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A CRITICAL ANALYSIS OF CHILD TRAFFICKING LAWS AND POLICIES IN SOUTH AFRICA

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM degree in Human Rights Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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PROLOGUE

*'There can be no better measure of our governance than the way we treat our children, and no greater failing on our part than to allow them to be subjected to violence, abuse or exploitation...Parliamentarians have to power to alleviate the suffering of millions of children around the world, if only they would use it.'*¹

'The trafficking of human beings is unacceptable under any circumstances'.²

*'The Conference [Inter-Parliamentary Union] Calls on all States: (b) To take all appropriate national, bilateral and international measures to develop laws, policies, programmes and practises to ensure the effective implementation of international instruments for preventing and combatting the trafficking and sale of children for any purpose or in any form.'*³

*'There's another humanitarian crisis spreading, yet hidden from view. Each year, an estimated 800, 000 to 900, 000 human beings are bought sold or forced across world's borders...There's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of [the] sex trade see little of life before they see the very worst of life – an underground brutality and lonely fear...And governments that tolerate this trade are tolerating a form of slavery.'*⁴

'Trafficking in human beings is morally reprehensible, it is illegal; it robs people of their dignity and violates their fundamental human rights. It objectifies and commodifies individuals, preys on the vulnerable and the marginalised, it perpetuates their vulnerabilities and it repeatedly victimises and re-victimises those who are the objects of trafficking'.⁵

'Human beings are not commodities to which a price can be attached; they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end'.⁶

¹ Lange, J. United Nations International Children's Emergency Fund (UNICEF). Inter-Parliamentary Union's 110th Assembly in Mexico City, 20 April 2004.

² International Labour Organisation (ILO). 2002. *Unbearable to the human heart: Child trafficking and action to eliminate it*. International Labour Organisation: Switzerland at p. v.

³ 106th IPU Conference (Ouagadougou, Burkina Faso, September 2001).

⁴ President George W. Bush. Speech to the United Nations. New York City, 23 September 2003.

⁵ Opening Address by Dr. EG Pahad, Minister in the Presidency of the Republic of South Africa, delivered at the Global Initiative to Fight Human Trafficking (GIFT) Interfaith Dialogue held in Cape Town, South Africa, 3-5 October 2007.

⁶ Ackermann J in *S v Dodo* 2001 (3) SA 382 (CC) at para. 38.

DEDICATION

To my loving family and fiancé

University of Cape Town

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TABLE OF CONTENTS

	Page Numbers
Title page.....	i
Plagiarism declaration.....	ii
Prologue	iii
Dedication	iv
Acknowledgments	v
Table of contents.....	vi
List of abbreviations	vii
Chapter One: Introduction.....	1
1. Introduction	1
2. Problem statement.....	2
3. Aims and objectives	5
4. Significance of this study	6
5. Methodology.....	6
6. Chapter outline.....	8
Chapter Two: Child trafficking: Definition, history and key concepts	9
1. Introduction	9
2. A brief history of child trafficking.....	9
3. Defining child trafficking	12
4. Some conceptual issues pertaining to child trafficking.....	16
4.1. Causes of child trafficking.....	16
4.2. Supply factors	17
4.3. Demand factors	19
5. Contemporary views on child trafficking.....	20
6. Conclusion.....	22

Chapter Three: South Africa's obligations under international and African regional law.....	23
1. Introduction	23
2. Brief overview of the law on child trafficking	24
2.1. UN treaties	24
2.2. ILO instruments	26
2.3. International criminal law	27
2.4. African regional system.....	27
3. The duty to preventing the trafficking and exploitation of children.....	29
4. Assisting the victims of trafficking.....	37
5. Investigating and prosecuting traffickers	40
6. International cooperation.....	41
7. Conclusion.....	42
Chapter Four: South Africa's domestic law and policies on child trafficking.....	44
1. Introduction.....	44
2. The relevance of international law in South Africa	45
3. A brief overview of the laws on child trafficking.....	46
4. Definition of child trafficking in South African law.....	52
5. Preventing the trafficking and exploitation of children	54
6. Assisting the victims of trafficking.....	55
7. Investigating and prosecuting child trafficking	59
8. Cooperation with other states	63
9. Conclusion	64
Chapter Five: Conclusion.....	66
1. Summary.....	66
Bibliography	72
Annexures.....	82
1. Annexure I.....	82

2. Annexure II.....92

LIST OF ABBREVIATIONS:

Aids	Acquired Immune Deficiency Disease
AU	African Union
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention of the Rights of the Child
CTOC	Convention against Transnational Organised Crime
DAW	Division for the Advancement of Women
DPP	Director of Public Prosecutions
ECOWAS	Economic Community of West African States
EU	European Union
GIFT	Global Initiative to Fight Human Trafficking
HIV	Human immune-virus
HRC	Human Rights Commission
HSRC	Human Sciences Research Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
IOM	International Organisation for Migration
OAU	Organisation of African Unity

OAS	Organisation of America States
OHCHR	Office of the High Commissioner of Human Rights
NDPP	National Director of Public Prosecution
NGO	Non-governmental Organisation
NPA	National Prosecuting Authority
SADC	Southern African Development Community
SALC	South African Law Commission
SALRC	South African Law Reform Council
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
UNODC	United Nations Office on Drugs and Crime
USA	United States of America
VAW	Violence against Women

Chapter One

INTRODUCTION

1. INTRODUCTION

Human trafficking is one of the gravest human rights abuses currently perpetuated within the regional and international community. The trafficking of human beings has generated much public and political attention over the last decade.⁷ The trafficking of children, in particular, has emerged as an important global issue and one that affects nearly all countries in the world.⁸ It is one of the worst forms of exploitation perpetuated against children, which results in the violation of some of their key rights. The act of trafficking involves a variety of criminal acts and abuses that can be associated with the recruitment, sale and movement of children into a range of exploitative acts around the world.⁹ Trafficking, especially of children, is however not a new phenomenon; it can be traced back to the early days of slavery.

The trafficking of children has been recognised by the international community as a transnational organised crime that affects children globally.¹⁰ As the child rights movement has grown in momentum over the last few decades, so has the concern regarding the exploitation of children. Child trafficking is certainly one of the gravest forms of abuse currently perpetuated against a child and his/her rights. Despite the numerous policy documents, international treaties and various other legal documents prohibiting the sale of children for any purpose; these documents have not resulted in the decrease or elimination of child trafficking. This paper will engage with child trafficking through a human rights lens in order to highlight the full extent of child abuse perpetuated by child trafficking. It is due to the very nature of child trafficking that resulted in the international and regional community enacting legal instruments to deal with different aspects of this crime. These instruments

⁷ Lee, M. 2007. -Introduction: Understanding human trafficking. In Lee, M. (ed). *Human trafficking*. Willan Publishing: USA at p. 1.

⁸ International Labour Office (ILO). 2002. *Unbearable to the human heart: Child trafficking and action to eliminate it*. International Labour Organisation: Switzerland at p. v.

⁹ Lee op cit (n7) at p. 1.

¹⁰ Lee op cit (n7) at p. 116.

require states to prevent and punish the trafficking of children. This paper will examine South Africa's child trafficking laws and policies having regard to its international and regional obligations.

2. PROBLEM STATEMENT

Trafficking in humans, especially children, is considered to be the 21st century form of slavery, and is regarded as being more prevalent now than at any other time in history.¹¹ The trafficking of children is certainly not a new issue but one that has existed for many years and continues to grow globally. For clarity, a child has been defined as any person below the age of 18 years.¹² The term 'trafficking' is very broad and covers many different forms of exploitation; including sexual, emotional and physical exploitation. The International Labour Organisation (ILO) has identified child trafficking as one of the worst forms of child labour and calls for states to take immediate action to eliminate and prohibit all worst forms of child labour.¹³

Trafficking itself results in the violation of *inter alia*, the right to life, dignity, equality and security of persons.¹⁴ However, when children are involved, very specific human rights are violated including the right to life, maximum survival and development; the right to non-discrimination and equality; the right to health; and the right to be protected from all forms of harm and exploitation.¹⁵ The violation of these rights will result in greater physical and emotional trauma being inflicted upon the child. Despite current or popular misconceptions, children are not solely trafficked for the purposes of prostitution and sexual exploitation. The international community has come to recognise that the exploitation of children may come in many forms, each with their own causes and effects.¹⁶ The ILO has acknowledged

¹¹ Kreston, S. 2007. 'Trafficking in children in South Africa: An analysis of pending legislation' in *Child Abuse Research in South Africa*. Vol. 8 (1): 35-50 at p. 35.

¹² See paragraph one of the UNCRC and African Children's Charter and section 16 of the Constitution of the Republic of South Africa Act of 1996.

¹³ ILO (2002) op cit (n8) at p. v.

¹⁴ Kibicho, W. 2009. *Sex tourism in Africa: Kenya's booming industry*. Ashgate Publishers: USA at p. 6.

¹⁵ King, G. 2004. *The new slave trade: Women, child for sale in the 21st century*. Penguin Group: USA at pp. 15-16.

¹⁶ Lee op cit (n7) at pp. 3-10.

that children are trafficked and therefore exploited by their traffickers for the following reasons: domestic work, conscription in the armed forces, forced marriages, illegal adoptions and in other exploitative industries (for example in the agricultural sector, hospitality industry and begging on the streets).¹⁷ However, the main reason for the trafficking of children largely remains commercial sexual exploitation.

In the world of trafficking, children are simply commodities that are used, exploited and traded. Trafficked children are quite simply another source of labour. Thus, children are trafficked largely as a result of an increasing demand for cheap and malleable labour.¹⁸ Girls and boys between the ages of 16 and 17 years, in particular, are used to fill the gaps in an ever increasing and growing commercial sex industry.¹⁹ There are many reasons that influence and exacerbate the causes of trafficking in children including poverty, lack of education, political conflict, natural disasters, inadequate local laws, cultural attitudes towards children and a desire to earn a living or support ones family.²⁰

According to recent statistics, it has been estimated that between 600, 000 and 800, 000 people are trafficked worldwide annually.²¹ In 2006, the Trafficking in Persons Report estimated that 80 per cent of all trafficked victims were women.²² According to a study conducted by the United States of America, between 300, 000 and 400, 000 children are trafficked internationally each year.²³ The ILO estimates that between 200, 000 and 300, 000 children are trafficked each year for forced labour and sexual exploitation in West and Central Africa.²⁴ The United States Drug Enforcement Administration further believe that close to 700, 000 women and children are trafficked annually.²⁵ Furthermore, some 1.2 million women and children are estimated to enter the commercial sex market through trafficking.²⁶ It

¹⁷ ILO (2002) op cit (n8).

¹⁸ ILO (2002) op cit (n8) at p. xi.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Trafficking in persons report (USDOS 2006) at p. 6.

²² ILO (2002) op cit (n8) at p. xi.

²³ King op cit (n15) at p. 13.

²⁴ Fitzgibbon, K. 2003. "Modern-day slavery? The scope of trafficking in persons in Africa" in *African Security Review*. Vol. 12 (1): 81-89 at pp. 82-83.

²⁵ Lee, M. 2009. *Sex trafficking*. Willan Publishing: USA at p. 12.

²⁶ Ibid.

must be noted that the flow of people, due to globalisation, has reached such proportions that the United Nations in 2000 estimated that almost 13 million people (approximately 2 per cent of the world's population) are on the move at any one given time.²⁷ Unfortunately, these statistics do not provide a clear picture on exactly how many women and children are trafficked worldwide annually. In fact, we are no nearer to understanding the full extent of this problem either globally or regionally. Thus, despite the growing interest in the trafficking of women and children, our knowledge base remains limited.

There remains little to no evidence on the exact number of children trafficked in and out of South Africa. The lack of adequate statistics on child trafficking in South Africa remains a concern. However, Molo Songololo, a child rights non-governmental organisation, estimated that there are at least 28, 000 children in commercial sexual exploitation in South Africa's urban centres.²⁸ Furthermore, there is evidence to prove that foreign women are being trafficked into South Africa for the purposes of sexual exploitation from areas such as Europe, Southeast Asia and other African countries.²⁹ Although we do not have accurate statistics in South Africa regarding the trafficking of children, the trafficking of women and children is happening within and through our borders. Trafficking thus remains an important issue for South Africa.

Child trafficking has become the focus of much research, academic debate and public awareness programmes.³⁰ In fact, there is a large body of international, regional and domestic instruments and laws dealing with the trafficking of children.³¹ Despite almost universal ratification of the United Nations Convention on the Rights of the Child (CRC), little has been done by way of implementing the very values this document was founded on particularly the right to dignity and security of persons for

²⁷Ibid.

²⁸ South African Police Service of Child Protection Unit statistics. *The trafficking of children for the purposes of sexual exploitation: South Africa*. A report by Molo Songololo, Cape Town, South Africa, August 2000.

²⁹ Fitzgibbon op cit (n24) at p. 83.

³⁰ Lee op cit (n7) at p. 1.

³¹ Please visit: www.un.org for a list of all international and regional documentation on Trafficking.

all children.³² Although many of the legal instruments focus their attention on the prosecution of traffickers,³³ such instruments are still able to capture, protect and prevent the human rights violations that encompass the trafficking of children. This paper will attempt to critically illustrate this point using the current laws and policies of South Africa. It shall be argued that the laws and policies in force or being adopted by South Africa attempt to and, in many regards do, meet South Africa's existing international and regional obligations. In other words, South Africa's laws and policies illustrate Parliament's attempts to effectively prevent and prohibit the trafficking in children as required by the international and African regional community.

3. AIMS AND OBJECTIVES

This paper aims to provide a critical analysis of the current laws and policies concerning child trafficking in South Africa. The principal objective of this study is to examine child trafficking legislation and policy through a human rights lens.³⁴ Child trafficking is one of the most serious violations of a child's basic human right yet current laws have not suppressed this growing global problem. In order to engage critically with this particular topic, South Africa's obligations under both international and regional law will be examined. Additionally, these obligations will then be assessed against South Africa's proposed and existing legislation concerning child trafficking and the exploitation of children. Finally, this study will propose some of the measures that South Africa still needs to take at all the relevant government and other levels in order to effectively and permanently eradicate the trafficking of children.

³² United Nations Division for the Advancement of Women (DAW) and the United Nations Office on Drugs and Crime. Trafficking in women and girls: Report of the Expert Group Meeting, Glen Cove, New York, USA, 18-22 November 2002 at p.10.

³³ ILO (2002) op cit (n8) at p. xi.

³⁴ Cranston, M. 1973. *What are human rights?* London 36. Cranston defined human rights as a moral right that all man has simply because he or she is human.

4. SIGNIFICANCE OF THIS STUDY

Through the last three decades, much has been said and debated about child trafficking. Laws and policies have been adopted at both domestic and international levels. South Africa, following the international trend, has over the last ten years, created and amended legislation to effectively criminalise the act of child trafficking.³⁵

This study is significant because it will investigate the current policies and laws on child trafficking in South Africa. These policies and laws will then be critically assessed with regard to South Africa's international and regional obligations. This study will determine whether or not South Africa proposed legislation meets the standards set in these international and regional human rights instruments. This is important as the intended purpose of creating the Prevention and Combatting of Trafficking Bill (Prevention and Combatting of Trafficking in Persons Bill)³⁶ was to meet South Africa's obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Palermo Trafficking in Persons Protocol).³⁷ This paper is thus significant as it will illustrate that despite the proposed anti-trafficking bill South Africa's current laws uphold its international and regional obligations. It shall thus be argued that the Trafficking in Persons Bill, once brought into effect, will serve to further enhance and improve South Africa's human trafficking legislation.

5. METHODOLOGY

This paper is library-based, analytical and descriptive in nature. Sources will be drawn from both international and domestic law. The primary focus of this paper

³⁵ Gould, C. 2006. 'Cheap lives: Countering human trafficking: considerations and constraints' in *SA Crime Quarterly*. Vol. 16(3): 19-25 at p. 24.

³⁶ Bill 7 of 2010.

³⁷ G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

will be a critical review of the current laws and policies in the Republic of South Africa.

Some of the primary instruments that will be reviewed include:

- The Convention on the Rights of the Child of 1989 (CRC);³⁸
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2000) (Palermo Trafficking in Persons Protocol);³⁹
- The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and Recommendations (No 182) (ILO Convention on Child Labour);⁴⁰
- The African Charter on the Rights and Welfare of the Child of 1990 (African Children's Charter);⁴¹
- The Constitution of the Republic of South Africa Act of 1996 (Constitution);
- The Children's Act 38 of 2005;
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act); and
- The Prevention and Combating of Trafficking in Persons Bill of 2010 (Trafficking in Persons Bill).

Secondary sources will be employed to gain greater insight and understanding into this multi-faceted topic. Such sources will include journal articles, protocols, recommendations, resolutions, internet articles and cases.

The above-mentioned literature will be used to examine the full extent of the laws and policies on child trafficking in South Africa. Such laws and policies will be

³⁸ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167. U.N. Doc. A/44/49 (1989). Entered into force 2 September 1990.

³⁹ G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

⁴⁰ (ILO No. 182), 2133 U.N.T.S.161. Entered into force 19 November 2000.

⁴¹ OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29 November 1999.

critically examined so as to establish whether South Africa is fulfilling its duty to suppress and prevent the sale and exploitation of children in and out of its borders.

6. CHAPTER OUTLINE

This chapter has examined the aims and objectives of this thesis as well as its significance to the study of children's rights in South Africa. The main argument has been identified as well as the main international and regional instruments that will be the focus of this discussion.

Chapter Two will provide a brief history and general background on child trafficking. It will examine various conceptual issues that surround this phenomenon including a concise definition of child trafficking, its causes, and the various elements that make up child trafficking. Chapter Three will examine South Africa's current legal and other obligations under international law and the African regional system, and will provide clarity on South Africa's main obligations under their existing legal instruments. This chapter will then lead into a critical discussion of South Africa's current domestic laws and policies on child trafficking in Chapter Four. Furthermore, Chapter Four will critically examine whether these laws and policies meet South Africa's existing obligations as defined in the main international and regional instruments on child trafficking. Chapter Five will conclude with a brief overview of the laws and policies on child trafficking in South Africa and discuss whether they meet current child trafficking prevention standards. Furthermore, solutions to the concerns raised in Chapter Four will also be provided in this chapter.

Chapter Two

CHILD TRAFFICKING: DEFINITION, HISTORY AND KEY CONCEPTS

1. INTRODUCTION

This chapter seeks to provide a comprehensive definition of what is meant by the term child trafficking. Additionally, all the elements that make up child trafficking will be examined in greater detail. However, in order to understand the issues pertaining to child trafficking, one needs to understand its history and development in the international arena. This chapter will therefore begin with a brief history of child trafficking before discussing its definition. In order to come to any possible solutions on child trafficking, one needs to understand all its complexities and causes. This chapter thus aims to set the foundations for our understanding of what is precisely meant by child trafficking and why it continues to occur.

2. A BRIEF HISTORY OF CHILD TRAFFICKING

The trafficking of children has existed for many centuries. In fact, trafficking could be regarded as old as trade itself.⁴² However, historical accounts of trafficking presume and document child trafficking as a phenomenon of the twentieth century. The trafficking of children and women has come to be associated with the period of slavery, which saw hundreds of thousands of people transported as commodities from their native land to areas of colonial control.⁴³ What has however changed over the years is what is being trafficked, what trade is prohibited and by whom. Slavery provides an obvious example as it was regarded as legitimate trade in the early twentieth century, which is strictly prohibited in our modern human rights era. For the purposes of this study, the history of traffickers themselves and the practice of child trafficking need to be considered in greater detail.

⁴² Lee op cit (n7) at p. 1.

⁴³ Kibicho op cit (n14) at p. 1.

Originally, in the early sixteenth century, the term ‘trafficker’ was not used to describe a person who committed certain wrongdoings or who moved across international borders. Rather, this term was synonymous with the word ‘trader’ and connoted a person who simply traded in goods.⁴⁴ It was only in the latter half of the sixteenth century that this term became disassociated with the term ‘trader’ and began to be used to refer to a person who illegally sold disreputable goods.⁴⁵ In this later form the word ‘trafficker’ was incorporated into law and politics and came to be associated with the smuggling of contrabands, such as weapons, alcohol and drugs, across borders for profit.⁴⁶ However, by the end of the nineteenth century the term ‘trafficker’ was used to refer to a person who sold humans and displaced them across borders or within a country.⁴⁷ Traffickers in the modern era are, however, seen in terms of a collection of people rather than as individuals.

As previously noted, the history or origins of trafficking can be traced back to the late nineteenth and early twentieth century when, as Kempadoo notes, ‘the gendered international migration patterns set the stage for a racialized social panic about the ‘White slave Trade.’⁴⁸ Originally, trafficking and the concern surrounding it were born out of early social purity movements. These movements created the racially based trafficking stereotype; namely: ‘white adolescent girls who were drugged and abducted by sinister immigrant procurers waking up to find themselves captive in some infernal foreign brothel, where they were subject to the pornographic whims of sadistic non-white pimps and brothel masters.’⁴⁹ Through this purity movement, two international instruments were born: The International Agreement for the Suppression of the White Slave Trade (1904)⁵⁰ and the International Convention for the Suppression of the White Slave Traffic⁵¹ (1910).⁵² These instruments were later

⁴⁴ ILO (2002) op cit (n8) at p. 1.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Kempadoo, K. 2005. *Trafficking and prostitution reconsidered: New perspectives on migration, sex work, and human rights*. Paradigm Publishers: USA at p. x.

⁴⁹ As quoted in Doezema, J. 1998. ‘Forced to choose: Beyond the voluntary v. forced prostitution Dichotomy’ In Kempadoo, K and Doezema, J (eds). *Global sex workers’ rights, resistance, redefinition*. Routledge: South Africa at p. 36.

⁵⁰ International Agreement for the Suppression of the ‘White Slave Traffic’ 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83. Entered into force 18 July 1905.

⁵¹ International Convention for the Suppression of the ‘White Slave Traffic.’ May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, *as amended by* Protocol Amending the International

followed by three conventions by the League of Nations: The International Convention to Combat the Trafficking in Women and Children (1921) (–Trafficking in Women Convention)⁵³, the International Convention for the Suppression in the Traffic in Women of Full Age (1933) (–Suppression of Trafficking in Women Convention)⁵⁴ and,⁵⁵ importantly, the International Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others⁵⁶ (1949) (–Suppression of Trafficking in Persons Convention).⁵⁷

Unfortunately, the Suppression of Trafficking in Persons Convention conflated trafficking in women and children with prostitution, as it stated that –prostitution and the traffic in persons for the purposes of prostitution are incompatible with the dignity and worth of the human person.⁵⁸ This Convention thus failed to appreciate the obvious distinction between labour and exploitation; namely that some people may choose prostitution as a career while others are forced into it through trafficking. Despite these early conventions, the concern surrounding trafficking abated until the 1980s when feminist scholars placed the trafficking of women and children back on the international agenda.⁵⁹ This renewed interest in human trafficking resulted in the adoption of the Palermo Trafficking in Persons Protocol.

Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23. Entered into force 21 June 1951.

⁵² Gould op cit (n35) at p. 20.

⁵³ International Convention for the Suppression of the Traffic in Women and Children, 1921 [1922] LNTSer 70; 9 LNTS 415, *as amended by* Protocol signed at Lake Success, New York, on 12 November 1947, to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921.

⁵⁴ International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. Entered into force 24 August 1934.

⁵⁵ Gould op cit (n35) at p. 20.

⁵⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

⁵⁷ Gould op cit (n35) at p. 20.

⁵⁸ As quoted in Doezema op cit (n49) at p. 38.

⁵⁹ Gould op cit (n35) at p. 20.

3. DEFINING CHILD TRAFFICKING

The definition of human trafficking in international, African regional and South African domestic law can be found in the Palermo Trafficking in Persons Protocol. This instrument was the first attempt by the international community to adopt a universally accepted definition for human trafficking. This Protocol was adopted in December 2000 to respond to this increasing issue in international law and lays down the judicial and law enforcement tools to combat the cross-border trafficking of humans.⁶⁰ It 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 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 purposes of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in the definition.

Article 3 (c) further states that “[t]he recruitment, transportation transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons even if this does not involve any of the means set forth in subparagraph (a) of this article. For there to be human trafficking, there must therefore be any of the following acts listed in article 3 including holding, transporting or harbouring a person by any means for the purposes of exploitation.⁶¹

The definition provided in the Palermo Trafficking in Persons Protocol has been internationally and universally accepted.⁶² It was developed through consultation with governments, non-government organisations (NGOs) and other international human rights organisations.⁶³ The definition in the Palermo Trafficking in Persons Protocol is extremely broad so as to provide states with a guideline upon which to implement their domestic legislation.⁶⁴ However, one must also have regard to the fact that the definition is so broad and casts the net so wide that any person who ends up in an exploitative situation may be regarded as a victim of trafficking.⁶⁵

⁶⁰ ILO (2002) op cit (n8) at p. 5.

⁶¹ ILO (2002) op cit (n8) at p. 5.

⁶² Gould op cit (n35) at p. 20.

⁶³ Ibid.

⁶⁴ Gould op cit (n35) at p. 20.

⁶⁵ Ibid.

As it has been noted by Kauko Aromaa, there are major difficulties associated with quantifying something that is difficult to define. He goes on to state that “[t]he situation where a crime is characterised by an absence of the unity of time, place, perpetrator and activity makes the counting exercise particularly demanding [as in the case of trafficking].”⁶⁶ In other words, both the quantification of trafficking and law enforcement is affected.⁶⁷ One of the main problems associated with defining the offence of human trafficking is that it is made up of many different offences each with their own elements. A trafficker might, for example, traffic a child for the purposes of domestic employment, which involves violating existing labour laws, migration laws and human rights laws. Definitions of human trafficking are therefore deliberately vague and open-ended so as to capture all the elements and offences that result in human trafficking. However, to determine if the definition of child trafficking in the Palermo Trafficking in Persons Protocol is comprehensive, one must evaluate the factors that have affected its wording.

As previously discussed, human trafficking was originally, and to some degrees in the modern world, regarded as a form of slavery.⁶⁸ Slavery has been branded as the worst form of human exploitation in our history, and was a time characterised by the kidnapping and auctioning of people like animals.⁶⁹ Academics and politicians alike have characterised human trafficking, particularly child trafficking, as the modern day form of slavery. They argue that the conditions in which such people are treated is akin to being taken advantage of and sold as commodities in a booming market.⁷⁰ However, unlike slavery, child trafficking is characterised by temporary, not permanent, ownership and by very exploitative contractual agreements in which children are sold into situations of forced labour.⁷¹ Although the use of the term slavery with regard to child trafficking is appropriate, one must be careful of over-sensationalising this issue. The term “slavery” is an extremely emotive term, which

⁶⁶ Aromaa, K. “Trafficking in human beings: Uniform definitions for better measuring and for effective counter-measures.” Paper presented at the ISPAC International Conference on *Measuring Human Trafficking – Complexities and Pitfalls*, Courmayeur, Mont Blanc, Italy: 2-4 December 2005 at p. 3.

⁶⁷ Gould op cit (n35) at p. 21.

⁶⁸ Lee op cit (n7) at p. 3.

⁶⁹ Lee op cit (n7) at p. 3.

⁷⁰ Ibid.

⁷¹ Lee op cit (n7) at p. 4.

does not aid the fight against child trafficking. It is however unsurprising that elements of slavery were included within the definition of human trafficking in the Palermo Trafficking in Persons Protocol. Thus words such as ‘abduction’, ‘fraud’, ‘abuse of power or of position of vulnerability’, and the ‘giving or receiving of payments or benefits to achieve the consent of a person having control over another person’ for the purposes of exploitation were included. In other words, the Palermo Trafficking in Persons Protocol covers one of the essential elements of slavery; namely the kidnapping or buying of a person for the purposes of exploitation and for some benefit.

The association of trafficking with prostitution is an age-old one and one that can be traced back to the ‘white slave trade’ where, in the late nineteenth century, there was a concern for white women and girls being moved across borders to be prostituted.⁷² Although recent studies have illustrated that children and women are trafficked for more than merely prostitution, sexual exploitation remains the most predominant form of exploitation perpetuated against trafficked children. It is thus unsurprising that many, if not all, the legal instruments mentioned above contain a clause prohibiting the sexual exploitation of children. In many of the child specific instruments a distinction is made between sexual abuse and sexual exploitation.

Much of the literature available argue that sexual abuse, together with rape, is simply a sub-category of sexual exploitation.⁷³ Sexual exploitation however refers specifically to the sexual manipulation of a child for some benefit or gain.⁷⁴ In other words, child trafficking would fall primarily under sexual exploitation whereby the victim could, and often does, experience sexual abuse. For the purposes of this discussion on states obligations with regard to child trafficking, both sexual abuse and sexual exploitation are relevant. For clarity, the other forms of exploitation are for purposes of labour, child soldiers and in dangerous industries, such as fishing and agriculture. Having recognised that children are trafficked for reasons beyond sexual

⁷² Ibid.

⁷³ Please see: Silbert, Mimi H.; Pines, Ayala M. 1983. ‘Early sexual exploitation as an influence in prostitution’ in *Social Work*. Vol. 28(4): 285-289; and, Simons, R.L.; Whitbeck, L.B. 1991. ‘Sexual abuse as a precursor to prostitution and victimization among adolescent and adult homeless women’ in *Journal of Family Issues*. Vol. 12 (3): 361-379.

⁷⁴ Please see: Shouvin, D.P. 1981. ‘Preventing the sexual exploitation of children: A model act’ in *Wake Forest Law Review*. Vol. 17: 535.

exploitation, the Palermo Trafficking in Persons Protocol thus makes reference to general exploitation. By definition, a child will be considered as trafficked once the element of exploitation has been established. As argued above, the Palermo Trafficking in Persons Protocol casts the net so wide that any child caught in an exploitative situation will be considered a victim of trafficking. Although with regard to exploitation the Palermo Trafficking in Persons Protocol is comprehensive enough to cover all aspects of human trafficking, this creates practical problems relating to the investigation and punishment of human traffickers.

Human and child trafficking have long been understood as an issue of migration. The growth of migratory movements within this globalised world has been spurred on by *inter alia*, economic crises, civil wars, natural disasters, ethnic persecutions, social inequalities and broader global transformation.⁷⁵ Studies concluded in the mid 20th century have noted that there were approximately 12 million forced migrants in all regions in the world. As Green and Grewcock have noted, in places where people feel trapped by poverty or have been turned away by restrictive migration and asylum policies, migration through trafficking and other illegal means is regarded as the only means of escape.⁷⁶ With regard to migration, the Palermo Trafficking in Persons Protocol refers to the transportation and transfer of humans for the purposes of exploitation. As trafficking of humans is essentially and by definition a crime involving the transportation of humans within and across countries, the inclusion of a prohibition on illegal migration in the Palermo Trafficking in Persons Protocol was both necessary and essential.

As previously noted, the only universally accepted definition of human trafficking is contained in the Palermo Trafficking in Persons Protocol. However, in order for this definition to be regarded as comprehensive it must define the essential elements of the offence and make reference to the issue of slavery, prostitution and illegal migration. The Palermo Trafficking in Persons Protocol identifies all the definitional aspects of the human trafficking, in particular, the taking of another by any means for

⁷⁵ Lee op cit (n7) at p. 7.

⁷⁶ Green, P and Grewcock, M. 2002. 'The war against illegal immigration: State crime and the construction of a European identity', in *Current Issues in Criminal Justice*. Vol. 14: 87-101 at p. 99. These authors also suggest that these 'broad zones of exclusion' are set up through state policies and laws and represents a common response by states to identify, control and thus exclude those people who it deems to be a threat to society or economic prosperity.

the purpose of exploitation. With regard to slavery, the terms "sale", "procurement", "capture", "supply" and "disposal" could have been included.⁷⁷ The sale, procurement and supply of a person are the definitional elements of human slavery and its omission in the Palermo Trafficking in Persons Protocol is unfortunate. Furthermore, the Palermo Trafficking in Persons Protocol makes no reference to the disposal of a person. In the world of human trafficking, people are disposed for many reasons, in particular, when they are rendered worthless, are of no further use to a particular trafficker, or are sold to another trafficker for some benefit. The failure of the Palermo Trafficking in Persons Protocol to make reference to the disposal of trafficking victims creates an unfortunate gap in its definition of human trafficking. However with regard to illegal migration and exploitation the Palermo Trafficking in Persons Protocol is certainly comprehensive. Illegal migration and exploitation, including their essential elements, are thus fully covered in the definition of human trafficking. Despite the omission of the provisions relating to slavery, the definition on human trafficking in the Palermo Trafficking in Persons Protocol remains comprehensive in nature. Thus, despite its weaknesses, it remains the most comprehensive definition on human trafficking currently in international law and as such, shall be the focus of this study.

4. SOME CONCEPTUAL ISSUES PERTAINING TO CHILD TRAFFICKING

4.1. Causes of child trafficking

There are innumerable reasons why children are trafficked. Trafficking is, however, overwhelmingly a supply and demand driven industry. On the supply side, there are factors that render women and children particularly vulnerable to trafficking especially: processes marked by class, gender and ethnic concerns that serve to marginalise women and girls in, for example, education and unemployment; cultural practices; natural disasters and gender-discrimination in policies. On the demand

⁷⁷ It must be noted that these terms are included in South Africa's current law in section 6 of the Criminal Law (Sexual Offences and other Related Matters) Amendment Act 32 of 2007 and section 1 (1) of the Children's Act 38 of 2005.

side the main cause of child trafficking remains globalisation.⁷⁸ Thus open borders, economic development in certain sectors, restrictive migration policies and an increase in labour laws, all contributes to the trafficking in children. It will be illustrated that these factors are all of a kind that can be improved by states, which, if reduced or eradicated, will in turn decrease the trafficking of children and other human beings.

4.2. Supply Factors

Poverty is one of the most important factors affecting and contributing to the trafficking of children.⁷⁹ Poverty leads to vulnerability, which in turn creates opportunities for exploitation by those more powerful. Children who are poor or who come from poor communities are more likely to be lured by false promises of employments, higher living standards and other attractive economic opportunities.⁸⁰ This is particularly prevalent for the children in Central and Southern Africa, as many are lured into South Africa on promises of employment and better living conditions.⁸¹ However, in reality, they will be sold, traded and exploited by traffickers and their clients.

Poverty levels further result in a lack of education or educational opportunities for children. Children with little to no opportunity to progress in their education are left with very little option but to seek employment.⁸² Similarly, poor infrastructure, poor quality of education and teaching, abuse in schools and lack of adequately trained teachers all influence ones attitude towards the educational system as a whole.⁸³ Parents, and in turn children, who discourage education are increasingly vulnerable to exploitation.⁸⁴ Additionally, a lack of education or a lack of a quality education makes it difficult to enter into the formal or paid employment sector. It has been proven that there is a strong correlation between the trafficking of women and girls

⁷⁸ ILO (2002) op cit (n8) at p. 31.

⁷⁹ ILO (2002) op cit (n8) at p. 32.

⁸⁰ Ibid.

⁸¹ Please see for a greater discussion on this issue: Molo Songololo op cit (n28).

⁸² ILO (2002) op cit (n8) at p. 33.

⁸³ Ibid.

⁸⁴ Ibid.

for prostitution and a lack of education or educational opportunities.⁸⁵ Unfortunately, this is one of the major causes in trafficking in Africa, for example in Nigeria, where the situation is further exacerbated by a weak economy.⁸⁶ Children who have a limited education are therefore more susceptible or gullible to traffickers' false promises of better opportunities and improved living standards.

Additionally, conflicts, civil wars and other violent movements create or worsen existing levels of poverty and lack of educational opportunities, which in turn results in the massive migration of people from their country of origin to countries that are perceived as 'safe'. The main cause of such migration is the fear of being caught up in the violence and/or to escape the destruction violence causes.⁸⁷ Political tensions and conflicts cause political and economic instability, which further increase existing levels of poverty and crime. Conflicts thus provide perfect or ideal circumstances for the trafficking of women and children. The International Organisation for Migration (IOM) has estimated that approximately 175, 000 people (one quarter of the people trafficked around the world annually) are trafficked from Central and Eastern Europe, for reasons largely associated with economic and social tensions and lack of opportunities.⁸⁸ Thus, where there is political and other violent tensions, trafficking will increase, particularly in situations where social and legal structures are undermined or rendered ineffective.

Furthermore, natural disasters are often the last straw for those families and children already living in poverty. Such disasters, unfortunately, affect poor children the most. Natural disasters cause the forced or voluntary relocation of people from those areas most affected to other areas or, in some instances, other countries. These mass relocations most often result in high numbers of unaccompanied or separated children, who are particularly vulnerable and run a greater risk of being abducted.⁸⁹ Similarly, families who are recovering from natural disasters are more open to being persuaded to send their children to other countries for better economic and other

⁸⁵ ILO (2002) op cit (n8) at p. 33.

⁸⁶ See Nwogu, V. 'Trafficking of persons to Europe: The perspective of Nigeria as a sending country.' Presented at the ASI and OIKOS *Conference on trafficking and migration: A human rights approach*. 4th to 5th March 2005, at the British Council, Lisbon, Portugal.

⁸⁷ ILO (2002) op cit (n8) at p. 34.

⁸⁸ International Organisation for Migration. Available at: <http://www.iom.int/jahia/Jahia/lang/en/pid/1>. Accessed on: 26 August 2010.

⁸⁹ ILO (2002) op cit (n8) at p. 35.

opportunities.⁹⁰ It is therefore in these circumstances that traffickers are most dangerous as they prey on those children and families that are vulnerable and weak.

Furthermore, in many poor or rural communities and countries, there remains a long standing tradition of child labour; whereby children are expected, from a certain age, to assist the family in the home or in the fields. This is particularly common in Africa where it is considered appropriate for children to help in maintaining the family's small holding. Unfortunately this can lead to exploitative child labour practices from which it is difficult to escape.⁹¹ Related to this issue is the social trend to send one's children to other places in order to seek employment. This occurs in both developed and developing states and occurs for many reasons. However, what results is the placement of the child beyond parental control, which makes it easier for the child to be exploited and manipulated into trafficking.⁹²

Finally, gender-based discrimination is one of the key factors or causes of trafficking. Girl children are most often regarded as expendable and socially inferior to their male counterparts. Cultural, religious and social traditions have resulted in the unequal treatment of girls and boys, which has manifested itself into law and law enforcement policies and practices.⁹³ In many communities, girls do not have equal opportunities in education and employment but rather are expected to assist in the family and take on familial responsibilities. However, the exploitative nature of this practice is largely ignored due to a lack of information by law enforcement and a lack of education on the part of the families.

4.3. Demand Factors

As noted above, child trafficking relies on several demand factors. Thus, where there is a particular market, individuals will find a way to supply that demand in order to

⁹⁰ ILO (2002) op cit (n8) at p. 34.

⁹¹ Ibid.

⁹² Ibid.

⁹³ ILO (2002) op cit (n8) at p. 35.

make money.⁹⁴ Trafficking is unfortunately no different. Trafficking is thus primarily about trade, money and exploitation and as such, has been increased by current economic growths in the globalised world.⁹⁵

Undoubtedly, one of the fastest growing sectors globally is the commercial sex industry. The rapid increase in this sector has resulted in a growing demand for children for the sole purpose of sexual exploitation.⁹⁶ The growth in child prostitutes has stemmed from ignorant beliefs towards HIV/Aids and its transmission, societal sexualisation of the youth, a growing indifference to the consequences of sexual exploitation of children and a demand for younger sexual partners.⁹⁷ Sex tourism has emerged as new international problem for children. Sex tourists are drawn into certain countries, for example Kenya, Netherlands and Thailand, and promised an abundance of cheap child prostitutes.⁹⁸ It has been shown that women and children are trafficked into these countries to meet the growing demand for cheap sex. However, it must be noted that the reasons that motivate trafficking and the methods used do change over time. Thus, as the demand changes so traffickers will strive to supply the newly created market.

5. CONTEMPORARY VIEWS ON CHILD TRAFFICKING

Recently, the trafficking of children has been viewed from a human rights perspective. Trafficking and how it has been perceived has progressed over time from a racial stereotype to an issue of prostitution to an issue of gender. Thus, the human rights focus on child trafficking stems from issues of gender and equality.

Currently it is accepted that efforts to combat child trafficking needs to focus on a human rights perspective and on the gender implications of the problem. In other words, law and policies need to combat gender inequalities, which in turn will reduce

⁹⁴ United Nations Division for the Advancement of Women and the United Nations Office on Drugs and Crime op cit (n32) at p. 8.

⁹⁵ ILO (2002) op cit (n8) at p. 31.

⁹⁶ United Nations Division for the Advancement of Women and the United Nations Office on Drugs and Crime op cit (n32) at p. 8.

⁹⁷ ILO (2002) op cit (n8) at p. 32.

⁹⁸ See Kibicho op cit (n14).

or eliminate child trafficking. Child trafficking is, without doubt, fuelled by patriarchal beliefs and out-dated cultural practices that view women and girls as weak and, thus expendable. Gender based violence is rife throughout the world and continues to be based on gender discrimination and racism.⁹⁹ Similarly, throughout the Western world, there continues to be social structures and cultural practices that violate the inherent dignity of women and girls;¹⁰⁰ for example, in many parts of the world, women still find it difficult to enter certain careers due to deep-seated gender stereotypes.¹⁰¹

Human rights have been defined as universal or natural rights that one has by virtue of being a human and rational being.¹⁰² The word 'right' implies possession of normative property whereby there rests a corresponding duty or obligation on the part of another. According to Dworkin, a right 'is a claim that it would be wrong for a government to deny an individual even though it would be in the general interest to do so.'¹⁰³ All human rights are interdependent and interrelated. One right is thus dependent on another to give it meaning and force. Human dignity is undeniably one of the most important human rights and in order to fully realise and appreciate this right, certain other rights must exist; for example the right to life and the right to security of all persons. Due to the interdependent nature of all human rights, it is difficult to argue that one has a right to dignity but no right to equality.

Child trafficking and the debates it has provoked have recently focused on this link between the right to dignity and equality. It has been argued that as long as cultural and other practices continue to perpetuate gender-based policies and practices, women and girls will continue to have their right to dignity and equality violated through the act of trafficking. Conversely, if such practices were prohibited, the sale and exploitation of women and children should decrease as a result. Recent debates have thus been focused on the drafting of policies and legislation that specifically recognises that gender discrimination fuels the trafficking of women and girls.

⁹⁹ United Nations Division for the Advancement of Women and the United Nations Office on Drugs and Crime op cit (n32) at p. 7.

¹⁰⁰ Ibid.

¹⁰¹ See DeLaat, J. 2007. *Gender in the workplace: A case study approach* (2nd ed). SAGE Publications: Thousand Oaks.

¹⁰² Cranston op cit (n34) at p. 1-2.

¹⁰³ Dworkin, R. 1978. *Taking rights seriously* at p. 269.

6. CONCLUSION

Child trafficking remains one of the worst forms of child labour and results in the violation of some of the child's core human and other rights. States, together with the international community as a whole, need to find practical solutions to effectively prohibit child trafficking and the factors that sustain it. This chapter briefly discussed the history of human trafficking from its origins in the late nineteenth century to the present day. With regard to the definition of human trafficking, the Palermo Trafficking in Persons Protocol was critically assessed.

This chapter identified the definitional elements of the offence of human trafficking; namely the taking of another for the purposes of exploitation, and assessed the definition as contained within the Palermo Trafficking in Persons Protocol against trafficking's historical associations with slavery, prostitution and illegal immigration. It was found that the Palermo Trafficking in Persons Protocol, despite the omission with regard to slavery, was sufficient and covered all the necessary aspects of human trafficking. Thus despite its weaknesses, the definition of human trafficking in the Palermo Trafficking in Persons Protocol is comprehensive in nature and as such, can be used to investigate and punish traffickers in humans. Finally, this chapter identified that factors that sustain human trafficking globally, in particular, high levels of poverty, inadequate domestic laws, lack of education and the demand for cheap labour. It was argued that states, such as South Africa, remain obligated to take steps to reduce or eradicate the factors that sustain human trafficking.

The following chapter will provide a comprehensive overview on South Africa's international and regional obligations to prevent and prohibit child trafficking. It will thus be argued that South Africa remains obligated to prevent the trafficking and exploitation of women and children.

Chapter Three

SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL AND AFRICAN REGIONAL LAW

1. INTRODUCTION

Human trafficking is undoubtedly one of the gravest human rights abuses currently perpetuated throughout the global world. The international community has attempted to respond to this growing problem through the creation of various international instruments, which directly and indirectly deal with the issue of child trafficking. This chapter will examine the key international documents relating to child trafficking, especially the Palermo Trafficking in Persons Protocol;¹⁰⁴ CRC¹⁰⁵ and its Optional Protocol on the Sale of Children;¹⁰⁶ ILO Convention on Child Labour¹⁰⁷ and Recommendation c 190;¹⁰⁸ and, CEDAW.¹⁰⁹ Despite the almost universal ratification of the CRC and the increasing number of states adopting the Palermo Trafficking in Persons Protocol, child trafficking continues to occur on almost a daily basis.

Similarly, many regional groupings throughout the world have attempted to respond to the issue of child trafficking. Regional bodies such as the African Union (-AUø), European Union (-EUø) and the Organisation of American States (-OASø), have attempted to develop existing international instruments in order to make them more

¹⁰⁴ Supplementing the United Nations Convention against Transnational Organized Crime. G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49 at 60. U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

¹⁰⁵ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167. U.N. Doc. A/44/49 (1989). Entered into force 2 September 1990.

¹⁰⁶ Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6. U.N. Doc. A/54/49. Vol. III (2000). *Entered into force* 18 January 2002 and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7. U.N. Doc. A/54/49. Vol. III (2000). *Entered into force* 12 February 2002.

¹⁰⁷ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161. *Entered into force* 19 November 2000

¹⁰⁸ International Labour Organization Recommendation (No. 190) Concerning Worst Forms of Child Labour Convention, 1999. 17 June 1999. Geneva, Switzerland.

¹⁰⁹ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193. U.N. Doc. A/34/46. Entered into force 3 September 1981.

accessible and applicable to that particular region. This paper will focus on the laws and policies created by the AU as South Africa is one of its member states. The AU created specific child trafficking laws to meet the specific and unique challenges facing the continent as a whole. Unlike the other regional groupings, Africa hosts some of the poorest nations in the world with high levels of unemployment and low levels of service delivery. Due to the increasing demands for better health care and housing, issues such as child trafficking is often pushed to the periphery. Through the work of various NGOs, the African region has created instruments that deal particularly with the issue of child trafficking on the continent specifically the African Children's Charter,¹¹⁰ the African Youth Charter,¹¹¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the AU Women's Protocol).¹¹²

The international and regional instruments on child trafficking, discussed above, places various obligations upon states. Such obligations are essential to the effective elimination of child trafficking throughout the global world. This chapter aims to critically discuss the main obligations imposed on South Africa by the international and African community.

2. A BRIEF OVERVIEW OF THE LAW ON CHILD TRAFFICKING

2.1. UN treaties

The UN has over the last few years develop various international instruments, which aim to effectively eliminate child trafficking. For much of the 1900s, states have been under immense political and other pressure to prevent child trafficking. The International Agreement for the Suppression of the White Slave Traffic of 1904 and 1910¹¹³ placed specific obligations upon states to prevent the trafficking of white

¹¹⁰ OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29 November 1999.

¹¹¹ Adopted by the AU in 2006. No full citation could be found for this Charter.

¹¹² Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000). Reprinted in 1 Afr. Hum. Rts. L.J. 40. Entered into force 25 November 2005.

¹¹³ International Agreement for the Suppression of the White Slave Traffic of 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83. Entered into force 18 July 1905; International Convention for the Suppression of

women and children. Although, as previously discussed, these agreements were born out of the social purity movements at the time, they nonetheless required states to take measures to prevent the trafficking of women and children. States were, under these agreements, expected to: cooperate with other states in their efforts to prevent human trafficking;¹¹⁴ establish the causes of trafficking;¹¹⁵ and, repatriate the victims to their country of origin.¹¹⁶ The International Agreements for the Suppression of the White Slave Traffic¹¹⁷ were followed up by various League of Nations instruments; for example the Trafficking in Women Convention of 1921¹¹⁷ and the Suppression of Trafficking in Women Convention of 1933.¹¹⁸ According to article 2, 3, 4 and 6 of the Trafficking in Women Convention and article 1 and 2 of the Suppression of Trafficking in Women Convention, states must take measures to discover, prosecute and punish all persons who attempt to or do traffic children. Furthermore, article 3 of the Suppression of Trafficking in Women Convention requires states to cooperate in the eradication of child trafficking; whilst article 7 of the Trafficking in Women Convention requires all parties to protect women and children whilst they are travelling internationally. More recently, the UN enacted the CRC in 1989, which required states to protect children from various forms of abuse including economic,¹¹⁹ sexual¹²⁰ and physical abuse.¹²¹

In 2000, the CEDAW was enacted and required states to take all appropriate measures to suppress all forms of trafficking in women and exploitation of prostitution of women.¹²² Furthermore, the Palermo Trafficking in Persons Protocol, which supplements the UN Convention on Transnational Organised Crime,

the White Slave Traffic. May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23. Entered into force 21 June 1951.

¹¹⁴ See Articles 1, 2 (1) and 3 (1) of the International Agreement for the Suppression of the White Slave Traffic.

¹¹⁵ See Article 3 (1) and (2) of International Agreement for the Suppression of the White Slave Traffic.

¹¹⁶ See Article 3 and 4 of International Agreement for the Suppression of the White Slave Traffic.

¹¹⁷ International Convention for the Suppression of the Traffic in Women and Children, 1921 [1922] LNTS Ser 70; 9 LNTS 415, *as amended by* Protocol signed at Lake Success, New York, on 12 November 1947, to amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921.

¹¹⁸ International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. Entered into force 24 August 1934.

¹¹⁹ Article 32 of the CRC.

¹²⁰ Articles 19, 34 and 35 of the CRC.

¹²¹ Article 19 of the CRC.

¹²² Article 6 of CEDAW.

requires states to put in place mechanisms to effectively respond to human trafficking including criminalising trafficking in persons, prosecuting offenders, protecting and assisting victims, and educating the public and victims about trafficking in persons.¹²³ It is thus evident that these international instruments place particular obligations on states to punish child traffickers and take effective measures to prevent this transnational crime. However, the above-mentioned instruments are not the only ones that place particular obligations on states to react and respond to the trafficking of children.

2.2. ILO instruments

The ILO has for many years been focused on the issue of child trafficking. Although its initial work focused predominantly on the problems of the 'white slave trade', the ILO's focus has recently shifted to more general human trafficking. Through the enactment of its Forced Labour Conventions (c 105 and c 29),¹²⁴ states are under an obligation to prohibit and abolish all forms of forced or compulsory labour.¹²⁵ Forced or compulsory labour is defined in ILO Convention c 29 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'.¹²⁶ Furthermore, in 1999 the ILO enacted its Convention on Child Labour.¹²⁷ This Convention places an obligation on states to effectively and speedily eliminate all forms of child trafficking, as such amounts to one of the worst forms of child labour.¹²⁸ Article 3 of ILO Convention on Child Labour defines worst form of child labour as, among other things:

all forms of slavery or practices similar to slavery, such as the sale and trafficking of children; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs.

¹²³ See articles 2, 4, 5, 6 and 9 of the Palermo Trafficking in Persons Protocol.

¹²⁴ Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291. Entered into force 17 January 1959; Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55. Entered into force 1 May 1932.

¹²⁵ Article 1 of c 105 and Articles 1, 4, 5 and 7 of c 29.

¹²⁶ Article 2 of ILO c 29.

¹²⁷ 2133 U.N.T.S.161. Entered into force 19 November 2000.

¹²⁸ Article 3 (a) read with article 4 of the ILO Convention on Child Labour.

All member states are urged to take immediate action to align their national law to the requirements of this Convention.¹²⁹ This Convention thus places clear and distinct obligations on states to take effective and immediate steps to prevent the sale of children and child trafficking.

2.3 International criminal law

With regard to the criminalisation and punishment of traffickers, the Rome Statute of the International Criminal Court (‘Rome Statute’) is applicable.¹³⁰ According to article 7 (1)(c) of the Rome Statute, the enslavement of any person constitutes a crime against humanity. Enslavement is defined as the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular, women and children. The offence of trafficking quite simply amounts to the trading of humans as commodities. States are thus under an obligation to: (a) render enslavement an offence in their national law, and (b) punish any person who is guilty of this offence.

2.4 The African regional system’s instruments

The African regional system has imposed various obligations on its member states to prevent the trafficking of children on the continent. Under the African Charter on Human and People’s Rights (‘African Charter’), article 18 (3) reads: ‘The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.’ Thus, through this provision, member states are enjoined to adopt measures to protect women and children according to the standards currently set in international law. Similarly, the African Children’s Charter notes in its preamble that ‘the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger’ ø The Preamble further notes that children require particular care with regard to their

¹²⁹ Articles 4, 5, 6 and 7 of the ILO Convention on Child Labour.

¹³⁰ 2187 U.N.T.S. 90. Entered into force 01 July 2002.

health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.¹³¹ Member states must therefore ensure and take measures to prevent: the exploitation of children;¹³² sexual, physical and mental abuse of children;¹³³ and, the sale and abduction of children.¹³⁴

Furthermore, the AU Women's Protocol was enacted to expand on article 18 of the African Charter. Article 18 calls on member states to eliminate all forms of discrimination against women and to ensure that the rights of women are protected. The protection of the rights of women is reaffirmed in both the preamble and article 2 of the AU Women's Protocol. States must therefore adopt legislation to effectively prohibit the discrimination of women and girls in Africa. Article 4 (2)(g) requires states to prevent and condemn the trafficking in women, punish traffickers, and protect and assist victims of trafficking. Furthermore, the African Youth Charter places additional obligations on states as they are required to enact and enforce legislation that protects girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography.¹³⁵ This Charter thus acknowledges the need for states to eliminate all forms of discrimination against girls and young women.¹³⁶ The AU, much like the international community, has thus imposed various obligations on its member states to effectively punish and prevent the trafficking in women and children.

From the following brief discussion it is clear that there are a number of common elements in the legal instruments that have been previously discussed. These legal instruments impose obligations upon states in regard to the prevention and eradication of child trafficking globally. States are thus required to do the following: prevent human trafficking, assist the victims of trafficking including repatriating them back to their country of origin, cooperate with the international community and criminalise the offence of child trafficking. These common themes shall be discussed in greater detail below.

¹³¹ Paragraph 6 of the African Children's Charter.

¹³² Article 15 of the African Children's Charter.

¹³³ Articles 16 and 27 of the African Children's Charter.

¹³⁴ Article 27 of the African Children's Charter.

¹³⁵ Article 23 (1)(1) of the African Youth Charter.

¹³⁶ Article 23 (1) of the African Youth Charter.

3. THE DUTY TO PREVENT TRAFFICKING AND THE EXPLOITATION OF CHILDREN

All of the above-mentioned international and regional instruments require states to prevent some form of act or event from occurring. With regard to the trafficking of children, states are expected to implement standards, procedures and legislation to effectively prevent human trafficking from occurring. As noted in chapter two, the definition of child trafficking is best captured in the Palermo Trafficking in Persons Protocol, which marked the first direct attempt by the international community to comprehensively define human trafficking in international law. Under Article 3 (a), human trafficking is defined 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 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 purposes of exploitation shall be considered trafficking in persons^ø even if this does not involve any of the means set forth in the definition.

Article 3 (c) states that “[t]he recruitment, transportation transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking in persons^ö even if this does not involve any of the means set forth in subparagraph (a) of this article.^ø Article 3 (a) and (c) note that the trafficking of children and women amounts to the holding or transporting of a person from one area or country to another for the purposes of exploitation. Thus, even if the trafficker does not use any of the means listed in this article, the person may be deemed to be a trafficker in persons. The Palermo Trafficking in Persons Protocol therefore places greater emphasis on the transportation and harbouring of victims for the purpose of exploitation than on the means used to traffic a woman or child.

In 2002, the UN High Commissioner for Human Rights issued the “Recommended Principles and Guidelines on Human Rights and Human Trafficking” (“UN Principles and Guidelines”).¹³⁷ These recommended principles provide an informed

¹³⁷ United Nations Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking E/2002/68/Add.1.

interpretation of the Palermo Trafficking in Persons Protocol and identify the human rights considerations that must be taken into account when implementing this Protocol.¹³⁸ Principles 1 and 2 state that the human rights of all trafficked persons must be at the heart of all efforts to prevent and combat human trafficking. The notion that the rights of women and children who are trafficked must be given due consideration was further endorsed by the African Youth Charter, which held that states must uphold the human rights of all young women and girls on the African continent.¹³⁹ The UN Principles and Guidelines further emphasised that states remain under an obligation in international law to act *with due diligence* to prevent trafficking, prosecute traffickers and assist and protect the victims of trafficking.

One of the most important elements of the UN Principles and Guidelines is that it includes express reference to the rights of children who are trafficked and stresses the importance of ensuring that the best interest of the child is the over-arching principle at all times.¹⁴⁰ The UN Principles and Guidelines aim to ensure that victims of trafficking have their human rights upheld and respected through law. States are thus under an obligation to ensure that *all appropriate measures and procedures adopted to prevent and prohibit* human trafficking are done with the victims human rights in mind. Although these principles carry little legal force in international law, they continue to be used as a normative framework for the creation of anti-trafficking law. Thus, these principles will provide states, such as South Africa, with the basis upon which domestic law can be created and enforced. As the trafficking of children results in a serious violation of their human rights, the CRC and the African Children's Charter are highly relevant.

The CRC was a landmark treaty dealing with children's rights,¹⁴¹ and remains the most ratified human rights instrument in international law.¹⁴² Despite the importance of the CRC for children's rights, this instrument does not define child trafficking.

¹³⁸ ILO. 2008. *Combating trafficking in children for labour exploitation: A resource kit for policymakers and practitioners*. Geneva: International Labour Office at p. 18.

¹³⁹ The Preamble read with article 23 (1) of the African Youth Charter.

¹⁴⁰ Principle 10 of UN High Commissioners Principles and Guidelines.

¹⁴¹ Neiglick, E. 2004. 'Child trafficking: The legal instruments' in *Juvenile Justice Quarterly*. Vol. 1 (3): 8-11 at p. 8.

¹⁴² United Nations International Children's Emergency Fund (UNICEF). 2005. *Combating child trafficking*. Interparliamentary Union: United Nations International Children's Emergency Fund at p. 26.

The Palermo Trafficking in Persons Protocol stems to curb the harbouring and transportation of humans, especially children. A similar provision can, however, be found in the CRC in article 11, which places an obligation on states to adopt measures to combat the illicit transfer and non-return of children abroad. With regard to trafficking however, article 35 requires states to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. Like the CRC, the African Children's Charter expressly contains a trafficking provision. Article 29 of the African Children's Charter requires states to take all appropriate measures to prevent the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child. Under these provisions, any person who abducts sells or traffics a child will be guilty of an offence. However, under the definition of child trafficking in the Palermo Trafficking in Persons Protocol, an act will not amount to trafficking if it was not done for the purpose of exploitation. In other words, if a child is harboured for any other reason but exploitation, that act may not amount to child trafficking. However, under the CRC and the African Children's Charter the mere fact that a child is taken without the consent of his or her parents is enough to establish the offence of child trafficking.

Following the enactment of the African Children's Charter, the AU Women's Protocol further recognised that states need to take all appropriate and effective measures to prohibit all forms of violence against women; including unwanted or forced sex in both the private and the public spheres.¹⁴³ Article 4 (2)(g) places an obligation on states to prevent and condemn the trafficking in women, punish perpetrators and protect women who are most at risk.¹⁴⁴ The AU Women's Protocol is one of the first documents in Africa to expressly recognise that the exploitation of women and children can occur within the private sphere. Through this Protocol, states are thus required to take steps to ensure that women are always protected from violence and that perpetrators are punished regardless of their relationship with the victim.¹⁴⁵ The AU Women's Protocol therefore places a heavier burden on states

¹⁴³ Article 4 (2)(a) of the Protocol on the Rights of Women in Africa.

¹⁴⁴ The list of women most at risk is provided for in article 4 (2) of the AU Women's Protocol.

¹⁴⁵ Article 1 (h)(j) read with article 2 of the AU Women's Protocol.

with regard to violence against women and children as states must protect women both in the public and private spheres.

Due to the increasing concern of the numbers of children being trafficked and sold internationally for the purposes of child prostitution and child pornography, the international community enacted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (the CRC Optional Protocol on the Sale of Children).¹⁴⁶ Unfortunately, this Protocol does not define nor deal directly with child trafficking. Rather, it defines the sale of children as being: "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."¹⁴⁷ In comparison with the universally accepted definition of child trafficking in the Palermo Trafficking in Persons Protocol, it can be argued that for the purposes of defining child trafficking, child trafficking would be covered under the definition of "sale of children" in the CRC Optional Protocol on the Sale of Children. Thus, selling a child for a benefit can be regarded as exploitation and as such, falls under article 3 (a) of the Palermo Trafficking in Persons Protocol.

Furthermore, unlike the CRC which only requires states to take "all appropriate measures" to prevent the abuse and exploitation of children and their rights, the CRC Optional Protocol on the Sale of Children uses significantly stronger language ("shall prohibit") by obliging states to make certain activities criminal offences in relation to the sale of children.¹⁴⁸ Thus, the CRC Optional Protocol on the Sale of Children requires the following acts to be prohibited under states national law: the offering, delivering or accepting, by whatever means, a child for the purposes of sexual exploitation; transfer of organs of the child for profit; engagement of the child in forced labour; and improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.¹⁴⁹ Kassan argues that although child trafficking is not specifically mentioned in the CRC Optional Protocol on the Sale of Children, the acts of offering, delivering or

¹⁴⁶ G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6. U.N. Doc. A/54/49. Vol. III (2000). Entered into force 18 January 2002.

¹⁴⁷ Article 2 (a) of CRC Optional Protocol on the Sale of Children.

¹⁴⁸ South African Law Commission (SALC). 2006. Discussion Paper 111. *Trafficking in persons*. Project 131. Pretoria: South African Law Commission at para. 2.32.

¹⁴⁹ Article 3 of Protocol.

accepting a child for sexual exploitation, transfer of organs or forced labour, could be interpreted as amounting to child trafficking.¹⁵⁰ This would, as argued above, be in line with the Palermo Trafficking in Persons Protocol's definition of child trafficking as a child is being transported or harboured for an exploitative purpose. The UN Principles and Guidelines expressly recognised that trafficked children suffer increased risk of vulnerability to exploitation, which should be prevented through law, policies, programmes and *state intervention*.¹⁵¹

Article 32 of the CRC and article 15 of the African Children's Charter expressly place an obligation on states to protect all children from economic exploitation. Both articles are housed under the provision on child labour.¹⁵² However, unlike article 32 of the CRC, article 15 of the African Children's Charter provides for both the informal and formal sectors of employment. The inclusion of this provision was important as the African community recognised that most children in Africa are exploited within informal work environments and not within formal employment. Both articles do, however, expressly prohibit performing any work that is likely to be hazardous to or interfere with the child's education, health or social development. Under article 15 of the African Children's Charter member states are required to take all legislative and administrative measures to ensure the full implementation of this section. However, article 32 requires states to go beyond mere legislative and administrative measures and requires states to take all social and educational measures to fully implement this article. States must further provide the minimum age of employment, regulate the hours and conditions of employment, and penalise those who fail to adhere to these provisions.¹⁵³ However, the African Children's Charter goes further than any other international or regional document in the protection of children when it included begging as another form of exploitation of children. Thus through article 29 (b), the AU recognised that severe levels of poverty

¹⁵⁰ As quoted in Allais, C., Combrinck, H., Connors, D., Jansen van Rensburg, M., Ncoyini, V., Sithole, P., Wentzel, M., Barolsky, V., Hadland, A. & Tilley, V. 2010. *Tsireledzani: understanding the dimensions of human trafficking in southern Africa*. Pretoria: National Prosecuting Authority of South Africa at p. 27.

¹⁵¹ Principle 10 of the UN High Commissioners Principles and Guidelines.

¹⁵² The notion of trafficking as a form of labour was also recognised in the report of the Special Rapporteur on Contemporary Forms of Slavery. In the reports 'Causes and Consequences' it was reported that there are links between forced labour, bonded labour and human trafficking. See Shahinian, G. 2009. *Report of the special rapporteur on contemporary forms of slavery, including its causes and consequences*. UN Doc A/HRC/12/21 at para. 62.

¹⁵³ See article 32 (2) (a) to (c) of the CRC and article 15 (2) (a) to (d) of the African Children's Charter.

on the continent may encourage the exploitation of children through begging. The African Children's Charter is also in line with the ILO's conventions and recommendations on child labour.

The ILO Convention on Child Labour's main objective is to eliminate the worst forms of child labour. As previously discussed, article 3 of ILO Convention on Child Labour defines the worst forms of child labour in three parts: (a) all forms of slavery or practices akin to slavery, including child trafficking; (b) use or offering of a child for prostitution, pornography or pornographic performances; and, (c) use, procuring or offering of a child for illicit activities, including drug trafficking. All member states are urged to take immediate action to align their national law to the requirements of this Convention. This provision is complementary to CEDAW, which provides that states must take all appropriate measures to suppress all forms of trafficking in women and exploitation of prostitution of women.¹⁵⁴ In both provisions, child prostitution is regarded as an exploitative labour practice and as such, places an obligation upon states to take all appropriate measures to eliminate it.

Furthermore, the ILO's definition of the worst forms of child labour is most certainly in keeping with the Palermo Trafficking in Persons Protocol's definition of child trafficking as both are focused on the exploitation of children in all its forms. However, the ILO Convention on Child Labour goes beyond those labour practices that are most often recognised as exploitative in nature (sweatshops, agriculture, mining, for example) and includes illegal and criminal situations (drug trafficking, prostitution, for example). The ILO Convention on Child Labour is in line with current international standards in that it places an obligation on states to prohibit the economic exploitation of children in their domestic law. Therefore, under CEDAW, the Palermo Trafficking in Persons Protocol and ILO Convention on Child Labour, there is no uncertainty with regard to the obligation of states to adopt all appropriate measures to eradicate the economic exploitation of children.

As previously noted, the ILO has focused much of its recent work on the causes of child trafficking and the various factors which sustain it, for example natural

¹⁵⁴ Article 6 of CEDAW.

disasters, civil wars and high levels of poverty. Through its work, the international community has recognised that children are no longer trafficked solely for sexual reasons. This notion was recognised and accepted by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the monitoring body of CEDAW. In its General Recommendation 19, the CEDAW Committee dealt with the issue of trafficking within the context of violence against women. The CEDAW Committee expressly recognised that high levels of poverty and unemployment greatly increases opportunities for the trafficking in women.¹⁵⁵ The Committee thus evaluated the various practices related to trafficking including sex tourism, recruitment of women and children as domestic labour from developing countries to developed countries, and forced marriages with foreign nationals. Furthermore, the CEDAW Committee noted that armed conflicts and war lead to an increase in the level of prostitution, sexual assault and the trafficking of women and children. Thus in order to combat the exploitation of women, the CEDAW Committee requires states to implement specific protective and punitive measures.¹⁵⁶ States are further required, in its periodic reports to the CEDAW Committee, to describe all measures taken to ensure the protection of women and their rights, particularly with regard to trafficking. States are thus under an obligation to not only ensure that measures are being adopted but that these measures are effective.¹⁵⁷

Article 19 of the CRC provides that states must take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of abuse, including sexual abuse. Similarly, article 16 of the African Children's Charter requires member states to take specific legislative, administrative, social and educational measures to protect the child from sexual abuse. One of the most notable differences between these two provisions lies in the obligation it imposes on states. The CRC requires states to take whatever measure is necessary to ensure that a child is not sexually abused. The African Children's Charter however requires states to take very specific action, action that would ultimately protect the child from sexual abuse. It could be argued that the former places a greater burden on states, as states are expected to take all appropriate measures to prevent the abuse of children

¹⁵⁵ CEDAW Committee General Recommendation 19 at para. 14.

¹⁵⁶ CEDAW Committee General Recommendation 19 at para 16 read with para 24 (g).

¹⁵⁷ CEDAW Committee General Recommendation 19 at para. 24 (h).

whereas the latter requires states only to take action that is specifically focused on the prevention of child abuse.

Furthermore, article 27 of the African Children's Charter reads: 'State Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse. The sexual exploitation of children includes: the inducement, coercion or encouragement of a child to engage in sexual activity;¹⁵⁸ use of a child in prostitution;¹⁵⁹ and, the use of a child in pornography.¹⁶⁰ In comparison, article 34 of the CRC reads very closely with the African Children's Charter except with regard to states obligations in preventing the sexual exploitation of children. Article 34 requires states to take all appropriate national, bilateral and multilateral measures to prevent the sexual exploitation and sexual abuse of children. Article 27 is thus less clear with regard to states obligation to protect children from sexual exploitation. However, one must assume, by the wording of article 27 (1), that African states must to do all they can to prevent the sexual abuse of children. Another difference between these articles lies in the use of the word 'encouragement' in article 27 (1)(a), which is omitted in article 34 (1)(a). Through the use of this term, one can argue that the AU contemplated a situation whereby traffickers may encourage families or the child itself to engage in sexual acts for various reasons including financial and other benefits. As previously noted, the African continent hosts some of the poorest nations in the world with high levels of poverty and unemployment. Due to these circumstances, families may be tempted to use their children as another source of income.

It must therefore be argued that states are obligated to prevent the trafficking of women and children through the enactment of law, policies and other necessary mechanisms. States must therefore, under the international and regional instruments discussed above, take all the necessary steps to effectively prevent and eradicate all forms of exploitation of children through the adoption of laws and policies. Therefore, it can be argued that South Africa is obligated to adopt all appropriate

¹⁵⁸ Article 27 (1)(a) of the African Children's Charter.

¹⁵⁹ Article 27 (1)(b) of the African Children's Charter.

¹⁶⁰ Article 27 (1)(c) of the African Children's Charter.

domestic remedies to prevent the trafficking and exploitation of children within its borders.

4. ASSISTING THE VICTIMS OF TRAFFICKING

It is generally understood or accepted that children who are trafficked suffer great emotional, physical and psychological harm.¹⁶¹ The CRC¹⁶² and the African Children's Charter¹⁶³ repeatedly recognise that children are in need of special protective care and assistance, due to their age, vulnerability, immaturity and physical size. Similarly, the Palermo Trafficking in Persons Protocol recommends that all states adopt appropriate punitive and protective measures in order to protect children from trafficking and exploitation.¹⁶⁴ Although both the CRC and the African Children's Charter recognise that the duty to protect a child first lies with the parents¹⁶⁵ both acknowledge that in the absence of the parents or where the parent does not act in the best interest of the child, it is the state that bears the responsibility to protect the child. Furthermore, when multinational or international crimes occur, it is the state that bears the duty and responsibility to assist the child.

Article 39 of the CRC requires states to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim from: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhumane or degrading treatment or punishment; or armed conflicts. States are further obligated to assist the child in an environment, which fosters the health, self-respect and dignity of the child.¹⁶⁶ Under the CRC Optional Protocol on the Sale of Children, states are further obligated to take all measures to provide the appropriate assistance to child victims including their full social reintegration, and their full physical and psychological recovery.¹⁶⁷ Similarly, article 10 of the CRC Optional Protocol on the Sale of Children places an obligation on states to promote

¹⁶¹ For further discussion on this, see: UNICEF's website. Available at: www.unicef.org. [Accessed 12 June 2010].

¹⁶² For example: paragraph 4, 5, 9 and 11 of the Preamble and in article 3, 19 and 20 of the CRC.

¹⁶³ For example: paragraph 3 and 5 of the Preamble and in article 16 of the African Children's Charter.

¹⁶⁴ Paragraph 24 of the Palermo Trafficking in Persons Protocol.

¹⁶⁵ Article 5 of the CRC and article 20 of the African Children's Charter.

¹⁶⁶ See article 39 of the CRC.

¹⁶⁷ Article 9 (3) of the CRC Optional Protocol on the Sale of Children.

international cooperation to assist child victims, particularly with regard to their physical and psychological recovery, their social reintegration and repatriation.¹⁶⁸

The African Children's Charter does not have a corresponding provision to article 39 in the CRC. In comparison, article 16 (2) of the African Children's Charter requires states to adopt protective measures to assist victims of child abuse and torture. These measures include: "the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention for the identification, reporting referral and investigation, treatment and follow-up of instances of child abuse and neglect."¹⁶⁹ This article must be read with article 20 of the same treaty, which requires states, in accordance with their means and national conditions, to adopt all appropriate measures to "assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing."¹⁷⁰ With regard to the assistance to child victims, the African Children's Charter is clearly the weaker provision as it does not clearly and concisely outline the obligation imposed on member states. Despite this weakness in the African Children's Charter, both instruments impose obligations on states, most notably to assist the child victim with all its psychological, emotional and physical needs.

The Palermo Trafficking in Persons Protocol, like the above two instruments, requires states to protect and assist victims of trafficking having respect for their human rights.¹⁷¹ Article 6 is solely dedicated to outlining states obligation to assist and protect the victims of trafficking, which includes requiring each state to ensure that its domestic legal and administrative systems contain measures that provide assistance to the victims of trafficking.¹⁷² These systems should include the implementation of measures to provide for the "physical, psychological and social recovery of victims of trafficking in persons"¹⁷³ Furthermore, states are required to

¹⁶⁸ Article 10 (2) of the CRC Optional Protocol on the Sale of Children.

¹⁶⁹ Article 16 of the African Children's Charter.

¹⁷⁰ Article 20 (2)(a) of the African Children's Charter.

¹⁷¹ Article 2 (b) of the Palermo Trafficking in Persons Protocol.

¹⁷² Article 6 (1) of the Palermo Trafficking in Persons Protocol.

¹⁷³ This includes: appropriate housing, counselling, medical assistance, employment and education. See article 6 (3) of the Palermo Trafficking in Persons Protocol.

take note of the age, gender and special needs of the victim especially when the victim of human trafficking is a child.¹⁷⁴ This provision thus ensures that child victims are given special care and assistance.

One of the most common forms of state assistance provided to children who are trafficked is repatriation. Repatriation requires states to return a foreign trafficked child back to their country of origin, in circumstances where the child's safety and best interest have been taken into account. The CRC Optional Protocol on the Sale of Children is one of the few international instruments that provides for the repatriation of child victims.¹⁷⁵ Article 8 of the Palermo Trafficking in Persons Protocol provides further clarity on this issue by requiring states to facilitate and accept, with regard to the victim's safety, the return of that child without undue or unreasonable delay to the country of which they are a national or hold permanent residence status.¹⁷⁶ States are further obligated to assist these child victims in travelling without the proper documentation.¹⁷⁷ Despite the importance of repatriation for children, there is no clause in either the CRC or the African Children's Charter on this issue. Furthermore, even though it is contained within the CRC Optional Protocol on the Sale of Children, the obligation on states in relation to the repatriation of child victims is not explained. The only guidance we have with regard to repatriation is that the best interests of the child must always be considered.¹⁷⁸ However, the UN High Commissioner on Human Rights has noted that repatriation is not always done in the best interest of the child¹⁷⁹ and, thus, recommended that states cooperate with NGOs and other civil groups to assist them in repatriating victims of trafficking.¹⁸⁰ States thus bear an important duty to assist and protect child victims, especially through the repatriation process. States must further assist the child victim with all its needs including their healthcare, emotional, physical, and mental needs.

¹⁷⁴ Article 2 (a)(b) read with article 6 (4) of the Palermo Trafficking in Persons Protocol.

¹⁷⁵ Article 10.

¹⁷⁶ Article 8 (1) of the Palermo Trafficking in Persons Protocol.

¹⁷⁷ Article 8 (4) of the Palermo Trafficking in Persons Protocol.

¹⁷⁸ See article 3 of the CRC, article 4 (1) of the African Children's Charter and article 8 (3) of the CRC Optional Protocol on the Sale of Children.

¹⁷⁹ Principle 11 of the Recommended Principles and Guidelines on Human Trafficking.

¹⁸⁰ Recommended Principles and Guidelines on Human Trafficking principle 11.

5. INVESTIGATING AND PROSECUTING TRAFFICKERS

The most important provisions within international trafficking instruments are arguably those concerning the investigation of trafficking and the prosecuting of traffickers. The UN High Commissioner on Human Rights argued that states have a responsibility under international law to act with due diligence to investigate and prosecute traffickers.¹⁸¹ All traffickers should be investigated regardless of whether public officials, government officials or non-state actors are suspected of being traffickers.¹⁸² States are thus obligated to effectively investigate and prosecute human trafficking, including all its component acts and related conduct.¹⁸³ States are, under the CRC and the African Children's Charter, required to criminalise and punish traffickers of children within their domestic criminal law.¹⁸⁴ Due to the lack of a specific provision dealing with the investigation and prosecution of traffickers in the CRC, it was included in the CRC Optional Protocol on the Sale of Children. Article 10 of this Protocol reads:

States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism.

Through this provision, states bear the important duty to investigate and prosecute child traffickers.

The Palermo Trafficking in Persons Protocol provides further clarity on the obligation on states with regard to the investigation and prosecution of traffickers.¹⁸⁵ Under this Protocol, states must provide and strengthen training for law enforcement, immigration and other officials. The training provided must focus on the methods used in preventing trafficking, prosecuting trafficking and protecting the rights of victims.¹⁸⁶ The human rights of the victim should therefore be a further dimension of

¹⁸¹ Principle 2 of the Recommended Principles and Guidelines on Human Trafficking.

¹⁸² Principle 6 read with principle 13 of the Recommended Principles and Guidelines on Human Trafficking.

¹⁸³ Principle 13 of the Recommended Principles and Guidelines on Human Trafficking.

¹⁸⁴ Article 16 (2) of the African Children's Charter and article 19 of the CRC.

¹⁸⁵ Article 4 states that the scope of the Palermo Trafficking in Persons Protocol is the prevention, investigation and prosecution of human trafficking.

¹⁸⁶ Article 10 (2) of the Palermo Trafficking in Persons Protocol.

the training provided by states.¹⁸⁷ Despite the clarity the Palermo Trafficking in Persons Protocol provides with respect to the investigating and prosecuting of human trafficking; it only applies to crimes that are transnational in nature and involves an organised criminal group.¹⁸⁸ In other words, when trafficking occurs within one country, the Palermo Trafficking in Persons Protocol cannot be invoked. It does however remain a relevant and useful tool as it provides states with some guidance in the prevention of human trafficking.

6. INTERNATIONAL COOPERATION

According to the UN Secretary General Kofi Anan, multilateral and bilateral cooperation are essential to effectively eliminating and combating human trafficking as it is a crime that extends across borders and jurisdictions.¹⁸⁹ Over the last few decades, there has been an increase in the number of cooperative agreements entered into by sub-regional groups; for example the Asian-Pacific Bali Process and the ECOWAS Joint Plan of Action against Trafficking in Persons, Especially Women and Children in West and Central Africa. These sub-regional instruments play a fundamental role as they are often more accessible than international and regional agreements and are tailored to meet the needs of those within a very small region.

As child trafficking is an offence that most often transcends borders and jurisdiction, it is important that states cooperate in the prevention, investigation and prosecution of child traffickers. The Palermo Trafficking in Persons Protocol, in article 2, lists the promotion of cooperation amongst states as one of its purposes. The UN High Commissioner on Human Rights notes that human trafficking is a regional and global issue and one that cannot always be dealt with effectively at a national level.¹⁹⁰ Therefore, in order to respond effectively to this problem, international, bilateral and multilateral cooperation is required to combat human trafficking and all its components.¹⁹¹ Furthermore, such cooperation becomes particularly important

¹⁸⁷ Ibid.

¹⁸⁸ Article 4 of the Palermo Trafficking in Persons Protocol.

¹⁸⁹ Anan, K. 2008. Report of the Secretary-General on crime prevention and *criminal justice responses to violence against women and girls*. UN Doc E/CN.15/2008/2 at para. 15.

¹⁹⁰ Guideline 10 of the Recommended Principles and Guidelines on Human Trafficking.

¹⁹¹ Ibid.

between countries who are involved in different stages of the trafficking process. Similarly, article 42 of the African Children's Charter mandates its Committee, and in turn African states, to cooperate with other African, international and regional institutions and organisations to promote and protect the rights and welfare of the child. As the CRC lacks a provision dealing with international cooperation in relation to the rights of children, a provision was included in its Optional Protocol on the Sale of Children. As mentioned above, article 10 of this Protocol requires states to strengthen its international cooperation through multinational, bilateral and regional arrangements.¹⁹² Furthermore, states must also promote international cooperation and coordination between their local authorities, national and non-governmental organisations, and international organisations.¹⁹³

The ILO has for many years promoted and encouraged cooperation amongst states to eliminate the worst forms of child labour.¹⁹⁴ States are obligated to through international cooperation and assistance provide support for social and economic development, poverty eradication and universal education.¹⁹⁵ The ILO thus recognises the importance of international cooperation to the elimination of the worst forms of child labour and the factors that sustain it. Through international cooperation, states can eliminate child trafficking globally.

7. CONCLUSION

As this chapter has demonstrated, various treaties, protocols, declarations and other documents have been adopted at both the international and regional levels to prohibit the trafficking of both women and children. Such documents not only vary in the degree to which they prohibit human trafficking but also in the manner in which they seek to do so.

The international and regional instruments discussed above place particular obligations on states to achieve the effective elimination of child trafficking globally.

¹⁹² Article 10 (1) of the CRC Optional Protocol on the Sale of Children.

¹⁹³ Ibid.

¹⁹⁴ Article 8 of ILO c 182.

¹⁹⁵ Ibid.

These obligations include the duty to prevent child trafficking and child exploitation, the duty to assist victims of trafficking and the duty to prosecute traffickers. These obligations are extensive in nature and require states to alter and adopt their domestic law to meet their international and regional obligations. These duties are essential to the effective eradication of human trafficking whilst still seeking to provide redress to those victims of this offence. It must therefore be examined whether South Africa has met all its international and regional obligations with regard to its current and proposed legislation on human trafficking.

Chapter Four

SOUTH AFRICA'S DOMESTIC LAW AND POLICIES ON CHILD TRAFFICKING

1. INTRODUCTION

South Africa, following international trends, has signed and ratified various international and regional documents that prohibit the trafficking of women and children. Through these conventions, declarations and protocols, South Africa has committed itself to effectively eradicate and prohibit child trafficking within its domestic sphere. In 2004, after ratifying the Palermo Trafficking in Persons Protocol,¹⁹⁶ a Law Reform Commission project was created to evaluate the drafting of specific legislation dealing with human trafficking.¹⁹⁷ Due to their work, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (=:Sexual Offences Amendment Act), which contains a chapter dealing specifically with the criminalisation of trafficking in persons for sexual purposes, was enacted.¹⁹⁸ Furthermore, a Trafficking in Persons Inter-Sectorial Task Team was formed and is comprised of both government and non-governmental organisations.

As argued in chapter three, child trafficking amounts to the exploitation of children and the abuse of their fundamental human rights. It is due to the very nature of child trafficking and what it entails that demands that this crime be effectively prosecuted and dealt with under existing domestic law.

This chapter will identify and critically examine both the law currently in force and the proposed legislation that deals with the prohibition of child trafficking in South Africa, against the backdrop of South Africa's obligations under international and

¹⁹⁶ Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

¹⁹⁷ Leggit, T. 2004. "Hidden agenda's? The risk of human trafficking legislation in SA *Crime Quarterly*. Vol. 9 (3): 1-5 at p. 1.

¹⁹⁸ See part 6 of the Act.

regional human rights law. It shall be argued that South Africa is currently meeting or attempting to meet its international and regional obligations concerning child trafficking.¹⁹⁹

2. THE RELEVANCE OF INTERNATIONAL LAW IN SOUTH AFRICA

With regard to the applicability of international law in domestic courts in South Africa, sections 231 and 232 of the Constitution are important. Section 231 states that international agreements are only binding on the Republic once it has been incorporated into national legislation by Parliament. However, section 232 states that customary international law automatically forms part of South African law unless it is inconsistent with the Constitution. Importantly, the Palermo Trafficking in Persons Protocol has been partially domesticated into South African law. For example, section 70 of the Sexual Offences Amendment Act amounts to a transitional provision that meets South Africa's partial requirements under the Palermo Trafficking in Persons Protocol. Furthermore, section 282 of the Children's Act 38 of 2005²⁰⁰ gives full force to the Palermo Trafficking in Persons Protocol with regard to trafficking in children. Once the Prevention and Combatting of Trafficking in Persons Bill 7 of 2010 (the Trafficking in Persons Bill) comes into effect, this will translate the whole of the Palermo Trafficking in Persons Protocol law in South Africa. Although South Africa has not incorporated the majority of international human rights instruments into domestic law, there have been some attempts, in the area of child rights, to incorporate international standards with specific Acts.

Apart from serving as a source of law, international law also plays the role of an aid to constitutional and statutory interpretations. Section 39 (1) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. In the *State v Makwanyane and another* judgment,²⁰¹ the

¹⁹⁹ As discussed in chapter three.

²⁰⁰ For clarity, this section reads: "The UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act."

²⁰¹ *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para. 686D-F.

Constitutional Court held that international law in this context must be read broadly to include not only those treaties and conventions that are binding on South Africa but also those that are non-binding on it. This means that many treaties on trafficking which have not been ratified by South Africa and other sources of international law could be used for interpreting the provisions of the Bill of Rights.

South Africa has signed and ratified many international documents. However, for the purposes of this discussion, the following are most important: the CRC and its Optional Protocol of the Sale of Children;²⁰² Palermo Trafficking in Persons Protocol;²⁰³ ILO Convention on Child Labour;²⁰⁴ and, the CEDAW.²⁰⁵ With regard to regional instruments, South Africa has ratified the following: African Charter;²⁰⁶ African Children's Charter;²⁰⁷ African Youth Charter;²⁰⁸ and the AU Women's Protocol.²⁰⁹

3. A BRIEF OVERVIEW OF THE LAWS ON CHILD TRAFFICKING

The Constitution is the supreme law of the South Africa; anything inconsistent with it is automatically invalid to the extent of inconsistency.²¹⁰ Although the Constitution does not deal with the issue of child trafficking directly, it has a number of provisions that are relevant to the protection of children from abuse and exploitation. Section 12(1) of the Constitution states that everyone has the right to

²⁰² CRC, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167. U.N. Doc. A/44/49 (1989). Entered into force 2 September 1990 and ratified on 16 June 1995; CRC Optional Protocol on Sale of Children, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6. U.N. Doc. A/54/49. Vol. III (2000). Entered into force 18 January 2002 and ratified on 01 July 2003.

²⁰³ Palermo Trafficking in Persons Protocol. Ratified on 20 February 2004.

²⁰⁴ 2133 U.N.T.S.161. Entered into force 19 November 2000 and ratified on 7 June 2000.

²⁰⁵ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193. U.N. Doc. A/34/46. Entered into force 3 September 1981 and ratified on 15 December 1995.

²⁰⁶ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Entered into force 21 October 1986 and ratified on 9 July 1996.

²⁰⁷ OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force 29 November 1999 and ratified on 07 January 2000.

²⁰⁸ Adopted by the AU in 2006 and ratified by South African on 28 May 2009.

²⁰⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000). Reprinted in 1 Afr. Hum. Rts. L.J. 40. Entered into force 25 November 2005 and ratified in 2003.

²¹⁰ Section 1 read with section 2 of the Constitution.

freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.²¹¹ Additionally, section 12 (2) provides for the right to bodily and psychological integrity,²¹² whilst section 13 protects all individuals from being subjected to slavery, servitude or forced labour. Perhaps the most important provision in the Constitution for the purposes of this discussion is however section 28. This section provides that all children have the right to be protected from maltreatment, neglect, abuse or degradation²¹³ including the right to be protected from exploitative labour practices.²¹⁴ The Constitution could not provide further clarification on the rights of the child, thus the Children's Act²¹⁵ was enacted to give effect to the rights of children as contained in section 28 of the Constitution and to create new offences with regard to children.

The Children's Act remains one of the most important pieces of legislation on children in South Africa. It replaced the out-dated Child Care Act,²¹⁶ which no longer provided sufficient protection to children and their rights. The definition of child trafficking found in section 1 (1) of the Children's Act mirrors the definition of child trafficking contained in the African Children's Charter and the Palermo Trafficking in Persons Protocol. Chapter 18 of the Children's Act deals particularly with the issue of trafficking in persons for the purposes of exploitation. It must be noted that the Trafficking in Persons Bill, once it is enacted into force, will repeal the trafficking provisions in the Children's Act. However, up until such time, the Children's Act and its trafficking provisions remain relevant and provide the necessary protection to children who are trafficked in and out of South Africa.

The common law of South Africa does not deal directly with the issue of child trafficking *per se*; however, a number of provisions remain relevant. South African common law prohibits the following acts relating to the exploitation and abuse of children, for example rape, assault, indecent assault, prostitution, owning a brothel, and abduction.

²¹¹ Section 12 (1)(c) of the Constitution of South Africa.

²¹² Section 12 (2) of the Constitution of South Africa.

²¹³ Section 28 (1)(d) of the Constitution.

²¹⁴ Section 28 (1)(e) read with section 28 (1)(f) of the Constitution.

²¹⁵ Act 38 of 2005.

²¹⁶ Act 74 of 1983.

Under the common law,²¹⁷ rape is the unlawful and intentional sexual intercourse with a woman without her consent.²¹⁸ Consent is one of the definitional elements of this offence and the absence of it renders the act of sexual intercourse unlawful.²¹⁹ Related to rape is the offence of prostitution and owning a brothel. Under the Sexual Offences Act of 1957,²²⁰ it is an offence to have unlawful sexual intercourse or commit acts of indecency with another person for reward.²²¹ Similarly, section 33 and 33 A of the same Act makes it an offence to manage or own a brothel for any purpose including for the use of prostitution.

The common law defines assault as the unlawful and intentional application of force to the body of another or inspiring the belief in another person that force will immediately be applied to him or her.²²² South Africa law prohibits various forms of assault; for example: common assault, assault to cause grievous bodily harm and indecent assault. Indecent assault refers to the unlawful and intentional assault of another, which has the effect of diminishing that person's sexual autonomy, bodily integrity and dignity.²²³ Conventionally, indecent assault is understood to be some form of sexual activity that falls short of actual penetration or sexual intercourse; for example masturbation, fondling, external intercourse and exposing one's naked body to another.²²⁴ Assault may amount to indecent assault even in those circumstances where it may not be objectively indecent, but where the perpetrator has subjectively expressed that his conduct was intended to be indecent.²²⁵ However, much of the common law on sexually related offences has been altered by the Sexual Offences Amendment Act of 2007.

The approval of the Sexual Offences Amendment Act in 2007 marked the long-awaited reform in the law pertaining to sexual offences in South Africa.²²⁶ This process began in 1996 when the South Africa Law Reform Commission (SALRC)

²¹⁷ Also found in the Sexual Offences Act 23 of 1957.

²¹⁸ Burchell, J. 2008. *Principles of criminal law*. 3rd edition. Juta & Co: South Africa at p.162.

²¹⁹ Minnie, D. "Sexual offences against children" In Boezaart, T (ed). *Child law in South Africa*. Juta & Co: South Africa at p. 525.

²²⁰ Section 20 (1)(aA) of Act.

²²¹ Burchell op cit (n218) at p. 884.

²²² Burchell op cit (n218) at p.161.

²²³ Burchell op cit (n218) at p.165.

²²⁴ Burchell op cit (n218) at p. 695.

²²⁵ See *R v Abrahams* 1918 CPD 590 and *S v F* 1982 (2) SA 580 (T).

²²⁶ Minnie op cit (n219) at p.541.

was mandated to investigate the criminal justice system and, in particular, sexual offences by and against children. However, in 1998, the SALRC mandate was extended to investigate sexual offences against adults.²²⁷ In 2004 the working draft of the Criminal Law (Sexual Offences) Amendment Bill (an amended version of the Law Commission's Bill of 2002) came into effect. This Bill created new offences relating to the protection of children from sexual abuse, including exposure to pornography,²²⁸ a reworking of the definition of incest to include sexual penetration,²²⁹ exposure of sexual acts to the child,²³⁰ and the grooming of a child for sexual purposes.²³¹ With regard to child trafficking, the Bill created a number of prohibitions, in particular, punishing those who traffic children for the purposes of sexual exploitation or pornography²³² and provides for the establishment of a National Register for the Protection of Children against Sexual Offences.²³³ In 2007 Parliament approved the Sexual Offences Amendment Bill, thus bringing into effect new offences, which are relevant to the issue of child trafficking in and out of South Africa.

As international law has illustrated,²³⁴ the trafficking of humans has repeatedly been viewed as one of the money generating activities of organised crime groups. Although many of the offences covered by the Prevention of Organised Crime Act are in fact covered by existing statutory and common law, the South African Parliament adopted this Act to specifically deal with organised crime. Under the Prevention of Organised Crime Act, it is an offence to be involved in racketeering, and to receive, use and/or invest in, any property derived from patterns of racketeering activities.²³⁵ A pattern of racketeering activity is defined in Prevention of Organised Crime Act as "[t]he planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1"²³⁶ For the purposes of this study, the relevant Schedule 1 offences are: rape, kidnapping, indecent assault and the statutory offences contained in sections 14 to 20 of the

²²⁷ Ibid.

²²⁸ Clause 9 of the 2004 Bill.

²²⁹ Clause 11 of the 2004 Bill.

²³⁰ Clause 16 of the 2004 Bill.

²³¹ Clause 19 of the 2004 Bill.

²³² Part 5 of the 2004 Bill.

²³³ Part 6 of the 2004 Bill.

²³⁴ See the CTOP.

²³⁵ See Sections 1 and 2 of Prevention of Organised Crime Act.

²³⁶ Section 1 of Prevention of Organised Crime Act.

Sexual Offences Act.²³⁷ The one difficulty in trying to invoke this Act to punish persons accused of trafficking women and children lies in having to prove the 'organised' element contained within the definition of 'pattern of racketeering'.²³⁸ Thus, for a person to be convicted there must be clear evidence that the act of trafficking was not simply done on impulse but rather that it was a carefully pre-planned and coordinated event involving several individuals.

There are a number of pieces of legislation that pertain to, and could thus be used to, prosecute particular activities that may amount to human trafficking. However, for the purposes of this discussion, they will only be briefly mentioned. The Films and Publications Act 65 of 1996 prohibits the possession, production and distribution of child pornography.²³⁹ The Immigration Act 13 of 2002 prohibits the entry of certain persons into the Republic, for example, people who belong to organised crime groups.²⁴⁰ Similarly, both the Intimidation Act 72 of 1982 and the Corruption Act 94 of 1992 could be used in creative ways to ensure the prosecution of human traffickers. Other Acts that could be used in this regard include the Riotous Assembly Act 17 of 1956, the Basic Conditions of Employment Act 75 of 1997, and the Domestic Violence Act 116 of 1998. Thus, to varying degrees, all the above-mentioned Acts could in some way help prosecute human traffickers and stop all their related activities that would constitute human trafficking.

As noted earlier, the South African Parliament is currently in the process of adopting a new Act on the prevention of human trafficking, entitled the Trafficking in Persons Bill. This Bill seeks to give effect to South Africa's international obligations under the Palermo Trafficking in Persons Protocol.²⁴¹ The Bill recognises that there is a great concern regarding the increase in trafficking in women and children globally and that current law does not adequately deal with this issue. The adoption of this legislation is also a response to the criticisms levelled at South Africa by the

²³⁷ Act 23 of 1957.

²³⁸ Pithey, B. 2004. 'Do new crimes need new laws? Legal provisions available for prosecuting human trafficking' in *SA Crime Quarterly*. Vol. 9 (3): 7-10 at p. 9.

²³⁹ Section 27 of Act 65 of 1996. However, this section has been amended by the following Film and Publication Amendment Acts: section 8 of Act 34 of 1999, section 11 of Act 18 of 2004 and section 30 of Act 3 of 2009.

²⁴⁰ See section 29 and 30 of the Act.

²⁴¹ Preamble of the Trafficking in Persons Bill.

Committee on the Elimination of Discrimination against Women (CEDAW Committee).

In its periodic reports to the CEDAW Committee, states are required to describe all measures taken to ensure the protection of women and their rights, including those relating to the trafficking and sexual exploitation of women. Paragraph 24 (h) of General Recommendation No 19 further requires states to explain the effectiveness of the measures adopted.²⁴² South Africa submitted its first report in 1997 and issued a combined second, third and fourth report in 2009. After receiving South Africa's initial report, the CEDAW Committee expressed concern regarding the issue of human trafficking in South Africa.²⁴³ The CEDAW Committee went on to explain that it felt that insufficient attention was being given to the issue of women and child trafficking in the country. It recommended that South Africa should adopt legal and other measures to sufficiently address the reality of trafficking within the country and suggested that such measures should be contained and explained within South Africa's subsequent reports.²⁴⁴ In its second report, South Africa noted the concern of the CEDAW Committee and addressed the issue of strengthening measures aimed at combating the trafficking of women and children in the country.²⁴⁵ In the report, special mention is made of building up international relations, especially with its Southern African neighbours, and prosecuting traffickers through existing legal provisions and administrative mechanisms.²⁴⁶ Due to the heavy criticisms of the CEDAW Committee for not adequately dealing with the issue of human trafficking within and through its borders, the Trafficking in Persons Bill was created to bring the current law in line with South Africa's international and regional obligations.

²⁴² CEDAW Committee General Recommendation No. 19.

²⁴³ CEDAW Committee. 1998. *Consideration of reports submitted by states parties under article 18 of CEDAW: The initial report of South Africa (CEDAW/C/ZAF/1)* at its 387th, 388th and 393rd meetings, on 24 and 29 June 1998 (see also CEDAW/C/SR.387, 388 and 393). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/237/78/PDF/N0223778.pdf?OpenElement>.

[Accessed on 25 November 2010].

²⁴⁴ CEDAW Committee General Recommendation No. 19 at para. 125-6.

²⁴⁵ CEDAW Committee op cit (n241) at para. 68-72.

²⁴⁶ This report is currently being considered by the Committee.

4. DEFINING CHILD TRAFFICKING IN SOUTH AFRICAN LAW

According to the Constitution, a child is any person below the age of 18 years.²⁴⁷ This definition is in line with current international and regional standards.²⁴⁸ As previously stated, the Constitution does not deal directly with the issue of child trafficking but rather prohibits the abuse of children.²⁴⁹ For the purposes of child trafficking specifically, the Children's Act is thus extremely important and lays the foundations of children's rights in South Africa. Section 1 (1) of the Children's Act defines child trafficking as:

- i. the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic or by any means, including the use of threat, force or any other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of the child; or
- ii. Due to a position of vulnerability, for the purposes of exploitation.²⁵⁰

In comparison with the Children's Act's definition of child trafficking, the Sexual Offences Amendment Act, which refers to human trafficking generally, includes the disposal, procurement, capture and removal as further forms of human trafficking. This list will be further extended by the Trafficking in Persons Bill, if adopted, which includes delivery, exchange and lease as alternative forms of trafficking.

Through the use of terms such as "sale" and "supply" the definition of child trafficking in the Children's Act, the Sexual Offences Amendment Act and the Trafficking in Persons Bill is akin to article 3 (c) of the Palermo Trafficking in Persons Protocol. However, unlike the Palermo Trafficking in Persons Protocol, the definition contained in the Sexual Offences Amendment Act and the Trafficking in Persons Bill places a greater evidentiary burden on prosecutors and investigators. Kassin argues that article 3 (c) of the Trafficking in Persons Protocol provides that recruiting, transporting, transferring, harbouring or receiving a child for the purposes of exploitation should amount to the trafficking of children, regardless of the means

²⁴⁷ Section 28 (3) of the Constitution.

²⁴⁸ Article 1 of the CRC and article 2 of the African Children's Charter.

²⁴⁹ See section 28 (1)(f)(g) of the Constitution.

²⁵⁰ Section 1(1)(a) of the Children's Act.

employed or not employed (for example, threats, physical force, deception or abduction).²⁵¹ According to Kassan's argument, therefore, the trafficking of children can occur when a child is merely taken from its parental care for the purposes of exploitation. Kassan's argument is consistent with the wording of article 3 of the Palermo Trafficking in Persons Protocol, which states that an act may amount to trafficking in humans even if one of the listed means is not employed.

Like the Palermo Trafficking in Persons Protocol, the Children's Act states that an act will amount to human trafficking even if one of the listed means in section 1 are not employed.²⁵² Thus, the focus of this definition is on the removal of a child from its parental care without consent for the purposes of exploitation. In comparison to the Children's Act, the Sexual Offences Amendment Act and the Trafficking in Persons Bill requires that one of the listed means be used in order for an act to amount to human trafficking.²⁵³ It is thus unsurprising that section 70 (2) of the Sexual Offences Amendment Act and section 1 of the Trafficking in Persons Bill has been criticised.²⁵⁴ It must therefore be argued that the Children's Act is most in keeping with the Palermo Trafficking in Persons Protocol, which focuses on exploitation and lack of consent as the basis for the offence of human trafficking. South Africa thus needs to remove this evidentiary burden on investigators and prosecutors in the Trafficking in Persons Bill. However, despite this evidentiary burden, it must still be argued that South Africa's current definition of human trafficking, as contained within the Acts mentioned above, are comprehensive in nature. South Africa's definition thus ensures that all the aspects associated with human trafficking and the exploitation of humans is covered by the law.

²⁵¹ Kassan, D. 2007. 'Trafficking in children' In Davel, CJ and Skelton, A (eds.). *A commentary on the Children's Act 38 of 2005*. Juta & Co: South Africa.

²⁵² Section 1 of the Children's Act.

²⁵³ Section 70 (2) of the Sexual Offences Amendment Act and section 1 (1) of the Trafficking in Persons Bill.

²⁵⁴ Van Zyl, M and Horne, J. 2009. 'A policy perspective on the investigation challenges of child trafficking in South Africa' in *Child abuse research: A South African Journal*. Vol. 10 (2): 10 6 24 at p.14.

5. PREVENTING THE TRAFFICKING AND EXPLOITATION OF CHILDREN

International and regional instruments have established that child trafficking amounts to the exploitation of children for some financial, sexual or other benefit. The Children's Act and the Trafficking in Persons Bill define "exploitation" extensively to include²⁵⁵ all forms of slavery or practices similar to slavery including debt bondage or forced marriages; sexual exploitation; servitude; forced labour or services; child labour; and the removal of body parts.²⁵⁶ However, the latter instrument further includes "the impregnation of a female person against her will for the purpose of selling her child when the child is born" as another form of exploitation.²⁵⁷ It must be noted that neither the Children's Act nor the Trafficking in Persons Bill provides a closed list with regard to the definition of exploitation. These definitions are thus in keeping with the Palermo Trafficking in Persons Protocol, which only provides the minimum of what amounts to exploitation.²⁵⁸

The Sexual Offences Amendment Act however defines the sexual exploitation of children as:

A person ("A") who unlawfully and intentionally engages the services of a child complainant ("B"), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ("C") for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or by committing a sexual act with B.

The Sexual Offences Amendment Act is therefore distinct from the Children's Act and the proposed Trafficking in Persons Bill as its definition of exploitation is explained in terms of an act between two or more people, with the lack of consent from one party being the central element of the offence. This definition may not mirror the ones contained in the Children's Act and the Trafficking in Persons Bill but the definition in the Sexual Offences Amendment Act is simply a more concise and restrictive definition. Therefore, the definition in the Sexual Offences Amendment Act is limited to engaging the child in services without the child's

²⁵⁵ Section 1(1) of the Children's Act and Trafficking in Persons Bill.

²⁵⁶ Ibid.

²⁵⁷ Section 1 (1) of the Trafficking in Persons Bill.

²⁵⁸ See article 3 (a) of the Palermo Trafficking in Persons Protocol.

consent and for some benefit, which can be found in the Children's Act and the Trafficking in Persons Bill under its definition of exploitation.

It must be further noted that both the Sexual Offences Amendment Act and the Trafficking in Persons Bill go beyond exploitation as a reason for human trafficking, to include grooming and abuse of a person for sexual purposes.²⁵⁹ These are two new elements and as such, place a greater obligation on South Africa who not only has to prohibit the exploitation of children, but also their grooming and abuse. As the full extent of trafficking in South Africa is unclear, it cannot be accurately argued whether South Africa is adequately preventing human trafficking. From a legal perspective, however, the law with regard to human trafficking is extensive in nature and goes beyond what is required under the international and regional instruments previously discussed. These instruments, such as CEDAW,²⁶⁰ the CRC²⁶¹, the African Youth Charter,²⁶² and the African Children's Charter,²⁶³ require states to prevent and prohibit the exploitation and trafficking of women and children through the enactment of domestic law. It can thus be argued that South Africa, with regard to the prevention of trafficking and exploitation through the enactment of comprehensive national legislation, is meeting its international and regional obligations. Whether these obligations are being effectively implemented on the ground is however an alternative discussion, which is beyond the scope of this study.

6. ASSISTING VICTIMS OF TRAFFICKING

Under CRC and the African Children's Charter, child victims require special care due to their age, physical strength and vulnerability.²⁶⁴ States are thus required to provide all the necessary assistance and protection to victims of human trafficking, especially child victims. The Children's Act deals with this issue in section 286 whereby the Director General (DG) of Foreign Affairs is instructed, having due

²⁵⁹ See section 70 (2) of the Sexual Offences Amendment Act and section 1 of the Trafficking in Persons Bill.

²⁶⁰ See article 6.

²⁶¹ See article 35.

²⁶² See article 23.

²⁶³ See article 29.

²⁶⁴ See the preamble and article 16 of the CRC and the preamble and articles 16 and 25 of African Children's Charter.

regard to the child's safety and without delay, to return the child victim to South Africa if that child is a citizen or permanent resident of the country and to refer such a child to a social worker.²⁶⁵ However, section 286 primarily deals with the logistical and technical elements of transporting a child from one country to another without, in most instances, having the necessary travel documents. Unfortunately, the Children's Act does not therefore stipulate what care or assistance must be provided to the child victim with regard to their health care and emotional needs. However, sections 15 of the Trafficking in Persons Bill provide foreign children with the same right to health care services as citizens of the Republic. It can thus be inferred that all victims of trafficking under the proposed legislation will have a right to health care. In 2005, the National Department of Health issued a National Sexual Assault Policy, which aimed to provide the necessary medical and health needs to sexual assault victims. This policy was thus aimed at providing all the necessary health care services to sexually assaulted victims. This policy was accompanied by the National Management Guidelines for Sexual Assault Care for health care practitioners. Through this policy, all children trafficked for the purposes of sexual exploitation, should receive comprehensive medical treatment.

Furthermore, the Victim Empowerment Programme (VEP) is one of the most important policies in South Africa, and specifically identifies victims of trafficking as a priority target group. This programme was formally launched in 1998, but it was only in 1999 that the full implementation of the VEP began.²⁶⁶ It was created by the Department of Social Development in order to provide some form of protection and assistance to victims of violence. The VEP aims to restore the loss or damage caused by a criminal act and its consequences, through an interdepartmental and inter-sectorial programme. The target group of the VEP is a lot broader than the Victims Charter and makes provision for funding, resource allocation, training, monitoring and marketing.²⁶⁷

One of the major weaknesses in this policy, as with the Children's Act, is the fact that, despite the allocation of services to victims, it does not state the nature and

²⁶⁵ A similar provision can be found in section 14 of the Trafficking in Persons Bill.

²⁶⁶ Nxumalo, C. 2009. 'Overview of the victim empowerment programme' Available at: www.pmg.org.za/files/docs/090915overview.ppt. [Accessed on: 01 September 2010].

²⁶⁷ Frank op cit (n4) at p. 4.

quality of services that will be provided. The VEP states that it will provide victims with their basic needs, such as health care and assistance in the criminal justice system, but does not guarantee nor articulate the full extent or nature of the services that will be provided.²⁶⁸ This is again an unfortunate omission with regard to the services that may be provided to victims of trafficking. In other words, clarity with regard to the duties on particular individuals helps to ensure that assistance is actually being provided to victims.

Under section 289 of the Children's Act, there is only an obligation on South Africa to refer the child to a designated social worker, assist the child in obtaining refugee status, and providing the child with temporary safe care if such is required. Although this section provides some assistance to child victims, it remains limited by the fact that the above-actions must be provided through a court process or authorised by a child court. In comparison, the Trafficking in Persons Bill only requires that an investigation be conducted by the DG (Director General) of Home Affairs and on the basis of his/her finding provide the necessary assistance to the victim.²⁶⁹ Section 17 of the Trafficking in Persons Bill further requires that foreign victims of trafficking must be allowed to remain in South Africa for a non-renewable recovery and reflection period of 90 days. This period is granted for two primary reasons; notably to assist investigators and law enforcement officials in investigating alleged human trafficking, and to provide the DG with information regarding repatriation of the victim to their country of origin. Based on the findings of the investigation, the Trafficking in Persons Bill requires the state to grant temporary or permanent residence in South Africa in those circumstances where it is not in the victim's interests to be returned to their country of origin.²⁷⁰ The Trafficking in Persons Bill thus goes beyond the Children's Act in providing more than mere technical assistance to victims of trafficking. South Africa is thus, through the above provisions, attempting to provide some assistance to the victims of trafficking.

One of the distinct weaknesses of the Children's Act and Trafficking in Persons Bill lies in sections 288 and 14 respectively. Section 288 places a specific mandatory

²⁶⁸ Ibid.

²⁶⁹ Section 17.

²⁷⁰ See section 18 and 19 of the Trafficking in Persons Bill.

obligation on immigration officials, police officials, social workers, social service professional, medical practitioners or registered nurses who come into contact with a child victim of trafficking, to refer that child to a designated social worker who must undertake an investigation in terms of section 289 (2) of the same Act. In comparison, section 14 of the proposed Trafficking in Persons Bill places an obligation on any person who finds a child victim of trafficking to refer that child to a designated social worker. Kassan argued that section 288 specifically does not stipulate whether the failure to make this referral amounts to a criminal offence.²⁷¹ The same argument could be levelled against section 14, which does not provide any guidance as to the repercussions of non-referral. There is thus no mandatory obligation to report incidences of trafficking to the South African police services by the social worker, the child victim, or the general public. This problem, in turn renders it difficult, if not impossible, for the police services to adequately investigate the crime of human trafficking. This is a problematic situation, especially in those cases where the crime of child trafficking is never reported to the police or when the reporting happens too long after the crime was committed.²⁷²

As the police services are the primary organisation that investigates crime in the Republic, these sections make it difficult for the police to prevent and investigate instances of child trafficking in the country. The only guidance the police services have can be found in section 36 of the Trafficking in Persons Bill. This section requires that the National Commissioner for the South Africa Police Service must consult with various governmental bodies to: create a division within the police service to deal with human trafficking, lay down the process or manner by which to investigate and report incidences of trafficking, and how to handle victims of trafficking through the different stages of the criminal justice process. As the Trafficking in Persons Bill is only proposed legislation, it remains undecided whether this provision will be retained in the Bill's final draft.

Foreign child victims are generally the most vulnerable and thus require greater care and assistance. Under international and regional law, the process of repatriation is employed to return the child back to its country of origin, when it is in the child's

²⁷¹ Kassan op cit (n251).

²⁷² Van Zyl op cit (n254) at pp. 14 to 15.

best interest to do so.²⁷³ The issue of repatriation of a foreign child back to their country of origin can be found under section 290 of the Children's Act and section 30 of the Trafficking in Persons Bill. The DG is under an obligation, in terms of the Trafficking in Persons Bill, not to return a foreign victim of trafficking to their country of origin without having due consideration for the child's best interest, safety, and the possibilities of being trafficked or harmed again.²⁷⁴ Additionally, the Trafficking in Persons Bill provides a specific section relating to the repatriation of a victim back to South Africa.²⁷⁵ Section 32 thus requires the DG of International Relations and Cooperation to work with the DG of Home Affairs to coordinate the return of a trafficking victim back to the Republic and his/her subsequent care. With regard to repatriation, South Africa is thus attempting to uphold its international and regional obligations. South Africa aims to ensure that the best interest of the child must be taken into consideration at every stage of the repatriation process. However, whether the best interest of the child is actually being considered as the primary factor remains unclear.

7. INVESTIGATING AND PROSECUTING CHILD TRAFFICKERS

South Africa is under an international and regional obligation to investigate instances of trafficking and to punish and prosecute child traffickers. The Children's Act is extensive in nature and prohibits certain acts that may facilitate child trafficking. According to section 285, the following behaviour related to child trafficking is a crime: knowingly leasing, subleasing or allowing property to be used for the purposes of harbouring a child who is a victim of trafficking, and advertising, printing, distributing of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology. These provisions were added in by the SALR in its Discussion Paper as they noted that

²⁷³ See CRC Optional Protocol on Sale of Children and the UN High Commissioner on Human Rights: Recommended Principles and Guidelines on Human Trafficking.

²⁷⁴ See section 290 (1) and (2) of the Children's Act and section 30 of the Trafficking in Persons Bill.

²⁷⁵ Section 32.

trafficking in children is often supported by people who indirectly assist in the trafficking of children.²⁷⁶

Section 28 (2) of the Children's Act states that where a juristic or natural person or corporation has trafficked a child or allowed a child to be trafficked, consent by either the child or its guardian cannot be raised as a valid defence to a charge of child trafficking.²⁷⁷ Thus, consent cannot absolve traffickers from being charged with or found guilty of child trafficking. This section thus acknowledges that the basis of child trafficking is exploitation and as such, any form of consent obtained may not have been freely given.²⁷⁸ Furthermore, this section states that even in situations where the intended exploitation did not occur, such will not serve as a defence to a charge of child trafficking. In other words, the mere intention to exploit a child is sufficient grounds upon which to charge someone with child trafficking.

One of the most notable inclusions in the Children's Act is section 287, which recognises that parents, guardians and other persons responsible of the child may be traffickers. During the SALRC's discussions, it was decided that special consideration needed to be given to this issue. Although it was agreed that such parents should not get special treatment within the criminal justice system, it was decided that courts should have greater discretion in imposing sentences having regard to the circumstances of each case. Section 287 however does allow the court to suspend all parental rights and responsibilities in those cases where it believes the parents have trafficked or allowed their child to be trafficked. It is thus unsurprising that the Trafficking in Persons Bill contains a similar provision recognising that a parent or legal guardian may be traffickers of children.²⁷⁹ The issue of parents being possible traffickers has been recognised in our courts in cases concerning inter-country adoption and alleged abduction of children by one parent.²⁸⁰ Judges are thus aware of and make note of the fact that parents may be traffickers in children, particularly their own.

²⁷⁶ SALRC Discussion Paper 111 at p. 81.

²⁷⁷ Section 284 (2) (a) and (b) of the Children's Act.

²⁷⁸ *Kassan op cit* (n251) at p. 201.

²⁷⁹ Section 34.

²⁸⁰ For example, see: *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC); *De Gree and another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA); and, *Family Advocate, Cape Town, and another v EM* 2009 (5) SA 402 (C).

As child trafficking is a crime that transcends international and regional borders, it was important to include a provision that allowed a person to be prosecuted even if the act was committed in another country. Thus, section 291 of the Children's Act states:

A citizen or permanent resident of the Republic, a juristic person or a partnership registered in terms of an law in the Republic that commits an act outside the Republic which would have constituted an offence in terms of this Chapter [chapter 18] had it been committed inside the Republic, is guilty of that offence as if the offence had been committed in the Republic and is liable on conviction to the penalty prescribed for that offence.

Similarly, section 10 of the Trafficking in Persons Bill grants the High Courts of the Republic with extra-territorial jurisdiction in cases of human trafficking. Due to the global nature of this crime, these provisions are indeed both necessary and very important. Furthermore, section 71 (2) of the Children's Act, which is commentary to the Trafficking in Persons Bill,²⁸¹ provides that a life sentence may be imposed on a person convicted of trafficking in persons.²⁸² Importantly, sections 7 (2) and (5) of the Children's Act, section 71 (5) of the Sexual Offences Amendment Act and section 16 of the Trafficking in Persons Bill prohibit the criminal prosecution of any victim of human trafficking whereby an offence was committed as a direct result of being trafficked; for example immigration related offences. These provisions are important as they seek to ensure that South Africa is upholding its international and regional obligations to protect victims of human trafficking.

As the Trafficking in Persons Bill is not yet in force, South Africa lacks specific human trafficking legislation. As it has been previously discussed, there are many pieces of legislation that indirectly and directly pertain to the offence of human trafficking. These provisions may thus be used to prosecute a person and convicted them of several aspects of human trafficking, for example sexual exploitation of a child or operating a brothel. The only case in South African law, which resulted in the successful conviction of two human traffickers was the *Sayed* case.²⁸³ This case concerned a couple, Basheer Sayed and Somcharee Chuchumporn, who were

²⁸¹ Section 11 read with section 27 of the Bill.

²⁸² Trafficking in persons is one of the offences included in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

²⁸³ Heard in 2010 by the Durban Regional Court. No citation could be found. See South African Press Association website. Available at: www.sapa.org.za [Accessed on 09 February 2011].

recruiting Thai girls with the full intent to use them as prostitutes. The couple was arrested in 2007 after three girls had escaped to the Thai Embassy. The National Prosecuting Authority (NPA) charged the couple using existing racketeering laws as relating to sexual exploitation.²⁸⁴ The couple was thus charged with 19 counts of racketeering. Earlier this year, the couple were convicted and sentenced on the charge of racketeering for the purpose of sexual exploitation. Thus, although specific anti-trafficking legislation is not in effect, the NPA was able to use existing law to ensure the conviction of human traffickers in South Africa.

Similarly, in the *Malachi* case,²⁸⁵ the applicants were recruited by the respondents to work for them as an exotic dancer. Upon arrival in South Africa her passport was removed. The respondents refused to give the applicant her passport on the basis that she had incurred expenses under their employment contract. When the applicant fled to the Russian Consular for assistance she was arrested. Although this case focussed predominately on the *tanquam suspectus de figa* rule under the Magistrates Act 32 of 1944, there was reference made to human trafficking. The applicant's attorney tried to obtain compensation from the respondents on the basis that their treatment of the applicant amounted to human trafficking. Although the applicant lost on this point, this case serves to illustrate that the legal profession as whole is starting to recognise and enforce the human trafficking provisions mentioned above. Currently there is a case before our courts concerning 9 Nigerian men who were arrested and charged with the trafficking of women into South Africa.²⁸⁶ The above cases thus serve to illustrate that South Africa is using existing law to prosecute and convict persons suspected of trafficking humans. The international community, in particular, has recognised South Africa's efforts in investigating and prosecuting traffickers.²⁸⁷ It can thus be argued that South Africa is attempting to prosecute traffickers and as such, is upholding its international and regional obligation to investigate and prosecute human traffickers.

²⁸⁴ See Prevention of Organised Crime Act.

²⁸⁵ *Malachi v Cape Dance Academy International (Pty) Ltd and others* 2010 (11) BCLR 1116 (CC).

²⁸⁶ Known as the Ermelo case. Heard in 2010. No citation could be found. See South African Press Association website. Available at: www.sapa.org.za [Accessed on 09 February 2011].

²⁸⁷ For example the national project co-ordinator for human trafficking Johan Kruger of the UN Office on Drugs and Crime was quoted as saying: 'We [UNODC] would welcome any prosecution for trafficking in humans in particular successful prosecutions' This was in reference to the *Sayed* case.

8. COOPERATION WITH OTHER STATES

Article 35 of the CRC and article 29 of the African Children's Charter requires states to take all multilateral, bilateral and national measures to prohibit and prevent the trafficking in children. Through section 283 of the Children's Act and section 35 of the Trafficking in Persons Bill, provision is made for entering into bilateral and multilateral agreements with other states, regardless of whether that state[s] is a member of the Palermo Trafficking in Persons Protocol. These sections thus envisage cooperation amongst states in order to effectively deal with child trafficking in South Africa.²⁸⁸

South Africa has signed a number of bilateral agreements, particularly with the European Union, with regard to various aspects of human trafficking. In 2004, for example, South Africa entered into a bilateral agreement with the EU entitled 'Financing Agreement concerning Support to Policing of Crimes against Women and Children in the Eastern Cape'; whilst in 2006 South Africa entered into a further agreement with the EU regarding financing its prevention efforts against human trafficking.²⁸⁹ Furthermore, in 1998, South Africa entered into a bilateral agreement with the ILO with regard to the elimination of child labour in the country,²⁹⁰ and in 1996 entered into a cooperative agreement with UNICEF.²⁹¹ As can be illustrated from the above, South Africa's bilateral agreements concerned finance and assistance with regard to various aspects of human trafficking and the exploitation of children. With regard to multilateral agreements, South Africa has entered into various agreements with other states. For the purposes of this discussion however the following are important examples: the South African Development Countries (SADC) Regional Strategic Plan of Action on Combating Trafficking in Persons of 2009, Beijing Platform Declaration and Platform for Action, and the UN Millennium Development Goals. It is thus evident from the above that South Africa has entered into various bilateral and multilateral agreements regarding human trafficking. It

²⁸⁸ Kassan op cit (n251).

²⁸⁹ Entitled: Financing Agreement concerning Assistance to the South African Government to Prevent and React to Human Trafficking.

²⁹⁰ Entitled: Memorandum of Understanding between the Government of the Republic of South Africa and the International Labour Organisation concerning the Elimination of Child Labour.

²⁹¹ Entitled: Basic Cooperation Agreement between the United Nations Children's Fund and the Government of the Republic of South Africa.

must therefore be argued that South Africa is attempting to prevent the trafficking in humans in the country through the help of regional and international assistance. Accordingly, this should be regarded as a positive sign, especially with regard to the prevention of human trafficking in the country. South Africa has therefore made some progress with regard to the effective elimination of child trafficking in the country.

9. CONCLUSION

South Africa has enacted various pieces of legislation dealing with child trafficking, particularly the Children's Act, Prevention of Organised Crime Act, the Sexual Offences Amendment Act, and, is about to enact the Trafficking in Persons Bill. These instruments have been critically assessed having regard to the international and regional obligations imposed on states, as previously discussed in chapter three.

South Africa, following international and regional trends, incorporated the Palermo Trafficking in Persons Protocol definition, under article 3, into its domestic legislation. The definition of child trafficking in the Children's Act and the Trafficking in Persons Bill therefore closely resembles that found in international law. Unfortunately the definition, as contained within the Sexual Offences Amendment Act and the proposed Trafficking in Persons Bill, place an unnecessary burden on prosecutors and investigators. However, their definition together with the one contained in the Children's Act, is sufficient to prohibit all aspects of human trafficking in South Africa. Furthermore, as South Africa's proposed and current legislation prevents all aspects human trafficking, this places a greater obligation on South Africa to prohibit all forms of exploitation and trafficking in the country. From a legal perspective, it must thus be argued that South Africa's law with regard to human trafficking goes beyond what is required under the international and regional instruments previously discussed.

Additionally, South Africa has recognised that the duty to assist victims of trafficking is one of the most important obligations found in international and regional human rights law. From the above discussion, it must be argued that South

Africa has taken positive steps to providing assistance to victim of trafficking through the enactment of laws and policies. One of concerns however remains the lack of explanation regarding the duties imposed on various members of the public. Thus, through the adoption of policies or directives, South Africa would strengthen its fulfilment of the duty to assist victims of trafficking. Furthermore, through the ratification of various bilateral and multilateral agreements and with recent prosecutions of traffickers, it must be argued that South Africa is taking positive steps to ensure that the trafficking of humans is eradicated both globally and domestically. South Africa should thus continue to strengthen its measures to effectively combat child trafficking in the country.

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Chapter Five: **CONCLUSION**

1. SUMMARY

Trafficking, particularly of children, is a global issue and one that affects nearly every country in the world. This study has illustrated the gravity of human trafficking as an offence that involves a variety of criminal acts and abuses perpetuated against women and children. When children are trafficked a host of human rights are violated including the right to life, maximum survival and development; the right to non-discrimination and equality; and, the right to be protected from all forms of harm and exploitation.²⁹² It is thus unarguable that trafficking is one of the gravest human rights violations currently perpetuated against children.

This study sought to critically examine South Africa's child trafficking obligations under current international and regional human rights law. The international and African regional community has attempted to respond to this issue of child trafficking through the enactment of various human rights instruments, in particular, the CRC, CEDAW, the ILO Child Labour Convention, and the African Children's Charter. These international and regional instruments were analysed to establish the obligations they impose on states. It became apparent that the main obligations imposed upon states through these human rights instruments are the duty to prevent human trafficking and human exploitation, the need to assist victims of trafficking, the duty to prosecute and investigate human traffickers, and finally, the duty to use international cooperation in the elimination of child trafficking globally.²⁹³

The definition of child trafficking forms the foundation of this study. The only universally accepted definition of human trafficking in the global community can be

²⁹² King op cit (n15) at pp. 15-16.

²⁹³ Please see chapter two and three of this paper for further discussions on the main obligations imposed on states.

found in article 3 of the Palermo Trafficking in Persons Protocol.²⁹⁴ Although this definition does not adequately incorporate the essential elements of slavery, particularly the sale and disposal of a person, the definition remains comprehensive. Thus, the definition of human trafficking in the Palermo Trafficking in Persons Protocol provides states with a necessary guideline upon which to model their domestic legislation. South Africa thus incorporated the Palermo Trafficking in Persons Protocol definition into its domestic legislation, particularly in, the Children's Act and the Trafficking in Persons Bill.²⁹⁵ This study has however argued that South Africa's current and proposed definition, in the Sexual Offences Amendment Act and the Trafficking in Persons Bill, place an unnecessary evidentiary burden on investigators and prosecutors by requiring that one of the listed means must have been used to traffic a child. This was an unfortunate inclusion by Parliament and as such, it is recommended that this requirement be removed, particularly in the proposed Trafficking in Persons Bill. South Africa is evidently trying to uphold its international and regional obligations and the exclusion of this burden would result in further compliance with these obligations.

As noted above, states are under a duty to prevent the trafficking and exploitation of all people. This is one of the most important obligations investigated in this study and is arguably the most important obligation states have as far as child trafficking is concerned. States are thus required to act with due diligence to prevent the trafficking and exploitation of all humans. This duty further requires states to ensure that the human rights of all trafficked persons are at the heart of all efforts made to prevent and combat the trafficking in humans.²⁹⁶ This study identified that states are bound to take all appropriate measures including national and bilateral measures to combat the trafficking in children. With regard to South Africa, it goes beyond the international and regional human rights instruments in what its law serves to prevent. Exploitation is thus extensively defined to include forced marriages, forced labour or services, child labour and the impregnation of a female person against her will for the purpose of selling her child when the child is born.²⁹⁷ Furthermore, the Sexual

²⁹⁴ Please refer to page 12 of this study for an extensive analysis of the Palermo Trafficking in Persons definition.

²⁹⁵ Please refer to page 51 of this study for the full analysis of South Africa's definition of child trafficking.

²⁹⁶ Please refer to page 29 for a lengthy discussion on this obligation.

²⁹⁷ See Section 1(1) of the Children's Act and the Trafficking in Persons Bill.

Offences Amendment Act and the Trafficking in Persons Bill go beyond mere exploitation as a reason for human trafficking, to include grooming and abuse of a person for sexual purposes. These are two new elements and as such, place a greater obligation on South Africa. However, South Africa is evidently not only trying to prohibit the exploitation of children but also all other abuses that make up the offence of child abuse.²⁹⁸ Although the full extent of trafficking in South Africa remains unclear, from a legal perspective, the law with regard to human trafficking is extensive in nature and, in some important respects, goes beyond the standards established in the international and regional instruments previously discussed.

The importance of the obligation on states to assist victims of trafficking cannot be underestimated. Victims of trafficking suffer various forms of emotional, physical and psychological abuse at the hands of the trafficker or as a result of trafficking. International and regional law, in particular, have recognised that children are in need of special care due to their age, physical strength and vulnerability.²⁹⁹ States need to therefore provide the necessary and appropriate care to these victims, especially when victims are not in their country of origin. This obligation distinctly requires that all measures taken to assist these victims are informed by the human rights of victims and the best interests of the child. The Constitution itself requires that the state provides the requisite care and assistance to all children who lack their parental care.³⁰⁰ With regard to this duty, South Africa has implemented various policy documents to ensure that different members of the public are given the responsibility to care for and assist victims of trafficking. For example, through the National Sexual Assault Policy and the National Management Guidelines for Sexual Assault Care for Health Care Practitioners, all trafficked children who were sexually assaulted should receive comprehensive medical treatment.

Unfortunately, the duty to assist is not clearly detailed in the Children's Act, which merely places an obligation on various government bodies to assist victims.³⁰¹ The Children's Act places an obligation on South Africa to: refer the child to a designated social worker, to assist with obtaining refugee status, and to provide the child with

²⁹⁸ Please refer to page 56 for a lengthy discussion on this obligation

²⁹⁹ Please refer to page 36 for more information with regard to the duty to assist victims of trafficking.

³⁰⁰ See section 28 of the Constitution.

³⁰¹ Please refer to page 55 for a lengthy discussion on this obligation with regard to South African law.

temporary safe care if such care is required.³⁰² Unfortunately, the above mentioned assistance can only be granted during a court process or authorised by a child court. The Trafficking in Persons Bill however goes beyond the Children's Act as it provides more than simply technical assistance to victims of trafficking. For example, the Trafficking in Persons Bill grants the DG of Home Affairs with the discretion to determine the form of assistance appropriate to each victim of trafficking and requires that the victim of trafficking be allowed to remain in the country for a minimum of 90 days to recover.³⁰³

Furthermore, repatriation, which continues to be used globally and remains the most commonly used form of assistance to foreign victims, was briefly examined. It has been internationally accepted that a child may only be repatriated if it is in their best interest to do so.³⁰⁴ Both the Children's Act and the Trafficking in Persons Bill, place an obligation on the DG of Home Affairs to not return a child to their country of origin without first considering the child's best interest, safety and the possibilities of being trafficked again. It can therefore be argued that South Africa goes beyond the international requirements for repatriation, which only requires that the child's best interests be a primary consideration. South Africa is thus ensuring that some assistance is provided to victims of trafficking. It is, however, recommended that Parliament should specify the nature of the duties of health workers and investigators. Such duties may relate to the provision of the following assistance: psychiatric therapy and trauma counselling; health care including physical examinations, HIV and Aids testing, pregnancy testing and medical advice; and when shelter is required, such places are child friendly having regard to the fact that the child is a victim of trafficking. Although the specific duties on each public servant responsible for the care of victims of trafficking is lacking, South Africa does provide the necessary assistance to victims to meet at least the minimum requirements found in the international and regional human rights instruments.

As was shown in Chapter Three, South Africa is under a further international and regional obligation to investigate instances of trafficking and to punish and prosecute

³⁰² Section 289 of the Children's Act.

³⁰³ Please refer to page 56 for a lengthy discussion on this provision.

³⁰⁴ Please refer to pages 40 and 60 for the full discussion on repatriation.

traffickers.³⁰⁵ The Children's Act is extensive in nature and prohibits certain acts that may facilitate child trafficking. Additionally, South Africa's legislation goes beyond its international and regional obligations to punish those who assist, support or harbour traffickers of children.³⁰⁶ This study has noted that there are many pieces of legislation in South Africa that could, to differing degrees, be used by prosecutors to convict suspected traffickers in children. However, there is no specific legislation which currently provides for the prosecution of human traffickers in South Africa. To address this lacuna, the Trafficking in Persons Bill is in the advanced stages of adoption. When this Bill comes into effect, it will be possible to prosecute a person suspected of trafficking children directly for trafficking, and not indirectly through other criminal offences. In the meantime, however, prosecutors must invoke existing laws to prosecute traffickers. For example, in the *S v Sayed and another* case of 2010,³⁰⁷ prosecutors were able, under existing law, to prosecute persons on the charge of human trafficking using the Prevention of Organised Crime Act. The importance of this case cannot be underestimated as it is the first human trafficking case in South Africa that has ended in a successful conviction. Furthermore, through the *Ermelo* case,³⁰⁸ it must be argued that South Africa is making progressive steps to ensure that people suspected of human trafficking are convicted and tried. South Africa is thus attempting to uphold its international and regional obligations in terms of investigating and prosecuting suspected human traffickers. However, once the Trafficking in Persons Bill is fully enacted, South Africa's fulfilment of this obligation will be further strengthened.

The final obligation imposed on South Africa by the international and regional human rights instruments, as outlined above, is international cooperation.³⁰⁹ It was noted by the High Commissioner on Human Rights that human trafficking, by its very nature, cannot be combatted solely through domestic means; rather states are required to work together in their efforts to eradicate child trafficking globally. South Africa's current and proposed legislation specifically requires Parliament to

³⁰⁵ The duty to investigate is provided on pages 39 and 58 of this study.

³⁰⁶ Section 285 of the Children's Act.

³⁰⁷ Case heard in 2010 in the Durban Regional Court. No citation is currently available.

³⁰⁸ *Malachi v Cape Dance Academy International (Pty) Ltd and others* 2010 (11) BCLR 1116 (CC). No citation currently exists for the Ermelo case as it is still ongoing. Heard in 2010. No citation could be found. See South African Press Association website. Available at: www.sapa.org.za [Accessed on 09 February 2011].

³⁰⁹ The need for international cooperation is discussed on pages 41 and 60 of this study.

enter into bilateral and multilateral agreements with other states, regardless of whether those states are members of the Palermo Trafficking in Persons Protocol.³¹⁰ South Africa is thus required to seek cooperation from other states in order to effectively deal with the many issues that concern or form part of child trafficking. This study has identified some of the bilateral and multilateral agreements that South Africa has entered into including the Financing Agreement concerning Assistance to the South African Government to Prevent and React to Human Trafficking, Memorandum of Understanding between the Government of the Republic of South Africa and the International Labour Organisation concerning the Elimination of Child Labour, Basic Cooperation Agreement between the United Nations Children's Fund and the Government of the Republic of South Africa, and the Beijing Platforms. It must be argued that the mere fact that South Africa has entered into these agreements must be seen as a positive step in preventing child trafficking within the country and globally. South Africa is thus attempting to combat human trafficking through the assistance and finance of the international and regional community. With regard to the duty to combat human trafficking through international cooperation, South Africa is certainly attempting to uphold its obligation to fight human trafficking. South Africa is thus recommended to continue to enter into and respect the conditions of those bilateral and multilateral agreements so as to ensure that human trafficking is being comprehensively addressed both globally and domestically.

South Africa clearly took note of the criticisms levelled against it by the CEDAW Committee as it has made notable positive steps to address the issue of human trafficking within and beyond its borders.³¹¹ This study has shown that there are some gaps that need to be filled but that new legislation is being adopted and will, hopefully, be passed soon to address some of these outstanding concerns. In particular, South Africa should be encouraged to continue to strengthen its anti-trafficking legislation by addressing the concerns about the Trafficking in Persons Bill previously mentioned and enacting it without undue delay. Greater efforts must now be devoted to the implementation of the legislation and the relevant international and bilateral agreements.

³¹⁰ Section 283 of the Children's Act and section 35 of the Trafficking in Persons Bill.

³¹¹ This was discussed in greater detail on page 52 of this study.

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ANNEXURE I

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime

G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Entered into force 9 September 2003.

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

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

Article 3

Use of terms

For the purposes of this Protocol:

- (a) "Trafficking in persons" shall mean 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, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) "Child" shall mean any person under eighteen years of age.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5

Criminalization

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

II. Protection of victims of trafficking in persons

Article 6

Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons,

including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7

Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8

Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal

proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral

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

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means

of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14

Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.
2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.
3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit

with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

ANNEXURE II

PREVENTION AND COMBATING OF HUMAN TRAFFICKING BILL 7 OF 2010

[Note: *** indicated parts have been omitted]

To give effect to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to prevent and combat the trafficking in persons within or across the borders of the Republic; to provide for measures to protect and assist victims of trafficking in persons; to provide for the establishment of the Intersectoral Committee on Prevention and Combating of Trafficking in Persons; and to provide for matters connected therewith.

PREAMBLE

RECOGNISING that the search for improved socio-economic opportunities contributes to making persons vulnerable to becoming victims of trafficking;

CONCERNED by the increase of trafficking in persons, especially women and children, and the role played by organised criminal networks in the trafficking in persons globally;

SINCE the South African common law and statutory law do not deal with the problem of trafficking in persons adequately;

AND SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the right to human dignity, the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, the right not to be subjected to slavery, servitude or forced labour, and the right of children to be protected from maltreatment, neglect, abuse or degradation; and

MINDFUL of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, and other international instruments which place obligations on the Republic of South Africa towards the combating and, ultimately, the eradication of trafficking in persons,

Parliament of the Republic of South Africa therefore enacts as follows:ô

DEFINITIONS AND OBJECTS OF ACT

Definitions

1. In this Act, unless the context indicates otherwise

“**abuse of vulnerability**”, for purposes of the definition of trafficking, means any physical or psychological abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes, but is not limited to, taking advantage of the vulnerabilities of that person resulting from

(a) the person having entered or remained in the Republic illegally or without proper documentation;

(b) pregnancy;

(c) any disability of the person;

(d) addiction to the use of any dependence-producing substance;

(e) being a child; and

(f) socio-economic circumstances;

“**accredited organisation**” means an organisation accredited in terms of section 20 to provide services to adult victims of trafficking;

“**carrier**” includes a company, or the owner, agent, operator, lessor, driver, charterer or master of any means of transport;

“**child**” means a person under the age of 18 years;

“**Children’s Act**” means the Children’s Act, 2005 (Act No. 38 of 2005);

“**children’s court**” means a children’s court referred to in section 42 of the Children’s Act;

“**court**” means a High Court or a magistrate’s court for any district or for any regional division;

“**Criminal Law (Sexual Offences and Related Matters) Amendment Act**” means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);

“**Criminal Procedure Act**” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“**debt bondage**” means the status or condition that arises from a pledge by a person of

(a) his or her personal services; or

(b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the

(i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive;

(ii) length and nature of those services are not respectively limited and defined; or

(iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt;

“designated child protection organisation” has the meaning ascribed to it in section 1 of the Children’s Act;

“exploitation” includes, but is not limited to

(a) all forms of slavery or practices similar to slavery;

(b) forced marriage;

(c) sexual exploitation;

(d) servitude;

(e) debt bondage;

(f) forced labour;

(g) child labour as defined in section 1 of the Children’s Act;

(h) the removal of body parts; and

(i) the impregnation of a female person against her will for the purpose of selling her child when the child is born;

“forced labour” means labour or services of a person obtained or maintained 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;

“forced marriage” means a marriage concluded against the will and without the valid consent of both parties to the marriage;

“foreigner” means a person who is not a citizen or permanent resident of the Republic;

“guardian” has the meaning ascribed to it in section 1 of the Children’s Act;

“illegal foreign child” means a child who is present in the Republic in contravention of the Immigration Act;

“**internet service provider**” means an internet service provider as defined in section 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002);

“**Immigration Act**” means the Immigration Act, 2002 (Act No. 13 of 2002);

“**Minister**” means the Cabinet member responsible for the administration of justice;

“**National Director of Public Prosecutions**” means the person referred to in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, and appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

“**parent**” has the meaning ascribed to it in section 1 of the Children’s Act;

“**parental responsibilities and rights**”, in relation to a child, means the responsibilities and rights referred to in section 18 of the Children’s Act;

“**person**”, for purposes of this Act, includes a natural person, a juristic person and a partnership, unless the context indicates otherwise;

“**prescribe**” means prescribe by regulation in terms of section 43 of this Act;

“**provincial department of social development**” has the meaning ascribed to it in section 1 of the Children’s Act;

“**provincial head**” has the meaning ascribed to it in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

“**removal of body parts**” means the removal of or trade in any organ or other body part from a living person who has been trafficked or the body of a deceased person who has been trafficked and killed for the sole purpose of removing the organ or other body part in contravention of the National Health Act, 2003 (Act No. 61 of 2003);

“**servitude**” means a condition in which the labour or services of a person are provided or obtained through threats or perceived threats of harm to that person or another person, or through any scheme, plan or pattern intended to cause the person to believe that, if the person does not perform the labour or services in question, that person or another person would suffer harm;

“**sexual exploitation**” means the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law against a victim of trafficking, and includes forcing a victim of trafficking to participate in the production of pornographic material or to perform any act of a sexual nature in, but not limited to, a strip club, massage parlour, brothel or escort agency;

“**slavery**” means 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;

“**social service professional**” has the meaning ascribed to it in section 1 of the Children’s Act;

“**social worker**” means a person registered as a social worker in terms of section 17 of the Social Service Professions Act, 1978 (Act No. 110 of 1978);

“**trafficking**” includes the delivery, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, exchange, lease, disposal or receiving of a person, or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic, of a person trafficked or an immediate family member of the person trafficked, by means of

- (a) a threat of harm;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) the abuse of vulnerability;
- (d) fraud;
- (e) deception or false pretences;
- (f) debt bondage;
- (g) abduction;
- (h) kidnapping;
- (i) the abuse of power;
- (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (k) the giving or receiving of payments, compensation, rewards, benefits or any other advantage, for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic; and

“**UN Protocol to Prevent, Suppress and Punish Trafficking in Persons**” means the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000, the English text of which is replicated in Schedule 2.

Objects of Act

2. The objects of this Act are to

- (a) give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons;
- (b) provide for the prosecution of persons involved in trafficking and for appropriate penalties;
- (c) provide for the prevention of trafficking in persons and for the protection of and assistance to victims of trafficking;
- (d) provide services to victims of trafficking;
- (e) provide for effective enforcement measures;
- (f) establish an Intersectoral Committee on the Prevention and Combating of Trafficking in Persons, which must develop a draft national policy framework; and
- (g) combat trafficking in persons in a co-ordinated manner.

OFFENCES, PENALTIES AND EXTRA-TERRITORIAL JURISDICTION

Trafficking in persons and acts aimed at committing, acquiring another person to commit, or conspiring to commit an offence under this Chapter

4. (1) A person is guilty of an offence of trafficking in persons if that person traffics another person and is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.
- (2) A person is guilty of an offence of involvement of trafficking in persons and is, subject to section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), liable on conviction to a fine or imprisonment, or such imprisonment without the option of a fine or both, if that personô
- (a) performs any act aimed at committing an offence under this Chapter;
 - (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit an offence under this Chapter; or
 - (c) conspires with any other person to commit an offence under this Chapter or to aid in the commission thereof.
- (3) It is no defence to a charge of contravening subsection (1) or (2) thatô
- (a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking, or that the

intended exploitation or action did not occur, even if none of the means referred to in the definition of trafficking have been used; or

(b) an adult person who is a victim of trafficking has consented to the intended exploitation, the action which was intended to constitute trafficking or that the intended exploitation or action did not occur, if one or more of the means referred to in the definition of trafficking have been used.

(4) In order to establish the liability in terms of subsection (1) or (2) of an employer or principal, the conduct of an employee or agent of or any other person acting on behalf of the employer or principal may be attributed to the employer or principal if that person is acting

(a) within the scope of his or her employment;

(b) within the scope of his or her actual or apparent authority; or

(c) with the express or implied consent of a director, member or partner of the employer or principal.

(5) Subsection (4) does not exclude the liability of an employee or agent of or any other person acting on behalf of the employer or principal for committing the offence of trafficking in persons.

(6) (a) A finding by a court that an employer or principal has contravened subsection (1) or (2) serves as a ground for the revocation or cancellation of any licence or registration that the employer or principal may require in order to conduct its business.

(b) The clerk or registrar of the court which made the finding referred to in paragraph

(a) must, in writing notify the authority that granted the licence or registration of the finding.

(c) The authority that granted the licence or registration must review the licence or the registration and, where necessary, revoke or cancel the licence or registration.

Debt bondage

5. Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

Possession, destruction, confiscation, concealment of or tampering with documents

6. Any person who has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in facilitating or promoting

trafficking in persons is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years.

Using services of victims of trafficking

7. 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 that such person is a victim of trafficking, is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

Conduct facilitating trafficking in persons

8. (1) A person is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years if the person

(a) intentionally leases or subleases any room, house, building or establishment for facilitating or promoting trafficking in persons or allows it to be used or ought reasonably to have known that it will be used for facilitating or promoting trafficking in persons; or

(b) advertises, publishes, prints, broadcasts, distributes or causes the advertisement, publication, printing, broadcast or distribution of information that facilitates or promotes trafficking in persons by any means, including the use of the internet or other information technology, and knows or ought reasonably to have known that it will be used for facilitating or promoting trafficking in persons.

(2) An internet service provider operating in the Republic

(a) must take all reasonable steps to prevent the use of its service for the hosting of information referred to in subsection (1)(b); and

(b) that has knowledge that any internet address on its server contains information referred to in subsection (1)(b) must

(i) without delay report that internet address, as well as the particulars of the person maintaining or in any manner contributing to that internet address, to the South African Police Service;

(ii) take all reasonable steps to preserve any evidence for purposes of investigation and prosecution by the relevant authorities; and

(iii) without delay take all reasonable steps to prevent access to that internet address by any person.

(3) An internet service provider who fails to comply with the provisions of subsection

(2) is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years.

(4) (a) A finding by a court that an internet service provider has contravened subsection (2) serves as a ground for the revocation or cancellation of that licence.

(b) The clerk or registrar of the court which made the finding referred to in paragraph (a) must, in writing, notify the authority that granted the licence of the finding.

(c) The authority that granted the licence must review the licence and, where necessary, revoke or cancel the licence.

Liability of carriers

9. (1) A carrier who brings a victim of trafficking into or removes a victim of trafficking from the Republic knowing that the victim of trafficking does not have a passport and, where applicable, a valid visa required for lawful entry into or departure from the Republic, is guilty of an offence and is liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years.

(2) A carrier is not guilty of an offence under subsection (1) if entry of the victims of trafficking into the Republic occurred because of circumstances beyond the control of the carrier.

(3) In addition to any other offence under this section, a carrier is liable to pay the expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim, as provided for in section 28.

Extra-territorial jurisdiction

10. (1) A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence in terms of this Act had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the person to be charged

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) has committed the offence against a citizen of the Republic or a person who is ordinarily resident in the Republic;

(d) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic;

(e) is, for any reason, not extradited by the Republic or if there is no application to extradite that person; or

(f) is a juristic person or a partnership registered in terms of any law in the Republic.

(2) Only a High Court has jurisdiction in respect of an offence referred to in subsection (1)(d).

(3) A person who commits an offence referred to in subsection (1) is liable on conviction to the penalty prescribed for that offence.

(4) The Minister must, in consultation with the Chief Justice and after consultation with the National Director of Public Prosecutions, in writing designate an appropriate court in which to conduct a prosecution against any person accused of having committed an offence in a country outside the Republic as provided for in subsection (1).

(5) No prosecution may be instituted against a person in terms of this section with respect to conduct which formed the basis of an offence under this Act in respect of which that person has already been convicted or acquitted by a court of another jurisdiction.

(6) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions.

CHAPTER 4

IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING

Reporting and referral of child victim of trafficking

12. (1) Despite any other law, policy or code of conduct prohibiting the disclosure of personal information, an immigration officer, labour inspector, social worker, social service professional, medical practitioner, nurse, teacher, traditional health practitioner, traditional healer or traditional leader who, on reasonable grounds, suspects that a child is a victim of trafficking must immediately report that suspicion to a police official for investigation.

(2) Any person other than the persons referred to in subsection (1) who on reasonable grounds suspects that a child is a victim of trafficking, must report that suspicion to a police official for investigation.

(3) A person referred to in subsection (1) or (2)â

(a) must provide reasons for that suspicion to a police official;

(b) who makes the report in good faith, is not liable to civil action on the basis of the report; and

(c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.

(4) A police official to whom a report has been made in terms of subsection (1) or (2) or a police official who, on reasonable grounds, suspects that a child is a victim of trafficking must, within 24 hours, refer that child to a designated child protection organisation or the provincial department of social development, pending a police investigation into the matter.

(5) The procedure provided for in section 110(5) to (8) of the Children's Act applies in respect of a child referred to a designated child protection organisation or the provincial department of social development in terms of subsection (4).

(6) A person who fails to comply with the provisions of subsections (1), (2) or (4), is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year.

Reporting and referral of adult victim of trafficking

13. (1) (a) An immigration officer, labour inspector, social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader who, on reasonable grounds, suspects that an adult person is a victim of trafficking must, subject to paragraph (b), immediately report that suspicion to a police official for investigation.

(b) A social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader may only report a matter to a police official as provided for in paragraph (a) if the victim has given his or her written consent in the prescribed manner, except where the person is

(i) mentally disabled; or

(ii) in an altered state of consciousness, including being under the influence of any medicine, drug or other substance, to the extent that the person's consciousness or judgement is adversely affected.

(2) Any person, other than the persons referred to in subsection (1)(a), who on reasonable grounds suspects that an adult person is a victim of trafficking, may report that suspicion to a police official for investigation.

(3) A person referred to in subsection (1) or (2)

(a) must provide reasons for that suspicion to a police official;

(b) who makes a report in good faith, is not liable to civil action on the basis of the report; and

(c) is entitled to have his or her identity kept confidential if his or her safety is at risk as a result of the report, unless the interests of justice require otherwise.

(4) A police official to whom a report has been made in terms of subsection (1) or (2) or a police official who, on reasonable grounds, suspects that an adult person is a victim of trafficking must, within 24 hours, refer that person to an accredited organisation or the provincial department of social development, pending a police investigation into the matter.

(5) An accredited organisation or the provincial department of social development to which a referral has been made in terms of subsection (4) mustô

(a) within 24 hours, where necessary with the assistance of the South African Police Service, ensure the safety of the person concerned if the person's safety is at risk; and

(b) without delay, in the prescribed manner, assess whether the person concerned is a victim of trafficking.

(6) An adult person referred to in subsection (1), (2) or (4) may temporarily be accommodated at an accredited organisation pending a decision in terms of subsection

(5)(b) on whether he or she is a victim of trafficking.

(7) If, after an assessment referred to in subsection (5)(b), it is found that the person concerned is a victim of traffickingô

(a) a certificate, as prescribed, must be issued to him or her, certifying him or her to be a victim of trafficking; and

(b) he or she must be informed of the right to apply for a recovery and reflection period in terms of section 17, if he or she is a foreigner.

(8) An immigration officer or labour inspector who fails to comply with the provisions of subsection (1) or a police official who fails to comply with the provisions of subsection (4) is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year.

(9) A social worker, social service professional, medical practitioner, nurse, traditional health practitioner, traditional healer or traditional leader is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year if he or she fails toô

(a) request the written consent referred to in subsection (1)(b) of an adult person referred to in subsection (1)(a) whilst he or she on reasonable grounds suspects that that person is a victim of trafficking; or

(b) make a report referred to in subsection (1)(a) after he or she has obtained the written consent referred to in subsection (1)(b).

Child victim of trafficking found in Republic

14. (1) A child who is a victim of trafficking

(a) must be referred to a designated social worker for investigation in terms of section 155(2) of the Children's Act; and

(b) may, pending such investigation, be placed in temporary safe care in terms of section 151 of the Children's Act.

(2) If, after an investigation as provided for in subsection (1), an illegal foreign child is brought before the children's court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act, 1998 (Act No. 130 of 1998).

(3) A finding in terms of section 156 of the Children's Act that an illegal foreign child who is a victim of trafficking is a child in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the children's court order.

Provision of health care services

15. A foreigner who is a victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access.

Criminal prosecution against victim of trafficking prohibited

16. (1) No criminal prosecution may be instituted against a child who is found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children's Act, or against an adult person who has been certified to be a victim of trafficking in terms of section 13(7)(a), for

(a) entering or remaining in the Republic in contravention of the Immigration Act;

(b) assisting another person to enter or remain in the Republic in contravention of the Immigration Act;

(c) possessing any fabricated or falsified passport, identity document or other document used for the facilitation of movement across borders; or (d) being involved in an illegal activity to the extent that he or she has been compelled to do so, as a direct result of his or her situation as a victim of trafficking.

(2) If, during a criminal prosecution of a child or an adult person in respect of any matter referred to in subsection (1), the prosecutor on reasonable grounds suspects that that child or adult person is a victim of trafficking, the prosecutor must

(a) apply to the court for a postponement; and

(b) refer that child to a designated child protection organisation or provincial department of social development for an investigation in terms of section 110 of the Children's Act; or

(c) refer that adult person to an accredited organisation or provincial department of social development for an assessment referred to in section 13(5).

(3) A certificate that an adult person is a victim of trafficking or a finding by a children's court that a child is a victim of trafficking serves as ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking.

CHAPTER 5

STATUS OF FOREIGN VICTIMS OF TRAFFICKING

Recovery and reflection period

17. (1) Despite the provisions of the Immigration Act, the Director-General: Home

Affairs must, in the prescribed manner and subject to the prescribed conditions, allow a foreigner who has been certified to be a victim of trafficking in terms of section 13(7)(a), regardless of his or her status, to remain in the Republic for a non-renewable recovery and reflection period not exceeding 90 days.

(2) If a foreigner referred to in subsection (1), after a period of 30 days since he or she has been granted a recovery and reflection period, is unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, an investigation into his or her circumstances must be conducted by the Director-General: Social Development in order to determine whether it is safe to return him or her to his or her country of origin or the country from where he or she has been trafficked.

(3) If a foreigner referred to in subsection (2) is still unwilling to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker upon expiration of the recovery and reflection period, the information obtained as a result of an investigation referred to in subsection (2) must be provided to the Director-General: Home Affairs to be taken into account when deciding whether to repatriate the foreigner.

(4) If the Director-General: Social Development is unable to complete an investigation referred to in subsection (2) before the expiration of the recovery and reflection period, he or she must, in the prescribed manner, request the Director-General: Home Affairs to extend, in the prescribed manner, that period to six months.

(5) The granting of a non-renewable recovery and reflection period referred to in subsection (1) does not

(a) depend upon the willingness of a victim of trafficking to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons; and

(b) prevent or prejudice the competent authority from conducting any relevant investigation, provided that due regard is given to the emotional state of the victim.

Temporary residence

18. (1) Despite the provisions of section 11(1) of the Immigration Act, a visitor's permit may be issued to a victim of trafficking

(a) who

(i) is present in the Republic; and

(ii) has agreed to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a case of trafficking in persons; or

(b) if an investigation referred to in section 17(2) indicates that it is not safe to return him or her to his or her country of origin or the country from where he or she has been trafficked.

(2) Despite the provisions of section 11(1) of the Immigration Act, a visitor's permit may be renewed by the Director-General: Home Affairs for the duration of the investigation of and the prosecution of a case of trafficking in persons.

(3) A visitor's permit referred to in subsection (1) may be issued to a victim of trafficking regardless of

(a) his or her status; or

(b) whether a recovery and reflection period as provided for in section 17 was granted or has expired.

(4) For purposes of this Act, the Director-General: Home Affairs may, on humanitarian grounds, extend a visitor's permit referred to in subsection (1), taking into account the likelihood that the holder of that permit may be harmed, killed or trafficked again if he or she is returned to his or her country of origin or the country from where he or she has been trafficked.

(5) Despite the provisions of section 11(2) of the Immigration Act, the holder of a visitor's permit that has been extended in terms of subsection (4) may conduct work or study in the Republic.

CHAPTER 8

DEPORTATION AND REPATRIATION OF VICTIMS OF TRAFFICKING

Summary deportation of victim of trafficking prohibited

29. Subject to section 30, the summary deportation of a victim of trafficking is prohibited.

Repatriation of victim of trafficking from Republic

30. (1) The Director-General: Social Development may not return a foreign child who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to the

(a) best interests of the child standard as provided for in section 7 of the Children's Act;

(b) safety of the child during the repatriation process;

(c) availability and suitability of care arrangements and the safety of the child in the country to which the child is to be returned; and

(d) possibility that the child might be harmed, killed or trafficked again.

(2) The Director-General: Home Affairs

(a) may not return an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked without giving due consideration to the

(i) safety of the person during the repatriation process;

(ii) safety of the person in the country to which the person is to be returned; and

(iii) possibility that the person might be harmed, killed or trafficked again; and

(b) must

(i) before returning a person referred to in paragraph (a) to his or her country of origin or the country from where he or she has been trafficked, request the Director-General: Social Development to take reasonable steps as provided for in section 31(a); and

(ii) inform a person referred to in paragraph (a), in the prescribed manner, of any arrangements that have been made for his or her reception in the country to which he or she is to be returned.

(3) This section does not prohibit the voluntary return of an adult who is a victim of trafficking to his or her country of origin or the country from where he or she has been trafficked.

Assistance to foreign victim of trafficking

31. The Director-General: Social Development must

(a) take reasonable steps to find suitable family members or an institution or organisation that renders assistance to victims of trafficking in the country to which a person referred to in section 30(1) or (2) is to be returned and that is willing to provide assistance to such a person; and

(b) without undue delay, provide the Director-General: Home Affairs with information in respect of a request made in terms of section 30(2)(b)(i).

Repatriation of victim of trafficking to Republic

32. With due regard to the safety of the person and without delay

(a) the Director-General: International Relations and Co-operation must

(i) in co-operation with the Director-General: Social Development assess the risks to the safety and life of a person who is a citizen or permanent resident of the Republic and who is on reasonable grounds considered to be a victim of trafficking, if he or she is returned to the Republic;

(ii) facilitate the return of a person referred to in subparagraph (i) to the Republic; and

(iii) advise the Director-General: Home Affairs on measures to secure the reception of a person referred to in subparagraph (i) at a South African port of entry;

(b) the Director-General: Home Affairs must

(i) facilitate and accept the return of a person referred to in paragraph (a);

(ii) where necessary, take measures to secure the reception of a person referred to in paragraph (a) at a South African port of entry;

(iii) issue travel documents or other authorisations as may be necessary to enable that person to travel to and enter the Republic;

(iv) at the request of another State that is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons or to an agreement relating to trafficking in persons to which the Republic is a party, verify that a person who is on reasonable grounds considered to be a victim of trafficking is a citizen or permanent resident of the Republic;

(v) upon entry into the Republic of a child who is on reasonable grounds considered to be a victim of trafficking refer the child to a designated social worker for investigation in terms of section 155(2) of the Children's Act; and

(vi) upon entry into the Republic of a person who is on reasonable grounds considered to be an adult victim of trafficking refer the person to an accredited organisation or provincial department of social development for an assessment referred to in section 13(5).

Escorting of child victim of trafficking

33. (1) If it is considered to be in the best interests of a child who has been trafficked, the Director-General: Social Development must authorise an adult at State expense to

escort the child from the place where the child was found to the place from which the child was trafficked.

(2) The Director-General may not act in terms of subsection (1) unless he or she is satisfied that the parent, guardian or other person who has parental responsibilities and rights in respect of the child does not have the financial means to travel to the place where the child is in order to escort the child back.

CHAPTER 9

GENERAL PROVISIONS

Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

34. (1) If a children's court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child, the court may

(a) suspend all the parental responsibilities and rights of that parent, guardian or other person; and

(b) place that child in temporary safe care, pending an inquiry by a children's court.

(2) Any action taken by a children's court in terms of subsection (1) does not exclude a person's liability for committing the offence of trafficking in persons as provided for in section 4.

International cooperation

35. (1) The President may on the conditions as he or she deems fit

(a) enter into an agreement with a foreign State that is not a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons; or

(b) enter into an agreement with a foreign State that is a State Party to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons in respect of any matter pertaining to trafficking in persons for the purpose of supplementing the provisions of that protocol or to facilitate the application of the principles contained therein.

(2) An agreement referred to in subsection (1) may not be in conflict with the provisions of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

(3) The President may agree to any amendment or revocation of an agreement referred to in subsection (1).

(4) An agreement referred to in subsection (1) or any amendment or revocation thereof, is not of any force or effect until that agreement, amendment or revocation has been approved by Parliament.