

# The impact of the Lomé Charter on Combating Trafficking in Persons at Sea: A South African Legal Perspective

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## Abstract

*A major maritime problem on the African continent is the widespread proliferation of threats to maritime security, including trafficking in persons ('TIP') at sea. The relevant South African legislation is the Prevention and Combating of Trafficking in Persons Act 7 of 2013. South Africa and other states on the continent have taken several steps to address this scourge; despite those steps, TIP continues. For that reason, and to address many other maritime security threats in Africa, member states of the African Union adopted in 2016 the African Charter on Maritime Security and Safety and Development in Africa ('the Lomé Charter'), which has yet to come into force. This article analyses the relevant pre-existing international instruments, the TIP provisions of the Lomé Charter and the South African legislation. The South African legislative provisions are then compared with the relevant provisions of the Lomé Charter to establish whether any legal steps are required to ensure that South Africa complies with its TIP-related obligations under the Lomé Charter should South Africa decide to ratify the Lomé Charter and should the Lomé Charter come into force. The legal steps required are that South Africa must, among others, adopt policies that guarantee the availability of resources, either from public funds or by forging public-private partnerships, to invest in equipment, operations and training to combat TIP at sea. In addition, South Africa should join other state parties in adopting guidelines and modalities to assist them in fulfilling their obligations in the Lomé Charter.*

## Keywords

cooperation, human trafficking at sea, legislation, Lomé Charter, maritime security, South Africa

## 1. Introduction

Many illegal activities take place at sea, including activities associated with trafficking in persons ('TIP'), such as forced labour, prostitution, slavery and the removal of human organs.<sup>1</sup> Victims are assaulted, injured or killed and often go missing.<sup>2</sup> In the first quarter of 2024, hundreds of migrants, including victims of TIP, died or went missing in the

1 See UNODC *Global Report on Trafficking in Persons* (United Nations, 2020) 84-87.

2 For example, see UN Doc S/2021/767, Implementation of Resolution 2546 (2020), Report of the Secretary-General of 2 September 2021, paras 18-20.

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Mediterranean Sea. In March 2024, for example, over 60 migrants and victims of TIP died after a rubber dinghy ran into trouble in the Mediterranean Sea; 25 were rescued by the Ocean Viking, a vessel operated by the humanitarian group SOS Mediterranean.<sup>3</sup> In February 2023, 73 migrants and victims of TIP were declared missing and presumed dead following a shipwreck off the coast of Libya; only seven survived.<sup>4</sup> The previous year, more than 1,200 migrants had died in the Mediterranean Sea,<sup>5</sup> and in September 2021, a report of the Secretary-General of the United Nations confirmed that over 1,595 migrants and victims of TIP perished or went missing on the central Mediterranean route.<sup>6</sup> The report emphasised that this number does not account for those who died or went missing after they had been returned to their place of departure.<sup>7</sup> Africa, as a whole, recorded huge numbers of TIP victims, of whom ‘children represent the majority of victims detected [...] in West Africa’, while the victims in Southern African and East African countries tend to be predominantly adults.<sup>8</sup> Undoubtedly, parts of the African maritime domain have been and remain important transit points for TIP.<sup>9</sup> This state of affairs led the African Union (‘AU’) to call for

a comprehensive regional and international approach involving countries of origin, transit, and destination, that includes measures to prevent [...] trafficking, [to] punish traffickers and to protect the victims of trafficking, including their human rights.<sup>10</sup>

3 Beake, N & Plummer, R ‘60 migrants die in dinghy in Mediterranean’ BBC News <<https://www.bbc.com/news/world-europe-68564971.amp>> accessed 23 August 2024.

4 Aljazeera ‘UN says 73 people presumed dead in shipwreck off Libya’ 15 February 2023 <<https://www.aljazeera.com/news/2023/2/15/un-says-73-people-presumed-dead-in-libya-shipwreck>> accessed 23 August 2024.

5 Sunderland, J ‘Endless tragedies in the Mediterranean sea’ Reliefweb, 13 September 2022 <<https://reliefweb.int/report/world/endless-tragedies-mediterranean-sea#:~:text=More%20than%201%2C200%20people%20have,almost%2025%2C000%20deaths%20since%202014>> accessed 23 August 2024.

6 For details of these routes, see UN Doc S/2021/767, Implementation of Resolution 2546 (note 2 above) para 17. However, human traffickers continue to use primarily rubber and wooden boats, as well as fibreglass boats, with migrant smuggling groups in the western launching area from Tripoli to Abu Kammash predominantly using wooden or fibreglass boats, and groups operating in the eastern launching region from Tripoli to Misratah mainly using rubber boats and occasionally fibreglass boats. The cost of travel by inflatable boat ranges from EUR 500 to EUR 1,400 and by wooden boat from EUR 800 to EUR 1,500, depending on the size of the boat and the number of people on board. With rubber boats being able to accommodate up to 120 persons, human traffickers and smugglers can earn up to EUR 168,000 per boat. See UN Doc S/2020/876, Implementation of Resolution 2491 (2019), Report of the Secretary-General of September 2020 para 8.

7 UN Doc S/2021/767, Implementation of Resolution 2546 (note 2 above) para 3.

8 UNODC, Report on TIP (2020) 165. UNODC ‘Human trafficking in West Africa: Three out of four victims are children says UNODC report’ <<https://www.unodc.org/conig/en/human-trafficking-in-west-africa-three-out-of-four-victims-are-children-says-unodc-report.html>> accessed 23 August 2024.

9 US Department of State ‘2021 Trafficking in Persons Report: Nigeria’ para 45 <<https://www.state.gov/reports/2021-trafficking-in-persons-report/nigeria/>> accessed 23 August 2024.

10 See Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children, adopted by the Ministerial Conference on Migration and Development in Tripoli, 22-23 November 2006, preambular 4.

This is a huge concern for Africa as its ports and waterways continue to be used, *inter alia*, as destination and transit points.<sup>11</sup> In Southern Africa, the waters of the regional hegemon, South Africa, remain another transit point for TIP. A report confirms that South Africa is a primary destination for victims of TIP in the Southern African region and within Africa generally. South Africa is also an origin and transit country for trafficking to Europe and North America.<sup>12</sup> Indeed, forced labour has also been ‘detected on fishing vessels in South Africa’s territorial waters.’<sup>13</sup> The syndicates concerned recruit ‘South African women to Europe and Asia, where traffickers force some into commercial sex, domestic service, or drug smuggling.’<sup>14</sup> In many cases, women and children are exploited ‘aboard fishing vessels in South Africa’s territorial waters.’<sup>15</sup> In the same way, traffickers ‘exploit foreign male victims aboard fishing vessels in South Africa’s territorial waters.’<sup>16</sup>

South Africa and many other African states have taken steps to address this scourge, but TIP still continues.<sup>17</sup> For that reason, and to combat several other threats to maritime security around the continent, a substantial number of AU members adopted, in 2016, the African Charter on Maritime Security and Safety and Development in Africa (‘the Lomé Charter’),<sup>18</sup> which is yet to come into force.<sup>19</sup> This article sets out the relevant pre-existing international instruments, the TIP provisions of the Lomé Charter, and the South African legislation. The South African legislation is compared with the relevant provisions of the Lomé Charter to establish whether any legal steps are required to ensure that South Africa complies with its TIP-related obligations in the Lomé Charter, should it decide to ratify the Lomé Charter and should the Lomé Charter come into force.

## 2. International legal instruments on trafficking in persons

The 1982 United Nations Convention on the Law of the Sea (‘LOSC’)<sup>20</sup> provides that the passage of a foreign ship is considered to be prejudicial to the ‘peace, good order or

11 US Department of State (note 9 above) para 45.

12 See UNODC ‘South Africa launches Prevention and Combating of Trafficking in Persons National Policy Framework’ <<https://www.unodc.org/unodc/en/human-trafficking/glo-act/south-africa-launches-prevention-and-combating-of-trafficking-in-persons-national-policy-framework.html>> accessed 18 August 2024.

13 *Ibid.*

14 See US Department of State ‘2021 Trafficking in Persons Report: South Africa’ para 18 <<https://www.state.gov/reports/2021-trafficking-in-persons-report/south-africa/>> accessed 23 August 2024.

15 *Ibid* para 18.

16 US Department of State ‘2023 Trafficking in Persons Report: South Africa’ <<https://www.state.gov/reports/2023-trafficking-in-persons-report/south-africa/>> accessed 18 August 2024.

17 Singlee, S & Witbooi, E ‘Trafficking In Persons and Forced Labour of Migrants in Fisheries: Law Enforcement Challenges in South Africa’ (2018) 1 *Journal of Ocean Governance in Africa* 1 at 3-5. See also Oladele, G & Orifowomo, O ‘Legal and Institutional Framework for Combating Trafficking in Persons in Nigeria’ (2017) 5 *ANULJ* 49 at 54-61.

18 AU Doc. Ext/Assembly/AU/1(VI).

19 In terms of Art 50, the Lomé Charter will enter into force 30 days after the deposit of the 15<sup>th</sup> instrument of ratification. As of June 2022, only Togo, Benin and Senegal had ratified the Lomé Charter.

20 Opened for signature 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397 (‘LOSC’).

security of a coastal State if in the territorial sea it engages in' the loading or unloading of any person contrary to the immigration laws and regulations of the coastal state.<sup>21</sup> In such a case, passage is not innocent,<sup>22</sup> and the full criminal jurisdiction of the coastal state may be exercised with regard to the foreign ship and the persons on board.<sup>23</sup> The criminal jurisdiction of the coastal state cannot be exercised against a foreign vessel involved in TIP on board and passing through the territorial sea, unless the TIP 'extend[s] to the coastal State,'<sup>24</sup> or 'disturb[s] the peace of the country or the good order of the territorial sea,'<sup>25</sup> or 'if the assistance of the coastal State has been requested by the master of the ship involved in the TIP' or by a 'diplomatic agent or consular officer of the flag State.'<sup>26</sup> In the contiguous zone, the coastal state may exercise the control necessary to prevent a foreign vessel involved in TIP from loading or offloading traffickers or the victims of TIP, and to punish those involved in TIP.<sup>27</sup>

As far as slavery is concerned, states have an obligation to 'prevent and punish the transport of slaves in ships' and to prevent the use of their flags for the transport of slaves.<sup>28</sup> In that regard, a warship which encounters a ship engaged in the slave trade is justified in boarding, arresting and seizing such ship.<sup>29</sup> The term 'slave' is not defined in the LOSC; however, the term may include forcing victims by any means to submit to the control of another, as if that other person is the owner of that victim. The victims of TIP at sea are mostly found in such conditions, exploited and dehumanised, as they often do not have any choice but to submit to the control of the trafficker. Moreover, the term 'exploitation' includes 'slavery or practices similar to slavery,'<sup>30</sup> and states have an obligation to prevent slavery and punish their ships engaged in slavery.

Six years after the LOSC came into force, the General Assembly of the United Nations adopted the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime ('the TIP Protocol'),<sup>31</sup> to which South Africa is a party.<sup>32</sup> For purposes of the Protocol, the term 'trafficking in persons' means

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

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21 LOSC, Art 19(2)(g).

22 LOSC, Art 19(1).

23 LOSC, Art 27(1)(a).

24 LOSC, Art 27(1)(a).

25 LOSC, Art 27(1)(b).

26 LOSC, Art 27(1)(c).

27 LOSC, Art 33(1).

28 LOSC, Art 99.

29 LOSC, Art 110(1)(b).

30 See the definition of TIP below; see also the discussion in UNODC *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (2011) 23-57.

31 2237 UNTS 319. Adopted 15 November 2000; EIF: 25 December 2003.

32 South Africa acceded to the Protocol on 20 February 2004.

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;

- (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, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article.<sup>33</sup>

Within these parameters, the objectives of the TIP Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.<sup>34</sup>

These objectives must be read jointly, in the sense that the TIP Protocol is applicable to the

prevention, investigation and prosecution of the offences established in accordance with article 5 of th[e] Protocol, where those offences are transnational in nature and involve an organized criminal group.<sup>35</sup>

The range of activities and circumstances to which the TIP Protocol applies, as well as the exclusions to its application, are governed by Article 4 of the TIP Protocol and the 2001 United Nations Convention against Transnational Organised Crime ('CTOC').<sup>36</sup> The TIP Protocol supplements the CTOC and both are to be interpreted together.<sup>37</sup> The CTOC clarifies that an offence is 'transnational in nature' if

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

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33 TIP Protocol, Art 3. In the same provision, the term 'child' means 'any person under eighteen years of age'.

34 TIP Protocol, Art 2.

35 TIP Protocol, Art 4.

36 TIP Protocol, Art 4 read with the CTOC, Arts 2 and 3.

37 TIP Protocol, Art 1.

- (d) It is committed in one State but has substantial effects in another State.<sup>38</sup>

An 'organised criminal group' means 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 th[e] Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>39</sup>

The TIP Protocol is limited in scope; however, that limitation does not prohibit any state party from adopting legislative and other measures as may be necessary to establish as criminal offences any conduct in the definition of TIP.<sup>40</sup> Similarly, each state party is required to establish as criminal offences the following activities: attempting to commit, or participating as an accomplice, or organising or directing other persons to commit, any TIP offences.<sup>41</sup> In addition, all state parties can adopt stricter measures than those provided by the TIP Protocol and the CTOC; however, any such measure outside the scope of those instruments will not be covered by the various requirements on international cooperation.<sup>42</sup>

To effectively achieve those objectives, each state party is required to adopt efficient anti-TIP measures, regardless of whether the TIP occurs domestically or transnationally and regardless of whether the TIP is perpetrated by one individual or an organised criminal group.<sup>43</sup> These measures include preventing, as far as possible, any means of transport operated by commercial carriers from being used to commit TIP.<sup>44</sup> In addition, it must be ascertained that all 'passengers are in possession of the[ir] travel documents.'<sup>45</sup> The provisions deal only with 'commercial carriers'; however, this does not mean that the TIP Protocol does not apply to non-commercial carriers.<sup>46</sup> Secondly, the obligation is 'only to ascertain whether or not passengers have the necessary documents in their possession',<sup>47</sup> which does not compel carriers to prevent or combat TIP. The law enforcement structures of state parties are urged to cooperate by exchanging information to determine:

38 CTOC, Art 3(2).

39 CTOC, Art 2(a).

40 TIP Protocol, Art 5(1).

41 TIP Protocol, Art 5(2).

42 See UNODC *Legislative Guide for the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* 2020 (*Legislative Guide*) paras 74 and 80.

43 *Ibid* 81.

44 TIP Protocol, Art 11(2).

45 TIP Protocol, Art 11(3).

46 In the fishing industry, for example, forced labour and the sexual exploitation of crew on board fishing vessels are prevalent: see UNODC *Transnational Organized Crime in the Fishing Industry – Focus on: Trafficking in Persons, Smuggling of Migrants and Illicit Drugs Trafficking* (2011) 23. See also UNODC *Transnational Organized Crime in the Fishing Industry* (2011) 22-23.

47 See UNODC *TRAVAUX PRÉPARATOIRES of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006) 409.

- (a) [w]hether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of [TIP];
- (b) [t]he types of travel document that individuals have used or attempted to use to cross an international border for the purpose of [TIP]; and
- (c) [t]he means and methods used by organized criminal groups for the purpose of [TIP], including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.<sup>48</sup>

Indeed, none of these provisions nor any of the TIP Protocol provisions refer to or mention TIP at sea, or compel state parties to cooperate in preventing or combating TIP at sea, like other similar transnational treaties that expressly make it obligatory for state parties to prevent and cooperate against vessels involved in similar crimes.<sup>49</sup> It is regrettable that the TIP Protocol does not expressly urge state parties to prevent TIP at sea. This is why most states, including South Africa, have not expressly included the prevention of TIP at sea in their relevant legislation.<sup>50</sup>

The other relevant instrument on TIP is the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ('STPC'),<sup>51</sup> to which South Africa is a party.<sup>52</sup> The STPC obligates parties to punish anyone who, to gratify the passions of another, '[p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person' or exploits the prostitution of another.<sup>53</sup> In addition, the STPC obligates parties to punish those who attempt to commit,<sup>54</sup> or intentionally participate in committing, any of those offences,<sup>55</sup> or who act in preparation for the commission thereof.<sup>56</sup> The parties undertake to take appropriate measures to ensure the supervision of seaports in 'order to prevent international traffic in persons for the purpose of prostitution.'<sup>57</sup> Nevertheless, the STPC is limited in scope as it does

48 TIP Protocol, Art 10(1).

49 See, for example, the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Migrants Protocol), particularly Arts 7, 8 and 9. See also the 1988 Drugs Convention, particularly Art 17.

50 For example, the Prevention and Combating of Trafficking in Persons Act of 2013 in South Africa incorporated the same provisions of the TIP Protocol. For other states that followed the TIP Protocol, see UNODC *Global Report on Trafficking in Persons* (2020) 137, 141, 148, 154, 159, 163 and 168.

51 Adopted in 1949 and entered into force on 25 July 1951.

52 South Africa became a signatory on 16 October 1950 and ratified the STPC on 10 October 1951.

53 STPC, Art 1.

54 STPC, Art 3.

55 STPC, Art 4.

56 STPC, Art 3.

57 STPC, Art 17(3).

not deal with all the elements of TIP, such as sexual exploitation, forced labour, slavery, practices similar to slavery, servitude, and the removal of human organs. However, parties, including South Africa, are required to cooperate in the prevention and suppression of the exploitation of the prostitution of others.

TIP is a criminal offence addressed by many international instruments and programmes, including the United Nations Global Initiative to Fight Human Trafficking ('UN.GIFT').<sup>58</sup> The UN.GIFT programmes aim to mobilise state and non-state actors to eradicate TIP and reduce potential victims' vulnerability and the demand for exploitation in all its forms. It ensures adequate protection of and support to victims, supporting the prosecution of criminals involved while respecting the human rights of all persons.<sup>59</sup> To actualise those objectives, the programmes increase knowledge, raise awareness of TIP, and foster new and innovative partnerships for joint action against TIP.<sup>60</sup> A key issue in the programme is technology, which is identified as both a help and a hindrance. Technology has given traffickers new and easier ways to recruit victims, particular by using social media.<sup>61</sup> On the other hand, advances in technology make it easier for advocacy agencies and law enforcement to monitor TIP, as different technological systems can be used to locate and rescue victims, as well as to analyse and collect data used to arrest and prosecute traffickers. Therefore, as far as TIP is concerned, technological advancements have 'prove[n] to be the quintessential double-edged sword'.<sup>62</sup>

At the continental level, the AU Agenda 2063,<sup>63</sup> which seeks to accelerate the implementation of past and existing continental frameworks and other similar initiatives for sustainable development,<sup>64</sup> recognises the need to eradicate threats that face the continent, including TIP at sea.<sup>65</sup> Regarding ocean affairs, Africa's Integrated Maritime Strategy 2050 ('AIMS')<sup>66</sup> provides a broad framework for the protection and sustainable exploitation of the African maritime domain for wealth creation,<sup>67</sup> including measures to address maritime security threats.<sup>68</sup> AIMS is structured to address contending, emerging and future maritime challenges and opportunities on the continent, taking into account the interests of landlocked countries.<sup>69</sup> It provides a clear focus on enhanced wealth

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58 Launched on 26 March 2007; that date marked 200 years since the abolition of the trans-Atlantic slave trade.

59 UN.GIFT *Human Trafficking a Crime that Shames Us All* <<https://www.unodc.org/documents/overview.pdf>> accessed 23 August 2024.

60 *Ibid.*

61 UN.GIFT 'Technology – Abetting Traffickers and Eradicating Trafficking' <<https://www.ungift.org/2017/09/23/technology-abetting-traffickers-and-eradicating-trafficking>> accessed 19 May 2022.

62 *Ibid.*

63 Adopted in 2015 by the AU Assembly of Heads of State and Government.

64 African Union *Agenda 2063: The Africa we Want* (2015) 2.

65 African Union *Agenda 2063: The Africa we Want* (2015) 2, 18-19.

66 (2016) 1 JOLGA 202. See Vrancken, P 'Africa's Integrated Maritime Strategy and the Law of the Sea' (2016) 41 SAYIL 97-125.

67 AIMS paras 15-16 and 84-91.

68 AIMS paras 61-66 and 70-73.

69 AIMS para 11.

creation from the sustainable governance of Africa's inland waters and seas.<sup>70</sup> AIMS also integrates an operationalisation plan,<sup>71</sup> with a clearly defined vision, achievable goals, specific desirable objectives, and milestones towards attaining AIMS' goal of increased wealth creation in a stable and secure African maritime domain.<sup>72</sup> To suppress human trafficking on the continent, the AU must encourage the regions to

harmonize national maritime laws and to enhance bi-lateral and regional strategic synergies, including signing and ratification and accession by Member States of the relevant international maritime instruments.<sup>73</sup>

To prevent the scourge of TIP, a substantial part of the work comprises awareness-raising, through media and training workshops, and capacity-building in source and transit countries.<sup>74</sup> The AU must work towards addressing the root causes of human trafficking, which include

poverty, unbalanced distribution of wealth, unemployment, armed conflicts, poor law enforcement system, degraded environment, poor governance, societies under stress, corruption, lack of education, lack of respect for universal human rights and discrimination, increased demand for sex trade and sex tourism.<sup>75</sup>

Similarly, the 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children ('the Plan')<sup>76</sup> urges each member state to introduce, where this does not exist, a comprehensive legislative and institutional framework that covers all aspects of trafficking in human beings in line with those instruments.<sup>77</sup> The Plan urges each member state to sign, ratify and fully implement the CTOC and its TIP Protocol, as well as other relevant continental and regional instruments.<sup>78</sup> The Plan further encourages each member state to create special units, within existing law enforcement structures, with a specific mandate to develop and effectively use operational activities to combat trafficking in human beings.<sup>79</sup> Member states are encouraged to enhance bilateral and multilateral co-operation between European and African countries, especially countries of origin, transit and destination to protect, prevent and combat TIP.<sup>80</sup> The Plan, however, is yet to achieve

70 *Ibid.* See also AIMS paras 83-84.

71 The AIMS Plan of Action for Operationalization was adopted at the African Union (AU) Commission Headquarters in Addis Ababa, Ethiopia, on 6 December 2012, by the 2<sup>nd</sup> Conference of African Ministers in Charge of Maritime Related Affairs organised by the African Union with the fifth African maritime cross-sectoral Experts Workshop, held on 3-4 December 2012, and the High Level African maritime cross-sectoral Senior Officials meeting which took place on 5 December 2012.

72 See AIMS annexure C (plan of action for operationalisation).

73 AIMS para 60.

74 AIMS para 76.

75 *Ibid.*

76 Adopted by the Ministerial Conference on Migration and Development, Tripoli, 22-23 November 2006.

77 Ouagadougou Action Plan 5.

78 Ouagadougou Action Plan 4.

79 Ouagadougou Action Plan 6.

80 Ouagadougou Action Plan 7.

its aims, especially as TIP on the continent remains a key issue at a global level.<sup>81</sup> Indeed, since the adoption of the Plan, TIP has, *inter alia*, worsened as a result of increased social, economic, environmental and political pressures on the continent, pushing vulnerable migrants into the clutches of international criminal networks that facilitate human trafficking and smuggling.<sup>82</sup> Ten years after the Plan was adopted, the AU adopted the Lomé Charter,<sup>83</sup> and one unique aspect of the Lomé Charter is that it is a legal binding instrument on maritime security. The Lomé Charter is discussed in detail in the following section.

At the regional level, in Southern Africa, the Southern African Development Community ('SADC'), of which South Africa is a member, developed several legal and policy instruments in response to the scourge of TIP.<sup>84</sup> One instrument is the 2016 Trafficking in Persons in the SADC Region: United to Fight 'Trafficking in Persons' in the SADC Region.<sup>85</sup> SADC encouraged member states to develop appropriate anti-TIP legal and policy instruments, as well as appropriate tools to facilitate the implementation of legislative frameworks. In addition, SADC encourages each member state to amend or strengthen existing TIP legislation to effectively integrate emerging issues in combating TIP.<sup>86</sup> The SADC further recommends the establishment of

bilateral and multi-lateral cooperation between source, transit and destination countries extending beyond the SADC region.

Regional instruments, including AIMS, do not have the force of law, and there is no legally binding instrument at the continental and regional levels in Africa other than the Lomé Charter.

### 3. The Lomé Charter and trafficking in persons at sea

Africans have taken steps individually and collectively to prevent and suppress TIP, but, despite those steps, TIP continues.<sup>87</sup> To address the scourge, as well as other threats to maritime security, a substantial number of AU members adopted the Lomé Charter in 2016. The objectives of the Lomé Charter include establishing national, regional and continental institutions against TIP at sea, and ensuring the implementation of relevant policies to prevent and suppress TIP and related matters.<sup>88</sup> The Lomé Charter expressly urges each state party to

develop and implement sound migration policies aimed at eliminating trafficking in human beings, especially women and children [...] by sea.<sup>89</sup>

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81 See 2019 African Union Draft Report of the Evaluation of the Implementation Status of the African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings 33-47.

82 *Ibid.*

83 Adopted by the Extraordinary Session of the Assembly, Lomé, Togo, 15 October 2016.

84 For example, the Harmonised SADC Regional Strategic Plan on Combating Illegal Migration, Smuggling of Migrants and Trafficking in Persons (2016-2020). See also the SADC Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (SIPO).

85 Policy Brief, August 2016 <[https://www.sadc.int/files/8414/7505/0081/SADC\\_TIP\\_Policy\\_Brief\\_-\\_English\\_FINAL.pdf](https://www.sadc.int/files/8414/7505/0081/SADC_TIP_Policy_Brief_-_English_FINAL.pdf)> accessed 19 May 2022.

86 Trafficking in Persons in the SADC 7.

87 Singlee & Witbooi (note 17 above) 3-5. See also Oladele & Orifowomo (note 17 above) 54-61.

88 Lomé Charter, Art 3(e) read with Art 3(a).

89 Lomé Charter, Art 16.

The term ‘trafficking in persons’ in the Lomé Charter means the

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>90</sup>

This definition is the same as in Article 3(a) of the TIP Protocol, and the term ‘exploitation’ in the Lomé Charter has the same meaning as in the TIP Protocol. However, one significant difference is that the Lomé Charter urges state parties to eliminate TIP at sea; on this, the TIP Protocol is silent. The Lomé Charter obligates each state party to develop a national legal framework to coordinate its action on TIP at sea.<sup>91</sup> The legal framework is required to incorporate international cooperation mechanisms,<sup>92</sup> which must be consistent with relevant instruments such as the LOSC and the TIP Protocol, or, where appropriate, the legal framework must be harmonised with such legal instruments.<sup>93</sup> Notwithstanding the differences in their legal frameworks, trafficking legislation

shall guarantee joint investigation mechanisms, secure information exchange procedures, judicial requests, extradition and transfer of detainees and other related mechanisms.<sup>94</sup>

Similarly, the legislation must establish a national coordinating structure which may include a centre for awareness to ensure strong coordination and effective cooperation between the relevant national institutions to prevent and suppress TIP at sea.<sup>95</sup> State parties must ‘strengthen law enforcement at sea, through the training and the professionalization of navies, coast guards, and agencies responsible for’ the prevention and suppression of TIP.<sup>96</sup> In addition, state parties must ‘maintain patrols, surveillance, and reconnaissance in’ African waters for law enforcement measures on vessels engaged in TIP.<sup>97</sup> Furthermore, states parties must

adopt policies that guarantee the availability of resources, either by public funds or by forging public-private partnerships, needed for investment in equipment, operations and training.<sup>98</sup>

Beyond those obligations, each state party

shall cooperate on the basis of its bilateral or multilateral agreements, or in the absence of a cooperation agreement, on the basis of its national legislation.<sup>99</sup>

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90 Lomé Charter, Art 1(1).

91 Lomé Charter, Art 39(1).

92 Lomé Charter, Art 39(2).

93 Lomé Charter, Art 8(a).

94 Lomé Charter, Art 40(3).

95 Lomé Charter, Art 7.

96 Lomé Charter, Art 6(b).

97 Lomé Charter, Art 6(c).

98 Lomé Charter, Art 9.

99 Lomé Charter, Art 40(2).

In addition, state parties must take adequate measures, individually or collectively, to effectively fight TIP at sea, and to ensure that traffickers are effectively prosecuted and denied the proceeds of trafficking.<sup>100</sup> The phrase ‘take adequate measures’ includes developing a system of information-sharing, and integrating national, regional and continental structures aimed at

- preventing the commission of TIP at sea;
- the arrest and detention of individuals preparing to or committing TIP at sea; and
- the seizure or confiscation of ships and equipment used in the commission of TIP at sea.<sup>101</sup>

Also, state parties must share intelligence between national services and regional and continental agencies, including appropriate international specialised organs, to ensure the effectiveness of the obligations geared towards the fight against TIP at sea.<sup>102</sup> State parties

shall also adopt guidelines and modalities to guide States Parties in fulfilling their obligations under th[e] Charter.<sup>103</sup>

State parties cannot fulfil their obligations if the Lomé Charter does not come into effect. At the continental and regional levels of Africa, the Lomé Charter is the only relevant legal binding international instrument against TIP at sea and it has not yet come into force. The Charter ‘shall enter into force thirty (30) days after the deposit of the fifteenth (15<sup>th</sup>) instrument of ratification’;<sup>104</sup> as of July 2024, only three states have ratified the instrument,<sup>105</sup> and that number does not include South Africa.

#### 4. South African legislation on trafficking in persons

South Africa’s legal framework on TIP is the Prevention and Combating of Trafficking in Persons Act<sup>106</sup> (‘the TIP Act’). The objects of the Act are (a) to give effect to South Africa’s international obligations concerning the trafficking of persons; (b) to provide for the prosecution of persons who commit offences referred to in the TIP Act and for appropriate penalties; (c) to provide for the prevention of trafficking in persons, the protection of and assistance to victims of trafficking; (d) to provide services to victims of

100 Lomé Charter, Art 32(2).

101 Lomé Charter, Art 33(2).

102 Lomé Charter, Art 34.

103 Lomé Charter, Art 46(4).

104 Lomé Charter, Art 50(1).

105 The states are Togo, Benin and Senegal. Togo signed the Lomé Charter on 15 October 2016 and ratified it on 16 January 2017; Benin signed it on 15 October 2016, and ratified it on 6 October 2016; and Senegal signed it on 30 January 2017 and ratified it on 11 February 2022. Thirty-five states have signed the Lomé Charter, but South Africa is yet to sign or ratify it: see Africa Union ‘List of countries which have signed, ratified/acceded to the Lomé Charter’ <[https://au.int/sites/default/files/treaties/37286-sl-AFRICAN\\_CHARTER\\_ON\\_MARITIME\\_SECURITY\\_AND\\_SAFETY\\_AND\\_DEVELOPMENT\\_IN\\_AFRICA\\_LOME\\_CHARTER.pdf](https://au.int/sites/default/files/treaties/37286-sl-AFRICAN_CHARTER_ON_MARITIME_SECURITY_AND_SAFETY_AND_DEVELOPMENT_IN_AFRICA_LOME_CHARTER.pdf)> accessed 23 August 2024.

106 Act 7 of 2013.

trafficking; (e) to provide for effective enforcement measures; (f) to provide for the co-ordinated implementation, application and administration of the TIP Act, including the development of a draft national policy framework; and (g) to combat TIP in a coordinated manner.<sup>107</sup> The TIP Act applies to anyone who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of South Africa 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.<sup>108</sup>

The term 'exploitation' includes, but is not limited to

- (a) all forms of slavery or practices similar to slavery;
- (b) sexual exploitation;
- (c) servitude;
- (d) forced labour;
- (e) child labour as defined in section 1 of the Children's Act;
- (f) the removal of body parts; or
- (g) the impregnation of a female person against her will for the purpose of selling her child when the child is born.<sup>109</sup>

A person who adopts a child facilitated or secured through legal or illegal means or who concludes a forced marriage within or across the borders of South Africa for the purpose of exploitation of that child or other person in any form or manner is guilty of an offence.<sup>110</sup>

107 TIP Act, s 3.

108 TIP Act, s 4(1).

109 TIP Act, s 1.

110 TIP Act, s 4(2).

The TIP Act expressly prohibits the trafficking of a child by a parent, guardian or other person who has parental responsibilities and rights in respect of such child,<sup>111</sup> even if the conditions in paragraphs (a) to (j) are not met.

The captain of a ship who, on reasonable grounds, suspects that any passenger is a victim of TIP or ought reasonably to have known that the person is a victim must immediately report that suspicion to law enforcement for investigation.<sup>112</sup> A captain who fails to report is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of the victim to his or her country of origin or country or place from where the victim was trafficked.<sup>113</sup> A law enforcement officer to whom a report was made in respect of a child or an adult, or where the officer knows or ought reasonably to have known or suspected that the person is a victim of TIP on board a South Africa's vessel, may, where necessary, without a warrant, enter onto the vessel if, on reasonable grounds, it is believed that the safety of that person is at risk or that the person may be moved from the vessel. The officer may use reasonable force as may be necessary to overcome any resistance to entry onto the vessel provided that he or she audibly demanded admission to the vessel and notified the purpose for which he or she sought to enter the vessel.<sup>114</sup>

With regard to adjudication, a South African court has jurisdiction in respect of TIP committed at sea, if the trafficker is a citizen of<sup>115</sup> or ordinarily resident in South Africa,<sup>116</sup> or the trafficker has committed the offence against such a person.<sup>117</sup> The court also has jurisdiction if, after trafficking a person, the trafficker is found in South Africa, or on its territorial waters or onboard a ship, off-shore installation or fixed platform.<sup>118</sup> The person convicted for TIP at sea is

liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.<sup>119</sup>

The court may, in addition to any sentence, order the trafficker to pay appropriate compensation to the victim for damage, injury or any other issue suffered by the victim.<sup>120</sup> The court may also order the trafficker to pay compensation to the state for any expenses incurred in connection with the care, accommodation, transportation, return and repatriation of the victim.<sup>121</sup>

With regard to international cooperation, South Africa is a party to the TIP Protocol; regardless of that membership, South Africa may enter into an agreement in respect of any

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111 TIP Act, s 36.

112 TIP Act, s 9(1) and (2).

113 TIP Act, s 9(3) and (4).

114 TIP Act, ss 18(4)(a) and 19(5)(a)(i).

115 TIP Act, s 12(1)(a).

116 TIP Act, s 12(1)(b).

117 TIP Act, s 12(1)(c).

118 TIP Act, s 12(1)(d).

119 TIP Act, s 13(a).

120 TIP Act, s 29.

121 TIP Act, s 30(1).

matter pertaining to TIP with a foreign state that is not a state party to the TIP Protocol.<sup>122</sup> South Africa may also enter into an agreement with a foreign state that is a state party to the TIP Protocol in respect of any matter relating to TIP for the purpose of 'supplementing the provisions of that protocol or to facilitate the application of the principles contained therein',<sup>123</sup> provided that such agreement is not in conflict with the provisions of the TIP Protocol.<sup>124</sup> The relevant provisions of the Lomé Charter do not conflict with any provision of the TIP Protocol, but supplement the TIP Protocol as far as TIP at sea is concerned. If South Africa ratifies or accedes to the Lomé Charter, only to the extent of TIP at sea, this will be a step in the right direction, especially as the Lomé Charter enhances the objects of the TIP Act.

## 5. Comparison between the Lomé Charter and South African legislation on trafficking in persons

The following are not the only similarities or differences between the Lomé Charter and the South African legislation on TIP, but they are the most relevant as far as TIP at sea is concerned. The Lomé Charter defines TIP,<sup>125</sup> whereas the TIP Act does not, but states when a person is guilty of TIP.<sup>126</sup> It is, however, submitted that the difference is immaterial, and the wording of these provisions is consistent with the definition in the TIP Protocol.<sup>127</sup> The TIP Act defines the term 'exploitation' whereas the Lomé Charter does not, but the Lomé Charter's definition of TIP is copied from the TIP Protocol, and the term 'exploitation' in the TIP Protocol also applies to the Lomé Charter; it is submitted that the difference is immaterial. The Lomé Charter expressly prohibits TIP at sea, whereas the TIP Act does not, but provides that the South African court has jurisdiction in respect of TIP committed outside South Africa, which includes TIP committed at sea.<sup>128</sup> The difference is irrelevant, as the TIP Act technically forbids TIP at sea.

The Lomé Charter provides for international cooperation for the suppression of TIP at sea,<sup>129</sup> which guarantees joint investigation, secure information exchange procedures, and cooperation in combating human trafficking at sea.<sup>130</sup> Other cooperation in the Lomé Charter includes maritime information sharing,<sup>131</sup> intelligence sharing,<sup>132</sup> establishing a framework for close cooperation in combating TIP at sea,<sup>133</sup> and other related cooperation that ensures the combating of TIP at sea.<sup>134</sup> The TIP Act allows South Africa to enter into an agreement in respect of any matter pertaining to TIP with a foreign state that is not

122 TIP Act, s 37(1)(a).

123 TIP Act, s 37(1)(b).

124 TIP Act, s 37(2).

125 Lomé Charter, Art 1(1).

126 TIP Act, s 4.

127 TIP Protocol, Art 3.

128 TIP Act, s 12(1).

129 Lomé Charter, Art 39(2).

130 Lomé Charter, Art 32.

131 Lomé Charter, Art 33.

132 Lomé Charter, Art 34.

133 Lomé Charter, Art 37.

134 Lomé Charter, Art 40.

a state party to the TIP Protocol,<sup>135</sup> or with a foreign state that is a state party to the TIP Protocol 'for the purpose of supplementing the TIP Protocol or to facilitate the application of the principles contained therein.'<sup>136</sup> Such agreement cannot conflict with the provisions of the TIP Protocol;<sup>137</sup> the relevant provisions of the Charter do not conflict with any provision of the TIP Protocol but supplement the Protocol as far as TIP at sea is concerned.

## 6. Conclusion

As demonstrated earlier, the LOSC, to which South Africa is a party, is silent on the prevention and suppression of TIP at sea, and the LOSC does not urge state parties to combat TIP at sea or compel state parties to cooperate in combating TIP at sea. That gap is perceived to be filled by the TIP Protocol, to which South Africa is a party, which expressly urges state parties to prevent and suppress TIP. However, that Protocol is silent on human trafficking at sea, unlike other similar international instruments that expressly urge their state parties to combat similar crimes at sea. The STPC, to which South Africa is also a party, does not assist in this regard, as it only deals with prostitution, which is limited in scope. The other instruments, such as the AU Agenda, AIMS, and the Plan, are policy documents that do not have the force of law. The only relevant international instrument in Africa with the force of law that expressly urges state parties to prevent and suppress TIP at sea is the Lomé Charter, of which South Africa is not yet a party.

Should South Africa decide to ratify the Lomé Charter and should the Lomé Charter enter into force, South Africa must adopt policies that guarantee the availability of resources, either from public funds or by forging public-private partnerships, to invest in equipment, operations and training to address TIP at sea. In addition, South Africa should join other state parties in adopting guidelines and modalities to guide state parties in fulfilling their obligations in the Lomé Charter. South Africa should ratify the Lomé Charter only to the extent of TIP at sea, especially as the Lomé Charter does not conflict with any international legal instruments on TIP but heavily supplements the TIP Protocol and other relevant international instruments to combat human trafficking at sea.

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135 TIP Act, s 37(1)(a).

136 TIP Act, s 37(1)(b).

137 TIP Act, s 37(2).