the victims escapes from the trafficker, she is found by him when she tries to purchase drugs to feed her habit.

⁸⁶ In **Alam (Seychelles)** one of the victims was 34 years of age. However, the case does not specify how old the other 3 victims were.

⁸⁷ See the global case digest, section 3.2.5.3 on *age*, p. 72 of English version.

Another example is **O.B. Abba (South Africa)** where two addicted young women, trafficked for sexual exploitation, slavery and servitude are given free drugs in order to facilitate their prostitution, but are also forced to buy further supplies of drugs from the accused.

Yet another example is **Wiedermeyer (South Africa)** where the accused intentionally recruited drug addicts for sexual exploitation and required them to prostitute themselves in exchange for drugs.

Created addiction

In several cases across the region, the traffickers create addictions in order to facilitate victims' prostitution, to maintain control over them and to force them to buy further supplies of drugs from the traffickers.

This full scenario occurs in **Ogochukwu (South Africa)** where a 15 year old victim is supplied with a drug called 'crystal' in order to facilitate her prostitution **and** maintain control over her, but is also required to buy further supplies of drugs from the trafficker. The victim was not yet addicted to drugs when she met the trafficker. She noted that the trafficker sold her drugs in order to boost her energy and "make her brave" so that she could get more clients and thus acquire more money to buy more drugs from the trafficker. In this way, she described the vicious cycle of prostitution and drugs, whereby she gave the accused all or part of her earnings so that she could buy drugs from him, over and beyond the free drugs that he gave her.

A similar scenario of created addiction transpires in **Dos Santos (South Africa)** where the accused forces victims to smoke cannabis in order to facilitate their prostitution and in **Uche Odii (South Africa)** where one victim is forced to smoke rock cocaine on arrival at the accused person's premises and thereafter in order to facilitate her prostitution.

In **Allima (South Africa)** there are intimations that the victim may have been drugged during her initial abduction and subsequently, during the course of her sexual exploitation. Thus, she speaks of feeling dizzy after being given juice by the accused and others, and testifies that she was barely being able to walk at some points. The expert clinical psychologist does not rule out that her memory loss was a function of being drugged, but neither is it ever made clear if there was sufficient proof for this explanation, especially since on the day after she was rescued, she tested negatively for drugs.

3.2.5.7 Physical or mental characteristics, including disabilities

Certain physical or mental characteristics may make a person more vulnerable to trafficking. These can include conditions like albinism or disabilities, whether physical or mental.

The following are some examples of such characteristics, drawn from cases across the region.

Albinism

Albinos suffer from a host of physical and social disabilities. Physically, they underproduce melanin. Consequently they are pale in color, sensitive to sun and suffer from visual impairments. On a social level, in the Southern African region they may undergo stigma and ostracism. Some local myths ascribe albinism to a curse or to a punishment for the mother's infidelity. In consequence, in many cases, the husband may leave the mother of an albino baby, and many grow up in single parent families, thus paving the way to a life of poverty and exclusion. In addition, they may encounter difficulties in access to schooling and employment. Moreover, there is a belief that

their organs have magical properties, thus leading to killings in order to remove their organs.⁸⁸ All these characteristics, make them vulnerable to exploitation and abuse.

A graphic illustration of this vulnerability appears in **Phiri (Malawi)**. The uncle of a 21 year old albino woman induced her to accompany him to a place where he promised her a good job. On the way, she was murdered and her organs removed, due to a superstition that albino organs can help people to get rich. The uncle pled guilty to murder, and to the allied crimes of extracting human tissue and a transaction in human tissue. Consequently, the judgment relates to the other persons convicted.

Mental disabilities

Mental disabilities appear in two cases in the sample. One is **Matini (South Africa)** where 2 mentally disabled children were trafficked for sexual exploitation. Their mental ages were assessed, respectively, as 10 and 9 years of age. While one of the victims was deemed capable of testifying, the court ruled that the second victim was not competent to testify due to her disability.

The testimony of one of the victims illustrates the impact of her vulnerabilities on the progression of events. Firstly, it seems that she and her friend were easily persuaded to accompany the accused persons. They were obedient to their requests and easily deceived by their lies. They were also silent when the dominant accused introduced them to others as her relatives, which was not the fact. When they were later warned by a lady that they were in trouble, instead of trying to escape, they informed the dominant accused person, who told them to trust only her. When they saw a newspaper clipping reporting that they were missing, they did nothing after the accused tore it up. Only later, when an old lady warned them that they were to be killed, did they escape.

The second case is **Eze (South Africa)** revolving around the trafficking for sexual exploitation of two young women. One of the victims was 19 years old when she testified, but her age was assessed to be between 14 and 18 years of age, which justified hearing her testimony via an intermediary.⁸⁹

The impact of this and other vulnerabilities can be seen in her testimony, and for example, when she tells the court that she loved various traffickers who exploited her, before the accused entered her life.

Physical disabilities

While the sample of cases before us does not present us with case where victims suffer from physical disabilities, they do appear in cases worldwide, as can be seen in the global case digest. A typical disability of this kind is deafness which makes it hard for the victim to communicate with the outside world.⁹⁰

3.2.5.8 Lack of education or little education

Lack of education or little education can make a person vulnerable economically, especially in the modern world where jobs often depend on knowledge of the world and of technology. Over and beyond this aspect, a dearth of education can facilitate deceptions on the part of a trafficker, since the persons approached may have no way to check his representations and no prior knowledge of

⁸⁸ See Baker, Lund, Nyathi and Taylor, *The Myths Surrounding People with Albinism in South Africa and Zimbabwe*, Journal of African Cultural Studies, Vol. 22, No. 2 (December 2010), pp. 169-181; Mandalitso Kateta, Magic and Murder – Albinism in Malawi, The New Humanitarian, 11 May 2016, available at <https://www.thenewhumanitarian.org/authors/madalitso-kateta>.

⁸⁹ For information about the **South African** legislative arrangement regarding intermediaries, see section 5.2 on *the role of police, prosecutors and judges/victim protection measures*.

⁹⁰ See section 3.2.5.5 of the global case digest on *disabilities*.

the true state of affairs. Such people may also be easier to exploit, because their expectations of life may be lower.

The importance of education can be seen in cases where traffickers discourage victims from completing their education, in order to keep them in a vulnerable situation and conversely in cases where traffickers lure the victims by offering them educational opportunities.⁹¹

Examples of this kind of vulnerability occur in cases across the region. Naturally, in cases of child trafficking, the victims have not had the chance to complete their education. Thus every case of child trafficking is also a case of lack of education or little education.⁹²

Examples where the court expressly mentions this aspect or one close to it are: **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour where the court mentions the 4 Bangladeshi victims' lack of education as a vulnerability; **Munyanyi (Zimbabwe)** where the four trafficked minors are described by the court as unsophisticated minors with a rural background from **Mozambique**; **Msweli (South Africa)** where the court record reveals that the mother of the baby who was trafficked for slavery has only 11th grade education.

Conversely, some victims are well educated. An example can be seen in **Mansaur (South Africa)** where the victim, trafficked for prostitution, was a theatre nurse and had studied English at the university level. This shows that "victims come in many shapes and sizes".⁹³ However, we note that though the accused pled guilty, he committed suicide before the case was decided.

3.2.5.9 Problematic family history

Problematic family history can pave the way for exploitation. It can lead to a cycle of victimization, because the victim has no support system or is accustomed to being exploited, and consequently falls into situations of exploitation time after time. This kind of vulnerability can also mesh with others, leading to emotional attachment to traffickers or to drug addiction.

There are many examples of this vulnerability in cases across the region.

In **Eze (South Africa)**, a case of trafficking for sexual exploitation, one of the victims, named Harmse, had a particularly problematic history. She was raped by her father when a mere baby, placed in an orphanage at the age of 6 months, and when her mother subsequently became a prostitute, she was separated from her siblings and placed in another social welfare home. She lived in children's homes until the age of 12 and experienced bullying and mockery in school. As is often the case, this form of vulnerability gave rise to another, and she developed traumatic bonding⁹⁴ with some of her traffickers whom she claimed to love, as well as an addiction to drugs.

In **Mboo (Zambia)**, a case of trafficking for removal of body parts, the victim was a 24 year old man who had just lost his wife and needed to take care of his child alone. He went to visit his brother in law who thereupon contacted a buyer to sell his organs and got him drunk in order to facilitate this. Clearly, the recent loss of his wife, the need to take care of his child alone, and his illusion of safety with a family member, made him vulnerable to exploitation.

A few cases revolve around victims who are orphans. One such example is **Esther Phiri (Zambia)** where the court stresses that the victim was a "double orphan" since she had lost both parents (although in this case we note that her great uncle who was like a grandfather to her, undertook many efforts to locate her). Another example is **Jezile (South Africa)** a case revolving around

⁹¹ See section 3.2.4.9 on *traffickers' use of education*.

⁹² See section 3.2.5.5 on *age*.

⁹³ See section 2.2.1.6 *seemingly inappropriate emotional reactions/individual reactions*.

⁹⁴ See section 3.2.4.2 on *trauma Bonding/Stockholm syndrome*.

trafficking for sexual exploitation of a young girl of 14 who is forcibly married to a 28 year old man. She was particularly vulnerable because her father had died and her mother worked outside the village where she lived. In **Jonas (Namibia)** too, the victim, trafficked for sexual exploitation, was an orphan who lived with her mother's sister.

Additional cases which refer to family problems are: **Martinet (Mauritius)** where the court mentions that one of the victims of trafficking for sexual exploitation faced family problems; **Ogochukwu (South Africa)** where the 15 year old victim, trafficked for sexual exploitation fought with mother, fled from her and did not want to return to her, despite her mother's efforts to persuade her; **O.B. Abba (South Africa)** where both victims had problematic family backgrounds. One was an illegal immigrant from **Zimbabwe** whose attempt to live with relatives in **South Africa** did not work out. The other victim was angry and hurt when she discovered that the man who she thought was her biological father turned out to be her stepfather.

However, conversely, the cases show situations where victims have strong family support. One example is **Veeran Palan (South Africa)**, where two vulnerable young women are trafficked for sexual exploitation. One victim's family helps her check out the veracity of the offer made to her by the recruiter, and they act immediately, when she informs them of her plight, so that she and her fellow victim are rescued within days. Her mother, father and uncle are clearly there for her. Another prominent example is the victim's family in **Allima (South Africa)** where the expert clinical psychologist notes that: "*Now she is with protective, caring parents but in future, people who don't know of her trauma may say or do something which will trigger it*". We note that in this case, the victim was abducted by the accused for sexual exploitation.

An example of a mixed family history can be found in regard to the second victim in **Eze (South Africa)**, a case of trafficking for sexual exploitation. In respect of the victim called Els, on the one hand, she had a difficult family past, in that she was sexually molested by a person close to her family during her childhood and married an abusive partner whom she divorced. However, on the other hand her parents supported her afterwards. They stood ready to receive her when she left the trafficker at one point, and made efforts to meet her on her birthday, even when she was still with him. However, when she left her children, they stopped talking to her which made her feel lonely. Subsequently, her parents agreed to be legal guardians for her children when she requested them to do so.

3.2.5.10 History of previous severe sexual exploitation and trafficking

A similar pattern to that of problematic family background, can emerge when the victim has a history of severe sexual exploitation before she is trafficked. Such exploitation can accustom the victim to objectification, violence and degradation and thus make her vulnerable to further exploitation.⁹⁵ Moreover, studies establish that prostitutes tend to have more mental health problems than other groups and for example, depression, anxiety and post-traumatic stress syndrome,⁹⁶ all of which may make them vulnerable. In addition, traffickers may look upon women who are already prostitutes as prime targets for further exploitation. The same kind of pattern can occur with victims who have already been trafficked.

A powerful example of this kind of vulnerability appears in **Eze (South Africa)**, a case of trafficking for sexual exploitation. Both victims underwent exploitative prostitution before they were sold to the accused. Thus, the victim called Harmse, had a history of severe abuse in the

⁹⁵ See Judith Herman, *Trauma and Recovery*, p. 84 where she addresses the feelings of degradation and indignity undergone by a woman subjected to prostitution and pornography.

⁹⁶ See Puri, Shannon, Nguyen and Goldenberg, *Burden and correlates of mental health diagnoses among sex workers in an urban setting*, *BMC Women's Health*, 17: 133 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5735638/>.

world of prostitution and drugs, after she left school. She was raped at gunpoint at the age of 13 and when 15 years old, she submitted a complaint to the police in regard to her pimp/trafficker, but was punished by him by being forced to witness the murder of a friend who had testified for her. The impact of this history can be seen in her testimony, when she explains why she did not flee from the accused, by telling the court of her traumatic experiences.

The other victim too, called Els, went through a series of severe sexual exploitation prior to her trafficking by the accused. It started when she was sexually exploited at a young age by a man close to her family, which led her to turn to drugs. In order to feed her habit, she exchanged drugs for sex and became what the court termed “*a full fledged sex slave*”. She was sold several times to pimps/traffickers for whom she prostituted herself in exchange for drugs. She fell pregnant and thereupon was sold to the accused, as she was not making much money at that point.

The following description by the court, reveals how her early history of sexual exploitation impacted on her life:

“In her childhood, she was molested throughout her school days by someone close to her family. This had a great impact on her life as an adult person. She felt unloved and dirty. To cope she took her mother’s prescription medicine, anti-depressants and sleeping tablets... She enjoyed the experience of drug induced happiness and over time her cravings grew... if she agreed to have sex with the dealer they would get a free supply of drugs. This exchange of sex for drugs extended to other Nigerian dealers as well. Eventually she began going out on her own to obtain drugs... she realised she was pregnant. Because she was not making any money, John sold her to the accused.”

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

Other examples of the vulnerability which may arise as a result of severe exploitation in the world of prostitution are: **O.B. Abba (South Africa)** where both victims had been prostituted before they met with the accused, who trafficked them for sexual exploitation, servitude and slavery; **Ogochukwu (South Africa)** where the 15 year old victim was abducted and forced to prostitute, and only afterwards was trafficked for sexual exploitation by the accused; **Laurenco (Malawi)**⁹⁷ where the 3 impoverished victims were prostitutes before they met with the accused, who recruited them, arranged their travel to Holland and then sold them for \$10,000 apiece to Nigerians who detained their passports and subjected them to sexual exploitation and violence in their sex clubs.⁹⁸

In addition, a good number of cases across the region exhibit a pattern whereby former victims of trafficking participate in trafficking other victims. This topic will be addressed in depth in section 3.3.8.7 on *victim’s illegal acts in the course of the trafficking process*. However, it raises the question if these victims’ own trafficking experiences did not lead to a heightened vulnerability which caused them to continue to fall under the sway of traffickers. This can be seen most clearly in **Veeran Palan (South Africa)** where the female recruiter of the two victims told them that she needed to find replacements for herself in order to be permitted to leave the trafficker who had prostituted her.

⁹⁷ Republic v. Lourenco, Criminal Case No. 150 of 1999 (unreported). A summary of this case is available in the UNODC Human Trafficking Case Law Database (UNODC Case Number MLW001).

⁹⁸ While the accused was exonerated from the crime of procurement for prostitution, due to the victims’ previous prostitution, this exoneration was before the new Trafficking Act came into force and the **Malawi** Law Commission notes that it shows the deficiencies of the old law which does not adequately reflect the nature of trafficking.

3.2.5.11 Gender

Women tend to be particularly vulnerable to trafficking in persons, due to their second class status in many societies and to societal norms which may objectify them. This is recognized in the Protocol⁹⁹ and in UNODC's Global Report on Trafficking in Persons 2020.¹⁰⁰

The cases in this sample illustrate this trend, though we must be careful not to see them as an absolute reflection of reality, as often men are more reluctant to complain than are women.¹⁰¹

Since most of the cases in the sample revolve around female victims, we will refer to just a few. In the following cases women were trafficked for sexual exploitation: **Luzama Kavula (DRC)**, where a young girl was trafficked by a neighbour; **Jonas (Namibia)** where a young woman was trafficked by the accused for sexual exploitation by a number of men; **Milinga (Tanzania)** where there was an attempt to traffic a number of young women for exploitation in massage parlours and bars; **Tsoana (Lesotho)**,¹⁰² where a teacher recruited 5 young women under the guise of marriage for sexual exploitation to men in **South Africa**; **Mahuni (Zimbabwe)**, where 2 young women were procured for prostitution from **Zimbabwe** to **Angola**.

In the following cases women were trafficked for various forms of labour exploitation: **Judgment No. 97-CO (Madagascar)**¹⁰³ where there was an attempt to traffic a young woman to Saudi Arabia for labour exploitation; **Esther Phiri (Zambia)**, where a 14 year old girl was trafficked from her village to labour for no pay in the capital of Lusaka; **Maroodza (Zimbabwe)**, where 6 young women were trafficked from **Zimbabwe** to Kuwait for what the court termed "unfair labour practices" or "some slavery", and "in particular bonded labour and forced labour".

In addition, in two cases women are trafficked for forced marriage, namely **Jezile (South Africa)** where a minor is trafficked for sexual exploitation in the context of a forced marriage; and **Criminal Judgment 45-CO (Madagascar)**¹⁰⁴ where a sister and brother are convicted of trafficking a young woman for forced marriage in China.

However, the Southern African region also presents us with important cases where men or boys are trafficked. Examples are **Shongwe (Eswatini)** where a 19 year old boy from **Lesotho** is trafficked to **Eswatini** to be exploited as a cattle herder; **Alam (Seychelles)** where 4 men from Bangladesh are trafficked to **Seychelles** for practices similar to slavery and forced labour; **Ramadhani (Tanzania)**¹⁰⁵ where a 14 year old boy is promised a housework job, but is

⁹⁹ The name of the Protocol includes an explicit recognition of the vulnerability of women: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Moreover, articles 6(4) and 9(1)(b) address this vulnerability in particular.

¹⁰⁰ See UNODC, Global Report on Trafficking in Persons 2020, Chapter I, page 31 on Profile of the Victims: "Female victims continue to be particularly affected by trafficking in persons. In 2018, for every 10 victims detected globally, about five were adult women and two were girls." This document is available at: <https://www.unodc.org/unodc/data-and-analysis/glotip.html>.

¹⁰¹ See global case digest section 2.2.1.2 on *delayed complaints/absence of complaints/reluctance to testify*, box entitled "The partial delayed complaint: a practitioner's explanation" on page 19 of English version.

¹⁰² Rex v. Tsoana, CR: 372/12, before Magistrate's Court. We note that while prosecution was pending, the magistrate was appointed to the High Court and the matter came to a standstill. The case has now been referred to the High court. A summary of the facts is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO001).

¹⁰³ Judgment No. 97-CO of June 25, 2019, in the Supreme Court of **Madagascar**. We note this was a judgment in default of the appearance of the accused persons.

¹⁰⁴ Criminal Judgment No 45-CO of April 25, 2019 in the Supreme Court of **Madagascar**. We note that there were two accused and that there was a default judgment in respect of one of them.

¹⁰⁵ Republic v. Ramadhani s/o Juma Lameck Ramadhani, DC Criminal Case No. 47 of 2015, 24 November 2015, **Tanzania**.

sexually exploited instead; **Mboo (Zambia)** where a 24 year old man is trafficked for removal of body parts.

3.2.5.12 Pregnancy, birth and breastfeeding

Pregnancy is recognized as a source of vulnerability in UNODC's Model Legislative Provisions against Trafficking in Persons¹⁰⁶ and in the Trafficking Acts of **Zambia** and **South Africa**.¹⁰⁷ Regular employment may be less available to such women or they may be less able to work at jobs which entail physical effort, thus causing them to accept irregular employment; their health may be affected, thus rendering them more vulnerable; they may hesitate to leave an abusive situation; they may be psychologically affected, especially if a pregnancy is unwanted.¹⁰⁸

Interestingly, both **South Africa** and **Namibia** have included a specific 'purpose of exploitation' which relates to the pregnancy of a woman, namely: *"the impregnation of a female person against her will for the purpose of selling her child when the child is born"*.¹⁰⁹

The global case digest refers to a number of cases where pregnancy created a vulnerability which was exploited by traffickers.¹¹⁰ In the sample of cases which form the basis of this digest, while young women fell pregnant as a result of sexual exploitation, in most cases pregnancy did not precede their exploitation. Indeed it sometimes ended this exploitation.¹¹¹ However, it is also possible that pregnancy exacerbated other vulnerabilities in all these cases.

A case which most clearly demonstrates the vulnerability which may arise because of pregnancy is **Eze (South Africa)** where one victim, named Els, falls victim to a cycle of prostitution and falls pregnant. Her pimps sell her to the accused trafficker because she is not making any money.

Another case where the pregnancy and recent birth of the victim's baby clearly made her vulnerable is **Saidi (Malawi)** where the accused person transported a woman who was expecting a baby with the aim of taking her baby from her. Since the victim gave birth on the very night that she was abducted, the court did not rule out that the accused may have induced the birth in order to take the baby. The baby was absent for 4 days, almost from birth, when it should have been breastfeeding.

In other cases where victims fall pregnant, the causal relationship between pregnancy and exploitation is less clear. In **Esther Phiri (Zambia)** a 14 year old orphan is promised a good job in the capital of Lusaka but falls victim to labour exploitation and is also sexually exploited. She falls pregnant and asks to go home. The accused returns her as a result of threats on the part of the community.

In **Matini (South Africa)**, a case of trafficking for sexual exploitation, one mentally disabled victim falls pregnant. When she escapes her pregnancy is terminated.

¹⁰⁶ UNODC Model Legislative Provisions against Trafficking in Persons, Chapter II, Article 6 on *definitions*, available at https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf.

¹⁰⁷ This appears under the definitions of *abuse of vulnerability*.

¹⁰⁸ See for example, Bahk, J., Yun, SC., Kim, Ym. *et al. Impact of unintended pregnancy on maternal mental health: a causal analysis using follow up data of the Panel Study on Korean Children* BMC Pregnancy Childbirth 15, 85 (2015). <https://doi.org/10.1186/s12884-015-0505-4>.

¹⁰⁹ See the definition of "exploitation" in sections 1 of the **South African** and **Namibian** Trafficking Acts.

¹¹⁰ See section 3.2.5.10 on *pregnancy*.

¹¹¹ This happened in Fakudze (**South Africa**) and Luzama Kavul (**DRC**).

In **Fakudze (South Africa)**¹¹² a 14 year old girl, raped continually by her stepfather, falls pregnant. When her pregnancy is suspected, the accused is angry, but takes her to the hospital where she reveals her exploitation.

In **R.T. Balele (South Africa)**¹¹³ which revolves around the trafficking for sexual exploitation of a number of minors from **Mozambique**, the accused's niece who was one of the victims, was raped by him repeatedly under the guise of marriage and fell pregnant. She managed to escape and complain to the police.

In **Luzama Kavul (DRC)**, a case revolving around the sexual exploitation of a young girl by her 58 year old neighbour, the girl fell pregnant, as a result of the series of rapes, at which point she was taken to the hospital and the sexual exploitation was revealed.

In **Luizon (DRC)** a man was charged with trafficking, kidnapping and forced prostitution for abducting a 15 year old girl for sexual exploitation. For more than a month, he locked the girl in his house and forbade her to go out during the day. The few outings she was allowed could only be at night and with him, in places he had targeted. After she was rescued she was discovered to be pregnant.

In an additional case of trafficking for sexual exploitation, namely, **Veeran Palan (South Africa)**, one of the victims was still breastfeeding when she was recruited, and the recruiter's mother assured her and her husband that she would pay for milk for the baby in order to replace the mother's milk. The breastfeeding stage might possibly have made this victim more vulnerable to exploitation. However, while the court notes the testimonies of the victim and her husband on this point, it does not connect them explicitly to her vulnerability as regards her recruitment for sexual exploitation.

3.2.5.13 Emotional vulnerability/traffickers in positions of trust

A special kind of vulnerability arises when traffickers stand in a position of trust towards victims. In such situations victims may find it hard to believe that the traffickers mean to exploit them. It may also be hard for victims to complain and testify, both because they may fear that they will not be believed, and because they may not wish to harm the trafficker. There may also develop a pattern by which victims want to believe in the good intentions of the trafficker, so that if he does even slight favours for them, they will tend to emphasize this part of his behaviour. Naturally, the younger the victim, the more easily he or she may be trafficked by those he trusts.

This kind of emotional relationship may exist with parents and other family members; romantic partners; friends and neighbours and persons in positions of status and authority in the community.¹¹⁴

Such vulnerabilities are prevalent in the sample of cases which form the basis for this digest, as can be seen in the following cases:

Parental complicity

A number of cases across the region illustrate intentional parental complicity in trafficking.

¹¹² We note that while the High Court exonerated the accused from trafficking, it confirmed his conviction on rape and did not deny the victim's vulnerabilities.

¹¹³ The State v. R.T. Balele, Case No. A331/16 BRITS CAS 269/7/2016 and 393/2/2015. Only the charge sheet was available.

¹¹⁴ See UNODC Global Report on Trafficking in Persons 2020, *ibid.* Chapter I, pp 40, 43, 53. See also U.S. State Department Report on Trafficking in Persons 2020 which describes religious leaders' complicity in some trafficking cases, and for ex. in Cameroon, Chad, Cote D'Ivoire and Togo.

The most blatant is **Knoetze (South Africa)**, a case revolving around the sexual exploitation of a number of minor girls. The recruiter was the mother of one of the exploited girls, aged 13. She would contact the end exploiter telephonically, arrange a meeting place and deliver the girl to him, whereupon the child was raped and paid, all of which payment was transferred to the mother who then decided how much she would give the girl. This mother later also recruited two of the girl's friends, aged 12 and 16 and the same pattern repeated itself with them.

Another case which involves a mother who traffics her own child is **Lamarie (Mauritius)**.¹¹⁵ The mother of a child was a prostitute who had sexual relations with the other accused who was the end exploiter. She agreed to sell her 11 year old daughter, who was a virgin, for sexual relations with said accused and he paid her for this. In the wake of this transaction, the end exploiter tried to engage in sexual relations with the victim, but did not force her to submit, when he realized that she was not willing.

Although the testimonies of the daughters and mothers were not available in the two above cases, clearly, the children's trafficking was facilitated by their relationship with their mothers, upon whom they were dependent for both physical and emotional needs, especially in view of their young ages.

Another case which reflects intentional parental complicity is Tshiswaka (**DRC**) where a father made use of the absence of his wife to rape his daughter continually, threatening her that he would not provide her with food and clothing, should she refuse.

In Fakudze (**South Africa**) a similar pattern presents itself. A stepfather raped his 14 year old stepdaughter continually, constantly reminding her that he was supporting her. The girl was totally dependent on her stepfather, as she was transported from her native **Eswatini** to **South Africa** and her own mother had abandoned her. The High Court confirmed his conviction on rape, although it exonerated him from trafficking, since it considered that the prosecution had failed to prove his criminal intent at the time of transporting the girl.

In Jeremiah Musa Dlamini (**Eswatini**) a man who was the father of two biological daughters and the uncle of a niece sexually exploited the younger of the daughters and the niece for years. Two of the girls were minor orphans (the daughter's mother and the niece's parents had died). The eldest adult daughter was asked to return to the accused's home after her marriage failed. When the victims who were minors when the exploitation began were asked by the adult daughter why they had allowed this exploitation to continue, they replied that not only were they afraid of the accused physically harming them, but they also feared he would expel them from his house and they had nowhere to go. It is particularly instructive how the minor daughter, who eventually married in **South Africa**, was emotionally manipulated by the accused. The accused tracked her down, located her and communicated with her, gloating and telling her that she would never find peace and happiness wherever she was and would struggle in life. When her marriage failed, she returned to him. As is common in cases of this kind, there were many kinds of vulnerabilities here, including the victims' ages and the accused's influential status in the community.

Interestingly, **Matini (South Africa)** reflects this pattern, although the accused persons were not parents of the exploited victims who appeared in the charge sheet. Several witnesses testified that the dominant accused, unfittingly named "Sweetness", had sexually trafficked her own daughter for sexual exploitation by a number of men, and that the girl had subsequently died of HIV.

In addition, the region yields a number of cases where parents sold or attempted to sell their own children due to poverty. One example is Fawza (**Mauritius**) where a mother sold her baby girl

¹¹⁵ Lamarie Perre Charles Jacques v. The State, 2004 SJ 2 Record No. 6748. Only a summary of an appeal on the sentence was available.

to a woman against a promise to give the mother a house in **Mauritius** and a trip to the U.K. As part of the transaction, she allowed the baby to be taken to U.K. by a man who falsely declared that he was the father of the child. In view of the absence of proof as to intent to exploit, the accused was not charged with trafficking, but rather with a violation of the Child Protection law which does not require proof of exploitation.

Another example is Mushenya (**Zambia**) where a husband and wife offered to sell their 3 year old son to another person. The potential buyer thereupon informed the police who subsequently arrested the parents after an officer posed as a buyer. The parents were convicted of trafficking in persons.¹¹⁶

Yet another example is Mwewa (**Zambia**) where a father tried to sell his daughter (and an uncle tried to sell his nephew). However, this case resulted in an exoneration, as the intent to exploit was not proved.

We note that child selling cases always raise the question if the intent to exploit can be proven. This issue will be addressed directly in section 4.7. of this digest under *issues arising in child selling and adoption cases*.

Interestingly, Allima (**South Africa**) reflects the awareness of traffickers as to the strength a parental relationship can exert over a victim. The female trafficker for sexual exploitation told the 16 year old victim, who experienced loss of memory, that she was her mother. The victim believed this, to the extent, that when her aunt finally found her, she insisted on contacting her “mother”, the accused.

We note that several cases present innocent parental complicity, whereby parents are deceived into allowing the trafficker to take their children. Examples are **Mabuza (South Africa)** where the recruiter succeeded in persuading the parents of some of the children to allow them to accompany them, claiming that they would be returned after visiting family, or that they would be sent to school in **South Africa**. Another example is **Mponda (Malawi)** where three girls were recruited by means of promises of jobs selling in a restaurant. The recruiter obtained the consent of their parents, but when they arrived at their destination, it was made clear to them that they would be required to prostitute themselves. The accused was convicted of trafficking. Yet another example is **Mujee (Botswana)** where the 16 year old victim of trafficking for sexual exploitation sought the consent of her parents in order to accompany the accused, who promised her a job in **Botswana**. After the father consulted the mother, they agreed, because they believed the deceptive promise of the accused. The accused was convicted of trafficking for sexual exploitation.

Other family members

Parents are not the only family members who traffic victims. Uncles, aunts, brothers, and brothers in law have also been convicted of trafficking.

Thus, in **Phiri (Zambia)** an uncle trafficked a young Albino girl for removal of her body parts; in **Jezile (South Africa)** the minor victim’s uncles forced her to marry a man of 28 and later returned her to him when she tried to escape; in **Jonas (Namibia)** the victim was trafficked for sexual exploitation by her aunt (the victim’s mother was the trafficker’s half sister).

While the above cases represent intentional trafficking by uncles or aunts, **Uche Odii (South Africa)** presents a case of acute negligence on the part of one victim’s aunt. She referred her 18 year old niece to the accused, who was offering a job taking care of a flat, even though he told her he was looking for a white female in particular, and had asked the aunt and another girl if they

¹¹⁶ We note that the court of first instance convicted the parents on the basis of a law which did not require intent to exploit, whereas the Supreme Court affirmed the conviction on a section of the Trafficking Act which did require proof of an intent to exploit.

smoked rock cocaine. Moreover, when accused number 1 told the aunt that accused number 3 was charging him 1000 rand for introducing girls, the aunt herself commented that it seemed as if he were selling the girls. Nevertheless, she referred her niece to the accused who claimed that he was offering a legitimate job, without pointing out the dangers.

In a few cases which yielded exonerations on trafficking, a similar pattern appears. Thus, in **Mwewa (Zambia)** an uncle tried to sell his nephew; in **Gole (Mozambique)**¹¹⁷ one of the accused persons who abducted an 8 year old boy, was his aunt; and in **Kasonde (Zambia)**¹¹⁸ an aunt tried to sell her minor niece. In all three cases the court exonerated the accused persons, as the prosecution had not proved an intent to exploit the children. We note that in Gole the accused aunt was convicted of the alternate charge of removal of a child by fraud and without permission of guardians.

A case of trafficking by an elder brother comes from **Zambia**, namely, **Sikapizya (Zambia)**¹¹⁹ where the accused trafficked his 12 year old brother. This was considered an aggravating circumstance by the court when it imposed sentence.

In **Mboo (Zambia)** the accused trafficked his 24 year old brother in law for removal of his body parts. As is common in such cases, the victim also laboured under other vulnerabilities, as he had just lost his wife and was left to care for their child.

In **Mabuza (South Africa)** the recruiter of the children for sexual exploitation and her sister, both of whom assisted the sexual exploiter to rape the children, prepared them for exploitation and received payments from the exploiter, were relatives of some of the children and familiar to all their families.

Family complicity also occurs in **Muzara (Zambia)**¹²⁰ where a woman from Congo trafficked 5 children, who were her relatives, for labour exploitation. The children were orphans whose parents had died and other relatives in the Congo agreed that the accused take the children, thus becoming innocently complicit in the trafficking. They were never enrolled in school; worked long hours in her business of selling scones and second hand clothing from 6 am until 9 pm; were not permitted to speak to neighbours and were threatened that they would be deported if they disclosed their nationality. The accused was convicted of trafficking in the court of first instance.

We also refer to **Balele (South Africa)** where one of the victims was the niece of the accused who was convicted of a series of rapes and trafficking for sexual exploitation.

Romantic partners

Cases where victims are in love with traffickers occur in the region, but the sample of cases before us only hints at this vulnerability. Some cases address victims' romantic feelings towards traffickers other than the accused persons in the particular cases at hand, and some show the traffickers' awareness of the power of romance to control victims, even if they do not succeed

¹¹⁷ State v. Gole et al, Case No. 29/17, Judicial Court of the Gaza Province, 4th Section, Xai, Xai – Criminal, 20 August 2019. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No.MOZ003).

¹¹⁸ People v. Mirriam Kasonde, Case No HRS/27/2020 in the High Court for **Zambia**.

¹¹⁹ The People v. Kendrick Sikapizya, HWS/50/2019, Kasama High Court in Northern Province **Zambia**, Justice EP Sunkutu. We note that conviction was adjudicated at Isoka Subordinate Court in Muchinga Province. We note that only the sentence was available.

¹²⁰ The People v. Maputa Muzara, SSV/111/2014, in the Magistrates Court in Maseru. The case is awaiting confirmation in the High Court and only a summary of the judgment ex tempore was available, based on interview with investigating officer and prosecutor involved in case. The summary can be accessed in the UNODC Human Trafficking Case Law Database, (UNODC No. ZMB003).

in deceiving the victims. For a fuller picture of romantic involvement as a form of emotional vulnerability, see the global case digest, section 3.2.5.11 on “*emotional vulnerability*”.

The clearest cases of romantic attachment occur in the following cases: **Lukas (Namibia)** where one victim of trafficking for sexual exploitation, called D, views the sexual exploiter as her boyfriend whom she loves; and **Matini (South Africa)** where a victim of trafficking for sexual exploitation named Mareeza convinces herself that she loves one of her sexual exploiters and marries him.

However, in other cases, the victim’s emotional vulnerability is less direct. Thus, in **Eze (South Africa)**, the victim of trafficking for sexual exploitation, named Harmse, testifies that she loved two traffickers before she was sold to the accused, but never feels love for the accused. Poignantly, the second victim, named Els, testifies that after her parents ceased speaking to her, she decided to try to make the accused happy in order to have a happy life.

Traffickers are aware of the power of romance in controlling victims. Thus in **Eze (South Africa)** the trafficker tells the victim named Harmse that he loves her when seeking to engage in sexual relations with her.

Similarly, in **Allima (South Africa)** the accused, who traffics a young girl for sexual exploitation, represents one of the men who sexually exploits her as her “husband”.

For a fuller picture of romantic vulnerabilities see section 3.2.4.2 on *trauma bonding/ Stockholm syndrome* and section 3.2.5.11 of the global case digest on *emotional vulnerability/ romantic relationships*.

Neighbours and friends

Over and beyond the trust that family relations can create, neighbours and friends can also be imbued with a feeling of reliability and trustworthiness in the eyes of victims. Cases across the region show this.

For example, in **Koch (Namibia)** the accused person was a neighbour of all the minors he exploited sexually. Moreover he was a close friend of the relative of one girl and a number of mothers testified that they were on good terms with him. Another example appears in **Dragon (Namibia)** where the accused was the father of the sexually exploited children’s playmates, and several victims testified that the accused was their friend. This facilitated the sexual exploitation of the children in both cases, as at least initially, they trusted the accused persons.

In several cases, the victims were recruited by friends or schoolmates. Thus in **Ogochukwu (South Africa)** the 15 year old victim of trafficking for sexual exploitation, was recruited by her 16 year old friend who was the accused’s girlfriend and who did not disclose to her that he was engaging women in prostitution in his residence. The two girls had been friends for 3 years and the victim revealed to her that she was experiencing problems with her mother. Similarly, in **Veeran Palan (South Africa)** the recruiter was a schoolmate of one victim and her parents were neighbours of the other victim.

In **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, the trafficker’s sister was married to a man from the same village as the victim. Thus she was a “known quantity”, better able to engender trust.

Religious leaders/other professionals who arouse trust

Persons in certain positions can arouse trust, even if they are not family members, neighbours or friends. Examples are religious leaders, police officers, and members of the helping professions. Not only can this status lead victims to trust such persons, but it can also make them reluctant to complain against them, as they fear no one will believe them.

A prominent example of such a process occurs in **Mndzebele (Eswatini)** where a pastor offers to pay the school fees of an impoverished girl, if she comes to live with him. Not only does his religious position facilitate her recruitment, but she later testifies that she did not tell her parents about the rapes he committed against her because she did not think they would believe her. Moreover, she describes their relationship as similar to one between a parent and child.

The accused stood as a parent to me as he paid for my school fees...My parents trusted the accused too much. I felt that they would not believe me. That is why I opted for my friends.

King v. Mndzebele, Case No: SDV 51/15 in Subordinate Court for the District of Manzini before D.V. Khumalo.

Another example of the power wielded by influential status occurs in **Jeremiah Musa Dlamini (Eswatini)**. Not only was the trafficker for sexual exploitation the father of one victim and the uncle of another one, but he was also an influential man of middle age who was the self-acclaimed pastor of a Zionist Church; a traditional healer with a private initiation consultation room; and a member of the local community police and of the local women's regiment. It is not surprising that such positions can engender trust and make victims hesitant to report crimes. Indeed the court notes that the sexual exploitation transpired over years and that the community, including his relatives, and the police were well aware of it but never acted.

Another case which reflects the trust engendered by persons in certain positions is **Msweli (South Africa)** where one accused's former position as a police officer, caused the mother of the trafficked baby to trust her, as was the case in regard to the second accused person who was represented to be a social worker.

3.2.5.14 Multiple vulnerabilities in different actors

Over and beyond the reality whereby most victims have multiple vulnerabilities, several cases present a picture of vulnerabilities in different actors. For example, in **Msweli (South Africa)**, a case revolving around the abduction of a baby from an impoverished family, not only was the 5 month old baby clearly vulnerable, due to its young age, but its mother, who lived in poverty, was vulnerable in her own right, as was the "buyer" of the baby, who was a childless woman.

Similarly, in **Saidi (Malawi)**, a case revolving around the trafficking of an expectant mother in order to take away her baby, both the expectant mother and her baby, who was taken from her at the age of one day, were vulnerable. In this case the accused was charged and convicted, both of adult trafficking in respect to the mother and child trafficking of the baby.

Cases which relate to trafficking for removal of organs can present this picture as well. For example, in **Netcare Kwa-Zulu Limited (South Africa)**,¹²¹ the case revolved around Israelis transported to **South Africa** in order to receive kidney donations from persons who were not their relatives, thus contravening **South Africa's** Human Tissue Act. In this case, both the recipients, whose malfunctioning kidneys placed them in danger, and the donors, who were from impoverished backgrounds, were clearly vulnerable.

Moreover, as noted in sections 3.2.4.4 on *inducing victims to commit illegal acts* and 5.5 on *the importance of not criminalizing victims*, sometimes the perpetrators too, are vulnerable persons who may be addicted to drugs or formerly trafficked for exploitation.

¹²¹ The State v. Netcare Kwa-Zulu Limited, summary available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF002).

Examples of vulnerabilities in trafficking cases

- Immigration status;
- Lack of familiarity with language and culture;
- Socio-economic status;
- Age;
- Addiction;
- Physical or mental characteristics including disabilities;
- Lack of education or little education;
- Problematic family history;
- History of previous severe sexual exploitation and trafficking;
- Gender;
- Pregnancy/birth/breastfeeding;
- Emotional vulnerability towards traffickers in positions of trust;
- Multiple vulnerabilities in different actors (Examples: babies/mothers; recipients and donors of organs)

Note:

- Not all victims display these or other vulnerabilities, as victims come in many shapes and sizes.
- Often victims present a host of vulnerabilities, not just one.

3.2.6 Restrictions of Freedom

Restrictions of freedom are among the weightiest pieces of evidence which can contribute to trafficking convictions, as they reflect the objectification of the victim whose autonomy is infringed, whose freedom is curtailed and whose wishes are ignored. It is for this reason that some States classify trafficking crimes as violations of freedom or dignity ¹²²

Such restrictions of freedom can support various elements of the crime, depending on the local legislation. Thus, they may be relevant to ‘actions’,¹²³ ‘means’¹²⁴ or ‘purposes of exploitation’.¹²⁵

Restrictions of freedom are not limited to lock and key imprisonment, but can include more subtle encroachments on a person’s freedom, such as: confiscating his passport or identity

¹²² See global case digest, section 1.1 on *Background/Introduction*, footnote 4.

¹²³ Examples are the ‘actions’ of “holds” in **Eswatini’s** Trafficking Act; the ‘actions’ of “capture” or “removal” as appear in **Mauritius’** Trafficking Act; the ‘action’ of “abducts” as appears in **Tanzania’s** Trafficking Act.

¹²⁴ Examples are “threats or use of force”; “other forms of coercion”; “abduction”; “abuse of power or of a position of vulnerability”, all of which appear in the Protocol and in most Trafficking Acts in the region; “kidnapping” as appears in the Trafficking Acts of **Namibia, South Africa and Lesotho**; “intimidation” as appears in the Trafficking Acts of **Mauritius** and **Tanzania**; and “the destruction, concealment, removal, confiscation, possession of any passport or immigration document or official identification document” which appears in the Trafficking Act of **Zambia** and relates directly to a certain form of restriction of freedom – by means of detaining a person’s passport or identity documents; “detention” which appears in the Trafficking Act of **Zimbabwe**.

¹²⁵ All the purposes of exploitation enumerated in the Protocol and similarly in States across the region may be supported by evidence about restrictions of freedom, namely: 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. The same goes for additional purposes of exploitation which appear in various States’ Trafficking Acts such as “forced marriage” (**Botswana, DRC, Lesotho, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, Zambia, Zimbabwe** and **South Africa**, where it appears as a separate trafficking crime) or child labour (**DRC, Namibia, South Africa, Zambia**) or use of persons in armed conflict (**Botswana, DRC, Tanzania**). It is particularly interesting that in the **DRC** the law notes that the exploitation of the person can be accompanied by retention of travel documents, identity or residence documents of victims which is a particular form of restrictions of freedom.

documents; warning him of the dangers in the outside world in order to foster fear; supervising his movements constantly; fostering financial dependence; placing him or her in a position where he has nowhere to go. Clearly some of these restrictions of freedom can be looked upon as subtle forms of coercion.¹²⁶

The following are some examples of restrictions of freedom which appear in cases across the region. We note that often traffickers use a number of such methods in order to restrict victims' freedom.

3.2.6.1 *Lock and key imprisonment/locking in and out*

In a number of cases, the victims were locked in a house or a room. Thus in **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of a number of children, some of the children testified that the accused locked the door of his house and one victim testified that he stopped her from leaving the house and closed the door.

Mujee (Botswana), a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, illustrates the paradox that both locking the victim in and not giving her a key to lock people out, can restrict her freedom. Thus, the victim was **locked in her room** from the outside to prevent her fleeing from the men who were exploiting her. However, the court also notes¹²⁷ that **the absence of a key** to her room, restricted the victim's freedom to lock out exploiters. We note that this case presents a few kinds of restrictions of freedom: lock and key imprisonment, interdictions and warnings, financial restrictions, and creating a situation of "nowhere to go".

By the same token, in **Allima (South Africa)** the 16 year old victim of trafficking for sexual exploitation testified that the accused locked her in her flat once and that she was always locked in by one of the men who sexually exploited her.

In **Obi (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 teenage girls, all three were locked in the premises which served as a brothel, and forced to consume illegal drugs. The court termed this, holding them captive. In **Wiedermeyer (South Africa)**, a case revolving around the trafficking for sexual exploitation of young addicts, one victim was kept in the premises and not permitted to leave. In **Luizon (DRC)**, a case revolving around the abduction of a 15 year old girl for sexual exploitation, the girl was locked in the premises for over a month and permitted to go out only at night with the accused.

Sometimes the trafficker differentiates between various victims in terms of restrictions of freedom. Thus, in **Uche Odii (South Africa)**, one victim was locked in her room when she refused to prostitute herself, whereas the other victim, who did not refuse, was not locked in.

Sometimes lock and key imprisonment is employed after a period of more mild restrictions. Such a scenario transpired in **Eze (South Africa)** where supervision of the victim Els' movements was followed by being effectively locked in the building after she had left the trafficker for a time to stay with her parents. Similarly, in **Jezile (South Africa)**, a case revolving around sexual exploitation on the background of forced marriage, at first, when the victim was in her home village, she was not locked in the premises. However, after her escape attempts, the accused person took her to Cape Town where he raped her several times and locked her in the house. He also locked the bedroom door before he raped her the fifth time.

Interestingly, while locking a victim *inside* premises clearly restricts his or her freedom, the same goes for locking a victim *outside* the premises, when he or she has nowhere else to go. This form of control transpired in **Matini (South Africa)**, a case of trafficking for sexual exploitation where 2 victims were mentally disabled children, assessed at younger ages than their biological

¹²⁶ See section 3.2.4 on *subtle means of coercion and abuse*.

¹²⁷ See paragraph 34.

ages. The accused person allowed men to sexually exploit these victims for a night at a time in exchange for food and other articles. If the girls were returned after the accused had already gone to work, they were locked out of the house, with nowhere to go, as they did not know anyone aside from the accused and those who frequented her house. This clearly strengthened the accused's control over the victims.

Forms of lock and key imprisonment

- Locking the victim in a room, apartment or house;
- Locking the victim out of a house, when he or she has nowhere to go;
- Not giving the victim a key to her own room, thus preventing her from locking others out;
- Locking only some victims, whereas others are permitted freedom of movement;
- Lock and key imprisonment following periods of milder restrictions;

3.2.6.2 Confiscation or absence of passports or other documents

Traffickers often confiscate passports and other personal documents in order to limit victims' freedom of movement. This is a particularly effective control mechanism, as without such documents, a person may have no way to identify himself and may be subject to detention or deportation.

The following cases are examples of such practices. In *Alam (Seychelles)*, a case revolving around the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi men, the trafficker detained the victims' passports and did not return them even though they requested this. He did not even accede to the requests of investigators from the Ministry of Employment to return the passports. A similar pattern can be seen in *Mahuni (Zimbabwe)*, a case of procurement for prostitution of young girls from **Zimbabwe** to **Angola** whose passports were confiscated by the trafficker.

Similarly, in *Maroodza (Zimbabwe)*, a case revolving around trafficking for labour exploitation of 6 young women who were trafficked to Kuwait, their passports were confiscated by their employers on arrival. This fact was mentioned by the court when it convicted.

Another example is *Adigwe Dike (Eswatini)*, a case where a couple was charged with the trafficking for labour exploitation of a young Nigerian girl. Here too, the accused confiscated the girl's passport, she requested its return and was met with a refusal. She found it one day when the accused persons were absent from the house, but when this was discovered, she was severely beaten and forced to return it. This last case yielded an exoneration on a trafficking charge due to the lack of proof of the intention to exploit at the moment the accused persons transported the girl to **Eswatini**. However, the constellation of circumstances does seem to show that the confiscation of the girl's passport was done intentionally in order to enhance her vulnerability in a foreign country.

In some of the above cases, the traffickers admitted detaining victims' passports but claimed that they did so in order to keep them safe. This claim surfaces in *Alam (Seychelles)* and *Mahuni (Zimbabwe)*, and is also prevalent in other regions.¹²⁸ The court's ruling in *Mahuni* is particularly instructive in this regard.

¹²⁸ See for example, *State of Israel v. Giuliani*, 29 February 2012, District Court of Jerusalem, Israel. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. ISR016). (Conviction affirmed by the Supreme Court, 6 September 2016, Criminal Appeal 6237/12.).

“The complainants are female adults. To then say that accused took their passports wonder¹²⁹ to ensure that they didn’t get lost is not reasonable. There are adults who could keep their own property on their own. The confiscation of passports can only be explained by an inference that accused wanted them to prevent them from leaving her.”

State v. Mahuni, CRB No. 1657/14 before court in Harare, 08/01/16

Interestingly, after the conviction of the accused, the court in Mahuni, ordered her to return the victims’ passports and phones within 7 days.

Another kind of identity document which may be confiscated is a person’s health passport which entitles him or her to medical care. Such a document was confiscated and also falsified by the accused in **Jonas (Namibia)**, a case of trafficking for sexual exploitation.

We note that sometimes traffickers can restrict the freedom of foreigners by transporting them across borders without valid passports. Under these circumstances they remain in a foreign country with no means of identification and are subject to detention or deportation. Such a scenario appears in **Mabuza (South Africa)** where children from **Mozambique**, trafficked for sexual exploitation in **South Africa**, were illegally transported across the border without valid passports. This also occurs in **Mujee (Botswana)** where a 16 year old minor from **Zimbabwe**, without a passport, was illegally transported to **Botswana**. In this last case, the accused explicitly used this illegality to engender fear of exiting the premises. We refer the reader to section 3.2.4.13 on *using the victim’s illegal status to create fear of arrest* as a subtle means of coercion and abuse.

3.2.6.3 Subtle restrictions of freedom

Over and beyond lock and key imprisonment and confiscation of passports, there are a number of subtle restrictions of freedom practiced by traffickers such as: warnings against exiting premises; constant supervision; placing the victim in a position where he or she has nowhere to go; making the victim financially dependent on the trafficker; allowing the victim no leisure time. The following are some examples of these subtle forms of restrictions of freedom:

- *Interdictions and warnings*

Sometimes traffickers restrict victims’ freedom by means of interdictions or warnings revolving around purported dangers involved in exiting the premises. This can be equally effective to locking them in.

In **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young addicts, one of the victims, called Harmse, testified that the accused forbid her to go anywhere outside the premises and that clients contacted her by phone.

In **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, illegal in **Botswana**, the accused warned the victim not to exit the premises, as she could be arrested, since she was illegal in **Botswana**. This was an effective way to restrict her movements, as the victim herself says in her testimony, as reported by the court.

¹²⁹ This is the language of the case. However, it is reasonable to assume that it is a technical mistake and that the court intended to say “in order to” rather than “wonder”.

"She [the victim] stated that there were times when she thought of running away but the accused had told her that she would never go far as she would be arrested."

The State v. Mujee, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021, sentence 14 July 2021, paragraph 11.

Sometimes the victim is permitted to go to certain places and not to others. This can be seen in **Maroodza (Zimbabwe)**, a case revolving around the trafficking of 6 young women from **Zimbabwe** to Kuwait for domestic service. They were not permitted to leave the premises where they worked except to take the children of the families of their employers to school. The court noted this circumstance when it convicted the accused of trafficking in persons. Similarly in **Fakudze (South Africa)**, a 14 year old girl, continually raped by her stepfather, was permitted to leave the house only to go to school. While the High Court exonerated the accused from trafficking charges because it ruled that there was no adequate proof of his intent to exploit at the moment of transporting the girl, it confirmed the court of first instance's conviction on rape.

Sometimes the interdictions are accompanied by warnings or threats of deportation as described in section 3.2.2.2 on *threats of deportation*.

- *Constant supervision*

Constant supervision of victims by traffickers is a common method of restricting their freedom and can be equally effective to locking them in the premises.

Thus in **Eze (South Africa)** a case revolving around the trafficking for sexual exploitation of 2 young women addicted to drugs, one victim, named Els, testified that the accused continually supervised her movements, kept guard over her and lurked in the background even when clients came.

Similarly, in **O.B. Abba (South Africa)** along with continual interdictions and warnings not to exit the premises, the accused also supervised the victims constantly. During the first stage, before one of the victims attempted to escape, both victims were accompanied, even when they hung out the washing to dry. After one victim's escape attempt, the supervision was heightened: the victims were not permitted to leave at all and were accompanied even to the hair salon and stores, where an accused either waited for them or picked them up. Moreover, the victims were not permitted to leave at all to the extent that they were sometimes required to hang out the washing in the windows or bathroom.

Similarly, in **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 young women from **Mozambique**, the victims were not permitted to leave the house unaccompanied by the accused person.

Sometimes phones can be used as a way to supervise victims or to facilitate the carrying on of the trafficker's business. Thus, in **Veeran Palan (South Africa)** the accused asked one victim's mother to purchase a phone for her so that he could keep in contact with her on her journey to her destination. When she arrived, he told her to use the phone only to maintain contact with customers and forbade her to contact family members or anyone else except customers. Similarly in **Eze (South Africa)** the accused encouraged the victim named Els to use her cell phone so that clients of prostitution could contact her.

By the same token, in **O.B. Abba (South Africa)**, a case of trafficking for sexual exploitation, slavery and servitude, the accused gave the victims phones so that they could contact him if they were in danger or in need of drugs or arrested. This recurs in **Allima (South Africa)** where the 16 year old victim, trafficked for sexual exploitation, was given a cell phone by one of the men

who sexually exploited her and who locked her in his room on a regular basis, seemingly, so that she could contact him.

- *Financial dependence*

Another subtle way of restricting the victim's freedom is by means of making him financially dependent on the accused. This can be done by not paying the victim or not paying him the full sums owed. This behaviour limits the victim's freedom in two ways: it binds him to the accused, in the hopes of receiving payment, and does not give the victim the means to flee his or her situation.

There are many examples of such restrictions of freedom in cases across the region. One example is **Alam (Seychelles)** where the 4 Bangladeshi victims of trafficking for practices similar to slavery and forced labour, were not paid for 4 months of work. In enumerating their vulnerabilities, the court notes their total financial dependency on the accused who, according to the court, acted more as master than employer. This dependency was exacerbated by the fact that the workers had borrowed large sums of money in order to pay the accused for finding them jobs, by their illegal status in the country and their unfamiliarity with the language and culture, all of which made it hard to flee. Interestingly in the case of some workers, the accused purportedly transferred whatever money he *did* pay, to the families of the workers in Bangladesh, without consulting them, thus making the money inaccessible to the workers themselves in **Seychelles**.

Another example is **Esther Phiri (Zambia)** where a 14 year old girl was promised a good job in the capital of Lusaka, at a distance from her village. However, when she arrived she was forced to work without pay and ended up being pressured to have sexual relations with men in bars. The victim knew no one in the capital except the sister of her trafficker who employed her in domestic work and took her to bars. Her financial dependency contributed to the obstacles which prevented her from fleeing her situation.

Yet another example is **Shongwe (Eswatini)** where a young man from **Lesotho** was trafficked to **Eswatini** where he was expected to herd cattle. He was paid only once and in enumerating his vulnerabilities, the court notes that he had no money to go home.

Similarly in **Mujee (Botswana)**,¹³⁰ a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, the court notes that the victim had to do the accused's bidding as she relied on her for food and shelter and had no one else to turn to for assistance. The court also notes that the victim had no source of income.

- *Lack of leisure time*

Lack of leisure time can restrict the victims' freedom, in that their ability to plan ahead and try to better their situation is impeded, as every day is a renewed battle to survive. Courts in various countries have explicitly viewed lack of leisure time as a restriction of freedom, as can be seen in the global case digest.¹³¹

While courts in the cases which form the basis for this digest do not explicitly see lack of leisure time as a restriction of freedom, there are cases across the region where the victims are worked long hours and have time only to work and sleep. While the motivations of the traffickers in these cases may focus on deriving the maximum economic benefit from the victims, rather than on restricting their freedom, the effect of such control methods is, in fact, to limit the victim's freedom.

¹³⁰ See paragraphs 31 and 34.

¹³¹ See the global case digest section 3.2.6.7 on *Restrictions of freedom/subtle restrictions: lack of leisure time*.

One example is **Alam (Seychelles)** where all the workers from Bangladesh were worked for long hours and three out of the four were required, in addition to their day jobs, to work for hours each evening and night in order to complete building their own accommodations. One victim testified that this additional work went on between 5 p.m. and 10 p.m. every night. The accused was convicted of trafficking for practices similar to slavery and forced labour.

Another example is **Maroodza (Zimbabwe)** where 6 young women were trafficked to Kuwait for labour exploitation. In convicting the recruiter of trafficking, the court notes that the women were forced to work more than 15 hours a day, only getting to sleep after midnight each day. In addition, they were not given any vacation days. The court called this constellation of circumstances unfair labour practices and noted that they were also subjected to “some slavery” in particular bonded labour and forced labour. Although the young women fled their employers in the end, clearly their ability to come and go as they chose was severely limited, not only by the interdictions on their leaving and supervision,¹³² but also as a result of lack of leisure time.

Yet another example is **Mahuni (Zimbabwe)** where young women were transported from **Zimbabwe** to **Angola** for prostitution. They were expected to work selling clothes each day and then to sleep with men at night. This double burden clearly did not leave them time to think or plan. In the end, these young women succeeded in fleeing with the aid of the accused person’s niece.

For a fuller picture of cases which include long hours of work, see section 3.2.9 on *difficult working and living conditions*.

- *Leaving the victim nowhere to go*

If the victim has nowhere to go outside the range of the trafficker’s control, this can restrict his freedom. The trafficker can effect this limitation of freedom by means of physical or socio-psychological means.

Mabuza (South Africa) is an example of limiting the victims’ freedom by means of physical isolation. A number of children from **Mozambique** were illegally transported across the border to **South Africa** and taken to a remote and hard to reach lumber camp. Their helpless situation was emphasized by the trafficker’s sister when she threatened the children that if they did not do as they were told and allow themselves to be sexually exploited, they would be abandoned and left without food.¹³³

Another example of this phenomenon transpires in **Jeremiah Musa Dlamini (Eswatini)**¹³⁴ where a mature man traffics his biological daughter and niece for sexual exploitation. When his eldest daughter returns home, she sees that her sister and cousin are acceding to the accused’s request to bathe him and that they are continually raped. She asks them why they allow this and they answer as follows:

“If he did not kill them then he could decide to expel them from his home and they would have nowhere to go and stay.”

Rex v. Jeremiah Musa Dlamini, Pigg’s Peak Case No. BH 350/19 – 21/08/20

¹³² See section 3.2.6 on *restrictions of freedom*, subsection on *constant supervision*.

¹³³ See section 3.2.2.3 on *threats of abandoning victims without the means to survive*.

¹³⁴ See paragraph 31.

This kind of restriction of freedom can also be accomplished by socially isolating the victim. This is generally done by taking him or her to an unfamiliar place where he knows no one but the accused. This recurs in many cases,¹³⁵ and for example: **Matini (South Africa)** where 2 mentally disabled children are abducted from their village for sexual exploitation and taken to a settlement where they know only the accused; **Allima (South Africa)** where a 16 year old girl is abducted for sexual exploitation and taken a distance from her original home; **Esther Phiri (Zambia)** where a 14 year old is persuaded to accompany the accused from her village to the capital of Lusaka where she knows no one and is exploited; **Criminal Judgment No 45-CO (Madagascar)**, where the victim is transported to China to be forcibly married to a Chinese man; **Mujee (Botswana)** where the victim is transported from **Zimbabwe** to **Botswana** where she knows no one but the accused and is isolated, both from her family and the neighbours.

Jonas (Namibia) where a young girl is persuaded to travel from her village to a farm where she knows only the accused, is particularly instructive in this regard, as the accused throws the victim out of her house with her luggage, which leaves her no choice but to accompany men for sexual exploitation.

However, this kind of social isolation can also be achieved when victims continue to reside in their homes. Thus, interestingly, in **Jeremiah Musa Dlamini (Eswatini)**, which is analyzed above, although the victims live in their community, they are socially isolated because the accused is an influential man which makes the community reluctant to expose him.

In order to complete the picture, we refer the reader to section 3.2.7.3 on *Isolation/nowhere to go*.

Kinds of Restrictions of Freedom

- Lock and key imprisonment;
- Confiscation or absence of passports or other personal documents;
- Subtle restrictions of freedom:
 - Interdictions and warnings
 - Constant supervision including by the use of phones
 - Financial dependence
 - Leaving the victim nowhere to go
 - Lack of leisure time

NOTE:

- Sometimes cases present multiple kinds of restrictions of freedom.
- Sometimes locking a victim out can restrict his freedom as well as locking him in.
- Sometimes not giving the victim a key to her room can restrict her freedom to lock out exploiters

3.2.7 Isolation

Isolation from other human beings and especially from those who form part of one's support system can lead to a loss of the sense of self and to dependence on the trafficker, not only for basic needs, but also for information and emotional sustenance.¹³⁶ This is why traffickers often

¹³⁵ Other prominent examples are Veeran Palan (**South Africa**) where two vulnerable young women are trafficked for sexual exploitation from Delft to Port Shepstone, a distance of some 1472 kilometers, and Jezile (**South Africa**) where the 14 year old victim, forcibly married against her will, is taken to another city after her escape attempts, and forced to reside in the perpetrator's brother's house, after her escape attempt.

¹³⁶ See Hopper and Hidalgo, p. 193.

intentionally isolate victims from familiar surroundings and limit their contact with family and friends. This can be done by physically isolating victims or by socially isolating them.

The use of isolation by a trafficker can contribute to proof of ‘actions’, ‘means’ or ‘purposes of exploitation’. In term of ‘actions’, a trafficker may intentionally “transfer” or “transport” a victim to a distant place where he knows no one except the trafficker, in order to isolate him. Isolation may also function as a ‘means’ like “coercion” or “abduction” or “abuse of power or of a position of vulnerability”. It may contribute to proof of a ‘purpose of exploitation’ like “forced labour” or “slavery”.

There is a certain amount of overlap between isolation and restrictions of freedom, because, of its nature, isolation restricts a victim’s movements and choices, as he has no one to support him and no one to whom he can flee. For this reason, we will refer to the cases cited in section 3.2.6 on *restrictions of freedom*, and in particular in regard to section 3.2.6.3 on *subtle restrictions of freedom*. We also note that isolation may be considered a created form of vulnerability, as mentioned in section 3.2.5.3 on *lack of familiarity with language and culture/distance from home*.

The following are examples of how traffickers use isolation to control victims.

3.2.7.1 Physical isolation

The best example of physical isolation is **Mabuza (South Africa)** where 4 children from **Mozambique** are illegally transported across the **South African** border with no valid passports and taken to a remote lumber camp. The court’s description of the location gives a graphic picture of physical isolation and its impact.

“This lumberjacks’ village, as we have seen during the inspection in loco, is a very remote place situated in a vast plantation area, which can be reached by a number of very bad dirt roads that can be accessed from the road between Sabie and Lydenburg (the ‘Long Tom Pass’) and from the road between Sabie and Nelspruit, turning off from the Long Tom Pass road. The village is in a very remote spot (only one or two trout farms nearby), with no direction or information boards, and a stranger would find it difficult to find the place without help and would experience true desolation if left there without food or shelter. A desolated place indeed, and if a stranger was brought there and chased away, as some of these children were threatened should they not do what they were told, they would literally not have anywhere to go.”

S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

3.2.7.2 Social isolation

In many cases, the trafficker intentionally isolates the victim from people in order to strengthen his control. This may be done by forbidding the victim to contact others; by confiscating his or her phone; by moving the victim from a familiar place to a distant one where he or she knows no one but the trafficker. The following are some examples of these forms of created social isolation. We note that naturally, physical isolation may also lead to social isolation.

In **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, the trafficker pays for the travel of the women from Delft to Port Shepstone, a distance of some 1472 kilometers. The place is so unfamiliar to the victims that they don’t even know where the police station is and need help to locate the premises in which they were held. The trafficker also forbids the victim named Candice to contact her family or any other person except customers by phone.

Similarly in **Eze (South Africa)**, one of the victims of trafficking for sexual exploitation testified that the accused limited her contact with her parents and others and on one occasion, when he allowed her to meet her parents in a mall in honor of her birthday, supervised her closely and ended the visit after 15 minutes.

Many additional cases reflect a pattern whereby the trafficker moves the victim from familiar surroundings and thus isolates him or her. The court in **Matini (South Africa)** recognizes that this is a form of psychological control.

"Traffickers may also transport or transfer victims within a country or across national borders to an unfamiliar or another environment. The purpose of the transport is to alienate the victim so that they become more vulnerable and thus easier to exploit. Their vulnerability arises from the fact that they do not have close relatives at their destination, do not have money or means to return home and sometimes cannot speak the language, are disadvantaged by their legal status... or do not know the environment they find themselves in."

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage, conviction 27/10/2017, sentence 8/2/2018

Interestingly, this case shows that **isolation can be achieved even if the distance between the victims' homes and the place to which they are transported is not objectively distant**. Thus, in this case, the distance of the mentally disabled victims' home from the trafficker's residence was a bare 28 kilometers.¹³⁷ Nevertheless, this distance isolated them from their families in view of their mental disabilities.

Sometimes victims are transported to distant places within their own countries, and for example: **Allima (South Africa)** where a 16 year old girl, trafficked for sexual exploitation, is abducted from her small town and transported to the large city of Durban, a distance of some 240 kilometers. She knows no one but the accused in Durban; **Jonas (Namibia)** where a young woman is transported for sexual exploitation from her village to a farm where she knows no one but the accused; **Esther Phiri (Zambia)** where a 14 year old girl, trafficked for child labour, is transported from her village to the distant capital of Lusaka where she knows no one but the accused and her sister; **Mponda (Malawi)** where 3 young girls trafficked for sexual exploitation, are transported from their village of Mulanje to the capital of Lilongwe, where they know no one, a distance of some 380 kilometers; **Jezile (South Africa)** where a child of 14 is transported to Cape Town from her village after she attempts to escape from the accused to whom she has been forcibly married. Once there, she is forced to reside with the accused's brother and his wife and knows no one except the accused and these relatives.

The sample before us also reflects transport of victims to foreign countries, which can make them even more isolated, especially if they are not familiar with the language or culture. This is the case in **Mabuza (South Africa)** where 4 children are trafficked for sexual exploitation from **Mozambique** to **South Africa**, where they are not familiar with the language or culture; **Alam (Seychelles)** where 4 Bangladeshi workers are trafficked to **Seychelles** where they do not know the language or culture well; **Shongwe (Eswatini)** where a young man from **Lesotho** is transported to **Eswatini**, where he does not know anyone except the accused and does not know the local language; **Mahuni (Zimbabwe)** where young women from **Zimbabwe** are procured for prostitution in **Angola**. It is instructive that the accused stresses their foreignness when

¹³⁷ The victims' home was in Uitenhage which is 28 kilometers from the accused's residence in Fairview. See <http://distancebetween.co.za/Suburbs/Fairview99.html>.

she tells them that they are now in Dos Santos' place and not Mugabe's place;¹³⁸ **Dos Santos (South Africa)**, where young women from **Mozambique** are trafficked to **South Africa** for sexual exploitation; **Criminal Judgment No 45-CO (Madagascar)** where a young woman is trafficked for China for forced marriage; **Mujee (Botswana)** where the victim of trafficking for sexual exploitation is transported from **Zimbabwe** to **Botswana**, where not only is she isolated from her family and support systems, but the accused also isolates her from the neighbours.

Other methods of social isolation include limiting victims' schooling, as transpired in **Jezile (South Africa)** where the trafficker for sexual exploitation, refused the victim's request to continue to attend school because he did not want an educated wife. This kind of control mechanism isolates the victim from schoolmates and teachers and limits her sources of information, thus strengthening the trafficker's control. Similar attempts to limit victims' education can be found in section 3.2.5.8 on *lack of education or little education*.

Interestingly, sometimes victims may be socially isolated, even when they are in their own communities, because the community knows of their abuse and passes over it. Such a scenario transpired in **Jeremiah Musa Dlamini (Eswatini)** where the court notes that the community, including the police, knew of the accused's sexual exploitation of his biological daughter and niece and yet did nothing. In such a situation, the victims were isolated even in their own communities.

3.2.7.3 Nowhere to go

Although we addressed this phenomenon in section 3.2.6.3 which deals with restrictions of freedom, it is also relevant to isolation.

Often, victims who are physically or socially isolated testify that they had "nowhere to go" or "no alternative" or "no one to turn to" or were "powerless", thus reflecting the sense of helplessness which accompanies isolation. These phrases appear in a number of cases across the region and for example: **Jonas (Namibia)** where a young girl is transported to another part of the country, to a farm where she testifies that she knows no one but the accused, who throws her out of her house with all her luggage to coerce her to move in with men who sexually exploit her; **Allima (South Africa)** where the 16 year old victim is transported to a distant place in the country where she knows no one but the accused. Her feeling of powerlessness is expressed several times in the course of her testimony; **Mujee (Botswana)**¹³⁹ where the court notes that the victim, who was trafficked from **Zimbabwe** to **Botswana**, had no one to turn to for assistance, both because she was far from family and because the accused forbid her to have contact with neighbours; **Mabuza (South Africa)** where the first instance court describes the remote location of the lumber camp where the children are kept for sexual exploitation and says that the children were well aware that if they did not do as they were told, they would have nowhere to go.

"They would literally not have anywhere to go...All of the girls knew all too well they would be left destitute if they did not do as told."

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

Another example of this feeling of nowhere to go can be seen in **Matini (South Africa)** where one victim, named Ncumisa Danster, testifies that she did not complain despite the sexual exploitation of her sister because they had nowhere to go:

¹³⁸ At that time, Dos Santos was the president of **Angola** whereas Mugabe was the president of **Zimbabwe**.

¹³⁹ See paragraph 34.

"She did not complain as both of them were without refuge. They needed a place to stay."

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage, conviction 27/10/2017, sentence 8/2/2018

Interestingly, the lack of alternatives embodied in the phrase "nowhere to go" can also act as a subtle restriction of freedom. See section 3.2.6.3 on *restrictions of freedom/subtle restrictions/ leaving the victim nowhere to go*.

3.2.7.4 *The significance of phones to isolation*

Like keys, which can be used to control victims, whether they are locked in or out, phones too can have a double-edged significance. Confiscating a victim's cell phone isolates him or her, as he or she cannot contact the outside world for practical help or emotional support. On the other hand, sometimes traffickers give cell phones to victims in order to better supervise them or allow them to contact customers. In both cases the phones are used to control the victim.

There are a number of cases in the region where cell phones are confiscated from victims in order to isolate them. Examples are **Mahuni (Zimbabwe)** where the victims' phones are confiscated by the accused along with their passports on their first day in **Angola**; **Adigwe Dike (Eswatini)** where a young Nigerian girl's cell phone and passport are confiscated by the accused who is charged with trafficking in the context of labour exploitation, although she is exonerated from that charge in the end.

In **M.L. (Seychelles)** a case of trafficking for sexual exploitation of a number of minor girls, the accused confiscated a cell phone from one of the girls as a blackmail tool, rather than with the purpose of isolating her. He threatened not to return it if she did not engage in oral sexual relations with him.

On the other hand, sometimes the trafficker wishes victims to have a cell phone so that he can better supervise them, or so that they can carry on the trafficker's business via the phone. Cases illustrating this use of phones can be found in section 3.2.6.3 on *restrictions of freedom/subtle restrictions/constant supervision*.

For a fuller treatment of isolation, see the global case digest, section 3.2.7 on *isolation*.

Kinds of Isolation

- Physical isolation – placing victims in remote places cut off from others
- Social isolation – examples:
 - Forbidding or limiting contact with others;
 - Confiscating cell phones;
 - Transporting victims to unfamiliar surroundings where they have no support systems and may experience language barriers;
 - Communities which know of the exploitation and pass over it isolate the victims.

The significance of phones to isolation

While confiscation of phones or interdictions as to their use may be used in order to isolate a victim, sometimes traffickers use phones as a way of supervising victims or allowing clients to contact them.

3.2.8 Low pay or absence of pay

Although low pay or absence of pay is part of the larger category of “*difficult working and living conditions*” described in section 3.2.9, we address it separately due to its centrality.

Absence of pay or low payment can contribute to the proof of an intent to exploit, as most Trafficking legislation in the region includes a ‘purpose of exploitation’ or an ‘unlawful purpose’.¹⁴⁰ Interestingly, **Madagascar** defines exploitation to mean: “*the obtaining of financial or other benefits by means of the reduction of a person to any type of services, prostitution, sexual servitude or other forms of servitude*”. This definition has a direct bearing on absence of payment or low pay.

Alternatively, this practice may contribute to proof of the ‘means’ as it can be looked upon as a subtle means of coercion, used to induce victims to continue to work in the hopes that they will eventually be paid.¹⁴¹

Cases across the region illustrate the strong connection between absence of pay or low pay and restrictions of freedom.

Thus, the court in **Alam (Seychelles)** shows a good understanding of how lack of payment can be used as such a method of control. In this case, the 4 Bangladeshi workers did not receive the pay promised them, were not paid overtime as promised and were not paid at all for a period of 4 months. In addition, the workers had borrowed large sums of money in order to pay the accused for finding them jobs, which exacerbated the distress caused by the lack of pay. Interestingly in the case of some workers, the accused purportedly transferred whatever money he *did* pay, to the families of the workers in Bangladesh, without consulting them, thus making the money inaccessible to the workers themselves in **Seychelles**. The court sees these practices as a means of control by the trafficker and convicts him of trafficking for practices similar to slavery and forced labour:

“The fact that salaries was not given to their hand for several months and instead a lesser amount than agreed, occasionally sent to their family which was not a part of the agreement, further indicates the financial control and financial dependency being exercised over the victims to prevent their freedom of movement. This control over their resources prevents their will to get away and make them more subjective to the employer.”

R. V. Alam (CO67/2016 [2018] SCSC 946 (19 October 2018), sentence 22 November 2018, the Supreme Court of **Seychelles**

Similarly, in **Shongwe (Eswatini)** a young man of 19 from **Lesotho** was trafficked from **South Africa** to **Eswatini** by deceptive means. Instead of the good job he was promised in another area of **South Africa**, he was taken to **Eswatini** where he was expected to herd cattle. He was paid for his work only once and the court noted that he did not have enough money to go home.

Many of the cases which address trafficking for sexual exploitation or prostitution involve women or children who receive no payment for engaging in sexual relations. Examples are **O.B. Abba (South Africa)**; **Ogochukwu (South Africa)**; **Obi (South Africa)**; **Allima (South Africa)**; **Mabuza (South Africa)**; **Dos Santos (South Africa)**; **Mujee (Botswana)**. This is also the case in **Jonas (Namibia)** and **Matini (South Africa)** where the accused persons are paid by means of food, rather than money, for recruiting young women for sexual exploitation.

¹⁴⁰ Thus, **Zimbabwe’s** law does not include the term ‘exploitation’, but one of the two trafficking offences requires proof of an ‘unlawful purpose’. We note that the second trafficking offence does not require proof of such a purpose.

¹⁴¹ See section 3.2.4.5 on *use of financial dependence* as a subtle means of coercion or abuse.

In other cases of trafficking for prostitution, the trafficker takes *most* of the money earned by the women. Examples are **Veeran Palan (South Africa)**, where the trafficker takes two thirds of the women's earnings; **Eze (South Africa)**, where the accused takes all the women's money but uses one half in order to buy drugs for one of them.

In yet another class of cases, women are not paid for prostitution, because the trafficker claims that they must pay him or her for the costs of transporting them to the country of destination. This transpires in **Mahuni (Zimbabwe)**, where one victim testified that the accused told her that she must sleep with men in order to pay the accused for the cost of the air tickets from **Zimbabwe to Angola**.

Another example is **Mansaur (South Africa)**, where the victim from Thailand was told that she had a 60,000 Rand debt to the accused for bringing her to **South Africa**, which means that the accused received all of her earnings until she repaid the debt. However in this last case, while the accused pled guilty, he committed suicide before the case was decided.

For a fuller picture of this practice see section 3.2.12 on *debt bondage*.

We note that this discussion of payment for prostitution does not reflect an approach whereby prostitution is considered to be work, as UNODC follows the Protocol in assuming a neutral approach towards this question.

Conversely, lack of payment is not required in order to convict on trafficking. Thus in **Maroodza (Zimbabwe)**, although the court notes that the 6 women victims were paid salaries for their domestic work, the accused person, who recruited them, was convicted of trafficking in persons, in view of the constellation of circumstances which characterized the case which included restriction of the women's movements, confiscation of their passports, particularly long hours of work with no vacations and the feeding of some of them with leftovers.

On the other hand, a **Madagascar** case yielded an exoneration, at least partially, because the prosecution had not adduced proof of inadequate remuneration. We refer to **Judgment 21 – CO (Madagascar)**.¹⁴² where the accused person recruited minors to work in a construction site but deceived them, took them to an unknown location, and confiscated their identity cards. Nevertheless the court harboured doubts about his intent to exploit, since there was no evidence that the remuneration proposed by the accused was inadequate or did not comply with legal provisions or that the victims worked under forced labour. However, this ruling may be a function of **Madagascar's** definition of "exploitation" as "*the obtaining of financial or other benefits by means of the reduction of a person to any type of services, prostitution, sexual servitude or other forms of servitude.*"

3.2.9 Difficult working and living conditions

Like the absence of pay or low pay, difficult working and living conditions may contribute to proof of a 'purpose of exploitation' such as "forced labour" or "slavery" or to proof of a 'means' such as "coercion" or "abuse of a position of vulnerability", in situations where these conditions are used to break the will of the victim and facilitate further exploitation. Literature on trafficking clarifies how such conditions may be used to control the victim.

¹⁴² Judgment 21 – CO of 5 March 2019, before Supreme Court of **Madagascar**.

“The creation of physical impairment and exhaustion is another form of control used by traffickers. Victims are frequently forced to work unreasonable hours, which leaves them physically exhausted. Basic necessities, such as adequate food, water, clothing, shelter, and sleep may be withheld, leaving some victims resembling “walking skeletons”. Lack of medical care may lead to additional physical impairment . . . Unsanitary and crowded living conditions, coupled with poor nutrition, foster a host of adverse health conditions such as scabies, tuberculosis, and other communicable diseases.

*Injuries sustained during work may further decrease viable alternatives for victims. In all of these situations, physical **impairment decreases resistance and increases the vulnerability of victims to further exploitation**...Trauma experts recognize that, “in addition to inducing terror, **the perpetrator seeks to destroy the victim’s sense of autonomy**. This is achieved by scrutiny and control of the victim’s body and bodily functions. “Deprivation of food, sleep, shelter, exercise, personal hygiene, and privacy are common practices. Deprivation of basic needs also creates a unique relationship between victim and perpetrator. Once the perpetrator has established this degree of control, he becomes a potential source of solace as well as humiliation. “The capricious granting of small indulgences may undermine the psychological resistance of the victim far more effectively than un-remitting deprivation and fear.”¹⁴³ (Our emphases)*

Hopper and Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims”, 1 Intercultural Human Rights Law Review, p. 197.

The following are examples of such difficult conditions. We note that convictions can depend on a **constellation of such conditions**, rather than one or another. However, for the purposes of analysis, we will focus on each condition in itself.

3.2.9.1 Long hours/no vacations

Trafficking cases across the region mention long hours among the difficult conditions which contribute to convictions.

An example is **Alam (Seychelles)** where 4 Bangladeshi workers were worked for long hours and three out of the four were required, in addition to their day jobs, to work for hours each evening and night in order to complete building their own accommodations. One victim testified that this additional work went on between 5 p.m. and 10 p.m. every night. The accused was convicted of trafficking in persons for practices similar to slavery and forced labour in regard to each of the 4 workers.

Similarly, in **Maroodza (Zimbabwe)** the court notes that the 6 women trafficked to Kuwait for domestic work were obliged to work 15 hours a day, often getting to sleep “way after midnight”. Nor were they given vacations. The judge convicted the accused recruiter of trafficking for unfair labour practices,¹⁴⁴ but also noted that the conditions included “some slavery and in particular forced labour and bonded labour”.

Sometimes, as in **Alam (Seychelles)**, victims are exploited in two frameworks, which when combined amount to long hours of work. Thus, in **Mahuni (Zimbabwe)** the victims worked selling clothes the whole day and were expected to sleep with men at night. The accused was convicted of procuration for prostitution.¹⁴⁵ Similarly, in **Matini (South Africa)** the mentally disabled minors were not only expected to sleep with men on a regular basis, but also helped the

¹⁴³ The quote within the quotes is from Judith Herman’s “Trauma and Recovery”.

¹⁴⁴ We note that the **Zimbabwe** Trafficking Act includes an ‘unlawful purpose’ of “illegal labour” as well as “forced labour”.

¹⁴⁵ We note that at the time the crimes were committed, **Zimbabwe** did not have a comprehensive Trafficking Act.

dominant accused with her dagga business and helped clean the house and do washing.¹⁴⁶ By the same token, in **Eze (South Africa)** one victim testified that in addition to being required to engage in sexual relations with men, she was required to clean the accused person's house and make food.

For a more detailed picture of how long hours of work can be used to restrict victims' freedom, see also section 3.2.6.3 on *subtle restrictions of freedom/lack of leisure time*.

3.2.9.2 Lack of safety equipment

Lack of safety equipment is mentioned by the court in **Alam (Seychelles)** as a circumstance which contributed to the conviction on trafficking. Thus, the court mentions in its list of circumstances leading to the conviction: "*the absence of protective equipment normally given to construction workers.*"

Similarly, in **Mahuni (Zimbabwe)**, a case revolving around procurement for prostitution,¹⁴⁷ the victims testified that they were expected to engage in unprotected sexual relations with a series of men.

We note that lack of safety equipment, in and of itself, may not suffice to lead to a conviction. For a fuller picture of this circumstance, see section 3.2.9 of the global case digest on *difficult working conditions*.

3.2.9.3 Lack of access to medical care

Lack of access to medical care may adversely affect the physical and emotional health of victims and thus weaken their will to resist.

In the sample of cases which form the basis for this digest, courts mention this aspect in a number of cases.

Thus, in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of victims, including 2 mentally disabled minors, two witnesses testified that they saw blood coming out of the vagina of one of the mentally disabled victims who was constantly given to men for sexual exploitation. Despite this, there is no mention of the victim being taken to receive medical care. When any of the witnesses remonstrated with the dominant accused person about her treatment of these victims, she told them to mind their own business, made up excuses or tore up a newspaper clipping which told of the two disabled victims going missing.

Interestingly, a number of witnesses testified that the dominant accused person also sold her own daughter to a series of men and that she subsequently died of HIV. One witness, the mother of accused number 2, testified that she herself paid for a doctor for the accused number 1's daughter, but was not assisted in any way by the accused. In its conviction ruling, while the court does not allude explicitly to the lack of access to medical care, it evaluates that the witnesses who testified about the medical condition of the mentally disabled victim and the accused number 2's own daughter were credible.

The connection between a conviction and lack of access to medical care is clearer in **Jezile (South Africa)**, a case revolving around the trafficking for sexual exploitation of a child, in the context of forced marriage. The accused injured the victim with the handle of a broom or mop and with a belt, in an effort to overcome her resistance to engage in sexual relations with him. According to the medical testimony rendered in the case, the victim had a huge gaping wound on the lower thigh that had become septic, two healing abrasions on the left forearm and a haematoma on her toe. The medical opinion established that the leg wound was consistent with the victim being assaulted with the handle of a mop or broom and the arm and foot injuries were

¹⁴⁶ We note that dagga is a term used for marijuana in **South Africa**.

¹⁴⁷ We note that at the time of the ruling, **Zimbabwe** had not yet enacted a Trafficking Act.

consistent with being assaulted with a belt. The victim was referred to the hospital's casualty unit to care for her leg and receive a tetanus shot.

The court of first instance noted that the septic condition of the leg wound contradicted the testimony of the accused's sister in law, according to which she had taken the victim to a doctor in order to receive medical care for the leg wound. The court of first instance convicted the accused of rape and assault in addition to trafficking, relying in part on the evidence of the victim's medical condition. The court of appeals convicted the accused of trafficking for sexual exploitation and rapes, but exonerated the accused of assaults. However, the exoneration from assaults was due to the court's opinion that they were part of the rapes, which crimes were proven, among the rest, by medical evidence of the victim's condition. We note that the victim was locked in her brother and sister in laws' house at the time of the assaults, so that she had no way of obtaining medical care on her own.

Conversely, in at least one case, the trafficker used health services in order to facilitate the victim's sexual exploitation. Thus, in **Jonas (Namibia)**, a case revolving around the trafficking of a young woman who was given to several men for sexual exploitation, the accused arranged for a fraudulent health passport for the victim, so that she could receive services at a health clinic. The accused then had the victim injected against pregnancy, without the victim understanding the nature of the injection. This was done in order to prevent the victim from falling pregnant which could impede her exploitation. On the other hand, at one point, the victim fell sick and was bleeding profusely, whereupon the accused brought her health passport to the sexual exploiter with whom she was living, and he took her to the hospital.

In **Adigwe Dike (Eswatini)**, a case revolving around alleged trafficking for forced labour, the alleged victim was severely beaten by the female accused, to the extent that several witnesses described the bruises on her face and the scratches all over her body, and one described her face as swollen with dark bruises. No testimony, including that of the accused, related that the alleged victim had been taken to a doctor. We also note that the victim would have been hard pressed to seek medical attention on her own, as she was foreign in the country and of no independent economic means. While the court exonerated the accused from trafficking charges, it convicted the female accused of assault. We note that the exoneration arose, at least in part, from the court's doubts regarding the accused persons' intent to exploit when the girl was transported to **Eswatini**, making the subsequent difficult conditions irrelevant in its view.

3.2.9.4 *Many clients*

Cases revolving around trafficking for sexual exploitation often stress how many clients victims usually served. Thus, in **Ogochukwu (South Africa)** the victim served 6 men a night; in **Eze (South Africa)** one victim testified that she served 4-5 clients a day; in **Matini (South Africa)** the two mentally disabled minor victims were constantly resold to men during the period of exploitation which lasted for 16 days; in **Dos Santos (South Africa)** there was testimony according to which victims sometimes slept with 8 men a day.

We note that the discussion of the many clients of prostitution does not reflect an approach whereby prostitution is considered to be work, as UNODC follows the Protocol in assuming a neutral approach towards this question.

3.2.9.5 *Lack of adequate food*

In cases across the region, traffickers often do not give victims adequate food. Sometimes it is clear that this is done in order to control them and break their will to resist.

Thus, in **Alam (Seychelles)**, the victims from Bangladesh, recruited in order to work in **Seychelles**, testified that they were given inadequate food by the accused, to the extent that they

begged food from another employer. A visit to the premises, where some of the victims resided, by a police officer revealed that there was barely any food in the refrigerator. In addition, at least one witness testified that the victims seemed thin. The court mentioned this, among other circumstances, in its ruling convicting the accused of trafficking for practices similar to slavery and forced labour.

Another example of victims reduced to begging for food occurs in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique** to **South Africa**. The children suffered from a lack of adequate food and experienced hunger which reduced them to begging for food sometimes. The court of first instance convicted the accused persons of trafficking for sexual exploitation, noting that among the ‘means’ used were “abuse of power or of a position of vulnerability.”

Similarly, in **Eze (South Africa)** a case revolving around the trafficking for sexual exploitation of 2 young women addicted to drugs, police found no food in the refrigerator at the premises where they were held. This confirmed the testimony of one victim that she sometimes ate only once a day. The court mentioned the victims being deprived of food and essentials as punishment at the whim of the accused in its ruling convicting him of trafficking for sexual exploitation.

Other examples of providing victims with inadequate food are **Mahuni (Zimbabwe)** a case revolving around the procurement for prostitution¹⁴⁸ of 3 young women from **Zimbabwe** to **Angola**, and **Allima (South Africa)** where a 16 year old was abducted from her native town for sexual exploitation. She testified that at one point she was not given food by the accused. While the courts do not dwell on this aspect directly in their rulings, it is mentioned in their description of the testimonies of the victims.

A particularly extreme example of starvation occurs in **Shongwe (Eswatini)** where a young man from **Lesotho**, trafficked from **South Africa** to **Eswatini** by deceptive means, is employed as a cattle herder and given only mealie meal to eat, so that he needs to gather fruit on the veld in order to survive and is dependent on a fellow herder to give him relish to eat with the mealie meal. These difficult living conditions are explicitly mentioned by the court as relevant to the conviction.

Sometimes victims are given only leftovers, as transpired in **Maroodza (Zimbabwe)** where all 6 victims, trafficked for domestic labour, received inadequate food and some of them received only leftovers to eat. The court calls these conditions (among others) unfair labour practices and notes that the victims were also subjected to “some slavery” and in particular, bonded labour and forced labour. It convicts the accused of trafficking in persons.

The use of food to control victims is made clear in 4 cases.

In **Eze (South Africa)** one victim testified that if she did not see clients, she was not given food as a punishment.

Similarly, in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**, the children were threatened that they would be abandoned and would have nowhere to go and no food to eat if they did not do as they were told. In addition, sometimes food like meat was denied the children in order to induce them to comply with the demand that they acquiesce to their sexual exploitation. The court of first instance clarifies that “*This motivated the children to simply do as they were told.*”

By the same token, in **Jonas (Namibia)**, a case revolving around the trafficking of a young woman who was given to a series of men for sexual exploitation, the accused denied the victim meat that came from a man called Philip as a means of pressure and punishment, when the victim

¹⁴⁸ We note that at the time of the ruling, **Zimbabwe** did not have a comprehensive Trafficking Act.

refused to stay with him in order to be sexually exploited. In its ruling, the court views this as satisfying the ‘means’ element of the crime.

Similarly, in **Mujee (Botswana)**,¹⁴⁹ a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, illegal in **Botswana**, the victim testified that sometimes, when the accused was angry with her for complaining about the abuse, she would refuse to provide food for her for days, thus using the withholding of food as a method of controlling the victim’s behaviour. In its ruling on the conviction, the court notes that the victim was dependent on the accused for food and shelter.

3.2.9.6 Lack of access to adequate clothing and hygiene

Cases across the region reflect neglectful treatment of victims in terms of clothing and personal hygiene.

A particularly extreme example occurs in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique** in **South Africa**. While the court of first instance does not explicitly connect the children’s living conditions to its conviction, it emphasizes them in its description of the facts of the case thus: “...*their clothes were tattered and they themselves were dirty.*”

Lack of adequate clothes is also mentioned in other cases, although the courts do not explicitly rule that it contributed to the conviction. One example is **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 young women from **Mozambique** in **South Africa**. The court mentions that the victims had very little clothing and that some arrived only with the clothes that they were wearing.

In **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of several victims, including 2 mentally disabled minors, several witnesses testified that the two mentally disabled victims had no luggage or extra clothing and two witnesses testified that in the case of one victim, they saw blood on her clothing or coming out of her vagina. This case illustrates the connection between lack of adequate clothing and poor hygiene.

Similarly, in **Allima (South Africa)** the 16 year old victim of trafficking for sexual exploitation was abducted with only the clothes on her back. She testified that she had no clothes of her own, so that another girl, named Vanessa gave her clothes to wear on occasion.

Two cases which ended in exonerations also reflect this condition. Thus in **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a 14 year old girl by her stepfather, the court of first instance mentions that while the stepfather bought clothes for his biological children, he neglected to buy clothes for his stepdaughter. Although the court of first instance, which convicted the stepfather of trafficking for sexual exploitation did not explicitly connect between this circumstance and the conviction, it does mention it. We note that while the High Court exonerated the stepfather on charges of trafficking, this did not reflect its approach to the problematic nature of this living condition, but rather had to do with lack of adequate proof of the stepfather’s intent when he transported the child from **Eswatini** to **South Africa**.

The second case is **Adigwe Dike (Eswatini)**, a case revolving around claims of trafficking for forced labour. Among the other difficult circumstances of the alleged victim’s life, the court mentions testimony whereby the alleged victim wore the same clothes constantly, although the accused persons were in the business of selling wares, including clothes. The court exonerated the accused persons from the charge of trafficking, since the prosecution had not proved that the accused never intended to enroll the girl in a tertiary educational institution when the girl was transported to **Eswatini**. The court also noted that the tasks performed by the girl were

¹⁴⁹ See paragraphs 9 and 34.

agreed tasks, which negated the element of exploitation, but never explored the question if the difficult living conditions impacted on the issue of exploitation. This case will be more thoroughly analyzed in section 4.4 on *how to handle the subject of victim consent*.

Why are lack of clothes and the lack of ability to clean oneself considered to be difficult living conditions? Why do they strengthen the trafficker's control over the victim? Because they deny victims the most basic autonomy over their bodies and can lead to lack of self esteem and even humiliation. The humiliating nature of lack of clothes is emphasized in a case from the United States:

"On one occasion in 2003, William Hespeler, an electrician performing work at the home, observed Samirah dressed in "raggedy clothes," ...Her meager dress that day was not atypical. Indeed, beginning around March 2007, Varsha Sabhnani refused to provide Samirah with even the semblance of adequate clothing, requiring her to wear tattered sweat pants and a top made from old rags and the cut remnants of a dress. Various witnesses testified that Samirah wore "torn or tattered," "messy" clothing, rags "used for cleaning the floor" and clothing that left her "private part ... visible."

U.S. v. Sabhnani, 599 F.3d 215 (2nd Cir. 2010), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA033).

Moreover, whereas bathing can lead to a reduction in stress, and is widely recognized to lead to emotional as well as physical benefits,¹⁵⁰ an extended period without bathing may well lead to the opposite.

3.2.9.7 Poor accommodations

Many cases across the region include descriptions of problematic accommodations for victims. These may be open to the elements; crowded; dirty; messy; without good access to water and electricity; ridden with mold and rodents. Such surroundings are thought to be related to lack of psychological well-being.¹⁵¹

One of the most extreme examples is **Shongwe (Eswatini)**, a case revolving around the trafficking of a young man from **Lesotho**, who resided in **South Africa**, to **Eswatini** in order to serve as a cattle herder. The court describes his living conditions at length and rules that they (among other conditions) lead to a conviction on trafficking for slavery.¹⁵² The court describes his accommodations as *"not fit for human occupation"*. He lives in one room made of concrete bricks and unplastered old corrugated iron sheets with multiple patches; there are water signs on the walls denoting that water pours down whenever it rains; there are water stains on the floor, showing that there are constant drops of water inside when it rains; the door is closed by tying it with wire and has big crevices from which one can see outside, even when the door is closed; windows are covered with scrap metal.

Another extreme case is **Alam (Seychelles)**, revolving around the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi workers. The accommodations of most of

¹⁵⁰ See for example, Yasuaki Goto et al., *"Physical and Mental Effects of Bathing: A Randomized, Intervention Study"*, Evidence-Based Complementary and Alternative Medicine, Volume 2018, (Hindawi), accessible at https://www.researchgate.net/publication/325632685_Physical_and_Mental_Effects_of_Bathing_A_Randomized.

¹⁵¹ See for example, Gary W. Evans, *"The Built Environment and Mental Health"*, *J Urban Health*, 2003, 2003 Dec; 80(4): 536–555, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3456225/>.

¹⁵² We note that according to the **Eswatini** Trafficking Act, "slavery" is defined as including a situation where a person is compelled to work through force or coercion or inducement or fraud without pay or pay below subsistence.

the workers were so poor that they were obliged to work on them after their regular work hours in order to make them fit for human habitation.

Thus, one worker testified that one of the accommodations where he was housed required one worker to sleep on the floor; there were no proper kitchen facilities or windows; running water was only available sometimes; water dripped through the ceiling onto the top bunk bed whenever it rained. Another accommodation had just been built and was not yet connected to electricity or water, requiring the workers to work on the house in order to build a septic tank and furniture and do tile work.

A public health services employee who visited one of the sites testified that there were 5 workers living in space fitting for 2; poor hygiene; rodent activity; mold growth; lack of running water in the kitchen; and lack of living areas. He expressed his opinion that the accommodation was “*not fit for human habitation*.” In its ruling on conviction, the court mentions the accommodations and the fact that the workers slept where they worked as circumstances which contributed to proof of the exploitation.

In **Maroodza (Zimbabwe)**, a case revolving around the trafficking for domestic service of 6 young women to Kuwait, the court notes, among other circumstances, that the victims were housed in very small rooms. This was considered one of the circumstances which led the court to convict on trafficking in persons. The court noted that this, among other circumstances, reflected unfair labour practices,¹⁵³ but also noted that there was “some slavery” and in particular bonded labour and forced labour.

In **Obi (South Africa)**, a case revolving around trafficking for sexual exploitation, the court noted that the accommodations were messy, with condoms lying all over the premises and sparse furnishings. However, since only the sentence was available, we do not know if this circumstance impacted directly on the conviction.

3.2.9.8 *A constellation of circumstances leading to conviction*

As said, in most cases which refer to difficult working and living conditions, there was a constellation of such circumstances, along with other pieces of evidence, which led to convictions on trafficking. **There was no case where a conviction proceeded from only one difficult working or living condition.**

For example, in **Alam (Seychelles)**, a case revolving around the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi men, the circumstances which led to a conviction on trafficking charges included several difficult working and living conditions such as absence of payment or low payment, lack of adequate food, inhumane accommodations, lack of safety equipment, and long hours of work. Moreover, there were other pieces of the mosaic of evidence which contributed to the conviction and for example, financial dependence, vulnerabilities, deception, threats, detention of passports, isolation.

Another such example is **Shongwe (Eswatini)**, a case revolving around the trafficking of a young **Lesotho** man from **South Africa** to **Eswatini** under false promises of a good job. The difficult working and living conditions included lack of payment after the first month, lack of adequate food, inhuman accommodations. Moreover the mosaic of evidence also included deception, violence, threats, vulnerabilities, isolation. The court explicitly ruled that this constellation of circumstances established labour exploitation or more exactly, trafficking for slavery.¹⁵⁴

¹⁵³ We note that the **Zimbabwe** Trafficking Act includes an ‘unlawful purpose’ of “illegal labour” in addition to “forced services” and “debt bondage”.

¹⁵⁴ We note that the **Eswatini** Trafficking Act defines slavery as: including a situation where a person is compelled to work through force or coercion or inducement or fraud without pay or pay below subsistence.

However, these are only two examples of the importance of a constellation of circumstances. It is noteworthy that all the cases mentioned in this section included a constellation of circumstances which led to convictions.

Non-exhaustive list of difficult working and living conditions

- Absence of pay or low pay
- Long hours/no vacations
- Lack of safety equipment
- Lack of access to medical care
- Many clients
- Lack of adequate food
- Lack of access to adequate clothing and hygiene
- Poor accommodations

NOTE: In general convictions are based on a constellation of such circumstances and other pieces of evidence as well.

3.2.10 Violations of privacy or dignity/humiliation

3.2.10.1 Introduction

Violations of privacy or dignity can be considered part of difficult living conditions and may also be considered subtle means of coercion and abuse. However, due to their connection to the basic values which underlie the crime of trafficking, namely, autonomy and dignity,¹⁵⁵ we have chosen to address them separately.

Like other difficult living conditions, such violations may contribute to proof of the ‘purpose of exploitation’ or ‘means’ such as “abuse of a position of vulnerability” or “coercion”.

Not allowing the victim private space encroaches on his or her autonomy and erodes his ability to challenge the trafficker’s control. This is recognized in literature on trauma.

*“Trauma experts recognize that, “in addition to inducing terror, the perpetrator seeks to destroy the victim’s sense of autonomy. This is achieved by scrutiny and control of the victim’s body and bodily functions”¹⁵⁶. Deprivation of food, sleep, shelter, exercise, personal hygiene, and **privacy** are common practices.” (our emphasis)*

Hopper and Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims”, 1 Intercultural Human Rights Law Review 185, 199

3.2.10.2 Violations of dignity

Many of the cases which form the basis of this digest, illustrate violations of dignity. For example, sometimes traffickers use subtle means of coercion in order to make the victims feel worthless. This phenomenon appears in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs. One of the victims, named Els, testified that the accused made her believe that she was worthless.

Other examples include cases of trafficking for sexual exploitation, where the victims are made to pose in scanty clothing or in the nude for internet ads, or where victims are forced to perform

¹⁵⁵ See section 1.4 on content for sources which support this.

¹⁵⁶ This quote within a quote is drawn from Judith Herman, “Trauma and Recovery”.

or view sexual relations in the presence of others. See for example: **Obi (South Africa)**, **Veeran Palan (South Africa)**, **Eze (South Africa)** where victims are forced to pose nude or in scanty clothing for internet ads. In addition, in **Obi (South Africa)**, one victim is raped in the presence of another accused person and a victim is raped in the presence of another victim and then forced to witness sex between an accused person and the other victim.

We also refer to **Dos Santos (South Africa)**, where the accused forced a victim to view pornographic movies and watch her engaging in sexual relations with her boyfriend in order to teach her how to prostitute herself. The court calls this “inhuman treatment”. In **Mahuni (Zimbabwe)**, the accused, who deceived young women from **Zimbabwe**, promising them good jobs in **Angola**, required them to prostitute themselves on arrival. In order to “teach” one of them the “job”, she humiliated both victims, by requiring the one who had just arrived to view another victim engaging in sexual relations with men.

In **Maroodza (Zimbabwe)**, which revolves around the trafficking of 6 young women for domestic work in Kuwait, although the victims are promised jobs with good salaries, including accommodation and food, they meet with difficult conditions, some of which are humiliating, and for example, inadequate food, with some victims forced to survive on leftovers, confiscation of passports, restrictions on their freedom of movement, very small accommodations. In convicting the accused of trafficking in persons, the court notes that the women were deprived of most of their human rights: the right to movement, to association and to freedom of choice. It calls the circumstances “*inhuman and degrading treatment*”.

3.2.10.3 Violations of privacy

Violations of privacy occur in a number of cases, and for example, cases in which accommodations are crowded or do not allow locks can violate privacy. Thus, in **Alam (Seychelles)**, revolving around the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi men, some of the accommodations in which the workers both lived and worked were crowded and unfinished, thus not allowing the victims basic privacy. In analyzing the element of “exploitation”, the court mentions these circumstances.

Similarly, in **Shongwe (Eswatini)**, a case revolving around the trafficking of a young man from **Lesotho**, the door of his dwelling could only be closed by tying it with wire and the door itself had big crevices from which one could see outside, even when the door was closed. The court ruled that the poor living conditions which included this aspect, were among the constellation of circumstances which led to conviction on charges of trafficking for slavery.¹⁵⁷

In **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished 16 year old minor, illegal in **Botswana**, the victim is not given a key to her room, thus allowing the sexual exploiters to enter it with no hindrance.

We also refer the reader to section 3.2.4.7 on *making the victim feel worthless: humiliation/verbal abuse/constant anger* for more details on this form of mechanism.

Cases which focus on constant supervision illustrate gross violations of privacy as well. We refer the reader to section 3.2.6,3 on *subtle restrictions of freedom/constant supervision*.

Interestingly, two cases which yielded exonerations on trafficking charges best illustrate large scale violations of privacy and dignity.

In **Adigwe Dike (Eswatini)**, a case revolving around charges of trafficking in a labour context, a young girl was brought from Nigeria to **Eswatini**, where she resided with the accused persons and was expected to help the female accused with her business of selling wares. In return, the

¹⁵⁷ We note that the definition of “slavery” in the **Eswatini** Trafficking Act includes a situation where a person is compelled to work through force or coercion or inducement or fraud without pay or pay below subsistence.

accused obligated herself to enroll the girl in a tertiary educational institution. At some point the court notes that the relationship soured and there ensued a series of difficult conditions which included the detention of the girl's passport, assaults and constant searches of the girl's room. The court notes that *"Her room would be raided anytime by the accused persons who would conduct unexplained searches."* Interestingly most of these facts were not disputed by the accused persons. The court exonerated the accused persons from the charge of trafficking, since it was of the opinion that the prosecution had not proved that the accused never intended to enroll the girl in a tertiary educational institution when she was transported to **Eswatini**. The court also noted that the tasks performed by the girl were agreed tasks, which negated the element of exploitation. We note that court did not explore the question if the difficult living conditions, including the violations of privacy, impacted on the issue of exploitation. This case will be more thoroughly analyzed in section 4.4 on *how to handle the subject of victim consent*.

In **Fakudze (South Africa)**, the case revolved around the sexual exploitation of a 14 year old girl by her stepfather, who transported her from **Eswatini** to **South Africa**. This is the case which best illustrates the loss of autonomy created by leaving the victim no space for herself, as described by the court of first instance.

"She was never given space as a child. The accused would sexually harass the child wherever she was, whether she was sleeping on the floor or on the bed. He would touch her breasts and private parts wherever she would be sitting."

State v. MMF, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in *Fakudze v State* Case no: AR410/2018 in the High Court of **South Africa** KwaZulu-Natal Division, Pietermaritzburg, June 7, 2019.

While the court of first instance convicted the stepfather of trafficking for sexual exploitation and rape, the High Court confirmed the conviction on rape but reversed the conviction on trafficking. It reasoned that the prosecution had not adequately proven the intent to exploit when the stepfather transported the girl to **South Africa**, especially since he did not begin to exploit her until she had been in the country for several months. We note that the High Court did not express an opinion on the relevance to the trafficking charge of the gross violation of privacy by the accused. Moreover, it did confirm the conviction on rape, thus recognizing that serial sexual exploitation had taken place, and not denying the instrumentality of the perpetrator's serial violations of the victim's privacy as a control method. This case too will be more thoroughly addressed in section 4.4 on *how to handle the subject of consent*.

3.2.11 Signs of ownership/objectification

3.2.11.1 Introduction

Signs of ownership or objectification can impact on several elements of the definition of trafficking in persons. They can be relevant to the 'actions' enumerated in the Protocol or to particular 'actions' enumerated in some States' legislation like "sale", or allied acts like "procurement", "exchange", "lease".¹⁵⁸

¹⁵⁸ **Lesotho's** Trafficking Act includes sale; **Mauritius'** Trafficking Act includes sale and procurement; **Namibia's** and **South Africa's** Trafficking Acts include: sells, exchanges and leases.

They can also be relevant to ‘means’ mentioned in the Protocol, like “coercion”, “abuse of power or of a position of vulnerability” or “abduction” or to ‘means’ which appear in the Trafficking Acts or sections of some States in the region like “trapping”,¹⁵⁹ “kidnapping”¹⁶⁰ or “detention”.¹⁶¹

They can also be relevant to ‘purposes of exploitation’ mentioned in the Protocol and additional ones, mentioned in the Trafficking Acts of various States and for example, one State recognizes sale of a person as a ‘purpose of exploitation’¹⁶² and another State includes the sale of a child as an example of the ‘purpose of exploitation’ of “child labour”.¹⁶³ In addition, ‘purposes of exploitation’ like “forced marriage”,¹⁶⁴ “child marriage”,¹⁶⁵ “recruiting or using a child for armed conflict”¹⁶⁶ or “child labour”¹⁶⁷ can reflect ownership and objectification.

Ownership and objectification may also be directly related to the ‘purpose of exploitation’ of “slavery” or to “slavery” as a separate crime allied to trafficking. Thus, most States in the region which define “slavery” follow the definition in the Slavery Convention of 1926 which turns on ownership thus:

“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.”

Even, the **South African** Trafficking Act which provides an innovative definition of the term, does not abandon the element of ownership, although the definition places more emphasis on control, thus:

““slavery” means reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person.”

Over and beyond the elements of the crime, signs of ownership or objectification best reflect the values at the core of the trafficking in person crime, which protects against the violation of a person’s autonomy, dignity and freedom.¹⁶⁸

The following are some examples of cases which reflect signs of ownership or objectification:

3.2.11.2 Selling people (including organs)

There is no better reflection of ownership or objectification than selling human beings. This extreme form of objectification occurs with regard to adult and child victims.

A number of cases describe the sale of a child. One example is **Kapinga (Malawi)**. The accused persons, who were a brother and sister, bought a 7 year old child in order to exploit him in a maize mill. The seller first met the male accused when employed by him to pack peas in his field. The employee was then asked to bring a “mortar”, which meant a human being, to use

¹⁵⁹ See **Angola’s** definition of ‘trafficking’.

¹⁶⁰ See the Trafficking Acts of **Lesotho, Namibia** and **South Africa**.

¹⁶¹ See the Trafficking Act of **Zimbabwe**.

¹⁶² See **Madagascar’s** Trafficking Act.

¹⁶³ See **Zambia’s** definition of the term “child labour” in its Trafficking Act.

¹⁶⁴ See the trafficking Acts of **Botswana, Lesotho, Madagascar, Mauritius, Mozambique**, and **Namibia**. See also **South Africa’s** Act which creates a special form of trafficking for forced marriage.

¹⁶⁵ See the trafficking Act of **Botswana**.

¹⁶⁶ See the trafficking Act of the **DRC**.

¹⁶⁷ See the trafficking Acts of the **DRC, Namibia, South Africa** and **Zambia**.

¹⁶⁸ See section 1.4 on *content* for sources which support this.

in the maize mill. Because the seller was desperate for money, he did so. The two buyers were convicted of child trafficking according to the Child Care and Protection Justice Act of **Malawi**. It is instructive that the Court of Appeals explicitly viewed this as commodification, noting that the child was viewed as *“a commodity in the form of a person to be used in the maize mill.”* The child subsequently disappeared and was presumed to be dead.

Another example of child selling is **Msweli (South Africa)**, where a 6 month old baby was abducted and sold to a childless couple for 2500 Rand and an air conditioner. The couple cared for him lovingly which raised questions regarding proof of the ‘purpose of exploitation’. The prosecution claimed that the elements of trafficking for slavery had been established, as there is no better reflection of slavery than buying and selling human beings. While the court did not explicitly support this claim, it convicted the sellers of child trafficking, ruling that all the elements of the crime were fulfilled, including the commodification of the child. A more detailed description of this issue appears in section 4.7 on *issues arising in child selling and adoption cases*.

Additional examples concern selling children for sexual exploitation. This transpired in **Allima (South Africa)** where a 16 year old girl was abducted from her town and given by the accused to a succession of men for monetary consideration. The accused was convicted of trafficking for sexual exploitation.

A similar scenario occurred in **Matini (South Africa)** which concerned an accused person who sold young women and minors, 2 of whom were mentally disabled, to men for food, comestibles and presents. Similarly, in **Mujee (Botswana)**¹⁶⁹ the court concluded that the accused received monetary compensation for allowing the sexual exploitation of a 16 year old minor by analyzing a constellation of circumstantial evidence. In both cases, the accused persons were convicted of trafficking for sexual exploitation.

Similar to child selling is child abduction. Thus, in **Saidi (Malawi)** a woman gave birth, and the same night her baby was taken from her, before it was even breastfed. In the end, the baby was separated from its mother for 4 days and then recovered. The accused was convicted of child trafficking.

The enormity of selling a child is reflected in **Sikapizya (Zambia)** where a 12 year old boy’s brother attempted to sell him. In sentencing the accused, the court expresses its moral disgust.

“Human beings are not items for selling; you sell items, livestock and animals not human beings;...this is no difference between what you attempted to do and those who were selling people off into slavery.”

People v. Sikapizya, HWS/50/2019, Kasama High Court in Northern Province **Zambia**, Justice EP Sunkutu. We note that conviction was adjudicated at Isoka Subordinate Court in Muchinga Province and that only the sentence was available.

We note that child selling cases have also yielded exonerations and for example **Mwewa (Zambia)**, where a father attempted to sell his daughter and an uncle attempted to sell his nephew, and **Kasonde (Zambia)** where the female accused attempted to sell her young niece. The charges related to a section of the law prohibiting advertisement of a person alluding to trafficking. The courts in both cases exonerated the accused persons, even though they were caught red handed attempting to conclude the transactions, because they interpreted the term “advertisement” as requiring the prosecution to prove that a specific victim was advertised, which had not been done. In addition, since the exploitation had not yet transpired, the prosecution did not succeed in proving what sort of exploitation was intended.

¹⁶⁹ See paragraph 34.

Cases also relate to the selling of adults, which can assume several forms. Firstly, there are cases where adults (like children) are sold for sexual exploitation. This occurs in **Jonas (Namibia)**, where an 18 year old girl is sold by the accused to a succession of men who pay the accused with food and other items. It can also be seen in **Eze (South Africa)**, where both victims of trafficking for sexual exploitation describe a series of sales of themselves by various pimps and traffickers until they are sold to the accused. In both cases, the accused persons were convicted of trafficking for sexual exploitation. It also occurs in **Lourenco (Malawi)**, where young women (one of whom is a minor of 15) are sold for \$10,000 apiece to Nigerians who run sex clubs. The accused was exonerated of procurement for prostitution because the girls had been prostitutes before she recruited them. However, we note that this charge was chosen because **Malawi** did not yet have a Trafficking Act at that time.

Secondly, several cases describe the selling of adults for their organs. One such example is **Phiri (Malawi)** where a 21 year old albino girl was induced by her uncle to accompany him to a place where he promised her a good job. On the way, she was murdered and her organs removed, due to a superstition that albino organs can help people to get rich.¹⁷⁰ The uncle pled guilty to murder, extracting human tissue and a transaction in human tissue. Consequently, the judgment itself relates to the other persons convicted.

Another example of selling a person in order to remove his organs occurs in **Mboo (Zambia)** where a 24 year old man, who had just lost his wife and had a child to support, came for a visit to his brother in law, who attempted to sell him for his organs. The potential buyer alerted the police who rescued the victim and arrested the perpetrator. The court convicted the accused of trafficking for body parts removal.

3.2.11.3 *Viewing victims as merchandise*

In cases across the region, traffickers use terminology which reflects the objectification of victims and the traffickers' sense of ownership over them. For example, in **Kapinga (Malawi)**, which concerned the sale of a 7 year old child, the child is referred to as a "mortar". Similarly, in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of victims, including 2 mentally disabled minors, when new girls arrive to be sexually exploited, they are referred to as "mounts". This term was explained by witnesses as an analogy to new horses without owners. One witness also stressed that the new girls are not called by their names, but rather "mounts" so that they do not know that they are being discussed. Similarly in **Mboo (Zambia)**, the accused person referred to his brother in law, whom he was intending to sell, as "the merchandise".

Terminology can also reflect ownership. Thus, In **Jonas (Namibia)** one of the men to whom the victim was sold told her that she "belonged to him".

3.2.11.4 *Ignoring victims' views and feelings as subjects of rights*

In cases across the region, traffickers act in disregard of victims' views and feelings as subjects of rights, thus objectifying them. In truth, this is an intrinsic characteristic of most trafficking cases, where victim consent is seldom genuinely free and voluntary.¹⁷¹

This behaviour can occur in any number of situations, and for example: when traffickers for sexual exploitation assume that they can sleep with victims as a matter of right; when sexual exploiters engage in sexual relations with victims despite their clear reluctance to do so, or even when they are unconscious; when traffickers in a labour context refuse to give victims written contracts,

¹⁷⁰ See section 3.2.5.6 on *Vulnerabilities/Physical or mental characteristics, including disabilities/albinism* and Baker, Lund, Nyathi and Taylor, "The Myths Surrounding People with Albinism in **South Africa and Zimbabwe**".

¹⁷¹ See section 4.4 on *how to handle the subject of victim consent*.

even when they are requested to do so; when victims are transferred from one employer to another without asking for their agreement; when salaries of victims are one sidedly sent to their families without seeking their consent. In essence, any time a trafficker deceives a victim or persuades him or her to accede to demands by means of coercion, whether physical or psychological, he is ignoring the victim's right to exercise free choice.

Due to the prevalence of this phenomenon in trafficking cases, only a few examples will be cited. In **Jonas (Namibia)** one of the men who pays for sexually exploiting the victim sleeps with her even when she herself is sleeping, thus treating her like an object. Similarly, in **Obi (South Africa)**, **Eze (South Africa)** and **Ogochukwu (South Africa)**, all of which concern trafficking for sexual exploitation, the traffickers who prostitute the victims expect them to sleep with the traffickers as a matter of right.

Another example reflecting this kind of objectification occurs in **Jezile (South Africa)**, a case revolving around trafficking for sexual exploitation of a 14 year old child in the context of a forced marriage. The perpetrator decides to marry the victim, even though he knows nothing about her except her age and her virginity, and has seen her only once; he does not seek the consent of the girl before he marries her; he does not consult her when he one-sidedly decides to move from her home village to Cape Town; he forces her to engage in sexual relations with him when he knows that she does not wish this. The court convicted him of a series of rapes and of trafficking for sexual exploitation.

Additional examples appear in **Alam (Seychelles)**, where 4 Bangladeshi men are trafficked for practices similar to slavery and forced labour in **Seychelles**. The trafficker refuses to give the men a written contract, although it exists and despite their requests; he subcontracts them to other employers without seeking their agreement; he sends payments for their work to their families in Bangladesh without asking them if they agree; he moves them from place to place without consulting them.

3.2.11.5 Failure to give victims basic information

Another form of objectification occurs when traffickers do not divulge full information about a job and the circumstances surrounding it, thus not allowing the victims to make reasoned decisions. For example, in **Bandawe (Malawi)** a number of young females were recruited for good jobs in Kenya. The accused persons took care of the immigration process single-handedly, without requiring the victims to do anything but be photographed. They never divulged crucial information to the victims, including the names of the contact people in Kenya and **Tanzania**; their final destination; which institutions would employ them in their final destinations. The accused was convicted of trafficking. The court highlights the impact of this lack of information in its ruling.

"Information about the specific final destinations and the details of their prospective employer(s) were vital in the decision making by the victims as well as their families. It is not surprising then that owing to the hazy information by the three accused persons, the four victims themselves were not even sure as to where exactly they were heading, whether Kenya or Dubai."

State v. Bandawe and others, Criminal Case No. 213 of 2017, in the Senior Resident Magistrate Court Setting at Lilongwe, conviction June 30, 2017; sentence July 26, 2017.

Another example of this kind of objectification relates to actions performed on victims without their being informed of the purpose of the action. In **Jonas (Namibia)**, the case revolves around the trafficking for sexual exploitation of an 18 year old girl who is given to a succession of men.

The accused takes the victim to a health clinic where she is given an injection against pregnancy, without telling the victim about the nature of the injection.

3.2.11.6 *Treating victims like instruments*

Sometimes treatment of victims reflects that they are only considered instruments to perform tasks. For example, it is instructive that in **Esther Phiri (Zambia)**, a case revolving around the trafficking of a 14 year old girl, the child is left at the gate of the accused person's sister's home, where she is to work, after a long journey, with no preparation or introductions whatsoever. A similar scenario occurs in **Veeran Palan (South Africa)** where the dominant male trafficker wants the victims to begin engaging in prostitution on the evening of their arrival, after a 16 hour journey.¹⁷² Both cases yielded convictions on trafficking.

3.2.11.7 *Advertising victims' bodies on internet sites*

In quite a few trafficking for sexual exploitation cases, traffickers arrange that victims' bodies be advertised on the internet in the nude or in scanty clothing in order to attract clients, thus objectifying the victims as nothing more than bodies.

This practice is described in **Veeran Palan (South Africa)**, where the two victims are expected to pay for the websites where their bodies are advertised; in **Dos Santos (South Africa)**, where the trafficker brings a photographer to photograph the victims in scanty clothing or nude to advertise them on internet; in **Eze (South Africa)**, where both victims are advertised over the internet in provocative poses in order to attract clients. One of the victims, named Els, stressed that she had no choice in the matter; **Obi (South Africa)** where the 3 victims' half naked bodies were advertised on the internet. All these cases yielded convictions on trafficking for sexual exploitation.

Similarly, in **Mansaur (South Africa)** the Thai victim is advertised in papers in order to attract clients. However, in this last case while the accused pled guilty, he committed suicide before the case was decided.

3.2.11.8 *Denying independence to victims*

Traffickers tend to try to ensure that victims have no independence as human beings, thus denying them that most human of attributes – autonomy.

An example of this behaviour pattern occurs in **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl of 18 who is given to a series of men in return for food and comestibles. At one point, after one of the sexual exploiters, named Nico, leaves their residence, the girl is employed by his former boss as a domestic worker for \$200N a month. She works for a month, whereupon the accused fetches her, saying that she is not supposed to work, because she was only given to Nico as a “wife”. Nothing better reflects the accused's sense of ownership over the victim.

Another example occurs in **Jezile (South Africa)**, a case revolving around the trafficking for sexual exploitation of a 14 year old child in the context of forced marriage. When the girl applies to the accused to continue her education, he refuses, telling her that he does not want an educated wife, thus denying her the possibility of autonomy, present and future.

¹⁷² On the basis of an internet check, the distance from the victims' hometown of Delft to the trafficker's residence in Port Shepstone is 1472 kilometers which requires a journey of approximately 16.8 hours.

Examples of different facets of ownership and objectification

- Selling victims or their organs
- Viewing victims as merchandise
- Ignoring victims' views and feelings as subjects of rights
- Denying information to victims
- Treating victims like instruments
- Advertising victims' bodies on internet sites
- Denying independence to victims

3.2.12 Debt bondage

Debt bondage is defined in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention) 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;”

Thus, ‘debt bondage’ reflects an arbitrary debt which it is virtually impossible to pay back, keeping the debtor in bondage during an unspecified period which may have no end in sight and sometimes can even last for generations.¹⁷³

Debt bondage may contribute to proof of a ‘means’ such as “coercion” or “abuse of a position of vulnerability” or “abuse of power”. It may also contribute to prove a ‘purpose of exploitation’. The Supplementary Slavery Convention views debt bondage as an example of ‘practices similar to slavery’. As such, States which include ‘practices similar to slavery’ among their ‘purposes of exploitation’ naturally include ‘debt bondage’. Moreover, some States in the region include ‘debt bondage’ specifically among their ‘purposes of exploitation’¹⁷⁴ or their ‘means’¹⁷⁵ and some define it, in a similar way to the definition in the Supplementary Slavery Convention.¹⁷⁶ Moreover in some States, “debt bondage” is a crime in its own right.¹⁷⁷

Examples of debt bondage can be found in various cases which form the foundation of this digest.

Thus, in **Alam (Seychelles)**, a case revolving around the trafficking of 4 vulnerable Bangladeshi men, the court explicitly mentions the heavy debts incurred by the men in order to travel to **Seychelles**, “*which they were desperate to repay*” as a source of vulnerability, and concluded that they would therefore be “*more servile and desperate*” towards the accused. The accused was convicted of trafficking for practices similar to slavery and forced labour.

In **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 young women, the women’s alleged debt increased the longer they stayed with the accused. On arrival at the dominant accused’s residence, he told them that they had no option but to work as prostitutes because they owed him bus fare, which amounted to a high sum of 1200 Rand

¹⁷³ See Bales, “*Disposable People*” (University of California Press, 2000), pp. 19-20.

¹⁷⁴ See the Trafficking Acts of **Botswana**, the **DRC**, **Madagascar**, **Namibia**, **Zambia** and **Tanzania**, as regards some of the trafficking crimes enumerated in its Trafficking Act.

¹⁷⁵ See **Lesotho’s** Trafficking Act.

¹⁷⁶ Examples are **South Africa**, **Zambia** and **Lesotho**.

¹⁷⁷ Examples are **Lesotho**, **Namibia** and **South Africa**.

a piece. Two days after they arrived, he told them that they also owed him for the food consumed by them, for advertising their bodies on the internet and for their accommodation. In the wake of this, the victim named Candice gave the accused 200 rand out of the 300 she had earned. This is a clear case of debt bondage. Even though the debt began with a specific charge for bus fare, it was used as a means of coercing the women to prostitute themselves from the start. As the exploitation continued, the debt became unspecified, as it was not clear what sums had been paid for food, accommodation and advertising. Moreover, since the expenses named would continue indefinitely, as long as the women resided with the accused, there was no prospect of the debt ever ceasing, as long as they were with the accused. The climate of bondage was made yet clearer in view of the fact that the accused number 2, who had herself been sexually exploited, told the victims that she had recruited them because she needed to find replacements in order to be released by the accused number 1. The court noted that the use of control mechanisms like debt bondage made it unnecessary for the trafficker to employ physical violence, and convicted the accused persons of trafficking for sexual exploitation.

A classic example of 'debt bondage' can be seen in **Mansaur (South Africa)**, where a Thai woman is recruited for prostitution and told that she owes the accused an enormous debt of 60,000 Rand. On the face of it, this sum is unconnected to any specific payment the accused made. She serves as a prostitute for the accused for three years and there is no mention that the debt was ever repaid. However, since only a summary of the case was available, this is not certain.

Another example of debt bondage occurs in **Uche Odii (South Africa)**, where two young women are trafficked for sexual exploitation. One victim refuses to prostitute herself and contacts a friend who arrives at the accused's residence. However, the accused refuses to release the victim unless the friend pays her transport costs and also forces her to leave her belongings with him in return for releasing her.

In several cases, the debt claimed by the accused originates in an actual sum paid by him or her. However, under some circumstances, this can still be considered to be 'debt bondage'.

One example is **Mahuni (Zimbabwe)**, a case of procurement for prostitution.¹⁷⁸ The victims were promised good jobs in **Angola**. Once they arrived, not only were they expected to work at selling clothes, but were told that they needed to repay the accused for their air tickets, by having unprotected sex with men each day after their return from work. On the one hand, this debt seemed to be a specific one related to a particular charge that the accused had, in fact, paid. However, instead of allowing the victims to pay the debt from their work selling clothes, the accused used the debt to pressure them into prostituting themselves. Nor did they ever seem to fully repay the debt. These circumstances seem to point to the use of this debt as a means of coercing the women into sexual exploitation.

Another example occurs in **Jonas (Namibia)**, a case revolving around the trafficking of an 18 year old girl who was given to a series of men for sexual exploitation. The girl was offered a good job by the accused, but when she arrived at the accused's farm, she was told that she must go with a man called Johnny and engage in sexual relations with him. At first she refused, but as a means of pressure, the accused told her that Johnny paid for her transport to the farm, so that she owes him. The girl went with Johnny after this was said, and after the accused threw her out of the house, but refused to have sexual relations with him at first. When the accused found out about this, she was angry with the victim and repeated to her that she owes Johnny for her transport. The girl then had no option but to have sexual relations with Johnny. On the one hand, this debt originated in a specific payment for transport, but it was used as a means of coercing the girl to be sexually exploited by Johnny and it was never clear when the debt would be repaid, as

¹⁷⁸ We note that at the time of the judgment, **Zimbabwe** had not yet enacted a Trafficking Act.

can be seen by the victim continuing to be sexually exploited by Johnny for 2 and a half months. As such, it can be viewed as a form of debt bondage used as “coercion”.

Yet another such example occurs in **Lourenco (Malawi)**, where 3 young girls are recruited for prostitution and sold to Nigerians operating sex clubs in Holland. When they protest, and demand to be returned to **Malawi**, the accused tells them that they first need to repay a debt of \$20,000 spent on their travel arrangements. While this appears to be a debt originating in a specific charge, it seems exorbitant on the face of it, which may point to ‘debt bondage’.

There is also an intimation of debt bondage in **Adigwe Dike (Eswatini)**, although the case yielded an exoneration. The alleged victim testified that when she asked to go home, the female accused person told her that she could not do so because she owed money to the accused. However, in its evaluation of the evidence, the court could not rule out that the accused did not allow the girl to return to her home because she simply did not have the money to buy her an air ticket.

However, it is useful to remember that not every debt may be considered “debt bondage”. Thus, in **Maroodza (Zimbabwe)**, a case revolving around trafficking in the context of domestic services, the travel fares of the 6 young women trafficked to Kuwait for domestic service, were paid by the accused on the understanding that they would pay him back from their salaries. On the face of it, this is a reasonable debt based on specific charges which would end with payment. We note that the accused was convicted of trafficking in persons on the basis of other circumstances.¹⁷⁹

3.2.13 Climate of fear

Often traffickers create a climate of fear in order to control victims and facilitate their exploitation. This is an amorphous term, but it reflects a reign of terror which can be effective in coercing victims. The term itself or one close to it appears in several international cases.¹⁸⁰

A climate of fear can contribute to proof of a ‘means’ like “threats or use of force” or “coercion” or to proof of a ‘purpose of exploitation’ like “forced labour”.

Interestingly, such a climate of fear need not be accompanied by a consistent course of violence.

¹⁷⁹ See section 4.5 on *issues arising in trafficking in the context of labour exploitation*.

¹⁸⁰ See for example *U.S. v. Farrell*, 563 F.3d 364 (2009), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA006). This case uses the term “climate of fear”; *U.S. v. Webster*, 2011, U.S. App. LEXIS 26438 (2011), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA148), where a closely allied term is used, namely “environment of fear of physical harm”; *State of Israel v. D.A. and A.M.*, Criminal Case 6749-08-11 in the Jerusalem District Court; later confirmed in *D.A. and A.M. v. State of Israel*, Criminal Cases 8027,8104/13 before the Supreme Court; later confirmed in Additional Criminal Hearing 6022/18 before the Supreme Court of Israel, where the court of first instance uses the term “climate of fear”.

The relationship between a climate of fear and violence

*“The TVPA¹⁸¹ acknowledges that traffickers utilize psychological manipulation and fear to maintain control, making “representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape” It indicates that these representations “can have the same coercive effects on victims as direct threats to inflict such harm,” clearly recognizing that the establishment of an **environment of fear** can have the same consequences as direct threats or physical violence. Although physical violence is a universal means of creating fear, perpetrators may use violence infrequently, as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear. The threat of death or serious harm [either to the victim or to others close to him or her] is much more frequent than the actual resort to violence.”¹⁸² (our emphases)*

Hopper and Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims”, 1 Intercultural Human Rights Law Review 185, 187 – 188.

Examples of such a climate of fear occur in a number of cases across the region.

In some of these cases no violence is exerted, but the victims nevertheless live in a climate of fear. For example, In **Alam (Seychelles)** where 4 Bangladeshi men are trafficked for practices similar to slavery and forced labour in **Seychelles**, the accused used a series of methods which coalesced in order to create a climate of fear: threats of violence against the workers and their families abroad which included brandishing a knife; threats of deportation, when most of the workers were the sole breadwinners for their families. There also contributed to the climate of fear difficult working and living conditions; isolation and detention of passports. One of the officials who interviewed the workers noted that they seemed fearful and reluctant to answer police and to give them the accused’s phone number. The workers themselves testified that they feared the accused, who threatened them with deportation and also threatened their families, if they did not do what he required. It is instructive that no actual violence was employed against the victims; other methods sufficed to create a climate of fear. The accused was convicted of trafficking for practices similar to slavery and forced labour.

Such a phenomenon can also be seen in a series of cases which yielded convictions on trafficking for sexual exploitation. In **Jonas (Namibia)**, where an 18 year old girl is trafficked and given to a series of men for sexual exploitation, the accused creates a climate of fear by angry talking, threats, and throwing the girl out of her house with her luggage when she refuses to accompany the men or engage in sexual relations with them. This behaviour pattern is particularly effective, as the girl has nowhere to go. Once again, it is instructive that no violence is used.

In other cases constant violence, threats, anger and arbitrary punishments can create a climate of fear. This can be seen in cases of trafficking for sexual exploitation such as: **O.B. Abba (South Africa)**, where the accused constantly assaults the victims, with fists, an umbrella or a beer bottle. Moreover one victim sees him assaulting the other and often the assaults are brought about because of trivialities like one victim not liking the cigarettes brought to her by the accused.

Another example is **Eze (South Africa)** where both victims speak of fear ruling their lives as a result of the accused’s constant anger, threats and assaults. Moreover in this case, the accused’s punishment of the victims by withholding drugs or food contribute to the climate of fear.

¹⁸¹ The TVPA is the Victims of Trafficking and Violence Protection Act of 2000, enacted by the Federal government of the United States of America.

¹⁸² We note that this quote draws on other literature, as well as the authors’ own insights, namely: The TVPA, the United States Model Law to Combat Trafficking in Persons, and Judith Herman, Trauma and Recovery, p. 77.

Yet another example is **Dos Santos (South Africa)**, where the victims trafficked for sexual exploitation from **Mozambique**, testified that they lived in fear. They also testified that they were subject to a series of assaults and threats. The assaults transpired when the accused “considered it necessary” and were inflicted with something resembling a whipping chain on her belt. The constant threats related to possible prosecution as they were in the country illegally and also to violence, should there be further complaints.

See also sections 3.2.1 on *violence or force*, 3.2.2 on *threats* and 3.2.4 on *subtle means of coercion and abuse*.

How traffickers can create a climate of fear

- Violence which can be sporadic and occur for trivial reasons;
- Having victims view violence against others;
- Threats of violence;
- Threats of deportation;
- Constant anger;
- Arbitrary punishments including withholding drugs.

NOTE: Often a climate of fear is created by a combination of circumstances and does not require the use of violence.

3.2.14 Duration of abuse

3.2.14.1 Introduction

Neither the Protocol, nor trafficking legislation across the region, require a certain duration in order to establish the crime of trafficking. Indeed according to the Protocol and most regional laws, the exploitation need not have transpired at all; it suffices that there is an intent to exploit.

Nevertheless, the shorter the duration of the exploitation, the more difficult it may be for the prosecution to convince the court to convict on a charge as serious as trafficking in persons or an allied crime. Moreover, duration may be an important consideration in sentencing, once the accused has been convicted.

We note that this digest includes a separate section addressing situations where the exploitation never transpired (see section 4.3 on *how to prove trafficking when the intended exploitation never transpired*). So this section will not address that particular issue.

3.2.14.2 Principle governing the relevance of duration

The sample upon which this digest is based does not include cases which explicitly address duration. So we cannot refer to regional cases which state the principles which govern the relevance of duration in cases of trafficking and allied crimes. However, the global case digest does address this issue in section 3.2.15 on *duration of abuse*. On the basis of this source, we will summarize the basic principle here, but refer the reader to a more extensive analysis in the global case digest.

The principle governing the relevance of duration is expressed in **Kunarac (International Criminal Tribunal for the former Yugoslavia)**¹⁸³ which revolved around the crime of “enslavement”, an allied crime to trafficking in persons. According to the court, duration can be a consideration when addressing the question if the crime has been committed, but is not a conclusive consideration, and other indicators should be considered as well.

¹⁸³ Prosecutor v. Kunarac, Kovac and Vukovic, Cases IT-96-23-T and IT-96-23/1-T ICTY, Trial Chamber, 22 February 2001.

We note that the elements of “enslavement”, as interpreted by the court, are generally similar to the elements of “slavery” as defined in the 1926 Slavery Convention.

3.2.14.3 *Convictions with a range of durations*

An analysis of cases across the region reveals a wide range of durations in cases where accused persons were convicted of trafficking or allied crimes.

Durations range from days to weeks to months and finally to years.

- *Durations of days*

The following are examples of exploitation or abuse which lasted for mere days.

In **Veeran Palan (South Africa)**, where the case revolves around the trafficking for sexual exploitation of two vulnerable young women, the sexual exploitation transpired over a period of **3 days**. However the abuse undergone by the victims was severe. They were deceived about the nature of the job; transported to a place distant from their homes; expected to engage in sexual relations with a succession of men; supervised; held under debt bondage; talked to in a threatening way; and objectified. The court convicted the accused persons of trafficking for sexual exploitation. In doing so the court did not explicitly address the short duration as a weakness in the case, but rather analyzed the elements of the crime and drew the conclusion that trafficking had been proven.

In **Obi (South Africa)**, where the case revolves around the trafficking for sexual exploitation of 3 minor girls, while one was exploited for a year, 2 others were exploited for **a few days**. However, even those exploited for a matter of days underwent particularly difficult conditions, which included being locked in the premises and forced to take illegal drugs. In addition, one was forced to watch sexual relations between the accused and another victim. While the court does not address the topic of duration, it convicts the accused persons of trafficking for sexual exploitation, despite the short duration of the exploitation in regard to 2 of the victims.

In **Mponda (Malawi)** the case revolved around the trafficking of 3 young girls who were promised a job in a restaurant. On arrival at the capital from their village, they were told that they would need to engage in sexual relations with clients. They cried, left the premises and were rescued after **4 days**. While this is strictly a case where the sexual exploitation never transpired, it can also be considered a case where the abuse extended over a matter of days, as the girls underwent a difficult situation for 4 days during which their vulnerabilities were abused. They were young, far from home, with no independent means, and were told that the only way to earn money was by engaging in sexual relations. The court convicted the accused person of trafficking.

- *Durations of weeks*

A few cases reveal exploitation for a week or a number of weeks. One example is **Mujee (Botswana)** where the sexual exploitation transpired over **a week**, although the trafficking process was longer. The court does not explicitly refer to the short duration, but convicts the accused of trafficking for sexual exploitation. However, we note that the circumstances of the case were particularly difficult in that the victim was a minor who was deceived by the accused; she was taken to a foreign country where she knew no one and was illegal; she was threatened and assaulted by the accused and was sold to a series of men with no option to lock her door to prevent them from entering.

Another example is **Eze (South Africa)** where two young women addicted to drugs were trafficked for sexual exploitation and required to prostitute themselves with a series of men. Whereas one was exploited for years, the other one was exploited for **3 weeks**. We note that this victim’s mental age was assessed to be between 14 and 18 years of age, which justified hearing

her testimony by means of an intermediary. We also note that the accused was also convicted of raping her on 2 occasions. The court did not explicitly address the relatively short duration of the exploitation in the case of this victim and convicted the accused of trafficking for sexual exploitation and rapes in regard to her.

Another example of a case where the exploitation lasted for a little over 2 weeks is **Matini (South Africa)**, where 2 mentally disabled children were trafficked for sexual exploitation. The exploitation lasted for **16 days**.¹⁸⁴ However, we note that the conditions were particularly difficult. The girls were mentally disabled; they were handed over to men nightly in return for foods and comestibles; no attention was given to their well-being even when one was observed to have blood coming out of her vagina; they were compared to horses and called “mounts”, thus commodifying them; they were expected to also work in the dominant accused’s illegal dagga business and do chores in her house. The court did not explicitly address the relatively short duration of the exploitation and convicted the accused of trafficking for sexual exploitation.

- *Durations of months*

Quite a few cases revolve around exploitation for some months. The following are some examples:

In **Shongwe (Eswatini)** a 19 year old boy from **Lesotho** was deceived and promised that he would be employed in a good job in **South Africa**. Instead, he was trafficked into **Eswatini** where he was employed as a cattle herder under difficult conditions which included lack of payment, inhumane accommodations, inadequate food and an assault. The exploitation transpired over **9 months** from May 2015 to February 2016. The court does not address the duration explicitly, but convicts on trafficking for slavery.

In **Alam (Seychelles)** the case revolved around the trafficking of 4 Bangladeshi workers who were exploited for **6 months**. Here too, the conditions were particularly difficult. The men were foreigners who did not speak the language well, were not paid at all for 4 months of work, were housed in inhumane accommodations, not given enough food, transferred to various sub - contractors without seeking their consent, threatened with physical violence and deportation and lived in a climate of fear. The court did not explicitly address the relatively short duration, and convicted the accused person of trafficking for practices similar to slavery and forced labour.

Similarly in **Mahuni (Zimbabwe)** where the case revolves around the procurement for prostitution¹⁸⁵ of 3 victims, transported from **Zimbabwe** to **Angola**, the exploitation of one victim lasted for **6 months**. Here too the conditions were particularly difficult. The young women were desperate for work and were deceived about the nature of the job; they were foreigners who knew no one but the accused; they were threatened and beaten when the accused “considered it necessary”; their passports were detained; they were required to sell clothes all day and have unprotected sex with a series of men afterwards. The court did not explicitly address the relatively short duration of the exploitation and convicted the accused of procurement for prostitution.

In **Koch (Namibia)** a number of children were trafficked for sexual exploitation which lasted for **4-5 months**. The children were between 9 and 13 years of age from impoverished families and were tempted with food and treats; the accused masturbated in front of them and tried to have sexual relations with some but was pushed off; he forced one of the victims to lick his penis; he was in a state of undress in the presence of some of the victims. The court did not explicitly address the relatively short duration of the exploitation, but convicted the accused of trafficking for sexual exploitation.

¹⁸⁴ The exploitation extended from 3 July to 19 July. The girls were abducted on July 3 and on July 19 were dropped off at their homes.

¹⁸⁵ When the crimes were committed, **Zimbabwe** had not yet enacted a Trafficking Act.

In **Luzama Kavul (DRC)** a minor girl was sexually exploited for **5 months** by a 58 year old man who lured her with cookies and candies while her impoverished parents were working outside her house. This was discovered when the girl fell pregnant. Since we have only a summary of the case, we do not know if the court alluded to the relatively short duration of the exploitation, but the accused was convicted of rape, forced prostitution, submission to degrading treatment and violation of the child protection law.

In **Allima (South Africa)** a 16 year old girl was abducted from her town and given to a series of men for sexual exploitation for a period of **4 months** from May to September. She knew no one but the accused in the place to which she was taken. In the wake of the trauma, she lost memory of her true identity and assumed another identity given to her by the accused. During the course of the exploitation she was raped repeatedly, not given food on occasion and possibly drugged. The court did not address the relatively short duration, but convicted the accused of trafficking for sexual exploitation.

In **Esther Phiri (Zambia)** a 14 year old girl was transported from her village to the capital of Lusaka to be exploited by the accused's sister. The exploitation lasted for **3 months**. On arrival, she was deposited at the sister's gate with no introduction and no concern for her welfare after a long journey; she was not paid for her work; she was expected to go to bars and sleep with men. The court did not explicitly address the relatively short duration of the exploitation and convicted the accused of child trafficking.

In **Jezile (South Africa)** a child of 14 was forced to marry a man of 28 who took her from her village to the city of Cape Town where she knew no one but the accused, housed her in his brother's house, locked her in the house, raped her on several occasions and assaulted her thus causing her grievous injuries. The exploitation lasted for **2 months**, from January to March. The court did not address the relatively short duration and convicted the accused of trafficking for sexual exploitation and rapes.

In **Ogochukwu (South Africa)** a 15 year old girl was prostituted by the accused for "**a month to two months**". She was given drugs in order to boost her energy and in order to induce her to buy drugs from the accused; slept with 6 clients a night; was expected to have sex with the accused; received only a pittance for food. The court did not explicitly address the relatively short duration and convicted the accused of several counts of trafficking for sexual exploitation, although it exonerated him on one such count because of problems of victim credibility regarding this sequence of events. The judge stresses that the girl was clearly vulnerable and a victim of human trafficking exploited sexually for financial gain.

In **Ramadhani (Tanzania)** a 14 year old boy was deceived that he would work for the accused doing housework, but instead was sexually exploited and assaulted on 3 occasions during a **month and a half**.¹⁸⁶ The court does not explicitly address the relatively short duration, but convicts on trafficking charges (though it exonerates on carnal knowledge charges).

- *Duration of years*

In **Jeremiah Musa Dlamini (Eswatini)** the accused, who was an influential man in the community, raped his 14 year old daughter and his niece repeatedly **over years**. It started off as sexual touching, brushing, caressing, licking and advanced to rape. They lost count of the number of times and places the accused did this to them. The accused was convicted of trafficking for sexual exploitation and rapes. The court mentioned that the exploitation transpired over a "fairly long time" and was known to members of the community, thus showing that the duration of the crime was brought into consideration.

¹⁸⁶ We note that though this period was mentioned in the victim's testimony, another witness testified that the victim and another boy told her that they had been exploited for one month.

In **Eze (South Africa)** one of the victims, who was a vulnerable young woman addicted to drugs, was exploited over a period of **4 years** from 2009 – 2013, although she did escape from the accused on several occasions. Over and beyond the long duration, the circumstances of the case were particularly difficult and included use of drugs to control the victim; advertising her body on the internet; expecting her to engage in sexual relations with the accused; supervising the victim's movements; employing force against her. While the court mentions the long duration of the abuse, it does not explicitly relate it to the conviction and convicts the accused of trafficking for sexual exploitation.

Two other examples of cases where the exploitation lasted for some years are **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children, 3 of whom were sexually exploited for **3 years** and 1 who was exploited **for 2 years**; **Mansaur (South Africa)** where a Thai woman was trafficked for sexual exploitation for **3 years**. However, while the accused in this last case pled guilty, he committed suicide before the case was decided.

We note that the duration of a crime may be used as an aggravating circumstance in sentencing the accused person. This transpired in the first instance ruling of **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a young girl of 14 by her stepfather. The court noted that the duration of the abuse is an aggravating factor and demonstrated *“a fixed and settled intention... to perform illegal acts in the pursuit of his selfish motives.”* Later on in the same judgment the court noted that the accused repeatedly raped the victim over a *“lengthy period of time”*. While the High Court exonerated the accused from charges of trafficking in persons, it confirmed the conviction on rape.

3.2.14.3 Conclusions

The range of durations in trafficking cases which yielded convictions across the region varies from mere days or weeks to months and even years. This shows that while duration can be a consideration for courts, as was clearly shown in **Jeremiah Musa Dlamini (Eswatini)**, it does not seem to be a central consideration. Moreover, in reviewing the cases, it seems that the more difficult the abuse or exploitation, the less duration seems to matter, even if the entire trafficking process extended only over a number of days.

3.3 Circumstances which may weaken a case

Naturally, along with circumstances which can contribute to convictions, addressed in section 3.2, there are many circumstances which may weaken a case. In this section we will address only a few central ones, without attempting to provide an exhaustive list.

Among the most important such circumstances are: the difficulties surrounding proof of an intent to exploit; victims who seemingly have alternatives to being exploited; cases where the trafficker provides good treatment to the victim; family complicity in the trafficking; and most crucially victims' behaviour during the trafficking process.

We note that a common denominator of most of the victim behaviour addressed in this section is that it seems to denote that the victim consented to the exploitation. This is such a central topic that it is also addressed in detail in section 4.4 of this digest on *“how to handle the subject of victim consent”* and in section 2.2.1 on *“typical weaknesses of victim testimony”*. It is also touched upon in section 3.2 on *circumstances which can contribute to convictions*, and for example, in section 3.2.2 on *threats*, section 3.2.3 on *deception*, section 3.2.4 on *subtle means of coercion and abuse* and section 3.2.6 on *restrictions of freedom*. The focus on this aspect in many parts of this digest reflects its centrality.

Although most of the weaknesses addressed in this section are evidential in nature, at least one, has to do with the substantive elements of the crime, namely, *difficulties in proving the intent of the accused person*.

3.3.1 Difficulties in proving the intent of the accused person

Trafficking in persons is a crime of specific intent, where the prosecutor must prove that the alleged perpetrator intended to cause a certain harm, namely, exploitation. While not all States use the term “exploitation” in their Trafficking Acts, even those who do not, list a number of purposes which denote exploitation.¹⁸⁷ Moreover, most States in the region explicitly enumerate the specific ‘purposes of exploitation’ which appear in the Protocol, namely: *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*.

Though some States add or subtract from this list of ‘purposes’, the basic framework of the crime is retained. We refer the reader to Appendix 2 which is a *Table of Southern African Trafficking Legislation* for a more detailed description of the different ‘purposes of exploitation’ listed in the various Trafficking legislations.

In some cases, despite questions as to the accused person’s intent, courts convicted him or her of trafficking. We refer the reader to detailed analyses of such cases in sections 4.3.4.1 and 4.3.4.2 on *convictions* in cases which raise questions of intent, since the exploitation never transpired. In view of the detailed analysis in that section, we will only note that in some cases which yielded convictions, there was direct testimony about the accused person’s intent and for example, **Mboo (Zambia), Mponda (Malawi), Kapinga (Malawi), Judgments 220-CO and 97-CO (Madagascar)**. On the other hand, in other cases, a constellation of suspicious circumstances sufficed, as in **Millinga (Tanzania), Mutwale (Zambia) and Tumo (Mozambique)**.¹⁸⁸

However, in a number of cases in the region, accused persons were exonerated, at least partially, because the courts ruled that the prosecution did not succeed in proving the requisite intent at the time the action was committed.

In some of these cases, the exonerations rested on the failure of the prosecution to bring evidence as to *any* intent to exploit. Sometimes this failure emanated from the fact that the criminals were apprehended before they had the chance to actually exploit. We refer the reader to section 4.3.4.3 on *exonerations* in cases where the exploitation did not transpire. Examples of these cases are **Gole (Mozambique), Nyassa Nicole Mulumbilwa (Zambia), Mwewa (Zambia), Kasonde (Zambia), Umutoniwase Diane (Tanzania)**,¹⁸⁹ **Judgment No. 101-CO (Madagascar)**,¹⁹⁰ **Judgment Number 138 - CO (Madagascar)**¹⁹¹ which are described in detail in that section of the digest.

¹⁸⁷ Compared to the Protocol and to other States in the region, the **Zimbabwe** Trafficking Act does not mention the term ‘exploitation’ but rather ‘unlawful purpose’. However, the unlawful purposes enumerated address exploitative practices like “*prostitution, child or adult pornography, the unlawful removal of organs, forced marriage, debt bondage, illegal labour, forced labour or other forms of servitude*”. **Zimbabwe** is still different than other States in the region, in that it has two central trafficking crimes. Whereas one requires an ‘action’ and an ‘illegal purpose’, the other requires nothing more than an ‘action’ and a ‘means’, and does not require a purpose of exploitation at all.

¹⁸⁸ State v. Amado Rachide Tumo, in Judicial Court of the province of Inhambane, 2nd Criminal Section. Only a summary was available from the UNODC Human Trafficking Case Law Database (Case No. MOZ002).

¹⁸⁹ Republic v. Umutoniwase Diane and others, Criminal Case No. 7/2018 in the Resident Magistrate Court of Dodoma, 1 August 2018.

¹⁹⁰ Judgment No. 101-CO of June 27 2019 in Supreme Court of **Madagascar**.

¹⁹¹ Judgment No. 138 – CO of 8 August 2019 in the High Court of **Madagascar** – Special Court for Anti Corruption.

In contrast to the above cases, where the prosecution did not adduce enough evidence of *any* intent to exploit, in other cases, where the intent to exploit (and indeed the actual exploitation) was clear during late stages of the trafficking process, some courts raised doubts as to proof of intent during early stages of the process. These doubts seem to arise due to the complexity of the trafficking crime, which attempts to cover a process, rather than an action which takes place at one juncture in time.¹⁹²

Thus, the ‘actions’ enumerated in the Protocol and in most States’ Trafficking Acts, cover many points in time: recruiting, transport, transfer, harbouring and receipt. In order to convict, the court must have evidence before it which ties the ‘purpose’ intended by the accused to a specific ‘action’ committed by him or her. In some cases, the courts found that a doubt arose as to the proof of such a connection, because they focused on ‘actions’ which transpired at an early stage of the trafficking process and for example: “recruiting”, “transporting” or “transferring”, when the accused’s purpose was not clear, rather than on an ‘action’ which occurred at a later stage, namely: “harbouring”, when the accused’s purpose seemed abundantly clear. Alternatively, even when these courts do focus on the ‘act’ of “harbouring”, they seem to require the accused to have formed the intention to exploit at the moment when he *began* to harbour the alleged victim, and not afterwards, although he continued to harbour her for a relatively long time. Interestingly these court rulings were handed down in cases where the accused performed ‘actions’ at both early and late stages of the process (recruiting/transporting/transferring and also harbouring).

One example occurs in **Mndzebele (Eswatini)**, a case revolving around a young girl from a poor family who was prevailed upon to live with a pastor who offered to pay her school fees. While the pastor did pay her fees, he also raped her repeatedly over a period of close to a year. The court found the victim’s testimony to be credible and convicted the accused of rape. However, it exonerated him from trafficking charges because it could not rule out that at the moment of taking the girl into his home the accused had a good intention of allowing her to realize her academic dream and did not intend to deceive her, an intent which crystallized at a later point in time. Here, the court seems to require that the accused person’s intent to exploit must be present at the moment he transports or *begins* to harbour the victim, rather than during the entire period of the “harbouring”.

A similar ruling was handed down in **Adigwe Dike (Eswatini)**. The case concerned a Nigerian couple residing in **Eswatini**, who recruited a young Nigerian girl to work in the wife’s business of selling wares, without pay, on the condition that she was to be enrolled in a tertiary educational institution after she had done her job for a certain time period. At one point the relationship soured. The girl requested to be enrolled in a tertiary institution as promised, but this was not done. When the girl requested to go home, the female accused told her that there was no money for this. Subsequently, the female accused detained the girl’s passport and cell phone, conducted constant searches of her room and sometimes chased her out of the house. Moreover the girl was not given adequate food or clothing and was assaulted several times. The girl resided with the accused for at least some months. The court exonerated the couple from trafficking in persons charges because, among other considerations, it entertained a reasonable doubt as to the question if the accused persons had intended to deceive the girl from the moment of the ‘actions’ of recruitment and transport. The court ruled that there was no clear evidence that the promise to enroll the victim in a tertiary institution was a ruse, although a strong suspicion was present. Moreover, in the court’s view, at a later stage, when the alleged victim asked to go home, the accused might have genuinely not had money to pay for the ticket, and might not have been acting in an attempt to continue to exploit her. The court maintained that the bottom line was that explanations other than an intent to exploit were possible.

¹⁹² See for example rulings where the court explicitly calls the trafficking crime a process and for example: Eze (**South Africa**) and Matini (**South Africa**).

Another similar ruling appears in *In Fakudze (South Africa)*, where a 13 year old girl, living in **Eswatini**, was abandoned by her mother, and begged her stepfather to take her with him to **South Africa**, although he had previously sexually abused her. On arrival in **South Africa**, he did not abuse her immediately, but rather waited for a few months, by which time she was 14 years of age, although the exact time frame is not clear.¹⁹³ He continued to do so for a number of months, until she was discovered to be pregnant. While the court of first instance convicted the stepfather of trafficking for sexual exploitation and rape, the High Court confirmed the conviction on rape but exonerated the accused from trafficking charges. In doing so, it relied, among the rest, on the time gap between the arrival in **South Africa** and the exploitation, which raised doubts as to the accused's intention to exploit the girl at the moment of transporting her to **South Africa**, or at the very least, at the moment he *began* to harbour her.¹⁹⁴

These exonerations give food for thought, as in all of them, in addition to the 'actions' of 'recruiting', 'transferring' and 'transporting', the accused persons also 'harboured' the victims in their homes for substantial periods of time. Whereas the intention of the accused persons may not have been clear at the time when they committed the initial 'actions', or even at the start of the "harbouring", it seemed to be abundantly clear at subsequent points in time during the process. Perhaps under the surface of these judgments is an attempt by the courts to draw a line between the elements of harbouring for exploitation in the context of a trafficking crime, and standalone exploitation offences like "forced labour" or "rape".

However, whatever the proper mode of analysis in cases like these, practitioners should be aware of these rulings in order to identify the issues and to properly build a case so that the intent of the accused person can be established, even at early stages in the trafficking process.

We also refer the reader to section 3.2.4.1 on *gradual grooming/seasoning exploitation with good treatment*, which poses additional questions as to the significance of lapses of time between the recruitment or transport of victims and their subsequent exploitation.

3.3.2 The victim's alternatives to being exploited, including their support systems

In cases across the region, cases have presented situations where the victim seemed to have alternatives to being exploited and yet did not use them. These alternatives can include various support systems, whether familial or other. Such a weakness can cast doubt on an element of the crime such as the 'means' or the 'purpose of exploitation', or impugn the victim's credibility, as if the situation was as bad as described, the question arises why he or she did not use the alternatives to change it.

We note that this weakness is particularly relevant to the 'means' of "abuse of a position of vulnerability" which is defined in various states as "*any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation.*"¹⁹⁵ If a victim did have alternatives to exploitation, seemingly, this 'means' would not apply to him or her.

¹⁹³ The facts of the case reveal that the accused and the victim arrived in **South Africa** in October 2014 and that he began abusing her sometime in 2015.

¹⁹⁴ While the court of first instance focused on the 'action' of "harbouring", the High Court judge seems to have focused on the 'action' of "transport" or at the very least on the moment when the stepfather *began* to harbour the girl. This can be seen by the court's description of the complainant's alternatives which were relevant only at the moment before she was transported (see section 3.3.2 on *the victim's alternatives including support systems*). It can also be seen by the judge's emphasis on the fact that the accused did not exploit the complainant immediately upon arrival in **South Africa** which the judge sees as "*another justification why it could not be said that he had brought the complainant to South Africa for the purpose of sexually exploiting her.*"

¹⁹⁵ This definition appears in **South Africa's** Trafficking Act and similar definitions appear in the Trafficking Acts of the **DRC, Madagascar** and **Zambia**.

In two cases this weakness directly contributed to an exoneration; in another case, the exoneration did not turn on this factor and in an additional case, the court convicted nonetheless.

We note that this weakness is directly related to two other topics: the victim's seeming consent to the exploitation¹⁹⁶ and the victim's failure to escape from the trafficking situation,¹⁹⁷ both of which are addressed separately further on in this digest.

Exonerations

In 2 cases, the victims' failure to utilize their alternatives, contributed to an exoneration from trafficking charges.

Thus, in **Shebe (Tanzania)** the alleged victim's support system in Pakistan served to weaken his credibility and contributed to the accused's exoneration from trafficking charges. The alleged victim claimed that the accused, who had formerly been married to his sister, deceived him that he was being sent to Pakistan to get a large amount of money, when in reality the accused intended that he be held against his will there as a bond for narcotic drugs. When he arrived in Lahore, his travel documents, passport and cell phone were confiscated and he was locked up. He managed to escape by breaking down the door. The court exonerated the accused from trafficking charges, because the alleged victim's story was not credible. One of the weaknesses described by the court was his failure to invoke his support system in Pakistan, in view of the fact that his parents were from Pakistan and he had an aunt there with whom he and his sister were in contact. The judge queried how was it that he did in fact visit mosques and other persons but not his aunt who was of his blood, and concluded that this impugned his credibility.

In **Fakudze (South Africa)**, the case revolved around the sexual exploitation of a 14 year old **Eswatini** girl by her stepfather in **South Africa**. While the court of first instance convicted the accused of trafficking for sexual exploitation and rape, the High Court confirmed the conviction on rape, but exonerated the accused from trafficking charges. The reasons behind the exoneration, turned, among the rest, on the court's view of the girl's wealth of alternatives, which were not used by her when she turned to the accused person to take her with him to **South Africa**. The following were the girl's alternatives, as described by the court:

1. The girl could have tried to trace her own mother who had abandoned her;
2. She could have gone to stay with her mother's friend until her mother was traced;
3. She could have stayed with her father's family. (We note that she testified that she did not like their way of living);
4. She could have gone to the police who might have taken her to social workers to be placed.

In view of these alternatives, the High Court concluded that the case did not reflect abuse of the girl's vulnerabilities.¹⁹⁸

This case gives much food for thought, as when these alternatives were before her, the girl was a vulnerable child of 13, abandoned by her mother, who viewed the accused as a parent. The question arises if in her situation she had the ability to make use of these alternatives, even if an independent adult could have. Moreover, since this was a case of child trafficking, it did not require the use of 'means' by the accused, so that the court's statement that the accused did not

¹⁹⁶ See section 4.4 on *how to handle the subject of consent*.

¹⁹⁷ See section 3.3.8.1 on *failure to escape or seek help at the first opportunity*.

¹⁹⁸ We note that the definition of "abuse of vulnerability" in the **South African** Trafficking Act is: "any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation."

abuse the girl's vulnerability is not entirely clear. We raise these questions in order to heighten readers' awareness of the questions which may arise in similar cases, but note, in addition, that the exoneration also turned upon the difficulties in proving the accused's intent to exploit the girl, in view of the period which elapsed between arriving in **South Africa** and the beginning of the sexual exploitation.¹⁹⁹

In regard to this case, we also refer the reader to section 3.3.1 on *difficulties proving the intent of the accused* and section 4.4 on *how to handle the subject of consent*.

In another case, the failure of the victim to use her support systems was mentioned as a defence claim, but though the court exonerated the accused, it was not on the basis of this aspect. Thus, in **Mndzebele (Eswatini)** a young girl was promised that a pastor would pay her school fees if she went to live with him and his family. When she did so, although he paid her school fees, he also raped her repeatedly. Under cross examination, the victim admitted that she contacted her family by phone and even visited them during the period when she resided with the accused, and that her brother and sister came to the town where she was resident for a funeral on one occasion. In addition, she admitted that the accused and his relatives did not prevent her from visiting her parents. When asked why she did not enlist her parents' help, but only turned to her friends a long while after the exploitation began, she testified:

"My parents trusted the accused too much. I felt that they would not believe me. That is why I opted for my friends."

The King v. Mndzebele, Court Case No. SDV 51/15 in Subordinate court for the District of Manzini, before D.V. Khumalo

The court found the victim's testimony credible and convicted the accused of rape, but exonerated him from trafficking charges because it considered that there was room for doubt that the pastor had intended to exploit the girl when he took her into his house. Thus, the exoneration was not connected to the defence claim that the victim had not used her support system to stop the exploitation.

In another case, the victims' failure to invoke support systems did not lead to exonerations, because the court was able to understand their behaviour in the context of their vulnerabilities. Thus, in **Eze (South Africa)**, the victim named Els had loving and supportive parents who willingly sheltered her several times when she escaped from the accused. However, as a result of her drug addiction, she returned to him time after time (sometimes by force) until finally, she contacted her parents through Facebook and arranged to go to the Children's Court to sign off her last born child so that her parents would be legal guardians. Although Els clearly had a good support system in the same city where she was exploited, she nevertheless did not fully utilize it in order to stop the exploitation. While the court does not explicitly address this factor as a weakness, it records the victim's testimony which describes it. Nevertheless, the accused was convicted of trafficking her for sexual exploitation. In its rulings, the court lays stress upon the overwhelming craving for drugs which kept the victim virtually enslaved.

In the same case, the 18 year old victim named Harmse, had an aunt to whom she had fled on a former occasion, but she did not contact her when with the accused. When asked about this omission, she explained that she did not have the aunt's telephone number and feared the accused too much to try to escape. She also remembered a situation where she had complained to police about another abuser who had friends in the police. Her docket disappeared and a friend who testified for her was murdered before her eyes. The court convicted the accused of trafficking her for sexual exploitation and raping her.

¹⁹⁹ See section 3.3.1 on *difficulties in proving the intent of the accused*.

In regard to both victims the court notes that “*The addiction had ruined their lives and left them no apparent alternative.*” (our emphasis)

3.3.3 The victim’s freedom to come and go

As we have seen, restrictions of freedom are important building blocks in cases of trafficking in persons, as they may be considered ‘actions’ like “capture”, ‘means’ like “coercion” or contribute to proof of ‘purposes of exploitation’ such as “forced labour”.²⁰⁰ By the same token, the victim’s freedom to come and go may weaken a case of trafficking in persons, whether by calling into doubt an element of the crime or by impugning the victims’ credibility, as if the circumstances were as bad as described, why did they not make use of their freedom to change their situation.

Most of the cases which form the foundation of this digest include at least subtle restrictions of freedom, even if victims are not locked in premises, as can be seen in section 3.2.6.3 on *subtle restrictions of freedom* to which we refer the reader.

Over and beyond the cases cited in section 3.2.6.3, in the following cases, the victims or alleged victims had the freedom to come and go, at least seemingly. In some of these cases the courts exonerated the accused persons and in some they convicted them. Most of the rulings do not explicitly connect between the verdicts and the victim’s freedom to come and go. Still, the value of these cases is in allowing us to understand that even when victims have a certain measure of freedom, this is not an automatic bar against convictions.

Exonerations

In the following cases, which describe the situation of victims who had some freedom to come and go, the court **exonerated** the accused persons from trafficking charges. However the verdicts rested on reasons other than the victims’ freedom to come and go.

Thus, in **Mndzebele (Eswatini)**, a young girl was prevailed upon to reside with a pastor who promised to pay her school fees. While he did pay the fees, he then repeatedly raped her over a period of close to a year. The girl was free to come and go in that, the accused and his relatives allowed her to contact her parents and visit them; she was permitted to see her brother and sister when they visited the town in which she resided; she could attend school and had school friends who were genuinely concerned about her and in the end, persuaded her to tell them what was happening and to report to the school authorities. While the court exonerated the accused from trafficking charges, it convicted him on rape. The exoneration did not proceed from doubts of the girl’s credibility, although she had failed to use her freedom in order to change her situation. The exoneration proceeded rather from doubts about the accused’s intent to exploit her when he brought her to his home.

In **Adigwe Dike (Eswatini)**, a case revolving around allegations of trafficking for forced labour, a young Nigerian girl was promised that she would be enrolled in a tertiary educational institution in **Eswatini**, if she would help the female accused with her business of selling wares. She was never enrolled in such an institution, although she did help with the accused’s business. She was also assaulted on two occasions, not given adequate food or clothing, her passport and cell phone confiscated and she worked for long hours. The female accused also conducted frequent searches of her room. However, the girl was not locked in the house or prevented from having contact with other people. Thus, two independent witnesses testified about her injuries, the state of her clothing and the accused person’s behaviour towards her. One had met her when she was selling jewelry and the other was an acquaintance who allowed her to stay in her house when she was chased out of the accused’s house. While the court exonerated the accused from the trafficking charge, the reasons had nothing to do with the measure of freedom the victim was given, but

²⁰⁰ See section 3.2.6 on *restrictions of freedom*.

rather related to doubts about the intent of the accused at the moment of recruiting and transport and to the girl's agreement to undertake the tasks she was assigned.

We refer the reader to section 3.3.1 on *difficulties in proving intent* in regard to the reasons for the exonerations in the first two cases and section 4.4 on *how to handle the subject of consent* in regard to the latter case.

Convictions

On the other hand, in other cases, the victims had a great deal of freedom and yet the accused was convicted. We note that some of these cases concerned children who may be more easily persuadable than adults, even when it seems that they are free.

In **Uche Odii (South Africa)**, the case revolves around the trafficking for sexual exploitation of 2 victims who are transported a distance from their homes.²⁰¹ One victim is given rock cocaine and told to stand outside in order to prostitute herself. She is not locked in the apartment as is the second victim. Nor does she seem to be constantly supervised.²⁰² She explains that she was scared and did as she was told as she did not know where she was. The court convicted the accused of trafficking for sexual exploitation. However, since only a summary was made available to us, we do not know if the court explicitly addressed this weakness.

In **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of 5 children, the children resided with their parents during the entire course of their sexual exploitation by the accused, so that he did not restrict their freedom to come and go when outside of his home.²⁰³ Nevertheless, they continued to visit the accused, although he continued to sexually exploit them. Interestingly, although the judge does not allude to this aspect of the case in his conviction judgment, he does mention his wonder at the children's returns to the abuser in his ruling on the sentence. Similarly in **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of 4 young children between the ages of 7 and 9, the children continued to reside with their parents throughout the course of their sexual exploitation by the accused, and there is no mention of his locking them in his house when they were inside. While these facts are mentioned, the court does not explicitly address them as weaknesses in the mosaic of evidence when it convicts the accused of trafficking for sexual exploitation.

3.3.4 The victim's power to say 'no' with impunity

Since trafficking is a violation of a person's autonomy, cases in which the victim can say 'no' with impunity may raise doubts as to the commission of the crime. The victim's ability to refuse the trafficker's requests may impact on the existence of 'means', as clearly such a victim is not under the trafficker's control. Alternatively, it may impact on 'purposes of exploitation' like "forced labour" or "forced marriage".

In **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of 4 young children, the children testified that sometimes they refused the accused's requests and he did not pursue his purposes. One example can be found in the testimony of the victim Norkoti who testifies that the accused asked them to lick him and she refused. No repercussions followed. Nonetheless, the accused was convicted of trafficking for sexual exploitation in regard to all the victims.

²⁰¹ The victims are transported from Durban to Pretoria, a distance of some 625 kilometers.

²⁰² Since only a summary was available, it may not reflect the whole picture.

²⁰³ We note that some of the victims claimed that he locked them in the house when they entered it, although others contradicted this testimony.

In **Jeremiah Musa Dlamini (Eswatini)**, where a man trafficked his daughters and niece for sexual exploitation, the eldest daughter, who returned to her grandmother, after a failed marriage, was requested by the accused to move in with him. Once there, she “flatly refused” to participate in bathing her father like the two other victims, and when he tried to fondle her vagina, she pulled back and left; packed her clothes and walked to police station where she made a formal report. Interestingly, while the accused was convicted of trafficking for sexual exploitation in regard to his other daughter and niece, the eldest daughter was not considered to be a victim.

A similar scenario transpires in **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**. After she is raped the first time, one of the children continually informs the female accused that she has her menses when called to visit the male accused, and manages to avoid being raped on subsequent occasions, although she is held for a period of 3 years. It is hard to categorize this as saying ‘no’ with impunity, but it has something of the same effect. Nonetheless, the court convicted the accused of trafficking for sexual exploitation in regard to this victim, although it did not explicitly address her ability to say ‘no’.

On the other hand, in most trafficking cases, even when victims initially refuse to be exploited, there are repercussions which force them to accede. One example is **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation of a young girl who is given to a series of men. The victim refuses to accompany the men allotted to her a few times, but each time, the accused punishes her, either by throwing her out of the house or denying her food. Thus, she is unable to say ‘no’ with impunity.

3.3.5 Seemingly good treatment of victim by perpetrator

Since the purpose of the trafficking process is exploitation of the victim, at first glance, good treatment of the victim by the perpetrator seems to negate trafficking. However, while sometimes this factor does lead to exonerations of the accused persons, there have been convictions nonetheless, as the totality of the evidence needs to be analyzed.

Exoneration

In **Yoseph Girmay Testagaber (Lesotho)**, a case revolving around charges of trafficking for domestic servitude, the Magistrate exonerated the accused, among other reasons, because: “...it could not be trafficking since the couple was taking care of her and treating her in an acceptable manner, including providing food and clothing etc.”

However, the facts of the case raise questions as to the impact of this good treatment, amid a constellation of circumstances which can be interpreted as exploitation.

An Ethiopian couple who resided in **Lesotho**, offered an Ethiopian lady, employed as a domestic worker in Ethiopia, to work in their home for a much better wage, to which she agreed. Subsequently they arranged her travel to **Lesotho**.

The first month she received the promised monthly salary. However, the gate was always locked and except when the couple entered or exited the house the victim could not leave the premises. After the first month, she was not paid and when she finally confronted the employer, she was told that her salary was being used to cover the cost of her air ticket and of giving her food and clothing. A few months later when she asked again, she was told that her salary was being sent to Ethiopia to her sister to educate her siblings, although her consent had never been sought. She had little rest and no vacations. She would often sit outside the house and cry.

The question arises if the good treatment, which was limited to giving the woman adequate food and clothing and treating her in an acceptable manner, is a weighty enough factor upon which to base an exoneration, in view of the constellation of circumstances described above.

Another question which arises is if the good treatment could possibly reflect subtle means of coercion as described in section 3.2.4.1 on *gradual grooming/seasoning exploitation with good treatment*. However, we note that the alleged victim experienced difficulties in giving testimony, as described in section 5.1²⁰⁴ which analyzes victim trauma in the context of victim protection steps, and this may have contributed to the exoneration as well. Moreover, only a summary was available to us, which may not reflect the totality of the evidential picture.

Convictions

There are additional cases where there were convictions despite the victims' admissions that the perpetrator treated them well. One example is **Sonah (Mauritius)**, where the accused advertised for babysitters, receptionists and massage workers and both adult victims and one minor victim answered the ads. However, either on arrival or a few days later, the accused informed them that they would be required to give massages accompanied by masturbation of the clients. The victims agreed because respectively, they were experiencing financial difficulties, had no other job or had no place to live. During their testimonies, two of the victims said that the accused was a good employer, and one testified that he had always respected her. Nevertheless, the accused was convicted of child trafficking for prostitution and exploiting a prostitute.

Similarly, in **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of 4 young children, the victims testified that the accused treated them well, despite the sexual exploitation. For example, before the exploitation started, he would give the children treats like dates and raisins and take them to stores to buy them food and other items. One child testified that he would also take them to the beach with his children and that after they returned from the supermarket he would give them peanut butter and brotchens.²⁰⁵ In addition, after sexually exploiting them he would give them money for chips and treats. One of the mothers of the exploited children testified that the accused spoiled the children with ice cream and sweets and also drove them around. Nevertheless, the court convicted the accused of trafficking for sexual exploitation.

We refer the reader to section 3.2.4.1 on *gradual grooming/seasoning exploitation with good treatment* which reveals that this sort of good treatment may be undertaken in order to groom children for sexual exploitation.

Similarly in **Mansaur (South Africa)**, a case revolving around trafficking for sexual exploitation, the accused trafficked the victim from Thailand, detained her passport, employed her in prostitution, and imposed a heavy debt upon her. However, he also gave her food, free accommodations and condoms. The accused pled guilty to charges of trafficking for sexual exploitation, but committed suicide before the case was decided.

Conclusion

What conclusion can we draw from these examples? While poor conditions and treatment can contribute to a conviction of trafficking, good treatment does not necessarily mean that an exoneration is in order. Thus in **Mansaur**, the case summary notes that giving the victim food, accommodation and condoms was a tool by which the trafficker ensured that the sexual exploitation would continue and in **Dragon**, showing the victims a good time and giving them treats can be viewed as a tool to groom the victims for sexual exploitation.

²⁰⁴ See the place of victim protection in the fabric of proof/ introduction: the impact of victim trauma.

²⁰⁵ Brotchens are bread rolls.

Around the world, good treatment by the trafficker does not necessarily ensure an exoneration in cases of trafficking and allied crimes. Thus, in the **Siliadin (ECHR)**,²⁰⁶ a case before the European Court of Human Rights, revolving around exploitation in the context of domestic servitude, the victim's uncle testified that she was always dressed adequately and seemed in good health. In addition, there was no claim that the accommodations were unsafe or unhygienic and she had the money to contact her uncle by phone. Despite this, the court ruled she had been held under forced labour and servitude.

Similarly, in **Wei Tang (Australia)**²⁰⁷, revolving around slavery in the context of prostitution, the Thai victims brought to Australia for prostitution, were properly fed and had good accommodations. They also had access to medical treatment. However this alone, did not negate the conviction of the accused on the crime of slavery.

By the same token, in the Israeli case of **Aldenko (Israel)**²⁰⁸ the Supreme Court of Israel convicted several accused persons of trafficking for prostitution, even though they had never exercised violence against the women and even took them to parties and entertainments. As in **Mansaur**, the court stated that this was done in order to elicit more work from the victims.

3.3.6 Selective treatment of victims

Sometimes traffickers treat various victims differently. This may be a 'subtle means of control' by which the trafficker elicits more work from the favoured victim, gives the unfavoured victim an incentive to work harder, strengthens the sense of worthlessness of the unfavoured victim or prevents victims from forming friendships.²⁰⁹ Alternatively, it may emanate from different stages of exploitation, where a seasoned victim is trusted to supervise new initiates.

This behaviour pattern may be viewed as a weakness in the case, as it can impugn the victim's credibility about his or her difficult circumstances, if other victims did not experience them. We refer the reader to section 3.3.4 of the global case digest on *selective treatment of alleged victims compared to persons in same situation*.

The clearest example of this patterns occurs in **Veeran Palan (South Africa)** where two vulnerable young women are trafficked for sexual exploitation. The recruiter was herself a victim of the dominant trafficker, and apologized to one of the victims for lying to her, explaining that she needed to find a replacement before she could return to Cape Town. This was confirmed by the dominant accused. The second victim testified that this female recruiter was treated like a daughter by the dominant accused and his wife. She did what they expected of her and had her

²⁰⁶ Siliadin v. France (App. No. 73316/01) ECHR 26 July 2005, European Court of Human Rights. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FRA010).

²⁰⁷ R. v. Wei Tang, before the Supreme Court of Victoria, Australia [2007], VSCA 134 and before the High Court of Australia [2008], HCA 39. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. AUS001).

²⁰⁸ State of Israel v. Aldenko Criminal Appeals 10545, 9510, 9905, 10752/04 before the Supreme Court of Israel. This case is available at the UNODC Human Trafficking Database (ISR002).

²⁰⁹ See for example, Zimmerman, C., Yun, K., Shvab, I., Watts, C., Trappolin, L., Treppete, M., Bimbi, F., Adams, B., Jiraporn, S., Beci, L., Albrecht, M., Bindel, J., and Regan, L. (2003). "The health risks and consequences of trafficking in women and adolescents. Findings from a European study" London, London School of Hygiene & Tropical Medicine (LSHTM). See page 25 where "Favouritism or prerequisites with the goal of causing divisiveness between co-workers and discouraging formation of friendships" is described as a form of social manipulation of traffickers. Available at <https://www.icmec.org/wp-content/uploads/2015/10/Health-Risks-and-Consequences-of-Traffic-in-Europe-Zimmerman-2003.pdf>; See also Walters, Jim and Davis, Patricia H. (2011) "Human Trafficking, Sex Tourism, and Child Exploitation on the Southern Border", Journal of Applied Research on Children: Informing Policy for Children at Risk: Vol. 2: Iss. 1, Article 6. Available at: <http://digitalcommons.library.tmc.edu/childrenatrisk/vol2/iss1/>.

own website. This testimony seems to point to the fact that the recruiter was still being sexually exploited by the dominant accused when the 2 other victims were in the trafficking situation and was treated better than were they. She was convicted of trafficking for sexual exploitation along with the dominant accused person.

3.3.7 Family complicity

When family members are complicit in the trafficking, the case may be more difficult to prove. The victims may be more easily recruited and continue to believe in the trafficker; they may still love the trafficker and be unwilling to testify against him or her; they may still be under the psychological domination of the family member; they may not view themselves as victims; the complicity of a family member may lead to a loss of trust in the world, including law enforcement and courts.

We refer the reader to section 3.2.5.13 on *emotional vulnerability/traffickers in positions of trust* for a detailed review of the cases in which family members were complicit in the trafficking. Most of these cases do not explicitly address the impact of the family relationship on the victim, but most of them hint at how easy it is for a family member to recruit a relative.

Several cases provide a window to the psychological state of victims recruited by family members.

The clearest statement of the connection between family complicity and the impact on victims appears in **Mabuza (South Africa)**, where 4 children from **Mozambique** are trafficked for sexual exploitation to a remote lumber camp in **South Africa**. The children are recruited by a woman who is a relative of some of them and familiar to the parents of others. She tells the parents that the children will be returned to them after they visit family in **South Africa** or that they will be enrolled in schools in **South Africa**. Both this woman and her sister prepare the children for sexual exploitation, assist the sexual exploiter and receive payments from the exploiter.

There is little doubt that the family relationship between the recruiter and some of the parents facilitated their willingness to allow her to take the children with her. By doing so, they become complicit in the trafficking, albeit innocently.

The impact of the family complicity can be seen in the words of the court of first instance:

"All this while they were related to Juliet²¹⁰, or knew her well enough to view her in a position of authority and trust and who seriously betrayed the trust of the children."

State v. **Mabuza** and other Case No. SHG 9/13 Regional Court for the Regional Division of Mpumalanga at Graskop (21 November 2014); conviction affirmed **Mabuza v. State** Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, (30 August 2017). The quote is from the court of first instance.

The reactions of one of the children reflects a loss of trust in the world which caused her to delay coming forth and experience difficulties in testifying. While the court does not explicitly tie this loss of trust to being trafficked by family members, it is likely that this factor contributed to it:

²¹⁰ Juliet was the recruiter of the children.

"She did however not make any disclosure to any of them of what had happened to her, because, so she said, she was afraid and ashamed to tell them. She trusted no one..."

After a firm decision had been taken to prosecute but, before the accused persons were requested to plead to any of the charges, JC, during consultation with the prosecutor for the first time disclosed that she had also been raped once by accused no 1. The reason that she advanced for this late disclosure was that, when she saw that the other children were free to disclose what had happened to them, and when she saw she could trust the prosecutor, she disclosed her ordeal in detail. This, despite the fact that, in her police statement to Nyathi, she denied that anything untoward had happened to her. Nevertheless, this disclosure then led to counts 1 and 2 being added to the subject matter on which the two accused were requested to plead. It must be pointed out here that JC was the most difficult witness to get to testify, even through the intermediary. Various factors could be detected and cited as the reason for her greater unwillingness or unease to testify. First, she indicated that she was scared and trusted no one..."

S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

In **Jonas (Namibia)** the victim was trafficked for sexual exploitation by her aunt, who deceived her with offers of a good job. While other young girls rejected the aunt's offers, the victim agreed to them. It is possible that in this, she was swayed by the family relationship which engendered trust, and indeed, when ruling on the sentence, the court notes that the accused is an extended family member of the victim which caused the victim to trust her.

The effects of her experience can be seen in the prosecutor's description of her testimony. When she identified the accused in court she screamed and was emotional and as a result the court had to adjourn for her to compose herself. As to the long term effects of the traumatic experience, the victim testified that the accused destroyed her life; that she has no future; and that she is psychologically affected because right now she is not thinking straight or properly. While she does not explicitly tie these effects to the family relationship between her and the trafficker, it does not require a high flight of imagination to conclude that it may have contributed to them.

Though the above cases and those described in section 3.2.5.13 on *emotional vulnerability/traffickers in positions of trust*, yielded convictions despite the difficulties involved in cases of family complicity, there was an exoneration in another such case, namely, **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a 14 year old girl by her stepfather who transported her from **Eswatini** to **South Africa**. The court of first instance noted that in her testimony the girl displayed confusion among her roles: *"She saw the accused as a father, but there would be times when she would be his wife."* By the same token, in its ruling, the court of first instance says that the stepfather abused his power vis a vis the girl, as: *"The accused treated the child like his wife and the mother of the house where she was given the responsibility to look after her siblings and take care of the housekeeping."* This confusion of roles may have led to difficulties in reporting the crime and in testifying, although this connection is not explicitly made by the court. We note that while the court of first instance convicted the accused of trafficking for sexual exploitation and rape, the High Court confirmed the conviction on rape, but exonerated the accused of trafficking due to doubts about his intent and his abuse of the girl's vulnerabilities.²¹¹

²¹¹ See sections 3.3.1 on *difficulties in proving intent* and 3.3.2 on *the victim's alternatives including support systems*.

3.3.8 Victim behaviour in the course of the trafficking process

Victim behaviour can impugn credibility in trafficking in persons cases. This can be seen during the trial process stage as described in section 2.2.1 of this digest on *typical weaknesses of victim testimony*. However, it can also be seen during the trafficking process itself, which is the subject of this section.

Victims may fail to escape or seek help at the first opportunity; they may return to abusers time after time; they may behave in a naïve or negligent fashion; various victims may react in widely different ways to the trafficking situation; a victim may initiate the proposal to accompany the trafficker; he or she may agree to contract with the trafficker; victims may commit illegal acts; they may have previously been engaged in prostitution; they may hold seemingly irrational beliefs; they may exhibit behaviour which is influenced by their cultures, but is not well understood by practitioners.

Sometimes these behaviour patterns may contribute to an exoneration, especially if the case presents a constellation of them. However since these patterns are common among victims of trafficking, they may also prompt courts to find ways to explain them, as a function of an analysis of the totality of the evidence,²¹² with particular attention paid to trafficking victims' particular vulnerabilities and profiles.

We note that many of these behaviour patterns seem to proceed from victims' consent to the crime, a topic which is addressed at greater length in section 4.4 of this digest.

3.3.8.1 Failure to escape or seek help at the first opportunity

Sometimes victims fail to escape or seek help at the first opportunity, leading to doubts of their credibility, under the assumption that if a person is truly undergoing such a severe crime as trafficking, he or she will seize on any opportunity to free himself from the situation as soon as possible. Alternatively, such behaviour may lead to the conclusion that the victim consented to his exploitation.²¹³

However, although courts tend to address this behaviour seriously, they do not necessarily exonerate on the basis of it, but rather carefully examine the totality of the evidence in order to gauge the victim's situation and vulnerabilities.

The following are examples of convictions and exonerations on the background of the victims' failure to escape or seek help at the first opportunity.

Convictions

In **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, addicted to drugs, the court explicitly addresses and dismisses defence claims of this nature, and convicts the accused persons of trafficking for sexual exploitation, slavery and servitude. In doing so, it analyzes the totality of the evidence, with particular emphasis on the victims' vulnerabilities:

²¹² See section 2.4.2 on *the totality of the evidence*.

²¹³ We refer the reader to section 4.4. on *how to address the subject of consent*.

"It was argued by Mr Moldenhauer that the two women surrendered willingly to the accused and had cell phones and could have called someone to come to their assistance, or they could simply have run away when they were walking the streets at night. This argument however loses sight of the fact that they had no money, nor did they have a support network that could assist them, if they should have tried to leave. It also loses sight of the fact that they were dependent on drugs. It must also be remembered that Ms Malema²¹⁴ was brought back by accused when she attempted to escape. The uncontested evidence is, that after that attempt, they were not allowed to leave the flat at all during the day and were not even allowed to go out unaccompanied to hang their washing and was actually locked inside the flat. The evidence is that accused 3 on occasion assaulted them if they didn't toe the line. They were locked up and given drugs to sleep during the day. They were as a result kept on the premises by threat or use of force...Even if they wanted to leave, as we know at least Ms Malema did, they could not. They were trapped by their socio-economic and personal circumstances as well as their dependence on drugs."

State v. OB Abba et al, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria)

Another example of a case where the court explicitly addresses the victim's failure to escape, and yet convicts, is **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, addicted to drugs. In addressing one victim's failure to flee or seek help, the court explains this in view of the victim's fear of the accused, his confiscation of her motorcycle and the accused's psychological control of her by means of drugs:

"...although opportunities presented itself for her to run away from the accused, the accused made threats to kill her family if she ever tried to run away and he had her motorcycle..."

In this context one understands why Els repeatedly returned to her captor and why she did not avail herself of the many avenues of seeking help or fleeing. The addiction had ruined their lives and left them with no apparent alternative."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

Yet another case which explicitly deals with a victim's failure to escape and seek help, and yet yields a conviction, is **Allima (South Africa)**. The case revolves around a 16 year old girl who is abducted from her hometown and subjected to sexual exploitation by a series of men. She is so traumatized that in the end, she forgets her true identity and believes that she is the accused's daughter and that her name is other than it really is. During several stages of the trafficking process, she seemingly could have fled or sought help and yet does not.

During the first stage of her abduction, when she still knows her true identity, the victim is taken to a taxi rank, where other members of the public surround her and yet does not seek their help. Subsequently, she is taken to the zoo by one of her abductors, and yet does not seek help from the zoo personnel or the public. During her sexual exploitation by one man, she is given a cell phone, but does not contact anyone to seek help.

The victim and the clinical psychologist respond to these issues under examination in chief and cross examination. Thus, the prosecutor asks the clinical psychologist why the victim did not try to escape or seek help at an early stage of the trafficking when at the taxi rank and the psychologist replies:

²¹⁴ Ms. Malema was one of the victims who attempted to escape at one point.

"Because of the threat, the intensity of the threat, she was highly unlikely to try and escape. And further on, she has indicated to us that she was confused and we do not know the degree of the confusion even though she was aware when she was at a taxi rank...even though it appeared in the public where she could even scream or where she could even run, the question is if she started running, who was going to be the first person to catch her. Was that person going to be visible...In fact if there is any trauma you carry the trauma in your physical body and it doesn't move away without in depth psychotherapy and I can tell you at the time when she was in the process of going to a new environment, already in her system fear was there. And therefore possibilities are to try and escape was more dangerous rather than to succumb."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (26 June 2014).

In respect of not seeking help at the zoo, during the examination in chief, the victim confirmed that there were people present, other than the threatening male who took her there, and among them workers and members of the public. During the cross examination, the defence counsel asked her if she alerted these people and she answered that she had not *"because I was dizzy and powerless"* and could not walk without support. In respect of her failure to seek help via the cell phone, the psychologist testified that the victim's confusion played a role and that this confusion was not a choice that the victim made.

The court noted that the victim and the clinical psychologist were credible witnesses and convicted the accused of trafficking for sexual exploitation, despite the weaknesses.

In **Jeremiah Musa Dlamini (Eswatini)** an influential man trafficked his biological daughter and niece for sexual exploitation for years. When his elder daughter came to live with them, she refused to be sexually exploited and in the end, reported the case to the authorities. The court notes that at one point she asked her sister and cousin why they did not end the exploitation. They answered that not only were they afraid of the accused physically harming them, but they also feared he would expel them from his house and they had nowhere to go. We note that although there is no mention of restrictions of freedom employed against the victims, which could have prevented them from seeking help, the court notes that the entire community, including the police, was aware of the exploitation, but did nothing to stop it, so that it is reasonable to assume that it would not have availed the victims to seek help. The accused was convicted of trafficking for sexual exploitation and rape.

Similarly in **Mujee (Botswana)** though the victim of trafficking for sexual exploitation was locked in her room on occasion, this was not so all the time. In her testimony, the victim says that *"there were times when she thought of running away but the accused had told her that she would never go far, as she would be arrested"*²¹⁵ since she was illegal in the country. The court convicted the accused of trafficking for sexual exploitation.

A case where the court viewed the failure to escape or seek help as *"the most material shortcoming in the evidence"* is **Veeran Palan (South Africa)**. This case revolves around the trafficking for sexual exploitation of two vulnerable young women who traveled from Delft to Port Shepstone, a distance of some 1 472 kilometers, due to a deceptive promise of good jobs in a hotel. On arrival they were told that they must prostitute themselves.

The court notes that the victims could go out on occasion and had access to a cell phone. In addition, when discussing the additional charge of kidnapping, the court notes that the victims did have opportunities to run off into the streets or into the night to seek help or to ask a barman or a shop assistant to call the police.

²¹⁵ See paragraph 11.

While the court does not explicitly address the victims' explanations for these omissions, it notes them. Thus the court notes that in their testimonies the victims describe their fear of the accused who carried a firearm and talked threateningly; the accused's constant supervision of them; their impression that the accused was well connected, so that seeking help would be in vain. The court also notes the victims' psychological processes, as expressed by them in testimony, including not knowing whom to trust and not being able to think clearly. The testimonies also reveal that the victims did not know where the police station was. In addition, a language barrier is mentioned, as it is stated that their command of English was not good. Moreover, the court notes the testimony of one victim, that though the accused did not threaten them, he pressured them, because they owed him money for transport, food, accommodation and placing advertisements of their services on the internet.

However, despite these explanations, which arise from the testimonies of the victims and other witnesses, the question why the victims did not make use of the first opportunity to flee or seek help from the public is, nevertheless, viewed by the court as "*the most material shortcoming*" which requires safeguards in order to convict on trafficking charges. The court finds these safeguards in various forms of corroboration.

Interestingly, when discussing the additional charge of kidnapping, which requires an element of deprivation of liberty, the court reaches the conclusion that this element was fulfilled, without stressing the need for caution.

In other cases, although the court convicts the accused of trafficking despite this weakness, it contributes to exonerations from other charges.

One example is **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of a number of children by a close neighbour. One child testified that the door of the accused's residence was secured by a hook from the inside, but not locked, so that she could have left. She explains staying by testifying that she chose to remain because of the others. In addition, at one point, 2 of the children left while others remained, although they too could have left. Other victims testified that the accused locked the door from the inside, so that they could have fled as well. When asked why they did not raise an alarm to stop the exploitation, one victim testified that they were afraid that the accused would harm them.

The court mentions these weaknesses, among others, and notes that "*the quality of evidence is very poor*". The weaknesses, including these, lead to an exoneration on rape charges, but do not prevent the court from convicting the accused of trafficking for sexual exploitation.

Similarly, in **Ogochukwu (South Africa)**, a case revolving around the trafficking for sexual exploitation of a 15 year old girl who leaves her home because of problems with her mother, the court notes that she was not debarred from going home and exonerates the accused from kidnapping charges, but convicts him on several counts of trafficking (although it exonerates on one count of trafficking where it deems the victim to have been non-credible).

In some cases the court does not explicitly address this weakness in the evidence, even though it arises from the facts noted by the court. One example is **Esther Phiri (Zambia)**, a case revolving around the trafficking of a 14 year old girl who is transported to the capital city of Lusaka, at a distance from her home village, expected to do domestic tasks with no pay for the accused person's sister and sexually exploited. The girl testifies that the accused gave her a sim card for her phone and that she talked to her guardian on at least two occasions, but lied to him at the accused's behest. The court does not explicitly address the victim's failure to flee or seek help, and convicts the accused person of trafficking in persons. However, clearly the girl's vulnerabilities and situation could have explained this behaviour and for example, her young age, her distance from her home and dependence on the accused's sister for basic needs, and her isolation from support systems.

Exoneration

In **Fakudze (South Africa)** the case revolves around the sexual exploitation of a 14 year old child by her stepfather, who began to rape her a few months after he transported her to **South Africa** from **Eswatini**. The exoneration does not turn on the alleged victim's failure to flee or seek help at the earliest opportunity; it rests on doubts about the accused's intent when he transported the girl to **South Africa** and on the girl's seeming wealth of alternatives to accompanying the accused.²¹⁶ However, though neither the court of first instance, which convicted the accused, nor the High Court which exonerated him, explicitly addressed this weakness, it appears in the facts of the case.

Thus, the alleged victim was permitted to go to school and yet did not report her situation to the school authorities. Moreover, although she did conduct at least one conversation with at least one neighbor, she did not seek help from him or her to escape from her situation. We note that the record reveals at least one such conversation where a neighbor told her that she was pregnant, whereas she initially did not know, and thought she had just gained a lot of weight.

Seemingly this weakness did not influence either the conviction by the court of first instance or the exoneration by the High Court, though it was present. We note that had the courts chosen to analyze this behaviour explicitly, they might have been able to put it in context in view of the girl's vulnerabilities (her age, family relationship with the accused, total dependence on him, illegality in the country); her restrictions of freedom, and isolation. Moreover, the facts of the case reveal that the accused had formerly sexually abused the girl in **Eswatini** when she was 12 years old. At that point in time, she did report the exploitation to the school authorities, but nothing came of that. This too, might have provided an explanation for her failure to report to school authorities in **South Africa**.

Examples of explanations for failure to flee and seek help

- Vulnerabilities (such as age, lack of means, illegality in country)
- Addiction to drugs
- Nowhere to go/social isolation
- Lack of familiarity with area
- Restrictions of freedom (including supervision and confiscation of personal property)
- Threats/the accused thought to be well connected
- Fear of accused
- Confusion
- Sense of powerlessness
- Physical impairment (such as dizziness)
- Not knowing whom to trust
- Failure of previous escape attempt

3.3.8.2 Returning to the abuser

Seemingly, returning to a person claimed to be an abuser, may serve to impugn the credibility of the alleged victim. It is assumed that if the situation were really so heinous, no rational person would voluntarily return to it. Moreover, this may also lead to the conclusion that the victim consented to the exploitation.²¹⁷

²¹⁶ See sections 3.3.2 on *difficulties in proving intent* and 3.3.3. on *the victim's alternatives including support systems*.

²¹⁷ We refer the reader to section 4.4. on *how to address the subject of consent*.

However, this seems to be a pattern of behaviour among victims of trafficking, as can be seen by convictions, despite it, around the region and the world.²¹⁸

The case which best highlights such a pattern is **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women who are addicted to drugs. One of the victims, named Els, leaves the accused time after time during a period of 4 years from 2009 – 2013, but continually returns to him and stays with him, mainly due to her drug dependence, to which he is able to cater. Some of the time, her return to the accused is not voluntary; he takes her back by force. However, even in those cases, her addiction leads her to seek drugs in places where the accused has contacts and where she could have anticipated that he would be.

Thus, at one point she goes to a welfare home for a week in order to give birth to her child and overcomes cravings for drugs, as she testifies that having the child was more important to her. She returns to live with her parents and is employed as a receptionist for a month or two, but her addiction overcomes her, and on a trip to purchase drugs, the accused traces her and forcefully takes her. A second escape takes place afterwards when she flees in the boot of a car belonging to the client of another woman. She returns to her parents and stays with them for a long time, during which her third daughter is born. However, once more she reverts to taking drugs and the accused comes across her when she goes to buy drugs and takes her back by force to his car. He then pays a drug debt that she incurred with another Nigerian. Subsequently she is taken by the accused to a man called Chooks, for whom she prostitutes herself in exchange for daily drugs. The money she earns there is shared with the accused. After this stint with Chooks, she once again goes to live with the accused and prostitutes herself for him in exchange for drugs.

Despite this series of returns to the abuser, the court convicts the accused of trafficking for sexual exploitation. The court explicitly refers to the problematics of the victim's series of returns to the accused, but explains them by means of her addiction to drugs:

In this context one understands why Els repeatedly returned to her captor and why she did not avail herself of the many avenues of seeking help or fleeing. The addiction had ruined their lives and left them with no apparent alternative."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria 27 November 2017

In **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of 5 minors, although the children had homes in the neighborhood of the accused, they continued to frequent his house 4 to 5 times, despite the sexual exploitation. On one occasion, even though they were playing in a protected place, namely in the yard of a relative of one of them, they went to the accused's house when he requested them to do so. One child testified that she did so "*because he asked her to come.*" Another one testified that she did so because she feared the accused. Despite this pattern of behaviour, the court convicted the accused of trafficking for sexual exploitation, although it exonerated him from rape charges. Although the court does not explicitly address this behaviour pattern in the conviction ruling, it does so in its sentence:

²¹⁸ See global case digest, section 3.3.6.2 on *returning to an abusive employer*.

"I am still puzzled by the regularity with which the complainants visited the home of the prisoner if one considers the horrible things they attributed to him. The morally harmful pornographic pictures displayed on the walls of his bedroom seems to me to be one possible attraction why the minors kept going to his home time and time again and it was during those visits that he at times indecently exposed himself to them and demanded to have sex with them".

S. v. Bertus Koch (CC 20/2017) [2018] NAHCMD 290 (18 September 2018), High Court of **Namibia** main Division, Windhoek, sentence 11 October 2018

In a number of cases which yielded convictions, the pattern of return to an abuser is present, but is not explicitly addressed by the court. One example is **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women who are given drugs by the accused. The first victim prostitutes herself for the accused for two months, and then moves on. She enters into a relationship with another pimp who does not treat her well and leaves him. She then returns to the accused and prostitutes herself for him. Despite this behaviour the dominant accused persons are convicted of trafficking for sexual exploitation.

Another example is **Dragon (Namibia)**, a case revolving around the trafficking for sexual exploitation of 4 young children from disadvantaged backgrounds, between the ages of 7 and 9. The accused was a man in his sixties, whose children were playmates of some of the victims. This man lured them by taking them into town, buying them treats and giving them attention. He then sexually exploited them on a number of occasions, paying them with money and sweets. Though the children had homes in the neighborhood, they continued to come back to him frequently, and on a regular basis²¹⁹ until the exploitation was uncovered. We note that the duration of the exploitation is not made clear. Despite this frequent returning to the abuser, the court convicted the accused of trafficking in persons for sexual exploitation and rape.

Similarly, in **Lukas (Namibia)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable minors, one of the victim returns to the sexual abuser 4 times, although it is clear to her that she will continue to be sexually exploited. The court notes that she did not wish the relationship to be terminated because she enjoyed the benefits of being paid and viewed the exploiter as her boyfriend. While the court does not explicitly address this behaviour in its own right, it deems the victim to be credible and convicts the two accused persons of trafficking for sexual exploitation and rape.

3.3.8.3 *The naïve or negligent victim*

In a number of trafficking cases, which form the basis of this digest, victims seem to behave in a naïve or negligent fashion. For example, they may accompany a trafficker where there are clear danger signs attesting to his unreliability, or may believe what he or she says, even when it is suspect. This can impugn the victims' credibility, as it may be hard to accept that they really believed the trafficker's representations. While in one case such behaviour may have contributed to an exoneration, in other such cases the court convicted nonetheless in view of the totality of the evidence, including the acute vulnerabilities of the victims and other situational factors.

Convictions

In **Jonas (Namibia)**, a case revolving around the trafficking for sexual exploitation, a young girl, orphaned and living with her mother's sister, was promised a good job outside her village by the accused, who was the half-sister of the victim's mother. However, according to the testimony of

²¹⁹ One victim said that the exploitation transpired every day and another one that it happened many times. In enumerating the common cause facts, the court notes that it happened on a regular basis.

a young girl who was a neighbor of the accused, this offer came after the accused had previously approached her, the victim and another young girl from the village and asked them to come with her in order to be with her male friends who were looking for girlfriends. They all refused, but some time after this incident, the victim decided to accept the accused's offer of a job.

On the face of it, this behaviour seems to be naïve or negligent, in view of the fact that the accused had previously shown that what she really intended was to have the girls serve as girlfriends of men. While the court did not explicitly address this weakness in its ruling, it was noted in the descriptions of the testimonies. Nevertheless, despite this seemingly questionable behaviour, the court deemed the victim to be a credible witness and convicted the accused of trafficking for sexual exploitation.

Another example of such a behaviour pattern occurs in **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women who are promised jobs in a hotel in a city distant from their homes, but on arrival, are expected to prostitute themselves. One victim's boyfriend suspected the recruiter, as he had heard suspicious stories about her relating to prostitution. Consequently, he prevented his girlfriend from getting on the bus. However, in the end, she disregarded his warning, and traveled to the location of the hotel without telling her boyfriend, because she was told by the recruiter that otherwise she would need to repay her for the expenses incurred for the bus fare.

Seemingly this behaviour appears to be naïve or negligent, in view of the warning and strong objections of the victim's boyfriend. While the court did not explicitly address this weakness in its ruling, it appears in the testimonies of the victim and her boyfriend. Nevertheless, despite this behaviour, the court deemed the victim to be a credible witness and convicted the two accused persons of trafficking her for sexual exploitation.

Similarly, in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of vulnerable female victims, several victims were warned that the accused means to exploit them. While some of them fled, others remained. Moreover the 2 mentally disabled minors were warned twice, saw a newspaper clipping about their own disappearance and yet did not flee, but rather told the dominant accused of the first warning and believed her when she told them to trust only her or they would be in danger. They behaved this way, even after it was clear to them that the accused was exploiting them by selling them to a series of men night after night.

Seemingly the behaviour of the 2 mentally disabled victims and those victims who did not flee, though warned, reflects naiveté or negligence. While the court does not explicitly address this weakness in its ruling, it describes testimonies which include it. Despite this weakness, the court does not impugn the credibility of the victim – witnesses²²⁰ who acted in this way, and convicts the accused of trafficking them for sexual exploitation.

In **Ogochukwu (South Africa)**, a case revolving around the trafficking for sexual exploitation of a young girl of 15, the victim fled her home due to problems with her mother. She happened to meet a friend on the street who suggested that she accompany her to another town, without divulging the nature of the place to which she was taking her. Nonetheless, the victim accompanied her. On arrival at the accused's residence, drugs were being taken and the friend informed the victim that she would be doing prostitution that night and invited her to do so as well. According to the friend's testimony, they both engaged in prostitution that night. The next day, this friend suggested to the victim that they leave the accused's residence, but the victim refused and opted to remain "*for the sake of her clients*".

²²⁰ We note that one mentally disabled victim did not testify, as the court ruled that she was not competent to do so because she could not distinguish between the concepts of truth and lies.

Seemingly the victim's behaviour appears to be naïve or negligent. She accompanies her friend without knowing the nature of the place to which they are going. Once there, when it becomes abundantly clear that prostitution and drugs are part of the accused's establishment, the victim opts to stay, although she could have left with her friend. While the court does not explicitly address this weakness in its ruling, it describes the testimony of the victim's friend which includes it, and deems it to be credible. Moreover, despite the victim's behaviour, the court deems her to be a credible enough witness to substantiate convictions on a number of counts of trafficking for sexual exploitation.²²¹

In **Mboo (Zambia)**, the case revolves around trafficking for body part removal. The brother in law of a 24 year old man who had just lost his wife and was left to care for their child, attempted to sell him to a buyer for his organs. In order to do so, he took him to a bar, gave him money to buy beer and told him that they needed to wait for a buyer in order to sell a canoe. The brother in law pressed the victim to drink so much beer that he could hardly walk at the end of the night, when the accused led him to the car of the potential buyer.

In his testimony before the court, the accused raised the same excuse that he had given the victim, namely, that he was trying to sell a canoe. The court considered this excuse to be non-credible because the accused never mentioned any details such as the name of the buyer. Nor did he ever show any canoes. Thus, the accused's excuse was non-credible on the face of it and the victim's gullibility may reflect naïve or negligent behaviour, especially since seemingly it should have been clear to him that the accused was taking pains to make him drunk. While the court does not explicitly address this weakness in its ruling, it convicts the accused of trafficking for removal of body parts.

In **Esther Phiri (Zambia)** a 14 year old girl, orphaned and living with guardians, was approached at night, while her grandmother was asleep, by a woman who offered her a job as a maid for her sister in the capital of Lusaka, and promised her that she would be paid. The woman warned her not to tell anyone. Consequently, the girl did not tell her guardians, but only a friend. On arrival in Lusaka she was never paid for her work and was also sexually exploited. On the face of it, the girl's gullibility in the face of the circumstances reflects naïve or negligent behaviour. While the court does not explicitly address this weakness, it nevertheless convicts the accused of trafficking in persons.

As can be seen by the analyses above, although the courts did not explicitly address this weakness in their rulings, the totality of the evidence provides possible keys to understanding the victims' behaviour in the context of their acute vulnerabilities and other situational factors.

Conviction in court of first instance versus exoneration in High Court

In **Fakudze (South Africa)**, the alleged victim, aged 14 years, is sexually exploited by her stepfather who takes her from **Eswatini** to **South Africa**. After her own mother abandoned her, she initiated a request to accompany her stepfather to **South Africa**, even though he had previously raped her at the age of 12. She does so in the hopes that he will not molest her again. The following is the description of her testimony on this point before the court of first instance:

²²¹ The court does not convict on one of the charges of trafficking due to non-credibility of the victim, but this is not connected to her naïve or negligent behaviour.

"After consideration she thought that she would stand a chance of a better life and a better future if she went with the accused and that perhaps, he would not repeat the things he had done to her previous... She thought she was going to be a street kid, a child with no future and had no idea where her mother had gone and felt like an orphan....Deep down in her heart she was fearful but decided to go with the accused, as she had no parent to support her or take her to school."

State v. MMF, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in *Fakudze v State* Case no: AR410/2018 in the High Court of **South Africa** KwaZulu-Natal Division, Pietermaritzburg, June 7, 2019.

Seemingly, this behaviour is naïve or negligent, as the accused had already sexually molested the girl, and she had no reason to believe he would not continue to do so. Nonetheless, the court of first instance deemed the alleged victim to be a credible witness who had stood steadfast under cross examination and had not exaggerated the story by saying that the accused threatened her or forced her to go with him. This court convicted the accused of trafficking in persons and rape, despite this obvious weakness. In doing so, the court analyzed the victim's behaviour in terms of her vulnerabilities as a young girl, abandoned by her mother with nowhere to go.

On the other hand, the High Court confirmed the conviction on rape but exonerated the accused from trafficking charges, because in its view, there were doubts respecting the accused's intent to exploit the girl at the moment of taking her with him to **South Africa**. Moreover, in the court's opinion, the girl had many alternatives besides going with the accused, thus showing that the accused had not abused her vulnerability.²²² Although the court does not explicitly tie the exoneration to the naïve and negligent behaviour of the victim in initiating a request to accompany the accused, it is possible that under the surface of its emphasis on the victim's alternatives lurks a doubt as to her credibility due to this behaviour.

3.3.8.4 Individual behaviour

In a number of cases across the region two or more victims who are trafficked by the same perpetrator and exploited in similar ways, react differently. On the face of it, this could cast doubt on the credibility of victims who do not react as did their fellow victims, or raise the question if certain victims consented to the exploitation, if they did not refuse the demands of the perpetrator, as did their co victims.²²³ We refer the reader to section 2.2.1.6 on *seemingly inappropriate emotional reactions/individual reactions* which addresses such individual behaviour during the trial process, while in this section we address such behaviour during the trafficking process.

The following cases are examples of convictions despite this behaviour pattern, thus providing support for the practitioner who said: "*Victims come in many shapes and sizes*".²²⁴

In **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation of two vulnerable young women, while one of the victims attempted to escape from the accused, the other one did not, although both were subject to exploitation by means of prostitution accompanied by violence and severe restrictions of freedom. While the court did not explicitly address this weakness, it appears in the description of the testimonies. Despite the different behaviour of the victims, the court deemed both to be credible and convicted the 2 dominant accused persons of trafficking for slavery, servitude and sexual exploitation in regard to both the victims.

²²² We refer the reader to sections 3.3.1 on *difficulties in proving intent* and section 3.3.2 on *victim's alternatives including a support system* for a more in depth analysis of the rationale of the High Court's exoneration.

²²³ We refer the reader to section 4.4 on *how to handle the subject of consent*.

²²⁴ See section 2.2.1.6 on *seemingly inappropriate emotional reactions/individual reactions*.

In **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique**, while all the children were raped by the dominant accused person, one of them was only raped once, because every time that she was invited to go to the accused's residence after the first time, she claimed that she had her menses. On the other hand, the other children did not use this excuse, acceded to the requests to go to the dominant accused's residence, and were raped several times. While the court did not explicitly address this behaviour pattern, it is described in the testimonies, and despite it, the court deemed all of the children to be credible and convicted the 2 accused persons of trafficking for sexual exploitation in regard to all of the victims.

In **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 vulnerable young women from **Mozambique**, one victim refused to perform all the sexual acts demanded by the accused's elderly male clients, whereas the other victims did not refuse any demands of the accused. Consequently, the victim who refused was returned to **Mozambique**, whereas the other victims were not. Despite this discrepancy between the behaviour of the victims, the court convicted the accused on 3 counts of trafficking for sexual exploitation, each of which related to one of the victims.

In **Uche Odii (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, while one of them refused to engage in prostitution, despite the demands of the accused, the other acceded to his request, because she was scared and did not know where she was. The court does not explicitly address this individual behaviour and convicts the accused persons of trafficking for sexual exploitation of both victims.

In **Lukas (Namibia)**, the case revolves around the trafficking for sexual exploitation of 2 vulnerable minors. While one of them returned to the sexual exploiter 4 times and viewed him as her boyfriend, the other one visited him only once and was reluctant to engage in sexual relations with him, pushing him off her at one point. The court comments that while the first victim did not wish to accept the end of her relationship with the abuser, the other one appeared to be genuinely ashamed by what she had done. Though the court does not explicitly address the differing reactions of the children as an issue in its own right, it deems both of them to be credible witnesses who testified coherently and logically and narrated the events in a way that *"dispels any suggestion that they are malicious and mendacious and had the motive to falsely implicate the accused."* The court convicted both accused persons of trafficking for sexual exploitation and rape regarding each of the victims.

In **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of female victims, including 2 mentally disabled minors, while some fled after being warned that the accused would exploit them, some remained despite the warnings. The court does not address this difference in behaviour explicitly, but nevertheless convicts the accused of trafficking for sexual exploitation of victims who did not flee, along with those who did.

In **Koch (Namibia)** and **Dragon (Namibia)**, which revolve around the trafficking for sexual exploitation of a number of minors, the testimonies describe situations in which some of the children refused to perform certain sexual acts, whereas others did not; some left the residence of the accused at one point and others did not. The courts did not explicitly address this behaviour pattern as an issue in its own right, but nevertheless, despite the differing behaviour of the children, convicted the accused persons of trafficking for sexual exploitation of all the victims.

3.3.8.5 *Victims who initiate accompanying the trafficker*

In various cases in the region, the victim initiates approaching the trafficker with a request to accompany him or work with him. Seemingly, this behaviour can impugn the credibility of the victim, or show that the victim chose this path with his or her eyes open, with full knowledge and consent.²²⁵ While there is one exoneration which can be attributed to this weakness, at least in part, there are also convictions despite it.

Convictions

This following are a number of convictions despite this behaviour pattern.

In **Ogochukwu (South Africa)**, the case revolves around the trafficking for sexual exploitation of a 15 year old girl, who fled from her mother's home due to a fight with her. The girl's friend introduced her to the accused, but at this stage she did not prostitute herself for him. She was then kidnapped to Pretoria and forced into prostitution. She testified that the accused fetched her from there, but the court raises doubts that the accused had a hand in her return to him, although it finds her credible about what transpired after she returned from Pretoria. From this we can conclude that according to the court's impression, the girl herself initiated going to the accused's residence after her stay in Pretoria. Only then did she begin to prostitute herself for him. The court does not address this weakness explicitly, but it appears in its evaluation of the facts. Despite it, the court convicts the accused of trafficking for sexual exploitation.

Similarly, in **O.B. Abba (South Africa)** both vulnerable victims, trafficked for sexual exploitation, initially approached the accused, knowing that he was involved in prostitution. Nevertheless, the court convicted the accused of trafficking for slavery, servitude and sexual exploitation, in view of his subsequent acts of violence, restrictions of freedom and use of drugs to subdue the victims. We refer the reader, in addition, to section 4.4.3.7 on *initiating an approach to the accused as an indication of consent*.

Interestingly, in **Dos Santos (South Africa)**, a case revolving around the trafficking for sexual exploitation of 3 vulnerable young women from **Mozambique**, the accused person claimed that the victims had initiated a request to accompany her and that therefore, either there was no trafficking situation or there was no intention on the part of the accused to traffic at the time the victims were transported. However, the victims' version of the facts, by which they were recruited by the accused, was held to be credible, rather than the accused's.

Conviction in court of first instance versus exoneration in the High Court

A case which reflects different approaches to this question in the court of first instance and the High Court provides us with a rich source of understanding regarding this form of behaviour.

In **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a 14 year old girl by her stepfather, according to the testimony of the victim, she initiated a request to accompany the accused to **South Africa** from her home in **Eswatini**, after her mother abandoned her and she feared that she would become a street child. Moreover, according to the facts described in the High Court decision, the accused refused this request at first, and only acceded to it later.

The court of first instance appreciated that the victim had initiated this request because of her vulnerabilities, all of which were well known to the accused (the victim was a child, abandoned by her mother, with nowhere to go and of low socio- economic status), and convicted the stepfather of trafficking for sexual exploitation and rape. In its ruling on the sentence the court even cites a source which recognizes this behaviour as a pattern thus:

²²⁵ We refer the reader, in addition, to section 4.4 on *how to handle the subject of consent*.

"Somewhat surprisingly...not only might victims be sought out by traffickers, they might also seek out traffickers, in hopes of a better life elsewhere."

State v. **MMF**, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in **Fakudze v State** Case no: AR410/2018 in the High Court of **South Africa** (KwaZulu-Natal Division, Pietermaritzburg) June 7, 2019. The quote is from the court of first instance.

On the other hand, the High Court reversed the conviction on trafficking (though it confirmed the conviction on rape), in part, because the child's request to accompany the accused cast doubt on his intent to exploit her, especially in view of the fact that he initially refused to take her with him. In this regard, the court noted that the accused person did not even know that the child would ask to accompany him to **South Africa**, since she had a wealth of other alternatives.²²⁶ It also noted that his intent to exploit her was doubtful in view of the fact that the exploitation began only a few months after they arrived in **South Africa**.²²⁷ The court also stated that the girl's many alternatives meant that the accused did not abuse the girl's vulnerabilities, as she had reasonable alternatives, whereas the definition of this 'means' requires that there be no reasonable alternatives.²²⁸

The thrust of this analysis is that the alleged victim's initiative in approaching the accused, although she had other alternatives, means that she *chose* to accompany him, rather than being persuaded to do so, which negates the accused's intent to exploit her. Thus, the court places much stress on the girl's initiative to accompany the accused, and this circumstance contributes to the exoneration. However, it is not clear if the court's approach would have changed if it had not identified alternatives at the disposal of the victim.

Conclusion

The analysis of the cases above reveals that there are differing approaches as to the evidential significance of a request by a victim to accompany an accused person. While some courts rule that this does not necessarily negate the accused's intention to traffic the victim, others view it as casting doubt on the accused's intent.

We note that the former approach has been espoused by other courts, and for example: **Tibbet (Israel)**.²²⁹ There a woman, formerly trafficked for prostitution by the accused, approached him to return to Israel to be prostituted again. Nevertheless, the court confirmed the trafficking conviction of the accused, stressing that the consent of the victim is irrelevant to the crime.

3.3.8.6 The victim's agreement to contract with the trafficker

A number of cases in the region present situations where the alleged trafficker and the alleged victim sign contracts or orally agree on tasks and other conditions. In one such case the court exonerated the accused, at least in part, because in its view, performance of the agreed tasks themselves cannot constitute exploitation "*as they were agreed upon*". Quite obviously, this

²²⁶ For a full list of the alternatives see section 3.3.2 on *the victim's alternatives, including support systems*.

²²⁷ For a fuller treatment of the reasons behind the exoneration see sections 3.3.1 on *difficulties in proving intent* and section 3.3.2 on *the victim's alternatives, including support systems*.

²²⁸ **South Africa's** Trafficking Act defines 'abuse of vulnerability' to mean: "*any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person.*"

²²⁹ Dan Tibbet v. State of Israel, Criminal Appeal 1216/08 before Supreme Court of Israel (12/3/2009).

impacts on the discussion of how to address consent which is dealt with at length in section 4.4 of this digest.

In **Adigwe-Dike (Eswatini)** the case revolves around allegations of trafficking in regard to a young woman brought from Nigeria to **Eswatini** in order to help one of the accused persons in her business of selling wares and to attend to other tasks. In return, it was promised that she would be enrolled at a tertiary institution in **Eswatini** in order to continue her education. A written agreement was drafted to that effect which the accused persons and relatives of the girl signed and which she herself stated she saw as binding.

The couple who contracted with the girl was exonerated of trafficking in persons charges, but one accused was convicted of assault with grievous injury. One of the reasons for the exoneration was the failure of the prosecution to prove that the accused had never intended to enroll the girl in a tertiary institution from the beginning and had thus recruited her, for the sole purpose of exploitation.²³⁰ However, another consideration was that performance of the agreed tasks themselves could not constitute exploitation “*as they were agreed upon*”.

Over and beyond what was agreed upon in the contract, the case describes the actual circumstances of the alleged victim’s employment which included: detention of the girl’s passport and cellular phone; inadequate food; lack of privacy (her room was searched on several occasions); being chased out of the house on one occasion; a few assaults with one incident of severe violence; inadequate clothing. In addition, the accused told the girl that she would not be permitted to return to Nigeria unless she returned moneys which were claimed to be owed.

Several questions arise in regard to cases like this. The first: does the victim’s agreement to a contract negate trafficking, even if the contract itself is exploitative? Secondly: should the court consider the contract alone, or is it incumbent upon it to consider the circumstances outside of the contract as well?

We note that a case from Australia provides an alternative way of viewing these questions. Thus, in the Australian case of **Wei Tang**, 5 Thai women entered into oral agreements to enter Australia as prostitutes by which they would incur a substantial debt which would need to be repaid by engaging in sexual relations with no remuneration for a time. Despite their agreement to these terms, the case yielded convictions on slavery offenses. In convicting the accused, the court relied on the totality of the circumstances which included a large debt, being effectively restricted to the premises, difficult working conditions, long hours, detention of passports, absence of pay for six out of seven days a week, and isolation. Thus the court found that at least one of the conditions of the contract was exploitative, namely, the large debt, despite the fact that the victims agreed to it. However, it did not make due with examining the contract, but rather also looked at the actual circumstances under which the women were employed, even though these had not been addressed in the contract.

Conversely, another case showcases how written contracts can provide workers with leverage against exploitative employers, whereas their absence can play into the hands of traffickers. In **Alam (Seychelles)**, a case revolving around the trafficking for practices similar to slavery and forced labour of 4 workers from Bangladesh, the accused violated his oral agreements with the victims regarding pay, accommodations, food and arranging legal status in the country, and never provided them with written contracts, although they asked for them. Nor did he comply with the regulatory obligation of submitting a written contract to the Labour Migration Office at the Employment Department of **Seychelles** within a month of the arrival of foreign workers, which obligation is meant to ensure supervision over employers of foreign workers in order to ensure fair conditions of work.

²³⁰ We refer to section 3.3.1 on *difficulties in proving intent* for more detail on this point.

3.3.8.7 *Victims' illegal acts in the course of the trafficking*

Sometimes victims commit illegal acts in the course of the trafficking process. This may impugn their credibility, on the assumption that persons who commit crimes are unreliable witnesses. In section 3.2.4.4 on *inducing victims to commit illegal acts*, we addressed traffickers who induce victims to commit crimes as a subtle means of coercion and abuse. We also refer the reader to section 5.5 on *the importance of not criminalizing victims*

The cases enumerated in those sections show that courts have deemed such victims to be credible, despite their illegal acts, and have convicted the accused persons of trafficking and allied crimes. However, as a rule, courts do not explicitly address this issue head on, although it appears in the description of the facts.

Interestingly, **Zimbabwe's** Trafficking Act explicitly states that it shall not be a defence to the crime that the victim has previously been convicted of any criminal offence.²³¹

The following are examples of convictions in cases where victims commit various crimes, although the courts do not explicitly address the issue:

- *Drugs*

In cases like **Eze (South Africa)**, **Obi (South Africa)**, **Ogochukwu (South Africa)**, **O.B. Abba (South Africa)** the victims are induced to take illegal drugs. In **Matini (South Africa)** 2 mentally disabled minor victims are induced to work in the dominant accused's illegal dagga²³² business. Despite these illegal acts, the courts did not impugn the credibility of the victims, and convicted the accused persons of trafficking for sexual exploitation.

- *Illegal stay*

In cases like **Alam (Seychelles)** and **Shongwe (Eswatini)** the traffickers do not arrange for the legal stay of the victims in the country of destination, so that the victims are illegal in those countries. Nevertheless, the respective courts convicted the accused persons of trafficking crimes.

Similarly, victims are of illegal status in **Dos Santos (South Africa)**, **Mabuza (South Africa)**, **Hlabi (South Africa)**,²³³ **Munyanyi (Zimbabwe)**, **Mujee (Botswana)** and **Mansaur (South Africa)**²³⁴. Nevertheless, their credibility is not impugned by the courts, who convict the accused persons of trafficking crimes.

We refer the reader to section 3.2.5.2 on *immigration status* as a vulnerability, for a more detailed description of these cases.

Interestingly, in **S L (South Africa)** the court criticizes police who detain 40 Thai women, rescued from a place suspected to be a hub of trafficking. Instead of investigating the serious crime of trafficking, the police place emphasis on the women's violation of the Immigration Act and place the women in a detention facility prior to deportation, due to their illegal stay in the country. Though this is not a criminal case, and questions of credibility do not arise, the court stresses the importance of investigating such cases and not criminalizing the victims for illegal stay.

²³¹ We refer to section 3(7) (b) of **Zimbabwe's** Trafficking Act.

²³² Dagga is a term used for marijuana in **South Africa**.

²³³ We note that no judgment was available in this case, but rather only the charge sheet and the State's Heads of Arguments respecting an application to discharge the accused due to a lack of evidence with the close of the prosecution's case.

²³⁴ We note that the accused pled guilty, but committed suicide before the court ruling.

- *Fraud*

In **Jonas (Namibia)**, the trafficker induces the victim to carry an identity card which actually belongs to the perpetrator's sister. In addition, she writes the victim's name on a health passport belonging to someone else, thus involving the victim in another fraudulent representation. Nevertheless, the court does not impugn the victim's credibility and convicts the accused of trafficking for sexual exploitation.

- *Recruiting victims of trafficking*

In a number of cases victims are induced to recruit other victims for exploitation. This can be seen in **Lukas (Namibia)**, **Ntonga (South Africa)** and **Martinet (Mauritius)**. Nevertheless, the respective courts do not impugn the credibility of the victims and convict the accused persons of trafficking crimes.

We refer the reader to sections 3.2.4.4. on *inducing victims to commit illegal acts* and section 5.5 on *the importance of not criminalizing victims* for further information on this pattern of behaviour.

3.3.8.8 *Previous voluntary prostitution*

Sometimes, in cases across the world, the accused brings evidence to prove that the victim was voluntarily in prostitution prior to the trafficking, in order to claim that she or he engaged in prostitution voluntarily with the accused as well. It is for this reason that some national trafficking legislation, explicitly states that previous prostitution on the part of the victim is not a defence against a trafficking charge.²³⁵

In various cases across the region, victims engaged in prostitution voluntarily, prior to meeting the accused. Most of these cases yielded convictions. There is only one case where an exoneration turned on this, but it related to a prostitution crime rather than a trafficking crime.

The following cases are examples of convictions on trafficking charges, although the victims were previously in voluntary prostitution before engaging in prostitution for the accused: **O.B. Abba (South Africa)**; **Ogochukwu (South Africa)**;²³⁶ **Eze (South Africa)**. We note that these cases do not explicitly address the issue of voluntary prostitution in terms of its impact on the verdict, although testimonies describe it factually.

On the other hand, in **Lourenco (Malawi)** 3 destitute girls from **Malawi**, who had already engaged in prostitution before meeting the accused, were approached by her. She arranged their travel to Holland, where she sold them for \$10,000 apiece to men who ran sex clubs. Once sold, their passports were detained; they were forced to perform strip shows and engage in sexual relations with private clients and their captors; and they underwent beatings, threats of violence and sexual assault. One of the victims was only 15 years of age. Since **Malawi** did not yet have a Trafficking Act at the time of the commission of the crimes, the accused was charged with procuration for prostitution and exonerated, since the alleged victims had engaged in prostitution prior to meeting the accused.

3.3.8.9 *Behaviour influenced by cultural practices and beliefs*

Sometimes, victims' behaviour is influenced by cultural practices and beliefs that are not always well understood by prosecutors or courts. This may lead them to conclude that the victims'

²³⁵ We refer to section 3(7) (b) of **Zimbabwe's** Trafficking Act: "It shall not be a defence to a charge of trafficking in persons for an offender to prove that ... (b) the victim had previously engaged in prostitution or pornography..." A similar provision also appears in **Zambia's** Trafficking Act, section 21(b). See also **Eswatini's** Trafficking Act, section 17 by which "A trafficked person's past sexual behaviour is irrelevant and inadmissible for the purpose of proving that the trafficked person was engaged in other sexual behaviour or to prove the trafficked person's sexual predisposition."

²³⁶ We note that this fact comes out in the testimony of the victim's friend.

behaviour is irrational or that their stories are implausible, thus paving the way for doubts about their credibility.

The most central case in this regard is **Allima (South Africa)**. This case revolves around the abduction of a 16 year old girl from her town to the distant city of Durban, where she knows no one but the accused and is sold to a series of men for sexual exploitation.

The circumstances of the girl's abduction are unclear and seem implausible. She testified that on her way to the library, she met the accused and two men, one of whom said that he loved her. The accused took out a container of juice, but the victim observed that it contained a brown fluid, and when she stepped over it, she became dizzy. She found herself in a taxi with the accused, who was telling others that her name was other than it was. She did not protest because she was sleepy and dizzy. She then found herself in another taxi and the two men she previously saw were in it. On arrival in Durban, she was taken to a room where she was raped by three men. Throughout the course of her sexual exploitation, which lasted from May until September, her true identity was erased and she believed that the accused was her mother and that her name was other than it really was.

On the face of it, this story seems implausible. In this regard, we refer the reader to sections 2.2.1.2 on *memory gaps and distortions* and 2.2.1.3. on *seemingly implausible testimony* which relate to her problematic testimony. However, not only is the testimony she renders in court implausible, but this implausibility seems to plague the victim's behaviour in the course of the trafficking process as well.

We find it hard to understand why stepping over a container of brown fluid caused dizziness and acquiescence to being abducted and why the victim believed the accused's representations about her name and identity and erased her own. Both the clinical psychologist who testifies and the court itself attempt to explain this behaviour, by means of psychological processes, possible drugs and cultural beliefs. In this section we will focus on the cultural explanations.

Both the psychologist and the court drew on cultural explanations in order to understand what happened. The court noted that the victim came from a rural community in which people tend to believe in superstitions such as that stepping over an object thrown by a foreign person with an intent to cause harm, will indeed cause harm. In discussing the victim's behaviour and how the accused abused her power over her, the court addresses different kinds of power, including superstitious power:

"This act of the accused clearly influenced her way of thinking, probably as a result of her belief in witchcraft or magical power and she got psychologically confused. Immediately thereafter and while in that state of psychological vulnerability, the accused psychologically embraced her and told her "from now onwards you are my child"..."

"...a person who believes in superstition will easily believe such and such a thing will happen. Here I take the example of a person who will step over something and then he believes, sincerely believes what I stepped over is something with magic power, it will influence me. He may get influenced when other people are not yet influenced..."

"The victim comes from a rural area town, Ulundi, where there may be so many superstitious powers. So it may be that after walking over this container her mind said to her oh, I've walked over this container thrown down by this foreign woman ...I will suffer something...that is superstitious power because she believed in superstition and got influenced by the power of the superstition. Then she got confused and after confusion anything could have happened to her. That is why at times her mind becomes lucid, she recognizes what is happening and then she falls asleep, she's in a blackout, on and off like that because of the confusion."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (June 26, 2014).

The clinical psychologist too, tried to explain the victim's behaviour by means of cultural beliefs in magic:

"Any person who understand²³⁷ Zulu tradition, is that there are magical things that can happen to you if there's a physical obstacle that has been planned for you to alter your mind state."

State v. Allima, RC92/13 (1 April 2014) in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (June 26, 2014).

Despite the seeming irrational behaviour of the victim, the court found her credible and convicted the accused of trafficking in persons for sexual exploitation. In doing so, the judge relied both on the clinical psychologist's testimony and on his own familiarity with cultural beliefs.

Jezile (South Africa) raises an interesting question about culturally influenced victim behaviour. This case revolves around trafficking for sexual exploitation in the context of forced marriage. A 14 year old minor was forced by male family members to marry a 28 year old man. The girl objected to the marriage from the start and tried to escape a number of times, thus showing that she did not consent. However, the accused person raised the claim that pretending to escape is a normal cultural practice for brides. The court did not accept this explanation and found much evidence to support the victim's lack of consent. However, this defence claim is an interesting example of an attempt to explain victim behaviour by means of cultural beliefs and practices.

We also refer the reader to sections 2.2.1.1 on *inconsistent statements and outright falsehoods* and 2.2.1.3 on *seemingly implausible testimony* which cite several cases which stress the importance of evaluating the victim's testimony in terms of his or her cultural background.

²³⁷ This language appears in the ruling and is probably a function of technical omissions in recording the testimony.

NOTES

NOTES



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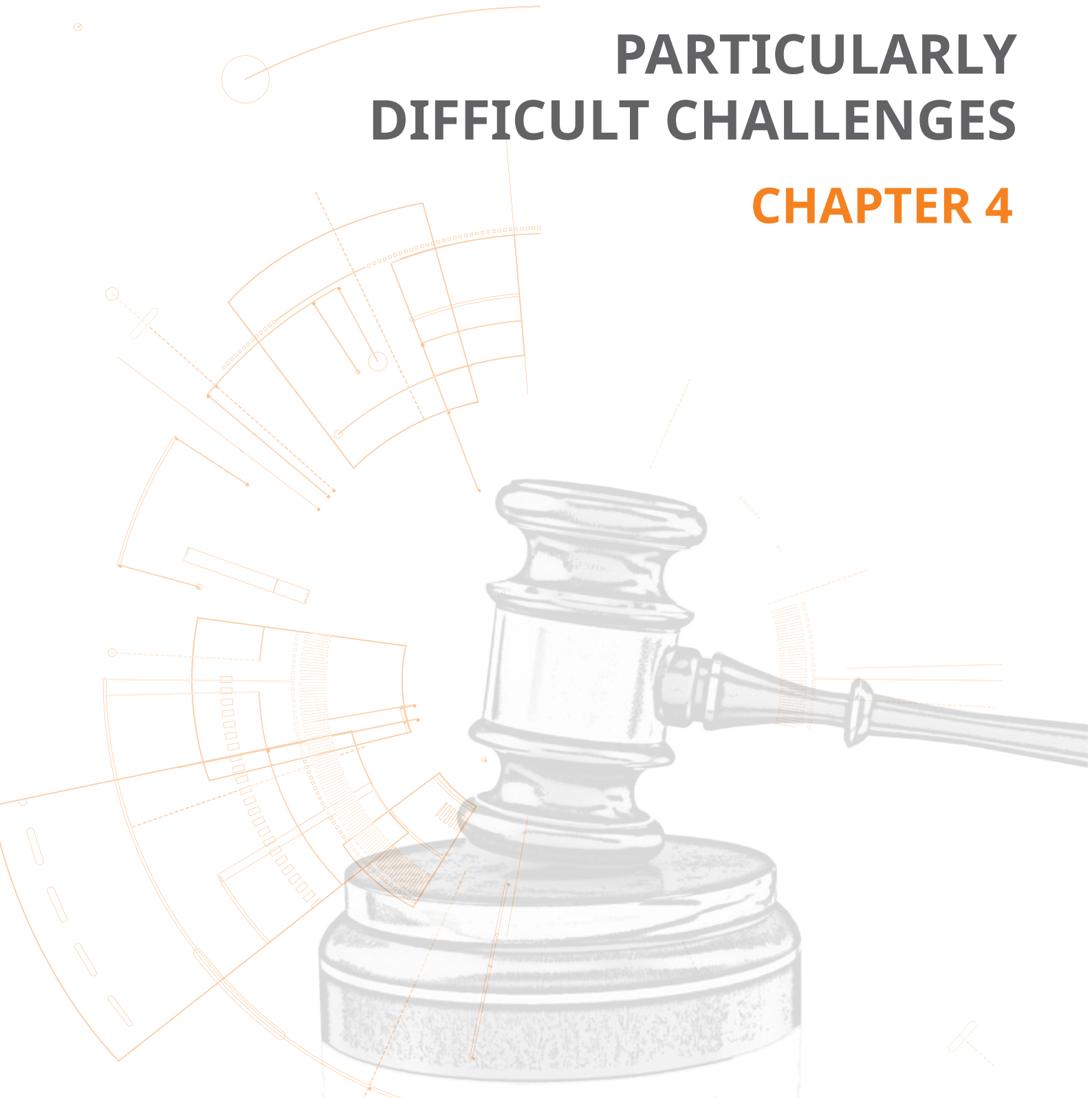
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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES
Regional Case Digest - Southern Africa

**PARTICULARLY
DIFFICULT CHALLENGES**

CHAPTER 4



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

PARTICULARLY DIFFICULT CHALLENGES

CHAPTER 4

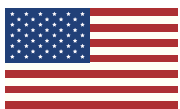


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4. PARTICULARLY DIFFICULT CHALLENGES

4.1 Introduction

Trafficking cases present several particularly difficult challenges which transcend the specific evidential issues addressed in chapter 3 on *the mosaic of evidence*. Though this chapter cannot encompass all such issues, it will focus on several particularly important ones.

The *first issue* is how to prove the chain of trafficking. Often several actors collude in order to traffic a person. While proving the intent of the end exploiter may present no special difficulties, proving the intent of other links in the chain may be harder.

The *second issue* is how to prove trafficking when the exploitation never transpired. While the Protocol and most national legislations do not require that exploitation occur, it may be difficult to prove the intent to exploit absent the actual exploitation.

The *third issue* is how to handle the subject of victim consent. While the Protocol and other national legislations explicitly state that consent is irrelevant or not a defence, if ‘means’ have been used, victim consent is often a central issue in trafficking cases nonetheless.

The *fourth issue* is how to distinguish between trafficking and mere violations of labour laws and regulations. This is an issue which arises worldwide and has not yet been fully explored. Cases from the region have much to contribute on this topic.

The *fifth issue* addresses particular questions which arise in child trafficking cases.

The *sixth issue* addresses a particular form of child trafficking, namely, child selling and adoption which presents a slew of issues in itself.

The importance of child trafficking and child selling and adoption is highlighted by the number of cases in which children fell victim to trafficking across the region.

4.2 How to prove the chain of trafficking

4.2.1 Introduction

In many cases across the region, more than one perpetrator is involved in trafficking the victim. Several issues can arise in this regard:

- *Proof of intent.* While the end exploiter’s intent is usually easy to prove, proving the intent of other links in the chain may present difficulties. In cases across the region, there are often 2 perpetrators, one of whom recruits the victim and one of whom exploits him or her.

In addition, there are cases in which a number of perpetrators are involved, with each performing a different function. Naturally when only 2 perpetrators are involved, it is easier to prove the intent of each, although questions have arisen in these cases as well.

- *Perpetrators who are not charged:* Sometimes the court notes critically that the prosecution has omitted to charge some of the links on the chain, and in particular, official functionaries who are suspected of corruption, thus presenting the court with a partial picture of the crimes.
- *Perpetrators who are vulnerable persons:* Sometimes perpetrators are themselves vulnerable persons, raising the question if this consideration should be taken into account and if so how.
- *Transnational perpetrators:* Sometimes links of the chain of trafficking reside in different countries, raising issues of how best to collect evidence and assist the victims.
- *The “big case”¹:* In cases with many accused persons, the case may also include many witnesses and documents, thus becoming unwieldy and leading to a spate of delays and complications.

Below we will address these questions, although the analysis does not purport to be exhaustive.

4.2.2 Intent and particularly of subsidiary accused persons

While some of the cases which form the basis of this digest involve more than one perpetrator, the most common cases are those where there are 2 or 3 perpetrators, with questions of intent arising particularly in regard to accused persons who perform subsidiary roles.

Courts have reached conclusions about intent on the basis of accused persons’ own admissions; the roles they have fulfilled; their familiarity with the end exploiter’s past patterns of behaviour; and serious discrepancies between defence claims and objectively proven facts. Interestingly, in some of the cases which yielded convictions, the subsidiary accused persons performed relatively minor roles, yet courts considered this only during the sentencing stage.

Convictions

Cases with 2-3 perpetrators

In **Lukas (Namibia)**, the recruiter was a young woman who brought the 2 minor victims to the end exploiter to be raped. In her initial defence, she claimed that she thought that the end exploiter was operating a welfare organization, and therefore brought one of the minors to him so that he could help her. She further claimed that she had only minimal contact with him. However, the cell phone records, submitted in evidence, revealed that she had spoken to the end exploiter frequently. The court viewed these cell phone records as evidence of her intentional collusion with the end exploiter. She was convicted of trafficking for sexual exploitation.

¹ An example of the use of the term “big case” with this meaning appears in Marcus, Philip (1961) “The Big Antitrust Case in the Trial Courts,” *Indiana Law Journal*: Vol. 37: Iss. 1, Article 2. Available at: <http://www.repository.law.indiana.edu/ilj/vol37/iss1/2>.

"In fact, after 23 April 2012 until 11 July 2012 she [the accused] was in regular contact with Pretorius² a mind-boggling 1 360 times stretching over 80 days. During that same period she was equally in nauseatingly regular contact with this minor child such that the only reasonable inference one can draw is that it was for an illicit purpose. The lies told by the accused about her contact with Pretorius after 23 April 2012 and the regular contact between her and D³ satisfies me that she was the instigator of the sexual liaisons between D and Pretorius... "

State v. Lukas, (CC 15-2013) [2015] NAHCMD 124 (2 June 2015)

Mabuza (South Africa) presents a similar situation in which 2 accused persons were convicted of trafficking for sexual exploitation: an end exploiter (accused number 1), and a young woman who assisted him (accused number 2). Although it was accused number 2's sister who recruited the children and undertook a central role in forcing them into sexual exploitation, the court noted that according to the testimonies of some of the children, accused number 2 participated in the crimes, although to a lesser extent. She sent the children to accused number 1 in the absence of her sister and received payments for doing so. In addition, some of the children also testified that accused number 2 had been sexually exploited by accused 1 in the past. All these testimonies were noted by the court and seemingly contributed to its conclusion that accused number 2 was aware of the purpose for which the children were taken to the residence of accused number 1. She was convicted of trafficking for sexual exploitation, but sentenced more mildly than the end exploiter.

A particularly interesting example of a ruling regarding the intent of a subsidiary perpetrator appears in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of female victims, including 2 mentally disabled minors. Here too, 2 perpetrators were involved: accused number 1 who was the dominant perpetrator and accused number 2, a young woman, whose involvement was limited to assisting the other accused to recruit 2 mentally disabled girls and borrowing clothes for them. Accused number 2 chose not to testify and the other testimonies described her role as relatively minor. However, the court used the fact that she was a former victim of trafficking for sexual exploitation by the accused number 1 as proof that she knew what was to happen to the mentally disabled children. She was convicted of trafficking for sexual exploitation, but sentenced far more mildly than the dominant accused person.

In **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women, the 2 accused persons were a young woman who recruited the 2 victims and a dominant accused person who sent them to be sexually exploited by men. Here, the intent of the subsidiary perpetrator was clear, as according to the testimony of one victim, she herself told them that she had been sexually exploited by the accused number 1 and had recruited them because she needed to find replacements for herself, in order to be released.

In **Kapinga (Malawi)**, a case revolving around the buying of a child to work in a maize mill, the accused buyers were a brother and sister. While the court notes that the brother was the "master mind" who took advantage of the financial straits of the seller to demand that he bring him a child, it also notes that the sister had clearly delineated roles in the crime. These included explaining to the seller that the child was wanted for work in a maize mill, giving money to her brother to be paid to the seller, and directing the seller to the shop of her brother. On the basis of her actions, the court ruled that the sister "...knew or must have known what was being brewed and did take part as narrated above, although she was not really in the front line." The court convicted the sister, as well as the brother, of child trafficking, but sentenced her more mildly.

² Pretorius was the end exploiter in the case.

³ D was one of the minor victims.

Similarly, in **Bandawe (Malawi)** where 3 accused persons trafficked a number of victims, each of the accused had clearly delineated roles. While there is no explicit discussion of the issue of intent, the court notes the victims' testimony as to what part each of the accused played in recruiting the victims and processing their papers and reaches the conclusion that they operated as a network in order to traffic the victims for labour in Dubai.

A similar focus on the roles of each perpetrator arises in **Criminal Judgment No 45-CO (Madagascar)** where a sister and brother deceived a girl about prospects of a good job in China, and in the end, transported her to China to be forcibly married. The only testimony was that of the brother who claimed that he had undertaken a subsidiary role in the enterprise compared to his sister. While his sister prepared the papers for the girl, told her the deceptive story and went with her to China, the brother was merely a taxi driver. However, he also testified that he and his sister had implemented the same kind of process in a number of other cases and that he usually prepared the girls' papers whereas his sister made arrangements in China. Despite the brother's subsidiary role as a mere taxi driver in this case, both he and his sister were convicted of trafficking for forced marriage.⁴

Similarly, in **Munyanyi (Zimbabwe)** 3 accused persons were convicted of trafficking for an illegal purpose, in that they transported 4 minor victims, originally from **Mozambique**, for the purpose of child labour. The court analyzes the role of each accused: one drove, knowing that he had vulnerable minors in his car; another accused spent 3 nights with the victims, knowing that they were to be taken to the capital in order to work; yet another accused recruited the minors by offering them employment. The court took notice of how young the victims looked, so that there could have been no doubt that they were minors. The court also noted that the minors were illegal in the country, and concluded that all the accused persons knew that the minors were being taken for illegal employment and that they were foreigners, thus showing that they had a common design. We note that in terms of **Zimbabwe's** Trafficking Act, it suffices that the prosecution prove the act of 'transport' and an 'unlawful purpose', where one of the unlawful purposes is "illegal labour" which includes child labour. However, we also note that the court viewed the offence of trafficking as one of strict liability, which does not require intent.

Interestingly, in some cases which involve a recruiter and an end exploiter, the recruiters were convicted of trafficking for sexual exploitation, whereas the end exploiters were convicted of sexual exploitation offences and not of trafficking. Examples are **Martinet (Mauritius)** and **Ntonga (South Africa)**. This provides us with food for thought as to the question when the end exploiter should be charged and convicted of only sexual exploitation charges and when he should be charged and convicted of both trafficking and sexual exploitation offences, as occurs in many other cases in the region, and for example: **Dragon (Namibia)**; **Mabuza (South Africa)**; **Lukas (Namibia)**; **Knoetze (South Africa)**.

More complicated trafficking chains

A number of cases present more complicated trafficking chains. However, they did not raise questions of intent, as they involved accused persons who confessed or pled guilty. One example is **Phiri (Malawi)**, where 8 accused persons were convicted of crimes in connection with the murder of a young albino girl in order to remove her organs. Four accused persons were convicted of murder; the victim's uncle pled guilty to murder, transacting in human tissue and trafficking in

⁴ Similarly in **Milinga (Tanzania)**, where three accused persons were charged with trafficking a number of young women to Kenya for exploitation in bars, saloons and massage parlors, the court analyzes the different roles of the accused persons, some of whom recruited the women, one who prepared photographs to send to Kenya and arranged bus tickets and one who took on a subsidiary role in arranging transport from the women's homes to the bus stop. While there is no detailed discussion of intent, clearly, the court looks upon all of the accused as involved in a common criminal enterprise. However, since only the appeals court ruling was available, it is not clear on what basis the court reached this conclusion.

persons; the remaining accused persons were convicted of transacting in human tissue/extracting human tissue. However, since the central evidence was the confessions of the accused persons and the uncle's guilty plea, no question of intent arose.

Netcare Kwa-Zulu Limited (South Africa) reflects another complex chain of trafficking by which Israeli kidney recipients were transported to **South Africa** in order to receive kidney donations from persons who were not their relatives, thus contravening **South Africa's** Human Tissue Act. The accused persons were Netcare Kwa-Zulu (Pty) Limited, its CEO, Richard Friedland, St Augustine's Hospital, 4 transplant doctors, a nephrologist, 2 transplant administrative coordinators and an interpreter. However, once again, the central accused persons, Netcare Kwa-Zulu (Pty) Limited and St Augustine's Hospital, admitted to having knowingly allowed employees and facilities to be used for the fraudulent kidney transplants. Moreover a plea bargain was concluded with the interpreter in **Ziegler (South Africa)**.⁵ We note that at the time the charges were submitted, **South Africa** had not yet ratified the Protocol and had not yet legislated a trafficking act.

Exonerations

Subsidiary accused persons:

On the other hand, a number of cases ended in exonerations of subsidiary accused persons due to lack of persuasive proof of intent. In some of these cases the subsidiary accused persons were family members or romantic partners of the dominant accused person.

Thus, in **Sonah (Mauritius)** the case revolved around the prostitution of a number of young girls, one of whom was a minor. Accused number 1 advertised for receptionists, babysitters and a masseuses, but on arrival, the girls were required to do massages with masturbation. The accused persons were a father and a son. While the father was convicted of child trafficking and exploiting prostitutes, the son was exonerated, because though he had visited the premises, acted as a cashier, and told clients about a "massage complete", there was no evidence that he understood what that meant.

Similarly in **Judgment No 76-CO (Madagascar)** the dominant accused person was the husband of the subsidiary accused person. The case revolved around the kidnapping of a 3 year old child in order to transfer him to another for remuneration. While the husband was convicted of transferring the child for remuneration, the wife was exonerated. The court notes that the husband participated in transfer of child and was in contact with a woman who is an alleged obtainer of stolen children. On the other hand, the court notes that the wife searched for her husband and led the police to the house. This cast doubt on her knowledge of his illicit activities.

In **O.B. Abba (South Africa)**, where 2 vulnerable young women, addicted to drugs were trafficked for slavery, sexual exploitation and servitude, there could be little doubt of the intent of the dominant accused (accused number 3) who prostituted the victims, restricted their freedom, assaulted them on several occasions and controlled them by means of drugs. The same was true of another accused person (accused 1) who was trained to run the business while the dominant accused was in Nigeria and did so by means of the same tactics. However, the additional accused person (accused number 2) was the former girlfriend of accused number 3 and the lease or sublease of the apartment in which the victims were prostituted was on her name, as was the electrical bill for the premises. Although the court deemed her a non-credible witness whose testimony was evasive, contradictory, and provided no explanation for her continued involvement with accused number 3, even after their relationship had ended, it exonerated her due to doubts

⁵ State v. Ziegler, Case No: 41/1816/2010 in the Regional Court of KwaZulu-Natal, held at the Specialised Commercial Crime Court, Durban. The documents available were a signed plea bargain from 23 November 2010 and a summary, available in the UNODC Human Trafficking Case Law Database (UNODC No. ZAF001).

of her intent. These doubts arose because she claimed that she had never visited the premises and consequently, did not know that prostitution was being carried on there, which claim was confirmed by the victims who never saw her on the premises.

Dominant and subsidiary accused persons:

Some cases also present exonerations of *dominant perpetrators* along with subsidiary ones.

Such is the case in **Nyassa Nicole Mulumbilwa (Zambia)** where 4 accused persons were charged with the trafficking in persons of 14 children from **Zambia** to **Namibia**. Two of the accused persons were from the Congo and claimed that they were trying to escape from the war in that country, together with their children and some nieces and nephews. The woman who claimed to be the mother of some of the children traveled to **Namibia** in order to sell wares. Having crossed the border with **Namibia**, she was assisted to communicate in English and a local language by another accused person who had traveled to **Namibia** on the same bus. Yet another accused person was an agent for bus operators who was contacted by the man who claimed to be the father of some of the children to help him find shelter. This accused transported the father and children to a lodge and paid for them, because they had no money.

In the court of first instance, all 4 accused persons were convicted of trafficking the 14 children. The conviction relied heavily on the contradictions between the accused persons' testimony, on an improperly admitted confession by one of them, on the fact that the children did not know where they were going and on the absence of valid travel and identification documents for the children. However, the appeals court exonerated all 4 accused, both because no 'means' had been proven and because the prosecution had not adduced evidence proving, or at least justifying an inference, that the children had been transported for the purpose of exploitation. The court took judicial notice of the civil strife in the Congo, so that entering **Zambia** with undocumented children, could not, in itself, substantiate a conviction on trafficking.

Similarly in **Gole (Mozambique)**, a case revolving around charges that 4 accused persons intended to traffic a child in order to sell him to a couple who was interested in him, the court exonerated all the accused persons of trafficking charges. The court describes the role of each accused in detail. Two of the accused persons, named Ana and Joice, came up with a plan to abduct minors. Joice then arranged for a buyer for the particular minor; Ana recruited the minor, telling him that she would take him to see his mother in **South Africa**, and traveled with him to deliver him to the buyers. Yet another accused person named Elina, did reconnaissance at the home of the minor until she discovered him and participated in recruiting him. The 4th accused, named Fatima, traveled with Ana and the minor but claimed she knew nothing about Ana's intention.

The accused persons were apprehended before the exploitation transpired, and except for Joice and Fatima, confessed to these facts. However, the court exonerated all the accused persons of trafficking because the prosecution did not adduce evidence as to the purpose of the abduction. Instead, the court convicted all of them, except Fatima, who had no knowledge of their intent, of the alternative charge of removal of a child by means of fraud and without the permission of guardians.

We also refer the reader to section 4.3 on *how to prove trafficking when the exploitation never transpired* in regard to the 2 cases described above.

A particularly interesting case where 2 accused persons were exonerated is **Judgment 21 – CO (Madagascar)**. The case revolved around a charge of trafficking for the exploitation of the begging of others. The first accused transported a number of minors to a construction site. However, the minors testified that he acted as a good Samaritan in so doing, because without this help, they would have had to walk for a day. They also testified that he gave food to them by

offering them sums of money per person. Nor did he abuse their vulnerability. It was decided to terminate the prosecution against him.

On the other hand, the second accused person recruited the minors to work in a construction site but deceived them, took them to an unknown location, and confiscated their identity cards. Nevertheless the court harboured doubts about his intent to exploit, since there was no evidence that the remuneration proposed by the accused was inadequate or did not comply with legal provisions or that the victims worked under forced labour. Moreover, no evidence was adduced that the victims had no real and acceptable choice but to submit. Unfortunately, the case is not detailed, so that we do not know if any connection existed between the 2 accused persons. Nor do we know if the charge was limited to trafficking for begging or also included trafficking for forced labour.

4.2.3 Partial picture of crime/omitting to charge some perpetrators

Sometimes courts note critically that due to law enforcement omissions, the prosecution has failed to charge some of the links on the chain of trafficking, and in particular, official functionaries who are suspected of corruption. As a result of these failures, the trial presents only a partial picture of the crimes committed and only partial links on the chain of trafficking.

One example is **Dos Santos (South Africa)**, where the only accused was a woman who trafficked young women of tender age from **Mozambique** to **South Africa** for sexual exploitation. However, the court notes that her actions were part of an elaborate and organized criminal enterprise in which corrupt government officials facilitated the transport of the victims to and from **South Africa**. Thus, one victim was returned to **Mozambique** with a passport containing the photograph of another individual in order to pass through immigration, and this passport was taken from her by the taxi driver when she reached the capital of Maputo. Moreover when she reported the matter to the police in **Mozambique**, the policeman demanded payment of money before he would investigate. In view of this reality, the court noted that the crimes charged are only part of the picture.

*"...there clearly exists an illicit infrastructure to transport these young females across the border into **South Africa** under escort. The mere existence of such infrastructure justifies the inference that the crimes of which the appellant had been convicted comprise but a fraction of the criminal activity the Convention and its Protocol aim to address."*

Dos Santos v. State, Case no. A26/2014 in the High Court of **South Africa**, Gauteng Division, Pretoria

Similarly, in **Chiyenda (Malawi)** the accused woman told a 15 year old girl that she would take her to **South Africa** to marry her brother. Subsequently, she obtained a passport for the girl with various forgeries, including a name and age different than the girl's true details, and without bringing her to the Immigration Offices. She was convicted of trafficking in children, and the judge noted that the passport attested, either to corruption in the Immigration Offices, or use of fraudulent means to obtain the passport.

In **Bandawe (Malawi)** 3 accused persons deceived 3 victims, telling them that they would be transported to Kenya for good jobs, when they were really to be sent to Dubai. The accused persons obtained passports and yellow fever books for the victims without their appearing at the Immigration Offices and without receiving yellow fever vaccinations. The accused persons were convicted of trafficking and the judge raised suspicions of corruption in the Immigration Department and the clinic where people receive vaccinations for yellow fever.

In **Obi (South Africa)**, a case revolving around the trafficking for sexual exploitation of minor girls, the court notes the corruption among police officers who were not charged in the case.

"It is a sad indictment of certain members of the police force who were expected to bring perpetrators to book but instead, exploited the situation to their own advantage by taking bribes and themselves taking advantage of the young victims. This is some of the evidence that came out in this trial."

State v. Obi and others, Case No: CC40/2018, in the High Court of **South Africa**, Gauteng Division, Pretoria. Only the sentence was available (25 January 2020).⁶

Similarly, in **Maroodza (Zimbabwe)**, a case revolving around the trafficking of 6 young women to Kuwait for domestic service, the court criticizes the omissions of the investigatory authorities in not following up on the recruitment companies in Kuwait and not liaising with the Kuwaiti authorities in order to learn what happened to the agencies involved and if it was discovered how these agencies operate.

In several cases, although the courts do not raise questions about other perpetrators not charged, the facts of the cases reveal their existence. One example is **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of 4 children from **Mozambique** to **South Africa**. The prosecution charged the dominant sexual exploiter and a young woman who assisted him, but did not charge her sister, Juliet, who was the central recruiter and apparently disappeared into **Mozambique**.

Similarly, in **Mboo (Zambia)**, where the accused was convicted of trafficking his brother in law for removal of body parts, he told the potential "buyer" that he needed money to share with his uncle. Yet the uncle was not charged in this case. By the same token, in **Mutwale (Zambia)**, where the accused was convicted of trafficking a group of children via **Zambia**, the court noted that another accomplice, named Jack Saidi, conspired with the accused to traffic the children, and yet he was not charged in this case. Still, it is possible that these additional perpetrators could not be located at the time of trial and were charged subsequently.

4.2.4 How to deal with a vulnerable perpetrator

In a number of cases across the region, a perpetrator may be a vulnerable person who was trafficked by the dominant accused in the past or is beset with other vulnerabilities.

This transpires in **Mabuza (South Africa)**, where the subsidiary accused person, who assisted the end exploiter to sexually exploit the minors, was herself trafficked for sexual exploitation by the dominant accused person by her own sister; **Matini (South Africa)**, where the subsidiary accused person who assisted in recruiting 2 mentally disabled minors, was herself trafficked for sexual exploitation by the dominant accused person; **Veeran Palan (South Africa)**, where the recruiter of 2 vulnerable victims for sexual exploitation was herself prostituted by the dominant accused and needed to find replacements in order to gain her release; **Obi (South Africa)**, where three of the persons complicit in the trafficking for sexual exploitation were themselves prostitutes, addicted to drugs and gave the dominant accused all the money they earned in exchange for drugs.

In none of these cases is the vulnerable perpetrator exonerated on this basis. However, as can be seen in the available sentences, courts consider this factor when they are sentencing these accused persons. Thus, in **Matini (South Africa)**, the court stresses that in general it is proper to mete out the same sentence for co-accused persons, but considers that there is a clear distinction between the moral blameworthiness of the 2 accused persons, in that accused number 2 was coerced by the accused number 1 at one time and brought up to act as she did. It adds that she was "*under the spell of accused number one and a community whom endorsed number one's actions by remaining quiet.*"

⁶ We note that only the sentence was available.

For this reason, the court does not sentence her to the minimum sentence of life imprisonment, as it does the accused number 1, but rather delivers a suspended custodial sentence supplemented by a rehabilitation program which includes free community service, attendance and successful completion of various life skills programs and continual monitoring.

Similarly, in **Mabuza (South Africa)** while the accused 1 is sentenced to life imprisonment, the subsidiary accused person is sentenced to a suspended custodial sentence and deportation from **South Africa**. One of the court's considerations was this accused's history as a trafficked victim, as can be seen by the sentencing ruling delivered in regard to her.

"Accused no. 2, you are 24 years old. You were trafficked for sexual abuse by your co-accused when you were still a very small girl. As 'reward' for your abuse, when you grew too old for accused no 1's liking, he gave you a job and a place to live in the compound, which on inspection I found to provide appalling circumstances of accommodation."

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

In regard to vulnerable accused persons, we also refer the reader to section 5.5 on *the importance of not criminalizing victims*.

4.2.5 Transnational chains of trafficking

The cases which form the basis of this digest include several where the chain of trafficking transpired across borders or was intended to do so. However, they do not provide much detail as to successful or unsuccessful cooperation with other States.

In **Bandawe (Malawi)** the traffickers intended to traffic young women across the border from **Malawi** through **Tanzania** and Kenya, with the final destination being Dubai. However, seemingly, the implementation of this intention was stopped before it transpired, so that the authorities did not need to resort to the assistance of other States' authorities.

In **Milinga (Tanzania)**, while the bus carrying the victims was intercepted by **Tanzanian** authorities, 2 of the accused persons had crossed the border to Kenya and were arrested and deported back to **Tanzania**. Though the court does not dwell on the process of deportation, it is reasonable to assume that it required cooperation between **Tanzanian** and Kenyan authorities.

In **Nyassa Nicole Mulumbilwa (Zambia)** 4 accused persons were charged with the trafficking in persons of a number of children from **Zambia** to **Namibia**. Two of the accused persons were from the Congo and claimed that they were trying to escape from the war in that country, together with their children and other child relatives. One accused, who claimed that she was the mother of some of the children and another accused, who was helping her, had crossed the border to **Namibia**. However, on arrest of the other 2 accused persons in **Zambia**, the **Zambian** police contacted the authorities in **Namibia** who apprehended the 2 accused persons and returned them to **Zambia**.

Similarly, in **Dos Santos (South Africa)** the investigation of the crime began in **Mozambique**, when the victim who was returned there complained to the police. The prosecution of the case entailed the cooperation of a senior police official from **Mozambique** with the **South African** Police Service.

In **Mabuza (South Africa)** the victims were trafficked from **Mozambique**, but were exploited and ultimately rescued in **South Africa**, so that the **South African** prosecution apparently did not need to request mutual legal assistance from **Mozambique**. However, there seem to have

been some contacts between the two States. Firstly, the court notes that the mother of one of the victims was traced and brought to court on the exact day when that victim was called to testify. Secondly, the court ordered that the subsidiary accused person be deported to **Mozambique** as part of the sentencing ruling. Interestingly, the court noted that Juliet, the subsidiary accused's sister, who undertook a central role in recruiting the children and forcing them into sexual exploitation, disappeared back into **Mozambique** and was never charged in this matter. The case does not reveal if the **South African** authorities made efforts to locate her through cooperation with the **Mozambique** authorities.

In **Munyanyi (Zimbabwe)**, as in **Mabuza**, the minors from **Mozambique**, who were intended to be exploited, were in **Zimbabwe** when their rescue transpired, so that seemingly there was no need to apply for mutual legal assistance from **Mozambique**. Although it would have been reasonable for the **Zimbabwe** authorities to make some efforts to trace the minor victims' parents, this is not mentioned in the case.

Similarly, in **Muzara (Zambia)** the trafficked Congolese minors were discovered in **Zambia**, so that there was no need to apply for mutual legal assistance. However, the summary of the case notes that their relatives in the Congo were traced which required cooperation between the 2 States.

In **Criminal Judgment No 45-CO (Madagascar)**, which concerned the trafficking of a girl to China for forced marriage, of the 2 accused persons, only the brother testified and the court notes that the judgment was given in default, as the sister was not found. In view of the brother's testimony that his sister took the girl to China, she may have remained there or may have returned to **Madagascar**. It is not known if the authorities made efforts to locate her.

As noted, in **Maroodza (Zimbabwe)** which revolves around the trafficking of a number of young women from **Zimbabwe**, for exploitative labour as housemaids in Kuwait, the court criticizes the investigation agencies in that they did not follow up on the recruitment companies in Kuwait and did not liaise with the Kuwaiti authorities in order to learn what happened to the agencies involved and if it was discovered how these agencies operate.

4.2.6 The "big case"

The case which best exemplifies a "big case" is **Netcare Kwa-Zulu Limited (South Africa)** which concerns a complex enterprise to transplant kidneys of **South African** nationals in Israeli nationals. The case involved 11 accused persons and doubtless would have required many witnesses. Perhaps this contributed to the admissions of 2 central accused persons and led to a plea bargain with an additional one.

The chain of trafficking

Issues which arise:

- How to prove intent, and especially of subsidiary accused persons/family members/romantic partners
- Partial picture of crimes as a result of omitting to prosecute some perpetrators
- How to address vulnerable perpetrators
- Difficulties presented by transnational trafficking, including locating perpetrators and tracing family members of minors
- Practical difficulties in prosecuting “big cases” with many accused persons.

Aids in proving intent:

- Admissions of perpetrators before victims or police
- Active roles performed by perpetrators
- Past familiarity of subsidiary accused persons with end exploiter’s patterns of behaviour
- Serious discrepancies between defence claims and objective evidence

Examples of different kinds of perpetrators:

- The master mind
- The end exploiter
- The recruiter
- Persons who prepare necessary documents
- Transporters/taxi drivers
- Persons who feed, clothe or shelter victims
- Persons who arrange visits to the end exploiter
- Family members or romantic partners of other perpetrators or of victims
- Former victims or vulnerable persons
- Corrupt government functionaries including police and immigration officials
- Doctors and other medical personnel
- Hospitals and hospital personnel
- Interpreters

NOTE: Even persons who perform relatively minor roles have been convicted if their intent has been proven.

4.3 How to prove trafficking when the intended exploitation never transpired?

4.3.1 Introduction

The Protocol and most national trafficking legislation in the region do not require that the exploitation actually transpire in order to prove the crime of trafficking in persons. It is sufficient to prove that the trafficker *intended* to exploit. Some States’ trafficking legislation even explicitly states that it is no defence to the crime that the exploitation did not transpire.⁷

However, in cases where the exploitation never transpired it may be difficult to prove the intent to exploit. This difficulty may result in exonerations or in convictions of attempt to traffic rather than trafficking. Nevertheless, there are cases in which courts have managed to convict despite these difficulties.

⁷ Examples are **Zimbabwe’s** Trafficking Act, section 3(7); **Zambia’s** Trafficking Act, section 21(d); **South Africa’s** Trafficking Act, section 11(1) and **Namibia’s** Trafficking Act, section 11(1)(b).

Among the issues which may arise are the following:

1. Must the prosecution prove the kind of exploitation intended or is it enough to prove that some non-specific exploitation was intended?
2. In cases where the exploitation did not transpire is it proper to charge trafficking or attempted trafficking?
3. What constitutes persuasive evidence of intent to exploit?

We note that issues like these arise, in particular, in respect of child selling cases, where it is not known for what purpose the child was sold. When the exploitation has not transpired, it is difficult to know what was intended, but there is at least one conviction based on the thesis that the very act of selling the child amounts to the ‘purpose of exploitation’ of “slavery”.⁸ We refer the reader to section 4.7 on *issues arising in child selling and adoption cases*.

4.3.2 Must the prosecution prove the kind of exploitation intended?

In cases across the region this question is answered differently. In **Milinga (Tanzania)** the case revolved around the discovery of 10 young women in their twenties, without valid travel documents, on a bus traveling from Dar Es Salaam in **Tanzania** to Nairobi in Kenya. Four out of the ten young women testified that the accused persons had promised them jobs in Nairobi, working in massage parlours, saloons and bars, and that the travel arrangements and documents were arranged by the accused persons. They further testified that their photos were taken by one accused and sent by him to Nairobi and that another accused person transported them from their homes to the bus. The young women were found by an Immigration Officer before they reached Nairobi.

The accused persons were convicted in the court of first instance and the High Court dismissed the appeal of the 2 accused persons who appealed. In analyzing the element of ‘purpose of exploitation’, the High Court judge ruled that it is enough for the prosecution to prove the risk of exploitation of any kind. The prosecution is not required to prove what sort of exploitation was intended.

*“According to the victims, they were going to work in massage parlour, hotel and bars and no work permits for them had been procured. Under the circumstances, upon arrival in Nairobi, **they could be exploited in any how** per the list in ingredients of offence charged.” (our emphasis)*

Milinga and others v. Republic, Crim. App. 33 of 2018 in the High Court of the United Republic of **Tanzania** (Dar Es Salaam District Registry), February 27, 2019 and 13 March 2019.

Two additional cases seem to espouse such an approach, although the courts do not explicitly address this issue. In **Chiyenda (Malawi)** the accused offered a 15 year old child to take her to **South Africa** in order to marry the accused’s brother. The accused did not inform the child’s mother and obtained a passport with fraudulent information about the child, including an older age and a different name, without the child appearing before the immigration authorities. The accused was apprehended before she succeeded in taking the child to **South Africa** and convicted of trafficking, although it was not clear what kind of exploitation had been intended.

Similarly, in **Bandawe (Malawi)** the accused persons recruited 4 victims by deceiving them that they would obtain employment for them, although it was not clear if this was to happen in Kenya or Dubai. The accused persons arranged and paid for the documentation, including

⁸ The prosecutor raised this claim and the court convicted, noting that the elements of the crime had been fulfilled, including the commodification of the baby. We note that this case was particularly challenging in that the baby was sold to loving parents who cared for him wonderfully.

passports and yellow fever books. However, the victims did not personally submit the applications for the passports and only appeared at the immigration offices to be photographed. Moreover, the victims never visited the clinic and were never vaccinated against yellow fever. The accused persons did not divulge crucial information to the victims, and for example, the identities of the contact people in **Tanzania**, Kenya and Dubai. Nor did they disclose the final destinations of the victims or the individuals who would employ them. The court noted that in so doing, they denied the victims vital information necessary to form decisions. The victims were not even sure where they were going, whether to Kenya or Dubai. The court convicted the accused of trafficking in persons, noting that an intent to exploit had been established. However, it remains unclear what kind of exploitation was intended.

Similarly, in **Mutwale (Zambia)**, the case revolved around the trafficking of 5 Congolese children from **Zambia** to **Namibia**. The victims were minors, illegal in **Zambia**, who came from a war torn country and were travelling under forged documents with identities that were not theirs, and accompanied by adults who may not have been related to them (as they did not answer to the names these adults called them by). The court notes the ‘actions’ and ‘means’ used by the accused and convicts him of aiding and abetting the trafficking of the children for exploitation. However, the court does not specify what form of exploitation was intended. Nor do the facts of the case clarify this.

Clearly in all four cases there were suspicious circumstances surrounding the accused persons’ actions, casting doubt on their intentions to procure honorable employment, marriage or protected immigration for the victims. However in none of the cases was it clear what kind of exploitation was intended. Nevertheless, all four courts convicted the accused persons of trafficking in persons, although only in the **Milinga (Tanzania)** case did the court explicitly rule that it sufficed to prove an intent to exploit in any way.

On the other hand, in **Kasonde (Zambia)** the High Court of **Zambia** explicitly states that the prosecution must prove the kind of exploitation intended. The failure of the prosecution to do so contributed to the acquittal of the accused by the High Court. This case is particularly interesting, because it included a sting where a businessman who was offered a child for sale, involved the police. Both the potential buyer and the police testified that the accused tried to sell a child between 8 and 15 years of age to the buyer. In addition, at one point, in the presence of police, during a phone conversation between the potential buyer and the accused, the accused asked if the buyer wanted to buy a live or dead person. When the buyer answered that he wished to see the person, the accused told him that she would then sell the virginity of the person if he so desired.

The accused was charged with conduct facilitating trafficking by means of an advertisement alluding to or suggesting trafficking. While the court of first instance convicted the accused, the High Court acquitted her, both because it ruled that the offer had not been specific enough to be considered an advertisement and because the prosecution did not prove what kind of exploitation was intended.

Similarly, in **Mwewa (Zambia)** a father and uncle approached a potential buyer to sell their daughter and nephew respectively. Once again, the buyer, under the direction of the headman of his village, organized a sting and villagers apprehended the 2 accused persons before they had the chance to conclude the sale. In the court of first instance the 2 accused persons pled guilty to conduct facilitating trafficking by means an advertisement suggesting or alluding to trafficking, and were convicted. However, the High Court exonerated the accused persons, both because it ruled that the offer had not been specific enough to be considered an advertisement and because the prosecution had not proved the purpose of exploitation. Though the language of the court is less clear than in **Kasonde**, its ruling can be interpreted to mean that the prosecution must prove what kind of exploitation was intended.

A number of cases from **Madagascar** concern accused persons who were apprehended before the exploitation had transpired and were exonerated from trafficking or attempted trafficking because insufficient evidence had been adduced as to the intent to exploit. However, these cases do not explicitly address the question if the prosecution is required to prove the *kind* of exploitation or simply an intent to exploit.⁹

4.3.3 Full-fledged trafficking or attempted trafficking?

States differ regarding the question if, in cases where the exploitation has not transpired, it is proper to charge and convict on attempted trafficking or full-fledged trafficking. The language of the Protocol and most national legislations would seem to justify charging a full-fledged trafficking offence in these cases, as all that is needed is the intent to exploit, and not actual exploitation. However, it is possible that charging and convicting on attempted trafficking may be seen to promote fairness, in view of the reduced culpability of a person who never succeeded in causing harm, even if it was intended.

In the vast majority of cases where the exploitation never transpired, the *full-fledged offence of trafficking* was charged. Examples are: **Milinga (Tanzania)**; **Bandawe (Malawi)**; **Chiyenda (Malawi)**; **Mwewa (Zambia)**; **Kasonde (Zambia)**; **Nyassa Nicole Mulumbilwa (Zambia)**; **Mponda (Malawi)**; **Kapinga (Malawi)**; **Saidi (Malawi)**; **Mboo (Zambia)**; **Mutwale (Zambia)**; **Lubinda (Zambia)**;¹⁰ **Munyanyi (Zimbabwe)**; **Gole (Mozambique)**. I note that the facts of these cases appear elsewhere in this section of the digest.

However, in 4 such cases, *attempted trafficking* was charged and served as the basis for convictions: **Judgment 220-CO (Madagascar)**, where the accused was convicted of attempted trafficking for domestic servitude; **Judgment 97-CO (Madagascar)**, where one accused was convicted and the other exonerated of attempted trafficking; **Tumo (Mozambique)** where the accused was convicted of attempted trafficking; **Chama (Zambia)** where the accused persons were convicted of attempted trafficking of 6 Indian males from India to **Zambia**. I note that detailed facts regarding **Tumo (Mozambique)** and **Judgments 97-CO and 220-CO (Madagascar)** appear elsewhere in this section of the digest.

4.3.4 What constitutes persuasive evidence of intent to exploit?

It is difficult to find a common thread in the rulings of courts across the region respecting the quantum of evidence which is sufficient to convict in cases where the exploitation did not transpire. While some cases include direct testimonies which clearly establish the intent of the accused, other cases are less clear and present differing approaches among courts. While some courts seem to require that a constellation of suspicious circumstances include evidence which directly relates to the intent to exploit, others make due with a number of suspicious circumstances, even when they do not directly relate to the intent to exploit in particular.

⁹ See for example: Judgment No. 101-CO of 27 June 2019 in Supreme Court of **Madagascar** where the court ruled that exploitation by means of accommodations against human dignity, was not proved; Judgment No 16-CO of 4 December 2018 before the Supreme Court of **Madagascar**, where the court ruled that the prosecution's contention that the accused intended to have the victim travel to China for forced marriage raised serious doubts, since the exploitation in China was not supported by objective elements.

¹⁰ The People v. Wina Lubinda, IU/87/2015, in The Subordinate Court of the First Class for Sesheke (Criminal Jurisdiction), 22 October 2015.

4.3.4.1 *Convictions based on testimonies regarding the intent to exploit*

There are a number of cases in which there is direct testimony as to the existence and nature of the purpose of exploitation.

One example is **Mboo (Zambia)**, where the accused was convicted of trafficking his brother in law for removal of body parts, although he was apprehended before the actual exploitation transpired. This case included a rich constellation of evidence: the testimony of an independent witness who was approached to be the buyer of the victim for the purpose of removing his body parts; the testimony of police officers who participated in a sting; a confession of the accused himself during cross examination of the independent witness; real evidence in the form of marked money which was paid to the accused. While the victim's testimony was not substantively relevant, this was because the accused had induced him to drink a large amount of beer, so that he did not remember what transpired on the night of the sale. At least some of this evidence directly related to the intent to exploit the victim by removing his body parts.

Another relatively clear case is **Mponda (Malawi)**, where 3 young girls were promised jobs selling in a restaurant, but on arrival were expected to engage in sexual relations with clients. The court notes that the prosecution paraded before it 4 witnesses. Although the court does not specify who they were, it is reasonable to assume that they included the 3 victims and perhaps a police officer. On the basis of their testimonies, the court was provided with detailed evidence of the victims' recruitment by means of deception; their transport to the accused person's premises; his demand that they engage in sexual relations with clients; their refusal to do so; and their rescue after 4 days. The conviction of the accused of trafficking for sexual exploitation was also facilitated by an evidentiary presumption in the **Malawi** law according to which, if the prosecution proves that the accused person was habitually in the company of the alleged victims or had knowledge of their whereabouts, he is presumed to have trafficked them.¹¹

Similarly in **Kapinga (Malawi)**, where the accused persons bought a child in order to exploit him in a maize mill, there was direct testimony about the purpose of exploitation on the part of the seller. While the court cautioned itself about relying on the testimony of an accomplice, it viewed the seller's testimony to be firm and consistent. The court of appeals confirmed the accused persons' conviction on child trafficking.

Another case where there seems to have been direct testimony is **Judgment 220-CO (Madagascar)** where 2 witnesses testified that the accused had recruited them for exploitation in domestic work in Saudi Arabia, a claim which was supported by a number of passports found in his residence.

Similarly, in **Judgment 97-CO (Madagascar)**, the main accused person promised the victims to find them domestic work in **Mauritius**, but in fact intended to transfer them to Saudi Arabia. The accused had the victims pay her, claiming that the payment was necessary in order to prepare their passports. The dominant accused person never returned this money, even though the victims reneged on the deal when they found out that their destination would be Saudi Arabia.

While the court does not analyze the evidence which led it to convict, the wealth of detail in its ruling makes it probable that at least some of the victims testified. Moreover, the court addresses the intent of the accused person explicitly, ruling that she knew full well that sending young women for domestic work in Saudi Arabia is prohibited due to the high risk of ill treatment, and stressed that this risk is common knowledge, which fact is reflected in a law prohibiting persons from sending young women for work in that country.

¹¹ This presumption is in section 36 of the **Malawi** Trafficking Act.

4.3.4.2 Convictions with no direct testimony as to intent to exploit

On the other hand, there are convictions where suspicious circumstances are present, but there is no direct testimony as to the intent to exploit.

One case which includes a persuasive constellation of circumstances is **Milinga (Tanzania)**. Ten young women were discovered on a bus from Dar Es Salaam to Nairobi, most of whom were without valid travel documents. They testified that the 2 appellants had arranged their travel to Nairobi, paid the travel costs and arranged passports for 2 of the young women, in order that they be employed in massage parlors, bars and saloons. They further testified that they were not provided with work permits, that one of the appellants sent their photographs to Nairobi, and that they were familiar with both appellants. In addition, there were cell phone records which substantiated that one appellant had been in contact with a person in Nairobi, to whom the young women were to be transferred, and that he had transferred their photographs to him. The defence did not explain these facts, but rather claimed that the appellants did not know the young women, whereas the court deemed the young women to be credible witnesses.

The conviction of the 2 appellants was confirmed by the High Court. While there was no direct testimony about the intent to exploit, the nature of the employment in massage parlours, bars and saloons, together with the absence of work permits, the defence's failure to adequately explain the victims' testimonies and the cell phone records, contributed to the affirmation of the conviction on charges of trafficking.

In **Mutwale (Zambia)** the evidence was less clear. The accused was a Congolese person, apprehended in a bus with 5 Congolese children between the ages of 8 and 10 years, who had no valid documents. The accused had a forged **Tanzanian** passport on his person with the names of the 5 children and with forged border stamps. The children did not respond to the names on the forged passport and told the interpreter that their names were different than those recorded. The accused admitted that he had prepared both his forged passport and that of a woman who presented herself as the grandmother of the children and testified for the prosecution. However, the children did not answer to the names that this purported grandmother called them or to the names on her forged **Tanzanian** passport. The court convicted the accused of aiding and abetting trafficking in persons. In doing so, it took into account that the accused had kept the children and the purported grandmother for 5 days while processing the forged documents; that he prepared the forged **Tanzanian** travel documents; and that he was paid by one Jack Saidi to facilitate moving the children and their purported grandmother from **Zambia** to **Namibia**. The court placed much emphasis on the fact that the children did not respond to the names on the forged passports and concluded that *"...the children might not even be related to either accused nor PW1¹² because the names they gave for the children, the children did not respond to them. The accused and Jack Saidi took advantage of the war... and collect innocent victims, as a syndicate traffic them into Namibia and other countries to be exploited.* We note, that although there was evidence as to an intention to smuggle the children into **Namibia**, there was no direct evidence as to an intent to exploit them in **Namibia**.

In **Tumo (Mozambique)** the accused was convicted of an attempt to traffic 5 men and 5 women from **Mozambique** to **South Africa**. The prosecution proved that the accused had deceived the victims. Some were told that relatives in **South Africa** would obtain jobs for them and others were told that they would meet romantic partners there. The accused admitted that he knew the victims had no passports and that he did not know their relatives. In convicting the accused person, the court took into account that the accused person had initiated contact with the victims; that no financial support was provided by the victims' relatives to cover the cost of the trip, although the accused claimed that this would be done; and that in any case, these relatives

¹² PW1 was the woman who claimed to be the children's grandmother.

did not even have the means to pay for the victims' travel within **Mozambique**. Moreover, the court found the accused's version, according to which one vehicle would take all the victims to their respective relatives, was implausible, as these relatives were located in different regions of **South Africa**. It also noted that the accused had given contradictory statements as to how he first met the victims. We note that much of this evidence relates to the implausibility of the accused's version, rather than to the purpose behind transporting the victims.

4.3.4.3 Exonerations

On the other hand, there are cases where courts exonerated the accused persons in situations where the exploitation did not transpire. In one of these cases, the exoneration is clearly well founded. We refer to **Umutoniwase Diane (Tanzania)**, where a driver who transported 2 Rwandese citizens with no valid passes or residence permits into **Tanzania** was accused of trafficking them. He was exonerated because the court could not find evidence that he had acted for *any* illegal purpose. The court stressed the difference between trafficking and smuggling in this regard:

"Not any act involving immigrant or a person in violation of migration law will be human trafficking!! As such, it is important to note that trafficking is an offence against a person while smuggling of immigrants is an offence against country borders."

Republic v. Umutoniwase Diane and others, Criminal Case No. 7/2018 in the Resident Magistrate Court of Dodoma, 1 August 2018.

However, in other cases, courts exonerate, despite a constellation of suspicious circumstances, and it is sometimes hard to differentiate between them and some of the cases where courts convicted accused persons on the basis of suspicious circumstances. The following are examples of such exonerations:

Nyassa Nicole Mulumbilwa (Zambia) highlights the issues which arise around proving the intent to exploit, in a situation of transnational travel with minors. Whereas the court of first instance convicted the accused persons of trafficking, the court of appeals exonerated them.

All 4 accused persons purportedly trafficked 14 children from the Congo to **Zambia** en route to **Namibia**. Two of the accused persons were from the Congo and claimed that they were trying to escape from the war in that country, together with their children and some nieces and nephews. The woman who claimed to be the mother of some of the children testified that she traveled to **Namibia** in order to sell wares. Having crossed the border with **Namibia**, she was assisted to communicate in English and a local language by another accused person who had traveled to **Namibia** on the same bus. Yet another accused person was an agent for bus operators who was contacted by the man who claimed to be the father of some of the children to help him find shelter. This accused transported the father and children to a lodge and paid for them, because they had no money.

In the court of first instance, all 4 accused persons were convicted of trafficking the 14 children. The conviction relied heavily on the contradictions between the accused persons' testimony; on an improperly admitted confession by one of them; on the fact that the children did not know where they were going; and on the absence of valid travel and identification documents for the children.

However, the appeals court exonerated all 4 accused, both because no 'means' had been proven and because the prosecution had not adduced evidence proving, or at least justifying an inference, that the children had been transported for the purpose of exploitation. The court took judicial notice of the civil strife in the Congo, to place the facts of the case in context, so that entering **Zambia** with undocumented children, could not, in itself, substantiate a conviction on trafficking.

The court stressed that the burden of proof is on the prosecution, so that the doubts raised by the accused persons' versions could not, in themselves, establish trafficking.

*"...It is clear that in this case, for the prosecution to prove the charges against the appellants, it was not enough to only show that the children were brought into the country without documentation and that they did not know where they were going. Evidence pointing to their transportation into, and across the country, through either the use of threats or use of force or other forms of coercion, abduction, fraud or deception and so forth, should have been led. **In addition, the prosecution should have placed before the court, evidence proving or at least on which an inference could have been drawn, that they were being transported for purposes of being exploited...***

*Much as the trial magistrate was entitled to doubt the claim that the appellants intended to report to the police, after having a meal at the lodge, that alone could not have been a basis for convicting them on a charge of trafficking in persons. **He should have first considered if all the ingredients of the offence had been proved before considering their response to the charges against them.**"* (our emphases).

The People v. Nyassa Nicole Mulumbilwa, 2U/24/2017, in The Subordinate Court of the First Class for Sesheke (Criminal Jurisdiction), 24 January 2018 and Nyasa Nicole Mulumbilwa et al vs. The People, CAZ APPEAL/NO. 154/155/156/157/2018 in the Court of Appeal for **Zambia** at Lusaka (Criminal Jurisdiction), 28 June 2019

Similarly, a number of child selling cases yielded exonerations due to the absence of proof of an intent to exploit.

In Gole (**Mozambique**), a case revolving around charges that 4 accused persons intended to traffic a child in order to sell him to a couple who was interested in him, the court exonerated all the accused persons of trafficking charges. The facts of the case clearly raised suspicions. Two of the accused persons, named Ana and Joice, came up with a plan to abduct minors. Joice then arranged for a buyer for a particular minor; Ana recruited the minor, by deceiving him that she would take him to see his mother in **South Africa**, and she traveled with him to deliver him to the buyers. Yet another accused person named Elina, did reconnaissance at the home of the minor until she discovered him and participated in recruiting him. The 4th accused, named Fatima, traveled with Ana and the minor but claimed that she knew nothing about Ana's intention.

The accused persons, were apprehended before the exploitation transpired, and except for Joice and Fatima, confessed to these facts. However, the court exonerated all the accused persons of trafficking because the prosecution did not adduce evidence as to the exploitative purpose of the abduction. Instead, the court convicted all of the accused persons, except Fatima, who had no knowledge of their intent, of the alternative charge of removal of a child by means of fraud and without the permission of guardians.

Madagascar presents a whole slew of cases where there were exonerations because the accused person's intent to exploit was not proven.¹³ One such case was Judgment No. 101-CO

¹³ Besides the cases cited here, see: Judgment No 16-CO of 4 December 2018, before the Supreme Court of **Madagascar** where the accused is charged with trafficking for forced marriage to China, but the court notes that no objective evidence was adduced to prove the intent to exploit; Criminal Judgment No 57-CO of May 20, 2019 in the Supreme Court of **Madagascar**, judgment by default, whereby the accused was charged with trafficking of his second wife for forced marriage in China, but the court ruled that this was hypothetical as no evidence was adduced about the intent to exploit or the means; Public Criminal Hearing of the Court of First Instance on 24 February 2015 where children were deceived that they would be given jobs in Saudi Arabia and were defrauded of money but no intent to exploit was proven; Judgment No. 138 – CO of 8 August 2019 in the High Court of **Madagascar** – Special Court for Anti Corruption, where a 17 year old entered into an agreement to work in domestic service for the accused, but no intent to exploit was proven.

(**Madagascar**),¹⁴ where a person was brought to **Madagascar** and promised to be enrolled in a sports club. The accused received \$300 from him in return, but never enrolled him in the club. While the accused was convicted of fraud, he was exonerated from trafficking charges, because no intent to exploit was proven.

In **Judgment Number 138 - CO (Madagascar)**¹⁵ the court emphasizes the importance of proving the accused person's intent to exploit when it says that "*abuse...is the defining element of the crime...*"

A number of child selling cases from **Zambia**, where the exploitation did not yet transpire, yielded exonerations. In both **Mwewa (Zambia)** and **Kasonde (Zambia)**, the facts of which appear above in this section, clearly the accused persons attempted to sell minors to potential buyers. In both cases, the potential buyers prepared a sting with witnesses to the attempted sale. Moreover, in **Mwewa**, the accused persons pled guilty to conduct facilitating trafficking. Nevertheless the accused persons were exonerated of conduct facilitating trafficking, at least partially, because the courts ruled that the prosecution had not adduced evidence of intent to exploit or of the kind of exploitation intended.

On the other hand, we refer the reader to a child selling case where there was a conviction on trafficking, even though there was no actual exploitation. In **Msweli (South Africa)** the prosecution claimed that the very sale of a child constitutes a 'purpose of exploitation' in the form of "slavery", because nothing better reflects slavery than the sale of a human being. While the court did not explicitly address this claim, it did mention that the elements of the crime had been fulfilled and that the baby was commodified, and convicted the accused persons of trafficking in persons, which leads us to assume as probable that it accepted the prosecution's claims.¹⁶ The case revolved around the sale of a six month old baby, by means of deceiving his biological mother. The baby was sold to a loving couple who took very good care of him, so that there was no actual exploitation except for the sale itself. It is hard to reconcile this case with the above exonerations in child selling cases. We refer the reader to section 4.7 on *issues arising in child selling and adoption cases*.

What can we learn from the above exonerations? *Firstly*, flaws in the accused persons' versions of the facts or even pleas of guilty, cannot, in themselves, prove intent to exploit. The prosecution must adduce evidence as to the intent to exploit, independent of the accused person's versions. *Secondly*, even when clear proof is adduced of illegal transport across borders or an attempt to sell a human being, it may not suffice to prove an intent to exploit. *Thirdly*, suspicious circumstances must be placed in context in order to gauge if they have bearing on the question of intent.

4.3.4.4 The use of alternate charges

Courts seem to differ as to their power to convict accused persons on alternate charges to those submitted by the prosecution. The different approaches may emanate from a difference in the respective criminal procedure laws. Thus in **Judgment 220-Co (Madagascar)** while the prosecution charged attempted trafficking for begging, the court substituted this charge with a different one, namely, attempted trafficking for exploitation in domestic work, which was proven by the testimonies. Similarly, in **Gole (Mozambique)** the accused persons were charged with attempted trafficking of a child, but since the intent to exploit was not clear, the court convicted them of fraudulent abduction of a child instead. On the other hand, in **Mwewa (Zambia)** the High Court exonerated the accused person from advertising for trafficking while noting that the

¹⁴ Judgment No. 101-CO of June 27 2019 in Supreme Court of **Madagascar**.

¹⁵ Judgment No. 138 – CO of 8 August 2019 in the High Court of **Madagascar** – Special Court for Anti Corruption.

¹⁶ Unfortunately, the full judgment was not available, but rather only the prosecutor's handwritten notes summarizing the judgment.

prosecution could have charged similar offences like child stealing, kidnapping and abduction. However, the court was of the view that a judge may not substitute charges.

Issues which arise in cases where the exploitation did not transpire

- Is the prosecution required to prove the kind of exploitation intended?
 - Should full-fledged trafficking or attempt to traffic be charged?
 - What constitutes persuasive proof of intent in such cases?
1. Direct testimony on intent to exploit
 2. A constellation of suspicious circumstances with bearing on intent
 - Some cases stress that it does not suffice that the accused person's version is doubtful.
 - Some cases stress that suspicious circumstances must connect specifically to the question of intent to exploit.
 - One case stresses that suspicious circumstances must be placed in context in order to gauge if they have bearing on the question of intent.
 3. Differing approaches in child selling cases in particular – is the act of selling enough to constitute the 'purpose of exploitation'?
 - Is the judge authorized to convict on charges other than those charged by the prosecution?

4.4 How to handle the subject of victim consent

4.4.1 Introduction

4.4.1.1 Legislative statements on consent

The Protocol and most of the Trafficking Acts across the region include explicit statements on consent, whereby the consent of the victim is irrelevant or not a defence.¹⁷ The various Acts differ as to two main issues:

- Consent to what? Whereas most of the States in the region follow the Protocol's statement that consent relates to the intended exploitation, some Trafficking Acts are wider and include consent to any act constituting the offence.¹⁸
- Is consent irrelevant or not a defence only when 'means' are present? Whereas most States follow the Protocol and condition the irrelevance of consent on the existence of 'means', some do not do so.¹⁹ However, it is doubtful how much this difference matters, as in general, 'means'

¹⁷ Exceptions are **Angola** and **Comoros**. Moreover, we note that though **Zimbabwe's** Trafficking Act has an explicit statement by which consent is not a defence, consent must be addressed differently in regard to its two kinds of trafficking offences. Regarding the first offence, which requires involuntary transport of the victim, consent is clearly a live issue, as lack of consent must be present in order to fulfill the element of "involuntariness". On the other hand, regarding the second offence, which requires voluntary transport of the victim for an unlawful purpose, the victim's consent is actually an element of the crime.

¹⁸ Examples are **DRC**, where consent relates to the commission of the offence; **Seychelles**, **Zambia** and **Zimbabwe**, where consent relates to an act in the offence of trafficking; and **South Africa** and **Eswatini** where consent relates to the intended exploitation or to the action which was intended to constitute an offence, and where the statement on consent applies to a number of allied offences besides trafficking in persons.

¹⁹ Examples of States whose Trafficking Acts do not explicitly condition the irrelevance of consent on the existence of 'means' are **Eswatini**, **Lesotho**, **Mauritius**, **Namibia**, **Zambia** and **Zimbabwe**.

is an element of the offence of trafficking, and as such, must be present in order to constitute the crime in any case.²⁰

The importance of the issue of consent is highlighted in UNODC's Model Legislative Provisions against Trafficking in Persons:²¹

Article 11. Irrelevance of Consent of the Victim in Establishing Guilt

Commentary

"The drafters of the Trafficking Protocol recognized that consent should have no bearing in determining whether or not someone had been trafficked. They also recognized that consent might be used by the defence as a method of deflecting attention away from their responsibility and that the means employed in trafficking in persons cases would preclude the possibility of consent."

The text of the Protocol shows the irrelevance of consent in establishing guilt in two ways. First, the definition of trafficking in persons does not include a reference to the victim's consent or lack thereof to any of the conduct captured by the definition. Rather, what is required is evidence of an act, committed by specific means and for a specific purpose. Second, article 3(b) further recognizes this point by specifying that consent to the intended exploitation is irrelevant when the means have been established."

UNODC Model Legislative Provisions against Trafficking in Persons, Vienna (2020), p. 39.

4.4.1.2 The realities and values which underlie statements on consent

The prevalence of statements on consent reflects the reality that in many cases of trafficking in persons, the victim seemingly consents to the exploitation or to other elements of the offence. This is especially so in cases with no overt violence or lock and key imprisonment. Sometimes victims explicitly say that they agreed to the exploitative situation because it was better than the conditions in their country or region of origin; that the trafficker was their best friend; that the trafficker loved them and that they loved him; that they didn't see any viable alternative. Even when victims make no such statements, often their behavior seems to denote consent and for example, not fleeing or seeking help at the first opportunity; returning to an abusive employer; initiating a proposal to accompany the trafficker; agreeing to the tasks imposed on them by the trafficker. We refer the reader to sections 3.3.8.1, 3.3.8.2, 3.3.8.5 and 3.3.8.6 which relate to these weaknesses in the mosaic of evidence.

Why are such patterns of behaviour observed in victims of trafficking? The key reason is their vulnerabilities, which limit their options in life, curtail their expectations and may lead them to behave in unexpected ways. As is noted in section 3.2.5 on *vulnerabilities*:

"Vulnerable people do not behave like you and me; one must understand their situation in order to understand their behaviour."

Regional Colloquium on Trafficking in Persons for Regional Court Magistrates, convened by UNODC in Johannesburg, **South Africa** between August 22 – 24, 2018. The quote is drawn from the words of a **Namibian** judge.

A number of different approaches may underlie statements on the irrelevance of victim consent, which appear in the Protocol and in most Trafficking Acts across the region. On the one hand, it is possible that these statements simply reflect the truism that when 'means' are present there is

²⁰ An exception is **Zimbabwe** which has two kinds of trafficking crimes, one of which does not require 'means'.

²¹ Vienna, 2020, available at https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf.

generally a flaw in the consent of the victim, even if there is no proof that a particular victim was affected in this way.

Alternatively, it is possible that underlying these statements is a value laden approach, whereby in a severe crime like trafficking which violates fundamental human values, society will not allow consent to matter, as is the case with other crimes which violate basic values, such as murder or grievous injury.²² Just as the crime of murder protects the basic value of human life and the crime of grievous injury protects the basic value of bodily integrity, the crime of trafficking protects the fundamental values of freedom, autonomy and dignity which society should not allow a person to waive.

Interestingly, even philosophers like John Stewart Mill, who view a person's right to autonomous decision making as among the highest of values,²³ still espouse the approach that society should not allow a person to consent to slavery.

"In this, and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave would be null and void.

...The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty...But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself...The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom."(our emphases)

John Stewart Mill, "On Liberty" chapter V, in John Stewart Mill, "On Liberty, Utilitarianism and Other Essays," Oxford University Press, 2015, United Kingdom, pp. 99-100.

Moreover, consent to such a violation of the essence of human freedom, may also cast doubt on the genuineness of the consent.

4.4.1.3 Consent is always a live issue

On the face of it, the statements on victim consent, present in almost all the Trafficking Acts across the region, should provide an adequate solution to the question of how to handle this pattern of victim behaviour. However, it is doubtful if this is the case. A UNODC issue paper on 'the role of "consent" in the trafficking in persons protocol'²⁴ included a survey among 12 States which reviewed legislation, case law and practice. The most interesting insight was that while most countries espouse the irrelevance of consent, consent is a live issue, no matter what the legislation or case law says. Why is this so? There may be a number of reasons:

²² See UNODC Issue Paper on "The role of "consent" in the trafficking in persons protocol" pp. 35-36.

A real life example in regard to the crime of murder can be found in the German case of Meiwes which concerns a man who advertised on the internet for a young man who would consent to be killed and eaten by him. An engineer named Brandes answered the advertisement and Meiwes killed and ate him. His defence to the charge of murder was that the victim had freely consented. The German Courts did not accept this claim. On 10 May 2006, a court in Frankfurt convicted Meiwes of murder and disturbing the peace of the dead, and sentenced him to life imprisonment.

²³ Mill's view is that society has no right to interfere with a person's decision, unless it harms others, even if the decision seems clearly to his own detriment.

²⁴ This issue paper is available at https://www.unodc.org/documents/humantrafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf;

1. It is counter intuitive for criminal justice practitioners to view consent as irrelevant, as they are accustomed to thinking that consent not only matters, but makes the difference between an act that is a crime and one that is not, as in the crimes of rape, assault or theft.
2. The modern world emphasizes the importance of respecting a person's autonomy to choose his path in life, even when the choice seems to impact negatively on him or her.²⁵
3. In most trafficking cases, there is heavy reliance on victim testimony which focuses the case on victim behavior, including consent.
4. In some trafficking cases, victims assert that they consented to the exploitation. It is hard for courts to ignore such explicit statements.

Thus, despite what legislation or case law states, cases tend to revolve around victim consent, even if it is a subtext in the court's ruling. The following subsections attempt to cull some practical guidance from cases across the region regarding how to handle the subject of victim consent.

For a global overview of this issue, we refer the reader to section 4.4 in the global case digest on *how to handle the subject of victim consent*. We note that in this section we will sometimes draw on cases from outside the region.

4.4.2 A useful mode of analysis

In every case where victim consent or seeming consent is an issue, there arise two central questions which lie under the surface, even if case rulings do not explicitly analyze each of them. The first is if the victim consented; the second is, if he did in fact consent, what is the significance of the consent?

4.4.2.1 Did the victim consent?

The answer to the first question – if the victim consented – is a function of both law and facts. Some States, like **Botswana**, include in their Trafficking Acts a specific definition of 'consent'. In order to be considered 'consent' the victim must have a choice and the freedom and capacity to consent.²⁶ Only if the factual picture fits this definition, does the law respecting the irrelevance of consent come into play.

On the other hand, **South Africa's** Criminal Law (Sexual Offences and Related Matters) Amendment Act, which included transitional provisions criminalizing trafficking for sexual exploitation before the enactment of **South Africa's** comprehensive Trafficking Act in 2013, required a lack of consent. This makes cases adjudicated under this law particularly relevant to this first question as to whether the victim consented. We note that this legislation also included a definition of 'consent' and a list of situations where the agreement of a person would not be considered consent. The definition of 'consent' required that the agreement be voluntary

²⁵ One source of this approach is in the works of the philosopher John Stewart Mill and especially his essay "*On Liberty, Utilitarianism and Other Essays*", Oxford University Press (U.K. 2015).

²⁶ The definition in section 2 of **Botswana's** Trafficking Act is as follows: "'consent' in relation to a person means that the person agrees by choice, and has the freedom and capacity to make that choice."

or uncoerced,²⁷ and the list of situations where agreement would not be considered consent was broad.²⁸

For States which do not include a definition of ‘consent’ in their Trafficking Acts, the criteria may be drawn from other, more general, pieces of legislation such as the Criminal Law or from case law.

In all States, the answer to the question if the victim consented, will be a function of applying the criterion for ‘consent’ to the facts of the case. In the following sections, we will analyze some of the factual issues which may impact on the question if the victim consented.

4.4.2.2 What is the significance of the victim’s consent?

Once the first question has been addressed and the conclusion reached that there has been consent, the next question is the significance of that consent. As said, most Trafficking Acts across the region include explicit statements on ‘consent’ by which it is irrelevant or not a defence, whether conditioned on the presence of ‘means’ or not.

Various cases across the region explicitly invoke these legislative statements in order to dispose of the issue of ‘consent’. However, as said, in general, they also analyze or at least describe the facts of the case in a way which can assist us in understanding if the victim genuinely consented and if so, why.

While the two questions regarding the presence of consent and its significance are addressed separately as an analytical tool, they clearly impact on one another. Thus we suspect the genuineness of consent in cases where the victim seemingly agrees to his own severe exploitation.

In the following sections of the digest we will draw on cases which can contribute to our understanding of how courts analyze ‘consent’.

4.4.3 Did the victim consent?

In analyzing the question if the victim consented, each State will naturally proceed according to its definition of consent, as reflected in its legislation and case law. In this section we will analyze factual questions which may assist courts to determine if the victim has truly consented, whatever the legal criterion.

Among the factual scenarios which present questions about the existence of consent, are several which were addressed in section 3.3 on weaknesses in the mosaic of evidence, and for example: failure to escape or seek help at the first opportunity (section 3.3.8.1); return to the abuser (section 3.3.8.2); victims who initiate accompanying the trafficker (section 3.3.8.5); the victim’s agreement to contract with trafficker (section 3.3.8.6).

²⁷ The Criminal Law (Sexual Offences and Related Matters) Amendment Act in **South Africa** included transitional provisions about trafficking. Section 71(1) enumerated the elements of the crime which included lack of consent, thus: “A person (“A”) who trafficks any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.”

Section 71(3) included a definition of ‘consent’ thus: “‘consent’ means voluntary or uncoerced agreement.”

²⁸ Section 71(4) of the Act included a list of situations where the victim could not be considered to have consented: “Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following— (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act— (i) asleep; (ii) unconscious; (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgement is adversely affected; (iv) a child below the age of 12 years; or (v) a person who is mentally disabled. ”

We note that several cases which form the foundation of this digest were adjudicated before **South Africa** had enacted its comprehensive Trafficking Act. At that time there were in force only a number of transitional provisions on trafficking for sexual exploitation, which required the lack of consent of the victim.²⁹ For this reason such cases are particularly relevant to the question if the victim consented, although they are irrelevant to the second question about the significance of consent. Examples are **Mabuza (South Africa)**, **Veeran Palan, Jezile (South Africa)**, **Matini (South Africa)**, **Allima (South Africa)** and **Eze (South Africa)**. However, as said, the definition of consent in this Act required that it be “voluntary or uncoerced” and it also enumerated a list of situations where the agreement of the victim could not be viewed as consent.

We also note that sometimes courts go directly to the second question about the significance of consent, without explicitly addressing the question if consent was given. However, even in these cases, they describe facts which impact on this important question.

Finally, we stress that while we address each of the factual questions below separately for analytical purposes, the outlines between them are often blurred. Moreover, most cases use more than one of them in order to reach their final conclusions.

4.4.3.1 *Informed consent*

In cases which do not include the use of force or lock and key imprisonment by the trafficker, the victim may agree to accompany the trafficker or to work for him at some stage of the process. However, the question arises: to what did the victim consent? In various cases which yielded convictions, it seems that the victim agreed on the basis of insufficient information or deceptive information. In other words, there was no informed consent.

Sometimes the consent is given on the basis of insufficient information. Such a scenario takes place in **Bandawe (Malawi)** where the accused persons recruited 4 victims by telling them that they would obtain employment for them. The accused persons did not divulge crucial information to the victims, and for example, the identities of contact people in **Tanzania**, Kenya and Dubai. Nor did they disclose the final destinations of the victims or the individuals who would employ them. The court noted that in so doing, they denied the victims vital information necessary to make decisions. The victims were not even sure where they were going, whether to Kenya or Dubai. The court convicted the accused persons of trafficking in persons, noting that an intent to exploit had been established.

Sometimes the seeming consent is a function of deception on the part of the trafficker as to crucial facts. In these cases, the victim’s consent relates to the promised conditions, rather than the actual conditions. In jurisdictions where consent is irrelevant or not a defence when ‘means’ are used, this clearly impacts on the application of the legislative statement which addresses the significance of the victim’s consent. However, it also impacts on the question if the victim consented at all.

As to cases which relate to deception, we refer the reader to section 3.2.3 on *deception*. The deception can relate to work conditions and place of employment, as in **Shongwe (Eswatini)** where the court explicitly connects between the deception practiced on the victim and the issue of consent.³⁰

²⁹ See section 4.4.2 for details about this legislation.

³⁰ We note that section 16 of the **Eswatini** Trafficking Act does not explicitly condition the irrelevance of consent on the existence of ‘means’. The following is the language of the section:

“In a prosecution for an offence under this Part, it shall not be a defence that the trafficked person consented to the act of people trafficking or to the exploitation.”

"... Consent of the victim of trafficking in persons to the intended exploitation is irrelevant mainly because deception was used."

King v. Shongwe Case No. HLU 60/2016 before Subordinate Court district Shiselweni; Shongwe vs King [166/19] [2020] SZHC 113 (24 June 2020).

Additional examples of cases where the victims were deceived as to the conditions of their employment are: **Alam (Seychelles)** which revolves around 4 Bangladeshi men who were deceived as to hours of work, employers, legal status, accommodations and food when they agreed to travel to **Seychelles; Maroodza (Zimbabwe)**, where 6 young women consented to travel to Kuwait because they were promised good paying jobs as housemaids with accommodations and food included, but faced markedly worse conditions upon arrival in Kuwait. While the courts do not explicitly connect between these deceptions and the consent of the victims, the factual picture presents a similar picture to that of **Shongwe (Eswatini)** where the court explicitly made this connection.

On the other hand, sometimes the deception concerns facts which impact directly on the trust of the victims or the purpose of the journey. Thus, in **Matini (South Africa)** 2 mentally disabled minors consented to accompany the traffickers after they were told that one girl's mother agreed to this and under the assumption that one trafficker was a relative, neither of which were true. They were also told that they would be given good jobs, whereas they were handed over to a series of men for sexual exploitation. While the court does not explicitly address their consent to accompany the traffickers, it convicted the accused persons of trafficking for sexual exploitation. In regard to this case, we also refer the reader to section 4.4.3 on *the genuineness of consent*.

By the same token, in **Veeran Palan (South Africa)**, 2 vulnerable young women agreed to travel to a distant city because the recruiter told them that they would obtain good jobs in a hotel. Instead, when they arrived, they were told that they must prostitute themselves. Both tried their best not to do so by informing clients that they did not wish to engage in sexual relations. Since the case was adjudicated on the basis of **South Africa's** transitional provisions against trafficking, which required the victims' lack of consent, the court addressed the existence of 'consent' explicitly and placed emphasis on the deception practiced on the two victims.

*"The evidence clearly shows that accused 1 and 2 had employed deception to lure the two complainants to Port Shepstone for the purpose of getting them to engage in prostitution and provided the finances and means of transferring them here. They were also harboured and accommodated by accused 1. **The women did not freely and with full knowledge of all the material facts consent thereto.** Consequently both accused are found guilty of the main counts of counts 1 and 2."* (our emphasis)

State v. Veeran Palan and other Case No. RCD 13/14, Regional Court of KwaZulu-Natal, 12 June 2015.

Similarly, in **Obi (South Africa)**, while the three victims willingly accompanied the accused recruiter, they did so because she told them that they were going on a short visit and would return the same day. They were subsequently locked in the dominant accused person's residence and forced to prostitute. While the court did not explicitly address their consent to accompany the trafficker, it convicted the accused persons of trafficking for sexual exploitation.

By the same token in **Mponda (Malawi)** three young girls agreed to travel to a place where they were told that they would obtain jobs as sellers in a restaurant. Instead, on arrival they were expected to prostitute themselves and refused, but did not have the wherewithal to flee.

While the court does not explicitly analyze the case in terms of the question of consent, it stresses the deception practiced against the victims and convicts the accused of trafficking in persons.³¹

Similarly, in **Mujee (Botswana)** the minor victim and her parents, whose consent she sought, agreed that she accompany the accused, because they believed that she would obtain a job for the victim as a maid in **Botswana**. Instead, the accused subjected her to a series of sexual exploitation. While the court does not explicitly connect the deception to the victim's consent, the very fact that this issue is not raised seems to intimate that the court did not view the victim's behaviour as consent.

We also refer the reader to section 3.2.3. on *deception* for additional cases in which deception impaired victims' consent and contributed to convictions on trafficking in persons.

4.4.3.2 Stages of consent

As mentioned in section 3.2.4.11 on *use of victims' initial consent as a means of pressure*, traffickers sometimes use a victim's initial agreement to exploitation in order to pressure him or her to remain under exploitative conditions. Such a phenomenon can be observed in **Urizar (Canada)** where the accused, who posed as the victim's romantic partner, induced her to work as an exotic dancer. At first she agreed, but at a later stage, wanted to stop, which led him to pressure her to continue by stressing that she had formerly agreed. This is an example of a case where the victim consented at the initial stage of the trafficking, but withdrew her consent at a subsequent stage. The accused was convicted of trafficking for sexual exploitation.

We also note that in the global case digest there is reference to a Norwegian case where an analysis of stages of consent was important in the conviction of the accused on charges of trafficking in the court of first instance. The following description is drawn from the global case digest.

*"In LB-2012-63028 (Norway) the defendants interviewed some 50 Filipino women for an au-pair job in Norway and exchanged a series of e-mails and chats with the women while they were still in the Philippines. Most of the chats were conducted by the male accused person and during the course of subsequent e-mails and chats it was made increasingly clear by him that sexual services would be required. Nevertheless, the victims agreed to come to Norway. The first victim arrived six months earlier than the second and was required to have sexual relations with the accused. The victim testified that although she knew this would happen, she hoped it would not. She was reluctant at first, but the male defendant reminded her that she had agreed. The defendants did not employ violence or lock and key imprisonment. At most, there was a subtle threat that people in the Philippines would find out if the victim did not consent. The victim was also told that if she did not agree, she would need to pay her own ticket to return to the Philippines. The same situation repeated itself with the second victim who arrived six months later. However, she reneged on her initial consent and sought help. A large part of the trial in the district court was devoted to the issue of victim consent. The court convicted the defendants of human trafficking, noting that **consent can always be withdrawn** and that the first victim's reluctance to engage in sexual relations showed that her consent had been withdrawn. The appeals court took the position that the victims could not validly consent and noted that the vulnerability of the victims had been abused."* (our emphasis)

UNODC Case Digest on Evidential Issues in Trafficking in Persons Cases, Vienna (2017), section 4.4 on "How to handle the subject of victim consent".

³¹ We note that in doing so, the court also applies an evidential presumption in the **Malawi** Trafficking Act by which if a person was habitually in the company of a trafficked person he is presumed to have committed the offence unless he gives proof to the contrary.

Courts in the cases which form the foundation of this digest do not explicitly analyze the issue of consent in terms of stages. However, there are several convictions in situations where there was initial consent by the victim, who later withdrew her consent. Naturally there is a certain overlap between a focus on stages of consent and the question about informed consent, addressed in section 4.4.3.1 above. However, both can assume importance as analytical tools.

In **O.B. Abba (South Africa)** both victims approached the dominant accused of their own volition. One victim knew that this accused was involved in prostitution and agreed to engage in it. However, as time went on and the accused exercised violence and restrictions of freedom against her, she tried to escape, thus showing that her initial consent had been withdrawn. The court addressed the question of her initial consent as part of a bundle of defence claims regarding consent, but did not deal with it separately. The court reached the conclusion that there had been no genuine consent, on the basis of the victim's vulnerabilities, and especially her addiction to drugs, and convicted the dominant accused of trafficking for slavery, servitude and sexual exploitation. We refer the reader, in addition, to section 4.4.3.3 on *the genuineness of consent*.

Another case involving stages of consent on the part of the victim is **Jonas (Namibia)**, where the victim agreed to travel to the accused person's place of residence because she was promised a good job, but was then forced into sexual exploitation, at which point she made her refusal clear. At another stage of the process, although the victim was working at a paying job, she obeyed the trafficker and left it to accompany her. The defence claimed that the victim knew that she was going to the accused's residence in order to connect with a boyfriend, but the court dismissed this claim on the basis of the legislation then in force which stated that consent was irrelevant if 'means' were used. While the court did not explicitly analyze the case in terms of stages of consent, this facet was part of the facts of the case. We refer the reader, in addition to section 4.4.4 on *the significance of consent: the place of legislation*.

By the same token in **Ogochukwu (South Africa)**, at one point, the minor victim initiated turning to the accused, though she knew he was involved in prostitution. However, in the aftermath, she fled to a church and requested help to leave the situation, thus clearly withdrawing her consent. The accused was convicted of trafficking for sexual exploitation. While the court does not analyze the case in terms of stages of consent, this aspect was part of the facts of the case.

Similarly, in **Eze (South Africa)** while the victim named Els initially agreed to prostitute herself for the accused, she escaped from him several times and was brought back by force, thus showing that her initial agreement had been withdrawn. The court did not explicitly address the question of stages of consent, but ruled that the victim had not consented to the exploitation, on the basis of her addiction to drugs, and convicted the accused of trafficking for sexual exploitation. We note that when this case was adjudicated, the law in force required lack of consent³² which makes this case particularly relevant to the question as to whether there was consent. In regard to this case, we also refer the reader to section 4.4.3.3 on *the genuineness of consent*.

4.4.3.3 *The genuineness of consent: the impact of vulnerabilities*

One of the most crucial questions in evaluating consent, is the genuineness of the consent. This question arises most often in cases where there is a power gap between the accused and the victim, thus exerting pressure on the victim to consent, and where the victim's vulnerabilities limit his or her ability to freely and genuinely consent. We note that although the voluntariness of consent also impacts on its genuineness, we will devote a separate subsection to that topic.

One of the vulnerabilities dwelt on by courts in the region in this context is addiction to drugs. The consent to exploitation of victims addicted to drugs has been viewed as non-genuine or impaired.

³² See section 4.4.2 for further information on this former Act.

One example occurs in **Eze (South Africa)** which revolves around the sexual exploitation of 2 young women, addicted to drugs, who are given free drugs by the trafficker in the morning and evening in order to facilitate their ability to engage in prostitution, but are also expected to buy additional drugs from him. Not only do the victims remain with the trafficker, but one of them fails to flee or seek help at the first opportunity and returns to him several times. We note that the law in force during the adjudication of this case was one which required lack of consent and did not include a statement on its irrelevance, so that this is a highly relevant case to the first question in our mode of analysis: was there consent? We also note that one of the circumstances enumerated by the Act as not “voluntary or uncoerced” was addiction to drugs.³³

In ruling that the victims did not consent to their exploitation, the court relies heavily on expert testimony as to the influence of addiction to drugs on the genuineness of the victim’s consent.

“In her addicted state a victim is experiencing overwhelming cravings for the drug and will do what she must do to satisfy them. She has impaired judgment and is susceptible to control...Drug addiction helps pimps keep prostitutes virtually enslaved...”

By keeping the complainants in an altered state of consciousness by employing fear and the threat of harm and by exploiting their addiction gave the accused the power over their vulnerability to the extent that the complainants were inhibited from indicating their unwillingness or resistance to being trafficked. This accords with the conclusions reached by the expert, Major Stollarz that these victims were therefore exposed to the typical mechanisms used by traffickers...that extended beyond the mere physical control to the expansive grip of psychological control.”

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

We also refer the reader to sections 3.3.8.1 on *failure to escape or seek help at the first opportunity* and 3.3.8.2 on *returning to the abuser* in connection to this case. We note, in addition, that both victims in this case were highly vulnerable, aside from their addictions, with a history of former abuse.

An example of how a bundle of vulnerabilities can impair consent, appears in **O.B. Abba (South Africa)** where 2 young women, addicted to drugs, approached the dominant accused and prostituted themselves for him. The court addressed their seeming consent to the exploitation as a function of their vulnerabilities which included difficult social and economic circumstances and addiction, among other circumstances, thus:

“This [their seeming consent]³⁴ must be seen in the context that they were dependent on drugs and came from difficult social and economic circumstances...They had no money, nor did they have a support network that could assist them. It also loses sight of the fact that they were dependent on drugs... They were trapped by their socio – economic and personal circumstances as well as their dependence on drugs. All of the aforesaid were ruthlessly exploited by the accused. ”

State v. O.B. Abba and others, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria).

We note that this case was adjudicated according to the comprehensive Trafficking Act of 2013, which does not require lack of consent on the part of the victim and does include an explicit statement by which consent is not a defence if ‘means’ are present.

³³ See section 71(1) of **South Africa’s** Criminal Law (Sexual Offences and Related Matters) Amendment Act as quoted in section 4.4.2.

³⁴ Our addition.

Yet another example of how vulnerabilities and power gaps can impair consent can be seen in **Sonah (Mauritius)**, where 3 jobless young women, one of whom was a minor, answered advertisements for babysitters, receptionists and massage workers. All 3 victims were vulnerable. The minor was jobless; another victim had just left her husband and had nowhere to live; the third victim was suffering from financial difficulties. However, either on arrival or a few days later, the accused informed them that they would be required to give massages accompanied by masturbation of the clients. The victims agreed, because respectively, they were experiencing financial difficulties, had no other job or had no place to live. The power gap between the victims and the accused is highlighted by the fact that 2 victims agreed to sign letters drafted by the accused after a police raid on the premises, according to which they had committed no illegal acts on the accused's premises. They did so after the accused told them that if they did not sign, they would not receive their salaries. While the court does not explicitly rule that the consent of the victims was not genuine, it accepts their versions of the facts and convicts the dominant accused of child trafficking for prostitution in regard to the minor and of exploiting a prostitute in regard to the 2 adult victims.

Another example of how vulnerabilities can affect the genuineness of consent is seen in **Mponda (Malawi)**, where three young girls agreed to travel to a place where they were told that they would obtain jobs as sellers in a restaurant. Instead, on arrival they were expected to prostitute themselves and refused, but yet did not flee, which could denote that they had consented to remain. In analyzing the facts of the case, the court stresses the vulnerabilities of the girls which did not give them the wherewithal to flee the situation, and convicts the accused of trafficking in persons.³⁵

"To add, the victims herein were in a position of vulnerability. They were taken from the rural areas of Mulanje to Lilongwe city. They had no money to support themselves and the defendant was aware of this. They were relatively young and in my estimation not more than 16 years old. They lacked financial, psychological and social acumen to come out of the whole ordeal the moment they realised that they were defrauded."

The State v. Mponda Case No: 352 of 2017 Senior Resident Magistrate Court, **Malawi**

Yet another example of how vulnerabilities can impair the genuineness of consent occurs in **Allima (South Africa)**, where a 16 year old girl is abducted from her hometown, taken to a distant city where she knows no one but the accused and subjected to a series of sexual exploitation. Not only does the girl not flee or seek help at the first opportunity, but she accepts the trafficker's representation that her name is other than it is and that the trafficker is her mother. During the course of her testimony, the girl is asked why she did not resist, why she did not flee at the first opportunity, why she accepted the trafficker's representations. She repeatedly tells the court that she felt powerless. Moreover, the clinical psychologist expert witness explains that the victim underwent a process of traumatic dissociation as a result of the fear raised during her abduction. In convicting the accused of trafficking for sexual exploitation, the court relies heavily on the psychologist's testimony as to the state of mind of the victim, which casts doubt on the genuineness of her consent. We note that this case too, was adjudicated according to the former **South African Act** which required lack of consent, so that it is particularly relevant to the question about the existence of consent. We also refer the reader to section 3.3.8.1 on *failure to escape or seek help at the first opportunity*.

³⁵ We note that the conviction also rests upon an evidential presumption in the Trafficking Act of **Malawi** by which if a person was habitually in the company of a trafficked person he is presumed to have committed the offence unless he gives proof to the contrary.

Similarly in **Jeremiah Musa Dlamini (Eswatini)** an influential man trafficked his biological daughter and niece for sexual exploitation over a period of years, during which they did not resist or report his actions, thus seemingly consenting to the exploitation. When his elder daughter came to live with them, she refused to be sexually exploited and in the end, reported the case to the authorities. At one point she asked her sister and cousin why they did not end the exploitation. They answered that not only were they afraid of the accused physically harming them, but they also feared he would expel them from his house and they had nowhere to go. Although there is no mention of restrictions of freedom employed against the victims, which could have prevented them from seeking help, there was clearly a power gap between the victim and the accused. The court notes that the accused was an influential man, who was a self-acclaimed pastor of a Zionist church, a member of the local community police, a traditional healer, and a member of the local women's regiment. Moreover, the court notes that the entire community, including the police, was aware of the exploitation, but did nothing to stop it, so that the entire weight of the community was behind the accused. Although the court does not explicitly address the topic of consent, it notes testimonies which impact on it and convicts the accused of trafficking for sexual exploitation and rape, despite the seeming consent of the victims.

4.4.3.4 *The voluntariness of consent*

In many cases across the region, while victims seemingly consent to their exploitation or to other elements of the crime, courts take into account the lack of voluntariness of their consent. In certain cases, force is exerted; in others threats, restrictions of freedom or isolation, all of which impair the voluntariness of the consent. The connection between the use of 'means' and the voluntariness of consent is also reflected by Trafficking Acts which render consent irrelevant or not a defence when 'means' are used. Thus, cases where the use of 'means' impacts on consent are relevant both to the question if consent occurred and to its significance, which will be addressed in section 4.4.4 on *the significance of consent: the place of legislation*.

Some of the cases in the region explicitly raise the topic of consent and refer to 'means' used against the victim. One example is **O.B. Abba (South Africa)**, a case revolving around the trafficking for sexual exploitation of 2 vulnerable young women addicted to drugs. The court addresses the victims' seeming consent on several planes and for example, their vulnerabilities, and the legislative statement on consent. However, in analyzing the issue of consent, it also places emphasis on the force exerted against them:

"...It must also be remembered that Ms. Malema was brought back by accused 3 when she attempted to escape...They were locked up and given drugs to sleep during the day. They were as a result, kept on the premises by threat or use of force. Even if they wanted to leave, as we know at least Ms. Malema did, they could not."

State v. O.B. Abba and others, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria).

Similarly, in **Jeremiah Musa Dlamini (Eswatini)** the case revolved around the trafficking for sexual exploitation of two vulnerable young women by an influential man who was the biological father of one of them and the uncle of the other one, over a period of years. The victims were asked by another daughter of the accused, who refused to be similarly exploited and reported the exploitation, why they remained with the accused. One of their answers was that they feared that he would physically harm them.

Similarly, in **Koch (Namibia)**, a case revolving around the trafficking for sexual exploitation of several minors, some of the victims were asked why they kept returning to the accused, though they knew that he would sexually exploit them. One replied that she was afraid of the accused. The accused was convicted of trafficking for sexual exploitation.

By the same token, in **Eze (South Africa)** the victim named Els left the accused several times, but returned. According to the testimonies described by the court, some of these returns were effected by force exerted by the accused. While the court lays more stress on the influence of Els' addiction upon her seeming consent, the force exerted by the accused appears in the description of the testimonies. The accused was convicted of trafficking for sexual exploitation.

In **Jonas (Namibia)** the court uses the 'means' employed against the victim and the legislative statement on the significance of consent in order to dismiss defence claims regarding consent. The case revolved around a young girl led to believe that she was traveling to the accused person's place of residence for a good job, whereas she was then forced into sexual exploitation. The defence claimed that the victim knew that she was going to the accused's residence in order to connect with a boyfriend. In dismissing this claim, the judge stressed that according to the **Namibian** law then in force, which adopted the Protocol, consent is irrelevant if 'means' are used, and the accused had used the 'means' of deception, fraud and abuse of a position of vulnerability. The accused was convicted of trafficking for sexual exploitation.

In other cases which yielded convictions, the court does not explicitly address the topic of consent. However, the facts of the case establish that the victims continued to remain with the accused due to various 'means' exerted against them which impaired the voluntariness of their behaviour. Examples are **Alam (Seychelles)** where the accused confiscated the victims' passports and threatened them with force and deportation; **Obi (South Africa)** where the sexually exploited minors were locked in the house and forced into prostitution; **Dos Santos (South Africa)** where force, restrictions of freedom and threats of deportation were employed against 3 vulnerable young women from **Mozambique** trafficked for sexual exploitation; **Mahuni (Zimbabwe)** where the vulnerable young women, procured for prostitution, were threatened that if they left they would be "disappeared" by a friend of the accused who worked in the police force, and their passports were detained; **Mujee (Botswana)** where the accused exerted threats, force, restrictions of freedom, isolation and denial of food against the minor victim, illegal in **Botswana**. While she admitted that she had considered trying to escape, she feared to do so because the accused had told her that she would be arrested.

4.4.3.5 Behaviour which denotes a lack of consent

Several cases across the region analyze behaviour which denotes a lack of consent, thus impacting directly on the question if the victim consented.

One example is **Mponda (Malawi)** where 3 young girls were deceived as to the purpose of their journey and instead of obtaining jobs as sellers in a restaurant, were expected to prostitute themselves. When they discovered this, they did not flee immediately, due to their vulnerabilities. However, the court views their behaviour as reflecting a clear lack of consent.

"The victims never consented to any of these. In fact they expressed their protest by crying and always leaving the premises of the bar and coming back late."

The State v. Mponda, Criminal Case Number 352 of 2017, in the Senior Resident Magistrate Court sitting at Lilongwe.

Another example is **Jezile (South Africa)** which revolved around the trafficking for sexual exploitation of a minor of 14 in the context of forced marriage. The case was adjudicated according to the **South African** Act in force before the comprehensive Trafficking Act was enacted, which required a lack of consent on the part of the victim.³⁶ In the court of first instance the accused raised the claim that the girl had consented to marry him and engage in sexual relations with him.

³⁶ See section 4.4.2 for more details about this legislation.

He also maintained that even her attempts to escape do not prove a lack of consent, as pretending to object to a marriage is a sign of modesty in their culture.

However, the testimonies of the victim and her mother, which were deemed credible by the court of first instance, clearly showed the girl's lack of consent according to the court. Among the clearest signs of her lack of consent were the following:³⁷ she pleaded with her uncle not to force her into marriage; left the marital home twice in an effort to escape; refused to engage in sexual relations with the accused when her uncles returned her to him; objected to going to Cape Town with the accused; wept and told the accused that she did not wish to be his wife or sleep with him; escaped from the home of the accused's brother in Cape Town after the accused raped her and employed force against her.

The court of appeals accepted the trial court's conclusions as to the lack of consent of the victim, and confirmed its conviction on trafficking for sexual exploitation.

The trial court found, and correctly in our view, that the running away by the complainant could not on the evidence have been an indication of any pretence on her part. If anything, the evidence with regard to her running away in the Eastern Cape, walking through a forest at night, alone, sleeping in the open and exposed to the elements was nothing more than a desperate attempt on her part at escaping from the appellant. It is therefore in our view nothing more than a cynical attempt on the appellant's part to claim that he harboured a belief that when the complainant ran away, she did so out of sheer modesty, and his reliance on the customary practice is entirely misplaced...

Moreover, the trial court did not find, on a careful examination of the evidence relating to the relocation and correctly in our view, that the complainant had consented to the customary marriage, the incidents of sexual intercourse with him, and that she had willingly relocated to Cape Town."

Jezile v. State, HCC No. A 127/2014, High Court of **South Africa** (Western Cape Division, Cape Town) (23 March 2015).

Another case with behaviour denoting lack of consent is **Veeran Palan (South Africa)** where 2 vulnerable young women traveled to a distant city after being told that they would obtain good jobs in a hotel, only to be expected to prostitute themselves. Both victims tried their best not to engage in prostitution and told clients that they were being held against their will.³⁸ While the court addressed their testimony with caution because they had failed to escape or seek help at the first opportunity, which could be interpreted as seeming consent, it also enumerated this behaviour vis a vis clients and stressed the deception which had been practiced against the victims. The accused persons were convicted of trafficking for sexual exploitation. We refer the reader, in addition, to section 3.3.8.1 on *failure to escape or seek help at the first opportunity*.

The court in **Mabuza (South Africa)** ruled that the 4 minors trafficked for sexual exploitation from **Mozambique** did not fulfill the definition of 'consent' because 'means' had been used against them³⁹ (see section 4.4.5 on consent in trafficking children and the mentally disabled). However, in describing the facts of the case, the court notes a number of behaviour patterns

³⁷ Other signs of lack of consent were: she refused to take off her school uniform at the behest of her uncle when she was to be married; refused at first to perform any household duties for the accused; on arrival to Cape Town refused to eat, wear bride attire or spend the night with the accused.

³⁸ It is not clear from the facts of the case if the traffickers knew of this behaviour on the part of the victims, so that it was doubtful if it could impact on proof of their intent.

³⁹ We note that according to the legislation then in force, the use of 'means' negated consent which was required to be "voluntary and uncoerced". See section 4.4.2 for further details on that legislation.

which clearly denote lack of consent and for example: that the children asked to go home or study in school; that some refused at first to sleep with the sexual exploiter; that some complained about their injuries, and that 3 out of the 4 victims were reluctant to engage in sexual relations until threatened, whereas the 4th was forced.

4.4.3.6 *Is an agreement to perform tasks tantamount to consent?*

Some cases in the region seem to espouse the approach that once a person has agreed to perform tasks, the performance of those tasks cannot be considered exploitative. We refer the reader to section 3.3.8.6 on *the victim's agreement to contract with the trafficker* for an analysis of this question.

However, these cases also impact on the question of 'consent', as underneath the surface lies the question: should the consent be gaged on the basis of the contract alone, or do other circumstances have weight in assessing it?

In **Adigwe Dike (Eswatini)** the case revolves around allegations of trafficking in regard to a young woman brought from Nigeria to **Eswatini** in order to help one of the accused persons in her business of selling wares and to attend to other tasks. In return, it was promised that she would be enrolled at a tertiary institution in **Eswatini** in order to continue her education. A written agreement was drafted to that effect which the accused persons and relatives of the girl signed and which she herself stated she saw as binding.

The accused couple was exonerated of trafficking in persons charges, although one accused was convicted of assault with grievous injury. One of the reasons for the exoneration was the failure of the prosecution to prove that the accused had never intended to enroll the girl in a tertiary institution from the beginning and had thus recruited her, for the sole purpose of exploitation.⁴⁰ However, another consideration was that performance of the agreed tasks themselves could not constitute exploitation "*as they were agreed upon*".

"There is no doubt, that performance of the agreed tasks themselves would not amount to exploitation as they were agreed upon. The exploitation would only arise where the other side deliberately failed to perform its part of the bargain. Clearly the parties herein were in agreement that if all the terms of the agreement were fulfilled by all the parties the question of exploitation would not arise."

Rex v. Adigwe Dike and other, Case No. 33/2012 in the High Court of Swaziland, judgment from 30th of April 2014.

Over and beyond the question if agreement to perform tasks always means that they are not exploitative,⁴¹ we note that the case describes the actual circumstances of the alleged victim's employment which included: detention of the girl's passport and cellular phone; inadequate food; lack of privacy (her room was searched on several occasions); being chased out of the house on one occasion; a few assaults with one incident of severe violence; inadequate clothing. In addition, the accused told the girl that she would not be permitted to return to Nigeria unless she returned moneys which were claimed to be owed. The question arises if these circumstances have some impact on the question of the alleged victim's consent, or if the contract to perform tasks is the sole gage of consent?

A similar approach is reflected in **Judgment No. 138 – CO (Madagascar)** where the accused agreed with a 17 year old that she work for him. Unfortunately, the case does not provide details

⁴⁰ We refer to section 3.3.1 on *difficulties proving intent of the accused person* for more detail on this point.

⁴¹ See *Wei Tang (Australia)*, where Thai women agreed to an exploitative contract which included debt bondage, but the accused person was nevertheless convicted of slavery offences, due to the exploitative nature of the contract and the surrounding circumstances, as they are described further on in this subsection of the digest.

as to the agreement. However, the accused was exonerated on the basis of the alleged victim's agreement to work.

"Because while it is true that he sheltered and employed... it is not proven that he abused her. Because the analysis of the situation shows that there was an employment agreement between the two parties, But it seems from listening to that she herself agreed with on the work to be done, and this is confirmed by the hearing of the defendant,

Judgment No. 138-CO of 8 August 2019 in the High Court of **Madagascar**.

However, we note that a case from outside the region reflects a different way of approaching this question. In **Wei Tang (Australia)** five Thai women entered into oral agreements to enter Australia as prostitutes by which they would incur a substantial debt which would need to be repaid by engaging in sexual relations with no remuneration for a time. Despite their agreement to these terms, the case yielded convictions on slavery offenses. In convicting the accused, the court relied on the totality of the circumstances which included a large debt, being effectively restricted to the premises, difficult working conditions, long hours, detention of passports, absence of pay for six out of seven days, and isolation. The court did not make due with examining the contract, but rather also looked at the actual circumstances under which the women were employed, even though some of these had not been addressed in the contract.

4.4.3.7 *Initiating an approach to the accused as a possible indication of consent*

Cases where the alleged victim initiates approaching the trafficker and proposes to join him, present a scenario of seeming consent. We refer the reader to section 3.3.8.5 on *victims who initiate accompanying the trafficker* for a detailed treatment of this topic. Here, it will suffice to note that most cases in the region do not consider this conclusive evidence of consent. However, in one case, the exoneration rested, at least in some part, on this aspect. The following are a number of cases with differing approaches.

In **O.B. Abba (South Africa)** both vulnerable victims initially approached the accused, knowing that he was involved in prostitution. The defence raised claims of consent which were dismissed by the court on the basis of the accused person's exertion of force, the severe restrictions of freedom employed by him and his use of the victims' addiction to drugs in order to subdue them. The accused was convicted of trafficking for slavery, servitude and sexual exploitation.

In **Ogochukwu (South Africa)**, the case revolves around the trafficking for sexual exploitation of a 15 year old girl, who fled from her mother's home due to a fight with her. The girl's friend introduced her to the accused, but at this stage she did not prostitute herself for him. She was then kidnapped to Pretoria and forced into prostitution. Thereafter, according to the court's evaluation of the facts, the girl herself initiated going to the accused's residence after her stay in Pretoria. Only then did she begin to prostitute herself for him. Nevertheless, the court convicted the accused of trafficking for sexual exploitation, even though the victim initiated the request to join him.

A case which reflects different approaches to this question in the court of first instance and the High Court provides us with a rich source of understanding regarding this form of behaviour.

In **Fakudze (South Africa)**, a case revolving around the sexual exploitation of a 14 year old girl by her stepfather, according to the testimony of the victim, she initiated a request to accompany the accused to **South Africa** from her home in **Eswatini**, after her mother abandoned her and she feared she would become a street child. Moreover, according to the facts described in the High Court decision, the accused refused this request at first and only acceded to it later.

The court of first instance appreciated that the victim had initiated this request because of her vulnerabilities, all of which were well known to the accused (the victim was a child, abandoned by her mother, with nowhere to go and was of low socio economic status), and convicted the stepfather of trafficking for sexual exploitation and rape. In its ruling on the sentence the court even cites a source which recognizes this behaviour as a pattern thus: *“Somewhat surprisingly... not only might victims be sought out by traffickers, they might also seek out traffickers, in hopes of a better life elsewhere.”*

On the other hand, the High Court reversed the conviction on trafficking (though it confirmed the conviction on rape), in part, because the child’s request to accompany the accused cast doubt on his intent to exploit her, especially in view of the fact that he initially refused to take her with him. The court also stated that the girl’s many alternatives meant that the accused did not abuse the girl’s vulnerabilities, as she had reasonable alternatives, whereas the definition of this ‘means’ requires that there be no reasonable alternatives.⁴² Among the girl’s alternatives, the court enumerated the following: she could have tried to trace her own mother; she could have gone to stay with her mother’s friend until her mother was traced; she could have gone and stayed with her father’s family, though she testified that she did not like their way of living; she could have gone to the police who might have taken her to social workers to be placed.

The thrust of this analysis is that the alleged victim’s initiative in approaching the accused, although she had other alternatives, means that she *chose* to accompany him, rather than being persuaded to do so, which negates the accused’s intent to exploit her. It is not clear if the court’s approach would have changed if it had not identified alternatives at the disposal of the victim.

This ruling raises a number of questions and for example: how did the alleged victim’s vulnerabilities impact on her ability to use the alternatives enumerated by the court? and was the ‘means’ of “abuse of a position of vulnerability” required to prove the offence in the case of a child who was 13 years old when she accompanied the accused and 14 year of age when she was exploited? ⁴³

Thus, there are differing approaches regarding the question if a victim who initiates approaching the accused can be seen to have consented. To round out the picture, we refer the reader to **Tibbet (Israel)** where a woman, formerly trafficked for prostitution by the accused, approached him to return to Israel to be prostituted again. Nevertheless, the court confirmed the trafficking conviction of the accused, stressing that the consent of the victim is irrelevant to the crime. ⁴⁴

4.4.4 The significance of consent: the place of legislation

Several cases across the region allude to the legislation addressing consent in analyzing the place of consent in the case at hand. Thus, in **Shongwe (Eswatini)** a young man from **Lesotho** voluntarily accompanied the perpetrator from **South Africa** to **Eswatini** due to deceptive promises, and was employed as a cattle herder under inhuman conditions. In convicting the perpetrator of trafficking for slavery, the judge ruled that the consent of the young man or his elder sister, had it been given, is not a defence by law and can never absolve.

In **O.B. Abba (South Africa)** the defence raised the claim that the 2 victims had consented to their sexual exploitation on the basis of several behaviour patterns on their part: they were in

⁴² **South Africa’s** Trafficking Act defines ‘abuse of vulnerability’ to mean: “any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person”.

⁴³ We note that this case was adjudicated under **South Africa’s** Trafficking Act from 2013 which does not require ‘means’ to prove child trafficking and which considers the child’s consent not to be a defence to the crime.

⁴⁴ In Israel, this is not anchored in legislation, but rather in case law.

prostitution and drugs before meeting the dominant accused; both initially came to him willingly; they did not seek help or flee, even though they had cell phones and could simply have run away while they were walking the streets at night. The judge convicted the accused of trafficking for slavery, servitude and sexual exploitation, noting that the **South African** Trafficking Act states that consent is not a defence if ‘means’ have been used.

“Relating to the defence’s argument that the women willingly joined the accused, the provisions of section 11 of the Human Trafficking Act should be kept in mind. Section 11 in relevant part reads as follows:

“11. Liability of persons for offences under this Chapter

(1) It is no defence to a charge of contravening section 4, 5, 6, 7, 8, 9 (1) or 10 that-

...

(b) an adult person who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, if one or more of the means referred to in section 4 (1) (a) to (j) have been used.

Consequently consent under these circumstances is no defence.”

*State v. O.B. Abba and others, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria)*

In **Lukas (Namibia)**, where 2 minors voluntarily accompanied the accused recruiter to the home of the sexual exploiter, the judge convicted the recruiter of trafficking for sexual exploitation. In his ruling, the judge notes that according to the **Namibian** Trafficking Act, consent is irrelevant if ‘means’ have been used and in regard to child trafficking in particular, consent is always irrelevant even if ‘means’ have not been used. Interestingly, despite this ruling, the judge notes that the recruiter abused the children’s position of vulnerability.

Similarly, in **Jonas (Namibia)** a young girl was led to believe that she was traveling to the accused person’s place of residence for a good job, whereas she was then forced into sexual exploitation. The defence claimed that the victim knew that she was going to the accused’s residence in order to connect with a boyfriend. In dismissing this claim, the judge stressed that according to the **Namibian** law then in force, which adopted the Protocol, consent is irrelevant if ‘means’ are used, and the accused had used the ‘means’ of deception, fraud and abuse of a position of vulnerability.

In **Maroodza (Zimbabwe)** 6 young women⁴⁵ agreed to travel to Kuwait to work as housemaids, under the impression that they would be well paid and given good accommodations. Instead, they underwent extreme conditions which included long hours of work, inadequate food, confiscation of passports, restrictions of freedom and poor accommodations which led them to flee their employers. The court convicted the accused of trafficking in persons for illegal labour and noted that there was also some slavery, and in particular bonded labour and forced labour. When addressing the consent of the young women to travel to Kuwait, the court dismisses its significance by citing **Zimbabwe’s** explicit statement on consent.

⁴⁵ Ten young women underwent this process, but only 6 testified.

“Section 3(7) of the Trafficking in Persons Act also further notes that it shall not be a defence to a charge of trafficking in persons for an offender to provide that a victim consented to any act constituting an offence. It is therefore in this case not a defence that the complainants consented to be employed or work in Kuwait and therefore the accused person should be absolved from the offence”

The State v. Maroodza, Case No. R674/18 in the Regional Eastern Division, Harare, 10/7/2020

Interestingly, in **Jezile (South Africa)**, a case revolving around the trafficking for sexual exploitation of a minor in the context of forced marriage, the case was adjudicated under the former **South African** law, which required lack of consent, as its facts transpired before the enactment of the new comprehensive Trafficking Act. Nevertheless, in dismissing the defence’s claims as to the minor’s consent, the court also refers to the new Trafficking Act’s statement on consent as reflecting the legislator’s attitude that it is not a defence, although it does not strictly apply to the facts of the case. In doing so, the court shows the importance it attaches to the new law’s approach regarding victim consent.

4.4.5 Consent in trafficking children and the mentally disabled

In various cases across the region children or mentally disabled persons fall victim to trafficking. The approach toward consent in regard to these victims depends on the given State’s legislation.

In States where trafficking requires lack of consent on the part of the victim, the application of the law to children and the mentally disabled will depend on the definition of consent. For example, under the **South African** Act which preceded its comprehensive Trafficking Act, and required lack of consent as an element of the crime, ‘consent’ was defined as “voluntary or uncoerced”. In addition, this Act enumerated several circumstances in which these requirements are not fulfilled and among them: that the child was under 12 years of age or that the victim was mentally disabled. Alternatively, in States which require lack of consent, but have no explicit definition of ‘consent’, it will be necessary to rely on other, general laws or case law.

On the other hand, in States which follow the Protocol’s approach, consent is never relevant as regards child trafficking, as it does not require ‘means’, as does adult trafficking. We refer the reader to Appendix 2 which is a *table of southern African legislation* addressing each State’s approach on this question. As regards mentally disabled persons, some States outside the region espouse the same approach towards them as towards children, in that no ‘means’ are required and thus consent is never relevant.⁴⁶ However, there is no such example in the Trafficking Acts of States across the region.

An example of a judgment analyzing the ‘consent’ of minors under a legislative regime which required lack of consent is **Mabuza (South Africa)** where 4 minors between the ages of 11 and 13 were trafficked for sexual exploitation from **Mozambique**. The relevant trafficking legislation when the case was adjudicated required lack of consent on the part of the victims. ‘Consent’ was defined as “voluntary and un-coerced” and a list of circumstances which did not fulfill that requirement appeared, including if ‘means’ had been used or a child was under the age of 12.⁴⁷

The court analyzed the ‘means’ employed by the trafficker and reached the conclusion that the children had not consented within the meaning of the law.

⁴⁶ One example is the Arab Republic of Egypt which compares any incapacitated person to children in terms of waiving the requirement of ‘means’.

⁴⁷ See section 4.4.2 for a full description of the legislation.

Both⁴⁸ were aware of the fact that they were all there without consent, under force, duress, coercion, abduction, fraud, deception, abuse of power or vulnerability, and both were aware of the fact that accused no 1 was giving payments or benefits to a person in control of the victims, to wit Juliet and Violet (accused no 2). Both of them were aware of the fact that the sole intention for the children being there, was for their exploitation by accused no 1 for sexual purposes.

S. v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

Interestingly, the judge did not use the fact that one of the children was under the age of 12 when she arrived at the site, in order to negate her consent. This was apparently because the children were sexually exploited over a period of years, so that at least some of the sexual exploitation occurred when this youngest child was over the age of 12.

On the other hand, several cases were adjudicated under legislative regimes which include statements on the significance of consent.

In **Esther Phiri (Zambia)** a 14 year old girl agreed to accompany the trafficker who told her she would obtain a good job in the capital, but was trafficked for labour exploitation. The trafficker did not apprise the girl's guardian of her intent and warned the girl not to tell anyone. The court stressed that a child cannot give consent without the knowledge of her guardian and convicted the accused of trafficking for child labour.⁴⁹

In **Fakudze (South Africa)** which revolved around the sexual exploitation of a 14 year old by her stepfather, while the court of first instance convicted the accused of trafficking for sexual exploitation and rape, the High Court exonerated the accused of trafficking for sexual exploitation because the accused person's intent had not been adequately proven. While the exoneration rested upon lack of proof of the accused person's intent, under the surface, there were assumptions about the alleged victim's consent. Interestingly, although the case was adjudicated according to **South Africa's** new Trafficking Act which does not require 'means' in cases of child trafficking and which states that the child's consent is not a defence to the crime, the court alludes to the 'means' of abuse of vulnerability and intimates that the child chose to accompany the trafficker. We refer the reader to section 4.4.3.7 on *initiating an approach to the accused as a possible indication of consent* for a more detailed analysis of this case.

An example of an analysis of consent in regard to mentally disabled victims occurs in **Matini (South Africa)** which revolved around the trafficking for sexual exploitation of a series of victims, including a number of minors and 2 mentally disabled minors. This case too, was adjudicated under a legislative regime by which lack of consent was required, but which enumerates mental disability as a circumstance which negates consent.⁵⁰ While the judge states that, under these circumstances, there was no consent, he also analyzes the 'means' employed by the traffickers, namely, threats, abuse of power and of a position of vulnerability, although this is not strictly necessary.

⁴⁸ Both the accused persons.

⁴⁹ Section 21(c) of the **Zambian** Trafficking Act states that the consent of the child or his parent or guardian are not a defence to the crime.

⁵⁰ See section 4.4.2 for more detail.

Questions which can assist an analysis of consent

1. Did the victim consent?

- Was there informed consent?
- At what stage did the victim consent?
- Was the victim's consent genuine? How did vulnerabilities impact on it?
- Was the victim's consent voluntary? What 'means' were used?
- Was there behaviour denoting lack of consent?
- Was the victim's agreement to perform tasks tantamount to consent?
- Is initiating an approach to the accused person an indication of consent?

2. If the victim consented, what is the significance of the consent?

Is consent irrelevant or not a defence according to the trafficking legislation?

3. How to handle cases of trafficking children or the mentally disabled

4.5 Issues arising in trafficking in the context of labour exploitation

4.5.1 Specific challenges which arise in trafficking for labour exploitation cases

Most of the trafficking cases adjudicated worldwide revolve around sexual exploitation rather than labour exploitation. Why is this the case?

Some light may be shed on this question by an issue paper published by UNODC on "*The concept of 'exploitation' in the trafficking in persons protocol*". In enumerating the reasons that trafficking for forced labour presents special challenges, the issue paper notes:

"...irrespective of the form of exploitation involved, trafficking cases are challenging to investigate and prosecute. However, forced labour presents particular difficulties, often being well hidden within an otherwise legitimate industry. There are also indications that political and social acceptance of exploitative working conditions, particularly among migrants contributes to the lower profile of such conduct. Practitioners in many States experience great difficulty in separating bad working conditions from situations that could or should be pursued as trafficking offences. The lack of definitive guidance in this regard was frequently referred to, as was the absence of alternative offences."

UNODC Issue paper on the concept of 'exploitation' in the trafficking in persons protocol, Vienna (2015), pp. 11 and 114.

In addition to these problems, victims of trafficking for forced labour are sometimes isolated in remote sites or within homes. Moreover, exposing illegality in places of work is generally seen as the province of labour inspectors or immigration officials, rather than police, so that often identifying cases requires good cooperation between these agencies, which is not always present.

How can these problems be solved? This is a topic which merits discussion and has been addressed in the UNODC issue paper cited above.⁵¹

In the following sections we will focus on one of the issues which present challenges in labour exploitation cases: how to distinguish between ‘mere’ labour law violations and trafficking in a labour context. We will do so by first analyzing the central ‘purposes of exploitation’ which generally occur in a labour context, and then proceeding to cull some guidelines from case law in the region and beyond.

However, we will also touch on other issues such as the need for coordination between agencies in pursuing cases of trafficking in the context of labour exploitation.

4.5.2 Introduction to the legislative background

The Protocol and Trafficking Acts across the region include a number of ‘purposes of exploitation’ which can transpire in the context of labour relations. Examples are “slavery”, “practices similar to slavery”, “forced labour and services” and “servitude”. We refer the reader to Appendix 2 which is a *table of southern African legislation* specifying how States’ Trafficking Acts compare with the Protocol in terms of ‘purposes of exploitation’.

In addition, there are Trafficking Acts across the region which include other forms of exploitation which can occur in a labour context. Examples are “illegal labour”,⁵² “child labour”,⁵³ “labour exploitation”,⁵⁴ “debt bondage”,⁵⁵ “serfdom”,⁵⁶ “domestic work”,⁵⁷ “exploiting the begging of another person”,⁵⁸ and various basket categories like: “any extraction of labour or services from a person”⁵⁹ or “other economic exploitation”⁶⁰. In addition, sometimes exploiting a person in criminal or illegal activities, as appears in two Trafficking Acts in the region, can transpire in a labour context.⁶¹

⁵¹ See pp.118-121. Among the suggestions are governmental policy steps and for example: the enhancement of coordination mechanisms to promote cooperation in general, and in particular between police and labour inspectors; specialization of investigative and prosecutorial response in order to meet the special challenges; the prioritizing of cases of trafficking for forced labour, thus leading to proactive investigations. Examples of steps which might be taken within prosecutorial bodies are: providing written guidance; implementing targeted training; considering plea bargaining to obtain cooperation from minor offenders; strategic use of non-trafficking less serious offences to target lower-level offenders in order to secure evidence against high level offenders.

⁵² See **Zimbabwe’s** Trafficking Act.

⁵³ See the Trafficking Acts of **Botswana**, the **DRC**, **Namibia** (which qualifies this as “prohibited child labour”), **South Africa**, and **Zambia**.

⁵⁴ See **Angola’s** Trafficking Act.

⁵⁵ We note that this form of exploitation is part of “practices similar to slavery” which appears in the Protocol. However the Trafficking Acts of the following States include it explicitly: **Botswana**, the **DRC**, **Madagascar**, **Mozambique**, **Namibia**, **Tanzania**, **Zambia** and **Zimbabwe**.

⁵⁶ See the **DRC’s** Trafficking Act.

⁵⁷ See **Madagascar’s** Trafficking Act.

⁵⁸ Ibid.

⁵⁹ See **Malawi’s** Trafficking Act.

⁶⁰ See **Namibia’s** Trafficking Act which enumerates forced labour and services, prohibited child labour and “other economic exploitation”.

⁶¹ See the Trafficking Acts of **Botswana** and **Namibia**.

In attempting to distinguish between ‘mere’ violations of labour law and trafficking, we will first turn to the definitions of the central forms of exploitation enumerated in the Protocol which generally transpire in a labour context.

4.5.3 Understanding purposes of exploitation which occur in a labour context

While the Protocol does not define ‘purposes of exploitation’ which generally transpire in a labour context, some States’ Trafficking Acts include definitions. However, for those States which do not define these terms, international instruments may shed some light. The following is a discussion of ‘purposes of exploitation’ in a labour context, as enumerated in the Protocol, in an effort to arrive at what distinguishes them from ‘mere’ violations of labour law and regulations.

4.5.3.1 Slavery

Slavery appears in many of the Trafficking Acts across the region as a ‘purpose of exploitation’.⁶² Sometimes the Acts themselves include a definition of the term, but sometimes they do not. The most widely accepted definition of “slavery” appears in the 1926 Slavery Convention, thus:

“The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

This is the definition most widely accepted among Trafficking Acts across the region,⁶³ reflecting the objectification which characterizes this form of exploitation.

However, we note that other States in the region define this term in different ways. One example is **South Africa’s** Trafficking Act which includes a definition emphasizing the element of “control” by the side of “ownership”. This definition reflects the evolution of slavery from classic slavery, which focused on the legal ownership of people, to modern slavery which places emphasis on control, recognizing that in our era, no one can legally own another human being.⁶⁴ The definition is as follows:

“Slavery” means reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person;” (our emphasis)

Another example is **Eswatini** which defines the term as follows: *“slavery” includes a situation where a person is compelled to work through force or coercion or inducement or fraud without pay or pay below subsistence”*.

4.5.3.2 Practices similar to slavery

This term appears in the Trafficking Acts of many States across the region, although there are some Acts which do not mention it,⁶⁵ and not all States define it. It appears in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (The Supplementary Slavery Convention) which enumerates a number of situations which amount to practices similar to slavery. While this list is not a definition, and is not exhaustive, it can assist practitioners to understand, at least some of the practices, and even attempt to find the common ground among them, so as to allow for the classification of other similar phenomena under this heading. The list includes: debt bondage, serfdom, various

⁶² Exceptions are **Angola, Lesotho, Madagascar, Malawi, Seychelles** and **Zimbabwe**.

⁶³ Examples are the Trafficking Acts of **Botswana, Mauritius** and **Zambia**.

⁶⁴ See Kevin Bales, “Disposable People: New Slavery in the Global Economy”, Berkley, University of California Press, 1999.

⁶⁵ Examples are **Malawi**, and in addition, **Mozambique, Tanzania**, and **Zimbabwe** which include just one facet of this ‘purpose of exploitation’, namely debt bondage.

examples of forced marriage and the transfer of a child by parents or guardians to another person for the purpose of his exploitation.

We note that some States define this term according to the above list and for example, **Zambia**.

4.5.3.3 Forced labour

Most States across the region include forced labour in their Trafficking Acts, but only some define it. Although international conventions do not define “forced services”, ILO Convention No. 29 from 1930 concerning forced or compulsory labour includes a definition of “forced labour”:

“For the 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.”

We note that while some States in the region, follow this definition, others have different definitions. One example is **Zambia** whose Trafficking Act defines this term as follows:

*“**Forced labour**” means labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion or physical restraint”.*

4.5.3.4 Servitude

This term appears in many Trafficking Acts in the region. Though there is no definition of servitude in international law, on the basis of international sources, experts attempt to define and distinguish this term from “slavery” in various ways.⁶⁶

- a. Some experts are of the opinion that it is both separate from slavery and broader than slavery, referring to “all conceivable forms of domination and degradation of human beings by human beings.”
- b. Other interpretations distinguish the two concepts according to their relative severity, where slavery is more severe and servitude concerns less far reaching forms of restraint and refers to the “total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change.”
- c. Yet another interpretation views servitude as a particular form of slavery differing from it less in character than in degree.
- d. The UNODC Model Legislative Provisions against Trafficking in Persons offers the following definition: “...the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change.”⁶⁷

Also instructive is the definition in the Trafficking Act of **Lesotho** (similar to definitions in the Trafficking Acts of **Namibia**, **South Africa** and **Zambia**):

“A condition in which the labour or services of a person are provided or obtained through threats of harm to that person or another, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services, that person or another will suffer harm.”

⁶⁶ See the discussion in UNODC’s Issue Paper on “The concept of ‘exploitation’ in the trafficking in persons protocol”, Vienna (2015) pp. 35-36 at https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf

⁶⁷ Ibid.

4.5.3.5 Preliminary conclusions as to the difference between labour law violations and trafficking

The conclusion which follows from the above sources is that “slavery”, “practices similar to slavery”, “forced labour or services” and “servitude” are severe forms of exploitation which are different in kind from labour law violations, such as slightly late payment of wages, payments marginally under the minimum wage, work hours slightly above the permitted number, departures from safety norms and employment without a legal permit. However, according to the principle by which cases are to be assessed in terms of the totality of the evidence,⁶⁸ courts may look differently on one such violation compared to many which may make the leap to trafficking.

4.5.4 The central regional trafficking cases in the context of labour

The cases which form the foundation of this digest present various examples of exploitation in the context of labour relations. The central cases which yielded convictions are the following: **Shongwe (Eswatini)** which concerns the trafficking for slavery of a young man from **Lesotho**, deceived that he would be taken to a good job in **South Africa**, whereas he is illegally transported to **Eswatini** to work as a herder under inhuman conditions; **Alam (Seychelles)**, which concerns the trafficking for practices similar to slavery and forced labour of 4 Bangladeshi workers brought to **Seychelles** under deceptive promises and held under difficult working and living conditions and threats; **Maroodza (Zimbabwe)**, where a number of young women are trafficked for illegal labour⁶⁹ to Kuwait and held under difficult conditions which the court views as including some slavery, and in particular bonded and forced labour; **Esther Phiri (Zambia)** which revolves around the trafficking of a 14 year old girl from her village to the capital under deceptive promises of a good job, whereas instead she is forced to labour without pay and is also sexually exploited. We note that this case is also analyzed in section 4.6 on *issues in cases of child trafficking*.

There are a number of other cases which yielded convictions in the context of labour exploitation. However, either they do not focus on the issues addressed in this section, or only summaries were available which did not include salient facts.⁷⁰

Two central cases which yielded exoneration are: **Adigwe Dike (Eswatini)** which concerns an agreement by which a young woman from Nigeria is taken to **Eswatini** in order to sell wares in the female accused person’s business in return for being enrolled in a tertiary educational institution. At some point the relations sour and the young woman is assaulted, chased out of

⁶⁸ See section 2.4.2 on *the totality of the evidence*.

⁶⁹ The **Zimbabwe** Trafficking Act includes an unlawful purpose which is “illegal labour”.

⁷⁰ Such cases either revolve around situations where the exploitation never transpired or only summaries were available which were not sufficiently detailed to instruct.

Examples of cases where the exploitation never transpired are: **Kapinga (Malawi)**, which revolves around the selling of a young boy for work in a maize mill, but the exploitation never transpired and the boy disappeared, so that there are no facts regarding the conditions of work; **Manyunyi (Zimbabwe)**, where a number of minors were trafficked for illegal labour, but the exploitation never transpired, so that there are no facts as to the work conditions; Judgment No. 97-CO of June 25, 2019 in the Supreme Court of **Madagascar**, where one accused was convicted of attempted trafficking – for taking steps to transfer a number of female victims to Saudi Arabia to serve as domestic help, whereas he had promised they would work in **Mauritius**, but the victims reneged and never traveled to Saudi Arabia.

Examples of cases where only summaries were available are: **Republic v. Banda**, Criminal Case No. 347 of 2005, **Malawi**, which concerns the labour exploitation of a number of minors under 14, but only a summary was available which did not include a description of the conditions of work; **Chama (Zambia)**, which revolves around the attempted trafficking of 6 Indian males to **Zambia**, but only a summary was available, as the judgment was ex tempore; **Muzara (Zambia)** which revolves around the labour exploitation of a number of minors and yielded a conviction on trafficking. However, the case is awaiting confirmation in the High Court and only a summary was available, as the judgment was rendered ex tempore and is based on interview with investigating officer and prosecutor involved in case.

the house on several occasions and her passport and cell phone detained; **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)**⁷¹ a case revolving around allegations of trafficking for domestic servitude.

Two additional cases yielded exonerations. In **Judgment 21 – CO (Madagascar)** a number of minors were deceived and taken to work in a construction site at an unknown location where their identity cards were confiscated. In **Judgment 138 – CO (Madagascar)** a 17 year old agreed to work as domestic help for the accused. Although we will refer to these cases, neither the judgments nor the description of facts is detailed, so that what we can learn from them is limited.

4.5.5 What can we learn from convictions?

What can we learn from the convictions? How do courts differentiate between ‘mere’ violations of labour laws and trafficking in persons?

A number of cases which yielded convictions note that besides trafficking, labour laws were breached. Thus, the court in **Alam (Seychelles)** notes that besides trafficking the victims, the accused violated labour laws by entering into subcontracts and not paying the victims their salaries, despite receiving payment from these subcontractors.⁷² Similarly, in **Maroodza (Zimbabwe)** the court notes that the case presents unfair labour practices along with elements of slavery with forced and bonded labour. However, in neither case does the court make due with convictions on labour law violations. In both cases, the accused persons are convicted of trafficking in persons.

We also note, that in differentiating between ‘mere’ labour law violations and trafficking, the particular State’s Trafficking Act should be addressed. For example, **Zimbabwe’s** Trafficking Act includes an unlawful purpose of “illegal labour” which is defined broadly, as: “*child labour or labour that is practised in conditions below the minimum standards required by the labour laws of a country or territory, or labour that is unregistered, unnotified or otherwise not permitted by the labour, social security or immigration laws of a country or territory.*” (our emphases). This definition seems to adopt the approach that any violation of labour laws is tantamount to trafficking if the ‘act’ of transport has been proven.

The following are circumstances gleaned from cases that yielded convictions which may assist in distinguishing between trafficking in the context of labour relations and labour law violations.

4.5.5.1 The importance of a constellation of circumstances

Cases with convictions on trafficking in a labour context present a constellation of circumstances which together amount to a severe picture of exploitation. These include difficult working and living conditions; restrictions of freedom; isolation; non-payment or minimal payment; threats, whether direct or indirect; deception; and force in some cases.

Thus, in **Shongwe (Eswatini)**, a young man from **Lesotho**, residing in **South Africa**, was promised a good job in another place in **South Africa**. Instead, the accused transported him illegally into **Eswatini** and employed him as a cattle herder. He was paid the agreed sum only once; forced to forage for food on the veld; accommodated in a house not fit for human occupation, with water leakages, a door which could only be closed with a wire and which had crevices showing the outside, and where the window was covered with scrap metal.⁷³ In addition, he was assaulted by the accused on one occasion and threatened that the accused would take his clothes if he tried to go home. The court also stressed the boy’s vulnerabilities: his illegality in

⁷¹ We remind the reader that we did not have access to the full case, as the verdict was rendered ex tempore (on the spot) and information on it was supplied by the investigating officer and prosecutor.

⁷² See paragraphs 107 and 109 of the judgment.

⁷³ We refer the reader to section 2.9.5 on *Site visit or “view”*, which has a detailed quote on the accommodations.

the country with no relatives and no money to return home and his unfamiliarity with the local language. The accused was convicted of trafficking for slavery.

Interestingly, although the accused was also charged with assault, the court viewed the assault as part of the exploitation, and not as a separate charge.

Similarly, in **Alam (Seychelles)** the case presents a constellation of severe circumstances, which led the court to convict the accused of trafficking for practices similar to slavery and forced labour. Two prosecution witnesses explicitly testified that they suspected trafficking because of the combination of circumstances presented by the case, and the court itself stresses that it considered the evidence in its totality.

Four Bangladeshi workers were brought to **Seychelles** by means of **deceptive promises** about the identity of their employer, their salaries, food, accommodation, legal status, work hours, overtime payment. Instead of the promised conditions their **working and living conditions** were **difficult** and not as promised. The victims were forced to work long hours with no overtime payment; were paid their salaries only part of the time; were not provided with personal safety equipment or scaffolding, although most were working in construction; were contracted to third parties who paid the accused directly; and some were employed at jobs different than those they had been promised. Moreover, they were not given adequate food, so that they were often hungry, and were housed in accommodations which were not fitting for human habitation. Some of these accommodations were not yet completed and the workers worked long hours, not only at their regular jobs, but also in order to finish the houses where they were living. Moreover, the workers had no steady addresses, as they were constantly moved. The court summarizes the characteristics of the various places where the workers were housed in its judgment.

"Some houses were in a dilapidated condition, some were incomplete, 5 persons were accommodated in a single room for two, there was leaking water, kitchen and toilet were in the same place, the soakage pit had overflowed and the places were dirty and victims had to live in incompleting building sites, no electricity and tiles and had to live and work on these sites in their spare time to complete these buildings. Public Health Inspector Kevin Pompey, too gave sworn evidence to the deplorable conditions the victims were living in which included lack of ventilation, rodent activity, mould growth, lack of running water and in his view, the premises were unfit for human habitation."

R. V. Alam CO67/2016 [2018] SCSC 946 (19 October 2018), sentence 22 November 2018, Supreme Court of **Seychelles**

When they complained about these conditions, the victims were **threatened** with physical violence and with deportation, which was a serious threat to them, as all were the sole breadwinners for their families. The court also noted their many **vulnerabilities** such as low socio-economic status and lack of proficiency in the language of **Seychelles**, which were exacerbated by their illegal status in the country, since the accused did not properly arrange this, although he had promised to do so.

Over and beyond the deception practiced against the victims, they were also **not given basic information** about their future jobs. One victim testified that he did not know the nature of the job he would do.⁷⁴ Moreover, the workers were not provided with copies of their contracts and thus, had no clear knowledge of the terms under which they were working.

In its judgment, the court also dwells on the victims' **restrictions of freedom**. The accused confiscated their passports on arrival and did not return them despite requests. In addition, since he controlled all the financial resources, they were not free to leave him. We note that this case did not include the use of force, despite the threats levelled against the victims.

⁷⁴ This worker was called LM.

In **Maroodza (Zimbabwe)** 6 young women⁷⁵ were offered jobs in domestic service in Kuwait with good salaries including food and accommodation. However, when they arrived, the conditions were different than had been promised, including **restrictions of freedom** in that their passports were confiscated and their rights to movement were restricted in that they were not permitted to leave their places of work except to accompany the children to school; **difficult working and living conditions**, in that they were given very small rooms in which to sleep; were expected to work more than 15 hours a day, going to sleep after midnight; were given inadequate food and some made to eat leftovers; and were allowed no vacations. The court terms this constellation of circumstances a deprivation of basic human rights, namely, the right to movement, to association and to freedom of choice. It further calls the situation “*inhuman and degrading treatment*”. The accused, an employment agent, was convicted of trafficking in persons. The court notes that these were unfair labour practices, but that there was also some slavery, including bonded and forced labour. Thus, the court is clearly of the opinion that the circumstances of the case transcend mere violations of labour law. **It is important to note that the accused was convicted even though the victims were paid salaries.**

In **Esther Phiri (Zambia)** a 14 year old orphan, raised by older relatives, was persuaded by the accused to accompany her from her village to the distant capital of Lusaka in order to work for the accused’s sister as a maid for a good salary. The accused did not seek the consent of the child’s guardians. On arrival, the girl was left at the gate of the accused’s sister’s house after a long journey with no introduction to the sister who was to be her employer; she was never paid for her labour and was sexually exploited, both by the sister’s husband and by men in a bar where she was taken by the accused’s sister. In the end, she fell pregnant and asked to go home.

The facts of the case reflect a constellation of circumstances which point to trafficking: the victim is acutely **vulnerable**, being a child of 14 and a “double orphan”⁷⁶ both of whose parents have died. The accused warns her not to tell anyone about her offer and does not seek the consent of her guardians. In addition, she is taken from her village to the distant capital where she knows no one but the accused and her sister and is thus **isolated with nowhere to go**. The victim is **deceived** by the accused and **objectified**, in that she is not given full information which would allow her to make reasoned decisions and in that she is deposited at the gate of the sister’s house with no introduction by the accused; her labour is exploited in that she is **never paid**. The accused was convicted of trafficking for child labour.⁷⁷

4.5.5.2 Acute victim vulnerabilities as central

Where there are convictions, the victims are characterized by a number of acute vulnerabilities which combine to make them easy prey. Most are of low socio-economic status, of little education, financially dependent upon the accused, with an absence of relatives or friends in the place of exploitation. They may also be illegal migrants, minors or young people or orphans, in debt or unfamiliar with the language and culture of the place to which they are trafficked.

In **Shongwe (Eswatini)** the court focuses on the victim’s vulnerabilities as factors relevant to the conviction on trafficking for slavery.

⁷⁵ Though 10 young women were trafficked, only 6 testified.

⁷⁶ See page 18 of the court’s judgment.

⁷⁷ The court notes that the ‘purpose of exploitation’ is “*to engage the child in work*”, which seemingly means that the ‘purpose of exploitation’ is “child labour”. Despite the fact that the child was also sexually exploited, it seems that trafficking for sexual exploitation was not charged because of the difficulty of proving that the accused, who was the recruiter, knew or could have known that this would transpire.

“The relevant facts to this ‘purpose of exploitation’⁷⁸ are the vulnerability created by the accused in that he caused the victim to enter into the country illegally. The assault on the victim and paying him a great deal less than promised. The victim did not have relatives in the country and money to go back home all that rendered him vulnerable, he also could not speak the local language.”

The King v. Shongwe, Case No. HLU 60/2016 before Subordinate Court district Shiselweni; Shongwe vs King [166/19] [2020] SZHC 113 (24 June 2020).

In **Alam (Seychelles)** the victims’ vulnerabilities, both inherent and created by the trafficker, are noted by the court as contributing to the conviction on trafficking for practices similar to slavery and forced labour.

“The background of all four victims as described in their evidence, clearly indicate their vulnerability as they were persons from the lesser socio economic bracket, had borrowed large sums of money which they were desperate to repay and therefore would be more servile and desperate as they lacked education and familiarity of language and culture in the environment they were subject to work in and had total financial dependency on the accused who was acting more as their a master and not their employer in the view of this court.”

R. V. Alam (CO67/2016 [2018] SCSC 946 (19 October 2018), sentence 22 November 2018, Supreme Court of **Seychelles**

In **Esther Phiri (Zambia)**, the court emphasizes the young age of the victim who is only 14 years of age and still in grade seven of school, and calls her “the child” numerous times during the course of the judgment. In addition, it notes the fact that she is a “double orphan” who lost both her parents and that she was transported to a place distant from her home where she knew no one. While the court does not explicitly connect these vulnerabilities to the conviction, they are dwelt upon and the court emphasizes that under these circumstances, the consent of the child to accompany the accused is irrelevant. The accused was convicted of trafficking for child labour.

4.5.5.3 Restrictions of freedom as central

A key factor in convictions on trafficking in the context of labour relations is restrictions on the victim’s freedom of movement by means of force; threats which relate to leaving the premises; detention of passports and financial control. Thus, in **Shongwe (Eswatini)** the victim’s freedom of movement was restricted by his illegal status in the country, the absence of relatives, his unfamiliarity with the language and culture and consequent isolation, his lack of money to enable him to leave the premises, threats and an assault by the accused.

The court in **Alam (Seychelles)** clearly enumerates restrictions of freedom as a crucial piece of evidence. Though no force was employed, the accused detained the victims’ passports and his total control over their financial means restricted their freedom to leave him.

⁷⁸ The ‘purpose of exploitation’ is “slavery” which is defined in the **Eswatini** Trafficking Act as: “slavery” includes a situation where a person is compelled to work through force or coercion or inducement or fraud without pay or pay below subsistence”.

*"...their freedoms were restricted in that they were not given their passports and financially they were constrained as they were not paid for months...the financial control and financial dependency being exercised over the **victims to prevent their freedom of movement. This control over their resources prevents their will to get away and make them more subjective to the employer.** It is apparent from the above facts the control of the victims, on matters concerning their own welfare and daily needs and requirements was being removed and controlled, instead, by the accused in this instant case."* (our emphasis)

R. V. Alam (CO67/2016 [2018] SCSC 946 (19 October 2018), sentence 22 November 2018, Supreme Court of **Seychelles**)

We note that the court's conclusions respecting restrictions of freedom were not affected by the testimony of one worker (LM), under cross examination, that he was not under constant supervision and reached his place of work independently each day.⁷⁹

In **Esther Phiri (Zambia)** although the court does not explicitly mention restrictions of freedom, the facts of the case reflect a situation whereby the victim, a minor of 14, was transported to the distant capital where she knew no one except the accused and her sister. Thus, she had nowhere to go, which situation clearly restricted her freedom. Moreover, since she was not paid for her labour, she did not have the wherewithal to leave.

4.5.5.4 *The place of physical violence*

While **Shongwe (Eswatini)** includes a physical assault, in **Alam (Seychelles)**, **Maroodza (Zimbabwe)** and **Esther Phiri (Zambia)** the accused persons are convicted of trafficking in persons, despite the fact that no physical violence or lock and key imprisonment are exerted against the victim.

4.5.5.5 *The place of non-payment of salary*

In **Shongwe (Eswatini)**, **Alam (Seychelles)**, and **Esther Phiri (Zambia)**, the non-payment of salary is mentioned by the courts as relevant to the convictions, thus clarifying that this is a relevant circumstance. However, in **Maroodza (Zimbabwe)**, the court convicts the accused of trafficking in persons despite the fact that the victims' salaries were paid, thus showing that this circumstance must be evaluated in the context of the other circumstances of the case and is not crucial to all convictions.

4.5.5.6 *The importance of coordination among relevant bodies*

Alam (Seychelles) is a case which highlights the importance of coordination among various bodies in pursuing cases of trafficking in a labour context. The coordination among labour inspectors, immigration officers, public health personnel and police was crucial to the success of this case in particular, and shows how important it may be in such cases in general. As said, labour relations are not a natural arena of police activity. In general, they are in the mandate of employment, immigration or public health bodies, who report on suspicious cases to police. In order that this transpire, these bodies must know whom to approach and when.

Thus, the case began with a complaint to the Immigration Officer dealing with permits for expatriates working in **Seychelles**. She checked the victims' permits and then referred the case to the Director General of Employment, who deals with the welfare of expatriates working in **Seychelles**. She in turn referred the complaint to another official in the Ministry of Employment who sent 2 investigators from the Employment Office to visit the sites and interview the workers. They prepared a report on the basis of which the matter was referred to the police. Interestingly,

⁷⁹ See paragraph 68 of the judgment.

an investigator from the Public Health Services coincidentally visited one of the worker's accommodations and prepared a report by which he too found it to be unfit for human habitation.

We note that the coordination among these bodies also extended to various victim protection steps. Thus, the police officer made arrangements with the Immigration Department to find different and better accommodations for the victims.

Clearly, the close coordination among these bodies contributed to the pressing of charges and ultimately to the conviction of the accused on trafficking for practices similar to slavery and forced labour.

4.5.5.7 *The centrality of training all relevant personnel*

Closely connected to the good coordination which transpired in the **Alam (Seychelles)** case is the training that various officials received as to indicators of trafficking. Several of the officials from the Ministry of Employment testified that they had undergone trainings about human trafficking that made them aware of the indicators which may signal that trafficking has taken place. Several mentioned the UNODC Human Trafficking Index which they used to determine if this could be a case of trafficking. Not only did this provide a common language among them and between them and the police, but it also set in place an awareness of the central question in such cases: how to distinguish labour law violations from trafficking in persons. The witness who best reflects an awareness of this issue is the investigator George Fidelia from the Ministry of Employment, who testified that he had received multiple trainings on human trafficking and was equipped to “*distinguish normal labour disputes from cases of human trafficking.*”⁸⁰

Interestingly, the judge too, drew upon UNODC materials, citing the UNODC Anti Human Trafficking Manual for Criminal Justice Practitioners.⁸¹ Thus, both law enforcement and the judge were able to use a common language in order to analyze the case.

4.5.6 What can we learn from exonerations?

4.5.6.1 *Detailed facts of relevant cases*

Two central cases present exonerations from trafficking charges in the context of labour relations: **Adigwe Dike (Eswatini)** and **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)**.

Before we commence delineating the issues which led to the exonerations, it is of importance to describe the facts of the cases in detail.

In **Adigwe Dike (Eswatini)**, an agreement was concluded between a young woman brought from Nigeria and a Nigerian couple residing in **Eswatini**, by which the young woman would be transported to **Eswatini** in order to help the female accused person in her business of selling wares and to assist her with other tasks. In return, it was promised that the young woman would be enrolled at a tertiary educational institution in **Eswatini**. A written agreement was drafted to that effect which the accused persons and relatives of the girl signed and which she herself stated that she saw as binding.

With time, the relationship between the girl and the female accused person soured, which led to difficult conditions for the girl. Her passport and cellular phone were detained; she was provided with inadequate food and clothing; the accused conducted constant searches of her room; she was chased out of the house on one occasion; she was assaulted a few times and severe violence was exerted once. The girl was never registered in a tertiary educational institution, though this was promised. In addition, the female accused told the girl that she would not be permitted to return to Nigeria until she returned money that she claimed was owed to her.

⁸⁰ See paragraph 44 of judgment.

⁸¹ See paragraphs 108 and 109 of the judgment.

The accused couple was exonerated of trafficking in persons charges, although one accused was convicted of assault with grievous injury. One of the reasons for the exoneration was the failure of the prosecution to prove that the accused had never intended to enroll the girl in a tertiary institution from the beginning and had thus recruited her, for the sole purpose of exploitation.⁸² Another consideration was that performance of the agreed tasks themselves could not constitute exploitation “as they were agreed upon”. A third consideration is particularly interesting. The judge noted that the legislature had imposed a harsh penalty for trafficking charges, thus limiting the discretion of the judge in imposing the sentence, which might lead to acquittals if the judge did not feel that the circumstances of the case warranted such harsh sentences.

“The problem with such statutory provisions on sentences is that it interferes with the discretion of the courts on sentencing making it difficult for the courts to impose sentences as they would consider warranted by the circumstances of each matter given that each matter turns on its own circumstances. It is therefore not unthinkable that there would be a matter in which whilst a conviction may be warranted from the facts, the court would be presented with a moral dilemma to impose the harsh sentence prescribed where the court is convinced a much less severe sentence was required or was appropriate. This often happens in sentences where the prescribed sentence is a lengthy custodial one or where there is a minimum sentence imposed. It is not unlikely that in such cases the court’s fearing an injustice might end up leaning towards acquitting an accused than imposing the prescribed sentence if it is viewed as unconscionable”

Rex v. Adigwe Dike and Other, Case No. 33/2012 in the High Court of Swaziland, judgment from 30th of April 2014

As far as the second central case, **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)**, we note that only a summary of the case was available, as the judgment was rendered ex tempore. However, the summary includes a wealth of details.

An Ethiopian couple residing in **Lesotho**, offered an Ethiopian lady, employed as a domestic worker in Ethiopia, to work in their home for a much better wage. They told her that they were interested in her, as she was able to cook Ethiopian food and help them raise their toddler according to Ethiopian ways, maintaining their language and culture. The victim accepted the offer.

The couple helped the alleged victim to obtain a passport and visitor’s visa for **Lesotho**, bought her an air ticket and organized that a relative of theirs accompany her.

On arrival, the wife picked up the alleged victim from the airport and asked her to hand over her passport which she never saw again. The first month she received the promised monthly salary. However, the gate to the house was always locked and the victim could not leave the premises, except when the couple entered or exited the house. After the first month she was not paid and when she finally confronted the employer, at first she was told that her salary was being used to cover the cost of her air ticket and of giving her food and clothing. A few months later when she asked again, she was told that her salary was being sent to Ethiopia to her sister to educate her siblings. She received no rest days and no vacations.

She would often sit outside the house and cry. Another domestic worker saw her but could not communicate because of the language barrier. She in turn asked the gardener if he could help and he managed to ascertain that the victim felt trapped, that she was not receiving pay and was not being given any rest or holidays.

⁸² We refer to section 3.3.1 on *difficulties proving the intent of the accused person* for more details on this point.

The domestic worker reported the matter to the police but they did not act and when 2 days passed, she talked to the gardener again to help her find the key to the gate. He did so and she helped the victim pack and took her to a location far from the residence where she had been working so that she would not be found, and reported to the local police there, who took action to arrest the employers and charge them under the Trafficking Act.

The victim was taken to a shelter for trafficking victims by the police, where she received counselling and skills building. It was difficult for the prosecutor to gain her trust because she was not sure whom she could trust.

The court exonerated the accused for two reasons. Firstly, it ruled that this could not be trafficking since the couple was taking care of the alleged victim and treating her in an acceptable manner, including providing food and clothing. The court also accepted the accused persons' version that they were paying the alleged victim's salary to her family in Ethiopia, as the accused produced receipts to that effect.

Two additional cases which yielded exonerations are less detailed, but may provide some information on relevant issues.

One is **Judgment 21-CO (Madagascar)** which revolves around the recruiting of a group of alleged victims for labour in construction. One accused transported the group without exacting payment and also provided them with food and drink. He was exonerated because he was acting as a good Samaritan. The second accused recruited the group to work on a construction site but subsequently they were taken to an unknown location. The court notes that this accused deceived the alleged victims and confiscated their identity cards, but exonerated him because there was no evidence that the remuneration offered by the accused was inadequate or did not comply with legal provisions, or that the victims worked under conditions of forced labour. It also noted that there was no evidence that the victims had no real and acceptable choice but to submit.

The other is **Judgment Number 138-CO (Madagascar)** which revolves around an agreement between the accused and a 17 year old girl whereby she would work as domestic help in his house. She worked for him for a period of 6 days.

The court exonerated the accused for a number of reasons. Firstly, the court noted that there was an employment agreement between the accused and the girl and that the alleged victim herself agreed on the work to be done, so that this cannot be called exploitation. Secondly, no evidence was brought that a reward or benefit was given to another person with power over the minor so that the accused could abuse her.

4.5.6.2 Issues which were important in exonerations

The issues which led to the above exonerations are of importance to practitioners in building cases and conducting trials on trafficking in the context of labour exploitation. Many of them have been addressed at length in previous sections of the digest to which we will refer. The following are the salient issues:

Consent as a central reason to exonerate

In **Adigwe Dike (Eswatini)** and **Judgment Number 138-CO (Madagascar)**, a central reason for the exonerations was that the alleged victims had agreed to do the work actually performed. In the courts' views, performance of agreed tasks could not be considered exploitation.

For a detailed analysis of this defence claim, we refer the reader to section 4.4.3.6 on *is an agreement to perform tasks tantamount to consent?*

Good treatment by the accused as a central reason to exonerate

In **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)**, one of the central reasons for the exoneration was that the accused couple was taking care of the alleged victim and treating her in an acceptable manner, including providing food and clothing and if so, this could not be trafficking.

We refer the reader to section 3.3.5 on *good treatment of victim by the perpetrator* for a thorough analysis of this defence claim.

Lack of proof of elements of the crime as a central reason to exonerate

In a number of cases, the court noted that the prosecution had not proved required elements of the crime. One example is a failure to prove intent to exploit.

Thus, in **Adigwe Dike (Eswatini)** the court ruled that there was a reasonable doubt as to the accused persons' intent to exploit. Firstly, it was not clear that the female accused had never intended to enroll the alleged victim in the tertiary educational institution when she recruited her, as agreed. Moreover, at a later stage, when the alleged victim asked to go home, the accused might have genuinely not had money to pay for the ticket, and might have not been acting in an attempt to continue to exploit her. The court maintained that the bottom line was that explanations other than an intent to exploit were possible.

For a more detailed analysis of this defence claim see sections 3.2.3.4 on *exonerations on the basis of failure to prove intentional deception* and 3.3.1 on *difficulties proving the intent of the accused person*

In other cases, the court exonerated the accused, at least partially, because 'means' had not been proven. Thus in **Judgment Number 138-CO (Madagascar)** one of the court's reasons in exonerating the accused was that no evidence was brought that a reward or benefit was given to another person with power over the minor alleged victim so that the accused could abuse her. In other words, the court was ruling that no 'means' had been proven.⁸³

Similarly in **Judgment 21-CO (Madagascar)** the court exonerated one of the accused persons, at least partially, because there was no evidence that the victims had no real and acceptable choice but to submit, which is the definition of "abuse of a position of vulnerability" in the **Madagascar Trafficking Act**.⁸⁴ However, the court also noted that this accused person had deceived the alleged victims, where deception too, is a 'means' according to the **Madagascar Act**.

We note that the above 2 cases from **Madagascar** are not detailed rulings, so that there may have been additional facts which could have clarified the questions which arise.

Adequate remuneration

In **Judgment 21-CO (Madagascar)** the court exonerated one accused person, at least partially, because there was no evidence that the remuneration offered by the accused was inadequate or did not comply with legal provisions.

This issue also arises in **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)** where the court accepted the defence claim that although no salary had been paid to the alleged victim after the first month, her salaries had been transferred to her family in Ethiopia. The court noted that

⁸³ We note a number of questions raised by this case and for example: Were 'means' a required element of the crime, in view of **Madagascar's** Trafficking Act's approach that 'means' are not a required element of child trafficking? Were other 'means' present, such as abuse of a position of vulnerability, in view of the fact that the alleged victim was a minor? The case does not present enough details to answer these questions, although the answers might have been clear to the adjudicating court.

⁸⁴ See Article 1 of the Act.

the accused produced receipts to confirm his version of the facts. We note that this defence claim is relatively common in cases of trafficking in a labour context worldwide.⁸⁵

We also refer the reader to section 4.5.5.5 on *the place of non-payment of salary* where there is reference to at least one case where the court convicted on trafficking although the victims' salaries were paid, as promised.

Other considerations

Certain exonerations reveal other considerations, whether explicitly stated by the court or under the surface.

One example, is weaknesses in the mosaic of evidence caused by victim behaviour, as appears in **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)** where the victim delayed her complaints, first towards her employers and then towards the authorities or other members of the public such as the gardener; her lack of trust in the prosecutor which made her hesitate to tell him the full story; her freezing when testifying on the stand. While the summary does not inform us if the court brought these circumstances into consideration, they appear in the facts of the case.

Another example appears explicitly in **Adigwe Dike (Eswatini)** where the judge criticized the harsh sentences legislated by the Trafficking Act and intimated that they could cause a moral dilemma for a judge who did not feel the circumstances of the case before him merited such a harsh penalty, thus leading him to acquit.

4.5.7 Comparison of convictions and exonerations

A comparison of convictions and exonerations does not yield a unified approach to cases of trafficking in the context of labour exploitation.

For example, on the face of it, the **Adigwe Dike (Eswatini)** case seems to include many circumstances which led to convictions in other cases. It presents us with a constellation of circumstances, including acute vulnerabilities, financial restrictions of freedom, detention of passport and cell phone, threats and assaults, violations of privacy, difficult living conditions. Yet, while these circumstances contributed to convictions in other cases, the court here placed more emphasis on the agreement between the accused and the alleged victim and the fact that there remained a reasonable doubt that the accused intended to exploit the girl at the stage of recruitment or later when the girl requested to go home. In doing so, the constellation of circumstances was not given weight in terms of its relevance to the accused persons' intent to exploit. A different approach can be discerned in the **Shongwe (Eswatini)** case where the court viewed the assault perpetrated on the victim as part of the exploitation.

Similarly, in **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)** too, there is seemingly a constellation of circumstances which led to convictions in other cases. The alleged victim suffered from acute vulnerabilities including a unfamiliarity with the language and culture; her freedom was restricted both by detention of her passport and by the locking of the gate of the premises except when the accused persons entered or left; she was both physically and socially isolated. However, the court placed more emphasis on the good treatment of her employers who gave her adequate food and clothing and on the fact that her salary was transferred to her family, although it did not address the question if her consent to such a transfer of funds was sought.

⁸⁵ See a similar defence claim in *Siliadin* (ECHR) where one accused claimed that she had deposited the victim's salary in a nest egg in the bank to be given to her when she left the employment. The claim was dismissed, as no evidence had been submitted to substantiate it. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FRA010).

It is hard to reconcile the cases presented in this section. However, both convictions and exonerations are valuable in that they apprise practitioners of issues which can arise in order to adequately prepare to address them.

4.5.8 What can we learn from international cases

Due to the importance of this topic and the relatively few regional cases that were available to us, we will also rely on several international cases of trafficking in the context of labour exploitation which support the insights gleaned from regional cases. Among the cases which yielded convictions on trafficking and allied crimes are the following; **Farrell (U.S.)**; **Siliadin (ECHR)**; **Connors (United Kingdom)**;⁸⁶ **Chowdury (ECHR)**⁸⁷; and **Giulani (Israel)**.⁸⁸

Among the cases which yielded exonerations are: **Ranya Boonmee (Thailand)**;⁸⁹ and **A.G.G.R. (Israel)**.⁹⁰

4.5.8.1 Summary of learning from international cases

An analysis of these cases yields the following insights, similar to those gleaned from the regional cases.

1. Cases with convictions present **a constellation of circumstances** which together amount to a severe picture of exploitation. These include difficult working and living conditions; restrictions of freedom; isolation; non-payment or minimal payment; threats, whether direct or indirect; force in some cases; vulnerabilities. This seems to support the insight that one of the yardsticks in distinguishing between ‘mere’ labour infractions and exploitation in the context of trafficking, is the provisions of the labour laws. The farther a case departs from these standards, the more likely it is to be considered trafficking.⁹¹
2. **Vulnerabilities** assume a central place in the convictions. The victims are characterized by acute vulnerabilities, both inherent and created by the trafficker, and for example, financially dependent illegal migrants, foreigners unfamiliar with the language and culture, minors, women, homeless alcoholics. On the other hand, a court’s failure to discern such vulnerabilities may lead to an exoneration.
3. A key factor in convictions is **restrictions of the victim’s freedom of movement** by means of lock and key imprisonment; constant supervision; lack of leisure time; threats which relate to leaving the premises; detention of passports. We note that it may harder to achieve a conviction if the accused uses only psychological means to restrict freedom.

⁸⁶ R. v. Connors and others [2013], EWCA Crim. 324, Court of Appeal, Criminal Division, 26 March 2013, United Kingdom of Great Britain and Northern Ireland. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. GBR016).

⁸⁷ Chowdury and Others v. Greece (App. no. 21884/15), ECHR, 30 March 2017, the European Court of Human Rights.

⁸⁸ State of Israel v. Giuliani, 29 February 2012, District Court of Jerusalem, Israel. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. ISR016); Conviction affirmed by the Supreme Court, 6 September 2016, Criminal Appeal 6237/12.0.

⁸⁹ Boonmee, Kaew Kongmuang and Manus Boonmee, Case No. 2013/2552, Criminal Court of Bangkok, 9 December 2010, Thailand, Appeals Court Black Case No. 1704/2554 and Red Case No. 4097/2556, 6 March 2013. Information about this case was obtained from the UNODC Human Trafficking Case Law Database. (UNODC Case No. THA001).

⁹⁰ State of Israel v. A.G.G.R. Criminal Case 23751-02-10, Tel Aviv September 2014.

⁹¹ See for example, Stoyanova, “*Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law*” (Cambridge University Press, 2017) pp. 70-72.

4. There are convictions despite **no physical violence** against the victim and no lock and key imprisonment.
5. There are convictions despite a **freely entered into employment contract**.
6. A central typical weakness in the cases is the **seeming consent of the victim** or victims to the exploitation, shown by their not fleeing when there was an opportunity to do so, not complaining, and returning to abusive employers. While this sometimes leads to an exoneration, some courts find explanations based on the victims' vulnerabilities.
7. **Other typical weaknesses** in the cases include victims who are not seen to be vulnerable; the collaboration of victims with the perpetrator's illegal actions; inconsistencies in victim statements and testimony; and selective treatment of workers other than the victims who claim that they were not exploited.

4.5.8.2 *Summary of facts from cases which yielded convictions*

The following is a summary of the facts of the cases cited above which yielded convictions:

Farrell (U.S.)

This case addresses the exploitation of Filipino workers in a hotel in the United States. While there is no physical violence, the circumstances are particularly difficult and include work around the clock, including at second jobs; sleep deprivation; lack of leisure time; isolation (workers are told not to be in contact with anyone); constant supervision; threats of calling in the immigration authorities; humiliation (constant verbal insults and yelling); enormous and constantly growing debts which amounted to debt bondage; minimal payment or lack of payment; difficult living conditions; lack of privacy (workers did not have keys to their apartments, but the accused persons did, and used them to conduct random inspections and also opened their mail); detention of passports. The workers were told to fill out immigration forms with false details thus making them complicit in deception towards the U.S. government and raising doubts as to their status in the country.

The case resulted in a conviction of peonage despite the **weaknesses in the case**, the strongest of which was: the **seeming consent** of the workers to the conditions, as shown by their return to the abusive employers for a second stint after they had returned to the Philippines; their failure to escape even when given opportunities to do so; their voluntary surrender of passports to the perpetrators. Another weakness was the collaboration of the victims with the perpetrators' deceit towards the United States government.

Siliadin (ECHR)

This case concerns the domestic work of a minor female migrant from Togo who was illegally in France. While the case did not include physical violence, lock and key imprisonment or overt threats, there were many circumstances which pointed to exploitation: working for long hours 7 days a week with no vacations; no leisure time; difficult living conditions (she slept on a mattress on the floor of the baby's room and was required to take care of him during the night); lack of remuneration; detention of passport; limited exits from house (to do shopping, to take children to activities, to attend church on occasion); the perpetrators nurtured her fear of arrest.

The case yielded a judgment by which the minor had been held in forced labour and servitude. This judgment was delivered despite **weaknesses in the case** which included: **seeming consent** to the exploitation, shown by various circumstances such as: the victim returning to the abusive employers after she had fled them; her failure to escape when given the opportunity to do so; the absence of complaints to her family members about her exploitation; the victim's ability to exit

the house on occasion; the fact that the alleged perpetrators gave her small presents on occasion; that there was no physical violence and no lock and key imprisonment.

Connors (U.K.)

This case concerned work in a landscaping business. The victims were not migrants, but rather United Kingdom citizens who were nonetheless acutely vulnerable. They were homeless alcoholics, some of whom suffered from mental health difficulties. The working conditions included low or non-existent pay; long working hours, sometimes seven days a week. They also experienced difficult living conditions (such as poor accommodations sometimes without heat or running water and inadequate clothing and equipment) and humiliation (their heads were shaved and they were verbally abused). There was some use of violence (some were slapped and punched); restrictions of freedom (some were told that they could not leave and would be subject to physical reprisals should they do so); confiscation of State benefit documentation to enable the perpetrators to steal their state benefits; social isolation; denial of access to medical care.

The court convicted the perpetrators of holding a person in slavery or servitude or requiring them to perform forced or compulsory labour, this, despite the following **weaknesses in the case**: While some victims succeeded in escaping, others did not even try; not all victims suffered violence; one victim changed his story significantly after his initial statement; some workers collaborated with the employers by supervising the other victims and even slapping them on occasion.

The court's understanding of why some victims did not even try to escape is telling, in that it is viewed as a sign of the level of control of the trafficker, rather than a weakness:

"One manifestation of this level of control was that many of those exploited were effectively deprived of the will to leave, and others were too demoralized to seek to leave, and yet others believed that the world outside had nothing better to offer them."

R. v. Connors and others [2013], EWCA Crim. 324, Court of Appeal, Criminal Division, 26 March 2013, United Kingdom of Great Britain and Northern Ireland.

Chowdury (ECHR)

The Chowdury case concerns the work of financially destitute illegal migrants from Bangladesh in a strawberry plantation in Greece. The case includes vulnerabilities; deception about payment of wages; difficult working and living conditions, including low wages, non-payment of even those low wages, long working hours, no vacations, accommodation in makeshift shacks without toilets or running water; a climate of fear (armed guards and constant threats); threats (by means of behavior reflected by wielding weapons, and by means of explicit words related to the exercise of force and withholding of salaries); constant humiliation of the workers; and violence towards some workers.

The European Court of Human Rights ruled that this was a case of forced labour and human trafficking (against the former ruling of a Greek court) despite **weaknesses in the case** which centered around the behaviour of the victims. Most important was the **seeming consent** of the victims to their situation: (by initially accepting the terms of an employment contract which they had the ability to negotiate; by stating that they would have continued working for the accused persons had their wages been paid despite the difficult conditions; and by means of their behaviour in not seeking alternative employment, even though they were free to come and go). Other weaknesses in victim behavior included delayed complaints as compared to other workers who complained immediately; no restrictions of freedom in that the workers were permitted to move freely to shop in stores which operated by agreement with the accused persons and even to

play cricket and take part in an association; no isolation from the world; the ability to say “no” as proven by three strikes initiated by the workers.

Giulani (Israel)

This case revolves around a young Filipina woman from a poor background, employed by a couple in domestic work. The case included the absence of an employment contract; illegality in the country; work around the clock including cleaning, babysitting, cooking; being on call continually; being accommodated in a tiny room which had been a bathroom – shower; no vacations despite her requests; no regular breaks during the workday; only partial payment of a sum far below the minimal wage; restrictions of freedom in that the accused detained her passport, locked the house and gave the victim no key and permitted the victim to leave the house independently only on short trips to the grocery store or to the accused couple’s daughter’s house, under supervision. Moreover, while the victim was permitted to contact people on her cell phone, she was not permitted to meet others face to face unless under the supervision of the accused.

While the victim was never expressly forbidden to go out on her own, when she expressed a desire to do so, the female accused responded with a series of warnings, excuses and evasions and for example: the complainant was warned that the police might arrest her should she leave the house unaccompanied.

Weaknesses in the mosaic of evidence were **seeming consent**, in that the victim had the physical ability to flee the house on various occasions and did not do so (she explained that she feared to do so because she did not know anyone and had no ready money); she was permitted to converse and send messages by means of cell phones; and experienced relatively **good treatment** in that the victim was treated respectfully, not forced to do kinds of work that she did not wish to do, provided with medical treatment, food, and small presents on occasion. No force or verbal abuse was exerted against her and she was allowed privacy in her small room, to which she had a key.

Nevertheless, the accused couple was convicted of holding a person under conditions of slavery.⁹²

4.5.8.3 Summary of facts from cases which yielded exonerations

Ranya Boonmee (Thailand)

This case concerned the work of vulnerable illegal migrants in a shrimp processing plant in Thailand. The workers, most of whom were women, were forced to live on the factory site which was surrounded by barbed wire, and not allowed to leave it; lived and worked under difficult conditions; were not adequately compensated; worked long hours; were threatened with punishment if they did not work.

This case resulted in a conviction in the court of first instance and an exoneration in the court of appeals.

Central weaknesses included: **selective treatment** of other workers who testified that they worked in the same factory and were permitted to leave it and were not exploited; inconsistencies in the testimonies of the victims; **seeming consent** of victims who voluntarily crossed the border into Thailand and showed no indication of unwillingness to work; collaboration of the victims with illegal entry into Thailand; reasonable explanations on the part of the accused as to the need for restrictions of freedom (the nature of the job required living on the premises; the illegal status of the workers risked their arrest should they live outside the premises; sometimes they were permitted to leave the premises).

⁹² NOTE: both the District Court and the Supreme Court interpreted the relevant slavery section as including two separate kinds of crime: slavery and involuntary servitude. They convicted the accused persons of the involuntary servitude clause because the victim’s freedom was denied by the accused persons.

The case is an excellent illustration of how two instances of courts can view the same evidence in completely different ways.

A.G.G.R. (Israel)

This case concerns a charismatic person who gathered around him a group of women and children and controlled all aspects of their lives. The women were persuaded to give him all their earnings and to live according to his rules which included not allowing them to purchase anything (even a bottle of water) without his approval; not allowing them to talk to one another; isolating them from family and friends; controlling what they wore, what they ate and if they could use internet; requiring them to receive authorization for leaving the house for any reason; supervising their actions by means of hidden cameras and demanding full access to their cellular phones; punishing them for any infringement of these rules, and among the rest, by separating them from their children.

The court exonerated the accused from the charge of holding persons under conditions of slavery (though it convicted him of sexual offences against some of the children).

Though this is an atypical labour exploitation case, it includes work exploitation, and still has much to teach in terms of the reasoning of the court. The court exonerated the accused for three main reasons:

1. **A slippery slope argument:** The court viewed the situation as analogous to a family milieu and maintained that if the slavery offence is interpreted so widely it will lead to the conviction of a parent who asks his child to help in a family business.
2. **The victims were not really vulnerable:** The victims were Israeli citizens who lived normative lives before they fell under the influence of the accused and knew that they could live in a different way.
3. **The victims could have easily left the accused:** There was no obstacle which prevented the victims from leaving the accused except his fantastic claims that he could harm them with his magical powers. The accused did not pressure them except by psychological means.

This case substantiates several of the conclusions which appear in this section and sharpens them. The approach of the court seems to be that in order to achieve convictions in labour exploitation cases, there must be a constellation of severe circumstances which are not wholly psychological; the victims must be acutely and clearly vulnerable; the victims must not seemingly consent to the exploitation by remaining with the accused although not physically coerced. The court does not view psychological means as strong enough to neutralize consent.

However, we note, that in an additional case with similar facts,⁹³ the Supreme Court of Israel stated that although the victims were Israeli citizens and did not fit the image of the usual victim vulnerabilities, their psychological makeup was such that it made them vulnerable. The court also stressed that control can be exerted by psychological means as well as physical (although unlike in A.G.G.R., in this case the accused also exerted force). The accused persons were convicted of holding persons under conditions of slavery, although the victims willingly followed the accused, some returned to him after leaving, and some even initiated abuse of the others.

⁹³ State of Israel v. D.A. and A.M. Criminal Cases 6749/6774-08-11 in the District Court of Jerusalem; convictions affirmed in Anonymous v. State of Israel, Criminal Appeals 8027 and 8104/13 in the Supreme Court of Israel sitting as a court of appeals for criminal matters, 27.5.2018; Additional Hearing denied in Anonymous v. State of Israel, Criminal Additional Hearing 6022/18 in the Supreme Court, 20.2.2019.

Questions which may assist to differentiate between trafficking and labour law violations

- Is there a constellation of circumstances which amounts to exploitation?
- Does the victim suffer from acute vulnerabilities? Is this a necessary component of the crime?
- Did the accused restrict the victim's freedom of movement?
- Was force employed? Is it always necessary?
- Was the victim paid? Partially paid? Is non-payment a necessary component of the crime?
- What is the relevance of a freely entered into employment contract?
- How should typical weaknesses be addressed and for example:
 1. Seeming consent to the exploitation
 2. Good treatment of the victim by the accused
 3. Problematic victim behaviour (failure to flee; return to abuser; delays in complaints)
 4. Selectively better treatment of other workers in the same work place
 5. No clearly visible vulnerabilities

4.6 Issues in cases of child trafficking

4.6.1 Introduction

The Protocol differentiates between adult and child trafficking, in that child trafficking does not require the use of 'means'. Rather, it is enough to prove an 'act' and a 'purpose of exploitation'.⁹⁴

The Trafficking in Persons Protocol

Article 3: Use of terms

For the purposes of this Protocol:...

(c) 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;

(d) "Child" shall mean any person under eighteen years of age.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

This distinction conforms to the realities of child trafficking. A child tends to be more susceptible to persuasion than is an adult, as his brain is more malleable.⁹⁵ Moreover, a child may be taught to respect adults and obey them.⁹⁶ In view of these characteristics, even if none of the 'means' mentioned in the Protocol are employed, a child may be more easily persuaded to accompany a trafficker and be exploited by him than an adult. In addition, generally children are more vulnerable, as they are dependent upon adults for their basic needs and have fewer choices.

These truths are reflected in many child trafficking cases in the region. For example, in **Dragon (Namibia)** the accused gained the sexually exploited children's trust by buying them treats and food. Similarly, in **Koch (Namibia)** the accused rewarded the sexually exploited children by

⁹⁴ See Article 3(c) of the protocol.

⁹⁵ See for example: Pamela Cantor, David Osher, Juliette Berg, Lily Steyer & Todd Rose (2019) *Malleability, plasticity, and individuality: How children learn and develop in context*, Applied Developmental Science, 23:4, 307-337.

⁹⁶ See Matini (**South Africa**).

giving them items collected at a dumpsite like sweets, hair accessories and hair sprays. In both cases the children returned to the accused persons several times, despite the exploitation that they underwent, thus showing that even small favours are effective in persuading children. Moreover, in **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of young women, some of whom were minors, including 2 mentally disabled children, the court notes that **South African** culture teaches children that adults know best, which means that they should not contradict adults and should be polite to strange adults.⁹⁷ This too can lead children to follow adults even if they do not know them.

While many Trafficking Acts across the region follow the Protocol's approach, some do not. We refer the reader to Appendix 2 which includes a *table of Southern African trafficking legislation*, for more details on this topic. We also note that although courts show an awareness that child trafficking does not require 'means', sometimes they analyze the 'means' element nevertheless. Examples are **Fakudze (South Africa)**, **Lukas (Namibia)** and **Judgment Number 138-CO (Madagascar)**.

Also relevant to the discussion of child trafficking in a labour context is the inclusion of a 'purpose of exploitation' called "child labour" in some States' Trafficking Acts.⁹⁸

The importance of this topic is clear in view of the many child trafficking cases cited in this digest. The prevalence of child trafficking is also attested to by UNODC's Global Report on Trafficking in Persons 2020.

"Globally, one in every three victims detected is a child, but in low income countries, children account for half of the victims detected, most of them trafficked for forced labour."

UNODC, Global Report on Trafficking in Persons 2020, p. 4

In cases of child trafficking across the region, sometimes the 'purpose of exploitation' is clear, whether sexual or in a labour exploitation context. However, sometimes the 'purpose of exploitation' is not clear and for example, when children are sold, as is discussed in section 4.7 on *issues arising in child selling and adoption cases*. Each form of child trafficking may raise specific issues.

4.6.2 Issues arising in child trafficking in a labour context

UNODC's Global Report on Trafficking in Persons 2020 points out that in the Sub Saharan region of Africa, the most prevalent form of child trafficking transpires in a labour context.

"Trafficked children detected in low income countries are more likely to be exploited in forced labour; this is particularly the case for Sub-Saharan African countries. Conversely, children detected in high income countries are more frequently trafficked for sexual exploitation."

Thus, it can be concluded that the nature of child trafficking in low-income countries, especially in Sub-Saharan Africa, seems to be part of the broader phenomenon of child labour."

UNODC, Global Report on Trafficking sss

In recognizing that child trafficking in a labour exploitation context is part of the broader topic of child labour in general, this quote highlights a central issue: how to differentiate between violations of child labour legislation and child trafficking in the context of labour.

⁹⁷ While the court uses this cultural tradition to explain why children are ill prepared to give evidence in court, it can also apply to the way they react to traffickers.

⁹⁸ See the Trafficking Acts of **Botswana**, the **DRC**, **Namibia** (which qualifies this as "prohibited child labour"), **South Africa**, and **Zambia**.

Two additional issues which arise concern the standards which should be applied to trafficking for slavery, practices similar to slavery, forced labour and servitude when child trafficking is involved; and the impact of cultural customs in regard to child trafficking in the context of labour.

Unfortunately, among the cases which form the foundation of this digest, while there are many regarding child trafficking for sexual exploitation, there are very few revolving around child trafficking for forced labour.⁹⁹ This may be a function of random chance, as the cases made available to us are far from reflecting all the cases in the region. Alternatively, it may be a function of the problems which attend the building of cases of trafficking in the context of labour exploitation. We refer the reader to section 4.5.1 on *specific challenges arising in trafficking for labour exploitation*.

In view of this limitation, our most important purpose in this section will be to raise questions, even if there are no conclusive answers. Moreover, due to the few regional cases on point and the absence of an explicit allusion to the questions we will raise in them, we will also rely on relevant sections of States' Trafficking Acts and on international cases. Given these limitations, the learning we will extract will, of necessity, be partial at best. Nevertheless, section 4.5 on *issues arising in trafficking in the context of labour exploitation* may also provide some assistance.

4.6.2.1 Differentiating between child labour law violations and child trafficking

UNODC's Global Report on Trafficking 2020, while viewing child trafficking for forced labour as part of the larger phenomenon of child labour, also distinguishes between them:

"The phenomenon of child labour is conceptually different than child trafficking for forced labour or children in exploitative situations. These two phenomena, however, appear to be interrelated and have similar determinants."

UNODC, Global Report on Trafficking in Persons 2020, Chapter III, p. 81.

We will attempt to do so by analyzing the different approaches of various Trafficking Acts and case law.

The place of legislation:

As said, some States' Trafficking Acts include a specific 'purpose of exploitation' of "child labour". Examples are the Trafficking Acts of **Botswana**, the **DRC**, **Namibia**, **South Africa**, and **Zambia**. In these States the question of how to differentiate between child labour law violations and trafficking for child labour is particularly acute. However, even in States which do not include "child labour" among their 'purposes of exploitation', a similar question may arise in respect of the distinction between child labour law violations and 'purposes of exploitation' like "slavery", "practices similar to slavery", "forced labour" and "servitude".

How can cases assist us in understanding the differentiation between 'mere' child labour law violations and trafficking in the context of labour exploitation?

The first step in analyzing cases is to turn to the Trafficking Act in force. Not all Acts espouse the same approach. Some jurisdictions reflect an approach whereby *any* labour exploitation of children is inherently severe enough to constitute a 'purpose of exploitation' in the context of trafficking. This seems to be the case in **Zimbabwe**, which defines the purpose of "illegal labour" broadly thus:

⁹⁹ Interestingly, in Hlabi (**South Africa**) the charge sheet charges the accused persons both with trafficking for sexual exploitation and trafficking for child labour, slavery, practices similar to slavery or servitude. However, a judgment was not available, but rather, only the charge sheet and the State's Heads of Arguments regarding an application to discharge the accused persons due to lack of evidence at the close of the prosecution's submission of evidence.

“Illegal labour means child labour or labour that is practiced in conditions below the minimum standards required by the labour laws of a country or territory or labour that is unregistered, unnotified or otherwise not permitted by the labour, social security or immigration laws of a country or territory”

This definition seems to consider a departure from labour laws as a sufficient purpose of trafficking.

On the other hand, some jurisdictions prefer to draw a line between ‘mere’ regulatory infractions and exploitation severe enough to constitute an element of trafficking. This seems to be the case in the **South African** Trafficking Act which includes a ‘purpose of exploitation’ called “*child labour*” and specifies that this is as defined in section 1 of the Children’s Act, thus: ¹⁰⁰:

“‘Child labour’ means work by a child which-

(a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and

(b) places at risk the child’s well-being, education, physical or mental health, or spiritual, moral, emotional or social development;”

The same goes for **Zambia** which defines “child labour” as “*includes all forms of slavery or practices similar to slavery*” and lists a number of examples.¹⁰¹ Clearly, slavery and practices similar to slavery are severe forms of exploitation, over and beyond child labour law violations.

On the other hand, the **DRC** and **Namibian** Trafficking Acts seem to espouse a more nuanced position in their definitions which include both severe exploitation and violations of child labour prohibitions. The following is **Namibia’s** provision:

*“Prohibited child labour” means any child labour which is in contravention of the **Namibian** Constitution, the Labour Act, 2007 (Act No. 11 of 2007) or the Child Care and Protection Act;”*

Most of the provisions in the three pieces of legislation mentioned in this definition are sufficiently stringent to distinguish them from ‘mere’ child labour law violations,¹⁰² but there are still provisions which raise questions, such as certain sections of the Labour Act.¹⁰³

A similar approach, including both severe exploitation and violations of labour laws and regulations, is reflected in the **DRC’s** Trafficking Act which includes a ‘purpose of exploitation of “child labour” in violation of the provisions of the Constitution, the Labour Code and laws and regulations governing the work of children.

¹⁰⁰ Act No. 38 of 2005: Children’s Act 2005. 19 June 2006, available at: <https://www.refworld.org/docid/46b82aa62.html>.

¹⁰¹ The examples are:

(a) the sale of a child;

(b) trafficking of a child for the purpose of engaging the child in work away from home and from the care of the child’s family, in circumstances within which the child is exploited;

(c) debt bondage or any other form of bonded labour;

(d) serfdom; and

(e) forced or compulsory labour, including forced or compulsory recruitment of a child for use in armed conflict;

¹⁰² See for example, Article 15(2) of the Constitution of **Namibia**:

Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

¹⁰³ See for example, section 3(3)(c) of the Labour Act which prohibits employing a child between the ages of 14 and 16 between the hours of 20.00 and 7.00. While as a rule, children require a minimal amount of time to sleep, and while employing them at night raises suspicions of exploitation, it is not clear if a minor infraction of this provision would suffice to constitute trafficking.

A neutral approach is reflected in **Botswana's** Trafficking Act which lists “child labour” as a ‘purpose of exploitation’ but does not define it, thus leaving the question wholly open to judicial interpretation.

Case Law

The following cases yielded convictions on trafficking for child labour. In analyzing them, we will pay close attention, both to the Trafficking Act in question, and to the constellation of circumstances noted by the courts.

In **Munyanyi (Zimbabwe)** 4 minors from **Mozambique**, illegally in **Zimbabwe**, were promised work selling eggs for an accused person’s mother in the capital of Harare, where they knew no one. They ranged in age from 14-17 according to the medical expert and from 10-17 years of age, according to the court’s impression. The minors were rescued before the exploitation transpired, so that there are no facts respecting the actual exploitation. The constellation of circumstances included multiple acute vulnerabilities (young ages, rural and unsophisticated backgrounds, illegality in the country, isolation from support systems, unfamiliarity with Harare). The court stressed these vulnerabilities and noted its impression that these were unsophisticated minors from a rural background. It also noted testimonies by which the victims told the accused persons about their foreign nationality. In view of their obvious vulnerabilities, the court concluded that the accused took them as the “*right target*”.¹⁰⁴ Other relevant facts noted by the court were payment that the minors gave one accused, and the deception practiced against them.

In convicting the accused persons of trafficking for illegal labour, the court stressed that it is illegal to employ minors or illegals. We note that in view of the **Zimbabwe** Trafficking Act’s approach that departures from labour norms are sufficient to constitute “illegal labour”, it is not clear that the court needed more than the ages of the minors and their illegality in the country in order to convict. However, despite this, the court did stress other victim vulnerabilities and even estimated some victim’s ages as yet younger than those assessed by the medical expert. This emphasis seems to point to the adoption of a higher standard by the court than the ‘mere’ violation of child labour laws. In regard to this case, we also refer the reader to section 4.3 on *how to prove trafficking when the exploitation never transpired*.

In **Esther Phiri (Zambia)** a 14 year old “double orphan” who had lost both parents, was recruited by the accused, who deceived her by telling her that she would obtain a paying job for her as a housemaid in the capital of Lusaka. The child was warned not to tell anyone about the offer and the permission of her guardians was not sought. She was transported to the home of the accused’s sister, who was supposed to employ her, but was never paid for her labour and was also sexually exploited. Moreover, on arrival at the sister’s home, she was deposited at the gate, with no introduction between her and her future employer. In addition, she knew no one in the capital except for the accused and her sister. In its ruling, the court dwells on the child’s vulnerabilities and the deception practiced against her, and convicts the accused of trafficking for child labour. In view of the **Zambian** Act’s stringent definition of “child labour” as “slavery and practices similar to slavery”, it is likely that this constellation of circumstances heavily influenced the conviction.¹⁰⁵

We also refer the reader to section 4.5 on *issues arising in trafficking in the context of labour exploitation* for a more detailed analysis of this case.

¹⁰⁴ See page 4 of the ruling.

¹⁰⁵ However, we note that although the **Zambian** Trafficking Act defines “child labour” as slavery and practices similar to slavery, one of the examples listed in the Act can be interpreted to be less stringent, namely: “*trafficking of a child for the purpose of engaging the child in work away from home and from the care of the child’s family, in circumstances within which the child is exploited*”.

In both the above cases, there was a constellation of circumstances which reflected a severe ‘purpose of exploitation’ beyond ‘mere’ child labour law violations, and in particular, acute vulnerabilities, deception, isolation and in one case, non-payment of salary and signs of ownership. In both cases, the courts noted these circumstances, and stressed the vulnerabilities of the victims. However, in the **Munyani (Zimbabwe)** case, the conviction may have been more a function of the approach reflected in **Zimbabwe’s** Trafficking Act, by which departures from labour laws suffice. Thus, in building a case of child trafficking in a labour context, it is of paramount importance to address the particular law in force, in addition to striving to clarify the entire constellation of circumstances.

4.6.2.2 *Should standards be different for labour exploitation of children and adults?*

In cases of trafficking for “slavery”, “practices similar to slavery”, “forced labour” and “servitude”, the question arises if the standards should be different for children and adults, so that a wider and less severe set of circumstances would suffice to constitute child trafficking for these purposes.¹⁰⁶ Among the cases of child trafficking in a labour context, we have not found a ruling where a court expressly addresses this question. Moreover, in none of the Trafficking Acts across the region is there a definition of these terms which distinguishes between their meanings in child and adult trafficking. However, perhaps it is possible to find partial answers to this question in a number of ways.

1. Drawing on the general approaches of the Protocol and States’ Trafficking Acts which differentiate between child and adult trafficking in many ways;
2. Deriving inspiration from States’ definitions of “child labour” which clearly present a lower standard than traditional forms of exploitation in the context of labour;
3. Drawing on regional and international case law.

While none of these sources give a categorical answer to our question, they do provide food for thought.

General approaches towards child and adult trafficking

The Protocol displays an awareness of the differences between child and adult trafficking in many ways. Even the name of the Protocol,¹⁰⁷ alluding specifically to children, touches on the enhanced vulnerability of children to trafficking in persons.

Moreover, as said, Article 3(c) of the Protocol differentiates between the elements of adult trafficking, which require an ‘act’, a ‘means’ and a ‘purpose of exploitation’ and the elements of child trafficking which require only an ‘act’ and a ‘purpose of exploitation’.

This special awareness of the need to consider children and their needs separately from adults is expressed, as well, in a number of Articles dealing with various aspects of the fight against trafficking in persons.¹⁰⁸

¹⁰⁶ This question was raised by a **Namibian** practitioner in a judicial colloquium organized by UNODC.

¹⁰⁷ The name of the protocol is Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (our emphasis).

¹⁰⁸ See for example: Article 2 which enumerates among the purposes of the Protocol, the need to combat trafficking, paying particular attention to women and children; Article 6(4) which mandates taking into account the special needs of children in applying various victim protection provisions, including appropriate housing, education and care; Article 9(1)(b) dealing with the need to prevent re - victimization of victims, especially women and children; Article 9(4) dealing with taking or strengthening measures to alleviate factors which lead to vulnerability and especially those which relate to women and children; Article 9(5) which addresses the discouraging of demand and especially demand that fosters the exploitation of women and children; Article 10(2) which deals with the need to train officials to consider gender and child sensitivity issues.

The distinction between child and adult trafficking is also reflected in the trafficking legislations of various States across the region, some of whom adopt the Protocol's approach as to waiving the requirement of 'means' in child trafficking¹⁰⁹ and some of whom include in their 'purposes of exploitation' specific forms which pertain to children only, such as "child labour"¹¹⁰ and "child marriage"¹¹¹. In addition, many States across the region also view the trafficking of a child as an aggravating circumstance, meriting a more severe sentence than adult trafficking.¹¹² Moreover, some States pay special attention to situations where parents or guardians traffic children¹¹³ or to adoptions for the purpose of exploitation.¹¹⁴

While this short analysis does not answer the questions we have posed directly, it does establish that both the Protocol and various national legislations view child and adult trafficking differently and enjoin States to consider children's special needs in ways sensitive to the differences between them and adults. Children react differently than adults in a trafficking context, are more vulnerable to trafficking than adults, and have different needs than adults. Perhaps this approach can lend credence to interpretations which differentiate between the standards applied to the exploitation of adults and children in a labour context.

How definitions of "child labour" may impact on standards

While no State's Trafficking Act in the region defines "slavery", "practices similar to slavery", "forced labour" and "servitude" differently in terms of adults and children, as seen, some include "child labour" as a separate 'purpose of exploitation'. In these States "child labour" is the 'purpose' which would naturally come to mind when charging cases of child exploitation in a labour context. We note that a detailed description of the definitions of this term can be found in section 4.6.2.1 on *differentiating between child labour law violations and child trafficking*.

In general, in jurisdictions which include "child labour" among the 'purposes of exploitation' and define it, the Trafficking Acts indeed apply a wider and more flexible standard for "child labour" than is the case for severe forms of exploitation like "slavery", "forced labour", "servitude" or "practices similar to slavery".¹¹⁵

¹⁰⁹ See Appendix 2: a table of Southern African trafficking legislation.

¹¹⁰ See the Trafficking Acts of **South Africa, Namibia, Botswana, Zambia, Zimbabwe**.

¹¹¹ See for example, the Trafficking Act of **Botswana**.

¹¹² See for example, section 14(i) of the **South African** Act; section 3(3)(a) of the **Zimbabwean** Act; section 5(2) of the **Lesotho** Act.

¹¹³ See for example the Trafficking Acts of **Botswana, Lesotho and Zimbabwe**.

¹¹⁴ The **South African** Trafficking Act includes a separate offence of adoption for exploitation which carries the same penalty as trafficking. Moreover, in **Lesotho**, legal or illegal adoption is one of the 'actions' which constitute the elements of the crime of trafficking in persons, and it also serves as an aggravating circumstance if it is used for the purpose of exploitation.

¹¹⁵ Thus, the **Zimbabwean** Trafficking Act's approach seems to be that any departure from child labour law violations can be considered a sufficient purpose of trafficking. This is clearly wider than the usual definitions of "slavery", "practices similar to slavery", "forced labour" and "servitude". The **South African** Trafficking Act definition of "child labour" refers to the definition in **South Africa's** Children's Act which is narrower and more stringent than the entire constellation of child labour law violations, but on the other hand, does not seem as stringent as the usual definitions of "slavery", "practices similar to slavery", "forced labour" and "servitude". While the **Zambian** law defines "child labour" as clearly severe forms of exploitation, namely, slavery and practices similar to slavery, it also lists a number of examples, one of which is less stringent than the usual definitions of these severe forms of exploitation, namely: "trafficking of a child for the purpose of engaging the child in work away from home and from the care of the child's family, in circumstances within which the child is exploited;". Similarly, while the **DRC** and **Namibian** Trafficking Acts define "child labour" by referring to largely stringent provisions in other laws and in the Constitution, they still include references to violations of Labour Acts which include some less stringent provisions, clearly different from "slavery", "practices similar to slavery", "forced labour" and "servitude".

So much is clear regarding States which define “child labour”. However, can this approach impact on States which either do not have this ‘purpose of exploitation’ or do not define it? Can it impact on how such States’ courts might interpret ‘purposes of exploitation’ like “slavery”, “practices similar to slavery”, “forced labour” and “servitude” when applying them to child victims?

A case could be made for a different interpretation of the terms “slavery”, “practices similar to slavery”, “forced labour” and “servitude” as regards children, even in States whose Trafficking Acts do not have include a ‘purpose’ of “child labour”. As we have mentioned, internationally, one of the yardsticks used by courts to distinguish between ‘mere’ labour infractions and exploitation in the context of trafficking, is the provisions of the labour laws. The farther a case departs from these standards, the more likely it is to be considered trafficking.¹¹⁶ Since the standards for child labour violations are more stringent than those for adults, it therefore follows that departures from these standards might occur in less severe situations than is the case with regard to adult trafficking.

As to the *content* of the different standards which might be applied to child trafficking in a labour context, perhaps these jurisdictions can rely on the approach reflected in definitions of “child labour” in States where this form of exploitation has been legislated. While these definitions cannot be adopted as is, perhaps they can serve as a source of guidance.

Regional case law

In the regional cases of child trafficking in a labour context, which form the foundation of this digest, only the **Esther Phiri (Zambia)** case, revolving around the trafficking of a 14 year old orphan, presents us with detailed facts about the actual exploitation which followed her recruitment. The accused was convicted of trafficking for child labour, where the **Zambian** Trafficking Act defines this as “slavery and practices similar to slavery”. As to the question if these facts would have constituted slavery or practices similar to slavery in the case of an adult, on the face of it, it seems that the case describes such an extreme constellation of circumstances, (acute vulnerabilities, deception, non-payment of salary, restrictions of freedom and signs of ownership), that we can envision a court convicting the accused of trafficking for slavery, practices similar to slavery or forced labour, even if the victim had been an adult (albeit minus the vulnerability of age).¹¹⁷ Thus, the case does not display any more flexible standard for children than for adults, but also does not explicitly rule that the standards should be the same.

However, a particularly interesting facet of this case may have some bearing on the question before us. A threat was made, which was effective with the 14 year old victim, but would scarcely have been effective with an adult. The sister of the accused threatened the victim that if she did not sleep with men in a bar, she would have to leave the bar with the sister’s child who was in her care. Consequently, the child did sleep with men at the bar. Seemingly, this shows that circumstances which a child perceives as a threat might not have this effect on an adult, and by extrapolation, what is perceived as force, or coercion by a child may be a far wider set of acts than is the case with the adults. This hints at the reasonableness of applying different standards for evaluating ‘purposes of exploitation’ like “forced labour” as regards children, although the court does not explicitly allude to this.

¹¹⁶ See Stoyanova, “*Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law*” (Cambridge University Press, 2017) pp. 70-72. See also UNODC Issue Paper on “The concept of ‘exploitation’ in the trafficking in persons protocol” p. 123 which raises a related question about labour standards:

“It is widely accepted that decisions about whether a particular situation constitutes ‘exploitation’ for purposes of trafficking should reflect the standards of the country in which the exploitation occurs. For example, accepted labour standards may be lower in one country than another. Is this principle still applicable when those standards fall well below international standards?”

¹¹⁷ See section 4.5.5 on *what we can learn from convictions* of trafficking in a labour context.

This conclusion is supported by **Kozminski (United States)**,¹¹⁸ where in a conviction on involuntary servitude, the court emphasizes that children may view certain situations as more coercive than do adults.

We refer the reader to the following section on *international cases* which addresses this topic and the Kozminski case in particular, and to section 3.2.2.6 on *seemingly irrational threats*.

International cases

While this is a regional case digest, international cases can be useful in regard to certain topics, including this one. We have not found a ruling where a court expressly differentiates between the standards used for the labour exploitation of minors and adults, but the following cases may provide some food for thought.

In **Kozminski (United States)**, where the defendant was charged with involuntary servitude,¹¹⁹ in discussing the nature of vulnerabilities and their influence over victims, the court advances a rationale for applying different standards to physical coercion in regard to children. Thus, the court noted:

"[A] child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be."

United States v. Kozminski 487 U.S. 931 (1988)

Another case in which the court seems to have applied different standards for child victims is **Case 13-149986MED-LARV (Norway)**.¹²⁰ The case revolved around a father who sent his two children to beg. The family members were beggars from Romania, none of whom had a job. Their earnings came only from begging and doing casual work in their travels across central and northern Europe. The district court found the father guilty of human trafficking for the purpose of exploiting another person in a situation of forced labor or other forced services, including begging, or inducing another person to let himself/herself be used for such purposes.¹²¹

The central legal question was where the line should be drawn between "forced labour and other services" and less severe acts. The majority of the court found that the defendant had **pressured** his children sufficiently for the provision to be violated. In this regard, the court noted that the children were raised to travel around different countries to beg; they did not attend school; there was an expectation in the family that the children should beg for money; the children could not retreat from begging because of their dependency on their father; they were both of young age, lacked language skills, and had no money for food and travel arrangements. Furthermore, the court found that the defendant's actions were undoubtedly intentional, as he brought the children to Norway solely for the purpose of begging.

¹¹⁸ **United States v. Kozminski** 487 U.S. 931 (1988)

¹¹⁹ We note that this quote is an obiter, drawn from the Court of Appeals ruling, which reversed the convictions of the accused on involuntary servitude and remanded the case for further proceedings. The court's reason for the reversal of the convictions was that the first instance judge's instructions to the jury were faulty, in its view, in that involuntary servitude requires physical or legal coercion, rather than psychological coercion, which does not suffice.

¹²⁰ District Court Case 13-149986MED-LARV, Larvik District Court (Larvik Tingrett), (25.9.2013). The case is accessible on the UNODC Human Trafficking Case Law Database (UNODC No. NOR004)

¹²¹ We note that according to this provision, if the victim is under 18 years of age, such actions are considered "a serious crime" and it is not necessary that violence, threats or abuse of a vulnerable position have occurred in order to justify a conviction on trafficking.

Here we see a court bringing into account the age of the children, the family expectations of them, the denial of schooling and their dependency in order to decide that the father pressured them enough to fulfill the requirements of “forced labour”. It is doubtful if such pressure would have sufficed to constitute “forced labour” had the victims been adults.

On the other hand, in a number of cases worldwide, courts did not distinguish between children and adults as regards the criteria for forced labour. One example is **Case No. 3365/12 (Argentina)**¹²² where the court exonerated a defendant who had exploited a 14 year old minor in his sewing workshop. The basis of the exoneration was that the victim was free to leave the house at will and that she was not hosted in conditions incompatible with human dignity. Furthermore, the court ruled that the evidence did not show the existence of threat or use of force or other forms of coercion, abuse of power or a position of vulnerability. The court did not devote special attention to the difference between adults and children in such a situation.

It is interesting to compare the reasoning in the above case to that in **Siliadin (ECHR)**, where the European Court of Human Rights ruled that a 15 year old minor had undergone forced labour and servitude, although she was permitted to exit the premises on occasion, and though she was not physically abused or directly threatened. While there too, the court did not expressly apply a different standard to the forced labour of a minor compared to that of an adult, it stressed the victim’s vulnerability as an illegal minor and the violation of the family’s obligation to allow her to receive schooling as relevant factors to prove a situation of forced labour, thus:

*“As a minor, she had no resources and was vulnerable and isolated, and had no means of living elsewhere than in the home of Mr and Mrs B., where she shared the children’s bedroom as no other accommodation had been offered. She was entirely at Mr and Mrs B.’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred...As **she had not been sent to school**, despite the promises made to her father, the applicant **could not hope that her situation would improve and was completely dependent on Mr and Mrs B.**” (our emphases)*

Siliadin v. France (App. No. 73316/01) ECHR 26 July 2005, European Court of Human Rights, section 126. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FRA010),

In conclusion, while the above cases do not explicitly distinguish between the standards required to fulfill “forced labour or services” or “servitude” of children and adults, at least some courts seem to bring into account children’s special vulnerabilities in evaluating if the threshold of forced labour or servitude has been reached.

4.6.2.3 The impact of culture on child trafficking in the context of labour

Sometimes children are sent to work in spheres and under conditions which have been an acceptable customary way of employing them in the past, and for example herding cattle in pastoral communities¹²³ or children sent to beg by Roma families. Should it matter that these are widely accepted cultural practices?

Among the cases which form the foundation of this digest, we have not found any which explicitly address this issue, although in **Shongwe (Eswatini)** a young man of 19 is employed as a cattle herder under inhuman conditions.

¹²² The case is available in the UNODC Human Trafficking Case Law Database (UNODC No.ARG032) at https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2012/causa_n_336512.html?lng=en&tmpl=sherloc.

¹²³ See Food and Agriculture Organization, United Nations (2013), *Children’s Work in the Livestock Sector: Herding and Beyond*.

However, **Jezile (South Africa)**, has much to contribute on this question, even though it does not concern trafficking in a labour context. The case concerned a man of 28 who married a child of 14 against her will. Her uncles were complicit in the marriage, but her mother's consent was not sought. Nor would it have been given, according to the mother's testimony. The girl tried to escape a few times while she and the accused were in her home area, whereupon the accused took her to Cape Town where she was housed with the accused in his brother's house and raped and assaulted by the accused on a few occasions.

The accused's central defence claim was that the marriage was permitted because it was a customary marriage. The court dismissed this claim, relying on seven amicus curiae briefs submitted to it, which established that the marriage did not accord with the conditions of customary marriage, one of which requires consent on the part of both parties. The court called such forced marriages with minors an aberrant form of customary marriage, and invoked the **South African** constitution and various national laws and international conventions intended to protect children, in order to reach the conclusion that such practices could not be protected under **South African** law. The accused was convicted of trafficking for sexual exploitation, but the court mitigated his sentence due to his genuine belief that this was a customary marriage.

An analogy can be drawn between this case and cases of child trafficking in a labour context. As in child marriage, the system of national laws and constitutional provisions protecting children, and a universally ratified convention, namely, the I.L.O Worst Forms of Child Labour Convention (No. 182),¹²⁴ prohibit harmful labour practices towards children, including slavery and practices similar to slavery, forced labour, serfdom, debt bondage and any work which is likely to harm the health, safety or morals of children.¹²⁵ A court confronted with child labour practices which fit any of these categories could reasonably draw on the **Jezile** ruling in order to dismiss a defence based on a claim that these are accepted cultural practices.

Moreover, the trafficking legislations of some States in the region explicitly negate such a cultural defence. For example, according to **Zimbabwe's** Trafficking Act it is not a defence that an essential element of the crime is a customary or religious practice.¹²⁶ Similarly, **Zambia's** Trafficking Act states that it shall not be a defence that the act constituting the offence is a customary practice.¹²⁷

Several international cases may also provide some guidance on this topic in connection with Roma children sent to beg by their families who raise a defence claim that this is an accepted cultural practice among the Roma people.¹²⁸

¹²⁴ This convention has been universally ratified or acceded to by all 187 member States of the United Nations International Labour Organization. See <https://news.un.org/en/story/2020/08/1069492>

¹²⁵ The convention prohibits the following practices: (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) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the 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; (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.

¹²⁶ Section 3(7) (e).

¹²⁷ Section 21(e).

¹²⁸ Courts in different jurisdictions react differently to this phenomenon, with some exhibiting reticence at convicting and some convicting. Interestingly in Thailand, a distinction is made between cases in which the whole family begs for its own survival and cases where only the children are sent to beg. In the former case, the family member is exonerated as he or she is not seen to have an intention to exploit. See UNODC's Issue Paper on the concept of 'exploitation in the trafficking in persons protocol' and for example: pp. 53, 71, 89, 92.

One example is a Norwegian case revolving around such a cultural defence, namely, **Case 11-194827MED-BBYR/01 (Norway)**¹²⁹ where Six Romanian citizens operated within an extended Roma family group, and exploited four young girls in the family, aged between 13 and 16, in shop-lifting, begging and sale of false gold jewelry. The accused persons were convicted of trafficking for forced labour or services, although the defendants raised the claim that they had acted in line with accepted cultural practices and even brought expert witnesses on Roma society to support their claims.

4.6.3 Issues arising in cases of child trafficking for sexual exploitation

Among the child trafficking cases which form the foundation of this digest, there are far more cases concerning trafficking for sexual exploitation than trafficking in the context of labour exploitation.¹³⁰ This is so, although UNODC's Global Report on Trafficking in Persons 2020, maintains that the region has far many more detected cases of child trafficking in a labour context.¹³¹ This discrepancy may be a function of the randomness of the cases made available to us, or of the special problems presented by building cases of trafficking in the context of labour exploitation.¹³²

The following subsections will address issues and patterns which may arise in cases of child trafficking for sexual exploitation: the definition of "sexual exploitation", the defence claim of duplication of charges in cases of trafficking for sexual exploitation which include rape or assault; and patterns discerned in cases across the region in regard to child trafficking for sexual exploitation.

4.6.3.1 The definition of sexual exploitation

Several Trafficking Acts across the region either define "sexual exploitation", or specify which kinds are relevant to the Act. Some have wide definitions, whereby any offence of a sexual nature is included;¹³³ some do not provide definitions but specify that all forms of sexual exploitation are

¹²⁹ District Court Case 11-194827MED-BBYR/01, Bergen District Court (5 July 2012). A summary of the case is available in the UNODC Human Trafficking Case Law Database (UNODC No. NOR008)

¹³⁰ Examples of child trafficking for sexual exploitation include: Mujee (**Botswana**); Luizon (**DRC**); Tshiswaka (**DRC**); Luzama Kavul (**DRC**); Jeremiah Musa Dlamini (**Eswatini**); Machawe P Dlamini (**Eswatini**); Mndzebele (**Eswatini**); Martinet (**Mauritius**); Sonah (**Mauritius**), where an allied prostitution crime was charged; Lamarie (**Mauritius**), where an allied crime according to the Child Protection Act was charged.; Koch (**Namibia**); Dragon (**Namibia**); M.L. (**Seychelles**); Mabuza (**South Africa**); Matini (**South Africa**); Ntonga (**South Africa**); Ogochukwu (**South Africa**); Jezile (**South Africa**); Balele (**South Africa**); Fakudze (**South Africa**), though this case yielded an exoneration on trafficking by the side of a conviction on rape; Ramadhani (**Tanzania**).

¹³¹ See section 4.6.2 on *issues arising in cases of child trafficking in a labour context*.

¹³² See section 4.5.1 on *specific challenges arising in trafficking for labour exploitation*.

¹³³ See **Namibia's** Trafficking Act: "sexual exploitation" means the commission of any offence of a sexual nature in terms of a law against a person; **South Africa's** Trafficking Act: "sexual exploitation" means the commission of—(a) any sexual offence referred to in the Criminal Law (Sexual Offences and Related Matters) Amendment Act; or (b) any offence of a sexual nature in any other law; **Botswana's** Trafficking Act: "sexual exploitation" means the commission of any sexual offence in terms of the Penal Code or any offence of a sexual nature in any other law against a victim of trafficking, and includes forcing a victim of trafficking to participate in the production of an obscene publication or obscene display including pornographic material or the performance of any act of a sexual nature."

included;¹³⁴ some list practices which include prostitution and pornography;¹³⁵ some are limited to certain forms of sexual exploitation, whether commercial, induced or certain forms only.¹³⁶

While the most important source for practitioners in each State is clearly the definition in their Trafficking Act, case law may still be helpful in addressing questions not directly answered by the definitions, and for example, if physical contact is necessary in order to constitute sexual exploitation. Moreover, in States whose Trafficking Acts do not include definitions of this term, case law may clearly be relevant in providing guidance, even if the case was adjudicated in another State.¹³⁷

Three cases in our sample address the term “sexual exploitation”: **Koch (Namibia)**; **Dragon (Namibia)**; and **Matini (South Africa)**. As seen above, both **Namibia** and **South Africa** have broad definitions of “sexual exploitation” in their Trafficking Acts, including all sexual offences which appear in the laws of those States. However, during the period of time during which all three cases were adjudicated, the new Trafficking Acts had not yet entered into force and there was no definition of “sexual exploitation” in the Acts then in force. All three cases rule or intimate that sexual exploitation does not require physical contact.

In **Koch (Namibia)** the court convicted the accused of the trafficking for sexual exploitation of a number of minors between the ages of 9 and 13, but exonerated him from rape charges, because there was no good evidence of sexual penetration. In the light of an absence of a definition of the term “sexual exploitation” in the then in force **Namibian Act**, the court drew on international sources.¹³⁸ It noted that though there is no exhaustive definition of this term in international law, there are international instruments which list certain practices as amounting to sexual exploitation of children, such as inducement or coercion of a child to engage in any unlawful sexual activity and the exploitative use of children in prostitution or other “sexual practices”. The court stressed that the term ‘practices’, as distinguished from ‘acts’ recognizes the reality that people derive sexual pleasure, not only through physical contact, but through other deviant behaviour, including acts of a sexual nature which are immoral or indecent if performed in the presence of a child. In view of this analysis, the court reached the conclusion that **sexual exploitation is not limited to physical contact**, but rather it is enough if the accused committed indecent or immoral acts or solicited or enticed children to commit such acts.

¹³⁴ See **Angola’s** Trafficking Act which includes “*sexual exploitation*” in general; **Eswatini’s** Trafficking Act which includes “*all forms of sexual exploitation*”; **Lesotho’s** Trafficking Act which includes “*induced prostitution and other forms of sexual exploitation*”; **Mozambique’s** and **Tanzania’s** Trafficking Acts which include prostitution and “other forms of sexual exploitation.”

¹³⁵ See the **DRC’s** Trafficking Act which has such a list and specifies child prostitution and pornography; See also **Botswana’s** Trafficking Act which explicitly mentions pornography; **Mozambique’s** Trafficking Act which includes pornography, prostitution and sexual exploitation in general;

¹³⁶ See **Madagascar’s** Trafficking Act which is limited to prostitution and sexual servitude; **Malawi’s** Trafficking Act which is limited to forced participation in all forms commercial sexual exploitation such as prostitution, sexually explicit performance and pornography; **Mauritius** whose definition is limited to commercial forms of exploitation including prostitution and other kinds of sexual services and pornography; **Seychelles’** Trafficking Act where the definition is limited to commercial sexual exploitation and includes a wide list of practices, including a broad category of encouraging, inducing or forcing a person to be used for the sexual gratification of another, pornography, or commercial sexual exploitation; **Zambia’s** Trafficking Act where the definition is limited to involuntary prostitution or other sexual acts or pornography; **Zimbabwe’s** Trafficking Act which limits such exploitation to prostitution or pornography.

¹³⁷ See section 1.3 on *the added benefit of a regional case digest*, footnote 6 which lists examples of courts in the region who have cited cases from other jurisdictions as providing guidance.

¹³⁸ The court relies on UNODC’s Issue Paper on the concept of ‘exploitation’ in the trafficking in persons protocol.

The court also referred to the **Namibian** Combating of Immoral Practices Act which includes an offence of committing an indecent or immoral act or soliciting or enticing a child to commit such an act, and found that such acts would suffice to constitute sexual exploitation for the purposes of trafficking.

Examples of such acts in the case at hand were: that the accused was in a state of undress in the presence of the victims; that on one occasion he put a condom on his penis and masturbated in their presence; that on another occasion he put a plastic bread wrapping on his penis in the presence of one child and she was made to lick it. This evidence showed that the accused had a sexual motive and derived sexual gratification when he engaged in acts of indecency, even if there was no physical contact with the children.

In **Dragon (Namibia)** the case revolved around the sexual exploitation of 5 young children between the ages of 7 and 9. The accused was a neighbour of the victims and the father of their playmates, who gave them food and treats to gain their trust. The court noted that he introduced the children gradually to his nakedness by being wrapped in a towel every time they came to his house and subsequently removing it and remaining naked in their presence. At times he watched pornographic movies when they came in, thus gradually introducing them to inappropriate behaviour.

In interpreting the term “sexual exploitation”, the court cited the ruling in **Koch**, by which sexual exploitation does not require physical contact, but rather that it suffices that the accused performed indecent and immoral behaviour in the presence of children for the purpose of sexual gratification. The court deemed that this was amply proven by the facts of the case.

In **Matini (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of young women, some of whom were minors, including 2 mentally disabled children, the charged acts took place before the entry into force of the **South African** Trafficking Act of 2013 which includes a wide definition of “sexual exploitation”. In the absence of such a definition, the court drew on research analyzing the trafficking of women and girls in Africa, and gleaned from it that “*Sexual exploitation implies the act of misusing or mistreating another person through sex.*”¹³⁹ While this was not strictly a definition of the term, this insight infused it with meaning and intimated that no physical contact was necessary in order to come within its ambit. Naturally, the facts of the case fell within this meaning, as the accused persons recruited the victims in order to sell them to a series of men for remuneration.

¹³⁹ See Matini, p. 56 of English version, the text beside footnote 25. See also footnote 25 which reveals that the court’s insight derived from T.M. Luty 2012, *Human Trafficking of Young Women and Girls for Sexual Exploitation in South Africa* at p. 7.

4.6.3.2 Duplication of charges

Defence claims of duplication of charges, when certain crimes are charged by the side of trafficking, or when multiple trafficking offences are charged, arise in cases of trafficking in general and are not limited to cases of child trafficking for sexual exploitation. However, since prominent cases concerning child trafficking for sexual exploitation present this issue, we will address it here.

In some cases, the defence claimed that charges of **trafficking and rape** should not be submitted together because this constitutes a duplication of charges. Examples of this claim appear in **Ntonga (South Africa)** and in **Lukas (Namibia)**. In both cases, the courts rejected the claim. In analyzing the two crimes, the court in **Lukas** held that the mens rea in each crime is different and that a conviction on trafficking would be possible, even if there were no proof that a rape actually occurred. This court also addressed the defence claim that **multiple counts of trafficking** could be considered a duplication of charges, but reached the conclusion that the charges were proper, as they related to conduct committed on different dates which required separate charges.

Even in cases where this claim is not explicitly raised, courts do convict on trafficking for sexual exploitation and rape,¹⁴⁰ alongside cases where both crimes are charged but the accused is convicted of only one, due to evidential issues.¹⁴¹ Moreover, they also convict on trafficking and kidnapping charges.¹⁴²

On the other hand, in **Matini (South Africa)** the court refused to convict both on procuring for prostitution and trafficking for sexual exploitation, because it viewed this as a duplication of charges.

Interestingly, in two cases, courts refused to convict on both trafficking and assault or on both rape and assault because they viewed the assault as part of the central crime. In **Jezile (South Africa)**, although the accused was charged with both rape and assault (in addition to trafficking for sexual exploitation), the court viewed the assaults as part of the rapes and did not convict the accused of them separately. In **Shongwe (Eswatini)** the court viewed the assault against the victim as part of the crime of trafficking for slavery. While Shongwe is not a case of child trafficking for sexual exploitation, we include it because it reflects the approach of the court regarding this particular issue.

In **Fakudze (South Africa)**, while the defence did not make such a claim in terms of the indictment submitted, which included trafficking for sexual exploitation and rape, it did make use of this claim in the court of first instance, in order to request that the sentences for both counts should run concurrently. This claim, to have both life sentences run concurrently, was accepted by the court. However, we note that the High Court, while confirming the conviction on rape, exonerated the accused from trafficking charges.

¹⁴⁰ Examples are **Jezile (South Africa)**; **Ntonga (South Africa)**; **Mabuza (South Africa)**; **Knoetze (South Africa)**; **Balele (South Africa)**; **Dragon (Namibia)**; **Jeremiah Musa Dlamini (Eswatini)**.

¹⁴¹ Examples are: **Koch (Namibia)** where the court convicted on trafficking for sexual exploitation, but exonerated on rape because there was not good evidence of penetration; **Fakudze (South Africa)**, where the High Court affirmed the conviction on rape but reversed the conviction on trafficking for sexual exploitation due to doubts about the accused's intention during the 'acts' that he committed; **Ramadhani (Tanzania)**, where the court convicted the accused of trafficking for sexual exploitation but exonerated him from the charge of carnal knowledge of the minor; **Mndzebele (Eswatini)**, where the accused was convicted of rape but exonerated from trafficking for sexual exploitation because the court could not rule out that at the time of recruitment he had not intended to exploit the minor.

¹⁴² See **Msweli (South Africa)** regarding child selling and **Veeran Palan (South Africa)** although the latter case concerns adult trafficking.

4.6.3.3 Typical patterns

The wealth of cases regarding child trafficking for sexual exploitation, provides an opportunity to point to some regional patterns, in the hopes that this may assist practitioners in identifying cases. The following are some of the regional patterns which emerge from the cases made available to us.

- *Recruitment methods*

Some cases describe the ease with which children are recruited. Prime examples are **Dragon (Namibia)**, **Koch (Namibia)** and **Luzama Kavula (DRC)** where the accused persons lured the children by means of treats and foods, and in one case with small items like hair accessories or hair sprays.

Recruitment via family complicity is also widespread in the case of minors who are sexually exploited. Examples are **Jezile (South Africa)** where the male family members of the victim forced her to marry the accused and thereafter to travel with him to Cape Town; **Mabuza (South Africa)** where one of the traffickers was the biological aunt of one child victim and knew the families of the others; **Muzara (Zambia)** where, apparently, the trafficker who recruited the children was a relative of the child victims. Additional examples are **Knoetze (South Africa)** where a mother recruited her own child for sexual exploitation; **Tshiswaka (DRC)** where the biological father of the child sexually exploited her; **Jeremiah Musa Dlamini (Eswatini)** where the accused was convicted of the trafficking for sexual exploitation of his minor biological daughter and his niece.

An allied pattern is the innocent complicity of family members in the trafficking of children, because they too believe the trafficker's lies. Examples occur in **Mabuza (South Africa)** regarding some of the victims' parents and **Mujee (Botswana)**.

In other cases, neighbours or respected persons appear as both recruiters and sexual exploiters, and for example in **Dragon (Namibia)**, **Koch (Namibia)** and **Luzama Kavula (DRC)** where neighbours recruit and exploit the children and in **Jeremiah Musa Dlamini (Eswatini)** and **Mndzebele (Eswatini)** where influential persons recruit the minors (although we note that Mndzebele resulted in an exoneration on trafficking and a conviction on rape).

Deception is a widespread method of recruitment of minors, as appears, for example, in **Mujee (Botswana)**, **Esther Phiri (Zambia)**, and **Ramadhani (Tanzania)**. We refer the reader to section 3.2.3 on deception for details on the nature of the deception in these cases.

In at least one case, the victim was abducted.¹⁴³ In a few cases drugs are used to control or recruit minor victims.¹⁴⁴

- *Victims' profiles*

In the sample of cases which form the foundation of this digest, a preponderance of minor victims for sexual exploitation are females, although there is one case where a 14 year old male victim is exploited.¹⁴⁵ In general, the minors have multiple vulnerabilities like low socio-economic status,

¹⁴³ See Allima (**South Africa**).

¹⁴⁴ Examples are Obi (**South Africa**); Ogochukwu (**South Africa**).

¹⁴⁵ See Ramdhani (**Tanzania**).

lack of education, difficult family backgrounds, illegality in the country of destination, family connection to the accused.¹⁴⁶

The ages of the victims range from 7 or 8 years of age¹⁴⁷ up to 17 years of age¹⁴⁸, and many are teenagers.¹⁴⁹

- *Traffickers' profiles*

Many of the recruiters are females¹⁵⁰ some of whom are former victims of trafficking or abuse.¹⁵¹ As a rule, the end exploiters are men.¹⁵² Some traffickers are family members.¹⁵³ At least some of the traffickers are vulnerable and for example: poor,¹⁵⁴ foreign in the country,¹⁵⁵ with little education or professional qualifications¹⁵⁶ and some are former victims of trafficking or abuse, as noted above.

Often, there is a large age discrepancy between the traffickers and their victims.¹⁵⁷ In general, the traffickers in the sample are opportunistic and operate alone or with one other person, rather

¹⁴⁶ See for example Jeremiah Musa Dlamini (**Eswatini**), where the victims were family members of the accused, with no financial means and nowhere to go, isolated from the community where the accused was influential. See also Lukas (**Namibia**), where the minors were from poor backgrounds, from the impoverished **DRC** community, and one resided in a Catholic Hostel; and Mabuza (**South Africa**), where the minors were from poor backgrounds, illegal in the country and both physically and socially isolated.

¹⁴⁷ See Dragon (**Namibia**), where the victims ranged from 7-9 years of age. See also Balele (**South Africa**) where the victims ranged from 8 to 15 years of age.

¹⁴⁸ The court in Jonas (**Namibia**) noted that the victim was under 18 years of age, but since the prosecution did not charge child trafficking, the court convicted the accused on trafficking charges, rather than child trafficking charges.

¹⁴⁹ Examples are Ogochukwu (**South Africa**) (15 years old); Obi (**South Africa**) (early teenage years); Martinet (**Mauritius**) (13 and 14 years old); Luizon (**DRC**) (15 years old); Allima (**South Africa**) (16 years old); M.L. (**Seychelles**) (while one is 10, two of the others are 13 and 14 years of age); Lukas (**Namibia**) (13 and 14 years of age); Mujee (**Botswana**) (16 years of age); Machawe P Dalmimi (**Eswatini**) (under the age of 16).

¹⁵⁰ See for example: Mabuza (**South Africa**); Matini (**South Africa**); Knoetze (**South Africa**); Ntonga (**South Africa**); Lukas (**Namibia**); Martinet (**Mauritius**).

¹⁵¹ See for example: Mabuza (**South Africa**); Lukas (**Namibia**); Matini (**South Africa**); Obi (**South Africa**).

¹⁵² See for example: Mabuza (**South Africa**); Ntonga (**South Africa**); Matini (**South Africa**); Lukas (**Namibia**).

¹⁵³ See for example: Jezile (**South Africa**); Mabuza (**South Africa**); Knoetze (**South Africa**); Muzara (**Zambia**); Jeremiah Musa Dlamini (**Eswatini**); Tshiswaka (**DRC**).

¹⁵⁴ See for example: Koch (**Namibia**), where the accused is unemployed and collects throw away items from dumpsites; Lukas (**Namibia**), where the accused is from a poor and unfortunate family where her mother is the only breadwinner.

¹⁵⁵ An example is Allima (**South Africa**), where the accused is from Burundi.

¹⁵⁶ See for example, Koch (**Namibia**).

¹⁵⁷ Examples are Dragon (**Namibia**), where the trafficker was 63 years old when the crimes were committed, whereas the child victims were between 7 and 9 years of age; Jezile (**South Africa**), where the accused was 28 years old and the child victim was 14; Machawe P Dlamini (**Eswatini**) where the accused was 30 years of age and the minor victim under 16. See also Jeremiah Musa Dlamini (**Eswatini**), where the accused was 52 years old when he stood trial. Since the exploitation went on for many years, he must have been in his 40s when he began to exploit his biological daughter who was 14 years old when the exploitation began. See also Mabuza (**South Africa**), where the victims were between 11 to 13 years of age when first abused, whereas the end sexual exploiter was 62 when he stood trial and the court of first instance noted that he was old enough to be the children's grandfather.

than in an organized criminal structure.¹⁵⁸ This confirms the conclusions of UNODC's Global Report on Trafficking 2020.¹⁵⁹

- *A series of exploitation/a number of victims*

In many of the cases of child trafficking for sexual exploitation in our sample, the children experience a series of sexual exploitation rather than just one event of exploitation. Exceptions are one of the victims in **Lukas (Namibia)**; one of the victims in **Mabuza (South Africa)**; and **Ntonga (South Africa)** where the victim experienced one rape.

Moreover, in many cases there are more than one minor victim. Examples are **Mabuza (South Africa)**; **Matini (South Africa)**; **Obi (South Africa)**; **Knoetze (South Africa)**; **Koch (Namibia)**; **Dragon (Namibia)**, **M.L. (Seychelles)**. However, on the other hand there are cases which revolve around one victim, such as: **Allima (South Africa)**; **Ogochukwu (South Africa)**; **Jezile (South Africa)**; and **Tshiswaka (DRC)**.

- *Use of internet*

The use of the internet by traffickers is not limited to cases of child sexual exploitation. However, it appears in 2 cases dealing with this pattern of exploitation. Thus, in **M.L. (Seychelles)**, the trafficker used the internet to pose as a female model from a modeling agency and to invite the victims to send intimate photographs in order to be considered as models. He then threatened them that if they did not allow him and his friends to sexually exploit them, he would publicize the pictures. In **Obi (South Africa)** the trafficker advertised the minor victims' pictures on the internet in order to attract customers for sexual services.

4.7 Issues arising in child selling and adoption cases

4.7.1 Introduction

The Protocol does not include 'actions', 'means' or 'purposes of exploitation' directly related to the sale of human beings in general or children in particular. However, some States across the region do include such explicit references to the sale of persons or to the adoption of children.

Some States do so by means of an 'act' of sale, or allied acts like procurement, exchange, lease;¹⁶⁰ another State includes sale of a person as a 'purpose of exploitation'¹⁶¹ and yet another State includes the sale of a child as an example of the 'purpose of exploitation' of "child labour".¹⁶²

Adoption is also mentioned in several Trafficking Acts. One State includes a specific 'act' of legal or illegal adoption;¹⁶³ another State includes "false or illegal adoption contrary to a written law" as a 'means';¹⁶⁴ yet another State includes illegal adoption as a 'purpose of exploitation'.¹⁶⁵

¹⁵⁸ Most of the cases of child trafficking for sexual exploitation fit this pattern and for example: Jonas (**Namibia**); Veeran Palan (**South Africa**); Jeremiah Musa Dlamini (**Eswatini**).

¹⁵⁹ See page 40.

¹⁶⁰ **Lesotho's** Trafficking Act includes sale; **Mauritius'** Trafficking Act includes sale and procurement; **Namibia's** and **South Africa's** Trafficking Acts include: sells, exchanges and leases.

¹⁶¹ See **Madagascar's** Trafficking Act.

¹⁶² See **Zambia's** definition of the term "child labour" in its Trafficking Act.

¹⁶³ See **Lesothos's** Trafficking Act.

¹⁶⁴ See **Zambia's** Trafficking Act.

¹⁶⁵ See **Madagascar's** Trafficking Act.

Another State's Trafficking Act includes a separate trafficking crime of adopting a child by legal or illegal means for the purpose of exploitation.¹⁶⁶

States in the region are not alone in recognizing that the sale of a person¹⁶⁷ is the ultimate violation of his or her autonomy, dignity, and freedom which, are the values protected by trafficking crimes.¹⁶⁸ Moreover, some States' explicit reference to the adoption of children as a tool which can serve traffickers, reflects realities in the region and the world where irregular adoption practices have led to the sale of children for remuneration, as recognized by several international instruments.¹⁶⁹

In her report to the Human Rights Council of the United Nations, the Special Rapporteur on the sale and sexual exploitation of children addressed the connection between illegal adoptions and trafficking in persons:

"There is no reliable data on the number of children who have been or are being adopted as a result of being sold, trafficked or subjected to other illegal acts and illicit practices. Firstly, reliable figures are difficult to establish owing to the illicit and clandestine nature of those activities. Secondly, illegal adoptions can appear legal since many of the children concerned receive, at some point in the process, "official" adoption papers. The abduction of babies (e.g. through kidnappings or by falsely informing parents that their baby was stillborn or died shortly after birth), the improper inducement of consent (e.g. through misrepresentation, bribery or coercion) and improper financial gain (e.g. through payment for the child or the payment of bribes to intermediaries involved in the adoption process) are among the most common methods used in the sale of children and illegal adoptions. Inherent to the methods is the falsification of documents (e.g. birth and medical certificates, the identification documents of the biological mother, DNA test results and relinquishment or abandonment declarations) and the bypassing of regulations."

UN Human Rights Council: Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, 34th Session, February 27 – March 24, 2017, A/HRC/34/55, Chapter III *Study on Illegal Adoptions*.¹⁷⁰

¹⁶⁶ See **South Africa's** Trafficking Act.

¹⁶⁷ Examples of other States which directly incorporate sale of persons in the elements of their trafficking crimes are the Arab Republic of Egypt's Law No. (64) of 2010 regarding Combating Human Trafficking which includes: "sale, offer for sale, purchase, or promise thereof" and Thailand, whose Emergency Decree Amending the Anti-Human Trafficking Act 2008 enacted in 2019, includes "procuring, buying, selling, vending".

¹⁶⁸ See for example Mjwanga (**Tanzania**), where the court explicitly mentions these values.

¹⁶⁹ Additional international conventions relevant to the adoption or sale of children and the interconnections between them and trafficking are the *Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and the Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33, available at: <https://www.refworld.org/docid/3ddcb1794.html>.

¹⁷⁰ Available at <https://undocs.org/en/A/HRC/34/55>.

The sample of cases which form the foundation of this digest present relatively many cases where a person is sold. While some of the victims are adults,¹⁷¹ most of the sales relate to children. A number of issues arise in these cases.

The first issue is what needs to be proved for the sale of a child to constitute trafficking? Is a ‘purpose of exploitation’ required, aside from the sale itself? If it is a required element, can the act of sale, in itself, constitute the ‘purpose of exploitation’ of “slavery”?

The second issue is what is the requisite mens rea in cases of trafficking in the context of child sale or child adoption? Must there be intent to exploit, or does knowledge, recklessness, or negligence suffice? Is it enough that a perpetrator can reasonably envision *some* form of exploitation though he does not know which kind will transpire?

The following sections analyze these issues.

4.7.2 Proving the ‘purpose of exploitation’

4.7.2.1 Is proof of ‘purpose of exploitation’ required?

The sale or transfer of a child does not, in itself, constitute the crime of trafficking. Over beyond the ‘action’¹⁷² and the ‘means’,¹⁷³ in order for trafficking to be charged and convicted, there must also be a ‘purpose of exploitation’. This approach can clearly be seen, both in the deliberations which preceded the adoption of the Protocol and in cases across the region. However, we note that there are exceptions to this rule among the Trafficking Acts in the region, the most notable of which is **Madagascar’s** Trafficking Act, where “*the sale of persons*” appears as a ‘purpose of exploitation’ in its own right.¹⁷⁴

An Interpretative Note to Article 3 of the Protocol, recorded in the discussions which preceded the adoption of the Protocol,¹⁷⁵ addresses the question of exploitation in the context of child adoption.

¹⁷¹ An example of a case where an adult is sold is Mboo (**Zambia**), where a man sells his brother in law for the removal of his organs. In other cases where victims are prostituted, the testimonies tell of their sale from one trafficker to another. Examples are Eze (**South Africa**) and Weidermeyer (**South Africa**). In yet other cases of trafficking for sexual exploitation, the trafficker sells women to a series of men for remuneration which can include money and food. Examples are Matini (**South Africa**), where some of the victims were young adults, and Jonas (**Namibia**), where the victim was considered to be 18 years old by the court, although it noted that she was almost 18.

¹⁷² Depending on the Trafficking Act in question, the ‘action’ will usually fit into some category such as: recruiting, transferring, receiving harbouring, selling, leasing, exchanging, procuring.

¹⁷³ Although child trafficking does not require ‘means’ according to the Protocol and most States Trafficking Acts, some States’ Acts do require ‘means’. Moreover, even in jurisdictions which do not require ‘means’, some cases still analyze ‘means’ even when child trafficking is involved. Examples are Fakudze (**South Africa**) and Lukas (**Namibia**). Depending on the Trafficking Act in question, the ‘means’ can usually be proven, either by using the ‘means’ enumerated in the Protocol or additional ‘means’ in particular Trafficking Acts.

¹⁷⁴ We also note that **Zambia’s** Trafficking Act includes a ‘purpose of exploitation’ of “child labour” which is defined as “includes all forms of slavery or practices similar to slavery”, but also enumerates a number of examples, among which is: “*the sale of a child*”, without qualifying that this needs to be for a purpose of exploitation. However, perhaps the proper interpretation of this example is that it must be qualified by the larger category of “*slavery or practices similar to slavery*” which are clearly ‘purposes of exploitation’.

¹⁷⁵ See *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 347, available at https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf.

Interpretative Note

"The interpretative notes on article 3 of the protocol approved by the Ad Hoc Committee and contained in its report on the work of its first to eleventh sessions(see A/55/383/Add.1, paras. 63-68) are as follows:

...

(d) Where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery it will also fall within the scope of the protocol."
(our emphasis)

Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p. 347

For a transfer of a child to be considered a 'practice similar to slavery' according to article 1(d) of the Supplementary Convention on Slavery, a 'purpose of exploitation' must be proven. The convention does not make due with the transfer alone.

Supplementary Slavery Convention

Article 1

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:

...

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour. (our emphases)

Thus, according to the Interpretative Note, which draws on the Supplementary Slavery Convention, in order that the sale or adoption of a child be considered trafficking in persons, it must be done with the intent to exploit the child. It follows that seemingly the sale or adoption, is not considered a 'purpose of exploitation' in its own right.

Among the sample of cases which yielded convictions on trafficking in the context of child selling or adoption, a few present a clear 'purpose of exploitation'. Thus in **Kapinga (Malawi)** a 7 year old child victim was sold to work in a maize mill. The purpose of the sale was attested to by the seller, although the exploitation never transpired and the child disappeared.

Matini (South Africa) too presents us with a clear purpose of exploitation, in that the dominant accused sold young women, some of whom were minors, including 2 disabled children, to men for sexual exploitation, for which she received food, cigarettes, drinks and money. The case differs from Kapinga, in that the accused sold the victims to a series of men on a nightly basis, rather than transferring full ownership or control over them. The accused was convicted of trafficking for sexual exploitation of some victims and of sexual exploitation of children regarding others.

Similarly, in **Allima (South Africa)** a 16 year old girl was abducted from her town and sold to a series of men for remuneration for varying periods of time, in order to be sexually exploited.

Here too, the ‘purpose of exploitation’ was clear. The accused persons were convicted of trafficking for sexual exploitation.

A similar scenario takes place in **Jonas (Namibia)** where the victim is sold to a series of men for sexual exploitation for varying periods of time. The accused receives remuneration in the form of food. However, although the court notes that the victim was a bit under the age of 18 when she was trafficked, the prosecution did not submit proof as to her age, so that the court did not convict on child trafficking. The accused was convicted of trafficking for sexual exploitation.

However, in most of the cases which involve situations of child selling, the ‘purpose of exploitation’ remains unclear. In such cases, prosecutors often submit alternate charges, such as child selling or violations of child protection acts. If trafficking is charged and the case comes to court, some courts tend to exonerate the accused persons, although there are a few cases where courts convict nevertheless.

Examples of cases where prosecutors submitted **non-trafficking charges** are: **Judgment No. 76-CO (Madagascar)**, where a husband and wife¹⁷⁶ purportedly tried to sell a child to another person and were charged with child selling which does not require an intent to exploit;¹⁷⁷ **Fawza (Mauritius)** where a mother sold her baby to another person and was charged with a violation of child trafficking according to the Child Protection Act, which does not require an intent to exploit the child.¹⁷⁸

Similarly, in a case from the **DRC**¹⁷⁹ a non-trafficking charge was submitted in a baby selling case. A Congolese woman pretended to be pregnant in order to receive money from a male partner in **Angola** who she claimed was the father of the baby. While she generally resided with her partner in **Angola**, at the time, she was staying in the **DRC** for an extended period of time. With the passage of months, she needed to return to **Angola** with a baby, and engaged an intermediary to sell her a baby. This intermediary stole a week old baby from the maternity ward of a local hospital in order to sell it to this woman, but was arrested before she was able to complete the sale. She was charged with sale of a child, a violation of the Protection of Children Law which does not require that a purpose of exploitation be proved.

We note that in some cases in our sample only sentences were made available to us which did not clarify the purpose of exploitation.¹⁸⁰ In some of these cases trafficking was charged and in others allied crimes like child selling or violations of child protection acts.

In a number of cases where trafficking in persons was charged, the prosecution did not succeed in proving the ‘purpose of exploitation’. This was one of the reasons which led to exonerations in some of these cases.

One example is **Gole (Mozambique)**, revolving around charges that 4 accused persons intended to traffic a child in order to sell him to a couple who was interested in him. The court exonerated

¹⁷⁶ In the end, the court exonerated the wife but convicted the husband.

¹⁷⁷ The language of the section is: “Carrying out any act or transaction involving the transfer of a child to another person for remuneration or any other advantage”.

¹⁷⁸ The following is the language of the relevant section 13A(4)(a): *Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child in return for any valuable consideration shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 15 years.*

¹⁷⁹ Unfortunately, only a summary of the case was available with no citation. All we know is that it was adjudicated in the Court of Songololo, where the theft of the child had taken place.

¹⁸⁰ This is the case in Sikapizya (**Zambia**), where a brother sold his 12 year old brother and in Saidi (**Malawi**), where the accused trafficked a mother and her day old baby.

all the accused persons of trafficking charges because the prosecution did not adduce evidence as to the purpose of the abduction. Instead, the court convicted all of them, except one,¹⁸¹ of the alternative charge of removal of a child by means of fraud and without the permission of guardians.

Similarly, in **Mwewa (Zambia)** and **Kasonde (Zambia)**, the accused persons attempted to sell minors to potential buyers. In both cases, the potential buyers prepared a sting with witnesses to the attempted sale. Moreover, in **Mwewa**, the accused persons pled guilty. Nevertheless the accused persons in both cases were exonerated of conduct facilitating trafficking, at least partially, because the courts ruled that the prosecution had not adduced evidence of intent to exploit or of the kind of exploitation intended.

Interestingly, in **Mushenya (Zambia)**, a similar scenario yielded a conviction. A husband and wife offered to sell their 3 year old son to another person, due to their poverty, but it is not clear for what purpose the child was to be sold. The potential buyer secretly contacted a police officer who posed as an employee of his company. The sellers, the buyer and the policeman went to the accused persons' house and they brought out the child. They then drove to the police officer's home and once there, he gave the husband and wife the money. While they were counting it, police officers who had secreted themselves apprehended them.

The accused persons pled guilty in court of first instance, but one of their appeals claims was that they had been charged according to section 143 of the Penal Code, which had been repealed at the time of the commission of the offences. This section related to child selling and trafficking in children, but did not require an intent to exploit,¹⁸² whereas **Zambia's** Trafficking Act, which was then in force, does require a 'purpose of exploitation'. Nevertheless, the court confirmed the conviction because, in its view, the Trafficking Act had replicated the former provision and was on the same subject. It is possible that the conviction also brought into account that one of the examples of the 'purpose of exploitation' of "child labour" in the **Zambian** Trafficking Act is "*the sale of a child*".¹⁸³

A similar issue and set of facts arises in **Mjwanga (Tanzania)**, where the accused, who was trying to sell a 10 year old child in a hotel, was apprehended by means of a sting carried out by 4 parties, one of whom posed as the buyer. The accused told these 4 parties that he was selling the child and when they he received payment from them, they apprehended him. It is not clear for what purpose the accused was selling the child.

As in **Mushenya (Zambia)**, the accused was charged and convicted in the court of first instance, according to a law which had been repealed before the offence was committed. Whereas the repealed Act did not require an intent to exploit,¹⁸⁴ the Trafficking Act does include such a requirement, in regard to all the trafficking crimes enumerated in it, and in particular, in regard

¹⁸¹ The court ruled that the accused person who was exonerated, named Fatima, had no knowledge of the intent of the other accused persons.

¹⁸² The language of this section was as follows: "*Any person who sells or traffics in a child or other person for any purpose or in any form commits an offence is liable, upon conviction, to imprisonment for a term of not less than twenty years.*" (our emphasis)

¹⁸³ However, as mentioned in a previous footnote, this interpretation raises questions, as the central definition of "child labour" in **Zambia's** Trafficking Act is "*all forms of slavery or practices similar to slavery*", both of which are severe 'purposes of exploitation'. Since the sale of a child is only an example of such practices, it is possible that the legislator intended it to conform to one of these 'purposes of exploitation'.

¹⁸⁴ The repealed Act was section 139A of the Penal Code, cap 16: "(1) Any person who – (a) engages in the act of buying, selling or bartering of any person for money or for any other consideration; (b) for the purposes of promoting, facilitating or inducing the buying or selling or the placement in adoption of any person for money or for any other consideration – (i) arranges for, or assists a child to travel within or outside the united Republic without the consent of his parent or legal guardian..."

to a specific trafficking crime which addresses adoption, and includes the following elements: “adopts or facilitates the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labour and slavery, involuntary servitude or debt bondage”.¹⁸⁵ Nevertheless, the High Court confirmed the conviction on trafficking, because it viewed the conviction on the basis of a repealed law as a mere irregularity which had not occasioned a failure of justice, since the Trafficking Act included similar offences.

As can be seen, the exonerations due to prosecutorial failure to prove an intent to exploit, largely transpire in cases where the exploitation did not transpire, where there is often no way to learn of the accused’s purpose. However, in **Mushenya (Zambia)** and **Mjwanga (Tanzania)**, although this was the case, the courts convicted.

4.7.2.2 Can the act of selling a child be viewed as “slavery”?

Another question which arises in regard to proof of ‘purpose of exploitation’ in cases of child selling, is if the very act of selling a child can constitute the ‘purpose of exploitation’ of “slavery”.

Such a claim was raised by the prosecution in **Msweli (South Africa)**,¹⁸⁶ a case revolving around the sale of a baby and his abduction. Two female perpetrators, who falsely represented themselves as a teacher and a social worker¹⁸⁷ kidnapped a 6 month old baby and sold him to a childless couple for money and an air conditioner. The couple who purchased the baby treated him well. Whereas he was sickly and in tattered clothes when he arrived, he was well and happy 5 months later when he was recovered. Thus no exploitation transpired and it was doubtful that the accused persons intended it.

The prosecution and seemingly the court¹⁸⁸ viewed the act of selling as the ultimate expression of slavery, which strives to commodify a human being. According to this view, the moment a child is sold, the elements of “slavery” have been fulfilled, and since “slavery” is clearly a ‘purpose of exploitation’ according to the Protocol and the Trafficking Act of **South Africa**, the element of exploitation is satisfied, even if the buyers treated the child excellently, and even if the accused persons knew and intended that this would be the case.

State’s Heads of Argument *State v. Msweli*

“Chattel slavery, also called traditional slavery, is so named because people are treated as the chattel (personal property) of the owner and are bought and sold as if they were commodities. It is the least prevalent form of slavery in the world today. In a child selling case, it is submitted that the exploitation is the sale itself, even without future harm. This brings it in line with the policy against slavery (defined as treating people as chattel/buying and selling of persons).”

State v. Msweli, Case No: RC 465/2015, in the Regional Court for the Regional Division of KwaZulu-Natal at Pinetown, 17/10/2017, State’s Heads of Argument

¹⁸⁵ Section 4(f) of **Tanzania’s** Trafficking Act.

¹⁸⁶ We note that only the following documents were available respecting this case: a list of charges, the State’s Heads of Argument respecting the judgment and sentence and the handwritten notes of the prosecutor regarding the judgment. However, the documents provide a wealth of detail, including respecting the testimonies heard.

¹⁸⁷ In addition, one of the accused persons represented herself on a different occasion as the sister of a nurse who worked in a hospital.

¹⁸⁸ In the handwritten notes of the prosecutor which recorded the main points of the judgment, she notes that in analyzing the elements of the crime, the court explicitly stated that the child was commodified. Thus, the conviction would seem to point to an acceptance of the prosecution claim that the ‘purpose of exploitation’ was slavery, as reflected by the sale of the baby.

Practitioners may find it useful to consider the strengths and weaknesses in this approach, in order to decide how to handle such cases in future.

On the one hand, slavery can be viewed as tantamount to commodification, whether according to the accepted definition in the Slavery Convention of 1926, which focuses on ownership, or according to the definition in **South Africa's** Trafficking Act, which focuses on "control".¹⁸⁹ Given these definitions, an act of sale, can be seen to represent the ultimate expression of commodification, at the core of the values which underlie the 'purpose of exploitation' of slavery.

However, on the other hand, certain doubts can be raised about this interpretation. *Firstly*, the question arises if it is in line with the accepted three pronged definition of "trafficking". In the law of **South Africa** and other jurisdictions "selling" is an 'action' of trafficking.¹⁹⁰ If it is to be considered both an 'action' and a 'purpose of exploitation' in a given case, this may militate against the approach that trafficking must satisfy three separate elements. However, on the other hand, this is not the only blurring of elements present in various kinds of trafficking. For example, the "force" element in "forced labour" and "forced marriage" is relevant to these 'purposes of exploitation', but also to the 'means' element of "force".

Secondly, this interpretation raises a question as to how to differentiate between the crime of trafficking and that of child selling in jurisdictions which include both crimes in their legislations.

Thirdly, the question arises if slavery can be fulfilled by one act alone. As the most severe of the 'purposes of exploitation' in the group of *slavery, forced labour, servitude, practices similar to slavery*,¹⁹¹ it would seem that slavery requires a constellation of circumstances in order to establish that it occurred. Thus, in cases where there were convictions on trafficking for slavery or slavery, as a rule this form of exploitation took place over time and was characterized by a combination of circumstances, including restrictions of freedom, long hours of work, no leisure time, debt bondage, isolation and on occasion force.

In this respect, we refer to **Shongwe (Eswatini)** where the court convicted on trafficking for slavery, and **O.B. Abba (South Africa)** where the court convicted on trafficking for slavery, servitude and sexual exploitation.¹⁹² We also refer to **Wei Tang (Australia)** and **Giulani (Israel)** which yielded convictions on slavery.¹⁹³ While none of the above cases concerns minor victims, they are relevant to the larger topic of what constitutes slavery. In view of the constellation of facts in these cases, it is doubtful if one act alone, like selling, can suffice to constitute slavery, though on the other hand, there is no doubt that the act of selling is a very weighty circumstance in the mosaic of evidence, and exemplifies better than any other, the exercise of ownership or control over a human being.

Fourthly, the question arises if this interpretation conflicts with the Interpretative Note on adoption, cited above, which requires that adoption of a child include an intent to exploit in order to constitute trafficking. It could be claimed that if we accept this interpretation of 'slavery', in

¹⁸⁹ See section 4.5.3.1 on *slavery*.

¹⁹⁰ See section 4.7.1 on *introduction* to this topic, which includes the various 'acts' of selling, exchanging, leasing, procuring which appear in Trafficking Acts in the region.

¹⁹¹ See the gradation between slavery, servitude and forced labour in Siliadin (ECHR).

¹⁹² O.B. Abba (**South Africa**), unlike the other cases cited, relates to the sphere of sexual exploitation. However, the court convicted, not only on trafficking for sexual exploitation, but also on trafficking for slavery, because of the particularly harsh constellation of circumstances, including force, severe restrictions of freedom, difficult working and living conditions, threats, using drugs as a method of control.

¹⁹³ For the constellation of circumstances present in these cases, we refer the reader to sections 4.5.5 and 4.5.8 on issues which arise in cases of trafficking in the context of labour exploitation.

effect, any illegal adoption for consideration could, in itself, be considered slavery, thus narrowing the ambit of the Interpretative Note or even neutralizing it. On the other hand, it can be claimed that this interpretation can fit into the Interpretative Note and the **South African** legislation, as it does not waive a ‘purpose of exploitation’, but merely views the act of sale as encapsulating the ‘purpose of exploitation’.

An case which provides us with an extreme example of the commodification of a child by means of selling her is **Muiambo (Mozambique)**,¹⁹⁴ where an 11 year old child is sold by her father as a security for a loan which he obligates himself to repay at 100% interest. Since there was no child selling offence in **Mozambique** at that time, the father and buyer or lessor were charged and convicted of trafficking, though the facts leave unclear what purpose of exploitation was intended. This might have been an appropriate case to test the interpretation whereby the act of sale is, in itself, slavery.

4.7.3 The requisite mens rea

Questions regarding mens rea arise in every case of trafficking in persons and are not limited to cases of child selling. However, in view of the weighty questions which arise about the ‘purpose of exploitation’ in such cases in particular, we will address this question here. We stress that this is not intended to be an exhaustive analysis of the topic of intent in cases of trafficking in persons in general.

4.7.3.1 Intent, knowledge, recklessness?¹⁹⁵

The question as to what constitutes the requisite mens rea in trafficking crimes is naturally a function of the respective criminal laws and Trafficking Acts of particular States. Consequently, these are the primary sources that practitioners should turn to when seeking to explore the intent required in cases of trafficking.

However, since most States across the region have adopted the Protocol’s requirement of a ‘purpose of exploitation’, there is value in consulting UNODC’s Model Legislative Provisions against Trafficking in Persons, which clarify that in order to prove trafficking, the accused must have either **intended** that the victim be exploited, or have **known** that the victim would be exploited. The Model Provisions also note that States may choose to add mens rea elements such as **recklessness** to cover cases where the accused did not know for certain that the exploitation might transpire, but realized that there was a clear risk that it would happen, and proceeded nonetheless.¹⁹⁶

¹⁹⁴ State v. Samson Chale Magona Muiambo, Processo no 31/10 in Tribunal Judicial Provincial de Manica (provincial court), 10 December 2010. Only a summary was available in the UNODC Human Trafficking Case Law Database (UNODC No. MOZ001).

¹⁹⁵ For readers who are interested in making sense of the welter of possible mental states, the Model Penal Code of the United States can be of help. I refer readers to Wechsler H., “*On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*”, *The Annals of the American Academy of Political and Social Science* 1962;339(1):24-41.

¹⁹⁶ For a differentiation among intent, knowledge, recklessness and negligence, see *ibid*.

UNODC's Model Legislative Provisions against Trafficking in Persons

Element #3: Mental State: For the Purpose of Exploitation

*"The Trafficking in Persons Protocol makes clear that whatever prohibited act(s) are alleged, they must also have been done for the purpose of exploiting the victim. Article 5(1) also makes clear that States Parties are obligated to criminalize conduct that is committed intentionally. As a mens rea standard in criminal law, the phrase "for the purpose of" can mean either knowledge or intention. This means that evidence that the accused engaged in the prohibited conduct...**with either the intention that the victim be exploited or knowledge that they would be exploited will be sufficient to establish the offence...***

*Trafficking in persons is a crime of specific intent (or special intent). **Specific intent crimes require, for example and as in the case of trafficking in persons, an intention to bring about a specific consequence or knowledge that it will occur.***

...

It remains open to legislators to include additional mens rea elements in their national offences, subject to the requirements of national legal systems. For instance, legislators could add **recklessness** to the offence, alongside knowledge/intention, would enable a prosecution in cases where the accused committed the physical elements and did not know for certain that the victim would be exploited but appreciated there was a risk that the victim would be and, despite knowledge of that risk, proceeded. Recklessness, in this context, would be, as an additional subjective mental state, and addresses the behaviour of an accused who proceeds in the face of the clear risk that the victim will be exploited."

(our emphases)

UNODC Model Legislative Provisions against Trafficking in Persons, Article 10 on Human Trafficking Offence and the Elements of the Crime, p. 36 of English version

An example of a mens rea provision which seems to incorporate the mental state of recklessness in regard to the trafficking crime, and negligence in regard to allied crimes, appears in **South Africa's Trafficking Act**.

South Africa's Trafficking Act

Article 2

2. (1) For purposes of this Act, a person is regarded as having knowledge of a fact if—
 - (a) that person has actual knowledge of the fact; or
 - (b) the court is satisfied that—
 - (i) the person believes that there is a **reasonable possibility** of the existence of the fact; and
 - (ii) the person has **failed to obtain information** to confirm the existence of that fact, and "knows" or "knowing" must be construed accordingly.
- (2) For purposes of this Act, a person **ought reasonably to have known or suspected** a fact if the conclusions that he or she ought to have reached are those which would have been reached by a **reasonably diligent and vigilant person** having both—
 - (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
 - (b) the general knowledge, skill, training and experience that he or she in fact has.
- (3) A reference in this Act to any act, includes an omission and "acting" must be construed accordingly.

(our emphases)

Prevention and Combating of Trafficking in Persons Act, 2013, **South Africa**, article 2.

Clearly this Act facilitates convictions in that it widens the scope of the requisite mens rea required in trafficking crimes to **recklessness**, where it is enough that the person is aware of a clear risk and disregards it.¹⁹⁷ Moreover, in respect to allied crimes like using the services of a victim of trafficking (section 7) or leasing premises for trafficking (section 8(1)(a)), **negligence** suffices, where the person is not aware of the substantial risk, but ought to be aware of it.¹⁹⁸

No judgment in the child selling cases in our sample includes an in depth analysis of the mens rea required. However, it might be valuable to analyze the **Msweli (South Africa)** case, in the light of the requisite mens rea in baby selling cases, as it provides us with a wealth of details and a particularly thorny issue in regard to intent, in that the childless couple who bought the baby treated him wonderfully. Not only was there no exploitation, but it was doubtful that the accused persons had intended or known that there would be exploitation.

The question arises: can an analysis of the accused persons' mens rea according to the parameters in the **South African** Trafficking Act, give us an understanding of the conviction in this case? Could this have been one of the court's considerations, even independently of the thesis that the sale, in itself, constitutes "slavery"? The circumstances of the case may provide answers to these questions.

The accused persons were not a registered adoption agency, which conducts a series of interviews and visits to the homes of prospective parents over a period of time in order to ascertain their fittingness to adopt. They knew very little of the buyers, having met the female buyer only on 2 occasions outside her home, and her husband only once, when they transferred the baby; they maintained contact with the buyers mainly through a middleman named Thembi; and the transaction extended over a relatively short period of time, from the end of September – beginning of October until October 29. Moreover, the behaviour of the dominant accused towards the baby, when he was in her care, showed a lack of attention to his welfare, as the baby was transferred to the buyers without formula and the accused even asked for the baby's clothes and bottle to be returned, as she had borrowed them from a neighbour. In addition, when the female buyer told the dominant accused that she did not have the money to buy the baby, she threatened to throw him or give him away.

Given this constellation of circumstances, it seems that the accused persons were reckless in their behaviour, in that they were aware of the risk of selling the baby to a couple whom they hardly knew and yet took no steps to ascertain if there was a risk.

Thus, according to the **South African** Trafficking Act, the accused persons seem to have had the requisite mens rea of recklessness. They "knew" that there was a reasonable possibility that exploitation could occur and failed to obtain information which would establish that fact.

This analysis shows how a mens rea of recklessness may lead to a conviction, even in a case where no actual exploitation took place after the child was sold.

4.7.3.2 *Is it required to prove the kind of exploitation intended?*

The question arises if it enough that a perpetrator can reasonably envision *some* form of exploitation or must he envision a particular kind of exploitation in order to have the requisite mens rea.

As we have seen in section 4.3.1 in the context of cases where the exploitation did not transpire, courts have different approaches as to the answer to this question. While not all these cases revolve around child selling, their rulings have bearing on the issue at hand.

¹⁹⁷ See Wechsler, On *Culpability*, pp. 29-30.

¹⁹⁸ Ibid. p. 30

Thus, in **Milinga (Tanzania)** the case revolved around the discovery of a group of young women on a bus to Kenya, without valid travel documents, who told law enforcement that they had been promised jobs in massage parlours, bars and saloons in Nairobi. In analyzing the element of ‘purpose of exploitation’, the High Court explicitly expressed its opinion that it is enough for the prosecution to prove the risk of exploitation of any kind. The prosecution is not required to prove what sort of exploitation was intended.

The same approach seems to be adopted by other courts, although there are no explicit rulings on this issue. Thus, in **Chiyenda (Malawi)** the accused deceptively offered a 15 year old child to take her to **South Africa** in order to marry the accused’s brother. Though there were suspicious circumstances which pointed to an intention to exploit, it was never clear what kind of exploitation was intended. Nevertheless, the accused was convicted of trafficking. Similar approaches seem to be adopted by the courts in **Bandawe (Malawi)** and **Mutwale (Zambia)**, though they too do not explicitly analyze this issue.

On the other hand, in a number of child selling cases, courts seem to require the prosecution to prove the particular kind of exploitation intended. The clearest ruling is found in **Kasonde (Zambia)** where the High Court of **Zambia** explicitly states that the prosecution must prove the kind of exploitation intended. The failure of the prosecution to do so contributed to the acquittal of the accused by the High Court of charges on conduct facilitating trafficking by means of an advertisement alluding to or suggesting trafficking.

In a similar child selling case, namely, **Mwewa (Zambia)** the accused persons were apprehended before they had the chance to conclude the sale, so that it was not clear what kind of exploitation had been intended. The High Court exonerated the accused, in part, because the prosecution had not proved the purpose of exploitation. Though the language of the court is less clear than in **Kasonde**, its ruling can be interpreted to mean that the prosecution must prove what kind of exploitation was intended.

We refer the reader to section 4.3.1 for a more detailed picture of these cases.

Issues Arising in Cases of Child Trafficking

Child trafficking in a labour exploitation context

- Is there a difference between child trafficking and 'mere' child labour law violations? (See the different approaches of regional Trafficking Acts/regional cases)
- Should there be different standards for child trafficking for slavery/practices similar to slavery/servitude/forced labour in comparison to adult trafficking? (The approaches of the Protocol and regional Trafficking Acts/the impact of definitions of "child labour"/what regional cases can teach/ what international cases can teach).

Child trafficking for sexual exploitation

- What is the definition of "sexual exploitation"? Does it require physical contact?
- When are a number of charges improper in terms of duplication of charges? (Trafficking for sexual exploitation and rape? Trafficking and kidnapping? Trafficking/rape/assault?)
- What are the patterns of child trafficking for sexual exploitation which can help practitioners identify cases? (Methods of recruitment/profile of victims/profiles of traffickers/series of exploitation/number of victims/use of internet)

Child sale or adoption

- Is it required to prove a 'purpose of exploitation' beyond the sale or adoption itself? Can the act of the sale or the adoption be considered to be "slavery" in itself?
- What is the requisite mens rea in cases of child sale or adoption? Intent/knowledge/recklessness/negligence?
- Must the prosecution prove the particular kind of exploitation intended or does it suffice to prove intent to exploit in general? (The different approaches of courts).

NOTES

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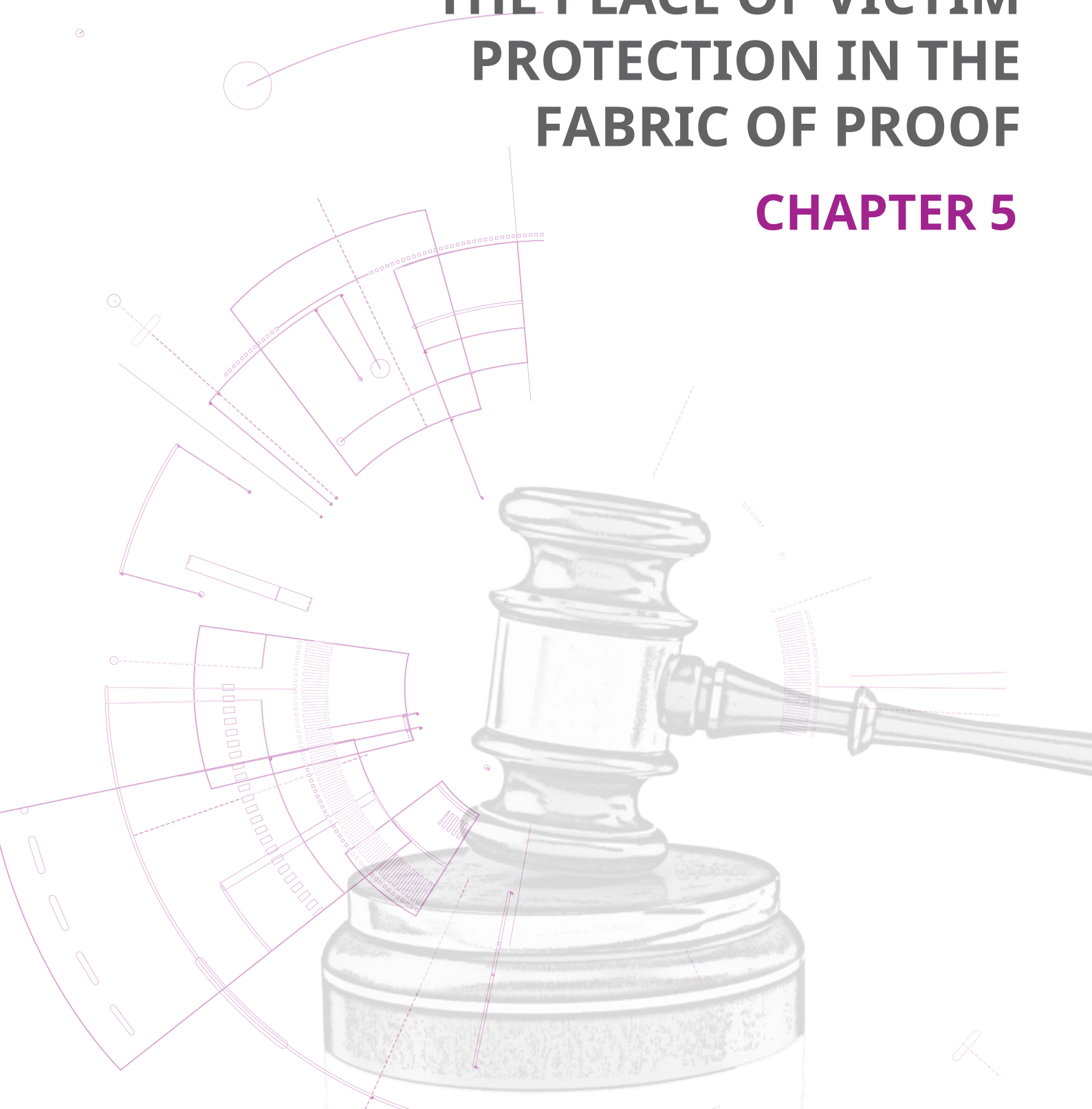
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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES
Regional Case Digest - Southern Africa

THE PLACE OF VICTIM PROTECTION IN THE FABRIC OF PROOF

CHAPTER 5



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

THE PLACE OF VICTIM PROTECTION IN THE FABRIC OF PROOF

CHAPTER 5

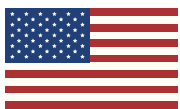


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5. THE PLACE OF VICTIM PROTECTION IN THE FABRIC OF PROOF

5.1 Introduction: the impact of victim trauma

Previous sections of this digest have highlighted victims' vulnerabilities and trauma and the impact this has on the availability and quality of their testimony. Alongside the impact on trial results, the traumatic events which are part of trafficking deeply affect the victims themselves. Thus victim protection is important, both to ensure that victims can render credible testimony at trial, and as an aim in itself – to assist human beings who continue to suffer the effects of trafficking. This reality means that both law enforcement and the public have a wider role in trafficking in persons cases compared to other cases. This wider role includes victim protection.

Before we enter into the roles of police, prosecutors, courts and the public in victim protection, it is important to listen to the voices of the victims, as they are reflected in a small sample of cases.

On a short term level, the impact of trauma can be seen in the victims' testimony before courts. For example, in **Eze (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women addicted to drugs, one of the victims, named Harmse, started to cry uncontrollably shortly after commencing evidence by close circuit television, which caused the trial to be postponed. Clearly she was traumatized. In **Yoseph Girmay Testagaber Adanech Beru (Lesotho)**, a case revolving around the alleged trafficking of a woman in the context of domestic servitude,¹ the prosecutor who summarized the case describes the reaction of the victim on the stand as follows:

"On the first day of the trial when the victim saw the accused she froze and could barely say a word. The prosecutor had to request a postponement to reassure her again. Eventually she gave testimony with much difficulty, further complicated by the need for an interpreter."

Rex v. Yoseph Girmay Testagaber Adanech Beru, CR:07/12 before the Magistrates Court for the District of Maseru, verdict 17/12/2012.²

¹ We note that the court exonerated the accused in this case.

² We note that we did not have access to the full case, as the verdict was rendered ex tempore (on the spot) and information on it was supplied by the investigating officer and prosecutor.

Long term impact is reflected in several cases as well. One example is **Jonas (Namibia)**, where an 18 year old girl³ was trafficked from her home to a remote farm where she knew no one but the accused. Instead of the good job she was promised, she was given to a series of men for sexual exploitation. When she refused, she was thrown out of the accused's house with all her luggage and had nowhere to go, whereupon she unwillingly submitted to the exploitation. The following is how the court described the impact of the trafficking upon her, as arising from her testimony:

"It was again complainant's evidence that the accused by doing what she did to her had destroyed her life. She has no future and she is psychologically affected because right now she is not thinking straight or properly."

S. v. Jonas (CC14/2017) [2019?], High Court of **Namibia** Main Division, Windhoek

Similar testimony appears in **Allima (South Africa)**, where a 16 year old girl was abducted from her home and given to a series of men for sexual exploitation. The events she experienced were so traumatic that her memory of her real identity was wiped out. The following testimony reflects the impact of the trafficking on her life:

"I have a trauma. I lost part of my life that at the time when we interact as girls and the girls maybe will talk about making their mothers happy, making their parents happy in behaving well. I feel that I'm no longer a virgin so my parents won't be happy about that. So sometimes I feel sidelined or not like a real girl."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (June 26, 2014).

Moreover, in this case, a clinical psychologist evaluated the possible long term damage to the victim thus:

"There are triggers in life which are unpredictable...Now she is with protective, caring parents, but in future, people who don't know of her trauma may say or do something which will trigger it. Moreover, psychologists do not cure but only assist a person to develop beyond the challenges... Remember that we are born on this earth and we do not move to heaven once we are born. We still stay with the human beings which are two legged and we still stay with the faces that can remind us of our past and therefore if we are reminded because of certain conditions, the fear comes back."

State v. Allima, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (June 26, 2014).

The impact of trafficking on young children may be yet more pervasive. Thus in **Mabuza (South Africa)** when the judge in the court of first instance deliberated upon the proper sentence for trafficking 4 children for sexual exploitation, he also discussed the effects of the trafficking upon the child victims:

³ The court noted that she was a bit younger than 18 when the trafficking took place, but since the prosecution had not charged child trafficking, the court dealt with the case as if the victim were 18 years of age.

"I could see during their evidence that they had reached a stage in their lives where they had actually lost all hope of a happy and safe childhood and adult life and that, therefore, they continued to subject themselves to continued rape, simply because they had nowhere else to go. When one loses all hope in life, the next step is to kill oneself and, some of these children, I sensed, were on the verge of doing exactly that."

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance.

5.2 The role of police, prosecutors and judges

In order to respect the victims' pain and allow them to testify fully, the police, prosecution and courts may need to assume a broader view of their role than in other cases. A victim who has lost trust in the world may not be willing to cooperate with law enforcement; his or her vulnerabilities may lead to an inability to testify or to an inability to recognize his or her victimhood; his or her trauma may make him or her reluctant to return to the events which triggered it. If police, prosecutors or judges do not address these realities, cases may fail and victims may be re-traumatized.

5.2.1 Developing trust

In an effort to meet this challenge, in several cases in the region, we find practitioners taking the time to develop a relationship of trust with victims.

A case which illustrates this building of trust comes from **Lesotho**: **Yoseph Girmay Tesfagaber (Lesotho)** The case revolves around the alleged domestic servitude of an Ethiopian woman in **Lesotho**. Although the case ended in an exoneration, the prosecutor's summary of the difficulties and how he tried to address them is instructive:

"In the meantime the prosecution prepared Tigist for trial. At first it was very difficult to gain her confidence. She clamped up and would not speak as she was not sure who she could trust. However, the prosecutor took time to explain his role and that he was on her side, and to explain her how the criminal justice machinery worked and the process that would unfold. He also familiarized her with the court room and surroundings. On the first day of the trial, when Tigist saw the accused, she froze and could barely say a word once in the witness box. The prosecutor had to request a postponement of the matter to reassure her again. Eventually she gave testimony with much difficulty, and this was further complicated by the need for an interpreter."

Rex v. Yoseph Girmay Testagaber Adanech Beru, CR:07/12 before the Magistrates Court for the District of Maseru, verdict 17/12/2012.

The importance of developing a relationship of trust with victims is also illustrated in the **South African** case of **Mabuza (South Africa)**, a case revolving around the sexual exploitation of a number of children, in which one of the victims did not disclose what had happened to her until she developed trust in the prosecutor. The court quotes her explanation as to the impact of the prosecutor's behaviour thus:

“The reason that she advanced for this late disclosure was that when she saw that the other children were free to disclose what had happened to them, and when she saw she could trust the prosecutor, she disclosed her ordeal in detail.”

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed Mabuza v. State Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of first instance..

5.2.2 Victim Protection Measures

Another way practitioners can encourage victims is by means of various victim protection measures which afford victims the chance to feel safe and may allow them to come forth and testify.

5.2.2.1 Victim protection steps outside the courtroom

In several cases, police or prosecutors sent victims to a safe house, thus allowing them to stay in a place of refuge where they could recover, even if partially. This occurs in **O.B. Abba (South Africa)**, a case revolving around trafficking for sexual exploitation, slavery and servitude, and in **Mutwale (Zambia)**, a case revolving around the trafficking of a number of children before the exploitation actually transpired. Similarly, in **Balele (South Africa)**, a case revolving around the trafficking of a number of children for sexual exploitation, the prosecution made sure that the victim and her mother, both from **Mozambique**, were accommodated in a safe house. In **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, the police officer made arrangements with the Immigration Department to place the workers who had been exploited in different accommodations because the present ones were not proper and in order to prevent intimidation by accused. He also made arrangements for an interpreter in order to properly interview the workers. In addition, a police superintendent testified that an interview was conducted with the victims in order to assess if they needed any medical or social probation assistance. In **Eze (South Africa)** too, a case revolving around the trafficking for sexual exploitation of two addicted young women, we find a description of the victims' withdrawal symptoms from drugs while in a safe house after their rescue.

In **Muzara (Zambia)** 5 children trafficked by a relative from the Congo to **Zambia**, were given counselling; their relatives were traced; and they were given temporary travel documents to return to their homes. In addition, there was coordination between the Social Welfare Department and the police to resolve matters in court within 2 weeks. Coordination also took place with the I.O.M. (International Organization for Migration) in order to ensure the children's welfare.

Another example of victim protection steps undertaken by police can be found in **Mujee (Botswana)** where the police officer who rescued the victim of trafficking for sexual exploitation made sure that she was interviewed by a female police officer.

A case in which the court censured the police and prosecution's failure to adequately protect victims and their families is **Lukas (Namibia)**, a case revolving around the trafficking of two minors for sexual exploitation. Besides censuring the fact that the investigation only began in October, when the crimes were committed in April – May, the court notes that even when giving testimony, the victims and their families had not been offered counselling.

5.2.2.2 Victim protection in the courtroom

In other cases, prosecutors requested and courts allowed various victim protection supports in the courtroom. These included hearing victims' testimony via closed circuit television or in camera, and for example in **O.B. Abba (South Africa)**, **Fakudze (South Africa)**, **Eze (South Africa)**, revolving around trafficking for sexual exploitation and **Kapinga (Malawi)**, a case revolving around child selling. Courts also assisted victims by ordering the media not to disclose

their identities, as in **Dragon (Namibia)** and **Mabuza (South Africa)**, both of which revolve around trafficking for sexual exploitation of minors.

South Africa affords victims of crime a special kind of support which allows their testimony to be heard via an intermediary, rather than directly, if they are under the biological or mental age of eighteen years and if undue mental stress or suffering would be caused to them by testifying directly before the accused. In view of its importance, we will quote the relevant sections of the **South African** Criminal Procedure Act which establishes this option:

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place-

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries."

Section 170A(1) of The Criminal Procedure Act 51 of 1977 of **South Africa**

While this section is not limited to trafficking victims, it is particularly relevant to them, and there are a number of cases in which **South African** courts ordered that the testimony of victims of trafficking should be given via intermediaries. These include: **Mabuza (South Africa)**, **Fakudze (South Africa)**, **Balele (South Africa)** and **Matini (South Africa)** where the child victims were also mentally disabled, and **Eze (South Africa)** where one victim was 19 years of age, but her mental age was estimated between 14 and 18 years of age. All these cases revolved around trafficking for sexual exploitation.

Courts can also assist victims by allowing them to sit during testimony and by postponing testimony if the victim is exhausted as occurred in **Matini (South Africa)**⁴ and **Allima (South Africa)** and by actively clarifying to victims inaccuracies or obscurities in the defence counsel's questions, as happened in **Matini (South Africa)**, **Allima (South Africa)** and **Mabuza (South Africa)** in the court of first instance. These cases revolved around trafficking for sexual exploitation. In **Allima (South Africa)** the court was also active in asking questions of the

⁴ Compare this situation with **Mabuza (South Africa)**, where the court notes the overly complex method of questioning employed by the defence counsel.

witnesses after the parties had completed their examinations, in order to clarify certain points of their testimonies.

Sometimes, the court is caught between two valid goals: victim protection and fairness to the accused. This occurred in **Allima (South Africa)**, a case revolving around the abduction of a 16 year old from her hometown for the purpose of sexual exploitation by a series of men. The victim was so traumatized that she lost memory of her true identity. After the victim underwent the ordeal of testifying under grueling cross examination, the defence requested that she be brought back to testify, following the accused's testimony, in the light of new information discovered by way of a new defence witness. The court allowed this in order to ensure fairness to the accused, but limited the questions to ones addressing the new information only and ordered that the testimony be heard in camera. Interestingly, in its final ruling, the court expressed doubts as to its decision to recall the victim, commenting that the request should not have been made, nor should the court have granted it. Equally interesting, the court ordered that the victim's testimony be heard in camera only during this late part of her questioning.

5.2.2.3 Identifying victims: the special role of police and courts

Naturally, police are often in the forefront of identifying victims of trafficking. However, sometimes judges can perform this function, even if they are not adjudicating a criminal case on trafficking. Such a scenario transpired in the **Eze (South Africa)** case where one victim appeared before a Children's Court judge in a matter relating to her children. She told her story to the judge, who immediately referred the case to police. They subsequently arrested the perpetrator and rescued an additional victim. The perpetrator was convicted of trafficking for sexual exploitation.

5.2.2.4 Sentencing as an arena of victim protection

In sentencing perpetrators, courts can both act to protect the specific victims who testified before them and to prevent future persons from falling victim to the perpetrators' actions. They can do so by means of sentences which include compensation to victims, stiff penalties for perpetrators, rehabilitative orders and preventative orders.

Courts can provide protection for the specific victims before them by ordering that the accused pay them **compensation**. This was done by the court in **Alam (Seychelles)** which ordered that victim compensation should be taken from the cumulative sum of the fines imposed on the accused.

Penalties too may serve the cause of victim protection. Many Trafficking Acts across the region mandate minimum sentences for trafficking offences or at the least, severe penalties which courts then impose. Not only can this serve to forward retribution, but also to serve as a deterrent to future crimes, thus protecting persons from falling victim in the future.

Courts also sometimes include **rehabilitative measures** in their sentences. In one case, the court designed a rehabilitative program for a trafficker, who had herself formerly fallen victim to the dominant trafficker. This was done in **Matini (South Africa)** where the court ordered that in addition to other penalties, this trafficker must attend and successfully complete programs related to life skills, orientation, and sex offence specific treatment.

Moreover, in several cases, court meted out **orders to prevent perpetrators from repeating their crimes**, in an effort to protect future persons from falling victim. Examples are prohibitions of: employment in work with vulnerable populations,⁵ possession of firearms;⁶ and

⁵ See **Matini (South Africa)** and **Fakudze (South Africa)**, the court of first instance's sentence.

⁶ *Ibid.*

using intoxicating liquor or drugs except when prescribed.⁷ Another example is ordering that the names and details of the perpetrators be entered into the Sexual Offenders Register,⁸ and in one case, the Attorney General was ordered to report these crimes to Facebook through the complaint mechanism provided for on the Facebook platform and request that the accused's account profiles be removed, as he had used social media to lure unsuspecting victims.⁹

5.2.2.5 *Questionable behaviour on the part of law enforcement and its impact*

Sometimes the questionable behaviour of law enforcement has a negative impact on victim protection in general and on victim willingness to cooperate in particular.

In the **Mboo (Zambia)** case, the victim of an attempt to sell his body parts is locked in a cell in a police station the night of the rescue, instead of being sent to a safe house.¹⁰ While it is possible that police do not yet know the full details of the case, it seems clear, even at that stage, that he is a victim, not a perpetrator, as the police took part in the sting which resulted in the arrest of the perpetrator and the rescue of the victim. Moreover, when the victim testifies on the stand that he does not remember anything, the prosecution requests that he be declared a hostile witness and has him remanded to custody. When he returns to testify, he is unable to cast light on the core facts of the case, since he had no idea that the accused was attempting to sell him and was induced by him to drink heavily on the night of the crime, so that he does not remember what happened. Thus, declaring him a hostile witness and remanding him to custody, not only risked causing him additional suffering, but proved of little utility to the case.

Another case which raises doubts is **Allima (South Africa)**, where the victim's testimony is held in camera only during the second stage of the proceedings, when she is recalled to render further testimony, although she is a vulnerable minor from the start.

Moreover in cases across the region, we see instances of police behaviour further eroding victims' trust. This can be seen in **Eze (South Africa)**, a case revolving around the sexual exploitation of two addicted young women, where the police raided the premises where one victim was held. Although she reported the abuse, the police returned her to the abuser. Her reaction, as described by the court, is instructive:

"This made her lose all faith and hope in their ability to help her."

State v. Eze, Case no. 14/546/2013 in the Regional Division of Gauteng, held at Pretoria, 27 November 2017

Clearly, this loss of trust resulted in subsequent delays in reporting her abuse, and indeed the case reveals that in the end, she reported to the Children's Court judge, rather than to the police.

Another example occurs in **Veeran Palan (South Africa)**, a case revolving around the trafficking for sexual exploitation of two young women, where the female police officer encounters resistance from her charge office commander when she wishes to arrest the accused on the grounds of trafficking, and must substitute the charge of kidnapping. Yet more disturbing is her description of other police officers' behaviour towards the two victims, which requires her to protect them from the other police officers who were reluctant to let the investigation continue or to assist her in any way.

⁷ See Matini (**South Africa**).

⁸ See Matini (**South Africa**); Fakudze (**South Africa**), the court of first instance's sentence; M.L. (**Seychelles**).

⁹ See M.L. (**Seychelles**).

¹⁰ We note that this might have been done due to a lack of shelter facilities.

An example of seeming police negligence occurs in **Yoseph Girmay Testagaber, Adanech Beru (Lesotho)** where the person who rescued the alleged victim from her place of work reported the matter to the police, but nothing was done. After 2 days of waiting, she took the alleged victim to a location far from the residence where she had been working so that she would not be found, and reported to the local police there who took action.

Naturally, corrupt behaviour by law enforcement personnel or other persons with powerful positions can also serve to erode victims' trust. Thus, in some cases, perpetrators tell victims that they have connections with the police or are otherwise well connected, which results in the victims' reticence to seek help. Such a scenario unfolds in **Alam (Seychelles)**, a case revolving around trafficking for practices similar to slavery and forced labour, **Mahuni (Zimbabwe)**, a case revolving around procurement for prostitution, and **Veeran Palan (South Africa)** and **Eze (South Africa)**, cases revolving around trafficking for sexual exploitation.

We refer the reader, in addition, to section 3.2.2.7 on *threats relying on the trafficker's powerful connections* for a more detailed description of these cases.

In addition, there are 2 cases where former law enforcement personnel and a civil service worker, participated in the trafficking crime. While the cases themselves do not explicitly address the effect of this phenomenon on the victims, it is probable that it led to a certain loss of trust. For example, in **Msweli (South Africa)**, a case revolving around the selling of a baby, the fact that one accused person was a former police officer led the baby's mother to trust her at first. Conversely, the discovery of this woman's deception may very well have served to erode her trust in the authorities. Similarly, in **M L (Seychelles)**, a case revolving around the trafficking of children for sexual exploitation, one of the perpetrators worked in a government position in the **Seychelles Fisheries Association** and continued to work with them free-lance until his remand. This too, may have served to erode the children's faith in government.

5.3 A comprehensive view of victim protection

A leading case regarding victim protection and its ramifications on proving a case comes from **South Africa**. This is **S.L. (South Africa)** which provides comprehensive guidance as to what authorities need to do in order to protect victims and pursue cases.

This case mirrors the famous **Rantsev (ECHR)** case.¹¹ Like that case, it too, rules that the State and its agents have positive obligations to protect victims of trafficking and describes how failure to do so may impact on a case. While the Rantsev Case draws on the European Convention of Human Rights, this case draws on the **South African Constitution** and its Prevention and Combating of Trafficking in Persons Act. These positive obligations include investigating the trafficking situation, referring the victim to a safe place and giving her or him needed medical care.

The facts of the case are as follows: In a police raid on a hotel functioning as a brothel, which according to informants was a trafficking hub, police detained a number of Thai persons who were working in the brothel. They were held at a detention center, pending their deportation to Thailand, because they were suspected of contravening the Immigration Act. They were detained for two months without being deported.

The applicants were interviewed by an immigration official and when they told him that they did not understand English, he made a Thai interpreter available. The Ministry of Home Affairs admitted that the detainees were suspected victims of trafficking. The applicants did not appeal their deportation and did not seek protection.

¹¹ Rantsev v. Cyprus and Russia, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, available at: <https://www.refworld.org/cases,ECHR,4b4f0b5a2.html>

The court ruled that the police and the Ministry of Home Affairs had violated their obligations according to **South Africa's** Trafficking Act. The police did not conduct an investigation as to trafficking in persons; the decision to deport the detainees was undertaken almost immediately following their arrest; no suspects were arrested on charges of trafficking in persons; nor were the detainees requested to testify against traffickers. The police also failed to furnish the Department of Social Development with information gathered from investigations, in order to properly assess the detainees' situation. The only legislation applied was the Immigration Act, although information was received from an informant that the females from Thailand were forced to work as prostitutes at the hotel, and despite confirmation by three of the detainees of this information.

Not only does the court recognize that speedy deportations of suspected victims may impede investigations, but it also stresses the dangers involved in deporting a victim without assessing the risks that she may face in the country of origin, thus violating her right to be protected.

The court recognizes typical victim mindsets and behaviour which impact on investigations and recognition of victim status. Thus, it stresses that it is not enough for police and the authority responsible for recognizing victims to rely on the victims' statements alone, as their vulnerabilities may lead them to not view their experience as one of exploitation and to not view themselves as needing protection. The court enumerates various typical vulnerabilities in order to explain this typical behaviour pattern among victims (socio-economic status, illegality in the country of destination, Stockholm syndrome,¹² fear of harm to family members should they report their experiences, approaching their coerced work positively as it allows them to send money to their families).

The court also recognizes the pitfalls which can arise from language barriers between interviewers and victims, and indeed endorses the suspicion that perhaps in this case the interpreter was involved in the case, before he acted as an interpreter, which may have caused him to misrepresent what the victims were saying. This evokes UNODC's Anti Human Trafficking Manual for Criminal Justice Practitioners, Module 10 on "Interpreters in Trafficking in Persons Investigations".¹³

The court also stresses that suspected victims of trafficking should not be prosecuted for illegalities without the written authorization of the Director of Public Prosecutions. Due to its importance, this topic of non – criminalization will be addressed separately further on in section 5.5 on *the importance of not criminalizing victims*.

5.4 The role of the public in victim protection

The behaviour of the community can impact on victims' well-being and sense of trust and self-worth, which can in turn enhance their suffering and also affect their ability to testify against the trafficker.

The community's importance is recognized in trafficking laws across the region. Thus, many States legislatures have imposed a duty upon the public to report cases of trafficking in persons. The violation of this duty may entail criminal sanctions in some States.¹⁴

¹² See section 3.2.4.2 on *use of trauma bonding or Stockholm syndrome* as a subtle means of coercion and abuse.

¹³ Accessible at: https://www.org/documents/human-trafficking/TIP_module10_Ebook.pdf

¹⁴ See for example: Article 8 of **Mozambique's** current trafficking law from 2008, which imposes a duty to report on the part of all citizens; article 10 of **Seychelles's** Trafficking Act from 2014, which imposes a duty to report on certain professionals and on the public at large; article 13 of **Mauritius's** Trafficking Act from 2009, which imposes this duty on any person; Sections 18 and 19 of **South Africa's** Trafficking Act from 2013, addressing with the duty to report child and adult trafficking; section 12 of **Namibia's** Trafficking Act from 2018; sections 13 and 14 of **Botswana's** Trafficking Act from 2014, addressing the duty to report child and adult trafficking.

Usually, this kind of duty is not imposed on the public respecting crimes in general, as legislatures are reticent to impose too many burdens on individuals, especially in areas generally reserved to the realm of morality.¹⁵ The duty to report suspected trafficking crimes recognizes this crime's special attributes which lead to a dearth of self-reporting by victims. In trafficking situations, often victims cannot complain, because they are physically imprisoned, are isolated, or are psychologically under the sway of the trafficker. It follows that the public's role in uncovering trafficking may be far more crucial than in other crimes.

Moreover, the community's attitude towards the exploitation may impact positively or negatively on the victim and consequently on the quality and availability of his or her testimony.

Cases across the region show the positive and negative roles that the community can fulfill and highlight the importance of the public's involvement. Though few cases explicitly allude to the impact the community on the behaviour of the victim, it is probable that it has a powerful impact.

The positive role the public may play appears in many cases across the region. In a few cases, the initial report to police is by a member of the public. One example is **Gole (Mozambique)** in which a whistleblower reveals that he received a call from a woman who proposed to sell black or albino children who could be traded dead or alive. While the accused persons were exonerated from trafficking, some were convicted on an alternate charge.¹⁶ Similarly in **Mboo (Zambia)**, a case revolving around trafficking for the removal of body parts, **Kasonde (Zambia)** and **Mwewa (Zambia)**, cases revolving around the selling of children, **Mutwale (Zambia)**, a case revolving around the trafficking of a number of children and **Mujee (Botswana)**, a case revolving around the trafficking for sexual exploitation of an impoverished minor, illegal in **Botswana**, the investigations began on the basis of tips from the public.

In a number of cases, the public do more than inform the police; they act to rescue the victims. One example is **Mahuni (Zimbabwe)**, a case revolving around the procurement for prostitution of two young women, where the niece of the accused helps the two victims to escape. This also transpires in **Ogochukwu (South Africa)**, a case revolving around trafficking for sexual exploitation, where church members rescue the victim. Another example is **Mabuza (South Africa)**, a case revolving around the trafficking for sexual exploitation of a number of children, where the wife of one of the accused number 1's employees takes in one of the victims. In addition, in **Hlabi (South Africa)** employees at the taxi rank where the two minor young girls were taken, threatened the accused persons who arrived in order to collect them, and refused to allow the children to leave with them.¹⁷

Similarly, in **Jonas (Namibia)**, a case which revolves around the recruiting of a victim for sexual exploitation by a succession of several men, the cousin of the accused, allowed the victim to stay with her at one point and provided a refuge for her.

In yet another set of cases, the public is seen as a force which exerts pressure on the accused. Thus in **Esther Phiri (Zambia)**, a case of child trafficking, people in the community begin to suspect that the accused person sold a child and they threaten her that she will go mad. As a result of the fear she experiences, she returns the child. Similarly, in **Msweli (South Africa)**, one key witness, named Thembi, cannot be located because she felt threatened by the community who was angry with her, as she had taken part in the selling of a baby.

¹⁵ See for example, Susan J. Hoffman, "Statutes Establishing a Duty to Report Crimes or Render Assistance to Strangers: Making Apathy Criminal", Kentucky Law Journal: Vol. 72 : Issue 4 , 5.

¹⁶ The alternate charge was removal of a child by fraud and without permission of guardians.

¹⁷ This is stated in the State's Heads of Arguments.

In a number of cases, members of the public who are approached by accused persons to purchase victims, report to police and take part in stings so that the accused can be apprehended. This occurs in **Mwewa (Zambia)**, in **Kasonde (Zambia)**, in **Mboo (Zambia)** and in **Mushenya (Zambia)**, although not in every case does this lead to a conviction.

In some cases, persons with authority in the community take part in the plan to apprehend the accused person. This occurs in **Mwewa (Zambia)**, where the headman advises the person who was approached by the accused to buy a baby, to organize people to hide in his house in order to apprehend the accused person when she comes to sell the child.

On the other hand, the community can provide a climate friendly for trafficking, as can be seen in **Matini (South Africa)**, a case revolving around trafficking for sexual exploitation. The community can also stigmatize victims who have been exploited. We can see a hint of this in **Allima (South Africa)**, where the sexually exploited young girl says that her parents can no longer be happy with her, as she is no longer a virgin.

Another case which describes the negative side of community inaction is **Jeremiah Musa Dlamini (Eswatini)** where the father and uncle of the victims sexually abuses them over a period of years. The court notes that the sexual exploitation went unreported for a “fairly long time” (years) not only by the victims, but by community members, relatives and police officers who knew about it. This clearly impacted on the victims’ failure to report the abuse, as when asked why they did not object, they explained that they had nowhere to go.

Both the negative and positive aspects of the community are best highlighted in **Matini (South Africa)**. While in one sense, the local community countenanced and even encouraged the trafficking for sexual exploitation, on the other hand, simple citizens warned victims of their danger and even, on occasion, provided refuge and bus fare so that they could return to their homes.

The judge’s negative view of the community is instructive. However, we note again that the testimonies also reveal members of the public who did try to help the victims:

“In general this case encompasses the ways of people staying in informal settlements throughout our country and in this instance, Fairview. It depicts a life style riddled with greed, lust and everything else. Law and morality as values have a totally different concept to what the general public experiences. Dealing in liquor, drugs and other substances are in the order of the day. People’s lives are worth what the net person pays for. It is a “dog eats dog” world.”

State v. Matini, RC 123/13, in the Regional Court held by the Regional Division of the Eastern Cape held at Uitenhage, conviction 27/10/2017, sentence 8/2/2018.

In conclusion, it can be said that the public’s attitude and actions can impact on the victim’s sense of trust and self-worth, and ultimately on the availability and quality of his or her testimony.

5.5 The importance of not criminalizing victims

Several cases across the region describe victims who commit illegal acts during the course of the trafficking. We refer the reader, in addition, to sections 3.2.4.4 on *inducing victims to commit illegal acts* and 3.3.8.7 on *victims’ illegal acts in the course of the trafficking*.

Such crimes can expedite the trafficking, as when the victim is given false identity papers or is illegally transported into a country; they can be crimes that the trafficker imposes upon the victim in order to facilitate the trafficking of others; they can even be crimes that the trafficker imposes in order to tighten his control on the victim; or for economic gain.

On the one hand, on the face of it, States have a legitimate interest in preventing and punishing all crime. However, according to international best practices States should take into account that a crime has been committed by a victim of trafficking and try to ascertain if the crime has been committed as a consequence of the trafficking or as a result of duress or force in the course of the trafficking.

Why is crime committed by victims of trafficking viewed differently? Because the trafficking experience impairs the victim's autonomy, so that the victim has no free will or limited free will, and in any case is not an independent actor.¹⁸ This can be seen along the entire range of possible crimes, but in particular, when the trafficker uses the commission of crimes as a method of control. This can transpire when the trafficker knowingly forces the victim to commit atrocities in order to infuse him with shame and a lack of incentive to improve his lot.¹⁹

Why is it important to not criminalize victims?

1. Trafficking is a crime in which the human rights of the victims have been violated in an extreme way and States should seek not to cause them further suffering, as part of the victim centered approach generally accepted in fighting trafficking, which enjoins protecting and giving assistance to victims.
2. Moreover, without this principle, victim assistance and support programs are rendered ineffective and sometimes meaningless.²⁰
3. From a law enforcement perspective, victims are far less likely to cooperate in trafficking investigations if they are criminalized.²¹
4. Traffickers use crimes committed by victims as a means of control, as victims who commit crimes are less likely to complain and are sometimes expressly warned that such complaints will not avail them.²²

It is for these reasons that this principle has been recognized in various international instruments²³ and in various Trafficking Acts across the region.

There are various approaches to the criteria which should govern non-criminalization. The two main criteria are **causation** and **duress** or **compulsion**. The causation criterion posits that if the

¹⁸ See Office of Special Representative and Co-ordinator for Combating Trafficking in Human Beings, "*Policy and Legislative Recommendations towards the Effective Implementation of the Non – Punishment Provision with regard to Victims of Trafficking*", 2013, section 2 (OSCE Document).

¹⁹ See section 3.2.4 on *inducing a victim to commit illegal acts* as a subtle means of coercion and abuse; UNODC Anti Human Trafficking Manual for Criminal Justice Practitioners, Module 4 on *Methods of Control*; an interview with Judith Herman, the author of "Trauma and Recovery" as recorded in a video conference from August 2013 in the framework of a training for judges in Haifa, Israel regarding trafficking in persons.

²⁰ See Background paper prepared by Secretariat for June 2010 meeting of the Working Group on Trafficking in Persons; CTOC/COP/WG.4/2010/6 (17 February 2010).

²¹ See GRETA, Council of Europe Committee of the Parties, Council of Europe Convention on Action against Trafficking in Human Being, Meeting Report of the 7th Meeting of the Committee of the Parties (Strasbourg, 30 January 2011), THB –CP (2012) RAP7 (Strasbourg 9 Feb. 2012), Appendix II par. 7 as quoted in OSCE Document.

²² See Scholenhardt and Markey – Towler, "*Non Criminalisation of Victims of Trafficking in Persons – Principles, Promises and Perspectives*", Groningen Journal of International Law, volume 4(1), p. 10 at pp. 16, 22-23.

²³ Examples are resolutions of the General Assembly of the United Nations from 2001 and 2010; the Council of Europe Convention on Action against Trafficking in Human Beings; the European Union Directive on preventing and combating trafficking in human beings and protecting its victims; Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking adopted by the Office of the U.N. High Commissioner for Human Rights.

crime was committed as a direct result of the trafficking, the victim should not be criminalized. On the other hand, the duress criterion assumes that a victim who is coerced to commit a crime should not be held responsible for it. In the Southern African region there are a number of approaches to the criteria for non-criminalization. The following are a few examples:

- a. **A closed list of offences:** **Zimbabwe** lists a closed number of offences which should not be criminalized (pornography, prostitution or breach of immigration or labour laws), without any general criterion for other crimes.
- b. **A list of typical offences and a general criterion:** States like **Eswatini** enumerate a list of typical crimes (illegal stay and fraud) and add a general criterion which must be fulfilled regarding those acts: “*where such acts are the direct consequence of an act of people trafficking or people smuggling that is alleged to have been committed or was committed*”. **Botswana** enumerates a shorter list of typical crimes committed by trafficked victims in the course of the trafficking (any offence related to being in **Botswana** illegally) and then adds a general criteria for *other* acts: “*any criminal act that was a **direct result** of being trafficked*”; **Namibia’s** Trafficking Act enumerates two specific crimes typical in trafficking cases: entering or remaining in **Namibia** in contravention of the Immigration Control Act and possessing fabricated or falsified documents, along with a basket category of “an illegal activity” which can cover any crime. Both the typical crimes and the basket category require a general criterion of “direct result”. Moreover, in the case of the basket category – yet another criterion is required – that the act be done under compulsion.
- c. **A general criterion:** Some States in the region, like **South Africa** and **Tanzania** do not list specific offences, but include only the general criterion of “**direct result**”. Interestingly, while **Lesotho** too espouses a general criterion rather than a list of offences, it is a broader criterion: “*A victim shall not be liable for crimes committed **in connection with** own trafficking.*” (Our emphasis).

Whereas most States in the region which include a non-criminalization provision, do so as a categorical obligation in law, **South Africa** leaves its implementation to prosecutorial discretion, though it includes a general criterion of “direct result” to which the prosecutor should give due consideration. It is also interesting to note that the **Democratic Republic of the Congo:** Act includes in its non-criminalization provision, not only penal acts but also administrative acts.

Interestingly, in **S.L. (South Africa)**, which addresses victim protection in a comprehensive way, much emphasis is devoted to the importance of not criminalizing victims. The court stresses that the **South African** Trafficking Act decrees that no criminal prosecution may be instituted or proceeded with against a person suspected to be a victim of trafficking without the written authorization of the Director of Public Prosecutions.²⁴ It adds that a letter recognizing a person as a victim of trafficking serves as a ground for the withdrawal of the criminal prosecution or the discharge or the victim of trafficking, if the prosecutor is satisfied that the offence was committed as a direct result of the person’s position as a victim of trafficking.

However, it is sometimes hard to draw the line between victims who are induced to commit crimes as a direct result of the trafficking situation or under duress, and those who take a more active role. Thus, in **Mabuza (South Africa)** and **Matini (South Africa)** the less dominant accused person was formerly trafficked for sexual exploitation by the more dominant accused person, and thereafter assisted the other accused in recruiting additional victims or in other ways. The courts convicted these two former victims of trafficking for sexual exploitation, but mitigated their sentences in view of their difficult histories. We note that in both cases the former victims were no longer being sexually exploited when they assisted the other accused to traffic

²⁴ See section 22 of the **South African** Trafficking Act from 2013 on *Criminal prosecution of victim of trafficking*.

additional victims, and the trafficking situations in which they assisted were separate from their own exploitation. Interestingly, the court in **Matini** uses the former victim's previous exploitation by the dominant accused as proof of her intent, as in view of it, she knew what would happen to the current victims.

A more difficult scenario is presented by **Veeran Palan (South Africa)**, where two vulnerable young women are trafficked for sexual exploitation. They were recruited by a young woman who was herself exploited by the dominant accused person in prostitution. She apologized to one victim that she lied to her, but explained that she needed to find a replacement in order to return to her home. According to the testimony of one of the victims, it seems that the recruiter was still being prostituted while the other victims were in the trafficking situation, as she notes that the recruiter has her own website and does all that the dominant accused and his wife expect from her. Nevertheless, she too was convicted of trafficking for sexual exploitation. Perhaps her behaviour was not viewed as a direct result of the trafficking.

A recent UNODC publication addresses the topic of former victims of trafficking for sexual exploitation who engage in trafficking. I refer the reader to "Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Analysis" for a more thorough analysis of this broad topic.

An interesting example of criminalization of victims of trafficking can be seen in **Umutoiwase Diane (Tanzania)**, a case revolving around a driver who transported 2 Rwandese citizens with no valid passes or residence permits into **Tanzania**. He was accused of trafficking, whereas they were accused of being unlawfully present in **Tanzania**. While the driver was exonerated from trafficking charges, at the end of the case, the prosecution seemed to view the 2 Rwandese as victims of trafficking when the charges were submitted. The question arises if they should have been prosecuted, in view of **Tanzania's** non-criminalization provision in section 34(1) of its Trafficking Act.²⁵

Similarly in **Milinga (Tanzania)** persons suspected to be victims of trafficking were arrested along with the suspected perpetrators of trafficking, as the victims had no valid travel documents. This practice raises questions as to the proper treatment of persons suspected to be victims of trafficking, even if they are suspected of other crimes.

²⁵ Section 34(1) of the **Tanzanian** trafficking act reads as follows: "*Trafficked persons shall neither be the subject of prosecution trafficking in persons nor penalized for crimes directly related to prosecution in offences stipulated under this Act.*"

NOTES

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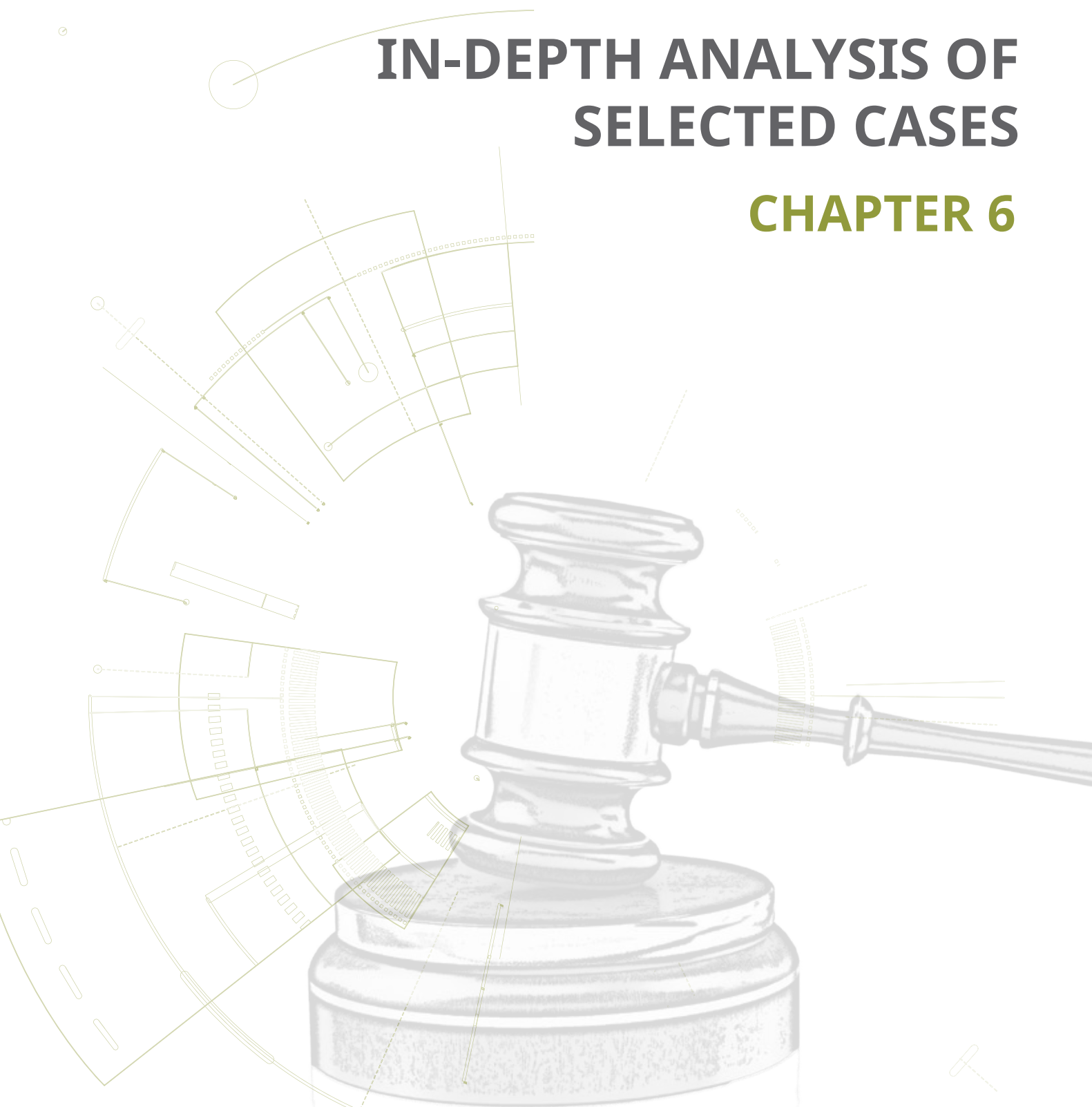
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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES
Regional Case Digest - Southern Africa

IN-DEPTH ANALYSIS OF SELECTED CASES

CHAPTER 6



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

IN-DEPTH ANALYSIS OF SELECTED CASES

CHAPTER 6

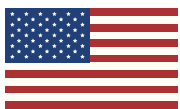


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6. IN-DEPTH ANALYSIS OF SELECTED CASES

The preceding sections of the digest, analyze each kind of evidence or circumstance hermetically, in order to highlight how it can contribute to the building of a case or an exoneration. This section attempts to show how an array of evidential building blocks work together in order to yield a conviction.

Drawing on the metaphor in the first section of this digest,¹ while the “kinds of evidence” are like the tools which assist in building a house and the “mosaic of evidence” resembles the materials needed to compose the house, this section personifies the house itself, showing how the tools and the materials contribute to the actual putting up of the house. To use yet another metaphor, while the preceding sections of the digest resemble the skeleton of a body, this section, resembles the muscles of the body, which allow the skeleton to move.

6.1 Lukas (Namibia)

I. General information:

Kind of crimes: Trafficking in persons for sexual exploitation and rape.

Perpetrator: A female accused person served as a middleman for the sexual exploiter, named Pretorius.

Victims: The victims were minors of 13 and 14 years of age from impoverished backgrounds.

Verdict includes sentence

II. Facts of the case:

The accused person, a 20 year old female, induced two minors of 13 and 14 years of age to engage in sexual relations with a man called Martinus Pretorius. In return for the sexual relations, the children received money from Pretorius, as did the accused. The two minors were impoverished members of the **Democratic Republic of the Congo**: settlement in **Namibia**, one of whom resided in a Catholic Hostel for needy children. They both attended school.

The first minor, 13 years of age, called D, was first approached by the accused by means of text messages and promised material benefits, such as a touch screen, if she would consent to engage in sexual relations with a man. When D agreed, she was taken by the accused to the house of the Pretorius 4 times, where D engaged in sexual relations which included oral sex on one occasion. D received money from Pretorius in return for these acts, as did the accused person. The accused

¹ See section 1.7 on the *structure* of the digest and sections 1.5 and 5 of the global case digest.

took her to the man's house by taxi on those occasions. In order to facilitate the oral sex on one occasion, the accused gave D an alcoholic beverage and cigarettes, and also told D that oral sex would not involve infection from germs, as feared by D. The accused added that she herself had oral sex with her boyfriend. At first, D did not tell the truth to the school authorities, but subsequently, told the true story. In her testimony she referred to Pretorius as her boyfriend and was interested in continuing the relationship with him in order to receive material benefits.

The second minor, called M, who resided in the Catholic Hostel for needy girls, was first approached by D, who had been asked by the accused to find another young girl for another man. She then met the accused person, who induced her to come to her house, telling her that D would be there, which was not the case. The accused then took M to Pretorius' house, telling her that he was a 26 year old man who paid \$1 000 to girls who engaged in sexual relations with him. Once at the house, M saw that the man was older and bigger than she had been told. Pretorius told her to remove her clothes, but she left her underwear on, at which point he spoke to her in a harsh way. She then removed everything and he raped her. She told him to get off her, but he refused and she pushed him away. He paid her a small sum of \$200. The accused took her back to the hostel, and since it was late, told the hostel personnel that she was a relative of M's and had gone shopping with her.

At first, M lied and told her parents and superiors at the hostel that she had gone out with friends, but later she divulged the truth to her parents. Like D, she too lied to the school authorities at first, but subsequently told the truth.

III. The accused's defence:

The accused claimed that she first knew of Pretorius via a friend named Felicity who told her that he intended to establish a welfare organization to assist under privileged children from the **DRC** settlement. Pretorius asked her if she knew of children who could benefit from the organization. She obtained D's telephone number from another friend, Marlene, and took her to Pretorius' house in order to do paper work concerning the welfare organization. However, due to lack of time, the paper work was not done and they returned by taxi. She claimed to have met M through D, who represented her as a girl who could profit from the welfare organization. She took M to Pretorius' house only once to get information about the welfare organization. She claimed that her contact with Pretorius was of short duration, a claim belied by the cellular phone records.

IV. Kinds of evidence²:

Prosecution Testimony: two minor victims, the mothers of the minors³, a taxi driver⁴; the minors' school principal⁵; a matron at the Catholic Hostel where one of the minors lived⁶; a former girlfriend of the sexual exploiter⁷.

² NOTE: The Court stressed that it did not explicitly refer to all the evidence adduced, in its ruling, as some was superfluous.

³ They testified regarding their ages and in addition, one testified that the accused person never contacted her about the possibility of her daughter benefiting from a welfare agency, as claimed by the accused.

⁴ He testified that he had driven and subsequently picked up the accused and a young girl from a street which was proved to be the address of Pretorius, who sexually exploited the minors.

⁵ He testified regarding what the minor victims told him about the crime and his referral of the matter to the social workers.

⁶ She testified that the accused brought the minor to the hostel late one night and explained that she was a relative who had taken her shopping. In addition, she testified as to what the minor victim subsequently told her of the crime whereupon she referred the matter to her superiors.

⁷ She testified that Pretorius worked in a mine, as specified by one of the minors.

Prosecution Expert Testimony: a general practitioner doctor who also practiced as a gynaecologist⁸ and a government social worker⁹.

Documents: records of cellular phone conversations between the accused and the sexual exploiter and between the accused and one of the minors.

Real Evidence: the demeanour of the minor victims on the stand.

Defence Testimony: The accused person; a friend of the accused; the accused's cousin (see below "*the accused's defence*").

V. Summary of strengths in the mosaic of evidence:¹⁰ abuse of vulnerability of victims (impoverished minors from the **Democratic Republic of the Congo** community in **Namibia**); abuse of power over victims; giving payments to achieve consent; subtle means of coercion; deception; proven falsehoods of the accused.

VI. Summary of weaknesses in the mosaic of evidence: No violence, threats or lock and key imprisonment; seeming consent to exploitation; desire of one victim to continue exploitative relationship; duration of sexual exploitation (a period of a month and a half, during which there were 4 exploitative acts against one minor and one exploitative act against the other); falsehoods told by victims at the outset of the case; each of victims a single witness to what transpired with her; different reactions of the two victims to the exploitation and during the investigation and court hearings; inconsistencies in the testimonies of the victims.

VII. Verdict: The accused was convicted of 5 counts of trafficking for sexual exploitation and 5 counts of rape. She was sentenced to 13 years imprisonment in total (5 years of imprisonment for each of the trafficking charges, to run concurrently, and 8 years for each of the rape charges, to run concurrently).

VIII. Evidential strengths in detail:

Among the evidential strengths, the following are especially worthy of note:

- 1. Abuse of Vulnerability:** The court stresses the vulnerabilities of the two victims, who were impoverished minors from the vulnerable **DRC** community in **Namibia**. It explicitly states that their vulnerable position allowed the accused to groom them for sexual exploitation, as they were susceptible of being exploited in return for material benefits.
- 2. Additional 'means':** The court's relation of the facts of the case reveals a number of "means" used by the accused in addition to abuse of a position of vulnerability. These include abuse of power over victims; deception (promising D a laptop, which never materialized; promising M that the man to whom she would be taken was 26 years old, whereas he was much older and bigger than described; promising M that D would be in her house when she visited the accused, which was not true); subtle means of coercion (using alcohol and cigarettes to persuade D to have oral sex with Pretorius; telling her that no germs pass through such intercourse and that the accused engages in oral sex with her boyfriend).

NOTE: **Namibian** legislation does not require the use of 'means' when the crime is one of child trafficking. Nevertheless, the court dwells on the "means" used in order to understand the children's consent to the exploitation. For the reasons for this, see above "*particularly difficult evidential challenge – "consent"*".

⁸ He testified that the two minors were not virgins, but could not attest to the date of the sexual activity.

⁹ She testified regarding the reactions of the minor victims during an interview and what they told her about the crimes.

¹⁰ See further on in this analysis for a detailed analysis of evidential strengths and weaknesses, including, in the mosaic of evidence.

3. **Demeanour and coherence of testimony:** The court stressed that the demeanour of M on the stand did not lead it to doubt her veracity or to impute a motive to falsely implicate the accused person. It added that both victims told their stories in a logical and coherent manner.
4. **Corroboration:** The court noted that the victims corroborated each other regarding important facts like the description of the room where they were sexually exploited and the description of Pretorius. In addition, their testimony was corroborated by the cell phone records which revealed the many messages which passed between the accused and Pretorius and the accused and D, and various other testimonies.
5. **Proven falsehoods of the accused:** The court noted that the proven falsehoods of the accused provided strong evidence for the prosecution case. One example was her claim that she had been in telephone contact with Pretorius only on one date, whereas the records of her cell phone conversations revealed over a thousand messages before, during and after the trafficking process. In addition, there were records of many telephone messages between the accused and D, though she claimed she had only taken her to Pretorius one time in order to ascertain if she could receive benefits from the welfare organization he purportedly founded. **Thus, the cell phone records were crucial evidence in the case.**

IX. Evidential weaknesses:

1. **Individual reactions:** The two minors reacted very differently during the trafficking process and during the investigation and court hearing. Whereas D complied with Pretorius' demand that she undress and allowed him to have sexual relations with her on four occasions, M was reluctant and at first, undressed only partially, and thereafter asked him to get off her and pushed him away. D considered Pretorius her boyfriend, and thought she was in love with him. She was interested in continuing her "relationship" with him by which she received benefits. In its ruling on the sentence, the court noted that D was "desensitized" which led to her relating despicable acts of sexual depravity as if they were mundane. On the other hand, M was "*genuinely ashamed by what she had done and seemed confused about the whole matter.*" In addition, the government Social Worker who interviewed the two victims testified that D "*seemed very streetwise and impressionable, whereas M was more reserved and quiet...dominated by D during the interview.*"

These different behaviour patterns continued throughout the trafficking process, investigation and hearing. While the court does not explicitly rule on the evidential significance of these differences, they did not lead it to conclude that any one of the minors was not credible because her behaviour diverged from some "norm" of victim behaviour.

2. **Victim's desire to return to abuser:** As mentioned, D was interested in continuing her "relationship" with Pretorius whom she considered to be her boyfriend. While the court did not explicitly address the evidential significance of this desire, it is clear that it did not negate D's credibility in the eyes of the court.
3. **A victim who commits a criminal act:** D recruited M after the accused asked her to find another girl for another man. Consequently, the Defence claimed, that she, and not the accused was the culprit in this respect. The court dismissed this claim, as even if it could be said that D recruited M, she did so as the accused's agent, and in any case, the accused was the one who took M to Pretorius. The court does not explicitly address the evidential significance of D's act, but it is clear that it did not form a basis to negate her credibility.
4. **Duration of crime:** The entire series of crimes took place from April 23, 2013 through May of 2013, a bare month and a half, during which there were 4 exploitative acts against

- D and one against M. Moreover, each separate trafficking charge related to one relatively short incident along this time spectrum. Though the court does not explicitly address the evidential significance of this relatively short duration, clearly, it did not lead to an exoneration on trafficking charges.
5. **Outright falsehoods:** Both victims told outright falsehoods after the exploitation transpired. M lied to her parents and the superiors at the Catholic hostel and told them that she had gone out with friends when she really accompanied the accused to Pretorius' residence. Both she and D lied to the school authorities at first. However, the court did not negate their credibility on this basis. Instead, the court found explanations for the falsehoods told by each minor. As regards D, the court understood that she lied at first, because she did not accept the termination of her relationship with Pretorius and the loss of material benefits, but had no intention to falsely implicate the accused. As regards M, the court concluded that she was genuinely ashamed by what she had done and seemed confused. Thus she initially told some untruths in a state of '*childish confusion*'. Moreover, the court stressed that after telling the falsehoods, '*reality dawned*' and both children testified in a coherent and logical fashion.
 6. **Inconsistencies:** While the court noted inconsistencies in the testimonies of the two victims, it ruled that they were not material and thus did not detract from the veracity of their accounts. In addition, the court noted that their stories were corroborated by the accused's proven lies (see above "proven falsehoods of accused") and by other testimonies. Moreover, the court noted certain important facts about which the victims corroborated each other (see above "corroboration").
 7. **No violence, threats or lock and key imprisonment:** Throughout the trafficking process, the accused did not employ violence or threats against the children. Nor did she lock the victims in the premises. The court noted that the accused abused the children's vulnerability, abused her power over the children, deceived them, and offered them material benefits, but violence, threats and lock and key imprisonment do not appear. While the court did not explicitly address the evidential significance of this point, clearly, it did not lead to an exoneration of the accused.

X. Particularly difficult evidential challenge – how to address consent:

This case presents a situation whereby the victims consented to their sexual exploitation for material benefits. While the court explicitly states that where minors are trafficked, no 'means' are necessary and consequently, their consent to the intended exploitation is never relevant to the case, nonetheless, the court analyzes the use of 'means' by the accused. It stresses the minors' vulnerability and that this vulnerability was abused and views the accused's actions as an abuse of the power she had over the minors. Both of these reflect 'means' which appear in the Protocol and in **Namibia's** Trafficking Act, then in force. In examining the use of 'means', the court *implicitly* (though not explicitly) addresses the topic of consent, in that it succeeds in understanding the minors' consent to the exploitation as a product of the 'means' that were used against them. This confirms the conclusions of the UNODC Issue Paper on "*The role of "consent" in the trafficking in persons protocol*" according to which consent is a live issue, without regard to what the legislation of a given jurisdiction states. Thus, a description of the 'means' can help a court understand what happened and enhance the credibility of victim testimony.

We refer the reader, in addition, to sections 4.4.1.3 on *consent is always a live issue*; 4.4.3.3 on *the genuineness of consent: the impact of vulnerabilities* and 4.4.3.4 on *the voluntariness of consent* for further details on these aspects of 'consent'.

XI. Other Legal Issues:

1. **Duplication of convictions:** The Defence claimed that convictions for trafficking for sexual exploitation and rape would represent an improper duplication of convictions, as some of the elements of the crimes are the same. The court dismissed this claim, ruling that the proof of the mens rea for trafficking is not the same as that for rape, as a conviction for trafficking would lie even if there was no proof that a rape actually occurred.

The Defence also claimed that conviction on multiple counts of trafficking represents an improper duplication of convictions. The court dismissed this claim, as the different trafficking charges related to different dates and required the accused to make arrangements on each separate occasion with Pretorius and the minors.

2. **Single child witnesses:** Each of the minor victims was a sole witness of what transpired in relation to the charges of trafficking and rape pertaining to her. The court cautioned itself, but ruled, on the basis of precedents, that it is entitled to convict on the evidence of a single child witness if it is satisfied that the testimony is true and satisfactory in all respects, as was the case here. The court noted that both children narrated the events involving the accused and Pretorius in a *“coherent and logical fashion that dispels any suggestion that they are malicious and mendacious and had the motive to falsely implicate the accused.”* Moreover, there was corroboration to their testimony and the accused’s proven falsehoods contributed to the mosaic of evidence.
3. **The totality of evidence rule:** The court ruled that no item of evidence must be taken in isolation, but rather courts must have regard to the totality of the evidence led at trial, including that of the accused. In this case, the court found particularly important: the proven falsehoods told by the accused person, and especially her untruthfulness about the contacts between her and Pretorius subsequent to the first trafficking incident; the minute detail with which the minors described the incidents; the fact that the accused admitted that she was in regular contact with D after the first alleged incident, thus excluding lack of opportunity to commit the acts described in the charges.
4. **Psychological analysis as a basis for understanding victims’ behaviour:** The court analyzes the psychological mechanisms at play in the two victims in order to understand their behaviour, and for example, their initial falsehoods to various authorities. The court notes that D viewed Pretorius as her boyfriend and wished to continue the relationship in order to continue to receive benefits. On the other hand, M was ashamed and confused at what had happened. In addition, in its sentencing judgment, the court interprets D’s matter of fact rendition of the horrendous facts relating to her sexual exploitation, by the light of the process of desensitization she underwent as a result of the conduct perpetrated against them. The court notes that this caused D to relate despicable acts as if they were mundane, whereas *“Her description of those acts would make even the most hardened adult shudder.”* On the other hand, the court discerned in M, shame at what she had done and “childish confusion”.

XII. Sentencing considerations:

As said, the court meted out a sentence of 13 years of imprisonment. It noted that the **aggravating factors** were the abuse of the children’s vulnerabilities, the motivation of greed, the damage caused to the children, who were desensitized to horrendous acts; the use of the accused’s position of power over the children. Moreover, **Namibian** law included minimum sentences for some of the crimes charged. On the other hand, the court took into account **in mitigation** the personal circumstances of the accused: her youth when she committed the crimes (20 years old); her personal history (becoming a mother at the age of 18 with

3 children to support); the impoverishment and ill health of her family caretakers which made them unable to care for the accused's children; the accused being a first offender.

NOTE: In her testimony, the accused mentioned that she herself had been sexually abused by an uncle at the age of 9. This too, might have been expected to be a mitigating factor. However, the court does not explicitly allude to this factor in its sentencing considerations.

XIII. Patterns and Trends:

The case reflects the following patterns which can also be found in section 4.6.3.3 on *typical patterns* in child sexual exploitation cases.

1. **Child trafficking for sexual exploitation:** In this case the victims were children who were trafficked for sexual exploitation. Trafficking of children is a prevalent worldwide pattern in view of their vulnerabilities. In the sample of cases which forms the foundation of this digest, most of the cases revolve around sexual exploitation and many of them relate to child sexual exploitation.
2. **Female traffickers who are not end exploiters:** The accused in this case recruited the children for sexual exploitation by Pretorius. UNODC's Global Report on Trafficking in Persons from 2016 notes a relatively high proportion of female traffickers compared to the role of women in other crimes.¹¹ Among the explanations given in this report and in the 2014 Global Report is that being of the same gender as female victims can enhance trust which may account for the fact that as a rule, female traffickers traffic female victims. As in this case, it is noted that in general, female traffickers are usually in subsidiary roles.¹² We also refer the reader to section 4.6.3.3 on *typical patterns* of child sexual exploitation.
3. **An accused who is a former victim:** The accused testified that she herself was sexually abused by an uncle when she was about 9 years old. Past abuse of an accused is not a rare phenomenon in the world of trafficking. See sections 3.3.8.7 on *victims' illegal acts* and 5.5 on *the importance of not criminalizing victims* for other examples of this pattern.
4. **Enlisting victims to recruit additional victims:** In this case, the accused enlisted D to recruit another girl for sexual exploitation. The enlisting of victims to recruit additional victims or to perform other kinds of criminal actions is not rare in the world of trafficking. This is a pattern attested to by the UNODC Global Report on Trafficking in Persons¹³ and by other cases such as **Veeran Palan (South Africa)**.
5. **Use of alcohol or drugs to facilitate sexual exploitation:** In this case, the accused gave D an alcoholic beverage to make it easier for her to engage in oral sex. The use of alcohol to help victims overcome their inhibitions to engage in sexual activity recurs in many cases worldwide¹⁴ and across the region. We refer the reader to section 3.2.4.3 on *use of drugs and alcohol* as a subtle means of coercion and abuse.
6. **A number of victims/a series of sexual exploitation:** As in many cases of child sexual exploitation in the region, this case presents the exploitation of more than one victim, where one is exploited 4 times.

¹¹ Page 37. See also UNODC's Global Report on Trafficking in Persons 2020, page 37.

¹² Ibid.

¹³ UNODC Global Report on Trafficking in Persons 2016, p. 36.

¹⁴ See section 3.2.5.4 of the global case digest for citations of additional cases.

7. **A discrepancy between the age of the sexual exploiter and the victim:** As in many cases of child sexual exploitation in the region,¹⁵ there was a large discrepancy between the age of accused 1 who sexually exploited the children and the children.

6.2 Mabuza (South Africa)

I. General Information:

Kind of Trafficking: Child trafficking for sexual exploitation.

Perpetrators: End exploiter who raped the children (accused 1) and a female formerly exploited by him, who assisted to harbor the victims and bring them to the end exploiter (accused 2).

Victims: 4 minors trafficked from **Mozambique**.

Courts: of first instance and court of appeals rulings, including sentencing ruling by court of first instance.

II. Facts of Case:

Four children, ranging from the ages of 11 to 13, were recruited from **Mozambique** to **South Africa** by the sister of accused 2, named Juliet. Three of the children were recruited by means of **deception**, as Juliet told their parents that they would be taken to **South Africa** to visit family, after which they would return home or stay in **South Africa** to study in school. Neither of these promises materialized, and the children were not returned home, even when some of them requested this. One of the children was **abducted** in that she was told by Juliet that her grandmother consented to her going which was not the case. Juliet and accused 2, named Violet, were born and raised in **Mozambique** and were **relatives** of some of the children and **known** to the parents of the others. **Juliet had formerly trafficked accused 2 to South Africa** where she was sexually exploited by Accused 1.

Since **none of the children had valid passports**, they were smuggled across the border to **South Africa**. They were then taken to a lumberjack's village which was a very **remote place** situated in a vast plantation area which could only be reached by a number of very bad dirt roads. Moreover, there were no direction or information boards, so that a stranger would find it difficult to find the place without help and would experience desolation if left there without food or shelter. Moreover, at least at first, there was a language barrier between the children and people other than accused 2 and Juliet.

The children were housed in a small house in the village. Accused 1 was the manager of the plantation who resided in a large house a short distance away. On different occasions, the children were taken to accused 1's house where they were raped, over a period of 3 years as regards three of them and 2 years as regards the remaining child who arrived later. Juliet, and in her absence, accused 2 would ready the children and fetch them at the request of accused 1 who would sometimes pay Juliet and accused 2 or send them money by way of the children. In the absence of Juliet, accused 2 would care for the children, giving them food, while knowing what would be done to them. Three of the children were raped several times and one of them was raped once because she claimed she was in her menses whenever summoned after the first rape.

¹⁵ See *ibid.*

Three of the children testified that they were threatened by accused 1 with a firearm should they not do as he said. One child was forced to sleep with accused 1, while the others refused at first, after which they were threatened by Juliet that they would be abandoned and would have nowhere to go and no food to eat. In addition, sometimes food like meat would be refused, all of which motivated the children to do as they were told.

All the children identified the vehicle used by accused 1, described his bedroom, said that he smeared their private parts with a cream or ointment each time before he raped them. One child testified that accused 1 injected himself before he raped her the first time. One child testified that accused 1 used a condom.

The children reported to Juliet that the accused 1 injured their private parts, but she said that they would get used to it eventually. When they complained, Juliet threatened them with abandonment; when they requested to be sent back or to study in school, she told them that there was no money. She told one child that she needed to sleep with accused 1 in order to get the money to buy school uniforms. This behaviour was exacerbated by the fact that some children were related to Juliet and accused 2 and some had known Juliet well enough before they were trafficked so as to view her as in a position of authority and trust.

The children lived under difficult conditions. They were hungry and sometimes begged for food; their clothes were tattered and they themselves were dirty.

The children were rescued only after several years. At one stage, a woman whose husband worked in the lumberjack plantation under accused 1, saw the difficult conditions under which the children were living and took one to live with her. However, the child did not always get along with this woman's children and in the end, she ran away. At school, the principal and social worker spoke to her, but she only talked of the other children's plight, and not her own. Nor did she disclose this when the police took her statement. Only when she met with the prosecutor, and saw that the other children were free to reveal what had happened to them, and that she could trust the prosecutor, did she disclose her ordeal in detail. Afterwards she explained that before this stage she was afraid and ashamed to tell anyone, and that she felt she could trust no one.

III. Kinds of Evidence: This case includes the following kinds of evidence:

1. **Prosecution testimonies: 5 child victims;**¹⁶ 6 additional prosecution witnesses (2 **police officers** who testified respectively, as to the condition of the children when rescued and about one victim's uncooperativeness and an additional witness who rescued a child from the premises; 2 **expert testimonies** of a registered nurse and a doctor who specialized in dealing with the examination of victims and especially children in sexual assault cases in regard to sexual penetration and the age of the children; a **school social worker** who had talked to one of the child victims soon after she fled her rescuer and yet did not divulge what had happened to her; the **wife of an employee of accused 1** who had rescued one of the children).
2. **Prosecution documentary evidence:** included the social worker's reports and the reports of the two expert medical witnesses. However, these documents did not stand alone, as the drafters of them also testified before the court.
3. **Real evidence:** included the **demeanour** of the child victims and accused 1 during their testimonies and a **site visit** whereby the court visited the lumber camp where the

¹⁶ One of the five victims did not testify as to her sexual exploitation. Nor did the other children testify as to her. Consequently, the accused persons were exonerated of the charge regarding her trafficking.

children had been held and two houses, one of which was claimed to be the place where the children were raped.

4. **Defence testimony:** While accused 1 testified, accused 2 did not testify. Accused 1's version was that he did not know the children and that they had seemingly colluded against him.

IV. Summary of strengths in the mosaic of evidence: deception in recruitment; abduction; threats, both overt and subtle (by means of a firearm and also centering on the children having nowhere to go); vulnerabilities (child victims who were foreigners, illegal in the country, with only partial familiarity with language and culture, economically disadvantaged, abused by relatives or people known to their families and them); subtle coercion (telling the children they would get used to the abuse, telling one victim she needed to sleep with accused 1 to get money for school uniforms); the giving of payments by accused 1 to accused 2 as remuneration for sexual exploitation of children; isolation (remote premises, little contact with others, no schooling); restrictions of freedom (lack of valid passports and nowhere to go); long duration of abuse (3 years for three children and two years for another one, with most children being raped a few times); difficult living conditions (insufficient food, tattered clothing, lack of cleanliness); victim behaviour showing lack of consent (children asked to go home or to study in school and were told there was no money for that; some refused at first to sleep with accused 1; they complained about their injuries); accused 2 was formerly trafficked for sexual exploitation by accused 1 and thus was aware of the children's plight.

V. Summary of weaknesses in mosaic of evidence: victim behaviour during the trafficking process (individual behaviour where one victim avoided abuse after the first rape by informing the accused that she had her menses, whereas the other victims did not and were raped numerous times); delayed complaint (one victim divulged what happened only at a very late stage of the proceedings); unwillingness of one victim to testify; language and cultural barriers between the children and the authorities including the court; victim contradictions in themselves, among themselves and with others.

VI. Summary of particularly difficult evidential challenges¹⁷

- Chain of trafficking
- Seeming consent to exploitation.

VII. Verdict:

Ruling: Both accused persons were convicted of several counts of trafficking for sexual purposes and several counts of rape. Accused 1 was sentenced to the minimum sentence of imprisonment for life. Accused 2, in view of mitigating circumstances, was sentenced to 20 years of imprisonment, all of which were suspended for a period of 5 years on condition she is not convicted of any crime involving the trafficking of persons or rape and that she is handed over to the Department of Home Affairs for deportation. Both the convictions and sentences were affirmed by the court of appeals.

NOTE: The verdict was based on the former law: Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 which addresses only trafficking for sexual purposes and requires, as an element of the crime, non-consent of the victims.

Court's analysis of elements of crime: According to the court's analysis, accused 1's 'act' could be considered to be "receiving of a person", whereas accused 2's 'act' could be considered to be "harbouring".

¹⁷ These topics will be analyzed in depth further on in this section.

Accused 1's 'means' could be considered to be "a threat of harm, a threat of force, force, intimidation, the abuse of power, the giving or receiving of payments, compensation, rewards, benefits or any other advantage", accused 2's 'means' could be considered to be the abuse of power or of a position of vulnerability, as she, as well as her sister Juliet, was related to some of the children and seen to be in a position of authority in her absence. In addition, she received payments from the accused 1 for her part in bringing the children to him.

The 'purpose of exploitation' could be considered the commission of a sexual offence.

VIII. Court's detailed analysis of evidential strengths and weaknesses

1. The value of holistic analysis

The court of first instance analyzed the evidence painstakingly, stressing that each piece of evidence must not be analyzed in isolation, but rather holistically, an approach affirmed by the court of appeals. Such a **holistic analysis** led to the conclusion that the children's evidence, corroborated by various other testimonies and by objective data, was sufficiently credible to prove the case beyond reasonable doubt. Conversely, the court found the testimony of accused 1 to be weak and noted that accused 2 chose to remain silent.

Due to its importance, I quote the court of appeals' approach on holistic analysis, drawing on precedent:

"Ultimately the evidence must be assessed as a whole and it is necessary to step back a pace and consider the mosaic as a whole. If this is not done, one may fail to see the wood for the trees."

State v. Mabuza and other Case No. SHG 9/13 Regional Court for the Regional Division of Mpumalanga at Graskop (21 November 2014); conviction affirmed **Mabuza v. State** Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, (30 August 2017). The quote is from the court of appeals.

In order to arrive at a holistic analysis of the evidence, the court carefully analyzed various evidential strengths and weaknesses as follows:

2. Evidential strengths in detail:

The evidential strengths in the case reflect the many building blocks found in the mosaic of evidence, together with an evaluation of the quantum of evidence and its credibility, thus:

- a. **Building blocks in the mosaic of evidence:** As mentioned above in section IV, the case includes many building blocks mentioned in chapter 3 on *the mosaic of evidence*, some of which are explicitly mentioned by the court as important to the conviction such as the '**means**' employed in the form of deception, fraud, threats, and abuse of power and a position of vulnerability (laying stress on the acute vulnerabilities of the children in terms of age, illegality, lack of familiarity with language and culture, low socio – economic status, emotional vulnerability in that accused 2 was the relative of some and known to the others); **restrictions of freedom** and **isolation** which left the children "nowhere to go"; and **difficult living conditions** (unhygienic surrounds, lack of adequate food and clothing attested to by 2 independent witnesses). In addition, several of these building blocks, while not mentioned explicitly as important to the conviction, are described in the facts of the case and for example: the **relatively long duration** of the exploitation (3 years for most of the children and 2 years for one) and **subtle forms of coercion** (such as telling victims that they would get used to the sexual exploitation).

- b. **Objective corroboration:** Objective details mentioned by the children were found to be correct and no explanation was given by the accused 1 as to their knowledge of them, as he claimed that he had never met the children. Examples were the color of his Jeep and the company name on the Jeep; the description of his house, and in particular the bedroom with en-suite bathroom; his possession of a firearm.
- c. **Testimony regarding details that a normal child does not know:** The children testified that the accused 1 smeared their private parts with cream before raping them and that on one occasion he injected himself with a chemical taken from the refrigerator before the rape. One child testified that accused 1 used a condom. These are details with which children are not normally familiar and could not be expected to fabricate.
- d. **The importance of the expert testimony:** The court found corroboration of the children's testimony in the expert testimony of a registered nurse and a doctor who specializes in dealing with the examination of victims and especially children in sexual assault cases. Both experts addressed evidence of sexual penetration and in the case of the doctor, in addition, lesions on the private parts of some of the children which could attest to forcible penetration. In addition, the doctor testified as to the ages of the child victims which accorded with their own testimony. While this evidence did not prove that rape had transpired, it did strengthen the children's evidence as to the sexual relations they had undergone at such early ages.
- e. **The children's stories were largely consistent:** The various children's testimonies were largely consistent with one another and in themselves.
- f. **The child victims did not exaggerate:** Both instances noted that the children did not exaggerate, and for example, one testified that she did not know if her sister had been raped; they testified that accused 2 had not always been involved in preparing them for accused 1, but rather her sister Juliet; one of the children who had only been raped once did not claim several assaults; they did not claim that the accused 1 ever hit or hurt them except for the pains of sexual penetration.
- g. **The quality of the children's testimony:** The court stated that the four children conducted themselves quite well, taking into account their language and cultural challenges and that their testimony was easy to follow and not inherently improbable.
- h. **The children had no motivation to lie:** They did not previously know the accused persons; their relatives had never had problems with accused 1; nor did they initiate the process which led to charging the accused persons.
- i. **The children's behaviour showed non-consent to the abuse:** The children complained about the abuse; asked to go home; requested to go to school. All these forms of behaviour showed that they did not consent to the abuse. In addition, three of the four children were reluctant to engage in sexual relations before being threatened and the fourth was forced.

3. Evidential weaknesses:

We note that while some of the following evidential weaknesses were explicitly addressed by the court, some were not, although they appear in the facts of the case.

- a. **Delayed complaint:** One of the children did not reveal her plight, though questioned by a school principal and social worker and by the police. Only during consultation with the prosecutor did she reveal this. The court noted her explanations, that she was afraid and ashamed and trusted no one until she saw that the other children had freely revealed what they underwent to the prosecutor and she felt he could be trusted. The court mentions this weakness explicitly but nevertheless views the testimony as credible.

- b. **Difficulty in testifying:** The same child whose complaint was delayed was reluctant to testify in court. Here the court noted her fear and lack of trust in anyone; the fact that she discovered that her mother, whom she hadn't seen for years, was in the courtroom, but was not allowed to see her before she testified; her late realization that she would need to testify on the following day as well as the one day for which she had prepared herself. The court stressed that despite this reluctance, her evidence was clear and satisfactory.
- c. **Individual behaviour:** Whereas three of the children were raped repeatedly by the accused 1, one of them was only raped once, as every subsequent time she was summoned, she claimed to be in the midst of her menses. On the face of it, the court might have found that the other three children had consented to the abuse or deemed them non-credible. However, it did not do so. **NOTE:** The court does not address this point explicitly.
- d. **Contradictions and inconsistencies:** While there were some contradictions between the children, and in each testimony, none were material. The court of first instance also noted that being children, they have different powers of observation and emotions and thus remember different things in accordance to what they find important. In addition, some of the seeming contradictions arose from a misunderstanding of the cross examiner's questions which were couched in a confusing way. Finally, the court of appeals stressed that not any contradiction or even several contradictions need lead to the rejection of a witness' testimony, as there is a distinction between a proved deliberate falsehood and an honest mistake.

Interestingly, the court of appeals even used these contradictions as a sign of strength, rather than weakness.

"...the contradictions between the evidence of the child witnesses are not material. Rather they indicate that the child witnesses did not fabricate their evidence."

State v. Mabuza and other Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop, 21 November 2014; conviction affirmed **Mabuza v. State** Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, 30 August 2017. The quote is from the court of appeals.

As to contradictions between the children's testimony and what they purportedly said to a social worker whose only function was to assess if they needed to testify via an intermediary, both instances viewed this as hearsay evidence communicated via a social worker who had no training in recording statements and whose function did not include addressing the merits of the case. In addition, in any case the contradictions were not material.

4. The defence case:

The weakness of the defence case provided no counter to the strength of the prosecution case in view of the following:

- a. **Accused 2 chose not to testify:** Thus, she could not contradict the children's testimony and could not provide explanations to controvert her knowledge of their plight and her participation in their abuse. Her cross examination of the children attempted to prove that she had nothing to do with their abuse and that she only gave them shelter and food in Juliet's absence. While some of the children confirmed this, others clarified that she readied them and sent them to accused 1 at his request and that on occasion she received money from him via them. Since she did not testify, she could not deny this in evidence. Nor could her version be tested by means of cross examination.

- b. **Accused 1's defence was weak:** Both accused 1's defence position and demeanour on the stand were weak. His **defence position** was a total denial of the State's case: he had never met the children. Nor had they been in his house during the relevant period. Nor had he ever had a sexual relationship with them or accused 2. However, he could not explain how the children knew about his red jeep with company name on it; his own name; the layout of his house and bedroom in particular; that he possessed a firearm. Nor could he satisfactorily explain their motivation in framing him. He did posit that perhaps they wanted to get money from him, but since they had not initiated the case, but rather the social worker and the police, this hypothesis was not substantiated. In addition, **accused 1's demeanour** on the stand was problematic. His evidence had to be dragged out of him by his own lawyer, the Prosecutor and the court; his answers were short, non-committal and beside the point; he was not quick to disclose details.

IX. Particularly difficult evidential challenges:

There were two particularly difficult evidential challenges in this case:

1. Consent to intended exploitation:

The law which formed the basis of the charges was the former criminal law of **South Africa** regarding trafficking for sexual exploitation (Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007) which requires the non – consent of the victims to the sexual exploitation. In contrast, the new Trafficking Act espouses the Trafficking in Persons Protocol's approach according to which the consent of the victim to the intended exploitation is irrelevant if a 'means' has been used and a child's consent is never a defence.

Still, though the approach is different than that of the Protocol, it is less so than would first appear, as the law gives a narrow definition of consent whereby very few cases would qualify as consent. Thus, the definition is: "**voluntary or uncoerced agreement**". Moreover, the law then enumerates a list of situations which are not to be considered "consent", some of which are reflected in the 'means' of "*threat of harm, threat or use of force, intimidation or other forms of coercion, abduction, fraud*", all of which were present in this case: **abduction:** in that one child was told that her grandmother agreed that she travel to **South Africa** and went on that deceptive basis; **fraud:**¹⁸ in that the parents of three of the children were deceived as to the purpose of the children's traveling to **South Africa** and the length of the stay; **threat of force:** in that the accused 1 used a firearm to threaten the children; **force:** in that one of the children was forced to sleep with accused 1; **threat of harm or intimidation:** in that the children were given to understand that if they did not accede to the demands of the accused 1, they would be abandoned with no food or shelter and nowhere to go; other forms of coercion: in that they were told that they would get used to the pain of the sexual relations and in one case were told they needed to sleep with accused 1 to obtain money for school uniforms. However, we note that the court did not explicitly rely on this last 'means' in its conviction.

Interestingly, the court seems to assume that though Juliet was responsible for recruiting the children by means of fraud and abduction, the accused persons were aware of this and consequently responsible for these actions. The same goes for Juliet's methods of control in telling the children that they would be abandoned with nowhere to go should they refuse accused 1's demands, that they would get used to the pain of the sexual relations and that one of them needed to sleep with the accused 1 in order to obtain money for school uniforms.

¹⁸ While there is a difference between "fraud" and "deception", the elements of fraud seem to be satisfied. See <https://legal-dictionary.thefreedictionary.com/fraud>

Though the court does not explicitly address this point, certain forms of behaviour on the part of the children seem to point to non-consent to the exploitation. Thus, as mentioned, the children complained about the abuse; asked to go home; requested to go to school. All these forms of behaviour showed that they did not consent to the abuse. In addition, three of the four children were reluctant to engage in sexual relations before being threatened and the fourth was forced.

2. Chain of trafficking:

While this case does not present a vast organized crime venture, it does include two accused persons, only one of whom is the end exploiter. The challenge in the case was to prove the part accused 2 took in the trafficking, her awareness of the elements of the crime and her intention to bring about the sexual exploitation. This is the more difficult, as a more central link in the chain, her sister, Juliet, who recruited the children, threatened and coerced them, disappeared and was not charged.

As mentioned, accused 2 chose not to testify, but her lawyer's cross examination of the children sought to prove that she did nothing but feed and shelter the children. While two of the children confirmed this, the others testified that in Juliet's absence, she readied them to go to accused 1 after receiving telephonic requests from him, and that accused 1 transferred money to her via them after they were raped. In addition, she herself was trafficked to **South Africa** and sexually exploited by the accused, and was thus well aware of the children's similar plight.

X. Special Form of Evidence – Child Testimony:

This case addresses in depth how to evaluate child evidence and displays a more liberal approach than is present in other cases in the Southern African region, both in the court of first instance and the court of appeals.

While the **court of first instance** cites precedents whereby child testimony should be viewed with caution, it stresses that this should not be allowed to displace the exercise of common sense. Moreover, the judge leaves room for another view by which children are not necessarily or generally untrustworthy witnesses and cites cases which stress that children generally do not fantasize over things that are beyond their own direct or indirect experience. Nor are they capable of sustaining consistent perjury. The court adds that recent advances in psychology can assist in the assessment of child evidence, meaning that courts should not simply reject children's evidence under the cautionary rules, just because courts and jurists in the past have viewed them as inherently untrustworthy. Nevertheless, the court stresses that it will still approach the children's testimony with due caution, but will not allow itself to go overboard and reject their version on the basis of any "slender" criticism.

Interestingly, the court notes that as regards *contradictions between children's testimonies, these must be evaluated in a special way* compared with adult contradictions. The court notes that being children, they have different powers of observation and emotions and thus remember different things in accordance to what they find important.

In analyzing the credibility of the specific child victim-witnesses, the court deems the minors' evidence trustworthy in view of the totality of the evidence which includes support for parts of their testimony in that of other witnesses and in the accused's statements; testimony about details relating to sexual matters which children do not naturally know (such as the use of an injection to produce an erection and the use of creams on the genital area to ease the pain of penetration); no reason for the children to falsely implicate the accused; medical evidence on sexual penetration; no exaggerations in the testimony of the children.

The court of appeals is yet more liberal in its assessment of child testimony. In dealing with the testimony of child witnesses, the court addresses the aim of rules of evidence and concludes that they are not constitutional principles to be construed restrictively, but rather common sense rules whose purpose it is to seek truth and justice. Thus, *tests of credibility may need to be different for children* than for adults and the rules of evidence *do not require courts to impose the same exacting standards on them as it does on adults*. For example the presence of inconsistencies and especially as to peripheral matters such as time and location should be considered in the context of the age of the witness at the time of the events.

XI. Victim protection:

1. The role of the prosecutor

The importance of developing a relationship of trust with victims is illustrated in this case. As mentioned, one of the victims did not disclose what had happened to her, though questioned by a school principal and social worker and a police officer. Only when she developed trust in the prosecutor did she disclose what had happened to her.

This case also illustrates the special attention a prosecutor should consider giving to victims of trafficking in requesting protective measures for their testimony. In this case the Prosecution applied to the court, requesting that the child victims' testimonies be heard in camera, by means of an intermediary and via closed circuit television.

We refer the reader, in addition, to section 5.2.1 on *developing trust*.

2. Child protection measures during trial:

As mentioned, in this case, the Prosecution requested the court to hear the case in camera, allow for the testimony of the children via an intermediary and by means of closed circuit television. The court acceded to these requests and commented that it had the authority to do so, even without a report from a social worker. This ruling was affirmed by the court of appeals.

XII. Sentencing Considerations:

The court of first instance's sentencing considerations can prove to be of general importance in trafficking cases.

NOTE: In this section we will address sentencing considerations particularly relevant to trafficking cases and not considerations of more general import.

1. Aggravating factors:

- **Child victims:** The court of first instance notes as a kind of damage, that the child victims had lost all hope of a happy and safe childhood. The court adds "*When one loses all hope in life, the next step is to kill oneself and some of these children, I senses, were on the verge of doing exactly that.*" He adds that "*a very heavy sentence is required to restore the trust of the victims and their families (and of society as a whole) in the criminal justice system...*"
- **Is exploitation by many more heinous than by one?** The court of first instance rules that the crime of trafficking is not less severe when victims are trafficked for exploitation by one individual rather than many, as long as the purpose of exploitation is, in itself, heinous, like sexual exploitation.
- **Breach of trust:** In this case, the children's trust was breached as they were trafficked by aunts or known persons.

- **Sexual exploitation by much older man:** The court of first instance notes the horror of being exploited by a man old enough to be the children's grandfather.
 - **The victims were physically injured:** The child victims' sexual penetration was accompanied with pain and suffering.
 - **The relevance of the foreignness of the victim:** The fact that the victim is foreign in the country where he or she was abused can be relevant to the sentence in that it can make victims more vulnerable to exploitation. Abuse of such vulnerability can be looked upon as an aggravating factor in meting out a sentence, as has occurred in other cases in the Southern African region. While the court does not explicitly use this as an aggravating factor in sentencing, it does mention the language and cultural barriers experienced by the victims and that they were smuggled across the border without valid passports.
2. **Particular mitigating circumstances relating to the accused:** The following circumstances were noted by the court in the case of accused 2. Some were explicitly mentioned as mitigating circumstances and others merely noted:
- **Former trafficking victim:** The court of first instance notes that accused 2 was trafficked to accused 1's premises by her own sister when she was "a very small girl". This is noted among the circumstances which justify a lesser sentence.
 - **Living under difficult conditions:** The court of first instance notes that after accused 2 grew too old to be sexually exploited, she was given a job and a place to live by accused 1 which displayed "appalling circumstances of accommodation." This is mentioned among the circumstances which justify a lessening of her sentence.
 - **Limited choices:** The court notes that accused 2 was dependent on the accused 1 for her job and accommodations and that this would have been endangered had she refused to cooperate with him.
 - **Youth:** The court notes that accused 2 was a young woman of 24.
 - **No release on bail due to foreign status:** The court notes that in view of the foreign status of this accused she was not released on bail.
 - **Subsidiary role?** Though the court does not explicitly say so, perhaps another factor which led to mitigation of sentence for accused 2 was that she performed a subsidiary role as compared to that of accused 1 and her sister Juliet who recruited the children, exercised control over them and threatened and coerced them.

3. The Balance in Sentencing:

In view of **South Africa's** regime of minimal sentences for trafficking offences, the court of first instance was unwilling to mitigate the punishment of accused 1 in view of the lack of substantial and compelling circumstances to justify this. However, the court did reduce the minimal sentence of accused 2 in view of factors like her difficult living conditions and her having been formerly trafficked for sexual exploitation. The court saw in these factors "substantial and compelling circumstances" to justify a departure from the minimal sentence regime.

XIII. Patterns of Trafficking:

This case displays several patterns of trafficking, some of which are present worldwide and across the region:

1. **Child trafficking for sexual exploitation:** In this case the victims were children who were trafficked for sexual exploitation. Trafficking of children is a prevalent worldwide

pattern in view of their vulnerabilities. In the sample of cases which forms the foundation of this digest, most of the cases revolve around sexual exploitation and many of them relate to child sexual exploitation.

2. **Perpetrator and victim from same ethnic group:** This case confirms a worldwide pattern of trafficking whereby the perpetrator and victim are from the same ethnic group, which is not the majority population of the country in which the trafficking takes place. Here, while accused 1 was apparently **South African**, both accused 2 and her more dominant sister Juliet were **Mozambique** citizens as were the child victims.
3. **Trafficking accompanied by other crimes as well:** This case reflects a pattern worldwide whereby trafficking` may be accompanied by other crimes as well. Here the charges included rape as well as trafficking for sexual exploitation.
4. **Family complicity in trafficking:** In this case, as occurs in cases worldwide and across the region, we see 2 kind of family complicity: innocent family complicity,¹⁹ whereby the parents of three of the four child victims agreed that they travel to **South Africa**, having been deceived by the recruiter; and intentional family complicity,²⁰ in that Juliet and accused 2 are related to some of the children and in that Juliet formerly trafficked her own sister, namely accused 2, for sexual exploitation. Such a family relationship makes it easier to recruit due to the natural trust existing between family members, facilitates control, as victims are reluctant to oppose family members and may even militate against complaints and testimony.
5. **Trafficking by known people:**²¹ In this case, as in cases worldwide and across the region, the recruiter, Juliet was known to the parents of the children and the children themselves, even if she was not related to them. This too, apparently facilitated the recruiting of the children, placed her in a position of authority vis a vis them and might have militated against complaints and testimony.
6. **An accused person who is a former trafficking victim:** In this case, as in cases worldwide and across the region,²² accused 2 was formerly a victim of trafficking by her own sister. While the court did not exonerate her on this basis, it did consider this a mitigating factor in meting out a sentence.
7. **Use of created vulnerabilities:** In this case, none of the children had valid passports and they were transported across the border illegally. This created an additional vulnerability in that they were illegal in **South Africa**. In addition, besides the isolated nature of the physical surroundings, the children were not permitted to go to school which isolated them from contact with other people. Such created vulnerabilities are prevalent worldwide.
8. **Female perpetrator a subsidiary actor:** In this case, as in cases worldwide and across the region,²³ the female accused, namely, accused 2 was a subsidiary actor. Not only was she not the end exploiter like accused 1, but she acted only in the absence of her sister, Juliet in caring for the children, readying them to go to accused 1 and receiving payment from him on occasion.

¹⁹ Examples of a similar pattern occur in Mujee (**Botswana**); and Muzara (**Zambia**) on the part of the parents of the victims.

²⁰ Examples of a similar pattern occur in Mboo (**Zambia**), where a brother in law attempts to traffic for removal of body parts; Jeremiah Musa Dlamini (**Eswatini**) where a man traffics his biological daughter and niece for sexual exploitation; and Jezile (**South Africa**) where the uncles of the victim force her to marry the trafficker.

²¹ Examples of a similar pattern appear in Koch (**Namibia**) and Dragon (**Namibia**) where neighbors traffic children.

²² Examples of such a pattern occur in Veeran Palan (**South Africa**) and Lukas (where the accused was abused when 9 years old).

²³ Examples of this pattern occur in Lukas (**Namibia**); Veeran Palan (**South Africa**); Matini (**South Africa**).

9. **Use of subtle means of coercion:** In this case, as in others,²⁴ the traffickers used subtle means of coercion amid more overt methods like threats of force and force. These included subtle threats that if the children refused to comply, they would be abandoned, with no way to obtain food or shelter; telling the children they would get used to the abuse; telling one victim she needed to sleep with accused 1 to get money for school uniforms.
10. **A number of victims/a series of sexual exploitation:** As in many cases of child sexual exploitation in the region,²⁵ this case presents the exploitation of more than one victim, and many occurrences of exploitation for 3 of the 4 victims.
11. **A discrepancy between the age of the sexual exploiter and the victim:** As in many cases of child sexual exploitation in the region,²⁶ there was a large discrepancy between the age of accused 1 who sexually exploited the children and the children. The court of first instance noted that he could have been their grandfather.

²⁴ See section 3.2.4 on *subtle means of coercion and abuse*.

²⁵ See section 4.6.3.3 on typical patterns in the context of child sexual exploitation.

²⁶ See *ibid*.

NOTES

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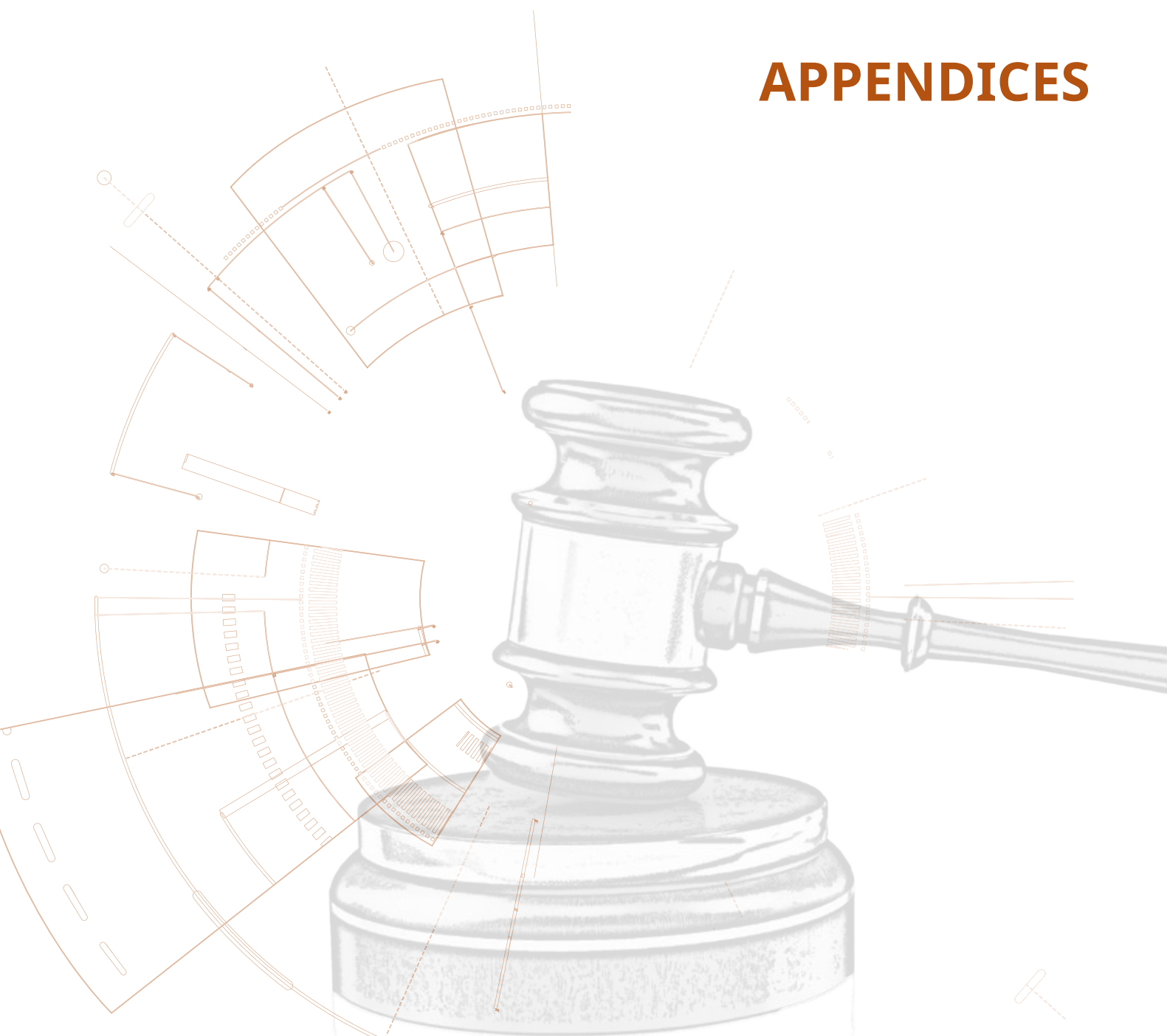
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TYPICAL ISSUES IN TRAFFICKING IN PERSONS CASES

Regional Case Digest - Southern Africa

APPENDICES



UNITED NATIONS OFFICE ON DRUGS AND CRIME
South Africa

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APPENDICES

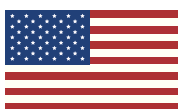


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Appendix 1: A list of States' Trafficking Legislation

1. The Republic of **Angola**: Artigos 19-23 do Novo Código Penal (Articles 19-23 of the New Penal Code).
2. The Republic of **Botswana**: Anti-Human Trafficking Act, 2014, including Anti-Human Trafficking (Amendment) Act, 2018
3. The Union of **Comoros**: **Comoros** does not have a comprehensive trafficking law. Nor does it have a specific crime of adult trafficking. However it does criminalize forced prostitution and forced labour of adults. It also explicitly criminalizes child trafficking for all the purposes of exploitation enumerated in the Protocol, but requires the use of 'means' unlike the Protocol. (We refer to Articles 8 and 13 of the 2014 Law to Combat Child Labor and Trafficking in Children which criminalizes all forms of child labor trafficking and some forms of child sex trafficking; Article 323 of the penal code which criminalizes forced prostitution of adults; and Articles 2.1 and 260 of the **Comoros** Labor Code which criminalize forced or compulsory labor of adults.
4. The **Democratic Republic of the Congo**:: Loi n° 22-2019 du 17 juin 2019 portant lutte contre la traite des personnes (Law number 22-2019 from 17 June 2019 about the Fight against Trafficking in Persons).
5. The Kingdom of **Eswatini**: People Trafficking and People Smuggling (Prohibition) Act, 2009.
6. The Kingdom of **Lesotho**: Anti -Trafficking in Persons Act, 2011.
7. The Republic of **Madagascar**: Loi No. 2014-040 Sur la lute contre la traite des etres humains (Law No. 2014-040 On the fight against human trafficking).
8. The Republic of **Malawi**: Trafficking in Persons Act No. 3 of 2015.
9. The Republic of **Mauritius**: The Combating of Trafficking in Persons Act 2009 (Act No. 2 2009).
10. The Republic of **Mozambique**: Regime Jurídico aplicável à Prevenção e Combate ao tráfico de Pessoas em particular Mulheres e Crianças (Lei n° 6/2008 de 9 de julho); (Legal Regime applicable to the Prevention and Combat of Trafficking in Persons, in particular Women and Children, Law no. 6/2008 of July 9).
11. The Republic of **Namibia**: Combating of Trafficking in Persons Act 1 of 2018.
12. The Republic of **Seychelles**: Prohibition of Trafficking in Persons Act, 2014 (Act 9 of 2014).
13. The Republic of **South Africa**: Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013).
14. The United Republic of **Tanzania**: The Trafficking in Persons Act, 2008.
15. The Republic of **Zambia**: The Anti-Human Trafficking Act, 2008.
16. The Republic of **Zimbabwe**: Trafficking in Persons Act, 2014.

NOTE: When the official language of the State is French or Portuguese, we first note the official name in that language, followed by a translation into English in parentheses.

Appendix 2: Table of Southern African trafficking legislation

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
Angola	Similar to Protocol. ¹	Similar to Protocol with certain differences. ²	Similar to the Protocol but with less detail. ³	None	Similar to Protocol but some 'means' required. ⁴
Botswana	Same as Protocol.	Same as Protocol.	Similar to Protocol with some differences. ⁵	Same as Protocol but with an additional definition of 'consent' ⁶	Same as Protocol.
Comoros⁷					Different than Protocol. 'Means' required.

¹ Exact language (in translation): "offers, delivers, attracts, accepts, transports, lodges, hosts".

² The additions are: a specific allusion to "trapping" in addition to "fraud". The 'means' missing are "other forms of coercion" and "deception" as distinguished from "fraud". A difference is that the 'means' of attaining the consent of a person with control over the victim does not include the giving or receiving of benefits as in the Protocol and only "serious threats" are included.

³ The legislation includes three large categories: sexual exploitation, labour exploitation or organs extraction

⁴ The legislation requires "whatever means", thus widening the 'means' that can fulfill the requirement compared to adult trafficking.

⁵ The additions are: "forced marriage"; "child marriage"; "forcible or fraudulent use of a person in armed conflict"; "use of a person in illegal activities"; "debt bondage"; "human sacrifice or harmful rituals or practices". In addition, the definition of 'sexual exploitation' is wide and explicitly includes pornography. The difference is that removal of organs includes body parts and must be forcible or fraudulent.

⁶ Whereas **Botswana**, like the Protocol, states that consent is irrelevant if 'means' have been used, the Trafficking Act also includes a definition of consent: "*that the person agrees by choice, and has the freedom and capacity to make that choice*"

⁷ According to our information, **Comoros** does not have a comprehensive trafficking law. Nor does it have a specific crime of adult trafficking. However it does criminalize forced prostitution and forced labour of adults. It also explicitly criminalizes child trafficking for all the purposes of exploitation enumerated in the Protocol, but requires the use of 'means' unlike the Protocol.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
DRC	Same as Protocol.	Same as Protocol.	Similar to Protocol with some differences. ⁸ Particularly interesting: exploitation must have a purpose of generating profit.	Similar to Protocol – not explicitly contingent of presence of ‘means’. ⁹	Same as Protocol.
Eswatini	Same as Protocol with some additions. ¹⁰	Same as Protocol, with some additions. ¹¹	Same as Protocol.	Consent to act of trafficking or exploitation- no defence – not explicitly contingent on ‘means’.	Same as Protocol.
Lesotho ¹²	Same as Protocol with some additions. ¹³	Same as Protocol with some additions. ¹⁴	Similar to Protocol with some differences. ¹⁵	Consent irrelevant – not explicitly contingent on ‘means’.	Different from Protocol. ¹⁶

⁸ Regarding labour exploitation, the **DRC** law adds: child labour, debt bondage, serfdom; regarding sexual exploitation, the **DRC** adds pornography; it adds forced and servile marriage; recruiting or using a child for armed conflict; begging (organizing begging for profit or profiting from the begging of children); the removal of tissues as well as organs if the process contravenes a list of conditions; the use of a person for criminal activities. The law notes that the exploitation of the person can be accompanied by retention of travel documents, identity or residence documents of victims and that the purpose of ‘exploitation’ is to generate a profit, whether financial, material or otherwise.

⁹ Consent to the commission of the offence is not a cause for exemption from liability or a circumstance mitigating for the offender.

¹⁰ The additions are: “employs”, “maintains” and “holds”.

¹¹ Besides “abuse of power”, the Act includes “abuse of law or legal process”.

¹² We note that along with the general definition of “trafficking”, the **Lesotho** Act includes a series of specific trafficking crimes which may require different acts, means and purposes of exploitation. For example, one such specific crime includes matching a person to a foreigner for the purpose of buying, offering, selling, trading him for prostitution, pornography, sexual exploitation, forced labour or slavery, forced labour, involuntary servitude, debt bondage. This is particularly interesting in view of the fact that the general definition of trafficking does not include “slavery”.

¹³ The additions are: “legal or illegal adoption”, “sale” and “supply”.

¹⁴ The additions are: “kidnapping” as well as “abduction”; “abuse of law or legal process” as well as “abuse of power”; “debt bondage”.

¹⁵ The act lacks “slavery” includes only “**induced** prostitution” and adds “forced marriage”.

¹⁶ The Act does not differentiate between adult and child trafficking in terms of the elements of the offence, but does establish an aggravated sanction for child trafficking.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
Madagascar	Similar to Protocol with differences. ¹⁷	Same as Protocol.	Similar to Protocol with some differences. ¹⁸ Particularly interesting – a definition of exploitation.	Same as Protocol.	Same as Protocol.
Malawi	Same as Protocol + “obtaining”.	Similar to Protocol with some differences. ¹⁹	Similar to the Protocol with some differences. ²⁰	Same as the Protocol.	Same as the Protocol.
Mauritius ²¹	Same as Protocol with some additions. ²²	Similar to Protocol with some differences. ²³	Similar to Protocol with some differences. ²⁴	Consent to act intended to be trafficking not a defence. Not explicitly contingent on ‘means’.	Different to Protocol - same elements as adult trafficking.

¹⁷ The addition is “accommodate”; missing are “transfer” and “receipt”.

¹⁸ The definition of ‘exploitation’ is as follows: “Exploitation” shall mean the obtaining of financial or other benefits by means of the reduction of a person to any type of services, prostitution, sexual servitude or other forms of servitude. Missing is “slavery” and “other forms of sexual exploitation”. Additions are: “domestic work”, “forced marriage”, “sale of a person”, “illegal adoption”, “debt bondage”, “exploiting the begging of another”, “sexual commercial exploitation of children”; includes only “prostitution” and not “other forms of sexual exploitation”.

¹⁹ “Coercion” appears instead of “other forms of coercion”. Additions are: “threats or abuse of the law or legal process”; “threats of abuse” as well as abuse appear in the ‘means’ of “abuse of a position of vulnerability” and an “abuse of power”.

²⁰ Some ‘purposes of exploitation’ do not appear explicitly: “slavery”, “practices similar to slavery”, “servitude” but there appears a general form of exploitation called “forced labour or any extraction of labour or services from a person”; sexual exploitation is limited to forced and commercial forms but explicitly includes pornography; removal of organs includes tissues and body parts. Particularly of interest is a basket category: “any other practice in terms of which it cannot be said that the person participated willingly”.

²¹ We note that along with the more general trafficking crime, **Mauritius** includes another trafficking crime which is “adoption facilitated or secured through illegal means”.

²² The additions are: “sale”, “supply”, “procurement”, “capture”, “removal”. We note that **Mauritius** also includes a separate trafficking offence where “adoption” is the only ‘act’.

²³ The addition is “intimidation”. The differences are: instead of “other forms of coercion”, there appears “coercion”, though in the context of this Act, this does not seem to make a difference. We note that **Mauritius** also includes a separate trafficking offence where the ‘act’ is “adoption” and the ‘means’ is “facilitated or secured through illegal means”.

²⁴ Lacking is “servitude”. The differences are: “illegal removal of organs” instead of “removal of organs”; “forced marriage” is explicitly included in “practices similar to slavery”; pornography is explicitly included in definition of sexual exploitation.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
Mozambique ²⁵	Similar to Protocol with some differences. ²⁶	Similar to Protocol, but the full gamut of 'means' dispersed over several Articles. ²⁷	Similar to Protocol, but the full gamut of purposes dispersed over several Articles. ²⁸	Consent does not mitigate criminal liability – not explicitly contingent on presence of 'means'.	Different from Protocol – elements of child and adult trafficking the same. ²⁹
Namibia ³⁰	Includes all the Protocol's 'acts' and more. ³¹	Includes all the Protocol's 'means' + kidnapping.	Includes all the Protocol's purposes and more. ³²	Not a defense that a person consented to the intended exploitation – not explicitly contingent on presence of 'means'.	Same as Protocol.
Seychelles	Same as Protocol.	Similar to Protocol with one clarification. ³³	Similar to Protocol with some differences. ³⁴	Similar to Protocol. ³⁵	Same as Protocol.

²⁵ We note that while **Mozambique** has one section labelled “trafficking in persons”, it also enumerates a number of other connected crimes which fill in the gaps in the general section and for example include the ‘purpose of exploitation’ of “removal of organs” which is not included in the trafficking section. We also note that the glossary includes a definition of trafficking which enlarges on the ‘acts’, ‘means’ and ‘purposes of exploitation’ beyond what is said in Article 10 on “trafficking in persons”.

²⁶ In Article 10, the Article on trafficking in persons, missing are the ‘acts’ of “transfer” and “harbour” and additions are: “give shelter to” and “supply”.

²⁷ Article 10, the Article on trafficking in persons, requires “any means” and includes a specific example: “under pretext of domestic work, or work abroad, training or apprenticeships”. However, in the glossary, many more ‘means’ are enumerated, including all those which appear in the Protocol and in addition – “forced marriage”.

²⁸ Thus, in Article 10, only forced labour, slavery, indentured servitude or debt servitude appear, but in Article 11 which is a connected crime, there appear “pornography, sexual exploitation, forced labour, slavery, indentured servitude or debt servitude”; in Article 13 there appears “removing or selling the internal organs”; and in the glossary, there appear “prostitution or other forms of sexual exploitation”, and “forced marriage” as well.

²⁹ However if the victim is a child, it is considered an aggravating circumstance.

³⁰ We note that under section 3 with the heading “prohibition of trafficking” there appears a subsection describing an additional separate offence with a different approach to ‘acts’ and ‘means’ than the general subsection: “a person who facilitates or secures the adoption of a child, for the purpose of exploiting that child”.

³¹ The additional ‘acts’ are: “delivers”, “sells”, “exchanges”, “leases”.

³² The additional purposes are: “prohibited child labour or other economic exploitation”; “debt bondage” and “forced marriage” as explicitly mentioned “practices similar to slavery”; “criminal exploitation”; “the impregnation of a female person against her will for the purpose of selling the child when the child is born”. In addition, the purpose of “removal of organs” is wider than in the Protocol and includes in addition, removal of body parts.

³³ The addition to ‘deception’ is as follows: “including any misrepresentation by words or conduct as to financial incentive or promise of reward or gain and other conditions of work”.

³⁴ The list of ‘purposes of exploitation’ lacks “slavery”; includes an added form of exploitation of “forced marriage”; “removal of organs” is just by fraudulent means and includes body parts as well as organs; “sexual exploitation” explicitly includes pornography.

³⁵ Consent to an act in the offence of trafficking is not a defence if ‘means’ exist.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
South Africa ³⁶	Same as Protocol with additions. ³⁷	Similar to Protocol with additions. ³⁸	Similar to Protocol with additions. ³⁹	Similar to Protocol. ⁴⁰	Similar to Protocol. ⁴¹

³⁶ Under ‘trafficking in persons’ there appears a general crime, as in the Protocol and also two specific crimes: “legal or illegal adoption of a child for exploitation”; and “forced marriage for exploitation”.

³⁷ The additions are: “delivers”, “sells”, “exchanges”, “leases”.

³⁸ The additions are: “threat of harm” in addition to “threat of force”; “kidnapping” as well as “abduction”; clarification that giving benefits to a person with control over the victim can be direct or indirect; an additional ‘means’ of “the direct or indirect giving or receiving of payments, compensations, rewards, benefits or any other advantage.” Yet more importantly, the Act clarifies that these ‘means’ can be aimed at either the person or an immediate family member or any other person in close relationship to that person.

³⁹ Slight differences are: no explicit allusion to prostitution of others, but this is covered by the term “sexual exploitation” as widely defined in the Act. Substantive additions are: “child labour”, “the impregnation of a female person against her will for the purpose of selling her child when the child is born”. Substantive difference is that removal of body parts is prohibited rather than removal of organs. We note that **South Africa** has established two special trafficking crimes whereby adopting a child, facilitated or secured through legal or illegal means or concluding a forced marriage - both for the purpose of exploitation is considered a crime of trafficking in persons (section 4(2) of **South Africa’s** trafficking Act).

⁴⁰ Consent of an adult to the intended exploitation or the act is not a defence if ‘means’ exist. Consent of a child or a person in control of having authority over a child to the intended exploitation or the act is not a defence even if no ‘means’ exist.

⁴¹ Consent of a child or a person in control or having authority over the child to the intended exploitation of the act is not a defence even if no ‘means’ exist.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
Tanzania ⁴²	General trafficking crimes similar to Protocol. ⁴³	General trafficking crimes similar to Protocol. ⁴⁴	General trafficking crimes similar to Protocol. ⁴⁵	Same as Protocol.	Similar to Protocol. ⁴⁶
Zambia	Same as Protocol + "obtain".	Similar to Protocol with differences. ⁴⁷	Similar to Protocol. ⁴⁸	Similar to Protocol. ⁴⁹	Similar to Protocol. ⁵⁰

⁴² **Tanzania** has general crimes of trafficking similar to that in the Protocol, but its Act also includes a series of additional crimes under the heading of "Prohibition of Trafficking in Persons". These include varied 'acts', 'means' and 'purposes' and sometimes only include two elements instead of three. Examples are "introduces or matches a person to a foreign national for marriage for the purpose of acquiring, buying, offering, selling or trading the person in order that person be engaged in prostitution, pornography, sexual exploitation, forced labour, slavery, in-voluntary servitude or debt bondage"; "adopts or facilitates the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced-labour and slavery, involuntary servitude or debt bondage". In addition, although the interpretation section defines 'exploitation' broadly, as including: "people smuggling, prostitution and other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs", each of the specific crimes does not include all these forms of exploitation.

⁴³ As said, there are a number of specific trafficking crimes whose 'acts' are not similar to those in the Protocol, but of the two general crimes, one – with 'purposes of exploitation' of "prostitution, pornography, sexual exploitation, forced labour; slavery, involuntary servitude or debt bondage" – includes all the 'acts' in the Protocol and adds "provides"; the other – with the 'purpose of exploitation' "removal or sale of organs" – lacks "transfers", "harbours; and "receives" and adds – "hires", "adopts", and "abducts".

⁴⁴ The first general trafficking crime requires *any* means, including those done "under the pretext of domestic or overseas employment, training or apprenticeship". The other – reads – "threat or use of force, fraud, deceit, violence, coercion or intimidation, thus adding intimidation and lacking "abduction", "giving or receiving benefits", "abuse of power or a position of vulnerability".

⁴⁵ The definition of 'exploitation' includes all the 'purposes of exploitation' enumerated in the Protocol with the addition of people smuggling. The first general trafficking crime includes most of the 'purposes of exploitation' in the Protocol – namely: "prostitution, pornography, sexual exploitation, forced labour; slavery, involuntary servitude or debt bondage (which is included in the Protocol's "practices similar to slavery"" but lacks "practices similar to slavery" and "removal of organs". The second, includes only "the removal and sale of organs", and in the case of a child or disabled person – "engaging them in armed activities".

⁴⁶ The relevant section states: "*Where a victim of trafficking in persons is a child, consent of the child, parent or guardian of the child shall not be used as a defence in prosecution under this Act regardless of whether there is evidence of abuse of power, fraud, deception or that the vulnerability of the child was taken advantage of.*"

⁴⁷ **Zambia** includes all the 'means' enumerated in the Protocol with some additions and a difference. The additions are: "false or illegal adoption contrary to a written law"; "the destruction, concealment, removal, confiscation, possession of any passport or immigration document or official identification document"; explicitly includes "abuse of law or legal process" under "abuse of power". The difference is that whereas the Protocol enumerates giving or receiving benefits to achieve the consent of a person controlling the victim, the **Zambian** Act has a wider 'means' of "the giving or receiving of payments or benefits to achieve the consent of the person".

⁴⁸ **Zambia's** Act includes all the purposes of exploitation enumerated in the Protocol. In addition the **Zambian** Act includes "child labour" which is defined as "slavery and practices similar to slavery" and includes sale of a child; and explicitly includes "forced marriage" and "debt bondage" under "practices similar to slavery". Instead of "removal of organs", it includes "removal of body parts contrary to the Human Tissues Act"; it explicitly includes pornography under "sexual exploitation", but all forms of sexual exploitation must fulfill the requirement that they are not done voluntarily.

⁴⁹ Consent to an act constituting the crime is not a defence.

⁵⁰ Consent of child victim or his parent, guardian or person having parental rights or responsibilities to an act constituting the offence is not a defence. We note that this does not depend on the existence of 'means'.

STATE	ACTS	MEANS	PURPOSES	STATEMENT ON CONSENT	CHILD TRAFFICKING
Zimbabwe ⁵¹	Only one 'act' – transporting.	One of two trafficking offences requires 'means' similar to Protocol but with differences. The other does not require 'means'. ⁵²	One of two trafficking offences requires 'purposes' similar to Protocol but with differences. The other does not require 'purposes'. ⁵³	Similar to Protocol. ⁵⁴	Similar to Protocol. ⁵⁵

⁵¹ **Zimbabwe** has two trafficking offences, each with only two elements. One requires transporting a person involuntarily and includes an 'act' and 'means'; the other requires transporting a person for an unlawful purpose and includes an 'act' and 'purpose'.

⁵² Compared to the Protocol, the one offence in the **Zimbabwe's** Act which requires a 'means' lacks: "abuse of a position of vulnerability" and "coercion" and includes in addition: "violence" as well as "force", "extortion", "detention", "administering drugs to subdue the victim or causing the victim to be addicted to drugs".

⁵³ Compared to the Protocol, the one offence in the **Zimbabwe** Act which requires a 'purpose', does not mention the term 'exploitation' but rather 'unlawful purpose'. Moreover, the **Zimbabwe** Act lacks "slavery", "practices similar to slavery" (although it does explicitly include one form, namely, "debt bondage"); "forced services" (although it does include "forced labour"). Compared to the Protocol, it includes additional purposes: "illegal labour", "forced marriage" and explicitly includes "pornography". It narrows the Protocol's "removal of organs" to "unlawful removal of organs". It includes "servitude" under "forced labour" ("forced labour and other forms of servitude").

⁵⁴ It is not a defence if the victim consented to any act constituting the offence.

⁵⁵ It is not a defence if the victim or his parent or guardian or any person having parental authority consented to any act constituting the offence – without regard to the existence of 'means'.

Appendix 3: Glossary of Southern African terms appearing in cases

NOTE: Though most of the terms are typical to the region, some are common to places outside the region, and in particular the terms denoting various drugs. The definitions are drawn from dictionaries and Wikipedia.

1. **Amadaki:** specially designed attire for a new bride. Appears in Jezile (**South Africa**).
2. **Apongo:** term used to identify with respect a mother, father, son and daughter in law. Appears in Chiyenda (**Malawi**).
3. **Brotchens:** bread rolls Appears in Dragon (**Namibia**).
4. **Chigayo:** a grinding machine. Appears in Mboo (**Zambia**).
5. **Chitenge or Kitenge:** an East African, West African and Central African fabric similar to sarong, often worn by women and wrapped around the chest or waist, over the head as a headscarf, or as a baby sling. Kitenges are colourful pieces of fabric. Appears Wina Lubinda (**Zambia**).
6. **‘Crystal’:** Crystal meth is short for crystal methamphetamine. It is just one form of the drug methamphetamine. Methamphetamine is a white crystalline drug that people take by snorting it (inhaling through the nose), smoking it or injecting it with a needle. Some even take it orally, but all develop a strong desire to continue using it because the drug creates a false sense of happiness and well-being—a rush (strong feeling) of confidence, hyperactiveness and energy. One also experiences decreased appetite. These drug effects generally last from six to eight hours, but can last up to twenty-four hours. Appears O B Abba (**South Africa**).
7. **Dagga:** a term used for marijuana in **South Africa** Appears in Eze (**South Africa**) and Matini (**South Africa**).
8. **Damara man:** member of a semi nomadic people in **Namibia**. Appears in Mboo (**Zambia**).
9. **Doek:** a square of cloth worn mainly by African women to cover the head, especially to indicate married status (from Afrikaans). Appears in Msweli (**South Africa**).
10. **‘The Hawks’:** **South Africa’s** Directorate for Priority Crime Investigation (DPCI) which targets organized crime, economic crime, corruption, and other serious crime referred to it by the President or the **South African** Police Service (SAPS), set up by the Zuma administration in 2008. Appears O B Abba (**South Africa**) and Eze (**South Africa**).
11. **Lobola:** among southern African peoples, a bride price, especially one paid with cattle, or the practice of paying a bride price. Appears in Jezile (**South Africa**).
12. **Lozi:** also known as siLozi and Rozi, is a Bantu language of the Niger–Congo language family within the Sotho–Tswana branch, that is spoken by the Lozi people, primarily in southwestern **Zambia** and in surrounding countries. Appears in Mboo (**Zambia**).
13. **Makoti:** a bride; a newly-wed woman, especially in the Bantu language community. Appears in Jezile (**South Africa**) and Matini (**South Africa**).

14. **Mandrax:** Methaqualone is a [sedative](#) and [hypnotic](#) medication, sold as a [combination drug](#) under the brand name Mandrax which contained 250mg methaqualone and 25mg [diphenhydramine](#) within the same [tablet](#), though mostly in Europe. An [overdose](#) can lead to nervous system shutdown, [coma](#) and [death](#). Appears in Eze (**South Africa**).
15. **Motswana:** the singular form of Batswana, and may refer to a member of the [Tswana people](#), an ethnic group in southern Africa or a citizen of **Botswana** of any ethnic background. Appears in Mujee (**Botswana**).
16. **Nshima:** maize flour porridge. (Appears in Nyassa Nicolemulumbilwa (**Zambia**) and Mponda (**Malawi**).
17. **Ntash or ‘Cat’:** slang names, given to the stimulant drug called methcathinone. It can be snorted or inhaled and is highly addictive. The side effects are similar to those of cocaine: it causes euphoria, increased alertness, anxiety, hallucinations, delusions and paranoia. It is white in appearance and comes in powder form. It usually sells for R200 to R250 per gram in Johannesburg. Both drugs cause an intense psychological addiction. Appears in O B Abba (**South Africa**).
18. **(From) pillar to post:** to move from one place to another with no purpose and direction. Appears in Matini (**South Africa**) in the testimony of police officer Plaatjies.
19. **‘Rocks’:** also known by street names such as “candy, nuggets” and “grit,” the [rock drug](#) is another name for what is widely referred to as crack cocaine. Unlike its powdered form, cocaine, crack is smoked rather than snorted. As a result, the effects are instant and short-lived, with a high that typically lasts between 5 and 10 minutes. The rock drug is classified as a stimulant or “upper,” which relates to the fact that it causes a “high” characterised by an extreme energy boost, increased alertness and an elevated mood. Because of its formulation and the fact that it is smoked rather than snorted, crack is far more potent than cocaine. Its side effects are therefore more far-reaching and devastating. Cocaine has a high street value, while crack is sold cheaply and is therefore easier to acquire. Unfortunately, the substances that are often used to produce crack include toxic substances like rat poison and even arsenic. For those addicted to crack cocaine, there are no guarantees as to what is being taken into the body and what its effects will be. Appears in O B Abba (**South Africa**).
20. **Shebeen:** (especially in Ireland, Scotland, and **South Africa**) an unlicensed establishment or private house selling alcoholic liquor and typically regarded as slightly disreputable. Appears in Matini (**South Africa**).
21. **Sjombok:** a heavy leather whip, traditionally made from an adult hippopotamus or rhinoceros hide, but also commonly made out of plastic. A strip of the animal’s hide is cut and carved into a strip 0.9 to 1.5 metres long, tapering from about 25 mm thick at the handle to about 10 mm at the tip. It is also known as litupa. Appears in Mndzebele (**Eswatini**) and Jezile (**South Africa**).
22. **Spaza shop or tuck shop:** an informal convenience shop business in **South Africa**, usually run from home. They also serve the purpose of supplementing household incomes of the owners, selling small everyday household items. Appears in Obi (**South Africa**).
23. **Trout farm:** a lake or other [enclosed](#) area of water where [trout](#) are bred for food. Appears in Mabuza (**South Africa**) court of first instance, where the judge says that the place where the child victims were held was remote and that there were only two trout farms nearby.⁵⁶

⁵⁶ The judge says “trout arms” rather than “trout farms” but this is probably a typing mistake.

24. **Ukuthwala:** a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers, with the intention of compelling the girl or young woman's family to endorse marriage negotiations. Today, ukuthwala is being practiced in different ways from the original tradition, as it is marked by violence and rape. Appears in Jezile (**South Africa**).
25. **Veld (also spelled veldt):** open, uncultivated country or grassland in southern Africa. Appears in Shongwe (**Eswatini**).

Appendix 4: Index of regional and international cases

NOTE: The following citations are intended to give the reader basic information on the cases, but not all follow the different rules of citation in the various States.

I. Regional cases:

Botswana:

1. The State v. Sarudzai **Mujee**, CTHGB-000042-17 in the High Court of **Botswana** at Lobatse, conviction 6 July 2021, sentence 14 July 2021.

Democratic Republic of the Congo::

Note: These cases were summarized by various law enforcement practitioners. Full judgments and citations were unavailable.

2. **Luzama Kavula**, in the Court of Peace, Kinkole Court of the Commune of Nsele, city of Kinshasa, reported by the Territorial Police.
3. **Luizon**, in the Court of Peace, Kinkole Court of the Commune of Nsele, city of Kinshasa, reported by the Territorial Police.
4. **Tshiswaka**, in the Court of Peace.
5. Court of Peace of Songololo, a case of baby theft, reported by advocate Deo Memvanga.

Eswatini:

1. Rex v. **Adigwe Dike** and other, Case No. 33/2012 in the High Court of Swaziland, judgment from 30th of April 2014. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. SWZ001).
2. King v. **Mndzebele**, Case No: SDV 51/15 in Subordinate Court for the District of Manzini before D.V. Khumalo. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. SWZ002).
3. King v. **Shongwe** Case No. HLU 60/2016 before Subordinate Court district Shiselweni; **Shongwe** vs King [166/19] [2020] SZHC 113 (24 June 2020).
4. King v. **Jeremiah Musa Dlamini**, Case No. BH350/19 in the Magistrates' Court of **Eswatini**, held at Pigg's Peak, 21.08.20; an extract of the ex tempore judgment was made available.
5. Rex v **Machawe P Dlamini**, Case Number P207/2017 in the Magistrate's Court.

Lesotho:

Note: only summaries of cases were available.

6. Rex v. **Tsoana**, CR: 372/12, before Magistrate's Court. We note that while prosecution was pending, the magistrate was appointed to the High Court and the matter came to a standstill. The case has now been referred to the High court. A summary of the facts is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO001).

7. **Rex v. Yoseph Girmay Testagaber, Adanech Beru Woldegioregis**, CR:07/12, before the Magistrates Court for the District of Maseru, verdict 17/12/2012. A case summary available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO003).
8. **Rex v. Zhen Shu Xhian** CR 139/2011, before Magistrates Court, verdict 27 January 2012; conviction reversed in High Court of **Lesotho** CRI/APN/129/12 22/2/2012. A case summary is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. LSO002).

Madagascar:

9. **Judgment 21-CO**, 5 March 2019, in the Supreme Court of **Madagascar**, Anti Corruption Section of Antananarivo, First Instance, Criminal Division.
10. **Judgment No. 101-CO**, 27 June 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.
11. **Judgment No. 97-CO** from 25 June 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.
12. **Judgment No. 220-CO** from 22 October 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.
13. **Judgment No. 45-CO** from 25 April 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.
14. Judgment from 24 February 2015. The citation was unavailable.
15. **Judgment No. 57-CO** from 20 May 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.
16. **Judgment No. 16-CO** from 4 December 2018.
17. **Judgment No.76-CO** from 6 June 2019, in the Supreme Court of **Madagascar**, Anti - Corruption Section of Antananarivo, First Instance, Criminal Division.

Malawi:

18. **The State v. Mponda**, Criminal Case Number 352 of 2017, in the Senior Resident Magistrate Court sitting at Lilongwe. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MWI006).
19. **Joseph Kapinga** and other v. The Republic, Criminal Appeal No. 22 of 2015 in the High Court of **Malawi**, Principal Registry, Criminal Division. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MWI005)
20. **The State v. Bandawe** and others, Criminal Case Number 213 of 2017 in the Senior Resident Magistrate Court Sitting at Lilongwe, conviction June 30, 2017; sentence July 26, 2017. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No MWI003).
21. **The State v. Phiri** and others, Criminal Case No. 109 of 2018, in the High Court of **Malawi** (Criminal Division) Lilongwe District Registry Sitting at Dowa, conviction June 13, 2019; sentence November 29, 2019.

22. The State v. **Chiyenda**, Criminal Case No. 30 of 2018, in the Senior Resident Magistrate Court Sitting at Lilongwe; conviction and sentence, January 19, 2018. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MWI004).
23. The State v. **Saidi**, Criminal Case Number 208 of 2017 in the Senior Resident Magistrate Court Sitting at Dedza; sentence May 22, 2017.
24. Republic v. **Ruth Lourenco**, Criminal Case Number 150 of 1999 (unreported). Only a summary of this case was available and can be accessed in the UNODC Human Trafficking Case Law Database (UNODC Case Number MLW001).
25. Republic v. **Banda**, Criminal Case No. 347 of 2005. Only a summary was available which can be accessed at the UNODC Human Trafficking Case Law Database (UNODC No. MLW002).

Mauritius:

26. Police v. **Sonah** and others, Cause No. 949/2010, 2012 INT 192, in the Intermediate Court of **Mauritius**.
27. Police v. K.P. **Hawoldar**, Cause No. 320/2012, 2015 INT 348m in the Intermediate Court of **Mauritius**.
28. Police v. **Fawza**, Cause No. 1330/13, 2017 INT 82, in the Intermediate Court of **Mauritius**.
29. Police v. **Martinet** and others, Cause Number 672/09, 2009 INT 253, in the Intermediate Court of **Mauritius**. A summary is available in the UNODC Human Trafficking Case Law Database (MUS002).
30. Police v. **Roy Monque Therese**, Cause No: 1529/2004, 2008 INT373 in the Intermediate Court of **Mauritius**.
31. **Lamarie** Pierre Charles Jacques v. The State, 2004 SJ 2 Record No: 6748, before Supreme Court of **Mauritius**. Only a summary was available and can be accessed at the UNODC Human Trafficking Case Law Database (UNODC No. MUS001).

Mozambique:

32. State v. Ana Ezequiel **Gole** and others, Case No. 29/17, Judicial Court of the Gaza Province, 4th Section – Criminal, 20 August 2019 (translated from Portuguese to English). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. MOZ003).
33. State v. Amado Rachide **Tumo**, Case No. 11/19, 24/6/2020. Only a summary was available in the UNODC Human Trafficking Case Law Database (UNODC No. MOZ002).
34. State v. Samson Chale Magona **Muiambo**, Processo no 31/10 in Tribunal Judicial Provincial de Manica (provincial court), 10 December 2010. Only a summary was available in the UNODC Human Trafficking Case Law Database (UNODC No. MOZ001).

Namibia:

35. S. v. **Lukas** (CC 15-2013) [2015] NAHCMD 124 (2 June 2015), High Court of **Namibia**, Main Division, Windhoek; sentence – (CC 15/2013) [2015] NAHCMD 186 (10 August 2015), High Court of **Namibia**, Main Division, Windhoek. A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. NAM001).

36. *S. v. Jonas* (CC14/2017) [2019], High Court of **Namibia** Main Division, Windhoek, conviction (31 July 2019); sentence (3 December 2019). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. NAM003).
37. *S. v. Bertus Koch* (CC 20/2017) [2018] NAHCMD 290 (18 September 2018), High Court of **Namibia** main Division, Windhoek; sentence (11 October 2018). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. NAM002).
38. *S. v. Dragon Vujicin*, SKW-CRM-1000/2016, conviction on trafficking affirmed on appeal *Vujicin v S* (HC-MD-CRI-APP-CAL-2020-00062) [2020] NAHCMD 551 (1 December 2020) (1). **NOTE: This case is called Dragon (Namibia) in the digest.**

Seychelles:

39. *R. v. Alam* (CO 67/2016) [2018] SCSC 946 (19 October 2018) in the Supreme Court of **Seychelles**, sentence CO 67/2016 [2018] SCSC 1074, (14 November 2018). A summary is available in the UNODC Human Trafficking Case Law Database (UNODC No. SYC010).
40. *The Republic v. M.L. and others* CrS 63/19 [2019] SCSC (17 April 2020) in the Supreme Court of **Seychelles**.

South Africa:

41. *State v. Veeran Palan* and other, Case No. RCD 13/14, Regional Court of KwaZulu-Natal, (12 June 2015), available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF007).
42. *State v. Mabuza* and other Case No. SHG 9/13 Regional Court for the Regional Division of Mpumalanga at Graskop (21 November 2014); conviction affirmed *Mabuza v. State* Case No A150/2016 in the High Court of **South Africa**, Gauteng Division, Pretoria, (30 August 2017), available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF012).
43. *Jezile v. State*, HCC No. A 127/2014, High Court of **South Africa** (Western Cape Division, Cape Town) (23 March 2015), available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF011).
44. *Ntonga and others v. State* CA 159/2012 (1) High Court of **South Africa**, (Eastern Cape, Grahamstown) (22 August 2013) available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF005).
45. *State v. MMF*, Case 41/942/16 in the Regional Division for KwaZulu-Natal at Durban, conviction 15 March 2017; sentence 24 March 2017. Conviction on trafficking reversed on appeal, conviction of rape confirmed in *Fakudze v State* Case no: AR410/2018 in the High Court of **South Africa** (KwaZulu-Natal Division, Pietermaritzburg) June 7, 2019, available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF009). **NOTE: This case will be referred to as Fakudze (South Africa) in the digest.**
46. *Dos Santos v. State*, Case no. A26/2014 in the High Court of **South Africa**, Gauteng Division, Pretoria, available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF010).
47. *State v. Eze*, Case no. 14/546/2013 in the Regional Division of Gauteng, Pretoria 27 November 2017, available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF015).

48. State v. **Matini**, RC 123/13, in the Regional Division of the Eastern Cape, Uitenhage, conviction 27/10/2017; sentence 8/2/2018.
49. State v. O.B. **Abba** and others, Case number CC41/2017, in the High Court of **South Africa** (Gauteng Division, Pretoria).
50. State v. **Allima**, RC92/13 in the Regional Court for the Regional Division of KwaZulu-Natal held at Nongoma (26 June 2014).
51. State v. **Ogochukwu**, Case No: SS14/201 in the High Court of **South Africa**, Gauteng Local Division, Johannesburg (28 February 2017).
52. State v. **Obi** and others, Case No: CC40/2018, in the High Court of **South Africa**, Gauteng Division, Pretoria. Only the sentence was available (25 January 2020).
53. **S.L.** and others v. The Minister of Home Affairs and others (2016/ 01352) [2016] ZAGPJHC 47 (26 February 2016) in the High Court of **South Africa**, Gauteng Local Division, Johannesburg.
54. State v. **Wiedermeyer** and others, case No. 14/255/2015 in Gauteng, conviction (26 September 2017), sentence (27 August 2018). NOTE: Only the charge sheet and handwritten pleas, judgment and sentence were available, so that the citation is missing details and only the decisions were recorded with no legal reasoning.
55. State v. **Balele**, Case No. A331/16 in Gauteng, Pretoria. NOTE: only the charge sheet and 2 prosecutorial summaries were available, so that the citation is missing details.
56. State vs. **Uche Odii** and others, verdict from August of 2012. Only a summary was available, accessible in the UNODC Human Trafficking Case Law Database (UNODC No. ZAF008).
57. State v. **Mansaur** Only a summary of the facts is available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF006). There is no court decision as the accused committed suicide before the court hearing, after he pled guilty to the charges.
58. State v. **Hlabi**, Case Number 14/368/19 in the Regional Division of Gauteng in Pretoria. Only the charge sheet and the Main Heads of Argument by the State in an application for discharge in terms of section 174 of the CPA 51/1077, were available.
59. State v. **Msweli**, Case No RC 465/2015, in the Regional Court for the Regional Division of KwaZulu-Natal at Pinetown, conviction 13 March 2017, sentence 27 September 2017. We note that the only documents available were a handwritten summary of the judgment prepared by the prosecutor; the sentence; the charges; and the State's Heads of Argument on the conviction and sentence.
60. State v. William **Knoetze** and other Criminal Case No. 73-01-2014, in Stutterheim. The only documents available were the decision of the Deputy D.P.P. as to the charges, and a summary prepared by the prosecutor were available, so that the citation is not full. We were informed that there is no transcription of the judgment, as it was never appealed.
61. State v. Ziegler, Case No: 41/1816/2010 in the Regional Court of KwaZulu-Natal, held at the Specialised Commercial Crime Court, Durban. The documents available were a signed plea bargain from 23 November 2010 and a summary, available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF001).

62. The State v. **Netcare** Kwa-Zulu Limited, summary available in UNODC Human Trafficking Case Law Database (UNODC No. ZAF002).

Tanzania:

63. **John S/O Mjwanga** v. Republic Criminal Appeal 124 of 2016 in the High Court of **Tanzania** at Mbeya, 30 December 2016.
64. Republic v. **Ramadhani S/O Juma**, Criminal Case 47 of 2015 in the District Court of Nyamagana District at Mwanza, 24 November 2015.
65. Milinga and others v. Republic, Crim. App. 33 of 2018 in the High Court of the United Republic of **Tanzania** (Dar Es Salaam District Registry), February 27, 2019 and 13 March 2019.
66. Republic v. **Shebe**, Criminal Case No. 192 of 2017 in the Resident Magistrate's Court of Dar Es Salaam at Kisutu, 29 August 2018.
67. Republic v. **Umutoniwase** Diane and others, Criminal Case No. 7/2018 in the Resident Magistrate Court of Dodoma, 1 August 2018.

Zambia:

68. People v. **Chama**, 2SP/E//198/09, Magistrate's Court Maseru, verdict confirmed in High Court (April 2010), available at UNODC Human Trafficking Case Law Database (UNODC No. ZMB002). NOTE: Only a summary was available on the basis of an interview with the investigating officer and prosecutor involved in the case, as the judgment was ex tempore.
69. People v. **Muzara**, SSV/111/2014 in Magistrate's Court Maseru; Magistrates Court conviction and sentence; awaiting confirmation in the High Court. Only a summary was available in UNODC Human Trafficking Case Law Database (U.N. No. ZMB003).
70. The People v. **Mutwale**, IU/130/2015, in the Subordinate Court of the First Class for Sesheke [Criminal Division] 25 February 2016.
71. The People -V- **Nyassa Nicole Mulumbilwa** and others, 2U/24/2017, in The Subordinate Court of the First Class for Sesheke (Criminal Jurisdiction), 24 January 2018; verdict reversed **Nyasa Nicole Mulumbilwa** and others vs. The People, Caz Appeal No. 154/155/156/157/2018 in the Court of Appeal for **Zambia** at Lusaka (Criminal Jurisdiction), 28 June 2019. A summary is available at UNODC Human Trafficking Case Law Database (UNODC No. ZMB004). NOTE: the Court of Appeals reversed the conviction and exonerated the accused persons.
72. The People v. **Mboo**, IU/117/2015, in The Subordinate Court of the First Class for Sesheke [Criminal Jurisdiction], 28 July 2016.
73. The People v. Wina **Lubinda**, IU/87/2015, in The Subordinate Court of the First Class for Sesheke [Criminal Jurisdiction], 22 October 2015.
74. The People v. **Mwewa** and other, HRS/29/2020, in the High Court for **Zambia** at Mansa (Criminal Jurisdiction), 19 August 2020.
75. Mushekwa **Mushenya** and others v. The People, Appeal No. 60,61/2020 in the Supreme Court of **Zambia** at Lusaka.
76. People v. **Kasonde**, HRS/27/2020, in the High Court for **Zambia** at Mansa (Criminal Jurisdiction), 19 August 2020.

77. People v. **Esther Phiri**, Case No. IXD/12/2018 in the Subordinate Court of the First Class for the Chadiza at Chadiza, conviction 28 December 2018, sentence 8 January 2019.
78. The People v. **Sikapizya**, HWS/50/2019, Sentence in Kasama High Court in Northern Province **Zambia**, Justice EP Sunkutu. We note that conviction was adjudicated at Isoka Subordinate Court in Muchinga Province.

Zimbabwe:

79. State v. **Mahuni** CRB No. 1657/14 before court in Harare, January 8, 2016.
80. State v. **Munyanyi** and others, Case No. MSVP804 - 6/17 in the Magistrates Court for the Province of Masvingo, 13 June 2017? (NOTE: the date of the judgment is unclear, as it was arrived at from the court stamp which was faded.) A summary of this case is available in the UNODC Human Trafficking Case Law Database (ZWE001).
81. State v. **Maroodza**, Case No. R674/18, in the Regional Eastern Division, Harare, July 10, 2020.

I. International Cases

Argentina:

1. Causa N° 3365/12 in Tribunal Oral en lo Criminal Federal N°1, La Plata, September 2012. A summary is available in UNODC Human Trafficking Case Law Database (UNODC No. ARG032).

Australia:

2. R. v. **Wei Tang**, before the Supreme Court of Victoria, Australia [2007], VSCA 134 and before the High Court of Australia [2008], HCA 39. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. AUS001).

Canada:

3. R. v. **Urizar**, File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), 13 August 2010, and Urizar v. R., No. 500-10-004763-106, Court of Appeal, Quebec, 16 January 2013. The trial court case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. CAN005).

Finland:

4. Helsinki District Court, Judgment R 11/1073. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FIN008).

Israel:

5. State of Israel v. **A.G.G.R.** Criminal Case 23751-02-10, Tel Aviv September 2014.
6. State of Israel v. **Aldenko** Criminal Appeals 10545, 9510, 9905, 10752/04 before the Supreme Court of Israel. This case is available at the UNODC Human Trafficking Database (ISR002).
7. State of Israel v. **D.A. and A.M.** Criminal Cases 6749/6774-08-11 in the District Court of Jerusalem; convictions affirmed in Anonymous v. State of Israel, Criminal Appeals 8027 and 8104/13 in the Supreme Court of Israel sitting as a court of appeals for criminal matters, 27.5.2018; Additional Hearing denied in Anonymous v. State of Israel, Criminal Additional Hearing 6022/18 in the Supreme Court, 20.2.2019.

8. **State of Israel v. Giuliani**, 29 February 2012, District Court of Jerusalem, Israel. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. ISR016). (Conviction affirmed by the Supreme Court, 6 September 2016, Criminal Appeal 6237/12.0).
9. **Tibbet v. State of Israel**, Criminal Appeal 1216/08 before Supreme Court of Israel (12/3/2009).

Norway:

10. Appeals Court Case No. LB-2012-63028, Borgarting Lagmannsrett Judgement (2 April 2013). District Court Oslo Tingrett Judgement (2 February 2012), TOSLO-2011-68460, Norway.
11. District Court Case 11-194827MED-BBYR/01, Bergen District Court (5 July 2012). A summary of the case is available in the UNODC Human Trafficking Case Law Database (UNODC No. NOR008).
12. District Court Case 13-149986MED-LARV, Larvik District Court (Larvik Tingrett), (25.9.2013). The case is accessible on the UNODC Human Trafficking Case Law Database (UNODC No. NOR004).

Thailand:

13. **Ranya Boonmee**, Case No. 2013/2552, Criminal Court of Bangkok, 9 December 2010, Thailand, Appeals Court Black Case No. 1704/2554 and Red Case No. 4097/2556, 6 March 2013. Information about this case was obtained from the UNODC Human Trafficking Case Law Database (UNODC Case No. THA001).

United Kingdom:

14. **R. v. Connors** and others [2013], EWCA Crim. 324, Court of Appeal, Criminal Division, 26 March 2013, United Kingdom of Great Britain and Northern Ireland. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. GBR016).

United States:

15. **U.S. v. Campbell** 770 F.3d 556, 559 (7th Cir. 2014) cert. denied, 135 S. Ct. 1724 (2015) denied, No. 14-8610, 2015 WL 2340955 (U.S., 18 May 2015).
16. **U.S. v. Farrell**, 563 F.3d 364 (2009), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA006).
17. **United States v. Kozminski** 487 U.S. 931 (1988).
18. **U.S. v. Sabhnani**, 599 F.3d 215 (2nd Cir. 2010), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA033).
19. **U.S. v. Webster**, 2011, U.S. App. LEXIS 26438 (2011), United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA148).

ICTY:

20. **Prosecutor v. Kunarac**, Kovac and Vukovic, Cases IT-96-23-T and IT-96-23/1-T ICTY, Trial Chamber, 22 February 2001.

European Court of Human Rights:

21. **Chowdury** and Others v. Greece (App. no. 21884/15), ECHR, 30 March 2017, the European Court of Human Rights.
22. **Siliadin** v. France (App. No. 73316/01) ECHR 26 July 2005, European Court of Human Rights. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. FRA010).
23. **Rantsev** v. Cyprus and Russia, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010.

Appendix 5: UNODC materials used in the digest

1. UNODC, Case Digest on Evidential Issues in Trafficking in Persons Cases, 2017, available at: https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf
2. UNODC, Human Trafficking Case Law Database, available at: <https://sherloc.unodc.org/cld/v3/htms/cldb/index.html?lng=en>
3. UNODC, Global Report on Trafficking in Persons, 2016, available at: https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf
4. UNODC, Global Report on Trafficking in Persons, 2020, available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf
5. UNODC, Anti-Human Trafficking Manual for Criminal Justice Practitioners, August 2009: available at: <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>
6. UNODC, Model Legislative Provisions against Trafficking in Persons, 2020 available at: https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf
7. UNODC, Issue paper on Abuse of a position of vulnerability and other means within the definition of trafficking in persons, 2013 available at: https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf
8. UNODC Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2012 available at: https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf
9. UNODC Issue paper on The role of ‘consent’ in the trafficking in persons protocol, 2014 available at: https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf
10. UNODC Issue paper on The concept of ‘exploitation’ in the trafficking in persons protocol, 2015 available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf
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UNODC

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