

International Criminal Justice Series

Volume 27

Series Editors

Gerhard Werle, Berlin, Germany

Moritz Vormbaum, Münster, Germany

Series Information

The *International Criminal Justice Series* aims to create a platform for publications covering the entire field of international criminal justice. It, therefore, deals with issues relating, among others, to:

- the work of international criminal courts and tribunals;
- transitional justice approaches in different countries;
- international anti-corruption and anti-money laundering initiatives;
- the history of international criminal law.

It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars.

Editorial Office

Prof. Dr. Moritz Vormbaum
University of Münster
Faculty of Law
Bispinghof 24–25
48143 Münster, Germany
vormbaum@uni-muenster.de

More information about this series at <http://www.springer.com/series/13470>

Nicksoni Filbert Kahimba

Human Trafficking Under International and Tanzanian Law



ASSER PRESS



Springer

Nicksoni Filbert Kahimba
School of Law
University of Dar es Salaam
Dar es Salaam, Tanzania

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-434-1 ISBN 978-94-6265-435-8 (eBook)
<https://doi.org/10.1007/978-94-6265-435-8>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

© T.M.C. ASSER PRESS and the author 2021

No part of this work may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher, with the exception of any material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.

The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

To my stepmother whom I consider my mother and to all the young people in Africa who, despite the challenges they face, resolve that it is not their unfortunate origins that determine who they become but the faith in the better tomorrow.

Acknowledgements

I would like to sincerely thank Prof. Werle for his priceless and invaluable supervision and counselling in the writing and completion of this book. I am immensely indebted to Dr. Epik and Dr. Li for their assisting supervision and endless encouragement in the course of writing this work. I highly appreciate the time they dedicated to reading, correcting and suggesting areas for improvement in each chapter of this book. My gratitude as well reaches out to the entire team of the Chair of Prof. Werle, especially to Frau Schepke, Anna, Nella and Tanja, for their ceaseless readiness to help whenever I consulted them. I also acknowledge the role played by my colleagues, especially Victoria and Seada, in giving me hope and constant strength in the course of developing the book.

I acknowledge the contribution of my family and all the relatives who have played their part like none other. I give special thanks to my stepmother, who, because of her initial decision to enrol me at Vingunguti Primary School in Dar Es Salaam for my primary education and also at Mbingu Sister's Education Centre in Mbingu Kilombero for my secondary education, I have been able to reach this far. I also thank my aunt and uncle, Mr. and Mrs. Rwenyagira, whose initial trust in my intellectual capacity when I was but a small boy sparked in me that hope which I forever cherish in my heart. I am as well thankful to my church communities and friends at Vingunguti, Chuo Kikuu and New Life Berlin for their spiritual, moral and intellectual support.

Finally, I have to admit that my faith in God in the person of Jesus Christ has been the reason for my life and all that I have been able to accomplish. To Him resides all the wisdom and knowledge I ever can attain. To Him, I shall constantly return the glory forever and ever, amen.

Contents

1	Introduction to the Book	1
1.1	Introduction and Background Information	1
1.2	Objectives of the Book	12
1.3	Chapter Outlines	12
	References	13
 Part I International Anti-trafficking Legal Frameworks		
2	Understanding Trafficking in Persons	27
2.1	Historical Perspectives	28
2.1.1	Before the League of Nations	29
2.1.2	After the League of Nations	30
2.1.3	United Nations (UN)	34
2.1.4	International Organization for Migration	36
2.1.5	European Union	36
2.1.6	Council of Europe	38
2.1.7	Organization of American States (OAS)	39
2.1.8	African Union (AU) and Asia	40
2.1.9	Report of the UN Special Rapporteur	41
2.2	Need for a New Definition of Trafficking	42
2.3	Drafting the TIP Protocol 2000 and Its Definition	43
2.4	Current Definition of Trafficking	44
2.4.1	Action Element of Trafficking	45
2.4.2	Means Element of Trafficking	47
2.4.3	Purpose Element of Trafficking	55
2.5	Conclusion	73
	References	74

3	International Legal Regime	89
3.1	Anti-trafficking Primary Legal Regime	90
3.1.1	Organised Crime Convention	92
3.1.2	TIP Protocol	97
3.1.3	Migrant Smuggling Protocol	105
3.2	Regional Anti-trafficking Legal Frameworks	115
3.2.1	SAARC Convention	116
3.2.2	CoE Anti-trafficking Convention	119
3.2.3	Directive 2011/36/EU	124
3.2.4	Fragmented Legal Framework of the AU	132
3.3	Human Rights Instruments	138
3.3.1	Universal Declaration of Human Rights (UDHR)	140
3.3.2	ICCPR Covenant	140
3.3.3	ICESCR Covenant	141
3.3.4	CEDAW Convention	142
3.3.5	CERD Convention	143
3.3.6	CRC Convention	145
3.3.7	CoE Human Rights Convention	146
3.3.8	African Human Rights Charter	147
3.3.9	American Convention on Human Rights	149
3.3.10	Migrant Workers Convention	149
3.3.11	Refugee Convention	155
3.4	Conclusion	161
	References	161
4	State Responsibility for Trafficking	181
4.1	State Responsibility in International Law	182
4.2	Attribution	187
4.3	Breach of an International Obligation	194
4.4	Special Considerations on State Responsibility for Trafficking	196
4.5	Legal Consequences	202
4.6	Invoking International Responsibility	206
4.7	Countermeasures	209
4.8	Conclusion	211
	References	211
5	Anti-trafficking Obligations	225
5.1	Obligation of a Criminal Justice Response	226
5.1.1	Obligation to Criminalise Trafficking in Persons	226
5.1.2	Criminalisation of Trafficking Related Crimes	230
5.1.3	Criminal Jurisdiction	232
5.1.4	Investigation, Prosecution and Adjudication	234
5.1.5	Sanctions and Penalties	236

- 5.1.6 Asset Confiscation, Recovery and Use 238
- 5.1.7 International Co-operation 241
- 5.2 Obligation to Prevent Trafficking 246
 - 5.2.1 Preventing Trafficking through Addressing Vulnerability 247
 - 5.2.2 Preventing Trafficking by Addressing Demand 248
 - 5.2.3 Preventing Trafficking Lawfully 251
- 5.3 Obligation of Protection, Assistance, Support and Remedies . . . 254
 - 5.3.1 Obligation to Identify Victims of Trafficking 255
 - 5.3.2 Obligation not to Punish Victims 258
 - 5.3.3 Protection from Further Harm and of Privacy 259
 - 5.3.4 Physical and Psychological Care and Support 262
 - 5.3.5 Obligation Relating to Legal Assistance and Protection 264
 - 5.3.6 Obligations Relating to Repatriation 267
 - 5.3.7 Obligation of Effective and Appropriate Remedies 270
- 5.4 Conclusion 272
- References 272

Part II Tanzania’s Legal and Institutional Anti-trafficking Framework

- 6 Trafficking in Persons in Tanzania 287**
 - 6.1 Human Trafficking General Landscape 288
 - 6.1.1 Legal and Geographical Background 288
 - 6.1.2 Trafficking and Its Historical Underpinnings 289
 - 6.1.3 Nature of Trafficking in Tanzania 291
 - 6.1.4 Causes of Trafficking in Persons 296
 - 6.2 Early Anti-trafficking Legal Response 301
 - 6.2.1 Penal Code 302
 - 6.2.2 Sexual Offences Special Provisions Act of 1998 (SOSPA) 305
 - 6.2.3 Penal Act of Tanzania Zanzibar 312
 - 6.3 Need for a Different Legal Regime 313
 - 6.3.1 Domestication 315
 - 6.3.2 Enactment of the 2008 Act 317
 - 6.3.3 Constitution of Tanzania 322
 - 6.4 Conclusion 324
 - References 325
- 7 Criminal Justice Response 335**
 - 7.1 Some Interpretational and Problematic Aspects 336
 - 7.2 Criminalisation and Prohibition of Trafficking 348
 - 7.2.1 First Act of Trafficking [Section 4(1)(a)] 348

- 7.2.2 Second Act of Trafficking [Section 4(1)(b)] 359
- 7.2.3 Third Act of Trafficking [Section 4(1)(c)] 360
- 7.2.4 Fourth Act of Trafficking [Section 4(1)(d)] 362
- 7.2.5 Fifth Act of Trafficking [Section 4(1)(e)] 364
- 7.2.6 Sixth Act of Trafficking [Section 4(1)(f)] 365
- 7.2.7 Seventh Act of Trafficking [Section 4(1)(g)] 367
- 7.2.8 Eighth Act of Trafficking (Placement)
[Section 4(2)] 375
- 7.2.9 Acts Promoting or Facilitating Trafficking
[Section 5] 379
- 7.3 Trafficking of Children [Section 4(3)] 391
- 7.4 Consent of the Victim [Section 4(4)] 393
- 7.5 Criminal Jurisdiction 393
- 7.6 Duty to Investigate Cases of Trafficking 394
- 7.7 Judicial Proceedings 396
- 7.8 Powers of the Court on Compensation 397
- 7.9 Sanctions and Penalties 399
- 7.10 Asset Confiscation, Forfeiture and Use 399
- 7.11 Obligation to Collect and Exchange Information 401
- 7.12 Obligation of International Co-operation 401
- 7.13 Conclusion 404
- References 405

8 Prevention of Human Trafficking and Protection of Victims 415

- 8.1 Obligation to Prevent Trafficking in Persons 416
 - 8.1.1 Preventing Trafficking through Addressing
Vulnerability 416
 - 8.1.2 Preventing Trafficking through Addressing Demand 422
 - 8.1.3 Preventing Trafficking by Acting Lawfully 423
- 8.2 Obligation of Assistance, Protection, Support and Remedies 426
 - 8.2.1 Obligation to Identify Victims of Trafficking 427
 - 8.2.2 Obligation Not to Punish Victims 430
 - 8.2.3 Rescue, Protection from Further Harm and Respect
of Privacy 431
 - 8.2.4 Obligation to Provide Physical, Social
and Psychological Care 433
 - 8.2.5 Obligation to Provide Legal Assistance
and Protection 437
 - 8.2.6 Obligation of Repatriation 438
 - 8.2.7 Obligation of Effective and Appropriate Remedies 440
 - 8.2.8 Special Consideration on the Child Victims
and Disabled Persons 442

- 8.3 Centres for Protection and Assistance of Victims 444
- 8.4 Conclusion 446
- References 447
- 9 Institutional Framework and the Action Plans 455**
 - 9.1 Institutional Framework 455
 - 9.2 National Action Plans 458
 - 9.2.1 Guiding Principles 459
 - 9.2.2 Strategic Actions 460
 - 9.3 Case Law 466
 - 9.4 Conclusion 476
 - References 477
- Part III Summary, Conclusion and Recommendations**
- 10 Summary, Conclusion and Recommendations 481**
 - 10.1 Comprehensive Summary 481
 - 10.2 Conclusion 497
 - 10.3 Recommendations 499
- Table of Cases 503**
- Index 509**

Acronyms and Abbreviations

ACJHPR	African Court of Justice and Human and Peoples' Rights
AG	Attorney General
AIDS	Acquired Immune Deficiency Syndrome
ASEAN	Association of Southeast Asian Nations
ATC	Anti-Trafficking Committee
ATF	Anti-Trafficking Fund
ATS	Anti-Trafficking Secretariat
AU	African Union
AU.COMMIT	AU Commission Initiative against Trafficking
CAP	Chapter
CATW	Coalition against Trafficking in Women
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CRC	Committee on the Rights of the Child, Convention on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
C-SEMA	Children's SEMA, Swahili National Helpline 116
CSOs	Civil Society Organisations
DPP	Director of Public Prosecution Services
DRC	Democratic Republic of the Congo
DSW	Department of Social Welfare
EAC	East African Community
EARPCCO	Eastern African Regional Police Chiefs Corporation Organisation
EC	European Commission
ECOWAS	Economic Community of Western African States

ECtHR	European Court of Human Rights
EES	Employment and Earnings Survey
EMN	European Migration Network
ESCR	Economic, Social and Cultural Rights
EU	European Union
EUROPOL	European Union Agency for Law Enforcement Cooperation
FATF	Financial Action Task Force
GAATW	Global Alliance Against Trafficking in Women
GCIM	Global Commission on International Migration
GN	Government Notice
GRETA	Group of Experts on Action against Trafficking in Human Beings
HCD	High Court Digest
HIV	Human Immunodeficiency Virus
IACtHR	Inter-American Court of Human Rights
ICAT	Inter-Agency Coordination Group against Trafficking in Persons
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGP	Inspector General of Police of Tanzania
ILC	International Law Commission
ILFS	Integrated Labour Force Survey
ILO	International Labour Organization
IMT	International Military Tribunal
INTERPOL	International Criminal Police Organization
IOM	International Organization for Migration
KIWOHEDE	Kiota Women's Health and Development Organisation
LGAs	Local Government Authorities
LHRC	Legal and Human Rights Centre
LRC	Law Reform Commission of Tanzania
M&E	Monitoring and Evaluation
MCDGC	Ministry of Community Development, Gender and Children
MDAs	Ministries, Departments and Agencies
MLA	Mutual Legal Assistance
MoHA	Ministry of Home Affairs
NGOs	Non-Governmental Organisations
NMIS	National Management Information System
NOLA	National Organisation for Legal Assistance
NSGRP	National Strategy for Growth and Reduction of Poverty
OAS	Organization of American States
OUA	Organisation of African Unity
OECD	Organization for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PCCB	Prevention and Combating of Corruption Bureau

PCIJ	Permanent Court of International Justice
R	Republic
RE	Revised Edition
RECs	Regional Economic Communities
RMMS	Regional Mixed Migration Secretariat
SAARC	South Asian Association for Regional Cooperation
SADC	Southern African Development Community
SARPCCO	Southern African Regional Police Chiefs Cooperation Organisation
SOSPA	Sexual Offences Special Provisions Act
SSA	Sub-Saharan Africa
STDs	Sexually Transmitted Diseases
TAWLA	Tanzania Women Lawyers Association
TI	Transparency International
TIP	Trafficking in Persons
TISS	Tanzania Intelligence and Security Services
TLR	Tanzania Law Reports
TLS	Tanganyika Law Society
TNBS	Tanzania National Bureau of Statistics
TRA	Tanzania Revenue Authority
TUKI	Swahili-English Dictionary
TV	Television
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNCHR	United Nations High Commissioner for Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNTC	United Nations Treaty Collections
UNTS	United Nations Treaty Series
USA	United States of America
UTSS	Under The Same Sun
WHO	World Health Organization
WLAC	Women's Legal Aid Centre
ZLSC	Zanzibar Legal Services Centre