

**Labour law as an avenue to address forced
labour: Lessons for South Africa from a United
Kingdom and Brazilian Perspective**

T Mogapaesi

 **orcid.org/0000-0002-8781-7667**

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Promoter: Dr A Botes

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Student number: 24793213

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SUMMARY

The abolition of forced labour has been one of the International Labour Organisation's (ILO) core mandates since its formation in 1919. During that era, forced labour was commonly used in colonial empires by colonial governments to propel production and cut labour costs. In an endeavour to achieve the significant reduction of its use, the ILO mandated its members who ratified its *Forced Labour Convention* to declare the use of forced labour a criminal offence and assign strict penalties to it. Over and above the Convention's historical foundation, this standard has been carried into the international community's twenty-first century efforts to eliminate forced labour.

Consequently, forced labour has for the past eighty-seven years been characterised as a criminal offence in national laws. Despite the deterrent nature that criminal sanctions ought to serve, it seems that the incidence of forced labour has not witnessed a significant reduction. Recent evidence points out that there is a rise in the use of forced labour in private economy work. This rise has been attributed to a number of factors that highlight that criminal law centred approaches to forced labour are susceptible to gaps and failures. The non-preventative nature of these approaches tends to focus on the punishment of offenders and fail to pay due regard to the need to put in place measures to prevent its occurrence. In addition, adoption of such an approach results in a focus on improving the criminal law to better respond to the offence. Along this line, the contribution of the labour law and its enforcement mechanisms has been side lined and not been developed to properly address the offence.

In a recent turn of events, the introduction of the *Protocol of 2014 to the Forced Labour Convention* demonstrates the ILO's recognition that criminal enforcement alone cannot eliminate forced labour. Through this new Protocol, cognisance is taken of the importance that the labour law and labour market institutions may play towards eliminating the offence. The Protocol makes it binding for signatories to involve labour market institutions in national strategies tailored to curb the offence.

It further calls for renewed efforts to fight forced labour in an integrative and multi-dimensional manner that not only focuses on reacting to the crime but also puts in place measures to prevent its occurrence. The Protocol envisions frameworks where employers' organisations, trade unions as well as labour inspectors' roles are properly asserted in national forced labour laws.

Meanwhile, human trafficking has also found audience within the forced labour discourse due to the relationship between the two offences. Whilst the two offences are normally seen as counterparts, this relationship has been overemphasised resulting in frameworks that lean on human trafficking to address forced labour. As a result, such approaches fail to extend coverage to all forced labour victims because its occurrence is not always linked to human trafficking. In effect, forced labourers who have not been trafficked are left with no clear indication as to what their remedy is.

Currently, the South African framework to forced labour appears to mirror the standard introduced by the *Forced Labour Convention* through its strict criminalisation of forced labour. The prohibition of forced labour is recognised as a human right within the country's constitutional framework. However, the legislative framework tailored to give effect to this right is not fully compliant with the aspirations of the Convention. Contrary to the broad coverage envisioned by the Convention, the *Basic Conditions of Employment Act's* endeavour to punish forced labour is restricted to forced labour that affects workers who are considered as 'employees' for purposes of the Act thus leaving forced labourers whose employment relationships fall beyond the Act without a remedy. The enactment of the *Prevention and Combating of Trafficking for Persons Act* also does little to fill this legislative gap as it merely identifies forced labour as an outcome of human trafficking. It appears that beyond the trafficking framework, no clear remedy lies for general forced labour victims.

Contrary to the South African approach, the United Kingdom and Brazil have adopted progressive measures to deal with forced labour and ensure that their

frameworks meet the international standards of the Convention. In particular, the UK has moved away from a framework that relies on human trafficking to address the offence of forced labour in recognition of the fact that forced labour can occur independent of human trafficking. Whereas the *Modern Slavery Act* is founded on criminal law, it further introduces an opportunity for labour institutions to be involved through its establishment of the Office of the Anti-Slavery Commissioner. The country's *Gangmasters Licensing Act* also recognises forced labour as an issue of labour market concern through its endeavour to curb the practice in select sectors of agriculture. Labour market institutions such as trade unions have particularly asserted their relevance to making a significant reduction to forced labour.

Brazil on the other hand employs a framework largely based on policies to support its Penal Code's establishment of the offence of slave labour. Brazil has made strides in the area of labour law involvement in the fight against slave labour through the extended reach of labour inspectors as well as the unrestricted jurisdiction of labour courts to make decisions on slave labour. Currently, the Brazilian framework largely emulates the measures introduced by the Protocol as binding towards signatories. Taken together, the UK and Brazilian approaches exhibit good examples from which South Africa may derive lessons to enrich its framework.

While the importance of criminal sanctions should not be downplayed, the current approach adopted by South Africa does not meet the standards proposed in the Convention, neither does it reflect attributes of the *2014 Protocol on Forced Labour*. In light of this, it is necessary to ask and address how and to what extent the international, English and Brazilian law may assist South Africa adjust its labour laws to meet the international standard. This exercise is meant to highlight to South Africa that its current approach is susceptible to failures and may hence whittle down global efforts to curtail the crime.

This thesis incorporates the law as at April 2018.

Key concepts: Forced labour, modern slavery, slavery, human trafficking, labour law, criminal law, labour rights, human rights, worker, employee, employer, informal employment, formal employment, conventional labour laws

OPSOMMING

Sedert die ontstaan van die Internasionale Arbeidsorganisasie (IAO) in 1919 was die afskaffing van dwangarbeid as een van die kern mikpunte daarvan gestel. Gedurende daardie era was slawerny en dwangarbeid algemene praktyke van koloniale regerings ten einde produksievlakke te verhoog en arbeidskoste te besnoei. In 'n poging om 'n noemenswaardige afname in hierdie praktyke te bewerkstellig het die IAO die lidstate daarvan (en wat die *Forced Labour Convention* geratifiseer het), aangemoedig om dwangarbeid as 'n kriminele oortreding te verklaar en streng strawwe daaraan te koppel. Bo en behalwe die Konvensie se historiese grondslag en toepaslikheid het die standarde daarin vervat verder tot die hedendaagse internasionale gemeenskap se pogings bygedra om dwangarbeid in die een en twintigste eeu te elimineer.

Gegewe die fokus van die Konvensie was dwangarbeid oor die afgelope sewe en tagtig jaar deur nasionale regstelsels as 'n kriminele oortreding bestempel en as sodanig aangespreek. Die afwerende aard van strafregtelike sanksies ten spyte, blyk dit egter dat die voorkoms van dwangarbeid nie 'n merkwaardige afname getoon het nie. Onlangse studies dui aan dat daar eerder 'n toename in die gebruik van dwangarbeid in die privaatsektor plaasgevind het. Gemelde toename kan aan meerdere faktore toegeskryf word, wat hoofsaaklik illustreer dat die suiwer strafregtelike benadering tot dwangarbeid vir leemtes en tekortkominge vatbaar is. Die nie-voorkombare aard van hierdie benaderings illustreer 'n tendens om slegs oortreders te straf eerder as om stappe te neem wat kan verhoed dat dwangarbeid in die eerste plek plaasvind. Die voormelde benadering het ook tot gevolg dat hoofsaaklik op die ontwikkeling van die strafreg op hierdie gebied gefokus word. Die belangrike rol wat die arbeidsreg en die relevante arbeidsmeganismes in die gevalle van dwangarbeid kan vertolk word derhalwe, oorgesien en nie ontwikkel om die arbeidsregtelike implikasies van dwangarbeid behoorlik aan te spreek nie.

In 'n onlangse verwikkeling is die *Protocol of 2014 to the Forced Labour Convention* deur die IAO bekend gestel, ingevolge waarvan die IAO erken dat die strafregtelike

benadering tot dwangarbeid alleen nie voldoende is om die praktyk behoorlik te elimineer nie. By wyse van hierdie Protokol word erkenning verleen aan die belangrikheid van arbeidsreg en die instellings wat daarmee gepaardgaan in die proses om dwangarbeid vanuit die werkplek te verwyder. Ingevolge die Protokol word lidstate wat dit onderteken het daartoe verbind om arbeidsinstellings te betrek in hulle nasionale beweging om dwangarbeid te stuit. Vervolgens stel die nuwe ontwikkelings van die IAO dit in die vooruitsig om die stryd teen dwangarbeid tot 'n geïntegreerde en multidimensionele aanslag te vernuwe. Sodoende word daar nie net op die oortreding gereageer nadat dit reeds plaasgevind het nie, maar word daar meganismes in plek gestel wat die oortreding van meet af aan kan voorkom. Om laasgenoemde te bereik beoog die Protokol die instel van regsraamwerke ingevolge waarvan die samewerking van werkgewersorganisasies, vakbonde en arbeidsinspekteurs afgedwing word.

Mensehandel het ook al binne die bestek van dwangarbeid aandag geniet weens die erkende verhouding wat tussen die twee oortredings bestaan. Terwyl hierdie oortredings normaalweg as samehangend beskou was, het die oorbeklemtoning van die betrokke verhouding tot gevolg gehad dat dwangarbeid in vele regstelsels slegs vanuit die oogpunt van mensehandel in wetgewing aangespreek is. Die gevolg hiervan is dat sodanige benaderings nalaat om beskerming te verleen aan diegene wat nie deur middel van mensehandel-praktyke slagoffers van dwangarbeid geword het nie. In effek sal in laasgenoemde geval remedies ingevolge daardie wetgewing nie vir dwangarbeiders beskikbaar wees nie omdat hulle buite die trefwydte van die wetgewing val.

Tans blyk Suid-Afrika se regsposisie met betrekking tot dwangarbeid die standarde van die *Forced Labour Convention* te reflekteer deur sulke praktyke streng te kriminaliseer. Deur nie aan dwangarbeid onderwerp te word nie word as 'n fundamentele reg in die land se grondwetlike raamwerk bevestig. Alhoewel, die wetgewende raamwerk wat ontwerp is om aan hierdie reg effek te gee is nie ten volle met die oogmerke van die Konvensie belyn nie. Strydig met die wye dekking van die Konvensie erken die *Wet op Basiese Diensvoorwaardes* dwangarbeid as 'n

strafbare oortreding slegs in gevalle waar dit gepleeg is teen 'n persoon wat ingevolge daardie wet as 'n 'werknemer' geklassifiseer kan word. Dit hou vervolgens in dat persone wat nie aan die definisie van 'n werknemer voldoen nie sal nie ingevolge hierdie wet beskerming teen dwangarbeid ontvang nie. Die inwerkingtreding van die *Prevention and Combating of Trafficking in Persons Act* dra verder weinig by om die leemte te vul, aangesien dit slegs dwangarbeid binne die konteks van mensehandel aanspreek. Dus blyk dit dat, buite die raamwerk van mensehandel, daar geen duidelike remedies vir slagoffers van dwangarbeid in die algemeen beskikbaar is nie. Soos die posisie tans daar uitsien speel die Suid-Afrikaanse arbeidsreg en arbeidsinstellings geen rol in die stuit van dwangarbeid nie. Bogenoemde kwelpunte behoort dringend aangespreek te word ten einde te verseker dat aan die internasionale arbeidsstandaarde voldoen word.

In teenstelling met die Suid-Afrikaanse benadering het die Verenigde Koninkryk (VK) en Brasilië progressiewe maatreëls aangeneem by wyse waarvan dwangarbeid binne hierdie jurisdiksies aangespreek word. Daarmee word gepoog om so ver moontlik aan die internasionale standaarde van die IAO te voldoen. In die besonder het die VK wegbeweeg van 'n stelsel wat slegs dwangarbeid binne die konteks van mensehandel aanspreek. Die VK erken nou dat dwangarbeid wel onafhanklik van mensehandel kan plaasvind en dus as 'n losstaande oortreding in wetgewing gedek behoort te word. Alhoewel die *Modern Slavery Act* op die strafregtelike aspekte van dwangarbeid fokus, skep dit ook geleentheid vir arbeidsinstellings om aktief by die stryd teen hierdie praktyk betrokke te raak. Laasgenoemde geleentheid is benut deur die Kantoor van die Anti-Slawerny Kommissaris in die lewe te roep. Die VK se *Gangmasters Licensing Act* erken verder dat dwangarbeid nie net 'n kriminele oortreding is nie, maar ook 'n arbeidskwessie verteenwoordig. Sodanige erkenning word verleen deur te poog om hierdie praktyke in gekose sektore van landbou te stuit. Laastens het vakbonde in die VK ook al hulle relevansie in die stryd teen dwangarbeid bewys deur 'n rol in die merkwaardige afname van hierdie praktyke te speel.

Brasilië maak hoofsaaklik van 'n raamwerk gebruik wat op beleide geskoei is, waardeur die *Penal Code* se verbod op dwangarbeid ondersteun word. Brasilië het noemenswaardige vordering gemaak om die arbeidsreg tot die stryd teen dwangarbeid te betrek. Dié vordering is veral sigbaar in die verreikende rol van arbeidsinspekteurs en die onbeperkte jurisdiksie van arbeidshoue om bevindings oor dwangarbeid te maak. Tans reflekteer die Brasiliaanse posisie tot 'n groot mate die standaarde soos deur die Protokol voorgestel. Die VK posisie en die benadering in Brasilië blyk goeie voorbeelde van die korrekte benadering tot dwangarbeid in te hou en kan waardevolle lesse daaruit deur die Suid-Afrikaanse reg ontleen word.

Terwyl die belangrikheid van kriminele sanksies teen dwangarbeid nie in hierdie studie afgemaak word nie, moet erken word dat die huidige benadering wat in Suid-Afrika gevolg word nie ten volle aan die internasionale arbeidsstandaarde in die Konvensie voldoen nie en veral nie die kenmerke van die 2014 Protokol weerspieël nie. In die lig van bogenoemde moet die vraag derhalwe gestel word tot welke mate die internasionale reg en die posisies in die VK en Brasilië aangewend kan word om Suid-Afrika van hulp te wees in die verbetering van die huidige posisie met betrekking tot dwangarbeid. Die verbeterings moet uiteindelik daarop gemik wees om die Suid-Afrikaanse reg meer met die internasionale standaarde te belyn, veral met betrekking tot die rol wat die arbeidsreg in die stryd teen dwangarbeid behoort te vertolk. Hierdie studie beoog om aan te toon dat die huidige benadering in Suid-Afrika met betrekking tot dwangarbeid vatbaar is vir mislukking en dus die internasionale pogings om hierdie oortreding te bekamp, belemmer.

Hierdie studie beslaan die posisie van die reg soos dit was tot en met April 2018.

Sleutelwoorde: Dwangarbeid, moderne slawerny, slawerny, mensehandel, arbeidsreg, strafreg, arbeidsregte, menseregte, werker, werknemer, werkgewer, informele sektor, formele diensverhoudinge, konvensionele arbeidsregte

LIST OF ABBREVIATIONS AND ACRONYMS

AHRLJ	African Human Rights Law Journal
AIQR	An Irish Quarterly Review
AJIL	American Journal of International Law
ASIL	American Society of International Law
AU	African Union
AUILR	American University International Law Review
BCEA	Basic Conditions of Employment Act
BUIJ	Boston University International Law Journal
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CE	Council of Europe
CILJ	Cornell International Law Journal
CILSA	Comparative and International Law Journal of South Africa
CJAS	Canadian Journal of African Studies
CONATRAE	National Commission to Eradicate Slave Labour
CoVE	Commission on Vulnerable Employment
CWILJ	California Western International Law Journal
EAS	Employment Agency Standards
EC	European Council
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
ETI	Ethical Trading Initiative
GEFM	Special Mobile Group

GERTRAF	Executive Group to Eradicate Forced Labour
GJICL	Georgia Journal of International and Comparative Law
GLA	Gangmasters Licensing Authority
GMLA	Gangmasters Licensing Act
HRMC	Her Majesty's Revenue and Customs
HRQ	Human Rights Quarterly
HSE	Health and Safety Executive
IACHR	Inter-American Commission on Human Rights
IJAHS	International Journal of African Historical Studies
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILP	International Law and Politics
ISS	Institute for Security Studies
ITUC	International Trade Union Confederation
IUR	International Union Rights
JBS	Journal of Black Studies
JHIL	Journal of the History of International Law
JHSN	Journal of the Historical Society of Nigeria
JLAS	Journal of Latin American Studies
JLH	Journal of Legal History
JRF	Joseph Rowntree Foundation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act

MIU	Mobile Inspection Unit
MSA	Modern Slavery Act
MTE	Ministry of Labour and Employment
NJIL	Nordic Journal of International Law
OAS	Organisation of American States
OAU	Organisation of African Unity
PCTPA	Prevention and Combating of Trafficking in Persons Act
PER/PELJ	Potchefstroom Elektroniese Regstrydskrif /Potchefstroom Electronic Law Journal)
QJIL	Quebec Journal of International Law
RJIL	Regent Journal of International law
SAJC	Southern African Journal of Criminology
SAJE	South African Journal of Economics
SAJHR	South African Journal of Human Rights
SCID	Studies in Comparative International Development
STELL LR	Stellenbosch Law Review
TCILJ	The Comparative and International Law Journal
THAHR	The Hispanic American Historical Review
TRHS	Transactions of the Royal Historical Society
TUC	Trades Union Conference
UICA	Unemployment Insurance Contributions Act
UIF	Unemployment Insurance Fund
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNGIFT	United Nations Global Initiative to Fight Human Trafficking
VOC	Verenigde Oostindische Compagnie
VUWLR	Victoria University Wellington Law Review

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	i
SUMMARY	iii
OPSOMMING	vii
LIST OF ABBREVIATIONS AND ACRONYMS	xi
CHAPTER 1	1
INTRODUCTION	1
1.1 Background	1
1.2 The international law approach	4
1.3 Problem statement	8
1.4 The UK approach	11
1.5 The Brazilian approach	15
1.6 Objectives of the study	16
1.7 Points of departure	19
1.8 Hypotheses	20
1.9 Research methodology	22
1.10 Outline of the study	26
1.11 Conclusion	27
CHAPTER 2	29
FORCED LABOUR IN INTERNATIONAL LAW	29
2.1 Introduction	29
2.2 Definition, historical background and standard setting	30

2.3	Forms of forced labour.....	35
2.3.1	<i>Traditional/chattel slavery</i>	36
2.3.2	<i>Serfdom.....</i>	39
2.3.3	<i>Debt bondage.....</i>	40
2.3.4	<i>Commercial sexual exploitation</i>	41
2.3.5	<i>Child forced labour.....</i>	41
2.3.6	<i>Domestic servitude</i>	43
2.4	The relevance of human trafficking to forced labour	44
2.5	Forced labour as a violation of human rights	48
2.5.1	<i>The Universal Declaration of Human Rights.....</i>	50
2.5.2	<i>The Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery</i>	51
2.5.3	<i>The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.....</i>	52
2.5.4	<i>The Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).....</i>	53
2.6	ILO standards on forced labour	56
2.6.1	<i>General observations</i>	56
2.6.2	<i>Relevant ILO Conventions</i>	58
2.6.2.1	<i>Forced Labour Convention and the Abolition of Forced Labour Convention.....</i>	59
2.6.2.2	<i>Protocol of 2014 to the Forced Labour Convention, 1930</i>	62

2.6.3	<i>The role of labour law in addressing forced labour</i>	69
2.6.3.1	<i>Labour inspectors</i>	72
2.6.3.2	<i>Businesses and employers' organisations</i>	74
2.6.3.3	<i>Trade unions</i>	77
2.6.3.4	<i>Labour courts and other labour dispute resolution mechanisms</i>	79
2.7	Forced labour as a violation of labour and employment rights	81
2.7.1	<i>The right to work and decent work</i>	81
2.7.2	<i>Labour rights infringed by forced labour</i>	83
2.7.2.1	<i>Restriction of movement, isolation and intimidation</i>	83
2.7.2.2	<i>Abusive working and living conditions and excessive overtime</i>	86
2.7.2.3	<i>Debt bondage and/or the withholding of wages</i>	89
2.7.2.4	<i>Abuse of vulnerability, deception and physical or sexual violence</i>	90
2.8	Conclusion	91
CHAPTER 3		94
THE UNITED KINGDOM APPROACH		94
3.1	Introduction	94
3.2	Historical background of slavery in the UK	95
3.3	The situation of forced labour in modern-day UK	98
3.3.1	<i>General observations and definitions</i>	98
3.3.2	<i>Influence of the European Convention on Human Rights (ECHR)</i>	100
3.3.2.1	<i>Distinction between forced labour and slavery</i>	102

3.3.2.2	<i>Prohibition of forced labour and corresponding obligations.....</i>	<i>104</i>
3.3.3	<i>Scope and extent of forced labour in the UK.....</i>	<i>107</i>
3.3.4	<i>Continuum of exploitation</i>	<i>116</i>
3.4	The relationship between forced labour and human trafficking in the UK.....	121
3.5	UK responses to forced labour.....	125
3.5.1	<i>Legislative responses.....</i>	<i>125</i>
3.5.1.1	<i>The Gangmasters (Licencing) Act 2004.....</i>	<i>126</i>
3.5.1.1.1	Interpretation and scope	126
3.5.1.1.2	Gangmasters Licensing Authority (GLA) and its relevance to forced labour	127
3.5.1.2	<i>Modern Slavery Act 2015</i>	<i>130</i>
3.5.1.2.1	Establishment of the offence of forced labour	131
3.5.1.2.2	The office of the Anti-Slavery Commissioner	133
3.5.1.2.3	Assistance and support of victims	135
3.5.1.2.4	Supply chains	136
3.5.2	<i>Policy and administrative responses</i>	<i>138</i>
3.5.2.1	<i>Trade Unions and NGOs.....</i>	<i>138</i>
3.5.2.2	<i>Role of businesses/ employers.....</i>	<i>140</i>
3.5.2.3	<i>Labour/employment tribunals.....</i>	<i>140</i>
3.5.2.4	<i>Statutory regulatory bodies</i>	<i>142</i>
3.6	Conclusion.....	144
CHAPTER 4.....		147
THE BRAZILIAN APPROACH		147

4.1	Introduction.....	147
4.2	Historical background of slavery in Brazil.....	148
4.3	Forced labour in modern Brazil.....	155
4.3.1	<i>General observations and definitions.....</i>	<i>155</i>
4.3.2	<i>Influence of the Inter-American human rights system.....</i>	<i>160</i>
4.3.2.1	<i>Regional definition and/or interpretation of forced labour.....</i>	<i>162</i>
4.3.2.2	<i>Distinction between forced labour and slavery.....</i>	<i>163</i>
4.3.2.3	<i>Prohibition of forced labour and corresponding obligations.....</i>	<i>166</i>
4.3.3	<i>Scope and extent of slave labour in Brazil</i>	<i>171</i>
4.4	The relationship between slave labour and human trafficking in Brazil.....	182
4.5	Brazilian responses to slave labour	184
4.5.1	<i>Legislative responses.....</i>	<i>185</i>
4.5.1.1	<i>The Brazilian Penal Code.....</i>	<i>185</i>
4.5.1.2	<i>Labour legislation</i>	<i>189</i>
4.5.2	<i>Policy and administrative responses</i>	<i>190</i>
4.5.2.1	<i>Government initiatives</i>	<i>193</i>
4.5.2.1.1	<i>Special Mobile Group (GEFM).....</i>	<i>193</i>
4.5.2.1.2	<i>Payment of compensation and unemployment benefits to freed workers</i>	<i>195</i>
4.5.2.1.3	<i>Labour courts</i>	<i>196</i>
4.5.2.2	<i>Private sector initiatives</i>	<i>197</i>
4.5.2.2.1	<i>Role of employers and businesses.....</i>	<i>197</i>

4.5.2.2 Workers' and employers' organisations	199
4.6 Conclusion	200
CHAPTER 5	203
THE SOUTH AFRICAN APPROACH	203
5.1 Introduction	203
5.2 History of slavery in colonial South Africa	205
5.3 Forced labour in modern South Africa	212
5.3.1 General observations	212
5.3.2 South African definition of forced labour	216
5.3.3 Influence of the African Human Rights System	220
5.3.3.1 Regional definition and/or interpretation of forced labour	221
5.3.4 The scope and extent of forced labour in post-apartheid South Africa	224
5.4 Relationship between human trafficking and forced labour in South Africa	232
5.5 South African responses to forced labour	234
5.5.1 Legislative and constitutional responses	235
5.5.1.1 Prevention and Combating of Trafficking in Persons Act (PCTPA)..	235
5.5.1.2 Basic Conditions of Employment Act (BCEA)	238
5.5.1.3 Constitution of the Republic of South Africa, 1996	242
5.5.1.3.1 The right not to be subjected to forced labour	243
5.5.1.3.2 The right to fair labour practices	250
5.5.1.3.3 Constitutional remedies	262

5.5.2 Policy and administrative responses	268
5.5.2.1 Department of Labour.....	269
5.5.2.2 Trade unions.....	270
5.5.2.3 Businesses and employers' organisations	272
5.5.2.4 Labour inspectors	273
5.5.2.5 Labour courts and dispute resolution mechanisms	276
5.5.2.6 Other labour market institutions and constitutional bodies.....	280
5.5.2.6.1 National Economic Development and Labour Council (NEDLAC)	280
5.5.2.6.2 South African Human Rights Commission (SAHRC).....	281
5.5.2.6.3 The Unemployment Insurance Fund (UIF)	283
5.5.2.6.4 Commission for Employment Equity	286
5.5.2.6.5 Employment Conditions Commission	287
5.5.3 Preventative and victim assistance measures.....	289
5.6 Conclusion.....	296
CHAPTER 6	299
CONCLUSION: LESSONS FOR SOUTH AFRICA.....	299
6.1 Introduction.....	299
6.2 The distinction between forced labour and slavery	302
6.3 The contribution of international human rights law to the forced labour debacle	306
6.3.1 Forced labour in view of the United Nations' human rights perspective	306
6.3.2 Influences of regional human rights systems	309

6.4	A contrast of the scope and extent of forced labour amongst the jurisdictions.....	315
6.5	Analogy of the relationship between forced labour and human trafficking	320
6.6	A collation of the responses to forced labour	326
6.6.1	<i>ILO standards on forced labour</i>	326
6.6.2	<i>The relevant national responses to forced labour.....</i>	331
6.6.2.1	<i>The relationship between forced labour and labour law.....</i>	331
6.6.2.2	<i>National responses to forced labour</i>	335
6.7	Recommendations	346
6.8	Conclusion.....	349
BIBLIOGRAPHY.....		351
<i>Literature</i>		351
<i>Case law.....</i>		379
<i>Legislation.....</i>		383
<i>International Instruments.....</i>		385
<i>Internet Sources</i>		388

CHAPTER 1

INTRODUCTION

1.1 Background

Maintaining a livelihood and being able to live a decent life depends on one's ability to work and earn an income. For centuries, having a job that pays an income has therefore been an aspiration of the generality of people.¹ Having access to employment, however, is more than a common human aspiration; it has also been classified as a fundamental human right in the United Nations' *Universal Declaration of Human Rights*, 1948 (UDHR). In this context, every human being has the right to a livelihood. In addition, the right to work comes with mutually supporting rights that are tailored to ensure that whatever work is performed is of acceptable quality.² Put differently, it is not enough to possess a right to work if the work negates the worker's rights to dignity and equality. Closely connected to this and fundamentally relevant to this thesis is the fact that it is the human right of every person to freely choose his or her preferred occupation.³

For millennia before these rights were recognised by the international community, however, the institutions of forced labour and slavery were thought to be natural to socio-economic life.⁴ In point of fact, history tells us that these institutions were once supported by law and government.⁵ Whereas they are essentially different in nature,⁶ forced labour and slavery had in common the characteristic of preventing their victims from freely choosing their occupations and subjecting them to poor working conditions.⁷ Both practices were simultaneously to be the objects of

1 See amongst others Ascoli 1939 *Social Research* 255-268; Ellingston 1946 *The Annals* 27-39;

2 Article 23 and 24 of the UDHR.

3 Article 23(1) UDHR. See further para 5.5.1.3 below.

4 Para 2.2 below.

5 Milbrandt 2013 *RJIL* 49; Wilson 1950 *TAJIL* 510; Kern 2004 *JHIL* 235; Van Niekerk 2004 *CILSA* 7. Also see paras 2.3.1, 3.2, 4.2 and 5.2 below.

6 Para 2.3.1 below.

7 See in particular paras 3.2, 4.2 and 5.2 below.

international efforts aimed at their abolition,⁸ particularly in the nineteenth century.⁹ These efforts were later extended to abolishing forced labour through the efforts of the International Labour Organisation (ILO).¹⁰

A study of the history of forced labour and slavery brings to light the fact that though they are similar in effect, they have different distinguishing characteristics. Brief definitions of them are necessary at this point in order to put this into perspective. According to the ILO, forced labour is all work or service which is exacted from any person through the imposition of a penalty, and for which the person affected has not offered himself voluntarily.¹¹ On the other hand, the United Nations defines slavery as the status or condition of a person over whom a right of ownership is exercised.¹² Thus, whereas a slave may perform forced labour, he is in a position different from that of a forced labourer owing to the fact that he is seen as the property of another person.¹³

It follows from the foregoing that one must be cautious about thinking of the terms forced labour and slavery as being synonyms. It must be noted at this stage that the focus of this thesis is to be on forced labour and how it is addressed in modern society. For this reason, slavery will feature in this study only insofar as it has a historical consequential relationship to forced labour.¹⁴ But slavery in itself has also often been considered a form of forced labour,¹⁵ which is why the phrase "modern slavery" is cautiously adopted in this thesis as also referring to forced labour.

The need to address the problem of forced labour in recent times stems from a number of points of fact. Firstly, the increased prevalence in the use of forced labour

8 Wilson 1950 *AJIL* 510; ILO *Tripartite Meeting of Experts on Forced Labour* 12; ILO *Stopping Forced labour* Report I(B) 10.

9 Lassen 1988 *NJIL* 197-198; Wiebalck 1998 *TCILJ* 47.

10 Para 2.2 below.

11 Article 2(1) of the *Forced Labour Convention*.

12 Article 1(1) of the *Slavery Convention*.

13 See further para 2.3.1 below.

14 The ILO asserts that international efforts to abolish forced labour originally developed from the international movement to abolish slavery. See further Thomann *Steps to Compliance* 185; ILO *Tripartite Meeting of Experts on Forced Labour* 12.

15 ILO *A Global Alliance Against Forced Labour* Report I(B) 8.

in the twenty-first century instructs us that this is not a practice that disappeared with the collapse of colonialism. The ILO has estimated that around twenty-one million people are currently being subjected to forced labour globally.¹⁶ While note is taken of the decline in state-imposed forced labour, note is also taken of the massive increase in the use of forced labour in the private economy by private agents.¹⁷

While this shift in emphasis does not rule out the possibility of framing laws designed to deal with this phenomenon,¹⁸ the implementation of such laws would depend partly on accurately knowing when and how the law is being flouted, and there has been a realisation that the incidence of forced labour in the private economy is difficult to establish.¹⁹ This is attributable amongst other reasons to the fact that the workplaces where people are forced to labour are often hidden, the reach of labour inspection is limited, and the victims of forced labour are often ignorant of their rights. In addition to this, forced labour is often linked to clandestine economic activity and the performance of work that is obviously illegal.²⁰ While any worker in private employment could be vulnerable to forced labour in some form, observations made by the ILO show that those in informal employment are the most vulnerable.²¹ This is primarily caused by the failure of certain nations to extend their labour laws²² to offer sufficient protection in respect of people's employment. The ILO has furthermore attributed the rise in the practice of forced labour to the existence of gaps and failures in national laws aimed at addressing forced labour in particular.²³

16 ILO *Global Estimate of Forced Labour* 13; ILO *Profits and Poverty* 7.

17 ILO *Global Estimate of Forced Labour* 13-14; Belser *Forced Labour and Human Trafficking* 3.

18 Forced labour in the private economy can be addressed by national laws on forced labour. However, efforts to do this are normally hampered by the observations made herein.

19 Andrees *Forced Labour and Human Trafficking* 9-10; Andrees and Belser "Forced Labour" 1-9.

20 For example the use of forced labour in the sale and distribution of illegal drugs and narcotics as well as in illegal prostitution. See amongst others ILO *Standards on Forced Labour* 19; Andrees "Trafficking for Forced Labour in Europe" 90; Skrivankova 2014 *JRF Programme Paper* 11.

21 ILO *Tripartite Meeting of Experts on Forced Labour* 11.

22 For example in the United Kingdom the deregulation of the labour market has been characterised as contributing to the exacerbation of poor working conditions and forced labour. See for example Scott *et al JRF Programme Paper* 14-15.

23 ILO *Strengthening Action to end Forced Labour* Report IV(1) 3.

While acknowledging that the ILO's estimate of the global prevalence of forced labour is imprecise, this thesis accepts it as being indicative at least of the fact that forced labour indubitably still occurs globally. The human rights of many people are potentially at risk if the issue is not appropriately addressed. There needs to be a realisation that employing forced labour is not only a criminal offence but also has implications for people's labour and employment rights.²⁴

In the light of the above, this thesis will attempt to make a contribution to knowledge about forced labour, its prevalence and how it arises in general. It will advance the understanding of the various effects of forced labour on its victims, and will suggest how forced labour can be addressed not only through its criminalisation but also in terms of labour law. An initial overview of the position in international law will provide a background for and a perspective on this line of argument. As will be seen below, there is abundant room for development in this field in the South African law. The position of forced labour in various other jurisdictions will also be investigated in an attempt to assist the South African Government to improve its legal framework.

1.2 The international law approach

The ILO recognises the fundamental right of every worker to be protected from forced labour. Members of the ILO are thus obliged under Article 2 of the *Declaration on Fundamental Principles and Rights at Work*, 1998 to ensure the elimination of all forms of forced or compulsory labour, regardless of whether or not they have ratified the Declaration. This obligation accrues to all members regardless of whether they have ratified the specific forced labour conventions of the ILO or not.²⁵ Thus, the elimination of forced labour together with the protection of a few

24 See para 2.7 below.

25 Article 2 of the Declaration.

other core rights²⁶ must be a priority for all ILO members and deserves to be reflected in their national laws and policies.

Due to the international role the ILO plays in the endeavour to eradicate forced labour and the global standards it proposes, it is pertinent that its position on the topic be fully investigated in this thesis. The ILO's forced labour normative framework relies on two fundamental Conventions: the *Forced Labour Convention* No 29 of 1930 and the *Abolition of Forced Labour Convention* No 105 of 1957. The *Forced Labour Convention* (being the first ILO instrument to speak to forced labour) is the primary instrument that sets the standards on how forced labour is to be addressed in national laws. It arises from this Convention that the ILO has from the outset favoured the criminal law as the ideal mechanism to address forced labour in national laws. This is evident from the Convention's requirement that signatories must ensure that penalties assigned to the offence are "adequate and strictly enforced".²⁷

Owing to the establishment of this standard, the inclination of national laws has always been to lean on criminal law to address forced labour.²⁸ Whilst the strict enforcement of criminal sanctions is meant to be a deterrent, its effect is limited. Firstly, enforcement takes place in reaction²⁹ to the event. It is important that regulatory mechanisms should also be preventative in nature.³⁰ Secondly, approaching forced labour only in terms of criminal law has as a consequence a focus on the improvement of criminal law enforcement mechanisms.³¹ The development of other relevant parts of the law – such as labour law and immigration laws (where appropriate)³² – is not prioritised. Thirdly, addressing forced labour only

26 Other core rights are the right not to be subjected to child labour, not to be discriminated against in respect of employment and occupation, and the right to freedom of association and collective bargaining.

27 Article 25.

28 See generally Andrees and Belser "Strengthening Labour Market" 109-114.

29 Andrees and Belser "Strengthening Labour Market" 109.

30 Article 2 *Protocol of 2014 to the Forced Labour Convention*, 1930.

31 Balch 2012 *JRF Programme Paper* 10-12; Andrees *Forced Labour and Human Trafficking* 1-2.

32 It is recognised that combatting forced labour may involve the application of a myriad of laws, including criminal law, labour law, immigration law and human rights law. This study intends to speak to forced labour in so far as it is relevant to labour law. References to immigration laws

from a criminal law perspective overlooks the effects of the offence on the labour rights of its victims,³³ as the primary focus is on prosecuting the offender.

In the light of this, the ILO has since seen the need to redirect its members' approach to forced labour. This is done through the *Protocol of 2014 to the Forced Labour Convention, 1930* (hereafter the 2014 Protocol on Forced Labour), which introduces radical changes to the conventional approach to forced labour. This Protocol requires a change from strict criminalisation to the inclusion of other areas of the law and, in alignment with the purposes of this study, labour law in particular.³⁴ While criminal law approaches to forced labour remain relevant, this study intends to demonstrate that on their own they cannot comprehensively address all of the ramifications of forced labour.³⁵ In the light of the ILO's recent promotion of decent work,³⁶ using contemporary labour law to address forced labour is more relevant now than ever before.

Alongside criminalisation, human trafficking has gradually and rightly factored into national frameworks as an important element of forced labour. Human trafficking is an offence that more often than not results in forced labour, as established by the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. In its definition of human trafficking, the Protocol establishes that the offence may be perpetrated for the purposes of forced labour.³⁷ The ILO's support for the ratification of the Protocol to curb human trafficking for

are made only where regulatory frameworks use human trafficking mechanisms as a means to address forced labour. Similarly, the thesis does not delve into specific immigration laws and how they may be improved to better address forced labour that arises as a result of human trafficking. See paras 3.4 and 5.5.1.1 below.

33 For example, a criminal law approach may not address poor working conditions, a failure to pay wages, issues of social security, or the inhibition of workers' right to freedom of association, all of which stand to be affected by forced labour. See further para 2.7 below and the discussion on the continuum of exploitation at para 3.3.4 below.

34 Articles 1-2.

35 That is, the implications forced labour has for the labour and employment rights of its victims as highlighted within this paragraph.

36 ILO *Decent Work Indicators* 18-23.

37 Article 3(a).

this reason further confirms that certain workers are forced into such labour as a result of human trafficking.³⁸

Be that as it may, this research seeks to demonstrate that the over-emphasis on the relationship between these two practices has the potential to misdirect national approaches on forced labour to the extent that they lean almost entirely on the trafficking framework to address forced labour.³⁹ The undesirable result of this is that there is a lack of appreciation of the fact that forced labour can occur outside the ambit of human trafficking. Granted, effective trafficking frameworks are well placed to combat human trafficking and consequently to pre-empt the occurrence of forced labour that arises therefrom. This notwithstanding, a national approach to forced labour that is wholly dependent on the human trafficking framework has the potential to exclude from its application forced labourers who have not been trafficked, leaving them without recourse. In addition, national legal frameworks that fail to deal with forced labour separately from human trafficking are not compliant with either the *2014 Protocol on Forced Labour* or the *Forced Labour Convention*, which recognise forced labour as a stand-alone offence. This thesis will attempt to establish what steps need to be taken to be compliant with the above labour standards and, amongst other things, to sever the umbilical cord between forced labour and trafficking. Forced labour will be addressed as an offence independent of human trafficking, thus extending universal coverage to all forced labour victims. Some jurisdictions have made strides in this respect, and they will be scrutinised in this study in order that we may learn from their practices.

This thesis thus first of all intends to investigate the international position on forced labour described in brief above, to elucidate the measures Member States of the ILO ought to take to be in compliance with the prescribed standards. During the analysis of the South African framework regarding forced labour, a conclusion will be drawn as to the extent to which it currently complies with its international obligations.

38 ILO *Tripartite Meeting of Experts on Forced Labour* 18-20.

39 See in particular paras 3.4 in contrast with 5.4 below.

Some issues regarding the South African position on forced labour should already be identified in order that the ultimate objective of this thesis may be addressed.

1.3 Problem statement

In the context of a regional human rights system that is still developing,⁴⁰ South Africa has a developed and progressive human rights system, as is evident from both its constitutional framework as well as its developed labour relations system.⁴¹ However, this fact should not pre-empt discussion of the issue of forced labour, which may seem abstract in the South African context, given the fact that it is a constitutional democracy. Very little attention is being given to the issue of forced labour in this country, by Government through the enactment of legislation, or in academic circles. This state of affairs does not mean that South Africa is free of forced labour. In fact, this silence is most likely attributable to a lack of knowledge about the phenomenon arising from the lack of previous research and statistics documenting its occurrence. Studying the nature and prevalence of forced labour in South Africa should be the first step in the formulation of an effective regulatory framework to combat forced labour, as this might inform the Government as to the best approach to take.

In South Africa, human trafficking has received more attention than forced labour in scholarship and legislation.⁴² Scholars have written extensively on the offence and its occurrence in this region.⁴³ It is conceded that this is possibly justified, as South Africa has been characterised as a hub for trafficking.⁴⁴ For this reason the Government also intensified its efforts to curb the crime by enacting the *Prevention and Combating of Trafficking in Persons Act 7 of 2013* (PCTPA). While the Act is relatively new, it offers a comprehensive mechanism to address the offence as well

40 Para 5.3.3 below.

41 Para 5.3.1 below.

42 Para 5.4 below.

43 See amongst others Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *ISS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Cavell 2011 *SAJC* 245-265

44 Mofokeng and Olutola 2014 *SAJC* 115.

as to assist victims. The Act also introduces for the first time a legislative definition of forced labour as a recognised outcome of human trafficking in South Africa.

While the above is true, this study intends to demonstrate that the South African legislative framework on forced labour currently lacks comprehensiveness. This is evident from the piece-meal approach adopted in the various statutory platforms. For example, the country's labour legislation on forced labour currently protects employees with respect to section 48 of the *Basic Conditions of Employment Act* 7 of 1997 (BCEA).

Whereas the *Constitution of the Republic of South Africa*, 1996 expressly outlaws subjection to forced labour with respect to everyone,⁴⁵ this does not in itself establish a legislative provision that gives meaning and content to the right. Furthermore, there is a need for legislation to clarify what conduct exactly falls within the ambit of forced labour and what does not, as evidenced by the *Forced Labour Convention*.⁴⁶ This is because not all work that is of a compulsory nature will be deemed forced labour.⁴⁷ Currently the BCEA fails to do this.⁴⁸ In addition to the unlimited⁴⁹ protection guaranteed under section 13 of the Constitution, the South African Government seems to meet the obligation imposed in the *Forced Labour Convention* in not restricting forced labour protection to employees in formal employment.⁵⁰ This notwithstanding, the legislation falls short of establishing comprehensive means of implementing this protection. This results in a lack of clarity on the approaches to be taken in addressing the unique effects⁵¹ of forced labour on its victims.⁵² In addition to this, the BCEA cannot be employed to address

45 Section 13.

46 Para 2.6.2.1 below.

47 For example, certain professions such the medical profession require candidates to undergo residency. Whilst this is "compulsory labour" of some sort, it is *arguably* not forced labour for the purposes of the Convention. Article 2(2) of the Convention further outlines categories of work that fall outside the ambit of the Convention's definition of forced labour. Also see para 2.6.2.1 below.

48 Para 5.5.1.2 below.

49 The right to not be subjected to forced labour extends to everyone. See para 5.5.1.3.1 below.

50 The definition of who an employee is under labour legislation is wide enough to encompass a worker in the informal economy. For an in-depth discussion of this, see para 5.5.1.2 below.

51 See amongst others paras 2.7.2 and 3.3.4 below.

52 Paras 5.5.1 and 5.5.2 below.

the occurrence of forced labour in relationships that fall beyond the classification of an employment relationship, a situation which may arise when dealing with forced labour.⁵³ These matters will be critically investigated.

Furthermore, the *PCTPA* does little to solve the lack of a forced labour legislative provision that extends protection to everyone without the strict requirement to prove the existence of an employment relationship. The Act merely recognises forced labour as a form of exploitation that can arise from human trafficking, which may lead to prosecution.⁵⁴ Currently, this legislation represents the only platform where forced labour and slavery are defined. Nevertheless, as will be demonstrated throughout this thesis, the trafficking framework cannot be relied on to cover all occurrences of forced labour.⁵⁵

Despite the existence of the framework on trafficking, South Africa still requires legislation that speaks to forced labour, which allows for a multidimensional approach to cover all facets of forced labour, and provides the requisite support to victims of the practice. At the moment the *PCTPA* is also not clear on how exactly it will extend assistance to trafficked forced labourers, as the forms of assistance envisioned by the Act lean more towards addressing the effects of the offence of trafficking.⁵⁶

In addition to a trafficking framework, the South African approach seems to lean towards using the criminal law to address incidents of forced labour. As will be shown in this thesis, unlike in the United Kingdom and Brazilian approaches, the essential roles of labour law and its enforcement mechanisms in South Africa are negligible. Currently, the various constitutional and labour market institutions in this country have specialised roles in the protection and advancement of labour rights. This study will investigate the extent to which these institutions can, as in the

53 See para 5.5.1.2 below.

54 Para 5.5.1.1 below.

55 Paras 2.4, 3.4, 4.4 and 5.4 and 6.5 below.

56 Para 5.5.1.1 below.

comparative jurisdictions,⁵⁷ play a role in raising awareness on and addressing forced labour in the labour legislative framework.⁵⁸

The South African Labour Court has recently been given the mandate to adjudicate matters in respect of section 48 of the *BCEA*.⁵⁹ Considering South Africa's position in this regard, it will be useful first to consider whether labour courts in the United Kingdom and Brazil take a similar stance, and secondly, to investigate the manner in which labour courts in these two jurisdictions have previously approached forced labour matters, so as to distil from them possible lessons for South Africa.

In the light of the foregoing, this study seeks to critically investigate the shortcomings of the South African labour law in addressing forced labour and the implications thereof. Before this is done, however, the thesis will consider the positions in the UK and Brazil and investigate the lengths to which these jurisdictions have gone in an attempt to address the scourge of forced labour within their borders. This comparative approach will serve as a method of discovering lessons that can be applied to the South African situation so that South Africa can improve and strengthen its regulatory framework regarding forced labour. The study also intends to test the applicability of the right to fair labour practices in section 23(1) (as well as other relevant sections) of the Constitution to the argument for the need to view forced labour as an offence that should be equally and sufficiently addressed within the provisions of South African labour law.

1.4 The UK approach

In contradistinction to South Africa's legal framework, which is silent on the topic of forced labour, in the UK forced labour receives attention in legislation and in academia, and serious attempts are being made to establish its domestic prevalence, which is why the UK was chosen as an ideal subject for this comparative analysis. Firstly, the jurisdiction's attitude to forced labour is different because it developed

57 See paras 3.5.2, 4.5.2 in comparison with 5.5.2 below.

58 Para 5.5.2.5 below.

59 Para 5.5.2.4 below.

from studies that initially focused on exploitative working conditions and human trafficking, which led to studies of the incidence of forced labour.⁶⁰ This made it possible to identify the unique causes of forced labour in the UK. It must be highlighted that whilst the industries commonly affected by forced labour in the UK⁶¹ are very similar to those identified by ILO studies on forced labour globally, certain characteristics of these sectors in the UK seem to exacerbate the offence. For example, the operational characteristics that are inherent in some of the industries such as the need to cut the cost of production and increase productivity normally result in relatively poor working conditions and low wages.⁶² Some industries of a seasonal nature are also made to depend on contract labour, which has been seen to create opportunities for the imposition of forced labour.⁶³

The intense interest in uncovering the dynamics of forced labour in the UK has brought to light the fact that employers may actually use the gaps and failures in the law to impose forced labour on their workers.⁶⁴ For example, the flexible labour market of the UK, which ousts the extensive regulation of employment relationships, has been seen to exacerbate the exclusion of informal economy workers from mainstream labour regulation, thus leaving them vulnerable to forced labour. The Overseas Domestic Worker Visa has also been noted as an item of immigration law that promotes the use of forced labour as domestic workers are made to depend on their employers for the maintenance of their livelihoods whilst in the UK.

Secondly, prior to 2009⁶⁵ the UK framework on forced labour was founded on the offence of human trafficking. In this regard, legislation required human trafficking to be treated as a prerequisite for prosecuting forced labour. It will be pointed out in

60 See for example Dowling *et al Trafficking for the Purposes of Labour Exploitation* 7-16; TUC *Hard Work, Hidden Lives* 9-32; Equality and Human Rights Commission 2010 *Inquiry into Recruitment and Employment* 7-26; McKay *et al Migrant Workers in England and Wales* 17-99; Skrivankova *Trafficking for Forced Labour* 8-18 in contrast to Geddes *et al* 2013 *JRF Programme Paper* 7-95; Lalani and Metcalf 2012 *JRF Programme Paper* 7; Anderson and Rogaly *Forced Labour and Migration* 23; Skrivankova 2010 *JRF Programme Paper* 7.

61 Para 3.3.3 below.

62 Para 3.3.3 below.

63 Para 3.3.3 below.

64 Para 3.3.3 below.

65 This is the era preceding the enactment of the *Coroners and Justice Act* of 2009.

this discussion⁶⁶ that linking the offences in this way contributed to a confusion of the two and prejudiced forced labour victims who had not been trafficked.⁶⁷ Advocacy emerged from the academic discourse for the need to recognise forced labour as an issue of both workers' rights and criminal justice, as opposed to limiting it to human trafficking. The then framework was by and large adopted in South Africa.

Thirdly, the UK's legislative framework on forced labour has noteworthy elements. The recent *Modern Slavery Act*, 2012 (MSA) establishes forced labour as an offence independent from human trafficking, so that the legislation now protects all forced labour victims, whether they had been trafficked or not.⁶⁸ One noteworthy aspect of this Act is its use of the term "modern slavery" to encompass forced labour, slavery and human trafficking. In this regard the Act has arguably asserted the likeness of forced labour to a form of slavery, in the sense that the forced labour is classified as a "modern slavery" offence without necessarily ascribing characteristics to it that accrue to the true offence of slavery. Whereas this Act is a criminal law statute, it introduces to the UK framework aspects that offer an opportunity for labour law and labour enforcement mechanisms to be involved in the repression of forced labour. For example, the existence of an Office of the Anti-Slavery Commissioner opens up the possibility of cooperation with other relevant organisations to build an improved knowledge base on forced labour in the UK.

In addition to the MSA, the UK framework is also reliant on the *Gangmasters Licensing Act*, 2004 (GMLA) to contribute to the framework on forced labour.⁶⁹ With its introduction of a licensing body that is intended to prevent poor working conditions and forced labour in selected sectors of the agricultural industry, the GMLA has been acclaimed for having made strides in the fight against forced labour in the UK. The Act particularly introduces a form of labour inspection that is not dependent on criminal law.

66 Para 3.4 below.

67 Skrivankova 2010 *JRF Programme Paper* 8.

68 As discussed at para 3.5.1.2 below.

69 Para 3.5.1.1 below.

Fourthly, to extend this discussion beyond legislative issues, academic scholars writing about forced labour in the UK propose that it must not be isolated from poor working conditions, although such conditions are not in themselves forced labour.⁷⁰ For this reason, their insistence that there is such a thing as a continuum of exploitation⁷¹ properly leads to the assertion that labour law and labour market institutions have roles to play in the fight against forced labour by juxtaposing the latter with decent work. This juxtaposition of decent work against forced labour is meant to show that poor working conditions form the middle ground between these two opposing phenomena, and that to address the problem of forced labour in isolation is not conducive to finding solutions for the prevalence of poor working conditions. In this regard, solutions for poor working conditions that have a bearing on labour law will require labour law enforcement as appropriate.

Over and above that, labour market institutions⁷² in the UK are reasonably involved in the fight against forced labour. This is evidenced through the initiatives that trade unions and employers' organisation have taken to assert their role in curbing forced labour. While UK labour tribunals have no outright jurisdiction on forced labour cases, they have previously made pronouncements on labour exploitation matters where possible cases of forced labour may be argued to have existed.

The situation in the UK was chosen for comparative use in this study on account of the foregoing considerations and to demonstrate to the South African legislature that it is possible to gradually move from a forced labour framework that relies on its trafficking counterpart to one that sees forced labour as an independent offence. The UK's extensive knowledge of forced labour and its causes make it a favourable jurisdiction from which lessons may be derived. In particular, the UK's obligations arising from the *European Convention on Human Rights* (ECHR)⁷³ are seen as demonstrating the need for an unambiguous national framework pertaining to forced

70 Pollert and Wright *The Experience of Ethnic Minority Workers* 14-55; Scott *et al* 2012 *JRF Programme Paper* 15-68; Skrivankova 2010 *JRF Programme Paper* 7.

71 Para 3.3.4 below.

72 Para 3.5.2 below.

73 Para 3.3.2 below clarifies how the UK is still bound by the *ECHR* despite its exit from the European Union (popularly known as Brexit).

labour, an aspect which the South African Government may learn from. Attributes of the UK framework will be used to recommend to the Government how it can approach forced labour so that it may fully comply with the international standard.

1.5 The Brazilian approach

Like the UK, Brazil is characterised by the possession of a regulatory framework that is founded on well-documented knowledge of the occurrence of forced labour within its borders.⁷⁴ However, Brazil takes a different approach by adopting the term slave labour and defining it to include forced labour and degrading and exploitative working conditions.⁷⁵ While the primary normative framework intended to address slave labour is the *Brazilian Penal Code*, the Brazilian framework is unique in the sense that it demonstrates that the effectiveness and comprehensiveness of forced labour laws do not necessarily depend on the identity of the body mandated to implement them. Rather, the situation in this jurisdiction indicates that what matters is the commitment of the government to ensuring the elimination of forced labour, which is evident in the manner in which it implements forced labour legislation.⁷⁶

For this reason, Brazil employs various mechanisms that are based on policies to fight forced labour. Amongst others, the Executive Group to Eradicate Forced Labour brings together the actions of seven government ministries under the supervision of the Ministry of Labour and Employment. The coordinated actions of these ministries derive authority from a national plan directed at eliminating slave labour. Most importantly, Brazil is an example of a jurisdiction that has consistently asserted the place of its labour law and labour institutions in eradicating forced labour.⁷⁷ Key amongst these is the Special Mobile Group, which carries out labour inspections to uncover possible cases of slave labour. In addition to this, Brazilian labour courts have jurisdiction to adjudicate over slave labour cases, and they have accordingly

74 Para 4.3.3 below.

75 Sakamoto "Slave Labour in Brazil" 15; Costa *Fighting Forced Labour* 1; McGrath 2012 *Antipode* 1005-1028; Figueira 2012 *Studies in Unfree Labour* 252-253; Antero 2013 *Policy Studies* 89-111.

76 Para 4.5.1 below as read with para 4.5.2 below.

77 Paras 4.5.2.1.1, 4.5.2.1.2, 4.5.2.1.3, 4.5.2.2.2 below.

used this opportunity to make pronouncements that largely reflect on the fact that the offence negatively affects the rights of its victims. On the other hand, businesses also make contributions towards the overall framework on slave labour through self-regulation by means of a pact that is meant to ensure that there is zero tolerance of slave labour in production and supply chains.

All things considered, the Brazilian framework was chosen because whilst employing slave labour is a criminal offence in Brazil, cognisance is taken of the role that labour law can play in curbing the offence. The Brazilian framework can teach the South African legislature that declaring forced labour to be a criminal offence in legislation should not pre-empt the effective participation of labour market institutions in implementing such legislation. Further to this, the role of these organisations needs to be clearly affirmed and supported by the government. The *American Convention on Human Rights*' prohibition of forced labour will be further considered to determine the extent to which it has contributed to Brazil's framework.

1.6 Objectives of the study

The primary aim of this study is to determine how and to what extent international law, the UK and Brazilian law can assist in developing South African labour law to properly address the issue of forced labour. Consequently, the intended analysis is meant to establish how and to what extent forced labour is approached from a labour law perspective in international law as well as in the UK and Brazil, thereby justifying the need to reform South Africa's framework. In order to fully address this objective, the following issues will receive attention:

- 1.6.1 Whether forced labour and slavery are synonymous concepts, thus justifying their interchangeable use in national laws. The common use of the term "modern slavery" in the twenty-first century may displace the relevance of forced labour in both law and practice, because the use of the term "slavery" conjures up images of labour relations in the era preceding the twentieth century, that were characterised by ownership. In this regard, it is necessary for an investigation of forced labour to clearly establish the boundaries

between these two phenomena so that they are properly addressed in national laws. This investigation should determine why there is a demarcation between the treatment of slavery and forced labour in the UN and ILO.

1.6.2 The ILO principles on forced labour form a vital part of this study because they set standards that all jurisdictions that are the subject of this study must comply with. For this reason, it is imperative to use the ILO's standards in this study as a yardstick against which national frameworks may be evaluated. Further to this, it is necessary to enquire whether UN human rights standards can be used to strengthen the ILO's standards through arguments for a rights-based approach to forced labour in national laws.

1.6.3 While the principles and standards of international law emanating from both the ILO and the UN are vital aspects of the investigation, a need arises to narrow down international law standards to the regional platform so as to identify if there are any disparities between these two components of international law. Further to this, this investigation will identify whether regional human rights systems relevant to the jurisdictions in this study have previously made any contributions worth deriving lessons from to aid the global fight against forced labour.

1.6.4 In its endeavour to bring forced labour within the labour law discourse, this study will establish the role labour law can play in the eradication of forced labour and subsequently explore how the UK and Brazil use their labour laws and policies to this effect so as to draw lessons for South Africa in that regard. This is accompanied by an examination of the role that labour market institutions may play in the prevention of forced labour and the various ways in which they may assist those who fall victim to the crime.

1.6.5 In order to firmly establish the relevance of forced labour to contemporary labour law, this study will maintain a consistent examination and analysis of the scope and extent of forced labour in the UK, Brazil and South Africa. This

exercise is pertinent for various reasons. It will confirm the assertion of the ILO that forced labour has intensified in the twenty-first century and it will determine whether the causes of forced labour and its prevalence are similar across all three jurisdictions. It follows that the findings will buttress the argument that each jurisdiction ought to take an interest in studying the occurrence of forced labour so as to formulate responses that are tailored to the offence's peculiarities within their borders.

1.6.6 Whereas the offence of human trafficking has received a great deal of attention in South African scholarly discourse as well as comprehensive legislative regulation, this study cannot dispense with the need to demystify the relationship between human trafficking and forced labour. It is necessary to ask whether the relationship between the two offences justifies their inseparable treatment in national laws. The study will determine whether forced labour victims who have not been trafficked have a remedy in South Africa, and if not, how the situation could be improved if forced labour were not firmly linked to human trafficking and therefore approached in terms of criminal law only.

1.6.7 In establishing how South African labour laws may be enriched, it is necessary to juxtapose the reach of the *Forced Labour Convention* against that of the *BCEA*. This will be done to establish whether the *BCEA* is comprehensive in its coverage of all forced labour victims, as established by the Convention. Further to this, the *PCTPA* will also be compared with the Convention so as to determine if it can be said to establish a proper normative framework on forced labour for South Africa.

1.6.8 This study also intends to make a contribution by asking whether section 23(1) of the Constitution can be employed as the justification of the need to view forced labour as a labour law issue in South Africa. It is important to answer this question, because this constitutional provision extends the right to fair labour practices to everyone in South Africa. In this regard, it becomes

necessary to uncover whether forced labour is an unfair labour practice for the purposes of this provision and whether indeed everyone may find protection under this right where forced labour is concerned. The potential role of other constitutional rights in the fight against forced labour will also be investigated.

1.6.9 A need arises to consider whether the international approach supports and actually envisions the potential role of labour market institutions in efforts to eradicate forced labour. This consideration will lead to an examination of whether this international aspiration has been adopted across the three jurisdictions.

1.6.10 Finally, suitable and sound recommendations for improving the South African approach to forced labour will be made after investigating the approaches to forced labour in international law and the UK and Brazil.

1.7 Points of departure

1.7.1 All ILO Member States have an obligation to ensure the eradication of forced labour within their jurisdictions by virtue of their membership of the Organisation, whether they have ratified the *Forced Labour Convention* or not.

1.7.2 Section 13 of the *Constitution of the Republic of South Africa*, 1996 expressly establishes the right of everyone in South Africa not to be subjected to forced labour.

1.7.3 As in 2012, the estimates of the prevalence of forced labour indicate that millions of people are subjected to forced labour globally.

1.7.4 Whether it arises from human trafficking or not, forced labour exists in South Africa. The absence of studies on the offence does not imply that it does not occur.

- 1.7.5 Little is known about the occurrence of forced labour in South Africa due to a lack of studies on the offence, although academic and legislative attention has been paid to the offence of human trafficking over the years.
- 1.7.6 The UK and Brazil exhibit progressive multidisciplinary approaches to forced labour which have the potential to be extremely effective.
- 1.7.7 A gap exists in general knowledge as well as in legislation pertaining to forced labour in South Africa.
- 1.7.8 Forced labour in South Africa is currently predominantly addressed in terms of human trafficking legislation within a criminal law context, which consequently does not cover the various effects forced labour might have on the victims thereof.
- 1.7.9 Ineffective and fragmented strategies to combat forced labour lead to the limited protection of forced labourers.

1.8 Hypotheses

- 1.8.1 Knowledge on the shape and prevalence of forced labour in South Africa might inform this jurisdiction on how best to approach this problem.
- 1.8.2 The complex nature of forced labour and its dynamics require a framework that is multi-dimensional and integrated.
- 1.8.3 The inclusion of labour law in the framework addressing forced labour may improve the understanding of, overall eradication of, and prevention of forced labour in South Africa.
- 1.8.4 In particular, the inclusion of labour market institutions such as the Department of Labour, National Economic Development and Labour Council,

trade unions, labour inspectors and labour courts may effectively develop the current framework to meet the international standards. Constitutional bodies with a general human rights mandate such as the South African Human Rights Commission and advisory bodies created under labour legislation may also make a contribution to these efforts.

- 1.8.5 Consequently, whereas the current labour law approach to forced labour has the potential to extend to workers in the informal economy, the practical reality of enforcing this protection may be whittled down by the nature of their work, which renders them vulnerable. The need to prove the existence of an employment relationship may thwart efforts to use labour dispute resolution mechanisms. In certain instances, enforcing the protection may be inconceivable for victims who are engaged in illegal work. This warrants the need to strengthen targeted preventative and enforcement mechanisms such as labour inspection and awareness-raising on forced labour.
- 1.8.6 In addition, drawing a distinction between human trafficking and forced labour may assist in guarding against a framework that confines forced labour to human trafficking.
- 1.8.7 The regional human rights systems of the jurisdictions relevant to this study may further provide valuable guidance on how South Africa may deal with forced labour and other associated offences such as slavery and human trafficking.
- 1.8.8 The South African Government can make use of well-established concepts of international, UK and Brazilian law in order to reformulate its framework to meet the international standard and further the understanding of forced labour among employers and workers alike, as well as the general public.

1.9 Research methodology

In order to assist in developing and making a meaningful contribution to labour law in so far as forced labour is concerned, this thesis will employ a comparative study of forced labour and current responses in South Africa in contradistinction to international law, the UK and Brazilian law. The aim is not to blindly suggest a transplanting of the lessons learnt from other jurisdictions into South African law, because measures are normally employed taking into account a jurisdiction's own circumstances.

Utilising international law and the comparable experiences of other nations as interpretative aids is justified under the Constitution. As a starting point, the significance of international law to the Constitution and to South African law in general was highlighted in *Glenister v President of the Republic of South Africa and Others*,⁷⁸ where the Court indicated that:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law...These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.

In particular, section 39(1)(b) of the Constitution obliges South African courts to consider international law when interpreting the Bill of Rights. In *S v Makwanyane*⁷⁹ the Constitutional Court said that:

International agreements and customary international law...provide a framework within which Chapter Three can be evaluated and understood, and for that reason, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of

78 2011 3 SA 347 (CC) at para 97.

79 1995 3 SA 391(CC) at para 35.

specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.

In essence, therefore, section 39(1)(b) justifies the use of international law as an interpretative aid in the courts' attempt to give meaning and content to the rights within the Bill of Rights. In addition, and significantly for this study, the decisions of regional human rights tribunals and specialised agencies may also provide direction on the interpretation of these rights.

The significant role of international law in South Africa is further extended to national legislation through section 233 of the Constitution, which exhorts South African courts to prefer interpretations of domestic legislation that are consistent with international law over any that conflict with it.⁸⁰ This is to ensure that interpretations of legislation do not contravene the obligations that the state has in terms of international law.⁸¹ By way of illustration, in *Sidumo and Another v Rustenburg Platinum Mines*,⁸² the Constitutional Court rejected the argument that in determining the fairness of a dismissal in terms of the *Labour Relations Act*, the commissioner ought to approach the case from the perspective of an employer. Instead, the Court emphasised that the correct approach was for the commissioner to consider the matter impartially. According to the Court, this approach is in agreement with the international standard as expressed in the ILO's *Convention on Termination of Employment*. Owing to the abovementioned constitutional provisions, it is expected that courts interpreting forced labour provisions in South Africa will have to align their interpretations with the obligations that South Africa may have towards international instruments dealing with the subject.

Section 39(1)(c) also recognises the value that foreign law may have in the interpretation of the Bill of Rights. However, unlike the provisions regarding international law described above, those with reference to the use of foreign law by

80 See for example *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) at para 80.

81 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) at para 80; *Azarian Peoples Organization v The President of South Africa* 1996 4 SA 672 at para 26.

82 2008 2 SA 24 (CC) at para 61.

the courts are merely permissive. In *MEC for Education KwaZulu-Natal v Pillay*⁸³ the Constitutional Court alluded to the significance of utilising comparative law in the development of human rights within South Africa, particularly where the matter concerns an underdeveloped area of the local law.⁸⁴ In this regard, the comparative experiences of other jurisdictions may be of persuasive value to interpretations of the Bill of Rights without necessarily imposing an obligation on the court to follow them. The reasoning of the Court weighs in favour of the use of a comparative study in this thesis, since it concerns the investigation of a phenomenon that is understudied and not sufficiently regulated in South African law, but which arguably is sufficiently regulated in the UK and Brazil. This notwithstanding, the comparative experiences of these two jurisdictions are approached in the light of the caveat expressed in *Prinsloo v Van De Linde and Another*,⁸⁵ that a comparative analysis should not result in a simplistic transplanting of lessons into the South African approach. In this regard, measures to avert forced labour and mitigate its effects on the rights of its victims must be formulated taking into account the circumstances prevailing in South Africa.

The comparative study will make it easier to identify whether South Africa is in compliance with its international obligations, and whether the measures it employs to counteract forced labour are appropriate to its occluded and multi-faceted nature. Where gaps or shortcomings are identified (in the labour law sphere), they will be appropriately addressed through drawing inspiration from international law and the comparative jurisdictions. This mode of study will also provide an opportunity to discover and describe how forced labour has developed in the comparative jurisdictions, and determine whether the responses adopted by the UK and Brazil are at all similar.

Whereas international law will be used to establish the minimum standards expected of nations in the treatment of forced labour, the status of international law in South

83 2008 1 SA 474 (CC) at para 61.

84 Also see *S v Makwanyane* 1995 3 SA 391 (CC) at para 37; *Prinsloo v Van De Linde and Another* 1997 3 SA 1012 (CC) at paras 18-19.

85 1997 3 SA 1012 (CC) at para 19.

Africa as founded in sections 231-232 of the Constitution makes it useful to carefully recall the place of international treaties in national law. Unlike section 39(1)(b), these provisions speak to the incorporation of international law into South African law. Section 232 declares outright that customary international law is law in South Africa unless it is inconsistent with the Constitution or national legislation. In essence, customary law is deemed to be automatically part of municipal law so long as it is congruent with the latter and the Constitution itself. South African Courts have consistently engaged with the principles of customary international law where they find application in issues before them.⁸⁶

However, a dissimilar status has been accorded to international agreements. Section 231(2) requires that an international agreement (except an agreement which is technical, administrative, or executive in nature, or does not require ratification or accession)⁸⁷ be approved by resolution in both the National Assembly and the National Council of Provinces before it can be binding on the Republic. The Constitutional Court has interpreted this provision to imply that upon approval by the two parliamentary houses, South Africa will be bound by that particular treaty at the international level only.⁸⁸ Consequently, the Republic needs to take steps such as incorporating the treaty into national law or aligning national laws to comply with the substance of the treaty. For this reason, a treaty that has not been incorporated into national law does not create rights and obligations capable of enforcement by individuals before South African courts.⁸⁹ Consequently, section 231(4) proceeds to establish that an international agreement becomes part of national law when it is so enacted by national legislation. The self-executing provisions of a treaty approved by Parliament are part of national law in so far as they are not inconsistent with the Constitution or legislation.

86 See for example *Kaunda and Others v The President of the Republic of South Africa* 2005 4 SA 235 (CC) at paras 23-29.

87 These types of agreements bind the Republic without the approval of the National Assembly and the National Council of Provinces as enunciated by section 231(3) of the Constitution.

88 *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) at paras 91-92.

89 See further *Azanian Peoples Organisation and Others v President of the Republic of South Africa and Others* 1996 4 SA 671 at para 26-28.

The effect of incorporating international law under section 231(4) is not to translate the rights and obligations in the treaty into constitutional rights but rather to transform them into statutory rights and obligations enforceable under the specific legislation.⁹⁰ It follows from this that the use of various international instruments in this study should be taken to follow the caveats imposed by the Constitution.

The study of the positions of the international, UK and Brazilian law will be conducted via a critical analysis of relevant literature, international instruments and national legislation and other legislative measures, from which developments which may guide South Africa will be extracted. Where available, case law will be discussed to illustrate the application of various national, regional and international instruments. The South African position will be established by means of a critical review and analysis of the available literature, statutes and other legislative measures.

1.10 Outline of the study

Chapter 2 of this thesis considers the international law approach to forced labour as a backdrop against which discussions on the chosen jurisdictions may follow. The international law approach will consider both the general human rights implications of forced labour as well as the labour rights that stand affected by the offence. The basic import of this chapter is to identify the international minimum standards on forced labour as well as the principles of international law that may guide national legislative and policy frameworks. On that note, it considers the international position concerning the role that labour market institutions may play towards eliminating forced labour. The chapter also establishes the distinction between slavery and forced labour and provides general findings on the relevance of human trafficking to forced labour.

Following this, the approach adopted by the UK is considered in chapter 3. In this chapter the study explores how the UK has gradually developed its forced labour

90 *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) at para 102.

framework to reasonably meet the international standard proposed by the *Forced Labour Convention*. The position adopted is juxtaposed against the demands of the *2014 Protocol on Forced Labour*. The chapter further uncovers how experiences of forced labour in the UK are to highlight its uniqueness within this jurisdiction. The focal point of the discussion is to uncover the relevance of labour law to the UK's approach to forced labour. In a similar manner, chapter 4 examines the situation in Brazil and the measures the country has adopted to counteract the practice of slave labour. The South African framework is discussed in chapter 5 of this thesis, which follows the *modus* adopted in chapters 3 and 4. It incorporates in a comparative manner, elements of the UK and Brazilian approaches in order to put into perspective the shortcomings of the South African framework. Finally, lessons that the South African Government can learn from international law as well as the UK and Brazil are brought together in chapter 6. Accordingly, chapter 6 concludes this study by making recommendations for South Africa in view of the lessons learnt.

1.11 Conclusion

Whether in old or modern forms, slavery is a proliferating problem that transcends geographical boundaries. While the global community needs to speak of forced labour as a historical practice, it appears that much still needs to be done to achieve this ideal. Because criminal law has over the years served as the ideal *modus* to curb this practice, the gradual rise in the use of forced labour suggests that this approach has not been very successful in national laws. For this reason, a need has been seen to introduce a multi-disciplinary approach to forced labour that includes labour law where appropriate.

To that end, it is justified to re-visit South Africa's criminal law-centred national approach to forced labour in order to identify its shortcomings and make recommendations as to its adjustment. The continued failure of criminal law and the recent anticipated inclusion of labour law further justify the need for this study to ask how the international, UK and Brazilian law handle forced labour in a manner that pays due regard to the contribution of labour law and its enforcement

mechanisms. To set a background for the overall study, the ensuing chapter considers international standards on forced labour.

CHAPTER 2

FORCED LABOUR IN INTERNATIONAL LAW

2.1 Introduction

The international law framework views forced labour as a criminal offence and a human rights violation on which criminal sanctions must be imposed.⁹¹ While the use of forced labour can be traced back to the era of colonisation and has a corresponding relationship with slavery, evidence shows that it still finds relevance in modern labour relations. On that note, in the world of work, forced labour has been characterised as a violation of the human, labour and employment rights of those affected. Contrary to this sentiment, the traditional approach of the International Labour Organisation (ILO) has leaned towards a criminalisation of forced labour with the requirement that signatories to the *Forced Labour Convention* No 29 of 1930 devise measures to ensure that its penalties are strictly enforced. In this model, little is said about the need to ensure proper redress pertaining to the said labour and employment rights of those affected. Further to that, the normative framework is quite silent on how forced labour can practically factor into the labour law discourse. Recently, the *Protocol of 2014 to the Forced Labour Convention*, 1930 has suggested a combination of measures geared towards the elimination of forced labour, giving due credence to the contribution that national labour laws may actually play alongside other areas of the law. The above aspects will be thoroughly examined in this chapter.

In this regard, the focus of this chapter is to give the reader an overview of the international standards pertaining forced labour, which are meant to be adhered to by all members of the international community.⁹² While there is a recognition that forced labour calls into question the application of a myriad of laws, the focus of this

⁹¹ See article 25 of the *Forced Labour Convention* as well as article 4 of the *Universal Declaration of Human Rights*, 1948

⁹² That is, by virtue of their ratification (and domestication where necessary) of the *Forced Labour Convention*. It must also be noted that the prohibition of forced labour is one of the four core principles of the ILO. Hence, any member of the ILO, whether they have ratified the said Convention or not, is bound to ensure that there is non-tolerance of forced labour within its borders.

discussion is to explore whether the international framework supports the idea that forced labour should be viewed through a labour law lens. Due to the establishment of forced labour as a criminal offence and its relationship to human trafficking,⁹³ many a legal framework⁹⁴ is reliant on a human trafficking framework to simultaneously address forced labour. This chapter examines the appropriateness of such approaches in the light of recent international developments on the topic. Alongside this, the chapter delves into whether or not there is a difference between the concept of slavery and that of forced labour. This clarification will also allow for appropriate approaches to be adopted in respect of each of these, should it be found that they are different.

2.2 Definition, historical background and standard setting

The international attempts to end forced labour and efforts to put an end to slavery and the slave trade must not be seen as independent of each other. Accordingly, endeavours to end forced labour are commonly traced to the earliest approaches adopted by colonial masters to end slavery and the slave trade.⁹⁵ Notwithstanding that there were no instruments drafted specifically to address slavery and the slave trade, provisions making reference to their abolition were included in a number of treaties in the 19th century.⁹⁶ Although their objectives were related to matters beyond slavery, the 1814 Peace Treaty of Paris, the 1815 Second Treaty, the 1815 Declaration and the Final Act of the Congress of Vienna had clauses calling for the abolition of slavery and the slave trade.⁹⁷ The principal theme captured by the clauses was that the slave trade was repugnant to the principles of humanity, and they called for its suppression by the community of nations and signatories.⁹⁸

⁹³ The United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* of 2000 establishes this relationship. Para 2.4 below explores this relationship in-depth.

⁹⁴ For example, the discussion at para 3.4 below identifies that the United Kingdom previously adopted this approach. South Africa currently uses this approach, as discussed at para 5.4 and 5.5.1.1 below. Also see Andrees and Belser "Strengthening Labour Market Governance" 111.

⁹⁵ Thomann *Steps to Compliance* 185; ILO *Tripartite Meeting of Experts on Forced Labour* 12.

⁹⁶ Lassen 1988 *NJIL* 197-198.

⁹⁷ Lassen 1988 *NJIL* 197-198; Wiebalck 1998 *CILJ* 47.

⁹⁸ Lassen 1988 *NJIL* 197-198; Wiebalck 1998 *CILJ* 47.

Forced labour became a specific issue of discussion and international standard setting following the work of the League of Nations pertaining to mandated territories and the adoption of the *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*.⁹⁹ In addition to addressing slavery, the *Slavery Convention* also sought to prohibit the use of forced labour by requiring contracting parties to "take all necessary measures to prevent forced or compulsory labour from developing into conditions analogous to slavery".¹⁰⁰ At the time, an international definition had not been assigned to forced labour.

Following this, the League of Nations vested the responsibility for dealing with forced labour on the ILO.¹⁰¹ The ILO is an international organisation which was founded in 1919, under the auspices of the League of Nations. It later became a specialised agency of the United Nations (UN), after the dissolution of the League of Nations. It is a specialised organisation, in that it deals with the promotion of rights at work, the formation of decent jobs and the enhancement of social protection, and provides a platform for social dialogue in respect of employment issues.¹⁰² The ILO is unique in that it promotes tripartite cooperation on the formulation and implementation of its instruments. By virtue of a country's membership, its government and social partners are entitled to vote independently on the adoption of an instrument.¹⁰³

In order to further its newly conferred mandate, the ILO Governing Body appointed a Committee of Experts on Native Labour, whose role was to examine the existence of forced labour systems generally but most particularly in colonised countries.¹⁰⁴ Forced labour was at that time commonly used by colonial administrations in order

⁹⁹ Hereafter referred to as the *Slavery Convention*. This Convention was first negotiated under the League of Nations.

¹⁰⁰ See article 5 of the Convention. Note also para 2.3.1 below, which explores the relationship between slavery and forced labour.

¹⁰¹ ILO *Tripartite Meeting of Experts on Forced Labour* 12. The mandate of dealing with issues of slavery and the slave trade was to remain within the auspices of work done by the League of Nations. This was later transferred to the United Nations upon dissolution of the League of Nations. See generally Thomann *Steps to Compliance* 185,188-189.

¹⁰² Preamble of the *ILO Constitution*, 1919.

¹⁰³ Article 4 and 7 *ILO Constitution*, 1919. See para 2.6.2 below on the ILO's supervisory mechanism.

¹⁰⁴ ILO *Stopping Forced Labour* Report I(B) 10; ILO *Tripartite Meeting of Experts on Forced Labour* 4.

to propel developments as well as to provide labour for mines and plantations.¹⁰⁵ Following the work of the Committee of Experts, the ILO adopted the *Forced Labour Convention* No 29 of 1930, which mandated signatories to ensure the suppression of the use of forced or compulsory labour in all its forms within the shortest possible time.¹⁰⁶ Post the Second World War it was discovered that the use of forced labour was still prevalent and used amongst others as a means of political coercion, punishment for the infringement of labour discipline, and for economic purposes.¹⁰⁷ The ILO therefore adopted the *Abolition of Forced Labour Convention* No 105 of 1957 to help put an end to the use of forced labour for such purposes.¹⁰⁸

According to the *Forced Labour Convention*, forced labour is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."¹⁰⁹ According to the ILO, the definition covers all types of work, whether legal, illegal, formal or informal, notwithstanding the industry. Implicitly, forced labour should be seen as a practice that may occur across all sectors of employment indiscriminately.¹¹⁰ Further to this, there is recognition that all persons, whether women, men or children, stand to be victims of forced labour.¹¹¹ The penalty imposed on the person being held in forced labour may be in the form of criminal sanctions or through intimidation ranging from threats, violence, seizure and retention of identity of documents, confinement, or even the non-payment of wages.¹¹² The element of voluntariness plays an important part in the Convention, in that people have the right to choose or accept work and the freedom to terminate a contract of employment in accordance with requirements of a notice period as stipulated by national employment laws.¹¹³

¹⁰⁵ ILO *Stopping Forced Labour* Report I(B) 10; ILO *Tripartite Meeting of Experts on Forced Labour* 4.

¹⁰⁶ Article 1(1). Also see ILO *Stopping Forced labour* Report I(B) 10; ILO *Tripartite Meeting of Experts on Forced Labour* 4-5.

¹⁰⁷ ILO *Stopping Forced Labour* Report I(B) 11; ILO *Tripartite Meeting of Experts on Forced Labour* 5.

¹⁰⁸ ILO *Tripartite Meeting of Experts on Forced Labour* 5.

¹⁰⁹ Article 2(1).

¹¹⁰ ILO *Tripartite Meeting of Experts on Forced Labour* 4-5; Ruwanpura and Rai *Forced Labour* 2.

¹¹¹ ILO *Combating Forced Labour: A handbook* 8; Andrees *Forced Labour and Human Trafficking* 4.

¹¹² ILO *Combating Forced labour: A handbook* 8; Andrees *Forced Labour and Human Trafficking* 4.

¹¹³ ILO *Combating Forced Labour: A handbook* 8; Andrees *Forced Labour and Human Trafficking* 4.

In this light it is clear to see that forced labour goes further than the subjection of a worker to poor working conditions and the payment of low wages.¹¹⁴ Forced labour essentially compromises the freedom of the worker affected as well as his human and labour rights.¹¹⁵ Freedom is compromised in at least two ways: through denying the worker the right to freely choose his occupation through the deceptive means of acquiring their consent from the onset,¹¹⁶ and through various means of coercion employed to keep the worker in such employ through the use of a threat of penalty.¹¹⁷ Consequently, it must be noted that a worker who finds himself unable to leave a job due to an apparent scarcity of employment options cannot be said to be in a situation of forced labour.¹¹⁸ For a situation of forced labour to be proved, the elements enunciated above must be present.

Although efforts to bring an end to forced labour predate the era of the formation of the UN, forced labour appears still to be an issue of concern in the 21st century. In fact, a 2012 global estimate of forced labour conducted by the ILO reports that approximately 21 million people are held in forced labour worldwide.¹¹⁹ In this regard, forced labour remains a global problem that affects both developing and industrialised countries in varying magnitudes.¹²⁰ The ILO's statistical evaluations pigeonholes forced labour into three categories. Firstly, there is forced labour that may be imposed by the state or armed forces (which comprises forced labour that may be exacted by military or rebel groups, compulsory participation in public works, and forced prison labour¹²¹), which is approximated to make up 10% of the global

¹¹⁴ ILO *A Global Alliance Against Forced Labour* Report I(B) 5.

¹¹⁵ Belser *Forced Labour and Human Trafficking* 2.

¹¹⁶ Belser *Forced Labour and Human Trafficking* 2; ILO *Tripartite Meeting of Experts on Forced Labour* 7. Practical examples of this may be seen through practices of forced and slave labour in both the UK and Brazil, as examined at paras 3.3.3 and 4.3.3 below.

¹¹⁷ ILO *Tripartite Meeting of Experts on Forced Labour* 7. See in particular the discussions at paras 2.7.2.1, 3.3.3 and 4.3.3 below.

¹¹⁸ ILO *A Global Alliance Against Forced Labour* Report I(B) 5.

¹¹⁹ ILO *Global Estimate of Forced Labour* 13; ILO *Profits and Poverty* 7.

¹²⁰ Beirnaert 2008 *IUR* 7; ILO *Combating Forced Labour: A Handbook for Employers* 13. Whilst there is no estimate by country, regional estimates show that the Asia-Pacific region leads the estimates with 11.7 million victims, followed by Africa at 3.7 million. See ILO *Global Estimate of Forced Labour* 16.

¹²¹ Belser *Forced Labour and Human Trafficking* 3; ILO *A Global Alliance Against Forced Labour* Report I(B) 10.

estimate.¹²² Secondly, there is forced commercial sexual exploitation which involves the forceful entry of women, men and children by private agents into prostitution or into other forms of commercial sexual activities,¹²³ which makes up 22%.¹²⁴ The residual 68% is forced labour for economic exploitation imposed by private agents and enterprises in sectors other than the sex industry.¹²⁵ It is apparent from these estimates that forced labour imposed in the private economy appears to be the most common form of forced labour in the 21st century. Essentially, there has been a shift in the historical use of forced labour by the then colonial masters, as noted above. Notably, the statistics indicate that even governments themselves have gradually stopped imposing forced labour since the inception of the *Forced Labour Convention* in 1930.¹²⁶ The current challenge lies with the use of forced labour in the private economy.

While it may affect both informal and formal economy workers, research shows that informal economy workers are most vulnerable because they usually enjoy little or no protection under national labour laws.¹²⁷ Domestic work, agriculture, construction, manufacturing and entertainment are identified as the sectors most affected.¹²⁸ In addition, it is observed that people from minorities or socially excluded groups, as well as seasonal workers who move from rural to urban areas in search of work, are most likely to end up in forced labour.¹²⁹ Migrant workers with a regular or irregular migrant status are also common victims of forced labour.¹³⁰ A variety of factors come into play in increasing people's vulnerability to forced labour. Amongst these are discrimination, poverty, a lack of jobs in an individual's locality or

¹²² ILO *Global Estimate of Forced Labour* 13-14.

¹²³ Belser *Forced Labour and Human Trafficking* 3; ILO *A Global Alliance Against Forced Labour* Report I(B) 10.

¹²⁴ ILO *Global Estimate of Forced Labour* 13-14.

¹²⁵ ILO *Global Estimate of Forced Labour* 13-14; Belser *Forced Labour and Human Trafficking* 3.

¹²⁶ Also see Andrees *Forced Labour and Human Trafficking* 7.

¹²⁷ ILO *Tripartite Meeting of Experts on Forced Labour* 11.

¹²⁸ ILO *General Survey on the Fundamental Conventions* Report III 104; ILO *Tripartite Meeting of Experts on Forced Labour* ¶11.

¹²⁹ ILO *General Survey on the Fundamental Conventions* Report III 104; ILO *Tripartite Meeting of Experts on Forced Labour* 11; Also see para 4.3.3 below.

¹³⁰ ILO *General Survey on the Fundamental Conventions* Report III 104; *Tripartite Meeting of Experts on Forced Labour* 11.

an absence of alternative means to sustain a livelihood, illiteracy, a lack of skills, and lack of social protection.¹³¹

This discussion further holds the view that forced labour finds relevance in academic discussions and calls for labour legislative and policy intervention, because forced labour constitutes a violation of the four core labour rights enunciated in the *ILO Declaration of Fundamental Principles and Rights at Work*, 1998. Forced labour violates the right not to be subjected to forced labour as a right on its own. In addition, it may go to the extent of affecting the exercise of the three accompanying fundamental rights, which are the right to freedom of association and collective bargaining, the right not to be discriminated against in respect of employment and, in the case of children, the right to protection from child labour.¹³² Taken together, these principles make the point that forced labour is inevitably the opposite of decent work. It invariably has the potential to nullify all the rights and principles envisioned by the aforementioned Declaration. For this reason, it is inconceivable why arguments cannot be made to bring forced labour within the ambit of labour law.

Having set the context through defining forced labour and outlining its three categories as suggested by the ILO, a need arises to consider the forms forced labour may take. Having sufficient knowledge of the nature of forced labour may assist in making valid arguments touching on the violation of the human and labour rights of those affected. In addition, a problem is better addressed when its dynamics are understood.

2.3 Forms of forced labour

Whereas it is agreed that forced labour is prevalent in modern workplaces and the society at large, it remains a cunning practice that is hidden and difficult to

¹³¹ ILO Tripartite Meeting of Experts on Forced Labour 26; see further para 4.3.3 below.

¹³² Para 2.7.2 below considers these rights and other workplace rights that may be affected by forced labour.

identify.¹³³ This is largely attributable to its being common in informal employment, where there is little or no regulation by national labour laws.¹³⁴ This may suggest why forced labour remains a global problem that affects millions of people across the world.¹³⁵ If it is to be eliminated from labour markets, there is a need to understand the forms it takes and its dynamics. This knowledge helps set a background for advancing propositions on the various means with which forced labour may be eradicated, more particularly with reference to labour laws and labour administration. Moreover, a labour law approach requires the ability to differentiate subjection to poor working conditions from a situation of forced labour.

2.3.1 Traditional/chattel slavery

Slavery is arguably the oldest form of forced labour known to mankind. Slavery and the slave trade were common in ancient civilisations,¹³⁶ wherein the laws permitted for the purchase and/or acquisition of slaves by slave masters. At that time, slavery was legally recognised and justified as a beneficial human institution.¹³⁷ According to Miers,¹³⁸ the practice was traditionally characterised by ownership, thereby bestowing ownership rights on slave masters. Slaves had little or no rights and could be bought or sold, and worked with no payment of wages.¹³⁹ The very fact that they had few or no rights meant that more often than not they were exposed to poor working conditions and had no workplace rights.

¹³³ Andrees *Forced Labour and Human Trafficking* 9-10.

¹³⁴ Andrees and Belser "Forced Labour" 1-9.

¹³⁵ Andrees *Forced Labour and Human Trafficking* 7; ILO *Global Estimate of Forced Labour* 13; Beirnaert 2008 *IUR* 7.

¹³⁶ For example, accounts of slavery and the slave trade were written in the Code of Hammurabi (Babylonia) and in many forms in the Roman Empire. See in this case Wiebalck 1998 *CILJ* 41-42.

¹³⁷ Aristotle was one of the Greek philosophers who justified slavery. He submitted that slavery was a naturally occurring process; that is, some people were born to be slaves and others masters. His theory was based on the assertion that natural slaves were unfit to manage their affairs and therefore needed a master for assistance. To Aristotle, slaves were comparable to domestic animals; that is, fit only for physical labour. See Smith *Aristotle's Theory of Natural Slavery* 109.

¹³⁸ Miers 2000 *CJAS* 714-715.

¹³⁹ Miers 2000 *CJAS* 714-715.

Historically, a person could acquire the status of slavery in a number of ways. Prisoners of war were often turned into slaves or kidnapped as a means of tribute.¹⁴⁰ In other cases, enslavement was used as a means of punishment for criminals and could be imposed due to debt.¹⁴¹ It was also common for a person to give himself up for slavery, sell his children, or be born a slave.¹⁴² Slavery was hereditary and could be passed from one generation to another within a family.¹⁴³ Enslaved people could not own property, and their masters dominated all aspects of their lives.¹⁴⁴ Beyond ancient civilisation, slavery and the slave trade were institutionalised during the colonial era in most parts of the world. Governments recognised it and it was therefore protected under constitutions.¹⁴⁵

It is evident, then, that slavery has been a common institution for millennia. Whereas it should be spoken of as a thing of the past, it is asserted that slavery as evidenced during ancient and colonial times has developed into equivalent modern forms over the years.¹⁴⁶ The *Slavery Convention*¹⁴⁷ provides an international definition for slavery. In terms of Article 1(1), slavery is defined as follows:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

It is evidenced from this definition that slavery is characterised by ownership, an element that is necessary in the case of traditional/chattel slavery. Despite receiving criticism from human rights scholars,¹⁴⁸ this provision is internationally recognised as properly capturing the definition of slavery.

Exploring the meaning of slavery is relevant to this discussion in the following manner. The rise of the use of forced labour and the attention it has received has

¹⁴⁰ Blake *The History of Slavery* 17-20; Wiebalck 1998 *CILJ* 44.

¹⁴¹ Blake *The History of Slavery* 17-20.

¹⁴² Blake *The History of Slavery* 17-20.

¹⁴³ Wiebalck 1998 *CILJ* 43.

¹⁴⁴ Wiebalck 1998 *CILJ* 43.

¹⁴⁵ Redman 1994 *Chicago-Kent Law Review* 766-769.

¹⁴⁶ Lassen 1988 *NJIL* 197.

¹⁴⁷ South Africa ratified this Convention in June 1927.

¹⁴⁸ See amongst others, Quirk 2006 *HRQ* 568; Chong 2004 *Singapore Law Review* 140.

resulted in the word "slavery" or "modern day slavery" being adopted to refer to the various forms of forced labour prevalent in the contemporary world. However, when juxtaposed with slavery as defined under the *Slavery Convention*, forced labour does not necessarily require an element of ownership to be exercised over the victim. Consequently, Thomann¹⁴⁹ proposes that the key differences between slavery and forced labour are the exercise of ownership rights and the duration of the exploitation. Accordingly, he asserts that slavery is a *form* of forced labour. Under the chattel slavery institution, a slave is owned by his master and he cannot own property independent of the control of the master. On the contrary, in a modern-day forced labour situation, he is compelled to work, but his employer may not claim ownership rights over him and he can still exercise civil liberties.

Similarly, the ILO classifies slavery as a form of forced labour.¹⁵⁰ In addition, whilst the UN's work encompasses the study of slavery and its impact on human rights, it should not be taken to imply that it cannot be addressed in the context of forced labour by the ILO. To further denote the relationship between slavery and forced labour, the ILO traces the history of forced labour to the abolition of slavery.¹⁵¹ The relationship between the two is also evidenced from the preamble of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*.¹⁵² According to the preamble, the Convention was adopted taking into consideration the *Forced Labour Convention* and subsequent work by the ILO concerning forced and compulsory labour. The ILO also notes that the term slavery is nowadays commonly used to refer to forced labour or slavery-like conditions.¹⁵³

Flowing from this, whereas UN treaties and covenants popularly retain the use of "slavery" and the "slave trade", the ILO Committee of Experts has on many occasions referred to them as applicable to forced labour.¹⁵⁴ Moreover, whereas the

¹⁴⁹ Thomann *Steps to Compliance* 205.

¹⁵⁰ ILO *A Global Alliance Against Forced Labour* Report I(B) 8.

¹⁵¹ ILO *Tripartite Meeting of Experts on Forced Labour* 4.

¹⁵² Entered into force on 30 April 1957. Hereafter "Supplementary Convention on Slavery".

¹⁵³ ILO *A Global Alliance Against Forced Labour* Report I(B) 8.

¹⁵⁴ ILO *Report of the Committee of Experts on the Application of Conventions* Report III 38.

UN conducts extensive work on slavery, it does not place it beyond the jurisdiction of the ILO. Consequently, ILO research has outlined the present-day occurrence of chattel slavery and other slavery-like practices such as abductions.¹⁵⁵ Situations of hereditary slavery have also been noted in countries that have anti-slavery legislation.¹⁵⁶

Whereas the two terms are commonly used interchangeably, it appears that slavery and forced labour have inherent differences, as outlined above. As a result, it might be helpful for the term "slavery" to be clearly defined and for the boundaries of its application to be set out, if it is to be used in connection with forced labour in national legislation. A blanket provision prohibiting slavery is insufficient, in that it might be interpreted as relating to practices of chattel slavery which are not common in contemporary workplaces. Such a provision has the undesirable effect of possibly leaving a forced labour victim without a remedy because he may fail to establish the exercise of ownership rights over him by the perpetrator. In this regard, a little bit of clarity goes a long way, more particularly in order to ensure that employers and workers can independently create workplace codes of conduct that properly reflect protection from the use of forced labour. In addition to this, clear provisions will ensure that people are aware of what conduct exactly the law seeks to prohibit.

2.3.2 Serfdom¹⁵⁷

Serfdom is identified under the *Supplementary Convention on Slavery* as a practice similar to slavery. In terms of article 1(b), serfdom is defined as the status of a tenant who is bound to labour for his landlord notwithstanding whether such labour is rewarded or not. In this situation, the landlord holds all powers pertaining to

¹⁵⁵ ILO *General Survey on the Fundamental Conventions Report III* 104; also see in this regard ILO *Tripartite Meeting of Experts on Forced Labour* 11.

¹⁵⁶ ILO *Tripartite Meeting of Experts on Forced Labour* 11.

¹⁵⁷ It is noted that serfdom is a historic term that is derived from feudalism as found in Europe. See Welch 2009 *HRQ* 99-100. A discussion of this practice is commonly found in the work of human rights scholars. The ILO does not specifically provide extensive information on serfdom but classifies it as a common modern form of forced labour; hence its inclusion in this discussion. See for example the *Convention to Eliminate the Worst Forms of Child Labour* No 182 of 1999.

access to the land and the duty of the serf is to provide labour.¹⁵⁸ Welch¹⁵⁹ submits that the relationship between a serf and a landlord is characterised by amongst other features by poverty, debt bondage, the subordination of indigenous people, and the subjugation of groups susceptible to discrimination.

2.3.3 Debt bondage

Also known as bonded labour, debt bondage has been classified as the most common form of contemporary forced labour.¹⁶⁰ In terms of the *Supplementary Convention on Slavery*, debt bondage is classified as an institution or practice similar to slavery if the services rendered by a debtor in payment for his debt are not calculated to bring an end to the debt, or if the period in which services are to be rendered has no defined time frame, as well as if the nature of such services is undefined.¹⁶¹ It can be seen from this that the agreement to pay off a debt by performing work or rendering a service may start voluntarily. However, the problem ensues when the work performed does not bring an end to the debt or the details pertaining to the nature and duration of such an agreement are vague. The World Labour Report¹⁶² published in 1993 captures a typical example of how a worker may be trapped in a vicious cycle of debt bondage.

The employer typically entraps a bonded labourer by offering an advance which he has to pay off from future earnings. But since the employer generally pays low wages, may charge the worker for tools and accommodation, and will often levy fines for unsatisfactory work, the debt can never be repaid.

This demonstrates the potentially unending trap that bonded labourers may find themselves in. Accordingly, the ILO Committee of Experts observes that this practice is mainly propelled by poverty, with its victims being the poorest people in societies.¹⁶³ Illiteracy and lack of knowledge of their human rights are also common

¹⁵⁸ Welch 2009 *HRQ* 99-100.

¹⁵⁹ Welch 2009 *HRQ* 99-100.

¹⁶⁰ Miers 2000 *CJAS* 724.

¹⁶¹ Article 1(a).

¹⁶² ILO *World Labour Report* 11.

¹⁶³ ILO *General Survey on the Fundamental Conventions* Report III 125.

contributors, seeing that they make it easy for the employer to exploit the worker.¹⁶⁴ Because of its complex nature and duration, it has been found that it is common for the debts of an employee to be inherited by one or more of his relatives upon his death.¹⁶⁵

2.3.4 Commercial sexual exploitation

Commercial sexual exploitation is the non-consensual introduction to work in the sex industry, either as a prostitute or in other commercial sexual activities.¹⁶⁶ This is a widespread activity that thrives on organised crime and allegedly exists almost everywhere.¹⁶⁷ Whereas women, men and children may all be victims, recent ILO estimates demonstrate that women and girls are most affected by this activity.¹⁶⁸ Typically, a victim is recruited by trickery with a false promise of a specified job, only to discover that the job is not what she expected.¹⁶⁹ Victims are then retained in the industry through intimidation, force and violence.¹⁷⁰ More often than not, due to the desperate need to fend for their families back at home, they fear to report such illicit activity to the authorities due to the fear of deportation.¹⁷¹

2.3.5 Child forced labour

It has already been noted above that children are also vulnerable to forced labour, no matter the form it takes. However, not all child labour¹⁷² is forced labour. Therefore there is a need to properly address child labour that is non-consensual as

¹⁶⁴ ILO *General Survey on the Fundamental Conventions* Report III 125.

¹⁶⁵ ILO *General Survey on the Fundamental Conventions* Report III 125.

¹⁶⁶ ILO *A Global Alliance Against Forced Labour* Report I(B) 10.

¹⁶⁷ Miers 2000 *CJAS* 729.

¹⁶⁸ Globally, females account for 98% of sexual exploitation situations, with males making up the remaining 2%. In an estimate of adults in comparison to children, it is submitted that 79% of victims are adults, whilst children form 21% of commercial sexual exploitation victims. In this regard see ILO *Global Estimate of Forced Labour* 14-15.

¹⁶⁹ Miers 2000 *CJAS* 729-730.

¹⁷⁰ Miers 2000 *CJAS* 729.

¹⁷¹ Miers 2000 *CJAS* 729.

¹⁷² Child labour is defined as "work that deprives children of their childhood, their potential and their dignity and that is harmful to their physical and mental development." See ILO date unknown <http://ilo.org/ipecc/facts/lang--en/index.htm>.

child forced labour. Child forced labour is recognised as a practice akin to slavery where a person under the age of eighteen is given away by his parents to another with an endeavour to have the child work for or get exploited by that person.¹⁷³ Whereas the *Worst Forms of Child Labour Convention*¹⁷⁴ classifies slavery and related practices among the four worst forms of child labour,¹⁷⁵ it does not specifically define child forced labour. As a result, the ILO has ruled that the generic definition of forced labour as crafted under the *Forced Labour Convention* is equally applicable to child forced labour.¹⁷⁶ However, this should be applied with caution, taking into account a number of factors. Because the element of voluntariness is key to forced labour, the ILO submits that where children are concerned, the law must be interpreted bearing in mind that a minor below the age of majority cannot consent to work.¹⁷⁷ As a result, the consent of the parents must be taken into account.¹⁷⁸ Parents may give a child away into forced labour either voluntarily or involuntarily. In the case of the former, the penalty is applied to the parents as opposed to the child.¹⁷⁹ In addition, a child may be a victim of forced labour as an outcome of his parents being forced labourers themselves.¹⁸⁰

With that in mind, the ILO asserts that any economic activity performed by a child with an element of coercion by a third party to such a child or his parents, intended to force the child to accept a job or remain in such employment, is child forced labour.¹⁸¹ Child forced labour invariably takes away the right of children not to be subjected to forced labour and their right to be protected from child labour, which are fundamental rights under the *ILO Declaration on Fundamental Principles and Rights*.

¹⁷³ Article 1(d) of the *Supplementary Convention on Slavery*.

¹⁷⁴ Convention No 182 of 1999, entered into force on the 19th November 2000.

¹⁷⁵ Article 3(a) of the Convention lists practices similar to slavery as including the sale and trafficking of children, debt bondage and serfdom, and the forced or compulsory recruitment of children for use in armed conflict. Of particular interest also is Article 3(b) which classifies the use of children in prostitution and the sex industry as the worst form of child labour.

¹⁷⁶ ILO *Hard To See, Harder To Count* 16 & 17.

¹⁷⁷ ILO *Hard To See, Harder To Count* 16 & 17.

¹⁷⁸ ILO *Hard To See, Harder To Count* 16 & 17.

¹⁷⁹ ILO *Hard To See, Harder To Count* 16-17.

¹⁸⁰ ILO *Hard To See, Harder To Count* 16-17.

¹⁸¹ ILO *Hard To See, Harder To Count* 16-17.

2.3.6 Domestic servitude

Domestic work in itself is not a form of forced labour. Various factors may turn it into domestic servitude, however, thus rendering it a form of forced labour. For a domestic worker to be deemed to be in a situation of domestic servitude, an employer must be found to have withheld wages, physically or even sexually abused the worker, or subjected the worker to debt bondage.¹⁸² Migrant domestic workers stand to be the most vulnerable to forced labour.¹⁸³ In the case of trafficked domestic workers, false promises of job prospects or education are commonly used to lure women and trap them into domestic servitude.¹⁸⁴ The informal nature of their job and the fact that it takes place in private homes aggravates the problem and makes it more complex to detect.

According to the ILO, the absence of labour legislation protecting domestic work and their inability to exercise labour rights such as freedom of association further complicates the position of domestic workers trapped in domestic servitude.¹⁸⁵ Furthermore, even in cases where there is legislation in place, people employed in domestic work are commonly not well skilled and are unlikely to know their rights, facts which make them vulnerable to abuse.

In conclusion, the ability to differentiate between forced labour forms enables the development of legislative and policy responses that are targeted at addressing the different needs of forced labour victims and measures that will avoid its recurrence. While the aim is to ensure the overall eradication of forced labour, the uniqueness of its forms may require the adoption of unique additional measures to cater for victim assistance, which is now a significant part of the ILO's strategy, as will be seen below.¹⁸⁶ For example, a response to a forced child labour situation will require different measures from forced labour exerted on adults. Addressing forced labour in

¹⁸² Ruwanpura and Rai *Forced Labour* 5-6; ILO *General Survey on the Fundamental Conventions* Report III 104.

¹⁸³ ILO *Tripartite Meeting of Experts on Forced Labour* 12.

¹⁸⁴ Anon date unknown [Fightslaverynow.org/why-fight-there-are-27-million-reasons/labortrafficking/domestic-servitude/](https://fightslaverynow.org/why-fight-there-are-27-million-reasons/labortrafficking/domestic-servitude/).

¹⁸⁵ Ruwanpura and Rai *Forced Labour* 5-6.

¹⁸⁶ Para 2.6.2.2 below in particular.

the case of children may call into question the observance and respect of matters such as the best interest of the child, as required by international law.¹⁸⁷

2.4 The relevance of human trafficking to forced labour

Attention to human trafficking (or trafficking in persons) has grown in recent years. When research is done on matters of forced labour, human trafficking almost always arises as an accompanying factor. On certain occasions it has also been classified as a form of forced labour.¹⁸⁸ It is conceded that most cases of forced labour begin with the trafficking of victims.¹⁸⁹ Be that as it may, whenever human trafficking is discussed in relation to forced labour, caution should be applied, since not all instances of human trafficking result in forced labour.¹⁹⁰ Also, not all forced labourers are victims of trafficking. It is therefore essential to clarify the relationship between human trafficking and forced labour and identify the extent to which the two concepts are different.

The issue of human trafficking has been dealt with since the era of attempts at ending slavery and slave trade.¹⁹¹ In recent times it has gone from being an issue of human rights and migration to an international crime prohibited globally. Shelley¹⁹² suggests that if we address human trafficking within the framework of transnational crime, the bigger picture will come into play, which essentially moves from viewing it as a relatively minor problem to a truly significant one linked to international organised crime. Article 3(a) of the UN *Protocol to Prevent, Suppress and Punish*

¹⁸⁷ Article 3 of the Convention on the Rights of the Child provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

¹⁸⁸ *ILO Global Estimate of Forced Labour* 13.

¹⁸⁹ Andrees *Forced Labour and Human Trafficking* 5; *ILO Human Trafficking and Forced Labour* 3-5, 17-21.

¹⁹⁰ Andrees *Forced Labour and Human Trafficking* 5.

¹⁹¹ See para 2.2 above, which captures the earliest attempts to put an end to slavery and the slave trade in the 19th century.

¹⁹² Shelley *Human Trafficking* 116-137.

*Trafficking in Persons Especially Women and Children*¹⁹³ defines human trafficking as:

... 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. 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...¹⁹⁴

According to this definition, for a person to be trafficked three elements must be in place. Firstly, trafficking involves moving a person through recruitment, transportation, transfer, accommodation or receipt of such person. Secondly, the movement must not be voluntarily on the part of the victim. It must be achieved through force, coercion, abduction, fraud or deception, or by taking advantage of a person's vulnerability. Fraud and deception diminish the ability of the victim to take voluntary action, since his consent would have been obtained fraudulently.¹⁹⁵ Lastly, the purpose of such movement must be to subject the victim to one or more of the forms of exploitation alluded to in article 3(b) above, forced labour and slavery inclusive.

Therefore, the proposition that human trafficking is forced labour can be misleading to a certain extent. Arguably, the correct position is that human trafficking almost always leads to forced labour,¹⁹⁶ but is not in itself forced labour. With that sentiment in mind, human trafficking must be classified as a means to an end, *viz* forced labour, as opposed to an end itself. Notwithstanding a suggestion that it is forced labour, the ILO has also determined that although they are related, human

¹⁹³ This Protocol supplements the UN *Convention on Transnational Organised Crime*. It is hereafter referred to as the Trafficking Protocol. It is also commonly referred to as the Palermo Protocol.

¹⁹⁴ Exploitation in the form of organ removal is omitted because it is beyond the scope of this research.

¹⁹⁵ Article 3(b).

¹⁹⁶ ILO 2008 [http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang-en/index.htm).

trafficking and forced labour are not the same thing.¹⁹⁷ Accordingly, whereas it is admitted that most forced labour occurs as a result of human trafficking, local people who are forced labourers do not form part of the population who are in forced labour owing to human trafficking.¹⁹⁸ In addition, the need to distinguish between subjection to sub-standard working conditions and actual forced labour requires that a distinction be made between the latter and human trafficking. Certain instances of human trafficking result in the subjection of victims to sub-standard working conditions that do not necessarily amount to forced labour.

It is undeniable that human trafficking violates the right of a person to freedom and security of the person, among other rights. From a labour law perspective, where human trafficking ends in forced labour, workplace rights¹⁹⁹ are also affected. As a result, human trafficking for the purposes of forced labour has over the years been a concern of the ILO, because it encroaches on the labour rights of workers. For its own work, the ILO has devised labour and trafficking measures to assist member states to combat human trafficking for the purposes of forced labour. Of particular relevance here is the new binding standards of the *Protocol of 2014 to the Forced Labour Convention*,²⁰⁰ which requires the extension of victim assistance measures to trafficked forced labour victims and the protection of migrant workers from deceptive and abusive practices that may be invoked by recruitment agencies.²⁰¹ Another notable standard includes that set by the *Migration For Employment Convention*,²⁰² which requires governments to ensure the welfare of migrant workers by ensuring the provision of accurate information when taking up employment within their borders, and equal protection by national laws, among other things. Article 3 requires a signatory to take measures to counter the dissemination of misleading

¹⁹⁷ ILO 2008 [http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang-en/index.htm).

¹⁹⁸ ILO 2008 [http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/events/WCMS_090236/lang-en/index.htm).

¹⁹⁹ Para 2.7 below features an extensive discussion of the impact of forced labour on the labour and employment rights of its victims.

²⁰⁰ The provisions of the protocol are binding on ILO members who ratify it. It is open for ratification by members who ratify or have ratified the *Forced Labour Convention*. See par 2.6.2.2 below.

²⁰¹ Articles 1(3), 2(d) and 4. Para 2.6.2.2 below considers the standard set by the Protocol.

²⁰² Convention No 97 of 1949.

information relating to immigration, which in this case would imply information calculated to mislead migrants into accepting false promises of decent jobs.

The role of employment agencies in fostering human trafficking for the purposes of forced labour has also been noted. As a result, provision is made for the regulation and monitoring of employment agencies in order to curb abuses and fraudulent practices associated with job placements of all job seekers, migrant workers inclusive.²⁰³ Members of the ILO have been required to draft and implement National Action Plans on forced labour (and human trafficking) which set out strategies on how to approach the problem, identify gaps in legislation and policies, and map out ways to address it. In their analysis of National Actions Plans, Andrees and Belser²⁰⁴ observed that most such plans focus on human trafficking. In addition to this, the ILO observed that most National Action Plans adopt an approach where labour administration and labour inspectors play a negligible role, with the greater part of the responsibility and allocation of resources being bestowed on criminal law enforcement.²⁰⁵

Over and above its strategies, the ILO supports the ratification of the *Trafficking Protocol* by its members bearing in mind the relationship between forced labour and human trafficking.²⁰⁶ By ratifying the Protocol, a state party undertakes to achieve suppression and the prevention of human trafficking and to provide assistance to its victims in cooperation with other state parties.²⁰⁷ The Protocol requires that state parties put in place legislative measures that criminalise human trafficking and speak to victim support and assistance.²⁰⁸ While the ratification of the *Trafficking Protocol* and its domestication into national legislation may assist in combating trafficking for forced labour and ensuring the prosecution of perpetrators, the question should be asked if such legislation will address cases of forced labour in their entirety, or if it will exclusively apply to forced labour that arises owing to human trafficking.

²⁰³ *Private Employment Agencies Convention* No 181 Of 1997.

²⁰⁴ Andrees and Belser "Strengthening Labour Market Governance" 111.

²⁰⁵ Andrees *Forced Labour and Human Trafficking* 11.

²⁰⁶ ILO *Tripartite Meeting of Experts on Forced Labour* 18-20.

²⁰⁷ Article 2.

²⁰⁸ Article 5.

Due to its nature,²⁰⁹ the *Trafficking Protocol* does not in any way suggest that its provisions can be applied to general cases of forced labour. It therefore follows that national legislation domesticating the Protocol is more likely to be applied in addressing forced labour that arises due to human trafficking. In this case, where national criminal and labour laws do not comprehensively address forced labour, a gap is created in the sense that the trafficking spectrum of forced labour is addressed, whilst that which occurs independently of trafficking is not. As a result, sole reliance on trafficking legislation cannot be deemed enough to address forced labour on its own.

In cases where trafficking legislation is used to address forced labour arising from human trafficking, the need to ensure non-fragmentation of the approach is also essential. Because the Protocol is classified as a criminal justice instrument, most ILO Member States that ratify it adopt an approach that relies solely on the criminal justice system to deal with human trafficking.²¹⁰ On this note, the ILO moves for unification between criminal, immigration and labour law in order to provide an improved protection to victims.²¹¹ In essence, victims should not only be seen as victims of human trafficking, but also as workers whose labour rights have been violated. In this case labour law is seen as relevant, in that it can improve access to compensation through employment tribunals and dispute settlement mechanisms independently from criminal proceedings.²¹²

2.5 Forced labour as a violation of human rights

It has been expressed above²¹³ that the earliest approach to ending slavery and the slave trade was based on the view that they are repugnant to the spirit of humanity. Whereas this approach did not openly characterise these practices as violations of

²⁰⁹ The primary purpose of the Protocol is to curb human trafficking, not forced labour. Note also para 61(a) of the *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons*, which provides that the Protocol is essentially a criminal justice instrument.

²¹⁰ Andrees *Forced Labour and Human Trafficking* 11.

²¹¹ ILO *Action Against Trafficking* 8.

²¹² ILO *Action Against Trafficking* 8.

²¹³ Para 2.2.

human rights, it sent a clear message about their malignant effects on those subjected to slavery. Upon the adoption of the *ILO Declaration of Philadelphia*,²¹⁴ efforts to abolish slavery and the slave trade shifted to a rights-based approach.²¹⁵

In its endeavour to tackle the issue of slavery, the UN adopts a different approach to that of the League of Nations. While the League's approach was centred on a collective end to slavery and the slave trade monitored by the international community, it did not refer to it directly as a violation of human rights.²¹⁶ On the other hand, the UN's *modus* is essentially based on the view that slavery is a violation of human rights to which no one should be subjected, without distinction.²¹⁷ The right not to be subjected to slavery is found in a plethora of the UN's international human rights documents, as will be seen below. In addition, regional human rights instruments and treaties expressly protect this right.²¹⁸ Owing to the recognition it has received over the years, it is said to be a rule of customary international law and also the first human right to be accorded that status.²¹⁹

The fact that the UN deals with slavery and the ILO with forced labour²²⁰ does not suggest that human rights standards flowing from human rights instruments of the UN are non-applicable to forced labour. In fact, the ILO Committee of Experts²²¹ reports that:

²¹⁴ Adopted on 10 May 1944. This Declaration recalls the purpose of the ILO as an international organisation and also establishes the value of human rights to the achievement of social justice. See Article I and II.

²¹⁵ See in particular article II(a) which provides that "All human beings, irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."

²¹⁶ The body of the *Slavery Convention* does not refer to these practices as violations of human rights.

²¹⁷ The human rights embodied in UN documents are guaranteed to all persons without distinction or discrimination based on any ground. See Article 2 of the *Universal Declaration of Human Rights*, Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* and Article 2(1) of the *International Covenant on Civil and Political Rights*.

²¹⁸ Regional human rights instruments are a class of treaties formulated under regional human rights systems. These include amongst others, the *African Charter on Human and Peoples' Rights*, the *European Convention on Human Rights* and the *Organisation of American States Charter*. To maintain a coherent argument, regional instruments are considered in chapters dealing with the relevant jurisdictions. See paras 3.3.2, 4.3.2 and 5.3.3 below.

²¹⁹ Redman 1994 *Chicago-Kent Law Review* 759.

²²⁰ See para 2.2 above.

²²¹ ILO *Report of the Committee of Experts on the Application of Conventions* Report III 38.

...international labour standards and the provisions of the United Nations human rights treaties related to them are complementary and mutually reinforcing. Close cooperation between the ILO and the United Nations in relation to its human rights treaties is therefore an important strategy to enhance the influence of ILO standards and to ensure consistency and coherence within the United Nations system with regard to human rights at work.

In this regard, authority is given for UN human rights treaties and their provisions to be applied to ILO labour law standards as and when they become applicable, in view of the fact that this will augment the authoritative value of ILO labour standards. Albeit primarily focusing on issues of slavery and the slave trade, the ILO has stated that UN human rights instruments have standards and principles related to forced labour.²²²

2.5.1 The Universal Declaration of Human Rights

The *Universal Declaration of Human Rights*²²³ was adopted by the UN in 1948 and is the first agreement on fundamental human rights by the international community. The *UDHR* is a renowned international law document with legal stature.²²⁴ International legal instruments on human rights derive their authority from it,²²⁵ and it is valued as an interpretation of the human rights clauses in the UN Charter and as part of customary international law.²²⁶

In so far as forced labour is concerned, the *UDHR* specifically establishes the inherent right not to be held in slavery or servitude. Article 4 of the Declaration provides that "no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms". Reading the set of characteristics alluded to above,²²⁷ it is evident that forced labour violates not only the right to be free from enslavement but a number of other rights embodied in the *UDHR*. It has to be pointed out that forced labour, whatever forms it takes, infringes on the right of a

²²² ILO *Tripartite Meeting of Experts on Forced Labour* 17.

²²³ Hereafter referred to as the UDHR.

²²⁴ Hannum 1996 *GJICL* 290.

²²⁵ Hannum 1996 *GJICL* 290.

²²⁶ Hannum 1996 *GJICL* 290.

²²⁷ Reference should be made to para 2.2 above, which explores the definition of forced labour in depth and thereby highlights its characteristic.

person to be free, and constitutes a threat to the security of the person.²²⁸ It is also obvious that the conditions of forced labour have no reverence for the human dignity to which everyone is entitled.²²⁹ The *UDHR* also embodies workplace rights that can be used in support of an argument against forced labour. In accordance with the Declaration, all people possess not only the right to work but also the right to freely choose their occupation,²³⁰ elements of which are absent in forced labour. Also, forced labour takes away the right of an individual to just and favourable conditions of work.²³¹ The fact that forced labour is more often than not characterised by the payment of inadequate or no wages means that it furthermore infringes on the right of an individual to just and favourable remuneration.²³²

2.5.2 The Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery

The UN also adopted the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery*²³³ in 1956 to enhance the prohibition of slavery enunciated in the *Slavery Convention*. The *Supplementary Convention* does not replace the *Slavery Convention*, but it endorses its provisions as still effective. Furthermore, Article 7 confirms that the definition of slavery as contained in the *Slavery Convention* is still effective and is the universal definition of slavery.²³⁴

The *Supplementary Convention on Slavery* introduces details left out by the *Slavery Convention* by acknowledging the fundamental human rights to freedom and dignity as the guiding principles compelling the abolition of slavery.²³⁵ Effectively, therefore, it introduces a rights-based approach to the elimination of slavery. It also identifies and defines institutions and practices similar to slavery that signatories must abolish,

²²⁸ Article 3.

²²⁹ Article 1.

²³⁰ Article 23(1).

²³¹ Article 23(1).

²³² Article 23(1).

²³³ Hereafter the *Supplementary Convention on Slavery*.

²³⁴ See para 2.3.1 above on the definition of slavery under the *Slavery Convention*.

²³⁵ See the preamble of the Convention.

whether or not they fall within the definition of slavery under the *Slavery Convention*. Signatories to the Convention undertake to take "practicable and necessary legislative and other measures" to attain a progressive complete abolition of debt bondage, serfdom, forced marriages, servitude and child forced labour.²³⁶

The *Supplementary Convention on Slavery* furthermore mandates all parties signatory to it to criminalise all activities involved in the act of enslaving or attempting to enslave a person.²³⁷

2.5.3 *The International Covenant on Civil and Political Rights*²³⁸ and the *International Covenant on Economic, Social and Cultural Rights*²³⁹

As international human rights instruments, the *ICCPR* and the *ICESCR* are both founded on the *UDHR* and thus borrow largely from the wording of its provisions. The *ICCPR* elaborates on the civil and political rights and freedoms listed in the *UDHR*. Article 8(1) of the *ICCPR* presents a reproduction of Article 4 of the *UDHR* with regards to slavery and the slave trade. The right not to be held in slavery and servitude falls within the class of rights that state parties²⁴⁰ cannot derogate from in periods of public emergency.²⁴¹ Consequently, state parties (including individuals) will not under any circumstances be permitted to resort to the use of servitude, slavery or the slave trade.

The *ICCPR* proceeds to protect persons from being required to perform compulsory or forced labour. Nevertheless, the Covenant sets apart what should not be classified as forced labour, an element that is essential to this discussion. In terms of Article

²³⁶ Article 1.

²³⁷ Article 3(1) and 6(1).

²³⁸ It was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976; hereafter referred to as *ICCPR*.

²³⁹ It was adopted by the UN General Assembly on 16 December 1966 and entered into force on 3 January 1976; hereafter referred to as *ICESCR*. South Africa has been a signatory to these two instruments since October 1994.

²⁴⁰ Although states that are party to this covenant are the main duty bearers, the obligation to respect the rights expressed in the *ICCPR* extend to individuals also. See article 5 of the covenant in this regard.

²⁴¹ Article 4(1).

8(3), not all work that a person is required to perform will be classified as forced or compulsory labour. In this case, work imposed on a person under detention arising out of an order of court, service of a military character, and work that arises from a normal civil obligation should not be taken to comprise forced labour. The *ICESCR*, on the other hand, builds upon the social and economic rights espoused in the *UDHR*. It is premised on the human right of individuals to self-determination, which accordingly allows them to "freely determine their political status and freely pursue their economic, social and cultural development."²⁴² Of particular relevance is the right to work, which is inclusive of the right to choose or accept employment.²⁴³ Article 7 protects the right to the enjoyment of just and favourable conditions of work, which includes fair remuneration, safe and healthy working conditions, the right to rest, and a limitation of working hours. The right to freedom of association and collective bargaining also finds protection under this covenant.²⁴⁴

These two instruments reduce forced labour to the violation of a right that is civil and political as well as economic in nature. They establish how forced labour inevitably has an effect on the liberty of persons as well as a direct impact on their socio-economic development. Arguably, this classification renders the protection against forced labour capable of entrenchment in constitutions that normally constitutionalise civil and political rights to the exclusion of socio-economic rights.

2.5.4 The Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

It should be taken into account that children equally benefit from the human rights documents discussed above. But because their rights are specifically protected in a separate convention in addition to the human rights instruments already referred to, it is instructive to consider the *Convention on the Rights of the Child* in reference to

²⁴² Article 1(1).

²⁴³ Article 6(1).

²⁴⁴ Article 8.

their exposure to forced labour.²⁴⁵ This Convention does not specifically speak to the right of children to be protected against slavery or forced labour. However, it embodies articles that may be used to support this argument. For example, Article 32(1) speaks of the right of children to be protected from economic exploitation and from carrying out any work that may be detrimental to their health or interfere with pursuance of their right to education.²⁴⁶ Moreover, Article 32(2) binds signatories to the Convention to ensure a legislative minimum age of employment. Consequently, if a child is admitted into employment, provision should be made for the regulation of the hours and conditions of employment. It follows therefore that forced labour constitutes economic exploitation, because it comprises the manipulation of the labour of a child without his consent, wherein he is kept under a threat of the imposition of a penalty.²⁴⁷ The regulation of working hours and conditions of employment also factors in, because whilst poor working conditions are not in themselves forced labour, they have been used to commonly establish the existence of forced labour.²⁴⁸

Similarly, the *CEDAW*²⁴⁹ does not specifically speak of forced labour and/or slavery. However, it becomes applicable in cases of forced labour imposed on women and girls. The basic premise is that ratifying states must commit to ensuring the elimination of all forms of discrimination against women. Article 11(a) of the Convention reaffirms the right of women to work, which must be accompanied by the right to freely pursue a profession of their choice.²⁵⁰ The right to their social security in case of unemployment or disability should be protected,²⁵¹ as well as the right to safe and healthy working conditions.²⁵² Article 6 requires measures to be taken to suppress the trafficking of women and their subjection to sexual

²⁴⁵ See further para 2.3.5 above. South Africa is a signatory to this Convention as of January 1993.

²⁴⁶ The right to the education of the child is protected under Article 28 of the Convention.

²⁴⁷ See para 2.3.5 above.

²⁴⁸ See para 3.3.4 below.

²⁴⁹ As ratified by South Africa in January 1993.

²⁵⁰ Article 11(c).

²⁵¹ Article 11(e).

²⁵² Article 11(f).

exploitation.²⁵³ The introduction of these elements into the Convention coincided with efforts to suppress forced labour and slavery (of women in particular) as contained in other human rights documents discussed above. The requirement to suppress the trafficking of women also makes a contribution to the reduction of forced labour, in that it targets human trafficking perpetrated for the purposes of commercial sexual exploitation, which has been identified above as a form of forced labour.²⁵⁴ The imposition of all forms of forced labour on women runs counter to the spirit and ideals of this Convention.

Based on this account, human rights instruments on slavery find proper application in an argument against forced labour. Moreover, as seen above, some of the human rights instruments expressly speak to the prohibition of forced labour. To employ a rights-based approach to forced labour makes it compelling, bearing in mind the special nature of human rights. Moreover, this approach is unique in that it places an obligation on governments to ensure the respect and protection of such rights by themselves and by individuals. Human rights instruments can also serve as guidance in the formulation and interpretation of national legislation prohibiting forced labour. For example, when a country complies with its obligations under the *ICCPR* and *ICESCR* towards forced labour, this significantly contributes towards the overall aim of suppressing forced labour in respect of the ILO conventions. Consequently, the ILO conventions on forced labour and general human rights instruments complement one another.

Whereas UN human rights instruments speaking to slavery may be used in arguments against forced labour, this must be done cautiously, because it may be confusing where national legislation makes a sweeping provision prohibiting slavery without setting out clear boundaries on its application *vis-a-vis* forced labour. A superficial reading of such a provision may be misunderstood, bearing in mind the differences between forced labour and slavery.²⁵⁵ Put differently, slavery provisions

²⁵³ Note that commercial sexual exploitation is regarded as a form of forced labour. See para 2.3.4 above.

²⁵⁴ Para 2.3.4 above.

²⁵⁵ Para 2.3.1 considers the relationship between slavery and forced labour.

emanating from UN human rights instruments can and must be used to back up forced labour provisions. However, more should be done to improve legislation that employs a simple prohibition of slavery as if it would be sufficient to curb forced labour.

2.6 ILO standards on forced labour

2.6.1 General observations

It has been outlined above²⁵⁶ that the ILO has been addressing the issue of forced labour since its formation. The adoption of the *Forced Labour Convention* in 1930 marked the first normative framework specifically intended to suppress the use of forced labour by the then colonial masters. That was almost eighty-seven years ago. Clearly the practice of forced labour has evolved from its sole use by such colonial powers to the categories identified by the ILO, as discussed above.²⁵⁷ As will be seen below, the changing trends in the use of forced labour have necessitated a shift in the ILO's strategy as initially proposed under the *Forced Labour Convention*.

Firstly, the *ILO Declaration of Philadelphia*²⁵⁸ provides that labour is not a commodity. That is, people should not be treated like chattels or commodities, but should be respected and treated with dignity. Secondly, freedom from forced labour is also recognised by the ILO as a fundamental principle and right that must be observed in every workplace.²⁵⁹ All members of the ILO, whether or not they have ratified conventions on forced labour, are obliged by virtue of their membership to promote and protect this right.²⁶⁰ Alongside this principle are freedom of association and collective bargaining, the abolition of child labour, and the abolition of discrimination in respect of employment and occupation. Thomann²⁶¹ observes that forced labour has received scant attention in academic circles, in comparison with

²⁵⁶ Para 2.2 above.

²⁵⁷ Para 2.2 above.

²⁵⁸ Article 1(a).

²⁵⁹ Article 2(b) of the *ILO Declaration on Fundamental Principles and Rights at Work*, 1998.

²⁶⁰ Article 2 *ILO Declaration on Fundamental Principles and Rights at Work*, 1998.

²⁶¹ Thomann *Steps to Compliance* 185.

the other three rights and principles.²⁶² In addition, the ILO also observes that forced labour is a largely misunderstood concept. Hence, in some cases it is used to define situations of poor working conditions and the non-payment of wages.²⁶³

As observed above,²⁶⁴ forced labour is a reality to around 21 million people in the world. To have it discussed so seldom in academia and not properly addressed in legislation arguably aggravates it. Academic dialogue could serve as a tool for legislative and policy reform on forced labour. Consequently, a need arises for knowledge on forced labour to be improved, as this will inform intended legislative and policy reforms. With these sentiments in mind, forced labour has been described as any work or service that a person is involuntarily required to perform accompanied by the threat of a penalty.²⁶⁵ It has also been notified that such penalties may take different forms. Previous observations demonstrate that there is a need to ensure precise definitions and clarity as to what constitutes forced labour. Swepston²⁶⁶ asserts that there are two main reasons why any attempts at addressing forced labour in national legislation should not overlook the importance of giving clarity to the meaning of forced labour in all its guises. Firstly, there is a need to clarify exactly what conduct is being prohibited and what is not.²⁶⁷ Ideally, this would help employers know as and when they could be liable for prosecution for employing forced labour. Workers also need to know exactly when a situation can be classified as forced labour and what their rights are should they find themselves in such a situation. Secondly, if the various forms of forced labour were clarified, proper means to deal with them could be developed individually.²⁶⁸

In order to assist in differentiating between poor working conditions and forced labour, the ILO has formulated forced labour indicators that draw largely from the

²⁶² This could be attributed to the misconception that forced labour affects under-developed and developing countries only. This could also be caused by the challenges that exist in collecting reliable data owing to the hidden nature of forced labour. In this regard see paras 3.3.3, 4.3.3 and 5.3.4 below.

²⁶³ ILO *A Global Alliance Against Forced Labour* Report I(B) 5.

²⁶⁴ Para 2.2.

²⁶⁵ Para 2.2 above.

²⁶⁶ Swepston *Forced and Compulsory Labour* 23.

²⁶⁷ Swepston *Forced and Compulsory Labour* 23.

²⁶⁸ Swepston *Forced and Compulsory Labour* 23.

definition of forced labour. The ILO lists the abuse of vulnerability, deception, the restriction of movement, isolation, physical and sexual violence, intimidation and threats, the retention of identity documents, the withholding of wages, debt bondage, abusive working and living conditions, and excessive overtime as indicators of forced labour.²⁶⁹

2.6.2 Relevant ILO Conventions

Before dealing with the relevant ILO conventions, it is imperative to consider the legal obligations that arise from ratifying its instruments, since this serves as guidance with respect to their implementation into national legislation. Article 19(5) of the *ILO Constitution* provides that ILO conventions are binding on states that ratify them. Recommendations, on the other hand, are non-binding instruments which give guidelines on how conventions may be implemented.²⁷⁰ By accepting a convention as binding, a member submits itself to the ILO supervisory mechanism, which is made up of two systems. The first entails a regular system of supervision which is performed by the ILO Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards. This procedure requires a member to submit annual reports with respect to steps it has taken both in law and in practice to ensure the implementation of and compliance with a convention.²⁷¹ The Committee of Experts examines the report and may make general observations and/or a direct request.²⁷² The second system is a special procedure based on complaints or representations made by workers' and employers' organisations and other ILO members.²⁷³

²⁶⁹ ILO *Indicators of Forced Labour* 3.

²⁷⁰ Article 19(6).

²⁷¹ Article 22.

²⁷² Observations entail comments regarding fundamental questions raised with respect to the application of a convention by a member. On the other hand, direct requests are made where a question on a technical aspect is raised with regard to the application of the convention. Unlike observations, direct requests are not published in the Committee of Experts' report but are communicated directly to the government in question. In this regard see ILO *Report of the Committee of Experts on the Application of Conventions* Report III 2-3.

²⁷³ Article 24 and 26.

Participation by employers' and workers' organisations in the supervisory mechanism is recognised, in that article 23(2) of the ILO Constitution mandates governments to communicate the reports they submit to the ILO office to these organisations as well. Organisations are also permitted to highlight gaps in law and practice concerning the implementation of a convention by a government, and to involve the Committee in requesting further information from the government.

*2.6.2.1 Forced Labour Convention and the Abolition of Forced Labour Convention*²⁷⁴

Identified above²⁷⁵ as the first ILO instrument defining forced labour, the *Forced Labour Convention* is one of the eight fundamental ILO conventions which seek to ensure the realisation of the fundamental right not to be subjected to forced labour. The Convention's scope of application is broad in at least two ways. Firstly, the Convention does not list within its text examples of acts that may be classified as forced labour. It is asserted that this mode of crafting enables the Convention to cover all "possible forms" of forced labour, which include slavery and slavery-like practices.²⁷⁶ Finally, the Convention is not selective as to which industries or workers it shall apply to. It thus applies across all industries, whether they resort in the private or the public sector, and to all workers, whether they are in informal or formal employment.²⁷⁷ In essence, therefore, the *Forced Labour Convention* is blind to the employment relationship, and its application will not be defeated by the absence of an employer-employee relationship between the perpetrator and the victim. What is necessary is evidence that some sort of work or service was being exacted from the victim under the threat of penalty.

When a state ratifies this Convention, it undertakes to suppress the use of forced labour in all its forms.²⁷⁸ The obligation incurred is two-pronged. The state must itself refrain from the use of forced labour and must also prohibit its use by

²⁷⁴ South Africa, the United Kingdom and Brazil have ratified both these Conventions.

²⁷⁵ Para 2.2 above.

²⁷⁶ ILO *Tripartite Meeting of Experts on Forced Labour* 7.

²⁷⁷ ILO *Tripartite Meeting of Experts on Forced Labour* 6.

²⁷⁸ Article 1(1).

individuals. Signatories are required to make the use of forced labour a penal offence and to ensure that the accompanying penalties are "adequate and strictly enforced".²⁷⁹ Whilst it makes it compulsory to criminalise forced labour, the Convention does not establish the relevance of labour institutions in states' endeavours to suppress forced labour. It follows, therefore, that in addition to criminalisation, room is left for a signatory to formulate additional mechanisms (which may be of a labour law nature) that may help bring an end to forced labour. This is a limitation of the Convention in the sense that from the outset it already assigns a residual role to labour institutions or, in the most extreme, contributes to the failure by signatories to properly assign a place for these institutions in their laws and policies. In accordance with the thinking in the time when it was drafted, the Convention adopts a relatively conservative approach to addressing forced labour, in the sense that it fails to give an indication of measures that can be adopted not only to deal with forced labour but also to ensure protection and assistance to its victims. An approach that gives a great deal of autonomy to signatories is problematic, in that only governments that are willing to go an extra mile will take the trouble to devise an integrated system which will fully address the problem.²⁸⁰ In its 2007 general survey, the Committee of Experts also noted that the signatories are faced with challenges in effectively applying the Convention, particularly with regards to the emergence and growth of human trafficking for the purposes of forced labour.²⁸¹

In addition to defining forced labour, the Convention gives guidance as to what conduct is exempt from classification as forced labour. Article 2(2) excludes the following practices from the application of the Convention: compulsory military service, the normal civic obligations of citizens, the compulsory labour of convicted persons so long as such labour is not exacted by private companies or individuals, labour exacted in cases of emergency or naturally occurring disasters, and minor communal service.²⁸² These exemptions signify that there are circumstances where it

²⁷⁹ Article 25.

²⁸⁰ Brazil is an example of a jurisdiction that has gone further than the standard proposed by the Convention. See para 4.5 below.

²⁸¹ ILO *General Survey Concerning the Forced Labour Convention* Report III 39-40.

²⁸² This provision is identical to the exception to forced labour under article 8(3) of the ICCPR. Note also that the *Forced Labour Convention* allowed signatories to resort to forced labour under the

will be justified to have an individual's labour exacted forcefully. For example, it will be justified for labour to be exacted in cases of emergency. The Tripartite Committee of Experts on Forced Labour has previously highlighted that this exception is applicable where there is a threat or an eminent threat of calamity that poses a threat to the "existence or wellbeing of the whole or part of the population".²⁸³ The inclusion of these exceptions in national legislation might be helpful, so that a citizen might be made aware that reliance cannot be placed on the Convention regarding the avoidance of the imposition of penal labour, for example.

On the other hand, the *Abolition of Forced Labour Convention* supplements the *Forced Labour Convention* by prohibiting the use of forced labour on five occasions. According to this Convention, ratifying states undertake to suppress and refrain from using forced labour in the following instances: as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to those of the established political, social or economic system; for economic development; as a means of labour discipline; as punishment for participation in strikes; and as a means of racial, social, national or religious discrimination.²⁸⁴ The Committee of Experts has cautioned against the application of this Convention to protect civil liberties such as freedom of expression and thought and to resolve issues of labour discipline and strikes.²⁸⁵ The purpose of the Convention is merely to ensure that forced labour is not used as a penalty arising from participating in such activities.²⁸⁶

The two Conventions set a good standard particularly with regards to their general scope of application, which extends coverage to all workers notwithstanding their industry and the legality or otherwise of the work they are involved in. Furthermore,

authority of its transitional provisions which include articles 1(2), 3-24. The ILO Committee of Experts has submitted that these transitional articles can no longer be invoked because they are detrimental to the purpose of the Convention, which is to attain the abolition of forced labour within the shortest possible period. In this regard see ILO *General Survey Concerning the Forced Labour Convention* Report III 6.

²⁸³ ILO *Tripartite Meeting of Experts on Forced Labour* 8-9.

²⁸⁴ Article 1.

²⁸⁵ ILO *General Survey Concerning the Forced Labour Convention* Report III 80; ILO *General Survey on the Fundamental Conventions* Report III 107.

²⁸⁶ ILO *General Survey on the Fundamental Conventions* Report III 107.

the existence of an employment relationship is not necessary for a victim to successfully prove forced labour, an element which is key, because the need to prove the existence of this relationship would potentially negate the claims of many informal economy workers, whose participation in the labour market is not reliant on such an arrangement. This is advantageous owing to the fact that forced labour is prevalent mostly in the informal economy,²⁸⁷ where workers enjoy little or no protection from the national labour laws. Whilst the Conventions do not suggest any specific means to achieve this, the broad coverage provision must challenge governments to extend protection from forced labour to this class of workers.

*2.6.2.2 Protocol of 2014 to the Forced Labour Convention, 1930*²⁸⁸

The 2014 *Protocol on Forced Labour* is a recent addition to the ILO forced labour instruments that seeks to address gaps in the implementation of the *Forced Labour Convention*. The Protocol is a legally binding instrument open to ratification by members who have ratified the Convention. This Protocol deviates somewhat from the conventional mode of addressing forced labour (in comparison with the *Forced Labour Convention*) by specifically recommending an integrated and multi-faceted approach, as will be seen in the discussion below. This does not suggest that it repeals previous forced labour instruments, but rather that it provides for a robust mode of dealing with forced labour, whilst endorsing previous Conventions. The Protocol reaffirms the definition of forced labour as contained in the *Forced Labour Convention*²⁸⁹ but makes provision for the deletion of the Convention's transitional provisions in article 1(2) and (3) and articles 3 to 24,²⁹⁰ which had previously been declared not in use by the ILO Committee of Experts. The provisions of the Protocol

²⁸⁷ See para 2.2 above.

²⁸⁸ Adopted on 11 June 2014 at the 103rd International Labour Convention Session, hereafter referred to interchangeably as the 2014 Protocol on Forced Labour or the 2014 Protocol. For the purposes of this discussion, the Protocol is read with the *Forced Labour (Supplementary Measures) Recommendation 203* of 2014 (hereafter Recommendation 203), which gives additional non-binding guidelines on how the provisions of the Protocol may be applied in practice. As at April 2017, the Protocol had registered a total of thirteen ratifications. See ILO date unknown
http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672.

²⁸⁹ Article 1(3).

²⁹⁰ Article 7.

apply to all victims of forced labour, whether trafficked or not.²⁹¹ In addition, the new approach proposes that forced labour can be effectively tackled with a combination of preventative, protective and remedial measures.

Every signatory to the Protocol commits itself to preventing the occurrence and/or reoccurrence of forced labour within its borders. As a result, the preventative measures proposed under the Protocol seek to ensure that a member that accepts the Protocol addresses the root causes of forced labour. Preventative measures are crafted in line with the ILO's previous research findings, which highlight that illiteracy, lack of information and poverty exacerbate forced labour.²⁹² Education is considered one of the ways in which vulnerable people²⁹³ may be sensitised to forced labour.²⁹⁴ Education in this instance may include awareness-raising campaigns aimed at highlighting the main elements of forced labour and how people can avoid falling victim to it.

Education on issues of forced labour must also be extended to employers, so that they do not become involved in the use of forced labour.²⁹⁵ This awareness-raising exercise can be made plausible through the combined effort of employers' and workers' organisations, bearing in mind their representative positions towards employers and workers. Members are also required to particularly provide protection to migrant workers from possible abusive and fraudulent practices during the recruitment and placement process.²⁹⁶ In this process, it will be helpful for a signatory to consider the *Migration for Employment Convention* and the *Private*

²⁹¹ Article 1(3).

²⁹² See para 2.2 above.

²⁹³ The Protocol does not specify which people are particularly vulnerable to forced labour. In previous literature the ILO has more often than not categorised the following as vulnerable people: workers who belong to a group that has previously suffered discrimination, such as indigenous and tribal people; migrant workers with an irregular migrant status; workers employed in informal enterprises such as sweatshops; domestic workers; and finally young people and unskilled or illiterate workers who are ignorant of their rights. See ILO *Combating Forced Labour: A Handbook for Employers* 16. Also see para 2.2 above, which gives an overview of the categories of people who stand to be vulnerable to forced labour.

²⁹⁴ Article 2(a).

²⁹⁵ Article 2(b).

²⁹⁶ Article 2(d).

*Employment Agencies Convention*²⁹⁷ in harmonising legislation and/or policies for ensuring the elimination of trafficking for the purposes of forced labour.

Raising awareness amongst citizens of possible migration for labour opportunities plays an important role in the notification of the possible tactics employed by unscrupulous employers and employment agencies. In addition, information dissemination is needed to ensure both regular and irregular migrants that they are equally protected by the law, should they fall victim to forced labour. Additional non-binding measures under Recommendation 203 propose that governments should make provision for and/or improve social protection in order to keep people from poverty. Social security is an important right under the ILO, as will be discussed below,²⁹⁸ and the ILO asserts that the provision of social security ensures that all people maintain a decent standard of living. If they are not subject to poverty people are kept from desperation and do not accept indecent job opportunities.

Article 1(1) of the Protocol proceeds to exhort signatories to provide the victims of forced labour with protection and access to appropriate and effective remedies such as compensation, and to sanction the perpetrators of forced labour. This is so notwithstanding the victim's migration status in the country where they were held in forced labour.²⁹⁹ This is to ensure that protection is extended to undocumented migrant workers. Also, requiring the remedies to be "effective" indicates that measures should be hands-on, and that the law should not make it unnecessarily complicated for victims to obtain compensation.³⁰⁰

Signatories are mandated to put in place means of recovery and rehabilitation for all victims of forced labour, as well as other means of assistance and support.³⁰¹ This provision is inspired by the fact that in most cases, forced labour is accompanied by the use of threats, force and abuses.³⁰² Rehabilitating victims entails providing some

²⁹⁷ See para 2.4 above.

²⁹⁸ Para 2.7.2.2 below.

²⁹⁹ Article 4(1).

³⁰⁰ See para 12-13 of the Recommendation.

³⁰¹ Article 3.

³⁰² Also see paras 2.7.2.1 and 2.7.2.4 below.

form of psychological therapy for the victims, with a view to reintegrating them back into society. Rehabilitation should be specifically tailored to address the unique needs of a particular group. For example, children need a more sensitive approach in the assistance offered to them, which takes taking into account the requirement of the best interests of the child. The needs of trafficked forced labourers may not necessarily be similar to those of ordinary forced labourers. The practical implementation of this requirement does not necessarily entail the establishment of new institutions, as current social welfare institutions can be used to facilitate this exercise. The assistance and support systems suggested under article 3 may include legal and non-legal assistance from legal aid organisations, trade unions and human rights organisations. These organisations can assist victims to assert compensation claims, with special care being extended to child victims, bearing in mind their incapacity.

Regarding victim protection, the Protocol requires authorities not to prosecute foreign workers for illicit activities if they were carried out as a direct consequence of their performing forced labour.³⁰³ This is to ensure harmony between victim protection measures and local penal laws. For example, sex work is an illegal activity in some countries. Be that as it may, it may forcefully be imposed on people.³⁰⁴ A forced labour sex worker must not be arrested and prosecuted, because her conduct is a direct consequence of her being forced to work in this manner. Members are also challenged to go the extra mile in the sense that more often than not, upon identification, migrants with an irregular migrant status and trafficked forced labourers are immediately considered as "illegal immigrants" or trafficked persons who have to be sent back to their countries of origin, thereby ignoring the fact that they were workers whose labour rights were undermined by their employers. It is for these reasons that the Protocol calls for cooperation amongst signatories in the overall implementation of the Protocol.³⁰⁵

³⁰³ Article 4(2).

³⁰⁴ See para 2.3.4 above on commercial sexual exploitation.

³⁰⁵ Article 5.

It flows from this that upon the identification as a forced labour victim, the person should be informed of his right to seek compensation. The *Forced Labour (Supplementary Measures) Recommendation 203* of 2014 suggests diversity insofar as forums for addressing forced labour complaints are concerned.³⁰⁶ In addition to laying criminal charges, victims should be in a position to approach civil courts and or/other dispute resolution mechanisms to pursue claims for compensation, damages and unpaid wages. The determination of how compensation and/or damages are to be calculated is left to the signatories. In this case, then, when approached with a claim for compensation, the court in question must make an award subject to the requirement or standard set in national labour laws. For example, inspiration can be drawn from the standard set in the South African *Labour Relations Act* 66 of 1995 with regards to the award of compensation by the Labour Court, wherein the court is given the discretion to make an award that is "just and equitable in all circumstances".³⁰⁷

In addition to prevention and protection initiatives, the 2014 *Protocol on Forced Labour* suggests the adoption of an integrated approach towards the elimination of forced labour. Article 2(c) of the Protocol introduces a departure from the popular approach³⁰⁸ adopted by members by providing that:

Members shall take efforts to ensure that coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy and labour inspection services and other services responsible for the implementation of this legislation are strengthened.

Because the *Forced Labour Convention* expressly establishes criminalisation only, this provision indicates that the 2014 Protocol necessitates a departure from this model by requiring members to identify and recognise the role of labour law in identifying, preventing and addressing forced labour, an element which is absent from previous forced labour conventions. In addition to criminalising forced labour in

³⁰⁶ Para 12(a) generally suggests courts, tribunals and other resolution mechanisms without making specific mention of labour tribunals.

³⁰⁷ Section 194. The position as to how South African labour courts may deal with forced labour cases will be dealt with extensively at Chapter 5 of this thesis.

³⁰⁸ See para 2.4 above.

its penal code or constitution, a signatory must ensure that its labour legislation properly addresses forced labour. Because article 2(c) requires the implementation of legislation to be strengthened, a simple prohibition of forced labour does not suffice. Effective implementation of this provision compels the framing of relevant legislation containing comprehensive provisions on forced labour and enforcement mechanisms to back up the legislation. It is quite impractical to suggest that a criminal law code must have lengthy provisions on forced labour extending to outlining the role of labour market institutions to its eradication. Hence, labour legislation is a proper forum where such provisions can be made. Put differently, a provision in labour legislation can encompass the classification of forced labour as a penal offence, its proper definition and exceptions, and its indicators, and set out the specific contributions that labour market institutions can make towards its eradication. The provisions of such labour legislation must consequently be read together with the provisions of the constitutional and the criminal code.

Furthermore, members are bound to develop a national policy and plan aimed at ensuring an effective and sustained suppression of forced labour.³⁰⁹ This policy is to be developed with the involvement of employers and workers organisations, and its implementation shall "involve systematic action by competent authorities and as appropriate in coordination with employers and workers organisations as well as with other groups concerned."³¹⁰ This calls for a structured and unified effort to fight forced labour among the concerned authorities, be it the police, labour law administration, employers, or workers' and employers' associations. The effectiveness of the national policy rests largely on the commitment of a signatory to implementing the provisions of the Protocol. In order to achieve that, it is imperative to follow the integrated approach suggested by the Protocol and as far as possible to engage all concerned stakeholders. A combined effort should see the concerned parties meeting each other halfway. That is, in areas where the authority of criminal justice and immigration officials are limited, labour market institutions should be

³⁰⁹ Article 1(2).

³¹⁰ Article 1(2).

engaged. Similarly, where limitations in the role of labour market institutions are unavoidable, criminal justice mechanisms must be brought in.

Another noteworthy detail introduced by the Protocol is a requirement on signatories to extend protection to workers in the informal sector, which is often unregulated by national labour laws.³¹¹ This is a challenge that must nonetheless be embraced. In this case, since they are normally excluded from coverage by national labour laws, policies should be formulated to allow such workers to register associations that can further their rights.³¹² Regulations concerning the registration of such associations should be expedient and not be so complex as to make it impossible to register such societies and associations. Allowing the registration of informal workers' organisations may improve the regulation of the industry and ultimately give those involved a collective voice.

Over and above that, it is deduced from the provisions of the 2014 Protocol that crosscutting measures must be adopted in order to maintain a framework that is resistant to the occurrence and growth of forced labour. The Protocol draws attention to the need to address the root causes of forced labour in order to prevent it. At the same time, protective measures must be put in place to ensure the provision of appropriate assistance to victims. The underlying factor is that these measures must hinge on the adoption of an integrated approach that brings together all law enforcement mechanisms. The model presented by the Protocol is radical, and requires commitment on the part of a member that ratifies it. Its implementation is bound to bring about challenges, since it requires the allocation of adequate human, institutional and financial resources, which are issues of a quasi-political nature.

³¹¹ The Protocol supplements the *Forced labour Convention*, which requires the suppression of forced labour in respect of all workers whether in the formal or the informal economy. The Protocol is open for ratification only to members who have ratified the Convention (article 8(1)). Also see para 2.6.2.1 above.

³¹² Paras 2.6.3.3 and 2.7.2.1 below consider the challenges of collective bargaining in the informal economy and argue for this mode as one of the ways informal workers may centralise advocacy with respect to their labour rights.

Because it is a new instrument, it is still to be seen how member states who ratify it will implement it in their national laws, and the challenges they encounter in doing so. However, it must be noted that by accepting it as binding, a member state submits itself to the compliance and supervisory framework of the ILO, which requires the constant submission of reports on how the Protocol is implemented, and the ILO Committee of Experts may issue observations or direct requests with respect to compliance with the provisions of the Convention.

2.6.3 The role of labour law in addressing forced labour

To properly grapple with the relevance of labour law in addressing forced labour, the following should be borne in mind. Firstly, freedom from forced labour is recognised by the ILO as a fundamental right and principle to be observed in every workplace, thereby making it an indispensable element of decent work. Secondly, the following submission made in a report by the International Labour Conference³¹³ shall serve as guidance:

Forced labour does not exist in a vacuum. It is an extreme manifestation of gaps and failures in a wide range of policies, institutions and enforcement mechanisms. It therefore has to be addressed in an integrated and coherent way if forced labour and all related practices are to be eliminated for good. While the prime responsibility in this respect lies with state institutions, the social partners also have a crucial role to play in mobilising employers and workers worldwide to achieve this goal. Greater involvement of strong labour market institutions, including labour inspectorates, is a prerequisite for upholding labour rights at the workplace and preventing the occurrence of violations that may lead to forced labour.

Although it receives less attention than other fundamental labour rights,³¹⁴ it will be demonstrated below that forced labour affects several workplace rights³¹⁵ of its victims, thus necessitating that it be addressed. It has been shown above that the *Forced Labour Convention* requires signatories to "suppress the use of forced labour

³¹³ ILO *Strengthening Action to End Forced Labour* Report IV(1) 3.

³¹⁴ Para 2.6.1 above.

³¹⁵ The right to freedom of association and collective bargaining, the right not to be discriminated against in respect of employment or occupation, and the rights to receive remuneration and make social security contributions are amongst the rights considered at para 2.7.2 below.

in all its forms within the shortest possible period."³¹⁶ The Convention also requires that the use of forced labour be punished as a penal offence and that ratifying members "ensure that the penalties imposed by law are really adequate and are strictly enforced."³¹⁷ The *Abolition of Forced Labour Convention* also requires that ratifying members "take effective measures to secure the immediate and complete abolition of forced or compulsory labour."³¹⁸ From these provisions, it can be seen that these two Conventions leave it to ratifying states to formulate measures or approaches to address forced labour, with the sole requirement of making it a penal offence and ensuring the penalties imposed are adequate.

Whereas the illegal use of forced labour can be a penal offence under either criminal or labour codes, it has been noted that "adequate" penalties are most likely to be included in penal codes.³¹⁹ Moreover, taking into account its perceived relationship to human trafficking, the common approach of tackling forced labour amongst states has been to address it under national criminal laws.³²⁰ Whether or not penalties are adequate depends on the mode chosen. If a fine is imposed it must be big enough, or in the case of imprisonment, incarceration must be long enough to serve as a deterrent to would-be offenders. Whether or not penalties under criminal codes are adequate, criminalising forced labour amounts to partial compliance with the requirements of the Conventions.

According to Andrees,³²¹ in an ILO assessment carried out in 2007 it was found that the national action plans of ILO members against forced labour and human trafficking adopt an approach that gives labour administration a negligible role to play whilst conferring the entire responsibility for action on the criminal justice system. The ILO notes that although forced labour is widely prohibited in criminal national laws, it is rarely punished, owing to fragmented nature of the relevant legal

³¹⁶ Article 1(1). Also see para 2.6.2.1 above.

³¹⁷ Article 25.

³¹⁸ Article 2.

³¹⁹ ILO *Human Trafficking and Forced Labour* 18.

³²⁰ ILO *The Cost of Coercion* 6-7.

³²¹ Andrees *Forced Labour and Human Trafficking* 11.

and policy frameworks.³²² In addition, there are negligible official statistical data on the occurrence of forced labour, and a general lack of awareness of it in the society in which it is to be found.³²³ It may be concluded from a reading of the statements of the International Labour Conference outlined above that forced labour continues to grow and go unpunished due to failures and gaps that exist in law and practice.³²⁴ The International Labour Conference³²⁵ has also noted that:

Ending forced labour demands multifaceted responses which cut across ministerial boundaries, as well as close cooperation with the social partners and a wide range of civil society actors. Labour market institutions have a vital role to play as universal access to decent work lies at the heart of any long-term solution.

Flowing from these observations, it is possible to conclude that forced labour, whether arising out of human trafficking or not, is considered a serious criminal offence, and there is a realisation that criminal justice alone cannot tackle it.³²⁶ In fact, Andrees and Belser³²⁷ posit that criminal law enforcement is only reactionary in nature and contributes little to efforts to actually prevent the occurrence of the crime. In addition to that, a criminal justice-centred approach is lacking in that it overlooks the contribution that labour law and labour administration may make towards eliminating forced labour from workplaces. Moreover, it is highly unlikely that a criminal law approach will fully take into account the labour rights violations imposed by forced labour on its victims. The ILO therefore suggests a multifaceted approach that seeks to involve all stakeholders in the elimination of forced labour. This is evidenced through the *2014 Protocol to the Forced Labour Convention*, which now makes it binding to involve social partners and/or labour market institutions in formulating policies targeted at forced labour.³²⁸ Whilst taking cognisance of the significance of criminal justice and immigration laws, national legal and policy frameworks must also reflect a dynamic and integrated approach which takes

³²² ILO *A Global Alliance Against Forced Labour* Report I (B) 17.

³²³ ILO *A Global Alliance Against Forced Labour* Report I (B) 17.

³²⁴ Also see ILO *Strengthening Action to end Forced Labour* Report IV (1) 26.

³²⁵ ILO *Strengthening Action to End Forced Labour* Report IV (1) 17.

³²⁶ Andrees *Forced Labour and Human Trafficking* 11; ILO *Strengthening Action to End Forced Labour* Report IV (1) 3.

³²⁷ Andrees and Belser "Strengthening Labour Market Governance" 109-110.

³²⁸ See articles 1(2) and 2(c) of the Protocol.

recognition of the labour market approach to forced labour. Flowing from this, it is instructive to reflect on the potential roles that labour market institutions can play in this framework.

2.6.3.1 Labour inspectors

The role of labour inspectors in bringing an end to forced labour cannot be emphasised enough. The starting point is to appreciate that labour inspectors play a critical role in ensuring compliance with national labour laws.³²⁹ They also serve the important mandate of giving feedback to authorities on workplace abuses not specifically covered by existing legal provisions.³³⁰ Although they play such important roles in general, it has been observed that in issues of forced labour (and human trafficking for the purposes of forced labour), they are often, not clear as to what their role is.³³¹ This may be attributed to the fact that both forced labour and human trafficking are criminal offences that are primarily dealt with by the police.³³² Moreover, the scope of labour inspection may not extend to sectors in which forced labour occurs, such as domestic work and the sex industry.³³³

That notwithstanding, the ILO observes that the role of labour inspectors in addressing forced labour in both the regulated and the unregulated sectors is quite significant.³³⁴ Labour inspectors are particularly important because their duty is to safeguard the right of employees to decent working conditions. Routine inspections by labour inspectors on health and safety or illegal employment in workplaces positions them in such a way to be able to identify forced labour indicators.³³⁵ Labour inspectors can also conduct awareness and training in workplaces and

³²⁹ Article 3(a) of the *Labour Inspection Convention* No 81 of 1947.

³³⁰ Article 3(c) of the *Labour Inspection Convention*.

³³¹ Andrees *Forced Labour and Human Trafficking* 13.

³³² Andrees *Forced Labour and Human Trafficking* 13.

³³³ Andrees *Forced Labour and Human Trafficking* 13.

³³⁴ Andrees and Belser "Strengthening Labour Market Governance" 114-115.

³³⁵ ILO *Tripartite Meeting of Experts on Forced Labour* 26. Para 2.7.2 below features a discussion of forced labour indicators.

provide early caution in an endeavour to avoid exploitative conditions from worsening and so transforming into forced labour.³³⁶

Where informal sector employment is concerned, it has been noted above that the scope of the operation of labour inspectors may be limited.³³⁷ As a result, the ILO suggests that labour inspectorates must be allocated adequate human and material resources to enable them to extend their mandate to remote areas and deal with both formal and informal sector employment.³³⁸ In cases of illegal employment, it is suggested that when they encounter migrants with an irregular migrant status, labour inspectors should not be hasty to enforce immigration law. Instead, their mandate is to draw their attention towards the employment relationship itself by identifying exploitative conditions that workers could have possibly been exposed to and ensuring that they benefit the statutory rights flowing from the employment relationship.³³⁹

To all intent and purposes, the main objective of labour inspectors should be to ensure that workplaces are safe and that the workplace rights of all workers without distinction whatsoever are respected. Much needs to be done to strengthen the mandate of labour inspectorate services with reference to informal sector workers. While this exercise will be a difficult one, policy frameworks can be formulated to address the extension of labour inspectorate services to informal sector workplaces. Where informal sector employment involves scattered workplaces, labour inspectors can centralise their service through cooperative action with informal workers associations³⁴⁰ to disseminate information on workers' rights to decent working and living conditions and empower them to look out for one another. Legislation or policy that implements the 2014 Protocol will also hopefully reflect cooperation between labour inspectors and immigration officials to ensure the protection of both regular

³³⁶ ILO *Tripartite Meeting of Experts on Forced Labour* 26; ILO *Strengthening Action to End Forced Labour* Report IV(1) 31.

³³⁷ Andrees and Belser "Strengthening Labour Market Governance" 116-117.

³³⁸ Andrees *Forced Labour and Human Trafficking* 35; ILO *Tripartite Meeting of Experts on Forced Labour* 26; ILO *Strengthening Action to End Forced Labour* Report IV(1) 31.

³³⁹ Andrees *Forced Labour and Human Trafficking* 36.

³⁴⁰ Andrees and Belser "Strengthening Labour Market Governance" 117.

and irregular migrant workers in forced labour situations. The overall idea is that an enforcement mechanism where labour inspectors play a proactive role may help address forced labour,³⁴¹ bearing in mind the nature of the role they play in ensuring compliance with national labour laws. The key point is that alongside other law enforcement officials (such as the police and immigration officials), they need to be given proper training in order to be able to play the role assigned to them in dealing with forced labour in workplaces.

2.6.3.2 Businesses and employers' organisations

Employers and businesses employ people to render services or enable the production of goods, and may also import semi-finished products or raw materials necessary to industrial production. As a result, businesses may find themselves proactively or passively involved in the perpetration of forced labour.³⁴² It therefore obvious that they also have a key role to play in averting forced labour. In fact, businesses are already taking a proactive role in stating in their codes of conduct their aversion to production that uses forced labour.³⁴³ However, such action is ineffective if it is not integrated with that of the government and workers organisations. Accordingly, businesses should be involved in initiatives to fight forced labour. Because ILO members ratify conventions on forced labour, it is sanctioned as a serious crime in most countries. Companies have an array of national and international laws to comply with, forced labour laws inclusive. As a result, companies and enterprises must refrain from using forced labour and must comply with these laws or face fines for non-compliance.³⁴⁴

In addition, companies are faced with everyday risks and need to be able to manage such risks. It therefore lies with them to avert the risk of involvement in the use of forced labour internally or through their supply chains and affiliates. An allegation of forced labour brings with it the legal risks of prosecution and reflects negatively on

³⁴¹ Article 2(c)(ii) of the 2014 Protocol.

³⁴² ILO *Profits and Poverty* 9-16.

³⁴³ ILO *Combating Forced Labour: A Handbook for Employers* 3.

³⁴⁴ ILO *Combating Forced Labour: A Handbook for Employers* 5.

the firm's reputation and brand.³⁴⁵ Consequently, companies are advised to take a proactive role by putting in place clear and transparent policies that outline the measures they will take to prevent forced labour within their operations and supply chains.³⁴⁶ They also need to provide training on forced labour to their human resource and compliance personnel.³⁴⁷

This notwithstanding, companies may actually face challenges in taking such initiatives. It may be difficult to identify forced labour in practice, particularly where there is inadequate information regarding what it constitutes and its exceptions. Flowing from this, in order to effectively address it employers and businesses need to be given training on the law and policy addressing forced labour. As representatives of employers in the tripartite relationship, employers' organisations are in a position to give training to employers and businesses on the topic of forced labour. For this to be feasible, employers' organisations need to be informed on its aspects and dynamics. The involvement of employers' organisations in the framing of national policy and legal frameworks aimed at forced labour will assist such organisations to identify and foreground the challenges employers face in identifying forced labour in their supply chains and recruitment mechanisms (where independent recruiters are used), which would stimulate dialogue on ways to better deal with such challenges.

In practice, this strategy would be less problematic to apply to employers and business organisations that enjoy the support and representation of employers' organisations. However, small-scale businesses operating in the informal economy should also be targeted. Steps to help fight the use of forced labour among small, medium and micro enterprises (SMMEs) can be taken with the support of government and social partners.³⁴⁸ It is quite common for a government to give

³⁴⁵ ILO *Combating Forced Labour: A Handbook for Employers* 5

³⁴⁶ ILO *Combating Forced Labour: A Handbook for Employers* 4.

³⁴⁷ ILO *Combating Forced Labour: A Handbook for Employers* 4.

³⁴⁸ See generally Birchall *Organising Workers in the Informal Sector* 24-27; Goldman *Organising in South Africa* 24, 37.

financial assistance to SMMEs to help start up or improve their operations,³⁴⁹ and the action suggested here would improve the business ethic and help the employers to improve the working conditions of their workers. Social partners can also help employers in the informal economy to come together, to form associations of their own, and to use such platforms to disseminate relevant information.³⁵⁰ Assisting SMMEs this way would not necessarily involve framing entirely new legislation or policy. Existing legislative and policy frameworks could be creatively used to ensure that information on forced labour reaches such employers. For example, the South African *National Small Business Act*³⁵¹ establishes the Ntsika Enterprise Agency, which is aimed at providing non-financial support such as training and counselling to small businesses in line with the National Small Business Support Strategy.³⁵² Training on business ethics conducted by this agency could be used to disseminate information on forced labour, since national laws prohibiting its use invariably bind SMMEs.³⁵³

Finally, it must be highlighted that the foregoing sentiments are now envisioned under the forced labour normative framework. The 2014 *Protocol to the Forced Labour Convention* requires a clear involvement of businesses (as employers) in the suppression of forced labour.³⁵⁴ In addition, the involvement of businesses is envisioned through a requirement that they ensure that their supply chains are free of forced labour.³⁵⁵

³⁴⁹ This submission is made in the light of the South African government's initiatives that were established to give financial aid to SMME's. The Small Enterprise Finance Agency (SEFA) is a good example. See www.sefa.org.za.

³⁵⁰ Birchall *Organising Workers in the Informal Sector* 24-27; Goldman *Organising in South Africa* 24, 37.

³⁵¹ Act No 102 of 1996.

³⁵² Section 9.

³⁵³ It should be recalled that the 2014 Protocol calls for the involvement of "other groups concerned" (article 1(1)). This discussion maintains that national trade and industry regulatory systems are a relevant group, bearing in mind their regulatory role towards businesses.

³⁵⁴ Articles 1(2), 2(b)(e) and 6.

³⁵⁵ Article 2(b) and (e).

2.6.3.3 Trade unions

Trade unions have over the years played the special role in ensuring protection and compliance with labour rights by employers. The general perception is that trade unions are in place to bargain for employees' wages and better working conditions. Given a special role in the labour and employment relationship, they are also well placed to fight the occurrences of forced labour in the labour market.³⁵⁶ From the ILO's point of view, all trade unionists must concern themselves with the issue of forced labour because of its negative effects on unions' bargaining power.³⁵⁷ Forced labour jeopardises the bargaining power of trade unions in that workers in forced labour are cheap labour and their poor working conditions are irremediable while they are unprotected.³⁵⁸ This makes it difficult for trade unions to negotiate with employers for better wages and decent working conditions³⁵⁹ for all workers, whether they are subjected to forced labour or not. The possibility that forced labour is most prevalent in the informal sector, where many workers are not unionised should not be considered a deterrent to the involvement of trade unions in that sector, because they have a general mandate to defend the rights of workers notwithstanding their status or sector.³⁶⁰

Consequently, trade unions may play a plethora of roles in helping detect, reduce and avoid the use of forced labour. Because little knowledge exists in the sphere of forced labour as compared with other workplace issues, trade unions can firstly conduct research into employment in both the formal and the informal sector to fill the existing gaps in knowledge pertaining to forced labour.³⁶¹ As they carry out this research or in pursuance of their normal activities, trade unions may come across actual cases of forced labour and thus identify victims.³⁶² They therefore need to know how to identify a situation of forced labour and how to respond to it. Secondly,

³⁵⁶ Andrees and Belser "Strengthening Labour Market Governance" 125-126.

³⁵⁷ ILO *Forced Labour and Human Trafficking: A Toolkit* 24.

³⁵⁸ ILO *Forced Labour and Human Trafficking: A Toolkit* 24.

³⁵⁹ ILO *Forced Labour and Human Trafficking: A Toolkit* 24.

³⁶⁰ ILO *Forced Labour and Human Trafficking: A Toolkit* 24.

³⁶¹ ILO *Forced Labour and Human Trafficking: A Toolkit* 29.

³⁶² ILO *Strengthening Action to End Forced Labour* Report IV(1) 59; ILO *Forced Labour and Human Trafficking: A Toolkit* 31.

they may also take part in raising awareness and campaigning about forced labour across all industries, to sensitise workers and the general public about exploitative working conditions and forced labour and the rights of workers.³⁶³ In the third place, trade unions are well placed to offer legal assistance to victims of forced labour as well as to help them win compensation through civil and labour tribunals.³⁶⁴

Identifying trade unions as being among the relevant parties in preventing and addressing forced labour is not misplaced. Their collective power and voice has over the years seen the improvement and adoption of laws that protect the labour force.³⁶⁵ This special capacity should be taken advantage of and utilised to the advantage of the victims of forced labour. Because of the nature of labour unions, they can offer legal assistance³⁶⁶ at no cost to workers in the context of forced labour, who are in most cases unable to afford the legal costs that may be incurred through their claims for compensation.

It is an accepted fact that most informal economy workers cannot unionise and therefore do not benefit from the decent working conditions negotiated by trade unions.³⁶⁷ However, the international standard demands that trade unions extend their mandate to assist workers operating in the informal economy.³⁶⁸ For example, the International Confederation of Free Trade Unions (ICFTU) proposes that trade unions should consider extending their activities and agreements to cover informal economy workers.³⁶⁹ Trade unions can also offer training for skills development to this class of workers and assist them set up quasi-trade union organisations or

³⁶³ ILO *Forced Labour and Human Trafficking: A Toolkit* 24; ILO *A Global Alliance Against Forced Labour and Trafficking* 4-5; Beirnaert 2008 *IUR* 4.

³⁶⁴ ILO *Strengthening Action to End Forced Labour* Report IV(1) 51; ILO *A Global Alliance Against Forced Labour and Trafficking* 4-5.

³⁶⁵ For example, trade unions in apartheid South Africa made a contribution towards the radical transformation of labour laws in South Africa. In this regard see Grawitzky *The Role of the ILO during and ending Apartheid* 2. Apart from South Africa, the contribution of trade unions has also been noted elsewhere globally. See, amongst others, Hobsbawm 1967 *Economic History Review* 358-364; Hagan 1968 *Labour History* 46-49.

³⁶⁶ Andrees and Belser "Strengthening Labour Market Governance" 125.

³⁶⁷ Beirnaert "A Trade Union Perspective" 484.

³⁶⁸ Bonner and Spooner 2011 *International Politics and Society* 92-97; Birchall *Organising Workers in the Informal Sector* 25-26.

³⁶⁹ For example, section 28(1)(i) of the *Labour Relations Act* allows bargaining councils to extend their services to informal workers.

associations³⁷⁰ that can centralise advocacy. In practice, informal sector workers can be brought together using classifications like gender or type of trade. For example, women in informal employment have previously gained benefits through the activism of organisations such as the Self-Employed Women's Union (SEWU) in South Africa.³⁷¹ Once informal workers are affiliated, they can be easily reached by trade unions, or as organisations themselves they would be able to share information regarding their concerns in the workplace, would possibly be in a position to address forced labour, and would be able to reach out to assist fellow workers who may be trapped in it. The successful formation and survival of quasi-trade union associations of informal economy workers is dependent to an extent on the cooperation of existing trade unions and governments. The active participation of trade unions is now made obligatory to ILO members who ratify the 2014 Protocol under article 1(2).

2.6.3.4 Labour courts and other labour dispute resolution mechanisms

It is internationally accepted that forced labour is an international crime that attracts penal sanctions. With its relationship to the offence of human trafficking, the common approach has been to criminalise it, causing enforcement mechanisms to dwell more on the criminal justice system with little to no participation by labour enforcement mechanisms. The question that arises, then, is whether or not labour courts and other labour dispute resolution mechanisms can adjudicate on matters of forced labour.

It has been observed that few forced labour cases are prosecuted globally owing to the inadequacy of the enforcement systems and the increasing impunity of the

³⁷⁰ Bonner and Spooner 2011 *International Politics and Society* 92-97; Birchall *Organising Workers in the Informal Sector* 25-26; Motala *Organising in the Informal Economy* 14-30; Goldman *Organising in South Africa* 24,37.

³⁷¹ Another notable example is the Self-Employed Women Association (SEWA) in India. Organisations need not be unions *per se* as previous experience shows that informal cooperatives can also assist centralise advocacy for informal economy workers. In this regard see Birchall *Organising Workers in the Informal Sector* 25-27.

offenders.³⁷² It should therefore not be surprising if few or no cases on forced labour have been brought before labour courts. The ILO believes on the grounds of experiences drawn from various jurisdictions that labour courts may play a valuable role in adjudicating forced labour matters.³⁷³ Claims for compensation may be pursued, in addition to criminal or civil claims. It further notes that the procedure involved in pursuing a claim in a labour tribunal may be less complicated than that involved in criminal proceedings, as the burden of proof is usually lower.³⁷⁴

As will be seen hereafter,³⁷⁵ the exaction of forced labour does not only infringe on human rights but also on the labour and employment rights of victims. It is for this reason that it is submitted that labour tribunals are better placed to adjudicate on issues of labour and employment rights prejudiced by forced labour. Labour courts may not impose hefty penal sanctions, but the judgements they hand down will reflect on aspects of the employment relationship. A judgement may touch on the effects of forced labour on one or more of a victim's labour rights, such as freedom of association and social security rights.³⁷⁶ Invariably, labour tribunals should also bear the responsibility for demystifying what forced labour is through their judgements, given that it is common for national legislation to speak less about what forced labour is and what it entails. This would develop labour jurisprudence on forced labour.

³⁷² ILO *Strengthening Action to End Forced Labour* Report IV (1) 26.

³⁷³ ILO *Strengthening Action to End Forced Labour* Report IV (1) 50.

³⁷⁴ ILO *Strengthening Action to End Forced Labour* Report IV (1) 50. For example, in order to secure a criminal conviction, it has to be proven beyond reasonable doubt that the accused is guilty of an offence. The threshold is high, in that a complainant must bring forward evidence that is sufficiently convincing to strike out all reasonable doubt of the accused's guilt in the mind of a reasonable person. On the other hand, since they fall within the class of civil matters, the burden of proof in labour matters is on a balance of probabilities. This burden of proof is considered low because it is judged on the probability of the relevant fact occurring. In this regard see Le Roux-Kemp 2010 *Obiter* 692.

³⁷⁵ Para 2.7 below.

³⁷⁶ See for example para 4.5.2.1.3 below.

2.7 Forced labour as a violation of labour and employment rights

2.7.1 *The right to work and decent work*

Article 23 of the *UDHR* makes it a human right of every individual to work in order to sustain a livelihood. Important as it is, the right to work does not stand alone. The right to freely choose employment and the right to just and favourable conditions at work support it.³⁷⁷ This implies that the acquisition of a job is not enough on its own. The individual's choice to accept such employment and its quality are key to the respect of the worker's human rights. This is also important for the attainment of the respect for the worker's labour and employment rights.

The protection and promotion of labour rights hinges on the notion that labour is not a commodity, implying that people who work should not be treated like inanimate commodities but rather should be treated as human beings and accorded dignity and respect. The ILO *Declaration on Fundamental Principles and Rights at Work*³⁷⁸ provides that:

...in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

In the light of the above statement, the protection and guarantee of fundamental rights and principles in the workplace helps workers assert a right to compensation for contributing their skills and services towards the employer's business. The corollary to this statement is that a lack of respect for workplace rights inhibits the professional and personal growth of workers. For example, it is difficult to conceptualise the professional growth of a worker subjected to workplace discrimination. Similarly, where the right to the payment of wages is not met, an employee's standard of living suffers.

³⁷⁷ See article 23(1) of the *UDHR* and 6-7 of the *ICCPR*.

³⁷⁸ Preamble of the Declaration.

The ILO Decent Work Agenda is premised on similar sentiments and can be employed in the elimination of forced labour. The Agenda recognises that work is a means to social and economic progress.³⁷⁹ However, such progress can be attained only in an environment that creates decent jobs.³⁸⁰ Accordingly, "decent work involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration."³⁸¹ In order to achieve this, the Decent Work Agenda is implemented through four objectives that find relevance to this discussion.

Firstly, in order to improve people's standard of living, jobs must be created.³⁸² When the standard of living is improved, poverty, which has been identified as a common factor leading people to forced labour,³⁸³ is reduced. Secondly, the Agenda requires that workers, especially those susceptible to discrimination, be guaranteed that their rights will be respected and protected in the workplace.³⁸⁴ Ideally, forced labour cannot exist in a situation where the rights of workers are guarded. This leads to the third objective, which is that social protection be made a priority to ensure that workers enjoy working conditions that are safe and allow adequate free time and rest.³⁸⁵ It goes without saying that in situations of forced labour, health and safety in the workplace is less of a priority and no social security contributions are made to ensure employees' welfare in case of unemployment or occupational injuries.³⁸⁶

Fourthly, the Agenda calls for the promotion of cooperation between governments and social partners (employers' and workers' organisations) in dealing with issues

³⁷⁹ ILO date unknown <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm>.

³⁸⁰ ILO date unknown <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm>.

³⁸¹ ILO date unknown <http://ilo.org/global/topics/decent-work/lang--en/index.htm>.

³⁸² Para A(i) *ILO Declaration on Social Justice for a Fair Globalisation*, 2008.

³⁸³ Para 2.2 above.

³⁸⁴ Para A(iv) *ILO Declaration on Social Justice for a Fair Globalisation*, 2008.

³⁸⁵ Para A(ii) *ILO Declaration on Social Justice for a Fair Globalisation*, 2008.

³⁸⁶ See for example paras 4.3.3 and 4.5.2.1.2 below.

arising in the world of work.³⁸⁷ It lends weight to the argument that governments, employers' organisations and trade unions each have roles they can play in striving for the elimination of forced labour, both individually and collectively. This objective backs up the new standard established by the 2014 Protocol.³⁸⁸

2.7.2 Labour rights infringed by forced labour

To fully appreciate how forced labour impacts on workers' labour rights, it is instructive to conceptualise a situation of forced labour from the definition set out in the *Forced Labour Convention*.³⁸⁹

...forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

In order to enable the practical application of this definition, the ILO has provided an explanation that is reflected at paragraph 2.2 of this discussion. Moreover, forced labour indicators have been formulated to help identify forced labour in practice. Arguably, these indicators may also assist labour market institutions to pinpoint ways in which forced labour violates labour and employment rights. This discussion therefore uses the indicators formulated by the ILO to identify various labour rights that stand affected by the exaction of forced labour. This is done with caution, bearing in mind that the presence of a particular indicator in isolation may or may not suggest the presence of forced labour.³⁹⁰

2.7.2.1 Restriction of movement, isolation and intimidation

One of the ways in which forced labour can be identified is through noting the restricted movement of forced labourers.³⁹¹ The ILO submits that it is quite common

³⁸⁷ Para A(iii) *ILO Declaration on Social Justice for a Fair Globalisation*, 2008.

³⁸⁸ See para 2.6.2.2 above on the 2014 Protocol's binding requirement that social partners be involved in the fight against forced labour.

³⁸⁹ Article 2(1).

³⁹⁰ *ILO Indicators of Forced Labour* 3.

³⁹¹ *ILO Indicators of Forced Labour* 9.

for forced labourers' movement within and outside the workplace to be restrictively guarded in order to prevent them from escaping. With regard to isolation, forced labour takes place commonly in isolated areas, for example on farms, where means of transportation are difficult to access.³⁹² Isolation may also occur in populated areas by keeping the forced labourers behind closed doors, away from public contact with other members of society.³⁹³ In addition, isolation may come about because of the nature of the business the employer conducts. In many instances, businesses in the informal sector are unregistered, which makes it difficult for law enforcement officers to locate them and monitor the welfare of workers.³⁹⁴ It is also common for the victims of forced labour to be constantly intimidated and threatened, should they complain about their conditions of work or express their intention to leave their employment. Common threats include denunciation to immigration authorities, particularly in the case of irregular immigrants, loss of wages, deterioration of working conditions, and threats to family members.³⁹⁵

Individually or collectively, these indicators point to the fact that forced labour may take away the victims' right to freely associate, or any other right arising from it. It is established at international law that the right to freedom of association enables workers to join trade unions of their own choosing without prior authorisation.³⁹⁶ Trade unions are empowered to further the rights and interests of workers with regard to the employment relationship. Workers may freely exercise the right to organise, which allows them to take part in trade union activities. In particular, the *Right to Organise and Collective Bargaining Convention*³⁹⁷ provides that workers must be protected "against acts of anti-union discrimination in respect of their employment".³⁹⁸ It is thus unlawful for an employer to make employment conditional upon a worker's not joining a trade union, or that a worker should have to renounce

³⁹² ILO *Indicators of Forced Labour* 11.

³⁹³ See generally ILO *Tripartite Meeting of Experts on Forced Labour* 2.

³⁹⁴ ILO *Indicators of Forced Labour* 11.

³⁹⁵ ILO *General Survey on the Fundamental Conventions* Report III 104.

³⁹⁶ Article 2 *Freedom of Association and Protection of the Right to Organise Convention* No 87 of 1948, hereafter *Convention No 87*.

³⁹⁷ *Convention No 98 of 1949*.

³⁹⁸ Article 1(1).

union membership if he wishes to retain his employment.³⁹⁹ Also, a worker may not be dismissed for taking part in union activities outside working hours or within working hours with the consent of the employer.⁴⁰⁰ Constant threats and intimidation cannot flourish where a worker is a member of a trade union, because trade unions primarily ensure the protection of workers' rights at work. By having his movement restricted, a forced labourer cannot effectively take part in trade union activities, and threats and intimidation usually experienced in a forced labour arrangement may even go to the extent of expressly prohibiting trade union membership.⁴⁰¹

It was observed earlier⁴⁰² that forced labour commonly occurs in the informal economy where workers have little or no protection from labour and employment laws and cannot unionise. That they are among the marginalised, atypical workers whom trade unions have difficulty in reaching does not imply that a discussion on the right to freedom of association and collective bargaining cannot be made pertaining to these workers. As a matter of fact, the ILO Committee of Experts has submitted that by employing the language "without distinction whatsoever", the Convention intended to extend the right to freedom of association and collective bargaining to all workers, irrespective of the industry they operate in or the type of their employment relationship.⁴⁰³ As a result, the Committee has held that workers who operate in the informal economy possess the right to freedom of association and to collectively organise just as do any other workers.⁴⁰⁴ It is granted that unionising informal economy workers is difficult,⁴⁰⁵ but as has been shown above,⁴⁰⁶

³⁹⁹ Article 1(2)(a).

⁴⁰⁰ Article 1(2)(b).

⁴⁰¹ This submission applies the indicators in so far as the right to freedom of association and participation in trade union activities is concerned. Cognisance is taken of the difficulties incurred by informal economy workers in unionising and taking part in trade union activities in a strict sense as reflected within this paragraph and para 2.6.3.3 above.

⁴⁰² Para 2.6.3.3 above.

⁴⁰³ ILO *General Survey on the Fundamental Conventions* Report III 23; Article 2 of Convention No 87 reads "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

⁴⁰⁴ ILO *General Survey on the Fundamental Conventions* Report III 28.

⁴⁰⁵ Common challenges have mostly to do with the nature of work involved in this sector. It is characterised by atypical employment relationships which may be tied to kinship or family, workers may regularly move from one occupation to another, and there is lack of a clear dividing

in principle trade unions have a mandate to protect all workers irrespective of the industry they operate in. In order to circumvent the challenges that hinder workers' right to freedom of association, it is suggested that trade unions should take proactive action by reaching out to these workers, raising awareness of the benefits of trade union membership, and offering them assistance to form their own quasi-trade unions and associations.⁴⁰⁷

Taking into account the unique challenges encountered in unionising informal sector workers, the ILO recognises the quasi-trade union roles that cooperatives, community member-based organisations and sectoral associations may play in ensuring that workers exercise their right to collectively organise.⁴⁰⁸ Whilst they may not be recognised as trade unions *per se*, experience shows that these organisations are instrumental in ensuring that the rights and welfare of workers in atypical employment relationships are safeguarded. As a result, challenges in recruiting forced labourers into established trade unions does not strike off the presence of other platforms that can enable them to exercise this right. This discussion therefore maintains the view that if freedom of association and the collective bargaining of forced labourers cannot be discussed in the context of trade unions, it must be discussed in terms of associations that informal sector workers form with or without the support of established trade unions.

2.7.2.2 Abusive working and living conditions and excessive overtime

Notwithstanding the fact that the existence of abusive working conditions in isolation does not imply the imposition of forced labour, it is quite common for forced labour

line between the employer and the employee where self-employment is concerned. Also, workers are situated in scattered or individualised workplaces and in cases of self-employment, workers consider it a loss of profits if they close shop to attend to organisational activities. In this regard see Birchall *Organising Workers in the Informal Sector* 25-26; Beirnaert "A Trade Union Perspective" 484.

⁴⁰⁶ Para 2.6.3.3 above.

⁴⁰⁷ See generally Goldman *Organising in South Africa* 24, 37.

⁴⁰⁸ Bonner and Spooner 2011 *International Politics and Society* 92-97; Birchall *Organising Workers in the Informal Sector* 25-26; Motala *Organising in the Informal Economy* 14-30; Goldman *Organising in South Africa* 24,37. See para 2.6.3.3 above for reference to examples of the organisations.

situations to be characterised by poor working conditions.⁴⁰⁹ In the informal economy in particular, employers and businesses operating on small profit margins may cut labour costs and thus skimp on occupational health and safety requirements. In turn, forced labourers are usually required to work in conditions that are hazardous without appropriate protective equipment.⁴¹⁰ As against this, the health and safety of workers is considered fundamental to the achievement of decent work.⁴¹¹ ILO standards on occupational health and safety are aimed at ensuring the protection of workers against sickness, disease and injury arising from employment.⁴¹²

The right to a healthy and safe working environment also calls in to question the provision of social security to workers. The provision of social security in the world of work is premised on the notion that there are risks that accompany the pursuance of an individual's right to work. Consequently, social security systems provide an assurance of income in cases of unemployment, illness and injury, and income for the family where the breadwinner is deceased, among other things.⁴¹³ The question that arises then is, if employers who engage in the use of forced labour actually ensure that the labourers have social security. According to the ILO, forced labour generates an estimated \$150 billion in illegal profits globally, generated partly by the

⁴⁰⁹ ILO *Indicators of Forced Labour* 23.

⁴¹⁰ Forastieri *Improvement of Working Conditions and Environment in the Informal Sector* 5 at www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/publication/wcms_110306.pdf.

⁴¹¹ ILO *Global Strategy on Occupational Safety and Health* 1. Workers in both the formal and the informal economy sectors are entitled to the provision of occupational health and safety measures in the workplace. Workers in formal employment are usually readily covered under national occupational health and safety laws. For informal workers, it has been suggested that occupational health and safety can be achieved through innovative measures such as training pertaining to the improvement of work practices, offering training on first aid provision and the identification and control of occupational hazards. In addition, the improvement of occupational health and safety in informal workplaces can be achieved through cooperation with local public health care facilities that can give occupational health services.

See Forastieri *Improvement of Working Conditions and Environment in the Informal Sector* 11-13; ILO *Employment and Social Protection in the Informal Sector* 16-17.

⁴¹² See in particular article 4 of the *Occupational Safety and Health Convention* No 155 of 1981.

⁴¹³ Social security standards emanating from the ILO include the *Social Security (Minimum Standards) Convention* No 102 of 1952, *Social Protection Floors Recommendation* No 201 of 2012, *Equality of Treatment (Social Security) Convention* No 118 of 1962 and *Maintenance of Social Security Rights Convention* No 157 of 1982.

evasion of tax and social security contributions.⁴¹⁴ This estimate gives authority to the submission that forced labour violates the right of workers to social security.⁴¹⁵ A forced labourer is not guaranteed income should he fall sick or sustain injuries in the course of his employment, neither would his family get compensated should he die whilst performing work that is within the course and scope of his employment.

The limitation of working hours is considered essential, in that it allows workers to recuperate from their work engagements.⁴¹⁶ Allowing workers to rest is also beneficial for their well-being, which helps to minimise workplace accidents arising from fatigue and health ailments.⁴¹⁷ In accordance with international labour standards,⁴¹⁸ national laws and collective agreements normally make provisions for the limitation of working hours, overtime work and the right of employees to take leaves of absence and rest during public holidays. Contrary to national laws, forced labourers normally work without being given periods of rest.⁴¹⁹ The imposition of overtime does not constitute forced labour *per se* more particularly if it is within the limits permitted by national laws and collective agreements.⁴²⁰ However, where the set limit of overtime hours is exceeded, a relationship has to be established between the obligation to perform overtime work and forced labour. In this case, the ILO Committee of Experts has submitted that where overtime work is imposed by exploiting a worker's vulnerability under the threat of a penalty, which may include dismissal or the payment of wages below the minimum level, such exploitation transitions from poor working conditions to forced labour.⁴²¹

⁴¹⁴ ILO *Profits and Poverty* 13.

⁴¹⁵ See generally ILO *General Survey on the Fundamental Conventions* Report III 126.

⁴¹⁶ ILO date unknown http://ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_TIM_EN/lang--en/index.htm.

⁴¹⁷ ILO date unknown http://ilo.org/empent/areas/business-helpdesk/WCMS_DOC_ENT_HLP_TIM_EN/lang--en/index.htm.

⁴¹⁸ The *Hours of Work (Industry) Convention* No. 1 of 1919 and *Hours of Work (Commerce and Offices) Convention* No 30 of 1930 stipulate a maximum standard working time of 48 hours per week and 8 hours per day.

⁴¹⁹ ILO *Indicators of Forced Labour* 25.

⁴²⁰ ILO *General Survey on the Fundamental Conventions* Report III 123.

⁴²¹ ILO *General Survey on the Fundamental Conventions* Report III 123-124.

2.7.2.3 Debt bondage and/or the withholding of wages

Debt bondage and the withholding of wages by an employer have been identified as common characteristics of forced labour. The ILO has estimated that \$21 billion worth of income is lost annually arising from its being held in forced labour as opposed to a free employment relationship.⁴²² Income is lost through the employer not paying wages or, artificially making deductions from the wages due or paying wages that are lower than the required minimum.⁴²³ Artificial wage deduction would in this situation be unlawful, false deductions to a forced labourer's wage, often arising from debt bondage. As discussed above,⁴²⁴ in a debt bondage situation an incurred debt can never be paid off due to the low wages paid, the making of deductions for equipment, food and shelter, and of levies for unsatisfactory work. In essence, when wages are withheld, a forced labourer is not compensated for contributing his skill, effort and handiwork to the enterprise of the employer.

Be that as it may, it is an established principle of both international and national law (common and statutory law) that upon the conclusion of an employment relationship, and by virtue of an employee entering and remaining in service, the employer bears a duty to remunerate that employee for his services.⁴²⁵ At international law, the *Protection of Wages Convention*⁴²⁶ provides minimum standards aimed at ensuring the protection of the right of workers to be remunerated for putting their services at the disposal of an employer. The Convention permits deductions to be made only subject to conditions prescribed under national laws or collective agreements.⁴²⁷ In addition, workers must be informed of the conditions under which deductions may be made and the extent of the deductions.⁴²⁸

⁴²² ILO *Tripartite Meeting of Experts on Forced Labour* 3.

⁴²³ ILO *Tripartite Meeting of Experts on Forced Labour* 3.

⁴²⁴ See para 2.3.3 above.

⁴²⁵ Grogan *Workplace Law* 61; ILO *General Survey of the Reports Concerning the Protection of Wages Convention* Report III 1-2.

⁴²⁶ Convention No 95 of 1945.

⁴²⁷ Article 8(1).

⁴²⁸ Article 8(2).

2.7.2.4 Abuse of vulnerability, deception and physical or sexual violence

All workers in both formal and informal employment are susceptible to exposure to forced labour. However, ILO research shows that there are categories of workers who are more vulnerable than others. This includes workers who belong to groups that have previously suffered workplace discrimination such as indigenous peoples and tribes, women who are particularly engaged in sectors where forced labour is common such as domestic work, children and migrant workers.⁴²⁹ Vulnerability to forced labour may also be exacerbated by factors such as poverty and illiteracy.⁴³⁰ The mere fact that a person is in a vulnerable position does not in itself lead to forced labour. For forced labour to occur, the employer must take advantage of such vulnerability to impose labour on the worker.⁴³¹ Linked to this is the common practice of employers and/or recruitment agencies to use deceptive recruitment practices to lure people and trap them into forced labour.⁴³² Misrepresentations of the nature of the work, the working and living conditions are made with the intent to deceive the candidate, whereupon when the candidate assumes such employment and the conditions agreed to do not materialise.⁴³³

From the above, it is evident that certain groups of people are more susceptible to being subjected to forced labour as than others. The implication of this is that forced labour is often based on discrimination in respect of an individual's origin, gender and descent.⁴³⁴ The *Abolition of Forced Labour Convention* attests to this in that it expressly creates a link between forced labour and "racial, social, national or religious discrimination".⁴³⁵ Forced labour may therefore constitute a violation of the right not to be discriminated against in respect of employment and occupation, which is one of the four fundamental rights expressed in the *ILO Declaration on*

⁴²⁹ Andrees *Forced Labour and Human Trafficking* 10; ILO *Tripartite Meeting of Experts on Forced Labour* 11; ILO *General Survey on the Fundamental Conventions* Report III 104.

⁴³⁰ ILO *General Survey on the Fundamental Conventions* Report III 125.

⁴³¹ ILO *Indicators of Forced Labour* 5.

⁴³² ILO *Indicators of Forced Labour* 7.

⁴³³ ILO *A Global Alliance Against Forced Labour* Report I (B) 6; Miers 2000 *CJAS* 729-730.

⁴³⁴ ILO *General Survey on the Fundamental Conventions* Report III 104-105; ILO *A Global Alliance Against Forced Labour* Report I (B) 9.

⁴³⁵ Article 1(c).

Fundamental Rights and Principles.⁴³⁶ In terms of Article 1(1)(a) of the *Discrimination (Employment and Occupation) Convention*,⁴³⁷ discrimination in respect of employment and occupation includes any distinction, exclusion or preference made on the basis of race, colour, sex, national extraction or social extraction which culminates in a negation of the equality of opportunity or treatment in employment or occupation. Flowing from this, a forced labourer can assert that due to his ethnicity, he was subjected to forced labour, which negated his right to equality of treatment in the workplace.

In the light of the foregoing, it is evident that in as much as forced labour is a serious criminal offence to which hefty penalties may be imposed, it also has consequences that have manifestations on victims' labour rights. This justifies the argument that forced labour is not only a matter of criminal justice but also presents issues that demand to be addressed from a labour and employment law perspective. Consequently, the involvement of labour institutions and the strengthening of labour legislation are vital to the efficiency of enforcement systems that not only ensure criminal convictions but also address the labour market effects of forced labour.

2.8 Conclusion

Since 1930, the international framework has acknowledged forced labour to be a problem that requires suppression. This notwithstanding, its evolution over the years has resulted in variations in its use, from a colonially motivated practice to a practice of private agents, amongst others. The proliferation of private economy forced labour sends a message to the effect that national governments need to re-visit their approaches to grappling with the problem. In so doing, particular attention should be paid to the fact that the common reference to forced labour as slavery could negatively influence the effective implementation of forced labour laws. In this regard, any reference to forced labour as modern slavery must be done cautiously.

⁴³⁶ See para 2(d) of the Declaration.

⁴³⁷ Convention No 111 of 1958.

In addition to this, there is a need to realise that forced labour constitutes a violation not only of the general human rights of those affected but also of their labour and employment rights. Failures by current approaches to take cognisance of this have resulted in criminal justice-centred approaches to forced labour, which emphasise the adequacy of the penalties imposed on the crime. Focusing on prosecuting perpetrators has displaced the need also to consider the effects of the crime on its victims, some of which have a direct bearing on labour law discourse. Clearly, such an approach to addressing forced labour is wrong and does not comply with the 2014 Protocol.

Without entirely rendering the *Forced Labour Convention* unhelpful, with its suggestion that a criminal law approach to combatting forced labour should be adopted, this discussion has proposed that the said approach must be seen as a minimum standard for achieving the suppression of forced labour. The Convention clearly permits signatories to devise additional measures to grapple with forced labour, as and when the need arises.⁴³⁸ This notwithstanding, an autonomous approach has not yielded much with regards to formulating frameworks that appreciate the role that the labour law may play therein.⁴³⁹

With this in mind, the 2014 *Protocol to the Forced Labour Convention* makes it a legal obligation for ILO members who ratify it to assert the role of the labour market institutions and labour legislation in frameworks devised to fight forced labour. This discussion has reached the conclusion that this ideal is not only theoretical but practical, because the labour law and labour market institutions can play an indispensable role in forced labour national plans, given the chance. In particular, the role of labour inspectors is crucial, bearing in mind the roles they are authorised to perform in respect of workplaces.

Trade unions could be just as useful in assisting to develop the knowledge base concerning forced labour. This concerns not only raising awareness amongst

⁴³⁸ See for example the discussion on the Brazilian approach to forced labour at Chapter 4 below.

⁴³⁹ See for example the approaches adopted in the United Kingdom and South Africa at Chapters 3 and 5 below respectively.

workers, but also conducting research on the prevalence of forced labour in both the formal and the informal economy. Employers' organisations are better placed to give guidance to employers in ensuring that workplaces are forced labour intolerant. The key requirement is that all these actors must be trained and allocated resources in order to meet the demands of combatting forced labour in practice. The ILO also calls for enforcement systems that integrate the criminal justice system with labour administration and all other actors concerned.

While the prosecution of perpetrators remains important, the new approach also prioritises victim assistance, including the reintegration of the victim into the society. With regards to victim assistance, the pursuance of claims for compensation in labour tribunals rather than in criminal courts is suggested, because it may prove to be less onerous. Moreover, labour tribunals are better placed to make judgements that largely reflect on the impact of forced labour on labour and employment rights.

Finally, forced labour will continue to present challenges and proliferate if it is not properly addressed in law and in practice. A simple prohibition of forced labour in legislation is not enough to address the problem. It needs to be properly defined and its exceptions enumerated so that employers and workers may know what conduct is prohibited. Having established the standards set by the international normative framework, the subsequent chapter looks into how the United Kingdom (UK) ensures compliance with these standards. The aim will be to pinpoint the mechanisms employed in the UK framework to abolish forced labour in the labour market. The discussion will maintain a similar theme by establishing how the labour law finds relevance in addressing forced labour in the UK legislative framework.

CHAPTER 3

THE UNITED KINGDOM APPROACH

3.1 Introduction

Within the context of the European human rights system, the practice of forced labour constitutes a violation of human rights to which criminal sanctions have to be ascribed.⁴⁴⁰ In addition, the United Kingdom⁴⁴¹ has an obligation under ILO Conventions⁴⁴² to establish an effective mechanism that can best address the offence and bring offenders to book. This chapter is directed at identifying the extent of forced labour in the UK and how that has influenced the jurisdiction's current responses to the problem. It seeks to examine whether the UK labour law and its enforcement mechanisms play a role in addressing and preventing forced labour, and whether such is recognised within the current forced labour framework. In answering those questions, it will establish whether the UK approaches forced labour strictly as a criminal law matter and/or links it to human trafficking, or whether consideration is also being given to its employment and labour law implications, as expected by the ILO. The chapter will also consider whether the causes of forced labour could be peculiar to a jurisdiction, thereby necessitating the development of knowledge on forced labour and the frameworks that address the particularities prevailing within that jurisdiction. This investigation is performed with a view to foreground aspects of the UK's framework that may be exemplary in developing the South African framework to properly address forced labour as a labour law issue.

⁴⁴⁰ Article 4 of the *European Convention on Human Rights*.

⁴⁴¹ The United Kingdom of Great Britain and Northern Ireland (the UK) is made up of England, Scotland, Wales and Northern Ireland. In certain circumstances, the provisions of particular acts of parliament are applied differently within these territories. This thesis, however, will focus on all relevant laws as if they were generally applicable to the entire territory.

⁴⁴² See para 3.3.1 below.

3.2 Historical background of slavery in the UK

There is abundant literature indicating that the UK took part in the trade in slaves and the intensification of slavery both within its territory and in its colonies.⁴⁴³ According to Webster,⁴⁴⁴ the need to engage in commercial slave trading arose from the emergence of new labour markets, following the UK's colonisation of territories in North America and the Caribbean. It is recorded that British colonies such as the Cape of Good Hope,⁴⁴⁵ Cameroon and other parts of Africa⁴⁴⁶ also practiced slavery and the slave trade. Within its territory, Britain also legally and morally backed the practice of slavery and the slave trade. This was evidenced by the passing of laws⁴⁴⁷ that regulated the insurance of ships transporting slaves and stipulating regulations on the carriage of slaves. Also, merchants were granted "exclusive African trading rights", thus giving them the right to engage lawfully in the trade.⁴⁴⁸ Moreover, judgements were previously handed down in English Admiralty Courts outlining the legality of slave trading and slavery.⁴⁴⁹

Nevertheless, the UK has also been characterised as the leading force behind the international abolition of slavery and the slave trade, in particular from the year 1807.⁴⁵⁰ Within the UK's territory, the first attempts to end slavery began in 1772 after the decision in *Somerset v Steward*⁴⁵¹ made slavery (and the slave trade)

⁴⁴³ Milbrandt 2013 *RJIL* 49; Wilson 1950 *AJIL* 510; Kern 2004 *JHIL* 235; Van Niekerk 2004 *CILSA* 7.

⁴⁴⁴ Webster 2007 *JLH* 286.

⁴⁴⁵ Van Niekerk 2004 *CILSA* 4.

⁴⁴⁶ Milbrandt 2013 *RJIL* 47-48.

⁴⁴⁷ For example the *Dolben Act* of 1788 (28 Geo. III c.54). In this regard see Webster 2007 *JLH* 297.

⁴⁴⁸ Webster 2007 *JLH* 286.

⁴⁴⁹ For example the *Zong* case, as discussed by Webster 2007 *JLH* 285-298 which considered the legality or otherwise of disposing of slaves into the high seas during transportation to a commercial destination.

⁴⁵⁰ Wilson 1950 *AJIL* 505. The year 1807 is considered significant, because it marked the first attempt by the UK government to extend efforts to end slavery and the slave trade to its colonies through the passing of the *Act for the Abolition of the Slave Trade*. Thereafter, the UK's efforts to see a global end to slavery and the slave trade were made through attempting to persuade other states to abandon the practice.

⁴⁵¹ *Somerset v Steward* (1772) 98 ER 499. Somerset was the property of Charles Steward. After being brought to England and serving as a slave for two years, Somerset escaped. However, he was captured and put aboard a ship set for Jamaica where he was to be sold as a slave. Whilst slavery was tolerated in British colonies, the argument made on behalf of Somerset was that the court had to apply the law of England. As a result, it was held that the law in England did not permit a master to forcefully capture a slave to be sold abroad because he had deserted from his

unlawful at common law⁴⁵² in England. Whilst largely celebrated by abolitionists, the decision was effective only within the territories of the UK, which meant that the capture of and trade in slaves, and the practice of slavery, would still be recognised amongst its colonies.⁴⁵³ In order to extend the abolition of the slave trade to its colonies, the *Act for the Abolition of the Slave Trade* was passed in 1807. The aim of this Act was to prohibit the slave trade in the British Empire and press other European states to abolish it.⁴⁵⁴ As the Act did not abolish slavery but focused mainly on trading in slaves, an additional *Slavery Abolition Act* was passed in 1833 to put an end to slavery itself. The Act sought to give slaves freedom whilst at the same time providing compensation to the owners of those slaves. However, the freedom granted to the slaves was not absolute. They had to be attached to their former owners as apprentices for a specific period of time. In addition, the Act was limited in that it was not applicable in all territories of the British Empire.⁴⁵⁵

It has also been documented that the British Empire was determined to see other slave trading territories such as Spain, America and Brazil put an end to the practice.⁴⁵⁶ In an attempt to achieve this, Britain resorted to the use of its belligerent position and naval powers during the Napoleonic wars to search and seize vessels of neutral states headed to enemy states for the presence of slaves as cargo.⁴⁵⁷ This practice had its limitations. Firstly, it was particularly difficult to achieve a global abolition of the slave trade, bearing in mind that the practice of slavery was flourishing in territories such as America, and the fact that not all slave trading territories shared the same sentiments as Britain.⁴⁵⁸ Moreover, it was later held that

service. Whilst misunderstood to mean that this decision signalled the emancipation of slaves in the UK, the essence of the decision was that a slave could not be forcibly removed from Britain and sold into slavery.

⁴⁵² Slavery (and the slave trade) had never been authorised by statute in England, so the decision in *Somerset v Steward* extended to the common law. It must be clarified that the effect of this decision was to outlaw slavery and the slave trade in England only. Slavery would still remain legal the British Empire.

⁴⁵³ Van Niekerk 2004 *CILSA* 5-7.

⁴⁵⁴ Van Niekerk 2004 *CILSA* 3.

⁴⁵⁵ Van Niekerk 2004 *CILSA* 4-5.

⁴⁵⁶ Van Niekerk 2004 *CILSA* 6; Kern *JHIL* 233.

⁴⁵⁷ Wilson 1950 *AJIL* 510; Kern 2004 *JHIL* 235; Van Niekerk 2004 *CILSA* 7.

⁴⁵⁸ Wilson 1950 *AJIL* 507.

Britain could not legislate on behalf of other territories.⁴⁵⁹ Upon the failure of this method, Britain moved for international cooperation towards the abolition of the slave trade. This was to be achieved through treaties of search and seizure which gave signatories reciprocal rights to search vessels and capture them if they were found to be transporting slaves, where after they would be brought before admiralty courts.⁴⁶⁰

Considering all the above, it is clear that the UK had a role to play in both promoting slavery and the slave trade and later in leading international efforts to bring an end to the practices. Besides the international efforts to prompt other states to end slavery, the efforts to end slavery were centred on ensuring its illegality within the UK without affecting the practice in its colonial territories. This was a piece-meal approach to solving the problem. For example, the decision in *Somerset v Steward* did not have the effect of emancipating slaves within the UK and its colonies, but merely protected slaves within the UK from non-consensual seizure and further trade elsewhere. Similarly, the abolition legislation was arguably not framed from a human rights perspective, because its intent was to give slaves superficial freedom and made provision for the payment of compensation to their masters.

Nevertheless, the UK's efforts to see the international abolition of slavery and the slave trade have gone down as notable events within the anti-slavery movement. To that end, it will be considered whether or not the UK's historical approach to slavery has informed how the current mechanisms address forced labour.

⁴⁵⁹ A myriad of admiralty cases were brought before the courts to determine whether Britain had the power to seize vessels of other states. See in particular the *The Amedie* 1810 1 Acton 240 12 ER 92 in Kern 2004 *JHIL*236 and *The Africa* 1810 2 Acton 1 12 ER 156 and *The Donna Mariana* 1812 1 Dods 91 165 ER 1244 in Van Niekerk 2004 *CILSA* 9.

⁴⁶⁰ Some of these treaties include the Anglo-Portuguese Treaty of 1815, the Anglo-Spanish Convention of 1835 and the Anglo-French Convention of 1831. See in particular Wilson 1950 *AJIL* 509-510; Van Niekerk 2004 *CILSA* 14-21.

3.3 The situation of forced labour in modern-day UK

3.3.1 *General observations and definitions*

Before dealing with the UK legislative and policy responses to forced labour, it is instructive to consider what knowledge of the practice there is within the UK. The wish to do this is based on the notion that effective legislative and policy responses to a problem are shaped by the extent of the knowledge that exists concerning that problem.

It is generally acknowledged, that the UK has a flexible labour market. According to Monastiriotis,⁴⁶¹ a flexible labour market is one that is characterised by a system where factors that render entry into the labour market difficult are done away with. These factors, better known as labour market rigidities, are chiefly of a political, financial and institutional nature.⁴⁶² In the UK labour market flexibility has been achieved through a relaxation of institutional rigidities *viz* the deregulation of certain parts of the labour relations.⁴⁶³ This has resulted in there being fewer regulations on the conduct of employment relationships. Determinations on the substance of the relationships are the prerogative of the employer and the worker.

Manifestations of flexibility have been seen in the UK with regard to working hours, appointments and dismissals, the common use of short-term contracts, and flexibility in wage arrangements.⁴⁶⁴ Whilst this approach has been criticised, it has also been asserted that labour market institutions generate rigidities that significantly account for the prevalence of unemployment not only in the UK but also in other European economies.⁴⁶⁵

⁴⁶¹ Monastiriotis 2007 *Area* 312.

⁴⁶² Monastiriotis 2007 *Area* 312.

⁴⁶³ Key labour market institutions deregulated in the UK include social security systems, minimum wage, employment protection legislation and trade unionism.

⁴⁶⁴ Anderson and Rogaly *Forced Labour and Migration* 23.

⁴⁶⁵ Monastiriotis *Labour Market Flexibility* 2.

From a regional perspective, the UK is bound by the *European Convention on Human Rights* to establish mechanisms that provide for the punishment and prevention of forced labour within its territory, as will be seen below. In the international sphere, the UK is a member of the International Labour Organisation (ILO). It has ratified all of the ILO's fundamental conventions, the *Forced Labour Convention*⁴⁶⁶ inclusive. The standards set out in the *Forced Labour Convention* are therefore legally binding on the UK.⁴⁶⁷ Apart from obliging members to establish measures to deal with forced labour, one other principal standard set by the Convention is that relating to the definition of forced labour. That said, the next inquiry is to determine how the UK legal framework defines forced labour and whether the ILO's definition⁴⁶⁸ has been taken into account in the formulation of the UK framework.

Whilst it does not specifically provide a definition, the starting point in defining forced labour in the UK could be section 1(1)(b) of the *Modern Slavery Act* of 2015,⁴⁶⁹ which provides that:

A person commits an offence if he requires another person to perform forced or compulsory labour and the circumstances are that he knows or ought to know that the person is being required to perform such labour.

Whilst this provision does specifically define forced labour in similar words to the ILO, there is an intention on the part of the legislature to establish a relationship between the two. This is demonstrated under section 1(2) of the Act, which requires the provision in section 1(1)(b) to be interpreted in accordance with article 4 of the *European Convention on Human Rights*.⁴⁷⁰ Article 4 of the *ECHR* specifically prohibits slavery, servitude and forced labour among its signatories. In interpreting forced labour under article 4 of the Convention, the European Court of Human Rights has

⁴⁶⁶ Convention No 29 of 1930.

⁴⁶⁷ See para 2.6.2.1 above.

⁴⁶⁸ See para 2.2 above.

⁴⁶⁹ Repeals section 71 of the *Coroners and Justice Act* of 2009.

⁴⁷⁰ Hereafter referred to as the *ECHR*. The influence of the *ECHR* will be discussed fully at para 3.3.2 below.

submitted that it relies amongst others things on the *Forced Labour Convention*.⁴⁷¹ Implicitly, in the case of forced labour, when reading provisions of section 1(1)(b), guidance must be sought from the definition set out in the *Forced Labour Convention*.

That said, it is safe to submit that the definition of the ILO on forced labour is applicable to all matters that seek to raise the issue within the UK. For this purpose, then, forced labour in the UK is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".⁴⁷²

3.3.2 Influence of the European Convention on Human Rights (ECHR)⁴⁷³

Global international law standards emanating from the ILO⁴⁷⁴ and the UN⁴⁷⁵ are very influential in the formulation and application of law pertaining to forced labour. Notably, the ILO's tripartite system of monitoring implementation and compliance with ratified conventions helps in ensuring that there are checks and balances in government efforts to meet the minimum standards pertaining to the protection and fulfilment of workplace rights.⁴⁷⁶ Be that as it may, the role regional human rights systems may play in ensuring a local compliance with norms established at the global level should not be overlooked. From a general point of view, it has been observed that regional human rights systems have previously had an influence in promoting and ensuring the protection of universal human rights.⁴⁷⁷ It is for this reason that a need arises to consider how far regional human rights systems have gone in developing standards on the prohibition of forced labour and ensuring compliance amongst the jurisdictions considered in this study.

⁴⁷¹ European Court of Human Rights 2014 http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.

⁴⁷² Article 2(1) of the *Forced Labour Convention*. Also see Geddes *et al* 2013 *JRF Programme Paper* 3; Lalani and Metcalf 2012 *JRF Programme Paper* 5.

⁴⁷³ Assented to in 1950 and entered into force in 1953.

⁴⁷⁴ Para 2.6 above.

⁴⁷⁵ Para 2.5 above.

⁴⁷⁶ See para 2.6.2 above.

⁴⁷⁷ See generally Barelli 2010 *HRQ* 952.

In addition to its ILO membership, the UK is a member of the Council of Europe (CE), a European regional human rights organisation founded in 1949. The CE must not be confused with the European Council (EC), because they are two distinct institutions which deal with distinct mandates within Europe. The CE is an international organisation which upholds human rights, democracy and the rule of law in Europe. Unlike the EC, the CE cannot make binding laws, but it possesses the powers to enforce the obligations European countries incur over certain agreements.⁴⁷⁸ The European Court of Human Rights is an example of the CE's enforcement mechanism, which enforces the European Convention on Human Rights (ECHR). The *ECHR* is a civil and political rights treaty founded on the principles of the *Universal Declaration of Human Rights*,⁴⁷⁹ and it largely draws inspiration from various UN human rights instruments and ILO instruments, as will be seen throughout this discussion.

On the other hand, EC is an institution of the European Union (EU), which defines the EU's overall political direction and priorities. In this regard, the recent decision by Britain to leave the EU (commonly known as the Brexit) does not have any impact on the application of the *ECHR* on the UK. In actual fact the Brexit only has a potential impact on the rights established under the EU and EC.⁴⁸⁰

At the moment the UK is a signatory to the *ECHR* and remains bound to respect and guarantee the rights protected under it. When a country ratifies the Convention, it binds itself to extend the protection of the rights embodied in the Convention to everyone within its borders.⁴⁸¹ In order to supervise the implementation of the obligations incurred by state parties, the European Court of Human Rights⁴⁸² is established under article 19 with jurisdiction over "all matters concerning the

⁴⁷⁸ Council of Europe date unknown <http://www.coe.int/en/web/portal/home>; Council of Europe date unknown <http://www.echr.coe.int/Pages/home.aspx?p=home>.

⁴⁷⁹ Preamble of the Convention.

⁴⁸⁰ Dalzell 2016 <https://rightsinfo.org/whats-difference-european-union-european-convention-human-rights/>; Lock 2016 <https://blog.oup.com/2016/06/brexit-human-rights-law/>.

⁴⁸¹ Article 1. Protection is extended to everyone within a jurisdiction and is not exclusive to nationals, although to assert a claim from the court the concerned person must be a victim. See Boyle 2009 *VUWLR* 172.

⁴⁸² Referred to as "the court" within this chapter.

interpretation and application of the convention and its protocols".⁴⁸³ All state parties are bound to implement the judgements of the court. Boyle⁴⁸⁴ observes that the court is well renowned and has seen its judgements shape and inform the approach to human rights within Europe. The UK remains subject to the jurisdiction of the Court despite the Brexit.⁴⁸⁵

3.3.2.1 *Distinction between forced labour and slavery*

For purposes of this discussion and in so far as forced labour is concerned, article 4 of the *ECHR* reads: "No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour." Since it was argued earlier that the use of the terms slavery and forced labour interchangeably could cause confusion,⁴⁸⁶ it is necessary to consider whether any guidance has been given regarding the application of these concepts, or whether within the European framework (and ultimately for the UK) they should be treated as synonymous.

The distinction between forced labour and slavery was drawn by the European Court in the case of *Siliadin v France*.⁴⁸⁷ The case involved an application by a Togolese woman who had been brought to France as an adolescent and required to serve as a domestic worker. She had entered France on a tourist visa, and had been promised that she would be sent to school and that her immigration status would be regularised (because she was an illegal immigrant). On the contrary, these events did not materialise and she was instead made to work for a French couple and was not paid for her services. Her primary complaint was that French laws had failed to provide a sufficient remedy for her being held in slavery and being required to perform forced labour, and that consequently the government was in breach of its

⁴⁸³ Article 32(1).

⁴⁸⁴ Boyle 2009 *VUWLR* 174.

⁴⁸⁵ Lock 2016 <https://blog.oup.com/2016/06/brexit-human-rights-law/>; Dalzell 2016 <https://rightsinfo.org/whats-difference-european-union-european-convention-human-rights/>.

⁴⁸⁶ Para 2.3.1 above.

⁴⁸⁷ Application No. 73316/01 of 2005. Judgements of the European Court of Human Rights cited within this chapter are available at <http://hudoc.echr.coe.int/>. The Court also considered the question of servitude, but it is omitted from this discussion because the gist of this section is to highlight the need to distinguish and/or apply the terms slavery and forced labour with caution in national legislation. See para 123-129 of the Court's judgement on servitude.

obligations under article 4 of the *ECHR*. As a starting point, the Court indicated that for the purposes of interpreting the term slavery under the Convention, its meaning as enunciated by the UN *Slavery Convention*⁴⁸⁸ should be adopted. In addition, with regards to forced labour, guidance had to be sought from the *Forced Labour Convention*. In holding that a case of forced labour had been satisfactorily established, the court held:

What there has to be is work "exacted under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he has not offered himself voluntarily... Although the applicant was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat...⁴⁸⁹

Turning to the question of slavery it was held that:

Although the applicant was deprived of her autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an object.⁴⁹⁰

Read together, the Court's submissions point out that the establishment of these two offences under one provision should not be implied as embracing similar conduct. As a result, caution must be exercised, more particularly if the two are going to be used in legislation to proscribe unlawful conduct. If slavery is going to be used as an umbrella term for forced labour and the related practices, the law should be clear about this, because a blanket provision prohibiting slavery may not set clear boundaries regarding its relevance to forced labour in a modern society. As argued previously,⁴⁹¹ a superficial reading of a provision simply proscribing slavery may be misinterpreted as finding little or no relevance to modern-day labour relations. The implication therefore is that UK laws must be in a position to indicate that forced labour and slavery are not synonymous subjects. If the need arises to use slavery as

⁴⁸⁸ Article 1(1) of the *Slavery Convention* provides "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Also see para 2.3.1 above.

⁴⁸⁹ Para 117-118.

⁴⁹⁰ Para 122.

⁴⁹¹ Para 2.3.1.

the all-embracing term, laws must go a step further to identify where forced labour fits into the picture.

3.3.2.2 *Prohibition of forced labour and corresponding obligations*

Article 4(2) of the *ECHR* expressly binds State Parties to prohibit the exaction of forced labour against all individuals within their jurisdictions. The Convention is silent with regard to explaining the meaning and content of forced labour and how State Parties are to develop mechanisms to eradicate it and prevent its recurrence. The European Court of Human Rights has in this instance been very instrumental in giving guidance on how forced labour should be dealt with. It is important to note that the standards emanating from the Convention and the corresponding interpretation from the Court were strongly influenced by the ILO *Forced Labour Convention*. In fact, the Court in *Rantsev v Cyprus and Russia*⁴⁹² emphasised that the *ECHR* should not be interpreted in isolation or as an independent human rights instrument. Thus, in *Siliadin v France*⁴⁹³ the *Forced Labour Convention*'s definition of forced labour was cited and applied with reference to the question of forced labour. Flowing from this, it is observed that whilst the *ECHR* is authoritative in its own right, it derives much of its inspiration from other international human rights instruments, including ILO conventions.

Consequently, in identifying whether forced labour is present, it is well established that the Court uses the standard required by the *Forced Labour Convention*'s definition of forced labour. The standard is that there must be work exacted from a person without his will under the threat of a penalty. What is notable from the decisions of the Court⁴⁹⁴ is that whilst article 4 of the *ECHR* prohibits slavery and

⁴⁹² Application 25965/04 of 2010 para 273.

⁴⁹³ See para 51 for the citation and para 117-118 for the application of the definition to the facts of the case. Also see para 32-41 in *Van de Mussele v Belgium* Application No 8919/80 of 1983, where the court expressly used the *Forced Labour Convention* to make a determination on the question of forced labour. Para 34-35 in *C.N v UK* Application No 4239/08 of 2012 also reflects a direct application of the *Forced Labour Convention* and ILO indicators of forced labour by the court.

⁴⁹⁴ *Siliadin v France*, *Rantsev v Cyprus and Russia* 25965/04; *Van de Mussele v Belgium* Application No 8919/80.

forced labour, each of them must be fully addressed in national legislation and policy. The Court has emphasised that the law must not be ambiguous or insufficient where it is designed to protect a non-derogatory right.⁴⁹⁵ That said, it turns out that compliance with article 4(2) will come about in a regulatory system that recognises and punishes forced labour as a criminal offence, and establishes administrative mechanisms to offer assistance to victims.

On that note, the next enquiry dwells on what obligations state parties have towards forced labour in terms of the *ECHR*. In *Siliadin v France*⁴⁹⁶ it was held that the obligation incurred by State Parties is two-pronged. A State Party has to refrain from directly violating the right and also has a positive obligation to ensure the "effective protection" of its residents against forced labour, and the protection of those who are victims. The Court has interpreted "effective protection" as encompassing establishing a legislative and administrative framework that proscribes forced labour and brings perpetrators to book.⁴⁹⁷ That is, in addition to a legislative prohibition of forced labour, there is an obligation to ensure the implementation of the law through taking practical measures that can enable victims to seek redress and ensure the incarceration of perpetrators.

Consequently, in *Siliadin v France* the Court held that a prohibition of labour exploitation and subjection to working and living conditions incompatible with human dignity were not specifically representative of the values of article 4 of the *ECHR*, which are to proscribe slavery and forced labour.⁴⁹⁸ At the time, articles 225-13 and 225-14 of the *French Criminal Code* did not criminalise slavery and/or servitude, but made provision for the penalisation of conduct calculated to exploit labour without payment and of subjecting a person to working and living conditions incompatible with dignity. As a result, the Court noted that this represented a failure by the French government to provide practical and effective means by which the applicant,

⁴⁹⁵ See in particular *Siliadin v France* para 148.

⁴⁹⁶ Para 89 and 112. See also *C.N and V. v France* Application No 67724/09 of 2012 at para 69.

⁴⁹⁷ *C.N and V. v France* para 105. Note also that in *Rantsev v Cyprus and Russia* para 218-219 it was concluded that positive obligations incurred under article 4 may call for a state party to take operational measures to protect victims or potential victims.

⁴⁹⁸ Paras 141-149.

a minor, could seek redress.⁴⁹⁹ Flowing from this, there is therefore an obligation on State Parties to have a legislative framework that specifically addresses all the offences established under article 4, accompanied by administrative measures to investigate and offer victim protection and assistance. This avoids a situation where the framework appears to be selective as to which conduct is being prohibited.

On that note, the case of *C.N v UK*⁵⁰⁰ represents a situation where the court dealt with a complaint turning on a selective legal framework. The case involved a Ugandan woman who, with the help of a relative, entered the UK on false travelling documents. Upon arrival she was forced to work for an elderly couple. In this position she was always on call and was given only one afternoon off per month. Her wages were paid to her relative, who gave her only a small portion of it. He had also seized her travel documents. Upon fleeing the situation she applied for asylum, but her application was rejected. A police unit specialising in human trafficking carried out an investigation upon the request of her lawyer and concluded that there was no evidence that she had been trafficked and that no further investigation could be made on her case. The police's conclusion was reached notwithstanding that a psychiatry report and report from an anti-human trafficking organisation indicated that the applicant had been subjected to forced labour.⁵⁰¹ It should be noted that at the time UK laws did not make provision for the prohibition and punishment of forced labour independent of human trafficking.⁵⁰²

The applicant approached the Court, alleging that the UK government had not met its positive obligation to criminalise forced labour and servitude as required by article 4 of the *ECHR*. Whilst the government argued that it had complied with the operational requirement to investigate, the Court was of the view that the investigation still fell short of the protection of the right in article 4(2) of the *ECHR*. That is, the investigation had been restricted in that it was aimed at establishing whether there was human trafficking, and not at establishing the offence of

⁴⁹⁹ *Siliadin v France* para 148.

⁵⁰⁰ Application No 4239/08 of 2012.

⁵⁰¹ Paras 20-28.

⁵⁰² Section 4(4) *Asylum and Immigration (Treatment of Claimants) Act*. See also para 3.4 below.

domestic servitude. As a result, it was held that the law as it then was did not afford the applicant "practical and effective protection against treatment falling within the scope of article 4" seeing as it was promulgated to prohibit human trafficking and not forced labour *per se*. It can be derived from this judgement that a prohibition of human trafficking cannot be said to be a prohibition of forced labour, even where forced labour is identified as a form of exploitation resulting from human trafficking. Also, by suggesting practical and effective measures, the implication is that legislation must go beyond a simple prohibition of forced labour to give authority to the establishment of administrative mechanisms to enforce forced labour laws.

In the light of the foregoing discussion, it is without a doubt that regional human rights systems may play a significant role in the understanding of forced labour at a regional and national level. Flowing from the decisions of the European Court of Human Rights as discussed above, it is clear that regional human rights instruments that speak to forced labour may bring about domestic compliance with the chief international instruments. This is done by assisting countries to interpret international standards in line with the circumstances peculiar to the region and also by localising a system of holding them to the obligations they incur under ILO Conventions and the specific regional instruments. Cases such as *C.N v UK* and *Siliadin v France* demonstrate that it is quite common for governments to pass off non-specific provisions as sufficiently extending coverage to forced labour victims. However, the Court has demonstrated that, like human trafficking, forced labour must also be given the necessary attention, and that as it constitutes a violation of human rights, laws directed at outlawing it must do so clearly.

3.3.3 Scope and extent of forced labour in the UK

First and foremost, research suggests that there is little empirical data measuring the scope of forced labour in the UK.⁵⁰³ Geddes *et al*⁵⁰⁴ assert that forced labour has only recently been acknowledged to exist in the UK. Prior to this, forced labour was

⁵⁰³ Lalani and Metcalf 2012 *JRF Programme Paper 7*.

⁵⁰⁴ Geddes *et al* 2013 *JRF Programme Paper 3*.

viewed as a problem affecting poor and undeveloped countries, owing to its hidden nature and the fact that it is not fully understood.⁵⁰⁵ Nevertheless, a significant amount of literature indicates the presence of forced labour in the UK, more particularly in low-skilled, low-paid and insecure private sector employment. Whilst not entirely measuring its scope, previous studies have made a considerable effort to study forced labour as it occurs in the UK, its causes, sectors that stand most affected, and the current legislative and policy responses.⁵⁰⁶

Initially the focus of most studies was to identify general workplace exploitation and the prevalence of human trafficking in the UK.⁵⁰⁷ The findings of these studies have been useful because they provided a background against which research exploring forced labour could be developed. One of these studies was that of the UK Trades Union Congress (TUC) Commission on Vulnerable Employment, which sought to report on the scope of vulnerable employment in the UK. According to the Commission's report, "vulnerable work"⁵⁰⁸ exists in areas where there is less regulation of employment relationships, thus placing workers at risk of manipulative practices by employers due to the imbalance in power that exists in the employer-employee relationship. The report continues by stating that vulnerable work is insecure in that it is characterised by the flexibility of the employment relationship as evidenced by situations where there are no employment contracts and no provision is made for social security due to the flexibility of the wage arrangements.⁵⁰⁹ The work involved is generally low-skilled and low-paid, making the chances of progression very slim. In addition, the low skill element means that there is easy

⁵⁰⁵ Geddes *et al* 2013 *JRF Programme Paper* 3.

⁵⁰⁶ Geddes *et al* 2013 *JRF Programme Paper* 1-63; Lalani and Metcalf 2012 *JRF Programme Paper* 3-35; Scott *et al* 2012 *JRF Programme Paper* 3-70; Anderson and Rogaly *Forced Labour and Migration* 4-67; Kagan *et al* 2011 *JRF Programme Paper* 4-68.

⁵⁰⁷ See in particular Dowling *et al* *Trafficking for the Purposes of Labour Exploitation* 7-16; TUC *Hard Work, Hidden Lives* 9-32; Equality and Human Rights Commission *Inquiry into Recruitment and Employment* 7-26; McKay *et al* *Migrant Workers in England and Wales* 17-99; Skrivankova *Trafficking for Forced Labour* 8-18.

⁵⁰⁸ The Commission defines vulnerable work as precarious work that places people at risk of continuing poverty and injustices from an imbalance of power in the employer-employee relationship. Among these more vulnerable sectors the report identifies care homes, cleaning, catering and hospitality, hairdressing and beauty and security services. It can be gathered from this list that "vulnerable employment" is to be found mostly in the private, informal economy, where there is little or no regulation.

⁵⁰⁹ See generally TUC *Hard Work, Hidden Lives* 12-22.

entry into the labour market, a fact which consequently makes job security low, as workers are easily dispensed with.⁵¹⁰

Whilst involvement in vulnerable work does not imply the imposition of forced labour, the TUC study finds that workers involved in vulnerable work are at risk of exposure to workplace exploitation because they fall outside the ambit of regular employment legislation, and the incentive to unionise is weak within their sectors.⁵¹¹ It is the observation of the Commission that the formation of trade unions is still inconceivable amongst these workers due amongst other reasons the stringent eligibility criteria for membership and participation associated with existing trade unions.⁵¹² Consequently, the lack of regulation and the overwhelming power employers have in the employment relationship are conditions that are conducive to exploitation that could degenerate into forced labour.⁵¹³

Another inquiry is the *Trafficking for the Purposes of Labour Exploitation*⁵¹⁴ review carried out for the British Home Office, wherein the aim was to identify the level of knowledge concerning trafficking for the purposes of forced labour in the UK. Whilst the study did not look at forced labour in its entirety, it sought to establish gaps in knowledge concerning forced labour arising from human trafficking, and considered forced labour and other measures of exploitation endured by trafficking victims.⁵¹⁵ The study found that there is little recorded evidence to establish the prevalence of human trafficking for forced labour within the UK, but found that workers in informal sector employment were most vulnerable.⁵¹⁶ Whereas the two studies considered above did not examine forced labour broadly, they suggested that there is a prevalence of workplace exploitation in the UK, more particularly amongst workers engaged in vulnerable work. In addition, they suggested that human trafficking resulting in forced labour was a common occurrence in the UK. The findings of these

⁵¹⁰ TUC *Hard Work, Hidden Lives* 12-22.

⁵¹¹ TUC *Hard Work, Hidden Lives* 68-74.

⁵¹² TUC *Hard Work, Hidden Lives* 68-74.

⁵¹³ TUC *Hard Work, Hidden Lives* 11-18.

⁵¹⁴ Dowling *et al Trafficking for the Purposes of Labour Exploitation*.

⁵¹⁵ Dowling *et al Trafficking for the Purposes of Labour Exploitation* 6-16.

⁵¹⁶ Dowling *et al Trafficking for the Purposes of Labour Exploitation* 6-16.

two initial studies amounted to a useful context in which research on the extent of forced labour in the UK could be carried out.

Following the findings of the two reports considered above and others,⁵¹⁷ focus has recently shifted towards studying forced labour in its entirety, without narrowing the focus to human trafficking. Recent studies⁵¹⁸ have established that forced labour does exist in the UK, with informal economy workers and migrants being the most vulnerable groups. Industries that are most often affected include construction, agriculture, food processing and packaging, hospitality and catering, and domestic work.⁵¹⁹ As a result, interest has been generated in examining forced labour in so far as it occurs within these industries. According to Scott,⁵²⁰ UK researchers employ the ILO's indicators⁵²¹ of forced labour in identifying the existence of forced labour. However, Scott⁵²² further observes that an indicators approach may be difficult to apply in practice, particularly where employers use subtly disguised means of coercion such as tied accommodation to confine workers to their jobs. Consequently, the trend amongst most investigations and reviews is not to focus exclusively on identifying forced labour but also to expose exploitative or poor working conditions.⁵²³

To give an illustration of how people have been exposed to forced labour in practice in the UK, a few examples drawn from factual incidents are considered. Firstly, debt bondage is one of the most common forced labour practices witnessed across industries susceptible to forced labour. In its most apparent form, it arises through the imposition of recruitment fees which are thereafter deducted from wages at very

⁵¹⁷ See amongst others Equality and Human Rights Commission *Inquiry into Recruitment and Employment* 7-36; McKay *et al Migrant Workers in England and Wales* 17-122; Skrivankova *Trafficking for Forced Labour* 6-32.

⁵¹⁸ Geddes *et al* 2013 *JRF Programme Paper* 7-95; Lalani and Metcalf 2012 *JRF Programme Paper* 7; Anderson and Rogaly *Forced Labour and Migration* 23.

⁵¹⁹ Lalani and Metcalf 2012 *JRF Programme Paper* 7; Anderson and Rogaly *Forced Labour and Migration* 23.

⁵²⁰ Scott *et al* 2012 *JRF Programme Paper* 30.

⁵²¹ See para 2.7.2 for the ILO's indicators of forced labour.

⁵²² Scott *et al* 2012 *JRF Programme Paper* 30.

⁵²³ See para 3.3.4 below, which explores this approach in detail.

high interest rates.⁵²⁴ It has also been observed through the requirement to sign lease agreements with threats of loss of employment should an employee decline.⁵²⁵ This tied accommodation creates a situation of dependency on the employer. The accommodation fees charged are very high, leaving the employee trapped in accumulating accommodation debt. Fees for recruitment, travel and accommodation levied by employers and/ or recruitment agencies have been seen to leave workers in a situation where they are working only to pay off the debt.⁵²⁶

Lalani and Metcalf⁵²⁷ observe that the non- or underpayment of wages is also a common occurrence. Threats of dismissal would sometimes be levelled against workers for refusing to complete unpaid overtime work.⁵²⁸ It is also recorded that it is quite common for poor working conditions in the industries mentioned above to be perceived not as problems but as inherent characteristics of the work associated with the industry,⁵²⁹ thereby creating an environment where workers never complain of such conditions. Thirdly, a myriad of abusive practices ranging from bullying, verbal abuse, racism, sexism and threats have been widely documented across these industries.⁵³⁰ Migrant workers have also been subjected to the seizure of travel documents and threats of denunciation to authorities if they fail to comply with the employers' demands.⁵³¹ Finally, because of the nature of the work involved in industries such as domestic work, agriculture and construction, where employees have to be housed on-site or within employer's household (in the case of domestic workers), it has been found that employers can use this to isolate and restrict workers' movements.⁵³² Domestic workers have been the most vulnerable, with

⁵²⁴ Scott *et al* 2012 *JRF Programme Paper 5*; Lalani and Metcalf 2012 *JRF Programme Paper 8*.

⁵²⁵ Lalani and Metcalf 2012 *JRF Programme Paper 8*.

⁵²⁶ Scott *et al* 2012 *JRF Programme Paper 5*.

⁵²⁷ Lalani and Metcalf 2012 *JRF Programme Paper 8*.

⁵²⁸ Lalani and Metcalf 2012 *JRF Programme Paper 8*.

⁵²⁹ Pollert and Wright *The Experience of Ethnic Minority Workers* 27.

⁵³⁰ Scott *et al* 2012 *JRF Programme Paper 5*; Lalani and Metcalf 2012 *JRF Programme Paper 8*; House of Commons Home Affairs Committee *The Trade in Human Beings: Human Trafficking in the UK* 16.

⁵³¹ See in particular Anon date unknown <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Slavery-by-a-new-name-Briefing.pdf>.

⁵³² Lalani and Metcalf 2012 *JRF Programme Paper 8*.

extreme cases evidencing situations where a worker is not allowed out of the employer's premises unaccompanied.⁵³³

In the light of the above, it can be seen that forced labour practices that identify with the ILO's indicators of forced labour⁵³⁴ are present in the UK. It can also be seen that there is a relationship between observations made in practice and those of the TUC on vulnerable employment. That is, the industries identified by the TUC's report as involving vulnerable work are the same industries where forced labour is likely to occur. Another key point highlighted is that workers' vulnerability to poor working conditions is more likely to give rise to forced labour, which may go unreported because of workers' acceptance of such as being an intrinsic characteristic of their jobs.

Having identified the industries most susceptible to forced labour, the next enquiry is to identify what causes or facilitates the prevalence of forced labour in the UK. Answering this question will assist in making it possible to discern whether or not the causes of forced labour might be specific to particular jurisdictions or whether the causes identified by the ILO should be taken to apply across board. Also, identifying whether or not there are specific causes for forced labour in a particular legal system could help that jurisdiction tailor its responses to the demands arising from the uniqueness of the nature of the forced labour prevailing within its borders. It is recalled from ILO findings that forced labour occurs in contexts characterised by such factors as poverty, illiteracy, lack of social protection and discrimination.⁵³⁵ That notwithstanding, the UK approach suggests that forced labour may be caused or exacerbated by a combination of legal, social, economic and political factors.⁵³⁶ This hypothesis is influenced by a criticism of the ILO's approach to forced labour expressed by Lerche⁵³⁷ who submits that it seeks to address forced labour without challenging the political systems that give rise to its occurrence. Consequently, the suggestion is that in addition to social, cultural and economic challenges, political

⁵³³ Lalani 2011 <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-Report-final.pdf>.

⁵³⁴ See para 2.7.2 above.

⁵³⁵ See para 2.2 above.

⁵³⁶ Geddes *et al* 2012 *JRF Programme Paper* 15-16.

⁵³⁷ Lerche 2007 *Journal of Agrarian Change* 430.

and legal systems must be acknowledged as contributors to the creation and facilitation of forced labour. Be that as it may, this discussion maintains the view that the ILO approach must be used as a standard for identifying forced labour, especially at grass-roots levels or in jurisdictions where there is an absence of knowledge concerning forced labour. Put differently, the approach of the ILO must be used as a minimum standard to develop a forced labour framework. This notwithstanding, a government employing this approach must not confine itself to causes of forced labour that it thinks to be unique to its situation, as against those suggested by the ILO. This submission further suggests the need for governments to ensure that they play a proactive role in research on forced labour, as suggested throughout this thesis.⁵³⁸

The existence of forced labour in the UK has been attributed to a number of factors, ranging from political and legal factors to the operational characteristics of work industries.⁵³⁹ Firstly, the flexibility of the UK's labour market⁵⁴⁰ has been seen as a contributor to increased workplace exploitation and forced labour. In fact, Geddes *et al*⁵⁴¹ are of the view that a flexible labour market is a breeding ground for forced labour, seeing that it largely disempowers employees. One of the negative manifestations of the flexible market is that it has resulted in a complete isolation from mainstream labour relations of workers who operate in low-wage and low-skilled employment.⁵⁴² Drawing from the findings of the TUC, the fluidity of low-skilled employment results in there being little or no job security for workers.⁵⁴³ Coupled with flexibility of their employment relationships, the workers are made even more vulnerable to being trapped in forced labour situations due to the lack of regulation in such relationships.

⁵³⁸ See amongst others paras 4.3.3 and 5.3.4 below.

⁵³⁹ Anderson and Rogaly *Forced Labour and Migration* 24-35.

⁵⁴⁰ See para 3.3.1 above.

⁵⁴¹ Geddes *et al* 2012 *JRF Programme Paper* 15-16.

⁵⁴² Geddes *et al* 2012 *JRF Programme Paper* 15-16.

⁵⁴³ Lalani and Metcalf 2012 *JRF Programme Paper* 13.

Anderson and Rogaly⁵⁴⁴ posit that the operational characteristics of the industries susceptible to forced labour can exacerbate the exploitative nature of the working conditions. Employers and businesses operating in these industries face the challenge of highly competitive markets, which pressurise them into reducing costs and increasing productivity.⁵⁴⁵ There is evidence to the effect that labour costs account for more than half of the operational costs of such businesses, and as so the way to cut costs is to cut wages.⁵⁴⁶ Also, the seasonal nature of industries such as the agricultural and construction sectors requires a supply of labour willing to accept employment conditional upon the availability of work.⁵⁴⁷ Because of the nature of the markets they operate in, where the demand for goods and services is always fluctuating, there is an increase in the use of agency and contracted labour.⁵⁴⁸

While its use is beneficial to firms,⁵⁴⁹ it has been observed that the rising demand and use of agency and sub-contracted labour may actually create opportunities for the imposition of forced labour in the following ways. Agencies may tend to act in ways that benefit from a lack of scrutiny to stay ahead of their competition. Accounts of workers being required to work compulsory overtime with no pay have been noted, alongside threats of dismissal.⁵⁵⁰ Alternatively, labour brokers have been known to charge facilitation fees, a practice not authorised at law.⁵⁵¹ In addition, it has been observed that the use of subcontracted labour creates a co-existence of formal and informal employment, where agency workers are at the receiving end of exploitation.⁵⁵² Agency workers may be required to work alongside permanent employees and sometimes in poor working conditions and at much lower wages. In the construction industry it has been found that permanent workers were sometimes more susceptible to dismissal by the employer than temporary workers,

⁵⁴⁴ Anderson and Rogaly *Forced Labour and Migration* 35.

⁵⁴⁵ Anderson and Rogaly *Forced Labour and Migration* 35; Lalani and Metcalf 2012 *JRF Programme Paper 7*.

⁵⁴⁶ Anderson and Rogaly *Forced Labour and Migration* 35; Lalani and Metcalf 2012 *JRF Programme Paper 7*.

⁵⁴⁷ Anderson and Rogaly *Forced Labour and Migration* 35-36.

⁵⁴⁸ Lalani and Metcalf 2012 *JRF Programme Paper 8*.

⁵⁴⁹ Lalani and Metcalf 2012 *JRF Programme Paper 12*.

⁵⁵⁰ Lalani and Metcalf 2012 *JRF Programme Paper 11-12*.

⁵⁵¹ Lalani and Metcalf 2012 *JRF Programme Paper 11-12*.

⁵⁵² Lalani and Metcalf 2012 *JRF Programme Paper 16*.

because the temporary workers cost less.⁵⁵³ Whilst it is agreed that offering poor working conditions does not amount to forced labour, it is noted that such situations may deteriorate into situations of forced labour.⁵⁵⁴

Besides being an indicator of forced labour, Lalani and Metcalf⁵⁵⁵ submit that isolation of workplaces common in some of the aforementioned industries can facilitate forced labour. In most of these industries workers inevitably have to work in isolated places. This is true of domestic workers employed in individual households, or on-site housing in the case of farm workers. The provision of accommodation by the employer is conducive to the imposition of forced labour as it creates a situation of dependency. Where on-site housing is the only viable option, workers have no choice but to accept it. Employers may charge hefty fees for the accommodation, and this could generate into debt bondage.

The Overseas Domestic Worker Visa (also known as the tied visa) offered to migrant domestic workers brings about a situation where immigration laws may also contribute to the growth of the practice of forced labour.⁵⁵⁶ The nature of this visa is that it ties a migrant domestic worker to his or her employer for its duration. During the period of its validity, the worker cannot leave the employer, and if she does so she has to leave the UK. This creates a situation of dependency on such workers relative to their immigration status, visas, jobs, and accommodation, thus increasing their vulnerability to exploitation. According to research carried out by Kalayaan,⁵⁵⁷ the introduction of the tied visa increased the number of complaints of exploitation and forced labour practices amongst migrant domestic workers as against those who entered the UK on different visas.

⁵⁵³ Wilkinson *et al Forced Labour and the Gangmasters Licensing Authority* 50-53.

⁵⁵⁴ See para 2.7.2 above for forced labour indicators.

⁵⁵⁵ Lalani and Metcalf 2012 *JRF Programme Paper* 12.

⁵⁵⁶ Lalani 2011 <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-Report-final.pdf>.

⁵⁵⁷ Lalani 2011 <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Kalayaan-Report-final.pdf>. Kalayaan is a charitable organisation that assists migrant domestic workers in the UK. See para 3.5.2.1 below on the work of Kalayaan.

A study of the industries susceptible to forced labour as identified above also shows that labour supply factors⁵⁵⁸ have a role to play in increasing workers' vulnerability to forced labour. Because the majority of the workers in these sectors are migrants, it has been found that this increases their vulnerability, in the sense that they are more often than not willing to accept lower wages and poorer working conditions than British workers.⁵⁵⁹ In some cases, employers have been seen to take advantage of migrant workers' limited choice of employment and to see them as easy targets for exploitation. Key to this is the desperation of migrant workers to sustain livelihoods for themselves and their families.⁵⁶⁰ In this case, then, forced labour is likely to occur or thrive in the above mentioned industries because most of the workers in those industries are migrants, have low expectations, and are most likely never going to complain about poor working conditions.

Having said that, it appears from the UK experience that forced labour takes place in both developed and undeveloped economies, in varying magnitudes and in different forms. Its existence may not be recorded because it most often affects the most vulnerable workers, who are not protected by labour regulatory systems. Moreover, it appears that how forced labour is practised may actually be peculiar to a jurisdiction. The UK situation demonstrates that coercion may actually take subtle forms, and that employers are quite capable of taking advantage of gaps in the law to subject workers to exploitative practises and forced labour.

3.3.4 Continuum of exploitation

From the discussion above, it is safe to conclude that a great deal is known about forced labour the UK. A common characteristic amongst the studies of forced labour referred to above is their popular reference to the relationship between exploitative

⁵⁵⁸ Labour supply factors influenced by production characteristics such as the seasonal nature of work in industries such as agriculture, the use of sub-contracting and the influx of migrant workers in these industries. See in particular Anderson and Rogaly *Forced Labour and Migration* 24-33.

⁵⁵⁹ Anderson and Rogaly *Forced Labour and Migration* 35; Lalani and Metcalf 2012 *JRF Programme Paper* 12.

⁵⁶⁰ See amongst others Geddes *et al* 2013 *JRF Programme Paper* 82. For a real life example also see Anon 2014 <http://www.bbc.com/news/uk-england-lancashire-25986388>.

working conditions and forced labour. The ILO has submitted that the imposition of poor working conditions should not be equated to forced labour.⁵⁶¹ That notwithstanding, the research emanating from the UK has not attempted to draw such a sharp line between forced labour and exploitative working conditions. Consequently, when conducting studies on forced labour, UK researchers normally adopt a broader view by not restricting themselves to identifying and finding solutions for forced labour only. They also seek to point out exploitative working conditions and make suggestions on possible solutions. This is evidenced through studies⁵⁶² that do not specifically identify forced labour liable for prosecution but nonetheless put emphasis on exploitative working conditions and link them to forced labour.

As stated earlier, UK researchers use the ILO indicators on forced labour to identify forced labour. However, it has been admitted that the use of indicators can pose challenges in practice. In this regard, in a 2012 study carried out to identify forced labour in the UK food industry Scott *et al*⁵⁶³ suggest that there is a possibility of escaping forced labour indicators where the employer uses less obvious means to coerce workers. They⁵⁶⁴ argue that:

Not all aspects of forced labour can be distilled into identifiable indicators...It is easy to identify coercion, but workers may be compelled to accept certain conditions, and have their personal sovereignty compromised, through more sophisticated, subtle and non-coercive means. Examples in this respect would be the use of psychological controls and economic precarity by an employer to impinge upon and erode an individual's free will and subject them to exploitative practices that a worker might be willing to accept.

⁵⁶¹ See para 2.2 above.

⁵⁶² See amongst others Pollert and Wright *The Experience of Ethnic Minority Workers* 14-55; Scott *et al* 2012 *JRF Programme Paper* 15-68.

⁵⁶³ Scott *et al* 2012 *JRF Programme Paper* 30.

⁵⁶⁴ Scott *et al* 2012 *JRF Programme Study* 30. This study was carried out with the guidance of six ILO indicators from 2005. At the time, the indicators covered threats of actual physical harm, the restriction of movement, debt bondage, the withholding of wages, the retention of identity documents, and threats of denunciation to authorities. Considering issues of general exploitation, the researchers proposed that they were limited in application and extended them to nineteen indicators. However, the ILO indicators have since been extended and they now seek to cover most situations. See paras 2.7.2.1 to 2.7.2.4 above for the ILO indicators of forced labour.

What can be understood from this argument, and what is probably useful for this discussion, is the idea that whilst a clear-cut case of coercion may be easy to recognise, employers' attitudes and coercive tactics are always changing. As a result, in an attempt to identify forced labour in practice, there is a growing demand to keep an open mind in detecting and analysing conduct instead of readily disqualifying it as not being a case of forced labour. This argument could be helpful in providing guidance to a jurisdiction where there is an interest in developing knowledge on forced labour, more particularly where forced labour has received little attention. In addition, Scott's argument may be used to support the assertion that certain forms of vulnerability and the corresponding tactics employed by employers may not be easily discernible, since some are a creature of the law. A practical example of vulnerability created by the law that may easily be by-passed would be the use of the tied visas by migrant domestic workers in the UK.⁵⁶⁵

Challenges have also been encountered in determining how severe working conditions have to be in order for a situation to be classified as forced labour.⁵⁶⁶ It is asserted that in practise it is quite common for most incidents to fall in an intermediary position, and thus not to fit the theoretical description of forced labour.⁵⁶⁷ Put differently, the identification of whether or not incidents constitute forced labour for which criminal prosecution may be pursued is sometimes difficult, since some situations occupy the middle ground between mere exploitation and what would be considered forced labour. Skrivankova⁵⁶⁸ thus argues for the relationship between exploitative working conditions and forced labour to be addressed through a continuum of exploitation by using the decent work concept. According to the continuum, decent work and forced labour are two opposing phenomena, and exploitative working conditions occupy the medial area between these two extremes.⁵⁶⁹ As a result, attempting to solve forced labour in the strict sense in isolation leaves out solutions to the poor working conditions that exist between decent work and forced labour. Hence, the continuum of exploitation

⁵⁶⁵ See para 3.3.3 above.

⁵⁶⁶ Skrivankova 2010 *JRF Programme Paper 7*.

⁵⁶⁷ Skrivankova 2010 *JRF Programme Paper 7*.

⁵⁶⁸ Skrivankova 2010 *JRF Programme Paper 16*.

⁵⁶⁹ Skrivankova 2010 *JRF Programme Paper 18*.

suggests movement from a case of acceptable working conditions (decent work) through poor working conditions up to the extreme, which is forced labour. In this case, the continuum ensures that solutions⁵⁷⁰ for exploitative working conditions are found alongside solutions for forced labour. Skrivankova⁵⁷¹ argues that:

In order to understand and resolve situations of forced labour these need to be understood through the lens of a continuum of exploitation...The absence of a clear definition of exploitation makes it difficult to draw the line between exploitation in terms of the violation of labour rights and extreme exploitation amounting to forced labour. The continuum of exploitation is a concept that enables the identification of a remedy for any situation in which a worker might find himself that differs from decent work.

In this case, the continuum can be used to identify solutions to cover not only extreme cases of forced labour but also to find appropriate redress for the grey areas between decent work and forced labour. It is argued that this model is appropriate, because it will help to match exploitative working conditions with the appropriate response.⁵⁷² For example, the withholding of wages would call for a labour law response, whilst the withholding of identity documents falls within the ambit of the criminal law. Where the withholding of wages and identity of documents is combined, a mixed intervention would be required.⁵⁷³

The notion of the continuum of exploitation is useful to this discussion as it makes a case for placing forced labour within the context of labour regulatory systems.⁵⁷⁴ That is, it makes the point that forced labour does not exist in a vacuum and should therefore not be addressed as if it did. When the primary aim is to find solutions for forced labour in isolation of the violation of labour rights, the solution will more likely lean towards the application of a criminal justice mechanism. The continuum of

⁵⁷⁰ The solutions for exploitative working conditions and forced labour will not necessarily be the same, because the circumstances are not the same. The continuum of exploitation suggests that it may be necessary to identify solutions to the two problems simultaneously so as to demonstrate the relationship between forced labour and decent work, and the need to address the labour law implications of forced labour.

⁵⁷¹ Skrivankova 2010 *JRF Programme Paper* 16.

⁵⁷² Skrivankova 2010 *JRF Programme Paper* 19-21.

⁵⁷³ Skrivankova 2010 *JRF Programme Paper* 19-21.

⁵⁷⁴ This submission is made in order to relate the idea of the continuum to the aim of the thesis. The argument is not necessarily restricted to the relevance of labour law to addressing forced labour.

exploitation supports the argument in this discussion in that it asserts that by bringing in the concept of decent work, juxtaposing it against forced labour, and identifying what conditions exist between these two extremes, consideration inevitably has to be given to exploitative working conditions which call for labour law intervention. Moreover, when conditions present overwhelming evidence that one is dealing with a situation of forced labour, the continuum is helpful in that it suggests the need for a mixed intervention to the problem, thus bringing together the labour law and criminal justice systems.

Because most systems rely on the criminal law to ensure the punishment of perpetrators of forced labour, the expectation is that most cases will be brought before criminal courts.⁵⁷⁵ Normally, the burden of proof in criminal cases is of a high standard.⁵⁷⁶ The implication is therefore that before one approaches the court, there must be enough evidence to prove beyond a reasonable doubt that an employer is guilty of forced labour. For that reason, finding cases that do not present overwhelming evidence against perpetrators could be frustrating for prosecutors and the victims of forced labour. The continuum of exploitation model could be useful here, in that a failure to garner enough evidence to warrant approaching a criminal court does not imply a loss of entitlement to justice. By suggesting that there is a need to find solutions for all situations one implies that avenues could be open to find redress for exploitative working conditions that could not be equated to forced labour.

It can be gathered from this that the conditions of decent work are not always static. While a work relationship can start with acceptable working conditions, they can degenerate into exploitative working conditions and eventually into forced labour.⁵⁷⁷ In addition, whilst exploitative working conditions are not forced labour *per se*, in practice they could help in identifying cases of forced labour. Moreover, taking a keen interest in exploitative working conditions could help researchers to

⁵⁷⁵ Andrees *Forced Labour and Human Trafficking* 11; ILO *The Cost of Coercion* 6-7. Also see para 2.6.3 above.

⁵⁷⁶ Also see para 2.6.3.4 above.

⁵⁷⁷ Skrivankova 2010 *JRF Programme Paper* 7.

keep track of the varying tactics employed by employers to violate the labour rights of workers and impose forced labour on them.

3.4 The relationship between forced labour and human trafficking in the UK

In the previous chapter⁵⁷⁸ it was noted that an overwhelming relationship is often drawn between forced labour and human trafficking. It was established that whilst the two offences may be related, they should not be treated as one concept. Because most systems addressing forced labour rely on criminal justice to remedy the situation, based on the relationship between human trafficking and forced labour, it is important to consider how the UK deals with these two separate concepts before moving on to the UK's legislative responses on forced labour. The aim is not to find out how the UK has gone about meeting its obligations towards the international trafficking normative framework but to outline whether the legislative framework recognises and makes provision for addressing forced labour as a stand-alone offence independent of human trafficking.

The UK is signatory to the *UN Trafficking Protocol*, binding it to make human trafficking a criminal offence. It is also party to the *Council of European Convention on Action Against Trafficking*,⁵⁷⁹ requiring trafficking for all purposes to be criminalised. It is asserted that assent to this Convention largely influenced the development of a comprehensive trafficking framework in the UK.⁵⁸⁰ Also, human trafficking has been classified as a form of slavery under article 4 of the *ECHR*, which requires the prohibition of slavery, servitude and forced labour.⁵⁸¹ Regarding forced labour, it has been noted above⁵⁸² that the UK has an obligation not only under the

⁵⁷⁸ Para 2.4 above.

⁵⁷⁹ No 197 of 2005.

⁵⁸⁰ Balch 2012 *JRF Programme Paper* 10-13.

⁵⁸¹ European Court of Human Rights 2014
http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.

⁵⁸² Paras 3.3.1 and 3.3.2 above.

ILO's *Forced Labour Convention* to criminalise forced labour, but also under the ECHR.⁵⁸³

The development of legislation pertaining to human trafficking in the UK can be traced to 2002, when the *Nationality, Immigration and Asylum Act* of 2002 introduced a provision making trafficking for the purposes of prostitution illegal. This was later repealed by provisions of the *Sexual Offences Act* of 2003,⁵⁸⁴ which sought to extend the scope from trafficking for purposes of prostitution to cover trafficking for the purposes of all forms of sexual exploitation. In 2010 forced labour was made mention of under the *Asylum and Immigration (Treatment of Claimants) Act*. The Act did not criminalise forced labour *per se*, but recognised that it could be a form of exploitation resulting from trafficking.⁵⁸⁵ As a result, the key offence under the Act was trafficking. Besides this, there were no provisions relating to the criminalisation of forced labour as a stand-alone offence, an absence which was hugely criticised as an open failure by the UK to meet its obligations under article 4 of the *ECHR*.⁵⁸⁶ Indeed, there was evidence that human trafficking for the purposes of forced labour existed in the UK,⁵⁸⁷ necessitating legislative and policy responses. Be that as it may, the UK legislative framework was lacking in these respects.

Because the law provided for the punishment of imposing forced labour only as an outcome of trafficking, the key requirement was that trafficking was to be proven as a prerequisite.⁵⁸⁸ This meant that forced labour victims not trafficked did not fall within the ambit of the Act and its accompanying policies. The result was also a confusion of the two offences to the detriment of non-trafficked forced labour victims.⁵⁸⁹ There is evidence that there had been forced labour victims who had not

⁵⁸³ The UK is still under an obligation to respect and guarantee the rights under the *ECHR* as Brexit does not have an impact on those obligations.

⁵⁸⁴ Sections 57-60.

⁵⁸⁵ See in particular section 4(4).

⁵⁸⁶ Equality and Human Rights Commission *Human Rights Review 2012* 144. See also para 3.3.3 above on the obligations arising from article 4 of the *ECHR*.

⁵⁸⁷ See generally Dowling *et al Trafficking for the Purposes of Labour Exploitation* 6-19.

⁵⁸⁸ Balch 2012 *JRF Programme Paper* 11-12; Dwyer *et al* 2011 *JRF Programme Paper* 7.

⁵⁸⁹ Skrivankova 2010 *JRF Programme Paper* 8.

been trafficked, as they possessed a right to work in the UK.⁵⁹⁰ Whilst the law sought to solve the problem of trafficking, the approach was flawed in that it provided solutions for only one side of the problem. The inevitable result was the exclusion of general forced labour victims from the application of the protection and assistance programmes formulated under trafficking legislation. Arguably, there was no redress at law for those who were in forced labour but had not necessarily been trafficked.⁵⁹¹

Over and above that, the implementation of the UK's obligations towards the *Council of Europe Convention on Trafficking* in so far as forced labour (arising from trafficking) was concerned was problematic. Balch⁵⁹² observes that the government vested the implementation on the UK Border Agency, thereby demonstrating that any issues arising would be treated largely in the light of immigration law and policy. The challenge was therefore that not all victims were subject to immigration laws, as some would be UK nationals or foreign nationals with a right to work in the UK.⁵⁹³ In addition, Balch⁵⁹⁴ observes that in training the agency's staff, forced labour was identified as a "particular type of trafficking". These two observations demonstrate that where the trafficking agenda is used, there is a likelihood of bias in terms of selecting the channels to implement the legislation. Such bias may be justified where the primary objective of the legislation is to address human trafficking, a result that is undesirable where forced labour is concerned. Effort is also directed towards training immigration officials, showing in the situation observed by Balch that there is a blatant misconception of the relationship between forced labour and human trafficking. This demonstrates that where the government is not ready to situate forced labour outside the boundaries of human trafficking, misconceptions are bound to exist.

It is submitted in this context that there is a danger in systems that address forced labour largely within the trafficking framework. In addition to the observations

⁵⁹⁰ Balch 2012 *JRF Programme Paper* 11.

⁵⁹¹ See for example *C.N v UK* at para 3.3.3 above.

⁵⁹² Balch 2012 *JRF Programme Paper* 11.

⁵⁹³ Balch 2012 *JRF Programme Paper* 11.

⁵⁹⁴ Balch 2012 *JRF Programme Paper* 12.

emanating from UK academics, this discussion maintains that addressing forced labour within the trafficking framework could pose challenges both at law and in practice. Even with regard to forced labour that occurs within the boundaries of human trafficking, it is not enough to merely mention it as an offence or as a possible outcome of the trafficking. It is necessary to avoid enacting sweeping provisions so that both aspects of the situation are fully addressed. Where forced labour is treated as a secondary offence, there is a likelihood of glossing over its meaning, content and manifestations, since the focus will be on the primary offence, being human trafficking.

Arguments for the inclusion of forced labour victims within assistance and protection measures under trafficking legislation should be made with caution. A one-size-fits-all approach could lead to inadequacy in addressing the needs of forced labour victims. The protection and assistance measures designed for a trafficking victim may need to differ from those for a forced labour victim, whether trafficked or not. Noting the bias in the approach described above, it is safe to submit that in practice there is a likelihood that such measures will lean more on providing assistance with regards to human trafficking, bearing in mind the overwhelming attention it continues to receive in legal frameworks.

It is important to note that the position regarding the relationship between forced labour and human trafficking in the UK has since changed, upon the passing of the *Coroners and Justice Act* of 2009, which created a separate offence of forced labour. In addition, in terms of the new *Modern Slavery Act*,⁵⁹⁵ the two offences are treated as separate and there is no need to rely heavily on the human trafficking framework to address forced labour. The *Modern Slavery Act* makes provision for assistance to and the protection of victims of forced labour, whether they have been trafficked or not. These aspects will be discussed below.

⁵⁹⁵ See para 3.5.1.1 below.

3.5 UK responses to forced labour

It has been established that the UK has obligations under both the *Forced Labour Convention* and the *ECHR* to prohibit the use of forced labour and punish those found guilty of the offence.⁵⁹⁶ This part of the discussion seeks to establish how far the UK has gone in ensuring compliance with these obligations. Whilst having regard to the responsive legal framework as a whole, this discussion will focus on identifying whether it can be said that the labour regulatory system has a significant role to play in combating forced labour within the UK. It is recalled that the *Forced Labour Convention* requires the establishment of measures to penalise forced labour.⁵⁹⁷ Also, in terms of the *ECHR* the European Court of Human Rights has held that what is required is the creation of effective legal and administrative means to prevent and prosecute the crime. Whilst these standards are silent on addressing the manifestations of forced labour in so far as labour rights are concerned, it will be helpful to note that the UK has ratified the *2014 Protocol on Forced Labour*,⁵⁹⁸ which now expressly demands a regulatory framework that is cognisant of the role of the labour law in issues of forced labour.

3.5.1 Legislative responses

It was noted above that the labour market in the UK is highly de-regularised.⁵⁹⁹ This means there is less legislative interference in the conduct of employment contracts and relationships. Meanwhile it has been well established that forced labour is concentrated mostly in the informal economy, where labour legislation and institutions rarely operate.⁶⁰⁰ Whereas this is so, it is important to note that protection from forced labour is a fundamental human right which is meant to be extended to all workers regardless of their type of employ. So notwithstanding the labour market policy chosen, the expectation is that the government must make a

⁵⁹⁶ Paras 3.3.1 and 3.3.2 above.

⁵⁹⁷ Para 2.6.2.1 above.

⁵⁹⁸ Para 2.6.2.2 above. The Protocol is now in force in the UK. See ILO 2016 http://www.ilo.org/global/standards/WCMS_445132/lang--ja/index.htm.

⁵⁹⁹ Para 3.3.1 above.

⁶⁰⁰ Para 2.2 above.

notable effort to legislate against forced labour to cover all workers. It is reiterated also that the Court in *Siliadin v France*⁶⁰¹ has stated that where the intention is to legislate in response to the protection of a fundamental human right, legislation must be clear and unambiguous as to what conduct is being prohibited.

3.5.1.1 *The Gangmasters (Licencing) Act 2004*⁶⁰²

The *GMLA* is a piece of legislation that is famously known for its adoption in the wake of an incident in which twenty-three Chinese illegal migrant workers drowned at Morecambe Bay whilst picking cockles for their employer, who had acquired their services through a labour supplier.⁶⁰³ It is reported that the workers had been smuggled into the UK and were appointed to their employ through a Chinese-organised crime agent. It turned out that although they had little experience, their work was unsupervised, and they possessed little knowledge of the bay and of the vital information that would have saved their lives as the tide swept in on the bay. Through the *GMLA* the government took a step to ensure the regulation of services that supply labour and to eliminate forced labour and human trafficking.

3.5.1.1.1 Interpretation and scope

According to section 4 of the Act, a gangmaster is a person who supplies labour to another within industries covered by the Act.⁶⁰⁴ To ensure extensive coverage and avoid situations where contractual arrangements may exclude a person from the operation of the Act, section 4's definition of a gangmaster is widely crafted. In this case, a person is identified as a gangmaster not only if he ordinarily supplies labour, but also if he uses labour for the purposes of his business, if it falls under sectors

⁶⁰¹ Paras 121 and 148.

⁶⁰² Hereafter referred to as the *GMLA*.

⁶⁰³ Lalani and Metcalf 2012 *JRF Programme Paper 9*; Anon 2014 <http://www.bbc.com/news/uk-england-lancashire-25986388>.

⁶⁰⁴ The word gangmaster is largely used in the UK to refer to a person who supplies casual manual labourers to other people. For the purposes of the Act such persons are referred to as gangmasters, but they may also be referred to as labour providers or suppliers. The nature of their operation is similar to that of temporary employment agencies. See generally Lalani and Metcalf 2012 *JRF Programme Paper 10*.

covered by the Act.⁶⁰⁵ In order to avoid situations where a labour supplier may evade the Act due to a contract that states that the provision is for services and not labour *per se*, the Act stipulates that the use of workers to supply services to a client falls within the ambit of the Act.⁶⁰⁶ Moreover, coverage is made for sub-contract gangmasters,⁶⁰⁷ and issues of control and supervision are not considered where a person's conduct falls within the ambit of the Act.⁶⁰⁸ The Act applies only to the agricultural sector, shellfish gathering and any processing and/ or packaging arising therefrom.⁶⁰⁹

3.5.1.1.2 Gangmasters Licensing Authority (GLA) and its relevance to forced labour

The objective of the *GMLA* is to protect workers in the abovementioned industries from poor working conditions and exploitation. In order to do so, the GLA is established under section 1 as an enforcement agency of the Act. The GLA's overall role is to conduct the licensing of gangmasters and keep their activities in check.⁶¹⁰ The Act makes it a criminal offence to supply labour without prior licensing and to procure labour from an unlicensed gangmaster.⁶¹¹

Before a licence can be issued, the applicant must pass all the licensing standards set by the GLA. These standards cover health and safety, accommodation, wages, transport and training. The applicant must also be fit and proper to hold the licence, and evidence of provision for tax and national insurance regulations must be met. Upon acquiring the licence and during its subsistence, the gangmaster must ensure that his operation continues to comply with these standards. Because the GLA is empowered in terms of the Act to inspect licensed gangmasters and any person

⁶⁰⁵ Section 4(5).

⁶⁰⁶ Section 4(4).

⁶⁰⁷ Section 4(3)(b)(c).

⁶⁰⁸ Section 4(3)(d).

⁶⁰⁹ Section 3(1).

⁶¹⁰ Section 1(2).

⁶¹¹ Sections 6 and 13 respectively.

believed to be acting as one,⁶¹² a degeneration of previously approved standards will result in the revocation of the licence.

The GLA standards help in eliminating the use of forced labour and general exploitative working and living conditions in a number of ways. The first requirement is that the licence holder must act in a fit and proper manner at all times. In making a determination as to whether this requirement is being met, the GLA considers all relevant factors, including previous convictions for offences including intimidation, forced labour and human trafficking.⁶¹³ In addition, a previous contravention of the standards and requirements set by other regulatory bodies and an unreasonable obstruction of inspection in respect of the GMLA will also be considered.⁶¹⁴ Where the licence had already been issued and the test is subsequently failed, the licence will be revoked immediately.

Secondly, a licensed gangmaster who employs workers on the basis of a contract of employment or services is required to register with Her Majesty's Revenue and Customs (HMRC), and the workers must be paid at least the national minimum wage.⁶¹⁵ It is required that records be kept to vouch for the payment of wages as well as records showing that workers receive other benefits such as paid annual leave, sick and maternity leave.⁶¹⁶ Thirdly, a gangmaster is mandated to avoid the use of physical and mental maltreatment on workers in his operations.⁶¹⁷ A worker who intends to terminate his current employ should not be prejudiced for his intention to do so, neither should he be bound to reveal where he intends to seek employment next.⁶¹⁸ The withholding of identity documents and all conduct calculated to restrict a worker's movement must also be avoided. The chance of a worker's incurring debt bondage is eliminated through a requirement that where a loan was advanced to a worker he should not be required to pay a sum more than

⁶¹² Section 15 and 16.

⁶¹³ *GLA Licensing Standards* 2012 para 1.1.

⁶¹⁴ Section 18 of the *GMLA* makes it an offence to obstruct an officer carrying out his mandate in pursuance of the Act. Also see *GLA Licensing Standards* 2012 para 1.1.

⁶¹⁵ *GLA Licensing Standards* 2012 para 2.2.

⁶¹⁶ *GLA Licensing Standards* 2012 paras 2.2 and 2.3.

⁶¹⁷ *GLA Licensing Standards* 2012 para 3.1.

⁶¹⁸ *GLA Licensing Standards* 2012 para 3.2.

that which was advanced. He must also be provided with detailed information pertaining to the repayment of such a loan,⁶¹⁹ and the incurrence of a loan should not bind him to the gangmaster and hinder him from seeking alternative employment.⁶²⁰ The gangmaster must ensure at all times that workers receive their wages, as it is not a valid reason to withhold wages in part or whole due to a failure to receive payment from the labour user.⁶²¹ A failure to comply with these standards will result in an immediate revocation of the licence, indicating the seriousness of the will to avoid forced labour and practices that may lead to forced labour.⁶²²

Another important consideration is with regard to workers' entitlement to rest, which includes annual leave and breaks during working hours. It is not permissible to require workers to work more than 48 hours a week, unless a worker voluntarily consents to this, and a contract in writing is signed by such a worker.⁶²³ The worker must be given the liberty to request an amendment of the contract or cancellation. Notably, a gangmaster must also not inhibit workers from exercising their right to freedom of association and any rights arising therefrom.⁶²⁴ Finally, the gangmaster and labour user must reach an agreement as to who is responsible for health and safety issues arising in the workplace, and the training of workers in that regard.⁶²⁵ A failure to observe the set standards relating to hours of work and the health and safety requirements will also result in the immediate revocation of the gangmaster's licence. By way of illustration, since 2008 the GLA has already secured fifty-eight convictions for the offence of operating as a gangmaster without a licence.⁶²⁶

It was identified above that the increased use of temporary or subcontracted labour in the UK has been classified as one of the factors that led to an increment of forced labour in the UK.⁶²⁷ As a result, the work of the GLA has improved the standards in

⁶¹⁹ *GLA Licensing Standards 2012* para 3.2.

⁶²⁰ *GLA Licensing Standards 2012* para 3.2.

⁶²¹ *GLA Licensing Standards 2012* para 3.3.

⁶²² Reference can be made to the discussion at para 2.7.2 above on the indicators of forced labour.

⁶²³ *GLA Licensing Standards 2012* paras 5.1 and 5.2.

⁶²⁴ *GLA Licensing Standards 2012* paras 5.3 and 5.4.

⁶²⁵ *GLA Licensing Standards 2012* para 6.

⁶²⁶ As at May 2008. See further GLA 2015 <http://www.gla.gov.uk/our-impact/conviction-totals/>.

⁶²⁷ Para 3.3.3 above.

the UK labour practice and many cases have dealt with rooting out unscrupulous gangmasters and their illegal conduct.⁶²⁸ The GLA licensing standards put forced labour within the context of the regulation of labour in the sense that whilst criminal sanctions may arise from operating such a business or engaging with an unlicensed gangmaster, the primary aim of the Act and its standards is aimed at addressing exploitative working conditions and the occurrence of forced labour in the relevant industries. Licensing keeps gangmasters and labour users on their toes, to ensure that whilst the work is low skilled, it nonetheless amounts to decent work for the workers concerned. GLA enforcement and compliance officers are not criminal law enforcement officials⁶²⁹ and their inspections are not criminal law inspections. Their inspections are carried out to ensure compliance with the standards of the licence. Criminal investigations are initiated where there is a contravention of the Act by either a gangmaster or a labour user. The *GMLA* is thus a good example of an enforcement mechanism that not only seeks to address forced labour as a crime but also ensures the protection of workers' rights. It also brings together the criminal and labour law in the sense that its enforcement officials may seek the assistance of criminal law officials in pursuance of their mandate.

3.5.1.2 *Modern Slavery Act 2015*⁶³⁰

It was noted above that the UK approach to forced labour has leaned on the human trafficking framework for a long time.⁶³¹ Over and above that, the entire framework has been criticised as being fragmented, lacking in provisions for the assistance of victims, and failing to identify the role of businesses in exacerbating forced labour.⁶³² In an endeavour to bring the framework together, the government drafted the *MSA* to provide a framework that brings slavery, servitude, forced labour and human trafficking under one Act. The Act is a criminal justice piece of legislation.

⁶²⁸ See generally Wilkinson *et al* *Forced Labour and the Gangmasters Licensing Authority* 7-9.

⁶²⁹ See for example para 3.7 of the *GLA Code of Practice on Compliance and Enforcement* 2014, which provides that an enforcement officer may bring along a police officer where he seeks to enter the premises of a gangmaster under a search warrant.

⁶³⁰ Hereafter *MSA*.

⁶³¹ Para 3.4 above.

⁶³² Balch 2012 *JRF Programme* 34.

However, it introduces certain elements that reflect on the recognition of the labour aspect of forced labour, as will be seen below.

3.5.1.2.1 Establishment of the offence of forced labour

Section 1(1) of the Act establishes the offences of slavery, servitude and forced or compulsory labour. A definition of forced labour is not given, but the Act requires that interpretation in that regard be made with reference to article 4 of the *ECHR*.⁶³³ This section repeals section 71 of the *Coroners and Justice Act*⁶³⁴ and adds two new elements to aid in determining forced labour. Firstly, consent on the part of the victim is irrelevant in establishing a case of forced labour. That is, the mere fact that a person initially consented to work does not automatically rule out a determination to be made on whether or not he was held in forced labour.

Secondly, in determining whether a person is a forced labour victim, the Act proposes that "regard be had to all the circumstances". Section 1(4) gives a non-exhaustive list of these circumstances. It provides that consideration must be given to the person's personal circumstances that may make him more vulnerable to forced labour than other people. This may include, according to the Act, minority in the case of children, family relationships, and any mental or physical illness. Because this list is not meant to be exhaustive, the element of migration status may also function as a factor influencing a person's vulnerability.

The Act also provides that regard be had to the work or services provided by the person, including work or services provided in circumstances which constitute exploitation.⁶³⁵ The requirement to consider the nature of work makes it possible for a determination to be made on the inherent characteristics of the work that may make a person susceptible to forced labour. This means that there is a possibility for

⁶³³ See para 3.3.2 above.

⁶³⁴ The *Coroners and Justice Act* was promulgated to make provisions relating to criminal justice and the treatment of offenders, among other things. In relation to forced labour, section 71 of this Act only created the offence of forced labour and a penalty of a fine or a maximum of fourteen years imprisonment.

⁶³⁵ Section 1(4).

the courts to address the labour market factors that make a certain industry susceptible to forced labour.⁶³⁶ It also implies that work or services may extend across formal and informal employment, including clandestine activities.⁶³⁷

This element of the Act implies that in making a determination of forced labour, the courts will be required to apply their minds to the standard of establishing forced labour, as enunciated by the *Forced Labour Convention* and the European Court of Human Rights. Inevitably, the workplace rights denied a worker would have to be considered in order for the courts to come to a just and informed conclusion as to whether or not there is a case of forced labour.

This discussion has previously asserted that the use of the terms slavery and forced labour interchangeably without clarity will probably cause confusion.⁶³⁸ The *MSA* takes cognisance of this risk by classifying forced labour, slavery, servitude and human trafficking as modern-slavery offences.⁶³⁹ This implies that modern-slavery should be understood to refer to any one of these offences. Because "slavery" is identified as a separate offence, the implication is that the definition of slavery that requires the attachment of ownership rights⁶⁴⁰ is applicable in relation to this offence only and cannot be applied in respect of other "modern-slavery" offences. The use of the prefix "modern" also highlights the intention of the legislature to avoid confusion with regards to the application of the Act in so far as forced labour and other related offences are concerned.

⁶³⁶ See para 3.3.3, above which established that research in the UK shows that certain characteristics of an industry or sector may actually make workers more susceptible to forced labour.

⁶³⁷ UK Government date unknown
<http://www.legislation.gov.uk/ukpga/2015/30/notes/division/1?view=plain>.

⁶³⁸ See paras 2.3.1 and 3.3.2.1 above.

⁶³⁹ Para 4 of the *MSA Explanatory Notes* asserts that "Modern slavery is a brutal form of organised crime in which people are treated as commodities and exploited for criminal gain".

⁶⁴⁰ Article 1(1) *Slavery Convention*. Also see paras 2.3.1 and 3.3.2.1 above.

3.5.1.2.2 The office of the Anti-Slavery Commissioner

The *MSA* establishes the office of the Anti-Slavery Commissioner, which has the primary function of ensuring "good practice" in all matters relating to the administrative application⁶⁴¹ of the Act to forced labour. In order to achieve this broad mandate, the Commissioner's supporting roles may be placed into two categories: reporting to the government and ensuring cooperation with all stakeholders concerned in bringing forced labour to an end. With regards to reporting to the government, it is provided that the government may from time to time request the Commissioner to provide reports on any matter the government requires information on.⁶⁴² This means that the Commissioner will constantly be required to conduct research on issues of forced labour and must keep abreast of international trends as well as rulings of the European Court of Human Rights that have a bearing on the application of article 4 of the *ECHR* in so far as forced labour is concerned.

The issue of research evokes the second category, which requires the Commissioner to cooperate with other public authorities, voluntary organisations and other relevant persons.⁶⁴³ Cooperation with other bodies here involves consulting with them or working with them jointly to ensure a proper discharge of his general mandate. Whereas the Commissioner may carry out research in his own right, the Act also permits him to offer financial and/or non-financial assistance to parties interested in carrying out studies on forced labour.⁶⁴⁴ The Commissioner is also expected to offer training and information to law enforcement bodies on how best to identify and deal with forced labour.⁶⁴⁵

The mandate of the Commissioner is a demanding one. Whilst the intention of the Act is primarily to criminalise forced labour, if it is to meet the standard set at

⁶⁴¹ Section 41(1) (a) and (b) provides that "The Commissioner must encourage good practice in the prevention, detection, investigation and prosecution of slavery and human trafficking offences" and the identification of victims.

⁶⁴² Section 41(3)(a).

⁶⁴³ Section 41(3).

⁶⁴⁴ Section 41(3)(c)

⁶⁴⁵ Section 41(3)(d).

international law and at the regional level, the Commissioner must apply his mind to all of the factors that may give rise to forced labour. By permitting him to consult and cooperate with other bodies, allowance is made for an environment of diverse opinions and approaches to forced labour. For example, criminal law experts may make contributions in regard to how criminal sanctions may be properly applied or improved. On the other hand, labour administration bodies and or non-governmental organisations (NGO's) will raise issues concerning the labour manifestations of forced labour and offer suggestions on how those may be applied. Whereas there is no express mention of his consultation with bodies such as trade unions, a failure to do so would run counter the "good practice" mandate he has.

Because the UK assented to its adoption, ensuring good practice in so far as forced labour is concerned should therefore be construed in the light of the new standard set by the 2014 Protocol. This therefore means that whilst the primary aim is to identify and address forced labour as a criminal offence, cognisance must be taken of its effects on the labour rights of victims and ensuring that these are addressed as well. Ensuring good practice in the prevention of forced labour requires him to address the root causes of forced labour in the labour market. It was established above that in addition to the causes identified by the ILO, forced labour in the UK is caused by a myriad of labour market-related factors.⁶⁴⁶ The effective prevention of forced labour cannot take place absent an input from those who have expertise on the functionalities of labour relations. Moreover, the detection and investigation⁶⁴⁷ of forced labour will require the Commissioner to encourage cooperation between labour inspection and criminal justice enforcement officials. Good practice will ensure that the Commissioner tries as much as possible to ensure that victims' rights to access justice is not limited to the criminal law.

⁶⁴⁶ Para 3.3.3 above.

⁶⁴⁷ Also note section 49, which requires the Secretary of State to give guidance on the identification of victims of forced labour to public authorities and other bodies.

3.5.1.2.3 Assistance and support of victims

Section 45 of the *MSA* gives a forced labour victim conditional immunity⁶⁴⁸ from prosecution for any criminal offences that he may have committed in pursuance of his employ as a forced labourer or as a direct consequence of being held in forced labour. This provision is designed to encourage victims to come forward and report forced labour, or to give evidence without fear of incarceration. In addition to this protection, section 47 introduces a provision that will make it possible for forced labour victims to access legal aid services in pursuance of claims arising from being held in forced labour. Previously, this assistance was exclusively available to human trafficking victims under the *Legal Aid, Sentencing and Punishment of Offenders Act*.⁶⁴⁹ Section 47 of the *MSA* thus amends this Act to extend aid to victims of forced labour.

A crucial element introduced by section 47 of the *MSA* is that the provision of assistance will not be limited only to the pursuance of claims in criminal courts. Victims wishing to pursue a claim of damages in a civil court or under employment law will also benefit. Section 47 tries to be as inclusive as possible by ensuring that it is not strictly necessary to have a determination made by a competent authority that a person is in fact a victim of forced labour in order to be able to claim legal assistance. When such a determination has not been made, what needs to be present is reasonable ground to believe that such a person is a victim. In addition, where the victim is deceased and the next of kin wishes to pursue the claim on his behalf, the Act permits legal aid to be offered.⁶⁵⁰ Leave will be granted to a victim to remain in the UK upon identification that he is or is likely to be a forced labour victim. This is also applicable to overseas domestic workers. In respect of these domestic workers, leave to remain in the UK will allow them to keep working as such

⁶⁴⁸ Section 45(7). This cannot be claimed where the offence committed is one classified as a serious offence in terms of the Act. Schedule 4 of the Act lists these offences

⁶⁴⁹ Act of 2012. Also see para 228 of the *MSA Explanatory Notes*.

⁶⁵⁰ Section 47(2).

and enable them to change their employer.⁶⁵¹ Section 45 and 47 reflects the position of the 2014 Protocol in so far as victim protection is concerned.⁶⁵²

3.5.1.2.4 Supply chains

Section 54 of the *MSA* mandates commercial organisations to provide annual statements reflecting their commitment to the zero tolerance of forced labour, and the steps they have taken during a financial year to ensure that it is absent within their supply chains and within their business operations. According to the Act, a commercial organisation is defined as a body corporate or a partnership that carries on a business or part of a business in the UK. The statements required from such organisations may include information relating to the business's policies pertaining to forced labour, the steps it has taken to ensure that there is no forced labour within its operations, and the training of staff. In the event of failure to comply, the Secretary of State may bring civil proceedings for an order requiring the business to comply. This addition is a step in the right direction because it shows acknowledgement of the role businesses may play in the prevention of forced labour and encourages them to take active steps as employers to ensure intolerance of the use of forced labour.

All things considered, the *MSA* represents a step in the right direction in so far as the use of criminal enforcement to address forced labour is concerned. It addresses forced labour as a criminal offence independent of human trafficking. Because the offence of forced labour is to be understood having regard to article 4 of the *ECHR*, this means that a court faced with a forced labour case in terms of the Act must address it in the light of the previous guidance given by the European Court of Human Rights, applying its mind to the offence and having regard to all the circumstances involved, whether the matter arises from trafficking or not.

⁶⁵¹ Section 53(1) and (2).

⁶⁵² See par 2.6.2.2 above.

The establishment of the Office of the Anti-Slavery Commissioner could also be a step taken towards improving the overall framework for addressing forced labour. While labour institutions are not specifically mentioned as bodies the commissioner must cooperate with or consult, his mandate to do so can be used to bridge the gap between criminal enforcement and the involvement of labour regulation. The mandate to carry out or support studies on forced labour shows the government's commitment to stimulating research and knowledge-sharing in matters of forced labour. The protection of victims that goes beyond trafficking to cover all victims of forced labour, with a recognition of the right of some victims to pursue civil claims and damages in labour tribunals, shows that the new framework will diversify the approach to forced labour.

Although certain provisions of the *MSA* mirror those of the 2014 Protocol, it would be incorrect to submit that it fully represents the standard created by the Protocol. An act of parliament seeking to implement the Protocol should not leave the role of the labour regulatory system to speculation.⁶⁵³ The Act subtly recognises the possible impact of forced labour on labour rights but does not expressly recognise the corresponding contribution that may flow from the input of labour institutions in fighting forced labour. Generally, it would be improper to expect criminal law legislation to give lengthy provisions relating to the effects of forced labour and how those can be addressed from a labour market perspective. What criminal legislation can do is to establish the offence and expressly provide for cooperation between the two enforcement systems regarding all activities and actions taken in pursuance of preventing, detecting and prosecuting forced labour. Consequently, this discussion maintains that labour legislation and policy are the proper forums within which such provisions should be made. This would probably ensure that the labour legislation would be adjusted to reflect the international standard. Nonetheless, the Act may still be instructive with respect to the elements it introduces to criminal enforcement.

⁶⁵³ For example, with reference to the Commissioner's role to engage with other bodies, the Gangmasters Licensing Authority is the only labour-orientated public authority that the Act specifically mentions as one of those to be engaged. It is left to speculation as to whether other "persons and voluntary organisations" will include trade unions, employers' organisations and other labour and human rights organisations. Note articles 1(2) and 2(c) of the 2014 Protocol.

3.5.2 Policy and administrative responses

International experience shows that the complexity of forced labour and its ability to thrive in modern society and workplaces is exacerbated not only by deficiencies in legislation but also by failures in enforcement and policy systems.⁶⁵⁴ In placing forced labour within the labour regulatory framework, this discussion has argued that a need arises consequently to consider the possible role that labour regulatory institutions can play in combating forced labour. Notably, in attempting to map out lessons for the future, it is important to go beyond theory and pinpoint what contributions these institutions have made in the UK's framework.

3.5.2.1 Trade Unions and NGOs

Theoretically, the potential role of trade unions in combating forced labour in the UK is well acknowledged.⁶⁵⁵ However, in practice trade unions face challenges in unionising because forced labour affects workers who are either cut off from labour regulation or operate in workplaces where traditional unionism is difficult to practice.⁶⁵⁶ Beirnaert⁶⁵⁷ observes that because the majority of the workers affected are migrants, barriers such as language are making it even more difficult for unions to reach out to them. That notwithstanding, Beirnaert⁶⁵⁸ posits that trade unions can overcome these obstacles through cooperation with NGOs that address the specific needs of migrant workers. For example, the UK Trade Union Congress (TUC) has previously used its political power to persuade government-funded agencies to provide direct financial aid to the Migrant Workers North West, an NGO formed to assist migrant workers in the north-western part of the UK.⁶⁵⁹ The UK TUC has also stepped in by giving assistance to the Citizen's Advice Bureaus (CAB) to effectively reach Polish and Portuguese workers. This was done through the launch of websites by the TUC in partnership with the CAB. The websites operate in the languages of

⁶⁵⁴ See para 2.6.3 above.

⁶⁵⁵ See for instance Lalani and Metcalf 2012 *JRF Programme Paper* 26-27; Beirnaet "A Trade Union Perspective" 483-486; Geddes *et al* 2013 *JRF Programme Paper* 88.

⁶⁵⁶ TUC *Hard Work, Hidden Lives* 19, 68.

⁶⁵⁷ Beirnaet "A Trade Union Perspective" 484.

⁶⁵⁸ Beirnaet "A Trade Union Perspective" 484-486.

⁶⁵⁹ ITUC Guide *Never Work Alone* 23.

these workers and this is made possible through cooperation with national unions from the countries of origin of the workers.⁶⁶⁰

The UK TUC has also made a significant contribution to research touching on forced labour through its research on vulnerable work.⁶⁶¹ Whilst the study did not specifically identify the extent of forced labour in the UK, it made for a good foundation for forced labour-orientated research. The report also highlights that trade unions are aware of the role they can play in the elimination of exploitative working conditions and ultimately forced labour⁶⁶² for workers. Whilst trade unions face the challenges of reaching out to marginalised workers, the law does little to support their efforts. The inconspicuous role given to trade unions in forced labour legislation somewhat disempowers them. Whereas they are better placed and can use their persuasive voice to advocate for an improvement of working conditions and laws on forced labour out of their own volition, the lack of support from the legal framework exacerbates their challenges. The contribution of trade unions would improve if their role was expressly recognised in forced labour legislation.

In their own right, NGOs in the UK have contributed immensely towards pushing for law reform and assisting victims of forced labour. Kalayaan,⁶⁶³ an NGO focusing on migrant domestic workers in the UK, is a good example. Kalayaan was formed in 1987 by domestic workers in order to advocate for the recognition of migrant domestic workers within UK immigration laws. Nowadays it predominantly helps migrant domestic workers employed in the UK to claim their rights.⁶⁶⁴ Amongst the services provided, is basic employment and immigration advice, English language training and support for combatting any form of exploitation experienced, whether forced labour or human trafficking.⁶⁶⁵ Its work has gone beyond merely giving assistance to domestic workers, and now includes collating evidence of the exploitation of domestic workers to form the basis of its studies, which recently

⁶⁶⁰ ITUC Guide *Never Work Alone* 23.

⁶⁶¹ See in general TUC *Hard Work, Hidden Lives* 12-25.

⁶⁶² TUC *Hard Work, Hidden Lives* 47.

⁶⁶³ See generally <http://www.kalayaan.org.uk> for the various work done by this organisation.

⁶⁶⁴ Kalayaan 2014 <http://www.kalayaan.org.uk/documents/tied%20visa%202014.pdf>.

⁶⁶⁵ Kalayaan 2014 <http://www.kalayaan.org.uk/documents/tied%20visa%202014.pdf>.

touch on the effect of Overseas Domestic Worker's Visa and the exacerbation of forced labour.⁶⁶⁶ The work of Kalayaan on forced labour and human trafficking is influential, as the organisation was one of the NGO's consulted during the drafting of the *MSA*.⁶⁶⁷

3.5.2.2 Role of businesses/ employers

Involving employers and businesses in efforts to end forced labour forms part of the new standards suggested under the 2014 *Protocol on Forced Labour*. Before the enactment of the *MSA*, businesses in the UK were already taking initiatives to ensure that there was intolerance of the use of forced labour in their supply chains and operations. The Ethical Trading Initiative (ETI) is a platform within the UK that ensures that companies adopt ethical trading to improve the lives of the workers their suppliers employ. This is done through the adoption of a code of labour practice by a company, which defines the conditions that the supplier must meet towards improving and maintaining acceptable working conditions for its workers. Section 54 of the *MSA* now makes it a legal obligation to ensure that supply chains are intolerant of the use of forced labour, in accordance with article 2(e) and (f) of the 2014 *Protocol on Forced Labour*.

3.5.2.3 Labour/employment tribunals

Labour courts in the UK have no jurisdiction in cases of forced labour, in the strict sense of the term.⁶⁶⁸ However, Geddes *et al*⁶⁶⁹ argue that matters brought before labour tribunals touching on labour exploitation, where a possible case of forced labour could exist, may be used to demonstrate their contribution in addressing forced labour. For example, in *Tomasz Kowal and Michael Obieglo v Peter Leslie and*

⁶⁶⁶ Kalayaan 2014 <http://www.kalayaan.org.uk/documents/tied%20visa%202014.pdf>.

⁶⁶⁷ Public Bill Committee Debates
<http://www.publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140721/pm/140721s01.htm>

⁶⁶⁸ Geddes *et al* 2013 *JRF Programme Paper* 30.

⁶⁶⁹ Geddes *et al* 2013 *JRF Programme Paper* 30.

Sons,⁶⁷⁰ a labour tribunal awarded two Polish students damages for unfair dismissal and injury to their feelings as a result of racial discrimination and the unlawful deduction of their wages. The students successfully proved that while they were in the employ of the company, after that had made a request to the employer to pay its workers the minimum wage, they were threatened and forced to endure poor living conditions in substandard accommodation, after which they had been dismissed.⁶⁷¹ Similarly, the court also awarded damages for injury to feelings and loss of earnings in *Camacho da Silva v Tushingham Stable Hire Ltd*,⁶⁷² where the applicant proved that his employer had unlawfully deducted his wages based on his race. A compensation order was also made in *Urbanska-Kopowska v McIlroy and Another*,⁶⁷³ where the applicant had been subjected to sexual and racial harassment during her employment in a factory. She alone had been required to perform additional work outside her normal duties by cleaning the factory, its bathrooms and the employer's house without payment, and was required to provide for her own protective clothing whilst the employer provided clothing for other workers.

These cases demonstrate that employment tribunals in the UK, while not having jurisdiction on forced labour, have played a role in addressing exploitative conduct that has a bearing on workers' rights, which when taken together could indicate a possible case of forced labour. In its experience, Kalayaan has also dealt with assisting domestic workers make claims in employment tribunals where there has been exploitation that would amount to forced labour. Kalayaan notes that most of the workers it has assisted chose to pursue their claims in an employment tribunal against their employers. It notes that this has been the preferred choice, because workers feel it gives them control as to whether or not to pursue the matter and to choose what remedy to seek from the court.⁶⁷⁴ Whereas awards had previously been

⁶⁷⁰ *Tomasz Kowal and Michael Obieglo v Peter Leslie & Sons t/a David Leslie* Case No 113343/09 and 113344/09.

⁶⁷¹ Primary sources on these cases could not be accessed. Reliance was therefore made on the notes in Geddes *et al* 2013 *JRF Programme Paper* 30-31.

⁶⁷² Application ET/2901585/05.

⁶⁷³ *Urbanska-Kopowska v McIlroy and Another t/a Mac's Quality Foods* NIIT/13376/08.

⁶⁷⁴ Lalani 2011 *Ending the Abuse* 17.

made, the major challenge identified was the lack of enforcement powers of the tribunals to ensure that employers complied with such orders.⁶⁷⁵

That notwithstanding, this suggests that the legal framework ought to make it possible for employment tribunals to be approached where a victim does not wish to pursue criminal charges. Because the new international standard for addressing forced labour seeks to see a combination of criminal and labour enforcement, it is submitted that governments do not only have to ensure that there are hefty penal sanctions but should also ensure that labour courts have the necessary powers to enforce any awards they may make in addressing the exploitation of workers. More particularly, where there is evidence that victims prefer to approach labour courts, a clear message is sent that their awards should not be made hollow but should be capable of enforcement so as to reduce the impunity of offenders.

3.5.2.4 Statutory regulatory bodies

In addition to the GLA discussed above,⁶⁷⁶ the UK government has also established other bodies that may find relevance in the reduction of forced labour through their focus on addressing or regulating aspects of employment rights that stand affected in a forced labour situation. The Employment Agency Standards Inspectorate (EAS) was established to ensure compliance with the provisions of the *Employment Agencies Act* 1973 and the *Conduct of Employment Agencies and Employment Business Regulations* 2003.⁶⁷⁷ These two pieces of legislation deal with the regulation of private recruitment agencies and employment agencies. Taking cognisance of the increased use of agency labour and the various modes of exploitation workers are subjected to,⁶⁷⁸ the work of the EAS touches on improving agency workers' and work seekers' awareness of their rights to safe working conditions and the payment of their wages, and that they have no obligation to pay

⁶⁷⁵ Geddes *et al* 2013 *JRF Programme Paper* 67; Lalani 2011 *Ending the Abuse* 17.

⁶⁷⁶ Para 3.5.1.1 above.

⁶⁷⁷ As amended by the *Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations* 2014.

⁶⁷⁸ See para 3.3.3 above.

fees to the agency for the provision of work.⁶⁷⁹ Where an agency fails to comply with the employment rights, the EAS may issue a warning for the rectification of the non-compliance, prosecute the agency operator (which attracts fines), or seek an order prohibiting a person from running an agency for up to ten years.⁶⁸⁰

Her Majesty's Revenue and Customs (HMRC) has also been cited as a relevant enforcement body through its enforcement of the obligation placed on employers to pay workers the national minimum wage, and more particularly to protect lower- and middle-income workers.⁶⁸¹ The *National Minimum Wage Act* of 1998 entitles every worker to the payment of a national minimum wage. The HMRC is empowered to ensure that employers comply with the Act by instituting civil and criminal proceedings. Where an employer is alleged to be in contravention of the Act, the HMRC's compliance officers will carry out an investigation of the business of the employer, which will comprise a thorough check of the payroll and an inquisition of the employer and the workers.⁶⁸² Where the employer has failed to comply, the compliance officer may issue a Notice of Underpayment which sets out the arrears to be paid out to the workers as well as a penalty for the employer's failure to comply with the Act.⁶⁸³

A failure to settle the requirements of the Notice of Underpayment entitles compliance officers to pursue civil claims in employment tribunals on behalf of the workers concerned.⁶⁸⁴ If the employer fails to comply with the tribunal's order, compliance officers are empowered to secure compliance through distraint or any compliance measures accessible to the tribunal. Section 31 makes provision for the initiation of criminal proceedings where there is a contravention of the Act. It is asserted that the option of criminal proceedings does not replace the civil proceedings route, but serves as a means to emphasise the need to comply with the

⁶⁷⁹ EAS Inspectorate *Annual Report* para 3.

⁶⁸⁰ EAS Inspectorate *Annual Report* para 5.

⁶⁸¹ Balch 2012 *JRF Programme Paper* 20; Geddes *et.al* 2013 *JRF Programme Paper* 50.

⁶⁸² Section 14(1).

⁶⁸³ Section 19(1).

⁶⁸⁴ Section 20.

Act.⁶⁸⁵ In 2011 the government introduced a scheme where employers who fail to pay workers the national minimum wage are named so as to deter would-be offenders. This was initiated having regard to the fact that some employers may be more responsive to a sanction that touches on their reputation.⁶⁸⁶

Because the imposition of forced labour may have an implication for health and safety in the workplace,⁶⁸⁷ the Health and Safety Executive (HSE) finds relevance to this discussion, in that it seeks to ensure compliance with health and safety laws in the UK. The HSE's remit extends over a wide range of sectors, covering catering, cleaning, hairdressing, entertainment, food and catering, all of which are instances of the informal work which is normally unregulated and where exploitation and forced labour has been previously identified.⁶⁸⁸

Keeping the indicators of forced labour in mind, a consideration of these enforcement mechanisms highlights the inevitable fact that forced labour has to be addressed not only as a criminal offence but also within the decent work agenda. These mechanisms were established to ensure workers' access to decent work, which includes the payment of wages, the provision of a safe and healthy workplace, the regulation of working hours, and other benefits. It cannot be argued that a framework wholly addresses forced labour when it blatantly fails to take cognisance of the contributions that may arise from such bodies and does not bring them together to form a cooperative and integrated framework.⁶⁸⁹

3.6 Conclusion

The UK has a rich history pertaining to the abolition of slavery and the slave trade. In modern times the UK experience shows that forced labour affects developed economies as well as developing and undeveloped economies. It also demonstrates

⁶⁸⁵ HMRC Enforcement *National Minimum Wage and National Living Wage* 16-20.

⁶⁸⁶ HMRC Enforcement *National Minimum Wage and National Living Wage* 16-20.

⁶⁸⁷ Paras 2.7.2.2 and 2.7.2.4 above.

⁶⁸⁸ Para 3.3.3 above. See <http://www.hse.gov.uk/index.htm> for the industries covered by the HSE.

⁶⁸⁹ Schedule 3 of the *MSA* only recognises the GLA as a regulator who has to cooperate with the Anti-Slavery Commissioner.

that the operational characteristics of certain industries and some recruitment practices may exacerbate the incidence of forced labour. In addition, the particularities of how some forced labour practices come about may be influenced by the specifics of particular legal and labour market regulatory regimes. As a result, the causes of forced labour identified by the ILO should be used as a minimum standard and inspire further research into the unique factors that may drive forced labour within a jurisdiction. Conducting in-depth research into forced labour practices within specific jurisdictions may highlight certain practices that are considered legal and that yet cause forced labour. It may also highlight instances where the law itself creates situations that may give rise to forced labour.

The European Court of Human Rights advocates the establishment of systems to criminalise forced labour. Whilst this involves setting up legislative and administrative measures dealing with forced labour, no express mention is made of the involvement of labour regulation. That notwithstanding, an expansive interpretation of "practical and effective" measures would entail the inclusion of labour regulatory systems. Bearing in mind the influence that the court has had over State Parties to date, a pronouncement touching on this would go a long way towards influencing European governments to see forced labour not only as an international crime but also as an issue of labour and human rights. Above all, whereas the court does not expressly speak to the role that labour regulatory systems can play, bearing in mind its previous influence from the ILO, it can be safely submitted that following the new standards established under the 2014 *Protocol on Forced Labour*,⁶⁹⁰ the court may in future require State Parties to ensure the involvement of the labour regulatory system within national mechanisms aimed at combatting forced labour.

On the other hand, the continuum of exploitation highlights the need for forced labour to be seen as a process, the genesis and subsistence of which comprise of a violation of labour rights. Using the continuum to explain forced labour and its relationship to exploitative working conditions and decent work properly clearly

⁶⁹⁰ See para 2.6.2.2 above.

demonstrates the need to ensure a role for the labour law in efforts to combat forced labour. The placement of exploitative working conditions between decent work and forced labour makes a case for the movement from a criminal law-centred approach to an approach that includes in the labour law and any other relevant mechanism, thus reflecting the standard of the Protocol.

The UK approach is also instructive in so far as it clarifies the fact that forced labour cannot be effectively addressed within the trafficking framework. Whereas the *MSA* is championed as ground-breaking by the government, this thesis has found that it is only a first step in the right direction towards addressing forced labour within the criminal law framework. It indeed has certain aspects that are instructive, but it does not do much with regards to establishing a relationship between criminal enforcement and labour regulatory systems. However, the role of the Anti-Slavery Commissioner may be used to explore the possibility of bringing together these two frameworks. On the other hand, the *GMLA* places forced labour within the labour law framework by addressing and ensuring workers' entitlement to labour rights in industries previously identified as susceptible to forced labour. Given a chance, UK labour regulatory systems may contribute to the effective elimination of forced labour owing to the work they have previously done touching on forced labour.

The next chapter will explore how the Brazilian framework addresses forced labour and the attempts Brazil has made towards bringing it within the labour regulatory framework.

CHAPTER 4

THE BRAZILIAN APPROACH

4.1 Introduction

The Inter-American human rights system⁶⁹¹ proscribes subjection of humans to forced labour and requires that signatories to its chief human rights instruments put in place effective mechanisms to ensure the respect and protection of this right. In order to fulfil its obligation, Brazil being a signatory to the mentioned instruments has declared slave labour a federal crime to which criminal sanctions accrue and to which compensation for violations of labour rights may be claimed.⁶⁹² The objective of this chapter is to identify the extent of forced labour in Brazil and how that has shaped the country's responses to the problem. The previous chapter discussed the approach of the English law to addressing forced labour, and the analysis indicated, amongst other matters, that forced labour may be peculiar to a jurisdiction, thereby calling for measures tailored to address the particularities prevailing in that jurisdiction. For example, the rising concentration of exploitation and forced labour in labour broking within the UK has culminated in the enactment of the *Gangmasters Licensing Act*, which ensures the regulation of services that deal in the supply of labour and the elimination of forced labour and human trafficking.⁶⁹³ This particular Act places forced labour within the context of the labour regulatory system in the sense that it proscribes the imposition of exploitative working conditions and forced labour on workers in the affected industries.

From a more general point of view, whereas the English framework legislation on forced labour heavily relies on criminal law, it has been posited in this thesis that the system introduces elements that include labour law within its operation. The *Modern Slavery Act* for instance, introduces victim assistance and support in the form of legal aid that is not limited to criminal claims, but opens the doors to pursuing civil

⁶⁹¹ Article 6 of the *American Convention on Human Rights*. Also see para 4.3.2 below.

⁶⁹² This fact will become clear in the discussions below.

⁶⁹³ Para 3.5.1.1 above.

claims.⁶⁹⁴ The Office of The Slavery Commissioner, as established under the Act, could also see the involvement of workers' and employers' organisations in drawing up national policy and strategy to deal with the problem of forced labour.

In accordance with the general aim of the thesis, the aim of this chapter is also to investigate whether and how the Brazilian labour law and its administration have made any contribution to the eradication of forced labour within the country's borders and whether due cognisance is taken of them in law and policy. This is done to identify components of the Brazilian system that South Africa may learn valuable lessons from. Notably, this will also inform the subsequent chapter which will attempt to identify any significant similarities between the Brazilian⁶⁹⁵ and the UK approach in an attempt to draw lessons for South Africa from them.

4.2 Historical background of slavery in Brazil

The previous chapters have established that slavery and the transatlantic slave trade were common and legal practices globally in the period preceding the nineteenth century, and in the early stages of that century.⁶⁹⁶ Similarly, evidence points to the fact that Brazil was one of the territories largely involved in these practices.⁶⁹⁷ Costa⁶⁹⁸ observes that forced labour and modern day slavery as it occurs in Brazil today is greatly influenced by the country's historical experiences of the practice. She further asserts that during the nineteenth century slavery in Brazil was not only a means of production but also became an institution embedded in the culture and

⁶⁹⁴ Para 3.5.1.2 above.

⁶⁹⁵ The reader ought to be alerted to the fact that the Brazilian official language is Portuguese. The legislation, certain terms and phrases and the names of organisations and institutions are normally referred to in the official language. This thesis will only refer to all such matters in the English language. To create harmony between this thesis and its Brazilian sources, the common abbreviations and acronyms of organisations and institutions will be written as they appear in the official language of Brazil. Also, Brazil is a federal state made up of twenty-six states. Studies of the Brazilian concept of slave labour therefore normally demarcate the matter according to particular states. This thesis will discuss the issue on a more general geographical plane, however, without distinguishing among the constituent states.

⁶⁹⁶ See paras 2.2 and 3.2 above.

⁶⁹⁷ Costa *Fighting Forced Labour* 31; Bethell 1991 *TRHS* 73-78; Van Niekerk 2004 *CILSA* 6, 23; Wilson 1950 *AJIL* 507,516-520; Kern 2004 *JHIL* 250-257.

⁶⁹⁸ Costa *Fighting Forced Labour* 31.

societies of the Brazilian people.⁶⁹⁹ Thus, as well as being a useful tool of production it was an essential component of social hierarchy and class.⁷⁰⁰ As a result, it is imperative for this thesis to consider Brazilian historical slavery not only as an academic exercise but also taking into account the possibility that it may provide answers to questions that may arise regarding the Brazilian approach to forced labour in modern times.

There is a large volume of published studies that outline to a certain extent the influence of colonisation on the institutional use of slavery and the growth of the slave trade.⁷⁰¹ Because they were in a position of power, colonial masters exploited this state of affairs and kept the institution of slavery and the slave trade functional owing to its usefulness in attaining their interests within their colonial empires and their borders.⁷⁰² In view of this, colonisation and slavery had a relationship, the nature of which was influenced by who the colonial master was and who the colony was. It is for this reason that it can be assumed that the experience of Brazil as a former colony may not necessarily be similar to that of a colonial master such as the UK. This assumption will be demonstrated below through a brief discussion of the history of Brazilian slavery.

Brazil was a colony of Portugal from as early as 1500 until 1822.⁷⁰³ From its period of colonisation, most of the economic activity⁷⁰⁴ in colonial Brazil relied on colonial slavery.⁷⁰⁵ Whereas the use of native slaves was common,⁷⁰⁶ the institution of slavery in colonial and post-colonial Brazil grew and remained in force largely as a result of the transatlantic slave trade.⁷⁰⁷ There is a consensus amongst scholars that

⁶⁹⁹ Costa *Fighting Forced Labour* 31.

⁷⁰⁰ See for example the general observations made on slavery in Quirk 2006 *HRQ* 580.

⁷⁰¹ See amongst others Bassiouni 1990-1991 *ILP* 450; Bravo 2007 *BUILJ* 213; Lassen 1988 *NJIL* 197; Van Nierkerk 2004 *CILSA* 6, 18; Kern 2004 *JHIL* 233.

⁷⁰² Bassiouni 1990-1991 *ILP* 450-451; Also see paras 2.2 and 3.2 above.

⁷⁰³ Fausto and Fausto *A Concise History of Brazil* 1.

⁷⁰⁴ Commercial agricultural became a large part of the Brazilian economy owing to the rising demand from European countries for commodities such as sugar, cacao and tobacco. In this regard see Barickman 1996 *JLAS* 584-588; Walker 2007 *Food and Foodways* 81-84; Butler 2011 *JBS* 971.

⁷⁰⁵ Costa *Fighting Forced Labour* 31.

⁷⁰⁶ Walker 2007 *Food and Foodways* 83.

⁷⁰⁷ Bethell 1991 *TRHS* 73-75; Walker 2007 *Food and Foodways* 81.

Brazil became the largest importer of African slaves in the 19th century⁷⁰⁸ due to the increase in demand for commodities such as sugar and coffee.

Chapter three above established that Britain launched and led a global movement to end slavery and the slave trade from the year 1807.⁷⁰⁹ This campaign was also felt in colonial and post-colonial Brazil, but the abolition of slavery and slave trading in Brazil proved to be a challenge.⁷¹⁰ Hence, Costa⁷¹¹ observes that the Brazilian abolition of slavery and the slave trade was a "slow gradual process". Firstly, challenges were experienced due to Portugal's colonial interests in Brazil. Pursuant to a decree of 1761, Portugal banned slave importation into its borders.⁷¹² However, it continued to rely heavily on slavery and the slave trade to propel economic activity amongst its colonies.⁷¹³ By way of illustration, Blackburn⁷¹⁴ observes that the objectives of the decree of 1761 were to stop the transport of slaves to Portugal and to redirect it to Brazil. In the light of the foregoing, Portugal could not readily cooperate or agree with the British idea of imposing outright bans on slavery and the slave trade.⁷¹⁵ Whereas jurisdictions such as the Netherlands, France and Spain gradually completed treaties with Britain to abolish the slave trade,⁷¹⁶ the same could not be attained with Portugal. The latter was prepared to be party only to treaties restricting the trade but not to outlawing it,⁷¹⁷ until the completion of the

⁷⁰⁸ Bethell 1991 *TRHS* 73-75; Drescher 1988 *THAHR* 431; Butler 2011 *JBS* 972; Walker 2007 *Food and Foodways* 81. Various researchers of the Brazilian slave trade rely on various different statistics to justify their conclusions, but there is general consensus among them that the number of slaves imported into Brazil grew rapidly during the nineteenth century. For example, Bethell observes that around 60 000 slaves had been imported into Brazil in 1848. On the other hand, Walker presents a cumulative statistic (not necessarily conflicting) indicating that between 3.5 and 5 million African slaves were brought into Brazil between 1538 and 1850.

⁷⁰⁹ See para 3.2 above.

⁷¹⁰ For example, Bethell notes that in 1848, Britain nearly ceased putting pressure on Brazil to end trading in slaves. See Bethell 1991 *TRHS* 76.

⁷¹¹ Costa *Fighting Forced Labour* 31. Also see Barickman 1996 *JLAS* 585.

⁷¹² Blackburn 1988 *The Overthrow of Colonial Slavery* 62.

⁷¹³ Van Nierkerk 2004 *CILSA* 22; Bethell *The Abolition of the Brazilian Slave Trade* 30. Some of the Portuguese colonies at this time included India, Mozambique and Angola. See Villers "The Estado da India in Southeast Asia" 37-68; Rodney "The Colonial Economy" 162-172.

⁷¹⁴ Blackburn *The Overthrow of Colonial Slavery* 62.

⁷¹⁵ Van Nierkerk 2004 *CILSA* 20; Kern 2004 *JHIL* 234.

⁷¹⁶ Van Nierkerk 2004 *CILSA* 17-21.

⁷¹⁷ For instance, the Treaty of Friendship and Alliance of 1810 prohibited the trade of slaves north of the Equator, thus restricting the transportation of slaves from West Africa only.

Anglo-Portuguese Treaty of 1842.⁷¹⁸ In essence, therefore, Portugal's non-cooperation in the era preceding 1842 frustrated British efforts to put an end to the trade in its entirety.⁷¹⁹

Attaining independence from Portugal in 1822 did not necessarily improve the slavery and slave trade situation in Brazil.⁷²⁰ In his analysis of the Brazilian slave trade, Bethell⁷²¹ submits that it was during this period that slavery in Brazil became difficult to control. This was due to a number of factors. Firstly, there was a growing demand for locally produced commodities such as sugar and coffee.⁷²² Hence, the importation of slaves was expedient to farmers to meet the labour demand arising from the rise in demand for their commodities.⁷²³ Lastly, Brazil had just gained independence, and the slave traders found it easy to transport slaves over the high seas under the protection of the Brazilian flag, to avoid search and capture by Britain.⁷²⁴

In an endeavour to persuade Brazil to put an end to the slave trade, the Anglo-Brazilian Abolition Treaty of 1826 was negotiated by Britain and Brazil. The objective of this treaty was to sanction slave trafficking into Brazil.⁷²⁵ It would also give Britain the right to inspect Brazilian ships on the high seas if they were suspected to be carrying slaves.⁷²⁶ Pursuant to the treaty, Brazil promulgated the Law of 7 November 1831,⁷²⁷ which aimed at incarcerating and imposing fines on slave traffickers, and

⁷¹⁸ Van Niekerk 2004 *CILSA* 19-20, 23; Butler 2011 *JBS* 970-971.

⁷¹⁹ The history of Portugal is considered herein to demonstrate the relationship between colonisation, slavery and the slave trade. In addition, the relative position of colonial Brazil and Portugal serves as a good instance of the relationship between a colony and its colonial master in so far as slavery and the slave trade were concerned. Because Brazil attained independence from Portugal in 1822, the Portugal position post this period becomes irrelevant to this discussion.

⁷²⁰ Bethell 1991 *TRHS* 76.

⁷²¹ Bethell 1991 *TRHS* 75; Bethell *The Abolition of the Brazilian Slave Trade* 29-30.

⁷²² Butler 2011 *JBS* 970; Bethell 1991 *TRHS* 76.

⁷²³ Butler 2011 *JBS* 970-971; Bethell 1991 *TRHS* 76.

⁷²⁴ Bethell *The Abolition of the Brazilian Slave Trade* 29-30. Note also that Britain had treaties of search and seizure with other territories, as stated in para 3.2 above. In this regard see Wilson 1950 *AJIL* 510.

⁷²⁵ Bethell 1991 *TRHS* 75; Fausto and Fausto *A Concise History of Brazil* 106.

⁷²⁶ Fausto and Fausto *A Concise History of Brazil* 106.

⁷²⁷ Historians refer to this particular law as the Law of 7 November 1831 or the Law of November 1831; hence the assumption is that it was cited and named as such during its subsistence.

emancipating any slaves who entered Brazil thereafter.⁷²⁸ Despite its good intentions, it appears that the Law of 7 November 1831 did not enjoy the full support of those in political power. For instance, Bethell⁷²⁹ observes that many deputy ministers at the time viewed the law as a legal fiction designed to placate the British, and hoped that it would not be implemented. Key to their reservations contemplation was the fact that the law had been adopted when the influx of slaves into Brazil had been somewhat reduced. They thought this reduction would be short-lived.⁷³⁰ In general, therefore, it seems that people in political power had an interest in sustaining the slave trade and ultimately in slavery. Hence, although the law specifically outlawed slave trading, there was little or no condemnation of slave traders by those in positions of authority.⁷³¹

The judicial process to prosecute those charged with the offence of slave trading also became flawed because of jurors' political relations with wealthy landowners and those in political power.⁷³² As a result, the slave traders enjoyed the support of the lawmakers, law enforcement, and individuals who had a voice in governance, making the law ineffective. This explains why the law ultimately proved difficult to implement upon the resuscitation of the slave trade.

Following years of gradual reforms,⁷³³ Brazil finally became the last country in the Americas to abolish slavery through its *Lei Aurea* (Golden Law) of May 1888.⁷³⁴ The *Lei Aurea* abolished slavery in its entirety and granted unconditional liberation to all

⁷²⁸ Fausto and Fausto *A Concise History of Brazil* 106; Bethell *The Abolition of the Brazilian Slave Trade* 69; Bethell *Brazil Empire and Republic* 64; Geary "The Limited Impact of 1808 in Brazil" 146-147.

⁷²⁹ Bethell *The Abolition of the Brazilian Slave Trade* 69; Bethell *Brazil Empire and Republic* 64; Bethell 1991 *TRHS* 76.

⁷³⁰ Fausto and Fausto *A Concise History of Brazil* 106; Bethell *Brazil Empire and Republic* 62. Bethell points out that the decline had been as a result of an earlier large influx in slave importation orchestrated to circumvent the effects of outlawing slave trading once the law came into effect. See Bethell *The Abolition of the Brazilian Slave Trade* 72.

⁷³¹ Fausto and Fausto *A Concise History of Brazil* 106.

⁷³² Fausto and Fausto *A Concise History of Brazil* 106.

⁷³³ The law of 1831 was followed by a series of legislative reforms intended to address slavery within Brazil's borders. Amongst them, the *Law of Free Birth* of 1871 emancipated all children born to slave mothers, whilst the *Sexagenarian Law* of 1885 freed all slaves over sixty years of age. See Rodriguez *Encyclopedia of Emancipation* 335-336; Butler 2011 *JBS* 976.

⁷³⁴ Coutinho and De Andrade Tosta *Brazil* 33.

slaves in Brazil, creating a large population of free workers.⁷³⁵ Briefly written and consisting of only two articles, the law deviated from laws preceding it by providing for the unconditional release of all slaves and intentionally omitting the provision of the payment of indemnification to either slave owners or to the government. This was a development worthy of being celebrated in the history of slavery. However, historians⁷³⁶ argue that the manumission of the slaves and their freedom was less excellent in its outcome than it could have been for at least two reasons. Firstly, the *Lei Aurea* failed to address issues relating to the economic and political status of slaves. No compensation was offered to former slaves, nor means to assist them to adjust to their newly acquired freedom.⁷³⁷ Ordinarily it would prove difficult to gain economic and social status because in terms of chattel slavery, slaves had no rights, could not own property and were the property of their owners.⁷³⁸ Hence emancipation with no clear direction as to what opportunities to exploit next would create the possibility of their becoming displaced persons and returning to a state of slavery.⁷³⁹

Secondly, the land reform laws passed by the government did not improve the situation. The Brazilian government was conscious of the fact that major rural producers were dependent on slave labour.⁷⁴⁰ As a result, its abolition was bound to cause a decline in their production and thus impact on the country's exports. To avoid this, the government passed the *Land Act* of 1850, which ensured a concentration of land amongst a few individuals. The effect of this Act was to bestow all unoccupied public land on the state. Private ownership of the land could be obtained only through a purchase.⁷⁴¹ Inevitably, this created a situation where land was exclusively owned by the wealthy, whilst the poor and freed slaves

⁷³⁵ Bethell 1991 *TRHS* 76; Butler 2011 *JBS* 970; Barickman 1996 *JLAS* 589; Walker 2007 *Food and Foodways* 81.

⁷³⁶ Butler 2011 *JBS* 974; Appiah and Gates *Encyclopedia of Africa* 617.

⁷³⁷ Appiah and Gates *Encyclopedia of Africa* 617.

⁷³⁸ Para 2.3.1 above.

⁷³⁹ Butler 2011 *JBS* 974.

⁷⁴⁰ Costa *Fighting Forced Labour* 31; Kern 2004 *JHIL* 251.

⁷⁴¹ Costa *Fighting Forced Labour* 31; Cunha 2011 *Fordham Law Review* 1173-1174; DeWitt *Early Globalisation* 35.

remained landless.⁷⁴² Access to land could give them the freedom to generate income from livestock and crop production,⁷⁴³ but because they were landless they had to continue to offer their labour to the wealthy in order to sustain a livelihood.⁷⁴⁴ Although this labour would be presumed to be free, there was the likelihood of reinsertion into what amounted to slavery due to their lack of the resources necessary to sustain a livelihood.⁷⁴⁵ Hence, it is observed that slavery in Brazil was propelled by the unequal distribution of economic resources and poverty.⁷⁴⁶

In conclusion, the history of slavery and the slave trade in Brazil highlights the difficulty Brazil has had in dealing with the two practices, both as a colonial empire and as an independent republic. It highlights the difference in approach by colonial masters to slave trading within their borders and in their empires. That is, it shows how the coloniser made it a priority to abolish slave trading and slavery at home whilst the practices were to remain functional within their colonies.⁷⁴⁷ Even so, overwhelming evidence has shown that most often, when abolition was envisioned amongst the colonies, this was meant to target slave trading as opposed to slavery itself.

In comparison with the history of the UK, the history of Brazil is that of a colony affected by the slave trade and slavery of a colonial master to the point where even after independence much reliance was still placed on the labour of slaves. Most significantly, the history shows how slavery came to be embedded in the social organisation, economy and lifestyle of the Brazilian people, with issues of unequal land distribution emerging as early as 1850. The UK's slavery and slave trade experiences cannot be usefully compared with those of Brazil taking account the fact that the UK was a colonial master and hence not subject to the control of another state, and later became the leading force behind the abolition of the slave trade.

⁷⁴² Cunha 2011 *Fordham Law Review* 1173-1174; DeWitt *Early Globalisation* 35.

⁷⁴³ Bethell 1991 *TRHS* 75; DeWitt *Early Globalisation* 35.

⁷⁴⁴ Bethell 1991 *TRHS* 75; Costa *Fighting Forced Labour* 33.

⁷⁴⁵ Appiah and Gates *Encyclopedia of Africa* 617.

⁷⁴⁶ Bethell 1991 *TRHS* 75; Costa *Fighting Forced Labour* 33.

⁷⁴⁷ See also for example para 3.2 above.

4.3 Forced labour in modern Brazil

4.3.1 *General observations and definitions*

Previous ILO studies and experiences drawn from the UK show that forced labour may affect both formal and informal economy workers alike.⁷⁴⁸ However, the consensus is that informal economy workers are the most vulnerable class of workers because they usually enjoy little or no protection under national labour laws. Moreover, both the international experience and the experience of the UK are in agreement that certain kinds of work stand most to be affected by the use of forced labour. These include, amongst others, agriculture, construction, domestic work and manufacturing.⁷⁴⁹ With that in mind, it should be stated that Brazil has a dual economy and labour market, entailing the co-existence of formal and informal employment.⁷⁵⁰

It is further observed that despite substantial industrialisation, large areas of Brazil are still given over to agricultural activity.⁷⁵¹ In addition, the Brazilian economy is largely informal, so a large number of workers are in informal employment and a small proportion are in formal employment.⁷⁵² Based on the foregoing observations, it should be expected that a lot of economic activity in Brazil involves agricultural work,⁷⁵³ a sector previously identified as susceptible to forced labour. Moreover, because a large population of workers are employed in the informal economy, the expectation is that forced labour (if existent) would be more prevalent in work falling within this category due to the lack of or inadequacy of the laws protecting informal workers.

⁷⁴⁸ See para 2.2 and 3.3.3 above.

⁷⁴⁹ See para 2.2 and 3.3.3 above.

⁷⁵⁰ Cornish 2004 *IUR* 22.

⁷⁵¹ Cornish 2004 *IUR* 22.

⁷⁵² Ernst *Recent Dynamics in Brazil* 2; Cornish 2004 *IUC* 22; Sakamoto "Slave Labour in Brazil" 16.

⁷⁵³ This should not be interpreted to rule out the presence of economic activity that is not agricultural that similarly stands to be affected by forced labour in Brazil.

In so far as international labour law is concerned, Brazil has been a member of the ILO since 1919.⁷⁵⁴ It ratified the *Forced Labour Convention* No 29 of 1930 on the 25th of April 1957 and the *Abolition of Forced Labour Convention* No 105 of 1957 on the 18th of June 1965.⁷⁵⁵ Under these circumstances, the forthcoming discussion on forced labour operates from the premise that it is correct to apply the ILO's forced labour instruments as binding on Brazil. From a regional perspective, Brazil has membership of the Organisation of American States,⁷⁵⁶ which has made a contribution to its forced labour laws, as will be seen below.

Having set the context, the next step is to consider how the present-day Brazilian framework defines forced labour. The Brazilian approach departs from using the term forced labour, which is the term used by the ILO and in the UK, and opts for "slave labour" instead, to refer to forced labour and all working conditions that compromise the freedom and dignity of workers.⁷⁵⁷ Reference to forced labour as slavery or modern slavery is of course not novel, due to the fact that the UK uses the term modern slavery to include forced labour, as is derived from its *Modern Slavery Act*.⁷⁵⁸ However, the mode in which Brazil has crafted and applies the concept of slave labour is rather different from that of the UK's concept of modern slavery, as will be seen shortly. Section 149 of the *Penal Code of Brazil* No 2,848 of 1940⁷⁵⁹ defines and criminalises slave labour by providing as follows:

[Slave labour is] Reducing someone to a condition analogous to that of a slave, namely: subjecting a person to forced labour or to arduous working days, or subjecting such a person to degrading working conditions or restricting, in any manner whatsoever, his mobility by reason of a debt contracted in respect of the employer or a representative of that employer. [Own addition]

⁷⁵⁴ <http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO>.

⁷⁵⁵ <http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO>.

⁷⁵⁶ www.oas.org.

⁷⁵⁷ Costa *Fighting Forced Labour* 15; Sakamoto "Slave Labour in Brazil" 16.

⁷⁵⁸ See in particular paras 3.3.2.1 above and 4.3.2.2 below. Para 3.5.1.2.1 above considers how the *MSA* applies the term modern slavery to forced labour.

⁷⁵⁹ Before a 2003 amendment of this section, the *Brazilian Penal Code* originally simply prohibited "reducing someone to conditions analogous to slavery" without expounding on how a person can be subjected to such conduct. The Penal Code will be referred to as the Brazilian Penal Code throughout this thesis.

If found guilty of the above offence, a person may be liable to pay a fine and to be sentenced to a minimum prison term of two years and a maximum of eight years.⁷⁶⁰

Section 149 proceeds to provide that:

Any persons committing the following offences shall receive the same penalties: retaining workers at the workplace by preventing them from using any means of transportation; retaining workers at the workplace by confiscating their personal papers or personal property, or by maintaining manifest surveillance.

What section 149 does is to criminalise the broad conduct of "reducing someone to a condition analogous to that of a slave". It can be deduced that the reduction of a worker to a status of a slave may take one or more of the following forms: subjecting the person to forced labour, requiring the person to work long hours, subjecting a worker to undignified working conditions, and debt bondage. In addition, the section proceeds to prescribe a similar penalty for offences pertaining to the confinement of workers through confiscation of personal documents and property and the imposition of surveillance. The implication is therefore that the foregoing practices should also be seen as reducing a worker to conditions akin to slavery.

On the question of interpretation, this study found that based on section 1(1)(b) of the *MSA*, article 4 of the *European Convention on Human Rights* and the European Court of Human Rights (ECHR), the UK adopts a similar forced labour definition to that of the ILO.⁷⁶¹ Based on the fact that Brazil is also a signatory to the *Forced Labour Convention*, the interesting finding is that Brazil deviates from the ILO's definition without defeating the authoritative value of the Convention to its national laws on slave labour. This is manifest from the following. Firstly, section 149 of the *Brazilian Penal Code* does not seek to prohibit forced labour only, nor to give a definition of forced labour. Instead, it takes a broader approach by including forced

⁷⁶⁰ Section 149.

⁷⁶¹ The ILO defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" as enunciated under its *Forced Labour Convention*. See para 2.2 above. For a discussion on the UK interpretation of forced labour by the *ECHR* see paras 3.3.1 and 3.3.2 above.

labour, debt bondage and degrading working conditions amongst conduct that would constitute reducing a person to conditions similar to slavery. In this case, then, room is made for the possibility to prosecute an employer for subjecting workers to degrading working conditions without requiring the strict proof of coercion⁷⁶² that would otherwise be needed in proving a case of forced labour in terms of the ILO and subsequently the UK.⁷⁶³

Secondly, the mere fact that section 149 does not specifically define forced labour should not be seen as a hindrance to the effective prosecution of this crime. As Brazil is a signatory to the *Forced Labour Convention*, inspiration will be drawn from this convention if a worker seeks to allege forced labour. This is clear from Costa's⁷⁶⁴ submission that the *Forced Labour Convention* and the *Brazilian Penal Code* must be seen as complementing each other in the sense that the latter ensures an incorporation of the former in national law. Be that as it may, in cases where a worker cannot prove coercion, he has an option to allege any of the offences covered under section 149, since all of them, including forced labour, carry a similar penalty. Hence, Costa⁷⁶⁵ suggests that the approach presented by the *Brazilian Penal Code* is a remarkable contribution to the Brazilian framework in addressing forced labour, seeing that it touches on the situation of forced labour as it is in Brazil today.⁷⁶⁶

Whereas it has been observed that the Brazilian approach is dissimilar from the ILO's concept of forced labour, the ILO has expressed the opinion that although the term has broader application, slave labour includes forced labour.⁷⁶⁷ Moreover, the ILO has described the Brazilian approach as a good example from which lessons to

⁷⁶² Costa *Fighting Forced Labour* 16.

⁷⁶³ Note that some of the coercive practices that may normally be alleged in a forced labour case can be treated as separate offences under section 149.

⁷⁶⁴ Costa *Fighting Forced Labour* 16-17. Para 4.3.2.1 below also expounds on the relevance of the *Forced Labour Convention* to the Brazilian framework as enunciated by the American Court of Human Rights.

⁷⁶⁵ Costa *Fighting Forced Labour* 17.

⁷⁶⁶ See para 4.3.3 below for a discussion of the extent of forced labour in modern Brazil.

⁷⁶⁷ McGrath 2012 *Antipode* 1007.

address forced labour can be derived.⁷⁶⁸ Apart from the mention of forced labour within section 149 as symbolising the relevance of forced labour to Brazil, this discussion holds the view that the relationship between forced labour as enunciated in the *Forced Labour Convention* and the *Brazilian Penal Code* should also be seen in the light of what would be forced labour indicators under the ILO,⁷⁶⁹ which in terms of section 149 are prosecuted as separate offences to which a penalty similar to that imposed for slave labour may accrue.

In the light of the above, it is apparent that the Brazilian legislative framework on slave labour is predominantly based on the criminal law.⁷⁷⁰ However, the key departure is that the framework provides a wider protection by not necessarily restricting "modern slavery" to forced labour in the strict sense of the term but choosing slave labour as the context within which manifestations of unfree labour can be addressed. The position of the law as it is in Brazil mirrors the aspirations of UK researchers into matters of forced labour, who have repeatedly outlined the importance of having a framework that does not seek to identify forced labour in a vacuum but as a manifestation of poor and/ or degrading working conditions.⁷⁷¹

In conclusion, therefore, section 149 of the *Brazilian Penal Code* does not only prohibit forced labour. It goes further to prohibit practices akin to slavery, or what would be called degrading working conditions. So slave labour, or conditions analogous to slavery, as the *Brazilian Penal Code* provides, includes but is not limited to forced labour in the strict sense of the term. The term "slave labour" will be adopted for the purposes of this discussion because it is the term widely used in Brazil today to refer to modern-slavery. This does not alter the general style of the thesis, where the term forced labour is used instead.

⁷⁶⁸ ILO *A Global Alliance Against Forced Labour and Trafficking* 41.

⁷⁶⁹ See para 2.7.2 above for forced labour indicators.

⁷⁷⁰ See para 4.5.1 below on the Brazilian legislative responses to slave labour and the application of their relevance to this thesis.

⁷⁷¹ See paras 3.3.4 above and 4.5.1.1 below.

4.3.2 *Influence of the Inter-American human rights system*

It was observed above that regional human rights systems generally aid in establishing a better understanding of international human rights, and may even bring compliance with such closer to home.⁷⁷² Pronouncements of the European Court of Human Rights have persuaded the submission in this study that regional human rights systems may contribute towards the national development of laws and policies addressing forced labour by holding members to the obligations they incur under regional human rights treaties they have signed.⁷⁷³ Notwithstanding the observation that the enforcement mechanism of the Inter-American human rights system is not popularly known for its successes, like its European counterpart,⁷⁷⁴ it is imperative for this discussion to consider whether and to what extent the American regional human rights system has had any influence on the development of Brazil's approach to slave labour.

Regional human rights issues in the Americas fall under the jurisdiction of the Organisation of American States (OAS), an organisation formed in 1948 by American states.⁷⁷⁵ The key human rights treaties within this region are the *American Declaration of the Rights and Duties of Man* of April 1948 (American Declaration) and the *American Convention on Human Rights* of July 1978 (American Convention). The *American Declaration* is a non-binding document administered by the Inter-American Commission on Human Rights (IACHR).⁷⁷⁶ The IACHR is an autonomous body of the OAS, which is empowered to ensure awareness and respect of human rights amongst people of the Americas.⁷⁷⁷ In so far as the Declaration is concerned, the commission can only make recommendations to governments concerning the

⁷⁷² Para 3.3.2 above.

⁷⁷³ Paras 3.3.2.1 and 3.3.2.2 above.

⁷⁷⁴ Goldman 2009 *HRQ* 856-857. Reference can also be made to para 3.3.2 above where it was observed that the European Court of Human Rights is a renowned court which has largely shaped the approach to and application of human rights in Europe. See in this regard Boyle 2009 *VUWLR* 174.

⁷⁷⁵ At that time, the organisation was formed by 21 American states. As at 2016, 35 sovereign states of the Americas are members of the OAS. See www.oas.org/en/about/member_states.asp.

⁷⁷⁶ Goldman 2009 *HRQ* 860; Cabranes 1968 *AJIL* 893-895.

⁷⁷⁷ Goldman 2009 *HRQ* 865; Cabranes 1968 *AJIL* 983-895; Medina 1990 *HRQ* 440.

adoption of measures to ensure the protection and realisation of human rights of people.⁷⁷⁸

On the other hand, the *American Convention* is a legally binding human rights instrument that seeks to augment the provisions of the *American Declaration* by extending specific civil and political rights to all Americans of ratifying states.⁷⁷⁹ The Convention recognises the IACHR as its enforcement mechanism⁷⁸⁰ but also establishes a purely judicial body, the Inter-American Court of Human Rights,⁷⁸¹ which has the power to accept petitions once they have been reviewed by the IACHR. Parties to the Convention must submit to the jurisdiction of the Court,⁷⁸² which receives petitions from the IACHR concerning violations of the rights guaranteed under the Convention. The Court's decisions are legally binding and a state that is party to the petition is under an international obligation to comply with the decision of the Court.⁷⁸³

Thus the Inter-American system is characterised by a dual system of human rights protection.⁷⁸⁴ The implication is therefore that American states that ratify the *American Convention* are bound by the provisions of that Convention, thereby superseding but not displacing the importance of the American Declaration.⁷⁸⁵ On the other hand, American states that choose not to ratify the Convention remain

⁷⁷⁸ Goldman 2009 *HRQ* 865; Medina 1990 *HRQ* 441. The content of the Declaration is not discussed because it does not have any provisions pertaining to forced labour and/or slavery.

⁷⁷⁹ Shelton 1994 *AUJLR* 335.

⁷⁸⁰ Articles 34-51 of the Convention.

⁷⁸¹ Articles 55-73 of the Convention.

⁷⁸² If a party to the Convention does not accept the jurisdiction of the Court, the IACHR is empowered to hand down judgement on cases probing whether or not the state has violated the convention.

⁷⁸³ Article 68(1). If a state does not comply, the Court may inform and make recommendations to the OAS general assembly in terms of article 65. The Convention is silent on what action the General Assembly may take in the circumstance. However, Medina posits that the Assembly may take political action (seeing that it is a political body) to put pressure on the state to comply. See Medina 1990 *HRQ* 447.

⁷⁸⁴ Goldman 2009 *HRQ* 866; Medina 1990 *HRQ* 439. "Dual system" here refers to the co-existence of two human rights treaties and their respective enforcement mechanisms. A contrast may be made with the European human rights system, which is governed by one chief human rights treaty, the European Convention on Human Rights.

⁷⁸⁵ Also see article 29.

morally obliged to respect the principles set out in the Declaration.⁷⁸⁶ Brazil is a member of the OAS and has ratified both the *American Declaration* and the *American Convention*.⁷⁸⁷ It has also submitted to the jurisdiction of the Court,⁷⁸⁸ and is thus bound by the jurisprudence of the Court. To that end, Brazil has an obligation to implement decisions of the Court that directly affect it and to ensure that its protection of human rights pursuant to the *American Convention* is in accordance with the principles emanating from the Court's case law.

4.3.2.1 Regional definition and/or interpretation of forced labour

In so far as forced labour is concerned, article 6(1) and 6(2) of the *American Convention* provides: "No one shall be subjected to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and the traffic in women. No one shall be required to perform forced or compulsory labour." Since the Convention's provisions on slavery, servitude and forced labour are general, the American Court of Human Rights had an opportunity in the case of *Ituango Massacres v Colombia*⁷⁸⁹ to demystify how forced labour in the case of the Convention (and ultimately for the national laws of its signatories) should be interpreted.

In this particular case the Court stated that it held a view similar to that of the European Court of Human Rights: that human rights instruments are and should be treated like living instruments whose interpretation must be conscious of contemporary human rights developments.⁷⁹⁰ The American Court proceeded to hold that article 29 of the Convention expressly gave authority for interpretation of the Convention not to be limited to itself, but also to be interpreted in the light of other human rights instruments.⁷⁹¹ In this light, the Court held that it found it "useful and

⁷⁸⁶ Goldman 2009 HRQ 866.

⁷⁸⁷ www.oas.org.

⁷⁸⁸ IACHR *Inter-American Yearbook on Human Rights* 2924.

⁷⁸⁹ Judgment of July 2006. See para 4.3.2.2 below for a discussion of the facts of this case.

⁷⁹⁰ Para 155. Also see para 121 of the judgment of the European Court of Human Rights in *Siliadin v France* 73316/01, at para 3.3.2.2 of this thesis above.

⁷⁹¹ Para 156.

appropriate" to apply the ILO *Forced Labour Convention* in giving meaning and scope to forced labour as provided for by article 6(2) of the *American Convention*.⁷⁹²

In applying to the facts at hand the criteria as set out in terms of the *Forced Labour Convention's* definition of forced labour, the Court found that for there to be forced labour, there must have been work or service performed involuntarily under the threat of a penalty.⁷⁹³ The Court found that there had been actual threats of violence and death directed at the captured herdsmen and that they had not given consent to work as so engaged.⁷⁹⁴ In the light of the decision of the Court, it is safe to submit that for all legislation that seeks to prohibit forced labour, the ILO definition and principles must be taken as instructive, taking into account the general nature of article 6(2) of the *American Convention*. Thus, in determining whether there was forced labour in a given scenario, a national court or tribunal must look at whether there was work done involuntarily in response to an imposition or threat of imposition of a penalty.⁷⁹⁵ The American Court therefore reinforces the value of ILO Conventions and principles in cases where forced labour is concerned.⁷⁹⁶

4.3.2.2 *Distinction between forced labour and slavery*

The capacity of national laws to set out clear boundaries in the application of the terms "slavery" and "forced labour" forms an important part of this thesis, as seen in the foregoing chapters⁷⁹⁷ and as will be seen below.⁷⁹⁸ It has also been highlighted above that Brazil has chosen to adopt the term "slave labour" to refer to all practices that compromise the freedom to work and degrading working conditions, forced labour inclusive. It is vital to consider what the position is within the Inter-American

⁷⁹² Para 157.

⁷⁹³ See paras 160-162. Compare with the ECHR's holding in *Siliadin v France* as discussed at para 3.3.2.2 above.

⁷⁹⁴ Paras 164-165.

⁷⁹⁵ See article 2(1) of the *Forced Labour Convention*.

⁷⁹⁶ See generally Ebert and Oelz *Bridging the Gap* 1-19, wherein the authors cover a variety of ILO conventions that have previously been applied by the Inter-American and European human rights systems to demonstrate the authoritative value of ILO conventions at the regional level.

⁷⁹⁷ Paras 2.3.1 and 3.3.2.1 above.

⁷⁹⁸ Para 4.5.1.1 below.

human rights system concerning these two concepts so as to be able to determine if it draws a distinction between the two.

It appears that the American Court on Human Rights has not had an opportunity yet to properly make precedent touching on the distinction between slavery and forced labour. That notwithstanding, it remains important for this discussion to consider whether or not this distinction exists within the Inter-American human rights system, and if in future the question arises, how the Court might approach it. In doing so, this thesis will employ the rules of interpretation emanating from the jurisprudence of the Court and as set out within the *American Convention*.

The starting point in doing so is to consider article 29(b) and (d) of the *American Convention*. It provides:

No provision of this convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any state party or by virtue of another convention to which one of the said states is a party or as excluding or limiting the effect that ... other international acts of the same nature may have.

Therefore Lixinski⁷⁹⁹ notes in this regard:

...the American Convention will be interpreted consistently with other relevant international treaties which recognise rights and freedoms. Any instrument can then be used as a means to expand the jurisdiction of the Inter-American system, as human rights are interdependent, even if they are not all contained within the key instrument the court is interpreting.

What can be understood from the above is that authority is given by the Convention for treaties that seek to pursue and protect human rights to be used to extend the meaning and scope of the rights and freedoms set out in the Convention. The Convention should not be interpreted as an isolated human rights document, but as a component of a system for the protection of human rights that requires holistic interpretation and application. In this case, then, authority is expressly given by the Convention for the consideration and application of other relevant human rights

⁷⁹⁹ Lixinski 2010 *EJIL* 587.

instruments that may be informative in the expansion of slavery as provided for by article 6(1).

In *Ituango Massacres v Colombia*,⁸⁰⁰ a paramilitary group had captured seventeen peasants and obliged them to herd livestock which they had taken from local communities during a military incursion/raid. It is important to make the point here that the petitioners had alleged amongst other things that there had been a violation of article 6(2) of the *American Convention*, which guarantees a right to freedom from forced labour.⁸⁰¹ As noted above, basing its reasoning on article 29(b) and (d) of the *American Convention*, the Court found it appropriate in the circumstances to apply the ILO *Forced Labour Convention* to expand on the meaning and scope of forced labour as provided for under article 6(2) of the *American Convention*.⁸⁰²

Assuming the petitioners had alleged a violation of article 6(1), which prohibits slavery or servitude in all its forms, it is submitted that the court would have looked to the United Nations' *Slavery Convention*, which provides: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."⁸⁰³ Perhaps in order to assist in attaining a better understanding of how the American Court of Human Rights would apply this provision in an endeavour to expound on article 6(1) of the *American Convention*, guidance should be sought from the application of the same by a court of similar standing. In this case, the European Court of Human Rights' sentiments concerning the application of the *Slavery Convention* to expound on the *ECHR* seems more appropriate for the following reasons.

Firstly, Neuman⁸⁰⁴ observes that the European Court has taken more contentious human rights decisions than the American Court. This could be owing to the fact that the American Court has been in existence for a shorter time than the European

⁸⁰⁰ Judgment of 29 July 2006.

⁸⁰¹ See para 18(c).

⁸⁰² See para 4.3.2.1 above for how the court applied the *Forced Labour Convention* to allegations of forced labour.

⁸⁰³ Article 1(1).

⁸⁰⁴ Neuman 2011 *QJIL* 103-104.

Court.⁸⁰⁵ Secondly, there is a consensus amongst scholars⁸⁰⁶ that the American Court faces challenges relating to being placed in a continent where there have been immense human rights violations and that the Court's authority is also being questioned by some Member States. This view is supported by Huneeus,⁸⁰⁷ who in contradistinction observes that the European Court "came of age overseeing a group of well-functioning democracies committed to the rule of law." Taken together, these considerations put the European Court in a relatively authoritative position vis-a-vis other human rights systems. In this light, this discussion seeks to assume that the American Court would borrow the principles of the European Court's interpretation of the *Slavery Convention* if need be to expound on article 6(1) of the *American Convention*.

With that in mind, the European Court of Human Rights, when applying the *Slavery Convention* in *Silidian v France*,⁸⁰⁸ held that for there to be a case of slavery in terms of the Convention, and ultimately in terms of the *European Convention*, certain property rights have to be exercised over an individual. Based on the above considerations it can safely be submitted that forced labour and slavery under the *American Convention*, although they are related, are two distinct subjects to which different principles must apply.

4.3.2.3 Prohibition of forced labour and corresponding obligations

The *American Convention* is unique in the protection of human rights in the sense that it not only provides for the protection of the human rights of the people of the Americas but also expressly makes provision for enforcement procedures to accompany the rights.⁸⁰⁹ Article 1(1) of the Convention imposes a general obligation

⁸⁰⁵ Huneeus 2011 *CILJ* 500; Cavallaro and Brewer 2008 *AJIL* 771. Note here also that the African human rights system (discussed at chapter 5 below) is the youngest of the three systems.

⁸⁰⁶ Medina 1990 *HRQ* 442; Pasqualucci *The Practice and Procedure* 330-331; Huneeus 2011 *CILJ* 500; Cavallaro and Brewer 2008 *AJIL* 774.

⁸⁰⁷ Huneeus 2011 *CILJ* 500. Also see Cavallaro and Brewer 2008 *AJIL* 769. This statement is based on a comparison between the two human rights systems and should not be construed to suggest that the European human rights system faces no challenges.

⁸⁰⁸ Para 117-118.

⁸⁰⁹ Goldman 2009 *HRQ* 866; Cabranes 1968 *AJIL* 897.

on State Parties to "respect" the rights and to also "ensure the free and full exercise" of such by their people. In the case of *Angel Manfredo Velasquez v Honduras*,⁸¹⁰ the American Court highlighted the scope and content of the obligation imposed by this article on State Parties. The Court held that article 1(1) imposes an indiscriminate obligation to respect and protect all the rights set forth in the Convention.⁸¹¹ It proceeded to hold that whenever an allegation asserts an infringement of any one of the rights in the Convention, it alleges the contravention of article 1(1).⁸¹² Consequently, the obligation imposed by article 1(1) and principles flowing from the interpretation of the Court concerning any right in the Convention can be equally used to ascertain the obligations of State Parties towards forced labour under the Convention.

In the case of *Velasquez Rodriguez* the Court noted that the obligation to respect the rights basically implies that the state undertakes to avoid infringement of the rights either through its acts or omissions, or even through those of private individuals or entities.⁸¹³ With regard to ensuring the realisation of the rights, the Court held:

This obligation implies the duty of state parties to organise the governmental apparatus and in general all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation the states must prevent, investigate and punish any violation of the rights recognised by the convention and moreover if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from violation.⁸¹⁴

By virtue of article 1(1), where forced labour is concerned, there is an obligation on Brazil to enact laws proscribing it and have in place measures designed to ensure the investigation and punishment of conduct that violates this right.⁸¹⁵ This must go further to include, where possible, the restoration of the right violated and the provision of compensation. It arises that the existence of a legal system made solely

⁸¹⁰ Judgement of July 1988. Hereafter referred to as the *Velasquez Rodriguez* case.

⁸¹¹ Para 161.

⁸¹² Para 162.

⁸¹³ Paras 164-165, 176.

⁸¹⁴ Para 166.

⁸¹⁵ Also see article 2 of the Convention.

with the purpose of complying with this obligation is not enough. The Court in this case proceeded to hold that it is the duty of the state to conduct itself in a way that ensures the usefulness of this mechanism.⁸¹⁶ In this regard, the Court emphasised that the obligation to investigate violations of human rights must be taken by the state as its own legal duty which must be conducted out of the state's own volition, and not rely on the initiative of the victim or his next of kin.⁸¹⁷ Consequently, it carries with it a positive obligation to ensure that laws and policy on forced labour (or slave labour, the term used in Brazil) do not only look good on paper but can actually be exercised and claimed.

These principles can be used in support of a proposition that the Court does not simply suggest the criminalisation or otherwise of the imposition of forced labour, or of the infringement of any other right protected under the Convention. In fact, in *Setimo Garibaldi v Brazil*⁸¹⁸ the American Court adopted the reasoning in the *Velasquez Rodriguez* case and added that the obligation set out in article 1(1) can be complied with in different ways, depending on the particular right a Member State is obliged to guarantee and the particular character of the case.⁸¹⁹ In essence, all rights set out in the Convention, although interdependent, are different and may require unique measures of protection and enforcement. Therefore, what needs to be there is an effective mechanism, whether civil or criminal, designed to protect the rights, punish those who infringe them and provide for compensation to those affected by the impairment of the rights.

Also intrinsically linked to the Court's interpretation is article 25(1) of the Convention, which this discussion seeks to employ to augment the obligation arising on State Parties with regard to forced labour. Article 25(1) reads as follows:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate

⁸¹⁶ Para 167.

⁸¹⁷ Para 177.

⁸¹⁸ Judgment of September 2009 at para 111.

⁸¹⁹ The court in the *Velasquez* case held that the duty to prevent human rights violations could be exercised through legal, political, administrative and cultural means. See para 175.

his fundamental rights recognised by the constitution or laws of the state concerned or by this convention, even though such violation may have been committed by persons acting in the course of their official duties.⁸²⁰

It can be concluded from this provision that the State Party to the Convention must have effective judicial forums that will enable citizens to access redress whenever there is an impairment of the rights protected under national law or those protected under the Convention. In the case of *Alfredo Lopez Alvarez v Honduras*,⁸²¹ the Court held that the judicial recourses established must not exist as a formality, but must be effective in the sense that a victim must be given a "real opportunity to present a simple and prompt recourse that allows them to obtain, in their case, the judicial protection required". Clearly then, there must be a guarantee that judicial bodies exist that victims of forced labour can approach, and it must not be unnecessarily difficult for the victim who seeks a remedy to approach a court and present his claim so as to obtain the specific judicial protection he seeks.

The case of *Jose Pereira v Brazil*⁸²² is a good example of a petition where article 1(1) and article 25(1) were invoked in an allegation bearing on the violation of the right to be protected from forced labour under article 6(2) of the American Convention. In their petition to the Inter-American Commission of Human Rights, a group of human rights activists alleged that Jose Pereira and one other worker had been shot following an attempt to escape from an estate farm they had been working in. It was further stated that together with other workers, they had been lured with false promises concerning working conditions only to discover they had to work forcibly, without the freedom to leave and under inhumane and illegal conditions.⁸²³

According to the petitioners, the facts represented a failure on the part of the Brazilian government to keep to its obligations under the *American Convention* due to its failure to respond effectively to the complaints regarding the practices

⁸²⁰ Also see article 8(1) which establishes the right to a fair trial.

⁸²¹ Judgment of February 2006 at para 137.

⁸²² Report No 95/03 of the Inter-American Commission on Human Rights. It has to be noted here that this petition was concluded in a settlement agreement and thus did not proceed to the American Court. It is cited here to demonstrate how litigants have used articles of the Convention previously in an attempt to hold Brazil to the obligation it incurs therein.

⁸²³ Para III (12).

outlined, notwithstanding that they were common in that region.⁸²⁴ They further argued that Brazilian legislation provided for the criminalisation of this conduct. That is, in addition to labour laws that establish the rights of workers to acceptable working conditions and a minimum wage, Brazil had specific laws that prohibit and criminalise subjecting workers to labour in conditions akin to slavery.⁸²⁵ Despite the existence of these laws and previous reports of conduct violating them, there had been no prosecutions of perpetrators.⁸²⁶ Moreover, it was common for police authorities to pay no attention to cases of vigilantes who sought to persecute workers who had escaped from forced labour sites.⁸²⁷ The Ministry of Labour was also not keen to raise and address issues of labour violation.⁸²⁸

The facts as alleged in the *Jose Pereira* case highlight the importance of the obligations arising from article 1(1) of the Convention as interpreted by the Court in the *Velasquez Rodriguez* case. It demonstrates that the existence of laws on forced labour is futile if complemented by an enforcement system that is not committed to ensuring a thorough investigation of the violation of human rights. In terms of the settlement agreement, Brazil undertook to ensure the prosecution of the perpetrators in the Jose Pereira case and amend the legislation so that future offenders are prosecuted accordingly.⁸²⁹ In addition, the government undertook to improve measures to monitor and repress slave labour, as will be seen below.⁸³⁰

Whereas a small number of contentious cases on forced labour were found, it can be concluded that the American Court's interpretation of the general obligations arising from the Convention sheds light on how the obligations to suppress forced labour ought to be viewed. Hence, it can be safely submitted that the court has been instrumental in the regional understanding of forced labour insofar as it is prohibited in the *American Convention* and the *Forced Labour Convention*, as well as the

⁸²⁴ Para III (13).

⁸²⁵ Para III (16).

⁸²⁶ Para III (16).

⁸²⁷ Para III (16)(17)(19)(20).

⁸²⁸ Para III(17).

⁸²⁹ Para II and IV.

⁸³⁰ Para IV.2 of the agreement. Also see para 4.5.2 below.

obligations accruing to State Parties. It is also noteworthy that the court takes cognisance of the ILO forced labour instruments when interpreting the concept for the purposes of its Convention. This brings compliance closer to home in the sense that the ILO *Forced Labour Convention* will be used to interpret forced labour where the particular State Party has ratified it. Moreover, it can be seen that within the Inter-American system State Parties to the *American Convention* have the autonomy to choose what form of legal sanction they apply to forced labour, be it of a civil or criminal nature, as well as the administrative mechanisms to enforce the sanction.

The influence of the Inter-American human rights system on Brazil is conspicuous in the sense that Brazil has previously been held to its obligations concerning forced labour under the *American Convention* in the light of the *Jose Pereira* case. The system has shaped responses adopted by Brazil to suppress and eliminate slave labour within its borders.⁸³¹ In an attempt to maintain a logical flow in the presentation of this discussion, slave labour will be the topic considered in the next section below.

4.3.3 Scope and extent of slave labour in Brazil

The study of the scope and extent of slave labour as it occurs in Brazil must be performed with caution. This is because much of the research and analysis emanating both from the government and from academics dwells on slave labour as it occurs in rural areas, that is, on farms or mining campsites. Currently, much of this research does not give an indication of whether or not there are instances of slave labour in urban areas.⁸³² It will be recalled that the purpose of this thesis is to

⁸³¹ Paras 4.5.1 and 4.5.2 below.

⁸³² While some sources choose the more general term of slave labour, some choose "rural slave labour", a term which suggests the limited scope of the concept under discussion. See for example Sakamoto "Slave Labour in Brazil" 15; Costa *Fighting Forced Labour* 1, in comparison with McGrath 2012 *Antipode* 1005-1028. Some texts mention the incidence of slave labour in urban areas, more particularly in the garment sector, and traces of forced sexual exploitation, but do not provide in-depth analysis of these practices. See for example Figueira 2012 *Studies in Unfree Labour* 252-253; Antero 2013 *Policy Studies* 89-111. In McGrath 2012 *Antipode* 1005-1028 a comparison of slave labour in the garment sector (which is a sector common in urban areas) and sugar cane farming was performed to identify the extent of the degrading working

examine forced labour in its entirety in the private economy, whether it occurs in rural or urban areas. It will also be recalled that it has been submitted in this thesis that the peculiarities of forced labour may be different from one jurisdiction to another.⁸³³ Because this discussion seeks to use the Brazilian jurisdiction for comparative purposes, it is prudent to adopt the form that has already been well researched so as to obtain comprehensive data and thorough analysis from which sound submissions can be made.

The starting point is to note that Brazil became one of the first countries to publicly acknowledge the existence of slave labour within its borders in 1995.⁸³⁴ Prior to this, slave labour was known to exist but largely ignored and its existence was even denied.⁸³⁵ As seen from the facts in the *Jose Pereira* case, the violation of workers' rights on Brazilian farms was a common occurrence that for the most part went unpunished and unaddressed. The settlement agreement between the government of Brazil and the petitioners in this case seems to have acted as a catalyst that compelled the government to make an effort to monitor and suppress slave labour in all of the states in Brazil. This effort has, as will be shown below, culminated in the production of comprehensive empirical research and data that indicates the extent of slave labour in Brazil and which industries are mostly affected.

Statistical data from the Ministry of Labour and Employment indicates that various industries in the agricultural sector account for the largest incidences of slave labour in Brazil.⁸³⁶ These industries include livestock farming and arable production (for the cultivation of commodities such as sugar, soybean, coffee and cotton).⁸³⁷ In addition, instances of slave labour have been found in small-scale garment

conditions in both sectors. This confirms that, albeit understudied, slave labour in urban areas occurs.

⁸³³ See in this regard chapter 3 above in comparison with this chapter. This line of argument will also be followed in chapter 6 below.

⁸³⁴ Costa *Fighting Forced Labour* 7; Sakamoto "Slave Labour in Brazil" 17.

⁸³⁵ Costa *Fighting Forced Labour* 7.

⁸³⁶ Phillips and Sakamoto 2012 *SCID* 288, 293; Costa *Fighting Forced Labour* 9,44-47; Sakamoto "Slave Labour in Brazil" 29. The statistics of the Ministry are based on data collected between 2003 and 2007 and are the latest available results that have been put within the context of theoretical knowledge on slave labour.

⁸³⁷ Phillips and Sakamoto 2012 *SCID* 288, 293; Costa *Fighting Forced Labour* 9,44-47.

production⁸³⁸ and within metal work production.⁸³⁹ Whilst arable production plays an important role in the Brazilian economy, the country is said to be the largest exporter of beef and beef by-products.⁸⁴⁰ Hence, to meet the demands associated with the expansion of their production, farmers have been seen to employ the use of slave labour to cultivate land in preparation for pasture production and for the clearing of forests to increase farmlands, thus making the beef production sector the largest user of slave labour.⁸⁴¹

The production of sugar in Brazil has also been on the rise due to the increase in demand arising from the local use of sugar-based ethanol due to its eco-friendly characteristics.⁸⁴² As a result, large-scale production has seen a high demand for sugarcane cutting workers who are subjected to slave labour.⁸⁴³ Metal work production is also amongst one of the industries largely affected by slave labour.⁸⁴⁴ This is owed to the global attraction that pig iron has gathered in metal work production.⁸⁴⁵ In this regard, its demand has risen globally for use in the production of special steels, where mineral charcoal is of no use. The rising global demand has thus led to a rise in deforestation through the use of slave labour.⁸⁴⁶ According to statistics based on data recorded between the year 2003 and 2007 by the Ministry of Labour and Employment, men and women alike are affected by slave labour.⁸⁴⁷ However, more men than women are affected, a characteristic which has been pointed out as owing to the nature of the work involved.⁸⁴⁸ Where women

⁸³⁸ McGrath 2012 *Antipode* 1005-1028.

⁸³⁹ Costa *Fighting Forced Labour* 46.

⁸⁴⁰ Phillips and Sakamoto 2012 *SCID* 288, 293; Costa *Fighting Forced Labour* 45; Sakamoto "Slave Labour in Brazil" 29.

⁸⁴¹ Costa *Fighting Forced Labour* 67,45; Phillips and Sakamoto 2012 *SCID* 290-293; Sakamoto "Slave Labour in Brazil" 28-29.

⁸⁴² Costa *Fighting Forced Labour* 45.

⁸⁴³ McGrath 2012 *Antipode* 1016.

⁸⁴⁴ Burberi *Contemporary Forms of Enslavement* 22.

⁸⁴⁵ Costa *Fighting Forced Labour* 46.

⁸⁴⁶ Burberi *Contemporary Forms of Enslavement* 22.

⁸⁴⁷ Sakamoto "Slave Labour in Brazil" 24-25.

⁸⁴⁸ Sakamoto notes that recruitment is more common in certain regions than in others because farm owners and *gatos* consider workers from there to be "hardworking" and "less demanding". See Sakamoto "Slave Labour in Brazil" 25; McGrath 2012 *Antipode* 1012.

were found to be victims, they would mostly be employed as cooks for the farmworkers.⁸⁴⁹

What can be understood from this is that rural slave labour in Brazil is most common in activities that involve agricultural work. The common characteristic amongst these industries is that they involve informal work, which at times is of a seasonal nature,⁸⁵⁰ meaning that the workers are mostly employed on a short-term basis. This notwithstanding, much of it involves the production of commodities that are demanded not only within the Brazilian market but also internationally.⁸⁵¹ The implication therefore is that producers are met with the challenge to meet not only the local demand for their products but also the international demand. Consequently, they become desirous of keeping production costs to a minimum. Achieving this involves compromising the freedom of workers and subjecting them to poor working conditions, conduct which qualifies as slave labour within the Brazilian framework.

Having identified the industries most affected, the next step is to ascertain how slave labour is executed through these industries or how workers end up in such situations. Slave labour in Brazil is mostly imposed on poor, illiterate and innumerate people who are willing to travel to distant farms and worksites in search of livelihoods.⁸⁵² It has been observed that most workers previously rescued from slave labour⁸⁵³ originate from areas with high levels of poverty, high unemployment rates and little prospect of human development.⁸⁵⁴ Labour recruiters, commonly known in Brazil as *gatos*, are mostly involved in "facilitating" workers from these regions to obtain work.⁸⁵⁵ However, this comes at a price that these workers will for the most

⁸⁴⁹ Sakamoto "Slave Labour in Brazil" 25.

⁸⁵⁰ McGrath 2012 *Antipode* 1016-1017; Costa *Fighting Forced Labour* 57, 67.

⁸⁵¹ See generally, Phillips and Sakamoto 2012 *SCID* 287-315.

⁸⁵² Sakamoto "Slave Labour in Brazil" 24-26; Costa *Fighting Forced Labour* 58, 64; Netter *World of Work* 14-15.

⁸⁵³ Rescue mission done under the Ministry of Labour by the Special Mobile Inspection Group between the years 1997-2002. See Sakamoto "Slave Labour in Brazil" 26.

⁸⁵⁴ Sakamoto "Slave Labour in Brazil" 26; Costa *Fighting Forced Labour* 61, 63-64.

⁸⁵⁵ Costa *Fighting Forced Labour* 63-73; Burberi *Contemporary Forms of Enslavement* 8; Sakamoto "Slave Labour in Brazil" 23-28.

part never be able to pay.⁸⁵⁶ The *gatos*⁸⁵⁷ employ various recruitment tactics that rely mainly on the manipulation of the economic position of potential workers, as will be seen below.

The first step in the recruitment process normally requires a *gato* to embark on a journey to one of the aforesaid impoverished regions to begin the process. His aim is to approach a vulnerable job seeker, whether in the person's home or elsewhere, with the false promise of employment with a constant and reasonable income.⁸⁵⁸ This is done bearing in mind that he must make an offer that appeals to the worker, hence the *gato* himself must also look appropriate for the task at hand by "adopting a specific appearance".⁸⁵⁹ Taking into account the economic status of their potential recruits, instances have been reported where *gatos* go to the extent of offering advance payments to the potential workers and provisions for their poor families, pending their travelling to the work destination.⁸⁶⁰

Recruitment (mostly affecting migrant workers) can also be done from hostels and boarding houses where job seekers reside whilst they are awaiting the next available job opportunities.⁸⁶¹ Sakamoto⁸⁶² observes that migrant workers constitute a very vulnerable group because they harbour no intention of establishing themselves in a specific place, and therefore normally have no place to call home. It is asserted that many of them migrated to Brazil a long time ago and thus no longer have contact with their families. As a result, their lives are spent on their own, lodging in hostels, with no stable group of companions.⁸⁶³ The migrants affected by slave labour are not only those of non-Brazilian origin. It has been observed that another group of

⁸⁵⁶ Previous experience shows that workers have only achieved their freedom only upon being rescued by officials or through escaping. The latter course of action may put their lives in danger. In this regard see Costa *Fighting Forced Labour* 56-59.

⁸⁵⁷ *Gatos* are normally appointed by landowners to recruit workers on a temporary basis. See Costa *Fighting Forced Labour* 68-69; Antero 2013 *Policy Studies* 98.

⁸⁵⁸ Crocitti and Vallance *Brazil Today* 613; Sakamoto "Slave Labour in Brazil" 25-27;

⁸⁵⁹ See in particular Burberi *Contemporary Forms of Enslavement* 8, where the author explains the type of address adopted; which is normally meant to emulate the North American concept of *cowboys*.

⁸⁶⁰ Burberi *Contemporary Forms of Enslavement* 8; Netter *World of Work* 14; Crocitti and Vallance *Brazil Today* 613; Sakamoto "Slave Labour in Brazil" 25-27.

⁸⁶¹ Sakamoto "Slave Labour in Brazil" 23; Costa *Fighting Forced Labour* 58-59.

⁸⁶² Sakamoto "Slave Labour in Brazil" 26-27.

⁸⁶³ Sakamoto "Slave Labour in Brazil" 26-27.

migrants consists of young people who want to establish themselves, move from their homes to "escape the limitations"⁸⁶⁴ of such places, but choose to maintain some form of contact with their families.⁸⁶⁵ However, those that completely cut their ties with their families are in the same position as the cross-border migrants, have no place to go and no families to assist them in the event that they fail to achieve their goals.⁸⁶⁶

Because they have either cut their ties with their families or live far from them, migrant workers have no choice but to reside in lodges and boarding houses.⁸⁶⁷ As they earn nothing when they are out of employment, they incur debt for their board and lodging and dining in the hostels. Therefore, when a *gato* recruits such a worker, he may offer to pay off the debt incurred and cover the recruit's transport costs to the work site.⁸⁶⁸ The newly recruited worker is therefore already indebted to his employer before he even commences his employ. Upon arrival at their workplace, workers are met with conditions very dissimilar from those represented by the *gato*. Furthermore, it is only at that point that they are notified of their indebtedness to the employer.⁸⁶⁹ In addition to this, they are expected to purchase workplace clothing and equipment, and are accountable for their own food, supplies and accommodation. Due to the remoteness of such worksites, the employers often own the food supply stores and sell food at inflated prices.⁸⁷⁰

⁸⁶⁴ Such as an actual or perceived lack of economic and personal progression arising from the poverty associated with their places of origin.

⁸⁶⁵ Sakamoto "Slave Labour in Brazil" 26. Also see significantly, Costa *Fighting Forced Labour* 70, where she notes that the desire to "escape" is sometimes based not only on economic necessity but is also influenced by family malfunction arising from the pressure imposed by the uncertain economic situation.

⁸⁶⁶ Sakamoto "Slave Labour in Brazil" 26-27.

⁸⁶⁷ Burberi *Contemporary Forms of Enslavement* 9. This author further notes that these lodging facilities are popularly known in Brazil as a contact place for those looking and those willing to offer jobs. The author further notes that it is quite common for hostel owners to collude with *gatos* to impose more debt on newly recruited workers before they depart.

⁸⁶⁸ Sakamoto "Slave Labour in Brazil" 26; Burberi *Contemporary Forms of Enslavement* 9; Costa *Fighting Forced Labour* 58-59.

⁸⁶⁹ Sakamoto "Slave Labour in Brazil" 26; Burberi *Contemporary Forms of Enslavement* 9; Costa *Fighting Forced Labour* 58-59.

⁸⁷⁰ Costa *Fighting Forced Labour* 59.

In essence, the debt arising from these transactions cannot be paid off, bearing in mind that it accumulates from the moment of recruitment and includes the costs related to, sustaining a livelihood at the workplace. This situation is thought to be the genesis of almost all situations of rural slave labour in Brazil. Thus, Burberi⁸⁷¹ observes that the imposition of debt is an important component of Brazilian slavery. In this regard, Costa⁸⁷² submits:

It is easy for *gatos* and landowners to dominate the workers: first, because it is they who determine for how long the workers must provide their services in order to pay off the debt (the amount of which is also decided on by the *gato*/landowner); secondly, although the debt may well be unfair and illegal, the workers' moral code dictates that all debts must be repaid. The latter is a symbolic and effective form of domination. Workers are imprisoned by the moral imperative (shared with their co-workers) to repay their debts, and this is enough for slavery to be perpetuated. Last but not least, employers exploit the illiteracy and innumeracy of workers who are mostly incapable of keeping a proper detailed account of their debts.

The debt thus puts the *gato* or landowner in a position of power from the moment of recruitment throughout the subsistence of the "employment" relationship. Because he determines the workers' indebtedness, the lifespan of the relationship is invariably at his discretion. The workers are rendered powerless⁸⁷³ and are faced with a situation they cannot redeem themselves from. As the employer or *gato* has overwhelming power, he can impose various means of exploitation on the workers, seeing that they cannot leave due to their moral obligations arising from their "workers' code of honour" that stipulates that all debts must be paid.⁸⁷⁴

⁸⁷¹ Burberi 2007 *Contemporary Forms of Enslavement* 15. Also see Costa 2009 *Fighting Forced Labour* 58.

⁸⁷² Costa *Fighting Forced Labour* 59.

⁸⁷³ Also see McGrath 2012 *Antipode* 1015.

⁸⁷⁴ Costa *Fighting Forced Labour* 64; Sakamoto "Slave Labour in Brazil" 27. Costa's assertion creates the impression that the code of honour can be in written format, authored by the employer, whilst Sakamoto's submission suggests that it need not necessarily be written, as a moral obligation can be created in the mind of the worker to the effect that he is in debt and cannot leave his employ until such debt is fully paid. See for example *Public Federal Ministry v Jose Gomes dos Santos Neto* Judgement No 2007.5101.811659-4 as discussed in ILO *Forced Labour and Human Trafficking: Casebook of Court Decisions* 2009 72, where it was observed that the affected workers had actually felt a moral obligation to stay on the job until they had fully paid their debt and that the employer had abused this moral obligation.

The imposition of debt on workers is most often accompanied by other practices that are degrading and compromise the freedom of workers. Having considered the issue of debt, it is easy to dispense with practices that touch on economic exploitation before proceeding to other conditions. The concomitant consequence of holding workers in an endless state of debt is the non-payment of wages or payment that is lower than the national minimum wage. Commonly, workers are expected to agree to a contract where the cost of the food provided is levied from their wages.⁸⁷⁵ Degrading working conditions have also been evidenced through the imposition of long working hours, a lack of respect for occupational health and safety, and a failure to provide medical attention to workers who sustain injuries or contract ailments in the workplace.⁸⁷⁶ Regarding their living conditions, the accommodation provided to the workers is normally sub-standard, and for the most part depends on the type of work the worker does. In work that involves the clearing of forests, makeshift accommodation is made from canvas or palm leaves.⁸⁷⁷

In addition to codes of honour fashioned in order to keep workers working, threats and actual violence or physical harm are used to inspire a sense of fear in them. These threats might include such as to inspire the fear of death, failing to provide for their families at homes, or not providing the necessary treatment if they fall ill or are injured. It has also been observed that fear is used as a tool to ensure that workers discharge their mandate satisfactorily.⁸⁷⁸ Costa⁸⁷⁹ observes that constant threats of physical harm and violence instil a sense of permanent fear that bars the workers from escaping or reporting the offending conduct. Closely connected with this is, as reported, the fact that the workplaces are constantly under surveillance by armed guards. The presence of armed guards is meant to instil fear in the workers, and convince them that any complaints regarding their work conditions or any attempt to escape will result in violence.⁸⁸⁰

⁸⁷⁵ Costa *Fighting Forced Labour* 50.

⁸⁷⁶ Costa *Fighting Forced Labour* 50-52.

⁸⁷⁷ Costa *Fighting Forced Labour* 48-49.

⁸⁷⁸ Costa *Fighting Forced Labour* 56.

⁸⁷⁹ Costa *Fighting Forced Labour* 56.

⁸⁸⁰ Costa *Fighting Forced Labour* 56, 62-63.

It may be inferred, then, that slave labour in Brazil is largely dependent on the exploitation of the vulnerable economic position of the poor. It was noted above that most workers who fall prey to such exploitation are from impoverished backgrounds and are in search of bettering their economic position and that of their families. However, identifying poverty as the sole contributor to the situation would not be a true representation of the causes of slave labour in Brazil. It is necessary to conduct a more nuanced analysis of the structural causes of slave labour in Brazil. Burberi⁸⁸¹ and Costa⁸⁸² observe that the historic land ownership regime in Brazil, where ownership was concentrated in the hands of a few individuals, is the root cause of the overwhelming poverty of many Brazilians. As noted above,⁸⁸³ after the abolition of slavery and the slave trade, the *Land Act* ruled that all unoccupied land would revert to the state, which in turn had the sole discretion to sell it, as opposed to giving it away, as had been the practice prior to the passing of the Act. Because it came at a price that many could not afford, only a few wealthy people could make purchases.⁸⁸⁴ The effects of this land regime are still felt today, despite the government's efforts to conduct land redistribution schemes, which have proved to be an onerous task.⁸⁸⁵ Whilst there have been movements to encourage land reform through support groups working with the government, the unwillingness of the landowners to sell continues to render the possibility of change bleak.⁸⁸⁶

Land is a valuable resource and that has the potential of improving the economic situation of most poor people. In order to establish the relationship between land issues and slave labour in Brazil, Costa⁸⁸⁷ submits:

Without land, a worker's income, normally low, becomes his mainstay in terms of survival. Items that could previously be grown (i.e. food) are transformed into goods that must be purchased. This undermines the principles of self-sufficiency that characterises peasant societies, in which land, family and work are central

⁸⁸¹ Burberi *Contemporary Forms of Enslavement* 25-26.

⁸⁸² Costa *Fighting Forced Labour* 33.

⁸⁸³ See para 4.2 above.

⁸⁸⁴ Cunha 2011 *Fordham Law Review* 1173-1174; DeWitt *Early Globalisation* 35.

⁸⁸⁵ Burberi *Contemporary Forms of Enslavement* 25-26.

⁸⁸⁶ Burberi *Contemporary Forms of Enslavement* 25-26.

⁸⁸⁷ Costa *Fighting Forced Labour* 33.

cultural categories in the construction of a system of ethics that guides the actions of family members, especially heads of the family.

In essence, the argument here is that unequal land distribution creates a situation of dependency on low incomes to support a worker and his family. However, the possession of land could reduce this dependency through its use as a means of production. Dependency on a low income perpetuates poverty in the sense that it fails to cover all the living expenses of the worker and his family. This therefore leads many to migrate to other regions in search of better opportunities of economic development.⁸⁸⁸ The continued possession of land by small-scale farmers has also been frustrated by international business policies that have promoted competitiveness and thus marginalised these farmers.⁸⁸⁹

The remoteness and isolation of worksites that utilise slave labour also contribute to the continued occurrence of the offence. According to Costa,⁸⁹⁰ the geographical traits of the Amazon region, which is the area in which most employers using slave labour carry out their operations, makes it difficult for captured workers to leave and for labour inspectors to reach such estates. Some estates can be accessed only through air travel, as there are no good roads.⁸⁹¹ Workers are more often than not unfamiliar with these estates because they are not accustomed to the area, and *gatos* and employers use this to further exploit them, knowing well that the chances of them escaping are slim.⁸⁹²

These findings suggest that rural slave labour in Brazil is mostly to be found in the informal sector, with workers from impoverished backgrounds being the target of employers and *gatos*. The enslavement takes place through a system of debt which puts the employer in a powerful position and creates a situation of dependency on the part of the worker. Once recruited, workers are subjected to various exploitative working conditions while working to pay the debts accumulated. Poverty and issues of land distribution contribute to the use of slave labour due to the inequality

⁸⁸⁸ Burberi *Contemporary Forms of Enslavement* 23-24.

⁸⁸⁹ Burberi *Contemporary Forms of Enslavement* 25-26.

⁸⁹⁰ Costa *Fighting Forced Labour* 60.

⁸⁹¹ Costa *Fighting Forced Labour* 60.

⁸⁹² Costa *Fighting Forced Labour* 60-61.

created and the workers' dependency on very low incomes. The vast areas of the estates on which slave labour occurs also increase the sense of impunity on the part of the offenders, since their practices are hidden and workers find it almost impossible to escape. This analysis suggests that the situation of labour in rural Brazil is unique to the jurisdiction, and may perhaps be thought to suggest that modern slavery in rural areas as a whole is different from modern slavery in urban areas. The occurrence of slave labour in urban areas remains a phenomenon that is somewhat under reported both in academic and preventative initiatives. This may also be taken to mean that the concentration of slave labour is overwhelming in rural areas, which is why so much attention is directed to it.

In conclusion, it is noteworthy that slave labour in Brazil and forced labour in the UK have much in common. Both practices commonly occur in the informal economy and are concentrated amongst the following industries: agriculture, construction, hospitality and catering, metal work production and domestic work.⁸⁹³ The findings of the research performed on these matters suggest that the genesis of both slave and forced labour is through the recruitment of workers. While the recruitment tactics may be distinct in some respects, they all have a common goal: to hold workers in perpetual debt. Hence, the imposition of debt bondage achieved through the imposition of recruitment fees or any other fees is common in both jurisdictions. Brazilian research mostly places the blame for the existence of slave labour on poverty, illiteracy, the isolation of workplaces and social inequality, while in addition to these factors, the UK identifies the operational characteristics of certain industries as propelling forced labour. Subcontracting and tied-visas are also seen as causes of forced labour in the UK. In both jurisdictions, migrant workers stand to be most vulnerable to the practices. Taken together, these findings provide further support for the proposition that there is a need to settle on a framework wherein the occurrence of forced labour is closely studied, since the causes of forced labour may be unique to particular jurisdictions.

⁸⁹³ The occurrence of forced and slave labour is common amongst some industries, whilst some instances were particular to a single jurisdiction. See para 3.3.3 above on the scope and extent of forced labour in the UK.

4.4 The relationship between slave labour and human trafficking in Brazil

The above study of the history of slave labour in Brazil has included the statement that Brazil was the largest slave importer in the 1800s. Whilst transporting captured African tribesmen over the Atlantic in the cramped holds of wooden ships characterised slave trading in the nineteenth century, human trafficking in modern times is differently executed and it remains a common and illegal practice. The relationship between human trafficking and forced labour is undisputable, but this study has emphasised the need to have systems that fully recognise the relationship and distinction between the two concepts.⁸⁹⁴ This opinion is based on the observation that some systems⁸⁹⁵ address forced labour in light of the trafficking framework as opposed to establishing separate mechanisms for the two crimes. This section of the argument seeks to identify whether or not the Brazilian framework takes cognisance of the differences between human trafficking and slave labour, so as to ascertain if they are addressed simultaneously.⁸⁹⁶

Brazil is a signatory to the *UN Trafficking Protocol*⁸⁹⁷ and is thus bound to criminalise human trafficking. The *American Convention*, which places legal obligations on Brazil, also establishes that the slave trade and traffic in women shall be prohibited.⁸⁹⁸ Brazil therefore has an obligation under the *American Convention* to set up a system that can properly respond to the protection of the right not to be subjected to forced labour. The obligation incurred under the ILO *Forced Labour Convention* requires the criminalisation of the offence and the establishment of measures to repress the practice.⁸⁹⁹

⁸⁹⁴ See paras 2.4 and 3.4 above.

⁸⁹⁵ The UK previously addressed forced labour through a human trafficking framework. See para 3.4 above. The opinion maintained in this thesis is that South Africa currently predominantly addresses forced labour through a human trafficking framework based on its *Prevention and Combating of Trafficking in Persons Act* 7 of 2013. See chapter 5 below.

⁸⁹⁶ Compliance by Brazil with its international obligations towards human trafficking is irrelevant to this discussion. The objective is to find out whether slave labour and human trafficking are treated as distinct offences and how they are applied in relation to each other.

⁸⁹⁷ See para 2.4 above on the definition of human trafficking by the Protocol.

⁸⁹⁸ Article 6(1).

⁸⁹⁹ Article 25 of the Convention. See also para 2.6.2.1 above.

The Brazilian approach to addressing human trafficking and slave labour has always treated the two as separate but overlapping offences. That is, before the amendment of the *Brazilian Penal Code's* provision on slave labour,⁹⁰⁰ human trafficking was still addressed on a separate provision. Section 207 provides the following concerning human trafficking:

Enticement of workers, with the aim of taking them from one location to another in the national territory: Penalty- imprisonment of 1 (one) to 3 (three) years and a fine. The same penalty shall be incurred by whosoever recruits workers outside of the workplace, in the national territory, through fraudulent means or the recovery of any sum from the worker...

Sakamoto⁹⁰¹ and Costa⁹⁰² observe that section 207 is crafted to address the recruitment of workers through enticement by *gatos*, which is a form of internal trafficking. Having considered the mode of recruiting workers into slave labour above,⁹⁰³ it is safe to submit that section 207 was framed taking into account the particularity of the internal trafficking of workers in Brazil.

In this case, a relationship is established between slave labour and human trafficking in the sense that workers are internally trafficked with the purpose of exposing them to slave labour. Taking into account the statistics of workers⁹⁰⁴ who have been found to fall prey to this trafficking, it is submitted that most of slave labour in Brazil occurs due to this internal trafficking, which establishes an overwhelming relationship between the two offences. This notwithstanding, the legislature still sees the need to address both offences, albeit in a similar code, under two separate

⁹⁰⁰ See para 4.3.1 above on the amendment of section 149 in 2003. In essence, even before amendments to the slave labour provision were made, human trafficking was addressed under a separate provision. Hence, in comparison with the UK, the Brazilian amendment was not aimed at separating the two offences, but rather solely at improving the slave labour provision. In contradistinction, the UK's series of amendments and new Acts was based on having in place a framework that addresses forced labour and human trafficking as separate offences. See par 3.4 above.

⁹⁰¹ Sakamoto "Slave Labour in Brazil" 15.

⁹⁰² Costa *Fighting Forced Labour* 20.

⁹⁰³ See para 4.3.3 above.

⁹⁰⁴ See Sakamoto "Slave Labour in Brazil" 15-33, where the author writes extensively on the internal trafficking of workers for slave labour in Brazil by using statistics obtained from the Brazilian Ministry of Labour and Employment. This discussion does not seek to go into such depth concerning this matter, since it looks at forced labour as a whole rather than attending to whether it arises as a result of human trafficking or not.

provisions. This implies that cognisance is taken of the differences in effect on people's rights when either one of the offences is committed. Of particular interest to this discussion is the fact that the trafficking framework has been framed in such a manner as to address the peculiar practice of worker enticement that subsequently leading to slave labour. If section 207 were used as the sole means to address slave labour, then workers who found themselves in slave labour not arising from trafficking would be left without a remedy. Notably also, as will be seen below, having slave labour and trafficking as two separate offences has assisted Brazil put together mechanisms that are specially crafted to address slave labour and its effects, and has helped liberate victims.

4.5 Brazilian responses to slave labour

The foregoing discussion has identified that Brazil incurs obligations at international law to protect all people within its jurisdiction from forced labour. In terms of the ILO *Forced Labour Convention*, there is a requirement on the state that ratifies the Convention to establish measures to penalise forced labour.⁹⁰⁵ With regards to the *American Convention*, what needs to be present is an effective mechanism to ensure the full protection and fulfilment of the right.⁹⁰⁶ It was also noted that slave labour in Brazil is a complex problem that mostly thrives through the imposition of debt on poor workers who are willing to travel to distant farms and work camps in search of work to improve their lives. The remoteness of the workplaces it occurs in exacerbates the impunity of offenders. Nevertheless, the ILO has classified Brazil as demonstrating leadership in fighting forced labour in the 21st century.⁹⁰⁷ The purpose of this segment, therefore, is to identify how Brazil has acted to meet the demands placed on it by the obligation to eradicate slave labour within its borders. The main objective is to find out if the Brazilian labour law framework participates in the mechanisms put forward to combat slave labour.

⁹⁰⁵ Article 25.

⁹⁰⁶ Para 4.3.2.3 above.

⁹⁰⁷ ILO *A Global Alliance Against Forced Labour and Trafficking* 41.

4.5.1 Legislative responses⁹⁰⁸

4.5.1.1 The Brazilian Penal Code

In addition to the *Constitution of Brazil*, 1988,⁹⁰⁹ the *Brazilian Penal Code* serves as the chief instrument employed in sanctioning slave labour. Before its 2003 amendment, section 149 remained too general in its prohibition of slave labour. It prohibited reducing someone to conditions analogous to that of a slave but failed to elucidate the scope and extent of that general provision. Costa⁹¹⁰ observes that this posed problems of interpretation in the sense that it blurred the line between modern slavery and colonial slavery, thus making it difficult to discern exactly what conduct was being prohibited.

The capacity of legislation to make a distinction between forced labour and slavery is important to this discussion, as previously seen.⁹¹¹ Hence Costa's observation highlights the actual difficulties of interpretation met in practice where the legislation makes a blanket prohibition of slavery without expounding on the scope of the offence. In the case of Brazil, the general provision was interpreted by government officials mainly in the light of colonial slavery, an interpretation that was not entirely correct.⁹¹² A need was therefore identified to clarify the provision so that it properly reflected the conduct being prohibited.

⁹⁰⁸ Owing to Brazil's legislation being written in Portuguese, this discussion uses the English versions of the relevant legislation as translated and discussed in secondary sources.

⁹⁰⁹ The *Brazilian Constitution* provides that the Federal Republic is founded on principles of human dignity in terms of article 1(iii) and upholds and protects the "social values of labour and of free enterprise" under article 1(iv). Hence it prohibits inhuman and degrading treatment (article 5) and stipulates that "economic order founded on the appreciation of the value of human work and on free enterprise" is essential in order to ensure social justice (article 170). These provisions may be used in an argument against slave labour. The Constitution may also be used with regards to its power to impose economic sanctions on those using slave labour. In particular, article 243 (as amended by Amendment No 81 of 5 June 2014) provides that all rural or urban real estate on which slave labour is found to have occurred shall be expropriated without compensation.

⁹¹⁰ Costa *Fighting Forced Labour* 16.

⁹¹¹ See paras 2.3.1, 3.3.2.1, 3.5.1.1.1 and 4.3.2.2 above.

⁹¹² Costa *Fighting Forced Labour* 14.

It was noted above and throughout this discussion that with reference to section 149 and concerning forced labour, Brazil has chosen to use "slave labour" as an all-inclusive term to denote forced labour and degrading working conditions. Costa⁹¹³ emphasises that the concept of slave labour adopted by Brazil should not be misinterpreted to imply colonial slavery. She further notes that in order to clear away the misconceptions in practice, terms such as modern-day slave labour or debt slavery are often used within the Brazilian context.⁹¹⁴ It is evident, therefore, that slave labour in Brazil is predominantly addressed under criminal as opposed to labour law. The key question, then, is how section 149 is useful to labour relations in Brazil and how it can be used in support of this thesis.

Section 149 can be said to classify slave labour as an offence that occurs due to a lack of respect for workers' rights, and subsequently violates those rights. If that is so, the *Brazilian Penal Code* places the criminal offence of slave labour within the context of labour law, in that it suggests that even though it is a criminal offence it has labour law implications that result in the actual offence itself. Section 149 thus presents an example of how criminal law and labour law can be used in conjunction to proscribe slave labour and, for purposes of international law, forced labour. To illustrate this and put it in context, the two cases below demonstrate how both criminal and labour courts of Brazil have applied section 149 from a criminal and labour perspective.

In *Public Ministry of Labour v Lazaro Jose Veloso*⁹¹⁵ an inspection by the Mobile Inspection Unit uncovered an incident where aspects of slave labour were present in a work camp. Various poor working conditions were cited. The employer allegedly withheld wages and failed to ensure the provision of medical attention and care to workers in cases of injury and illness arising in the workplace. In addition, the employer ran a store within the camp wherein food, work clothing and tools were exclusively purchased. In applying section 149 to the facts at hand, the Labour Court

⁹¹³ Costa *Fighting Forced Labour* 13.

⁹¹⁴ Costa *Fighting Forced Labour* 13.

⁹¹⁵ Judgement No 218/2002 of April 2003. These cases were accessible only through ILO publications. They could therefore not be referenced as primary sources. See ILO *Forced Labour and Human Trafficking: Casebook of Court Decisions* 2009 71.

concluded that the operation of a shop was a form of debt bondage (debt bondage is a form of slave labour under section 149) orchestrated to keep the workers in their job. In that regard, the Court stated that debt bondage had harmful effects on workers in the sense that it resulted in the withholding of wages. By and large, the non-payment or withholding of wages in labour law infringes on a worker's right to be remunerated for his labour and skill. Here we have the Court applying a criminal law provision to address a criminal offence that inextricably has an effect on labour rights, and not shying away from awarding damages that seek to make a reparation to the labour rights of the victims.⁹¹⁶

The Federal Court⁹¹⁷ in *Federal Public Ministry v Gilberto Andrade*⁹¹⁸ was the first in 2008 to secure a criminal conviction on the offence of slave labour. During an inspection conducted by the Mobile Inspection Unit, it was found that slave-like conditions had been imposed on nineteen workers in the employer's work camp. The workers' health and safety were at risk and where they were living was extremely. They had no access to drinking water, there was no sanitation, and there was no safety equipment for the job they were engaged in. In addition, their wages had been withheld for a period of five months, and they had had no rest periods, even during weekends. It was found that the workers had been charged a fee upon recruitment and were prevented from paying it off through the charging of inflated prices of food, tools and work garments bought exclusively within the owner's estate. The Court also took into account that the work camp was in a remote area, a fact which made it difficult for the workers to escape.

The Court found the employer guilty of subjecting the workers to degrading living and working conditions and restricting their movement. It characterised the employer's conduct of keeping the workers under constant surveillance, intimidating

⁹¹⁶ The court ordered that the employer pay the workers compensation for moral damages and penalties for failure to pay wages.

⁹¹⁷ Federal courts in Brazil have jurisdiction of a criminal nature and are empowered to make pronouncements on federal crimes. See generally Crocitti and Vallance *Brazil Today* 5. Slave labour is classified as one of the federal crimes the courts may investigate and prosecute.

⁹¹⁸ Judgement No 2000.3.7.00.002913-2 of April 2008 as cited in ILO *Forced Labour and Human Trafficking: Casebook of Court Decisions* 2009 72-73.

them and offering them violence as an aggravating factor that made the workers fearful to escape. The Court found that the facts at hand were enough to secure a criminal conviction of fourteen years with respect to the imposition of slave labour and fraudulent recruitment.⁹¹⁹ In addition, the Court ordered that the employer pay the workers the withheld wages, which were calculated in terms of the number of days the Court deemed appropriate, taking into account the gravity of the offence. In doing so, the Court measured the value of a single day according to the economic status of the employer. The Court in this case therefore took into account the fact that the employer had seven farms, amongst other possessions, and thus decided that the value of a day must be five times the minimum wage in respect of the wages he ought to have paid.

Taken together, the pronouncements of the two courts make the point that labour and criminal courts can apply section 149 in distinct but quite similar ways. Even though it cannot make a criminal conviction, a labour court can make an order touching on the labour aspects of the offence. On the other hand, a court that is empowered to impose a criminal conviction pertaining to section 149 has previously done so, but also went a step further to impose an additional remedy that touches on the labour rights of those affected by the offence.

It was noted above⁹²⁰ that with regard to the ILO, poor working conditions in themselves do not constitute forced labour. At the same time, labour inspectors have in practice found it difficult to draw a line between mere degrading working conditions and forced labour.⁹²¹ Section 149 departs from the ILO and UK approach by not being too restrictive in its inclusion of degrading work conditions as slave labour. This approach arguably reflects the aspirations of UK forced labour researchers: that forced labour needs to be addressed in terms of a continuum of exploitation as opposed to as an isolated criminal offence.⁹²² The Brazilian concept of

⁹¹⁹ A conviction was also made in respect of section 211, which is not relevant to this discussion.

⁹²⁰ Para 2.2 above.

⁹²¹ Para 3.3.4 above.

⁹²² Skrivankova 2010 *JRF Programme Paper 7-18*. See para 3.3.4 above for a detailed analysis of the continuum of exploitation.

slave labour thus ensures that whilst the offence is punished as criminal, the express inclusion of degrading working conditions brings in the element of labour law.⁹²³

Last but not least, it has been observed that section 149 of the *Brazilian Penal Code* was tailored to address the particularities of slave labour as it occurs in Brazil.⁹²⁴ This highlights the importance of developing research and knowledge-generating platforms to encourage research output and knowledge sharing on issues of forced labour.

4.5.1.2 Labour legislation

Brazilian labour legislation does not specifically proscribe slave labour. However, it is observed that slave labour in Brazil is commonly associated with the violation of other legislation, which when alleged may increase the chances of securing a conviction.⁹²⁵ Consequently, a worker can allege a violation of labour legislation in addition to section 149 of the *Penal Code*. For instance, in *Public Ministry of Labour v Lazaro Jose Veloso*,⁹²⁶ where the Public Ministry of Labour alleged a violation of section 149 by an employer, the court invoked the failure to pay social contributions by the said employer as a harmful effect caused to the society by the use of slave labour. This demonstrates that in addition to a violation of section 149, an employer who uses slave labour may be found guilty of violating labour legislation that regulates social security payments and or any other relevant labour legislation. Hence, criminal law and labour law are treated as complementary in addressing issues of slave labour in Brazil.

⁹²³ See para 3.3.4 above.

⁹²⁴ *Costa Fighting Forced Labour* 17.

⁹²⁵ *Costa Fighting Forced Labour* 17.

⁹²⁶ *Public Ministry of Labour v Lazaro Jose Veloso (Fazenda Sao Luiz)* Judgment No. 218/2002 as reported in *ILO Forced Labour and Human Trafficking: Casebook of Court Decisions*. See para 4.5.2.1.3 below for a discussion of the facts and holding in this case.

4.5.2 Policy and administrative responses

It is observed that the efficacy of the Brazilian framework in combating slave labour is largely owed to the coordination and cooperation of government and the other social actors involved.⁹²⁷ This cooperation makes sense in terms of the observation that slave labour in Brazil raises issues of a social, economic, political, criminal and environmental nature concurrently.⁹²⁸ It must be noted that this initiative has its roots in the settlement agreement reached between the Brazilian government and the petitioners in the case of *Jose Pereira*.⁹²⁹ In the said settlement, the government made various commitments to ensure that it complied with its obligations under article 1(1) and 6(2) of the *American Convention*. Of particular relevance here is the commitment to monitor and suppress forced labour.⁹³⁰ The government pledged as follows:

Considering that the legislative proposals will demand considerable time to be implemented insofar as they depend on the action of the National Congress, and that the gravity of the problem of the practice of slave labour requires that immediate measures be taken, the state undertakes from this moment to: (i) strengthen the Public Ministry of Labour; (ii) ensure immediate compliance with the existing legislation, by collecting administrative and judicial fines, investigating and pressing charges against the perpetrators of the practice of slave labour; (iii) strengthen the Mobile Group of the Ministry of Labour and Employment and (iv) take steps along with the judiciary and its representative entities to guarantee that the perpetrators of the crimes of slave labour are punished.

What can be understood from this is that whilst legislation forms the context in which slave labour must be prohibited and punished, the role played by administrative institutions is also vital to ensuring an effective eradication of forced labour. This represents the position in international law regarding obligations accruing towards the protection and promotion of the right not to be subjected to forced labour under both the *Forced Labour Convention* and the *American*

⁹²⁷ Costa *Fighting Forced Labour* 77; ILO *The Good Practices of Labour Inspection* 13-14; Sakamoto "Slave Labour in Brazil" 17; Vuong *Global Eye* 1,9.

⁹²⁸ Costa *Fighting Forced Labour* 77.

⁹²⁹ See para 4.3.2.3 above.

⁹³⁰ Para IV.2 of the settlement agreement.

Convention.⁹³¹ In addition, it ensures that the law does not only look good on paper but is also capable of being effectively enforced through policies, administrative organs and social actors. The nature of this pledge also exhibits the urgency with which the problem of slave labour must be treated, taking into account what prevails within the jurisdiction. The following discussion investigates how the Brazilian government has implemented its pledge, more particularly with the aim of finding out if labour law administration and other relevant bodies play a role in this framework.

The genesis of the creation of institutions to help in repressing and monitoring slave labour began with the formation of the Executive Group to Eradicate Forced Labour (GERTRAF).⁹³² It represented a combined effort by seven ministries brought together under the coordination of the Ministry of Labour and Employment (MTE).⁹³³ Their coordinated efforts derive their authority from two sources; the National Plan to Eradicate Slave Labour and the National Commission to Eradicate Slave Labour (CONATRAE).⁹³⁴ The National Plan was drafted to bring the plans of all the institutions involved together in one document which was to serve as a guideline for the activities of the government and the other institutions concerned.⁹³⁵ The role of the CONATRAE is to oversee the implementation of the National Plan by bringing together representatives of the executive, legislature and judiciary and various institutions in civil society.⁹³⁶ The ILO has also contributed immensely to drafting the National Plan as part of its technical cooperation project in Brazil.⁹³⁷ As part of this

⁹³¹ See para 4.3.2.3 above for an analysis of the obligations arising on Brazil in terms of the *American Convention*. Para 2.6.2.1 gives a detailed analysis of the general obligations arising in terms of the *Forced Labour Convention*.

⁹³² Sakamoto "Slave Labour in Brazil" 17; Costa *Fighting Forced Labour* 77.

⁹³³ Costa *Fighting Forced Labour* 78. In addition to the Ministry of Labour and Employment, the ministries involved are those of Justice, the Environment, Water, Agriculture, Industry and Commerce, Agrarian Policy, and Welfare and Social assistance.

⁹³⁴ Costa *Fighting Forced Labour* 77-78.

⁹³⁵ Costa *Fighting Forced Labour* 78.

⁹³⁶ Costa *Fighting Forced Labour* 78.

⁹³⁷ Costa *Fighting Forced Labour* 78. The technical cooperation project was launched in 2002 and is entitled Combating Forced labour in Brazil. It is aimed at assisting government and non-government efforts to suppress forced labour in Brazil. See ILO 2008 http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_092663/lang--en/index.htm; ILO *The Good Practices of Labour Inspection* 14.

technical cooperation project, the ILO has also supported other projects of non-governmental organisations in raising an awareness of slave labour.⁹³⁸

What can be gathered from this is that the Brazilian framework is premised on bringing together government and private sector institutions in its endeavour to combat slave labour. This demonstrates a recognition on the part of the government that slave labour can best be repressed when there is harmonisation of the efforts of the affected stakeholders, since the offence results in a violation not only of criminal law but also of a myriad of other laws and rights. The settlement agreement in the case of *Jose Pereira* was a step in the right direction in that it moved the Brazilian government to be innovative in its effort to abide by its obligations at international law. This submission is based on the idea that these measures were formulated pursuant to the *Forced Labour Convention*,⁹³⁹ which at that time failed to expressly establish the need to involve labour institutions in combating forced labour.⁹⁴⁰ It has been submitted in this thesis that the general nature of the *Forced Labour Convention* gives autonomy to State Parties to determine the best measures to deal with the problem, without specifically binding them to involve labour institutions in their measures.⁹⁴¹

The events described above reflect the new standard proposed under the ILO *Protocol of 2014 to the Forced Labour Convention* which makes it legally binding for State Parties to develop, with the involvement of employers and workers organisation, national policies and plans aimed at ensuring an effective and sustained suppression of forced labour.⁹⁴² Furthermore, the implementation of such plans and policies must be executed through "systematic action by competent

⁹³⁸ Costa *Fighting Forced Labour* 78, 100-109. For example, the National Campaign for the Prevention of Slave Labour is a campaign-based project coordinated by the ILO and advanced through the voluntary efforts of communication and publicity agencies in Brazil. The project produces various campaign content to raise awareness amongst Brazilian workers. See Netter *World of Work* 16.

⁹³⁹ This is in addition to the *American Convention*, which was the chief instrument in question before the IACHR. The *Forced Labour Convention* is singled out here as the chief international instrument governing the subject of this thesis and to which all the jurisdictions referred to in this thesis are bound.

⁹⁴⁰ Article 25 of the *Forced Labour Convention*.

⁹⁴¹ See para 2.6.2.1 above.

⁹⁴² Article 1(2).

authorities and as appropriate in coordination with employers and workers organisations as with other groups concerned."⁹⁴³ A framework that harmonises all associated institutions also avoids a fragmentation of activities and actions taken to combat forced labour. The mode in which the Brazilian National Plan was crafted shows that the involvement of all concerned institutions in drafting a national plan helps in the sense that the objectives are all contained in a single document that can serve as the sole reference point to implementing national laws on slave labour. However, where a national plan is crafted to the exclusion of others, there might not be a meeting of minds in terms of the ideas, objectives and measures proposed.

Having identified the general framework upon which the Brazilian framework is based, the segment below examines the specific measures taken to monitor and suppress slave labour.

4.5.2.1 Government initiatives

4.5.2.1.1 Special Mobile Group (GEFM)⁹⁴⁴

The GEFM was formed in 1995 under the MTE and is considered the most significant mechanism in the government's eradication of slave labour.⁹⁴⁵ This is because the activities of other stakeholders depend on its effectiveness in identifying cases of slave labour on the ground. Thus the GEFM performs the specialised role of investigating workplaces for possible or actual violations of section 149 of the *Penal Code*, arising from tip-offs from non-governmental organisations such as the Pastoral Land Commission and workers who have managed to escape from estates using slave labour.⁹⁴⁶ The operations of the GEFM are unique in the sense that teams are made up of labour inspectors, labour prosecutors and the Federal

⁹⁴³ Article 1(2). Also see para 2.6.2.2 above.

⁹⁴⁴ Some sources refer to the GEFM as the Mobile Inspection Unit (MIU).

⁹⁴⁵ Sakamoto "Slave Labour in Brazil" 17; Costa *Fighting Forced Labour* 79; ILO *The Good Practices of Labour Inspection* 13-14.

⁹⁴⁶ Costa *Fighting Forced Labour* 79; ILO *The Good Practices of Labour Inspection* 28-29.

Police.⁹⁴⁷ When carrying out an inspection, a team of investigators is empowered to impose penalties immediately, free workers and initiate proceedings to prosecute employers who use slave labour.⁹⁴⁸ The mandate of these labour inspectors is not an easy one as they are normally met with reactions such as threats of and actual violence from landowners who are not willing to comply with the law and resist inspections.⁹⁴⁹ This notwithstanding, it is observed that the work of the GEFM has raised awareness to an extent among both workers and employers concerning their rights and obligations *vis-à-vis* one another, thus decreasing impunity.⁹⁵⁰

It must be noted that the GEFM owes some of its achievements to the cooperation of trade unions. Costa⁹⁵¹ notes that the contributions made by rural workers' trade unions, among others, contribute immeasurably to the work of the GEFM, since they assist workers who have fled to make a formal complaint with the GEFM following which an inspection is made. The GEFM therefore presents a form of labour inspection that is not limited to criminal law.⁹⁵² The involvement of various labour professionals alongside the police brings together two enforcement systems that are better suited to identifying conditions of slave labour in workplaces. This demonstrates that whilst slave labour is a criminal offence in terms of the *Brazilian Penal Code*, cognisance is taken of the contribution those specifically trained in labour law can make. The activities of this inspectorate also highlight the role played by trade unions in fighting slave labour by acting as agencies through which workers may make complaints of degrading working conditions.

From the UK perspective, an example of labour inspection can be drawn from the Gangmasters' Licensing Authority enforcement and compliance officers who carry out inspections on whether *gangmasters* abide by the *Gangmasters' (Licensing) Act*

⁹⁴⁷ Andrees and Belser "Strengthening Labour Market" 115-116; Sakamoto "Slave Labour in Brazil" 17; ILO *The Good Practices of Labour Inspection* 13, 25.

⁹⁴⁸ Andrees and Belser "Strengthening Labour Market" 115; ILO *The Good Practices of Labour Inspection* 32.

⁹⁴⁹ Costa *Fighting Forced Labour* 80-81; ILO *The Good Practices of Labour Inspection* 30.

⁹⁵⁰ Costa *Fighting Forced Labour* 79-80; ILO *The Good Practices of Labour Inspection* 40.

⁹⁵¹ Costa *Fighting Forced Labour* 79, 83; see also ILO *The Good Practices of Labour Inspection* 29.

⁹⁵² See in particular Andrees *Forced Labour and Human Trafficking* 13; Andrees and Belser "Strengthening Labour Market" 115, wherein it is observed that forced labour matters and inspections are normally left to the police in most jurisdictions. Also see para 2.6.3.1 above.

and its regulations.⁹⁵³ It was discovered that their inspections are not criminal inspections but are carried out to ensure compliance with the Act's licensing standards, which are mainly based on the requirement of the provision of acceptable working and living conditions for workers. This discussion has argued that this puts their mandate within the context of efforts to prevent and suppress forced labour in the UK. However, unlike the GEFM's the inspectors' authority is limited due to the limited scope of the *GLA*, which applies only to workers in the agricultural sector, the shellfish gathering sector, and packaging and processing arising within these sectors. The *MSA* does not specifically identify the role of labour inspectors in the suppression of forced labour in the UK, and neither does the *Brazilian Penal Code* in Brazil. That notwithstanding, Brazil sets itself apart in the sense that an active step has been taken to include the labour inspectorate within the efforts to end slave labour, together with other enforcement officials such as the police, as discussed above. Lastly, the Brazilian initiative properly reflects the standard of the *ILO 2014 Protocol on Forced Labour*, which requires that labour inspectors be equally involved in planning and implementing national policies for the eradication of forced labour.⁹⁵⁴

4.5.2.1.2 Payment of compensation and unemployment benefits to freed workers

Once workers are freed from situations of slave labour, the GEFM is empowered to order that they be paid compensation for the violation of their labour rights.⁹⁵⁵ Provision is also made for the payment of unemployment benefits.⁹⁵⁶ For the payment of physical and moral damages, complaints are made before the courts through the Public Ministry of Labour or the Public Federal Ministry.⁹⁵⁷ The government also provides for the payment of unemployment benefits to freed, workers which is a form of temporary relief to which actual victims of slave labour are entitled.⁹⁵⁸ The payment of compensation and/or unemployment benefits helps

⁹⁵³ See paras 3.5.1.1 and 3.5.1.1.2 above.

⁹⁵⁴ Article 1(2) and 2(c)(ii).

⁹⁵⁵ ILO *The Good Practices of Labour Inspection* 32; Costa *Fighting Forced Labour* 84-88.

⁹⁵⁶ ILO *The Good Practices of Labour Inspection* 32; Costa *Fighting Forced Labour* 84-88.

⁹⁵⁷ ILO *The Good Practices of Labour Inspection* 32.

⁹⁵⁸ ILO *The Good Practices of Labour Inspection* 32.

to prevent victims from receding into slave labour again.⁹⁵⁹ This initiative can also be seen in terms of article (1) of the ILO *2014 Protocol on Forced Labour*, which urges signatories to make provision for compensation. In this light the Brazilian approach can be seen as demonstrating an interplay between slave labour and social security. Certainly, the provision of social security can help avert the incidence of slave labour.

4.5.2.1.3 Labour courts

It was identified above that the Brazilian framework permits victims to pursue claims for the payment of physical and moral damages before labour and federal courts. Whereas prosecutions on cases involving slave labour are few, Costa⁹⁶⁰ observes that labour courts are playing an active role in hearing such matters and are more likely to make an award for compensation in favour of the victim. The interest in bringing this class of matters before labour courts is owed to the ILO through its awareness-raising initiative on slave labour amongst judicial officers.⁹⁶¹ The *Public Ministry of Labour v Lazaro Jose Veloso (Fazenda Sao Luiz)*⁹⁶² case is an example of a case where an issue of slave labour was brought before a Labour Court. While carrying out an inspection on an estate, a mobile inspection unit reported that workers were working in subhuman conditions with no freedom of movement at all. The workers were not being remunerated, they were being denied medical attention, and they were being kept in debt bondage by the owner. The Court emphasised that workers could be kept in continuous debt because the employer was the sole supplier of food, clothing and working tools. The Court dismissed the defence that this practice was common on remote estates and reasoned that if a shop is to be run in the estate, it must be run to assist workers. Where it is clear that it exists to create indebtedness manufactured to keep workers on job, then it cannot be justified. The Court proceeded to hold that a production system that is dependent on the indebtedness of workers is detrimental in three ways. Firstly, workers are

⁹⁵⁹ ILO *The Good Practices of Labour Inspection* 35.

⁹⁶⁰ Costa *Fighting Forced Labour* 86.

⁹⁶¹ Costa *Fighting Forced Labour* 87.

⁹⁶² See para 4.5.1.2 above.

subjected to degrading working conditions and not paid their wages. Secondly, the harm extends to society in the sense that the employer evades paying tax and social security contributions. Lastly, it is a cost to the State to combat this production system. The Court thus ordered the employer to pay penalties for the failure to pay wages, and ordered that payment of compensation be made to the workers for moral damages.

This case demonstrates that labour courts in Brazil are actively involved in deciding matters that touch on slave labour without being constrained by the fact that it is a criminal offence. What is also evidenced here is that a labour tribunal will more often than not follow a line of reasoning that principally touches on the violation of the labour rights of workers and the violation of relevant labour legislation.

In contradistinction, this discussion discovered that labour tribunals in the UK do not have the jurisdiction to prosecute forced labour cases in the strict sense of the term.⁹⁶³ However, that has not stopped the tribunals from making pronouncements on cases touching on exploitative working conditions, which when taken together may constitute cases of forced labour. The UK discussion has also shown that on many occasions, workers have preferred to approach labour tribunals as opposed to criminal courts to seek redress.⁹⁶⁴ This is because the workers believe it gives them the autonomy to choose which remedy to pursue before the courts. Hence, there is a need for legislation on forced labour to give the victims options on which forums to approach to seek redress, as seen in terms of section 47 of the *MSA*.

4.5.2.2 Private sector initiatives

4.5.2.2.1 Role of employers and businesses

Employers and businesses in Brazil are also involved in acting against the imposition of slave labour in Brazil. This takes place as an exercise in corporate social

⁹⁶³ Para 3.5.2.3 above.

⁹⁶⁴ Para 3.5.2.3 above.

responsibility on the part of enterprises operating within this jurisdiction.⁹⁶⁵ A Declaration on the Social Responsibility of Companies and Human Rights is one of the guiding agreements made by presidents of national companies, the Brazilian branches of multinational companies, and the banks.⁹⁶⁶ Signatories to this declaration undertake the responsibility of promoting and enforcing human rights in their business operations. Amongst other purposes, this is done to eradicate forced labour from their supply chains.⁹⁶⁷

The National Pact for the Eradication of Slave Labour is also used to monitor the actions of businesses and employers in the private sector.⁹⁶⁸ Signatory enterprises pledge to improve and support the improvement of labour relations in their business operations and in general. Commitments made in the Pact are fundamentally based on improving labour relations in business operations insofar as slave labour is concerned.⁹⁶⁹ In a nutshell, they include eliminating slave labour from production chains, supporting initiatives to reintegrate affected workers, supporting awareness measures on forced labour and combating tax evasion, a common practice in enterprises that use slave labour.⁹⁷⁰

In terms of the UK framework,⁹⁷¹ the Ethical Trading Initiative (ETI) is comparable in that it is a cooperative endeavour amongst companies, trade unions and NGOs that seek to advance workers' rights. Section 54 of the *MSA* requires commercial organisations to provide statements on an annual basis reflecting their commitment to non-tolerance of forced labour within their operations and supply chains.⁹⁷² Article 2(e) and (f) of the *2014 Protocol on Forced Labour* also suggests the importance of monitoring the supply chains of businesses. It is not yet clear how the UK will implement its provision in practice. Both examples indicate that it is important for

⁹⁶⁵ Costa *Fighting Forced Labour* 99-100.

⁹⁶⁶ Costa *Fighting Forced Labour* 99-100.

⁹⁶⁷ Costa *Fighting Forced Labour* 100.

⁹⁶⁸ Vuong *Global Eye* 1, 9; Costa *Fighting Forced Labour* 95-98; ILO *The Good Practices of Labour Inspection* 37.

⁹⁶⁹ Vuong *Global Eye* 1,9; Costa *Fighting Forced Labour* 95-98; ILO *The Good Practices of Labour Inspection* 2010 37.

⁹⁷⁰ Costa *Fighting Forced Labour* 95-98.

⁹⁷¹ Para 3.5.2.2 above.

⁹⁷² Para 3.5.1.2.4 above.

the effort to be collective amongst companies pledging to ensure that slave and forced labour do not exist within their operations and supply chains. For example, in Brazil, companies are governed by a single initiative (the National Pact for the Eradication of Slave Labour), which serves as the authority for the pledges companies make. The Pact is monitored by the Management Committee to Monitor the National Pact, which was established by the ILO and NGOs in Brazil,⁹⁷³ offering centralised supervision of the pledges companies make in terms of the Pact.

4.5.2.2.2 Workers' and employers' organisations

In addition to their contributions towards other strategies aimed at combatting slave labour, workers and employers' organisations have led rehabilitation programmes for workers who had been found to be victims of slave labour.⁹⁷⁴ This has been achieved with the combined efforts of local authorities and civil society groups. Rehabilitation has been done in the form of the reinsertion of workers into work so as to prevent them from falling victims again. An example can be drawn from the programme of reinsertion of workers established by companies in the steel industry in conjunction with the Citizens Charcoal Institute, an organisation that brings together companies operating in the industry, trade unions for workers in that industry and the ILO.⁹⁷⁵ The initiative is run through contracting freed workers into formal jobs with guaranteed respect for their labour rights.⁹⁷⁶ This shows how trade unions and workers' organisations can come together to create an environment to prevent the continuance of slave labour.

Similarly, trade unions in the UK⁹⁷⁷ have previously contributed to national efforts to end forced labour. The UK Trade Union Congress (UK TUC) has made a contribution to research potentially touching on forced labour through its report on vulnerable

⁹⁷³ Vuong *Global Eye* 1,9.

⁹⁷⁴ Costa *Fighting Forced Labour* 109; UNGIFT "The Role of Employers' Organisations, Businesses and Trade Unions" 9.

⁹⁷⁵ Costa *Fighting Forced Labour* 109-110; UNGIFT "The Role of Employers' Organisations, Businesses and Trade Unions" 9.

⁹⁷⁶ Costa *Fighting Forced Labour* 109-110.

⁹⁷⁷ Para 3.5.2.1 above.

labour. The National Farmers Union and the UK TUC were also important players in the enactment of the *GLA*, thereby attesting that given a chance, trade unions may in actual fact play a part in the implementation of legislative efforts towards eradicating forced labour. However, the inconspicuous role given to both of them in forced labour legislation and policy may affect their ability to do so. In both frameworks, trade unions have taken the initiative to assist workers who have fallen victims to forced labour, without legislation specifically acknowledging their role therein. However, in Brazil the slave labour policy specifically incorporates trade unions within mechanisms vital to addressing the problem of slave labour within the jurisdiction, thereby reflecting the aspirations of the 2014 *Protocol on Forced Labour*.

4.6 Conclusion

History attests to the fact that Brazil has faced numerous challenges in its endeavours to abolish slavery and the slave trade. In recent times, the rise of slave labour in the rural areas of Brazil has drawn the attention of the Brazilian government, which has led to the development of a framework from which much to be learnt. In its departure from the conventional forced labour approach, the Brazilian framework on slave labour, which includes the provision of degrading working conditions as conduct that qualifies to be prosecuted under the slave labour provisions, presents an important lesson to those concerned with addressing the offence of forced labour. In essence, it demonstrates that if cognisance is taken of the fact that forced labour is a criminal offence that arises as a result of a violation of certain labour rights, then the possibility arises to identify and uphold the role that labour law may play in addressing the offence. Whereas this standard is set in terms of Brazilian criminal law, a fact which does not support the argument of this chapter (and therefore of this thesis as a whole), the Brazilian framework is far from disappointing. It must be recalled that this thesis has posited that labour legislation presents a proper forum in which extensive provisions on forced labour and the role of labour law mechanisms may be elucidated.⁹⁷⁸ While that proposition still stands, the Brazilian framework seems to suggest otherwise. It might be possible to argue

⁹⁷⁸ See in particular para 2.6.2.2 above.

that it is not so much about which Act of parliament is used to outlaw forced labour, but instead about how well the government as a signatory to the *Forced Labour Convention* is prepared to apply that law in practice.

This submission is derived from the consideration that the *Brazilian Penal Code* is the key instrument applied to addressing slave labour in Brazil. However, that has not stopped the government from taking active steps in ensuring the formulation of initiatives that go beyond the criminal law to encompass an area of law that is normally ignored. The endeavours of state actors are brought together in terms of the GERTRAF, wherein seven ministries cooperate under the coordination of the Ministry of Labour. Most significantly, the National Plan to Eradicate Slave Labour combines into one document the aims of all the institutions involved and contains an enforcement mechanism to oversee the implementation of the Plan. The GEFM also supports the active role played by inspectors in identifying slave labour and freeing trapped workers. The staff of the GEFM includes, amongst others, labour inspectors, federal police and attorneys, thus expressly showing that investigating slave labour is not the sole responsibility of a police force. Trade unions, workers organisations and businesses are also involved in this framework, and have already made contributions to the suppression of slave labour. Lastly, Brazil is set apart from the UK because Brazilian labour courts may try slave labour cases. In doing so, labour courts have already made orders of reparation touching on the labour rights of those affected.

In conclusion, therefore, the Brazilian framework presents a progressive mode of dealing with the unique nature of slave labour within its borders, which is essentially based on integrating the functions of all the institutions concerned, because the offence results not only in a violation of the criminal law but also of several general human rights. It must be submitted that the Brazilian framework has informed the 2014 Protocol which, establishes new binding standards for addressing forced labour that are essentially based on the recognition of forced labour as a criminal offence that has labour law implications or arises as result of the violation of labour laws.

In Chapter five the discussion will consider the position of the law regarding forced labour in South Africa. This is done to identify how the South African framework currently addresses forced labour and whether the labour law can reasonably be said to feature within the framework.

CHAPTER 5

THE SOUTH AFRICAN APPROACH

5.1 Introduction

Forced labour is recognised as a human rights violation in terms of section 13 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) and a criminal offence to which criminal sanctions must accrue in terms of section 48 of the *Basic Conditions of Employment Act* 7 of 1997. It follows, therefore, as will be seen below, that South African labour legislation specifically prohibits the subjection of employees to forced labour and slavery. Other than this legislative intervention, labour law is quite silent on forced labour. The new South African human trafficking framework as introduced by the *Prevention and Combating of Trafficking in Persons Act* 7 of 2013, to be addressed later on, could also play a pivotal role in combating forced labour.

It is an established fact, at least in so far as this thesis is concerned, that forced labour is largely viewed and punished as a criminal offence.⁹⁷⁹ Be that as it may, the international examination of ILO standards and opinion has demonstrated that forced labour has implications that inevitably touch on the employment and labour rights of those affected. Although employing different measures in recognition of this, the comparative jurisdictions are also in agreement with this position. This therefore makes it necessary to consider, as was done with the comparative jurisdictions, whether the South African framework takes sufficient cognisance of the multi-faceted nature of the offence.

In setting out to establish this, the chapter engages in a critical discussion of the protection currently provided under the labour legislative framework and whether it matches the international standards on forced labour. The extent to which the

⁹⁷⁹ See for example the UK's *Modern Slavery Act* and the Brazilian Penal Code, which are the chief pieces of legislation employed by the two jurisdictions respectively to address and punish the offence of forced labour.

criminal framework provides protection is also considered in terms of the human trafficking framework. Without necessarily suggesting that there is not a need for a comprehensive transformation of the current framework using lessons derived from the comparative jurisdictions, the chapter focuses on finding solutions for forced labour within South Africa's current framework by engaging in an analysis of how the constitutional right not to be subjected to forced labour may be invoked to strengthen legislative protection. The chapter will furthermore highlight how the interrelated nature of the rights in the Constitution demands that forced labour be not confined to a violation of section 13 but that it also be seen as an affront to the founding values of the Constitution and a variety of other constitutional rights. In this regard the importance of eradicating forced labour in South Africa is underscored. In relation to that, a discussion will follow on the relevance to forced labour matters of the constitutional right to fair labour practices. The meaning and scope of this right will be assessed through the use of constitutional jurisprudence to aid the formulation of value judgements on the extent to which the right may be employed to respond to forced labour in South Africa.

Flowing from the above, arguments will be made to the effect that the constitutional framework justifies a shift and/or amplification of the forced labour approach in the direction of labour market regulation. As indicated above, experiences drawn from Brazil have shown that there is a need to have a framework that encompasses law enforcement but is not limited to criminal law only.⁹⁸⁰ Most importantly, the Brazilian experience has shown that the mere fact that criminal law is the quintessential vehicle for prohibiting the offence will not and should not stop a jurisdiction from formulating effective policies that go beyond the criminal law to encompass labour law and other parts of the law that stand affected.⁹⁸¹ An examination of both the Brazilian and the UK framework have highlighted the need to have a mechanism that addresses and prevents forced labour as a stand-alone offence, without necessarily linking it to human trafficking.

⁹⁸⁰ See in particular para 4.5.1.1 as read with para 4.5.2.

⁹⁸¹ For example immigration laws, where migrants, regular or irregular must be protected from involvement in forced labour.

In the light of the above, the aim of this chapter is to investigate and critique the current South African framework addressing forced labour and to determine whether this jurisdiction primarily views forced labour as a criminal law matter, or as a combination of both criminal and labour law. In doing this, the aim is chiefly to identify the role of the South African labour law in addressing this crime and whether improvement is necessary.

5.2 History of slavery in colonial South Africa

The study of the historical contexts of slavery in the three preceding chapters makes the point that slavery was previously a practice welcome in society and backed by law. Chapters three and four have also underscored the influence and role of the British in ensuring a complete abolition of slavery and the slave trade amongst the world's colonies and in the home territories of the colonial masters. The Brazilian historical experience *vis-à-vis* that of the UK has been used in this thesis to highlight the difference in the use of slavery and the slave trade by a colonial master on a colony.⁹⁸² In addition, it has also brought to the attention of the reader the influence of colonisation on the slave trade and slavery.⁹⁸³ Hence, as with Brazil, the use of slavery in colonial South Africa can be traced back to its first colonisation by the Dutch in 1652. A number of historians observe that the genesis of the institutionalisation of slavery in colonial South Africa arose upon the arrival of the Dutch East India Company (known as the *Verenigde Oostindische Compagnie* (VOC))⁹⁸⁴ in the Cape in 1652.⁹⁸⁵

The colonisation of South Africa began in the Cape⁹⁸⁶ in 1652, wherein the VOC built an outpost.⁹⁸⁷ Initially, the VOC's aspirations for the Cape were less than establishing

⁹⁸² Para 3.2 as read with para 4.2 above.

⁹⁸³ Paras 3.2 and 4.2 above.

⁹⁸⁴ The VOC was founded in the Netherlands in 1602 and was more than just a company in the sense that it had sovereign rights and the capacity to govern, as will be seen below.

⁹⁸⁵ Worden *Slavery in Dutch South Africa* 2-12; Shell 1992 *IJAHS* 289-290; Dooling *Slavery, Emancipation and Colonial Rule* 17-19; Worden *The Making of Modern South Africa* 12; Worden 2014 *Kronos* 23-44.

⁹⁸⁶ Some sources refer to the Cape Colony as the Cape of Good Hope and also according to its eras of colonisation. Initially, the Cape Colony was colonised by the Dutch, who became the first

a colony. The company's fundamental goal was to use the area for the purposes of establishing a refreshment station for its ships traversing the oceans between Europe and the West Indies.⁹⁸⁸ Hence, the Cape would merely serve as a place where the crews were refreshed and supplied with green foodstuffs for their onward journey. Thus the company engaged in small-scale agricultural activity (in the Company Gardens) to generate commodities to supply the foresaid vessels.⁹⁸⁹ Drawing from Worden's⁹⁹⁰ emphasis, the Cape was not an unoccupied area of land upon the establishment of the Dutch settlement in 1652.⁹⁹¹ The observations of other historians too point to the fact that the company's officials established interactions with the Khoi-Khoi, an indigenous people who were the inhabitants of the area around the Cape.⁹⁹² Historical accounts point out that the Khoi-Khoi were well-renowned pastoralists who became reliable barterers of livestock with the Dutch settlers.⁹⁹³

During the few years that the refreshment fort stayed operational, there was a need to maintain a viable supply of foodstuffs not only to supply the ships but also to maintain the livelihoods of the Dutch settlers at the Cape.⁹⁹⁴ Contrary to the

settlers and colonisers of the area, hence during this era some sources refer to it as the Dutch Cape Colony. As will be seen later on in this discussion, the British also at some point took over the Cape Colony and became its administrators and colonisers; hence it is commonly referred to as the British Cape Colony. The Cape Colony was situated in the area which is now in and around Cape Town. For the purpose of general interest it is noted that the Cape Colony had access to both the Atlantic Ocean and the Indian Ocean.

⁹⁸⁷ Worden *Slavery in Dutch South Africa* 2; Sakarai 1976 *Economic and Political Weekly* 1627; Viljoen 2001 *Agricultural History* 28; Fourie and Van Zanden 2013 *SAJE* 468; Fourie 2011 *Slaves as Capital Investment* 2-3.

⁹⁸⁸ Worden *The making of Modern South Africa* 12; Worden *Slavery in Dutch South Africa* 19; Fourie and Van Zanden 2013 *SAJE* 468-469; Berger *South Africa in World History* 22.

⁹⁸⁹ Thompson *A History of South Africa* 33; Worden *Slavery in Dutch South Africa* 3; Worden *The making of Modern South Africa* 12; Fourie and Van Zanden 2013 *SAJE* 468-469; Berger *South Africa in World History* 22.

⁹⁹⁰ Worden *The making of Modern South Africa* 9-11.

⁹⁹¹ Also see Beck *The History of South Africa* 33-35; Berger *South Africa in World History* 24 where the authors report that the first interactions between Europeans and the Khoi-Khoi at the Cape was with Portuguese sailors who were not interested in South Africa, although they had first landed in South Africa and established powerful control of maritime voyages in the Atlantic Ocean and created forts elsewhere in Africa.

⁹⁹² Dooling *Slavery, Emancipation and Colonial Rule* 18; Thompson *A History of South Africa* 33; Fourie and Van Zanden 2013 *SAJE* 468; Berger *South Africa in World History* 22-28.

⁹⁹³ Berger *South Africa in World History* 22-28; Fourie and Van Zanden 2013 *SAJE* 468; Dooling *Slavery, Emancipation and Colonial Rule* 18.

⁹⁹⁴ Berger *South Africa in World History* 26.

company's expectations, small-scale farming turned out not to be sufficient to attain this goal.⁹⁹⁵ In fact, the settlement was far from self-sufficient, and had a pressing need to import food from Europe.⁹⁹⁶ In addition, although a barter relationship had been established with the Khoi-Khoi, it did not always run smoothly, due to frequent occurrence of tensions.⁹⁹⁷ In the light of these challenges, it made business sense for the company to release some of its employees into freehold farming with an obligation to trade with the company at low prices.⁹⁹⁸

Agricultural production grew rapidly, as did the influx of other Europeans who took an interest in settling at the Cape.⁹⁹⁹ The establishment of the new freehold farms called for a labour supply, which in this case was insufficient.¹⁰⁰⁰ It was the company's prerogative as the governing authority to find solutions to this problem. This presented conflicting options. On the one hand, it was the company's opinion that importing European workers would be expensive.¹⁰⁰¹ On the other hand, the Khoi-Khoi were reluctant to supply their labour on the aforesaid farms.¹⁰⁰² Enslaving them was also not an option as the company representatives had received clear instructions to retain peaceful relations with the indigenous community.¹⁰⁰³

Faced with these challenges, the Cape first entered the transatlantic slave trade in 1658.¹⁰⁰⁴ Historical accounts point out that the first imports of slaves were from West Africa and Asia.¹⁰⁰⁵ From then on, it is recorded that the company as the governing authority supported and encouraged the use of and reliance on slave

⁹⁹⁵ Dooling *Slavery, Emancipation and Colonial Rule* 18.

⁹⁹⁶ Dooling *Slavery, Emancipation and Colonial Rule* 18.

⁹⁹⁷ Berger *South Africa in World History* 26; Dooling *Slavery, Emancipation and Colonial Rule* 18.

⁹⁹⁸ Beck *The History of South Africa* 35-36; Thompson *A History of South Africa* 35; Fourie and Van Zanden 2013 *SAJE* 468-469.

⁹⁹⁹ Beck *The History of South Africa* 36; Thompson *A History of South Africa* 35; Dooling *Slavery, Emancipation and Colonial Rule* 20-21.

¹⁰⁰⁰ Dooling *Slavery, Emancipation and Colonial Rule* 21; Beck *The History of South Africa* 28; Worden *Slavery in Dutch South Africa* 8.

¹⁰⁰¹ Worden *Slavery in Dutch South Africa* 8; Dooling *Slavery, Emancipation and Colonial Rule* 20-21.

¹⁰⁰² Beck *The History of South Africa* 36; Dooling *Slavery, Emancipation and Colonial Rule* 21.

¹⁰⁰³ Beck *The History of South Africa* 28; Berger *South Africa in World History* 31-32.

¹⁰⁰⁴ Thompson *A History of South Africa* 36.

¹⁰⁰⁵ Sources vary on the specific countries within these two regions. However, overwhelming authority names Mozambique, Angola and Madagascar. See amongst others Beck *The History of South Africa* 28; Dooling *Slavery, Emancipation and Colonial Rule* 21; Thompson *A History of South Africa* 36.

labour on the farms at the Cape.¹⁰⁰⁶ Taken together, the importation of the slaves and the arrival of more Europeans contributed to a growth in the population. What began as a small settlement established for the purposes of a victualing station now grew and expanded into a settlement, whereupon the company decided to found a colony at the Cape.¹⁰⁰⁷

During its administration by the Dutch, the *modus* of slavery at the Cape was governed by regulations derived from the Roman-Dutch law of the Netherlands.¹⁰⁰⁸ In terms of Roman-Dutch law as practised in the Cape Colony, slaves were to be seen not only as property but also as persons.¹⁰⁰⁹ The effect of the law was not to give them full rights *per se* but to protect them from ill treatment and execution by their masters.¹⁰¹⁰ That is, although their rights were limited, the limitation was not absolute. For example, slaves were permitted to report cases of ill treatment by their masters, which could be tried before the courts.¹⁰¹¹ It is also important to note that it was a legal requirement for slaves to carry documents of identification (later known as passes) that had to be signed in cases of absence from their masters' homes.¹⁰¹² From a more general point of view, the law was intended to focus on regulating slavery and prosecuting cases of misconduct by slaves towards their masters. This is because from its inception in 1658 until 1806, when the VOC was finally ousted from the Cape, it was their opinion and that of the Cape Council of Policy that slavery played a pivotal role in the economy of the Dutch Cape Colony.¹⁰¹³

¹⁰⁰⁶ Thompson *A History of South Africa* 36-37; Fourie and Van Zanden 2013 *SAJE* 470.

¹⁰⁰⁷ Thompson *A History of South Africa* 36.

¹⁰⁰⁸ As well as the Roman-Dutch law as applied in the Dutch Empire of Batavia. However, where certain parts of the law were inconsistent with circumstances in the Cape, the Cape Council of Policy modified them accordingly. See Dooling *Slavery, Emancipation and Colonial Rule* 42; Thompson *A History of South Africa* 42.

¹⁰⁰⁹ Dooling *Slavery, Emancipation and Colonial Rule* 42.

¹⁰¹⁰ Dooling *Slavery, Emancipation and Colonial Rule* 42-48.

¹⁰¹¹ See in this regard Lenta 2008 *English in Africa* 35-51 where the author explores the system of dispute resolution amongst slaves and their masters by the courts from 1705 until 1794.

¹⁰¹² Thompson *A History of South Africa* 166.

¹⁰¹³ Beck *The History of South Africa* 28; Berger *South Africa in World History* 28; Berger *South Africa in World History* 31-32; Mason *Social Death and Resurrection* 30.

To that effect, there were no laws providing for voluntary manumission on the part of the government. This was because when manumission was sought it had to be purchased and was accompanied by stringent conditions.¹⁰¹⁴ Besides this arrangement, some few instances of manumission occurred where a slave was freed upon the death of his or her master, or where the European fathers of children born to slave women chose to purchase the freedom of their children.¹⁰¹⁵ By and large, children born to slave women (whether fathered by Europeans or members of indigenous community) were to remain slaves for the rest of their lives.¹⁰¹⁶

Flowing from the above, when the British first took control of the Cape Colony from the Dutch in 1795,¹⁰¹⁷ slavery and the slave trade were still in force. As with Brazil, the emancipation of the slaves at the Cape could not be attained hastily. In fact, in his analysis of the history of the Cape Colony, Thompson¹⁰¹⁸ remarks that the British regarded themselves as "temporary custodians" with "no intention of tampering with the status quo". Hence, at least for the time being there would be no changes regarding slavery and the slave trade in the Cape Colony. However, sight should not be lost of the fact that Britain led the global abolition of the slave trade and slavery from 1807.¹⁰¹⁹ Prior to this, it turns out that the trade in slaves (and slavery) were particularly welcome in the British Cape Colony until the *Act for the Abolition of the*

¹⁰¹⁴ Of particular reference here is Ordinance of 10 April 1770 as drafted by the Government of India in Batavia which provided that a slave's manumission could be purchased subject to government approval. See Weaver 2009 "Litigating for Freedom" 45-46. Furthermore, a considerable amount of literature points out that the slave in question was required to have a good command of the Dutch language, be confirmed in the Dutch Reformed Church and must provide proof that he could maintain himself in addition to making payment into the church welfare fund. See in this regard, Thompson *A History of South Africa* 44; Berger *South Africa in World History* 33; Keegan *Colonial South Africa* 18-19.

¹⁰¹⁵ Berger *South Africa in World History* 33.

¹⁰¹⁶ Berger *South Africa in World History* 33.

¹⁰¹⁷ Historical accounts point out that the British took control of the Cape colony in 1795 but lost it to the Dutch in 1803 pursuant to the Treaty of Amiens. British control of the Cape colony resumed again in 1806 and continued until 1834 following the Anglo-Dutch Treaty of 1814. In this regard see Beck *The History of South Africa* 42-50; Thompson *A History of South Africa* 52.

¹⁰¹⁸ Thompson *A History of South Africa* 54.

¹⁰¹⁹ Wilson 1950 *AJIL* 505; Van Niekerk 2004 *CILSA* 2-5; Beck *The History of South Africa* 54; Kern 2004 *JHIL* 233-236.

Slave Trade was passed in 1807.¹⁰²⁰ The Act was intended to put an end to the slave trade (not slavery) within the British Empire, the Cape colony inclusive.¹⁰²¹

Van Niekerk's¹⁰²² review of British efforts to end slavery and the slave trade draws attention to the fact that following this Act, all consequent imports of slaves into the Cape colony were either illegal or carried out upon obtaining "special permission" from the British governing body. In addition, Thompson¹⁰²³ observes that the end of the slave trade imposed a real loss on colonial farmers in the sense that they would no longer receive fresh supplies of labour. On the other hand, Dooling¹⁰²⁴ observes that the effect of the Act on the Cape Colony increased the price of slaves. Taken together, these observations highlight that the importation of slaves into the Cape proved to be difficult under the governance of Britain, and the sale and exchange of those already in the Colony came at a hefty price. The inevitable consequence of the *Act for the Abolition of the Slave Trade* was therefore a shortage of labour for farmers, who had to rely on the slaves they already owned.¹⁰²⁵

These developments had dire consequences for the Cape slaves, as their workload was increased and their living and working conditions deteriorated.¹⁰²⁶ In 1823 Britain's next policy intervention was the "amelioration" of the institution of slavery, imposing laws aimed at improving the living and working conditions of slaves.¹⁰²⁷ Of particular significance was Ordinance 19 of June 1826,¹⁰²⁸ which established amongst other things the office of the guardian of slaves (later changed to the protector of slaves), whose mandate was to hear the complaints of slaves and carry

¹⁰²⁰ Van Niekerk 2004 *CILSA* 5 notes that Britain had abolished slavery and the slave trade within its borders in 1775 following the *Somerset v Steward* case. However, the institutions were set to continue within British colonies. See para 3.2 above for a more detailed discussion of the effect of the *Somerset v Steward* case.

¹⁰²¹ Van Niekerk 2004 *CILSA* 2-5; Wilson 1950 *AJIL* 507.

¹⁰²² Van Niekerk 2004 *CILSA* 5.

¹⁰²³ Thompson *A History of South Africa* 57.

¹⁰²⁴ Dooling *Slavery, Emancipation and Colonial Rule* 83.

¹⁰²⁵ Dooling *Slavery, Emancipation and Colonial Rule* 83; Thompson *A History of South Africa* 57.

¹⁰²⁶ Thompson *A History of South Africa* 57; Dooling *Slavery, Emancipation and Colonial Rule* 82-86.

¹⁰²⁷ Thompson *A History of South Africa* 57; Mason *Social Death and Resurrection* 48-52.

¹⁰²⁸ Ordinance 19 replaced the Somerset Proclamation which made similar provisions but was only applicable to slaves confirmed in the Christian faith. See Mason *Social Death and Resurrection* 48.

out investigations on such.¹⁰²⁹ The Ordinance also made provisions regarding the quantity of food and clothes to be given to slaves by their masters annually.¹⁰³⁰ In addition, it stipulated that slaves were to be given rest on Sundays.¹⁰³¹

It is observed that the introduction of these measures resulted in an epiphany on the part of slave owners to the effect that the institution would be short-lived under British rule.¹⁰³² Whereas the slave owners did not agree with these developments and were not ready to cooperate,¹⁰³³ scholars such as Dooling and Datta¹⁰³⁴ express the opinion that the British measures were a means of transitioning from dependency on slave labour to an era of emancipation that would ensue in 1833.¹⁰³⁵ That said, the *Slavery Abolition Act* of 1833 was passed by the British parliament to abolish the institution of slavery in the British Empire.¹⁰³⁶ However, as noted earlier,¹⁰³⁷ the contemplated emancipation did not give slaves absolute freedom. Emancipation came with the condition that the slave had to be apprenticed to his or her former master for a period of four to six years. This provision was designed on the one hand to assist slave masters to transition into employers and the slaves themselves to transition from slavery into freedom. Provision was also made for the compensation of the former slave masters for the loss they encountered due to losing their slaves.¹⁰³⁸

With this in mind, it can be concluded that slavery and the slave trade played an important role in the economy of the Dutch Cape colony. The role of the British in introducing the transition from slavery to emancipation was directly felt in the Cape,

¹⁰²⁹ Dooling *Slavery, Emancipation and Colonial Rule* 85; Thompson *A History of South Africa* 57; Datta *From Bengal to the Cape* 112-113.

¹⁰³⁰ Dooling *Slavery, Emancipation and Colonial Rule* 85; Thompson *A History of South Africa* 57; Datta *From Bengal to the Cape* 112-113.

¹⁰³¹ Dooling *Slavery, Emancipation and Colonial Rule* 85; Thompson *A History of South Africa* 57; Datta *From Bengal to the Cape* 112-113.

¹⁰³² Thompson *A History of South Africa* 98.

¹⁰³³ Mason *Social Death and Resurrection* 57.

¹⁰³⁴ Dooling *Slavery, Emancipation and Colonial Rule* 85; Datta *From Bengal to the Cape* 112-113.

¹⁰³⁵ Dooling *Slavery, Emancipation and Colonial Rule* 85; Thompson *A History of South Africa* 57; Datta *From Bengal to the Cape* 112-113.

¹⁰³⁶ Effective within the Cape colony from 1st December 1834. See Mason *Social Death and Resurrection* 59.

¹⁰³⁷ See para 3.2 above.

¹⁰³⁸ Van Niekerk 2004 *CILSA* 2-6.

which had become its colony after 1806. As in Brazil, changes to the institution of slavery were not welcome, as slavery was seen as natural to social organisation and a vital aspect of the economy. As will be seen below, the historical foundations of slavery in the Dutch Cape Colony influenced events leading to the European invasion of South Africa beyond the Cape Colony, which later culminated in major shifts in the country's political administration.

5.3 Forced labour in modern South Africa

5.3.1 General observations

While most of the history of the European invasion of the interior of South Africa is beyond the scope of this thesis, its brief discussion may assist in putting into context the political system of South Africa in the 19th century. The foregoing discussion has shown that British rule over the Cape Colony brought major changes to the institution of slavery within the Colony. Whilst the changes were aimed at reducing the human rights violations associated with slavery, in the opinion of the disgruntled slaveholders the changes undermined the nature of the institution.¹⁰³⁹ A change to the way the system of slavery operated was one of the many administrative changes¹⁰⁴⁰ effected at the Cape. British rule also culminated in the arrival of other British settlers and missionaries within the colony.¹⁰⁴¹

Historians observe that it is with these developments that the descendants of the earlier Dutch settlers decided to move farther into the interior of South Africa, to establish territories where they would be independent of British rule.¹⁰⁴² This

¹⁰³⁹ Worden *The Making of Modern South Africa* 16.

¹⁰⁴⁰ Other administrative changes included the replacement of Dutch officials who served on the bench with lawyers from Britain to serve at the Court of Justice, who would henceforth apply British legal procedures. Local legislative council members and magistrates who served under the Dutch administration were also replaced with British magistrates. See Thompson *A History of South Africa* 68.

¹⁰⁴¹ Beck *The History of South Africa* 64.

¹⁰⁴² This movement is called the Great Trek, and the migrants were known as *voortrekkers* (pioneers). See Beck *The History of South Africa* 64-65; Worden *The Making of Modern South Africa* 15-16; Thompson *A History of South Africa* 67-68, 87-96.

movement brought about wars¹⁰⁴³ and the subjugation of indigenous peoples resulting in the annexation of certain territories¹⁰⁴⁴ of South Africa by both the British and the Afrikaner community.¹⁰⁴⁵ This competitive exercise was also fuelled by the discovery of minerals in the interior of South Africa and the desire of the British to have direct control of most of these territories.¹⁰⁴⁶ On the other hand, resistance came from the Afrikaners in a bid to defend their independence. The foregoing brief history sheds light on how South Africa came to be called the Union of South Africa in the early 20th century. To that end, the amalgamation of the Afrikaner republics and the British colonies was sealed in 1910 following the Treaty of Vereeniging of May 1902.¹⁰⁴⁷ The treaty provided that all of the territories would come under the authority of the British Government. From then, the Union of South Africa was a governing nation within the British Empire.

From as early as 1910 the government of the Union of South Africa imposed racial segregation laws and policies on its inhabitants.¹⁰⁴⁸ The Nationalist government during its reign from 1948 to 1994 also adopted this system of governance.¹⁰⁴⁹ Section 10 of the *Natives (Urban Areas) Act* of 1923 imposed a curfew of 72 hours on Africans in those urban areas. If there was a need to exceed the set limit, it was required that an employer indicates so. To build upon earlier laws, the *Native Laws Amendment Act* of 1952 was passed to regulate the movement of Africans in all urban areas.

¹⁰⁴³ See Beck *The History of South Africa* 80-86; Thompson *A History of South Africa* 73-96.

¹⁰⁴⁴ Colony of Natal, Orange Free State and Transvaal.

¹⁰⁴⁵ Worden *The Making of Modern South Africa* 24-30; Beck *The History of South Africa* 80-86; Berger *South Africa in World History* 65-84.

¹⁰⁴⁶ Thompson *A History of South Africa* 114-115; Beck *The History of South Africa* 80-86; Berger *South Africa in World History* 65-84.

¹⁰⁴⁷ The ratification of this treaty came after the Anglo-Boer war (some sources refer to it as the South African war) of 1899-1902 between the British and the Afrikaners. See Berger *South Africa in World History* 83-84; Worden *The Making of Modern South Africa* 30-38; Beck *The History of South Africa* 92-95.

¹⁰⁴⁸ Note that issues surrounding race and class date back to colonial South Africa during the slavery era, including during the time of British rule. See Worden *The Making of Modern South Africa* 76-80; Beck *The History of South Africa* 106- 113; Thompson *A History of South Africa* 117-122. Laws imposed from 1910 included the *Native Land Act* of 1913 which for instance created a system of land segregation and defined the boundaries of "Native reserves". Worden *The Making of Modern South Africa* 55-57; Beck *The History of South Africa* 113; Thompson *A History of South Africa* 163-165; Berger *South Africa in World History* 89-91.

¹⁰⁴⁹ Beck *The History of South Africa* 125-126; Thompson *A History of South Africa* 187-200; Berger *South Africa in World History* 114-124.

The issue of racial segregation and discrimination in the Republic of South Africa is relevant to this thesis in at least two ways. Firstly, due to pressure from newly decolonised member states in 1948¹⁰⁵⁰ the United Nations (UN) went through phases of attempting to establish that there was a relationship between apartheid and slavery.¹⁰⁵¹ This mammoth task resulted amongst other effects in the characterisation of apartheid as a "collective form of slavery" and later as a practice akin to slavery.¹⁰⁵² In doing so, the proponents of this school of thought argued that in establishing a link between the two, the legal definition of slavery and servitude as contained in the *Slavery Convention* and the *Supplementary Convention on the Abolition of Slavery* should not be a limitation.¹⁰⁵³

Whereas Allain¹⁰⁵⁴ asserts that these circumstances failed to establish a legal link between apartheid and slavery, it must be submitted that they probably formed a backdrop against which the anti-apartheid work of the UN would develop.¹⁰⁵⁵ The anti-apartheid movement grew out of a collective international opinion rejecting racial segregation in so far as it was a human rights issue. To that end, and secondly, the Republic of South Africa faced immense pressure from other ILO members to withdraw its membership of the organisation until it renounced apartheid.¹⁰⁵⁶ This request was backed by the submission that the South African

¹⁰⁵⁰ See Allain *Slavery in International Law* 148-151; Miers 2000 *CJAS* 719.

¹⁰⁵¹ At this point the UN already had several human rights instruments that could be interpreted as condemning *apartheid*. For example, articles 1 and 2 of the *Universal Declaration of Human Rights* of 1948 (UDHR) already provided that "all human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin". In so far as slavery is concerned, the *Slavery Convention* of 1926 at article 1(1) provided that "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Hence, the issue of apartheid in South Africa was of concern to the UN in so far as human rights and freedoms were concerned. See generally, Malhotra 1964 *The Annals of the American Academy* 137.

¹⁰⁵² Allain *Slavery in International Law* 148-151.

¹⁰⁵³ Allain *Slavery in International Law* 148-151.

¹⁰⁵⁴ Allain *Slavery in International Law* 151.

¹⁰⁵⁵ For example, the UN finally agreed to the *International Convention on the Suppression and Punishment of the Crime of Apartheid* in 1973, which declared apartheid a crime against humanity and classified the "exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour" as falling within the ambit of the crime of apartheid for the purposes of the Convention. See articles 1 and 2(e) of the Convention.

¹⁰⁵⁶ Gheballi 1990 *The Modern Law Review* 46. South Africa was one of the first countries in Africa to attain membership with the ILO in 1919 when the organisation was formed. It must be borne in mind that at the time of joining the ILO the country was still known as the Union of South Africa

mode of governance was repugnant to the principles and values of the organisation.¹⁰⁵⁷

For its own part, the ILO expressed its condemnation of apartheid through its initial joint projects with the UN. The ILO's stance was later developed through independent projects that culminated in various international instruments seeking to set standards against discrimination in the workplace.¹⁰⁵⁸ Whilst working with the UN against apartheid, the ILO-UN *Ad Hoc* Committee on Forced Labour released a report in 1953 that sought to establish the validity of claims of forced labour concerning various laws applied in South Africa.¹⁰⁵⁹ Amongst others, it was the opinion of the Committee that the pass laws "may exert pressure upon the native population which might create conditions of indirect compulsion similar in its effect to a system of forced labour for economic purpose."¹⁰⁶⁰ Whilst recruitment in terms of legislation was not compulsory, the Committee was of the opinion that the provisions of the *Natives (Urban Areas) Consolidation Act* of 1945 and its regulations could lead to forced labour due to the imposition of criminal sanctions upon breach of the employment contract.¹⁰⁶¹ In the Committee's opinion, provisions barring employees from unilaterally terminating employment contracts through the

and under the administration of the British, as discussed within the main body of this section. See Johnston 1965 *AIQR* 214; Grawitzky *The Role of the ILO during and ending Apartheid* 2.

¹⁰⁵⁷ For example, several labour laws made the exercise and enforcement of labour rights difficult. Thus, Industrial Councils established in terms of the *Industrial Conciliation Act* of 1924 did not recognise trade unions of African workers and barred such workers from participating in the collective bargaining process. Also, the *Mines and Works Act* 12 of 1911 had the effect of creating a divide concerning occupational positions that could be held by African workers and those that were reserved for their white counterparts.

¹⁰⁵⁸ The ILO *Declaration on Fundamental Principles and Rights at Work*, 1998 makes it mandatory for all ILO members to ensure the elimination of discrimination in respect of employment and occupation irrespective of whether they have ratified the *Discrimination (Employment and Occupation) Convention* No 111 of 1958, which is the key ILO instrument touching on discrimination in the workplace.

¹⁰⁵⁹ The terms of reference of the Committee provide that its mandate was to "examine the laws and regulations and their application" in the light of the principles in the ILO *Forced Labour Convention*, the principles of the UN and the principles of the *Universal Declaration of Human Rights*. It is asserted from this that the assessments or comments of the Committee should not be interpreted as having been made strictly in the context of either labour or criminal law. In the author's opinion, the observations and comments of the Committee were made generally from a human rights perspective.

¹⁰⁶⁰ ILO-UN *Report of the Ad Hoc Committee on Forced Labour* 74-75.

¹⁰⁶¹ ILO-UN *Report of the Ad Hoc Committee on Forced Labour* 74-75.

imposition of criminal sanctions were a direct restriction of personal liberty and could lead to forced labour if misused.¹⁰⁶²

The foregoing accounts demonstrate that South Africa has previously had a labour relations system that was not consistent with international human rights standards. Post 1994, Olivier¹⁰⁶³ has described the South African industrial relations system as "progressive" in the sense that it is characterised by a legislative framework that reflects an attempt to achieve the promotion of human rights. This is attributable to the process of metamorphosis that labour law and its administration were subjected to following the Wiehahn Commission report.¹⁰⁶⁴ Whilst observations concerning the laws predating 1994 draw inferences on the likelihood of forced labour having occurred, it is the objective of this thesis to ascertain later whether the new labour law system is shaped in such a way as to appropriately address forced labour as a contemporary labour law issue.

5.3.2 South African definition of forced labour

Previous ILO studies and experiences drawn from both the UK and Brazil highlight that forced labour may affect both formal and informal workers alike.¹⁰⁶⁵ Be that as it may, close attention must be paid to workers in the informal economy because it has been established¹⁰⁶⁶ in this thesis that they are the most susceptible to forced labour due to the fact that they have little or a total lack of protection under national labour laws. A variety of studies lend authority to the statement that (like those of the UK and Brazil) the South African labour market is dual in nature.¹⁰⁶⁷ That is, the informal economy offers opportunities for employment for those who cannot find employment in the formal economy. Based on previous studies, work in the informal

¹⁰⁶² ILO-UN *Report of the Ad Hoc Committee on Forced Labour* 74-75.

¹⁰⁶³ Olivier 2006 *Speculum Juris* 215-216.

¹⁰⁶⁴ Olivier 2006 *Speculum Juris* 215-216; Goldman *Organising in South Africa* 11.

¹⁰⁶⁵ See paras 3.3.3 and 4.3.3 above.

¹⁰⁶⁶ Paras 2.6.3.1, 3.3.3 and 4.3.3 above.

¹⁰⁶⁷ See amongst others Uys and Blaauw 2006 *Acta Commerdi* 252; Goldman *Organising in South Africa* 11-27; Bhorat and Oosthuizen *The Post-Apartheid South African Labour Market* 18-19; Motala *Organising in the Informal Economy* 7-14; Muller *Measuring South Africa's Informal Sector* 7-19; Wills *South Africa's Informal Economy* 5-57.

economy in South Africa includes street trading, domestic work, construction, garment production and farm work.¹⁰⁶⁸

The concentration of slave labour in the Brazilian agricultural sector lends credence to the UK's position and the international position concerning the prevalence of forced labour in that sector.¹⁰⁶⁹ They have also shown that the construction, domestic work and manufacturing industries are amongst those susceptible to forced labour.¹⁰⁷⁰ It follows from this that this section of the study needs to attempt to determine whether similar circumstances pertain in these industries in South Africa.

Before considering the prevalence of forced labour in South Africa, it is important to set the context for the forthcoming discussion by considering how the South African framework defines forced labour. It must be noted that a prohibition of forced labour has been part of the Constitution and the *Basic Conditions of Employment Act* (hereafter the *BCEA*) since their inception in 1996 and 1997 respectively.¹⁰⁷¹ Nonetheless, the prohibitions therein do not go as far as providing definitional guidance as to what forced labour is within the South African context.¹⁰⁷² Further to a lack of definitional guidance, in comparison with the *Forced Labour Convention*, the *BCEA* and the Constitution fail to outline the parameters of conduct that will not be deemed forced labour, an element that is vital because not all work that is imposed on an individual qualifies as forced labour under the Convention.¹⁰⁷³ The

¹⁰⁶⁸ Goldman *Organising in South Africa* 1-29; Motala *Organising in the Informal Economy* 15-19; Wills *South Africa's Informal Economy* 44-45.

¹⁰⁶⁹ Para 4.3.3 above.

¹⁰⁷⁰ Paras 2.2 and 3.3.3 above.

¹⁰⁷¹ Section 13 of the Constitution provides "No one may be subjected to slavery, servitude or forced labour". Section 48 of the *BCEA* provides that "Subject to the Constitution, all forced labour is prohibited".

¹⁰⁷² For the purposes of these two instruments forced labour is defined within the context of the ILO *Forced Labour Convention*, taking into account that one of the objects of the *BCEA* is to comply with the obligations of the Republic as a member of the ILO (section 2). In addition, courts and tribunals are exhorted to consider international law when interpreting the Bill of Rights and to prefer interpretations of national legislation consistent with international law as per sections 39 and 233 of the Constitution. In this regard see para 1.9 above. However, the discussion maintains the view that this position should not overshadow the need for a national definition, because national definitions can be tailored to address the specifics of forced labour in South Africa and guide intended policy.

¹⁰⁷³ See article 2(2) of the Convention. It must be added that this submission is cognisant of the fact that in interpreting either the *BCEA* or the Constitution, the court must apply its mind to this

definition of forced labour is introduced into South African legislation¹⁰⁷⁴ for the first time through the *Prevention and Combating of Trafficking in Persons Act* (hereafter the *PCTPA*)¹⁰⁷⁵ 7 of 2013, which defines forced labour as follows:

Forced labour means labour or services of a person obtained or maintained without the consent of that person and through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion or physical restraint to that person or another person.

For the most part, the South African definition of forced labour mirrors that of the ILO¹⁰⁷⁶ in the sense that in order to prove forced labour, at least two conditions must be present. That is, the work or service involved must be obtained without consent and done so under a threat of penalty of some sort. Chapter 3 above concluded that the UK's *Modern Slavery Act (MSA)* defines forced labour within the context of the *Forced Labour Convention*.¹⁰⁷⁷ On the other hand, Chapter 4 introduced a somewhat dissimilar approach by the Government of Brazil wherein section 149 of the Brazilian Penal Code is used to prohibit subjecting someone to slave labour, forced labour inclusive.¹⁰⁷⁸ Whilst presenting different approaches to their legislative prohibition and definitions of forced labour, it must be submitted that there is a harmony amongst these three jurisdictions in the sense that the national definitions of forced labour are fashioned to reflect the ILO international standard.

Moreover, it must be highlighted that the South African framework demonstrates a recognition that there is a distinction between forced labour and slavery. It has been

particular article of the Convention, even though it has been overlooked in national law. See section 39 of the Constitution and section 2 of the *BCEA*.

¹⁰⁷⁴ It must be highlighted that this definition is applicable in so far as this Act is concerned. Hence, its inclusion in the thesis should not be interpreted to mean that the Act is prescribing the definition as applicable to labour legislation. As it is, then, forced labour is only expressly defined within the criminal law context.

¹⁰⁷⁵ See section 1.

¹⁰⁷⁶ Article 2(1) of the ILO *Forced Labour Convention* provides that forced labour is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." It is possible that the drafters of the legislation framed the definition around that of the ILO so that when an issue of human trafficking for the purposes of forced labour occurs, then they may be able to identify the forced labour using the ILO indicators. Whether or not in such instances the forced labour itself will be given the attention it demands is debatable, as will be argued later on.

¹⁰⁷⁷ Para 3.3.1 above.

¹⁰⁷⁸ Para 4.3.1 above.

argued earlier that referring to slavery and forced labour interchangeably is problematic.¹⁰⁷⁹ A blanket prohibition on slavery in national legislation could be interpreted as confined to chattel slavery¹⁰⁸⁰ and as being not applicable to contemporary labour law. Hence, where the ambit of slavery can be stretched to include forced labour, this must be clearly indicated.¹⁰⁸¹ Section 13 of the Constitution enunciates the right not to be subjected to slavery, servitude or forced labour under one provision. The sentiments of the European Court of Human Rights regarding article 4 of the *ECHR* are quite informative in this regard. According to the court, an establishment of the two rights under a single provision should not be interpreted as creating a group offence or group right on slavery or forced labour.¹⁰⁸² The two rights must be treated as separate albeit interrelated rights.

Because an actual distinction is not drawn between the two rights within section 13, it is tempting to hold that both international¹⁰⁸³ and foreign law¹⁰⁸⁴ must guide an interpretation of this section in accordance with section 39 of the Constitution.¹⁰⁸⁵ On the other hand, it seems that the *PCTPA* sets clear boundaries between slavery¹⁰⁸⁶ and forced labour due the recognised distinction in the definitions of the two offences as prohibited under the Act. The Act accordingly follows the international paradigm as well as that extrapolated in the European Court, both of which ascribe rights of ownership where slavery is concerned, and describe forced labour as work performed under the menace of a penalty.¹⁰⁸⁷

¹⁰⁷⁹ See in particular paras 2.3.1, 3.3.2.1 and 4.3.2.2 above.

¹⁰⁸⁰ Para 2.3.1 above.

¹⁰⁸¹ An example can be drawn from the UK's *MSA*, which classifies forced labour, slavery, servitude and human trafficking as modern-slavery offences. The use of the word "slavery" by the Act has been clarified so as to remove any doubts. See para 3.5.1.2.1 above.

¹⁰⁸² Para 3.3.2.1 above.

¹⁰⁸³ Para 2.3.1 above.

¹⁰⁸⁴ Para 3.3.2.1 above.

¹⁰⁸⁵ See para 1.9 above.

¹⁰⁸⁶ The Act defines slavery as "reducing a person by any means to a state of submitting to the control of another person as if that other person were the owner of that person."

¹⁰⁸⁷ Paras 2.3.1 and 3.3.2.1 above.

5.3.3 Influence of the African Human Rights System

This discussion maintains that regional human rights systems have previously and may continue to play a crucial role in assisting national governments shape their national laws on forced labour. It is for this reason that the European and Inter-American human rights systems¹⁰⁸⁸ were considered in this study pertaining to their contribution to forced labour laws in the UK and Brazil. To maintain coherence in the analysis and argument, it is essential that the reader be given an overview of how the African human rights system has influenced or is likely to influence the South African approach to forced labour.

The regional protection of human rights in Africa falls under the supervision of the African Union (AU), an organisation founded by fifty-three African states on 26 May 2001.¹⁰⁸⁹ Before it evolved into what is known today as the AU, the Organisation of African Unity (OAU)¹⁰⁹⁰ was the organisation under which the African regional human rights system was administered. Whilst not introducing a complete overhaul of the OAU's treaties, one of the AU's aims at its formation is to provide for a mechanism to strengthen the protection and promotion of the human rights of the peoples of Africa.¹⁰⁹¹ In doing so, the AU inherited the *African Charter on Human and Peoples Rights* (hereafter *African Charter*)¹⁰⁹² as the main human rights treaty creating obligations for members of the organisation.

The mandate to uphold and interpret the provisions of the *African Charter* lies with the African Commission on Human and Peoples' Rights (African Commission) as established in terms of article 30 of the Charter. The Commission's decisions are not binding. In 1998 a *Protocol to the African Charter on Human and Peoples' Rights on*

¹⁰⁸⁸ See paras 3.3.2 and 4.3.2 above

¹⁰⁸⁹ www.au.int/en/history/oau-and-au.

¹⁰⁹⁰ Formed initially by thirty-two African states in Addis Ababa (Ethiopia) on the 25th May 1963. www.au.int/en/history/oau-and-au.

¹⁰⁹¹ Ouguergouz 2007 *ASIL* 428; Edo and Olanrewaju 2012 *JHSN* 54-55. Note also that the *African Charter* not only protects and promotes the human rights of the people of Africa; at articles 27-29 it also creates duties to go hand-in-hand with the rights.

¹⁰⁹² As adopted by the OAU in June 1989.

*the Establishment of the African Court on Human and Peoples' Rights*¹⁰⁹³ was adopted, establishing the African Court on Human and Peoples' Rights (African Court). According to the Protocol, the African Court was established to "complement the protective mandate of the African Commission".¹⁰⁹⁴ In addition to this, the Court's decisions are binding.¹⁰⁹⁵ In order to be bound by the jurisdiction of the Court, AU members must ratify the said Protocol.¹⁰⁹⁶ Flowing from this, where a member state chooses not to ratify the Protocol, such a member remains accountable to the African Commission only.

In addition to its ILO membership, South Africa is a member of the AU, after having joined the organisation on 6 June 1994¹⁰⁹⁷ subsequent to the installation of its first democratically elected government. South Africa is also a signatory to the *African Charter*, hence the Charter's provisions are binding on the country. South Africa is also one of the 24 AU members¹⁰⁹⁸ that have ratified the Protocol establishing the African Court and is thus bound by the jurisdiction of the court. Having established the above, the next step is to decipher whether and how the *African Charter* safeguards the right not to be subjected to forced labour and whether the African Commission and the African Court have previously grappled with questions touching on the offence.

5.3.3.1 Regional definition and/or interpretation of forced labour

First and foremost, it must be noted that the *African Charter* does not have a provision specifically prohibiting the imposition of forced labour. Hence, where forced labour is concerned, the closest and most relevant provision is that which concerns human exploitation and degradation.¹⁰⁹⁹ Article 5 of the Charter provides:

¹⁰⁹³ As adopted in 1998, entered into force in 2004.

¹⁰⁹⁴ Article 2.

¹⁰⁹⁵ Article 30.

¹⁰⁹⁶ Article 3.

¹⁰⁹⁷ www.au.int/en/AU_Member_States.

¹⁰⁹⁸ See www.achpr.org/instruments/court-establishment/#1.

¹⁰⁹⁹ Ouguergouz *The African Charter* 110.

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his 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.

What article 5 does is to prohibit all forms of exploitation, but it goes further to expressly specify slavery and the slave trade in particular. The wording of article 5 gives an indication that the specification of particular forms of conduct is not exhaustive, which therefore means that forced labour could find application under this article.¹¹⁰⁰ However, it must be asked why the authors of the Charter chose to omit reference to forced labour. After all, the chief human rights instruments in Europe¹¹⁰¹ and the Americas¹¹⁰² do not only prohibit slavery and the slave trade, but also specifically proscribe forced labour.

The approach of the *ECHR* and the *American Convention* demonstrates express international recognition that the two offences may be related but are not necessarily the same.

Hence, the expectation is that the chief human rights treaty seeking to extend the protection and promotion of the human rights (and freedoms) of the people of Africa would include a specific prohibition of forced labour amongst its prohibitions of human exploitation and degrading treatment.¹¹⁰³ This expectation rests on the fact that the *African Charter* purports to have a standing similar to that of its American

¹¹⁰⁰ Ouguergouz *The African Charter* 110.

¹¹⁰¹ Article 6(1) and 6(2) of the *ECHR* provides: "No one shall be subjected to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and the traffic in women. No one shall be required to perform forced or compulsory labour". Also see para 4.3.2.1 above.

¹¹⁰² Article 4 of the *American Convention* reads: "No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour".

¹¹⁰³ Also see Onyango 1995 *CWILJ* 51, who with reference to socio-economic rights criticises the Charter for falling short of the promise it makes in its preamble. The Preamble reads: "...It is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights... and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights." This argument lends support to the assertion made in this thesis that the *African Charter* speaks largely of "freedoms" but fails to expressly speak to the prohibition of forced labour in so far as it is a contemporary offence that by and large takes away the freedom of a person without necessarily requiring ownership rights to be exercised, as in the case of slavery, an offence which may not find relevance in contemporary labour law.

and European counterparts. That is, the Charter has as much authority over human rights in Africa as the *ECHR* and the *American Convention* have over human rights in their respective regions. In addition, the fact that the Charter makes provision for duties¹¹⁰⁴ would have been balanced out by an express prohibition of forced labour, in the sense that an additional protocol or enforcement mechanisms would at one point interpret what these obligations imply with reference to forced labour or their relationship *viz-a-viz* forced labour as an international criminal offence. This notwithstanding, Ouguergouz¹¹⁰⁵ asserts that the duties embodied under the Charter are not repugnant to the *Forced Labour Convention*, as they may be classified as normal civil obligations envisioned under the Convention.¹¹⁰⁶ Based on the inherent distinctions drawn between forced labour and slavery at the international and regional¹¹⁰⁷ level, the emphasis on slavery and the slave trade may ultimately overshadow the relevance and manifestation of forced labour in the African continent.

It must be noted, however, that notwithstanding the silence of the *African Charter*, obligations to eliminate forced labour remain in force for AU members arising from their ratification of the ILO *Forced Labour Convention* or in the absence of ratification, through the very fact that they are members of the ILO.¹¹⁰⁸ Article 60 of the Charter also expressly gives the African Commission authority to "draw inspiration from provisions of various instruments adopted within the specialised agencies of the UN of which parties to the present Charter are members."

In conclusion, therefore, the right to be protected from forced labour in the *African Charter* is not an express right as is with its American and European counterparts.

¹¹⁰⁴ See in particular article 29 (2), (4) and (6), which reads: "The individual shall have the duty; To serve his national community by placing his physical and intellectual abilities at its service; To preserve and strengthen social and national solidarity particularly when the latter is threatened; To work to the best of his abilities and competence, and pay taxes imposed by law in the interest of the society". Note that Article 2 (2) (d) and (e) of the *Forced Labour Convention* excludes work carried out as a normal civic obligation from the definition of forced labour.

¹¹⁰⁵ Ouguergouz *The African Charter* 110-112.

¹¹⁰⁶ See article 2 (2) of the Convention.

¹¹⁰⁷ Paras 2.3.1 and 3.3.2.1 above.

¹¹⁰⁸ Article 2 of the ILO *Declaration on Fundamental Rights and Principles at Work*, 1998.

Whether or not the enforcement mechanisms will read forced labour into article 5 is debatable.

5.3.4 The scope and extent of forced labour in post-apartheid South Africa

The study of forced labour in the UK revealed that little empirical research exists measuring the scope of the offence.¹¹⁰⁹ This is due to the fact that forced labour in the UK had previously been associated with undeveloped countries, particularly due to its hidden nature and the lack of knowledge of it.¹¹¹⁰ As against this, the literature points to the presence of forced labour in the UK, especially in low-skilled, low-paid and insecure private sector employment. On the other hand, slave labour as it occurs in rural areas of Brazil has previously been well documented. Statistical data point to the overwhelming occurrence of slave labour within various industries in the agricultural sector.¹¹¹¹ The common characteristic amongst these industries is that they involve informal work, and that the employers target poor, illiterate and innumerate people.

Based on the findings of this thesis, slave labour and forced labour in Brazil and the UK can be seen to be similar. Both practices commonly occur in the informal economy and affect workers in the agriculture, construction, hospitality and catering, metal work production and domestic industries.¹¹¹² Furthermore, whilst the tactics may be different, findings suggest that the recruitment of workers is done with the objective of holding them in perpetual debt in both jurisdictions.¹¹¹³ Whilst Brazilian studies mostly identify causes of slave labour as poverty, illiteracy, the isolation of workplaces and social inequalities, the UK adds to that by suggesting new elements.¹¹¹⁴ That is, the operational characteristics of certain industries are seen as

¹¹⁰⁹ Par 3.3.3 above.

¹¹¹⁰ Par 3.3.3 above.

¹¹¹¹ Para 4.3.3 above.

¹¹¹² Paras 3.3.3 and 4.3.3 above.

¹¹¹³ Paras 3.3.3 and 4.3.3 above.

¹¹¹⁴ Paras 3.3.3 and 4.3.3 above.

propelling the prevalence of forced labour in the UK.¹¹¹⁵ In addition, UK scholars suggest that there are instances where gaps in the law allow for abuse by employers resulting in forced labour.¹¹¹⁶

It is important to remind the reader of these findings, because a view is held in this study that it is imperative for the nature of forced labour in each instance to be studied, as it may present different characteristics in different jurisdictions. Hence, whereas the ILO stipulates certain characteristics as pertaining to forced labour, they should be used as a guide when studying forced labour as it occurs in a specific jurisdiction, and not applied through a one-size-fits-all approach. Also, the view that having the appropriate knowledge and understanding of forced labour and the critical role it plays in framing the legislative and administrative responses to the problem is endorsed in this study.

With this in mind, this study turns to observing if forced labour is well documented in South Africa, with the aim of establishing the context within which the South African responses may be later discussed. It must first be noted that in 2012 ILO studies estimated that around 3.7 million people in Africa are in situations of forced labour.¹¹¹⁷ Furthermore, ILO observations in the same year pointed out that forced labour is generally under-studied in Africa.¹¹¹⁸ That is, there is a dearth of both qualitative and quantitative studies on forced labour in Africa generally. The ILO's explanation of why this is so deserves reproduction:

The legacy of the slave trade can make the recognition of contemporary forced labour especially difficult for those in positions of power as well as for the public at large. Indeed, the very concept of forced labour, as well as slavery, conjures up images from the past in a continent where frequent use was made of forced labour until towards the end of the colonial era.¹¹¹⁹

This observation notes that the aftermath of the slave trade (in Africa) has the potential to mislead those who are in charge of making and administering laws by

¹¹¹⁵ Para 3.3.3 above.

¹¹¹⁶ Para 3.5.2.1 above.

¹¹¹⁷ ILO *Combating Forced Labour and Trafficking in Africa* 11-12.

¹¹¹⁸ ILO *Combating Forced Labour and Trafficking in Africa* 33-34.

¹¹¹⁹ ILO *A Global Alliance Against Forced Labour and Trafficking* 42.

blurring the lines between slavery and forced labour. In essence, even where an issue touches on what would be understood as forced labour, there is a likelihood that it will be interpreted in the context of slavery. It must be recalled that this chapter has noted that the *African Charter* expressly prohibits slavery and servitude without expressly mentioning forced labour.¹¹²⁰ The African Commission has also not had the opportunity to make pronouncements on the applicability of forced labour to article 5 of the *Charter*. Owing to the distinctions between slavery and forced labour, confining interpretations to slavery would arguably result in issues of contemporary forced labour being displaced and ultimately having no purchase in either law or policy.

Likewise, in South Africa forced labour has over the years received scant attention from either scholars or the Government. A great deal of attention has rather been paid to the offence of human trafficking. As of late, ample scholarly work¹¹²¹ and research from Government¹¹²² has been concentrated on understanding the extent of human trafficking in South Africa. This is arguably not misplaced due to the fact that in recent times human trafficking in South Africa has received a lot of media attention.¹¹²³ Whilst it is conceded that measuring its scope both internationally and regionally is difficult,¹¹²⁴ the consensus is that human trafficking actually occurs in South Africa.¹¹²⁵

¹¹²⁰ Whilst the UK and Brazil have also had experience of both slavery and forced labour, they ought to be distinguished because their regional human rights systems expressly distinguish between forced labour and slavery.

¹¹²¹ See amongst others Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *ISS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Subramanien 2011 *SAJC* 245-265.

¹¹²² For example in 2010, the National Prosecuting Authority (NPA) in collaboration with the Human Sciences Research Council released a research report aimed at giving a detailed understanding of the nature and extent of human trafficking in South Africa. The research was conducted under the auspices of the Tsireledzani programme, which is an initiative offering assistance to human trafficking victims in South Africa.

¹¹²³ Mofokeng and Olutola 2014 *SAJC* 115.

¹¹²⁴ Allais 2013 *Acta Academia* 275-284; Mofokeng and Olutola 2014 *SAJC* 115.

¹¹²⁵ Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *ISS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Subramanien 2011 *SAJC* 245-265.

It must be acknowledged that the lack of previous research on forced labour is a setback for this thesis, because it renders efforts to analyse the scope and extent of the offence in South Africa inconclusive. The lack of previous research on forced labour *prima facie* implies that this study cannot provide a well-informed analysis of the scope and extent of forced labour, as was done with the UK and Brazil.¹¹²⁶ This notwithstanding, it still remains mandatory to convince the reader that the concept of forced labour does find relevance in South African contemporary labour relations. That is, the comparative lessons that will be later drawn for South Africa are not merely an academic exercise, but can in actual fact find relevance in informing policy and practice in South Africa in so far as South Africa could also be affected by forced labour. It must be recalled that regarding the international position, the UK and Brazil are in agreement that forced labour is occluded and is thus difficult to detect.¹¹²⁷ In addition, the study of forced labour in the UK and Brazil in the previous chapters has confirmed the assertion that forced labour must not be associated with poor or undeveloped countries only.¹¹²⁸ Developed and undeveloped economies alike stand affected by forced labour. Based on these observations, it is submitted that the apparent lack of research on forced labour must not be taken to denote that forced labour does not exist in South Africa.

Thus, given the lack of both qualitative and quantitative research on forced labour in South Africa, this study seeks to use the overwhelming prevalence of human trafficking in the country to establish the occurrence of forced labour. This must not be interpreted to mean that forced labour and human trafficking are similar in their genesis or that human trafficking always leads to forced labour. It must be noted that one of the arguments previously made is that human trafficking and forced labour are not to be used interchangeably as if what accrues to forced labour also accrues to the former.¹¹²⁹ Taking into account the definition of human trafficking as contained in the United Nations *Protocol to Prevent, Suppress and Punish Trafficking*

¹¹²⁶ See paras 3.3.3 and 4.3.3 above respectively.

¹¹²⁷ Paras 2.3, 3.3.3 and 4.3.3 above.

¹¹²⁸ This assertion was made by the International Trade Union Confederation in its action guide on forced labour. See ITUC *Forced Labour* 5; Beirnaert 2008 *IUR* 3-4,19.

¹¹²⁹ Paras 2.4, 3.4 and 4.4 above.

in Persons Especially Women and Children (Trafficking Protocol),¹¹³⁰ this study has put forward the submission that in relation to forced labour, human trafficking is a means to an end.¹¹³¹ That is, human trafficking may result *inter alia* in forced labour.

It follows therefore that studies establishing the occurrence of human trafficking resulting in forced labour are partially useful in determining the occurrence of forced labour in South Africa. Their trustworthiness is limited, though, by the fact that not all forced labour occurs as a result of human trafficking. There are instances where forced labour occurs outside the ambit of human trafficking.¹¹³² That notwithstanding, such investigations may be used to highlight possible and actual occurrences of forced labour in South Africa. In addition, human trafficking that is intended to expose victims to commercial sexual exploitation also leads to the occurrence of forced labour. This is due to the fact that the international standard classifies commercial sexual exploitation as a form of forced labour.¹¹³³ Based on these assertions, this discussion may present a relatively accurate picture of forced labour in South Africa using previous human trafficking studies.

The consensus is that the general scope and extent of human trafficking in South Africa has not been officially measured.¹¹³⁴ Hence, previous scholarly discourses on the subject rely heavily on the estimates and studies carried out by non-governmental organisations (NGO's).¹¹³⁵ While human trafficking scholars¹¹³⁶ use such estimates with caution, they have used them to argue for further and well-

¹¹³⁰ Article 3(a) provides that: 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 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. 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".

¹¹³¹ Para 2.4 above.

¹¹³² See paras 2.4, 3.4 and 4.4 above.

¹¹³³ Para 2.3.4 above.

¹¹³⁴ Pharoah 2006 *ISS* 23; Mofokeng and Olutola 2014 *SAJC* 115.

¹¹³⁵ Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *ISS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Subramanien 2011 *SAJC* 245-265.

¹¹³⁶ Allais 2013 *Acta Academia* 275-278; Mofokeng and Olutola 2014 *SAJC* 115.

documented quantitative research into the concept in an endeavour to inform law and policy reform on trafficking.¹¹³⁷

Be that as it may, these studies point to the fact that South Africa has previously experienced both international and internal trafficking of men, boys, women and girls for commercial sexual exploitation.¹¹³⁸ In fact, the South African criminal courts have also previously made a ruling on a matter where trafficking of women for sexual exploitation was involved.¹¹³⁹ Whereas men and women, girls and boys alike stand vulnerable, a report of the NPA seems to suggest that women and children are the most susceptible to human trafficking in South Africa.¹¹⁴⁰

A number of factors have been identified as contributing to the susceptibility of people to trafficking. Chief amongst these are socio-economic challenges¹¹⁴¹ ranging from poverty, political and economic instability, broken families, unemployment and a lack of opportunities for personal development.¹¹⁴² There is consensus amongst scholarly discourses and NGO studies that traffickers target their potential victims' vulnerability and use it to lure them into being trafficked.¹¹⁴³ Vulnerability to human

¹¹³⁷ For example the International Organisation of Migration's study on the trafficking of women into South Africa for purposes of sexual exploitation estimated that around 1 100 women are trafficked into South Africa annually. See Martens *et al Seduction, Sale and Slavery* 50-108. Human trafficking scholars such as Pharoah and Roelofse warn against reliance on the estimates since their reliability is debatable. See Pharoah 2006 *ISS* 18-22, 24; Roelofse 2011 *SAJC* 9. This notwithstanding, there have been recent reports of police raids in the Gauteng and North-West Province on suspected brothels wherein the occurrence of trafficking is also suspected. In this regard see Themba 2017 <https://www.enca.com/south-africa/klerksdorp-brothel-human-trafficking-ring-suspected>; Sello 2016 <http://www.enca.com/south-africa/16-girls-rescued-from-human-traffickers>.

¹¹³⁸ Iroanya 2014 *SAJC* 102; Allais 2013 *Acta Academia* 284; Pharoah 2006 *ISS* 24.

¹¹³⁹ In *State v Sayed* (unreported) case number 041/2713/2008, a conviction was secured in relation to trafficking-related activities that involved the recruitment of women from Thailand to work as sex workers at a brothel in South Africa. The accused person had withheld the women's passports until they generated a sum of R60 000 each from prostitution for the accused.

¹¹⁴⁰ National Prosecuting Authority *Tsireledzani: Understanding the Dimensions* 5-6.

¹¹⁴¹ Mofokeng and Olutola 2014 *SAJC* 130; Iroanya 2014 *SAJC* 103; Roelofse 2011 *SAJC* 7-8; also see the Preamble of the *Prevention and Combating of Trafficking in Persons Act* 7 of 2013.

¹¹⁴² In line with the *Trafficking Protocol's* definition of human trafficking, the consent of the victim may be obtained forcefully or by deception and abuse of a position of vulnerability. Consent obtained in such a manner is nullified under article 3(b) of the Protocol. That is, the offender cannot allege that the victim freely consented to the trafficking.

¹¹⁴³ Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *ISS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Subramanien 2011 *SAJC* 245-265.

trafficking is also exacerbated by a lack of awareness and gaps in the relevant law, policy and practice.¹¹⁴⁴

Apart from the trafficking discourse, this study identified an analysis that sought to highlight poor working conditions which if not closely monitored may degenerate into forced labour.¹¹⁴⁵ Drawing from the comparative example of UK researchers who have previously used studies touching on poor working conditions to trace forced labour,¹¹⁴⁶ this investigation seeks to apply the same criterion to fill the gap in knowledge that exists on forced labour in South Africa.

In doing this, it is possible to employ Griffin's¹¹⁴⁷ study conducted on migrant Basotho domestic workers describing the poor working conditions some of them experience. Griffin finds that domestic workers whose migration status is irregular in South Africa are often exposed to exploitative and poor working conditions for a number of reasons. Firstly, because of their irregular status they cannot obtain valid work permits, making their employment in South Africa illegal.¹¹⁴⁸ This situation was found to disempower the domestic workers and put them at high risk of exploitation by their employers.¹¹⁴⁹ Employers take advantage of this because they know that the likelihood of the worker approaching the labour authorities is very slim.¹¹⁵⁰

In the same study, Griffin¹¹⁵¹ proceeds to make the observation that the irregularity of their migration status makes domestic workers desirous of "hiding" away from law enforcement officials such as the police. In order to achieve this they obtain domestic work that allows them to live with their employer as opposed to obtaining

¹¹⁴⁴ Allais 2013 *Acta Academia* 283-284; Pharoah 2006 *JSS* 25-33; Iroanya 2014 *SAJC* 109; Mofokeng and Olutola 2014 *SAJC* 114-129; Kruger and Oosthuizen 2012 *PER/PELJ* 283-426; Aransiola and Zarowsky 2014 *AHRLJ* 509-525; Subramanien 2011 *SAJC* 245-265.

¹¹⁴⁵ Griffin 2009 *IUR* 22-24. Griffin does not suggest that the exploitative and poor working conditions that her study identified can or should be equated to forced labour. This assertion is solely the submission of this thesis.

¹¹⁴⁶ See para 3.3.3 above.

¹¹⁴⁷ Griffin 2009 *IUR* 22-24.

¹¹⁴⁸ Section 19 of the *Immigration Act* No 13 of 2002 requires all foreign workers to obtain work permits before commencing work within South African borders. Also see Griffin 2009 *IUR* 22.

¹¹⁴⁹ Griffin 2009 *IUR* 22.

¹¹⁵⁰ Griffin 2009 *IUR* 22.

¹¹⁵¹ Griffin 2009 *IUR* 22-24.

separate accommodation elsewhere.¹¹⁵² The "live in" situation has been found to create a situation of dependency on the employer for the provision of accommodation and other basic necessities.¹¹⁵³ In comparison, the UK situation of the tied visas of domestic workers has previously informed Kalayaan that the dependency created by accommodation situations may put domestic workers at risk of exploitation by employers and may subject them to forced labour.¹¹⁵⁴

Whereas being employed in exploitative conditions is not in itself the equivalent of being subjected to forced labour *per se*,¹¹⁵⁵ the UK experience suggests how significant it may be to identifying actual forced labour in practice.¹¹⁵⁶ It must be recalled that UK researchers have previously highlighted the difficulty of using forced labour indicators in practice, in the sense that sometimes employers use "subtle and more sophisticated" tactics to disempower their workers.¹¹⁵⁷ In this case, UK scholars support the proposition by Skrivankova that forced labour must be viewed as a situation on a continuum of exploitation. Thus, in order to gain a better understanding of forced labour, it must be juxtaposed against decent work.¹¹⁵⁸ The existence of such a continuum further suggests that poor working and exploitative working conditions occupy the middle ground between these two extremes, hence establishing their contribution to identifying forced labour.¹¹⁵⁹

Based on the above considerations, it is difficult to make an analysis of the occurrence and dynamics of forced labour in South Africa due to a lack of quantitative data and qualitative studies. At this point, it must be emphasised that the importance of a knowledge base on forced labour is that it would be instrumental to informing legislative responses, the formulation of policies and the development of good practice directed at addressing forced labour. In the absence

¹¹⁵² Griffin 2009 *IUR* 22-23.

¹¹⁵³ Griffin 2009 *IUR* 23.

¹¹⁵⁴ Para 3.3.3 above. Also see para 3.5.2.1 above on the work done by Kalayaan in the UK.

¹¹⁵⁵ Para 2.2 above.

¹¹⁵⁶ Para 3.3.4 above.

¹¹⁵⁷ Para 3.3.4 above.

¹¹⁵⁸ Para 3.3.4 above.

¹¹⁵⁹ Para 3.3.4 above.

of such knowledge, the idea that forced labour is prevalent in South Africa is based on mere speculation.

In this case, Brazil and the UK are a step ahead of South Africa regarding the availability of knowledge on forced labour. The UK presents a largely qualitative analysis of the problem¹¹⁶⁰ while Brazil has previous quantitative data measuring the occurrence of slave labour in rural areas.¹¹⁶¹ Whereas qualitative data is restricted in the sense that it does not provide a measure of the scope of a problem, the UK experience has shown that scholarly opinion may be influential in advocating for legislative and policy change.¹¹⁶² In the case of Brazil, it is quite clear that when a problem is measured and its dynamics are understood, appropriate measures can be properly tailored to address it.¹¹⁶³

For these reasons, it is submitted that there is a need to generate academic interest in the analysis of forced labour in South Africa so as to create scholarly dialogue that may in future inform law reform. In addition to that, there is also a need for the Government of South Africa to allocate resources to study the possibility of the occurrence of forced labour outside the confines of human trafficking so as to create official statistics that may inform the formulation of policies.

5.4 Relationship between human trafficking and forced labour in South Africa

The previous chapters have alluded to the relationship between human trafficking and forced labour. The discussion in the foregoing chapters highlighted that while the two concepts overlap, their relationship is sometimes overemphasised to a point where they are treated as being similar.¹¹⁶⁴ Moreover, this relationship has also generally resulted in an approach where forced labour is largely addressed within

¹¹⁶⁰ Para 3.3.3 above.

¹¹⁶¹ Para 4.3.3 above.

¹¹⁶² Para 3.3.3 as read with paras 3.5.1 and 3.5.2 above.

¹¹⁶³ Para 4.3.3 as read with paras 4.5.1 and 4.5.2 above.

¹¹⁶⁴ See in particular paras 2.4 and 3.4 above.

the trafficking framework.¹¹⁶⁵ It was found that the UK and Brazilian frameworks address forced labour and human trafficking as offences which, although related, warrant separate attention.¹¹⁶⁶

With respect to the fact that section 13 of the Constitution creates a human right not to be subjected to slavery, Kruger and Oosthuizen¹¹⁶⁷ submit that the section does not establish the offence of slavery. Hence, the authors argue that there is a need to have a separate offence of slavery to back up the right established by the Constitution. Because section 13 equally establishes the right not to be subjected to forced labour, it follows therefore that there is a need for a separate establishment of the offence of forced labour to give effect to the right as founded under the Constitution. In that regard, section 48 of the *BCEA* criminalises forced labour by providing that a person who causes the use of forced labour for his or her own benefit or the benefit of another commits an offence. However, it should be kept in mind that the application of the *BCEA* is limited as it applies only to those regarded as "employees" in terms of the Act.¹¹⁶⁸ Put differently, there is a possibility that forced labourers who find themselves beyond the scope of application of the Act will not be capable of enforcing the protection envisioned under section 48. The scope and extent of the coverage of the Act are discussed below.¹¹⁶⁹

In consideration of the foregoing, it is safe to submit that the offence of forced labour that could likely cover all workers¹¹⁷⁰ has only recently been established under the South African legislative framework. This is done under sections 2, 4 and 7 of the *PCTPA*. Hence, the relationship between forced labour and human trafficking in South Africa can be traced to the Act, which at the moment proposes to

¹¹⁶⁵ Para 2.4 above.

¹¹⁶⁶ Para 3.4 and 4.4.

¹¹⁶⁷ Kruger and Oosthuizen 2012 *PER/PELJ* 295. The authors' primary focus is on whether the right not to be subjected to slavery can be employed to address human trafficking. Because section 13 has relevance to forced labour as well, this study seeks to apply the authors' slavery assertion as being equally applicable to forced labour without implying that the two concepts are synonymous.

¹¹⁶⁸ See section 1 of the Act. This aspect of the Act is discussed at para 5.5.1.2 below.

¹¹⁶⁹ Para 5.5.1.2 below.

¹¹⁷⁰ That is, all categories of people who work; for example, those in commercial relationships, volunteers, independent contractors and those performing work that is not remunerated or based on an employment relationship. See para 5.5.1.2 below.

punish the use of forced labour arising from human trafficking¹¹⁷¹ without an express categorisation of workers, as would be the case under the *BCEA*.

As will be seen below,¹¹⁷² the South African approach to forced labour largely depends on the trafficking framework. This position is somewhat similar to the position previously adopted by the UK, wherein forced labour was addressed within the confines of human trafficking.¹¹⁷³ The discussion below that analyses the *PCTPA* will deal with this position in depth, as it forms the crux of this thesis. Similarly, because the South African approach largely depends on the trafficking framework, it is consequential that forced labour is prohibited and is consequently approached through legislation as a criminal law issue, which provides little recourse in the labour law context.

5.5 South African responses to forced labour

The foregoing discussion has confirmed that South Africa has an international obligation to ensure the prohibition and elimination of forced labour within its territory.¹¹⁷⁴ This arises from its ratification of the ILO *Forced Labour Convention*, and by virtue of its membership of the ILO, as provided by the ILO *Declaration on Fundamental Principles and Rights at Work*, 1998.¹¹⁷⁵ The *Forced Labour Convention* requires a member state that ratifies it to establish measures that penalise forced labour.¹¹⁷⁶ At the regional level, the obligation to prohibit and eliminate forced labour can be read into article 5 of the *African Charter*, which prohibits slavery, torture and inhuman and degrading punishment, amongst other things.

It was also noted that the occurrence and nature of forced labour in South Africa remains largely unknown, as most studies have previously focused on human trafficking. This part of the thesis explores how the South African Government has

¹¹⁷¹ Section 7 of the Act.

¹¹⁷² In particular para 5.5.1.1 below.

¹¹⁷³ See para 3.4 above.

¹¹⁷⁴ See para 5.3.2 above.

¹¹⁷⁵ See article 2 of the Declaration.

¹¹⁷⁶ Article 25.

responded to the obligations it has incurred under the abovementioned instruments. Whereas the scope and extent of forced labour is unknown, because the thesis seeks to draw lessons for South Africa, the aim will be to critique whether the current framework can reasonably be said to address the demands of forced labour as it occurs or is likely to occur.

5.5.1 Legislative and constitutional responses

5.5.1.1 Prevention and Combating of Trafficking in Persons Act (PCTPA)¹¹⁷⁷

As noted above, the prohibition of forced labour is part of the Constitution. Based on the assertion by Kruger and Oosthuizen¹¹⁷⁸ as applied above, section 13 does no more than establish a right not to be subjected to forced labour. Hence, further legislation is needed to give effect to the right. With the exception of the *BCEA*, until 2013, there was no national legislation that attempted to criminalise forced labour in South Africa. Hence, the criminal offence of forced labour is partially established for the first time with respect to all workers in terms of the *PCTPA*. Section 4 of the Act provides:

Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of threat of harm, the threat or use of force or other forms of coercion, the abuse of vulnerability...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.

The foregoing provision must be read with section 7, which stipulates that:

Any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking or uses or enables another person to use the services of a victim of trafficking and knows or ought reasonably to have known or suspected that such person is a victim of trafficking, is guilty of an offence.

¹¹⁷⁷ Act 7 of 2013.

¹¹⁷⁸ Kruger and Oosthuizen 2012 *PER/PELJ* 295.

Section 4 essentially establishes the offence of human trafficking, which mirrors the international standard established under article 3(a) of the UN *Trafficking Protocol*. By necessary implication, making use of the services of a victim of trafficking arguably amounts to subjecting the victim in question to one or more of the forms of exploitation listed under the Act. In this regard, the abovementioned sections must be read with section 2(1), which gives a non-exhaustive list of conduct that is considered as exploitation for the purposes of the Act, forced labour inclusive. Section 2(1) proceeds to define forced labour as follows:

Forced labour means labour or services of a person obtained or maintained without the consent of that person and through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, physical restraint to that person or another person.

Taken together, the Act establishes the offence of human trafficking, which is clearly punishable under the Act. However, the same cannot be said for forced labour. For the purposes of the Act, this discussion holds the view that forced labour is seen as a form of exploitation that may result from human trafficking. It is for this reason that section 7 makes it an offence to use, facilitate the use of or profit from the use of the services of a trafficking victim. Consequently, the primary offence under the Act is human trafficking, of which forced labour could be a resultant form of exploitation. That is, without the element of human trafficking, matters of forced labour will fall outside the scope of the Act.

It is argued therefore that whereas the *PCTPA prima facie* appears to address the gap that exists in forced labour¹¹⁷⁹ laws in South Africa, it does so only partially. It must be noted that this discussion does not attempt to critique how effective the *PCTPA* could be in addressing human trafficking. Essentially, the *PCTPA* is a human trafficking Act enacted by parliament for the purpose of addressing human trafficking.¹¹⁸⁰ Hence, it cannot be expected that it will fully address forced labour unless parliament had specifically intended it to do so and expressly stated as much.

¹¹⁷⁹ Note that only debt bondage is a stand-alone offence under section 5 of the Act.

¹¹⁸⁰ Section 3 provides that the objects of the Act are amongst others to "give effect to the Republic's obligations concerning the trafficking of persons in terms of international agreements."

Assuming that it could be said that the Act addresses forced labour, the coverage would nonetheless be limited in the sense that in order to get redress, human trafficking must probably have been committed first. The scope of the application of the Act would thus be limited to victims of forced labour who had been trafficked. Essentially, the remedies¹¹⁸¹ under the Act will be directed towards trafficking victims as opposed to victims of forced labour. Based on these considerations, it is safe to submit that the South African legal system addresses forced labour within the trafficking framework.

From a comparative perspective, the experiences of the UK are instructive, because before the enactment of the *Coroners and Justice Act* and ultimately the *MSA*, the approach to forced labour was similar to that in South Africa. This study has found that in the UK before the *MSA*, the *Asylum and Immigration (Treatment of Claimants) Act* of 2010 did not criminalise forced labour but recognised it as a form of exploitation resulting from human trafficking.¹¹⁸² As a result, the primary offence under this Act was human trafficking. In order to make a claim under the Act, a forced labour victim must have been trafficked. Apart from this Act, the UK framework did not criminalise forced labour as a stand-alone offence.

The UK scholarly opinion has pointed out that this approach was flawed in a number of ways. Firstly, the effect of the Act was that trafficking had to be proven as a prerequisite.¹¹⁸³ This in turn excluded forced labour victims who had not been trafficked from the ambit of the application of the Act. Moreover, Skrivankova¹¹⁸⁴ submits that the Act had the effect of causing confusion between the two offences to the detriment of non-trafficked forced labour victims. Contrary to the

¹¹⁸¹ The Act makes provision for a variety of remedies such as assistance to victims of trafficking, compensation and rehabilitation. It also provides for special procedures on how to handle cases involving child victims of trafficking. The overall approach of the Act to supporting and compensating trafficking victims is more or less similar to the provisions of the *ILO 2014 Protocol to the Forced Labour Convention*. See amongst others, chapters 5 and 6 of the Act.

¹¹⁸² Para 3.4 above.

¹¹⁸³ Balch 2012 *JRF Programme Paper* 11-12; Dwyer *et al* 2011 *JRF Programme Paper* 7; see also para 3.4 above.

¹¹⁸⁴ Skrivankova 2010 *JRF Programme Paper* 8.

requirements of the Act, evidence showed that there were forced labour victims who had actually not been trafficked.

The UK position and scholarly opinion persuaded submissions to the effect that employing the trafficking framework to address forced labour is likely to create a bias in terms of the implementation of the relevant legislation, in the sense that it would most likely involve the training of police officials and border and immigration personnel while overlooking personnel that could be better suited to detecting and assisting forced labour victims.¹¹⁸⁵ Drawing from the submissions of UK scholars, this thesis holds the view that even where forced labour occurring within the boundaries of human trafficking is strictly addressed within that framework, this is likely to lead to the obfuscation of the meaning, content and manifestations of that particular forced labour.

Because the *PCTPA* was established to ratify the UN *Trafficking Protocol*, it is primarily an Act aimed at providing various forms of redress for the offence of human trafficking. Measures pertaining to victim assistance¹¹⁸⁶ as provided for under the Act are primarily tailored for human trafficking victims, with forced labour victims benefitting only if they had been trafficked. Be that as it may, the argument of this thesis is that this redress might not take into account the various implications of forced labour (arising from trafficking) and address them, but might instead focus on addressing the implications of the chief offence, being human trafficking.

*5.5.1.2 Basic Conditions of Employment Act (BCEA)*¹¹⁸⁷

The purpose of the *BCEA* is to give effect to the right to fair labour practices as provided for under section 23(1) of the Constitution (to be discussed below). In so far as forced labour is concerned, the *BCEA* creates the offence of forced labour, which is punishable by a maximum prison term of six years or a fine.¹¹⁸⁸ First of all it

¹¹⁸⁵ Para 3.4 above.

¹¹⁸⁶ See chapter 5 of the Act and para 5.5.3 below.

¹¹⁸⁷ Act 75 of 1997.

¹¹⁸⁸ Section 48 as read with section 93 of the Act.

must be noted that the protection from forced labour guaranteed by the Act is limited to workers who qualify as "employees" under the Act. Section 2 of the *BCEA* defines an employee as (a) "any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer."¹¹⁸⁹ Part (a) of the definition clearly excludes independent contractors from the ambit of the protection of the Act. However, any other person who provides labour to another (including the State) and is entitled to receive remuneration for such work is an employee for the purposes of the Act.

When read literally, part (b) seems to suggest that anyone who in any manner assists an employer to carry out work will be regarded as an employee, to the extent that independent contractors, volunteers and workers in commercial relationships may be covered. While a broader definition is preferred so as to deter employers from evading their obligations under labour legislation by misrepresenting the contracts of employment of those of work, the LAC in *Liberty Life Association of Africa v Niselow*¹¹⁹⁰ has previously held that a literal interpretation of this part of the definition would lead to an absurdity.¹¹⁹¹ In this regard, part (b) ought to be interpreted with due regard to the purpose of the Act, that is to restrict it to those who put their ability to work at the disposal of others.¹¹⁹² Consequently, in *Borcherds v C W Pearce & J Sheward t/a Labrite Distributors*,¹¹⁹³ the Court held that the object of the contract determines whether a person is an employee or independent contractor. It follows therefore, according to the Court, that where the contract was intended to produce a result rather than to render personal services, then the person concerned is an independent contractor. The general wording adopted does

¹¹⁸⁹ A similar definition accrues to "employees" in terms of the *Labour Relations Act* No 66 of 1995.

¹¹⁹⁰ (1996) 17 ILJ 673 at 683.

¹¹⁹¹ Essentially because such an interpretation would defeat the intention of the statute.

¹¹⁹² *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 at 683.

¹¹⁹³ 1993 14 ILJ 1262 at 1271-1272. See further *SA Master Dental Technicians Association v Dental Association of SA & Others* 1970 (3) SA 733 at 740-741; *Oak Industries SA (Pty) Ltd v John NO & Another* 1987 (4) SA 702 at 706.

not have the effect of extending the meaning of an employee to independent contractors (and consequently, therefore, to workers in commercial relationships).

In order to demarcate the broad scope of this definition, parts (a) and (b) have been read together in combination with the use of the common law tests¹¹⁹⁴ to determine the existence of an employment relationship.¹¹⁹⁵ The courts have shown a preference for the dominant impression test, because it requires a multiplicity of factors to be considered in determining the existence of an employment relationship. The implication of this is that the court will consider the substance of the relationship rather than its form.¹¹⁹⁶ With reference to the factors mentioned, the dominant impression test ought to be applied in conjunction with section 83A of the *BCEA*, which creates a rebuttable presumption of who an employee is. According to this presumption, where a litigant alleges that he is an employee he will be presumed to be one if he renders services to another person and any one of the factors is present in the relationship, regardless of the label given to the contract by the parties.¹¹⁹⁷ The employer would thereafter be granted the opportunity to attempt to prove otherwise. The following factors trigger the presumption and are therefore reproduced here:

the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person forms part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom he or she works or renders services; the person is provided with the tools of trade or work equipment by the other person; or the person only works for or renders service to one person.

¹¹⁹⁴ Common law tests developed by the courts are the supervision and control test, the organisational test, the economic dependency test and the dominant impression test.

¹¹⁹⁵ Van Niekerk and Smit *Law@work* 61.

¹¹⁹⁶ See for example *Denel (Pty) Ltd v Gerber* 2005 26 ILJ 1256 (LAC) at para 94; *Linda Erasmus Properties Enterprises (Pty) Ltd v Mhlongo & Others* 2007 28 ILJ 1100 (LC); *Schoeman v Longgrain CC* 2006 27 ILJ 2496 at 2500.

¹¹⁹⁷ *Universal Church of the Kingdom of God v Myeni & Others* 2015 36 ILJ 2832 (LAC) at para 37; *Schoeman v Longgrain CC* 2006 27 ILJ 2496 at 2500.

The elasticity of the definition of an employee and section 83A under the Act subsequently leave room for the coverage of a wide range of workers, inclusive of forced labourers, be they in informal or formal employment.

The sole reliance on section 48 of the *BCEA* to address forced labour will naturally pose challenges in connection with people who perform work but are not necessarily "employed". Le Roux¹¹⁹⁸ has previously argued that not all work is performed within the confines of an employment relationship, and neither are all people who perform labour entitled to a remuneration. For example, it should not be ruled out that what may begin as a child's duty to perform domestic chores in the household may deteriorate into a situation of domestic servitude.¹¹⁹⁹ Taking this scenario into account, the labour that is extracted forcefully from the child is not extracted within what can be labelled an employment relationship; nor is the child entitled to receive remuneration for that work. The child cannot seek protection from section 48(1) of the *BCEA* because he is not an employee for purposes of this Act.

The above scenario attests to the fact that there is a need for forced labour legislation that covers everyone without the need to explore the maze that is the employment relationship before the worker in question may seek remedy. Further to this, whilst the framework of the *BCEA* is elastic enough to encompass vulnerable workers, the practical reality of having them enforce their rights may be limited by a strict requirement to prove the existence of an employment relationship ahead of the occurrence of forced labour. This is exacerbated by the strong possibility that these workers are ignorant of their rights and probably do not enjoy effective representation by trade unions. Further to this, the unique circumstances in which they work may make it more difficult for them to prove the existence of an employment relationship, more so than other workers.

In contrast to the aforesaid, the *PCTPA* does not seem to suggest that the forced labourer (who has been trafficked) needs to prove the existence of an employment

¹¹⁹⁸ Le Roux "The New Unfair Labour Practice" 50.

¹¹⁹⁹ See ILO date unknown <http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.htm>

relationship before the allegation of human trafficking and subsequent forced labour can succeed. The definition of forced labour under the Act speaks of using the labour or services of a "person", suggesting that the worker need not be an employee to be covered by the Act. This argument is supported by the fact that the Act does not define who an employee is for its purposes, thereby making the issue of an employment relationship moot.¹²⁰⁰ Thus, despite its limited protection, the *PCTPA* introduces an approach that might prove essential in legislation. This approach prohibits forced labour and extends coverage to all that fall victim to the offence; even those not regarded as employees in the true sense of the word.

Ultimately, even if a forced labourer succeeds in proving his or her employee-status in terms of the *BCEA* and consequently enjoys coverage, it ought to be underscored that the protection and remedies¹²⁰¹ envisaged under the current labour law framework appear negligible. This is true since the labour law framework exhibits no clear recognition of the unique effects of forced labour on workers and does not properly provide for measures to address them. Therefore, it is justified to claim that the South African framework needs to be amended to better respond to forced labour, as has been done in the UK and Brazil.

5.5.1.3 Constitution of the Republic of South Africa, 1996

It would have been desirable to be able first to discuss the *Constitution of the Republic of South Africa, 1996* (referred to as the Constitution in this chapter), as it is the supreme law of the land. Importantly, section 2 of the Constitution provides that "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". The Constitution thus stands at the apex of all laws in South Africa and all law and conduct must derive their legitimacy from it. Instead, the current legislative framework was discussed first so as to properly identify the gaps existing

¹²⁰⁰ Section 11 of the Act speaks to the liability of the employer or his agent.

¹²⁰¹ See para 5.5.2 below on the responses possible within the South African framework and how despite their significant functions they are not specifically tailored to respond to the unique consequences of the offence of forced labour. This observation is made in comparison with the responses formulated within the UK and Brazilian frameworks.

in the relevant law. The Constitution can then be employed as the supreme law of the land as a means through which possible solutions could be found to fill the gaps without resorting to comparative examples.

As has been said repeatedly, this discussion will employ comparative examples and experiences of the UK and Brazil to assist the South African Government in adjusting its laws and policies to properly address forced labour in accordance with the international standards. Nevertheless, caution has been exercised against suggesting a direct translation of what has been learnt from the comparative jurisdictions into the South African context, because the measures adopted by a jurisdiction are normally tailored to address the particularities of forced or slave labour within that jurisdiction. Hence, while comparative examples will be instructive in drawing lessons for South Africa, it is sought in this thesis also to find solutions within the available laws that may address the issue of forced labour.

5.5.1.3.1 The right not to be subjected to forced labour

Given the gaps that exist in the current legislation and the tenuous application thereof,¹²⁰² this discussion seeks to explore whether the Constitution can be said to offer redress to those who find themselves engaged in forced labour. As a point of departure, one must first highlight the constitutional position on forced labour *per se*. Section 13 in the Bill of Rights stipulates that "No one may be subjected to slavery, servitude or forced labour." While the Constitution does not give an indication of how forced labour will be defined and treated in respect of section 13, it has been noted above that international law must be used as an interpretative aid to give meaning to Chapter 2 rights.¹²⁰³ Consequently, the ILO instruments and authorities touching on forced labour may be used in interpreting the scope and extent of the right contained in section 13 in the South African context.¹²⁰⁴

¹²⁰² Paras 5.5.1.1 and 5.5.1.2 above.

¹²⁰³ See para 1.9 above and further *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 97; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) at para 22.

¹²⁰⁴ See para 2.6 above.

It seems that the purpose of section 13 is to prohibit the subjection of any person in South Africa to forced labour, slavery or servitude. Accordingly, the right appears to apply to everyone within South African boundaries as it is distinct from rights that have been formulated to apply to citizens specifically.¹²⁰⁵ This proposition draws authority from the Constitutional Court's consistent interpretation of the word "everyone" in so far as it is used with respect to certain rights in the Bill of Rights. In holding that sections 12(1) and 35(2) of the Constitution apply to non-citizens, the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others*¹²⁰⁶ reiterated that when the Constitution uses the word "everyone" it ought to be given its literal meaning and that the Constitution makes it clear whenever it seeks to restrict rights to citizens only. The *UDHR*, *ICESCR* and *ICCPR* confer most human rights on everyone, as opposed to citizens only. The Constitutional Court has made arguments in a similar vein in earlier jurisprudence as well.¹²⁰⁷ It follows therefore that the abovementioned decisions of the Court are in line with South Africa's obligations under international human rights treaty law to not restrict human rights to citizens only. This consistent interpretation by the Court also draws support from its obligation to prefer an interpretation of national law that is consistent with international law. In this light the right in section 13(1) will be applied to all types of workers, whether they find themselves within the ambit of conventional labour law protection or not, and regardless of their citizenship.¹²⁰⁸ This position seamlessly meshes with the protection of trafficked forced labourers under the *PCTPA*, who would most probably be irregular¹²⁰⁹ immigrants, as well as with section 48(1) of the

¹²⁰⁵ Section 7(1) stipulates that the Bill of Rights enshrines the rights of *all people* in South Africa, supposedly casting a wide net of application. However, see for example amongst others sections 19, 20, 21(3), 21(4) and 22, which expressly reserves particular rights for citizens of the Republic.

¹²⁰⁶ 2017 5 SA 480 (CC) at para 26 (hereafter referred to as *Lawyers for Human Rights*).

¹²⁰⁷ See *Khosa and Others v Minister of Social Development and Others* 2004 6 SA 505 (CC) at para 111; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at paras 48-57.

¹²⁰⁸ People in commercial relationships and those in relationships akin to employment who cannot seek protection from the legislative prohibition of forced labour under section 48(1) of the *BCEA* should thus similarly be capable of being protected by this right. For example, with respect to workers who are clearly excluded from the application of the Act under section 3(1) and (3).

¹²⁰⁹ The *Immigration Act* uses the word "illegal immigrant" to refer to migrants with an irregular migration status in South Africa. The phrase "irregular migrant" is preferred in this thesis as it aligns with the international approach to the treatment of undocumented migrants. Human rights advocates have continuously expressed their dislike of the phrase "illegal immigrant" as it has

BCEA, which amounts to a guarantee to protect migrant workers even where they have been found to be employed illegally in South Africa.¹²¹⁰

Over and above this, the general application of this right to everyone is confirmed by the fact that had the intention been to limit it strictly to those regarded as employees or in something akin to an employment relationship, it would have been situated under the labour rights in section 23 of the Constitution.

Apart from the above, the Constitution contains a number of additional rights¹²¹¹ that can together with section 13 be employed in an argument against forced labour. In this respect, regard must be had firstly to the values contained in the Constitution as they are the basis upon which its provisions must be interpreted.¹²¹² Section 1 of the Constitution establishes human dignity, equality and freedom as the core values upon which the Republic is founded. Consequently, over and above being accorded the status of human rights in sections 9,¹²¹³ 10,¹²¹⁴ 12,¹²¹⁵ 21¹²¹⁶ and 22,¹²¹⁷ dignity, equality and freedom are regarded as values to be upheld in the interpretation of all human rights in the Constitution. The Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay*¹²¹⁸ reiterated that these values

discriminatory connotations. For a thorough discussion of the distinction between these phrases in international law, see amongst others Triandafyllidou *Irregular Migration in Europe* 2-5.

¹²¹⁰ It should be noted that migrant workers enjoy the full protection of South African labour laws such as the *BCEA* and *LRA* so long as they are employees for the purposes of those Acts. Section 49(3) of the *Immigration Act* makes the employment of "illegal" immigrants in South Africa illegal and the fine and/or penalty envisioned in the section is directed at the offending employer and not the migrant employee. In *Discovery Health Limited v CCMA & Others* (2008) 29 ILJ 1480, the Labour Court held that this section does not imply that the resultant contract of employment is invalid. According to the Court, a construction of that manner would be prejudicial to the right to fair labour practices as entrenched under section 23(1) of the Constitution.

¹²¹¹ See amongst others sections 9, 10, 12, 21 and 23.

¹²¹² See amongst others Mokgoro 2010 *STELL LR* 222-223; De Vos *et al South African Constitutional Law* 418-419.

¹²¹³ Section 9 reads "Everyone is equal before the law and has the right to equal protection and benefit of the law". The subsequent provisions of the section prohibit acts of direct or indirect unfair discrimination on the grounds of race, gender, social origin and religion, amongst others.

¹²¹⁴ Section 10 reads "everyone has the inherent dignity and the right to have their dignity respected and protected."

¹²¹⁵ Section 12 reads "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;..."

¹²¹⁶ Section 21(1) reads "everyone has the right to freedom of movement."

¹²¹⁷ Section 22 reads "every citizen has the right to choose their trade, occupation or profession freely."

¹²¹⁸ 2008 1 SA 474 (CC) at para 63.

as well as all other rights in the Constitution are seen as dependent on one another and should therefore not be interpreted separately.¹²¹⁹ In particular, the right to dignity undergirds most of the other rights in the Constitution.¹²²⁰ For this reason, this right has been used continuously in a plethora of the Constitutional Court's jurisprudence to shield and give effect to some of the other human rights of litigants.¹²²¹ For example, the breach of an individual's right to social security and/or the person's right to privacy cannot be addressed without acknowledging the impact that such a violation simultaneously has on the person's right to dignity. This was argued in *Khosa and Others v Minister of Social Development and Others*¹²²² and *NM and Others v Smith and Others*.¹²²³ The effect of the offence of forced labour on the victim necessitates that it also not be confined to a breach of section 13(1) only. Taking into account its nature, forced labour directly impacts on the right of the victim to dignity, freedom and equality, as well as on the right to fair labour practices (as will be demonstrated throughout the discussion below).¹²²⁴

By virtue of being classified as a core value, human dignity imposes on everyone a duty and obligation to regard other human beings in a dignified and humane manner. In addition to this, the court in *S v Makwanyane*¹²²⁵ held that:

...Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern.

¹²¹⁹ See further *Government of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) at para 23-24.

¹²²⁰ See amongst others *NM and Others v Smith and Others* 2007 5 SA 250 (CC) at paras 49-50; *S v Makwanyane* 1995 3 SA 391 at para 329; De Vos *et al South African Constitutional Law* 418-419.

¹²²¹ See amongst others *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2003 3 SA 936 (CC) at paras 34-37; *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC) at para 41; *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 at paras 31-33.

¹²²² 2004 6 SA 505 (CC) at paras 40-52. Similarly, in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 2 SA 1 (CC) at paras 30-55, the Court held that a failure of the *Aliens Control Act* to extend the privilege to apply for residents permits by same sex foreign couples was a limitation of their rights to dignity and equality.

¹²²³ 2007 5 SA 250 (CC) at para 48. See further *Ferreira v Levin No and Others* 1996 1 SA 984 (CC) at para 49.

¹²²⁴ The position at international law in particular with respect to the *UDHR* as alluded to above also favours this line of reasoning. Also see para 2.5.1 above.

¹²²⁵ 1995 3 SA 391 (CC) at para 328.

It follows from the foregoing that the principle of dignity is in conflict with the phenomenon of forced labour in that the conditions experienced in a forced labour situation¹²²⁶ hardly have regard to the worth of a human being and neither do they speak to treating these labourers with respect or concern for their basic human rights. For this reason, it must be submitted that the constitutional value of human dignity and its corresponding right, in section 10, can be used to buttress an argument for classifying forced labour as a contravention of human rights¹²²⁷ - beyond simply section 13.

With due appreciation for the relevance of freedom in matters pertaining to forced labour, the opinion of the Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay*¹²²⁸ on the value of freedom can similarly be referred to here. The Court succinctly describes the value of freedom in an open and democratic society. According to the Court:

A necessary element of freedom ... of any individual is an entitlement to respect for the unique set of ends that the individual pursues... That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

It is possible to derive an argument from the Court's sentiments that the imposition of forced labour on an individual should be viewed as an affront to the value of freedom, since forced labour may in certain circumstances compromise the freedom of individuals to pursue professions of their choosing and obliges them to provide work or services with little or no remuneration under poor working conditions. Physical freedom could also be taken away where encampment is used to keep forced labourers captive with threats of death should they attempt to escape.¹²²⁹

¹²²⁶ See para 2.7.2 above.

¹²²⁷ Also see para 5.3.3.1 above with respect to Article 5 of the *African Charter*, which bases its prohibition of slavery and other torturous and inhuman treatment on the value of dignity.

¹²²⁸ 2008 1 SA 474 (CC) at para 64.

¹²²⁹ See for example para 4.3.3 above. If this were to occur in a South African context, it would constitute a violation of the right to freedom of movement expressed in section 21(1) of the Constitution.

Section 22, providing the right to freedom of trade and occupation is subsequently negated where a trafficked worker eventually finds himself in a forced labour situation and he had no say with respect to the nature of the work he is forced to perform. However, the right may also be compromised where there is initial free choice of occupation in the absence of trafficking.¹²³⁰ This situation may arise from the coercive acts and constant threats of the employer, and from debt bondage, which has the purpose of retaining the services of the worker. It prevents the worker from withdrawing his services from that employer and from exercising the freedom to choose an alternative occupation which might be different in nature from that of his current employment.¹²³¹ In his analysis of the international right to work and freedom of occupation, Swepston¹²³² asserts that forced labour limits not only the right of the individual to choose whether or not to perform work, but also poses a limitation to the choice of work he may perform.¹²³³

With the above in mind, a reconciliation of sections 13 and 22 is necessary, as the former seeks to prohibit the imposition of forced labour on everyone while the latter limits the application of the right to freely choose a profession to citizens only. In view of the observation of the Court in *Lawyers for Human Rights*, that the limitations of the rights to citizens in the Constitution are explicit,¹²³⁴ it may be questioned whether a non-citizen may plead a violation of this right alongside other rights in a forced labour scenario.

¹²³⁰ See further para 3.3.4 on the topic of the continuum of forced labour, where it is argued that decent working conditions may gradually deteriorate into poor working conditions and ultimately into a forced labour situation.

¹²³¹ See para 2.2 above on the significance of the worker's freedom to terminate his employment with respect to the *Forced Labour Convention*.

¹²³² Swepston *The Development in International Law* 40.

¹²³³ It is recalled that the study of the TUC in the UK underscores that forced labour is common in "vulnerable work" because it normally does not require a skilled workforce. For this reason, the low-skilled nature of occupations provides for the easy entry and exit of workers into the workplace. See in this regard para 3.3.3 above. In view of this, the possibility exists within industries in the informal sector that certain workers are willing to move from one occupation to the other purely to sustain a living. Forced labour may consequently compromise a worker's right to freely replace one occupation with another by binding him to his current employer, thus violating the worker's right under section 22.

¹²³⁴ 2017 5 SA 480 (CC) at para 26.

The Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*¹²³⁵ had occasion to consider the scope of this right. Whereas the enquiry did not turn on the exclusion of non-citizens, the views of the Court may assist in interpreting the right. The Court stated that:

In broad terms this section has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society... Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity. One's work is part of one's identity and is constitutive of one's dignity.¹²³⁶

In the light of the significance of the right as highlighted by the Court, it is asserted that the limitation imposed in section 22 must not be seen to be prejudicial to non-citizens' freedom to pursue a profession of their choosing. The mere fact that the Constitution specifically reserves the right for citizens does not, it is submitted, mean that non-citizens are devoid of the right completely. In this regard, the right is arguably formulated in this manner to allow for the creation and/or imposition of restrictions as well as special regulations regarding the employment of non-citizens in South Africa.¹²³⁷ That is, non-citizens can also freely choose their professions but whether or not they actually practise that profession will be subject to immigration laws and in certain instances employment equity laws.¹²³⁸ For example, while non-citizens may choose their profession freely, the ultimate freedom to practice is preceded by compliance with the requirement to obtain a work permit in terms of section 19 of the *Immigration Act*.

As the third core value of the Republic, equality becomes relevant to forced labour where such conduct is used to perpetuate inequalities. It was observed in this study that international law recognises that forced labour can be imposed on persons

¹²³⁵ 2006 3 SA 247 (CC).

¹²³⁶ Para 58-59.

¹²³⁷ See in this regard sections 38 and 49(3) of the *Immigration Act*.

¹²³⁸ Notably, the Court in *S v Zuma* 1995 2 SA 642 (CC) at paras 14-16 highlighted that in interpreting the Bill of Rights, due cognisance must be taken of the language used whilst simultaneously adopting an interpretation that is generous and purposive which gives effect to the values of the Constitution. It follows therefore that to allow non-citizens free choice of profession arguably underscores the value of freedom, which cannot be disengaged from the values of dignity and equality.

based on their origin, descent or gender.¹²³⁹ In this respect, the ILO's *Abolition of Forced Labour Convention* recognises that forced labour can be used as a means of racial, social, national and religious discrimination.¹²⁴⁰ In this instance, then, a possibility exists that an employer may impose forced labour on a worker due to that worker's nationality (more particularly where he is an irregular migrant) with a threat of denunciation to the authorities. Meanwhile, similar treatment will not be extended to workers who are nationals due to the lack of a means of coercion. The Constitutional Court in *President of Republic of South Africa v Hugo* observed that:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their memberships of particular groups.¹²⁴¹

Consequently, unfair discrimination perpetrated in the form of forced labour goes against the spirit of the equal treatment of all people as envisaged by the Constitution. All things considered, forced labour represents a travesty of the very essence of the Constitution and the core values it seeks to uphold. On this basis alone, a valid claim can be made touching on the unconstitutionality of forced labour, irrespective of the fact that it also violates a combination of more specific interrelated constitutional rights. When the unconstitutionality of forced labour is extended to more specific rights, a violation of section 13 inevitably results in a violation of the specific rights to dignity, equality, freedom,¹²⁴² the right to freely choose a profession in terms of section 22 and the right to fair labour practices in section 23.

5.5.1.3.2 The right to fair labour practices

Having considered the relevance of the constitutional values, general human rights as well as the more specific human right not to be subjected to forced labour, the

¹²³⁹ Para 2.7.2.4 above.

¹²⁴⁰ Article 1(e).

¹²⁴¹ 1997 4 SA 1 (CC) at para 41.

¹²⁴² Illustrations of how these specific rights may be impacted by forced labour are similar to how the corresponding core values are affronted by the offence.

following discussion explores the relevance of section 23(1) of the Constitution to addressing forced labour within the labour law framework. Section 23(1) of the Constitution provides that "everyone has the right to fair labour practices". The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town*¹²⁴³ held that:

Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition... Indeed what is fair depends upon the circumstances of a particular case and essentially involves a value judgement... The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning in the first instance, from the decisions of the specialist tribunals... In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience...¹²⁴⁴

Drawing from the Court's statement, the concept of "fair labour practices" as protected under the Constitution forms an important part of the labour and employment law of South Africa. The evolution of the right can be traced back to section 1 of the *Labour Relations Act* of 1956, which defined the concept in wide terms as "any labour practice which in the opinion of the Industrial Court is an unfair labour practice." Subsequent amendments¹²⁴⁵ have since then delimited the wide scope presented in the 1956 Act, until the *Labour Relations Act* 66 of 1995 listed various labour practices in section 186(2) which will be deemed unfair.¹²⁴⁶ Upon considering the wording thereof, it has been submitted by Van Niekerk and Smit¹²⁴⁷ that section 186(2) of the *LRA* is incapable of being extended to conduct that has not been listed in the section. In contradistinction, the constitutional guarantee of

¹²⁴³ 2003 24 ILJ 95 (CC). Hereafter *NEHAWU v UCT*.

¹²⁴⁴ 2003 24 ILJ at paras 33-34.

¹²⁴⁵ For example in terms of the *Industrial Relations Amendment Act* 95 of 1982.

¹²⁴⁶ Section 186(2) reads "unfair labour practice means any unfair act or omission that arises between an employer *involving* unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to a probation) or training of an employee or relating to the provision of benefits to an employee; the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000, on account of that employee having made a protected disclosure defined in that Act." (Emphasis added)

¹²⁴⁷ Van Niekerk and Smit *Law@work* 187. By using the word "involving" in section 186(2) and not "including", the list is not to be considered to refer to kinds of conduct among others that can be read into the scope of 186(2). The word "involving" thus introduces a fixed, exhaustive list (*numerus clausus*).

fair labour practices enables the scope of unfair labour practices to be extended beyond what the *LRA* provides¹²⁴⁸ due to its apparent open-ended nature. Upon closer scrutiny of the meaning of this constitutional right, it may be found that forced labour can be classified as an unfair labour practice, thus possibly extending constitutional protection to forced labourers even further. To ascertain the extent to which the right may apply to forced labour, it is necessary to explore the various components of section 23(1).

The Constitution does not give an indication of what a labour practice is, how to determine the fairness or otherwise of such a practice, and who "everyone" is. For purposes of illustration, it is instructive to first consider how a labour practice has been delineated in terms of the *LRA*. In this regard, Grogan¹²⁴⁹ highlights the need to consider the word "labour" as giving guidance to conduct that can be classified as a labour practice. He argues that the word "labour" must be assigned a meaning similar to that of the word "employment", with the result that the envisioned practice will arise in the context of an employment relationship where one is deemed an employee in terms of the common law and in relation to the Act. Similarly, Cheadle¹²⁵⁰ argues that the phrase "labour practices" under section 23(1) relates to "practices that arise from the relationship between workers, employers and their organisations." It follows therefore that a "labour practice" must arise within the confines of an employment relationship notwithstanding the absence of a valid contract of employment,¹²⁵¹ such that section 23 is fashioned to regulate and ensure the fairness of conduct arising within and by virtue of the employment relationship or something akin to it.

¹²⁴⁸ *NEWU v CCMA & Others* 2003 (24) ILJ 2335 at 2340.

¹²⁴⁹ Grogan *Employment Rights* 93-94.

¹²⁵⁰ See Van Niekerk and Smit *Law@work* 39.

¹²⁵¹ For example, the courts have previously paid less attention to the existence of valid contracts of employment in determining whether affected workers qualified to be regarded as having been in an employment relationship. See for example *Kylie v CCMA* 2010 ZALAC 8 at para 23-24. In *SANDU v Minister of Defense* 1999 20 ILJ 2265 (CC) at paras 28-30 the Court held that the fact that a person is not employed under a contract of employment does not imply that he loses the constitutional protection under section 23(1). The determining factor is that he operates in a manner that emulates a worker employed under a contract of employment.

The jurisprudence emanating from the labour courts is in agreement with the aforesaid views, even though the courts do not normally delve into defining what a labour practice is. For example, in *NEWU v CCMA*¹²⁵² the ruling of the Labour Court indicates that what is envisaged is the lawfulness and fairness of conduct between an employer and employee. Consequently, paying regard to who an employee is with reference to the *BCEA* and *LRA* (and the common law), a labour practice will arise only between parties who can successfully establish the existence of an employment relationship or something akin to it between themselves. Therefore, since forced labour involves the extraction of a worker's labour for an employer, albeit forceful and prohibited, it could and must *prima facie* be deemed to be a labour practice for the purposes of the Constitution in so far as the conduct takes place within an employment relationship or something akin to it.

In determining whether forced labour can be classified as a "labour practice" at international law, the following elements must be considered. The ILO seems to attach a broader definition to what labour practices are. Accordingly, for the purposes of the ILO labour practices involve a gamut of relations between workers and employers, which encompasses aspects ranging from employment security, wage protection, skills development and occupational health and safety.¹²⁵³ It follows therefore that the ILO does not discriminate among practices that qualify as labour practices. It appears that all practices imposed by or emanating from the use of the labour of a worker as well as aspects reasonably incidental to the use of such labour will be seen as labour practices. Put differently, all aspects of employment and labour relations as well as areas that are incidental to their continuation such as occupational health and safety are equally seen as labour practices.¹²⁵⁴ By its very nature, forced labour is not an isolated occurrence. This element is confirmed by the continuum of exploitation which establishes the view that forced labour consists of a series of practices that have an effect on the labour and employment rights of its victims. In this regard, for the purposes of the ILO forced labour can be classified as

¹²⁵² 2003 24 ILJ 2335 (LC) at 2339-2340. Also see *Fedlife Assurance v Wolfaardt* 2002 2 All SA 295 at para 2; *National Union of Metal Workers of South Africa v Vetsak Co-operative* 1996 17 ILJ 455 at 589.

¹²⁵³ See for example Nathan *et al Labour Practices in India* 1-3.

¹²⁵⁴ Nathan *et al Labour Practices in India* 1-3, 23-27; ILO *Good Labour Practices* 2-12.

a labour practice because it involves the exploitation of labour characterised by an array of coercive labour practices and is hence an issue of labour market concern.¹²⁵⁵

By utilising the continuum of exploitation and the concept of decent work, an understanding of why forced labour is arguably an unfair labour practice under the Constitution as well as at international law is established. The continuum of exploitation suggests that in order to get a better understanding of forced labour it needs to be contrasted with decent work. According to the ILO, the concept of decent work is premised on the creation of jobs that add value to both the working and the everyday life of a person.¹²⁵⁶ Such work must ensure the payment of a fair wage and pay due consideration to health and safety in the workplace and ensure that social protection is guaranteed.¹²⁵⁷ Having considered the labour rights infringed on by the offence of forced labour,¹²⁵⁸ it is apparent that it runs counter to the ideal of decent work and thereby qualifies as an unfair labour practice for the purposes of section 23(1).

In determining whether forced labour may be viewed as an "unfair" labour practice under the Constitution, the rationale for the requirement of fairness in labour relations as envisaged under section 23(1) may be read from the Constitutional Court's reasoning in *NEHAWU v UCT*; that the relationship between the employer and employee must be conducted on terms that are fair to both.¹²⁵⁹ The

¹²⁵⁵ See Andrees and Belser "Forced Labour" 3-5; Andrees and Belser "Strengthening Labour Market" 109-127.

¹²⁵⁶ See para 2.7.1 above, which delves into the content of the decent work agenda.

¹²⁵⁷ See generally, ILO *Decent Work Indicators* 27-169.

¹²⁵⁸ It is noted that South African labour legislation does not define or give content to what forced labour is. However, a court deciding a case of forced labour under section 48 of the *BCEA* may consider the provisions of the ILO *Forced Labour Convention*, since South Africa is a signatory to the Convention. This statement derives authority from section 2 of the Act which provides that one of the purposes of the Act is to "give effect to obligations incurred by the Republic as a member state of the International Labour Organisation". In this regard, the provisions of the Act will be interpreted as far as possible in a manner that realises the obligations South Africa incurs from its ILO membership and ratified conventions. Therefore, in order to identify labour and employment rights affected by forced labour, resort may be had to the ILO indicators discussed at para 2.7.2 above. Also see section 233 of the Constitution, which regulates the application of international law in interpreting legislation.

¹²⁵⁹ *NEHAWU v UCT* 2003 24 ILJ para 40.

Constitutional Court in *Sidumo v Rustenburg Platinum Mines*¹²⁶⁰ also highlighted the role of labour legislation and the Constitution in addressing the power imbalance between these two parties in labour relations.

In addition, the courts' approach to the concept of "fairness" demonstrates that there is no rule of thumb for what constitutes fair conduct.¹²⁶¹ For this reason in *National Union of Metal Workers of South Africa v Vetsak Co-operative and Others*¹²⁶² the Supreme Court of Appeal observed that:

In judging fairness a court applies a moral or value judgment to established facts and circumstances... And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.

In essence, what is fair must be determined through a value judgement made from a fair consideration of the surrounding circumstances. A fair consideration of circumstances calls upon the court to balance the interests of both the employer and the employee amid a relationship where the employer possesses more power. For this reason, in *Sidumo v Rustenburg Platinum Mines* it was held that in as much as the employer normally has more power, the requirement of fairness in section 23(1) requires that the positions of both the employer and the employee be analysed as if they had equal standing.¹²⁶³ Put differently, the arbiter needs to evaluate the circumstances from an objective point of view¹²⁶⁴ by tilting the balance of fairness towards both sides.

Based on the assumption that it is a labour practice, and by utilising the above standard, it is submitted that forced labour is arguably unfair because it has the undesirable effect of enriching the employer at the expense of a worker's basic human and labour rights. More specifically, the discussion above highlighting the

¹²⁶⁰ 2008 2 SA 24 (CC) at para 74.

¹²⁶¹ *NEHAWU V UCT* 2003 24 ILJ paras 33-34.

¹²⁶² 1996 17 ILJ 455 at 589. (Hereafter NUMSA v Vetsak)

¹²⁶³ 2008 2 SA 24 (CC) at para 74.

¹²⁶⁴ *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* 2003 24 ILJ 1917 (LAC) at paras 58- 69.

manner in which forced labour affronts the constitutional values of dignity, freedom and equality as well as the corresponding rights demands that forced labour be viewed as an unfair labour practice. Under no circumstances can conduct that unjustifiably infringes upon an individual's rights to dignity, freedom, equality and not to be subjected to forced labour, be deemed fair. In totality, forced labour constitutes an unjustifiable limitation of a plethora of rights in the Constitution and in this sense does not comply with the permissible limitation of rights envisaged under section 36 of the Constitution.¹²⁶⁵

Finally, the apparently open-ended nature of section 23(1) is established by the use of the word "everyone". While the use of the word mirrors other rights of a general nature that are similarly conferred on everyone, sight should not be lost of the fact that section 23(1) is specifically tailored for labour relations. In this regard, the section has traditionally been interpreted with reference to the employment relationship. Therefore, practices that are covered by the right must be those that arise directly from and by virtue of that relationship. In this regard, Cooper¹²⁶⁶ identifies issues of security of employment, employment opportunity, freedom of association and collective bargaining as typical labour practices envisioned under section 23(1). By virtue of this, it must be submitted that section 23(1) is interpreted in the light of conventional employment as governed by the *BCEA* and the *LRA*.¹²⁶⁷ Other matters of labour market concern such as occupational health and safety as well as social security seem to be exempt from the labour practices envisioned under the right. Consequently, Cooper¹²⁶⁸ notes that section 23(1) is not to be seen as a "catchall right capable of embracing any person and any matter." As a matter of fact, section 23(1) is actually limited in its scope of coverage of labour matters as well as with regard to the category of people who may claim the right, as will be demonstrated shortly.

¹²⁶⁵ Limiting a right can be constitutionally valid only if the limitation is imposed by law and the limitation is considered to be reasonable and justifiable in a democratic society based on human dignity, equality and freedom.

¹²⁶⁶ As cited in Van Niekerk and Smit *Law@Work* 42-43; also see Le Roux "The New Unfair Labour Practice" 45.

¹²⁶⁷ Le Roux "The New Unfair Labour Practice" 45.

¹²⁶⁸ As cited in Van Niekerk and Smit *Law@Work* 43.

Firstly, the traditional position concerning the scope of matters covered by the right instructs us that not all issues that are labour market related automatically fall within the scope of section 23(1).¹²⁶⁹ However, as argued above, forced labour is an unfair labour practice for the purposes of section 23(1) with respect to the *BCEA*, bearing in mind the general purpose of the Act, which is to give effect to and regulate the right conferred under section 23(1).¹²⁷⁰ Hence, in addition to a plea resting on section 48 of the *BCEA*, complainants ought to be able to allege a breach of their right to fair labour practices as conferred by the Constitution.

It seems, however, that if forced labour is to be addressed within the labour framework by classifying it as an unfair labour practice in terms of section 23(1) of the Constitution, the approach to the interpretation of the right would have to be shifted to one that covers other fundamental labour rights that have been excluded from its scope. This proposal rests on the observations made above¹²⁷¹ which demonstrate that the execution of forced labour encompasses a violation of an array of rights that are not only limited to security of employment and unfair treatment in employment. Key aspects of labour relations such as occupational health and safety and social security feature amongst the rights commonly affected by the practice of forced labour.¹²⁷² In the light of the 2014 *Protocol on Forced Labour*, which requires the effective involvement of labour law in suppressing forced labour, it would seem that in addressing the offence, all aspects of labour law that stand affected by forced labour must be effectively addressed.

With that said, the argument made is that the emergence of contemporary labour market issues such as forced labour demands that section 23(1) be interpreted in a manner that reflects an aim to develop and maintain decent work in South Africa. That is, if the prohibition of forced labour is to be justified from a labour market perspective using section 23(1), the right must be capable of embracing other parts of labour relations that have traditionally been seen as falling outside its scope. In

¹²⁶⁹ Van Niekerk and Smit *Law@Work* 43.

¹²⁷⁰ The same cannot be said about section 186(2) of the *LRA* because the list of unfair labour practices therein is closed. See Van Niekerk and Smit *Law@Work* 187-188.

¹²⁷¹ Para 2.7.2 above.

¹²⁷² Para 2.7.2.2.

fact, in 2012 Le Roux¹²⁷³ used the ILO Decent Work Agenda as a justification for proposals to broadly interpret section 23(1) so as to accommodate other fundamental labour rights. Le Roux's argument is based on the consideration that the ideals of the Decent Work Agenda extend to the realms of occupational health and safety as well as social security, which are traditionally not seen as labour practices with respect to section 23(1).¹²⁷⁴ Further to this, the justification of this proposal is based on the applicability of the Agenda to South Africa through its memorandum of understanding with the ILO on the development and implementation of a Decent Work Country Programme.¹²⁷⁵

Contesting the extent and relevance of the word "everyone" in section 23(1) is relevant to this discussion for the following reasons. The international perspective has highlighted that the application of national labour laws is normally exclusive to workers who fit the description of an employee within the legislation.¹²⁷⁶ This is relevant more especially where the question of forced labour is concerned because as seen on the international plane, people susceptible to forced labour are more often than not those involved in work where it is difficult to discern whether there is an employment relationship or not.¹²⁷⁷ Moreover, because forced labour mostly occurs in informal work, such workers are mostly excluded from conventional labour laws due to the nature of their work.¹²⁷⁸ It must be noted that the ILO's concept of a labour practice has been used to cover workers in atypical employment such that the existence of an employment relationship is not used to make a determination on who labour practices may accrue to. Hence, for the purposes of the ILO the concept of a labour practice extends to practices imposed even on those in atypical employment.¹²⁷⁹

¹²⁷³ Le Roux "The New Unfair Labour Practice" 48-49.

¹²⁷⁴ Le Roux "The New Unfair Labour Practice" 48-49.

¹²⁷⁵ Le Roux "The New Unfair Labour Practice" 48-49; also see generally Cohen and Moodley 2012 *PER/PELJ* 320-344.

¹²⁷⁶ Para 2.2 above.

¹²⁷⁷ Paras 2.2 and 2.3 above.

¹²⁷⁸ Paras 2.2 and 2.3 above.

¹²⁷⁹ See for example the following studies: Nathan *et al Labour Practices In India* 1, 18-26; ILO *Good Labour Practices* 2-12; ILO *The Labour Principles* 9-33.

Assuming that it may be plausible to bring arguments against forced labour within the scope of section 23(1), it needs to be considered how far this section can go towards extending protection to categories of workers not covered under section 48(1) of the *BCEA*. Before considering the case law, it is necessary to note that section 7(1) of the Constitution provides that the Bill of Rights "enshrines the rights of all people in our country..." thereby implying that *everyone* within the borders of South Africa is entitled to the rights and freedoms enshrined within the Bill. Furthermore, section 23(1) in itself denotes that it has a broad scope of application by using the word "everyone". This position is supported by the sentiments of the Labour Appeal Court in *Kylie v Commission for Conciliation, Mediation and Arbitration & Others*,¹²⁸⁰ where the Court stated that the section is "supportive of an extremely broad approach to the scope of the right." In supporting its argument the Court referred to the sentiment expressed by the Constitutional Court in the case of *Khosa v Minister of Social Development*,¹²⁸¹ which warrants reproduction here. The Court in the latter judgment said:

The word "everyone" is a term of general import and unrestricted meaning. It means what it conveys.

The case of *Kylie v CCMA* is a good example of the application of the right to fair labour practices in so far as it applies to "everyone", since it has to do with whether or not a worker engaged in illegal work is entitled to this constitutional right. In this case the appellant was employed in a massage parlour as a sex worker. Her employment was terminated without a hearing. At the CCMA it was held that she could not rely on section 23(1) of the Constitution because it did not apply to workers who did not have "valid and enforceable" contracts, and in her case her employment was based on illegal activity. On review, the Labour Court agreed with the Commissioner to the extent that courts (as a matter of public policy) cannot sanction or encourage illegal activity.¹²⁸²

¹²⁸⁰ 2010 ZALAC 8 at para 16. Hereafter *Kylie v CCMA*.

¹²⁸¹ 2004 ZACC 11 at para 111. This judgment dealt with section 27 of the Constitution on the right of everyone to social security.

¹²⁸² Paras 5-13 of the LAC judgement.

The Labour Appeal Court (LAC) disagreed with this view by holding that a sex worker is not because of the nature of her work devoid of the rights enshrined in the Constitution.¹²⁸³ Hence, the Appellant was entitled to fair labour practices in so far as she was a worker for her employer. According to the Court, section 23 of the Constitution trumps the need for a contract of employment in the sense that such a contract is not a prerequisite for the worker to be able to benefit under the section.¹²⁸⁴ A person need not be an employee "in the full contractual sense of the word."¹²⁸⁵ What matters is that upon an analysis of the circumstances, the relationship between the parties largely emulates that of people in an employment contract.¹²⁸⁶

Hypothetically, the holding in *Kylie v CCMA* is vital in the area of forced labour, where illegal employment is common.¹²⁸⁷ By way of illustration, trafficked women who are engaged in commercial sexual exploitation¹²⁸⁸ as well as irregular migrants engaged in forced domestic servitude¹²⁸⁹ may in actual fact be left without a remedy if the legality of their employment is key in determining whether or not they are entitled to a remedy. With respect to forced labour, the judgment of the Court resonates with article 4 of the 2014 *Protocol to the Forced Labour Convention*, which instructs us that forced labour victims must not lose their entitlement to seek remedies or be prosecuted by virtue of their engaging in illegal activity arising directly from their being required to perform forced labour. What remains therefore is that section 23(1) is capable of covering forced labour victims who are excluded from the *BCEA*, irrespective of the legality of their employment, as long as there is evidence of an employment relationship or a relationship that emulates one.

¹²⁸³ Paras 21-28. The LAC also reached the conclusion that the appellant was an employee under the *LRA* (see paras 40-60 for a detailed analysis by the Court). However, this discussion confines itself to the court's holding pertaining to section 23 of the Constitution, since it is the key provision being examined in the thesis.

¹²⁸⁴ Para 21.

¹²⁸⁵ Paras 21-25.

¹²⁸⁶ Paras 21-25.

¹²⁸⁷ See paras 3.3.3, 3.5.1.1 and 3.5.2.1 above.

¹²⁸⁸ Para 2.3.4 above.

¹²⁸⁹ Para 2.3.6 above.

Meanwhile, it seems that beyond the employment relationship, section 23(1) is inapplicable.¹²⁹⁰ Taking into account the generous approach that the courts have taken in making a determination whether an employment relationship exists or not, section 23(1), like the *BCEA*, is capable of embracing a latitude of forced labourers, including those in illegal employment. However, the limitation of such an attractive right to those in employment relationships or something akin to such relationships is quite disappointing, more especially taking into account developments in the world of work which demonstrate that the standard employment relationship is not the only means of labour market participation in the 21st century.¹²⁹¹ This submission rests on the fact that as evidenced above,¹²⁹² it is not at all times that an employment relationship is easily discernible in arrangements concerning forced labour. In this light the intended scope of coverage of section 23(1) does not satisfy the demands of a contemporary labour market issue such as forced labour, which is blind to the employment relationship.¹²⁹³ Without necessarily implying that these categories of workers are completely without a remedy, the concern is that the traditional approach to section 23(1) renders the right not readily applicable to ensuring decent work for *all*, as per the ILO Decent Work Agenda.¹²⁹⁴

Closely connected to the above, Le Roux¹²⁹⁵ used the theme of the Agenda to argue for the constitutional right to fair labour practices to be detached from the employment relationship so that it may be capable of embracing all workers in line with the requirements of decent work. The suggestions advanced by Le Roux above lend support to the hypothesis made in this discussion that seeks to situate forced labour within the section. On its own, the traditional approach to section 23(1) has limitations that render it incapable of meeting the magnitude of an offence such as

¹²⁹⁰ Le Roux "The New Unfair Labour Practice" 43-45; Van Niekerk and Smit *Law@Work* 42-43. In this respect, "everyone" for the purposes of section 23(1) means everyone who can successfully prove the existence of an employment relationship or something akin to it between himself and the offending party.

¹²⁹¹ Le Roux "The New Unfair Labour Practice" 55; Theron 2005 *ILJ* 618-649.

¹²⁹² Paras 2.2 and 3.3.3 above.

¹²⁹³ Forced labourers who are not in employment relationships, such as independent contractors and those in purely commercial relationships, people who perform domestic work outside employment relationships and volunteers cannot successfully rely on this right.

¹²⁹⁴ Le Roux "The New Unfair Labour Practice" 48.

¹²⁹⁵ Le Roux "The New Unfair Labour Practice" 48-50

forced labour. In this regard, it is conceded that the right to fair labour practices "will suffocate and become less relevant"¹²⁹⁶ if it is tied down to its historical underpinnings because it is not alive to the non-static nature of the labour market which trumps the employment relationship.

In addition to the foregoing arguments, it is argued that the hypothetical classification of forced labour as an unfair labour practice under the Constitution warrants the improvement of South African labour laws and policy frameworks in addressing the offence.¹²⁹⁷ The argument for the improvement of labour laws and policy does not disregard the role of criminal laws in assisting to combat forced labour within South African borders. As seen from Brazil, it is plausible for forced labour to be addressed from both a criminal and labour law point of view.¹²⁹⁸ Hence, there is a need for a combination of criminal and labour laws that give effect to the right not to be subjected to forced labour in South Africa. Notably, such laws must extend coverage against forced labour to all workers irrespective of whether they are in typical or atypical employment.¹²⁹⁹

5.5.1.3.3 Constitutional remedies

The relevance of the various constitutional protections against forced labour as discussed above and reliance on them by forced labourers is argued without losing sight of the concept of constitutional avoidance. In this regard, the Constitutional Court has ruled that "where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed."¹³⁰⁰ To illustrate, it may therefore be considered enough for a forced labourer who satisfies the existence of an employment relationship to allege a

¹²⁹⁶ Le Roux "The New Unfair Labour Practice" 55.

¹²⁹⁷ Should it arise that the traditional interpretation of the right to fair labour practices is preferred, it ought to be conceded that a forced labour victim whose extraction of labour cannot be classified as having occurred within an employment relationship may rely on the general right in section 13.

¹²⁹⁸ Paras 4.5.1 and 4.5.2 above.

¹²⁹⁹ Article 2(c) of the 2014 *Protocol to the Forced Labour Convention*.

¹³⁰⁰ *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 2 SA 1 (CC) at para 21.

breach of section 48(1) of the *BCEA* without relying on a breach of his constitutional right in section 13. The court in question will have to interpret section 48 in a manner that complies with the Constitution prior to applying the Constitution directly or making a finding of unconstitutionality. As illustrated below, direct reliance on section 13 and other rights of a general nature will be permissible where the worker fails to establish that he is an employee under the *BCEA*,¹³⁰¹ and where alternatively he cannot prove as a prerequisite the occurrence of human trafficking prior to being subjected to forced labour in terms of the *PCTPA*.¹³⁰²

The courts have been consistent in enforcing this position. For example, in *NAPTOSA v Minister of Education Western, Western Cape Government and Others*¹³⁰³ the Court held that direct reliance on section 23(1) (or any other right for the purposes of this thesis) is permissible where the litigant's argument turns on the absence of an appropriate relief that is required to protect and enforce the Constitution in a specific statute. In the area of forced labour such an occurrence may be envisioned where the litigant concerned is an independent contractor and is thus excluded from the protection of the mechanism framed under section 48 of the *BCEA*, or where he has not been trafficked and thus cannot seek relief under the *PCTPA*.

In relation to the above, the consideration of the constitutional protection against forced labour (as per section 13 and possibly under section 23(1)) does not imply that the Constitutional Court should be seen as a court of first instance, in particular where a worker is one covered under the *BCEA*. In *Chirwa v Transnet Limited and Others*¹³⁰⁴ the Constitutional Court held that the establishment of a right to fair labour practices under the Constitution does not open doors for litigants to approach the Constitutional Court on the basis that the right has been infringed upon. Rather, the labour dispute resolution mechanisms established in terms of the *LRA* must be exhausted first, as this particular Act was established to give effect to the said right. Further to this, labour courts are given jurisdiction to make determination on

¹³⁰¹ See para 5.5.1.2 above.

¹³⁰² See para 5.5.1.1 above.

¹³⁰³ 2001 2 SA 112 (C) at 115-120.

¹³⁰⁴ 2008 4 SA 367 (CC) at paras 104-120.

constitutional rights that find application in the employment sphere with respect to section 157(2) of the *LRA*. In this regard, it is safe to presume that forced labourers who find protection under the *BCEA* must approach the labour courts first, citing allegations of the breach of section 48, before they may approach the Constitutional Court.

Over and above that, direct reliance on a breach of a fundamental right calls on the court to award an appropriate constitutional remedy. Section 38 of the Constitution instructs that a court faced with a suit in which a litigant alleges a breach of or threat to any of the rights in the Bill of Rights may grant "appropriate relief", including a declaration of rights.

Firstly, what constitutes an "appropriate relief" was clarified by the Constitutional Court in *Fose v Minister of Safety and Security*,¹³⁰⁵ where the Court held that:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

It seems therefore that what constitutes "appropriate relief" differs from case to case and it is left to the court to make a determination taking into account the nature of the right infringed and the nature of the infringement.¹³⁰⁶ Consequently, the abovementioned remedies may be awarded by the court where in its judgement they are appropriate to remedy a breach of rights. Further, the discretion of the court is wide enough to enable it to craft new remedies where appropriate. This conclusion is reinforced by the constitutionally conferred power on courts to make

¹³⁰⁵ 1997 3 SA 786 (CC) at para 19. (hereafter *Fose v Minister of Safety*)

¹³⁰⁶ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) at para 101 (hereafter *Minister of Health v TAC*).

orders that are just and equitable in addition to declarations of the invalidity of law or conduct inconsistent with the Constitution.¹³⁰⁷

Secondly, in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (hereafter Rail Commuters case),¹³⁰⁸ section 38 was interpreted as purely giving the Court the discretion to award a declaration of rights if in its opinion it constitutes "appropriate relief". When a court grants a declaration of rights, it essentially makes a clarification of the legal and constitutional obligations of the parties¹³⁰⁹ and does no more than that. This does not, however, extinguish the fact that a declaratory order may be accompanied by other orders such as a *mandamus* or interdict.¹³¹⁰ Because it merely declares rights and obligations, the remedy of a declaration of rights has been characterised as "non-intrusive" in that the court leaves it to the discretion of the offender to determine how and when to effect a remedy for the rights that the offender has breached.¹³¹¹ For this reason the Court in the *Rail Commuters* case held that a declaratory relief plays a significant role in preserving constitutional democracy in that it enables the courts "to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated should be observed".¹³¹²

Finally, the Court has also in the past exercised its discretion in granting a *mandamus*. For example, in *Minister of Health v TAC* the Court held that where considered appropriate, mandatory orders accompanied by the supervision of the Court may be awarded to ensure that constitutional obligations are complied with.¹³¹³ Besides mandatory interdicts and declaratory orders, it seems the latitude of "appropriate relief" does not exclude relief that is pecuniary in nature. This

¹³⁰⁷ Section 172(1) of the Constitution. Also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 2 SA 104 (CC) at paras 98-102, where the Court found it just and equitable to order a provision of temporary accommodation by the City of Johannesburg to occupiers who were subject to eviction due to their illegal occupation of land.

¹³⁰⁸ 2005 2 SA 359 (CC) at para 106.

¹³⁰⁹ *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC) at para 59; see further Mbazira *Litigating Socio-economic Rights* 156.

¹³¹⁰ *Rail Commuters* case 2005 2 SA 359 (CC) at para 107.

¹³¹¹ Mbazira *Litigating Socio-economic Rights* 156.

¹³¹² 2005 2 SA 359 (CC) at para 108.

¹³¹³ 2002 5 SA 721 (CC) at para 102-106.

position was established by the Court in *Fose v Minister of Safety* where it was observed that:

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.¹³¹⁴ It seems ... that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for...loss occasioned by the breach of a right vested in the claimant by the supreme law.¹³¹⁵

It follows from the Court's views that forced labourers who seek to lay their claim on a direct infringement on the right not to be subjected to forced labour, the right to fair labour practices (assuming the right is applicable to them) and other rights of a general nature may be awarded monetary compensation. The effect therefore is that a court should not confine itself to the remedy of a declaration of rights, a *mandamus* or interdict if in its opinion such remedies would not be effective in addressing the loss incurred by the litigants in the circumstances.¹³¹⁶ Whereas a declaration of rights would be very appropriate for an undeveloped right such as the prohibition of forced labour,¹³¹⁷ it is submitted that monetary compensation is relevant as well where the court finds that indeed the use of forced labour was involved as alleged.¹³¹⁸ This would imply that the court would make a determination taking into account that the infringement of the right in question involved the

¹³¹⁴ 1997 3 SA 786 at para 69.

¹³¹⁵ 1997 3 SA 786 at para 60. Chapter 3 of the Interim Constitution, which is now Chapter 2 in the Final Constitution.

¹³¹⁶ Further see *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) at paras 28-29. Monetary compensation for the unlawful occupation of land by informal settlers has also been previously awarded against the government in *President of the Republic of South Africa v Modderklip Boerdery* 2005 5 SA 3 (CC) at paras 61-68.

¹³¹⁷ This is in the light of the fact that, as highlighted above, forced labour is a phenomenon seldom discussed in South Africa. This does not mean, however, as contended above, that it does not exist. In this regard, the remedy of a declaration of rights would offer an opportunity for the judicial expansion of the section 13 right as well as its relationship with other rights in the Constitution such as the right to fair labour practices.

¹³¹⁸ The ILO's 2014 *Protocol on Forced Labour* is emphatic on access by victims of forced labour to effective remedies that include compensation. Hence monetary compensation for a breach of the right not to be subjected to forced labour and related rights accords with the purport of the Protocol.

forceful use of the labour of someone accompanied by poor working conditions and little or no remuneration.

In conclusion, the South African approach to addressing forced labour has its roots in the trafficking and criminal law framework as seen in terms of the *PCTPA*, which fails to establish an independent offence of forced labour. Whereas a separate offence of forced labour is established in the *BCEA* with respect to section 13 of the Constitution, the scope of application of the offence has the potential to be limited to only those recognised as employees under the Act. The framework as it is currently falls short of the international standard set in the 2014 *Protocol on Forced Labour*, which requires that laws aimed at addressing forced labour be inclusive so as to cover all categories of forced labourers across all sectors of the economy.¹³¹⁹ In terms of the Protocol, measures designed to address forced labour are also required to reflect an integrated and systematic approach by all competent authorities and relevant stakeholders.¹³²⁰ In this regard, the South African labour legislative framework on forced labour is fragmented in the sense that at the moment, legislation seeks to address forced labour arising from human trafficking only. There are currently no comprehensive laws or national policy on forced labour in general.¹³²¹

Finally, it is submitted that section 23(1) of the Constitution has the potential to be invoked in arguments against forced labour where a forced labour victim finds himself excluded from the application of the *PCTPA* and *BCEA* as long as the allegation of the forced labour can be placed within an employment relationship or something akin to it. However, this argument does not negate the need for specific legislation on forced labour that will extend coverage to all workers as well as all categories of forced labourers as a progressive approach to interpreting the right to promote decent work for all. Furthermore, the limited scope of section 23(1) does

¹³¹⁹ Article 2(a)(i). South Africa has not yet ratified the Protocol, but voted in favour of its adoption by the ILO.

¹³²⁰ Article 1(2).

¹³²¹ In an endeavour to draw lessons for South Africa, chapter 6 will provide a more detailed analysis of the shortcomings of the South African framework in comparison to the international standard, the UK and Brazil.

not imply that forced labourers outside the ambit of employment relationships are without a remedy, as they may rely directly on section 13 and any other right of a general nature. Moreover, notwithstanding the limited coverage of section 23(1), the interrelated nature of the constitutional rights on dignity, equality and freedom, which inevitably stand to be infringed upon in a forced labour situation, makes a compelling case to view forced labour as an unfair labour practice under the section.

5.5.2 Policy and administrative responses

International experience has shown that forced labour does not merely exist; it exists and continues to exist because of the loopholes in legislation, policies and enforcement mechanisms. In the light of this, the international perspective suggests that forced labour has to be addressed in an integrated and coherent manner if the goal is to ensure a complete elimination of the practice and offences related to it. It must also be recalled that in terms of the new standards set under the 2014 *Protocol on Forced Labour*, article 2(c) requires the implementation of the relevant legislation to be strengthened, implying that a simple prohibition of forced labour will not suffice.¹³²² To meet this standard, the implementation will require that relevant legislation make comprehensive provisions on forced labour and enforcement mechanisms to back it up.

In addition, it is required that the implementation of legislation must be coordinated by all the groups concerned.¹³²³ Faced with a system that largely addresses forced labour through the trafficking framework, the forthcoming discussion examines whether the South African labour enforcement mechanisms have previously played or could play a role in addressing the offence of forced labour.

¹³²² Para 2.6.2.2 above provides a substantive discussion of the Protocol.

¹³²³ Article 1(2) of the Protocol.

5.5.2.1 Department of Labour

The Department of Labour is the key Government institution charged with the mandate to regulate labour relations in South Africa through the development of legislation and policy in consultation with social partners.¹³²⁴ By virtue of its regulatory function, the Department of Labour is charged with performing a plethora of roles, which include amongst others the development of legislation, labour inspection, compliance with legislation, the monitoring and enforcement of labour legislation, and the promotion of social dialogue.¹³²⁵ The nature of these roles demonstrates that the Department may serve as the pioneer of legislation, policy and enforcement mechanisms directed at the prevention and alleviation of forced labour. The Department can and should use its regulatory role to coordinate with social partners in creating an awareness of forced labour across the South African labour market. It must be noted that the Minister of Labour (who is principally in charge of the Department) has been designated as one of the partners the Minister of Justice has to cooperate with in the implementation of the *PCTPA*,¹³²⁶ perhaps to assist in how best to address issues of forced labour that arise as a result of human trafficking under this Act, as well as to advise on the labour implications of forced labour arising from human trafficking. In this light the Department can also be actively involved in the formulation and implementation of forced labour legislation with the cooperation of other Departments such as the Departments of Social Development, Agriculture and Justice, to mention but a few. Essentially, the Departments selected need to be those that may make a contribution to the prevention of forced labour and provide assistance to the victims. For example, the inclusion of the Department of Agriculture could ensure awareness of forced labour amongst agricultural workers and employers, whilst the Social Development Department may craft mechanisms of social assistance targeting victims of forced labour to prevent their re-insertion. This assertion is made in the light of the thrust

¹³²⁴ Bhorat *et al* 2012 *International Labour Review* 280.

¹³²⁵ McGregor 2005 *Obiter* 661-664; Geminiani and Smallwood 2008 *Acta Structilia* 12-13; Bhorat *et al* 2012 *International Labour Review* 280.

¹³²⁶ Section 40(1).

of the 2014 *Protocol on Forced Labour*, which requires harmonised efforts from various stakeholders in combating forced labour.

5.5.2.2 Trade unions

The role of trade unions in advocating the rights of workers in South Africa dates back to the apartheid era. South African trade unions enjoyed the international support of the ILO in combatting the then political and racially divided labour relations system.¹³²⁷ In present day South Africa, trade unions continue to have a voice in the labour relations system and play a crucial role in the bargaining process. Before turning to their possible contribution to a framework for addressing forced labour, it is important to consider the legal framework within which South African trade unions reside. Section 23(2) of the Constitution guarantees and protects the right of every worker to freedom of association and free participation in union activities. Section 6 of the *LRA* gives effect to and regulates the right to freedom of association, as envisioned under section 23(2) of the Constitution. Thus, the *LRA* is the chief labour legislation regulating trade unions in South Africa. Section 213 of the Act defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation." The requirements of the definition must be adhered to if an association seeks to register as a trade union under the Act.¹³²⁸ In order to obtain registration, the association in question must follow the procedure set out in the Act.¹³²⁹

Once registered, trade unions enjoy a variety of rights such as the ability to collectively bargain on behalf of their members.¹³³⁰ Whereas the right to freely associate is comprehensively protected, the framework for the establishment of trade unions in South Africa from the outset excludes workers who do not fit the definition of employees under the Act. The question of who can belong to a trade

¹³²⁷ See generally Grawitzky *The Role of the ILO during and ending Apartheid* 5-11.

¹³²⁸ Grogan *Collective Labour Law* 34.

¹³²⁹ Section 95-106.

¹³³⁰ Section 11-22.

union is a determining factor in so far as the right to freely associate is concerned under the Act. If persons who are not employees under the *LRA* exercise their constitutional right to freely associate, the resultant organisation is not a trade union nor can it exercise any functions conferred on trade unions under the Act on behalf of its members.¹³³¹ The inevitable effect of this is that workers who are not employees for the purposes of the Act cannot therefore enjoy the bargaining power that they would as members of a normal trade union under the Act.

It was established earlier that forced labour mostly affects workers who do not enjoy the protection of conventional labour and employment laws.¹³³² As a result, and owing to the informal nature of their work, trade union membership is also alien to such workers. That notwithstanding, this study found that at international law, trade unions may in actual fact play a crucial role in a framework tailored to curb forced labour. Fundamentally, the 2014 *Protocol on Forced Labour* requires that national plans on forced labour be drawn in consultation and with the involvement of trade unions.¹³³³ In that regard the position at international law asserts that trade unions are actually well placed to play a role in detecting, reducing and avoiding the use of forced labour.¹³³⁴ This can be done through research aimed at filling knowledge gaps concerning the offence. Alternatively, it was discovered that trade unions are well placed to raise awareness on issues of forced labour amongst workers in both the formal and informal industry.¹³³⁵

It has been suggested at international law that trade unions may strengthen their reach to informal economy workers by extending their activities and agreements to such workers.¹³³⁶ Section 28(1)(l) of the *LRA* does something analogous by allowing bargaining councils to extend their services to informal workers. Alternatively, trade unions may bring informal economy workers together and assist them to form quasi-trade union organisations. Previous attempts to assist informal economy workers in

¹³³¹ Grogan *Collective Labour Law* 41.

¹³³² Para 2.6.3.3 above.

¹³³³ Para 2.6.2.2 above.

¹³³⁴ Para 2.6.3.3 above.

¹³³⁵ Para 2.6.3.3 above.

¹³³⁶ Para 2.6.3.3 above.

South Africa to unionise have resulted in the formation of associations of workers in common trades.¹³³⁷

5.5.2.3 Businesses and employers' organisations

The international perspective has established the fact that business and employers may proactively or passively be involved in the occurrence and continuance of forced labour.¹³³⁸ Hence, international opinion suggests that it is imperative to involve businesses and employers in the fight against forced labour alongside all of the other stakeholders. The comparative jurisdictions used in this study have also showcased the practical application of this. For example, in Brazil¹³³⁹ employers and businesses have made it their priority to combat forced labour as part of their corporate social responsibility through joining a National Pact for the Eradication of Slave Labour. Similarly, the UK framework has also highlighted the Ethical Trading Initiative (ETI)¹³⁴⁰ and an additional legislative requirement in terms of the *MSA* on commercial businesses to provide statements on an annual basis reflecting their commitment to the non-tolerance of forced labour in their operations and supply chains.¹³⁴¹ The 2014 *Protocol on Forced Labour* suggests that training and support must be accorded to businesses and employers as appropriate to avoid their involvement in forced labour.¹³⁴² In comparison with the UK and Brazil, South Africa currently lacks a clear mechanism regarding businesses' approach to forced labour that is centrally supervised.

¹³³⁷ For example, the Self-Employed Women's Union (SEWU) in South Africa was formed with the collective effort of self-employed women with the assistance of trade unions. Also see Motala *Organising in the Informal Economy* 1-29; Goldman *Organising in South Africa's Informal Economy* 36-40.

¹³³⁸ Para 2.6.3.2 above.

¹³³⁹ Para 4.5.2.2.1 above.

¹³⁴⁰ Para 3.5.2.2 above.

¹³⁴¹ Para 3.5.1.2.4 above.

¹³⁴² Para 2.6.2.2 above.

5.5.2.4 Labour inspectors

In terms of the South African labour framework, labour inspectors are appointed in terms of section 63 of the *BCEA*. Their mandate is to "promote, monitor and enforce compliance with an employment law." Hence they are empowered amongst other things to give guidance to both employers and employees pertaining to their rights and obligations regarding an employment law, conduct inspections and issue compliance orders.¹³⁴³ According to section 1 of the *BCEA*, an "employment law" means the *BCEA*, the *Unemployment Insurance Act* 30 of 1966, the *Skills Development Act* 97 of 1998, the *Employment Equity Act* 55 of 1998, the *Occupational Health and Safety Act* 85 of 1993 and the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993. In this regard, labour inspectors may be assigned to monitor compliance by employers with any of these Acts. It follows therefore that labour inspectors assigned to monitor compliance with the *BCEA* are empowered to investigate possible occurrences of forced labour that fall within the ambit of section 48 of the *BCEA*.

Besides dealing with actual cases of forced labour, the labour inspectors may also assist in averting the imposition of poor working conditions on employees. For this purpose the *BCEA* empowers labour inspectors to enter, without warrant or notice at any reasonable time, any workplace or place of business of an employer.¹³⁴⁴ Entry into a private employer's home is subject to two conditions: either upon consent by the owner of the premises or upon authorisation in writing by the Labour Court.¹³⁴⁵ The inspector may require the disclosure of information either orally or in writing and inspect the records of an employer to which an employment law relates.¹³⁴⁶ Where the labour inspector has reasonable ground to believe that the employer has failed to comply with the Act, he issues a compliance order which the employer must comply with within a specified period.¹³⁴⁷ The order sets out, amongst other matters, the details of the employer and the provisions of the *BCEA* that the employer has not

¹³⁴³ Section 64.

¹³⁴⁴ Section 65(1).

¹³⁴⁵ Section 65(2).

¹³⁴⁶ Section 66(1).

¹³⁴⁷ Section 69(1).

complied with.¹³⁴⁸ A copy of the order must be served on the employer and each employee affected by it or a representative of the employees.¹³⁴⁹

In terms of the *Basic Conditions of Employment Act: Amendment Act 20 of 2013* (hereafter BCEA Amendment Act), it is no longer compulsory for the labour inspector to secure a written undertaking of compliance from the employer.¹³⁵⁰ In this regard, the inspector is merely permitted to secure one, and where the employer gives such an undertaking due compliance must follow. A failure to do so prompts the Director-General to apply to the Labour Court in terms of section 73 to compel compliance with the undertaking.¹³⁵¹

Before the 2013 amendments to the *BCEA*, the employer had the option under section 71 to oppose the compliance order by making written representations to the Director-General within 21 days of receiving that order. The effect of this section was to give the employer an opportunity to object to any part of the order or the order in its entirety. Following the representations, the Director-General would confirm, modify or cancel an order or any of its part(s). Consequently, the employer could appeal the decision of the Director-General to the Labour Court within 21 days. With the 2013 amendments to the *BCEA*, these two avenues were repealed.¹³⁵²

Instead, section 73 is amended to give the Director-General the authority to apply to the Labour Court for the compliance order to be made an order of the Court if the employer fails to comply.¹³⁵³ After considering any representations made with respect to this application, the Labour Court may issue an order requiring the employer to comply with the provisions of *BCEA* or to comply with any other matter raised in the compliance order. The amendments to the Act repealing the making of representations to the Director-General speed up compliance with the orders of the

¹³⁴⁸ Section 69(2).

¹³⁴⁹ Section 69(3). A failure to serve the order to the affected employees or their representative does not invalidate the order.

¹³⁵⁰ Section 9(a).

¹³⁵¹ Section 9(b).

¹³⁵² See section 12 of the *BCEA Amendment Act*.

¹³⁵³ Section 13 *BCEA Amendment Act*.

labour inspectors, as it is now no longer possible for employers to buy time by making vexatious representations.

As indicated above, the mandate of labour inspectors is not extended beyond the Act. Labour inspectors do not have the authority to investigate forced labour in terms of other forced labour legislation that the South African legislature may promulgate in future. Because little is known about the existence or otherwise of forced labour in South Africa, it is assumed that little has been done thus far with respect to defining the mandate of labour inspectors where forced labour is concerned. For this reason, it is necessary to equip labour inspectors with skills on how to respond when they encounter a forced labour situation in their inspections.

The Act's restriction of labour inspectors' authority to enter private homes is a limitation to the ability to extend protection against forced labour for domestic workers. Forced labourers engaged in illegal activity occurring within private homes may also be outside the scope of labour inspectors. In a reflection on labour inspection in the domestic sector, Bamu¹³⁵⁴ asserts that forced labour is a criminal offence that ought to be dealt with by the South African Police Service with reference to the *Criminal Procedure and Evidence Act* 5 of 1977. The Act gives a police officer the authority to enter premises, which in this case may include a private home, and conduct a search without a warrant or consent where he has reasonable grounds to believe that an offence is being carried out in the premises.¹³⁵⁵ One may ask whether it would be constitutionally justified to grant similar powers to labour inspectors in the light of the right to privacy under the Constitution. Finally, it is concluded that the practical reality of such a suggestion is academic, as the human resources allocated to labour inspection in South Africa may not effectively meet the demands of the large number of domestic workplaces.¹³⁵⁶ Inspections of private homes are thus largely left to the police. This effectively renders the inspection conducted by the police a criminal law inspection and it is not clear whether cognisance will be taken of the violated labour rights of a victim.

¹³⁵⁴ Bamu "Nurturing a Culture of Compliance" 198.

¹³⁵⁵ Section 25.

¹³⁵⁶ Bamu "Nurturing a Culture of Compliance" 198.

In contradistinction to the restricted reach of labour inspectors within the South African framework, it must be recalled that the ILO has been emphatic about the role that labour inspectors stand to play in the fight against forced labour.¹³⁵⁷ On that note, the 2014 *Protocol on Forced Labour* requires that the mandate of labour inspectors regarding forced labour be strengthened.¹³⁵⁸ As it is, the South African approach in this regard falls short of the standard. Furthermore, the current approach does not clearly define their mandate where possible cases of forced labour arise.

The comparative jurisdictions used in the thesis demonstrate a degree of consonance with the ILO standard. The UK's approach to labour inspection can be seen in the light of the *Gangmasters' Licensing Act*, which empowers enforcement officials to inspect the workplaces of gangmasters and ensure compliance with the licence issued under the Act.¹³⁵⁹ The officials are not criminal law enforcement officials and the inspections they carry out under the Act are not of a criminal nature. However, an inspector may seek the assistance of a criminal law enforcement official in pursuance of his mandate under the Act.¹³⁶⁰ On the other hand, the role of the Special Mobile Group (GEFM) established in Brazil introduces a specialised form of labour inspection that brings together labour inspectors, labour prosecutors and the Federal Police.¹³⁶¹ The two approaches highlight an integration of both labour and criminal law in inspections directed at combating forced labour.

5.5.2.5 Labour courts and dispute resolution mechanisms

This discussion has highlighted that the industrial relations system adopted in contemporary South Africa has its roots in the protection and promotion of the human rights of workers and employers alike. Conceivably, in order to match such a progressive system, a need exists for the measures monitoring the system to be of

¹³⁵⁷ Para 2.6.3.1 above.

¹³⁵⁸ Article 2(c)(ii).

¹³⁵⁹ Para 3.5.1.1.1 above.

¹³⁶⁰ Para 3.5.1.1.2 above.

¹³⁶¹ Para 4.5.2.1.1 above.

an equally competent nature. In the light of this, Grogan observes that the South African dispute resolution mechanism is of an advanced nature.¹³⁶² For this reason, dispute resolution is not limited to litigation. Conciliation and arbitration are also important means of resolving labour disputes in South Africa. During a conciliation, parties to a dispute make representations to a commissioner or a bargaining council panellist whose role as an intermediary is to assist the parties to reach an agreement so as to settle the dispute at hand.¹³⁶³ The conciliator can do no more than give advice to the parties to the dispute. He cannot impose a settlement on them.¹³⁶⁴ On the other hand, an arbitration requires an arbitrator to determine a dispute and thereafter grant relief as permitted by the LRA.¹³⁶⁵ The framework of dispute resolution as established by the LRA is formulated to cater for these various processes. It comprises of bargaining councils, statutory councils, the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court.

Bargaining councils are established under section 27 of the LRA. They are formed by voluntary agreement between one or more registered trade unions and one or more registered employer's organisations.¹³⁶⁶ The bargaining council's role is to regulate wages and conditions of service for the sector in which it operates by concluding collective agreements and resolving disputes between parties (employers and employees) falling within its registered scope.¹³⁶⁷ In order to obtain the powers of a dispute resolution body, the bargaining council needs to be accordingly accredited by the CCMA.¹³⁶⁸ After obtaining accreditation, the council is empowered to exercise the dispute resolution functions of the CCMA in respect of disputes arising between parties falling within its registered scope. Disputes concerning parties to the council must be referred to it for conciliation.¹³⁶⁹ For this reason bargaining councils may

¹³⁶² Grogan *Labour Litigation* 1.

¹³⁶³ Grogan *Labour Litigation* 98-99.

¹³⁶⁴ Grogan *Labour Litigation* 98-99.

¹³⁶⁵ Grogan *Labour Litigation* 133.

¹³⁶⁶ Section 27(1).

¹³⁶⁷ Section 28(1).

¹³⁶⁸ Section 52(1).

¹³⁶⁹ Grogan *Labour Litigation* 46; Grogan *Collective Labour Law* 87.

play a vital role in assisting parties to resolve allegations of poor working conditions that may degenerate into forced labour in sectors within their jurisdictions.

The *LRA* also allows bargaining councils to make suggestions to the National Economic Development and Labour Council (NEDLAC) or any other appropriate forum on policy and legislation that may affect the sector. This role may assist NEDLAC in the formulation of legislation and/or policy that addresses concerns of poor working conditions and possible occurrences of forced labour in that sector.¹³⁷⁰ Bargaining councils also play a role that may be vital in the area of forced labour by extending their services and functions to the informal sector and home workers.¹³⁷¹

Because they are of similar standing in so far as conciliation is concerned, where there is no bargaining council to conciliate over a dispute, the CCMA assumes the authority to conciliate. The CCMA is established under section 112 of the Act as a juristic person independent of the state.¹³⁷² It derives its authority to act from the *LRA*. Hence it will perform only such acts as are specifically authorised by the Act. Section 115 sets out the functions of the Commission, which are that it must amongst other things attempt to resolve through conciliation any disputes referred to it in terms of the Act. This brings forth the key aspect that if the Act is not applicable to a worker by virtue of his not being an employee, then he may not refer a dispute to the CCMA in terms of the *LRA*.¹³⁷³ The jurisdiction of the CCMA is thus limited. It cannot hear an issue relating to forced labour with regard to a person not classified as an employee.

Section 151 of the *LRA* establishes the Labour Court as a court of both law and equity. In terms of section 157 the Labour Court has "exclusive jurisdiction in respect of all matters that elsewhere in terms of the Act or in terms of any other law are to be determined by the Labour Court."¹³⁷⁴ It must be noted that the *BCEA* previously ousted the jurisdiction of the Labour Court in matters of forced labour

¹³⁷⁰ See further para 5.5.2.5 below.

¹³⁷¹ Section 28(1)(l).

¹³⁷² *Grogan Labour Litigation* 41; Benjamin *Assessing South Africa's CCMA* 5.

¹³⁷³ *Grogan Employment Rights* 15.

¹³⁷⁴ Subject to the Constitution and section 173 of the *LRA*.

arising out of section 48 of that Act.¹³⁷⁵ In turn, section 93 of the *BCEA* gave magistrates' courts the power to impose a maximum imprisonment term of three years or to order the payment of a fine in respect of a contravention of section 48 of the Act. Hence, prior to the 2013 amendment to the *BCEA*, the lowest tribunal to make a determination on forced labour was a magistrate's court, whereupon the normal channel of the hierarchy of courts would be followed where the claimant or the state sought to appeal the decision of the magistrate. Section 77 of the *BCEA* has since been amended to give the Labour Court exclusive jurisdiction to grant civil relief in instances of a breach of section 48.¹³⁷⁶ Whilst the magistrate court's power to impose a penalty under section 93 still stands, a forced labourer may now choose to approach the Labour Court in pursuance of civil relief against the offending employer.

The amendment to the *BCEA* also increases to six years the prison term that a magistrate's court may impose.¹³⁷⁷ The recent amendment to the *BCEA* harmonises section 77 of this Act with section 157(2) of the *LRA*, which essentially gives the Labour Court concurrent jurisdiction (with the High Court) to hear matters regarding threats of or actual violations of chapter 2 rights in the Constitution where such violation arises from employment and from labour relations, amongst other things.¹³⁷⁸

In essence, therefore, a violation of the right not to be subjected to forced labour as well as the violation of the prohibition of forced labour in the *BCEA* may be addressed by the Labour Court, subject however to the principle of constitutional avoidance, as discussed above. Because the Labour Court has finally been granted jurisdiction in such matters, it follows therefore that the Labour Appeal Court may hear appeals regarding alleged breaches of section 48 of the *BCEA*.¹³⁷⁹

¹³⁷⁵ Section 77(1).

¹³⁷⁶ See section 15 of the *BCEA Amendment Act*.

¹³⁷⁷ Section 16 *BCEA Amendment Act*.

¹³⁷⁸ See further *Chirwa v Transnet Limited and Others* 2008 4 SA 367 (CC) at paras 56-69; *NAPTOSA & Others v Minister of Education* 2001 2 SA 112 at 116.

¹³⁷⁹ Subject to section 175, appeals from the Labour Court lie to the Labour Appeal Court in terms of section 167(2) and 173(1)(a).

5.5.2.6 Other labour market institutions and constitutional bodies

Whereas the forced labour framework in South Africa is generally underdeveloped, South Africa has an advanced labour regulatory framework which is accompanied by various administrative bodies which may potentially play a role in addressing forced labour. Of particular interest to this discussion is the National Economic Development and Labour Council; the South African Human Rights Commission and the Unemployment Insurance Fund. Finally, the discussion considers two advisory bodies: the Commission for Employment Equity and the Employment Conditions Commission, both created under the *Employment Equity Act* and the *BCEA* respectively.

5.5.2.6.1 National Economic Development and Labour Council (NEDLAC)

NEDLAC is established by the *National Economic Development and Labour Council Act* 35 of 1994. NEDLAC is a juristic person which consists of four chambers, namely a public finance and monetary policy chamber, a trade and industry chamber, a labour market chamber and a development chamber.¹³⁸⁰ The composition of the Council emulates that of the ILO's tripartite set-up by bringing together members from organised business, those representing organised labour, organisations representing community and development interests, as well as state representatives¹³⁸¹ in an endeavour to promote social dialogue.¹³⁸² NEDLAC conducts investigations into and research on social and economic matters and uses its findings to evaluate the sufficiency and effectiveness of current legislation, as well as to consider all proposed labour legislation before it is submitted to Parliament.¹³⁸³ In this light, NEDLAC is not merely an advisory body; it is a consensus-seeking body amongst social partners and the community.¹³⁸⁴ Taking into account the nature of NEDLAC, it is submitted that representatives of organised labour as parties dealing directly with employers and employees in practice may use this platform to make

¹³⁸⁰ Section 2(2).

¹³⁸¹ Section 3(1).

¹³⁸² Parsons 2007 *SAJE* 1-2; Parsons 2001 *SAJEH* 159.

¹³⁸³ Section 5(1); see further Gostner and Joffer 1998 *Law, Democracy and Development* 131-151.

¹³⁸⁴ Parsons 2001 *SAJEH* 152.

observations concerning possible occurrences of forced labour in practice. In turn, NEDLAC may serve as a forum for the initiation of forced labour legislation that takes into account the offence's effects on the labour rights of victims. The composition of the organisation also provides a platform for the involvement of organised labour and the community in the formulation of forced labour legislation in future; an aspect that would adhere to the requirement of the 2014 *Protocol on Forced Labour* to involve workers' and employers' organisations in legislation and policy formulation on forced labour.

5.5.2.6.2 South African Human Rights Commission (SAHRC)

Given the relevance of human rights to the analysis of forced labour, another South African institution in a position to address the problem of forced labour is the SAHRC. Section 181 of the Constitution establishes the SAHRC as one of the six state institutions¹³⁸⁵ established to reinforce constitutional democracy in South Africa. The SAHRC is responsible for the exercise of oversight, in that it focuses on ensuring the observation and respect of human rights within the Republic.¹³⁸⁶ In doing so, the SAHRC is constitutionally empowered to investigate and report to the National Assembly on whether or not human rights are being fostered and to proactively seek redress where there has been a violation.¹³⁸⁷ In relation to this, the SAHRC is empowered in terms of section 14 of the *Human Rights Commission Act*¹³⁸⁸ to play an adjudicatory role by mediating, arbitrating and negotiating the resolution of a dispute or rectification of an act or omission that violates a human right.¹³⁸⁹ While its decisions are not directly binding,¹³⁹⁰ it has been observed by Couzens¹³⁹¹ that public bodies are under a constitutional duty to act upon the Commission's recommendations to ensure the effectiveness of its performance of its mandate.

¹³⁸⁵ This is alongside the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

¹³⁸⁶ Section 184(1); see further Couzens 2012 *SAJHR* 560-567; Murray 2006 *PER/PELJ* 6-12.

¹³⁸⁷ Section 184(2); also see generally Horsten 2006 *PER/PELJ* 1-21.

¹³⁸⁸ Act 40 of 2013.

¹³⁸⁹ See for example *Freedom Front v South African Human Rights Commissioner & Another* 2003 (11) BCLR 1283 (SAHRC) and *Human Rights Commission of SA v SABC* 2003 (1) BCLR 92.

¹³⁹⁰ Stevens and Ntlama 2016 *Law, Democracy and Development* 63; Murray 2006 *PER/PELJ* 10.

¹³⁹¹ Couzens 2012 *SAJHR* 563.

Further, section 13(3) of the Act empowers the Commission to bring an action on behalf of affected litigants in its own name. This is in accordance with section 38(d) of the Constitution, which grants *locus standi* to anyone acting in the public interest. The Constitutional Court in *Ferreira v Levin*¹³⁹² laid down the factors to consider in determining whether or not a litigant is genuinely acting in the public interest. The Court held that:

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.

In this regard, where the SAHRC successfully proves the above factors it may be allowed to litigate in the public interest. This notwithstanding, it has been observed that the SAHRC scarcely ever acts accordingly and will initiate legal proceedings only where the *ratio decidendi* is likely to promote human rights and is likely to benefit the wider community.¹³⁹³ In addition, the Commission has also participated in litigation as *amicus curiae*, wherein it primarily intervenes as having an interest in the outcome of a matter before a court. For example, in *Fose v Minister of Safety and Security*,¹³⁹⁴ the Constitutional Court observed that by virtue of its human rights mandate, the Commission has "a real and substantial interest" in matters that come before the Court and that this warranted its admission as *amicus curiae*.¹³⁹⁵ Because the contravention of section 13 of the Constitution would as a consequence breach sections 9, 10 and 23, the Commission may use this role to intervene in forced labour matters as a party interested in the resolution of forced labour as a criminal offence that violates a variety of human rights.

¹³⁹² 1996 (1) SA 984 (CC) at para 234.

¹³⁹³ Couzens 2012 *SAJHR* 564.

¹³⁹⁴ 1997 (3) SA 786 (CC) at paras 5-10.

¹³⁹⁵ See further *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at para 12.

The Commission also has the mandate to carry out research (like NEDLAC) at its own volition or upon receipt of a complaint regarding an alleged human right violation.¹³⁹⁶ Since it need not wait to receive a complaint in order to carry out its investigative role, it may be submitted that the SAHRC could carry out research on possible occurrences of forced labour when such allegations attract media attention. The Constitution extends the functions of the SAHRC to include the role to educate.¹³⁹⁷ Whereas it is not explicitly prescribed whom the Commission should target in its educative role, it is argued that the intention is to give the Commission the power to raise awareness based on the outcome of its fact-finding missions. For these reasons, the investigative and educative role of the Commission may be useful in an occluded area such as forced labour in South Africa.

5.5.2.6.3 The Unemployment Insurance Fund (UIF)

It was highlighted above that Brazil integrates a criminal law approach with labour law in its approach to addressing forced labour.¹³⁹⁸ The Brazilian framework is also different from both the UK and South African approaches in its provision of the payment of unemployment benefits to workers rescued from slave labour to avoid their reinsertion. As highlighted above, the procedure of the payment of unemployment benefits in Brazil does not seem to strictly depend on a contributory system from the offending employer and the victim workers.¹³⁹⁹ This is because benefits are paid even where the workers had no prior registration under the fund and do not have work permits. The Unemployment Insurance Fund (hereafter referred to as the UIF or the Fund)¹⁴⁰⁰ in South Africa could potentially play a role in the area of forced labour as the Fund is similarly designed to pay unemployment benefits to an employee who for instance experiences a stoppage of income due to his unemployment.¹⁴⁰¹

¹³⁹⁶ Section 184(2) as read with section 13(3) of the *HRCA*.

¹³⁹⁷ Section 184(2).

¹³⁹⁸ Para 4.5.2 above.

¹³⁹⁹ ILO *The Good Practices of Labour Inspection* 35-36.

¹⁴⁰⁰ Established under section 4(1) of the *Unemployment Insurance Act* 63 of 2001 (hereafter the *UIA*).

¹⁴⁰¹ Section 16 of the *UIA*.

According to the *Unemployment Insurance Contributions Act* (UICA),¹⁴⁰² there is a duty on every employer and employee to whom the Act is applicable to make monthly contributions to the UIF.¹⁴⁰³ The employer is expected to register as an employer in terms of section 10 of the *UICA* and to subsequently deduct or withhold a determined sum from the employee's monthly remuneration.¹⁴⁰⁴ The said sum is paid to the Fund together with the employer's share of the contribution. It is contemplated that in addition to other benefits,¹⁴⁰⁵ employees who are covered under the Fund will receive unemployment insurance benefits where their employment is terminated due to their employer being found guilty of forced labour. However, the extent of the coverage of the *UIA* is limited since it is not designed with the phenomenon of forced labour in mind, unlike that in Brazil.¹⁴⁰⁶

The following examples illustrate the limitations of the UIF. While the Act seeks to be as comprehensive as possible by including within its ambit migrant workers, learners, domestic workers and public servants,¹⁴⁰⁷ the following limitations may affect its effectiveness where forced labour is concerned. Firstly, the Act excludes from its ambit independent contractors,¹⁴⁰⁸ who, as highlighted elsewhere in this study,¹⁴⁰⁹ are also susceptible to forced labour but largely remain excluded from the forced labour provisions crafted under the *BCEA*.¹⁴¹⁰ Thirdly, as will be argued below, the nature of the fund is most likely to result in the exclusion of workers where they

¹⁴⁰² The *UIA* and *UICA* are enacted to regulate the area of unemployment insurance in South Africa. The *UIA* specifically establishes the fund and sets out the contingencies upon which benefits may be paid out as well as the categories of employees eligible to be registered and contribute to the fund. In a nutshell, it deals with the administration of the unemployment benefit to targeted beneficiaries. On the other hand, the *UICA* focuses on the imposition and collection of contributions through various measures including imposing an obligation on employers and employees to contribute to the fund; by imposing a duty to register as an employer; and by setting out how contributions are determined. For this reason, it deals with the administration and governance of the Fund.

¹⁴⁰³ Section 5(1) of Act No 4 of 2002.

¹⁴⁰⁴ Section 7(1).

¹⁴⁰⁵ For example, payments of remuneration and leave pay upon termination in terms of section 40 of the *BCEA*.

¹⁴⁰⁶ Para 4.5.2.1.2 above.

¹⁴⁰⁷ In terms of section 1 of the *Unemployment Insurance Amendment Act* 10 of 2016.

¹⁴⁰⁸ Section 1.

¹⁴⁰⁹ See para 3.3.3 above.

¹⁴¹⁰ Para 5.5.1.2 above.

had not been making contributions due to the failure of the employer to register as such in terms of the *UICA*.

As highlighted earlier,¹⁴¹¹ the occurrence of forced labour is normally in informal employment and illegal activity such as commercial drug activity and illegal prostitution. Therefore, the likelihood of having certain "employers" go unregistered cannot be overlooked. The operation of the fund would be limited because for an employee to qualify for benefits, he has to be recognised as an unemployed "contributor". According to section 1(1) of the *UIA*, a contributor is a natural person who can *inter alia* satisfy the Commissioner that he or she has made contributions for purposes of the Act. It is submitted therefore that the South African concept of unemployment benefits operates from a social insurance¹⁴¹² perspective which requires the payment of contributions by targeted beneficiaries, whereas that in Brazil largely emulates a social assistance¹⁴¹³ system where any worker rescued from slave labour is eligible to receive benefits without an emphasis on the worker's having made previous contributions. In Brazil payments are made from the Workers' Assistance Fund.

Dupper *et al*¹⁴¹⁴ seem to share a similar view regarding the South African approach. In a critique of this approach, the author argues that the South African unemployment benefit is currently not ideal to cover unemployment from a social assistance perspective.¹⁴¹⁵ The sustenance of the Fund depends on the contributory capacity of both the employer and employee and it cannot be run on a grant-like basis. The current administration of the Fund will therefore fall short of extending coverage to forced labourers whose employer was not registered in terms of the *UICA* and where contributions have not been previously made. Should the need arise to pay unemployment benefits to forced labourers, the South African Government may need to craft a mechanism that does not overly rely on contributions from

¹⁴¹¹ Para 2.2 above.

¹⁴¹² See further Strydom "Introduction to Social Security Law" 9-11; Govindjee and Dupper 2011 *Stell LR* 776.

¹⁴¹³ See Strydom "Introduction to Social Security Law" 7-9.

¹⁴¹⁴ Dupper *et al* 2011 *Stell LR* 396-425.

¹⁴¹⁵ Dupper *et al* 2011 *Stell LR* 397.

employers and employees but rather one that is funded from national taxes as in the case of social grants to provide temporary relief to rescued forced labourers. This notwithstanding the Unemployment Insurance Board, as established by the Minister of Labour¹⁴¹⁶ may serve as an enabling body for the betterment of the Fund so that it may assist in responding to the socio-economic effects of forced labour. This submission is prompted by the advisory role of the Board to the Minister regarding policies speaking to the application of the Act and those intended to minimise unemployment.¹⁴¹⁷

5.5.2.6.4 Commission for Employment Equity

Because forced labour may impact on the right to equality as enunciated above, the Commission for Employment Equity is identified as one of the bodies that may play a role in addressing forced labour. The Commission is established under section 28 of the *Employment Equity Act* (EEA).¹⁴¹⁸ The achievement of equity in the workplace is the key objective of the EEA. The Act aims to achieve this by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and through implementing affirmative action measures to redress the disadvantage in employment experienced by designated groups.¹⁴¹⁹

Unlike that of the SAHRC, the role of the Commission for Employment Equity is fundamentally advisory in nature. The Commission advises the Minister of Labour on codes of good practice issued by the Minister in terms of section 54 of the *EEA*.¹⁴²⁰ According to this section, the codes of good practice may range from those on sexual harassment and racial harassment, those outlining measures to be taken in relation to persons with family responsibilities and the prioritisation of certain designated groups. Since the language used in the Act does not seem to suggest a

¹⁴¹⁶ Section 47.

¹⁴¹⁷ Section 48(1).

¹⁴¹⁸ Act 55 of 1998.

¹⁴¹⁹ Section 2.

¹⁴²⁰ Section 30(1).

numerus clausus of envisioned codes,¹⁴²¹ the Commission may possibly use this advisory role to make suggestions on the formulation of a code of practice outlining how employers may avoid the use of forced labour in their operations.¹⁴²²

Whereas the work of the Commission does not match that of the SAHRC with respect to the latter's promotion and protection of human rights, the Commission for Employment Equity may use its consultative and advisory role to make suggestions on the elimination of forced labour that perpetuates inequalities. While little is written on the influence of the Commission, the opinions of scholars differ with respect to its impact on the promotion of equality and transformation. On the one hand, it has been argued by Abrahams and February¹⁴²³ that the Commission has little influence and that it ought to be given a status similar to that of the SAHRC. Conversely, an argument has been advanced by Ngwena¹⁴²⁴ that the Commission possesses the requisite skills to ensure the effective implementation of the Act. In the light of this, and taking into account the implications of forced labour on the achievement of equality, it is suggested that the Commission's investigative role and role of reporting to the Minister must be made obligatory and not merely be permissive, as the Act suggests.¹⁴²⁵

5.5.2.6.5 Employment Conditions Commission

Finally, section 59(1) of the *BCEA* establishes the Employment Conditions Commission, which performs the role of advising the Minister of Labour. Its functions include amongst others the responsibility of advising the Minister on sectoral

¹⁴²¹ See section 54(1). It is noted in the Act that the subject of the codes *includes* the preparation of employment equity plans; advertising, recruitment and selection criteria; and sexual harassment and racial harassment, to mention but a few (emphasis added).

¹⁴²² The composition of the Commission allows the participation of both employers and employees in the decision-making process concerning the implementation of the Act. The Commission is also permitted to conduct research and present its findings to the Minister on matters falling under the application of the Act. The Commission is also required to submit annual reports to the Minister. The report analyses the progress made by designated employers in their effort to achieve transformation and equality in their workplaces. See sections 29-33 of the *EEA*; Ngwena 2000 *CILSA* 113.

¹⁴²³ Abrahams and February 2001 *International Journal of Discrimination and the Law* 123.

¹⁴²⁴ Ngwena 2000 *CILSA* 113.

¹⁴²⁵ Section 30(2).

determinations and any other matters bearing on the basic conditions of employment.¹⁴²⁶ By virtue of this provision, the Minister consults with the Commission regarding establishing sectoral determinations and effecting changes to employment conditions pursuant to section 55 of the Act. The Commission is mandated to report its recommendations in writing to the Minister, whereupon she will consider them prior to making a sectoral determination.¹⁴²⁷ Where the Minister disagrees with one or more of the recommendations, she must refer the report back to the Commission for reconsideration.¹⁴²⁸ The Minister may make a sectoral determination only upon consideration of the further report submitted by the Commission.¹⁴²⁹

The advisory role of the Commission may be significant in the area of forced labour as the offence inevitably comprises the imposition of poor working conditions on workers. Accordingly, the continuum of exploitation as discussed above¹⁴³⁰ highlights the need to not address forced labour in isolation without paying due regard to crafting solutions for the poor working conditions that occupy the middle ground between decent work and forced labour. It was subsequently concluded that the continuum makes a compelling case for the need to view forced labour as not only a criminal offence but also as a criminal offence that has implications for the labour rights of its victims.¹⁴³¹ The Commission's advice may play a role during policy and legislation formulation on forced labour to highlight the need to address not only extreme cases of forced labour but also the poor working conditions that a worker is exposed to in a forced labour situation.

Without defeating the need to establish institutions tailored specifically to address forced labour, it is concluded that the above institutions may play a valuable role in commencing conversations about and interest in the phenomenon of forced labour. In particular, the SAHRC's role as a body constituted to safeguard human rights may

¹⁴²⁶ Section 59(2). See further Clarke 2004 *CJAS* 561-562; Godfrey and Clarke 2002 *Law, Democracy and Development* 3.

¹⁴²⁷ Section 55(1).

¹⁴²⁸ Section 55(2).

¹⁴²⁹ Section 55(3).

¹⁴³⁰ Para 3.3.4 above.

¹⁴³¹ Para 3.3.4 above.

assist in the prevention of forced labour through raising awareness, as well as after its occurrence by assisting victims access justice for the infringement of their right not to be subjected to forced labour and other rights. The NEDLAC, Employment Conditions Committee and the Commission for Employment Equity may go so far as to become forums facilitating discussions on forced labour from a labour law perspective, and possibly the formulation of legislation targeted at addressing its labour law implications. This notwithstanding, the shortcomings evidenced in the UIF demonstrate that the roles of some labour market institutions¹⁴³² are not currently tailored to address the peculiar circumstances of forced labour, thereby warranting a need to simultaneously re-adjust their objectives upon the establishment of a forced labour framework.

5.5.3 Preventative and victim assistance measures

Previous discussions have established that international human rights treaty law firmly classifies forced labour as a violation of the human rights of its victims.¹⁴³³ A rights-based approach to forced labour demands that states accord forced labour the attention it deserves in national law and practice. Whilst the Constitution positions forced labour as a human rights violation in national law, it appears from the foregoing discussions that the constitutional entrenchment of the right not to be subjected to forced labour, which is not accompanied by a clear framework targeted at preventing and addressing occurrences of forced labour, is insufficient. By its very nature, forced labour calls for effective legislative provisions and enforcement mechanisms that may appropriately respond to its characteristics.

Accordingly, as distilled from the Brazilian and UK experiences, a rights-based approach to forced labour requires the need to appreciate the multi-faceted nature of the offence and its impact on the victims so as to bring together law enforcement mechanisms from various arms of the law to address the phenomenon

¹⁴³² See for example para 5.5.2.3 above on the limited scope of labour inspection under the *BCEA* in contradistinction to specialised labour inspection in the UK and Brazil - at paras 3.5.1.1.2 and 4.5.2.1.1 respectively.

¹⁴³³ Para 2.5 above.

effectively.¹⁴³⁴ Consequently, the aim of this approach is not only to make forced labour a criminal offence but also to address issues of prevention as well as to lessen the plight of those who have fallen victim to the offence.¹⁴³⁵ In this regard, the argument that forced labour must be viewed beyond its being only a criminal offence but also as an issue of constitutional and labour market concern is fortified. This more comprehensive approach demands that the state must, in addition to formulating forced labour legislation, ensure that it makes provision for preventative and victim assistance measures specifically tailored for forced labour.

In view of this, the ILO has also redirected its recommended approach on forced labour to ensuring the protection of victims as well as preventing the occurrence or recurrence of forced labour. The 2014 *Protocol on Forced Labour* is particularly clear about this in its call for members to adopt protection and effective remedies such as the payment of compensation to victims. In addition to this, the Protocol speaks to the need for the establishment of rehabilitation and recovery mechanisms for victims. The preventative measures envisioned in the Protocol include awareness raising amongst ordinary citizens and employers so that they do not make use of forced labour.¹⁴³⁶

The regulatory frameworks of the comparative jurisdictions used in this study cater to the needs of victims of forced labour and the need to prevent the occurrence of forced labour within their borders. It may be helpful to briefly remind the reader of those approaches. In the UK the *MSA* introduces conditional immunity to protect forced labourers from prosecution for criminal activity arising from their employment.¹⁴³⁷ It also makes provision for legal aid for victims of forced labour who wish to pursue claims in civil courts for damages against offenders.¹⁴³⁸ The Brazilian approach to victim assistance can be found in the work of the Special Mobile Group, which is empowered to free workers found in slave labour and order that they be

¹⁴³⁴ See paras 3.5.1, 3.5.2, 4.5.2 above.

¹⁴³⁵ Para 2.6.2.2 above.

¹⁴³⁶ Para 2.6.2.2 above.

¹⁴³⁷ Para 3.5.1.2.3 above.

¹⁴³⁸ Para 3.5.1.2.3 above.

paid compensation by the employer for the violation of their labour rights.¹⁴³⁹ The Brazilian framework also encompasses a social assistance mechanism that is premised on paying unemployment benefits to freed workers. The mechanism is unlike that of typical unemployment insurance schemes, which require that the employee be a contributor to the fund.¹⁴⁴⁰

Preventative measures in the UK are evident in the *Gangmasters Licensing Act*, which requires the licensing of all gangmasters.¹⁴⁴¹ The Act is administered by the Gangmasters Licensing Authority, which essentially requires that an applicant must pass all the licensing standards set by the authority.¹⁴⁴² The standards cover health and safety, accommodation, wages, transport and training. The Authority periodically carries out inspections to ensure compliance with its standards and will revoke the licence of a gangmaster who imposes poor working conditions or forced labour on workers.¹⁴⁴³ The *MSA* further compels commercial organisations to provide annual statements demonstrating their commitment to a zero tolerance of forced labour in their operations.¹⁴⁴⁴ As said above, Brazil employs the payment of an unemployment benefit to freed forced labourers to avoid their reinsertion into slave labour. Businesses and private sector employers monitor their conduct in order to prevent the use of slave labour through the National Pact for the Eradication of Slave Labour.¹⁴⁴⁵ All employers and businesses signatory to the Pact pledge to eliminate the use of slave labour in supply chains and to raise awareness on forced labour.¹⁴⁴⁶

In comparison with the ILO position and the approaches adopted by the UK and Brazil, despite its potentially strong human rights approach South Africa does not currently have a forced labour framework that is accompanied by specific measures

¹⁴³⁹ Para 4.5.2.1.1 above.

¹⁴⁴⁰ Para 4.5.2.1.2 above.

¹⁴⁴¹ Para 3.5.1.1 above.

¹⁴⁴² Para 3.5.1.1.2 above.

¹⁴⁴³ Para 3.5.1.1.2 above.

¹⁴⁴⁴ Para 3.5.1.2.4 above. Also see the initiative of the ETI described at para 3.5.2.2 above, which encourages ethical trading that is meant to curb the use of forced labour in supply chains.

¹⁴⁴⁵ Para 4.5.2.2.1 above.

¹⁴⁴⁶ Para 4.5.2.2.1 above.

to assist victims, nor does it have policy speaking to measures to be adopted in preventing the occurrence of the offence. As argued above, the focus of the legislation is on the offence of human trafficking, which, although it is related to forced labour, cannot cover all aspects of its manifestation. Apart from this, whilst the *BCEA* establishes the offence of forced labour in section 48, there is no clear targeted mechanism of dealing with the subjection of employees to forced labour.

At the moment, it seems the labour framework envisages that forced labour will be accorded treatment similar to other labour practices in the Act. In this respect, a victim of forced labour may claim civil relief in the Labour Court from the offending employer. According to section 158 of the LRA, the Court may *inter alia* make any appropriate order including an award of compensation and an order for costs.¹⁴⁴⁷ Furthermore, as advanced earlier, the traditional definition of a labour practice in terms of the Constitution exempts areas of social security and occupational health, which form crucial elements of addressing forced labour. For this reason, the current framework does not clearly outline how the social security and occupational health aspects of forced labour will be addressed simultaneously with its impact on other labour rights such as a lack of remuneration. The ability of the labour courts to grant civil remedies on breaches of section 48 or awards of constitutional remedies on the breach of section 13 (and other interrelated human rights) align with the 2014 *Protocol on Forced Labour* to award appropriate compensation. However, the protection remains scant in comparison to the international standard and the positions in the UK and Brazil.

While South Africa has a number of labour enforcement bodies and constitutional bodies¹⁴⁴⁸ that may potentially play a striking role in the protection of both the labour and human rights of victims of forced labour, there is no clear direction as to how violations attracted by forced labour are to be addressed by the bodies. In this regard, it is argued that South Africa needs a framework that specifically addresses forced labour. This will ensure that both the Government and other relevant bodies

¹⁴⁴⁷ Put differently, a successful litigation against an employer may not address all the concerns raised in a forced labour situation as it is essentially reactive.

¹⁴⁴⁸ See para 5.5.2 and 5.5.2.6 above.

have a clear grasp of what their role is and how best to effectively prevent forced labour and assist its victims.

By way of contrast, with reference to human trafficking in particular the *PCTPA* introduces targeted preventative and victim protection mechanisms that to a certain extent emulate those of the 2014 *Protocol on Forced Labour*. The comparison of the Act with the 2014 *Protocol on Forced Labour* is made to emphasise that like human trafficking, forced labour also ought to be addressed by specialised measures in national law. A consideration of the measures proposed under the *PCTPA* is necessary as they may serve as examples of how forced labour victims may be assisted.

Firstly, the Act recognises that the needs of a victim of trafficking who is a child are different from those of an adult. As a result, the Act exhorts all officials enforcing the Act to deal with children who are victims with due cognisance of the *Children's Act* 38 of 2005.¹⁴⁴⁹ Consequently, the treatment of adolescent victims has to be in consonance with the provisions of chapter 18 of the *Children's Act*, which amongst other things makes special provision for the treatment of minor victims of human trafficking concerning their repatriation to their countries of origin¹⁴⁵⁰ and assistance in an application for asylum status in South Africa where necessary.¹⁴⁵¹ Section 19(6) of the *PCTPA* provides for the placing of an adult victim of trafficking in temporary safe care pending transfer to an accredited organisation. The Act also requires that officials assist the victims to acquire the necessary medical care and transportation to temporary places of care or accredited organisations.¹⁴⁵²

Secondly, section 22(1) of the *PCTPA* could render assistance to victims of trafficking who ended up in forced labour that involves illegal activity. Like article 4(2) of the 2014 *Protocol on Forced Labour*, this provision compels a prosecutor during the criminal prosecution of a person suspected to be a victim to pay due regard to

¹⁴⁴⁹ Section 18(4).

¹⁴⁵⁰ Section 286.

¹⁴⁵¹ Section 289.

¹⁴⁵² Section 19(7) as read with section 21 of the Act.

whether the offence was committed as a direct result of the victim's having been trafficked. In this case, the prosecutor is permitted to apply to the court for a postponement of the prosecution and to refer the person to the Department of Social Development for an assessment of whether or not such person is indeed a victim of human trafficking.¹⁴⁵³ If this assessment is in the affirmative, the Act mandates the prosecutor to withdraw the charges against the victim.¹⁴⁵⁴

Thirdly, the *PCTPA* mirrors the 2014 *Protocol on Forced Labour* with respect to the recognition of the need to provide compensation to victims of trafficking. In terms of section 29 of the Act, the court may at its own discretion or upon the request of the victim make an additional order for the payment of compensation by the person convicted of the offence of human trafficking in addition to the sentence it may impose for the contravention of the Act. While the aspect of compensation is possible under the current forced labour approach in terms of the *BCEA*, the *PCTPA* highlights the possibility of imposing criminal sanctions alongside civil damages over an offence of forced labour.

Finally, unlike the current forced labour framework that requires a great deal of speculation and a generalised approach over the role of various institutions upon the occurrence of forced labour, the *PCTPA* firmly restricts the provision of assistance to the victims of trafficking only to institutions that are accredited in terms of section 24 of the Act. The Minister of Social Development is charged with the mandate of developing a system of accreditation that institutions need to engage in, in order to obtain a certificate of accreditation.¹⁴⁵⁵ According to the Act, the system of accreditation must be formulated in such a manner that it enables the evaluation of the programmes offered by the institution to ensure that it complies with the norms and minimum standards imposed in section 25 of the Act.¹⁴⁵⁶

¹⁴⁵³ Section 22(2). This assessment is conducted by the provincial department of social development in accordance with section 18 of the Act.

¹⁴⁵⁴ Section 22(3).

¹⁴⁵⁵ Section 24(2).

¹⁴⁵⁶ Briefly, the norms and minimum standards speak to the following; the provision of safety, access to and the provision of adequate healthcare to the victims of trafficking, and the provision of separate facilities for male and female victims. Where the facility is intended to house both child

The rationale behind the need to have designated institutions is that it is envisioned that the victims of trafficking will in most instances be foreigners, and hence without shelter after they are rescued from the places where they were held hostage. The need for designated institutions highlights that when organisations know what their role is with respect to forced labour they will have to act accordingly, taking into account the needs of the victims.

For this reason, section 26(1) of the *PCTPA* mandates an accredited institution to provide not only accommodation but also counselling targeting the reintegration of the victims of trafficking into their communities. Arguably, it ought to be assumed that all these services are tailored to address the suffering caused by human trafficking in particular and not forced labour. In this regard, it is suggested that assistance be provided taking into account the particularities of forced labour specifically, and that reintegration be tailored to address issues of labour market participation coupled with the prevention of reinsertion into forced labour.

The roles of the accredited institutions in the *PCTPA* are not limited to providing assistance to victims. The Act empowers the organisations to conduct research on various elements of human trafficking, an element which if introduced within a forced labour perspective may greatly assist in the overall understanding of forced labour in South Africa.¹⁴⁵⁷ This includes obtaining information on the number of foreigners, citizens and permanent residents who obtain the services facilitated by the institution, the countries from which the foreign victims have been trafficked, and the countries to which South African citizens have been trafficked.¹⁴⁵⁸ Furthermore, the institutions are to probe the purposes for which victims have been trafficked.¹⁴⁵⁹ This role is vital to assist the Government keep a record of the prevalence of human trafficking in South Africa. This component supports the observation that despite the attractive roles that labour market and human rights

and adult victims, it must provide a safe environment for children and ensure the provision of proper care for sick children. See section 25(3).

¹⁴⁵⁷ Section 25(4)(a).

¹⁴⁵⁸ Section 25(4)(a).

¹⁴⁵⁹ Section 25(4)(a).

institutions may contribute in the area of forced labour, the current framework does not clearly assert whose role it is to monitor the occurrence of forced labour in South Africa and how that organisation is to exercise that role.

In conclusion, the lack of a specific framework dealing with forced labour in South Africa results in there being a fragmented approach to the issue of victim assistance and preventative measures. The trafficking framework, as introduced by the *PCTPA*, underscores the fact that targeted mechanisms may go a long way towards addressing the unique challenges encountered where offences such as human trafficking and forced labour occur. Although not relevant to forced labour arising short of human trafficking, the mechanisms introduced by the *PCTPA* may be used as a guideline to formulate targeted measures for forced labour.

5.6 Conclusion

A study of South African history has shown that the country has had a difficult past due to the imposition of racial segregation on its population, which system was also reflected in labour relations in that period. Post 1994 South Africa has achieved progressive constitutional and labour relations systems that are alive to the promotion of human rights. Be that as it may, forced labour has received very little attention in the jurisdiction. The Constitution specifically prohibits the subjection of all people in South Africa to forced labour. Whilst the prohibition does not criminalise the offence, the *BCEA* does so through imposing a prison term or a fine with respect to the imposition of forced labour on employees. The recent extension of the jurisdiction of the Labour Court to matters involving forced labour perpetrated within the ambit of the *BCEA* is a step towards acknowledging the role that labour dispute resolution mechanisms may play in addressing forced labour. However, apart from the trafficking framework introduced by the *PCTPA*, it would seem that the South African approach still needs to be improved so as to not confine its approach to forced labour to the employment relationship. Whereas the elasticity of who an employee is in South Africa is capable of extending protection to a majority of workers in theory, it appears that in practice there are still categories of workers

who because of the circumstances of their employment will encounter difficulty in claiming this protection.¹⁴⁶⁰

Furthermore, the South African framework currently predominantly addresses forced labour in the human trafficking and criminal law framework as envisioned under the newly enacted *PCTPA*. Forced labour is not criminalised as a stand-alone offence, but is rather classified as a form of exploitation which may result from human trafficking. The danger of this system is that it is fragmented since it fails to address the broad spectrum of forced labour. It follows therefore that the South African approach does not meet the 2014 *Protocol on Forced Labour's* standard of addressing forced labour.

Given the gaps in the legislative framework, the Constitution offers protection by specifically entrenching a human right to not be subjected to forced labour. The established position that the rights in the Constitution should be treated as interrelated requires that forced labour be taken beyond the scope of this specific right to also encompass its outright violation of victims' right to dignity, freedom and equality. Supportive of this argument is the recognition that forced labour also constitutes at a preliminary level an affront of the constitutional values of dignity, freedom and equality.

Despite its limitations, section 23(1) of the Constitution can be employed to augment a claim against forced labour due to the protection guaranteed to everyone against unfair labour practices. Taking into account the many rights that are infringed on through forced labour, there can be no doubt that forced labour must be classified as an unfair labour practice under the Constitution. Furthermore, the classification of forced labour as an unfair labour practice under section 23(1) necessitates that the right be interpreted progressively. Should the South African Government ratify the 2014 *Protocol on Forced Labour*, there will be a need for the formulation of legislation that speaks to forced labour, for which a policy outlining the Government's planned approach can be formulated. While the supreme law of the

¹⁴⁶⁰ See Fourie *PER/PELJ* 2008 112-184.

land arguably introduces a rights-based approach to forced labour, the need for specific legislation on forced labour to address matters such as victim assistance and the compensation of victims cannot be denied, as South Africa currently lacks a targeted framework addressing these two aspects. While the current labour mechanisms may assist in combating forced labour and alleviating its effects, they may fall short of addressing its unique outcomes on victims. On the contrary, the *PCTPA* introduces specialised measures to protect and assist victims of human trafficking which to a large extent mirror the standards envisioned by the ILO in the *2014 Protocol on Forced Labour*.

The next chapter brings together the various principles and standards learnt at international law and the comparative experiences of the UK and Brazil to map out lessons for South Africa.

CHAPTER 6

CONCLUSION: LESSONS FOR SOUTH AFRICA

6.1 Introduction

The ILO's aspiration to bring an end to forced labour from an international level began in 1930 upon the inception of the *Forced Labour Convention*. Eighty-seven years later, as appears from the previous chapters, the objective of achieving a world free of forced labour is far from being reached. In 2012 the ILO estimated that approximately 21 million people were being held in situations of forced labour worldwide.¹⁴⁶¹ Of this number, estimates record that Africa accounts for 3.7 million.¹⁴⁶² While the recorded statistic is too general and not country specific, it has been adopted as useful in this thesis to indicate that forced labour is not an unknown phenomenon on the African continent. That notwithstanding, forced labour is not often the object of focus in South African legislation and academic circles. Meanwhile, close attention has been paid to the offence of human trafficking, which is considered to be prevalent within the country's borders.¹⁴⁶³ Recently the Government of South Africa has moved towards improving the country's human trafficking framework to better curb and address the offence.¹⁴⁶⁴ In this framework, forced labour appears to be treated as an offence secondary to human trafficking. Where it is treated as a separate offence,¹⁴⁶⁵ the legislation exclusively targets those who are regarded as employees in terms of the *BCEA*. This results in there being a gap with respect to establishing an offence that would apply to all types of workers, irrespective of the existence or otherwise of an employment relationship.

On the contrary, academics in the UK and Brazil have shown an increasing interest in exploring forced labour and the responses adopted both at international and

¹⁴⁶¹ ILO *Global Estimate of Forced Labour* 13; ILO *Profits and Poverty* 7.

¹⁴⁶² ILO *Combating Forced Labour and Trafficking in Africa* 11-12.

¹⁴⁶³ Para 5.3.4 above.

¹⁴⁶⁴ Paras 5.4 and 5.5.1.1 above.

¹⁴⁶⁵ Para 5.5.1.2 above.

national level.¹⁴⁶⁶ The laws and policies emanating from the Governments of these two jurisdictions also demonstrate a determination to address forced labour as a separate offence independent of human trafficking with a significant contribution of labour law and its institutions where appropriate.¹⁴⁶⁷ In the light of this, the primary aim of this thesis has been to engage in a comparison of the approaches employed by the UK and Brazil in addressing forced labour. An examination of the international standards which set the context in which all the approaches must be based was also important to the investigation and the argument that the nature and consequences of forced labour warrant that it be addressed as a labour law issue as well as a criminal issue. Consequently, the chief research question that this thesis sought to determine was: how and to what extent can international law, English law and Brazilian law assist in developing South African labour law in combating forced labour? The examination of the approach at international law and in the two jurisdictions as well as the limitations of the South African law having been performed, this chapter seeks to draw conclusions and compile the lessons learned from the above.

This study has discovered that the ILO *Forced Labour Convention* requires signatories to sanction forced labour as a penal offence and to ensure that the penalties assigned to it are "adequate and strictly enforced."¹⁴⁶⁸ Compliance with this requirement has been noted across the three jurisdictions that are the subject of this study.¹⁴⁶⁹ However, this study did not concern itself with interrogating the adequacy or otherwise of the penalties imposed on the offence in these jurisdictions. Instead, its focus has been to suggest that the effective involvement of labour law is one way of strengthening the sanctioning of forced labour.

It must be admitted that utilising systems based on criminal law to address forced labour is justified to a certain extent. By virtue of its being a criminal offence across the three jurisdictions, forced labour is characterised not only as a misdemeanour

¹⁴⁶⁶ Chapters 3 and 4 above.

¹⁴⁶⁷ Paras 3.4, 3.5, 4.4 and 4.5 above.

¹⁴⁶⁸ Article 25.

¹⁴⁶⁹ See section 1(1)(b) of the UK *Modern Slavery Act (MSA)*, section 149 of the *Brazilian Penal Code* and section 48 of the South African *Basic Conditions of Employment Act (BCEA)*.

against the individual offended but also against the State. The State thus demonstrates its commitment to punishing the crime as well as to sending a message to future offenders on the seriousness of the offence. Indeed, the international standard imposed by article 25 of the *Forced Labour Convention* sees the criminal law as the preferred mode of addressing forced labour amongst ILO members who ratify the Convention. In terms of its partial compliance with the Convention,¹⁴⁷⁰ the South African framework follows this approach in the sense that forced labour is addressed within the human trafficking framework by virtue of the *PCTPA*.¹⁴⁷¹ Where trafficking is not involved, the *BCEA* protects "employees" from forced labour and gives the Labour Court the jurisdiction to grant civil relief in respect of a breach of section 48.¹⁴⁷²

Nevertheless, the criminal law and human trafficking approaches to forced labour have over the years been shown to have shortcomings. Firstly, while criminal sanctions are in place, they have been criticised for their inadequacy and the difficulty of securing convictions in respect of the sanctions.¹⁴⁷³ Secondly, Andrees and Belser¹⁴⁷⁴ are of the opinion that criminal prosecutions are not proactive in nature. Criminal law reacts (not always successfully) to forced labour post its occurrence, as opposed to creating an environment where the offence may be prevented altogether. Thirdly, the analysis of situations in the UK and Brazil shows that viewing forced labour as a secondary offence to trafficking runs the risk of having forced labour overlooked.¹⁴⁷⁵

Although the inadequacies and *post facto* nature of the sanctions envisaged for forced labour suggest the need to have the penalties reviewed and improved, it is suggested in this thesis that focusing on refining the criminal law only is not enough to address forced labour in 21st century South Africa as forced labour takes place in

¹⁴⁷⁰ See para 6.6.2.2 below.

¹⁴⁷¹ Para 5.5.1.1 above.

¹⁴⁷² Para 5.5.1.2 above.

¹⁴⁷³ Costa *Fighting Forced Labour* 22; Sakamoto "Slave Labour in Brazil" 31; Scott *et al* 2012 *Experiences of Forced Labour* 72.

¹⁴⁷⁴ Andrees and Belser "Strengthening Labour Market" 109.

¹⁴⁷⁵ Paras 3.4 and 4.4 above.

the context of employment and therefore raises issues of labour and employment law. Consequently, the need arises for labour law to be equally involved in any regulatory framework designed to address forced labour. The ILO's emphasis on the concept of decent work in the 21st century¹⁴⁷⁶ should also be taken as an indication that labour law needs to be incorporated in regulatory systems dealing with forced labour.

The discussion in this chapter does not suggest that the criminal law is insignificant in grappling with forced labour in South Africa. However, it argues for the need to simultaneously bring forced labour within the context of labour law so as to ensure a far-reaching mechanism of averting and responding to the offence. Consequently, this chapter uses the comparative analysis done in the thesis to ultimately distil lessons from the UK and Brazil that the South African Government may use to develop its overall approach to forced labour.

6.2 The distinction between forced labour and slavery

This study has discovered that the attempt to put an end to forced labour can be traced to the struggle against slavery during the colonial era.¹⁴⁷⁷ The most interesting finding that harmonises the jurisdictions chosen for this study is that the UK's efforts to see a global end to both the slave trade and slavery was experienced in both Brazil and South Africa. Whereas the experiences are not entirely similar,¹⁴⁷⁸ together they demonstrate the change that took place from a time when slavery and the slave trade were seen as an inherent part of class and society and backed by law

¹⁴⁷⁶ Para 2.7.1 above.

¹⁴⁷⁷ Para 2.2 above.

¹⁴⁷⁸ The key difference between the two jurisdictions was that the UK became the colonial master of the Cape Colony (now the area around Cape Town in South Africa) and could impose its changes on the institutions of slavery and the slave trade with relatively less resistance than occurred in Brazil. In addition, emancipation came earlier in the British Empire by virtue of the enactment of the *Slavery Abolition Act* of 1833, meaning that slaves in the Cape Colony were released from absolute slavery earlier than slaves in Brazil. However, slaves in Brazil received absolute freedom in 1888 by virtue of the *Lei Aurea*. See para 4.2 as read with para 5.2 above.

to the present, when practicing slavery is a serious offence and a violation of human rights.¹⁴⁷⁹

The literature reviewed also indicates that a division of the mandates to deal with slavery and forced labour was established between the ILO and the League of Nations.¹⁴⁸⁰ To date, the UN's concern with human rights issues encompasses the field of slavery, whilst the ILO is concerned with forced labour. Be that as it may, the proliferation of forced labour in recent years and the attention it has received lately has resulted in a situation where it is commonly referred to as modern slavery. Whilst the two offences may *prima facie* seem to refer to similar conduct, the position at international law suggests the contrary.

The internationally accepted definition of forced labour¹⁴⁸¹ was found at article 2(1) of the ILO *Forced Labour Convention*, which defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." In the light of this definition, in order to successfully prove forced labour, a worker must prove that he was made to work or provide his services without his consent under the threat of an imposition of a penalty should he decline. In terms of the ILO's interpretation, the threats envisaged here include not only threats of a physical nature but also those that may be created in the mind of the worker.¹⁴⁸²

On the other hand, article 1(1) of the *Slavery Convention* defines slavery as the "status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." The pivotal point in this definition is that slavery inherently entails the exercise of ownership over an individual by another. Whereas the element of the exaction of work or service is involved, as in the case of forced

¹⁴⁷⁹ Paras 3.2, 4.2 and 5.2 above.

¹⁴⁸⁰ Paras 2.2 above.

¹⁴⁸¹ The relevance and application of the definition is confirmed in the new 2014 *Protocol to the Forced Labour Convention*, which is still open for ratification by ILO members who have ratified the *Forced Labour Convention*.

¹⁴⁸² See further para 2.2 above.

labour, the key distinguishing feature is that of ownership.¹⁴⁸³ The decision of the European Court of Human Rights in the case of *Siliadin v France* gives further authority to this distinction.¹⁴⁸⁴ What was in issue in this case was an alleged contravention of article 4 (1) and (2) of the *ECHR* by the French government. The manner in which article 4 of the *ECHR* is crafted¹⁴⁸⁵ is such that slavery and forced labour are prohibited within a similar article, to the extent that a relationship may be implied between the two. In this regard, the complainant in the *Siliadin* case pleaded that the French government had failed to protect her from being subjected to both forced labour and slavery contrary to its obligations under article 4 of the Convention.

The apparent distinction arising from the Court's ruling concerns the separate application of the relevant conventions to slavery and forced labour. With reference to the issue of slavery, the Court was of the view that the *Slavery Convention* is authoritative in that regard, whereas the *Forced Labour Convention* was relevant to the question of forced labour. Flowing from this, in order to be able to hold that an applicant was subjected to slavery, the European Court maintained that there must be evidence that a right of ownership was actually exercised over the applicant. On the other hand, the Court was of the view that where the imposition of forced labour is at issue, what must be proved is the exaction of work under the threat of a penalty, against the will of the applicant. As a result, the successful proof of circumstances establishing forced labour does not automatically prove the existence of slavery.

Article 6 of the *American Convention* is crafted very similarly to article 4 of the *ECHR*. The ruling of the American Court in the case of *Intuango Massacres v Colombia* points to the fact that the Inter-American system is in agreement with the European Court regarding the distinction between forced labour and slavery.¹⁴⁸⁶ In this particular case, the Court derived authority from article 29 (b) and (d) of the

¹⁴⁸³ Also see para 2.3.1 above.

¹⁴⁸⁴ Para 3.3.2.1 outlines the facts of the case.

¹⁴⁸⁵ "No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour."

¹⁴⁸⁶ Paras 4.3.2.1 and 4.3.2.2 above.

American Convention, to apply the *Forced Labour Convention* to address an alleged contravention of article 6(2), which speaks to forced labour. It must be noted that the Court did not address article 6(2), which speaks to slavery, since the applicants did not allege it. That notwithstanding, a conclusion was reached in this study that had the applicants pleaded a contravention of article 6(2) in addition to 6(1), the Court would probably have applied the *Slavery Convention* by virtue of article 29 of the *American Convention*.¹⁴⁸⁷

Article 5 of the *African Charter* is different from its European and American counterparts in the sense that it places emphasis on a prohibition on slavery, leaving forced labour to be inferred from the provision on torture, cruel and inhuman or degrading treatment.¹⁴⁸⁸ One unanticipated finding was that the African Commission has not as yet gone to the extent of setting a precedent on the meaning and scope of article 5 in so far as forced labour is concerned. In this regard, the prohibition of forced labour in terms of the Charter is debatable.

Nevertheless, the international approach dictates that the use of the terms slavery and forced labour interchangeably is to a certain extent wrong. Owing to their inherent differences, provisions on slavery and/or forced labour in national legislation must be clear so as to be distinguishable. That is, where slavery is used to encompass the occurrence of forced labour, national legislation must be in a position to clarify this. A prohibition of slavery designed to include forced labour in the absence of a clarification might be associated with chattel slavery, which finds little or no relevance in contemporary labour relations. For this reason, national laws must indicate that forced labour and slavery are distinct concepts. The use of slavery as an umbrella term requires that its boundaries be clearly defined so as to properly identify the context of forced labour within such legislation. A failure to set clear parameters runs the risk that a victim of forced labour may actually lack a remedy under such a provision because his grievance does not comply with the ingredients of the offence sanctioned under such legislation.

¹⁴⁸⁷ See para 4.3.2.2 above on detailed arguments in support of this line of thought.

¹⁴⁸⁸ Para 5.3.3.1 above.

The variations in the terminology employed in this context in the different jurisdictions required clarification. This study discovered that the UK's *MSA* uses the term "modern slavery" to encompass forced labour, slavery, servitude and human trafficking.¹⁴⁸⁹ In this regard, the term modern slavery accrues to any one of these offences. In the Brazilian framework, the term "slave labour" is used in application to work that takes away the freedom of a worker, forced labour inclusive.¹⁴⁹⁰ While the two jurisdictions' approaches lean towards the use of the term slavery, the clarification in legislation of the ambit of this usage settles the argument. Despite the existence of a regional human rights framework¹⁴⁹¹ that is silent on the topic of forced labour, South African legislation has been consistent in the distinct use of the two terms in its constitutional framework and in the *PCTPA*.¹⁴⁹² In this regard, it is advisable that the country's formulation of forced labour legislation in future maintains the distinction for the reasons advanced in this argument.

6.3 The contribution of international human rights law to the forced labour debacle

6.3.1 *Forced labour in view of the United Nations' human rights perspective*

The role of international standards emanating from the ILO and the UN concerning forced labour has been fundamental in lending authority to the views propounded in this thesis.¹⁴⁹³ It is an established fact that the mandate to deal with forced labour and slavery was divided between the two organisations as early as 1919. Nevertheless, human rights standards emanating from the UN remain valuable in

¹⁴⁸⁹ Para 3.5.1.2.1. Forced labour is referred to as a slavery offence throughout the Act.

¹⁴⁹⁰ Para 4.5.1.1.

¹⁴⁹¹ Article 5 of the *African Charter*. Also see para 5.3.3.1 above.

¹⁴⁹² In particular, the *PCTPA*'s definitions of forced labour and slavery are the same as those in the *Forced Labour Convention* and the *Slavery Convention*. The *BCEA* confines itself to forced labour with no express mention of slavery. It is not clear why this should be the case, but at the moment South African legislation as a whole (including the *PCTPA*) does not make provision for the criminal offence of slavery. In the light of this, it has previously been argued that slavery should be viewed as a common law crime in South Africa, taking into account developments at international customary law. See Kruger and Oosthuizen 2012 *PER/PELJ* 295-297.

¹⁴⁹³ See chapter 2.

augmenting the authority of the ILO standards.¹⁴⁹⁴ The coordination between the two systems also ensures harmony in standards where rights in the workplace are concerned. For this reason, one of the tasks undertaken in this thesis was to establish the relevance of UN human rights instruments to forced labour, without necessarily diminishing the authority of the ILO's forced labour instruments.

This exercise resulted in the conclusion that forced labour constitutes a violation of human rights enshrined in UN instruments, for the following reasons. Taking into consideration the accounts stemming from Brazil and the UK, forced labour infringes on the right of a person to be free and constitutes a threat to the security of the person, which is protected under the *UDHR*.¹⁴⁹⁵ For example, the use of debt bondage in the Brazilian practice of slave labour that puts workers in perpetual debt, coupled with the creation of the moral obligation to fulfil their debt before leaving their employ, has been found to compromise the freedom of workers in Brazil.¹⁴⁹⁶

In addition to this, the Brazilian situation demonstrates the absence of freedom in the sense that research suggests that most slave labour takes place on isolated farms and campsites that workers are unable to leave on their own. Finally, it is alleged that in order to prevent possible escapes by workers, armed personnel normally keep workplaces under constant surveillance. In extreme cases, reports from Brazil indicate that forced labourers and government officials have lost their lives in circumstances concerning slave labour.¹⁴⁹⁷ Similarly, the use of debt bondage is used to tie workers to their jobs in the UK. Threats and intimidation are also used in the UK to inspire fear in those held in forced labour.¹⁴⁹⁸

Furthermore, forced labour has no reverence for human dignity, which is the basic principle underlying all human rights.¹⁴⁹⁹ One of the values laid down by the ILO

¹⁴⁹⁴ Para 2.5 above.

¹⁴⁹⁵ Para 2.5.1 above.

¹⁴⁹⁶ Para 4.3.3 above.

¹⁴⁹⁷ Para 4.3.3 above discusses on this. Also see the case of Jose Pereira, as discussed at para 4.3.2.3 above.

¹⁴⁹⁸ Para 3.3.3 above.

¹⁴⁹⁹ See the Preamble of the *UDHR* and par 2.5.1 above.

upon which this study is based is the notion that labour is not a commodity.¹⁵⁰⁰ Put differently, there must be a realisation amongst employers that workers are not objects to be owned but are human beings with intact human rights to be protected and respected. It follows, therefore, that there is a need for the preservation and protection of the human rights of workers in the light of the need to protect their dignity. In this regard, the *UDHR* instructs that just and favourable conditions must be everybody's entitlement. However, poor working and living conditions, and the verbal and physical abuse associated with forced labour as seen in the UK and Brazil can never be associated with a dignified working life.¹⁵⁰¹

Closely connected to the foregoing is the observation that the *UDHR* embodies certain rights of a labour nature that must be respected.¹⁵⁰² It is important that an individual should be able to select an occupation of his or her choice.¹⁵⁰³ This right is inevitably denied where labour is exacted forcefully from a worker. The element of consent envisioned by the definition of forced labour as espoused in the *Forced Labour Convention* speaks to the fact that work or service performed is performed against the wishes of the worker. However, the ILO has previously stated that consent obtained by fraud or deception cannot be said to imply that the worker concerned offered himself voluntarily in line with the definition.¹⁵⁰⁴ Deceptive tactics used by *gatos* in Brazil as well as recruiters in the UK have been successful in obtaining the consent of workers so as to lure them into forced labour.¹⁵⁰⁵ An employer cannot rely on consent obtained by deceptive means to escape a charge of imposing forced labour and violating the workers' right to choose their occupation in respect of the *UDHR*.

Observations made during the studies carried out in the UK and Brazil indicate that forced labour is characterised by little or non-payment of wages.¹⁵⁰⁶ This is normally

¹⁵⁰⁰ Para 2.6.1 above.

¹⁵⁰¹ Paras 3.3.3 and 4.3.3 above.

¹⁵⁰² Para 2.5.1 above.

¹⁵⁰³ Also see section 22 of the *Constitution of the Republic of South Africa*, 1996 (hereafter referred to as the Constitution in this chapter).

¹⁵⁰⁴ Para 2.2 above.

¹⁵⁰⁵ Paras 3.3.3 and 4.3.3 above.

¹⁵⁰⁶ Paras 3.3.3 and 4.3.3 above.

achieved through the imposition of debt bondage, a system in which a worker's indebtedness to the employer is levied against his wages in perpetuity. As against this, the *UDHR* identifies the payment of a just and favourable wage as a human right.¹⁵⁰⁷ The ILO has also previously noted that the imposition of forced labour makes it possible for employers to evade making social security contributions, an aspect that slave labour research in Brazil has remarked on.¹⁵⁰⁸ This is another way in which forced labour leads to the violation of workers' rights.

It can thus be seen that the ramifications of forced labour inevitably place it within the spectrum of human rights. Whereas most UN human rights instruments speak to slavery, they are not completely irrelevant to the topic of forced labour. The evidence shows that forced labour is a flagrant violation of human rights and must be taken very seriously in national law, like slavery and human trafficking. While the role of the ILO instruments on forced labour remain authoritative, the argument made in this thesis is that a human rights-based approach to forced labour might serve as a more persuasive means of drawing the attention of law and policy makers to the problem of forced labour in the 21st century.

6.3.2 Influences of regional human rights systems

The influence and authoritative value of ILO standards on forced labour and the human rights perspectives arising from UN instruments cannot be ignored when addressing forced labour in national laws.¹⁵⁰⁹ In addition to this, regional human rights systems have previously been seen to generally play a significant role in promoting and ensuring the protection of human rights.¹⁵¹⁰ For this reason, this study found it compelling to consider the role regional human rights systems may play in assisting countries to develop their national laws and policies on forced labour. Furthermore, in addition to the obligations incurred under ILO instruments, regional human rights systems may impose further obligations or build upon those of

¹⁵⁰⁷ Para 2.5.1 above.

¹⁵⁰⁸ Para 4.3.3 above.

¹⁵⁰⁹ Paras 2.5 and 2.6 discuss these standards in detail.

¹⁵¹⁰ Para 3.3.2 above.

the ILO in an effort to enforce the right against forced labour as espoused in their chief human rights instruments.¹⁵¹¹

The *European Convention*, the *American Convention* and the *African Charter* were identified as the chief human rights instruments relevant to the jurisdictions that are the subject of this study.¹⁵¹² From a general point of view, judgements emanating from the courts charged with the mandate to oversee compliance with the instruments turned out to be instrumental in giving meaning and content to the right not to be subjected to forced labour as protected under regional human rights systems as well as at the international level. To establish this, the enquiries that were made concerned how forced labour is or must be interpreted in national laws, whether or not a distinction ought to be made between forced labour and slavery, and the obligations pertaining to forced labour imposed on a jurisdiction.

Firstly, it is an established fact that both the European and the American Court have previously used the *Forced Labour Convention* to interpret the meaning of forced labour with reference to both the *ECHR* and the *American Convention* respectively.¹⁵¹³ This was particularly evident in the distinction the European Court made between slavery and forced labour, as seen in the *Siliadin* case.¹⁵¹⁴ In a similar manner, the American Court used the *Forced Labour Convention* in its interpretation of forced labour in a case discussed above.¹⁵¹⁵ The two systems therefore endorse the ILO's approach regarding the *modus* to identify an occurrence of forced labour; that is, the exaction of work or services forcefully with a threat of penalty without the consent of the worker concerned.¹⁵¹⁶

Meanwhile, the same cannot be said about the African system in the sense that the *African Charter* only expressly prohibits slavery. Forced labour may conceivably be read into the scope of article 5 of the Charter, insofar as it prohibits degrading

¹⁵¹¹ Paras 3.3.2, 4.3.2 and 5.3.3 above.

¹⁵¹² Paras 3.3.2, 4.3.2 and 5.3.3 above.

¹⁵¹³ Paras 3.3.2.1 and 4.3.2.2 above.

¹⁵¹⁴ Para 3.3.2.1 above.

¹⁵¹⁵ Para 4.3.2.2 above.

¹⁵¹⁶ Paras 3.3.2.1 and 4.3.2.2 above.

treatment, amongst other matters.¹⁵¹⁷ Whereas a reasonable inference can be drawn from the provisions of article 5, this study has concluded that it is quite disappointing that the Charter's approach to forced labour must be left to inference, for the following reasons. An express prohibition of slavery to the exclusion of forced labour has the potential to displace the relevance of forced labour in the application of laws in today's world.¹⁵¹⁸ It has been noted that any reference to slavery may conjure up the image of chattel slavery. Indeed, the former approach adopted by the *Brazilian Penal Code* was mostly interpreted in the light of chattel slavery, an interpretation that was seen as wrong and as leaving out what would constitute slave labour in a modern setting.¹⁵¹⁹ In the light of this, article 5 runs the risk of having slavery displace forced labour in the legislation of African countries. This consideration may be linked with the ILO's observation that forced labour is generally understudied in Africa.¹⁵²⁰ Put differently, the focus on slavery which members derive from the Charter may very well result in the overlooking of the relevance of forced labour to Africa. Hence the negligible knowledge and research concerning it.

Secondly, the European and American systems impose obligations on the UK and Brazil respectively with reference to their national forced labour laws. In this regard, the European Court has held that article 4(2) of the *ECHR* brings with it the obligation on the UK Government to refrain from violating the right not to be subjected to forced labour as well as to ensure the effective protection of its residents against forced labour.¹⁵²¹ "Effective protection" has been construed to imply that all State Parties bound by the *ECHR* have an obligation to put in place legislative and administrative frameworks that address forced labour and ensure the effective prosecution of perpetrators.¹⁵²²

¹⁵¹⁷ Paras 5.3.3.1 above.

¹⁵¹⁸ Paras 3.3.2.1, 4.3.2.2 and 6.2 above.

¹⁵¹⁹ Para 4.5.1.1 above.

¹⁵²⁰ Para 5.3.4 above.

¹⁵²¹ Para 3.3.2.2 above.

¹⁵²² Para 3.3.2.2 above.

To that end, the European Court has further held that national provisions designed to proscribe forced labour must do so clearly. For example, in the *Siliadin* case the Court dismissed a provision in the *French Criminal Code* dealing with the exploitation of labour without payment and proscribing the subjection of workers to conditions incompatible with dignity as falling short of the standard required by article 4 of the Convention.¹⁵²³ In effect, ambiguous provisions that make it difficult to discern what conduct is being prohibited precisely must be avoided. In addition, a conclusion was reached in this discussion that the judgement of the Court means that governments must avoid adopting selective frameworks for the purpose of implementing article 4 of the *ECHR*.¹⁵²⁴ For the purposes of this study, a selective framework is one in which the government chooses which conduct to proscribe in national laws, to the exclusion of others.

The decision reached by the European Court in *C.N. v UK* was found to validate the above line of reasoning in the sense that a failure of UK laws to criminalise forced labour independent of human trafficking was found to be deficient of the requirements of article 4 of the *ECHR*.¹⁵²⁵ Taking into account the circumstances in *C.N. v UK*, the adoption of a selective framework meant that UK laws and the administrative mechanisms put in place to implement the law were focused on human trafficking, as it was the chief offence meant to be addressed by section 4(4) of the *Asylum and Immigration (Treatment of Claimants) Act*. The adoption of such an approach made it nearly impossible for authorities to investigate a case of forced labour, notwithstanding the fact that it had previously been proven that the claimant had been subjected to forced labour. In the light of the Court's holding, it is postulated that a prohibition of human trafficking does not automatically amount to a prohibition of forced labour. In addition, a framework that addresses forced labour under the auspices of human trafficking may pose challenges in practice where a case of forced labour independent of human trafficking is encountered.¹⁵²⁶ This

¹⁵²³ Para 3.3.2.2 above.

¹⁵²⁴ Para 3.3.2.2 above.

¹⁵²⁵ Para 3.3.2.2 above.

¹⁵²⁶ Paras 3.3.2.2 and 3.4 above.

experience illustrates the need for national frameworks that are capable of addressing forced labour independent of human trafficking.

In a like manner, article 1(1) has been found to impose a general obligation on State Parties to the *American Convention* to respect the right and also to ensure its free and full exercise by all inhabitants of the Americas.¹⁵²⁷ The obligation to "respect" constitutes an undertaking by Brazil to avoid contravening the right against forced labour¹⁵²⁸ through its acts or omissions as well as by third parties.¹⁵²⁹ In order to safeguard the free and full exercise of this right, Brazil has the obligation to organise government structures in such a manner that they are able to guarantee the free and full enjoyment of the right to be free from forced labour.¹⁵³⁰ Concomitantly, there is an obligation to prevent, investigate and punish any violation of this right as well as to restore the victims' freedom and pay compensation.¹⁵³¹ In order to ensure that these obligations are met, the American Court has previously held that such mechanisms must be functional, in the sense that the responsibility to investigate violations is the primary responsibility of the State.¹⁵³² This demonstrates the need for governments to take a variety of complementary positive actions in this regard to ensure that forced labour laws and policies are not merely empty formulae and are capable of bringing perpetrators to book.

Whereas the European system leans towards a criminalisation of forced labour in national laws, it is submitted that the American system presents a more liberal approach to how forced labour may be treated in national laws. In this regard, the American Court in *Setimo Garibaldi v Brazil* took cognisance of the fact that the various rights enshrined in the *American Convention* may call for various

¹⁵²⁷ Para 4.3.2.3 above.

¹⁵²⁸ Like the *Forced Labour Convention*, the *American Convention* uses the term forced labour, whilst Brazil adopts the term slave labour in its national laws and policies. A discussion of the difference in the meaning of the two terms and a justification of the use of these terms in this thesis are to be found in Chapter 4.

¹⁵²⁹ Para 4.3.2.3 above.

¹⁵³⁰ Para 4.3.2.3 above.

¹⁵³¹ Para 4.3.2.3 above.

¹⁵³² Para 4.3.2.3 above.

responses.¹⁵³³ There was no confinement to one set of measures to be adopted. Yet, the underlying requirement is that whatever measure is adopted must meet the condition of "effectiveness" in terms of article 1(1) of the Convention. In this light, the American system's liberal approach lends support to arguments for the need to integrate various responses to forced labour, as opposed to relying on a one-sided criminal approach.

All things considered, the European and American regional human rights systems have previously made invaluable contributions to the regulation of forced labour. Notably, the European and American Courts' interpretations of forced labour in line with the *Forced Labour Convention* have reiterated the authoritative nature of the ILO's instruments on forced labour. With this in mind, it is concluded that regional human rights systems may in actual fact inspire regional compliance with ILO instruments on forced labour and may also generally play a role in the global fight against forced labour. While the experiences highlighted above are not directly binding on South Africa, they offer a backdrop against which good forced labour laws may be formulated.

Faced with an African human rights system that leaves forced labour to be implied from other provisions in the *African Charter*, it is proposed that the European and American systems are informative to a jurisdiction like South Africa that still needs to construct its forced labour framework. On the whole, the key lessons emerging from the foregoing discussion include the fact that it is important for national laws to discriminate between slavery and forced labour. In addition, it is the duty of the government to safeguard its people from forced labour through enacting a framework that is capable of bringing perpetrators to book. Moreover, there is a need to avoid selective frameworks that deal primarily with human trafficking and are erroneously passed off as being capable of curbing forced labour as an independent offence.

¹⁵³³ Para 4.3.2.3 above.

6.4A contrast of the scope and extent of forced labour amongst the jurisdictions

This investigation has examined and analysed the scope and extent of forced labour in the UK, Brazil and South Africa for various reasons. First and foremost, international perspectives have characterised forced labour as a complex and hidden crime that is not too easy to detect.¹⁵³⁴ This is because it occurs most frequently in informal employment, where there is little or no regulation by national labour laws, and also as in isolated workplaces. In addition, while some acts of coercion are obvious to the naked eye, research has shown that employers' coercive tactics are evolving into more subtle forms sometimes relying on inspiring fear in the mind of the worker, such as the threat of denunciation to authorities where irregular migrants are the victims, or the confiscation of identity documents. If the ILO estimates of forced labour¹⁵³⁵ are taken as being authoritative, forced labour must be the concern of every government interested in achieving decent work. In this regard, it is proposed that law enforcement is but one of the several steps to be taken to curb forced labour.

Regulatory frameworks responsive to forced labour must be based on accurate knowledge of its nature and prevalence generally, as well as on local circumstances that may render its occurrence unique to a jurisdiction.¹⁵³⁶ In the light of this, there is a need for research on forced labour to be carried out in each jurisdiction in an endeavour to create a knowledge base that may inform both law and policy, and also serve as a source of awareness to the general public. The international regulatory context encourages the adoption of this approach by seeking to understand the forms of forced labour common in today's world. These include amongst others debt bondage, commercial sexual exploitation, forced child labour, and domestic servitude.¹⁵³⁷ For this reason, an examination of the scope and extent of forced labour among the three jurisdictions became one of the key features of this study.

¹⁵³⁴ Para 2.2 above.

¹⁵³⁵ Paras 2.2 and 6.1 above.

¹⁵³⁶ See paras 3.3.3, 4.3.3, 3.5 and 4.5 above.

¹⁵³⁷ Paras 2.3.3, 2.3.4, 2.3.5 and 2.3.6 above.

The UK and Brazil are different from South Africa as their regulatory frameworks are based on the thorough documentation of forced labour in those jurisdictions.¹⁵³⁸ In comparison, there is an absence of official statistical evidence and academic studies pointing to the occurrence of forced labour in South Africa.¹⁵³⁹ Nevertheless, the conclusion was reached that this dearth of research does not indicate that the country is free of forced labour. This conclusion was motivated by several factors that emerged throughout this study. Firstly, the ILO has established that forced labour is a problem that affects all countries, whether developed or undeveloped.¹⁵⁴⁰ Experiences drawn from the UK and Brazil attest to this finding.¹⁵⁴¹ Secondly, the absence of statistical data in South Africa could be attributable to a general ignorance on the part of those affected by forced labour. Closely connected to this and lastly, the South African framework's focus is largely on human trafficking, an element which overshadows forced labour.¹⁵⁴²

That notwithstanding, research from both the UK and Brazil confirm the international observation that forced labour is common in informal economy sectors that are normally outside the purview of conventional national labour laws.¹⁵⁴³ Furthermore, there is a commonality amongst the categories of people that stand affected by forced labour. Forced labour is most frequently imposed on migrant workers and the marginalised poor and illiterate population.¹⁵⁴⁴ While a wide range of industries such as agriculture, domestic work, construction and food processing emerged as most likely affected by forced labour in the UK, the Brazilian experience is that slave labour is mostly concentrated in the agricultural industry.¹⁵⁴⁵

Debt bondage appears to be a common way of keeping workers in forced labour in both the UK and Brazil. While the recruitment tactics are to a certain extent different, the result is similar. In the UK, recruitment to employment is normally

¹⁵³⁸ Paras 3.5 and 4.5 above.

¹⁵³⁹ Para 5.3.4 above.

¹⁵⁴⁰ Para 2.3 above.

¹⁵⁴¹ Paras 3.3.3 and 4.3.3 above.

¹⁵⁴² Paras 5.3.4 and 5.5.1.1 above.

¹⁵⁴³ Paras 3.3.3 and 4.3.3 above.

¹⁵⁴⁴ Paras 3.3.3 and 4.3.3 above.

¹⁵⁴⁵ Paras 3.3.3 and 4.3.3 above.

done by agencies that charge recruitment fees that are later deducted from workers' wages at high interest rates.¹⁵⁴⁶ The use of tied accommodation creates a relationship of dependency between the employer and worker, leaving the worker at the mercy of the employer. In Brazil, on the other hand, recruitment by *gatos* has taken extreme forms, with the *gatos* offering advance payments to the potential workers and provisions for their poor families, pending their travel to the work destination.¹⁵⁴⁷ In debt bondage in both the UK and Brazil, the debt incurred by the worker can never be paid off, resulting in the worker's wages being used to attempt to pay off the debt.

The comparative study reveals that the circumstances surrounding the occurrence of forced labour are not necessarily identical from place to place. For example, scholars have contended that the flexibility of the labour market in the UK is a possible contributor to the occurrence of forced labour there. This argument rests on the observation that a flexible labour market gives employers the upper hand and disempowers workers since there is limited regulation of employment relationships. In addition, the flexible labour market has been criticised as having marginalised low-skilled and low-wage workers.¹⁵⁴⁸ It must be recalled that the findings of the TUC identified these workers as being engaged in vulnerable work, which is a breeding ground for forced labour.¹⁵⁴⁹ As a result, flexibility in the labour market leaves workers susceptible to forced labour. In addition to this, the operational characteristics of the industries susceptible to forced labour have been seen to exacerbate exploitative working conditions. The highly competitive nature of the industries has seen a desire by employers to reduce costs through a reduction of wages and an increase in productivity.¹⁵⁵⁰ The seasonal nature of the industries has also led to a rise in agency work and sub-contracting, which have been seen to create opportunities for forced labour. Sub-contracting and agency work also leads to the use of illegal recruitment tactics.¹⁵⁵¹

¹⁵⁴⁶ Para 3.3.3 above.

¹⁵⁴⁷ Para 4.3.3 above.

¹⁵⁴⁸ Para 3.3.3 above.

¹⁵⁴⁹ Para 3.3.3 above.

¹⁵⁵⁰ Para 3.3.3 above.

¹⁵⁵¹ Para 3.3.3 above.

Another key factor identified in the UK points to situations where employers have abused immigration laws to keep migrant domestic workers in forced labour. The characteristic of dependency created in the employment relationship of domestic workers and their employers by the Overseas Domestic Worker Visa has been characterised as a contributor to the prevalence of forced labour in the sense that the migrant worker in question has to remain in the (domestic) employ of her employer.¹⁵⁵² In fact, investigations of the Kalayaan organisation recorded an increase in the statistics of complaints bearing on exploitation and forced labour under the tied visa system.¹⁵⁵³

By way of contrast, findings in this study indicate that in Brazil slave labour is most common on isolated estates that are predominantly used for agricultural production.¹⁵⁵⁴ Without dismissing the possibility that slave labour might actually occur in Brazil's urban settlements, this study found that Brazil has a well-studied background of slave labour in isolated estates in rural areas. While its focus is restricted, this study adopted the approach as being indicative of the fact that rural slave labour might actually be more predominant than slave labour in urban areas.¹⁵⁵⁵ This submission is made in light of the fact that Brazilian efforts to fight slave labour have been mainly concentrated in rural areas.

In that regard, Brazilian research demonstrates that slave labour is mostly associated with poverty and a lack of economic opportunities.¹⁵⁵⁶ In fact, the history of the social stratification associated with slavery and the slave trade and the land laws that were to follow have shown social stratification to be one of the many reasons why the underprivileged people in Brazil became the victims of slave labour. Consequently, the recruitment tactics used by the *gatos* and their masters are fashioned around exploiting the economic position of the poor and illiterate who are desperate to make ends meet.¹⁵⁵⁷ The victims are enticed by being offered working

¹⁵⁵² Para 3.3.3 above.

¹⁵⁵³ Para 3.5.2.1 above.

¹⁵⁵⁴ Para 4.3.3 above.

¹⁵⁵⁵ Para 4.3.3 above.

¹⁵⁵⁶ Para 4.3.3 above.

¹⁵⁵⁷ Para 4.3.3 above.

conditions that are entirely different from those that they will actually experience. The extreme isolation of the workplaces also makes it difficult for those trapped in slave labour to escape.

Be that as it may, it must be noted that the conditions of forced labour and slave labour as observed in the UK and Brazil are similar to an extent. In both instances, workers are subjected to poor working conditions that include long working hours and a blatant disregard for workers' occupational health and safety. The workers in the affected industries perceive this as being inherent to the nature of the jobs they are engaged in. Likewise, the underpayment of wages or a lack of the payment of wages is a common characteristic in both the UK and Brazil. Threats of and actual physical harm and violence are also common occurrences in both these jurisdictions. However, observations from Brazil indicate that in extreme cases, some workers have lost their lives in their attempt to flee from situations of slave labour. The case of *Jose Pereira* is an illustration of the inherent dangers that workers in slave labour in Brazil are faced with.¹⁵⁵⁸

Thus, there are similarities and differences in the practice of forced labour in both the UK and Brazil. Taken together, the above considerations confirm the assertion that while there may be certain commonalities pertaining the occurrence of forced labour in various jurisdictions, there may also be notable differences, both to what causes the phenomenon and to how it plays out. In the light of this, it is therefore important for the South African Government, as a signatory to the *Forced Labour Convention*, to establish the particular causes and nature of forced labour in South Africa before proceeding to frame legislation. The South African Government can learn from both the UK and Brazil the significance of a framework that is informed by an understanding of the dynamics of forced labour as well as the various ways in which it may manifest itself.

¹⁵⁵⁸ Para 4.3.2.3 above.

6.5 Analogy of the relationship between forced labour and human trafficking

The results of this study indicate that addressing human trafficking has become the concern of the global village in the 21st century.¹⁵⁵⁹ As a matter of fact, efforts to combat trafficking can be traced to the era of the abolition of slavery and the slave trade.¹⁵⁶⁰ Human trafficking finds relevance to discussions on forced labour (and ultimately to this study) because the two concepts are related. Furthermore, this study could not dispense with discussions on human trafficking since it forms the basis upon which some jurisdictions address forced labour. On that note, one of the aims of this study was to critique the relevance of human trafficking laws and/or policies to forced labour. In doing so, the objective was not to identify how far the three jurisdictions relevant in this study have gone towards meeting their international obligations relating to human trafficking, but rather to ascertain whether trafficking frameworks are sufficient in themselves to bring an end to forced labour.

The relationship between forced labour and human trafficking can be evidenced from the UN *Trafficking Protocol's* definition of the latter. According to the Protocol, human trafficking involves, amongst other things, the recruitment and transfer of persons for the purpose of exposing them to exploitation, which may involve forced labour.¹⁵⁶¹ In this regard, the relationship between the two is established where forced labour is an end result of trafficking. Hence, in itself, human trafficking cannot be equated to forced labour because it may manifest in other forms of exploitation which have nothing to do with forced labour, such as organ removal.

Observations at international law have shown that human trafficking almost always results in victims being subjected to forced labour.¹⁵⁶² It is therefore possible to assume that many trafficked people end up in situations of forced labour. In this regard, human trafficking laws and policies that are designed to embrace forced

¹⁵⁵⁹ Paras 2.4, 3.4, 4.4 and 5.4 above.

¹⁵⁶⁰ Para 2.4 above.

¹⁵⁶¹ See para 2.4 above for the *Protocol's* comprehensive definition.

¹⁵⁶² Para 2.4 above.

labour that occurs in such circumstances are better placed as they may contribute to the reduction of forced labour. Be that as it may, the argument advanced in this study is that such laws or policies are restricted in their coverage of the bigger problem, as they cover a fraction of those involved in forced labour due to human trafficking. This argument derives authority from the observation that the *Trafficking Protocol's* primary purpose is to curb human trafficking and not forced labour. In the light of this, national laws domesticating it will also have as their focus the eradication of human trafficking and hence their provisions cannot be applied to cases of forced labour occurring outside the ambit of human trafficking. In view of this, the conclusion was reached in this study that a *lacuna* is created in the law where national laws fail to address forced labour on the whole, to the exception of forced labour occurring as a result of human trafficking.

This investigation revealed that prior to the enactment of the *Coroners and Justice Act*, the UK's treatment of forced labour and human trafficking remained similar to the foregoing submissions.¹⁵⁶³ In fact, it was not until 2010 that forced labour became part of the laws of the UK. Prior to this, the relevant UK laws focussed on addressing human trafficking resulting in sexual exploitation. When the *Asylum and Immigration (Treatment of Claimants) Act* made mention of forced labour for the first time in 2010, the intention was not to criminalise it as a stand-alone offence but to recognise it as a form of exploitation occasioned by the chief offence of trafficking. Consequently, UK laws did not create a platform for the prosecution of forced labour as a stand-alone offence.

According to forced labour scholars in the UK, the implementation of this law was rather difficult and confusing where forced labour was concerned.¹⁵⁶⁴ Significantly, it was inevitable that the coverage of the law and its remedies would be limited only to forced labourers who had been trafficked. The undesirable result was that forced labourers who had not been trafficked were excluded from the coverage of protection and supportive programmes formulated under trafficking legislation. It is

¹⁵⁶³ Para 3.4 above.

¹⁵⁶⁴ Para 3.4 above.

perhaps noteworthy that the UK received criticism for this approach from the European Court in the *C.N. v UK* case, where the Court held that a failure to have a stand-alone offence on forced labour was a blatant failure to meet the obligations incurred by the Government under article 4 of the *ECHR*.¹⁵⁶⁵ Taken together, these two pointers highlight that laws implementing human trafficking conventions cannot be said to implement forced labour conventions.

In addition, implementation in the UK largely leaned towards improving immigration law and policy and the training of border officials. Indeed, a hands-on approach in implementing a trafficking framework is useful, as it may actually bring about a reduction in prevalence of the scourge of trafficking on the whole as well as in the forced labour resulting therefrom. However, the limitation arises from the fact that this approach views forced labour as a secondary offence. This may actually overshadow forced labour as a separate offence as argued in this thesis. The focus on training immigration officials in the UK actually leaves out other bodies that are relevant to addressing forced labour, even in situations where it is found to occur within the boundaries of trafficking.

Following from the above, this discussion maintains that even in themselves, trafficking frameworks may in actual fact have gaps in their regulation of the forced labour that occurs as a result of the trafficking. Put differently, trafficking laws will simply identify forced labour as a possible outcome of human trafficking, resulting in a failure to formulate provisions arising from a full appreciation of forced labour and its repercussions. Earlier on, arguments were made to the effect that a one-size fits all approach to the application of victim assistance and protection measures tailored in terms of trafficking legislation might not sufficiently address the needs of trafficked forced labour victims.¹⁵⁶⁶ Because the chief offence is human trafficking, it is expected that such an approach will overshadow the forced labour aspect and dwell more on addressing the trafficking aspect, as will be shown below. That said, it is important to note as a lesson that the UK's approach to human trafficking and

¹⁵⁶⁵ See para 3.3.2.2 above.

¹⁵⁶⁶ Para 3.4 above.

forced labour has shifted to the treatment of the two as related but separate offences, as per the international standard prescribed by the ILO as well as the regional obligations emanating from the *ECHR*.

In contrast to the position previously adopted by the UK, Brazil's approach has always treated the two as separate offences.¹⁵⁶⁷ Brazilian studies highlight that the internal trafficking of workers accounts for the majority of slave labour cases. In this regard, the perpetration of slave labour in Brazil is attributable to human trafficking. Nevertheless, the Brazilian framework maintains an approach that views the two as separate.

While the UK and Brazil currently reflect consonance with international law, the South African approach to forced labour is arguably based on human trafficking¹⁵⁶⁸ and consequently mirrors the UK's former approach. In order to arrive at this conclusion, the following observations were made. First of all, the Constitution has made the protection against forced labour a human right since its inception in 1996.¹⁵⁶⁹ This notwithstanding, an observation was made to the effect that a codification of this right in the Constitution does not in itself establish an offence of forced labour. Therefore, in addition to section 13, parliament must enact legislation that seeks to give effect to the prohibition of forced labour.

Secondly, consequent to section 13 of the Constitution, parliament has effected this mandate through its enactment of section 48 of the *BCEA*, which makes it an offence to demand, cause or make use of forced labour for the benefit of oneself or a third party. However, the application of the *BCEA* and ultimately section 48 is restricted to workers who are considered as employees in accordance with the Act.¹⁵⁷⁰ Following this, the offence of forced labour that has the potential to extend coverage to *all workers* is introduced via human trafficking in terms of the *PCTPA*. This is done through a provision that makes it an offence to utilise or benefit from

¹⁵⁶⁷ Para 4.4 above.

¹⁵⁶⁸ Para 5.4 above.

¹⁵⁶⁹ Para 5.3.2 above.

¹⁵⁷⁰ Para 5.5.1.2 above.

the services of a human trafficking victim.¹⁵⁷¹ In this case, exploiting labour forcefully from a human trafficking victim will attract a penalty under the Act.

While the introduction of forced labour (arising from human trafficking) into legislation is a step in the right direction, the outcomes of this study demonstrate that it is limited where forced labour is generally concerned. In order to make this submission, it was taken into consideration that the *PCTPA* was passed to put to effect South Africa's obligations towards the UN *Trafficking Protocol*. In this regard, the primary purpose of the Act is to curb human trafficking and not forced labour *stricto sensu*. Where forced labour is addressed in terms of the Act, it will be that which occurs as a result of human trafficking.¹⁵⁷²

Similar to the UK's former position under the *Asylum and Immigration Act*, the *PCTPA* does not criminalise forced labour as a stand-alone offence but recognises it as a form of exploitation occasioned by the chief offence of human trafficking. In the light of these considerations, the South African framework on forced labour currently rests on the trafficking framework, an approach that does not meet the international standard.¹⁵⁷³ It must be noted that when South Africa ratified the *Forced Labour Convention* in 1997, it directly undertook the obligation to suppress the use of forced labour in all its forms as per article 1(1). Moreover, the Convention instructs the taking of measures to combat forced labour without limiting it to trafficking victims.¹⁵⁷⁴ With its more integrative approach, the 2014 *Protocol on Forced Labour* also speaks to an overall focus on forced labour without categorising the means through which it occurs.¹⁵⁷⁵

Therefore, whereas the *PCTPA* is potentially a mechanism for combatting human trafficking and the forced labour that arises therefrom it still leaves much to be done regarding revising South African legislation to meet the standard proposed by the Convention and its Protocol. The sole reliance on a trafficking platform is flawed in

¹⁵⁷¹ See section 7 of the Act.

¹⁵⁷² Para 5.5.1.1 above.

¹⁵⁷³ Para 5.5.1.1 above.

¹⁵⁷⁴ Para 2.6.2.1 above.

¹⁵⁷⁵ Para 2.6.2.2 above.

that it arguably creates the impression that forced labour does not occur without human trafficking. This position has previously been proved to be wrong from both the international perspective as well as with regard to the UK and Brazil.¹⁵⁷⁶ South Africans and foreigners who find themselves in forced labour where they have not been previously trafficked and are also not deemed to be employees in terms of the *BCEA* are left outside the scope of these laws. In addition, creating this over-emphasised relationship could also blur the lines of demarcation and cause confusion as to the relationship between forced labour and human trafficking both amongst the public and throughout implementation of the law.

The need for improved forced labour laws is further evidenced by the view that trafficking frameworks may actually have gaps in their approach to forced labour resulting from human trafficking. Whilst the Act is relatively new and is still to be implemented, it already shows the potential to succumb to these gaps. Notably, forced labour is seen as a form of exploitation and what the Act offers is a mere criminalisation where use is made of the services of a trafficked victim.¹⁵⁷⁷ In other words, the *PCTPA* has little to offer for trafficked forced labour victims since the measures¹⁵⁷⁸ tailored in terms of the Act could overlook the labour implications of forced labour and focus on remedying the trafficking aspect only.

All things considered, a gap still exists in South African legislation due to a lack of provisions that are directly intended to prohibit forced labour irrespective of whether it occurs as a result of trafficking or not. Whereas no official data exist on the occurrence of forced labour in South Africa, it is proposed that this dearth might actually be attributable to its being overshadowed by human trafficking. Because this discussion has used the occurrence of forced labour arising out of human trafficking to speculate on general forced labour, the *PCTPA*'s aspect of forced labour offers a chance for dialogue to be generated about the occurrence of forced labour generally.

¹⁵⁷⁶ See paras 2.4. 3.4 and 4.4 above.

¹⁵⁷⁷ Section 7 of the Act.

¹⁵⁷⁸ See chapters 3 and 4 of the Act for victim support and assistance measures.

6.6 A collation of the responses to forced labour

Notwithstanding that the present study involves a comparative analysis tailored to draw lessons for the South African Government from the UK and Brazil, the position at international law was featured as a fundamental part of this discussion to set the context for that analysis. An examination of the international standard has assisted in putting into perspective the key obligations arising from the ILO's forced labour instruments and how Member States may ensure compliance. In the light of this, while the UK and Brazil may present valuable lessons from which the South African Government can learn, it is important that their approaches be in consonance with the international standard as far as possible. Further to this, the international approach has also assisted in the formulation of arguments for the need to equally address forced labour as a labour law issue through the use of indicators formulated by the ILO.

Having said that, the UK, Brazil and South Africa are all signatories to the *Forced Labour Convention*. Of the three jurisdictions, only the UK has ratified the 2014 *Protocol on Forced Labour*, which still remains open for ratification by members who have ratified the Convention.

6.6.1 ILO standards on forced labour

The discussion on international law has highlighted that the ILO's standards on forced labour as established by the *Forced Labour Convention* have been in existence for almost 86 years now. Nevertheless, the Convention's standards have been confirmed as still relevant in the 21st century to ILO members in pursuit of formulating means to eradicate forced labour.¹⁵⁷⁹ Consequently, ILO Member States that ratify this Convention have the obligation to ensure that the illegal use of forced labour is punished as a penal offence to which "adequate and strict" penalties accrue. Furthermore, the European and American Courts' previous reliance on the provisions of the Convention to give meaning to the *ECHR* and *American Convention*

¹⁵⁷⁹ Paras 2.6.2.1 and 2.6.2.2 above.

demonstrate that the *Forced Labour Convention* is a highly significant ILO instrument on forced labour.¹⁵⁸⁰

Besides the *Forced Labour Convention*, it appears that the obligation to promote an intolerance to forced labour is not restricted to ILO members who ratify the Convention. All ILO members, by virtue of their membership of the organisation, assume this obligation due to the ILO *Declaration of Philadelphia's* classification of the elimination of forced labour as a fundamental principle and right that deserves respect, promotion and realisation. This is so irrespective of whether or not they have ratified the Convention.¹⁵⁸¹ That said, the elimination of forced labour must be the concern of all ILO members whether or not they are parties to the Convention.

The *Forced Labour Convention* embodies two elements that have been prominent in this discussion. As a first consideration, the Convention offers a widely accepted definition of forced labour that has been followed at the regional level¹⁵⁸² and has guided the formulation of the national definitions adopted by the UK, Brazil and South Africa.¹⁵⁸³ According to the ILO, the definition of forced labour as espoused by the Convention is meant to cover all types of work, both informal and formal, irrespective of the legality or illegality thereof. To that end, the ILO Committee of Experts has stated that altogether, the Convention is intended to cover all workers without distinction of any kind.¹⁵⁸⁴ Consequently, the ILO envisions that all law and policy designed as means of implementing the Convention would extend protection to all workers against forced labour, notwithstanding the industry they operate in or the legality or otherwise of the work or service involved. In this case, it is sufficient to prove that work or service was being provided and that it was being exacted under the threat of a penalty directed to a person who had not offered himself voluntarily to such. The Convention dispenses with the need to establish whether there exists an employer-employee relationship between the victim and the offender. That said, law or policy intended to implement the Convention must be capable of

¹⁵⁸⁰ Paras 3.3.2 and 4.3.2 above.

¹⁵⁸¹ See article 2 of the Declaration.

¹⁵⁸² Paras 3.3.2 and 4.3.2 above.

¹⁵⁸³ Paras 3.3.1, 4.3.1 and 5.3.2 above.

¹⁵⁸⁴ ILO *Tripartite Meeting of Experts* 4-5.

being applied to all workers without emphasising the existence of this relationship. Flowing from this, a national framework that is exclusive in its approach to addressing forced labour is not compliant with the Convention.

The second and final consideration concerns the obligation imposed by the Convention on ratifying States. In terms of article 1(1), ratification implies an undertaking to suppress the use of forced labour in all its forms. According to the Convention, this is to be done through declaring the illegal use of forced labour a penal offence to which "adequate and strict" penalties accrue. On account of this, the *Forced Labour Convention* prescribes criminalisation as the ideal mode of approaching forced labour in national law and policy. Further to this, this study found that the Convention is completely silent on the relevance of labour institutions to eliminating forced labour.¹⁵⁸⁵ Taking into account this absence, this discussion has viewed criminalisation as a minimum standard, after which additional mechanisms may be formulated to assist accordingly. That regardless, the conservative position adopted by the Convention demonstrates that arguments for the need to acknowledge the role of labour law in addressing forced labour are an emerging concept and would probably not be common to all signatories.

The foregoing argument has not lost sight of the era in which the Convention was drafted, as this explains¹⁵⁸⁶ why it was not anticipated that forced labour could reasonably equally be addressed from a labour market perspective. Because forced labour as it was in 1930 and as it is now are very different, the 2014 *Protocol on Forced Labour* intervenes to bridge the gaps left by the Convention.¹⁵⁸⁷ It must be reiterated that the Protocol does not qualify the relevance of the Convention but rather makes provisions on comprehensive and strategic steps that must be taken to

¹⁵⁸⁵ Para 2.6.2.2 above.

¹⁵⁸⁶ The Convention was drafted originally to bring about a reduction of the use of forced labour by colonial administrators in mandated states. In the 21st century, a significant reduction has been noticed in the use of forced labour by governments, and the private sector accounts for most of its use.

¹⁵⁸⁷ See para 2.6.2.2 above for a discussion of the Protocol.

implement the Convention.¹⁵⁸⁸ Deviating from the conservative and criminal law-orientated approach adopted by the *Forced Labour Convention*, the Protocol introduces radical changes to the elimination of forced labour through its suggestion of an integrated and multifaceted approach. The Protocol also takes into account the occurrence of human trafficking for the purposes of forced labour, and is framed in such a way that it applies to all victims of forced labour, whether trafficked or not.

The integrative approach of the Protocol is succinctly captured at article 1(1), which declares that in order to implement the overall objective of the Convention, a member ratifying the Protocol must formulate a framework that comprises of prevention, protection, reparation and compensation for victims of forced labour. In this regard, the Protocol suggests that frameworks must go beyond a mere criminalisation of forced labour as was previously required by the *Forced Labour Convention*. It now becomes an obligation for a signatory to not only come up with laws sanctioning forced labour, but also to put in place effective preventative measures and provide compensation to victims.¹⁵⁸⁹

This requirement calls into question the need to have the government play a proactive role in creating dialogue on the occurrence of forced labour and research to detect its occurrence. Whereas the preventative measures proposed by the Protocol are framed around illiteracy, poverty and a deficit of information as some of the root causes of forced labour, it must be recalled that the comparative analysis in the present study has highlighted that some causes go beyond this.¹⁵⁹⁰ This finding has prompted the submission that the causes of forced labour as identified by the ILO must be taken as a guideline only, as causes may vary slightly among jurisdictions.

The Protocol's approach is mindful of the fact that an effective framework implies more than adequate and strict enforcement of penal sanctions against perpetrators

¹⁵⁸⁸ Consequently, the Protocol is also not selective in its application. Note also that it is with regard to the Protocol that transitional provisions as embodied in the Convention are deleted. See para 2.6.2.2 above.

¹⁵⁸⁹ Para 2.6.2.2 above.

¹⁵⁹⁰ See in particular the scope and extent of forced labour in the UK at para 3.3.3 above.

only. The provision of assistance to victims is seen as an important element of an effective framework. Hence, over and above the Convention's approach, which is firm on the topic of the strict enforcement of penal provisions, the Protocol additionally requires the framework to create room for the availability of remedies in the form of the payment of compensation to the victims of forced labour.

The Protocol also introduces a shift in the Convention's approach to laws formulated to address forced labour. In this regard, article 2(c) of the Protocol requires that forced labour laws, which shall where appropriate include labour laws, be designed in such a manner that they cover all workers. Two issues arise here. Firstly, acknowledgement of the importance of the criminal law, but also that sight should not be lost of the contribution that labour law may make to fight the scourge of forced labour. Secondly, that all laws formulated to curb forced labour must enjoy a general application and not be exclusive to certain categories of workers.

Article 2(c) not only requires the formulation of labour laws with a wide coverage, but it also stresses that the implementation of legislation be strengthened. In effect, a simple prohibition of forced labour even if it covers every worker does not comply with the Protocol. Consequently, relevant legislation must be comprehensive in its prohibition and be accompanied by enforcement mechanisms to reinforce legislation. It was suggested earlier in this study that labour legislation and policy are better-placed forums for comprehensive provisions on forced labour and the various roles of labour market institutions to be made. That is, whereas criminal laws may establish penal provisions, it may be too much to expect them to go further to outline comprehensive details on the role of labour law and its institutions in relation to forced labour.

That notwithstanding, the Protocol suggests the development of a national policy and plan as another forum within which forced labour can be addressed from various angles. What sets this envisioned policy apart is that it must be developed and implemented with the involvement of employers and workers' organisations. The national policy must therefore be aimed at consolidating action areas of all

various law enforcement agencies that can contribute effectively to reducing and preventing the occurrence of forced labour. That said, the elimination of forced labour is no longer the responsibility of criminal law enforcement bodies only, and now extends to labour law market institutions, amongst others.

In the light of the foregoing, the 2014 *Protocol to the Forced Labour Convention* adopts a robust approach to grappling with forced labour in national laws. For the first time, the Protocol makes it a binding standard to move away from strictly criminal law-centred approaches to a coordination of relevant areas in fighting forced labour, in particular labour law. The Protocol also emphasises that while it is important to ensure the punishment of the offenders, equal attention must be paid to the victims. In this regard, there is a need to restore the dignity of the victim as well as to reintegrate him into society. Accordingly, there is a realisation that forced labour has ramifications that can be better redressed with the involvement of those with expertise on the protection of labour rights and privileges. The new standard is also a step in the direction towards involving labour lawyers and academics in the dialogue concerning forced labour as an aspect of contemporary labour law.

6.6.2 *The relevant national responses to forced labour*

6.6.2.1 *The relationship between forced labour and labour law*

International law highlights that whereas the criminalisation standard as prescribed in the *Forced Labour Convention* remains in force, there has been a shift suggesting the need to integrate efforts to fight forced labour with other areas of the law, labour law inclusive.¹⁵⁹¹ Furthermore, the 2014 Protocol confirms that given a chance, labour market institutions may actually play a significant role in the prevention and reduction of forced labour both nationally and internationally. In the following discussion, this study makes a comparative analysis of how the three jurisdictions have tailored their laws and policies to respond to forced labour. The analysis seeks to identify whether labour law and labour market institutions play a

¹⁵⁹¹ Para 2.6.2.1 as read with para 2.6.2.2 above.

role in the approaches employed by the UK and Brazil and hence to draw lessons for South Africa.

Prior to this, it is important to set the context for the analysis by stating that the argument that forced labour should be viewed from a labour context is far from being purely abstract. Without overstepping the mandate of criminal law, it is established that freedom from forced labour is a fundamental right and principle to be observed in every workplace, thereby making it an indispensable element of decent work.¹⁵⁹² Consequently, in promoting decent work forced labour has to be a concern of those whose mandate lies in improving the working lives of people. Furthermore, it has been observed that forced labour thrives due to the existence of gaps and failures in policies and enforcement mechanisms.¹⁵⁹³ To say the least, the gaps and failures have been attributed to a lack of coordinated efforts between State institutions and labour market institutions in the enforcement of national forced labour laws.

For these reasons, the application of labour laws to forced labour remains an indispensable *modus* if the overall fight against forced labour is to be strengthened. To properly place forced labour within the context of labour law, this study has employed the use of forced labour indicators¹⁵⁹⁴ as being indicative of the effect forced labour has on several labour and employment rights¹⁵⁹⁵ of affected workers. Further to this, the international perspective arising from the *UDHR* supports the notion that forced labour affects not only human rights of a general nature but those having a bearing on labour and employment as well.¹⁵⁹⁶

The forced labour indicator speaking to the restriction of movement, isolation and intimidation has been noticed in both forced and slave labour in the UK and

¹⁵⁹² Para 2.6.3 above.

¹⁵⁹³ Para 2.6.3 above.

¹⁵⁹⁴ Para 2.7.2 above.

¹⁵⁹⁵ This discussion has confined itself to the possibly affected labour and employment rights. The indicators may show the violation of other rights of a more general nature, such as freedom of movement, the right to liberty and security of the person, and the right not to be subjected to cruel and degrading treatment, amongst others.

¹⁵⁹⁶ Para 2.5.1 above.

Brazil.¹⁵⁹⁷ By its nature, the confinement of workers inherently deprives forced labourers from exercising the internationally recognised right to freedom of association. In this regard, forced labour victims cannot join or take part in trade union activities. Note here that it was found that many forced labourers form part of the population of workers that trade unions are unable to reach. This notwithstanding, the role of trade unions regarding this population of workers has never been waived. This study has noted the various ways in which trade unions may in practice extend assistance to workers in the informal sector.¹⁵⁹⁸ In this case, the right of forced labourers to freedom of association remains affected by the imposition of forced labour.

In the international law, UK and Brazilian contexts, forced labour has been shown to be largely characterised by abusive living and working conditions.¹⁵⁹⁹ In this connection occupational health and safety have shown to be less of a priority to employers using forced labour as a means of production. In this regard, this study found that forced labour contributes to the violation of the right to social security not only through its non-compliance with occupational health and safety standards, but also through employers' evasion of the payment of social security contributions for workers.

It is well established that the right of a worker to be compensated for contributing his skill and workmanship to an employer is protected under the *UDHR* and is a labour standard safeguarded under the *ILO Protection of Wages Convention*.¹⁶⁰⁰ By withholding wages or imposing debt bondage, an employer fails on his reciprocal duty to remunerate the worker for putting his services at the disposal of the employer. In both the UK and Brazil, as well as at international law alike, the imposition of debt bondage is a common tactic used to hold workers in situations of forced labour. Consequently, forced labour results in a violation of this right.

¹⁵⁹⁷ Paras 3.3.3 and 4.3.3 above.

¹⁵⁹⁸ Para 2.6.3.3 above.

¹⁵⁹⁹ Paras 3.3.3 and 4.3.3 above.

¹⁶⁰⁰ Paras 2.5.1 and 2.7.2.3 above.

Taking into account the findings of previous ILO research, this study has concluded that forced labour is likely to result in the violation of the right not to be discriminated against in employment.¹⁶⁰¹ This conclusion was reached owing to the fact that forced labour normally involves the exploitation of the vulnerable position of the poor and illiterate, and the migration status of workers. Closely connected to this, the *Abolition of Forced Labour Convention* establishes that forced labour may in actual fact be used as a means of racial, social, national and religious discrimination. In respect of this, discrimination in respect of employment negates the equality of opportunity and treatment in employment.

The argument that it is necessary to understand forced labour within the continuum of exploitation further supports the view that forced labour must be placed within the context of labour law.¹⁶⁰² The continuum does this by arguing that forced labour is to be seen as a process the genesis and subsistence of which comprise a violation of certain labour rights. Accordingly, attempting to solve forced labour without regard to the process itself ignores solutions that may address the poor working conditions that result from forced labour. In this regard, the continuum can be used to identify solutions to cover not only extreme cases of forced labour but also find appropriate redress for the exploitative working conditions that accompany it. In the light of this, finding appropriate redress for exploitative conditions will involve calling labour enforcement into question: for example, the withholding of wages and poor working conditions inevitably require labour law interventions, whilst a seizure of identity and travel documents requires criminal enforcement.

The foregoing considerations confirm that forced labour is unequivocally the obverse of decent work.¹⁶⁰³ Taken together, they confirm that South African labour practitioners and labour enforcement mechanisms generally should take an interest in asserting their role in contributing to addressing forced labour in so far as it has negative implications for the labour and employment rights of its victims.

¹⁶⁰¹ Para 2.7.2.4 above.

¹⁶⁰² Para 3.3.4 above.

¹⁶⁰³ Also see para 2.7.1 above.

6.6.2.2 National responses to forced labour

Responses to forced labour as identified in the UK range from legislative to various enforcement mechanisms which when brought together constitute a framework that is alive to the occurrence of forced labour. From a legislative point of view, two major pieces of legislation targeting forced labour were identified in this study, namely the *Gangmasters Licensing Act*¹⁶⁰⁴ and the *Modern Slavery Act*.¹⁶⁰⁵

Owing to the rise in forced labour and the exploitative working conditions associated with labour suppliers, the *Gangmasters Licensing Act* (GMLA) was enacted to regulate the operations of gangmasters; that is, persons who supply casual manual labourers to other people. The Act is applicable to operations in the agricultural sector, shellfish gathering and any processing and packing arising therefrom. The objective of the Act is to protect workers from poor working conditions and exploitation. The procedure of regulation under the Act involves the licensing of gangmasters, to the extent that it is a criminal offence to operate as a gangmaster without prior authorisation. In this regard, for a gangmaster to be licensed, he must satisfy the licensing requirements of the Gangmasters Licensing Authority (GLA),¹⁶⁰⁶ which encompass health and safety, accommodation, wages, transport and training. Upon passing the requirements, the licensee must maintain these standards acceptably, as deterioration may result in the revocation of the licence.

Of particular relevance to this study is the consideration that the *GMLA* and *GLA* standards help in eliminating the use of forced labour and general exploitative working and living conditions in the following ways. The licensee is required to act in a fit and proper manner at all times, which includes amongst other matters refraining from forced labour practices.¹⁶⁰⁷ In addition to this, other standards enforced coincide with aspects that touch on forced labour indicators. For example, the withholding of workers' identity documents and conduct that is intended to

¹⁶⁰⁴ Para 3.5.1.1 above.

¹⁶⁰⁵ Para 3.5.1.2 above.

¹⁶⁰⁶ Para 3.5.1.1.2 above.

¹⁶⁰⁷ Para 3.5.1.1.2 above.

restrict their movement is outlawed.¹⁶⁰⁸ Closely related to this is the requirement that workers must be free to terminate their current employ without fear of prejudice by the gangmaster. Holding workers in debt bondage is eliminated because workers are not required to pay more than they initially owed if a loan was advanced to them by the gangmaster. The GLA standards also seek to protect and guarantee a respect for occupational health and safety by requiring the gangmaster and the employer/labour user to reach an agreement relating to who is responsible for ensuring compliance with these, and giving workers the appropriate training.¹⁶⁰⁹

Most importantly, this study has noted that the *GLA* has been lauded for its impact on reducing the use of forced labour and exploitative working conditions in the relevant industries.¹⁶¹⁰ On account of its objectives, it has been argued in this study that the *GLA*'s licensing standards put forced labour within the context of labour law in the sense that they are tailored to curb exploitative working conditions and the occurrence of forced labour.¹⁶¹¹ It must be noted that whilst operating as a gangmaster or engaging one without the requisite licensing attracts criminal sanctions, the Act provides not only for the punishment of offenders but for compliance with standards aimed at improving the living and working conditions of labourers engaged by gangmasters and labour users. Significantly, the enforcement officials of the Act are not criminal law enforcement agents, and their mandate to carry out inspections is not based on criminal law.

Notwithstanding that the *GMLA* demonstrates that exploitative working conditions that contribute to forced labour can be addressed without a strict criminal approach, the Act's coverage is limited.¹⁶¹² It must be reiterated here that the UK's overall approach to forced labour has previously undergone immense criticism for being overly fragmented and leaning on the trafficking framework. The *Modern Slavery Act* (MSA) was consequently enacted to address gaps and bring together under one Act the offences of forced labour, human trafficking, slavery and servitude. Unlike the

¹⁶⁰⁸ Para 3.5.1.1.2 above.

¹⁶⁰⁹ Para 3.5.1.1.2 above.

¹⁶¹⁰ Para 3.5.1.1.2 above.

¹⁶¹¹ Para 3.5.1.1.2 above.

¹⁶¹² Para 3.5.1.1 above.

now repealed section 71 of the *Coroners and Justice Act*,¹⁶¹³ the *MSA* goes further than just a mere criminalisation of forced labour to make provisions for victim assistance as well as to make it a priority of businesses and employers to ensure due diligence in the elimination of the use of forced labour in their supply chains.

Two prominent aspects arise from the Act that will probably improve the UK's overall approach to forced labour. Firstly, the establishment of an independent offence of forced labour that is not reliant on the existence of human trafficking is meant to cover everyone who finds himself in a situation of forced labour.¹⁶¹⁴ In terms of the Act, forced labour and human trafficking are identified as separate offences to which separate penalties accrue. Of course, the Act takes cognisance of the fact that human trafficking can occur for the purposes of forced labour.¹⁶¹⁵ However, the occurrence and punishment of forced labour is not made to rely on human trafficking. In this case, it is clear that forced labour that occurs outside trafficking can be prosecuted under the Act. Whereas the *MSA* is criminal legislation, it ought to be further highlighted that forced labour under the Act extends coverage without the need to prove the existence of an employer-employee relationship. These two aspects of the *MSA* are in compliance with the international standard as espoused in the *Forced Labour Convention* and the 2014 *Protocol to the Forced Labour Convention*. That is, national laws enacted for forced labour must extend coverage to all workers and must be capable of covering all forced labour victims, whether trafficked or not.

Secondly, the Act proposes the establishment of the office of the Anti-Slavery Commissioner,¹⁶¹⁶ who has the responsibility for ensuring good practice in the prevention, detection, investigation and prosecution of forced labour. In achieving this, the Commissioner must amongst other things make reports to government as well as establish cooperation with all concerned parties towards fighting forced labour. The requirement to make reports implies that the Commissioner must carry

¹⁶¹³ Para 3.5.1.2.1 above.

¹⁶¹⁴ Para 3.5.1.2.1 above.

¹⁶¹⁵ Section 3(2).

¹⁶¹⁶ Para 3.5.1.2.2 above.

out his own and support independent studies on issues of forced labour. The Commissioner is also required to formulate a strategic plan outlining how he intends to carry out his mandate as well as how he intends to provide information, education or training on issues of forced labour.

The *MSA* introduces for the first time in the UK framework the need to protect and assist victims of forced labour¹⁶¹⁷ through the avoidance of punishment where the victim committed an offence as a result of being held in forced labour. Legal assistance is also offered to victims of forced labour across the board without limiting it to trafficking victims as was previously done under the *Legal Aid, Sentencing and Punishment of Offenders Act*. This study has outlined that the 2014 *Protocol to the Forced Labour Convention* emphasises the element of providing assistance to victims of forced labour as opposed to only investing in ensuring the effective punishment of perpetrators. In this regard, whereas the *MSA* is criminal law legislation, it provides a step in the direction of implementing the standard of the Protocol.

While the UK legislative framework introduces standards mirroring the Protocol which are yet to be implemented, the Brazilian approach does not depend on legislation to do this. In fact, the *Brazilian Penal Code* equally prohibits forced labour through penal sanctions without reliance on human trafficking.¹⁶¹⁸ Hence, as in the UK, slave labour is a separate offence capable of being prosecuted without the requirement of trafficking. Over and above this, the Brazilian framework pertaining to slave labour is largely built on coordinated policy frameworks that involve action from various institutions as well as government.¹⁶¹⁹

All this is achieved through the following mechanisms. To ensure the avoidance of an incoherent effort to combat slave labour, the Executive Group to Eradicate Forced Labour brings together the actions of seven ministries under the coordination of the Ministry of Labour and Employment. In carrying out their mandate towards slave

¹⁶¹⁷ Para 3.5.1.2.3 above.

¹⁶¹⁸ Para 4.5.1.1 above.

¹⁶¹⁹ Para 4.5.2 above.

labour, the various ministries are guided by the National Plan to Eradicate Slave Labour, which sets out the objectives of all institutions involved in the strategy. The effective implementation of the plan is overseen by the National Commission to Eradicate Slave Labour through a combination of representatives of the executive, legislature and judiciary and various institutions in civil society. Overall, Brazilian efforts to fight slave labour are founded on an integrated policy framework which is monitored not only by the government but also by various institutions in civil society. Further to that, the Brazilian framework demonstrates that whilst legislation plays an important role, the role of enforcement mechanisms is also vital to ensuring an effective response to forced labour.

In this regard, the Brazilian framework utilises a variety of mechanisms that are tailored to involve labour market institutions in the detection and suppression of slave labour. This aspect is largely noticeable in the activities of the Special Mobile Group (GEFM), which investigates workplaces for possible or actual violations of the prohibition on the use of slave labour.¹⁶²⁰ The GEFM brings together labour inspectors, labour prosecutors and the federal police. In essence, the activities of the GEFM constitute specialised labour inspection that is not dictated by criminal law. Its activities have also previously been supported by trade unions, which have assisted forced labourers to make complaints to the GEFM. This aspect of labour inspection differs from the equivalent in the UK in the sense that this study has not identified how actively involved labour inspectors are in the UK on issues of forced labour. However, a practice similar to labour inspection concerning forced labour was noted with regards to the mandate of enforcement officials in terms of the *GLA*. To this extent, the Brazilian framework reflects the demands of the *Protocol to the Forced Labour Convention*, which makes it mandatory for national frameworks to ensure the participation of labour inspectorates in implementing forced labour laws and policies.

This study has also found that the Brazilian framework features the payment of compensation as well as unemployment benefits to freed victims of forced

¹⁶²⁰ Para 4.5.2.1.1 above.

labour.¹⁶²¹ The payment of compensation is ordered by the GEFM. It is to be paid by the employer for the violation of the workers' rights. The government also pays out unemployment benefits to victims of forced labour to avoid their re-insertion into slave labour. This practice reflects a framework that is cognisant of the socio-economic implications of forced labour on its victims.

Brazil involves the active participation of labour courts and/or tribunals in hearing matters of slave labour.¹⁶²² A Labour Court in Brazil previously had the opportunity to make a ruling on a slave labour matter and ordered the payment of compensation to the workers by the employer.¹⁶²³ This was done despite the fact that slave labour is a criminal offence in terms of the Brazilian Penal Code. Consequently, prosecutions in respect of slave labour are not confined to the criminal law only. Labour Courts may be further approached in pursuance of claims for the payment of physical and moral damages.

As envisaged in the country's National Plan, efforts to fight slave labour do not end at the government level. Private sector institutions as well as other civil society organisations are also involved in actions against slave labour in Brazil.¹⁶²⁴ A matter of particular relevance concerns the various practices adopted by employers and businesses to avoid the use of slave labour in their operations. For example, the Declaration on Social Responsibility of Companies and Human Rights binds signatory companies to promote and ensure respect for human rights throughout their operations. To monitor their activities, the National Pact for the Eradication of Slave Labour holds businesses and employers to the pledges they made to eradicate the use of slave labour in their production chains and to support awareness on slave labour. Employers' organisations also make contributions to the framework through rehabilitation programmes designed to offer employment on a contractual basis to slave labour victims so as to avoid their re-insertion into forced labour.¹⁶²⁵

¹⁶²¹ Para 4.5.2.1.2 above.

¹⁶²² Para 4.5.2.1.3 above.

¹⁶²³ *Public Ministry of Labour v Lazaro Jose Velose*. See para 4.5.2.1.3 above.

¹⁶²⁴ Para 4.5.2.2.1 above.

¹⁶²⁵ Para 4.5.2.2.2 above.

Taking into account the foregoing discussion, there are a few things to note about the Brazilian framework. That is, the use of criminal legislation to proscribe slave labour should not deter the adoption of additional measures that achieve effects beyond what can be achieved by criminal law alone. The Brazilian framework demonstrates how labour market institutions may be included in a slave labour framework founded on criminal legislation. All things considered, the Brazilian framework overwhelmingly mirrors the 2014 *Protocol to the Forced Labour Convention* and thus serves as a good example to learn from.

In comparison to the relatively developed frameworks current in both the UK and Brazil, it is submitted that the South African framework on forced labour is in need of an overhaul. Notwithstanding the recognition of forced labour as a human rights violation, little has been done about it in South Africa. The *BCEA*'s limited coverage does not comply with the *Forced Labour Convention*'s expectation that all national law and policy implementing the Convention shall extend coverage to all workers without distinction whatsoever. Whereas the definition of who an employee is in terms of the Act is broad enough to encompass most forced labourers, the application of the Act is not as universal as the spirit of the *Forced Labour Convention*.¹⁶²⁶ Put differently, the forced labour provisions and consequent remedies crafted under the *BCEA* are not meant to cover all relationships involving the performance of work or the provision of services. For this reason, independent contractors, people who perform domestic work for no remuneration as well as volunteers may not seek protection under the Act. They are further left with no remedy under national legislation if they do not fall within the ambit of trafficked persons under the *PCTPA*.¹⁶²⁷ The *PCTPA*, however, seems to suggest that there will not be a strict requirement to prove the existence of an employment relationship where a trafficked person was held in forced labour.¹⁶²⁸ For this reason, the *PCTPA* may guide the formulation of legislation that prohibits forced labour in respect of all persons without the strict requirement to prove the existence of an employment relationship.

¹⁶²⁶ Para 5.5.1.2 as read with para 2.6.2.1 above.

¹⁶²⁷ Para 5.5.1.1 above.

¹⁶²⁸ Paras 5.5.1.1 and 5.5.1.2 above.

The elastic nature of the definition of an employee and the presumption of employment under the *BCEA* has the potential to extend coverage to forced labourers in informal work.¹⁶²⁹ The progressive approach adopted by the Courts with respect to illegal work¹⁶³⁰ also accords with the standard of the 2014 *Protocol on Forced Labour*, which exhorts signatories to not prosecute those who by reason of forced labour had to commit offences.¹⁶³¹ These attributes are bound to strengthen the protection that forced labourers have in the current framework. This notwithstanding, it was argued that the practical reality of enforcing the protection might be inconceivable for some workers as they are normally ignorant of their rights, do not have representation of unions and may have their efforts negated by the need to prove the existence of an employment relationship prior to making a claim under the Act. This attests to why there is a need to strengthen other preventative mechanisms so as to avert the occurrence of forced labour and lessen the number of people who fall victim to it.

Despite its wide coverage, the current framework under which the *BCEA* operates is not thorough with respect to the treatment of forced labour in practice. While the compliance orders issued may be reaffirmed by the Labour Court, the Act does not outline how labour inspectors charged with the mandate to enforce the Act are to respond to an encounter with forced labour during their inspections.¹⁶³² Furthermore, the restriction preventing inspectors from entering the private homes of employers may increase the impunity of employers who impose poor working conditions on their domestic and home workers. Because forced labour is seldom spoken of in South Africa, it is likely that those performing work in domestic homes are not aware of the various remedies available to them. For this reason, there is a need to intensify awareness-raising efforts to reach both workers and employers.

Finally, it ought to be conceded that the recently acknowledged role of the Labour Court to grant civil remedies with respect to breaches of section 48 of the *BCEA* may

¹⁶²⁹ Para 5.5.1.2 above.

¹⁶³⁰ Paras 5.5.1.2 and 5.5.1.3 above.

¹⁶³¹ Para 2.6.2.2 above.

¹⁶³² Para 5.5.2.4 above.

bring the offence of forced labour within the purview of labour law.¹⁶³³ Significantly, this move is aligned with the requirement of the 2014 *Protocol on Forced Labour* that victims ought to be given the option to pursue civil claims against offending employers.¹⁶³⁴ However, there is still more to be done, as litigation cannot provide a spur-of-the-moment aid to forced labourers.

In that regard, the potential roles of other labour institutions were considered in an endeavour to find out how they may contribute to the betterment of the framework and whether they are in the position to assist victims.¹⁶³⁵ This discussion outlined that South Africa has attractive institutions that encourage amongst other things tripartite cooperation, community participation and accountability where the formulation and implementation of labour legislation is concerned.¹⁶³⁶ It is concluded that these characteristics will align with the 2014 *Protocol on Forced Labour* if used to formulate legislation on forced labour. The Department of Labour's role to oversee the formulation and implementation of labour legislation qualifies this Department as the body to spearhead the formulation of legislation on forced labour and the clarification of the roles of labour inspectors with respect to forced labour. Due to the multifaceted nature of forced labour, the Department will need to coordinate its efforts with those of other departments that may be relevant to forced labour. The specialised role of NEDLAC as a consensus-seeking body makes it an ideal forum for the initiation of forced labour legislation. Statutory bodies like the Commission for Employment Equity and the Employment Conditions Commission may further play an advisory role towards re-shaping current legislation and policy so that it speaks to forced labour and improves compliance by employers.

Due to the inevitable socio-economic impacts of forced labour, it is concluded that the UIF has the potential to come to the aid of forced labourers who may experience a period of unemployment after they have been rescued from a forced labour situation. However, the manner in which the UIF operates is likely to exclude the

¹⁶³³ Para 5.5.2.5 above.

¹⁶³⁴ Para 2.6.2.2 above.

¹⁶³⁵ Para 5.5.2.6 above.

¹⁶³⁶ Para 5.5.2.6 above.

majority of forced labourers due to its insurance-based approach.¹⁶³⁷ Currently, the UIF will assist forced labourers only if they can demonstrate that they were contributors to the Fund prior to their unemployment. Lastly, it is concluded that the SAHRC's constitutional mandate to oversee the respect for human rights positions it as a suitable institution to assist victims and create awareness of the impact of forced labour on human rights.

Closely connected to the above, it arose from the enquiry that unlike the UK and Brazil, South Africa does not currently have specific institutions tailored to assist the victims of forced labour and prevent its occurrence.¹⁶³⁸ In comparison, the *PCTPA* establishes specialised institutions to provide aid to the victims of trafficking.¹⁶³⁹ The Act also mirrors the standards proposed in the 2014 *Protocol on Forced Labour* with respect to protection from prosecution where a person has committed a criminal offence as a result of being trafficked. While the roles of the institutions created within the trafficking framework may assist trafficked forced labourers, a gap still remains with respect to establishing assistance mechanisms for forced labourers who have not been trafficked.

Over and above the abovementioned shortcomings in the current framework, it is found that the constitutional protection of the right not to be subjected to forced labour denotes that forced labourers who do not come under the protection of the *BCEA* and the *PCTPA* are not completely without a remedy.¹⁶⁴⁰ South Africa's constitutional democracy, which is based on the protection, advancement and fulfilment of human rights, instructs that the right to not be subjected to forced labour is underpinned by the values of dignity, equality and freedom. Upon analysis, these values suggest that to impose forced labour on a person is to deny that person's human rights. In addition, the constitutional jurisprudence suggesting that the rights in the Bill of Rights be treated as interdependent has the result that the practice of forced labour violates not only section 13, but also the rights to equality

¹⁶³⁷ Para 5.5.2.6.3 above.

¹⁶³⁸ Para 5.5.3 above.

¹⁶³⁹ Para 5.5.3 above.

¹⁶⁴⁰ Para 5.5.1.3 above.

and dignity, and the right to various freedoms.¹⁶⁴¹ On the basis of this alone, a forced labourer may successfully claim constitutional remedies against the perpetrator.

In addition to this, section 23(1) of the Constitution extending a right to fair labour practices to everyone was also found to be one of the rights that may stand affected by forced labour.¹⁶⁴² This may be successfully proved if the person alleging the infringement of the right can establish that there is an employment relationship between himself and the perpetrator. As a result, despite its apparent universal coverage, the right has been interpreted as targeting only those who are in employment relationships or something akin to them. Because forced labour violates a plethora of human rights, it may arguably be viewed as an unfair labour practice under the Constitution. However, the limited scope of the right may not be an ideal avenue to take in addressing forced labour. This is because the right does not extend to everyone in the strict sense of the term, and neither can all aspects of forced labour be brought under this right.

In the light of the above, the South African legislation may be said to have a gap in it, in the sense that there is no legislative provision extending protection to everyone. Without necessarily implying that the 2014 *Protocol to the Forced Labour Convention* is already binding on South Africa, the current domestic framework is not even close to the minimum standards encompassed by the Protocol. While reliance may be placed on the *BCEA* and the Constitution, there is no guidance as to the provision of assistance to the victims of forced labour. Furthermore, there is no strategic national plan outlining how State efforts, labour market institutions, and civil organisations may present a united front in ensuring a forced labour-free South Africa. The *PCTPA* is also not enough on its own, as it is directed at addressing human trafficking and is thereby restricted to addressing the forced labour arising therefrom. While the Act provides comprehensive victim assistance and support mechanisms, they cannot be equated to those of the 2014 *Protocol on Forced*

¹⁶⁴¹ Para 5.5.1.3 above.

¹⁶⁴² Para 5.5.1.3 above.

Labour due to their limitation to the offence of human trafficking. On the whole, South African labour market institutions and labour law have little involvement in issues of forced labour.

6.7 Recommendations

In the light of the foregoing discussion, the South African approach has demonstrated a failure to formulate a comprehensive forced labour framework that meets the international standard. Notwithstanding the existence of the country's progressive labour market regulation, which has a strong human rights resonance, the current framework does not thoroughly delineate how the offence of forced labour must be dealt with in practice. Where the framework attempts to offer a solution, it turns out to be fragmented and not thorough enough to address the needs of forced labourers. The following recommendations are therefore made:

- a) In formulating its forced labour laws, the South African legislature must pay attention to the distinction between slavery and forced labour so as to avoid confusion amongst those whom the law is intended to protect. While the phrase "modern slavery" may be used to encompass forced labour, this position will become clear only where legislation specifically indicates so. A sweeping provision on "modern slavery" may not necessarily be clear as to whether or not forced labour is applicable to it.
- b) The South African Government needs to view forced labour as a human and labour rights violation to which everyone may potentially become victim. Granted, the Constitution recognises forced labour as a human right violation. However, that in itself is not enough because constitutional entrenchment does not imply the establishment of a separate offence. At the moment the constitutional entrenchment of forced labour exists arguably as a formality. However, if both the human rights and labour law discourse were used to properly proclaim the right in legislation, then it would receive the attention it deserves. Legislation and consequential policy may serve as good avenues to

establish the roles and define the limits of various labour market institutions when dealing with forced labour.

- c) Whereas the African human rights system is silent on forced labour, the South African Government can learn valuable lessons from how the European and American systems have consistently applied ILO-forced labour conventions to cases before them. Besides the distinction between forced labour and slavery, the Government must note that when it establishes an offence of forced labour, there is an accompanying necessity to set up effective mechanisms to ensure that people are protected and that perpetrators are actually prosecuted. A simple prohibition of forced labour in legislation without a clear indication of the accompanying enforcement mechanisms does not qualify as an effective measure. The measures currently adopted by the South African Government are flawed as they lean more towards the criminal law and the trafficking discourse. In addition to this, the Government needs to ensure that its framework on forced labour is not selective, as expounded on below at (e).
- d) There is a pressing need for both the Government of South Africa and scholars alike (particularly in the labour law discourse) to develop an interest in studying forced labour. It is inconceivable how a responsive framework may be established if the scope and extent of forced labour in South Africa remains unknown. Key to this is the realisation that the circumstances causing and propelling forced labour may be unique to a jurisdiction. Hence, transplanting the mechanisms effective in one jurisdiction without paying regard to South Africa's circumstances to determine their suitability may not be successful. Various institutions existing in South Africa such as the SAHRC, NEDLAC, the Employment Conditions Commission and the Commission for Employment may use their research and fact-finding roles to assist in this regard. Furthermore, academic debate and opinion on forced labour may serve as tools for policy re-formulation.
- e) As much as the offence of human trafficking and forced labour coincide, the two offences are not similar. Consequently, the enactment of the *PCTPA* does not absolve South Africa from its failure to meet the minimum standard proposed by

the *Forced Labour Convention*. The South African Government must still formulate forced labour legislation that is capable of extending coverage to all victims of forced labour whether they have been trafficked or not. As noted above, South Africa employs a selective framework which has undergone criticism by the European Court with reference to the UK. Over and above that, should the Government ratify the 2014 Protocol in the near future, it cannot assume that the *PCTPA* and its mechanisms are sufficient to meet the obligations emanating from the Protocol.

- f) The need for the South African Government to formulate legislation on forced labour is further justified by the lack of universal coverage in the current framework. As noted above, constitutional entrenchment (which covers everyone) does not establish an offence of forced labour. The establishment of the section 48 offence of forced labour in the *BCEA* falls short of the standard proposed by the *Forced Labour Convention* in the sense that it covers only those who are classified as employees under the Act. Consequently, the Government needs to take cognisance of the fact that forced labour does not affect only those who are in employment relationships or something akin to them.
- g) The restricted reach of section 23 is also of little help where forced labour is concerned due to its emphasis on the existence or otherwise of the employment relationship or something akin to it. The content of the right also falls short of addressing all aspects of forced labour which extend beyond the realm of typical labour and employment rights. It is recommended that South African courts move towards interpreting section 23(1) in a more liberal manner that seeks to promote decent work for all in all spheres of labour law and other related areas such as social security and occupational health and safety. It is only then that forced labour may become fully encompassed by the right to fair labour practices.
- h) The South African Government needs to fully adopt an approach that does not treat forced labour as strictly a matter of criminal law enforcement. While the recently established jurisdiction of the Labour Court demonstrates that a shift is

under way, more still needs to be done as to the role of other labour market institutions in fighting forced labour in South Africa. Should the Government move towards improving its framework, it must take into account that the 2014 *Protocol on Forced Labour* now makes it binding for frameworks on forced labour to affirm the role of labour law and labour market institutions in efforts to combat the crime.

- i) Finally, the Government must establish targeted institutions and other measures to provide assistance to forced labour victims. The current legislative framework clearly establishes these with respect to trafficked persons. This approach may be used to inform propositions on institutions formulated for forced labour victims. It is further recommended that the Government organise measures intended to prevent the occurrence of forced labour within its borders.

6.8 Conclusion

For many years, forced labour has been viewed as a criminal offence to which penalties must be strictly enforced. With the rise in human trafficking, national approaches shifted towards addressing forced labour within the trafficking framework, thereby overlooking the fact that forced labour and trafficking can exist independently of each other. Despite these efforts, it appears that the prevalence of forced labour has increased due to failures in legislation and its implementation. In 2014 the focus shifted towards addressing forced labour with an approach that integrates the activities of all the actors concerned, labour institutions inclusive.

This study has demonstrated that forced labour is a criminal offence that has implications for the labour and employment rights of its victims. Hence, without denying the significance of criminal prosecutions, it is asserted that the effective involvement of labour law and labour institutions may make contributions to the prevention and reduction of the use of forced labour, taking into account their specialised approaches to issues of labour and employment.

It has been demonstrated that the South African framework on forced labour is not compliant with international standards as prescribed by the ILO. Currently, the framework is fragmented, reliant on the criminal and human trafficking framework, lacks a clear strategic plan as to how forced labour will be approached, and fails to establish the contributions that labour market institutions may play towards the overall framework. All things considered, a realisation must occur that constitutional democracies are not exempt from the instances of forced labour, especially where there are gaps and fragmentations in the relevant laws and policies and their implementation. There is a need for the South African Government to lead efforts to create dialogue on the existence of forced labour in South Africa, as it appears to be an abstract concept to the country. Following the recommendations made, the lessons to be learned from the jurisdictions with developed legal frameworks on the issue might go a long way towards filling the current voids pertaining to forced labour in the South African legal system.

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