



Botswana

Botswana's Legislative Compliance with International Instruments Concerning Trafficking in Persons

Dr. Elizabeth Macharia Mokobi

University of Botswana

Member IAWJ Botswana Chapter

Introduction

Let me take this opportunity to extend my thanks to the organisers of this important conference on human trafficking and in particular, Monsignor Sánchez Sorondo, for the invitation to present this paper. As already introduced, my name is Elizabeth Macharia-Mokobi. I am a lecturer in law at the University of Botswana with a research interest in International Law and Criminal Procedure.

Three presenters will speak on the situation in Botswana this morning. I have been charged with speaking about the degree to which Botswana's municipal trafficking laws are compliant with her international law obligations as set out in international instruments concerning the trafficking of persons. This topic is of utmost importance and should be considered by all nations wishing to legislate on trafficking. This is because international conventions set out the gold standard, a set of rules agreed by nations to combat the scourge of trafficking. However, as you are aware, in many jurisdictions, the interface between international law and municipal law can be complex.

Unless a country subscribes to a monist tradition, where international law automatically forms part of the municipal law, it is entirely possible that international law obligations remain aspirational and unreachable by ordinary victims of trafficking within the national jurisdiction.

This problem is most common in countries following the dualist tradition. In such countries, such as Botswana, international law must be taken through a process of domestication in order for it to form enforceable rights and duties. It is not unusual for some provisions of treaties to be ignored or watered down at the moment of domestication, in order to present a more palatable legislative document at the municipal level. Obviously there are many reasons that inform the departure from the express terms of treaties, and I shall not venture into those now. However, I will give some examples of treaty obligations not finding their way into municipal law from my own jurisdiction Botswana.

The first example concerns the death penalty. Botswana is signatory to several convention that prohibit torture, cruel and inhuman punishment and yet, like many other similar jurisdictions, Botswana still retains the death penalty as part of her municipal law. Another example concerns judicial corporal punishment. Botswana has acceded to the Convention on the Rights of the Child, which expressly prohibits corporal punishment of children, and yet Botswana still retains corporal punishment in all settings. The reason I point these examples out is to illustrate that International Law conventions are not always given full effect in the municipal setting. I am sure this is the experience of some nations here as well. The purpose of this paper is to investigate how closely Botswana's human trafficking laws adhere to her international law obligations.

International Instruments concerning trafficking in persons

One of the main international instruments used to combat human trafficking is the Palermo Protocol to Prevent, Suppress and Punish the Trafficking of Persons, Especially Women and Children, of 2000. The Palermo Protocol supplements the UN Convention against Transnational Organised Crime of 2000. Article 2 of this convention provides for the prevention of human trafficking, calls upon states to protect victims of trafficking, and to promote cooperation amongst states to combat human trafficking. Article 5 of the same Convention calls on states to criminalise, trafficking, attempted trafficking, acting as an accomplice in trafficking and the organisation and directing of human trafficking. Botswana ratified both the UN Convention against Transnational Organised Crime and the Palermo Protocol in 2002.

Three International Labour Organisation Conventions contain provisions dealing with forced labour. First is Convention number 29 of 1930, which requires states to suppress forced or compulsory labour. Botswana ratified this convention in 1997. The second ILO treaty dealing with forced labour is Convention number 105 of

1957 on the abolition of forced labour. Botswana ratified this convention in 1997. Lastly, Convention no. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) which Botswana ratified in the year 2000. This convention prohibits all forms of slavery and practices similar to slavery, prostitution of children, the use of children for illicit activities, and work which harms the health safety or morals of children.

Botswana is also a state party to the United Nations Convention on Civil and Political Rights since 2000. This convention prohibits slavery, the slave trade, servitude and forced labour. Botswana is state party to the Convention on the Elimination of all forms of Discrimination against women (CEDAW) since 1996. This convention prohibits trafficking in women and the exploitation of women through prostitution. Botswana is also state party to the Convention on the Rights of the Child since 1995 and its optional protocol on the sale of children, child prostitution and child pornography since 2003. Both of these conventions prohibit the trafficking of children for any purpose and the exploitation of children through exploitation or forced labour. Lastly, Botswana acceded to the UN Refugee Convention and its 1967 Protocol in 1969. The UN High Commissioner for Refugees has indicated that some trafficked persons may be entitled to international refugee protection if they have a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion, in their country of origin.

On the other hand, Botswana is not a state party to the following international instruments: first, the Slavery Convention of 1926 and its 1956 supplement whose aim is to prevent and suppress the slave trade and to bring about its complete abolition as well as to obtain the criminalisation of various forms of slavery. Botswana is also not a state party to the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), which requires states to criminalise the exploitation of others through prostitution.

Domestication of the relevant provisions of these instruments through municipal legislation

In order to win the war against human trafficking, states must take the provisions of these international conventions and make them their own. By this, I mean that states must take steps to suppress conduct and criminalise behaviour that would amount to human trafficking. Without robust municipal laws, rules contained in international conventions remain aspirational and factually inaccessible and ineffective for victims and law enforcement agencies alike.

Human trafficking can be combatted through an immigration perspective, through laws that curb human trafficking at the borders and also through a criminal perspective through laws that criminalise and prosecute offenders within a state's borders. These methods must be used simultaneously and not independently of each other.

A human rights based approach to combatting trafficking will also pay particular attention to the situation of the vulnerable victims of trafficking in order to ensure that the most vulnerable are protected. Victims of trafficking should be protected from the possibility of further victimisation due to disadvantage and lack of social protection. In short, effective municipal laws must prevent and prosecute trafficking but also protect victims of trafficking. I will now illustrate how Botswana's municipal law gives effect to its international obligations.

1. The Anti-Human Trafficking Act 2014 is an instrument enacted to give effect to, or domesticate, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (2000). The Act criminalises the trafficking of adults and children, provides procedures for reporting of suspected trafficked persons and provides social and psychological support for trafficked persons, provides immunity from prosecution of trafficked persons for immigration offences and the possibility to remain in Botswana if repatriation would be unsafe.

2. Forced or compulsory labour, which is prohibited under the ILO Conventions mentioned above, is included in the definition of exploitation under section 2 of the Anti-Trafficking Act and criminalised under section 9 of the same Act. Forced labour is also prohibited under sections 69 to 72 of the Employment Act, although the penalties under the Employment Act lack necessary severity.

3. Slavery and forced labour of children and the sexual exploitation of children is prohibited under the provisions of ILO convention number 182 concerning the worst forms of child labour. Forced labour and sexual exploitation of children is prohibited indirectly under section 2 as read with section 9 and 10 of the Anti-Human Trafficking Act. Similar provisions can be found under Part 16 of the Children's Act which is concerned with Child Abduction and Trafficking in children. Again, the only notable difficulty here is the disparity in penalties. Penalties under the Children's Act being markedly lower than those under the Anti-Human Trafficking Act.

4. The obligation to prevent and suppress slavery under the ICCPR is been given effect indirectly under the Anti-Human Trafficking Act and Botswana's Penal Code. Slavery as a form of exploitation is criminalised

under section 2 as read with section 9 to 12 of the Anti- Human trafficking Act and kidnapping and abduction for the purpose of slavery is criminalised under section 256 of the Penal Code.

5. Obligations to prevent the trafficking of women and children under CEDAW and the UNCRC are also indirectly met through provisions of the Anti-Human Traffic Act, 2014 and provisions of the Children Act, 2009.

6. Lastly, the possibility of a right to remain for trafficked persons who may meet the requirements for recognition as refugees is not expressly mentioned as such in the Anti-Human trafficking Act. However, the Act makes provision, under section 26, for the Minister to allow a victim of trafficking the right to remain in Botswana in the event that repatriation is not safe. This may indicate that it may be possible for victims of trafficking to be afforded refugee status where they qualify for such. This would effectively fulfil Botswana's obligations under the 1951 Refugee Convention and its 1967 Protocol.

Conclusion

The question I posed at the beginning of this discussion was whether Botswana's municipal laws fully domesticate her obligations under international conventions that she has ratified. Indeed, I believe that the answer is yes. What remains is to be seen how effectively such obligations can be implemented by government agencies charged with this task. One emerging challenge is the need to rationalise the disparities between penalties across the various pieces of legislation I have mentioned.

I thank you for your kind attention and hand over to my colleagues who will tell you more about Botswana's national efforts to combat human trafficking.