

TRAFFICKING IN PERSONS LIVING WITH ALBINISM IN SOUTH AFRICA

by

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DECLARATION

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I declare that this thesis, entitled '**Trafficking in Persons Living With Albinism In South Africa**', is my own work, and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.


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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People Rights
ACRC	African Charter on the Rights and Welfare of the Child
CAT	The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CESCR	The International Covenant on Economic, Social and Cultural Rights
CERD	The International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CLWA	Children Living With Albinism
CRC	United Nations Convention on the Rights of the Child
CRC	Committee on the Rights of the Child
ICESCR	International Covenant on Social and Economic Rights
OCA1	Oculocutaneous albinism type 1
OCA1A	Oculocutaneous albinism type 1A
OCA1B	Oculocutaneous albinism type 1B
OCA2	Oculocutaneous albinism type 2
OCA3	Oculocutaneous albinism type 3
OCA4	Oculocutaneous albinism type 4
OCA5	Oculocutaneous albinism type 5
OCA6	Oculocutaneous albinism type 6
OCA7	Oculocutaneous albinism type 7
UN	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UNTOC	United Nations Convention against Transnational Organized Crime
UDHR	Universal Declaration of Human Rights
USDS	United States Department of States
PLWA	Persons Living With Albinism

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CHAPTER 1

BACKGROUND

1.1 INTRODUCTION

There are myths that “people living with albinism” (PLWA) are cursed, and their body parts make potent charms for rich people.¹ The body parts of PLWA are used for witchcraft practice.² There are also beliefs that the blood of PLWA imparts magical powers, and that they don’t die, but vanish.³ As a result, PLWA are attacked and brutally killed for their body parts. In these brutal attacks and killings, Children Living With Albinism (CLWA) are targeted more than adults living with the condition. This threat to children living with albinism has forced some families to place them in hiding, as fear for their lives grows. The footnoted quotations which follow are illustrative:

On August 5, 2015, a 20-year-old woman living with albinism went missing in Phelandaba in KwaZulu-Natal, South Africa. On August 16, 2015, her remains were found in a shallow grave with most of the body parts and her skin missing. On the day of her disappearance, she had received a call from one of the suspects, to meet at Phelandaba, and by that evening she was not reachable on her cell phone. The family reported her missing on two occasions to the local police, but they were ignored both times. Her mother then reported the matter to the local chief and ward council, and a search was launched. They worked closely with the community and the police forum and were taken to a house where the community thought the murder might have taken place. A woman who lived there indicated that she had slaughtered a goat and not killed anyone, but with further interrogation the community found some clothing which was identified by the victim’s mother. Several young men also present at the house then revealed a shallow grave where they had buried her remains.⁴

¹ JH Cohan ‘The Problem of witchcraft in Africa’ (2011) *Suffolk University Law Review* 865,866.

² *Ibid* 865.

³ T Wentzel ‘Albinism: Tackling myths, stereotypes and superstitions’ *IOL news* 13 June 2017 available at <https://www.iol.co.za/news/opinion/albinism-tackling-myths-stereotypes-and-superstitions-9770739>, accessed on 23 August 2018.

⁴ *Under The Same Sun* (UTSS) ‘Reported attacks of persons with albinism’, 5 November 2018 available at <http://www.underthesamesun.com>, accessed on 21 November 2018.

In July 2016, a 28-year-old woman was arrested while allegedly trying to sell a 12-year-old boy living with albinism to a traditional healer for R100 000 at Manguzi, in the northern part of the province of KwaZulu-Natal.⁵ According to police, the 12-year-old boy and three other children with albinism in the area had been targeted by a syndicate which wanted to sell each child for R100,000.⁶

The healer who was the potential buyer informed police who set up a trap that led to a suspected child trafficker being apprehended. He told the police about a woman who came to his place with an offer of three children with albinism.

The healer had contacted the eMpangeni Family Violence and Child Protection Unit members who were already conducting an operation at the Manguzi area. They were looking for another four-year-old child living with albinism who was reported missing from eSikhaleni in Mpangeni in late June. As part of a covert operation, plain-clothes police disguised as the healer's accomplices, accompanied the woman. In August last year, a 21-year-old woman with albinism was murdered for her body parts. Her three murderers - who are currently serving 18-20 years imprisonment - admitted in court they procured her body parts for *muti* purposes, to acquire wealth.⁷

In January 2018,²⁸ a 13-year-old child with albinism was kidnapped with a 15-month-old child from their home in Hlalanikaze, Mpumalanga.⁸ According to Police, the body of the 15-month-old child was found on the side of the N4 freeway in Mpumalanga.⁹ The body of the child with albinism was found in February in a shadow grave in Cullinan, east of Pretoria, with some body parts missing.¹⁰

PLWA are human beings; they are entitled to enjoy human rights as are any other persons. The right to life in terms of section 11¹¹ of the Constitution of South Africa is

⁵ A Reporter 'Albino killings: ANCWL slams barbaric act' *IOL News* 19 July 2016 available at <https://www.iol.co.za>, accessed on 21 November 2018.

⁶ *Ibid.*

⁷ A Khoza 'Four appear in KZN for muti murder of albino woman' *News 24*, 25 August 2015 available at <https://www.news24.com/SouthAfrica/News/Four-appear-in-KZN-court-for-muti-murder-of-albino-woman-20150825>, accessed on 21 November 2018.

⁸ B Mabona 'Family of murdered Mpumalanga children, one albino, live in fear' *The Citizen*, 24 February 2018 available at <https://citizen.co.za/news/south-africa/1833571/family-of-murdered-mpumalanga-children-one-an-albino-live-in-fear>, accessed on 21 November 2018.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ The Constitution of the Republic of South Africa, Act 108 of 1996 section 11.

applicable to all individuals in the country, including PLWA.¹² The case of *S v Makwanyane*¹³ dealt with the importance of this right. O'Regan J stipulates that:

The right to life is, in one sense, antecedent to all rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the right to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life there cannot be dignity.¹⁴

The judgement in *State v Makwanyane*¹⁵ clearly indicates the importance of the right to life in South Africa. The brutal killings of PLWA violate this constitutional right. South Africa is also signatory to numerous international human rights conventions which also prohibit cruel, inhuman punishment and trafficking in persons, such as the Universal Declaration of Human Rights,¹⁶ and 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 (UN Protocol).¹⁷

1.2 PROBLEM STATEMENT

Human trafficking takes place in various forms. According to Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and

¹² I Currie and J De Waal *The Bill of Rights Handbook* 6 ed (2016) 259.

¹³ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ J Dugard *International Law A South African Perspective* 4 ed (2014) 325.

¹⁷ DC Subramanien 'Bought at a price': trafficking in human beings- A brief study of law in South Africa and the United States' (2011) 3 SACJ 247,248.

Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)¹⁸ trafficking in persons is:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁹

South Africa is signatory to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).²⁰ Under this Protocol all member states are urged to enact legislation that prevents and combats human trafficking.²¹ Due to its obligation to the UN Protocol, the South African Government ratified The Prevention and Combating of Trafficking in Persons Act.²² The Trafficking Act was enacted on the 29th of August, 2013, and came into operation on the 9th of August, 2015.²³ The Act criminalises all types of trafficking in persons in South Africa, including trafficking in body parts or organ removal.²⁴

Despite the existence of this Act, the brutal killings and trafficking of PLWA continues in South Africa.²⁵ It is unclear whether the Act is effective or not. There are also other statutes in South Africa that criminalise human trafficking, such as the Children's Act,²⁶ and The Criminal Law (Sexual Offences and Related Matters) Amendment Act.²⁷ However, these Acts do not cover all forms of human trafficking. The Criminal Law (Sexual Offences and Related Matters) Amendment Act specifically deals with

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ M Mswela 'Violent attacks against persons with albinism in South Africa: A human perspective' (2017) 17 *AHRLJ* 116.

²⁶ Children's Act 38 of 2005.

²⁷ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

trafficking in persons for sexual purposes,²⁸ while the Children's Act deals with trafficking in children.²⁹ In South Africa, murder is a crime in terms of the Criminal Law Amendment Act 105 of 1997.³⁰

PLWA in South Africa continue to be the victims of human trafficking. They are attacked and killed for their body parts or organs.³¹ The causes of these brutal attacks and killings are the myths and superstitions that their body parts have supernatural powers.³² There are beliefs that a *muti* or charm made from their body parts can make a person wealthy.³³ The lack of education on albinism contributes significantly in the trafficking of PLWA.³⁴ Apart from the myths and superstition surrounding albinism, PLWA also faces other challenges. They are vulnerable to skin cancer and have poor eyesight.³⁵

The South African government has taken several measures to arrest and prosecute the individuals responsible for the killings and trafficking of PLWA. In 2016, a Sangoma who killed a woman who was living with albinism, was sentenced to life imprisonment in the Mtubatuba Magistrates Court in Northern KwaZulu-Natal.³⁶ There has not been any other publicised case yet in South Africa that specifically deals with the murder of PLWA for *muti*. There are some cases still pending. There are cases however, where the South African courts have dealt with *muti* murders and delivered harsh sentences. In the case of *S v Mogaramedi*,³⁷ the appellant (a witchdoctor) was sentenced to life imprisonment, and the appeal was dismissed in the North Gauteng High Court.³⁸ The Appellant was found in possession of his sister's genital organs.³⁹ He told the court

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Criminal Law Amendment Act 105 of 1997.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ K Singh 'KZN witchdoctor gets life for the murder of a woman with albinism' available at <https://www.news24.com/SouthAfrica/News/kzn-traditional-healer-gets-life-for-murder-of-woman-with-albinism-20170223>, accessed on 25 February 2019.

³⁷ *S v Mogaramedi* 2015(1) SACR 427 GP.

³⁸ *Ibid.*

³⁹ *Ibid.*

that his practice required him to obtain the body parts of his immediate family member.⁴⁰ He then killed her sister and cut off her organs with an axe.⁴¹

Dosio AJ in this case stated:

Bearing in mind the strong cultural beliefs surrounding traditional healers and the fact that *muti* killings are unlikely to stop in the future, it is the task of this court to deter the killings of innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community have in the system. To regard such killings as substantial and compelling circumstance would send out the wrong message to the community. The prevalence of such killings in South Africa is high. The continuation of such killings will create more instability in the communities where such practices are rife. A strong message must be sent out that such conduct will not be condoned in a civilized society. Where such killings arise they must be punished with the full strength of the law.⁴²

As Dosio AJ illustrated in this case, perpetrators of these crimes must be punished harshly. However, South African courts are not equipped well enough to deal with these crimes.⁴³ According to reports, some police officials are reluctant to arrest traffickers because of fear that they may be killed by perpetrators.⁴⁴ This delays the prosecution of this crime.

The South African Parliament has also enacted The Prevention and Combatting of Hate Crime and Hate Speech Bill.⁴⁵ Its purpose is to prevent hate crimes in South Africa such as the brutal killing of PLWA.⁴⁶ It is unclear whether this Act will be effective or not. There is still a lot to be done before the trafficking and killing of people living with albinism in South Africa is put to an end. It is reported that eight PLWA went missing in 2016 alone, in Manguzi in the Northern Province of KwaZulu-Natal, and

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ The Prevention and Combatting of Hate Crime and Hate Speech Bill 9 of 2018.

⁴⁶ *Ibid.*

many more since 2009.⁴⁷ According to the community in the area, there are many Sangomas who use the body parts of PLWA for *muti*.⁴⁸ There is a lack of education on albinism in many societies in South Africa.⁴⁹ As a result there are many myths and superstitions surrounding albinism. PLWA continue to be the victims of *muti* murder.⁵⁰

1.3 RESEARCH AIMS AND OBJECTIVES

These are three questions that emanate from the research problem:

- How can the South African Government, through its legal framework, prevent human trafficking in PLWA?
- Does the South African legal framework comply with international standards on the prevention of trafficking in PLWA?
- What can civil society do to prevent trafficking in PLWA?

This research is aimed at identifying whether the South African legal framework meets the standards of the international agreements or not, specifically in preventing trafficking in PLWA.

The research will address the following:

- Whether the current South African legal framework is compliant with international instruments in combatting trafficking in PLWA?
- What are the social reasons for trafficking in PLWA in South Africa?
- Whether the current South African legal framework addresses trafficking in PLWA?
- What measures have been taken by South African government to combat trafficking in PLWA?

⁴⁷ X Dlamini 'hunted albinos flee school' available at <https://www.pressreader.com/south-africa/sowetan/20160928/textview>, accessed on 25 February 2019.

⁴⁸ *Ibid.*

⁴⁹ C Baker et al 'The myths surrounding people with albinism in South Africa and Zimbabwe' 2010 22(2) *J of African Cultural Studies* 170.

⁵⁰ R Breed 'Muti murder scourge in Zululand' available at <https://zululandobserver.co.za/118015/muti-murder-scurge-in-zululand>, accessed on the 25 February 2019.

1.4 LITERATURE REVIEW

A number of studies have shown that children with disabilities, including children with albinism, face a range of challenges in Africa.⁵¹ They live in conditions that are not suitable for human beings. PLWA in South Africa are a vulnerable group of people who are under the threat of extinction. PLWA are killed, based on the beliefs that potions made from their body parts can bring good luck, wealth and success.⁵² This has sparked angry protest, condemnation and outcry by the citizens, who perceive that the government's response to the threat against the lives of albinos is inadequate, as the number of trials and criminal convictions have not been commensurate with the number of killings.⁵³

A study by Chilemba shows that people living with disabilities (including PLWA) in South Africa are neglected by their own communities because of the wrong belief that they are cursed.⁵⁴ The study also shows that these people are being sexually abused, because of the myth that having sex with disabled people will cure HIV and AIDS.⁵⁵ The study shows that people living with disabilities need protection from government.

The South African Government promotes and values human dignity, equality, human rights and freedoms.⁵⁶ Section 7(2) of the Constitution puts an obligation upon the state to respect, protect, promote and fulfil the Bill of Rights.⁵⁷ According to Mswela, the brutal killings of PLWA denies them those constitutional rights, which include the right to life, the right to human dignity, the right to freedom of movement and the right to education.⁵⁸ She argues that it is the duty of the State to protect its citizens in terms of Section 7(2) of the Constitution.⁵⁹ She made reference to the case of *Carmichele v*

⁵¹ C Ngweni...et al. *African Disability Right Year Book* (2016) 80.

⁵² V Khumalo "Fear in KZN's Manguzi over persecution of people with albinism" (7 July 2016). Available at <http://www.sabc.co.za/news/a/fe6725804d6834b7a42eee4b5facb1b5/Fear-in-KZN%E2%80%99s-Manguzi-over-persecution-of-people-with-albinism-20160707>, accessed on 28 August 2018.

⁵³ SABC "Joburg march to highlight plight of people with albinism" (27 July 2018) available at <http://www.sabc.co.za/news/a/8091eb804da4950cb03efbcfeb4bc468/Joburg-march-to-highlight-plight-of-people-with-albinism-20162707>, accessed on 27 August 2018.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ The Constitution of the Republic of South Africa 1996, hereinafter referred to as the 'Constitution'.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

*Minister of Safety and Security*⁶⁰, where the Constitutional Court stated that the State has an obligation to protect its citizens from life-threatening attacks.⁶¹

Burke conducted a study on the discrimination and violence against PLWA in Tanzania.⁶² The study shows that PLWA experience stigma and discrimination, as do people with white skin in black societies, and people with disabilities of low vision or blindness, and susceptibility to contracting skin cancers.⁶³ According to Jenkins, of the Department of Human Genetics at the South African Institute for Medical Research, one in 35 African Southern Africans is a carrier of an albinism mutation. When both parents are carriers, the child is born with albinism.⁶⁴

A study by Susie Bucaro indicates that in 2009 there were more than twenty PLWA murdered.⁶⁵ Their body parts were used by witchdoctors as magic charms.⁶⁶ She indicates that PLWA in Tanzania are not regarded as human beings; they are seen as ghosts of white people.⁶⁷ As a result of this belief, a husband might divorce his wife if she gives birth to a child living with albinism.⁶⁸ A majority of children living with albinism in Tanzania are living without their fathers because of these wrong beliefs.⁶⁹

Ikuomola conducted a study on PLWA from Tanzania who emigrated to South Africa and Kenya, for better living.⁷⁰ The study found that even though they consider these countries safe for them to live in, they are seen as strangers, or persons without

⁶⁰ *Carmichele v Minister of Safety and Security* 2001 (4) SA 934 (CC).

⁶¹ *Ibid.*

⁶² J Burke 'Discrimination and violence against Tanzanians with albinism in the Great Lakes region: crime and national shame' available at <https://www.researchgate.net>, accessed on 14 June 2018.

⁶³ *Ibid.*

⁶⁴ Health Systems Trust 'Southern Africa: too white to be black - the challenge of albinism' available at <http://www.hst.org.za/news/southern-africa-too-white-be-black-challenge-albinism>, accessed on 28 August 2016.

⁶⁵ S Bucaro 'A black market for magical bones: the current plight of the east African Albinos' Available at <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1130&context=pilr>, accessed on the 25 February 2019.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ AD Ikuomola 'we thought we will be safe here: narratives of Tanzanian albinos in Kenya and South-Africa' (2015) 9(4) *African Research Review* 37.

identity, and that there are also cases of trade in body parts of PLWA in these countries, where they are mostly hunted for their fingers, feet and penises.⁷¹

Franklin, Lund, Bradbury-Jones and Taylor indicates that the violent treatment, kidnapping and brutal killing of children living with albinism has forced some parents to hide their children at home.⁷² This is also the case in KwaMhlabuyalingana in South Africa. The report indicates that in this area the incidence of abduction and killing of children living with albinism for *muti* has forced parents to remove them from the local schools, for fear that they will be victims of these attacks.⁷³

According to Cruz-inigo, Ladizinski and Sethi, there are many PLWA, particularly children who have been the victims of brutal attacks, murdered in Africa.⁷⁴ Most of these attacks and killings are done in the name of witchcraft, superstitions and wealth.⁷⁵ Their study indicates that the body parts of PLWA could cost 75,000 US Dollars.⁷⁶ As result of these brutal attacks, PLWA live in fear of their lives and are forced to flee their homes to avoid hunters.⁷⁷ The study also indicates that myths and superstitions surrounding albinism are as a result of a lack of education and ignorance.⁷⁸ They argue that the first step in assisting PLWA in Sub-Saharan Africa would be to educate communities about the cause of albinism, and to have awareness campaigns.⁷⁹

A study by Bruynell shows that PLWA in Africa face an extremely high risk of occult-based persecution, and continue to live in fear because of myths and superstitions.⁸⁰ According to this study, PLWA are attacked because their body parts can be sold at

⁷¹ *Ibid.*

⁷² A Franklin... et al 'Children with albinism in African religions: their rights to be "being" and "doing"' (2018) *BMC International Health and Human Rights* 4.

⁷³ *Ibid.*

⁷⁴ A Cruz-Inigo...et al 'Albinism in Africa: stigma, slaughter and awareness campaigns' available at [https://www.derm.theclinics.com/article/S0733-8635\(10\)00140-3/pdf](https://www.derm.theclinics.com/article/S0733-8635(10)00140-3/pdf), accessed on 23 December 2019.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ M Bruynell 'The dangers of modern day belief in the supernatural: international persecution of witches and albinos' (2012) 35(2) *Suffolk Transnational Law Review* 400.

very high prices, either by traditional healers, or on the black market.⁸¹ There are beliefs that the body parts of PLWA can be used for healing or can bring luck to the bearer of the item.⁸² In this article, Bruynell argues that brutal killings and attacks on PLWA constitute a violation of human rights. According to him these killings and brutal attacks violate many of the articles in the Universal Declaration of Human Rights, such as articles 3, 4, 5 and 10.⁸³

Further, Saliari indicates that there are many myths and superstitions surrounding albinism, but that the main reason why PLWA are killed is to obtain their body parts.⁸⁴ The study indicates that there are beliefs that the *muti* or charm made from these body parts brings fortune to people using it.⁸⁵

Minnaar conducted a study of *muti* murder in South Africa, which indicates that children are mostly murdered for *muti* because of their purity.⁸⁶ Minnaar argues that police officials are reluctant to investigate witchcraft crime in South Africa because of the fear that they will be bewitched themselves by witchdoctors.⁸⁷ From 2006 to 2014, there were over seventy-four documented brutal killings, fifty-eight attacks in which victims were left severely mutilated, and eighteen documented grave robberies.⁸⁸ According to a report compiled by Under The Same Sun (UTSS), 185 killings were reported, and 297 attacks, including survivors of mutilations, violence, rape, attempted abductions, missing persons, grave violations, and asylum (permanent residency), totalling 482 cases in twenty-six countries.⁸⁹

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ I Saliari 'Death for mutis: albino murders from Kenya to South Africa' available at [https://www.academia.edu/8617647/Death for mutis Albino murders from Kenya to South Africa](https://www.academia.edu/8617647/Death_for_mutis_Albino_murders_from_Kenya_to_South_Africa), accessed on the 25 February 2019.

⁸⁵ *Ibid.*

⁸⁶ A Minnaar 'Children as victim-target for muti murder in South Africa' available at <https://journals.co.za/content/servamus/108/7/EJC176364>, accessed on 25 February 2019.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

Rathman also conducted a study on human trafficking in which he explores different types of trafficking in persons.⁹⁰ This study is aimed at showing that trafficking in persons is a global issue today that needs the attention of everyone in order to eradicate it.⁹¹ In order to stop the human trafficking problem, governments and non-governmental organizations need to collaborate to identify victims and punish criminals⁹². Rathman cites The Ghana Anti-Human Trafficking Act, passed in 2005, as a step in the right direction.⁹³

The majority of studies conducted on PLWA in South Africa focus on human rights, discrimination, myths and superstition, and witchcraft. There are no studies that specifically deal with trafficking in PLWA. This study aims at addressing this gap.

1.5 RESEARCH METHODOLOGY

This study is qualitative research, solely based on desktop research. The research methodology for this dissertation will include literature review of various writings. It will entirely rely on both published and unpublished material mostly originating from academic journal articles, textbooks, newspapers articles, official reports, international agreements, and declarations on human rights, together with various countries' statutes, including the Constitution of the Republic of South Africa, Prevention of Human Trafficking Act 7 of 2013, The Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 and the Children's Act 38 of 2005.

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1.6 CONCLUSION

South Africa's Bill of Rights is aimed at protecting and promoting the rights of all South African citizens; however, PLWA do not enjoy these rights. The number of brutal killings and attacks on PLWA increases every year.⁹⁴ The government has taken some

⁹⁰ M Rahman 'Human trafficking in the era of globalization: The case of trafficking in the global Market economy' (2011) 2 *Transcience Journal* 55, 57.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ W Makwakwa 'Campaign launched to educate against albino killings' available at <https://citizen.co.za/news/south-africa/1356633/campaign-educate-albino-killings/>, accessed on 25 February 2019.

measures to protect PLWA, but much needs to be done to put an end to trafficking in PLWA. South Africa should ensure that the protection of the Bill of Rights is enjoyed equally by all citizens, regardless of the colour of their skin.⁹⁵ Stigmatisation of, and misconceptions about persons with albinism continues in South Africa, and the government has not done enough to implement measures to educate people about albinism, in schools or communities.⁹⁶

⁹⁵ *Ibid.*

⁹⁶ T Wentzel 'Albinism: tackling myths, stereotypes and superstitions' *IOL news* 13 June 2017 available at <https://www.iol.co.za/news/opinion/albinism-tackling-myths-stereotypes-and-superstitions-9770739> , accessed on 23 August 2018.

CHAPTER 2

UNDERSTANDING ALBINISM AND THE IMPACT OF THE MYTHS AND SUPERSTITION SURROUNDING IT IN SOUTH AFRICA

2.1 INTRODUCTION

Albinism is misunderstood in many societies in the African continent. The condition is surrounded by myths, superstitions and stereotypes.⁹⁷ The myths surrounding the condition are similar in many societies in Africa. People living with Albinism (PLWA) are seen as a transgression, a curse, or a symbol of punishment from God.⁹⁸ Because of these myths, they are attacked, trafficked in, and brutally killed. Many societies do not know what causes albinism. This chapter will provide a clear understanding on albinism. It further discusses the impact of the myths and superstitions surrounding albinism to the livelihoods of PLWA in South Africa.

2.2 WHAT IS ALBINISM?

Oculocutaneous albinism (OCA) is the most common form of albinism in Africa. It is described as an inherited disorder characterised by absent or minimal production of a pigment called melanin.⁹⁹ The absence of melanin affects the eyes, hair and skin.¹⁰⁰ The condition is acquired in an autosomal recessive manner, which means that both parents of the individual with the condition will get two faulty chromosomes.¹⁰¹ The condition affects people regardless of their race, ethnicity or sexual orientation. According to science genetics, the condition also affects animals such as insects, fish and birds.¹⁰² Individuals living with the condition are sensitive to the sun, and as a result they are vulnerable to skin cancer.¹⁰³ It is estimated that albinism affects at least

⁹⁷ MBJ Poee-Monyemore 'The experience of people with oculocutaneous albinism' (2012) 17 *Journal of Interdisciplinary Health Sciences* 1.

⁹⁸ OI Mabolaji 'Effect of stigmatisation on psychosocial and health wellbeing of people living with albinism in South West Nigeria' (2018) 8 *African Journal of Social Work* 32, 33.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.* See also PM Lund 'A health intervention programme for children with albinism at a special school in South Africa' (2002) 17(3) *Health Education Research* 366,367

one in 5,000 to one in 15,000 people in Africa.¹⁰⁴ The studies have also shown that one in seventy people is a carrier of this condition.¹⁰⁵ In South Africa, it is estimated that the condition affects at least one in 4,000 people.¹⁰⁶ The condition is common in black people as compared to other races.

Albinism is common in societies that allow marriage or relationships between close relatives.¹⁰⁷ In Tanzania, where there is a high prevalence of this condition, there are societies that allow first cousins to marry each other. This increases the chances of their children living with the condition. Although marriage between close family members is not allowed in many societies in South Africa, there are societies that allow them, such as the Sotho and Tswana tribes, where marriage between cousins is permitted. As a result, the condition is most common in these societies.¹⁰⁸ In Africa, temperatures are often high, and PLWA in the continent are more vulnerable to skin cancer than PLWA in other parts of the world. Beside skin cancer, they also have eye problems.

Albinism has existed for a long time in Africa; the term “albino” comes from the Latin word *albus* which means “white”.¹⁰⁹ “Albino” was initially used by a Portuguese historian in 1600 to label white negroes in Africa.¹¹⁰ The condition was first studied in the 18th century using the population of Italy.¹¹¹ The study indicated that about one in 29,000 Italians had albinism.¹¹² It was assumed that the albinism was brought about by an inalienable blunder of metabolism because of the absence of intracellular chemicals which orchestrated melanin.¹¹³ A universal survey was conducted between 1911 and 1913 on albinism.¹¹⁴ The survey incorporated a broad authentic and

¹⁰⁴ R Phatoli ‘Being black in a white skin: beliefs and stereotypes around albinism at a South African University’ available at https://repository.up.ac.za/bitstream/handle/2263/49464/Phatoli_Being_2015.pdf?sequence=1 accessed on 3 February 2019.

¹⁰⁵ K Gronskov ‘Oculocutaneous albinism’ (2007) *Orphanet Journal of Rare Diseases* 1, 2.

¹⁰⁶ JGR Kromberg *Albinism in Africa* 1 ed (2018) 4,5.

¹⁰⁷ *Ibid.*

¹⁰⁸ G Stevens ‘Oculocutaneous albinism (OCA2) in Sub-Saharan Africa: distribution of the common 2.7-kb P gene deletion mutation’ accessed on 1 April 2018.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

bibliographic foundation, and an exchange on the qualities and heredity of albinism, as well as a portion of the mental and social issues related to the confusion.¹¹⁵ The geographical dispersion of influenced individuals in the various light-skinned and dark-skinned races was depicted with help of the research findings and numerous photos.¹¹⁶ In the 20th century, Witkop *et al*/gave a clear understanding of albinism and its definition in their study.¹¹⁷ According to their study, albinism:

“Includes a group of inherited, congenital, generalised, hypomelanotic conditions in which melanocytes are present in integument and the eyes and are accompanied by specific ocular signs. The ocular changes include congenital nystagmus, hypoplasia of the fovea, hypopigmentation of the fundus, abnormal decussation of the optic neurons at the chiasm, decreased pigment in the irides frequently with photophobia; and decreased visual acuity.”¹¹⁸

The shade qualities associated with albinism and its distinctive subtypes were researched, and these anatomic investigations continue currently.¹¹⁹

2.3 TYPES OF ALBINISM

There are seven types of albinism that have been identified so far.¹²⁰ They are identified as OCA1, OCA2, OCA3, OCA4, OCA5, OCA6 and OCA7.¹²¹ All types of albinism are acquired as autosomal latent disarranges.¹²² The prevalence of the distinctive OCA conditions varies among societies around the world.¹²³ The four most common types of albinism in the world will be discussed in this dissertation. The other three types of albinism are less common.

2.3.1 Oculocutaneous albinism (OCA1)

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ M Mswela *A Selection of Legal Issues Relating to Persons Living With Albinism* (published LLD theses, University of South Africa, 2016).

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ SM Hutton ‘Comprehensive analysis of oculocutaneous albinism among non-hispanic Caucasians shows that OCA1 is the most prevalent OCA type’ (2008) 128 10 *Journal of Investigative Dermatology* 2442, 2443.

It is estimated that this form of albinism is prevalent in 1/40,000 people in the world.¹²⁴ It is characterized by hypopigmentation of the skin and hair, and the particular visual changes common to the various types of albinism.¹²⁵ This includes the following: nystagmus; decreased iris colour, with iris translucency; diminished retinal shade, with perception of the choroidal veins on ophthalmoscopic examination; forveal hypoplasia, with generous decrease in visual keenness, for the most part in the scope of 20/100 to 20/400; and misrouting of the optic nerve fiber radiations at the chiasm, bringing about strabismus, decreased stereoscopic vision, and adjusted visually-evoked potentials (VEP).¹²⁶

Persons with this type of albinism appear to have white hair.¹²⁷ Albino skin does not tan.¹²⁸ Albino babies are born with white or light yellow hair that obscures insignificantly with age, white skin that after some time builds up some negligible summed-up shade which may tan marginally with prudent sun presentation, and blue irises that obscure to green/hazel, or light darker/tan, with age, in spite of the fact that transillumination absconds endure.¹²⁹ This type of albinism is common in European descendants.¹³⁰ It is infrequent in African origins.

Oculotaneous albinism type 1(OCA1) is separated into two classes, namely OCA1A and OCA1B.¹³¹ Although both these classes are identical, the amount of iris pigment is not the same.¹³² Persons born with OCA1A have white hair, brows, and lashes, and white skin at birth.¹³³ Their skin remains white all through life in every single race, and perpetually consumes; however it does not tan. Skin injuries, for example, nevi are pink and unpigmented.¹³⁴ The irises are blue and completely translucent during childbirth, and remain so throughout life.¹³⁵ Nystagmus proceeds, and the retinal

¹²⁴ R Lewis 'Oculocutaneous Albinism Type 1' Available at <https://www.ncbi.nlm.nih.gov/books/NBK1166/>, accessed on 19 April 2019.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ P Manga *et al* 'Biology and genetics of oculocutaneous albinism and vitiligo-common pigmentation disorders in Southern Africa' (2013) *SAMJ* 103(12) 984,985.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

shade epithelium does not create melanin colouring.¹³⁶ Best correctable visual sharpness runs between 20/100 and 20/400, except if strabismic amblyopia adds to the deficiency.¹³⁷

In oculotaneous albinism type 1B(OCA1B), persons have white or very white light, or off-white hair at birth, and they develop detectable light-yellow hair shading within one to three years.¹³⁸ The development of shade in scalp hair is dynamic, and hair shading normally undergoes the phases of light yellow, to light fair, to brilliant fair, to dull fair, to light-coloured; yet this progression may stop at any phase of shading.¹³⁹ The shade of eyebrow hair is like that of the scalp hair, but the eyelash hair regularly turns somewhat darker than the scalp hair. Some persons report humble upgrades in visual keenness after some time.¹⁴⁰

2.3.2 Oculotaneous albinism type 2 (OCA2)

This is the most common type of albinism in the world. It is more prevalent in Africa and in the United States of America.¹⁴¹ It is characterized by hypopigmentation of the skin and hair, and the trademark visual changes found in a wide range of albinism, including nystagmus; diminished iris shade with iris translucency; decreased retinal color with representation of choroidal veins on ophthalmoscopic examination; foveal hypoplasia, associated with a decrease in visual sharpness; misrouting of the optic nerves at the chiasm, associated with strabismus, diminished stereoscopic vision, and adjusted visual evoked possibilities (VEP).¹⁴² Vision is steady, to gradually improving after early youth until mid to late adolescence, and no significant change to, or loss of visual keenness occurs.¹⁴³ The measure of cutaneous pigmentation in OCA2 ranges from insignificant to close typical.¹⁴⁴ Individuals born with this form of albinism have

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

pigmented hair, brows and lashes, with color ranging from light yellow to blond to brown. The prevalence of OCA2 is 1/3,900 in Africans.¹⁴⁵

2.3.3 *Oculocutaneous Albinism Type 3(OCA3)*

This type of albinism results from autosomal recessive mutations at the TYRP1 locus.¹⁴⁶ It is also common amongst African societies.¹⁴⁷ Like OCA2, the exact purpose of this gene is unidentified.¹⁴⁸ Be that as it may, shade generation is fundamentally decreased in its non-attendance.¹⁴⁹ The occurrence of OCA3 is 1/8,580 in Southern Africa.¹⁵⁰ The condition is uncommon to other parts of the world.¹⁵¹

2.3.4 *Oculocutaneous Albinism Type 4(OCA4)*

This type of albinism is also known as brown albinism.¹⁵² It is brought about by transformation in solute bearer family forty-five member two (SLC45A2) gene, which is also known as membrane associated transporter protein (MATP).¹⁵³ The change causes the absence of melanin generation.¹⁵⁴ The condition is prevalent mostly in Asian descendants.¹⁵⁵ It is estimated that about 27 percent of Japanese patients have this type of albinism.¹⁵⁶

In addition to these various medical challenges, PLWA face other challenges in many societies in Africa. They are victims of brutal attacks and trafficking in their body parts, for various reasons.¹⁵⁷ Children living with albinism (CLWA) are more vulnerable to these attacks, compared with adults living with the condition. PLWA are attacked for

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ B Nkrumah 'Hunted like animals: the conundrums of countering crimes against albinistic persons in the era of UDHR' (2018) 55 *International Journal of Law, Crime and Justice* 53.

their body parts.¹⁵⁸ The traffickers of PLWA use the body parts of this minority group of people for witchcraft practices and for selling in the black market.¹⁵⁹ The survivors of these brutal attacks and their families are left with trauma.¹⁶⁰ They continue to live in fear of their lives.¹⁶¹ The myths surrounding albinism are the same in Africa, but each country responds differently to these people. In Tanzania, it is reported that PLWA are seen as a curse.¹⁶² In Namibia they are seen as cannibals, while in South Africa they are called *izishaya* (“monkeys”). In some countries, such as Zimbabwe, there are false beliefs that sleeping with a PLWA cures HIV/AIDS.¹⁶³

2.4 WITCHCRAFT AND ALBINISM

PLWA in Africa face a high risk of witchcraft-related persecution because of the myths surrounding the condition.¹⁶⁴ The condition is associated with supernatural powers.¹⁶⁵ PLWA are brutally killed and attacked because of myths and witchcraft practices in Africa.¹⁶⁶ This minority group of people is vulnerable to attacks and to trade in their body parts.¹⁶⁷ In Tanzania there has been a higher percentage of brutal killings of PLWA than in any other country in Africa.

These murders and attacks are not only common in Tanzania but throughout Africa. Although such attacks in South Africa have not reached the levels in Tanzania, over the years these killings have increased. In South Africa, these killings often take place in the rural areas. In Manguzi, KwaZulu-Natal Province, there is a huge number of brutal attacks and killings of PLWA.¹⁶⁸ It is reported that there were about eight PLWA who went missing in 2016, and many more since 2009.¹⁶⁹ As a result of these attacks, parents have removed their children from local schools.¹⁷⁰ According to the community

¹⁵⁸ J Taylor ‘Witchcraft-related abuse and murder of children with albinism in Sub-Saharan Africa: a conceptual review’ (2019) 28 *Child Abuse Review* 14, 15.

¹⁵⁹ *Ibid.*

¹⁶⁰ I Kajiru & JC Mubangizi ‘Human rights violations of persons with albinism in Tanzania: The case of children in temporary holding shelters’ (2019) 9 (1) *African Human Rights Law Journal* 247.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

in the area, there are many witchdoctors in the area who allegedly use the body parts of PLWA for *muti* murder.¹⁷¹ A belief that a person can become rich at the expense of another person has resulted in a number of medicine murders, commonly known as “*muti* murder” in South Africa. *Muti* murder has been defined as follows:

“Practice of killing someone seen as successful and using his or her body parts in a medicine to bring power or luck to the killer. Horrifically, the participants remove the organs and body parts from the victim while he or she is alive in order to keep as much as possible of his/her vital energy.”¹⁷²

Many South Africans believe in witchcraft; there are beliefs in many African societies that in order to get luck, an individual should get a strong *muti*.¹⁷³ This *muti* is usually made from the human body parts.¹⁷⁴ The body parts have different purposes, and it depends on the client who approaches the witchdoctor, as to which body parts will be used. South Africa has a huge amount of such *muti*-related crime.¹⁷⁵ The country experiences about 50-300 cases of *muti* killings every year.¹⁷⁶ It is not clear how many PLWA are killed each year, as these numbers include people who do not live with albinism. The accurate number of PLWA abducted and killed is not found because most of these crimes are not reported. This makes it difficult for law enforcement to investigate these crimes.¹⁷⁷ The use of human body parts is usually for personal gain. In many societies in Africa there is a belief that there is life after death.¹⁷⁸ This means there will always be a connection between those living and those who have died. Ikuenobe stated:

In the traditional African view, reality or nature is a continuum and a harmonious composite of various elements and forces. Human beings are a harmonious part

¹⁷¹ *Ibid.*

¹⁷² M Bruynell ‘The dangers of modern day belief in the supernatural: international persecution of witches and albinos’ (2012) 35(2) *Suffolk Transnational Law Review* 86.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ BL Bhootra and E Weiss ‘Muti killing: a case report case reports’ (2006) 26(3) *Medical Science and Law* 255,256.

¹⁷⁷ B Nkrumah ‘Hunted like animals: The conundrums of countering crimes against albinistic persons in the era of UDHR’ (2018) 55 *International Journal of Law, Crime and Justice* 53, 55, 56.

¹⁷⁸ T Nhlapo ‘Homicide in traditional African societies: customary law and the question of accountability’ (2017) 1 *AHRLJ* 2, 3.

of this composite reality, which is fundamentally, a set of mobile life forces. Natural objects and reality are interlocking forces. Reality always seeks to maintain an equilibrium among the network of elements and life forces . . . Because reality and nature is a continuum, there is no conceptual or interactive gap between the human self, community, the dead, spiritual or metaphysical entities and the phenomenal world; they are interrelated, they interact, and in some sense, one is an extension of the other.¹⁷⁹

As part of this connection, those who are believed to live on another planet (ancestors) will require the individuals living to perform certain rituals or sacrifices, and animals are used for this purpose. In South Africa, many societies use animals such as goats, cows and sheep, depending on a particular culture. The use of human body parts as a sacrifice is beyond the powers of the ancestors.

Human sacrifice has been practised for years. It is referred to as the practice of mutilation of human beings.¹⁸⁰ Individuals who suffer from this practice are mostly people who are presumed to possess magical powers.¹⁸¹ In most cases these individuals feel excluded from their communities. In Mozambique it is reported that individuals use human body parts to escape poverty.¹⁸² The human body parts are reportedly used to make individuals wealthy.¹⁸³ In South Africa, PLWA are killed for *muti*. In these *muti* killings, human body parts are removed from the bodies of living persons.¹⁸⁴ These killings are usually done for financial gain or prosperity.

¹⁷⁹E Imafidom 'Dealing with the other between the ethical and the moral: albinism on the African continent' available at <https://www.ncbi.nlm.nih.gov/pubmed/28299591> accessed on 13 September 2019.

¹⁸⁰ *Ibid.*

¹⁸¹ P Bukuluki 'Child sacrifice: myth or reality' (2014) 30 (1) *International Letters of Social and Humanistic Sciences* 1, 2, 3, 4.

¹⁸² C Baker 'Representing the tribe of ghosts: stereotypes of albinism emerging from reports of recent attacks in Tanzania and Burundi' available at https://www.researchgate.net/profile/C_Baker2/publication/267995953_Representing_The_Tribe_of_Ghosts_Stereotypes_of_albinism_emerging_from_reports_of_recent_attacks_in_Tanzania_and_Burundi/links/54889fb30cf268d28f08fc66.pdf accessed on 12 February 2019.

¹⁸³ M Mswela 'Violent attacks against persons with albinism in South Africa: a human rights perspective' (2017) 17 *African Human Rights Law Journal* 115.

¹⁸⁴ *Ibid.*

There are three categories of people who participate in *muti* killings: the client, the witchdoctor, and the killer.¹⁸⁵ A client may approach a witchdoctor for various reasons, such as political power, financial gain or fertility issues.¹⁸⁶ The individuals who approach a witchdoctor do not participate in the murder process; they will only tell the witchdoctor what they require from him.¹⁸⁷ It is often the duty of the witchdoctor to suggest the use of human body parts.¹⁸⁸ Once consulted, the witchdoctor will then look for a killer to find human body parts.¹⁸⁹ The body parts are usually removed while the victim is alive.¹⁹⁰ In 2016, a witchdoctor was sentenced to life imprisonment in Mtubatuba Magistrates court, following the death of Thandazile Mpunzi.¹⁹¹ Thandazile Mpunzi was living with albinism. She disappeared from her home and her body was later found in a shallow grave in Manguzi.¹⁹² The co-accused in this matter pleaded guilty to the charge of murder, and they were sentenced to 20 years in prison.¹⁹³ The co-accused told the court that they killed the deceased, and that her body parts were used for witchcraft practices.¹⁹⁴ The other co-accused, who was 18 years old, was sentenced to 18 years, following his involvement in this case.¹⁹⁵ It is reported that the 18-year-old asked his friends to help him kill his girlfriend, so that they could use her body parts to get rich.¹⁹⁶ In 2016, four men appeared in Witbank Magistrates court, in Mpumalanga Province in South Africa, following the death of a girl who was living with the condition.¹⁹⁷ This girl was abducted and forced to drink brake fluid by the accused.¹⁹⁸ They then cut off her ovaries, uterus, vagina, lungs, heart and arms.¹⁹⁹ Despite these criminal prosecutions in the South African courts, the attacks and killings continue. In 2016, a six-year-old girl living with albinism was abducted in

¹⁸⁵ MS Thobane 'Armed robbers: creating a perception of invisibility and invincibility through mysticism - are sangomas providing protection?' (2015) *Southern African Journal of Criminology* 159.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ G Stolley 'Boyfriend jailed for albino muti murder' available at <https://www.iol.co.za/news/boyfriend-jailed-for-albino-muti-murder-1990611>, accessed on 14 April 2019.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

Mpumalanga.²⁰⁰ Reports indicate that she was playing with her friends at the time of the incident. The community worked together to search for her, and she was later found in the bush without any injuries.

The Witchcraft Suppression Act²⁰¹ prohibits any forms of witchcraft accusation in South Africa. In terms of section 1 of the Act:²⁰²

Any person who:

- (a) Imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
- (b) In circumstances indicating that he professes or pretend to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person;
- (c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;
- (d) Professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;
- (e) On the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing;
- (f) For gain pretends to exercise or use any supernatural power, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill

²⁰⁰ J Mpofu 'Albino girl kidnapped for body parts found' available at <http://zimmetro.net/index-id-news-zk-14983.html>, accessed on 1 April 2019.

²⁰¹ Witchcraft Suppression Act 3 of 1957.

²⁰² *Ibid.*

in or knowledge of any occult science to discover where and in what manner anything supposed to have been stolen or lost may be found,

Shall be guilty of an offence and liable on conviction-

- (i) In the case of an offence referred to in paragraph (a) or (b) in consequence of which the person in respect of whom such offence was committed, has been killed, or where the accused has been proved to be such habit or repute a witchdoctor or witch-finder, to imprisonment for a period not exceeding 20 years;
- (ii) In the case of any other offence referred to in the said paragraphs, to a fine or imprisonment for a period not exceeding 10 years;
- (iii) In the case of an offence referred to in paragraph (c), (d) or (e), to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding five years or to both such fine and imprisonment;
- (iv) In the case of offence referred to in paragraph (f), to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding 2 years.²⁰³

This Act clearly prohibits any form of witchcraft practice in South Africa. However, this Act is ineffective – the fact is that PLWA are victims of witchcraft practices in South Africa,²⁰⁴ and their body parts used in *muti* killings. One of the major problems with this Act is that it does not properly acknowledge that witchcraft exists in South Africa.²⁰⁵ In terms of this Act, an accused person either “professes or pretends” to use witchcraft.²⁰⁶ This make it difficult for the court to deal with witchcraft cases. One court held:

“The short of it all is that the law does not reconsider existence of witchcraft. Therefore, it cannot provide for law against it. It only provides against proclaiming by word or actions its existence. It does not matter how strongly we believe in its existence, the law does not provide for it. This is in keeping with the end to maintain social order since evidence of witchcraft would not lie in the ordinary world but in

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

the unnatural world to which we do not belong despite the fact that we may be victims of the same at one if not actual practitioners ourselves. Certainly not in our generation but many to come shall incorporate, may be witchcraft practicing into law.”²⁰⁷

The African Commission on Human and People’s Rights made similar remarks in 2008. The Commission made a report on the killings of PLWA in Africa and concluded that the brutal killing of PLWA is:

one of the most challenging areas relating to witchcraft because it is rooted in people’s beliefs and these are questions which cannot be treated by law. The problem is that the people and the government of Africa have not invested a lot in terms of measures to stop this problem. The law enforcement agencies can do better by investing in intelligence and gathering to the point of identifying and apprehending the perpetrators.²⁰⁸

The majority of witchcraft-related cases occur in rural areas.²⁰⁹ They often go unreported, and it becomes difficult for police officials to get evidence.²¹⁰ The courts in South Africa are not prepared enough to deal with witchcraft accusation cases, and do not recognise the existence of witchcraft.²¹¹ ²¹² This makes it difficult for prosecutors to deal with cases involving the killing of PLWA. The majority of these cases lack evidence. It becomes difficult for any court to deal with these cases, since the law does not recognise witchcraft.²¹³ The killings of PLWA will not come to an end in South Africa until there is a law that will recognise witchcraft.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ K Geldenhuys ‘When culture beliefs turn into crime: the witchcraft issue’ available at https://journals.co.za/docserver/fulltext/servamus/109/6/servamus_v109_n6_a7.pdf?expires=1555497504&id=id&accname=57926&checksum=5643303E41B98D4C9D18FBA9B4479FB9, accessed on 16 April 2019.

²¹⁰ *Ibid.*

²¹¹ J Hund ‘Witchcraft and accusation of witchcraft in South Africa: ontological denial and suppression of African justice’ available at https://www.google.com/search?rlz=1C1GCEU_enZA845ZA845&ei=f_62XIfVLe-W1fAPjpOFuAY&q=Witchcraft+and+accusation+of+witchcraft+in+South+Africa%3A+ontological+denial+and+suppression+of+African+Justice&oq=Witchcraft+and+accusation+of+witchcraft+in+South+Africa%3A+ontological+denial+and+suppression+of+African+Justice&gs_l=psy-ab.3...3292.7503..8476...0.0..0.0.0.....0....1j2..gws-wiz.....0..0i71.GknqBeiw_Q0, accessed on 10 March 2019.

²¹² *Ibid.*

²¹³ *Ibid.*

South African courts have dealt with cases of the killing of PLWA. However, many of them have not been finalised.²¹⁴ There are cases that have dealt with *muti*-related cases, where individuals have killed innocent people for *muti*. In *S v Sibande*²¹⁵ an appellant wanted to be successful in gambling.²¹⁶ He then consulted a witchdoctor who advised him to rape and kill his grandmother.²¹⁷ The witchdoctor also advised the appellant to cut off his grandmother's chin and ear for *muti* purposes.²¹⁸ The appellant did as he was advised, and was convicted of murder and sentenced to life imprisonment.²¹⁹ The court held that:

"It is quite true that in certain circumstances where primitive people commit offences under the influence of witchcraft that belief is regarded as an extenuating circumstance . . . But those are all cases where the accused killed the deceased in the genuine belief that by killing the deceased he was averting some great evil that would either befall himself or befall his family or his community. In no circumstance have I known a belief in witchcraft to be regarded as an extenuating feature where the motive for crime is for personal gain of the accused himself. For example, cases come from this court where a human being is murdered with the object of taking some portion of that human being's body for making "muti" to be used for witchcraft purposes. In every one of those cases the accused, who has been found guilty of that murder, has been found guilty of committing the offence without any circumstances of extenuation, although the killing was prompted by the belief in witchcraft."²²⁰

In another case, the South Gauteng High Court in *S v Mogaramedi*²²¹ imposed a harsh sentence on a witchdoctor who allegedly used human body parts for *muti*. He was found with the deceased's private parts.²²² The court in this case emphasised that *muti*-related killings in South Africa are high.²²³ Dosio AJ stated:

²¹⁴ *Ibid.*

²¹⁵ *S v Sibande* 1975 1 SA 966 (RA).

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *S v Mogaramedi* 2015(1) SACR 427 GP.

²²² *Ibid.*

²²³ *Ibid.*

“Bearing in mind the strong cultural belief surrounding traditional healers and the fact that muti killings are unlikely to stop in the future, it is the task of this court to deter the killings of the innocent people for such purposes. The community must be protected. The aspect of general deterrence is important to restore the trust the community have in the justice system. To regard such killings as substantial and compelling circumstances would send out a wrong message to the community. the prevalence of such cases in South Africa is high. The continuation of such killings will create more instability in the community where such practices are rife. A strong message must be sent out that such conduct will not be condoned in a civilized society. Where such killings arise they must be punished with full strength of the law.”²²⁴

The court also emphasized that *muti* killings are against the core principles of the Constitution.²²⁵ The Constitution prohibits any form of killing, as it was held in the case of *S v Makwanyane*.²²⁶ In South Africa, most cases which involve brutal killing of PLWA take a long time to finalize. It is also reported that some police officials don't investigate witchcraft cases because they fear that they will also be the victims of witchcraft practices.²²⁷

In Africa, many societies rely on witchdoctors for traditional medicine.²²⁸ It is estimated that 80% of people in Africa use traditional medicine in the continent.²²⁹ The World Health Organisation noted that traditional healers use theories and beliefs to make traditional medicine.²³⁰ In South Africa alone, it is estimated that there are about 200,000 witchdoctors compared to 25,000 medical doctors.²³¹ It is a country where the majority of citizens use medicine obtained from witchdoctors.²³² In 2007, South Africa passed legislation that regulates all traditional healers in the country. Traditional

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *S v Makwanyane* 1995(3) SA 391 (CC).

²²⁷ G Labuschagne 'Features and investigative implications of muti murder in South Africa' (2004) *Journal of Investigative Psychology and Offender Profiling* 192, 193, 194.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ R Kale 'Traditional healers in South Africa: a parallel health care system' available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2549561/pdf/bmj00591-0038.pdf> ,accessed on 5 March 2019.

²³² N Mbatha 'Sick certificates issued by South African health practitioners: current legislation, challenges and the way forward' (2012) 102 (3) *South African Medical Journal* 129, 130, 131.

healers are regulated by the Traditional Health Practice Act.²³³ This Act requires all traditional healers to be registered in South Africa. In terms of section 1 of the Act:

- (1) Any person wishing to be registered as a Traditional Health practitioner must apply on FORM THPA1 to be registered and practice as Practitioner as contemplated in Section 21 of the Act.
- (2) The application form must be accompanied by fees as stipulated in the Table of Fees as may be determined from time to time by the council.
- (3) The Registrar must enter the name of the person who meets the requirements contemplated in Section 21 in the register and issue the practice certificate to the person registered as such.²³⁴

This Act is generally not operational in South Africa and is ineffective. The majority of traditional healers or witchdoctors, particularly in rural areas, do not even know the existence of this Act. According to this Act, no individual may practise as a traditional healer without being registered.²³⁵ There are many traditional practitioners in the country who are undocumented. It is not known how many traditional healers are males or females. There are beliefs that the female dominates in this traditional practice.²³⁶

In Swaziland, PLWA are not considered as ordinary human beings.²³⁷ It is believed that having the condition is always associated with witchcraft.²³⁸ They are often called names such as *inkawu* ("monkey").²³⁹ It is believed that PLWA in this country do not get proper funerals.²⁴⁰ This is because of the traditional beliefs that people in this minority group do not die of natural death.²⁴¹ Because of brutal attacks and killings of PLWA, many of them are constantly living in fear of their lives.²⁴² In 2010, an 11-year-

²³³ Traditional Health Practice Act 22 of 2007.

²³⁴ Tradition Health Practitioners Act 22 of 2007.

²³⁵ RA Street 'Traditional Health Practitioners and sustainable development: a case study in South Africa' (2018) 165 *Public Health* 2, 3, 4.

²³⁶ C Rautenbach 'Review on a new legislative framework for traditional healers in South Africa' (2007) 28 3 *Obiter* 518, 519.

²³⁷ HL Ndlovu 'African beliefs concerning people with disabilities: Implications for theological education' (2016) 20 *Journal of Disability & Religion* 29, 30, 31.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

old teenager with albinism was murdered while she was with her friends.²⁴³ According to reports, the child was murdered because of her body parts. It is believed that the body parts of PLWA are used as a lucky charm.²⁴⁴

Although the myths about albinism vary from country to country, they are common in the majority African countries. However, in some parts of Africa, it is believed that PLWA are the cause of the shortage of rainfall resulting in food shortage. Because of these beliefs, PLWA are killed and buried in areas allocated for them.

2.5 CHILDREN LIVING WITH ALBINISM (CLWA)

Historically, CLWA were immediately killed after they were born. It was believed that they possess evil spirits.²⁴⁵ It was believed that having a CLWA would bring natural disasters such as earthquake or drought.²⁴⁶ The fathers of CLWA would leave their spouses if they gave birth to albino children. To spend time with their husbands, mothers would often kill their children.²⁴⁷ A mother reportedly killed her albino son in the 19th century in Southern Africa:

“During the time I resided at Mabotsa, a woman came to the station with a fine boy, an albino. The father had ordered her to throw him away, but she clung to her offspring for many years. He was remarkably intelligent for his age. The pupil of the eye was pink colour, and the eye itself was unsteady in vision. The hair, or rather wool was yellow, and the features were those most common among the Bechuanas. After I left the place, the mother is said to have become tired of living apart from the father, who refused to have her while she retained the son. She took him out one day, and killed him close to the village of Mapotsa, and nothing was done to her by authorities.”²⁴⁸

The attacks and killings of CLWA still take place in many societies in Africa. The late Professor Makumbe from the University of Zimbabwe, who lived there with the

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

condition, indicated that he was nearly murdered at the time of his birth.²⁴⁹ In his society it was believed that CLWA should be killed.²⁵⁰ The birth of CLWA is linked with evil spirits, witchcraft, and punishment from God.²⁵¹ Due to the myths and superstitions surrounding the condition, CLWA face discrimination in their homes, schools and communities. They are also vulnerable to brutal attacks and killings because of their body parts.²⁵² In the Democratic Republic of Congo, the birth of CLWA is associated with a water spirit; it is believed that albino children are born of a woman who had sexual intercourse with a water spirit.²⁵³

CLWA are normally born to parents who do not have albinism.²⁵⁴ They inherit this condition from their parents' genes. CLWA are more vulnerable to human trafficking and murder in Africa than adults living with the condition. They face abuse from their relatives, and in their schools and their societies.²⁵⁵ It is reported that they are often abused and avoided by their schoolmates.²⁵⁶ Their schoolmates often avoid participating in any activities with them, such as playing sports.²⁵⁷ Some societies do not like CLWA to share clothes with their children.²⁵⁸

There are many hardships faced by CLWA, yet little attention is given to them.²⁵⁹ In many areas in Africa, CLWA do not finish school. In most cases they have problems with their eyes, which makes it difficult to focus on their school work.²⁶⁰ When CLWA are exposed to the sun, they experience sunburn.²⁶¹ Lund *et al*/conducted a study on albino children in a South African special school.²⁶² The purpose of the study was to

²⁴⁹ CG Machoko 'Albinism: a life of ambiguity-a Zimbabwean experience' (2013) 11(3) *African Identities* 322,324.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ PM Lund 'A health intervention programme for children living with albinism in a special school in South Africa' (2002) 17 *Health Education Research* 365, 368.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ M Mswela 'Does albinism fit within the legal definition of disability in the employment context? A comparative analysis of the judicial interpretation of disability under the SA and US non-discrimination laws' (2018) *PELJ* 2.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

identify the challenges faced by these children in schools.²⁶³ During the study it appeared that most of these children had skin problems due to heat.²⁶⁴ The children stated that they had eye problems and were sensitive to the sunshine.²⁶⁵ A boy in Zimbabwe indicated that he was not able to see the blackboard properly, and he faced abuse from his schoolmates.²⁶⁶

Almost all individuals living with albinism have eye problems.²⁶⁷ OCA has an impact on the eyes of individuals living with the condition.²⁶⁸ Ocular disorders correlated with OCA include hypopigmentation of the iris, retina, hypoplastic fovea, hyperopia, strabismus, photophobia, loss of stereoscopic observation, and nystagmus.²⁶⁹ Such visual impairments ruin a portion of the real parts of adapting, for example, perusing and seeing a blackboard.²⁷⁰ These problems place CLWA understudies off guard. Many of them cannot manage the cost of ophthalmic consideration or the fitting of visual aids. Eye problems, destitution, absence of access to social insurance, and the absence of instructive arrangements, definitely causes poor instructive results and resulting dissatisfaction.²⁷¹ This encourages a cycle that keeps CLWA from succeeding and sentences them to manual open-air work - for example, work in sisal manors - further expanding the hazard of skin harm.²⁷²

Apart from visual problems, CLWA are also vulnerable to skin cancer. Africa is known as the hottest continent in the world.²⁷³ In Nigeria, it is estimated that PLWA are affected by skin cancer from around the age of 20.²⁷⁴ In Tanzania, the prevalence of skin cancer amongst PLWA in their twenties is 25%. A study was conducted in South Africa amongst 111 PLWA - the study showed that skin cancer affects about 23% of the population living with albinism.²⁷⁵ There is no cure for this, and PLWA live with the

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ PM Lund 'Lack of adequate sun protection for children living with oculocutaneous albinism in South Africa' (2008) *BMC Public Health* 2, 3.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

condition for the rest of their lives. In order for PLWA to avoid skin cancer and other diseases, they need to access proper health care. It is difficult for many PLWA to properly take care of themselves, because of poverty. In a report by the World Health Organisation (WHO) it appears that there are insufficient resources to help PLWA in Sub-Saharan Africa. Attacks upon, abduction, and killings of CLWA are a brutal and inhumane practice encountered in many countries of Africa. Reports have indicated that some CLWA have disappeared and not been found. IOL News reports:

The last time Zulmira Nhatave saw her little brother, he was wearing his school uniform; white shirt, grey trousers and a black jersey. Sibusiso Nhatave, a 14 year old boy with albinism, was seen talking to a man outside his school and Ikhandlela Junior Secondary in eSikhwini, on the north coast of KwaZulu Natal, where he was in grade 8. Yesterday marked 30 years since his disappearance and the Police say they are still investigating, despite the lack of clues.²⁷⁶

Eyewitness News reports:

A search is still underway for four-year-old Maneliswa Ntombela who has been missing for a month after being abducted near his home in Esikhwini Richards Bay.²⁷⁷

The reports indicate that in Malawi there were six PLWA killed in 2014, and as a result, the Malawian government gave an order to the police to kill every individual who attacks this minority group of people.²⁷⁸ The killings statistics vary from country to country in the African continent. According to the United Nations Children's Fund, about 74 CLWA were killed in Tanzania from 2000 to 2015. In all these incidents, it appeared that their arms were cut off. The continuance of these brutal killings makes individuals living with the condition live in constant fear of their lives, given their targeting for their body parts.

²⁷⁶ A Hlongwane 'Fear as albino boy vanishes' available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/fear-as-albino-boy-vanishes-1092451>, accessed on 5 April 2019.

²⁷⁷ D Bendile 'KZN cops urge parents of children living with albinism to be vigilant' available at <https://ewn.co.za/2016/07/17/KZN-urge-parents-of-children-living-with-albinism-to-be-vigilant>, accessed on 15 January 2018.

²⁷⁸ *Ibid.*

In some societies it becomes difficult for a mother to accept her albino child at birth. In some cases, medical practitioners are required to give counselling to the parents, and to inform them of the cause of albinism.²⁷⁹ Although some parents accept their children who are born with the condition, there are those who are ashamed of them.²⁸⁰ They hide their children from their communities.²⁸¹ In Venda, South Africa, a woman was ashamed of her albino child when she gave birth.²⁸² After she underwent counselling, she learnt to accept her child and to explain the condition to other people.²⁸³ There are many societies who do not believe that albinism is a genetic, inherited disorder.²⁸⁴

Report:

The mother attended a party while pregnant and saw a baby precariously strapped to her back in the blanket. Fearing the baby was about to fall she went forward to help tighten the blanket. She then saw to her fright that the baby had albinism. She believed that, as a direct result of this encounter, she had given birth to a child affected with the same condition.²⁸⁵

In most cases, parents trust teachers in the development of their children. However, for CLWA this is sometimes not the case. There are teachers who believe in myths and superstition surrounding albinism. A teacher in Zimbabwe said:

I really follow the scientific explanation that there is a gene responsible for albinism. However, though not disregarding science explanation, there is a general myth that albinism can still occur as form of a curse, say for instance if there has been a marital misdemeanour within the family. I do welcome the scientific explanation but still wonder whether the genetic make-up of parents is solely the cause.²⁸⁶

To ensure that CLWA do not have low self-esteem, teachers should ensure that they explain the cause of albinism to them. Teachers are powerful and appreciated in many

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

communities.²⁸⁷ They should play a huge role in raising awareness and educating people about albinism, in schools and in their communities.

2.6 MARRIAGES AND RELATIONSHIPS

The myths surrounding albinism do not only affect CLWA. Their mothers are also affected. It is reported that many CLWA are raised by single parents.²⁸⁸ The mothers are accused of cheating. In some societies there are strong beliefs that when a woman gives birth to a CLWA, she has either slept with the *tokoloshe*, or a European man.²⁸⁹ There are also beliefs that albinism indicates that something terribly bad has happened, or that it is God's punishment.²⁹⁰ These beliefs cause fathers to leave their loved ones.²⁹¹ In Zimbabwe there are reports that parents of albino children separate immediately when the children are born. This causes the mothers and their children to suffer from poverty and isolation.²⁹²

In Venda, Limpopo Province, in South Africa, there is a belief that there is a snake inside every woman.²⁹³ This snake protects women during their pregnancy and helps them when they give birth.²⁹⁴ It is believed that when a woman passes an individual with the albinism the snake will go away, she will no longer be protected, and as a result, she will give birth to a CLWA.²⁹⁵

In cases where the partners of PLWA accept them for who they are, their families and friends do not accept them.²⁹⁶ In some cases, the family and friends of the partners do not accept the PLWA either, and the relationship ends. In Zimbabwe, an individual living without albinism was engaged to a woman living with albinism, and they were

²⁸⁷ J Taylor 'Witchcraft-related abuse and murder of children with albinism in Sub-Saharan Africa: a conceptual review' (2019) 28 *Child Abuse Review* 14, 15.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ C Baker 'The myths surrounding people with albinism in South Africa and Zimbabwe' (2010) 22 2 *Journal of African Cultural Studies* 175.

²⁹⁶ *Ibid.*

expecting a baby.²⁹⁷ The family of her fiancé compelled their son to cancel the wedding, and the fiancé ended the relationship.²⁹⁸

Two-thirds of the killings and abductions of PLWA documented since 2011 comprise children.²⁹⁹ It is clear that CLWA are targeted more than adults living with the condition. It is widely believed in some societies that because children are innocent, the *muti* made from their body parts will be more powerful. This belief causes CLWA to be targeted more than adults living with the condition. CLWA are viewed as a curse in some societies; as a result killing them is considered to be a valuable measure.

2.7 BODY PARTS FOR MONEY

South Africa is a developing country. The economy of the country increases very slowly each year, for numerous reasons.³⁰⁰ The unemployment rate in the country is high, and many people in rural areas are poor.³⁰¹ There is no doubt that one of the reasons for an increase in trafficking in persons living with albinism is the economic state of South Africa. There is a high demand for body parts of PLWA in South Africa, and, as in many other countries in Africa, body parts of PLWA are sold in the black market at high prices.³⁰² A woman was arrested and appeared in Bonjeni Magistrate Court in KwaZulu-Natal, for trying to sell three children living with albinism to a witchdoctor.³⁰³ She was arranging to sell these vulnerable children for R100,000. A study by UNICEF indicated that body parts of PLWA are trafficked for witchcraft practices in Africa.³⁰⁴ It is reported that a set of arms, legs, ears or genitals of a PLWA could cost up to \$75 000.³⁰⁵

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ S Reporter 'Can I sell you an albino child?' available at <https://www.iol.co.za/news/can-i-sell-you-an-albino-child-2043617>, accessed on the 16 April 2019.

³⁰⁴ C Fauvrelle 'Mozambique, 19 May 2017: IOM, UNICEF, Mozambique host first ever forum to fight trafficking of people with albinism in South Africa' available at https://www.unicef.org/esaro/media-centre_moz2017_forum-albinism.html, accessed on 11 February 2018.

³⁰⁵ AE Cruz-Inigo 'Albinism in Africa: stigma, slaughter and awareness campaigns' available at https://www.clinicalkey.com/service/content/pdf/watermarked/1-s2.0-S0733863510001403.pdf?locale=en_US, accessed on 2 February 2016.

2.8 HUMAN TRAFFICKING AND ALBINISM

Human trafficking is the fastest-growing crime in the world and has existed for many years.³⁰⁶ It takes place in various ways. A human trafficker is an individual who transports, harbours, exploits and lures another person for his own or another's personal gain.³⁰⁷ In most cases, the victims of this crime are used in sexual activities and for cheap labour.³⁰⁸ Over the years, PLWA have been the victims of human trafficking, especially in Africa.³⁰⁹ They are often trafficked and killed for their body parts.

Although trafficking in PLWA is less prevalent in South Africa compared to other countries in Africa, over the past few years the incidence in these cases has increased.³¹⁰ It is reported that in countries such as Ghana, Nigeria, South Africa, Tanzania and Zambia, the human skin is the main target in these attacks.³¹¹ The most targeted group in trafficking in PLWA is children.³¹² According to reports, parents and extended family relatives are involved in trafficking of CLWA in exchange for money.³¹³ This is a criminal offense in South Africa. Section 284 (1) of the Children's Act 38 of 2005 stipulates that no person can traffic a child or allow a child to be trafficked.³¹⁴ Further, section 284(2) makes it clear that it is no defence that the child or the legal guardian consents to trafficking.³¹⁵

The Western Cape High Court emphasised this in the case of *Jezile v S and Others*.³¹⁶ In this case, the Appellant was convicted of human trafficking, rape, common assault and assault with intent to cause grievous bodily harm.³¹⁷ This was an appeal against the conviction and the sentence.³¹⁸ The Appellant argued that the charge of trafficking

³⁰⁶ Rahman H 'Human trafficking in the era of globalization: the case of trafficking in the global market economy' (2011) 2 *Transcience Journal* 53, 54, 57,

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015(2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC).

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

and rape must be set aside on the ground that a 14-year-old child consented to be his wife.³¹⁹ The High Court held that it is no defence that a child consented and the appeal against the conviction of human trafficking and rape was dismissed.³²⁰ Furthermore, in cases where parents/ legal guardian allows the child to be trafficked, section 287 (a) of the Children's Act permits the court to suspend all parental responsibilities.³²¹ The Prevention and Combatting of Trafficking in Persons Act 7 of 2013³²² also criminalises all forms of human trafficking including trafficking in PLWA.³²³

2.9 COLOURISM – THE CASE OF ALBINISM

Albinism is a condition that affects everyone, regardless of the colour of their skin.³²⁴ It is not classified as a race.³²⁵ In human terms, people living with the condition are no different to individuals living without the condition.³²⁶ In many societies in Africa, PLWA face severe discrimination because of the colour caused by their condition.³²⁷

Africa is known for its diversity - it is a home for all races. However, discrimination is a major problem in the continent. Historically, European races had privileges over Africans because of the colour of their skin.³²⁸ Discrimination does not only take place between different races, it also takes place between individuals of the same race.³²⁹ Africans living with albinism have been the victims of colour discrimination within their African communities because of their skin colour. Colourism involves stereotyping, prejudice and discrimination, based on skin tone.³³⁰ Many African PLWA are different

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² The Prevention and Combatting of Trafficking in Persons Act 7 of 2013.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ S Bucaro 'a black market for magical bones: the current plight of East African albinos' (2010) 15 *Public Interest Law Reporter* 131,132,133.

³²⁸ M Mswela 'Colour discrimination against persons with albinism in South Africa' (2013) 6 *SAJBL* 1, 2.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

from their communities because of the lack of pigment which causes their skin to be lighter.³³¹ They often suffer from colourism at the hands of their own family members.

In some societies, Africans that are lighter are considered to be better than darker Africans.³³² Lighter Africans also faces discrimination in their societies due to their skin tone/ shades.³³³ Colourism is the effective term to describe the social reasons behind these killings of, and attacks upon, PLWA in the African continent.³³⁴ The discrimination against and killings of the PLWA for their body parts in Africa is usually perpetrated by African individuals against African PLWA. Colourism is generally discrimination based on skin tone.³³⁵ Discrimination on the ground of race and colour is prohibited in many countries around the globe,³³⁶ yet the incidence of this form of discrimination remains in many societies.

The history of colourism can be found in South Africa. During the apartheid era, race and colour were used to group people according to their appearance.³³⁷ Black people suffered from this grouping.³³⁸ White people, coloured people and Indians were living in better areas compared to black people.³³⁹ There were statutes that were oppressive to black people, such as the Black Administration Act.³⁴⁰ This gave privileges to white people, while black people were less valued.³⁴¹ Discrimination on the ground of colour is often linked with race. However, in the case of PLWA, discrimination is based on skin tone alone.³⁴²

PLWA face different types of discrimination from the moment there are born, until they die. They often live in isolation, they are called names, murdered and attacked, based

³³¹ J Burke 'Colourism as an intra-racial phenomenon: the case of Tanzania' available <file:///C:/Users/218086172/Downloads/Burke2014conferencepaperAFSAAP.pdf>, accessed on the 16 April 2019.

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ J Sealy-Harrington 'Colour as a discrete ground of discrimination' (2018) *Canadian Journal of Human Rights* 2, 4, 5.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² M Mswela 'Colour discrimination against persons with albinism in South Africa' (2013) 6 *The South African Journal of Bioethics and Law* 25, 26.

on several myths surrounding their condition.³⁴³ The names used to describe PLWA vary from country to country. In Tanzania they are either called *ngulube*, which means “pig”, *zero*, which means “ghost”, or *mzungu*, which generally refers to a white person.³⁴⁴ This calling of names occurs not only in Tanzania - in South Africa there are also different names used by societies to describe PLWA.³⁴⁵ In KwaZulu-Natal Province, they are called *izishawa*, which means “monkeys”. This stigmatization is totally unacceptable and fuel the infringement of the rights of PLWA.

2.10 LACK OF KNOWLEDGE AND IGNORANCE ABOUT ALBINISM

Most societies are unaware of the causes of albinism. A study was conducted in Zimbabwe about the cause of the condition.³⁴⁶ It was found that about 50.7% of the individuals who participated in the study were unaware of the cause of albinism, 10.9 % stated the cause was biological, 13.8% stated they believed God as the creator is responsible, and 9.4% believed albinism is a result of witchcraft, or a punishment from God. This clearly indicates the need for government and NGOs to educate people about the condition.

The studies have indicated that even the parents of albino children are not aware what causes albinism. A study conducted in Malawi found that parents are not given proper information on albinism by medical practitioners when their albino children are born. According to this study:

They were asked what they had been told by medical personnel after the birth of a child with albinism. Not one person had received a good explanation for why a child is born with albinism. Some had been told to keep children with albinism out of the sun, while others had not been told anything.³⁴⁷

³⁴³ *Ibid.*

³⁴⁴ Diana Henry Salewi *The Killings of Persons with Albinism in Tanzania: A social-Legal Inquiry* (Unpublished LLM thesis, University of Pretoria, 2011) 10.

³⁴⁵ C Mnguni 'Government called upon to impose laws protecting people with albinism' available at <http://www.sabcnews.com/sabcnews/government-called-upon-impose-laws-protecting-people-albinism/>, accessed on 11 July 2018.

³⁴⁶ JGR Kromberg *Albinism in Africa* 1 ed (2018) 7.

³⁴⁷ C Baker 'The myths surrounding people with albinism in South Africa and Zimbabwe' (2010) 22 2 *Journal of African Cultural Studies* 175.

It is clear that a lot needs to be done to educate parents and community members about albinism. In some communities, there is an awareness of the cause of albinism, yet continued belief in the myths surrounding the condition.³⁴⁸ These myths vary from society to society.³⁴⁹ According to Jearnbrun and Sergent:

Societies respond differently to people with albinism. Some react strongly to the presence of a person with albinism in their midst: this is the case of sub-Saharan Africa, which, in many cases, surrounds these people with myths, confers sacerdotal functions on them or sacrifices them.³⁵⁰

Steps have been taken by different organisations and governments in Sub-Saharan Africa to educate people on albinism, but a lot remains to be done.³⁵¹

2.11 WHEN DO THE LIVES OF PLWA COME TO AN END?

In many societies in Africa, it is believed that the lives of PLWA does not come to an end, but instead they just disappear. In South Africa and Zimbabwe, people go to funerals to witness the death of PLWA.³⁵² A man in Venda in the Northern Province of South Africa indicated that he invited the whole community to witness the funeral of his relative. He wanted to show people that individuals living with albinism are ordinary people, and therefore they die like everyone else. Individuals living with the condition are told that they will not die. One PLWA stated:

When I was young, I was told that I would not die, they said I would just disappear because people like me . . . are not like other people and do not die. I spent my childhood waiting to disappear.³⁵³

A PLWA in Zimbabwe stated:

They think we do not die. I went to Harare for 8 months once, when I came back people were screaming spook, ghost, they thought I had died and come back.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ J Taylor 'Witchcraft-related abuse and murder of children with albinism in Sub-Saharan Africa- a conceptual review' (2019) 28(13) *Child Abuse Review* 13, 14, 15.

They think albinos do not die: they wander off into the bush. I even thought that myself before, I had never seen a dead albino. But now with the skin cancer I have seen many dead albinos. But an albino funeral that is a thing that is well attended. Not just because he has many friends. People come to see for sure that the albino is dead; they even touch him in the coffin to make sure he is really dead.³⁵⁴

The attacks against PLWA continue even when they die - their graves are violated in many parts of Africa in a quest for their body parts. *Daily Sun* newspaper reports:

Not even the grave is a safe resting place for people living with albinism. Daily Sun reported on Monday that Xolani Mkhize's grave was violated and some of his body parts were stolen.³⁵⁵

Sowetan newspaper reports:

A 54-year-old man and his driver will appear in the Mnabatho Magistrate's Court today in connection with the crime. Sipho Gordon Lolwane, who had albinism and was of Modimola village outside Mahikeng, died in June 2002 after a short illness. nine years later the family visited the grave to discover that it had been tampered with last year. They found human bones and pieces of the coffin next to the grave.³⁵⁶

The violation of the graves of PLWA in South Africa has not reached the level of other countries in Africa. In Malawi, more than 28 graves have been violated since 2004.³⁵⁷

2.12 SEXUAL VIOLENCE AGAINST WLWA

³⁵⁴ C Baker 'The myths surrounding people with albinism in South Africa and Zimbabwe' (2010) 22(2) *Journal of African Cultural Studies* 175.

³⁵⁵ M Mkhulisi 'Body parts stolen from the graves' available at <https://www.dailysun.co.za/News/National/body-parts-stolen-from-graves-20180320-2>, accessed on 16 April 2019.

³⁵⁶ B Tshehle 'Sangoma nabbed for bones dug up in grave' *Sowetan Live* 8 October 2012, available at <https://www.sowetanlive.co.za/news/2012-10-08-sangoma-nabbed-for-bones-dug-up-in-grave/>, accessed on the 16 April 2019.

³⁵⁷ C Manyozo 'The role of the media in advancing the rights of persons with albinism in Malawi' available at <http://chimwemwemanyozo.com/the-role-of-the-media-in-advancing-the-rights-of-persons-with-albinism-in-malawi/>, accessed on 16 April 2019.

There are beliefs in some societies in Africa that having sex with a woman living with albinism (WLWA) cures HIV/AIDS.³⁵⁸ As a result of these beliefs, WLWA are victims of sexual assault and violence, especially in the southern part of Africa.³⁵⁹ Cases of sexual assault against WLWA have been reported in Zimbabwe, Swaziland and South Africa. WLWA in the southern part of Africa are at risk of getting HIV and other sexually-transmitted diseases because of these wrong beliefs.³⁶⁰ African communities and government officials are urged to take necessary actions to eradicate violence against WLWA.³⁶¹

2.13 SOCIAL EXCLUSION AND DISCRIMINATION

PLWA are minority and socially-marginalized groups in many societies.³⁶² They face all forms of discrimination, from their families to their societies. Some people do not want to associate with them because of the myths surrounding the condition.³⁶³ PLWA find it difficult to enter sexual relationships with those who do not live with the condition.³⁶⁴ People who do not live with the condition are ashamed of being seen with them publicly.³⁶⁵ Most of these relationships do not last.³⁶⁶ A woman living with albinism indicated:

there are very few non-albinos' friends who come around asking for a relationship. After secondary school education, I became pregnant after being deceived by one of them thinking we were going to get married. After this incidence I recalled why he did not want me to meet his parents during the relationship. He would tell me to stay at home that he would be visiting me at home and in school. He would say 'it is because of the sun'. Later I suspected, he was not comfortable with me especially during the day but prefers talking to me at night. The day I told him I was pregnant he became furious and told me he couldn't have been responsible. His parents were also in denial saying 'our son couldn't have been the one, we

³⁵⁸SM Uromi 'Violence against persons with albinism and older women: tackling witchcraft accusation in Tanzania' (2014) 2(6) *International Journal of Education and Research* 337,338.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² DA Ikuomola 'Socio-cultural conception of albinism and sexuality challenges among persons with albinism (PWA) in South West Nigeria' 2015 4(2) *IJA* 190.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

know his girlfriend.’ Literally the parents meant he could not have been dating an albino, neither would have impregnated one.³⁶⁷

Some PLWA prefer to be single to avoid heartbreak in their relationships.³⁶⁸ To avoid being hurt in relationships, some PLWA prefer to use magazines and the internet for sexual pleasure.³⁶⁹ In a study conducted by Ikuomola, a man living with the condition indicated:

The internet can be accessed through phones, so it is much easier for me to watch sexual activities and get satisfied. Though it is not something I do often.³⁷⁰

A female also indicated:

just like any other person, I have some compact discs of erotic and romantic movies, when I get bored or experiences some urges I watch for some minutes and am done. It is not all the time and one has to be careful not to be seen.³⁷¹

PLWA prefer to use magazines and the internet for sexual pleasure because of the social exclusion they face from their homes and communities.³⁷² They face rejection from their communities from birth.³⁷³ Due to rejection, they isolate themselves. These myths, stigma and misconceptions make their lives difficult.³⁷⁴ The majority of PLWA do not go to events such as family gatherings and parties.³⁷⁵ This is because of the fear that they may be discriminated against.³⁷⁶ A male with albinism said:

The home is the most important avenue for socialisation but surprisingly the sexual challenges even start at home. Family members keep examining you as if your organs will be quite different in colours as well as in sizes. Sometimes they peep at one to see if the genitals are normal. It is embarrassing! Though family members accept one as he is, just because you are from the same womb, but they also

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

sometime make jest of one. Sometimes parents and siblings even distance themselves from PLWA. So we know these things. It is natural, once someone discriminate against you; one will definitely know. One does not need to be told when you are in a place where you are not accepted; instantly you will know. So we suffer all of these. These take a psychological toll on us (PWA) especially as one grows up into an adult.³⁷⁷

2.14 EMPLOYMENT

Job opportunities are scarce for this vulnerable group. They are denied opportunities because of their skin and eyesight problem. They are seen as not capable of doing a job that is done by persons living without albinism.³⁷⁸ There is no doubt that the lack of education of employers about the condition plays a huge role.³⁷⁹ PLWA have the same capacity to do a job as anyone else.³⁸⁰ There are many PLWA who established themselves in their fields, such as doctors, writers, teachers, lecturers and politicians.³⁸¹ In 2015, Dr. Abdallah Possi was the first minister living with albinism to be appointed. He holds numerous degrees and he is known as a human rights activist.³⁸² There are other PLWA who have performed well in their fields; for example, Malawian musicians Geoffrey Zigoma and Salif Keita, and Professor John Makumbe of the University of Zimbabwe.³⁸³ A woman in Zimbabwe indicated she was denied a job because she was living with albinism.³⁸⁴

2.15 CONCLUSION

The myths and superstitions surrounding albinism have major impact in the lives of PLWA. The lack of knowledge about the condition, and ignorance, have played a significant role in the trafficking of this vulnerable group. From the time they are born, they face discrimination, neglect and isolation. As a result, traffickers take advantage

³⁷⁷DA Ikuomola 'Socio-cultural conceptions of albinism and sexuality challenges among persons with albinism (PWA) in South West, Nigeria '2015 4(2) *IJAH* 195,196.

³⁷⁸ C Baker 'The myths surrounding people with albinism in South Africa and Zimbabwe' (2010) 22 2 *Journal of African Cultural Studies* 175.

³⁷⁹ *Ibid.*

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

of this discriminatory practices. To make matters worse, PWLA face all forms of discrimination from their families, school, and their community. The myths and superstitions surrounding albinism negatively affect their lives. There is a lack of knowledge on albinism in many societies. In order to deal with these challenges, government and NGOs should work hand-in-hand to raise awareness about albinism. Educators should also play a leading role in schools, to educate children about the condition, and build the self-esteem of children living with the condition.

CHAPTER 3

THE IMPACT OF INTERNATIONAL INSTRUMENTS IN COMBATting TRAFFICKING IN PERSONS LIVING WITH ALBINISM

3.1 INTRODUCTION

Trafficking in persons living with albinism (PWLA) is a global concern. However, many cases of this crime occur in Africa. Albinism is more prevalent in Africa than on other continents. Many countries in Africa are struggling to combat and prevent this crime. Over the past few years, the smuggling, murder, and trafficking of PLWA has continued to grow. This is likely to have many causes, such as economic conditions, unemployment, poverty rate, and witchcraft.

South Africa is one of the countries that has seen an increase in this crime over the past few years. Although the number has not reached the level of its neighboring countries, such as Tanzania, the cases have increased significantly. This country is signatory to several international instruments and protocols that prohibit human trafficking. Under these international instruments, South Africa is obliged to create legislation that support these instruments at a domestic level. International instruments play a pivotal role in preventing and combatting trafficking in persons. This chapter will focus on the international laws that protect and combat trafficking in PLWA. Although some of these treaties do not exclusively deal with trafficking in PLWA, they can be used in combating it, and in protecting PLWA.

3.2 PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN (UN PROTOCOL)

This Protocol was adopted by the United Nations Assembly in the year 2000.³⁸⁵ Thus far, there are 117 countries that are signatory to this protocol, and South Africa is one of them.³⁸⁶ Before this Protocol, there was no precise meaning of trafficking in persons.

³⁸⁵ KE Hyland 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8(2) *Human Rights Brief* 31.

³⁸⁶ *Ibid.*

The Protocol has now provided a precise definition, and all signatories must take appropriate measures to combat human trafficking.³⁸⁷ The Protocol also provides protection to the victims of trafficking.³⁸⁸ Living with albinism does not mean PLWA are not human and can be subject to any abuse. The trafficking and murder of PLWA is undoubtedly inhuman. PLWA are entitled to enjoy every right enjoyed by people who do not live with this condition.³⁸⁹ Article 2³⁹⁰ of this Protocol outlines its main purpose, which is:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To prevent and assist the victims of such human trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

In terms of Article 2, all forms of trafficking in persons should be prevented. Signatory states are expected to take appropriate measures to prevent trafficking, especially in women and children.³⁹¹ PLWA are protected by the same human rights as other people. The South African government is obliged under this Protocol to protect and prevent trafficking of this vulnerable group.³⁹² It is the duty of the South African government to make sure that PLWA enjoy the same rights as all other citizens. In spite of this duty, many signatories have failed to combat trafficking in persons,³⁹³ and they are unable to identify this crime as a human rights abuse.³⁹⁴ They often identify this crime as an organized crime rather than a human rights violation.³⁹⁵ It is important

³⁸⁷ A Gallagher 'Trafficking, smuggling and human rights: tricks and treaties' available at <http://www.twolittlegirls.org/ufiles/Trafficking,%20Smuggling%20and%20Human%20Rights.pdf>, accessed on 2 August 2019.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ Article 2 of Trafficking Protocol.

³⁹¹ *Ibid.*

³⁹² M Mswela 'A selection of legal issues relating to persons living with albinism (published LLD thesis, University of South Africa, 2016).

³⁹³ AD Jordan 'Human rights or wrongs? The struggle for a rights-based response to trafficking in human beings'(2002) available at <https://www.tandfonline.com/doi/pdf/10.1080/13552070215891>, accessed on 5 August 2019.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

for all signatories to view this crime in a broad way. All State countries in terms of this Protocol are obliged to:

- Criminalise trafficking and related conduct as well as impose appropriate penalties. Facilitate and accept the return of their trafficked nationals and permanent residents with due regard for their safety.
- When returning trafficked persons, to ensure that this happens with due regard both for the safety of the trafficked person and the status of any relevant proceedings.
- Exchange information aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers.
- Provide or strengthen training for law enforcement, immigration and other relevant personnel aimed at preventing trafficking as well as protecting traffickers and protecting the rights of the victims.
- Strengthen border controls as necessary to detect and prevent trafficking.
- Take legislative or other measures to prevent commercial transport being used in the trafficking process and to penalize such involvement; and
- Take steps to ensure the integrity of travel documents issued on their behalf and to prevent fraudulent use.³⁹⁶

Although witchcraft is the major factor in the trafficking of PLWA, there is no doubt that one of the other deep root causes of this brutal practice in Africa is poverty. Some perpetrators of this crime commit it to escape poverty. The body parts of these people are reportedly sold in a black market with high prices. In defining trafficking in persons, the UN Protocol covers all forms of trafficking in persons, including removal of body parts of people including PLWA. According to article 3 of the Protocol, trafficking in persons is defined as follows:

- (a) "Trafficking in Persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to

³⁹⁶ *Ibid.*

- achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
 - (c) The recruitment, transportation, transfer, harboring 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 18 years of age.

Subparagraph (a) suggests that trafficking in persons is broad.³⁹⁷ It involves organ removal, which is the case with PLWA. The myths that their body parts make a person wealthy and can be used as a lucky charm has caused PLWA to be exposed to human trafficking and brutal killings.³⁹⁸ They are attacked for their body parts in many countries in Africa including South Africa.³⁹⁹ From this definition it is clear that international instruments are trying with all means to end any form of trafficking in persons.

In dealing with cases of trafficking in persons, police officials should not check whether the victims or their families consented to this crime.⁴⁰⁰ This is according to Article 3(b) which states that consent is irrelevant in such cases, especially in matters concerning children.⁴⁰¹ Whether or not victims consented to trafficking is irrelevant. State parties should ensure the perpetrators of this crime are prosecuted. In eliminating this crime, courts should ensure that they impose sentences that will be fair to the victims, their families, and the society, as it was held in the case of *S v Rabie*.⁴⁰²

The term “trafficking in persons” was only used in reference to trafficking in women and children. Due to an increase in other types of trafficking in persons, the term now

³⁹⁷ Article 3 of the Trafficking Protocol.

³⁹⁸ M Mswela 'Violent attacks against persons with albinism in South Africa: a human rights perspective' (2017) 17 *African Human Rights Law Journal* 117, 118.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *S v Rabie* 1975 (4) SA 855.

recognizes all forms of human trafficking.⁴⁰³ It further differentiates trafficking in persons from other forms of criminal acts, such as the use of force, coercion, fraud, or deception for the purposes of exploitation.⁴⁰⁴ This Protocol is the first of its kind to define trafficking in persons.⁴⁰⁵ In terms of article 5 of this Protocol, all signatory states are required to make trafficking in persons a crime.⁴⁰⁶ The article requires that all signatories enact legal provisions that prevent and protect the victims of such trafficking. According to article 5:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this protocol, when committed intentionally.
2. Each State party shall also adopt such legislative and other measures as may be necessary to establish criminal offences.
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

Article 6⁴⁰⁷ of the Protocol puts an obligation on the states to protect the victims of trafficking in persons. According to this article:

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and the identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal and administrative system contains measures that provides to victims of trafficking in persons, in appropriate cases:

⁴⁰³ A Brysk *From Human Trafficking to Human Rights Reframing Contemporary Slavery* 1 ed (2012) 74, 75, 76.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ KE Hyland 'The impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8(2) *Human Rights Brief* 1, 2.

⁴⁰⁷ *Ibid.*

- (a) Information on relevant court and administrative proceedings;
 - (b) Assisting to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.
3. Each State party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
- (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, education and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.
5. Each State Party shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory.
6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

This provision provides that the rights of PLWA to privacy and dignity should be respected and protected.⁴⁰⁸ It also suggests that the government is obliged to provide the victims with accommodation for safety purposes. However, in many parts of South Africa, this has not happened, and the victims continue to live in poor conditions with no proper care from the government.⁴⁰⁹ This clearly indicates that the government has failed to protect this vulnerable group as required by the Constitution. This is not surprising. In the case of *Cheba and Others v Minister of Police and Others*,⁴¹⁰ the

⁴⁰⁸ *Ibid.*

⁴⁰⁹ C Baker 'The myth surrounding people with albinism in South Africa and Zimbabwe' (2010) 22 2 *Journal of African Cultural Studies* 175.

⁴¹⁰ *Cheba and Others v Minister of Police and Others* (520) [2018] ZALMPPHC6.

court expressed concerns over state officials who fail to perform their duties. Nair AJ stated that:

“Our courts have on several occasions expressed their disquiet at the failure of government officials, including Department officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution.”⁴¹¹

Furthermore, according to article 6, victims of trafficking should have employment, education and training opportunities; yet PWLA do not,⁴¹² and they are perceived as incompetent because of their skin condition. They are often judged for this, which indicates that there is still a lack of education on albinism in Africa.⁴¹³

Article 9 of this Protocol obliges State countries to prevent trafficking by all means. It states that:

1. States Parties shall establish comprehensive policies, programmes and other measures:
 - (a) To prevent and combat trafficking in persons; and
 - (b) To protect victims of trafficking in persons, especially women and children, from victimization.
2. States Parties shall endeavor to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
4. States Parties shall take or strengthen measures, including through bilateral cooperation, to alleviate the factors that make the persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures including through bilateral and

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children that leads to trafficking.

To ensure protection of PLWA in the future, countries in Africa should ensure that they strengthen their legislative measures. Numerous statutes have been passed in South Africa that prohibit trafficking in persons, such as the Prevention of Human Trafficking Act,⁴¹⁴ Prevention and Combatting of Hate Crime and Hate Speech Act,⁴¹⁵ Children's Act,⁴¹⁶ and The Promotion of Equality and Prohibition of unfair Discrimination Act.⁴¹⁷ In spite of this, the trafficking in PLWA shows no decline.⁴¹⁸ It is therefore the State's obligation to ensure that PLWA live freely in an open and democratic society, as they are entitled to do as citizens. There are some countries in Africa that have taken positive steps in preventing and combating trafficking in persons. In Tanzania, where there is a high incidence of this problem, the government has made it a serious crime to kill PLWA. As a result, there have been a number of arrests.⁴¹⁹

In many countries, such prosecution is not easy, due to lack of provisions that specifically combat trafficking, as required by the UN Protocol. This was highlighted in the case of *SL and Others v The Minister of Home Affairs and Others*,⁴²⁰ in South Africa. In this case, Modiba J stated:

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Trans Organised Crime (UN Protocol), confirms that trafficking in persons is a complex global phenomenon, perpetrated by organised crime syndicates often operating across several criminal jurisdictions. The prevention, detention and prosecution of incidents of trafficking in persons as well as the identification and protection of suspected victims of trafficking in persons requires a coordinated response by various governmental agencies which also require

⁴¹⁴ Prevention of Human Trafficking Act 7 of 2013.

⁴¹⁵ Prevention and Combatting of hate speech Act 9 of 2018.

⁴¹⁶ Children's Act 38 of 2005.

⁴¹⁷ The Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000.

⁴¹⁸ N Mollema 'The effectiveness of sentencing as a measure to combat human trafficking' (2017) SACJ 200, 203.

⁴¹⁹ S Bucaro 'A black market for magical bones: the current plight of East African albinos' (2010) 15 *Public Interest Law Reporter* 2, 3, 4.

⁴²⁰ *SL and Others V The Minister of Home Affairs and Others* (2016/01352) [2016] ZAGP JHC 46.

extra jurisdictional powers to deal with incidents of trafficking in persons and smuggling perpetrated beyond South African borders. Until the enactment of the PCTPA, South African criminal legal systems lacked capacity to deal with the offence of trafficking in persons.⁴²¹

Many countries are in the process of drafting such legislation, and South Africa has taken a positive step.⁴²² The Prevention and Combating of Trafficking in Persons Act became effective on 9 August 2015.⁴²³ The whole purpose of this Act is to eliminate and prevent trafficking in persons in South Africa.⁴²⁴ The Act seems to have been ineffective thus far, particularly in cases of PLWA, and these crimes against PLWA continue,⁴²⁵ with the perpetrators appearing to evade the long arm of the law. In combatting this crime, government will need to work together with communities and various NGOs to eradicate this brutal crime.

3.3 UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNTOC)

This Convention was adopted in 2000.⁴²⁶ All states parties to this convention committed themselves to eliminating all forms of organized crime. Organized crimes in terms of Article 2 of this Convention are those crimes that are committed by three or more people.⁴²⁷ In cases of trafficking in PLWA, there are usually three transgressors: the murderer, witchdoctor, and the client – this fits the organized crime definition. In terms of Article 2(a):

- (a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

⁴²¹ *Ibid.*

⁴²² P Goliath ‘Protecting victims of human trafficking- is South Africa doing enough?’ available at <http://www.derebus.org.za/protecting-victims-human-trafficking-south-africa-enough/>, accessed on 2 November 2019.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ United Nations Convention against Transnational Organized Crime.

⁴²⁷ Article 2 of United Nations Convention against Transnational Organized Crime.

In cases of trafficking in PLWA, there can be no doubt the perpetrators' primary purpose is to generate income. Clients' sole purpose is to become wealthy, after obtaining *muti* from body parts.⁴²⁸ The motivation of the witchdoctors and killers is financial gain. It is clear that this article protects PLWA. With regard to those who survive these crimes, article 25⁴²⁹ requires government to assist and protect them: This article states that:

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to the offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.
2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of defense.

This Article obliges all member States to take appropriate measures to assist the victims of human trafficking.⁴³⁰ Member States are also obliged to compensate the victims of this crime.⁴³¹

3.4 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UNDHR)

International human rights treaties have the prerogative of ensuring that people's rights are protected from such violation. They set out all guidelines to the signatory parties as to how human rights should be respected.⁴³² The UNDHR was adopted by the United Nations General Assembly on the 10th of December, 1948.⁴³³ Its primary purpose is to protect all human rights without giving preference to particular people

⁴²⁸ M Bruynell 'The dangers of the modern day belief in the supernatural: international persecution of witches and albinos' (2012) 35(2) *Suffolk Transnational Law Review* 86 87.

⁴²⁹ Article 5 of the United Nations Convention against Transnational Organized Crime.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² Universal Declaration of Human Rights.

⁴³³ M Freedman *Human Rights* 2 ed (2013) 117,118.

such as minority groups or persons living with disabilities (including PLWA).⁴³⁴ As with all international human rights treaties, the Declaration sets out guidelines for a dignified life for all humans, irrespective of their status.⁴³⁵

All state parties are expected to promote and respect universal human rights and fundamental freedoms.⁴³⁶ This Declaration protects all people from attacks and violations of their human rights. Article 1 stipulates that, “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another with spirit of brotherhood.”

From this article it is clear that trafficking of, and brutal attacks against, PLWA are prohibited. The article requires all human beings to treat each other with respect and love.⁴³⁷ The fundamental principle of this Convention is to ensure that no individual feels inferior or excluded.⁴³⁸ Trafficking in PLWA does not promote any spirit of brotherhood. Supplementing this Declaration, the Vienna Declaration confirmed in 1993 that all human rights are universal.⁴³⁹ This generally means that they apply to all country’s signatory to this Convention, and to all people.

Article 5 is also relevant to trafficking in PLWA, and it states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.⁴⁴⁰

PLWA in Africa are often attacked, trafficked and brutally killed for their body parts.⁴⁴¹ The reports indicate that their body parts are removed while they are alive.⁴⁴² It is believed that *muti* is more powerful when the body parts are removed from a living person. This is cruel and inhumane. Human rights apply to humans, regardless of a condition such as albinism.⁴⁴³ The existence of these attacks against this vulnerable group of people is a violation of their human rights under this Convention.⁴⁴⁴ All

⁴³⁴ *Ibid.*

⁴³⁵ J Donnelly *Universal Human Rights In Theory and Practice* 2 ed (2013) 15.

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ Vienna Declaration of Human Rights.

⁴⁴⁰ Article 5 Universal Declaration of Human Rights.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ A Fagan *Human Rights Confronting Myths and Understandings* (2001) 156.

⁴⁴⁴ *Ibid.*

countries that are signatory to this Convention should ensure that PLWA are protected from such attacks.⁴⁴⁵

3.5 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CAT)

This Convention was adopted by the United Nations General Assembly on 10 December 1984.⁴⁴⁶ The Convention obliges signatory states to implement laws that prohibit torture and other acts of cruel, inhumane and degrading treatment or punishment.⁴⁴⁷ Article 1⁴⁴⁸ of the Convention defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or the third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴⁴⁹

From this Article, it is clear that only torture committed by public officials or anyone acting in their capacity, is contemplated.⁴⁵⁰ In other words, PLWA cannot rely on this Convention for protection. This has raised a number of concerns from PLWA. In Tanzania, in the case of *X v United Republic of Tanzania*,⁴⁵¹ this argument was raised. In this case, the complainant (Mr. X) was living with albinism.⁴⁵² He was attacked by

⁴⁴⁵ *Ibid.*

⁴⁴⁶ J Herman Burgers and H Danelius 'A handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' available at https://books.google.co.za/books?hl=en&lr=&id=hMcR-TxS9BIC&oi=fnd&pg=PA1&dq=cruel+inhuman+or+degrading+treatment&ots=YIQIrd-tyE&sig=YIAf_4ZFuwF27CsKngjTTZBhcbU#v=onepage&q=cruel%20inhuman%20or%20degrading%20treatment&f=false, accessed on 3 October 2018.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

two men, and his arm was cut off.⁴⁵³ The police were informed of the incident.⁴⁵⁴ In one of the complainant's arguments, he referred to the article 1 definition of torture. However, the CRPD committee found that the act against Mr. X was not caused by public officials, nor anyone acting in such capacity, as stipulated by the Convention.⁴⁵⁵ The CRPD committee did emphasize that the State bears a duty to combat and punish the acts in article 15 of the CPRD, which applies both to public officials, and to those who do not work in state departments.⁴⁵⁶ Generally this means that this Convention also protects PLWA when they are trafficked/ attacked.

Words such as "cruel", "inhuman", "degrading punishment" and "punishment", have not been defined by the general assembly.⁴⁵⁷ According to the Human Rights Committee, the whole idea of these words:

Goes far beyond torture as normally understood, it may not be necessary to make a sharp distinctions between various forms of treatment and punishment. These distinctions depends on the kind, purpose and severity of the particular treatment . . . the prohibition must extend to corporal punishment, including excessive chastisement as educational and disciplinary measures.⁴⁵⁸

This does not give a proper meaning to these words. In any event, the article seems to provide protection from all ill-treatment, and inhumane and cruel conduct, directed against all human beings, including PLWA. In 2013, the United Nations High Commissioner for Human Rights⁴⁵⁹ published a preliminary report on discrimination against PLWA. According to this report:

States would adopt specific measures to protect and preserve the rights to life and security of persons with albinism, as well as their right not to be subjected to torture

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ M Goodale *Human Rights an Anthropological Reader* (2009) 77.

⁴⁵⁹ B Johnas and M Jeddy 'The predicament facing people with albinism: turning on the truly sight in Tanzania' available at http://repository.out.ac.tz/1516/1/THE_PREDICAMENT_FACING_PEOPLE_WITH_ALBINISM.pdf, accessed on 19 April 2019.

and ill-treatment, and ensure their access to adequate health care, employment, education and justice.⁴⁶⁰

From this report it is clear that this article protects PLWA. Trafficking in their body parts is regarded as exploitation. All the signatories to this protocol should ensure that any cruel and inhuman acts against PLWA are prevented, and the victims of such acts should be protected.

There are cases where PLWA end up leaving their countries of birth in fear that they will be attacked. These attacks and inhuman acts do not only occur in their communities,⁴⁶¹ but spread to schools and to their working environment. It becomes very hard for them to trust people, since they sometimes work together with perpetrators.⁴⁶² As a result, they flee their beloved countries in search of a better life. Article 3⁴⁶³ of this Convention clearly protects all PLWA who leave their countries in fear that they will become victims. Article 3⁴⁶⁴ states that:

1. No states party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.⁴⁶⁵

Instead of chasing the refugees living with albinism to their home countries, this article requires all signatory states to ensure that they work together in ensuring that PLWA are protected wherever there are.

⁴⁶⁰ *Ibid.*

⁴⁶¹ A Franklin ‘Children with albinism in African regions: their rights to being and doing’ (2018) 18 2 *BMC International Health and Human Rights* 3.

⁴⁶² C Baker ‘The myth surrounding people with albinism in South Africa and Zimbabwe’ (2010) 22 2 *Journal of African Cultural Studies* 175.

⁴⁶³ Article 3 of Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

3.6 INTERNATIONAL COVENANT ON SOCIAL AND ECONOMIC RIGHTS (ICESCR)

The primary aim of this Covenant is to ensure that all human beings, regardless of their identity or background enjoy their human rights freely, without any fear of attack and trafficking. This Covenant requires all signatories to ensure that their citizens enjoy their economic, social, cultural, civil and political rights.⁴⁶⁶ A number of human rights instruments provide combative and protective measures against trafficking, but they fail to examine the causes of trafficking.⁴⁶⁷

There is no doubt that social and economic reasons are a driving force in trafficking, particularly in the case of PLWA. For example, poverty, migration, and violence play a significant role.⁴⁶⁸ Many states parties, especially in Africa, have failed to look at the contributing factors. Instead, they focus on drafting and implementing legislation that prevents and combats human trafficking.⁴⁶⁹ This will not help to put an end to trafficking in PLWA. In order to combat it, it is important that signatories ensure that they identify all the social causes of trafficking.⁴⁷⁰ Many countries have spent a lot of money in criminalizing human trafficking; yet, the incidence of these brutal acts increase every year.⁴⁷¹ Government should ensure that it identifies the root causes of human trafficking, before implementing legislation.

The International Covenant on Economic, Social and Cultural Rights does not examine the social factors causing trafficking, but it does recognize the social, economic and cultural rights of all human beings. It also combats human trafficking and provides protection to its victims. There are some articles that suggest that any trafficking in persons is prohibited. Article 1⁴⁷² requires state parties to ensure that individuals control their own lives without any fear. According to article 1 of this Covenant:

⁴⁶⁶ *Ibid.*

⁴⁶⁷ J Chuang 'Beyond a snapshot: preventing human trafficking in the global economy' (2006) 13 *Indiana Journal of Legal Studies* 137,138.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *Ibid.*

⁴⁷¹ J Schnoebelen 'Witchcraft allegation, refugee protection and human rights: a review of the evidence' available at <file:///C:/Users/218086172/Downloads/witchcraft%20allegations,%20refugee%20protection%20and%20human%20rights.pdf>, accessed of 1 April 2019.

⁴⁷² Article 1 of the International Covenant on Economic, Social and Cultural Rights.

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political statuses, freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States parties to present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the charter of the United Nations.

The article gives every human the right to self-determination, and the freedom to make their political choices. It further gives people a right to pursue their economic, social and cultural development without any fear. This is also applicable to PLWA.⁴⁷³ In many countries in Africa however, PLWA are denied their right to self-determination.⁴⁷⁴ They constantly live in fear, and do not participate in social, economic and cultural development.⁴⁷⁵ The Covenant provides that all signatories should promote and protect the right of self-determination.⁴⁷⁶ This suggests that state parties should come up with appropriate measures to end trafficking in PLWA.⁴⁷⁷ This will help the family of people affected by albinism to identify these rights, and to enjoy such rights as voting for their chosen political parties, and participation in social and economic development.

The trafficking and killing of PLWA is also prohibited in term of Article 6 of this covenant. Paragraph 1 states: "Every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of this right."

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

In most trafficking cases, PLWA are killed, or they die from the pain suffered from removal of their body parts while they are alive.⁴⁷⁸ This Covenant guarantees everyone the right to life,⁴⁷⁹ and any person violating it should be brought to justice.⁴⁸⁰ The Covenant's protective measures can be applied to the problem of trafficking in PLWA, because of the commitments assumed by its signatories.

Another article in this Covenant that would seem to apply to PLWA is article 7.⁴⁸¹ This Article states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.⁴⁸²

Trafficking in PLWA occurs because of the myths that their body organs can be used for traditional medicine (*muti*).⁴⁸³ The beliefs that their body parts can make a person rich has caused much suffering to PLWA,⁴⁸⁴ who are attacked, and their body parts removed from them, in a most cruel and inhuman way.⁴⁸⁵ This article provides protection to all people in the signatory countries.⁴⁸⁶ No PLWA should be a victim of such violence. The article requires people and laboratories to obtain a consent before experimenting on their body parts. PLWA are murdered before their parts are taken and there is consequently no medical consent to afford them the protection of this provision.⁴⁸⁷ They are attacked and brutally killed,⁴⁸⁸ and they do not consent to the removal of their body parts, which is against the core values of the article, which prohibits any cruel and inhuman act.⁴⁸⁹ The signatories to this covenant should ensure that they implement legislation to protect and combat trafficking in PLWA.

⁴⁷⁸JA Cohan 'The Problem of witchcraft violence in Africa' (2011) 4 *Suffolk University Law Review* 886,887.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ C G Machoko 'Albinism: a life of ambiguity – a Zimbabwean experience (2013) 11 3 *African Identities* 319.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid.*

3.7 THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

It is unclear whether living with albinism can be regarded as a disability or not. Some scholars say albinism cannot be regarded as a disability, while others differ from that view.⁴⁹⁰ Many people living with the condition do not regard themselves as living with a disability. This creates a lot of controversy.⁴⁹¹ In 2015 a public servant in Swaziland who lived with albinism, Stukie Motsa,⁴⁹² argued that it is wrong to regard albinism as a disability. She made the following statement:

I personally think it is wrong for people with albinism to be classified as people with disabilities because they are not. They are just normal people and should be treated this way. They are just ill-placed in this category.⁴⁹³

Although some people who live with albinism prefer to be regarded as people living with disability, it is clear that there are some PLWA who are against this classification. A majority of countries have nevertheless classified PLWA as disabled.⁴⁹⁴ While it is not clear whether PLWA in South Africa are classified as disabled, the South African Human Rights Commission informed the United Nations High Commissioner for Human Rights in Geneva that South Africa regards albinism as a disability.⁴⁹⁵ The SAHRC⁴⁹⁶ stated:

In South Africa, persons with albinism are considered as persons with disabilities. In many communities within South Africa, disability is still generally seen as an illness, shame or curse, despite the fact that both section 9 of the Constitution, Act No. 108 of 1996, and the Promotion of Equality and Prevention of Unfair

⁴⁹⁰ M Mswela 'Does albinism fit within the legal definition of disability in the employment context? a comparative analysis of the judicial interpretation of disability under SA and the US Non-Discrimination Laws' (2018) 21 *PELJ* 3.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ HL Ndlovu 'African beliefs concerning people with disabilities: implications for theological education' (2016) *Journal of Disability & Religion* 34,35 and 36.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

Discrimination Act, No.4 of 2000, prohibit unfair discrimination on the basis of disability.⁴⁹⁷

From this statement, it is clear that South Africa does not have any legislation that defines disability or its thresholds.⁴⁹⁸ In terms of the Convention on the Rights of Persons With Disabilities, PLWA are regarded as disabled.⁴⁹⁹ As a result, PLWA are also protected in terms of this Convention. Trafficking in disabled persons is prohibited under this Convention. All state members are required to protect PLWA from becoming the victims of this crime.⁵⁰⁰

Article 15 of this Convention, like most international treaties, prohibits cruel and inhuman acts. It requires signatories to take appropriate measures to protect disabled persons from these violations. Article 16 specifically prohibits any forms of exploitation, including trafficking. Before the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, exploitation was limited to sexual exploitation and trafficking in women.⁵⁰¹ However, this Convention extended the definition of exploitation to include, in a broader sense, sexual exploitation, forced labour or services, slavery services and the removal of organs. There is no doubt that the intention of any international instrument such as the CPRD is to prohibit exploitation of PLWA.

Article 16⁵⁰² of this Convention states that:

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within

⁴⁹⁷ M Mswela 'Does albinism fit within the legal definition of disability in the employment Context? a comparative analysis of the judicial interpretation of disability under the SA and US Non-Discrimination Laws' (2018) 21 *PER/PELJ* 1, 2, 3, 4 and 5.

⁴⁹⁸ The Convention on the Rights of Persons with Disabilities.

⁴⁹⁹ A Possi 'The identity question versus appropriateness of legal anti-discrimination measures: endorsing the disability rights approach to albinism' available at http://www.adry.up.ac.za/images/adry/volume5_2017/Chapter%207_2017.pdf, accessed on 2 January 2018.

⁵⁰⁰ *Ibid.*

⁵⁰¹ S Marks 'Exploitation as an international legal concept' available at <https://legalform.files.wordpress.com/2017/08/marks-exploitation-as-an-international-law-concept-2008.pdf>, accessed on 5 February 2018.

⁵⁰² Article 16 of the Convention on the Rights of Persons With Disabilities.

and outside the home, from all form of exploitation, violence and abuse including their gender-based aspects.

2. States Parties shall also take appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including the provision of information and education on how to recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, State Parties shall ensure that all facilities and programmers designed to serve persons with disabilities are effectively monitored by independent authorities.
4. State Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of person and takes into account gender-and age-specific needs.
5. States Parties shall put in place effective legislation and polices, including women-and child-focused legislation and policies, to ensure that the instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Witchcraft is at the root of the trafficking in PLWA in Africa.⁵⁰³ Once they are caught, the perpetrators cut off their body parts in belief that their body organs possess magical powers.⁵⁰⁴ Body organs such as liver, lungs and arms are removed from them while they are alive, and used to make *muti*.⁵⁰⁵ They do not consent to these brutal attacks. Paragraph 1 of this Protocol clearly prohibits such abuse of rights and requires signatories to make their best efforts to protect PLWD, including PLWA.⁵⁰⁶ Parties to this Protocol are also obliged to implement measures to prevent these forms of

⁵⁰³ B Nkrumah 'Hunted like animals: The conundrums of countering crimes against albinistic persons in the era of the UDHR' (2018) 55 *International Journal of Law, Crime and Justice* 53.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

exploitation, in terms of paragraph 2. Many people in Africa are uneducated and lack knowledge of the causes of conditions like albinism.⁵⁰⁷ Paragraph 2 of this article requires all state parties to run programs that will educate people on the condition,⁵⁰⁸ and eradicate myths and superstitions surrounding albinism. Although many state parties in Africa have implemented this Protocol, much still needs to be done. Many cases of trafficking in PLWA have been reported, yet the indications are that very few have been finalized.⁵⁰⁹ This goes against paragraph 5 of this article which requires that these cases should be reported, and the perpetrators appropriately sentenced.⁵¹⁰ Heavy sentences will convey a strong message concerning the unacceptable abuse of PLWA. South African courts have dealt with *muti*-related murders in South Africa and imposed heavy sentences.

3.8 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

Most victims of human trafficking are women and children.⁵¹¹ It is estimated that about 80% of the victims of human trafficking are women, and half of them are under the age of 18.⁵¹² The case is no different to trafficking in PLWA. Although statistics are not provided on how many WLWA, and CLWA are affected by trafficking every year, compared with men, reports indicate that the women and children are more vulnerable.⁵¹³ WLWA are often accused of practicing witchcraft.⁵¹⁴ CLWA, on the other hand, are victims because of the belief that children are innocent. It is believed that the *muti* made out of their body parts is comparatively more powerful.

The United Nations General Assembly adopted CEDAW in 1979.⁵¹⁵ The primary purpose of this Convention is to eliminate all forms of discrimination against women

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ F Lenzerini 'International legal instruments on human trafficking and a victim- oriented approach: which gaps are to be filled' (2009) 4, *Intercultural Human Rights Law Review* 205, 207, 208.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ SM Uromi 'Violence against persons with albinism and older women: tackling witchcraft accusation in Tanzania' (2014) 2 6 *International Journal of Education and Research* 344, 327.

⁵¹⁵ *Ibid.*

across the globe.⁵¹⁶ Although the Convention does not specifically address trafficking in WLWA, a broad interpretation can be applied to combat trafficking in WLWA. Article 6⁵¹⁷ of the Convention states that “States Parties shall take appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women”.⁵¹⁸

By “trafficking in women” this article includes WLWA, who face many challenges in their societies.⁵¹⁹ They are victims of rape, trafficking, murder, violence and abuse, yet very little attention is given to them. Most of the victims of trafficking in PLWA are women.⁵²⁰ There are many cases of rape of WLWA in the southern countries of Africa such as South Africa, Zimbabwe and Swaziland.⁵²¹ This is owing to the myth that having sex with a WLWA cures HIV/AIDS.⁵²² As a result of these myths, if they are not raped in their homes, they face the risk of trafficking, rape and sometimes murder.⁵²³ Those who survive are likely to contract HIV and other sexually-transmitted diseases.⁵²⁴

In addition to rape, WLWA are also abducted for their body parts.⁵²⁵ Their hair, sexual organs, limbs, breasts, fingers, tongues and blood are believed to make a strong *muti*.⁵²⁶ Body parts such as breasts and sexual organs are usually found to have been removed from their dead bodies.⁵²⁷ According to *Under the Same Sun*, in 2011 the dead body of a WLWA was found in Zimbabwe, and certain parts of her body had been removed:

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

Professor John Makumbe was contacted by Zimbabwe police and taken to the morgue to assist in identifying the body. He noted that she had albinism and that her breasts and genitals had been removed.⁵²⁸

This case clearly demonstrates the risks faced by WLWA in many parts of Africa. According to reports, the use of body parts is determined by the advice given by witchdoctors to their clients. In other parts of Africa such as Tanzania, legs and arms are also removed.⁵²⁹ According to reports, an albino leg and arm can cost up to 3,000 US Dollars.⁵³⁰

3.9 DECLARATION ON THE ELIMINATION OF VIOLENCE AGAINST WOMEN

This Declaration specifically deals with women's rights. Any form of abuse and violence against women is prohibited. In defining violence against women, this declaration includes female genital mutilation, harmful traditional practices, and trafficking in women, generally faced by WLWA. Article 2⁵³¹ of this Declaration states that:

Violence against women shall be understood to encompass, but not limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and prostitution;

⁵²⁸ Under The Same Sun, available at <http://globaldisability.org/wp-content/uploads/2016/01/Attacks-of-PWA-extended-version.pdf>, accessed on 5 April 2018.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ Article 2 of the Declaration on the Elimination and Violence Against Women.

- (c) Physical, sexual and psychological violence perpetrated or condoned by State, wherever it occurs.

Children living with albinism are also an easy target for traffickers. This is simply because they cannot fight for themselves. There are many international instruments that prohibit and combat trafficking in children. These instruments are: the United Nations Convention on the Rights of a Child (CRC),⁵³² United Nations Committee on the Rights of a Child (CRC Committee),⁵³³ and African Charter on the Rights and Welfare of Children (ACRWC).⁵³⁴ All these instruments oblige member States to take appropriate measures to prevent and combat trafficking in children.

3.10 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

Children are the future of any nation. If they are taught well, and protected from any harmful practices, they can become future leaders. Many countries are failing to protect their children, particularly in Africa. Children across the globe are victims of exploitation, abuse and slavery.⁵³⁵ In many societies around the world, children are seen as objects, and therefore as being without any rights⁵³⁶ before they reach adulthood. This is not true - children have rights as do all human beings,⁵³⁷ and their rights must be respected. As philosopher Richard Lindley argues:

Certainly consciousness is a requirement. More specifically a person is a creature which has beliefs and desires, and acts on its desires in the light of its belief. However, this is insufficient for personhood. What is required in addition is the capacity to evaluate and structure one's beliefs and desires, and to act on the basis of these evaluations.⁵³⁸

⁵³² A Govindjee ... et al. *Introduction to Human Rights Law* (2009) 16.

⁵³³ CRC Committee.

⁵³⁴ African Charter on the Rights and Welfare of Children.

⁵³⁵ A Invernizzi and J Williams *The Human Rights of Children From Visions to Implementation* 1 ed (2016) 25,26.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

Children are more vulnerable than adults.⁵³⁹ They need protection from all forms of exploitation, abuse and violence.⁵⁴⁰ The CRC is designed to protect children across the globe from all forms of exploitation and abuse.⁵⁴¹ Almost every state has ratified this Convention. The only countries that have not yet ratified it are the United States of America, and Somalia.⁵⁴² According to The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children,⁵⁴³ trafficking in children is defined as :

the recruitment, transportation, transfer, harbouring or receipt of a child for exploitation. Exploitation shall include, at minimum, the exploitation or 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.⁵⁴⁴

The United Nations Convention on the Rights of the Child⁵⁴⁵ contains many articles that prohibit and combat exploitation and trafficking of children. Article 19⁵⁴⁶ of this Convention states as follows:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

⁵³⁹ United Nations Convention on the Rights of the Child.

⁵⁴⁰ JM Pobjoy *The Child in International Refugee Law* 1 ed (2017) 19.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ C Allais 'The profile less considered: the trafficking of men in South Africa' (2013) *South African Review of Sociology* 41,42, 43.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

CLWA are not only protected under the UNCRPD; they are also protected under the UNCRC.⁵⁴⁷ Under this Convention state parties are required to ensure that children are not subject to any form of abuse and exploitation.⁵⁴⁸ CLWA are victims of many witchcraft practices in Africa.⁵⁴⁹ They are an easy target because they do not have enough power to fight for themselves. They are trafficked from their homes, on their way to school, or when they play outside their homes. As a result, some parents do not allow their children to go to school or to play far from them, because of the fear that they might be attacked.⁵⁵⁰ In some communities, parents of CLWA often seek asylum in police stations to ensure that their kids are safe. Some parents even prefer to take their children to boarding schools. In protecting CLWA and ensuring that they get education, countries in Africa need to provide transport that will take children from home to school.⁵⁵¹ Thus far, Tanzania is one of the few countries that provides transport for CLWA to school. This shows the work that needs to be done by many countries in Africa.⁵⁵²

There are cases in Africa where parents sell their own children living with albinism to witchdoctors.⁵⁵³ A mother in Eskhwawini in the northern part of KwaZulu-Natal was caught trying to sell her CLWA to a witchdoctor.⁵⁵⁴ The community worked with police officials to find perpetrators of this crime.⁵⁵⁵ According to these articles, where such cases arise, government should ensure that they provide necessary support to these children.⁵⁵⁶ Those perpetrating such crimes must be prosecuted.

⁵⁴⁷ A Franklin 'Children with albinism in African regions: their rights to "being" and "doing"' (2018) 18 2 *BMC International Health and Human Rights* 3.

⁵⁴⁸ Article 9 of CRC.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ B Rohwerder 'Disability stigma in developing countries' available at https://assets.publishing.service.gov.uk/media/5b18fe3240f0b634aec30791/Disability_stigma_in_developing_countries.pdf, accessed of 4 September 2018,

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

⁵⁵³ J Ncala 'Muti rituals and biblical portrayal of child sacrifice' (published MTh thesis, University of Pretoria, South Africa, 2017).

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Camden Behrens 'Challenges in investigating and preventing muti-related offences in South Africa' available at <https://www.ingentaconnect.com/content/sabinet/crim/2013/00000026/00000001/art00002>, accessed on 1 September 2019.

⁵⁵⁶ *Ibid.*

Article 35⁵⁵⁷ is very specific on trafficking of children. According to this article, “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent abduction of, the sale of or trafficking in children for any purpose or in any form.”⁵⁵⁸ Article 35 combat trafficking in all children in all forms. In many parts of Africa, and worldwide, CLWA become the victims of trafficking from the moment they are born.⁵⁵⁹ According to this article, state parties should ensure that they take appropriate measures to combat trafficking in children.⁵⁶⁰ Cases of trafficking in children are increasing very rapidly in East and Southern Africa.⁵⁶¹ Children, particularly CLWA, are often killed for witchcraft practices.⁵⁶² Because of the myths surrounding albinism, CLWA are more vulnerable to these attacks.⁵⁶³ Laws need to be in place to combat these acts, and the perpetrators should be punished harshly, as a deterrent to those who would continue committing these crimes.

According to the UN Protocol, exploitation includes removal of organs.⁵⁶⁴ This generally means that article 36⁵⁶⁵ of this protocol also protects CLWA against human trafficking. This article states that “States Parties shall protect the child against all forms of exploitation prejudicial to any aspects of child welfare.”⁵⁶⁶

This article does not mention the types of exploitation envisaged. It would have been clearer for signatory parties and other organizations to deal with exploitation of children, if the article defined the different types of exploitation. As with the majority of international instruments, this protocol prohibits any cruel and inhuman treatment of children. This is according to article 37⁵⁶⁷ of this protocol.⁵⁶⁸ For countries combatting trafficking in CLWA, especially in Africa, it is important for them to take into account

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ D Budiani-Saberi ‘A human rights approach to human trafficking for organ removal’ (2013) *Med Health Care and Philos* 898,899,900.

⁵⁶² SM Uromi ‘Violence against persons with albinism and older women: tackling witchcraft accusation in Tanzania (2014) 26 *International Journal of Education and Research* 328,329.

⁵⁶³ *Ibid.*

⁵⁶⁴ UN Protocol.

⁵⁶⁵ Article 36 of CRC.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Ibid.*

the relevant provisions of this protocol.⁵⁶⁹ Although many countries have ratified this protocol and implemented law combatting trafficking in children, reports indicate no decline in this crime against humanity.

3.11 OPTIONAL PROTOCOL ON SALES OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

In many parts of Africa, CLWA are sold to witchdoctors even by their own parents and families. This protocol combats any form of sale of a child. It requires all signatories to ensure that any sale or trafficking of a child is a crime both in terms of domestic law and international law.⁵⁷⁰ Article 1 of this protocol states that “state parties shall prohibit the sale of children, child prostitution and child pornography, as provided by the present protocol.” In defining the sale of a child, article 2(a) provides a clear definition. It provides as follows: “(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. It is clear from this article that the sale of a child to witchdoctors and other perpetrators is prohibited. States parties to this protocol should ensure that these acts are criminalized, these acts place the lives of CLWA at risk, and their rights are being violated.⁵⁷¹

3.12 VIENNA DECLARATION AND PROGRAMME OF ACTION

This Declaration recognizes, respects and protects human rights. Although it does not address trafficking in persons directly, it does give protection to the victims of this crime.⁵⁷² All states parties are required to protect all human rights and freedom of persons.⁵⁷³

Trafficking in persons is a serious violation to the individual's human rights.⁵⁷⁴ In terms of paragraph 13 of this Declaration, states parties are required to ensure that they take

⁵⁶⁹ *Ibid.*

⁵⁷⁰ D Budiani-Saberi 'A human rights approach to human trafficking for organ removal' (2013) *Med Health Care and Philos* 898,899.

⁵⁷¹ B Nkrumah 'The hunted: UDHR and Africans with albinism' available at <https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12521>, accessed on 15 February 2018.

⁵⁷² Vienna Declaration and Program of Action.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

appropriate measures to combat any crime that violates human rights.⁵⁷⁵ This paragraph states that:

There is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. States should eliminate all violation of human rights and their causes, as well as obstacles to the enjoyment of these rights.⁵⁷⁶

This paragraph requires international organizations and NGOs to work together in combating crimes that violate human rights, such as trafficking in persons.⁵⁷⁷ In combating these crimes, states parties are also required to locate the deep roots of these crimes.⁵⁷⁸

When it comes to trafficking in women and children living with albinism, paragraph 18 makes it clear that they are entitled to enjoy human rights like all human beings.⁵⁷⁹ This paragraph requires all states parties to combat trafficking in women and children. Paragraph 18 emphasizes that the rights of women and children cannot be transferred to anyone - they belong to them.⁵⁸⁰ There is no doubt that this crime deprive victims their fundamental rights. This paragraph states that:

“The human rights of women and of a girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.”⁵⁸¹

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*

incompatible with the dignity and worth of human persons, and must be eliminated. This can be achieved by the legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.”⁵⁸²

From this paragraph it is clear that eliminating trafficking in persons, especially women, is the priority of all signatories. States parties are required to ensure that they take legislative measures to combat any form of trafficking in women.⁵⁸³ They are further required to work together with communities and non-governmental organizations to ensure that these measures are in place.⁵⁸⁴ It is clear that this declaration also protects WLWA.

3.13 AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRC)

In an African perspective, this Charter protects children from various forms of human rights abuse. All signatory states are obliged to protect children from any abuse such as trafficking and exploitation, and to ensure and guarantee that the rights and freedoms of every person are respected and protected.⁵⁸⁵ In relation to trafficking in children, the articles below protect them from this type of crime. Article 10⁵⁸⁶ states that:

No children shall be subjected to arbitrary or unlawful interference with privacy, family home or correspondence, or to attacks upon their honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.⁵⁸⁷

Although the article does not specifically touch on the trafficking of children, it prohibits attacks against children. It further requires parent(s) or legal guardians to make sure

⁵⁸² Paragraph 18 of Vienna Declaration and Program of Action.

⁵⁸³ *Ibid.*

⁵⁸⁴ *Ibid.*

⁵⁸⁵ B Thompson ‘African’s Charter on Children’s Rights: a normative break with cultural traditionalism’ (1992) 44 1 *The International and Comparative Law Quarterly* 433,435, 436.

⁵⁸⁶ Article 10 of the African Charter on the Rights and Welfare of the Child.

⁵⁸⁷ *Ibid.*

that their children are protected from all forms of attack.⁵⁸⁸ The article does not prescribe necessary steps or consequences in the event that a parent or legal guardian should fail to do so. Nonetheless, the article seems to provide protection and combat trafficking in persons including CLWA.⁵⁸⁹

PLWA are regarded as disabled people in many countries in Africa due to their visual impairment. As a result, CLWA are also protected under article 13⁵⁹⁰ of this Charter, which requires all signatories to provide protection to children living with disabilities. Article 13⁵⁹¹ stipulates that:

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under condition which ensure his dignity, promote his self-reliance and active participation.
2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment, recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his/her cultural and moral development.
3. The State Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disable person to the movement and access to public highway buildings and other places to which disabled may legitimately want to have access to.

Although the article does not expressly mention trafficking in persons, it gives special protection to all disabled children against any conditions that affect their human dignity and rights. Trafficking in CLWA is a violation of those rights.⁵⁹² The sad reality in many parts of Africa is that many of these children and their families continue to live in fear because of the attacks directed at them.⁵⁹³ The article protects them from such

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Article 13 of African Charter on the rights of Children.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*

violence; it requires states parties to ensure that they live a free life without fear of attack or trafficking.⁵⁹⁴ The states parties must also participate in community functions. Abuse, violence, and other violations of children's rights are prohibited in terms of Article 16⁵⁹⁵ of this Charter:

1. States parties to the present Charter shall take specific legislative, administration, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.
2. Protective measures under this Article shall include effective procedures for the establishment of special units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

According to this Charter, all states parties should take appropriate measures to protect children from all forms of violence, abuse and inhumane acts.⁵⁹⁶ States parties are also required to give support to the victims of this act and their families.⁵⁹⁷ In Africa, there are many cultural practices. It is woeful that some of these practices involve child sacrifice, especially CLWA.⁵⁹⁸ Although some traditional healers condemn this type of practice, it is still continuing in parts of Africa, and CLWA are the most targeted victims of this practice.⁵⁹⁹ There are many beliefs that their body parts are more powerful because of their innocence.⁶⁰⁰ As a result, they are stolen from their families and schools.

According to article 21 of the ACRC, any practice harmful to a child is prohibited. This article states that:

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) Those customs and practices prejudicial to the health or life of the child; and
 - (b) Those customs and practices discriminatory to the child on the ground of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Africa is the most diverse continent, with varied cultural beliefs.⁶⁰¹ Some of these beliefs are harmful to minorities, as in the case of PLWA. The myths surrounding albinism makes it hard for PLWA to live a normal life without any fear.⁶⁰² CLWA are defenseless, and as a result they are the main target of these harmful practices. Witchdoctors and other perpetrators target them for their body parts.⁶⁰³ This article provides for protection against any trafficking in children, particularly for the purposes of cultural beliefs. It requires all signatories to this protocol to combat any form of cultural belief which is harmful to children.⁶⁰⁴ Any cultural practice that endangers a child's life is prohibited.⁶⁰⁵

Under this Charter, the only article that specifically deals with trafficking in children is Article 29.⁶⁰⁶ The article obliges all states parties to take all necessary and appropriate measures to prevent:

⁶⁰¹ RN Ntinda 'Customary practices and children with albinism in Namibia: a constitutional challenge' page 243, 245 available at https://s3.amazonaws.com/academia.edu.documents/57501961/Childrens_Rights_In_Namibia.pdf?response-content-disposition=inline%3B%20filename%3DChildrens_Rights_in_Namibia.pdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=AKIAIWOWYYGZ2Y53UL3A%2F20190727%2Fus-east-1%2Fus-east-1%2Faws4_request&X-Amz-Date=20190727T144907Z&X-Amz-Expires=3600&X-Amz-SignedHeaders=host&X-Amz-Signature=e777cdec733308964b4b03f8054e920dc3cf83cc1d0e49c1ba7bbbea402d840#page=265 , accessed on 3 November 2018.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

- (a) the abduction, sale of, or trafficking in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

The demand for the body parts of PLWA is high in many countries in Africa,⁶⁰⁷ and this place their lives in danger. They are even sold by their own families. In spite of this, the article does not suggest measures that should be taken by states parties. Nevertheless, it prohibits any form of trafficking in children.⁶⁰⁸ Signatory states have an obligation to comply with this charter, to ensure that such trafficking is eliminated in Africa.⁶⁰⁹

In combatting trafficking in women and children, the States parties under the African Union concurred in the Solemn Declaration on Gender Equality in Africa.⁶¹⁰ This declaration states that:

To initiate, launch and engage within 2 years, sustained public campaigns against gender-based violence as well as the problem of trafficking in women and girls [and] reinforce legal mechanisms that will protect women at the national level and end impunity of crimes committed against women in a manner that will change and positively alter the attitude and behavior of the African Society.⁶¹¹

This declaration indicates that African countries are trying with all means to combat trafficking in women and girls. Making a declaration is not enough if countries do not take appropriate measures such as making laws that strictly combat trafficking in persons. All countries on the African continent need to ensure that they work together to combat this crime.

⁶⁰⁷ MP Mostert 'Albinism in Africa: a proposed conceptual framework to understand and effectively address a continental crisis' (2017) 5 *African Disability Rights Yearbook* 101, 108, 108.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

⁶¹⁰ A Lansink 'Human rights focus on trafficked women: an international law and feminist perspective' (2006) 12 *Empowering Women for Gender Equity* 45, 46 47.

⁶¹¹ *Ibid.*

3.14 PROTOCOL TO THE AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLE'S RIGHTS ON THE RIGHTS OF PERSONS WITH DISABILITIES IN AFRICA

According to this Protocol, signatories are expected to protect and prevent violations of the rights of PLWD.⁶¹² Although it does not directly prohibit trafficking in PLWA, there are articles that suggest that trafficking in PLWD be prohibited in Africa. Article 4 of this Protocol obliges all signatories to take appropriate and effective measures to ensure that the rights of PLWD are protected and respected.⁶¹³ These measures include drafting legislation and creating policies protecting the rights of PLWD.⁶¹⁴ In terms of article 4(d), signatories are obliged to make, modify, outlaw and criminalize any harmful act affecting PLWD.⁶¹⁵ This article would also protect PLWA.

Like many protocols and conventions, this Protocol prohibits acts such as trafficking.⁶¹⁶ It states clearly what measures should be taken by state parties to protect PLWD, and in combatting torture, and cruel, inhuman and degrading treatment or punishment.⁶¹⁷ Article 10 states that:

1. Every person with a disability shall have the right to the respect of his/her inherent dignity and to be free from torture or cruel, inhuman or degrading treatment, slavery, forced labour or unlawful punishment.
2. States Parties shall take appropriate and effective measure to ensure that persons with disabilities , on an equal basis with others:
 - (a) Are not subjected to torture or cruel, inhuman or degrading treatment or punishment:
 - (b) Are not subjected without their free, prior and informed consent to medical or scientific experimentation or intervention;
 - (c) Are not subjected to sterilization or any other invasive procedure without their free, prior and informed consent;

⁶¹² *Ibid.*

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*

⁶¹⁵ Article 4 of the Protocol to the African Chapter.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

- (d) Are protected, both within and outside home, from all forms of exploitation, violence and abuse.
3. State Parties shall take appropriate measures to prosecute perpetrators of such abuse and provide remedies for the victims.

Exploitation, abuse and violence in relation to PLWA is clearly prohibited in terms of this article.⁶¹⁸ Nevertheless, it remains unclear whether signatories have done enough to combat these acts in Africa. PLWD are still victims and easy targets for human trafficking. The position is not different to that of PLWA. Statistics indicate that despite the efforts of many countries in Africa, these cruel attacks continue.⁶¹⁹

Another article that suggests protection against trafficking in PLWA is Article 11 of this Protocol, which prohibits any harmful practice against PLWD. It states that:

1. States Parties shall take all appropriate measures and offer appropriate support and assistance to the victims of harmful practice, including legal sanctions, educational and advocacy campaigns, to eliminate harmful practices perpetrated on persons with disabilities, including witchcraft, abandonment, concealment, ritual killings or the association of disability with omens.
2. States Parties shall take measures to discourage stereotyped views on capabilities, appearance or behavior of persons with disabilities, and they shall prohibit the use of derogatory language against persons living with disabilities.

This article requires all signatories to the Protocol to combat any form of harmful practice against PLWD.⁶²⁰ The article specifically mentions those practices that should be eliminated, including witchcraft practices, brutal killings, and abandonment.⁶²¹ PLWA are trafficked and killed because of many myths and superstitions surrounding the condition. According to reports, upon consultation, some traditional practitioners in Africa will require their client to obtain body parts of a PLWA.⁶²² The beliefs that the

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

⁶²² *Ibid.*

body parts of PLWA possess magical powers are the deep cause of this harmful practice.⁶²³

PLWA are attacked, trafficked and killed in many parts of Africa. This is because of the myths and superstitions that they are cursed or that their condition is a punishment from God.⁶²⁴ The courts in South Africa have imposed some harsh sentences in respect of the killings of PLWD. In a case of *S v Shilamba*⁶²⁵ an accused was sentenced to life imprisonment following the killing of a deaf person. The penis of the deceased was removed. There are no reported cases yet on the killings of PLWA, but a sentence such as this conveys a strong deterrent against attacks on PLWA. Many countries in Africa have implemented laws that prohibit such harmful practices, but trafficking in PLWA is not declining, and PLWA are still at high risk of violence and murder.⁶²⁶ In these witchcraft-related rituals, they are harmed and killed so that their body parts can be used for ritual murder.⁶²⁷ A further disturbing observation is that politicians are amongst the perpetrators of the murder of PLWA. Reports indicate that PLWA are usually killed during election time in Africa,⁶²⁸ and it is believed that their body parts will make them win elections.⁶²⁹ In Tanzania, the government banned all witchcraft-related practices in an effort to combat the problem.⁶³⁰ The government was accused by various organizations that it had failed to protect PLWA.⁶³¹ Prior to the elections in 2015 in Tanzania, the United Nations issued a warning that trafficking in PLWA and attacks against PLWA were increasing.⁶³² Many politicians were reportedly visiting witchdoctors in the belief that this would ensure they won elections.⁶³³ Generally, government officials are expected to lead by example, in ensuring that PLWD are protected; however, this is not the case in many African countries.

⁶²³ *Ibid.*

⁶²⁴ *Ibid.*

⁶²⁵ *S v Shilamba* 2017(1) NR 211 (NLD).

⁶²⁶ C Bradbury Jones 'Beliefs about people with albinism in Uganda: a qualitative study using the common sense model' available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6185843/pdf/pone.0205774.pdf> accessed on 5 October 2019.

⁶²⁷ *Ibid.*

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

Tanzanian government officials, including their former President, Kikwete, have condemned trafficking in PLWA.⁶³⁴ Kikwete urged all Tanzanians to stop attacks on PLWA,⁶³⁵ and under his administration there were many public awareness programs on albinism.⁶³⁶ He also ensured that PLWA were assisted with their needs, including the launching of schools for CLWA.⁶³⁷ In addition, there were programs on television and in newspapers which urged Tanzanian people to stop these killings.⁶³⁸ However, the message did not reach Tanzanian communities living in rural areas.⁶³⁹ When they were asked about albinism, they continue to explain the condition in religious terms.⁶⁴⁰ This indicates that a lot needs to be done by African countries to change attitudes, and to eliminate these harmful practices.

3.15 AFRICAN CHARTER ON HUMAN AND PEOPLE RIGHTS (ACHPR)

This Charter was adopted on the 21st October, 1986.⁶⁴¹ All signatory states are obliged to protect human rights.⁶⁴² They are required to ensure that all citizens in the continent live a better life without any fear.⁶⁴³ Signatories also undertake to work together with international instruments such as the Charter of the United Nations and the Universal Declaration of Human Rights.⁶⁴⁴

There are articles under this Charter that suggest that trafficking is prohibited. PLWA continue to be victims of human trafficking in South Africa because of the discrimination directed against them because of their skin condition.⁶⁴⁵ Article 2⁶⁴⁶ of

⁶³⁴ G Brocco 'Labelling albinism: language and discourse surrounding people with albinism in Tanzania' available at <file:///C:/Users/218086172/Downloads/SecondDSRevision.pdf>, accessed of 5 October 2019.

⁶³⁵ *Ibid.*

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*

⁶⁴¹ M Mutua *Human rights: a Political & Cultural Critique* 1 ed (2002) 71,72 and 73.

⁶⁴² *Ibid.*

⁶⁴³ African Charter on Human and People's Rights.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*

⁶⁴⁶ GW Mugwanya *Human Rights in Africa Enhancing Human Rights Through the African Regional Human Rights System* (2003) 192.

this Charter prohibits any form of discrimination against any person.⁶⁴⁷ This article obliges African countries that are signatory to the Charter to ensure that people are treated fairly and equally.⁶⁴⁸

Furthermore, article 4⁶⁴⁹ states: “Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right.”⁶⁵⁰ Trafficking and murder constitute a denial of PLWA’s rights. Their lives are not respected. Those who survive this crime find it hard to trust other people.⁶⁵¹ There is no doubt that they lose their integrity. With respect to exploitation, article 5⁶⁵² provides that no human being shall be subject to exploitation.⁶⁵³ All human beings, whether disabled or not, should have their integrity respected. This article states that:

Every individual shall have the right to be respected of dignity inherent in human being and to the recognition of legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.⁶⁵⁴

The reality is that women, children, and PLWD are more vulnerable to these attacks. This charter creates special protection for these vulnerable groups. In terms of article 18(2),⁶⁵⁵ “The State shall ensure the elimination of any discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.”⁶⁵⁶ In addition, article 18(4)⁶⁵⁷ states: “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”⁶⁵⁸

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ Article 4 of African Charter on Human and People’s Rights.

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

⁶⁵² Article 5 of African Charter on Human and People’s Rights.

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*

⁶⁵⁵ Article 18(3) of African Charter on Human and People’s Rights.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ Article 18(4) of Africa Charter on Human Rights and People’s Rights

⁶⁵⁸ *Ibid.*

3.16 PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLE'S RIGHTS

The Protocol deals with accountability of state parties with regard to human rights in Africa. It ensures that all state parties that violate human rights are held accountable for the crime of genocide, crimes against humanity, and war crimes.⁶⁵⁹ Apart from these crimes, this protocol also deals with crimes such as trafficking in persons. This Protocol does not only deal with matters involving states parties; it also records decisions on crimes committed by individuals.⁶⁶⁰

3.17 CONCLUSION

South Africa is signatory to a number of international protocols that prohibit trafficking in persons. Although several of these human rights treaties do not address trafficking in persons directly, they may be applicable in prosecuting trafficking in PLWA cases. The Palermo Protocol is the most significant protocol that addresses trafficking in persons, and it provides a precise definition thereof.

Secondly, trafficking in PLWA is an organized crime and sometimes involves several participants. Obtaining evidence for this crime is not easy on prosecutors, and consequently, many of these cases take time to be finalized. South Africa needs specialized law enforcement personnel, sufficiently equipped to deal with this crime. The Organized Crime Convention addresses these issues. The Office of the High Commissioner for Human Rights⁶⁶¹ has also tabled recommendations for the combatting and prevention of this crime.

⁶⁵⁹ M Killander 'Human rights development in the African Union during' (2014) *AHRLJ* 538, 540, 550, 553, 556.

⁶⁶⁰ *Ibid.*

⁶⁶¹ 'Recommended principles and guidelines on human rights and human trafficking' available at <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

CHAPTER 4

THE SOUTH AFRICAN LEGAL RESPONSE TO TRAFFICKING IN PERSONS LIVING WITH ALBINISM

4.1 INTRODUCTION

The trafficking and killing of persons living with albinism is a global issue and a crime against humanity. It affects many countries in the Southern African Development Community (SADC) region, and the rest of the world.⁶⁶² Countries in the SADC region such as South Africa, Swaziland, Malawi, Tanzania are experiencing this crime more than other parts of Africa.⁶⁶³ All these countries are signatory to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, also known as the Palermo Protocol.⁶⁶⁴ Under this Protocol, countries are required to adopt legislative measures to criminalize all forms of human trafficking, and to combat this crime.⁶⁶⁵

Prior to the Palermo Protocol, South Africa did not have legislation that specifically addressed trafficking in persons. The country relied on the Constitution and other legislation such as the Children's Act, and on the common law, for prosecution of trafficking in persons.⁶⁶⁶ After ratifying the Palermo Protocol, SA was obliged to implement domestic legislative measures that directly criminalize and combat trafficking in persons.⁶⁶⁷ In 2013, South Africa enacted the Prevention and Combatting of Trafficking in Persons Act, which came into effect in August 2015.⁶⁶⁸ The country has also recently passed the Prevention and Combatting of Hate Crime and Hate Speech Bill, which seeks to criminalize hate crime such as the killing of PLWA. Despite these efforts the country is still on the Tier 2 watch list, according to the United States

⁶⁶² UNODC 'Trafficking in persons in the SADC region: a statistical report' (2014- 2016) available at [https://www.unodc.org/documents/southernafrica/Stories/EN - TIP Statistical Report.pdf](https://www.unodc.org/documents/southernafrica/Stories/EN_-_TIP_Statistical_Report.pdf), accessed on the 25 June 2019.

⁶⁶³ *Ibid.*

⁶⁶⁴ Palermo Protocol.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ J Aransiola 'Human trafficking and human rights violation in South Africa: stakeholders' perceptions and the critical role of legislation' (2014) 14 *African Human Rights Law Journal* 513.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ The Prevention and Combatting of Trafficking in Persons Act 7 of 2013.

Department of States. The list includes countries, which do not meet the minimum standards to combat human trafficking but have taken some measures to prevent and combat it.

Most of the cases that deal with trafficking in persons living with albinism have not been concluded in South African courts. This is not surprising; it is indicated that some police officials are reluctant to handle cases relating to *muti* killings.⁶⁶⁹ Since there are few reported cases on trafficking in PLWA, case law precedent from other countries which have dealt with the relevant criminal offences will need to be used.

Although the country has rectified to the Palermo Protocol and promulgated the Prevention and Combatting of Trafficking in Persons Act, the country has failed to combat and protect the victims of human trafficking. This chapter will analyze the current domestic legislation that criminalizes trafficking in persons.

4.2 UNITED STATES DEPARTMENT OF STATES (USDS) TRAFFICKING IN PERSONS RANKINGS

In 2019, the USDS ranked South Africa on the Tier 2 watch list in their trafficking in persons report.⁶⁷⁰ This report is divided into three categories, namely, Tier 1, Tier 2, Tier 2 watch list and Tier 3. There are about 35 African countries included in the list. Tier 1 countries include state parties that fully meet the minimum standards set by the Palermo Protocol, to combat trafficking in persons.⁶⁷¹ The Tier 2 list includes countries that do not fully meet the minimum requirements set by the Palermo Protocol, but have taken some steps in eliminating this crime.⁶⁷² The Tier 2 watch list includes countries who do not fully meet the minimum standards to combat trafficking but have made efforts to combat this crime.⁶⁷³ However, despite their efforts to combat trafficking, this

⁶⁶⁹ G Labuschagne 'Features and investigative implications of muti murder in South Africa' (2004) *Journal of Investigative Psychology and Offender Profiling* 201.

⁶⁷⁰ M Van Der Watt 'Trafficking and corruption, collusion nexus' available at <https://mg.co.za/article/2019-07-26-00-trafficking-and-the-corruption-collusion-nexus> ,accessed on 24 July 2019.

⁶⁷¹ Horn W *The Challenge of Child Trafficking* (2010) 95, 96.

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

crime is still on the rise.⁶⁷⁴ South Africa was included in this, which clearly means the country is facing a real challenge in combatting all forms of trafficking in persons. The last and final list is Tier 3.⁶⁷⁵ This list includes countries that do not meet the Palermo Protocol requirements to combat trafficking in persons and have not made any efforts to combat the crime.⁶⁷⁶

4.3 SOUTH AFRICAN PERSPECTIVE

South Africa is signatory to a number of international instruments which promote human rights.⁶⁷⁷ The country is therefore bound to comply with the provisions of each protocol. The Bill of Rights entrenched in the Constitution promotes human rights and complies with a number of international treaties to which this country is signatory. While the Constitution does not have specific sections that prohibit trafficking in persons, and especially PLWA, there are a number of provisions that prohibit trafficking in PLWA and the victims of this crime.⁶⁷⁸

In terms of section 10 of the Constitution, every South African citizen has a right to human dignity, and the right to have their dignity respected and protected.⁶⁷⁹ PLWA face violent abuse and exploitation during the trafficking crime.⁶⁸⁰ They are sometimes beaten, and force is used.⁶⁸¹ This is a clear violation of their right to human dignity. Section 11 of the Constitution guarantees every South African citizen the right to life.⁶⁸² The right to life is one of the most important rights in the Bill of Rights. Its importance was highlighted in the case of *S v Makwanyane*.⁶⁸³ In paragraph 3 of this case, the court stated that:

The right to life is, in one sense, antecedent to all other rights in the Constitution.

Without life in the sense of existence, it would not be possible to exercise rights or

⁶⁷⁴ M Mswela 'Violent attacks against persons with albinism in South Africa: a human rights perspective' (2017) 17 *AHRLJ* 116.

⁶⁷⁵ KA McCabe *The Trafficking of Persons* (2008) 62, 63.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ United Nations Human Rights 'The core International human rights instruments and their monitoring bodies' available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>, accessed on 24 June 2019.

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Section 10 of the Constitution.

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid.*

⁶⁸² Section 11 of the Constitution.

⁶⁸³ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the society is recognized and treasured. The right to life is central to such a society.⁶⁸⁴

This argument emphasizes the value of the right to life in the South African Constitution. The removal of body parts varies in each case, depending on the order of a witchdoctor or client. According to some scholars, in some societies in Africa it is believed that these body parts are powerful if they are removed from the victim whilst he is alive. If the victims do not get assistance, they will eventually die. Aside from other rights in the Constitution, this clearly denies them their right to life.⁶⁸⁵ The Constitution obliges citizens to value each other, and to share kindness with each other.⁶⁸⁶ Trafficking in PLWA goes against the core principles of the Constitution.⁶⁸⁷

Another section that is relevant to trafficking in PLWA is section 12 of the Constitution. This section deals with the freedom and security of the person. Section 12(1) states that:

Everyone has the right to freedom and security of the person, which includes the right-

- (a) Not to be deprived of freedom arbitrarily or without just cause;
- (b) Not to be detained without trial;
- (c) To be free from all forms of violence from either public or private sources;
- (d) Not to be tortured in any way; and
- (e) Not to be treated or punished in a cruel, inhuman and degrading way.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Section 2 of the Constitution.

⁶⁸⁷ *Ibid.*

According to reports, PLWA in South Africa live in fear of being trafficked, particularly children living with the condition.⁶⁸⁸ CLWA are attacked and trafficked in on their way to and from school.⁶⁸⁹ As a result, some children are afraid to go to school or associate with their friends.⁶⁹⁰ Section 12(c) clearly prohibits any violence against PLWA. The victims of this crime suffer from a great deal of pain before they die. The removal of their body parts takes place in the most brutal and inhuman way.⁶⁹¹ This is prohibited in terms of section 12(e) of the Constitution, which prohibits any cruel and inhuman treatment of PLWA.⁶⁹²

Section 28 of the Constitution categorically accords protection to children in South Africa. In terms of section 28(1)(b) of this section, every child is entitled to the right to family, parental or alternative care,⁶⁹³ whilst section 28(1)(c) entitles every child to the right to necessities.⁶⁹⁴ When CLWA are trafficked, they are denied these constitutional rights. Section 28(1)(d) also prohibits any abuse of children.⁶⁹⁵ It is the duty of all citizens and the State to ensure that CLWA are protected from any form of abuse, and that they enjoy their rights under the Constitution.

4.4 SOUTH AFRICAN CURRENT LEGAL MEASURES

South Africa is party to numerous international treaties that prohibit trafficking in persons. According to these international protocols, SA has been obliged to take necessary measures to prevent and combat trafficking in persons, and it has taken years for SA to enact legislation that explicitly prohibits trafficking in persons. The courts have relied mainly on common law offences such as abduction, kidnapping, assault and murder, to charge perpetrators and prosecute them for this crime.⁶⁹⁶

⁶⁸⁸ *Ibid.*

⁶⁸⁹ N Xolo 'People with albinism live in constant fear' available at <https://www.newframe.com/people-with-albinism-live-in-constant-fear/>, accessed on 03 October 2019.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.*

⁶⁹² Section 12 of the Constitution.

⁶⁹³ Section 28 of the Constitution.

⁶⁹⁴ Section 28(1) (c) of the Constitution.

⁶⁹⁵ Section 28(1) (d) of the Constitution.

⁶⁹⁶ HB Kruger & H Oosthuizen 'South Africa- safe haven for human trafficking? employing the arsenal of existing law to combat human trafficking' (2012) 15 *PELJ* 238, 239, 330.

Modiba J, in the case of *SL and Others v Minister of Justice and Others*,⁶⁹⁷ indicated the lack of legislation addressing trafficking in persons, prior to the promulgation of the Prevention and Combatting of Trafficking Act in South Africa. He stated:

The prevention, detention and prosecution of incidents of trafficking in persons as well as the identification and protection of suspected victims of trafficking in persons requires a coordinated response by various government agencies who also require extra jurisdictional powers to deal with incidents of trafficking in persons and smuggling, perpetrated beyond South African borders. Until the enactment of the PCTPA, the South African criminal legal system lacked the capacity to deal with offence of trafficking in persons.⁶⁹⁸

However, the position in South Africa changed in August 2015, when the first ever trafficking statute came into operation. The Prevention and Combatting of Trafficking Act prohibits all form of human trafficking and provides a broad meaning of trafficking in persons. It is the first statute of its kind in South Africa that specifically deals with trafficking in persons, in line with signatory states' obligations under the Palermo Protocol.

4.5 PREVENTION AND COMBATTING OF TRAFFICKING IN PERSONS ACT 7 OF 2013

South Africa is signatory to the Protocol to Suppress, Punish and Prevent Trafficking in Persons, Especially Women and Children (The Palermo Protocol).⁶⁹⁹ The Protocol required all signatories to enact all necessary legislative measures to illegalize any form of human trafficking.⁷⁰⁰ In August 2013, SA complied with the obligations under the Protocol, and enacted the Prevention and Combatting of Trafficking in Persons Act 7 of 2013.⁷⁰¹ This Act illegalizes all forms of human trafficking, including trafficking in PLWA.

⁶⁹⁷ *SL and Others v Minister of Justice and Others* 2016 SAFLII ZAGPJHC 47.

⁶⁹⁸ *Cheba and Other v Minister of Police* 2018 SAFLII ZALMPPHC 6.

⁶⁹⁹ *Ibid.*

⁷⁰⁰ The Palermo Protocol.

⁷⁰¹ Prevention and Combatting of Trafficking in Persons Act.

Chapter 2 of the Prevention and Combatting of Trafficking in Persons Act sets out all the offences and penalties for perpetrators of this brutal crime. In terms of section 4 under this chapter:

4(1) Any person who delivers, recruits, transport, transfer, harbours, sells, exchanges, leases or receives another person within or across borders of the Republic, by means of-

- (a) a threat of harm;
- (b) the threat or use of force or other forms of coercion;
- (c) the abuse of vulnerability;
- (d) fraud;
- (e) deception;
- (f) abduction;
- (g) kidnapping;
- (h) the abuse of power;
- (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation, is guilty of the offence of trafficking in persons.

(2) Any person who –

- (a) adopts a child, facilitated or secured through legal or illegal means; or
- (b) concludes a forced marriage with another person, within or across the borders of the Republic, for the purpose of the exploitation of that child or another in any form or manner, is guilty of an offence.

The definition of trafficking in persons in the South African Trafficking Act is broader than the Palermo Protocol definition.⁷⁰² It includes the threat of harm, whilst the Palermo Protocol does not. This designates a commitment by South Africa to criminalize and prevent any act fitting this crime. Some scholars may argue that the inclusion of this requirement is in conflict with the Palermo Protocol, but this is not the case. This requirement will assist prosecutors to prove that the victims of this crime suffered some form of threat before they were subjected to trafficking and murder. It will also assist prosecutors to prove that perpetrators had intention, and the available means, to attack and kill PLWA. Many of the offences under the Trafficking Act are not defined, and the Palermo Protocol does not give definitions either. A discussion of the offences and penalties in terms of section 4(1) will follow below:

4.5.1 *THE THREAT OF HARM*

As discussed above, this offence is not included in the Palermo Protocol definition. However, it will play a significant role in successful conviction of the perpetrators of this crime. The challenge with the requirements of this crime set out in the Act is that they are not explained. The Act does not define what amounts to a threat of harm for the purposes of the Act. This will place a huge challenge on prosecutors dealing with cases of trafficking in PLWA. In assessing what comprises threats of harm, the courts may rely mostly on the Intimidation Act⁷⁰³ to prove that the victims of these crimes were subjected to threats of harm. In terms of section 1 of this Act:

1. Any person who without lawful reason and with intent to compel or induce a particular person to do or to abstain from doing any act or to abandon a particular standpoint –
 - (a) Assaults, injures or causes damage to that person or any other person; or
 - (b) In any manner threatens to kill, assault, injure or cause damage to that person or any other person,shall be guilty of an offence or liable on conviction to a fine not exceeding twenty thousand rand or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.

⁷⁰² *Ibid.*

⁷⁰³ Intimidation Act 72 of 1982.

2. In prosecution for an offence the onus of proving the existence of lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution.

Section 1⁷⁰⁴ of the Intimidation Act clarifies what constitutes harm. Due to their vulnerability, PLWA, particularly women and children, are induced and lured easily during the commission of this crime. For example, perpetrators may call the child, who, unaware of danger, may go to the traffickers. They will then be threatened, injured, and even killed for their body parts, if they are not able to access help. The case of *Moyo v Minister of Justice and Constitutional Development and Others*⁷⁰⁵ (31) gives a clear definition of a true threat as a “threat of unlawful violence made by a person who intends to carry that threat out and has means to do so.”⁷⁰⁶

PLWA do not consent to the commission of this crime. There is usually an agreement between the witchdoctors, clients and perpetrators. This proves that this crime is planned, and the perpetrators always have means to threaten and kill PLWA. Some of the victims of this crime may be stalked by perpetrators. The perpetrators will try all means to obtain information about the victims - information such as where they work, what time they leave for work or school, and so forth, which assists perpetrators to successfully execute trafficking.

4.5.2 THE THREAT OF THE USE OF FORCE OR OTHER COERCION

The definition of trafficking in persons in the Palermo Protocol includes this requirement for trafficking. Prosecution will have a challenge in proving the requirements of section 4(1)(a) and section 4(1)(b). These sections are almost alike but in fact are not. Section 4(1)(b) deals with threats that force the victims to act against their own interest. There are a number of threats that PLWA face during these attacks, and they are not coerced in any of them.⁷⁰⁷ PWLA victims of organized crime such as trafficking are infused with fear and threatened by perpetrators, which coerces them

⁷⁰⁴ Sec 1 of Intimidation Act 72 of 1982.

⁷⁰⁵ *Moyo v Minister of Justice and Constitutional Development and Others* (387/2017).

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

to submit to the perpetrators' demands.⁷⁰⁸ This paragraph will assist prosecutors in determining whether force was used by perpetrators to threaten their victims and instill fear in them.

4.5.3 THE ABUSE OF VULNERABILITY

Neither the term "trafficking", nor the Palermo Protocol, has a specific definition of what amounts to vulnerability. The paper, "Abuse of a position of vulnerability", by the United Nations Albinism, concurs on this.⁷⁰⁹ There is no protocol nor any international law that defines this crime.⁷¹⁰ This will place a huge challenge on prosecutors dealing with this crime since there is no information on how prosecutors will approach or deal with it.⁷¹¹ Although there is no appropriate definition of vulnerability, the paper on vulnerability argues that the most acceptable definition is:

Vulnerable people are defined as those who, due to the reasons of age, gender, physical or mental state, or due to social, economic, ethnic, and/or cultural circumstance, find it especially difficult to fully exercise their rights before the justice system as recognized to them by law. The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimization, migration and internal displacement, poverty, gender, and deprivation of liberty. The specific definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development.⁷¹²

Based on this definition, there can be no doubt that PLWA are a vulnerable group of people. Due to their skin condition, they are subject to frequent abuse, discrimination and attacks.⁷¹³ As a result of these attacks, they are forced to stay indoors in fear that

⁷⁰⁸ V Dafele *The Prevention and Combating Of Trafficking in Persons Act of 2013: A Critical Analysis of its Potential Impact on Child Trafficking Prosecution in South Africa* (unpublished LLM thesis, University of KwaZulu-Natal, 2014).

⁷⁰⁹ United Nations Office on Drugs and Crime '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, accessed on 6 June 2019.

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² *Ibid.*

⁷¹³ CG Machoko 'Albinism: a life of ambiguity- a Zimbabwean experience' available at <https://www.tandfonline.com/doi/pdf/10.1080/14725843.2013.838896?needAccess=true>, accessed on 16 June 2019.

they may be attacked.⁷¹⁴ This denies them their rights to freedom of movement as afforded by the Constitution of South Africa. It is estimated that 1 in 4,000 people live with albinism in the country; this undoubtedly makes them a minority group.⁷¹⁵ Clearly because of the lack of knowledge and myths surrounding PLWA, this vulnerable minority group of people finds themselves the target of brutal attacks.

Although cases dealing with trafficking in PLWA take time to be finalized in South Africa, in the few that have been finalized, the courts have sent a clear message to the perpetrators. They have also imposed harsh sentences on the accused for attacking an extremely vulnerable group of people. In the case of Gabisile Shabane, who was living with albinism, the judge imposed a harsh sentence on the accused. In this case, Judge Segopotje said:

The accused and . . . the other took a decision to travel to Witbank to the house where they could find a person living with albinism. [An accomplice] provided them with the layout of the house. They further knew that the people who were living in the house were the most vulnerable. It was an old lady, her daughter and some children.⁷¹⁶

The accused was sentenced to two life imprisonment sentences for killing a PLWA.⁷¹⁷ This judgment will send a strong message to the public that the court does not tolerate any crime against vulnerable groups of people such as PLWA. These people should enjoy their rights without any fear or prejudice.

Generally, children rely on their parents for protection and guidance. For these reasons, under international law, children are identified as vulnerable to human trafficking.⁷¹⁸ With regard to cases dealing with trafficking in children with albinism, prosecutors will not have much challenge in proving vulnerability.

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*

⁷¹⁶ N Njilo 'Double life sentence for teacher who killed teen with albinism for muti' available at <https://www.timeslive.co.za/news/south-africa/2019-08-23-double-life-sentence-for-teacher-who-killed-teen-with-albinism-for-muti/> accessed on 3 October 2019.

⁷¹⁷ *Ibid.*

⁷¹⁸ United Nations Human Rights Office of the High Commissioner 'Human rights and human trafficking' available at https://www.ohchr.org/Documents/Publications/FS36_en.pdf accessed on 3 June 2019.

4.5.4 FRAUD

According to C R Snyman,⁷¹⁹ fraud is: “The unlawful and intentional making of misrepresentation which causes actual prejudice, or which is potentially prejudicial to another.”⁷²⁰

In order to prove the guilt of the accused, all the elements of this crime, which include prejudice, misrepresentation, unlawfulness and intention, must be proved concurrently in court.⁷²¹ Each element will be discussed below.

(a) Unlawfulness

This refers to unlawful conduct that creates a false representation to the victim. This conduct should be morally unacceptable to the community.⁷²²

(b) Misrepresentation

With respect to trafficking in PLWA, this refers to an action that deceives or misleads the victims.⁷²³ Victims are induced and misled by perpetrators through lies. Misrepresentation takes place in many ways; it can be written, oral, by means of conduct or by remaining silent.⁷²⁴

(c) Intention

There are two principles of intention with regard to fraud.⁷²⁵ These are intention to deceive and intention to defraud. Perpetrators of this crime must have knowingly made

⁷¹⁹ M Miller ‘Is theft a competent verdict on a charge of fraud’ available at <http://www.derebus.org.za/theft-competent-verdict-charge-fraud/> accessed on 13 September 2019.

⁷²⁰ *Ibid.*

⁷²¹ G Kemp...et al. *Criminal Law in South Africa* 1 ed Cape Town: Oxford, (2012) 404.

⁷²² S Naidoo *The South African Criminal Law’s Response to the Crime of Fraud and Corruption within Local Government* (Publish LLM thesis, University of Pretoria, 2017).

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

a misrepresentation or foreseen that such misrepresentation might not be true.⁷²⁶ South African courts have indicated that both these elements must be proved in order to find the perpetrator guilty.⁷²⁷ In the case of *Ndwabi v The State*,⁷²⁸ the court held that intention to defraud is made up of two principal aspects, namely: intention to deceive, and the intention to induce a person to alter or abstain from his or her legal position. With regard to intention to deceive, the court followed the *Derry v Peek*⁷²⁹ precedent, in which the Lord stated:

Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in the truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no belief in its truth.⁷³⁰

The courts further follow the case of *Ex parte Lebowa Development Corporation*⁷³¹ in which Stegmann J stated:

The essence of fraud in *dolus eventualis* appears to be the deceit practiced by the representor in suggesting that to be true which he knows may not be true. He knowingly exposes the representee to a risk (that the representation may be false) and deceitfully leaves the representee ignorant of his exposure to that risk.

Any such case of fraud by *dolus eventualis* may, I think, be analyzed further to disclose another fraud underlying and accompanying the first. When anyone makes a representation of fact whilst knowing whether his misrepresentation is true or false, he thereby actually makes two distinct representation of the fact. The fact represents as fact that which he does not know to be either true or false. The second is a misrepresentation of fact relating to his own state of mind: it is representation (usually implied) that he has an honest belief in truth of the first representation. Such second

⁷²⁶ *Ibid.*

⁷²⁷ J Minnaar 'Understanding fraud and white collar crime- the origin, definition and elements of fraud' available at <http://tei.org.za/index.php/resources/articles/fraud-and-corruption/1712-understanding-fraud-and-white-collar-crime-the-origin-definition-and-elements-of-fraud>, accessed on 6 July 2019.

⁷²⁸ *Ibid.*

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid.*

⁷³¹ *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T).

representation is one that he knows to be false, and it therefore establishes a case of fraud by *dolus directus*, simultaneously with the fraud by *dolus eventualis* relating to the first representation.⁷³²

Trafficking in PLWA is an organized crime; before committing this crime, perpetrators knowingly plan all the tricks and tactics to deceive the victims. When luring the victims, they foresee that their act of cruelty will cause prejudice. In cases where the victims escape danger of trafficking, perpetrators cannot claim that their false misrepresentation was not intended to cause prejudice. This is supported by the case of *R v Dyonta & another*,⁷³³ where the court held that:

If the misrepresentation is one which in the ordinary course is capable of deceiving a person, and thus enabling the accused to achieve his object, the fact that the person to whom the representation is made has knowledge or a special state of mind which effectually protects him from all danger of prejudice, does not entitle the accused to say that the false representation was not calculated to prejudice.⁷³⁴

(d) Prejudice

Misrepresentation must cause harm to the victims. Trafficking in persons involves a number of instances of fraud. There are a number of methods used by perpetrators to tempt the victims of this crime, and the method used depends on each case.⁷³⁵ PLWA find it is extremely hard to trust people because of fraud.⁷³⁶ There are hurt and inveigled by their own partners, family members and friends, because of the demand for their body parts.⁷³⁷ In the case of *S v Gumede and Others*, it is reported that one of the accused was the boyfriend of the deceased.⁷³⁸ Reports indicate that the boyfriend inveigled his girlfriend (Thandazile Mpunzi), who was living with albinism, to a particular area in Emanguzi.⁷³⁹ The girlfriend was then attacked and killed by the

⁷³² *Ibid.*

⁷³³ *R v Dyonta & another* 1935 AD 52.

⁷³⁴ *Ibid.*

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

⁷³⁸ *S v Bhekukufa Gumede* Case No: CCD51/16(Unreported case).

⁷³⁹ *Ibid.*

accused and accused number two.⁷⁴⁰ She was completely induced by her boyfriend.⁷⁴¹ This unquestionably indicates that the accused misrepresented his state of mind to the deceased.

4.5.5 *DECEPTION*

This offence is found in both the South African Trafficking Act and the Palermo Protocol. Generally, this means that South Africa complies with minimum standards set by this protocol. However, prosecutors will face difficulties in prosecuting this crime in South Africa. In terms of South African law, deception is not a specific crime.⁷⁴² It is an essential element of fraud.⁷⁴³ It was really unnecessary for this Act to include deception as a specific offense.

4.5.6 *ABDUCTION*

In terms of South African common law, abduction is defined as, “unlawfully taking a minor out of the control of her custodian, with the intention of enabling someone to marry or have sexual intercourse with that minor.”⁷⁴⁴

In order to charge a person with abduction, all the requirements of this offense (unlawfulness, taking, taking a minor, removal from the custodian’s control, and intent) must be met. In a South African context, the taking of a minor child can be either by force, consent of the victim, or cooperation.⁷⁴⁵ The victims of this crime can be both males and females.⁷⁴⁶ The crime is not limited to one specific gender. To charge the accused with this crime, the prosecution must prove beyond reasonable doubt that perpetrators had intention to marry, or to have sex with, the victims.⁷⁴⁷ If they cannot prove this, they cannot charge perpetrators with this crime in a South African context.

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

There are many myths associated with albinism in South Africa and the rest of the continent.⁷⁴⁸ In some societies it is believed that having sexual intercourse with a PLWA cures HIV/AIDS.⁷⁴⁹ This might be the main cause of abduction of CLWA.⁷⁵⁰ Based on the cases of trafficking in PLWA in South Africa, it is unclear whether the body parts of the victims are removed after the children have been raped or not. There is not enough research on that aspect. However, in dealing with this crime, prosecutors will have a challenging task. Firstly, the body parts of the victims are usually found in a bad state, and sometimes decomposed.⁷⁵¹ It will be difficult to determine whether perpetrators had sexual intercourse with the victims or not. Prosecutors will need a specialized forensic company to prove this crime, and this will delay prosecution.

Secondly, most of the victims of this crime are not found.⁷⁵² There are many cases that are not reported or documented with regard to trafficking in PLWA.⁷⁵³ The case of Maneliswa Ntombela clearly supports this. Maneliswa, a four-year-old boy living with albinism, still hasn't been found. Report:

Pitout said there is still no update on the young missing albino boy who was last seen on 21 June 2016.

Maneliswa was reportedly abducted by unknown men traveling in a silver double cab bakkie and it was alleged his kidnappers aimed to use his body for *muti*.⁷⁵⁴

This clearly indicates the challenges faced by prosecutors with regard to abduction of PLWA in South Africa. Unless the victims are found, whether dead or alive, there is not much that the prosecutors can do to prove these cases of abduction.

⁷⁴⁸ C Baker "The myths surrounding people with albinism in South Africa and Zimbabwe" (2010) 22(1) *Journal of African Cultural Studies* 172, 173.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ 'Police find two bodies believed to be linked to albino abduction case' available at <https://www.iol.co.za/news/south-africa/mpumalanga/police-find-two-bodies-believed-to-be-linked-to-albino-abduction-case-13412236> accessed on 30 December 2018.

⁷⁵² X Dlamini 'Hunted albinos flee school' available at <https://www.pressreader.com/south-africa/sowetan/20160928/281492160803718> , accessed on 1 June 2019.

⁷⁵³ *Ibid.*

⁷⁵⁴ C Harry 'Human trafficking alarm in ongoing boy search' available <https://zululandobserver.co.za/148478/human-trafficking-alarm-ongoing-boy-search/> , accessed on 15 September 2019.

4.5.7 KIDNAPPING

This crime is defined as, “unlawfully and intentionally depriving a person of liberty of movement and / or his custodians of control.”⁷⁵⁵

Under the common law crime of kidnapping, the center of interest is the infringement of human rights such as freedom of movement.⁷⁵⁶ The position is slightly different when it comes to the Trafficking Act.⁷⁵⁷ The Act extends the focus on trafficking to include the right to life, the right to human dignity, and the security of persons.⁷⁵⁸

Before the promulgation of the South African Trafficking Act, the country relied on common law to charge perpetrators with the crime of kidnapping.⁷⁵⁹ This is no longer the case; the Trafficking Act has made it a crime to kidnap a person, in terms of section 4 of the Act. Prosecutors will no longer rely on common law to prosecute the perpetrators of trafficking in PLWA.⁷⁶⁰ Since the Act is still new, with no precedents to follow, prosecutors might encounter challenges. The Act does not have an explanation of the charge of kidnapping, therefore prosecutors will still rely on the common law definition to prosecute cases of trafficking in PLWA.

4.5.8 THE ABUSE OF POWER

Generally, abuse of power refers to the process where someone in authority misuses his powers in an abusive way;⁷⁶¹ for example, taking advantage of vulnerable people for his personal gain. There is no precise definition of abuse of power. This is not only a challenge for the South African Trafficking Act; the drafters of the Palermo Protocol acknowledged that the Act has loophole.⁷⁶² The drafters of this protocol argued that the meaning of this term “should be understood to include the power that the male

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ Section 4 of the Prevention and Combatting of Trafficking in Persons Act.

⁷⁶¹ ‘Abuse of 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, accessed on 13 September 2019.

⁷⁶² *Ibid.*

family members might have over female members in some legal systems and the power that parents might have over their children.”⁷⁶³ There can be no doubt that this argument is veracious. PLWA suffer from this abuse both in their families and their communities at large.

A typical example is found in cases where parents sell their own children to traffickers or witchdoctors. In such cases parents are abusing their powers as guardians. Children, regardless of their conditions, are entitled to their own rights, and should not be subject to any abuse from their parents. The court in *S v M* concurred:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them . . . Individually and collectively, all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.⁷⁶⁴

Based on this case, it is clear that children should not be subjected to any abuse of power by their parents in South Africa. The Case Law Compendium in Trafficking in Human Beings⁷⁶⁵ provides ways in which the abuses of power in trafficking of human beings may take place. It states that:

Abuse of power, influence or position of vulnerability, as a means of perpetration of this criminal offense, may take different forms, including the abuse of a subordinate position of the victim, the abuse of the victim’s difficult material or

⁷⁶³ *Ibid.*

⁷⁶⁴ *YG v State* 2018 (1) SACR 64 (GJ) <http://saflii.org/za/cases/ZAGPJHC/2017/290.pdf> .

⁷⁶⁵ ‘A case law compendium in trafficking in human beings’ available at <https://www.osce.org/mission-to-bosnia-and-herzegovina/218656?download=true> , accessed on 29 September 2019.

family situation, or abuse of the victim's poor health. These actions aim at abusing "vulnerability" of the victims and their feeling of helplessness that result from objective circumstances, or include acts which take advantage of any situation in which a specific person has no other real or acceptable alternative other than giving in to or being taken advantage of.⁷⁶⁶

Since the South African Trafficking Act and the Palermo Protocol do not define the abuse of power, judges and prosecutors may use these guidelines in interpreting this offense with regard to trafficking in PLWA.⁷⁶⁷ With regard to the offense in terms of section 4(1)(i), none of the PLWA consent to this brutal crime.⁷⁶⁸ Perpetrators use force and other measures to lure them. In Section 4(1)(j) it is clear that in cases where a parent or family member sells a PLWA to a witchdoctor or trafficker, they will both be guilty of the offence of trafficking in persons.⁷⁶⁹ Both these provisions will help to identify whether there was any form of payment involved in the trafficking of PLWA. The onus will be on the prosecution to prove it.

Trafficking in PLWA is also a cross-border crime.⁷⁷⁰ The body parts of PLWA are reportedly transported to other countries and vice versa. It is unclear however whether or not the individuals who transport the body parts would be liable in terms of section 9 of the Trafficking Act.⁷⁷¹ This section states that:

9. (1) A carrier who transports a person within or across the borders of the Republic, and who knows that the person is a victim of trafficking or ought reasonably to have known that the person is a victim of trafficking is guilty of offense.

(2) A carrier who, on reasonable grounds, suspects that any of its passengers is the victim of trafficking must immediately report that suspicion to a police official for investigation.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Section 4 of the Prevention and Combating of Trafficking in Persons Act.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ MP Mostert and MM Weich 'Albinism in Africa: A proposed conceptual framework to understand and effectively address a continental crisis' available at <http://www.saflii.org/za/journals/ADRY/2017/7.html> accessed on 3 June 2019.

⁷⁷¹ Section 9 of the Prevention and Combating of Trafficking Act.

(3) A carrier who fails to comply with the provisions of subsection (2) is guilty of an offense.

(4) A carrier is liable to pay the expenses incurred or reasonably expected to be incurred in connection with care, accommodation, transportation, repatriation or return of the victim to his or her country of origin or country or place from where he was trafficked, if the court finds, on the balance of probabilities, that the carrier has knowingly transported a victim of trafficking or ought reasonably to have known or suspected that it was transporting a victim of trafficking.⁷⁷²

It can be argued that this section criminalizes transportation of persons, rather than their body parts. It does not illegalize the instances where perpetrators transport the body parts of PLWA to various countries. This will place a challenge on prosecutors in determining whether the individuals who transport body parts of PLWA will be liable under this Act or not.

Apart from the gap in section 9 with regard to criminalizing the transportation of the body parts of PLWA, the Trafficking Act is very clear on prosecuting individuals involved in trafficking in persons, in terms of section 10.⁷⁷³ According to this section:

10. (1) Any person who-

- (a) Attempts to commit or performs any act aimed at participating in the commission of;
 - (b) Incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or
 - (c) Conspires with any person to commit the offense under this chapter;
- is guilty of an offense.

(2) A person who is found guilty of an offense referred to in subsection (1) is liable, on conviction, to the penalties for the offense in question, as provided for in section 13.⁷⁷⁴

⁷⁷² *Ibid.*

⁷⁷³ Section 10 of the Prevention and Combatting of Trafficking Act.

⁷⁷⁴ *Ibid.*

Furthermore, section 11⁷⁷⁵ provides protection to the victims with regards to consent. In section 11(1)⁷⁷⁶ of the Act, it is provided that perpetrators of this crime cannot raise a defense that children consented to any of the offenses in terms of section 4(1)⁷⁷⁷ of the Act. This section is correct; children generally are incapable of differentiating between wrong and right. They always require guardianship either from their parents or their legal guardians. Perpetrators usually take advantage because of their vulnerability. Although section 11(1)(a) is only protecting children, section 11(1) (b) provides a shield for adults with regard to consent. This section also denies perpetrators the opportunity to argue that adults consented to the offences prescribed in section 4.

Many offences are undoubtedly committed during trafficking in PLWA,⁷⁷⁸ and the Trafficking Act seems to acknowledge and criminalize all these offences. Apart from the Trafficking Act, there are numerous common law crimes and statutory offenses that illegalize trafficking in persons in South Africa.⁷⁷⁹ Cases that took place prior to the promulgation of the Trafficking Act can also be prosecuted under these common law crime and statutory offenses. Although under common law there is no specific provision that addresses trafficking in persons, there are still provisions that can be used to prosecute perpetrators of this crime.⁷⁸⁰

4.5.9 MURDER

CR Synman defines murder as, “the unlawful and intentional killing causing death of another person.”⁷⁸¹

Although reports indicate that the body parts of PLWA are removed while they are alive, if they do not get any assistance they will eventually die. In cases where the

⁷⁷⁵ Section 11 of the Prevention and Combatting of Trafficking in Persons Act.

⁷⁷⁶ Section 11(1) of the Prevention and Combatting of Trafficking in Persons Act.

⁷⁷⁷ Section 4(1) of the Prevention and Combatting of Trafficking in Persons Act.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Ibid.*

⁷⁸¹ *Ibid.*

victims of these crimes are murdered, perpetrators will be charged with murder.⁷⁸² In such killings and trafficking, there are usually three participants in the crime, namely, the witchdoctor, client and the murderer.⁷⁸³ In most cases, the witchdoctor and clients do not kill the victims during the trafficking process. They usually hire a trafficker or murderer who will kill the victim. However, they might all be present at the scene, or the murderer might hire others to help him in committing the crime. In that case those present during the killing may all be charged with murder, regardless of who actually killed the victims. When two or more people agree to commit a certain crime, they will each be responsible for the crime, under the doctrine of common purpose. The case of *S v Mgedeze*⁷⁸⁴ sets out the essential requirements for this doctrine to arise. These requirements are:

- (1) The accused must have been present at the scene where the violence was committed.
- (2) He or she must have been aware of the crime committed.
- (3) He or she must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of others.

The doctrine of common purpose states that, “Where two or more people associate together in order to commit a crime, each of them will be liable for the conduct of the other that falls within the scope of their common purpose.”⁷⁸⁵

In raising this doctrine, prosecutors must prove beyond reasonable doubt that the perpetrators took some measures to indicate their intention of associating themselves with the crime. The case of *S v Williams*⁷⁸⁶ clarified this point. In this case, the court held that in order to raise this doctrine, there must be a causal link between the act of the accused and the death of the victims.⁷⁸⁷ In some cases of trafficking in PLWA in South Africa, the co-perpetrators travel with the perpetrators in commission of this

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*

⁷⁸⁴ *S v Mgedezi and Others* 1989 (1) SA 687 (A).

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *S v Williams and Another* 1980 (1) SA 60 (A).

⁷⁸⁷ MC Mare ‘The doctrine of common purpose in South African Law’ available at file:///C:/Users/218086172/Downloads/Joubert_JJ_0869819380_Section4.pdf, accessed on the 12 September 2019.

crime. They foresee that the victims might die in the commission of the crime. It can be argued that they all share the common purpose to kill the victims.

Another case which supports the doctrine of common purpose is the case of *S v Mgedezi*.⁷⁸⁸ The court in this case held that both the accused and the participants must share a common purpose, and that it is not enough that two or more participants share the same purpose.⁷⁸⁹ the “accused must have had the intention to collaborate with other people in executing the plan.”⁷⁹⁰ The *Mgedezi* case says that in determining whether the accused and co-accused shared a common purpose in trafficking and killing of PLWA, the following requirements must be met:

1. The participant must have been aware that the crime was or was about to be committed.
2. He must have intended to form a common purpose with those who were actually committing it.
3. He must have manifested this intention by performing some act of association with the conduct of others.
4. He must have had necessary *mens rea* in respect of the particular crime, whether *dolus directus*, *dolus eventualis* or *culpa*.

4.5.10 ATTEMPTED MURDER

In cases where a perpetrator attempts to kill a PLWA but fails (for example the victim escapes or the victim survives after his or her body parts were removed) he may be charged with attempted murder. In some societies, there are myths that having sexual intercourse with a PLWA cures HIV.⁷⁹¹ As a result of these myths PLWA are raped by perpetrators who are living with HIV/AIDS,⁷⁹² and perpetrators may be charged accordingly, where the victims died because of the disease.⁷⁹³ The onus will be on the prosecution to prove whether the perpetrator infected the victim with HIV/AIDS. This will be a challenge to the prosecution. The process will require blood tests and DNA.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.*

⁷⁹² *Ibid.*

⁷⁹³ *Ibid.*

South African Police stations do not have forensic departments or laboratories. Blood test and DNA samples will be sent to laboratories that are usually far from police stations, and the delays may deny successful prosecution of these cases.

4.5.11 COMMON ASSAULT

Traffickers may be charged with common assault. Common assault is defined as “the unlawful and intentional application of force to the complainant or inspiring a belief of imminent use of force against the complainant.”⁷⁹⁴

There are three requirements that should be met for a charge of common assault to be successful against the perpetrators of trafficking in PLWA. These requirements are:

- Unlawfulness
- intent and
- Applying force or inspiring the apprehension of force.

Besides luring the victims, a number of traffickers use force to extract them. Due to their vulnerability, women and children living with albinism are more likely to be the victims of this crime.⁷⁹⁵ Perpetrators may slap, punch or kick the victims in order to subdue them.⁷⁹⁶ In such cases, perpetrators may be charged with common assault. This crime is not only limited to unlawful and intentional application of force; it can also be committed through threats, words, gestures and acts that may cause panic and create an impression in the mind of the victim that he will be attacked.⁷⁹⁷ There are many offensive words that are used to label PLWA. These words (such as *inkawu*, and *isishawa*) cause panic, and create an impression upon the victims that they might be attacked. In such cases, perpetrators may be charged with common assault.⁷⁹⁸ It is important to note that words alone cannot amount to assault; perpetrators must have

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Ibid.*

⁷⁹⁶ *Ibid.*

⁷⁹⁷ *Ibid.*

⁷⁹⁸ *Ibid.*

applied a certain force to the victims.⁷⁹⁹ This was held in the case of *Stephens v Myers*.⁸⁰⁰

4.5.12 ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

In order to charge perpetrators with this crime, prosecutors are required to prove that the perpetrators assaulted the victim and had intention to perpetrate this crime.⁸⁰¹ The essential elements are:

- Assault
- Intent
- Grievous bodily harm.

There is no precise definition of what amounts to “grievous bodily harm”. In terms of section 150 of the Transkeian Penal Code, the injuries that amount to grievous harm include:

emasculation, permanent loss of sight or hearing, privation of any member or joint, loss of the use of a limb or organ, disfiguration of the head or face, fracture or dislocation of a bone, and any hurt that endangers life or causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits.⁸⁰²

When looking at this explanation there can be no doubt that the attacks, trafficking and killings by PLWA perpetrators justify prosecution for this offence. As discussed above, during trafficking in PLWA the victims sustain a number of injuries, particularly the removal of their body parts.⁸⁰³ For those who survive, it becomes extremely hard to pursue their daily activities. The South African courts have extended the meaning of this offence. In *R v Edwards*,⁸⁰⁴ the court considered that this crime should be a serious threat to someone’s health.⁸⁰⁵ The court in *S v Mbelu*⁸⁰⁶ concurred:

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Stephens v Myers* (1830) 4 C & P 349.

⁸⁰¹ *Ibid.*

⁸⁰² *Ibid.*

⁸⁰³ *Ibid.*

⁸⁰⁴ *R v Edwards* 1957 R & N 107 at 109-110.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *S v Mbelu* 1966 (1) PHH176(N).

However one expresses it, it is at least clear that there must be an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which would ordinarily follow upon assault. There must be an intention to injure and to injure in a serious respect.⁸⁰⁷

In proving whether the perpetrator had intention to cause grievous bodily harm, the court in *S v Phakoe* relied on the judgment of the unreported case of *S v Mamohlala Mafokeng*.⁸⁰⁸ In this case the court listed factors that should be used in determining the intention to cause grievous bodily harm, namely:

- (a) The nature of the weapon used and in what manner it was used;
- (b) The degree of force used and how such force was used;
- (c) The part of the body aimed at; and
- (d) The nature of injury, if any which was sustained.

Trafficking and murder of PLWA occur in the most brutal and inhuman form. According to Mswela, perpetrators use weapons such as knives and machetes to remove the body parts of their victims.⁸⁰⁹ As a result of this, the victims sustain serious injuries which leads to their death.⁸¹⁰ This clearly indicates that perpetrators of this crime may be charged with this offense.

In cases where PLWA escape from a perpetrator, the defence may not argue that the accused cannot be charged with assault with intent to do grievous bodily harm.⁸¹¹ It is not a prerequisite that the perpetrator literally causes grievous body harm to the victim.⁸¹² The fact that he had intention to cause such harm is sufficient for the prosecution to charge him with this crime. The prosecution will be required to prove that the victim was subjected to serious threats that indicate the perpetrator's intention to commit this crime.⁸¹³

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *S v Mafokeng* 2013 (1) SACR 143 (FB).

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

4.5.13 *CRIMEN INIURIA*

A variety of personal rights are protected in the Bill of Rights of in the South African Constitution.⁸¹⁴ They play a pivotal role in ensuring that every South African citizen is treated with respect and dignity. Among these are the right to human dignity and the right to life. Justice O' Regan, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁸¹⁵ defined these rights as follows:

Recognizing a right to life is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the bill of rights⁸¹⁶

However, it can be argued that vulnerable groups such as PLWA do not enjoy a number of the personal rights protected by the Constitution. They are regularly trafficked, abused and killed for their body parts.⁸¹⁷ As result, their *dignitas* is seriously impaired by the perpetrators of this brutal crime. For such acts, perpetrators may be charged with *crimen iniuria*.

Crimen iniuria is defined as, "unlawfully, intentionally and serious impairing the *dignitas* of another."⁸¹⁸ It is important to note that *dignitas* does not only mean human dignity or right to life, but also covers all personal rights such as the right to freedom and security of a person, and so forth. The main purpose of *crimen iniuria* is to defend all personal rights from being violated.

South African courts have identified numerous ways in which a person's *dignitas* may be impaired.⁸¹⁹ The list compromises of "public or private indecent exposure, peeping

⁸¹⁴ *Ibid.*

⁸¹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* (1998) (6) BCLR 726.

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ *Ibid.*

toms, making sexual overtures or suggestions, inviting sexual impropriety, indecent assault, vulgar abuse, insults and humiliation, inducing engagement or intercourse by fraud, and invasion of privacy.”⁸²⁰

Based on this list, it is clear that traffickers seriously impair the dignity of PLWA in various ways. There are various offensive words used in many societies to label PLWA.⁸²¹ Terms such as *inkawu*, “white kaffir” or *isishawa* are offensive words that qualify as vulgar language.⁸²² Although this crime illegalizes vulgar language directed at PLWA, most of this vulnerable group of people do not charge perpetrators because of their fear that they will be attacked. Besides the use of vulgar words, in some societies, PLWA are victims of rape because of the myth that sleeping with them cures HIV/AIDS.⁸²³ This criminal conduct also constitutes *crimen iniuria*.

In determining whether perpetrators’ acts impair PLWA’s *dignitas*, there are two questions that must be answered by the prosecution to the court, according to the case of *De Lange v Costa*.⁸²⁴ First is the question of whether the PLWA’s self-esteem was subjectively offended or not.⁸²⁵ If the victims are minors, or mentally ill, it is unnecessary for the prosecution to prove that their *dignitas* was subjectively impaired.⁸²⁶ These people are presumed to be unable to understand their conduct and the consequences thereof.⁸²⁷ Second is the question of whether or not a normal person would regard the conduct as objectively offensive.⁸²⁸ Third, the prosecution must prove the perpetrators had actual and legal intention to commit this crime.

4.5.14 VIOLATION OF A CORPSE

The definition of trafficking in the Palermo Protocol does not include trafficking in corpses. This generally causes confusion. Perpetrators who remove the body parts of a dead person living with albinism may be charged with the common law offence of

⁸²⁰ *Ibid.*

⁸²¹ *Ibid.*

⁸²² N Blankenberg ‘That rare and random tribe: albino identity in South Africa’ (2000)14 *Critical Art* 14.

⁸²³ *Ibid.*

⁸²⁴ *De Lange v Costa* 1982(2) SA 857(A).

⁸²⁵ *Ibid.*

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.*

⁸²⁸ *Ibid.*

violating a corpse. This crime is defined as “unlawfully and intentionally violating a corpse.”⁸²⁹

Generally, the Bill of Rights entrenched in the South African Constitution is applicable to living people. However, that does not entitle traffickers to violate the corpses of PLWA. The existence of the crime of violation of a grave in a South African context was first acknowledged in the case *R v Kunene and Mazibuko* in 1918.⁸³⁰ Where the victims’ corpses are violated, traffickers may be charged with the common law crime of violating a corpse. The South African law acknowledges that legal personality ends at death, meaning the deceased person is not entitled to any rights,⁸³¹ but the common law does protect corpses from violation – it protects the victim’s body and regulates disposal thereof.⁸³² Traffickers who remove body parts from the victim’s body are liable for this crime. The court in *S v Coetzee*⁸³³ emphasized that corpses are linked to God and should be respected.⁸³⁴ Roods J stated, “n lyk feitlik as iets heilig beskou moet word. Daarmee stem ek saam. Selfs primitiewe volkere het die hoogste respek vir dooies en hulle grafte.”⁸³⁵

Prosecutors handling these cases will have a very challenging task in charging traffickers with this crime. There are reports that indicate that the body parts of the victims are removed while they are alive.⁸³⁶ Other reports indicate that the victims are killed first, before traffickers remove their body parts.⁸³⁷ This crime is only applicable when the body parts are removed from a deceased person, rather than the victim’s

⁸²⁹ South African Police Services ‘Common law offences definition’ available at <https://www.saps.gov.za/faqdetail.php?fid=9> accessed on 3 September 2019.

⁸³⁰ A Christison and S Hoctor ‘Criminalization of the violation of a grave and the violation of a dead body’ (2007) *Obiter* 33.

⁸³¹ L Mullinder *A Comparative Study of the Criminalization of the Violation of a Corpse in Context of Traditional Medicine in Subequatorial Africa, Including Consideration of Customary Law* (unpublished LLM thesis, University of Pretoria, 2010) 13.

⁸³² D McQuoid-Mason ‘Terminating the pregnancy of a brain-dead mother: does a fetus have a right to life? The law in South Africa’ (2014) 7 (2) *South African Journal of Bioethics & Law*, available at <http://www.sajbl.org.za/index.php/sajbl/rt/printerFriendly/317/367> accessed on 6 June 2019.

⁸³³ 1993 2 SACR 191 (T).

⁸³⁴ *Ibid.*

⁸³⁵ *Ibid.*

⁸³⁶ N Grandchamps ‘Justice: the use of food, education, and the law to combat human trafficking in Sub-Saharan Africa’ available at <https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=2570&context=honorstheses1990-2015> accessed on 1 September 2019.

⁸³⁷ *Ibid.*

grave.⁸³⁸ The violation of the victim's grave is a separate crime. It will be really difficult for the prosecution to identify whether the body parts were removed from a corpse or a living person. In cases where the body parts are removed from a living person, it might also happen that before those body parts were removed, the victim was already dead. This creates confusion for the prosecution from a charge perspective. If the body parts were removed from a deceased person, traffickers will be charged with this crime. However, if the body parts were removed from a living person, this charge cannot be applied.

4.5.15 VIOLATION OF A GRAVE

Again, perpetrators who violate the graves of dead PLWA are not liable under the Trafficking Act. However, they may be charged with the common law offence of the violation of a grave. Under common law, this crime is defined as "unlawfully and intentionally disturbing the grave of a human being."⁸³⁹

The removal of the body parts of PLWA in their graves also occurs in South Africa.⁸⁴⁰ Traffickers frequently violate their graves to remove body parts, which clearly constitutes this crime. In terms of section 15 of the South African Constitution, ⁸⁴¹ everyone is entitled to the right of freedom of religion and practice.⁸⁴² Legal scholars have argued that the constitutional protection of religious practices expands to the entombment tradition.⁸⁴³ Although the deceased will not benefit from this right, the violation of the victims' graves indirectly violates their families' right to freedom of religion.

Apart from common law offenses, there are various statutory offences that can be used to prosecute perpetrators involved in trafficking in PLWA. These offences will be discussed below.

⁸³⁸ *Ibid.*

⁸³⁹ *Ibid.*

⁸⁴⁰ K Masweneng 'Horror as albino corpse's body parts stolen' available at <https://www.timeslive.co.za/news/south-africa/2018-03-15-horror-as-albino-corpses-body-parts-stolen/> accessed on 2 September 2019.

⁸⁴¹ Section 15 of the South African Constitution.

⁸⁴² *Ibid.*

⁸⁴³ *Ibid.*

4.6 THE RIOTOUS ASSEMBLIES ACT 17 OF 1957

The constitutionality of this statute was recently challenged in the case of *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and another*.⁸⁴⁴ The Economic Freedom Fighters argued before the South Gauteng High Court that the statute should be declared unconstitutional. However, the court upheld the constitutionality of this statute.⁸⁴⁵ In light of the judgment, there can be no doubt that this statute can be used to prosecute those involved in trafficking of PLWA in South Africa.

In view of the numbers of perpetrators of trafficking in PLWA, this statute may be used to prosecute them. The Act prohibits gatherings of two or more persons who threaten or are likely to cause danger to society.⁸⁴⁶ When traffickers converge to commit this crime, they could be charged under the Riotous Assemblies Act.⁸⁴⁷ Trafficking in PLWA clearly endangers public safety. However, this statute does not provide protection in respect of offenses committed outside the country,⁸⁴⁸ which will pose a problem for prosecutors involved in cases where the offence was committed outside the country.

4.7 THE INTIMIDATION ACT 72 OF 1982

Trafficking in PLWA is very brutal. Weapons such as knives and machetes are used by traffickers to intimidate PLWA.⁸⁴⁹ As in all trafficking cases, the victims' families too may be threatened.⁸⁵⁰ The Intimidation Act⁸⁵¹ provides a shield for any persons who have been intimidated. Traffickers who threaten PLWA may be charged with several offenses in terms of the Act.

⁸⁴⁴ *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and another* (2019) 3 SA 723 (GP).

⁸⁴⁵ *Ibid.*

⁸⁴⁶ The Riotous Assemblies Act 17 of 1957.

⁸⁴⁷ R Shepherd *Meeting the Minimum Standards of the Palermo Protocol* (unpublished LLM thesis, University of Western Cape, 2018), 50.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid.*

⁸⁵⁰ *Ibid.*

⁸⁵¹ Intimidation Act 72 of 1982.

Section 1 of the Act states that:

(1) Any person who-

(a) Without lawful reason and with intent to compel or induce any person or persons of particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-

(i) Assaults, injures or causes damage to any persons; or

(ii) In any manner threatens to kill, assault, injure or cause damage to any person or persons of particular nature, class or kind; or

(b) Acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

(i) Fears for his own safety or the safety of his property or the security of his livelihood, or for safety of any other person or the safety of the property of any person or the security of the livelihood of any other person; and

(ii) . . .

Shall be guilty of an offense and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

This statute clearly criminalizes any form of intimidation that may cause danger to the victim, which includes assault and injuries. It is not necessary for the prosecution to prove that perpetrators of this crime had intention to instill fear in, and threaten PLWA.⁸⁵² They will be liable for their conduct.⁸⁵³ In cases where traffickers organize to traffic a PLWA but for some reason fail to carry it out, the traffickers will be liable in

⁸⁵² Section 1 of the Intimidation Act 72 of 1982.

⁸⁵³ *Ibid.*

terms of this Act.⁸⁵⁴ The penalty provision of this offense in relation to trafficking in persons and particularly PLWA, is not reasonable or justifiable. In order to prevent and combat this crime, the courts should be empowered to impose harsher sentences, which will make it clear that the law will protect vulnerable groups against all forms of intimidation.

PLWA are a vulnerable minority group of people. This group of people is targeted due to their skin condition.⁸⁵⁵ Section 1A of this statute prohibits any form of intimidation directed at specific groups in South Africa, such as PLWA. In terms of this section:

(1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-

(a) Commits an act of violence or threatens or attempts to do so;

(b) Performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act;

(c) Conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (a) or referred to in paragraph (b), or to aid in the commission, bringing about or performance thereof; or

(d) Incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
Shall be guilty of an offense and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(1) If in any prosecution for an offence in terms of subsection (1) it is proved that the accused has committed any act alleged in the charge, and if such act resulted or was likely to have resulted in the achievement of any objects

⁸⁵⁴ *Ibid.*

⁸⁵⁵ *Ibid.*

specified in subsection (1), it shall be presumed, unless the contrary is proved, that the accused has committed that act with intent to achieve such object.

- (2) If in any prosecution for an offence in terms of subsection (1) the act with which the accused is charged, consists thereof, and it is proved, that he unlawfully had in his possession any automatic or semi-automatic rifle, machine gun, sub-machine gun, machine pistol, rocket launcher, recoilless gun or mortar, or any ammunition for or component part of such weaponry, or any grenade, mine, bomb or explosive, it shall be presumed, unless contrary is proved, that the accused had the said weaponry, ammunition, component therewith or in connection therewith in the Republic, in order to achieve any objects specified in subsection (1), any of the acts contemplated in paragraphs (a) to (d) inclusive.
- (3) For the purposes of this section 'violence' includes the inflicting of body harm upon or killing of, or the endangering safety of, any person, or the damaging, destruction or endangering of property.

As discussed earlier, PLWA are subject to various forms of assault during the trafficking process.⁸⁵⁶ Perpetrators use knives, guns and other weapons to threaten this vulnerable group of people.⁸⁵⁷ The use of these weapons instills fear in them and compels them to do things against their will.⁸⁵⁸ This section clearly prohibits any form of intimidation of this group. Section 1A(1) of this statute prohibits any unlawful conduct (e.g. the use of knives) that instills fear in a certain group of individuals such as PLWA.⁸⁵⁹ Perpetrators may be sentenced a maximum sentence of 25 years, or an appropriate fine.

Furthermore, there is clarification on what amounts to "violence" in section 1A (4) of the Act.⁸⁶⁰ Violence against PLWA occurs in various ways.⁸⁶¹ This clarification makes it easy for prosecutors handling trafficking these cases. The limited scope of this statute is of concern - it only criminalizes cases in South Africa. It would be difficult for

⁸⁵⁶ *Ibid.*

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Ibid.*

⁸⁵⁹ Section 1 of the Intimidation Act 72 Of 1982.

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.*

the prosecution to charge perpetrators of this crime who commit the offence outside the Republic.

4.8 THE PREVENTION AND COMBATTING OF CORRUPT ACTIVITIES ACT 12 OF 2004

Corruption is one of the major problems facing South Africa.⁸⁶² Generally, the public puts their trust in police officials for their safety. However, some members of the South African Police Services are party to the crime and receive bribes from traffickers.⁸⁶³ This is prohibited under the Prevention and Combatting of Corruption Act. Although there are no cases of trafficking in PLWA involving police officials yet, such cases might exist in South Africa. Some cases of missing PLWA are unreported.⁸⁶⁴ Police officials are reportedly reluctant to deal with *muti*-related cases.⁸⁶⁵ This might indicate that traffickers pay bribes to silence public officials. Corruption does not involve police officials only; traffickers might also pay bribes to the victims' parents, family, or any member of the community, to enable the perpetrators to commit the crime.

This statute makes it illegal for any person or public officer to participate in this crime.⁸⁶⁶ It criminalizes these offenses in two different forms, namely, where the offence is committed by general members of the public, as opposed to when it is committed by public officers, such as members of the South African Police Service.⁸⁶⁷ This makes it easy for the prosecution to deal with these cases. Section 3 of the Prevention and Combatting of Corruption Act⁸⁶⁸ criminalizes these offenses committed by general members of the public.⁸⁶⁹ In terms of this section 3:

3. any person who, directly or indirectly-

⁸⁶² *Ibid.*

⁸⁶³ R Moodley 'Corrupt flying squad police officers arrested' available at <https://www.sanews.gov.za/south-africa/corrupt-flying-squad-police-officers-arrested> , accessed on 4 May 2019.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Ibid.*

⁸⁶⁶ The Prevention and Combatting of Corruption Activities Act.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Section 3 of the Prevention and Combatting of Corruption Activities Act.

⁸⁶⁹ *Ibid.*

(a) Accepts or agrees or offers to accept any gratification from any other person, whether for benefit of himself or herself or for the benefit of another person; or

(b) Gives or agrees or offers to give any other person any gratification, whether for the benefit of that other person, or for the benefit of another person,

In order to act, personally or by influencing another person so to act, in a manner-

- (i) That amounts to the
 - (aa) illegal, dishonest, unauthorized, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any power, duties or the functions, arising out of a constitutional, statutory, contractual or any other legal obligation;
- (ii) That amounts to-
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or set of rules,
- (iii) Designed to achieve an unjust duty or set of rules,
- (iv) That amounts to any other unauthorized or improper inducement to do or not do anything,

Is guilty of the offence of corruption.

In terms of this section, it is clear that where parents receive any form of gratification from traffickers to sell PLWA, they will be liable under this Act.⁸⁷⁰ Traffickers will also be held liable for offering any form of gratification to the families of the victims.⁸⁷¹

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Ibid.*

Section 4 of the Act criminalizes corruption committed by public officers.⁸⁷² This section is almost similar to section 3, except that it criminalizes offences committed by public officers.⁸⁷³ Unlike most of the legislation applicable to the offences committed in the Republic, section 5 of this statute criminalizes corruption committed at the borders, or by foreign individuals in South Africa.⁸⁷⁴ For example, where a trafficker pays a bribe to a border official and imports body parts of a PLWA, he will be liable in terms of the statute, together with the official.

Furthermore, those who work as agents in the trafficking of PLWA will be held liable in terms of the Act.⁸⁷⁵ The Act also provides guidelines to the prosecution with respect to perpetrators' defense in court.⁸⁷⁶ In terms of section 25 of the Act,⁸⁷⁷ where a perpetrator is charged with offenses under the Act, it is not a defence for the perpetrator to affirm that he or she:

- (a) Did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered;
- (b) Accepted or agreed or offered to accept, or gave or agreed or offered to give the gratification without intending to perform or not to perform the act in relation to which the gratification was given, accepted or offered; or
- (c) Failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.

Perpetrators may raise various excuses for commission, such as unemployment and poverty. This section makes it no defense to rely on those grounds to commit this crime.⁸⁷⁸ Even in cases where the victim escapes, or perpetrators fail to commit this crime, the fact that there was some form of gratification between the parties, will render perpetrators liable for corruption,⁸⁷⁹ and they may be sentenced to a fine, or imprisonment up to a life sentence.

⁸⁷² Section 4 of the Prevention and Combatting of Corruption Activities Act.

⁸⁷³ *Ibid.*

⁸⁷⁴ *Ibid.*

⁸⁷⁵ Section 5 of the Prevention and Combatting of Corruption Activities Act.

⁸⁷⁶ *Ibid.*

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Ibid.*

⁸⁷⁹ *Ibid.*

4.9 THE PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998

There is no precise definition for organized crime.⁸⁸⁰ Neither the United Nations nor The Prevention of Organized Crime Act define this crime. The UN and the Prevention of Organized Crime Act only define the criminal group, rather than defining the crime. This will put a burden on prosecutors dealing with this crime. It will be difficult for them to identify whether or not the trafficking in PLWA is an organized crime or not. However, academic scholars have defined this crime in two aspects; on the crime aspect, and in terms of the group involved in this crime. On the criminal aspect, organized crime in the Prevention of Organized Crime Act is defined as “any wrongdoing committed by any institution or a set of more than three individuals who shares the same goal in committing any criminal group crime.”⁸⁸¹

As discussed earlier, there are three parties involved in trafficking in PLWA: the witchdoctor, client, and the murderer. This indicates that this crime can be regarded as an organized crime, and that the perpetrators can accordingly be punished under various provisions of this statute. Section 5 of the Act makes it a crime for persons to assist other persons in any commission of unlawful activities. This section states that:

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

- (a) The retention or the control by or on behalf of the said other persons of the proceeds of unlawful activities is facilitated; or
- (b) The said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

Shall be guilty of an offence.

⁸⁸⁰ SG Lebeya *Defining Organized Crime: A Comparative Analysis* (unpublished LLD thesis, University of South Africa, 2012), 46.

⁸⁸¹ *Ibid.*

There can be no doubt that this section can be applied to trafficking of PLWA, particularly where individuals are hired either by witchdoctors or clients to commit this crime. Trafficking in PLWA is clearly an unlawful activity, and murderers are paid huge sums of money to kill people in this vulnerable group. Section 9 of the Act specifically criminalizes unlawful activities committed by a criminal group. This section states that:

- (1) Any person who actively participates in or is a member of a criminal gang and who-
 - (a) Willfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with a criminal gang;
 - (b) Threatens to commit, bring about or perform in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence,

Shall be guilty of an offense.

- (2) Any person who-
 - (a) Performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;
 - (b) Incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity; or
 - (c) Intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang,

Shall be guilty of an offense.

Although some scholars might argue that traffickers are not an organized criminal gang, the fact is they are. The United Nations Convention against Transnational Organized Crime⁸⁸² requires that an organized criminal group exists for a period of

⁸⁸² United Nations Convention Against Transactional Organised Crime.

time. Where traffickers have for a period of time continually trafficked and killed PLWA, they may be classified as an organized group and be punished under this section.⁸⁸³ The onus is on the prosecution to determine how long the group has existed. Section 11 of the Prevention of Organized Crime Act ⁸⁸⁴ provides guidelines to the court in identifying whether a person is a member of a criminal gang or not. According to this section the court may take the following into account where a person:

- (a) Admits to criminal gang membership;
- (b) Is identified as a member of a criminal gang by parent or guardian;
- (c) Resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of the criminal gang;
- (d) Has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with the usual criminal activities;
- (e) Is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

This section clearly does not focus on cases of trafficking in persons. This creates a difficult challenge for the prosecution. These guidelines are inconsistent with the United Nations Convention against Organized Crime.⁸⁸⁵ While these guidelines may be used in other types of organized crime, they are not helpful in respect of trafficking in persons cases. Traffickers and their syndicates usually hide themselves. They do not show any sign that there are involved in this crime. The courts and prosecutors should not pay attention to these factors in considering whether or not traffickers were members of a criminal gang. The addition of this section is not required by international law.

⁸⁸³ Article 2 of the United Nations Convention Against Transactional Organised Crime.

⁸⁸⁴ Section 11 of the United Nations Convention Against Transactional Organised Crime.

⁸⁸⁵ *Ibid.*

4.10 IMMIGRATION ACT 13 OF 2002

It is unclear whether PLWA are trafficked into South Africa or out of the country alive or not. There has not been any research on that aspect. Nonetheless, where traffickers transport the victims in from outside the country, they will be held liable for contravening the Act.⁸⁸⁶ In terms of section 9 of the Act, no individual may enter the country without a valid passport.⁸⁸⁷ Where traffickers bribe public officials to commit this crime at the borders, section 49 of the Act will be applicable.⁸⁸⁸ However, the Act is silent on the question of cross-border trafficking in body parts. This is a bigger challenge since the reports indicate that body parts of PLWA are also transported across South African borders. Since trafficking in persons is a global concern, South Africa needs to strengthen its immigration law to prevent and combat this crime.

4.11 THE NATIONAL HEALTH ACT 61 OF 2003

The main motivation behind trafficking in PLWA is the taking of their body parts.⁸⁸⁹ In terms of the Palermo Protocol, trafficking in persons includes the removal of body parts.⁸⁹⁰ A study conducted by the International Organization for Migration on in-country trafficking in 2008 indicated that body parts such as eyes, tongues and genitals are used on the African continent for traditional practices.⁸⁹¹ This is a violation of the National Health Act. The Act only permits the use of human body parts in medical circumstances (e.g. organ transplant). Prior to the promulgation of this statute, South Africa relied on the Human Tissue Act⁸⁹² to prosecute crime relating to the unlawful removal of body parts.⁸⁹³

⁸⁸⁶ Immigration Act 13 of 2002.

⁸⁸⁷ Section 49 of the Immigration Act 13 of 2002.

⁸⁸⁸ Immigration Act 13 of 2002.

⁸⁸⁹ AD Ikuomola 'We thought we will be safe here: narratives of Tanzanian albinos in Kenya and South Africa' (2015) 9(4) *AFRREV* 38, 39.

⁸⁹⁰ Palermo Protocol.

⁸⁹¹ *Ibid.*

⁸⁹² Human Tissue Act 65 OF 1983.

⁸⁹³ 'Partial relief from the regulatory vacuum involving human tissues through enactment of chapter 8 of the National Health Act and regulations thereto' available at <http://www.samj.org.za/index.php/samj/rt/printerFriendly/5940/4415the> , accessed on the 29 September 2019.

The National Health Act controls the removal of body parts in South Africa and provides requirements for such removal.⁸⁹⁴ According to chapter 8 of the Act it is illegal to sell the body parts of another human being.⁸⁹⁵ Section 55⁸⁹⁶ clearly stipulates that:

A person may not remove tissue, blood, a blood product or gametes from the body of another living person for the purpose referred to in section 56 unless it is done-

- (a) With the written consent of the person from whom the tissue, blood, blood product or gametes are removed granted in the prescribe manner; and
- (b) In accordance with the prescribed conditions.⁸⁹⁷

Section 56⁸⁹⁸ as referred to in section 35⁸⁹⁹ stipulates that:

- (1) A person may use tissue or gametes removed or blood or blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed.

Undoubtedly, perpetrators involved in trafficking of PLWA may be charged under this Act. This section clearly criminalizes the use of human body parts for ritual purposes and stipulates that the removal of organs can be done only for medical purposes. This act, however, does not provide protection to the victim's corpse, and often the body parts of PLWA are removed from the victims' corpses. The Act only criminalizes unlawful donation of human bodies and tissue of deceased persons.

4.12 THE CHILDREN'S ACT 38 OF 2005

Trafficking in children in Africa is a major problem. Although women and children are more vulnerable to this crime than men, the study by UNICEF indicates that twice as

⁸⁹⁴ *Ibid.*

⁸⁹⁵ National Health Act 61 OF 2003.

⁸⁹⁶ Section 50 of the National Health Act.

⁸⁹⁷ *Ibid.*

⁸⁹⁸ Section 56 of the National Health Act.

⁸⁹⁹ Section 35 of the National Health Act.

many children are trafficked as women.⁹⁰⁰ In all the reported cases of trafficking, children are most vulnerable to this crime.⁹⁰¹ It is unclear how many CLWA are victims of this crime, since some cases are not reported to police officials.⁹⁰² In South Africa, apart from the Constitution, there is a specific statute that protects children, called the Children's Act.

During the trafficking of CLWA, various human rights are violated; the Children's Act protects those rights. There are many provisions in the Children's Act that prohibit violence against children living with albinism.⁹⁰³ Chapter 17 of the Act criminalizes child abduction.⁹⁰⁴ Abduction of CLWA is one of the common law crimes that are committed by traffickers due to beliefs that having sexual intercourse with the victims cures HIV/AIDS.⁹⁰⁵

The Children's Act has a specific provision that prohibits trafficking in CLWA. Chapter 18 of the Act prohibits trafficking in children. In terms of section 284 under this chapter, "no person, natural or juristic, or a partnership may traffic a child or allow a child to be trafficked." It may be argued that this act only prohibits trafficking in children for sexual exploitation, and not, for example, trafficking for body parts. This is because section 284(2) of the Act states that:

- (1) It is no defense to a charge of contravening subsection (1) that-
 - (a) A child who is the victim of trafficking or a person having control of the child has consented to-
 - (i) The intended exploitation; or
 - (ii) The adoption of the child facilitated or secured through illegal means; or

⁹⁰⁰ SS Krestons 'Trafficking in children in South Africa: an analysis of pending legislation' (2007) 8 *Child Abuse Research in South Africa* 36, 37.

⁹⁰¹ *Ibid.*

⁹⁰² *Ibid.*

⁹⁰³ EM Chilemba 'Legislative mechanisms for combatting violence against children with disabilities in selected African jurisdictions: a critical appraisal' (2016) *SAFLII* 89.

⁹⁰⁴ *Ibid.*

⁹⁰⁵ *Ibid.*

- (b) The intended exploitation or adoption of a child referred to in paragraph (a) did not occur.

Based on this section, it is clear that the application of this Act is limited to trafficking in children for exploitation, rather than covering all forms of trafficking in persons, including trafficking for the purposes of organ removal. In cases relating to trafficking of CLWA, it is unclear whether prosecutors can charge traffickers with offenses under this Act, since the Act is not broad enough to cover trafficking in children for organ removal.

Furthermore, although this chapter criminalizes trafficking in children, it fails to provide guidelines or preventative measures to combat trafficking in children. There are no provisions in the Act that provide guidelines on how the State, society and NGOs together should combat this crime. The Act does not give guidelines for training the people who handle trafficking in children cases. In cases where parents, guardians, or any individual who has parental responsibilities and rights in respect of a child, are involved in the trafficking of a child, the Act entitles the court to terminate those rights. The Act requires the court to give the victims temporary accommodation until the trial is finalized.

4.13 PREVENTION AND COMBATTING OF HATE CRIMES AND HATE SPEECH BILL

There is no legislation that regulates hate crimes and hate speech in South Africa. Once the Prevention and Combating of Hate Crime and Hate Speech Bill is passed by Parliament and becomes law, it will criminalize these acts. Before discussing this bill, it is important to differentiate these crimes. In terms of section 3 of this Bill:

3. (1) A hate crime is an offence recognized under any law, the commission of which bay a person in motivated by person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the

victim or his or her family member or the victim's association with, support for, group of persons who share the said characteristics:

- (a) Age
- (b) Albinism
- (c) Birth
- (d) Colour
- (e) Culture
- (f) Disability
- (g) Ethnic or social origin
- (h) Gender identity
- (i) HIV status
- (j) Language
- (k) Nationality, migration or refugee status
- (l) Occupation or trade
- (m) Political affiliation or conviction
- (n) Race
- (o) Religion
- (p) Sex, which includes intersex; or
- (q) Sexual orientation.

In terms of section 4(1), hate speech is described as:

4.(1)(a) any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to-

- (i) Be harmful or incite harm; or
- (ii) Promote or propagate hatred,
The grounds for this crime are exactly the same as the ground of the hate crime offense.

The Bill is not yet passed, but once enacted it will become the first legislation with a provision that specifically protects PLWA. The inclusion of “albinism” in both the definitions of hate crime and of hate speech indicates South Africa’s commitment to combat trafficking in this vulnerable group of people,⁹⁰⁶ who are victims of both these crimes. Despite medical explanations of albinism, some societies in South Africa are still ignorant and believe in the myths and superstitions surrounding the condition. Even societies that accept the medical explanations in some cases still believe in these myths.⁹⁰⁷ Due to society’s prejudices, PLWA become the victims of human trafficking.

From the hate speech perspective, PLWA are labelled with various names in South Africa, depending on their location.⁹⁰⁸ Some of those words are hurtful to this vulnerable group of people, and promote hatred. When this Bill becomes law, perpetrators of this crime will be punishable under the new statute. If the victims suffer from this crime, traffickers and traditional healers may be charged with these offences. Section 6 of the Bill⁹⁰⁹ prescribes sentences for perpetrators who commit hate crimes against this vulnerable group. This section states that:

⁹⁰⁶ MT Matadi and K Naidoo ‘A comparative analysis on the impact of the Prevention and Combatting of Hate Crimes and Hate Speech Bill of 2016 on the right to human dignity, equality, and freedom in South Africa’, available at <http://mbali.unizulu.ac.za/docs/Mbali%2006-12-2018.pdf#page=251>, accessed on 15 September 2019.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*

⁹⁰⁹ Section 6 of the Prevention and Combatting of Hate Crimes and Hate Speech Bill.

6. (1) Subject to subsection (2), any person who is convicted of an offense referred to in section 3 is liable, on conviction, to any of the following forms of penalties which the court sentencing the persons considers appropriate and which is within that court's penal jurisdiction:

- (a) Imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correction supervision, as contemplated in section 276 of the Criminal Procedure Act; or
- (b) Postponement or suspension of the sentence or a caution or reprimand, as contemplated in section 297 of the Criminal Procedure Act.

(2) If a person is convicted of an offence referred to in section 3, the court that imposes the sentence must-

- (a) If section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is not applicable; and
- (b) In the case of –
 - (i) Damage to, loss of, or the destruction of, property or loss of money;
 - (ii) Physical, or other injury; or
 - (iii) Loss of income or support,

Suffered by the victim as a result of the commission of the offence, regard the fact the person has been convicted of a hate crime as an aggravating circumstances.⁹¹⁰

With respect to hate speech, if the perpetrator is a first offender, in terms of section 6(3) he/she may be liable for either “a fine or to imprisonment for a period not exceeding 3 years, or to both a fine and such imprisonment.” For perpetrators who have committed a crime more than once, the courts should impose a sentence of a

⁹¹⁰ Section 6 of the Prevention and Combatting of Hate Crimes and Hate Speech Bill.

“fine or to imprisonment for a period not exceeding 5 years or to both a fine and such imprisonment.”⁹¹¹

Furthermore, the Bill prescribes preventative measures for these offences. In terms of section 9(1) of the Act, the State, South African Human Rights Commission and the Gender Equality Commission have an obligation to raise awareness of the prohibitions contained in these criminal provisions. This section does not provide guidelines on how these three institutions should promote awareness of the prohibitions. It is also unclear whether these institutions should work together or separately in combating these crimes.

Surprisingly, the Act provides for a cabinet member to be assigned by the president to raise awareness of these criminal provisions, and it sets out guidelines in section 9(2) for this purpose. This section states that:

Without derogating from the general nature of the duty referred to in subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to-

- (a) Conduct education and information campaigns to inform the public about the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences;
- (b) Ensure that all public officials who may be involved in the investigation and prosecution of hate crime and hate speech are educated and informed of the prohibition against these offences;
- (c) Provide assistance and advice to any person who wants to lodge a complaint of a hate crime or hate speech; and
- (d) Train public officials on the prohibition, prevention and combating of hate crimes and hate speech, which training must include social context training.

⁹¹¹ *Ibid.*

This section is very clear on what an appointed cabinet member should do to combat hate crimes and hate speech, but it leaves a loophole in respect of the proposed three institutions. It may be argued that a cabinet member is a member of the State, but the Act clearly stipulates the condition “without derogating from the general nature of the duty referred to in subsection (1) ...” which means that the guidelines are assigned specifically to a particular cabinet member. Section 9(1) should have given a clear direction on how the three institutions should cooperate to combat these crimes.

4.14 CONCLUSION

Trafficking in PLWA in South Africa has not reached the levels faced by other countries, such as Tanzania, but these cases are increasing. It is important to note that some of these crimes are not reported in South Africa. This makes it difficult to estimate how many PLWA are trafficked yearly. Although there is various legislation that prohibits trafficking in persons in South Africa, no legislation specifically addresses trafficking in PLWA and protects the victims. The Prevention and Combating of Hate Crime and Hate Speech Bill, if passed, will be the only legislation that has a specific provision protecting this vulnerable group against hate crime and hate speech.

Under its obligations to the Palermo Protocol, South Africa enacted the Prevention and Combatting of Trafficking in Persons Act. The purpose of this Act is to criminalize all forms of trafficking in persons. This Act however is very wide. Unlike the Prevention and Combatting of Hate Crime and Hate Speech Bill, this Act criminalizes, but fails to acknowledge or prohibit, trafficking in vulnerable groups such as PLWA. As far as the Children’s Act is concerned, that Act is very narrow. It seems to address trafficking in children for exploitation but fails to acknowledge trafficking in children for organ removal. This suggests that all statutes that prohibit trafficking in persons have loopholes somewhere, and it will therefore be difficult for prosecutors to deal with these cases.

Apart from the abovementioned statutes, South African courts may still rely on common law crimes and other legislation, depending on the merits of the case. In respect of raising awareness of the need to prohibit trafficking in PLWA, the South

African government has failed; it raises awareness of media platforms, but fails to engage with society directly, as to how this crime can be prevented.

Despite these arguments, the country is slowly moving in the right direction in combatting trafficking in PLWA. The fact that SA enacted the Prevention and Combatting of Trafficking in Persons Act indicates that the State has intentions to combat any form of trafficking in persons. The Prevention of Hate Crimes and Hate Speech Bill will also assist the State in prosecuting perpetrators of trafficking in PLWA.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

It is unclear how many PLWA are trafficked each year in South Africa. Some cases still go unreported because some communities are reluctant to report this crime because of fear and ignorance. Furthermore, law enforcement members are reluctant to handle *muti*-related cases in South Africa. As a result, it is difficult to ascertain how many PLWA are killed for *muti* purposes, and the exact number of killings of PLWA. Prior to the promulgation of the Trafficking Act, South Africa did not have legislation that prohibited trafficking in persons, and as a result, it was difficult for prosecutors to prosecute trafficking perpetrators.

According to its obligations under the Palermo Protocol, South Africa enacted the Trafficking Act in 2013 to criminalize trafficking in persons. Despite the promulgation of this Act, trafficking in PLWA remains a major issue. This crime shows no decline, and such cases continue to be reported in various parts of the country. The aim of this dissertation is to ascertain whether the South African government complies with international instruments that prohibit trafficking in persons, particularly persons living with albinism. This chapter will summarize the findings of this study and provide recommendations on how South Africa can prevent and combat trafficking in this vulnerable group of people.

5.2 CHAPTER 1

The aim of chapter one is to introduce the topic and to illustrate the challenges that led to the writing of this thesis. There is a growing concern about trafficking in PLWA in South Africa. This crime occurs throughout the country, but studies have found that it is more common in KwaZulu-Natal and Mpumalanga Provinces. In the Northern parts of KwaZulu-Natal (Manguzi, Empangeni and Richards Bay) many cases of trafficking in PLWA have been reported to police officials, it is believed that some

remain unreported. This makes it difficult to estimate how many people are victims of this brutal crime.

This crime affects all PLWA, but children are more exposed to it than adults living with the condition. This suggests that there is a need for cooperation between various state departments. The Department of Education and the Department of Social Development, in particular, cooperate to assist the victims. Victims may suffer from a variety of mental illnesses, which negatively impact upon their progress at school.

5.3 CHAPTER 2

It is estimated that about 80 percent of South African citizens consult witchdoctors for various reasons. Although traditional healers condemn the use of human body parts to make *muti*, there are many of them who use human body parts in the treatment of their clients. As held in the case of *State v Makwanyane*,⁹¹² the killing of another human being is prohibited in South Africa. However, PLWA continue to be subjected to trafficking and killings due to the myths and superstitions surrounding albinism.

Witchcraft is the leading factor in the occurrence of this crime; yet the country's Witchcraft Act fails to acknowledge the existence of witchcraft. The Act is further silent on witchcraft in relation to the purposes of trafficking. Apart from witchcraft, this chapter raises other factors that contribute to trafficking in PLWA in South Africa. This chapter also highlights the challenges faced by this vulnerable group of people from the moment they are born, such as stigma, myths, superstitions and discrimination; these are also factors that lead to trafficking in PLWA in South Africa.

5.4 CHAPTER 3

South Africa is a signatory to several international instruments that criminalize trafficking in persons. Although the majority of these protocols do not specifically deal with trafficking in PLWA, they can be used in prosecuting this crime. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

⁹¹² *Ibid.*

Women and Children, also known as the Palermo Protocol, is the only Protocol that directly criminalizes trafficking in persons. The purpose of this protocol is to:

Adopt effective action to prevent and combat trafficking in persons, especially women and children, which requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to promote the victims of trafficking⁹¹³

This Protocol was the first of its kind to have a precise definition of trafficking in persons. However, the definition is very broad. The Protocol does not contain specific provisions that address the problem of trafficking in PLWA. Although the definition does include trafficking for organ removal, which impacts on PLWA, the Protocol should go further and contain specific provisions addressed at PLWA.

This chapter focuses on the specific provisions that prohibit trafficking. It also further analyzes whether the South African legal framework complies with the provisions set by these Protocols.

5.5 CHAPTER 4

Prior to the promulgation of South African's anti-trafficking legislation, trafficking in PLWA was punishable under common law and statutory law. However, the country committed itself to several international instruments that prohibit trafficking in persons, and under the obligations of these protocols, South Africa has enacted several statutes that prohibit trafficking in persons. This chapter analyses whether the South African legal framework complies with these instruments that prohibit trafficking in persons, with a focus on PLWA.

Following its obligations under the Palermo Protocol, South Africa enacted The Prevention and Combatting of Trafficking in Persons Act 7 of 2013.⁹¹⁴ The Act is the only legislation that deals precisely with trafficking in persons in South Africa. As South African legislation, the Act should have had its own definition of trafficking in persons,

⁹¹³ Palermo Protocol.

⁹¹⁴ The Prevention and Combatting of Trafficking in Persons Act 7 of 2013.

and that definition should have included a specific provision that addresses trafficking in PLWA, and thus addresses issues specific to this country. However, this Act does not have a specific definition for this crime in a South African context. It still relies on the Palermo Protocol for the definition.

The study notes that the use of the definition in the Palermo Protocol might not assist South Africa in prosecuting this crime. For the country to combat and prevent this crime, the definition of trafficking in persons should take into account the South African context and provide a specific meaning for trafficking in PLWA. This would assist prosecutors in dealing with this crime.

Apart from the definition, the Trafficking Act is on the right path with respect to prosecution of the perpetrators of this crime. Section 4 of the Act⁹¹⁵ creates offences that perpetrators may be charged with for committing this crime. Many of these offences were under common law before promulgation of the Trafficking Act. The cases, which took place before the promulgation of the Trafficking Act, may still be prosecuted under common law and other statutory laws.

Furthermore, in instances where a person witnesses trafficking in PLWA but fails to report it to law enforcement personnel, they will be held liable in terms of sections 18 and 19 of the Trafficking Act. These sections make it an offence not to report trafficking in children and adults, respectively.

Although the country has enacted several statutes that criminalize trafficking in persons, such as the Children's Act 38 of 2005⁹¹⁶ and the Criminal Law Amendment Act 32 of 2007,⁹¹⁷ this study has found that these legislations appear to be ineffective and limited. The Children's Act only deals with trafficking in children and makes no provision for adults who are victims of this crime. The Criminal Amendment Act only focuses on trafficking for sexual purposes, and makes no provision for other forms of trafficking, such as trafficking for organ removal. There can be no doubt that this Act can be used in cases where PLWA were raped or sexually abused. However, it does

⁹¹⁵ Section 4 of the Prevention and Combatting of Trafficking in Persons Act 7 of 2013.

⁹¹⁶ Children's Act 38 of 2005.

⁹¹⁷ Criminal Law Amendment Act 32 of 2007.

not protect other victims. Trafficking in PLWA continues to be a major concern in South Africa, and the prosecution of this crime takes time to be completed.

The majority of South Africa's legislation does not address trafficking in PLWA directly. While some scholars may argue that PLWA fall within the category of disabled persons, the fact is that in order to combat and prevent trafficking in this vulnerable group, the country will need a specific statute that criminalizes this trafficking. Although the country enacted a specific Trafficking Act in 2013, that statute also failed to address issues concerning trafficking in PLWA.

Furthermore, the Trafficking Act is limited to trafficking in persons. It excludes trafficking in body parts from the corpses and the graves of PLWA. It does not even provide for punishment of the perpetrators. This clearly creates confusion for the prosecution. In most cases, the victims are found dead. In such cases, it becomes difficult to identify whether the body parts were removed from a live person or a corpse. If the body parts were removed from a corpse or grave, perpetrators may be charged under common law. The Trafficking Act should incorporate a provision that will address this aspect, since trafficking in persons regularly results in death.

Lastly, PLWA face every form of discrimination in their communities in South Africa. They are called names, there is clearly a hatred against them, yet the country does not have specific legislation that addresses hate crime. Once enacted, the proposed bill, the Prevention and Combatting of Hate Crime and Hate Speech Bill,⁹¹⁸ will be the only legislation in South Africa that makes specific provision for PLWA. Section 3(1)(b) of the Bill makes it a hate crime offence to kill PLWA in South Africa.⁹¹⁹

Furthermore, words that are harmful and promote hatred towards PLWA are punishable in terms of section 4(1)(a) (bb)⁹²⁰ of the Bill. This clearly indicates that the country is taking a positive step in dealing with the trafficking of this vulnerable group. The Bill further provides preventative measures against this crime through section 9⁹²¹

⁹¹⁸ The Prevention and Combatting of Hate Crimes and Hate Speech Bill.

⁹¹⁹ Section 3 (1)(b) of the Prevention and Combatting of Hate Crimes and Hate Speech Bill.

⁹²⁰ Section 4(1)(a) (bb) of the Prevention and Combatting of Hate Crimes and Hate Speech Bill.

⁹²¹ Section 9 of the Prevention and Combatting of Hate Crimes and Hate Speech Bill.

of the Act. It obliges cooperation between the various state institutions such as the South African Human Rights Commission and the Commission for Gender Equality, to engage with various stakeholders to raise awareness that addresses the prohibition of this crime.⁹²²

5.6 CHAPTER 5

This is the last chapter of this thesis. It summarizes the findings of the study. This chapter also makes recommendations on how South Africa can combat and prevent the problem of trafficking in PLWA.

5.7 RECOMMENDATIONS

Trafficking in persons living with albinism has not reached the level encountered by other countries in Africa. Nevertheless, South Africa cannot deny the fact that this crime is a major concern, and its cases continue to grow in the Republic. The country's legal framework does not protect this vulnerable minority group. It also fails to provide assistance to the victims of this crime and their families. The following recommendations are proposed to ensure that PLWA enjoy their human rights in this country and are not subject to any form of human trafficking.

5.7.1 Education

It is clear that many South Africans lack knowledge about albinism. The condition is still surrounded by myths and superstitions. In order to ensure that citizens understand the cause of this condition, it is important for a country to teach children at a young age about the condition. As reported in the study, many children living with albinism are bullied at school, and face various types of discrimination. There is clearly a need here to introduce a subject from primary school level that will teach children about albinism and inform and equip them not to discriminate against PLWA in their communities.

⁹²² *Ibid.*

5.7.2 Transportation of Children from their homes to school

As part of the SADC region, the South African Government should engage with its neighboring countries on how they can avoid trafficking of PLWA. The country should also adopt strategies that are used by other countries to avoid trafficking in children living with the condition. Following the increase of this crime in Tanzania, the Tanzanian government provided transport for CLWA. South Africa should also adopt this strategy. As discussed in this study, the majority of CLWA are trafficked on their way to or from school.

5.7.3 Awareness

The occurrence of this crime is prevalent in rural areas of the country, and few cases have been reported in urban areas. Most of the people living in rural areas are uneducated, and do not believe in the scientific clarification of albinism. Those that are aware of the scientific explanations are ignorant and in denial. This indicates the need for awareness campaigns in South Africa, primarily in rural areas. The government should hire experts on albinism to inform and educate people about this condition. The government should extend this awareness to social media, radio stations and TV channels. Government cannot combat and prevent this crime on its own. The government should engage with non-governmental organizations and other community groups to raise awareness about albinism. The government, together with these organizations, must position itself to address the root causes of trafficking in PLWA in the various communities of South Africa. This will provide clarity about the true nature of albinism.

5.7.4 Provision of safety, appropriate shelter and psychological support to victims

The victims of this crime, and their families, suffer from chroma and other mental illness, due to the occurrence of this crime. As a result, they continue to live in fear of their lives. They fail to engage with other community members because they do not know whom to trust. Not only have the victims themselves but the majority of PLWA in South Africa lived in fear because of the occurrence of this crime. The State should

provide psychologists to assist the victims and their families. These victims require proper counselling to equip them to heal and be able to continue with their lives. Furthermore, counselling will ensure that the victims do not suffer from resulting mental illness. For those victims who live in inadequate shelters, the State should ensure that appropriate shelter is provided.

5.7.5 Prosecution

It is the South African law enforcement's prerogative to ensure that all South African citizens are safe. However, the safety of PLWA is at risk in the Republic. According to reports, members of the law enforcement are often reluctant to handle cases involving *muti* killings because of the fear that perpetrators may also attack them. This indicates that the country needs to train specialized police officials to with the necessary skills to handle cases involving trafficking in PLWA.

Trafficking in PLWA is an organized crime - it involves more than one person. In some cases even members of the South African Police Services are involved in the commission of this crime. Some police officials may be reluctant to handle these crimes because they are participants. To ensure that members of the law enforcement are trustworthy and work with integrity, lie detector tests may be used to determine whether they are involved in the commission of this brutal crime.

5.7.6 Strengthen Security at the South African borders

Trafficking in PLWA is also a cross-border crime. The body parts of PLWA are illegally transported between South Africa and other countries in Africa. In some cases, perpetrators work with law enforcement members to commit this crime. To strengthen security at the South African borders there is need for the introduction of body cameras. These cameras will be switched on when police officials are on duty at the borders. The body-worn cameras are able to collect photographic evidence and will make it difficult for any law enforcement member to work with perpetrators of this crime. These body-worn cameras must not be under the control of police officials on duty because they might switch the cameras off to commit the crime. There must be

authorized officers who will monitor the use of these cameras to avoid them being switched off by corrupt law enforcement personnel.

Apart from any information which might be gleaned from body-worn cameras, it is unclear whether these body parts pass through border gates, or the perpetrators cross the border illegally. The State must strengthen and tighten the security at all borders in the country. All people working at the borders should undergo training which will equip them to deal with this crime. Forensic experts might also be needed in cases where law enforcement personnel find it difficult to identify human remains.

5.7.7 Suspension of parental responsibilities

In South Africa, parents and their families are sometimes involved in the trafficking of their own children. They commit this crime in exchange for money. In such cases, the State should ensure that they suspend all parental responsibilities of the parents. Section 36 of the Trafficking Act addresses this issue. This suspension of parental responsibilities must be permanent, to ensure perpetrators are never in a position to hurt the victims again.

5.7.8 Amend the Witchcraft Act

As discussed in chapter two of this thesis, the South African Witchcraft Act fails to acknowledge the existence of these crimes against PLWA. Furthermore, the constitutionality of this statute is still subject to debate. One of the major factors in trafficking in PLWA is witchcraft. It would be difficult for the country to combat this crime without legislation that deals properly with witchcraft. The Witchcraft Act should therefore be amended to provide for the punishment of perpetrators who kill other people for witchcraft purposes. Witchcraft is a broad and complex phenomenon, and the Act should be amended to assist the prosecution in handling these cases, and it is vital that it sends a clear, strong message to South Africans that witchcraft is prohibited, and that any person who practices it will face harsh punishment.

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African Charter on the Rights and Welfare of the Child.
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International Covenant on Economic, Social and Cultural Rights.
International Convention on the Elimination of All Forms of Racial Discrimination.
United Nations Convention on the Rights of the Child.
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International Covenant on Social and Economic Rights.
United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.
United Nations Convention against Transnational Organized Crime.
Universal Declaration of Human Rights.

Mr Siphesihle Mbatha (218086172)
School Of Law
Howard College

Dear Mr Siphesihle Mbatha,

Protocol reference number: 00004921

Project title: Trafficking in Persons Living With Albinism in South Africa

Exemption from Ethics Review

In response to your application received on 26 November 2019, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law

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