

**COMBATING HUMAN TRAFFICKING:
A SOUTH AFRICAN LEGAL PERSPECTIVE**

by

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I thank my Heavenly Father for His unfailing love.

**May this thesis be used to serve You –
contributing in some way to bringing hope
to those who have lost hope.**

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DECLARATION

I declare that this thesis submitted for the degree *Doctor Legum* at the University of the Free State is my own independent work and has not previously been submitted by me at another university.

ABSTRACT

The transatlantic slave trade has been outlawed for more than 200 years. However, could it be that slavery still exists, but in a modern form, namely that of human trafficking for various exploitative purposes?

Investigating the combating of human trafficking from a legal perspective is a relatively new research field in South Africa. Therefore, this study, having identified the gap in research on the current South African legal response to combating human trafficking, strives to make a contribution to the body of research on this issue.

The aim of the study is threefold: first, to provide a better understanding of the multifaceted human trafficking crime; secondly, to clarify obligations to combat human trafficking contained in relevant international and African regional instruments; and, thirdly, to analyse the South African legal response for combating trafficking and to assess whether this response complies with the identified international and African regional obligations.

The objectives of the research are designed to realise the threefold aim. As regards the first part of the aim, the objective is to describe and clarify important issues relating to human trafficking. This is in line with the reasoning of Gould¹ that an in-depth knowledge of the human trafficking phenomenon is vital for the purpose of an effective response.

¹ Gould 2006:19.

To realise the second part of the aim, the objective is to review the historical development of relevant international and African regional instruments in order to identify, categorise and, as far as possible, synthesise obligations to combat human trafficking.

Unlike many other studies, the present study draws obligations and recommended directives and guidelines for combating this crime from the broader framework of instruments relevant to human trafficking, and not only from the landmark treaty on human trafficking, namely the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).

As regards the last part of the aim, the objective is twofold. First, the current South African legal framework applicable to human trafficking is described and analysed. This framework comprises three components: existing general laws that may be applicable to some human trafficking activities; the first trafficking-specific legislative provisions as contained in the *Children's Act 38 of 2005* and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*; and the comprehensive anti-trafficking legislation proposed in the *Prevention and Combating of Trafficking in Persons Bill (B7-2010)*.

While the first part of the last objective maps out the South Africa anti-trafficking framework, the second part compares this framework with international and African regional obligations pertaining to domestic counter-trafficking responses. Finally, based on this comparison,

recommendations are made for enhancing the South African legal response designed to combat human trafficking.

By realising the threefold aim of the study, the study can, it is submitted, make a valuable contribution to research on combating human trafficking in South Africa from a legal perspective. By making the research available to the legal fraternity, such research may prove useful in litigation, in the training of lawyers, and in future law reform. The study may also be valuable in informing multidisciplinary stakeholders and service providers dedicated to combating human trafficking by contributing to a better understanding of the human trafficking phenomenon. Lastly, the study may be of practical value to other African countries that are in the process of drafting anti-trafficking legislation conducive to the African context. These countries may find some guidance in considering the road travelled by South Africa in the search for comprehensive anti-trafficking legislation.

KEY WORDS

Child trafficking

Combating human trafficking

Human trafficking

Modern-day slavery

Prosecution of human trafficking

Trafficking in persons

LIST OF ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	acquired immune deficiency syndrome
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Centre for Child Law UP	Centre for Child Law, Faculty of Law, University of Pretoria
CICC	Coalition for the International Criminal Court
COE	Council of Europe
CRC	Convention on the Rights of the Child
DFA	Department of Foreign Affairs (SA)
DoJ&CD	Department of Justice and Constitutional Development (SA)
DPP	Director of Public Prosecutions (SA)
ECOWAS	Economic Community of West African States
EU	European Union
GAATW	Global Alliance Against Traffic in Women
HCCH	Hague Conference on Private International Law: World Organisation for Cross-Border Co-operation in Civil and Commercial Matters
HCHR	High Commissioner for Human Rights
HIV	human immunodeficiency virus
HSRC	Human Sciences Research Council (SA)

ILO	International Labour Organisation
IOM	International Organization for Migration
NDPP	National Director of Public Prosecutions (SA)
NGO	Non-governmental organisation
NPA	National Prosecuting Authority (SA)
OAU	Organisation of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
Organized Crime Convention	Convention Against Transnational Organized Crime
Palermo Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
Parliamentary Committee: Justice and Constitutional Development	Parliamentary Portfolio Committee on Justice and Constitutional Development
PCU	Programme Coordinating Unit
POCA	<i>Prevention of Organised Crime Act 121 of 1998</i>
SA	South Africa
SADC	Southern African Development Community
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SAQA	South African Qualifications Authority

SOCA	Sexual Offences and Community Affairs
SOCA Unit (NPA)	Sexual Offences and Community Affairs Unit in the National Prosecuting Authority
TIP Report	Trafficking in Persons Report (USA)
<i>Trafficking Bill</i>	<i>Prevention and Combating of Trafficking in Persons Bill B7-2010 (Trafficking Bill)</i>
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UN DPI	United Nations Department of Public Information
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN.GIFT	The United Nations Global Initiative to Fight Human Trafficking
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNODC	United Nations Office on Drugs and Crime
US	United States
USA	United States of America

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CHAPTER 1

INTRODUCTION

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CHAPTER 1

INTRODUCTION

Any bar owner or group of bar owners in Greece can send someone up to southern Bulgaria to buy women for cash. The cost of a girl in that area is \$1,000, or, if you negotiate, you might be able to get two for \$1,000. Best to try on a Monday for cheap prices, because most trafficking happens at the weekends. Mondays are slow, so you can get the leftovers.¹

1. BACKGROUND TO THE STUDY

The transatlantic slave trade has been outlawed for more than 200 years.² However, could it be that slavery still exists, but in a modern form?³ The literature and key research studies by the United Nations Office on Drugs and Crime (UNODC)⁴ as well as the United States (US)

¹ Cockburn 2003:10.

² US Department of State 2008:2. Some UNODC sources estimate that, previously, about 11,5 million Africans were trafficked into slavery over four centuries, while more than 30 million women and children have been trafficked within and from Southeast Asia alone in a decade up to 2002 – Singh 2004:340-341.

³ Some scholars estimate that more people are enslaved in the 21st century than during the time of the Roman Empire or during the height of the transatlantic slave trade – Snyman 2005:282.

⁴ UNODC 2009a:8-12, 78-292.

Department of State⁵ underpin that wheeling and dealing in human beings still exists.⁶ However, nowadays this contemporary form of slavery is hidden and disguised. Still, in essence, humans prey upon humans for money – people are used and abused, and are bought and sold as mere commodities, for the sole purpose of benefiting their exploiters.⁷

Given the disturbing reality that modern forms of slavery still exist, the burning question is: Why has this present-day slavery not yet been eradicated? From one perspective, the answer is simple. Human trafficking is an extremely lucrative business for individuals and organised crime syndicates, because it is a high-profit, but low-risk, crime.⁸ With profits estimated conservatively at 10 billion US dollars per year,⁹ the bulk of the literature indicates that human trafficking is the third-most lucrative international criminal activity after, and often conjoined with, trafficking in arms and drugs.¹⁰

⁵ US Department of State 2009:7-8, 58-307; US Department of State 2007:8-29.

⁶ UNODC & SADC 2007a:17-20; UNICEF 2005:1; Pearson 2000:2, 20-24; Kreston 2007:37; Rijken 2003:5-7, 79-81; International Crime and Terrorism 2004:1; UN.GIFT 2008a:5. The US Central Intelligence Agency estimates that, in the 1990s, traffickers earned up to \$250 000 for each trafficked woman – Haynes 2004:223.

⁷ UNODC 2009a:6; Bales 2004a:4.

⁸ Haynes 2004:227; Kreston 2007:38-39; Lee 2007:16. For a further discussion, see 6.3 in Chapter 2 below.

⁹ McClain 2007:583; Kreston 2007:38; Haynes 2004:223; Gajic-Veljanoski and Stewart 2007:339.

¹⁰ Horn 2010:10; Gajic-Veljanoski and Stewart 2007:339; McClain 2007:583; Kreston 2007:38; Harrold 2006:101; Singh 2004:341; Haynes 2004:223; Snyman 2005:282.

Apart from human trafficking being a highly profitable undertaking, the additional advantage for agents in the human trafficking ring is that the risk of being detected, arrested and punished is minimal.¹¹ There are many reasons why the risk of detection in the case of this crime is so low.¹² The most significant reasons include the fact that anti-trafficking laws are lacking or are not implemented,¹³ that trafficked victims are often not identified and, when they are, are then prosecuted instead of being protected,¹⁴ that human trafficking is of a clandestine and transnational nature,¹⁵ that porous borders facilitate illegal border crossings, that corrupt government officials cooperate with human trafficking agents,¹⁶ and that traumatised victims are frightened to report the crime and are even more scared to testify against retaliating traffickers.¹⁷ While these factors contribute to the minimal arrest and conviction rate in respect of traffickers, an additional challenge is that,

¹¹ ILO 2008:11; Melvin 2006:6, 36; Truong and Angeles 2005:2; UN.GIFT 2008b:10; Shapiro 2008:18; Kanics and Reiter 2001:120-121; Shelley 2007:132; Snyman 2005:283; US Department of State 2007:47-56; UN.GIFT 2008e:1.

¹² David 2007:2-3; see also the discussion in 2.3 in Chapter 3 below.

¹³ UN.GIFT 2008c:2; UNODC 2006:xvii; ILO 2008:11; Shapiro 2008:18; Snyman 2005:283.

¹⁴ Melvin 2006:37; UN.GIFT 2008c:6; UNODC 2006:xx, 86, 89, 103; Kanics and Reiter 2001:112, 118; Lee 2007:11; Foundation Against Trafficking in Women *et al.* 2001:12; Stuurman 2004:5; Haynes 2004:26, 224, 227; Morawska 2007:105-106; McClain 2007:585; Rijken 2003:73; Raymond 2002:500; Snyman 2005:287; see also 3.2.6 in Chapter 3 and 3.9.1.1.2 in Chapter 6 below.

¹⁵ Gallinetti 2010:11.

¹⁶ GAATW 1999a:13; UN.GIFT 2008c:14; Singh 2004:344; UNODC 2006:xxi; ILO 2008:11; Gajic-Veljanoski and Stewart 2007:341; Foundation Against Trafficking in Women *et al.* 2001:4.

¹⁷ Haynes 2004:227, 245-246; Kreston 2007:39; Shelley 2007:116.

even when convictions are secured, deterrent sanctions are not imposed.¹⁸

In addition to the high profits and low risks, Haynes points out a further reason why human trafficking thrives. Unlike other trafficked commodities such as drugs, human beings are more profitable because they are “reusable, re-sellable and expendable commodities”.¹⁹ Given the enormous profits from resellable human “commodities” on the one hand, coupled with negligible risks on the other, it is not surprising that the trade in people is still booming worldwide.²⁰

The increased realisation of the gravity of the global human trafficking phenomenon has resulted in an extensive international response.²¹ Not only is the condemnation of the trade in people being rekindled on an international level, but a movement to combat this crime more effectively has also emerged.²²

The global ripple effect of international and regional interventions to curb human trafficking extends to national jurisdictions, including South Africa. Faced with the reality of this contemporary form of slavery, South Africa

¹⁸ US Department of State 2008:27; Haynes 2004:227, 245-246; UN.GIFT 2008b:10; Shelley 2007:132; Raymond 2002:492.

¹⁹ Haynes 2004:227; see also Lee 2007:16; Kreston 2007:39; International Crime and Terrorism 2004:1; Shelley 2007:116-117; Snyman 2005:282; Bales 2004a:4; Gallinetti 2010:11.

²⁰ HSRC 2010:5; US Department of State 2009:8; The Future Group 2007b:1-2; Defeis 2003/2004:485.

²¹ Gallinetti 2010:11; Kolberg 2005:2.

²² UNODC 2009a:6; see also the discussion of the development of international and regional instruments pertaining to trafficking in persons in Chapter 5 below.

is being challenged to design an effective national response to this complex crime. A key factor in designing a South African anti-trafficking response is the international obligations laid down for combating trafficking in persons. Many international and regional instruments relevant to human trafficking lay down obligations or minimum standards in respect of domestic anti-trafficking responses.²³ States parties to binding instruments are obligated to comply with these standards.²⁴ South Africa as a state party to many of these instruments is therefore required to review its counter-trafficking legal response and bring it in line with international obligations.

Another factor requiring South Africa to have an anti-trafficking legal response is the necessity for intercountry cooperation in combating human trafficking.²⁵ This crime not only thrives within countries, but also across international borders.²⁶ Therefore, national laws alone cannot combat cross-border trafficking.²⁷ To eradicate this transnational problem, the cooperation of all countries on all continents worldwide is required.²⁸ For this reason, South Africa needs to join forces and collaborate with the rest of the world in combating this mutual danger.

²³ For a discussion of these instruments, see Chapter 5 below.

²⁴ See Dugard 2005:62, 408-409 for a discussion of the requirements to be complied with before the Republic is bound by different types of international agreements. See also Kassan 2007:18–10; IOM 2009a:82; Stuurman 2004:5.

²⁵ Horn 2010:160.

²⁶ UNODC & SADC 2007b:13; GAATW 1999a:10.

²⁷ Rijken 2003:45-47. See also the discussion in 2.2.4 in Chapter 4 below.

²⁸ International Crime and Terrorism 2004:3; Rijken 2003:45-47; Burchell 2005:4; article 2(c) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).

2. RATIONALE FOR THE STUDY

In answering the call to develop a domestic counter-trafficking legal response, South Africa has introduced a variety of legislative and other legal measures. Given the unique nature of this complex crime,²⁹ it remains challenging to develop an appropriate legal response.³⁰ Recently, more research has been undertaken and a number of publications on human trafficking in South Africa have been incorporated in journals and books.³¹ However, comprehensive research designed to map out the South African legal response, in particular from a criminal justice perspective, for combating human trafficking and measuring its compliance with anti-trafficking obligations drawn from international and regional instruments, is lacking.³² For this reason, the main rationale for

²⁹ David 2007:1; see also 2 in Chapter 4 below.

³⁰ For a further discussion of the complexities of the human trafficking crime, see 2 and 3 in Chapter 2 and 2 in Chapter 4 below.

³¹ Examples of such publications include Horn 2010:1-164; HSRC 2010:1-206; Gould *et al.* 2010:37-45; Gallinetti 2010:11-17; IOM 2009a:1-115; IOM 2008:1-67; Kamidi 2007:1-50; Pharoah 2006:1-78.

³² The study of Kolberg focuses mainly on one international obligation, namely the duty to criminalise trafficking in persons as is required in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) – Kolberg 2005:3. However, the study does not cover other obligations pertaining to domestic responses, such as the provision of a clear definition of human trafficking, international cooperation, non-prosecution of victims or extraterritorial jurisdiction of the courts – see the discussion in 3 in Chapter 6 below. The study of Horn focuses on South Africa's compliance with its international obligations concerning child trafficking, but does not cover the trafficking of adult persons – Horn 2010:18. Similarly, Kamidi also focuses on child trafficking in a comparative study. The South African Law Reform Commission investigated some international and regional obligations to combat human trafficking and recommended law reform and specific anti-trafficking legislation – SALRC Project 131 in Issue Paper 25 *Trafficking in Persons* of 31-3-2004; SALRC Project 131 in Discussion Paper 111 *Trafficking in Persons* of 30-6-2006; and SALRC Project 131 in *Report on Trafficking in Persons* of August 2008. The recent research report of the Human Sciences Research Council concentrates on a better understanding of the many dimensions of human trafficking in

the present study is to make a contribution to addressing this gap in the research.

3. AIM AND OBJECTIVES OF THE STUDY

Investigating the combating of human trafficking from a legal perspective is a relatively new research field in South Africa.³³ Having identified the gap in research on the current South African legal response, this study strives to make a contribution to the body of research on this issue.

The aim of the study is threefold: first, to provide a better understanding of the multifaceted human trafficking crime; secondly, to clarify obligations to combat human trafficking contained in relevant international and African regional instruments; and, thirdly, to analyse the South African legal response for combating trafficking and to assess whether this response complies with the identified international and African regional obligations.

southern Africa – HSRC 2010:i. Although the study covers some aspects of the South African counter-trafficking legal response and international obligations to combat the phenomenon, key findings on, or an assessment of, South Africa's compliance with various international obligations are not included – HSRC 2010:iv-ix, 18-51. For a critical review of the HSRC Research Report, see Gould *et al.* 2010:37-45.

³³ Research by the International Organization for Migration indicates that about 80 percent of all studies on human trafficking are from Europe and the Asia-Pacific region, while only 13 percent are from the African continent – IOM 2006:9; see also HSRC 2010:1.

The objectives of the research are designed to realise the threefold aim of the study. As regards the first part of the aim, namely to provide a better understanding of human trafficking, the objective is to describe and clarify important issues relating to human trafficking. These issues include the definition of human trafficking and the various exploitative purposes for which trafficking is used, the characteristics of traffickers and trafficked persons, the causes and consequences of human trafficking, and the distinctive features of the crime that distinguish it from related crimes such as traditional slavery and people smuggling. The first objective, which is covered in Chapters 2 to 4, underscores the reasoning of Gould³⁴ that in-depth knowledge of the human trafficking phenomenon is vital for the purpose of an effective response.

To realise the second part of the aim, the objective is to review the historical development of relevant international and African regional instruments in order to identify, categorise and, as far as possible, synthesise obligations to combat human trafficking. This objective is dealt with in Chapters 5 and 6.

Unlike many other studies, the present study draws obligations and recommended directives to combat this crime from the broader framework of instruments relevant to human trafficking, and not only from the landmark treaty on human trafficking, namely the United Nations

³⁴ Gould 2006:19.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).³⁵

As regards the last part of the aim, the objective is twofold. First, the South African legal framework applicable to human trafficking is described and analysed in Chapter 7 below. The current legal framework comprises three components. The first component consists of existing general laws that may be applicable to some human trafficking activities. The second component comprises the first trafficking-specific legislative provisions in two pieces of legislation, namely the *Children's Act* 38 of 2005 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007. The last component of the South African legal framework is the comprehensive anti-trafficking legislation proposed in the *Prevention and Combating of Trafficking in Persons Bill* (B7-2010).

While the first part of the last objective maps out the South Africa anti-trafficking framework, the second part compares this framework with international and African regional obligations pertaining to domestic counter-trafficking responses. Finally, based on this comparison, recommendations are made for enhancing the South African legal response designed to combat human trafficking.

³⁵ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traffeng.pdf (accessed 11/3/2008); see also Defeis 2003/2004:487; IOM 2008:19; Kamidi 2007:20; Raymond 2002:492; UNODC 2008:1-2; Kolberg 2005:1-79.

4. STATEMENT OF THE PROBLEM

The problem statement of the study focuses mainly on whether the South African legal response is aligned with international and African regional obligations to combat human trafficking. To investigate the main problem, related issues are explored, such as what is human trafficking, how does human trafficking and its key features differ from other related crimes, what are the main international obligations to combat human trafficking, and what is the South African legal response regarding the combating of human trafficking?³⁶ Given South Africa's geographical location, it is also apposite to identify whether there are applicable African regional obligations to combat human trafficking. Having identified the international and African regional obligations to combat this crime, this study examines whether the current South African counter-trafficking response complies with these obligations. Finally, an assessment is made of whether the proposed South African legal reform concerning human trafficking is aligned with the identified international and African regional minimum standards for combating the trafficking crime.

South Africa has incurred international, regional and national obligations to address human trafficking. Internationally and regionally, South Africa signed and ratified anti-trafficking conventions, protocols and other

³⁶ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

relevant instruments.³⁷ On a national level, the *Constitution of the Republic of South Africa* 1996 necessitates the protection and realisation of human rights. Since numerous human rights are usually violated when persons are trafficked,³⁸ the government is obligated to introduce anti-trafficking measures to protect human rights enshrined in the South African Constitution.

In response to these obligations to address human trafficking, two schools of thought emerged. The one point of view cautions against precipitately introducing new trafficking laws while the existing South African legal system appears to be adequate to combat human trafficking.³⁹ Arguments were submitted as to why new laws to combat human trafficking should not be promulgated. One of the main arguments is that, before solutions can be developed, the extent and nature of the problem must first be clarified.⁴⁰ Rather than relying on unfounded trafficking estimates obtained without sound methodological research,⁴¹ it is submitted that, before new laws are drafted, the scope and nature of the problem should be ascertained.⁴² It is further submitted that trafficking-related offences can be prosecuted adequately under existing laws.⁴³ These laws include the common law crimes of murder,

³⁷ These international instruments are discussed in Chapter 5 below.

³⁸ See 3.8 in Chapter 6 below.

³⁹ Leggett 2004a:1-3.

⁴⁰ Gould 2006:23-24; UNODC 2009a:6.

⁴¹ See 2.2 in Chapter 2 below.

⁴² Gould 2006:23-24.

⁴³ Leggett 2004a:1-3; Pithey 2004:7; Gould 2006:22-23.

assault, extortion, abduction and kidnapping. Furthermore, a range of statutory provisions in various pieces of legislation may also be used to prosecute perpetrators successfully. Examples of such legislation are the *Basic Conditions of Employment Act 75 of 1997*; the *Children's Act 38 of 2005*; the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*; the *Domestic Violence Act 116 of 1998*; the *Films and Publications Act 65 of 1996*; the *Identification Act 68 of 1997*; the *Immigration Act 13 of 2002*; the *Prevention and Combating of Corrupt Activities Act 12 of 2004*; the *Prevention of Organised Crime Act 121 of 1998*; and the *Riotous Assemblies Act 17 of 1956*.

On the other hand, the counter-argument is that existing laws do not provide an adequate counter-trafficking response. In the first place, it is argued, they do not comply with obligations incurred in terms of ratified international and regional instruments.⁴⁴ In addition, it is argued, they do not deal adequately with the complexities of the human trafficking crime, and therefore tailor-made anti-trafficking legislation is needed.⁴⁵

The latter approach was chosen by the legislature. Accordingly, transitional trafficking-specific provisions were included in the *Children's Act 38 of 2005*⁴⁶ and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.⁴⁷ However, these provisions do not

⁴⁴ OHCHR 2002:8 – Guideline 4; see also 2 in Chapter 6 below.

⁴⁵ Molo Songololo 2000:86; IOM 2003:17-18, 133-134; Qaba 2004:42; Pithey 2004:9; Kreston 2007:40; Truong and Angeles 2005:58; UNODC & SADC 2007a:xii; Shapiro 2008:18; UN General Assembly Resolution 1994: paragraph 7; US Department of State 2003:7.

⁴⁶ Sections 1, 281-291.

⁴⁷ Sections 70-72; see also SALRC 2008:11.

address human trafficking comprehensively. First, while the *Children's Act* 38 of 2005⁴⁸ prohibits all forms of trafficking in children, no provision is made for trafficked adults. Secondly, although the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007⁴⁹ applies to both child and adult trafficked victims, it criminalises human trafficking for purposes of sexual exploitation only. Protection against other types of exploitation is not included. It must be noted that, from the outset, the trafficking provisions in these Acts were intended to serve only as an interim anti-trafficking measure pending their incorporation in the forthcoming comprehensive trafficking legislation.⁵⁰

In sum, the main research question focuses on whether the current South African compartmentalised legal response or the proposed law reform is aligned with African regional and international standards for combating human trafficking.

⁴⁸ Sections 281-291; see also Government Gazette no. 33076 of 1/4/10, Proclamation no. R.12, 2010 on the commencement of the remaining sections of the *Children's Act* 38 of 2005.

⁴⁹ Section 71.

⁵⁰ SALRC 2008:11. The scope of application of the trafficking provisions in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 is explained as follows in section 70(1): Pending the adoption of legislation in compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Trans-National Organised Crime (signed on 14 December 2000) and the repeal of this Part, the transitional provisions in this Part relating to the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of our international obligations and to deal with this rapidly growing phenomenon globally.

5. POINT OF DEPARTURE

An increased awareness on the part of the international community of the horrific dangers of human trafficking led to many countries adopting legislative and other mechanisms to address this crime.⁵¹ Notwithstanding the viewpoint opposing the promulgation of specialised trafficking legislation, South Africa joined these countries by mandating the South African Law Reform Commission to investigate the phenomenon of trafficking in persons for purposes of law reform.⁵² Pursuant to its obligations as signatory and party to relevant international and regional instruments⁵³, and because of the challenges embedded in addressing human trafficking with a multitude of existing laws, South Africa chose the route of introducing specific anti-trafficking measures. The legislature is in the process of finalising legislation dealing specifically and comprehensively with human trafficking.⁵⁴

Although recognising the view that specialised trafficking legislation is not essential, the point of departure of this study is that comprehensive, tailor-made anti-trafficking legislation aligned with international

⁵¹ Haynes 2004:224.

⁵² SALRC Project 131 in Issue Paper 25 *Trafficking in Persons* of 31-3-2004; SALRC Project 131 in Discussion Paper 111 *Trafficking in Persons* of 30-6-2006; and SALRC Project 131 in *Report on Trafficking in Persons* of August 2008; see also SALRC 2004:1-3; SALRC 2006:1; SALRC 2008:7.

⁵³ SALRC 2008:4; Kassan 2007:18–3. For a discussion of these international and regional instruments, see Chapter 5 below.

⁵⁴ Pithey 2004:7. A detailed discussion of the current South African anti-trafficking laws and of the proposed legislative reform follows in Chapter 7 below.

obligations must be promulgated and implemented, not only to prevent the trade and protect the victims, but also, and in particular, to prosecute and punish perpetrators adequately.⁵⁵ Anti-trafficking law reform is needed to deal properly with the transnational and intricate nature of the human trafficking phenomenon, the increasing involvement of organised criminal networks, and the daunting challenges to secure convictions and protect victims effectively.⁵⁶ While the process of finalising these anti-trafficking measures is taking place, the challenge is to review current laws and build international minimum standards as well as emerging good practices into proposed legislation.⁵⁷

6. RESEARCH DESIGN AND METHODOLOGY

The study is conducted by means of qualitative research.⁵⁸ Henning describes qualitative research as:

...the type of enquiry in which the qualities, the characteristics or the properties of a phenomenon are examined for better understanding and explanation.⁵⁹

⁵⁵ OHCHR 2002:8 – Guideline 4; see also 2 in Chapter 6 below.

⁵⁶ IOM 2003:17-18.

⁵⁷ David 2007:1, 3-6.

⁵⁸ Babbie and Mouton 2001:270-274; Maykut and Morehouse 1994:7-22.

⁵⁹ Henning *et al.* 2004:5.

Adopting a qualitative approach is apposite, in that human trafficking is examined and analysed in this study to enhance comprehension of this complex phenomenon.

Qualitative data was collected mainly by means of document analyses, which is a non-interactive strategy. A secondary research approach was mainly followed, with already-existing sources being relied upon.⁶⁰ As regards the analyses of document sources, multiple documents varying in nature and type were consulted and compared in order to enhance validity.⁶¹ These documentary sources include binding international and African regional instruments on human trafficking, as well as some non-binding documents.⁶² Furthermore, from a global point of view, data was collected from a range of research reports and other publications produced by international and intergovernmental organisations as well as by experts in the field. In the South African context, sources reviewed include the Constitution, the common law, existing legislation and proposed law reform on human trafficking, case law, relevant documents of the South African Law Reform Commission, research reports and other relevant publications.

To establish the authenticity⁶³ of the data sources, official records or primary sources were consulted as far as possible. For all components of

⁶⁰ Di Nicola 2007:54.

⁶¹ Babbie and Mouton 2001:274-278; Niewenhuys 2007:113-115.

⁶² See the various instruments covered in Chapter 5 below.

⁶³ Mouton 2001:72.

the study, secondary sources, including books, academic journals, research reports, newspaper articles and internet sources, were utilised.

To supplement primary data collection by means of document analyses, data was also obtained from informal discussions and interviews with key role players as an interactive strategy. From August 2007 to May 2010, informal, semistructured discussions and open-ended interviews were conducted with key participants, who were mainly identified by means of network sampling.⁶⁴ Discussions and interviews were conducted in person and also via telephone and email. Discussions with key participants were held in London and Cambridge (United Kingdom), Windhoek (Namibia), Maputo (Mozambique) and, locally, in Johannesburg, Pretoria, Cape Town, Kimberley, Bloemfontein and Durban. The majority of participants are listed in Addendum D. However, ethical considerations⁶⁵ have dictated that the identity of some interviewees not be disclosed for confidentiality and security reasons.

⁶⁴ McMillan and Schumacher 2001:403. According to Niewenhuys 2007:80, network or snowball sampling is a method “whereby participants with whom contact has already been made are used to penetrate their social networks to refer the researcher to other participants who could potentially take part in or contribute to the study. Snowball sampling is often used to find ‘hidden populations’, that is, groups not easily accessible to researchers through other sampling methods”. Di Nicola 2007:53, 57 confirms that one of the challenges in researching human trafficking is the fact that traffickers, victims, and clients of trafficked victims belong to so-called “hidden populations”. In this regard, human trafficking is often referred to as a “hidden” enterprise owing to the illegal nature of the activities and the coercion exercised on victims not to report the crime – see 2.2 in Chapter 2 below. In discussing sampling problems experienced in researching human trafficking, Di Nicola 2007:58 underscores the sampling of key informants by means of the snowball technique in order to achieve greater representation.

⁶⁵ McMillan and Schumacher 2001:579; Babbie and Mouton 2004:65. For a discussion of ethical implications of researching human trafficking, especially when focusing on informed consent as well as the safety, privacy and dignity of participants, see Di Nicola 2007:56, 57.

Along with the qualitative approach, an evaluation research methodology was adopted. According to McMillan and Schumacher,⁶⁶ evaluation research assesses a particular practice at a given site in terms of certain criteria. Applied to this study, evaluation research is used to assess the South African counter-trafficking response to criteria set in international and regional instruments. In selecting the most suitable form of evaluation research,⁶⁷ the methodological and other challenges encountered in researching human trafficking were taken into account.⁶⁸ In future when the comprehensive anti-trafficking legislation is finalised and implemented, summative,⁶⁹ judgement-oriented evaluation research⁷⁰ will be an appropriate design to measure how effectively the legislation has been implemented. However, at this stage, where anti-trafficking legislation is still in the development process, the study aims at making proposals regarding law reform, and, therefore, conducting a formative, improvement-oriented study⁷¹ is more suitable.

⁶⁶ McMillan and Schumacher 2001:20, 528.

⁶⁷ McMillan and Schumacher 2001:20, 528.

⁶⁸ Brennan 2005:35, 38-39 and Di Nicola 2007:53, 57 identify various challenges in researching human trafficking, in particular the diversity of trafficking contexts, in that trafficked persons come from various source countries, speak different languages and are subjected to different forms of trafficking. Other complicating factors are the transnational nature of some forms of trafficking and the fact that, since human trafficking is an illegal business, traffickers, victims, and clients of trafficked victims belong to so-called "hidden populations", which makes it problematic for researchers to identify and trace them and obtain their cooperation.

⁶⁹ While formative research aims at facilitating improvement, summative research focuses more on grading or assessment. For a discussion of formative and summative research, see McMillan and Schumacher 2001:529.

⁷⁰ McMillan and Schumacher 2001:529-531. Babbie and Mouton 2001:338 explain that judgement-oriented research measures performance against certain criteria to make a judgement as to whether it is successful or not.

⁷¹ Babbie and Mouton 2001:338 state that formative, improvement-oriented research typically involves collecting data during the start-up phases of an intervention in order to make suggestions about improvement.

A policy analysis evaluation design is chosen to address the main research problem of assessing whether the South African anti-trafficking response measures up to international and regional obligations.⁷² This design is appropriate, in that the compliance of the South African legal response with international obligations is evaluated in order to provide policy makers with possible recommendations for fine-tuning the response.

All research has its limitations and its strengths.⁷³ Some limitations may be identified in the methodology and design of the study. It is argued that rigorous quantitative research is essential to obtain more reliable data and to ensure a better understanding and management of the human trafficking phenomenon.⁷⁴ Di Nicola⁷⁵ also cautions that research on human trafficking mainly tends to be descriptive, describing and defining the phenomena, or at most exploratory, exploring the nature and frequency of the problem. It is conceded that this study also takes a descriptive, qualitative approach and does not include quantitative research. The lack of quantitative research in this study may thus

⁷² “Qualitative research” is an umbrella term which includes numerous research approaches, methodologies and designs – Niewenhuys 2007:56. For a further discussion of evaluation research, see McMillan and Schumacher 2001:20-21, 527-533; Babbie and Mouton 2001:270-174. Flowing from a discussion of qualitative research, McMillan and Schumacher 2001:527, 545-554 conclude that policy analysis evaluates government policies and related documents “to provide policymakers with pragmatic recommendations among policy alternatives”. Also see Patton 1999:1-3 <http://trochim.cornell.edu/tutorial/barrien/barrien.htm> (accessed 23-4-2008).

⁷³ Di Nicola 2007:64.

⁷⁴ HSRC 2010:155; Gould 2006:19, 25; UNODC 2009a:7; Laczko and Gramegna 2003:187.

⁷⁵ Di Nicola 2007:57-58.

constitute a limitation.⁷⁶ However, given the challenges and limitations concerning time, capacity, expertise and funding to incorporate quantitative data into the research,⁷⁷ it is submitted that an in-depth, quantitative investigation warrants a separate study.

Another possible limitation pertains to the lack of a comprehensive comparative component. While a representative sample of international and African regional instruments on human trafficking is included, the South African anti-trafficking response is only compared with the minimum standards drawn from these instruments. The inclusion of a comparison of the South African anti-trafficking response with the information-rich, counter-trafficking responses of other countries might have provided further in-depth insights. However, the inclusion of such a comparative component would have impacted negatively on logistical and time constraints, as well as feasibility considerations.⁷⁸

Apart from limitations, it is submitted that the study has a number of strengths. First, the descriptive, qualitative approach to clarifying present-day human trafficking contributes to filling the gap identified by, among others, Picarelli, who points out that, while “a rich literature exists on various aspects of slavery”, the same is still lacking regarding contemporary human trafficking.⁷⁹ Therefore, Part I of the study

⁷⁶ McMillan and Schumacher 2001:576.

⁷⁷ For a discussion of the challenges in quantitative research to provide reliable data on human trafficking, see Brennan 2005:47; Gajic-Veljanoski and Stewart 2007:339; Laczko and Gramegna 2003:179-193; see also 3.2 in Chapter 2 below.

⁷⁸ McMillan and Schumacher 2001:583.

⁷⁹ Picarelli 2007:26.

examines and analyses uncertainties pertaining to the definition and other distinguishing features of human trafficking. Also, where other studies often focus on the main international instrument on human trafficking, namely the Palermo Protocol, this study maps out the preceding international instruments in order to provide a richer insight into the historical developments relating to human trafficking. Furthermore, having noted some confusion and uncertainties regarding the South African counter-trafficking response,⁸⁰ an analysis of this response is provided from a legal perspective.

7. FOCUS AND DEMARCATION OF THE STUDY

Gajic-Veljanoski and Stewart justifiably note that human trafficking is multifaceted and can be researched from different angles, such as examining the phenomenon:

...in the context of migration, [labour,] prostitution, crime, human rights, health, child abuse or violence against women.⁸¹

An in-depth study covering all these aspects of human trafficking is not feasible. Although it is vital to deal with human trafficking by means of a

⁸⁰ In 2009, the UNODC 2009a:127 stated incorrectly in the Global Report on Trafficking in Persons that the *Children's Act* 38 of 2005 could be used to prosecute cases of child trafficking, whereas the child trafficking provisions in this Act only came into force on 1-4-2010 – see Government Gazette no. 33076 of 1-4-10, Proclamation no. R.12, 2010.

⁸¹ Gajic-Veljanoski and Stewart 2007:339; see also Lee 2007:1-2; Ezeilo 2009:8.

holistic and integrated approach,⁸² this study focuses mainly on combating the crime of human trafficking from a legal perspective, examining the phenomenon from a criminal law and broad criminal justice angle.⁸³

In the quest to combat human trafficking, various anti-trafficking models emerged.⁸⁴ On the one hand, some countries and international instruments advocate a model that focuses on the prosecution of traffickers.⁸⁵ On the other hand, others emphasise the protection of the victim and support a victim-oriented or “human rights” approach.⁸⁶ A third group prefers a model which is a combination of the first two models⁸⁷ – thus a more holistic approach to combating human trafficking.⁸⁸ A holistic perspective on human trafficking is to be found in the basic, international three-pronged approach, including prevention, prosecution and protection issues.⁸⁹ The so-called “three P’s” approach⁹⁰ broadly entails

⁸² Obokata 2006:101-104.

⁸³ Ezeilo 2009:8.

⁸⁴ Pearson 2000:57-70; Haynes 2004:238.

⁸⁵ Haynes 2004:239-247; Pearson 2000:62-63.

⁸⁶ Haynes 2004:247-253.

⁸⁷ Haynes 2004:253-269.

⁸⁸ Obokata 2006:101-104.

⁸⁹ HSRC 2010:1; US Department of State 2009:25-32; Snyman 2005:280, 288; Melvin 2006:22, 43.

⁹⁰ US Department of State 2010:5. Emphasising the need for different role players to form partnerships to combat human trafficking effectively, the Vienna Forum Report recommends that the three P’s approach of prevention, protection and prosecution should be expanded to include a fourth P, namely “partnerships” – UN.GIFT 2008e:59; US Department of State 2010:15; see also 3.6.1 in Chapter 6 below.

the *prevention* of human trafficking, the *prosecution* and punishment of the offenders, and the *protection* of the victims of this crime⁹¹ (my emphasis). While a comprehensive, holistic approach to countering human trafficking underpins this study, the focal point of the study is one of the three P's, namely prosecution. Certainly, it is acknowledged that the prevention, prosecution and protection aspects of human trafficking do not exist in isolation from one another, but are intertwined and often overlap. However, this study is directed at the prosecution component in combating human trafficking, especially the laws enabling the prosecution and punishment of the offenders.

The study broadly covers the trafficking of all persons and does not investigate a specific group of trafficked victims. The literature does, however, indicate that, by far, most victims of human trafficking are women and children, two groups that are particularly vulnerable.⁹²

Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin.⁹³

⁹¹ US Department of State 2009:25-32; US Department of State 2008:5; US Department of State 2007:6; Melvin 2006:22, 43.

⁹² Pharoah 2006:37; Truong and Angeles 2005:4; US Department of State 2007:9; Singh 2004:341; Rijken 2003:66; Snyman 2005:284; Foundation Against Trafficking in Women *et al.* 2001:3.

⁹³ *US Trafficking Victims Protection Act* of 2000: section 102(4). It must be noted that compelling cautionary arguments have been advanced against the common linkage of “women and children” in trafficking issues, for example such linkage often results in women being treated more like children than competent adults – see the discussion in Foundation Against Trafficking in Women *et al.* 2001:4.

Defeis⁹⁴ confirms that women and female children are especially vulnerable, essentially because of the “persistent inequalities they face in status and opportunity worldwide...”. On the other hand, research confirms that adult men are also trafficked, in particular for labour exploitation.⁹⁵ Although the investigation of particular groups of trafficked victims is an important topic for further research, including this issue will compromise the focus and feasibility of the study.⁹⁶ Consequently, the trafficking of specific vulnerable groups does not fall within the ambit of this thesis.

The regional framework on human trafficking is broad, covering Europe, the Americas, and other regions.⁹⁷ This research includes only the African regional framework on human trafficking, because of its contextual relevance to South Africa as part of the African continent.

⁹⁴ Defeis 2003/2004:485.

⁹⁵ US Department of State 2010:36; Ezeilo 2009:8; Rijken 2003:66; Truong and Angeles 2005:4; Di Nicola 2007:52; Snyman 2005:280, 284.

⁹⁶ Mouton 2001:51. The additional research, resources and time needed to incorporate specific groups of trafficked victims will extend the research beyond feasibility. Furthermore, some research focusing on certain groups of victims has recently been undertaken, for example trafficking of men by IOM 2009a:1-164; trafficking of children by Horn 2010:9-164; Blagbrough 2008:179-190; Agarwal 2008:1-255; Van de Glind and Kooimans 2008:150-166; and Dottridge 2002:38-42; and trafficking of women by Gajic-Veljanoski and Stewart 2007:338-358; Lansink 2006:45-56; and Singh 2004:340-373.

⁹⁷ For the broad regional framework on human trafficking, see HSRC 2010:34-39.

8. VALUE OF THE RESEARCH

By realising the threefold aim of the study, the study can, it is submitted, make a valuable contribution to research⁹⁸ on combating human trafficking in South Africa from a legal perspective. By making the research available to the legal fraternity, such research may prove useful in litigation,⁹⁹ in the training of lawyers,¹⁰⁰ and in future law reform. The study may also be valuable in informing multidisciplinary stakeholders and service providers dedicated to combating human trafficking by contributing to a better understanding of the human trafficking phenomenon.¹⁰¹ Lastly, the study may be of practical value to other African countries that are in the process of drafting anti-trafficking legislation conducive to the African context. These countries may find some guidance in considering the road travelled by South Africa in the search for comprehensive anti-trafficking legislation.

⁹⁸ McMillan and Schumacher 2001:578.

⁹⁹ The need for prosecutors to gain in-depth knowledge of, and expertise in, the new, multifaceted crime of human trafficking was expressed in personal communications with prosecutors from Pretoria, Durban, Bloemfontein and Port Elizabeth from 2008 to 2010. On a more official level, the recommendations contained in the 2010 research report on human trafficking in South Africa underpinned the need for more in-depth training of prosecutors – HSRC 2010:172.

¹⁰⁰ A unit on human trafficking is included in the undergraduate LLB programme (Criminal Law SFR 414) and the postgraduate LLM programme (Criminal Law SFR 701) at the University of the Free State.

¹⁰¹ The Free State Human Trafficking Forum, which facilitates the coordination of multidisciplinary interventions by a network of role players, including NGOs, faith-based organisations, community-based organisations, the UFS Unit for Children's Rights, student organisations, and government departments such as the SAPS, the NPA, Health, as well as Welfare and Community Development, pointed out the need for training and information to enhance the understanding of the human trafficking phenomenon in the South African context – see the minutes of the meetings held on 25-11-2009, 4-2-2010 and 18-3-2010 on file with the researcher.

9. TERMINOLOGY CLARIFICATION

At the outset, it is important to point out that some terminology concerning human trafficking may cause confusion and uncertainty.¹⁰² On the one hand, different terms are used to indicate the same concept, while, on the other, different meanings are ascribed to the same term.¹⁰³ To bring clarity to these terminological uncertainties, some of the terms related to the human trafficking phenomenon are discussed.

Important to this study are the concepts used to describe the crime which is the focus of this study. These concepts include “trafficking in persons”, “human trafficking”, “people trafficking”, “modern-day slavery” and “contemporary trafficking in human beings”.¹⁰⁴ The United Nations Office on Drugs and Crime (UNODC) cautions that the term “trafficking in persons” can be misleading:

...it places emphasis on the transaction aspects of a crime that is more accurately described as enslavement. Exploitation of people, day after day. For years on end.¹⁰⁵

Nonetheless, the term “trafficking in persons” is used in most international instruments and also in South African legislation and

¹⁰² Gallinetti and Kassan 2008:250.

¹⁰³ Gallinetti and Kassan 2008:250 refer to the confusion between “child trafficking”, “abduction” and the “sale of children”.

¹⁰⁴ Gould 2006:19, 21; Rijken 2003:66-71; Horn 2010:9; Ezeilo 2009:5.

¹⁰⁵ UNODC 2009a:6.

proposed law reform.¹⁰⁶ Despite the common use of this term, it was found during the research process that the term “human trafficking” is also frequently used in the literature and is sometimes better understood by stakeholders and the public at large.¹⁰⁷ The terms “trafficking in persons” and “human trafficking” are thus commonly used as synonyms and are therefore used interchangeably in this study.¹⁰⁸

In cases where children are trafficked, a few authors refer to “trafficking in minors”, but “trafficking in children” or “child trafficking” is more commonly used in the literature.¹⁰⁹ For this reason, the term “child trafficking” is mainly used in this study as well.

As regards the term “victim”, some groups argue that it is an inappropriate term, a disempowering label focusing on victimhood.¹¹⁰ For this reason, they prefer the term “survivor”.¹¹¹ Although not overemphasising victimhood, this study chooses to use the term “victim”

¹⁰⁶ For example, see the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and other instruments discussed in Chapter 5 below, as well as the trafficking provisions in South African legislation, namely the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* and the *Children’s Act 38 of 2005*.

¹⁰⁷ The following international and South African sources in the bibliography are examples of publications which use the term “human trafficking”: International Crime and Terrorism 2004; Laczko and Gramegna 2003; Shapiro 2008; Lee 2007; Leggett 2004a; Pithey 2004; Snyman 2005; Truong and Angeles 2005; Melvin 2006; Ezeilo 2009; Ezeilo 2010.

¹⁰⁸ Bruch 2004:1 in footnote 2; Ezeilo 2009:5-6; Ezeilo 2010:4, 6-7.

¹⁰⁹ Rijken 2003:87; Melvin 2006:22; Dottridge and Weissbrodt 1999:266; Gallagher 2001:988.

¹¹⁰ Askola 2007:17 in footnote 57; Raymond 2002:494.

¹¹¹ US Department of State 2008:43; GAATW 1999a:5, 87. The Global Alliance Against Traffic in Women (GAATW), established in 1994 and consisting of more than 150 organisations worldwide working towards the elimination of trafficking in women, focuses on the empowerment of women rather than treating them just as victims – GAATW 1999a:5, 87.

in concurrence with the bulk of the literature,¹¹² and because “victimhood is a relevant aspect of the legal treatment of trafficking”.¹¹³

Apart from victims in general, the concepts “trafficked person” or “victim of human trafficking” usually mean any natural person who has been subjected to the crime of human trafficking or whom the competent authorities of a state “reasonably believe is a victim of trafficking in persons, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted”.¹¹⁴ In addition to this basic definition, the UNODC Model Law Against Trafficking in Persons (UNODC Model Law)¹¹⁵ also refers to a “higher status determination” of whether a person qualifies as a victim of human trafficking or not. In these cases, a person qualifies as a trafficked victim in terms of government-set guidelines.¹¹⁶ Apart from providing for the initial basic and immediate needs of the victim, such “officially” recognised victims are also entitled to broader government services and assistance.¹¹⁷

¹¹² For a discussion of other definitions of the term “victim”, including direct and indirect victims, see UNODC 2009b:22-23.

¹¹³ Askola 2007:17 in footnote 57 indicates that the identification of a victim is often relevant in the legal system, for example in order to qualify for protection in a shelter or witness protection programme, as well as to apply for a residential permit.

¹¹⁴ UNODC 2009b:22-23 in article 1(v) of the UNODC Model Law; see also Planitzer 2009:5.

¹¹⁵ http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf (accessed 14/7/2010); see also UNODC 2009b:1 and further background to the UNODC Model Law in 2 in Chapter 6 below.

¹¹⁶ UNODC 2009b:23.

¹¹⁷ UNODC 2009b:23.

Other concepts, linked to victims, that need to be clarified are “revictimisation” and “secondary victimisation”. This study follows the distinction made by the UNODC Model Law between the two concepts.¹¹⁸ Accordingly, “revictimisation” means the situation where a victim is subjected to more than one crime over a specific period of time, while “secondary victimisation” refers to “victimisation that occurs not as a direct result of the criminal act, but through the response of institutions and individuals to the victim”.¹¹⁹

Specific terms are used to distinguish between human trafficking that takes place across national borders and trafficking within a country. Where victims are trafficked over international borders and moved from one country to another, this is referred to as international,¹²⁰ transnational or cross-border trafficking.¹²¹ In-country, domestic or internal¹²² trafficking refers to victims who are trafficked from one place to another within the same country.¹²³

Reference to origin, transit and destination countries is part of the cross-border human trafficking scenario. Countries involved in such trafficking are divided into three categories, with the victim status determining the

¹¹⁸ UNODC 2009b:19.

¹¹⁹ UNODC 2009b:19.

¹²⁰ UNODC & SADC 2007b:13.

¹²¹ GAATW 1999a:10.

¹²² UNODC & SADC 2007b:8.

¹²³ GAATW 1999a:10.

designation.¹²⁴ The first category comprises source or origin countries, indicating where the trafficked persons were taken from or lived before they were trafficked.¹²⁵ In other words, origin countries are countries where victims are trafficked from.¹²⁶ The second category consists of countries of transit, indicating which countries the victim was transported through, from the country of origin *en route* to the country of destination.¹²⁷ The last category comprises destination countries, signifying the countries to which the victims were transported in order to be exploited.¹²⁸ A country may be included in more than one, or even all, of these categories.¹²⁹ Depending on the fluctuation of trafficking trends, a country may change from one category to another from time to time. As regards in-country trafficking, where the victim may be transported from one place to another within the same country, the different locations are similarly specified as origin, transit and destination locations.¹³⁰

¹²⁴ Snyman 2005:5, 281; Kreston 2007:37.

¹²⁵ Gajic-Veljanoski and Stewart 2007:341; GAATW 1999a:12.

¹²⁶ Haynes 2004:227 in footnote 29.

¹²⁷ GAATW 1999a:12. Melvin 2006:39 states that the purpose of transporting trafficked persons through transit countries is often to help traffickers to cover their tracks.

¹²⁸ Haynes 2004:227 – see footnote 29; Melvin 2006:39; Gajic-Veljanoski and Stewart 2007:341.

¹²⁹ Kreston 2007:37.

¹³⁰ Snyman 2005:5, 281.

10. CHAPTER OUTLINE

Chapter 1: Introduction

After outlining the background to, and rationale for, the study, this Chapter describes the threefold aim of the study, and the objectives for realising the threefold aim. Subsequent to the problem statement and point of departure, the research design, methodology and demarcation of the study are provided. Finally, the chapter concludes with an indication of the possible value of the study, the clarification of a number of concepts, and a chapter outline providing an overview of the study.

PART I

TOWARDS AN UNDERSTANDING OF HUMAN TRAFFICKING

Chapter 2: What is human trafficking?

To inform the study and promote a thorough understanding of human trafficking, this Chapter examines important issues such as the definition of human trafficking, the global scope of the problem, and the profile of traffickers and trafficked persons.

Chapter 3: Causes and consequences of human trafficking

To further inform the comprehension of human trafficking, Chapter 3 sheds light on the various causes of, and factors contributing to, human trafficking. Subsequently, the wide-ranging, destructive consequences of this crime, not only for trafficked persons, but also for the global

community, are charted.¹³¹ Finally, the annual US Trafficking in Persons Report, which assesses counter-trafficking efforts of governments worldwide, maps out the comprehensive international response to counter human trafficking.

Chapter 4: Distinctive features of the crime of human trafficking

In this Chapter, further distinguishing features of human trafficking are examined. Having discussed these features, the Chapter compares human trafficking with other related crimes, namely human smuggling, slavery and slavery-like practices.¹³² To conclude Part I of this study, a synopsis is provided of the distinctive features of human trafficking so as to enhance understanding of this complex crime and also to serve as a foundation and point of reference for the rest of the study.

PART II STANDARDS FOR DOMESTIC LEGAL RESPONSES TO COMBAT HUMAN TRAFFICKING

Chapter 5: International and African regional framework on human trafficking

The Palermo Protocol is the landmark international instrument on human trafficking, but, as Farrior¹³³ points out, the normative framework on

¹³¹ Singh 2004:343; US Department of State 2007:5.

¹³² Weissbrodt and Anti-Slavery International 2002:12.

¹³³ Farrior 1997:213.

human trafficking comprises a range of international and regional instruments. This Chapter explores how human trafficking evolved from chattel slavery into its contemporary form by tracking the chronological development of international and African regional instruments relevant to human trafficking.

Chapter 6: Pursuing standards for domestic legal responses to combat human trafficking

This Chapter draws minimum standards for domestic counter-trafficking responses from the international and African regional framework on human trafficking identified in Chapter 5. These standards are categorised to provide a yardstick against which domestic counter-trafficking responses may be measured. Apart from the mandatory obligations drawn from these instruments, optional recommendations to combat human trafficking are also identified, together with guidelines provided by non-binding, but authoritative, sources.

PART III

THE SOUTH AFRICAN LEGAL PERSPECTIVE

Chapter 7: The South African legal response to combat human trafficking

Chapter 7 outlines the South African legal response for combating human trafficking. In indicating that the legal response is fragmented, the different parts of the counter-trafficking response are mapped out. These parts consist of the existing law that may be applicable to human trafficking, the interim trafficking provisions in the *Children's Act* 38 of

2005 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, and, finally, the proposed comprehensive law reform in the *Prevention and Combating of Trafficking in Persons Bill (B7-2010)*.

Chapter 8: Recommendations and conclusion: assessment of the South African legal response to combat human trafficking

This Chapter compares the relevant clauses of the *Prevention and Combating of Trafficking in Persons Bill of 2010 (Trafficking Bill)* with the minimum standards drawn from the international and African regional framework on human trafficking. Furthermore, the South African *Trafficking Bill* is also compared with recommended directives identified to enhance the combating of trafficking. Finally, recommendations are made for developing, modifying and fine-tuning the South African legal response for the efficient and effective combating of human trafficking.

PART I: TOWARDS AN UNDERSTANDING OF HUMAN TRAFFICKING

CHAPTER 2

WHAT IS HUMAN TRAFFICKING?

- 1. INTRODUCTION**

- 2. DEFINING HUMAN TRAFFICKING**
 - 2.1 A profusion of definitions**
 - 2.2 Definition in the Palermo Protocol**
 - 2.2.1 *A comprehensive international definition***
 - 2.2.2 *The three parts of the definition***
 - 2.2.2.1 Part one: the prohibited actions
 - 2.2.2.2 Part two: the means used by the trafficker
 - 2.2.2.3 Part three: the exploitative purpose
 - 2.2.2.3.1 *Interpreting “exploitation”*
 - 2.2.2.3.2 *Types of exploitation*
 - a Sexual exploitation
 - b Labour exploitation
 - c Slavery, practices similar to slavery and servitude
 - d Forced marriages
 - e Removal of organs
 - f Illegal adoptions
 - g Forced military service
 - h Begging
 - i Crime or other exploitative purposes
 - 2.2.3 *Child trafficking***
 - 2.2.4 *Consent issues***

- 3. SCOPE OF HUMAN TRAFFICKING**
 - 3.1 Introduction**
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PART I: TOWARDS AN UNDERSTANDING OF HUMAN TRAFFICKING

CHAPTER 2

WHAT IS HUMAN TRAFFICKING?

1. INTRODUCTION

Di Nicola¹ maintains that the human trafficking problem must first be thoroughly examined and analysed before a legal response to combat it can be developed. The complex nature of human trafficking requires clarification to ensure a better understanding of the phenomenon. Despite the international emphasis on anti-trafficking interventions, coupled with an increase in the literature on the topic,² Truong and Angeles conclude that many aspects of the phenomenon remain poorly understood.³ Therefore, the aim of Part I is to improve the understanding of human trafficking by clarifying key aspects of this multifaceted phenomenon.⁴

¹ Di Nicola 2007:49-50; see also Mouton 2001:50; Rijken 2003:79; Shelley 2007:117; Gallinetti and Kassan 2008:253. Di Nicola 2007:49 adds that the purpose of research is “to understand phenomena and their causes, and to solve problems, thereby satisfying concrete societal needs”. Such purpose is therefore also the purpose of the present study.

² Defeis 2003/2004:486.

³ Truong and Angeles 2005:1.

⁴ From the outset, it is conceded that almost all of the topics addressed in Part I justify a separate, in-depth study. Since such exhaustive coverage is not viable, the topics are

2. DEFINING HUMAN TRAFFICKING

Whatever the topic a researcher is working on, it is essential that s/he defines the phenomenon under scrutiny. Trafficking in human beings is no exception.⁵

Since slavery-like practices are still being identified and documented worldwide, it is important to clarify what is encompassed in the contemporary concept “human trafficking”.

2.1 A profusion of definitions

The historical development of the definition of human trafficking⁶ commenced more than a century ago⁷ and was followed by a multitude of definitions.⁸ The development of, and the various meanings attached to, human trafficking and related concepts in international instruments is covered in Chapter 5 below. Gould concludes that human trafficking is “a slippery concept, something that is hard to pin down and come to grips

addressed concisely, but as thoroughly as possible to serve the objective of Part I, namely to provide a better understanding of human trafficking.

⁵ Di Nicola 2007:50.

⁶ Various related terms, such as “human trafficking”, “human trade”, “people trafficking” and “trafficking in persons”, are used to refer to trafficking in human beings. Although these terms are usually interchangeable, the term “human trafficking” is mainly used in this study – see 9 in Chapter 1 above.

⁷ Rijken 2003:54 views the International Agreement for the Suppression of White Slave Traffic of 1904 as the first international effort to combat trafficking in women, noting that this agreement applied to trafficking for the purpose of prostitution only; see also 2.3.1 in Chapter 5 below.

⁸ Wijers and Lap-Chew 1999:42; Haynes 2004:223 in footnote 7; Bales and Robbins 2001:18; Gallagher and Holmes 2008:319. Rijken 2003:53, 59 points out that countries, as well as international and national organisations doing anti-trafficking work, use different interpretations for the same concept. For example, the Global Alliance Against Traffic in Women, a coalition of non-governmental organisations dedicated to eliminating trafficking in women, has developed its own definition of human trafficking – see GAATW 1999a:11; see also Foundation Against Trafficking in Women *et al.* 2001:5-7.

with”.⁹ The literature supports this view and indicates that many obstacles hamper the development of a comprehensive, clear definition of human trafficking.¹⁰ One of the main obstacles is the fact that human trafficking encompasses a wide range of activities, actors, violations and methods.¹¹ A further complicating factor is that trafficking is undertaken for various forms of exploitation, including exploitation of a sexual or labour nature, or trafficking for body parts, illegal adoptions, forced marriages, begging, criminal activities or conscripting child soldiers.¹²

To summarise, the human trafficking concept accommodates a multitude of facets:

Trafficking in persons is used as an umbrella term to cover a range of actions and outcomes. Viewed as a process, trafficking can be used to entail several phases - recruitment, transportation (which could be across several borders), and control in the place of destination. Different groups, agents or individuals may be involved in different phases of the process, and can organize recruitment, transportation and control in different ways. There is thus immense diversity between and within trafficking systems.¹³

⁹ Gould 2006:19.

¹⁰ Pharoah 2006:14; Gould 2006:19; Laczko and Gramegna 2003:180; US Department of State 2009:15.

¹¹ Laczko and Gramegna 2003:180; Pharoah 2006:14; Leggett 2004a:2; Foundation Against Trafficking in Women *et al.* 2001:5.

¹² US Department of State 2007:21, 24, 26-28; Pharoah 2006:14.

¹³ Laczko and Gramegna 2003:180.

Recognising this reality, Pharoah,¹⁴ Gould¹⁵ and others agree that knitting together so many trafficking components in one definition is indeed a challenging undertaking.¹⁶ Thus, despite continuous efforts, a single, universally accepted definition for the term “human trafficking” remains a challenge.¹⁷

2.2 Definition in the Palermo Protocol

2.2.1 *A comprehensive international definition*

The differing definitions of human trafficking undermine certainty and complicate the study of human trafficking. For this reason, international consensus on the definition of trafficking has become increasingly necessary to avoid confusion and also to develop effective responses to the human trafficking problem.¹⁸

In November 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).¹⁹ The Palermo Protocol is the current standard-bearer and contains the first internationally agreed-upon

¹⁴ Pharoah 2006:14 describes human trafficking as “an umbrella term that covers an assortment of outcomes...”.

¹⁵ In agreement with Pharoah, Gould also refers to human trafficking as a “blanket term”, because it covers such a multifaceted phenomenon – Gould 2006:19.

¹⁶ Laczko and Gramegna 2003:180; Snyman 2005:281.

¹⁷ Rijken 2003:53.

¹⁸ Di Nicola 2007:51; European Commission 2004:47; Gallagher and Holmes 2008:319.

¹⁹ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008); Ezeilo 2009:7.

definition of human trafficking.²⁰ The Palermo Protocol defines “trafficking in persons” as follows:

...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.²¹

Distinguishing itself from previous narrower definitions, the Palermo Protocol’s definition of “trafficking in persons” is a comprehensive definition. The definition encompasses not only sexual exploitation, but also all forms of exploitation.²² Furthermore, while some previous definitions focused only on women and children,²³ this definition recognises that all persons may qualify as victims of trafficking.²⁴ For these reasons, the Palermo Protocol is a significant milestone on the road towards an internationally recognised, homogeneous definition of human trafficking.²⁵

2.2.2 *The three parts of the definition*

The Palermo Protocol’s rather complex definition of human trafficking can be broken down into three constituent parts, namely the act or conduct of the trafficker, the means used by the trafficker to commit the act, and the

²⁰ UNODC 2006:ix; Laczko and Gramegna 2003:180; Rijken 2003:66; SALRC 2006:12.

²¹ Article 3(a) – Addendum A.

²² UNODC 2006:xii. Rijken 2003:64-65 discusses the previous narrower definitions, where the purpose of human trafficking was limited to prostitution; see also Lee 2007:10; Weissbrodt and Anti-Slavery International 2002:18.

²³ See the discussion in 2.3 in Chapter 5 below.

²⁴ UNODC 2006:xii; Weissbrodt and Anti-Slavery International 2002:26.

²⁵ Melvin 2006:22; Gallagher 2001:986-987.

purpose of the trafficker.²⁶ Stated differently, the definition describes the crime by stipulating what is done (the act), how it is done (the means) and why it is done (the purpose).²⁷

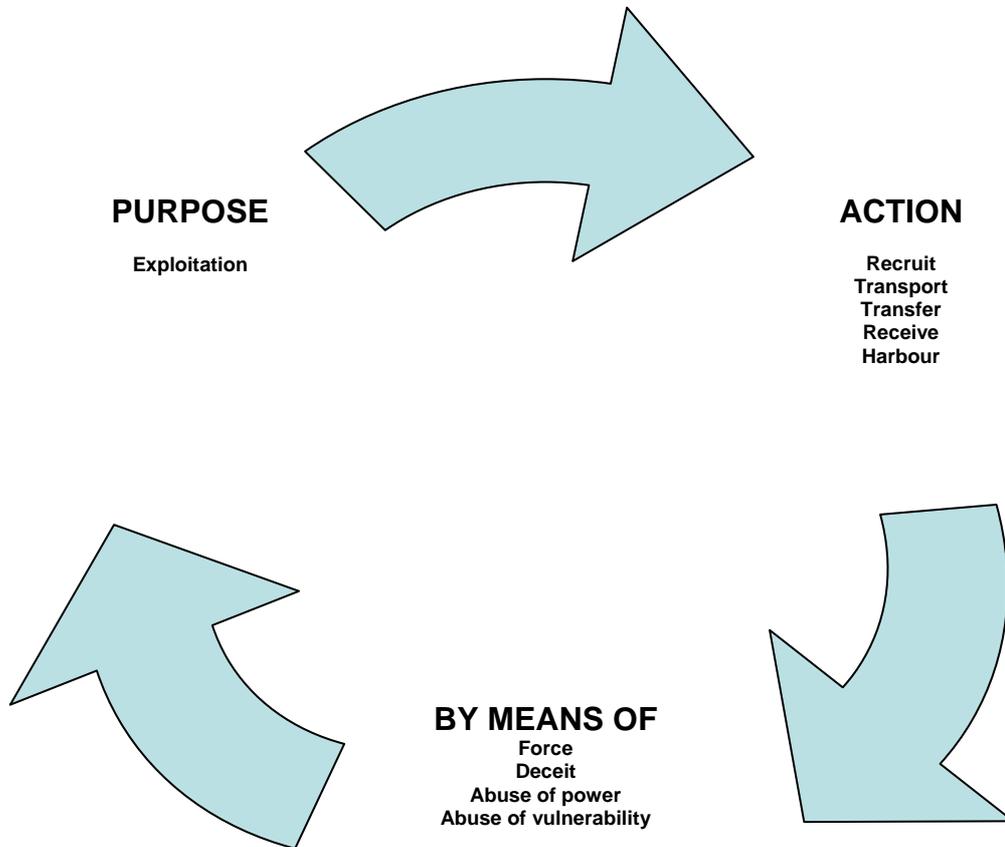


Figure 1: Parts of the definition of human trafficking – Palermo Protocol

From a legal point of view, the following definitional parts²⁸ must be proven to constitute human trafficking:

- (a) the commission of any one of the proscribed acts;

²⁶ The Future Group 2007a:6-7; UNODC 2006:xi; Snyman 2005:5:281; UNODC 2009b:31-32; Raymond 2002:498; UNODC 2004:268.

²⁷ UNODC 2008:2, 96.

²⁸ Snyman 2008:71 explains the concept “definitional elements” as the “concise description of the requirements set by law for liability for *the specific type of crime with which X is charged as opposed to other crimes*. By ‘requirements’ in this context is meant not the general requirements applying to all crimes (e.g. voluntary conduct, unlawfulness and culpability), but the particular requirements applying to a certain type of crime only.”

- (b) by means of any one or more of the listed methods;
- (c) for an exploitative purpose.²⁹

2.2.2.1 Part one: the prohibited actions

In a nutshell, the typical human trafficking process starts off with the recruitment of the victims, followed by moving the victims to a place where they are received and exploited.³⁰ Capturing the dynamics of the usual human trafficking process,³¹ the Palermo Protocol prohibits the following actions: the recruitment, transportation, transfer, harbouring or receipt of a trafficked person.³²

As regards the recruitment of victims, traffickers use a variety of recruitment techniques ranging from force to deceit, depending on what they regard as being the most successful in the circumstances of a particular case.³³ The various coercive and deceptive methods used by traffickers in the recruitment phase are discussed below.³⁴

After the victims are recruited, traffickers usually “transport or transfer” them within a country or across national borders to an unfamiliar

²⁹ UN.GIFT 2008b:5; Lansink 2006:49; Gallagher 2001:987; UNODC 2004:269.

³⁰ UNODC 2006:xiii-xiv; Truong and Angeles 2005:2; Lee 2007:1; Di Nicola 2007:49-50. Without mentioning recruitment or transportation, the 2007 US TIP Report states that the common denominator of trafficking scenarios is the use of force, fraud or coercion to exploit a person for profit – US Department of State 2007:8.

³¹ David 2007:2.

³² Article 3(a) – Addendum A; see also 2.2.1 above; Snyman 2005:281.

³³ Shelley 2007:127.

³⁴ See 2.2.2.2 below.

environment where there is a demand for their services.³⁵ Such movement may take place by land, air or sea.³⁶ Le Roux points out that “trafficking routes will always reflect one consistent factor - victims will be routed to where the demand exists for their services, where the potential profit of their exploitation is the highest”.³⁷

After being transported, victims are received and harboured at the destination location, where the main exploitation takes place.³⁸ According to the trafficking definition, the prohibited actions must be performed by using any of the means listed in the definition for the purpose of exploiting the victim.³⁹

The definition does not require that all the prohibited actions be committed by the same person.⁴⁰ Although the trafficking crime can be committed by a single person, it is common for a trafficked person to be recruited by one person, moved by another and harboured by a third person.⁴¹ Thus trafficking agents may play different roles in the recruitment, transportation and exploitation phases of the trafficking process. Acknowledging this practice, the Palermo Protocol’s definition of the crime is formulated in such a way that each person who recruits,

³⁵ UN.GIFT 2008c:11, 12. For a critical discussion of the “transport” act and whether “transport” is a prerequisite in order to constitute human trafficking, see 3.1.1.2.1 in Chapter 6 below.

³⁶ UN.GIFT 2008c:13; Singh 2004:344; Le Roux 2008:4; Shelley 2007:130. Although movement usually occurs by means of car, truck, train, boat or aeroplane, victims sometimes have to walk to the destination location – Shelley 2007:130.

³⁷ Le Roux 2008:5.

³⁸ UN.GIFT 2008c:11; Snyman 2005:5, 281.

³⁹ Article 3(a) – Addendum A; see 2.2.1 above.

⁴⁰ See 4.1 below.

⁴¹ David 2007:2.

transports, transfers, receives or harbours a trafficked person satisfies the conduct part of the crime of human trafficking.

2.2.2.2 Part two: the means used by the trafficker

Recognising that traffickers use various methods or means to ensnare victims in the trafficking net, the Palermo Protocol prohibits the use of a rather long list of methods.⁴² The forbidden methods are listed, but not defined, in the Palermo Protocol. These methods can be divided into three main categories, namely methods focusing on force, on deception or, lastly, on the abuse of power or of a position of vulnerability.

First, the Palermo Protocol prohibits forceful methods, ranging from threats of violence to direct force in the form of physical assaults, such as abducting or capturing people in a harsh way and beating them to make, and keep, them compliant.⁴³ The Protocol further forbids “other forms of coercion”, which indicates that the forms of coercion listed in article 3(a) are not exhaustive.⁴⁴ The author agrees with Rijken⁴⁵ that a wide interpretation of coercion is appropriate, that is, an interpretation covering the whole spectrum of different forms and degrees of force used by traffickers during the trafficking cycle.⁴⁶ In line with the broad definition of

⁴² Article 3(a) – Addendum A; see also 2.2.1 above.

⁴³ Article 3(a) – Addendum A; Snyman 2005: 5, 281; see also 2.2.1 above.

⁴⁴ Rijken 2003:67; Singh 2004:341. Therefore, the Palermo Protocol includes any form of coercion whereby an unwilling person is persuaded, by using force or threats, to do something – IOM 2007:22.

⁴⁵ Rijken 2003:63.

⁴⁶ The same approach is followed by the United States of America, in that the term “coercion” is also broadly defined in section 103(2) of the US *Trafficking Victims Protection Act* of 2000:
The term “coercion” means
(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

the term “coercion” in article 1(e) of the Model Law Against Trafficking in Persons of the United Nations Office on Drugs and Crime (UNODC Model Law),⁴⁷ it is submitted that intimidation and indirect force, such as threats against, and assaults on, the victim’s family or loved ones, are also included under “coercion” in this category of forceful methods.

Secondly, the Palermo Protocol prohibits the use of deceptive methods, such as defrauding or deceiving persons into trafficking.⁴⁸ The recruitment of a victim for human trafficking therefore need not include the use of any form of coercion or violence. In fact, it is reported that the vast majority of victims are being trafficked through false promises or other forms of deception and not by forceful methods such as kidnapping and abduction.⁴⁹

Trafficking agents use a range of deceptive techniques to recruit trafficking victims.⁵⁰ To lure potential victims, traffickers frequently use false promises or misrepresentations of well-paid employment, educational opportunities and better living conditions.⁵¹ These deceptions are tailored to the needs and circumstances of the potential victims and are especially shaped according to their vulnerabilities.⁵²

(C) the abuse or threatened abuse of the legal process.

⁴⁷ http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf (accessed 14/7/2010); UNODC 2009b:11; see also 3.1 in Chapter 6 below.

⁴⁸ UNODC 2009b:32. For a further discussion of the concept “deception”, see 3.1.1.2.2 in Chapter 6 below.

⁴⁹ Raymond 2002:497.

⁵⁰ See UNODC 2009b:12.

⁵¹ UN.GIFT 2008c:12; IOM 2006:20; IOM 2007:22; Gajic-Veljanoski and Stewart 2007:342; Shelley 2007:128.

⁵² Snyman 2005:5, 281-282.

Traffickers prey on the vulnerable.⁵³ The literature confirms that perpetrators:

...seek vulnerabilities in their intended victims, and they also seek environments in which they can exploit victims with minimal threat of the victims' escape or law enforcement action.⁵⁴

Vulnerable as a result of gender discrimination⁵⁵ and a lack of education and employment opportunities,⁵⁶ women are often eager for a better future and are thus susceptible to false promises of jobs abroad as babysitters, housekeepers, waitresses, dancers or models – jobs that traffickers turn into an exploitation nightmare.⁵⁷ In addition, traffickers also take advantage of the vulnerabilities caused by natural disasters, armed conflict and political instability to deceive desperate people with false promises and subsequently entrap them into being trafficked.⁵⁸

Another deception employed by traffickers is to misuse cultural traditions to trick people into becoming victims of human trafficking. In aspiring to improve the upbringing of children, some societies in various regions of

⁵³ US Department of State 2009:8.

⁵⁴ US Department of State 2008:28; US Department of State 2007:9.

⁵⁵ For a discussion of gender discrimination, see 2.2 in Chapter 3 below.

⁵⁶ Defeis 2003/2004:485.

⁵⁷ US Department of State 2009:8; US Department of State 2007:10; IOM 2007:25; UN.GIFT 2008c:12; The Future Group 2007b:2.

⁵⁸ Kreston 2007:38; US Department of State 2007:35.

the world,⁵⁹ including Africa, have the tradition of “placing” children.⁶⁰ This tradition involves sending the children to live with family or wealthier people in urban areas for work and educational purposes.⁶¹ Dottridge⁶² has documented that traffickers exploit this tradition by pretending to be agents, thus misleading parents into handing over their children to them. Once the children are under the control of the traffickers, previous promises of education or employment are not kept, but, instead, the children are trafficked for the benefit of the trafficker.⁶³ Dottridge concludes that “the West African tradition of ‘placing’ children in other people’s households has been a major cultural factor encouraging trafficking”.⁶⁴

To recapitulate, traffickers use various forms of deception to trap potential victims. It is therefore advisable to interpret “deception” broadly so as to cover the range of deceitful methods used in trafficking scenarios.⁶⁵

⁵⁹ Skinner reports that, in Haiti and also in Haitian communities across the United States of America, the “restavèc” custom, involving the “placing of a child”, usually from poor, rural areas, with more affluent people, is an acceptable practice. Human traffickers, pretending to be trustworthy agents, facilitate the placing of children, but actually sell these children to their new “owners”. Parents usually do not receive payment for giving up their children, because the agents promise schooling for them, a luxury many parents cannot afford. In reality, the restavècs, or the so-called “stay-withs”, are child slaves who are forced to work long hours without payment, who are often sexually abused and who rarely have the privilege of attending school – Skinner 2008:6-9.

⁶⁰ Truong and Angeles 2005:12, 16; Dottridge 2002:39.

⁶¹ Dottridge 2002:39.

⁶² Dottridge 2002:39.

⁶³ US Department of State 2007:35.

⁶⁴ Dottridge 2002:39.

⁶⁵ See also the discussion in 3.1.1.2.2 in Chapter 6 below.

Another category of forbidden methods involves the abuse of power or of vulnerability by traffickers to accomplish human trafficking. According to the *Travaux Préparatoires*, the Official Interpretative Notes to the Palermo Protocol, the abuse of a position of vulnerability refers “to any situation in which the person involved has no real and acceptable alternative, but to submit to the abuse involved”.⁶⁶ This method covers cases where force is often not applied, but persons in authoritative positions, such as teachers, parents or employers, use their powers inappropriately to facilitate trafficking.⁶⁷ Rijken⁶⁸ regards it as abuse of authority or of a dominant position when traffickers confiscate victims’ identification or travel documents, because, without proof of their legal status in the destination country, they are in a dependent and vulnerable position.

Lastly, the Palermo Protocol also prohibits the abuse of benefits in order to obtain the “consent of a person having control over another person”.⁶⁹ This type of abuse is specifically relevant to situations where parental authority is exploited by means of benefits given to parents or guardians to obtain their consent to traffic children in their care.⁷⁰

The key aspect of the means part of the trafficking crime is the power dominance of the role players in the trafficking ring over the trafficked

⁶⁶ UN General Assembly 2000: paragraph 63; Jordan 2002:7 in footnote 12; UNODC 2004:269; see also 3.1.1.2.3 in Chapter 6 below. The UNODC Model Law provides more than one definition of the “abuse of a position of vulnerability” – UNODC 2009b:9-11.

⁶⁷ IOM 2007:22; Rijken 2003:63; SALRC 2006:12; Jordan 2002:8.

⁶⁸ Rijken 2003:63.

⁶⁹ Article 3(a) – Addendum A.

⁷⁰ Article 3(a) – Addendum A. Shelley reports that this method of offering money to parents for their child has been used in Russia in some cases where the parents are alcoholics and drug addicts – Shelley 2007:128.

person.⁷¹ This part enables the trafficking agents to exercise control over the victim by means of force, coercion, deception or the abuse of vulnerability.⁷²

2.2.2.3 Part three: the exploitative purpose

The exploitation part is the final link in the chain that constitutes human trafficking. The trafficking definition in the Palermo Protocol requires that the offender must commit the prohibited action for the purpose of exploiting the trafficked person.⁷³

2.2.2.3.1 *Interpreting “exploitation”*

Exploitation is a core part of human trafficking, since traffickers primarily exploit victims to profit from it.⁷⁴ Although exploitation may occur from the initial stages of the trafficking process, the main exploitation occurs predominantly at the place of destination.⁷⁵

A closer examination of the definition of human trafficking in the Palermo Protocol reveals that the trafficker must have the purpose to exploit, but the actual exploitation of the victim need not have taken place.⁷⁶ Therefore, the offence is completed at an early stage.⁷⁷ Stated differently,

⁷¹ See the discussion in 2.3 in Chapter 4 below.

⁷² Snyman 2005:282.

⁷³ Article 3(a) – see Addendum A; Snyman 2005:282; UNODC 2004:268.

⁷⁴ IOM 2007:23. The exploitation part distinguishes human trafficking from kidnapping, in that kidnapping entails the deprivation of a person’s freedom of movement, usually by means of forceful or deceptive movement. However, exploitation of the victim is not a requirement of the crime of kidnapping – Rijken 2003:65; Snyman 2008:479-481.

⁷⁵ IOM 2006:34; Snyman 2005:282.

⁷⁶ Article 3(a) – see Addendum A.

⁷⁷ UNODC 2004:269.

the third part of the trafficking crime is satisfied when it is proven that the trafficker committed the forbidden acts with the intention⁷⁸ to exploit the trafficked persons, even if the victims were not eventually exploited.⁷⁹ However, Rijken⁸⁰ points out that, since the intention of the offender is a subjective element,⁸¹ it would be difficult, although not impossible, to prove the exploitative intention where such exploitation has not yet taken place.

The Palermo Protocol does not define the term “exploitation”,⁸² but lists some forms of exploitation, including:

...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.⁸³

The formulation in the Palermo Protocol that exploitation “shall include at a minimum” certain forms of exploitation means that other forms of

⁷⁸ Snyman 2008:182 defines intention, which is one of the general elements of a crime, as “the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful”. The author further elaborates that intention consists of two elements: the cognitive or intellectual element, requiring that the accused have knowledge of the act, of the circumstances and of the unlawfulness, and the conative element, requiring that the accused direct his or her will towards a certain act or result – Snyman 2008:182-183. For a further discussion of the intention element, see Burchell 2005:459-486.

⁷⁹ Rijken 2003:59, 64; SALRC 2006:15. Therefore, although the victim was not exploited, for example because the trafficker was arrested before the exploitation could take place, it suffices that the trafficker intended to exploit the victim – Snyman 2005:282.

⁸⁰ Rijken 2003:63.

⁸¹ In this regard, Snyman 2008:188 explains that a subjective test is used to test intention: “The court must determine what the state of mind of that particular person - the accused (X) - was when he committed the act. When determining whether X had intention, the question is never whether he *should* have foreseen the result, but whether he foresaw it as an actual fact.”

⁸² UN General Assembly 2000: paragraph 64.

⁸³ Article 3(a) – Addendum A; see also UNODC 2006:xii.

exploitation are not excluded.⁸⁴

2.2.2.3.2 *Types of exploitation*

None of the types of exploitation listed in the Palermo Protocol are defined in this treaty.⁸⁵ To obtain a better understanding of the complexities of human trafficking, the listed types of exploitation, as well as other types that are common in the case of this crime, are briefly discussed.

a Sexual exploitation

The Palermo Protocol prohibits human trafficking for the purpose of the “exploitation of the prostitution of others” or other forms of “sexual exploitation”. These two concepts are defined neither in international law nor in the Palermo Protocol.⁸⁶ The reason for not defining these concepts is that the countries which negotiated the Palermo Protocol could not agree upon definitions for such concepts – some countries have laws criminalising voluntary adult sex work, while others decriminalise or regulate such adult sex work.⁸⁷ For this reason, the Official Interpretative Notes (*Travaux Préparatoires*) to the Palermo Protocol state that the concepts “exploitation of the prostitution of others” and “other forms of sexual exploitation” have been intentionally left undefined.⁸⁸ Gallagher⁸⁹

⁸⁴ UNODC 2006:xii; Kamidi 2007:8; Gallagher 2001:987 in footnote 72.

⁸⁵ UNODC 2006:xii; Weissbrodt and Anti-Slavery International 2002:22 in footnote 111.

⁸⁶ UNODC 2006:xii; Jordan 2002:8. For a further explanation of why these two concepts were not defined, see Jordan 2002:8-9; UN General Assembly 2000: paragraph 64; SALRC 2006:15; Jordan 2002:8-9; Stuurman 2004:5; HSRC 2010:20-21.

⁸⁷ HSRC 2010:20-21; Gallagher 2001:984-986; SALRC 2006:15; Jordan 2002:8-9; Stuurman 2004:5; UNODC 2009b:14.

⁸⁸ UN General Assembly 2000: paragraph 64; Jordan 2002:8-9; HSRC 2010:20-21; Gallagher 2001:984-986; UNODC 2009b:14.

⁸⁹ Gallagher 2001:984-986.

confirms that this compromise was made to allow countries to sign and ratify the Palermo Protocol, even though their approach to voluntary adult sex work in their respective legal systems varies.

Importantly, Jordan recommends that, although these concepts are not defined in the Palermo Protocol, they be included in domestic legislation.⁹⁰ The UNODC Model Law suggests that “exploitation of prostitution of others” may be defined as the “unlawful obtaining of financial or other material benefit from the prostitution of another person”⁹¹, and “sexual exploitation” as the obtaining of financial or other benefits by involving another person in prostitution or other sexual services, such as pornographic activities.⁹²

The literature indicates that the majority of cross-border trafficking is for purposes of sexual exploitation.⁹³ Many people, mainly women and girls, are typically trafficked for sexual services through force or deception, thus finding themselves in the sex industry against their will.⁹⁴ There is consensus that conduct which amounts to coercing or deceiving an adult person into prostitution constitutes human trafficking.⁹⁵ Other persons who agree to provide sexual services often do not want to continue with such services, because they have been significantly deceived about the

⁹⁰ Jordan 2002:9; see also 3.1.2 in Chapter 6 below.

⁹¹ UNODC 2009b:14; for a similar definition see Jordan 2002:9.

⁹² UNODC 2009b:20.

⁹³ Rijken 2003:66; US Department of State 2008:23; US Department of State 2007:27; Raymond 2002:492. However, research indicates that cases of trafficking for labour purposes outnumber sex trafficking where trafficking is committed within a country's borders – US Department of State 2008:18.

⁹⁴ GAATW 1999a:13.

⁹⁵ GAATW 1999a:13.

deplorable working conditions, including confinement, excessive working hours, nominal wages, debt bondage and continuous abuse.⁹⁶ Importantly, even though consent is initially given to participate in prostitution or other sexual services, maintaining a person in such services through coercion also amounts to human trafficking conduct.⁹⁷

Numerous types of sexual exploitation have been documented, such as prostitution, sexual slavery, mail-order brides, forced marriages, the production of pornography and sex tourism.⁹⁸ Sex tourism involves clients who travel to engage in commercial sexual activities.⁹⁹ The main demand for this form of exploitation is from tourists travelling to developing countries, where they enjoy anonymity.¹⁰⁰

The demand for the many forms of commercial sexual services fuels sex trafficking and leads to the growth of sex markets.¹⁰¹ Traffickers worldwide grasp this opportunity to enrich themselves by exploiting people for sexual purposes.

⁹⁶ GAATW 1999a:13.

⁹⁷ US Department of State 2010:9.

⁹⁸ Snyman 2005:284; Dottridge and Weissbrodt 1999:272; Le Roux 2008:7; Morawska 2007:100; Foundation Against Trafficking in Women *et al.* 2001:5. Commercial sexual services are commonly provided in massage parlours, saunas, escort agencies, bars and brothels – Raymond 2002:492, 500; US Department of State 2009:21-22.

⁹⁹ Dottridge and Weissbrodt 1999:266; US Department of State 2008:14; Raymond 2002:492; US Department of State 2009:22, 25.

¹⁰⁰ US Department of State 2008:25; US Department of State 2007:23; UN General Assembly Resolution 1994: paragraph 5.

¹⁰¹ US Department of State 2008:24; Farris 1997:230; Lee 2007:8.

As far as children are concerned, it is estimated that about two million children are exploited in the transnational sex trade worldwide.¹⁰² Despite commendable steps taken by numerous countries such as Brazil, France, the United States of America (USA) and Madagascar to counter child sex tourism,¹⁰³ traffickers still pursue this type of trafficking. Research indicates that these prostituted children may be exploited by more than 100 perpetrators per year.¹⁰⁴ Traffickers thrive on child sexual exploitation, since weak law enforcement and the ease with which corrupt officials can be bribed in poverty-stricken tourist destinations make it a low-risk enterprise.¹⁰⁵

Misused technology is playing an increasing role in expanding the sex trade, opening up a multitude of markets for traffickers.¹⁰⁶ Without much effort, predators advertise sexual services worldwide on the internet, enabling buyers and sellers to arrange business deals with the push of a button.¹⁰⁷ In a similar way, the availability of brothels, mail-order bride industries and child sex tourism sites is communicated online by means of chatrooms, email and specific websites.¹⁰⁸ Filming of child sexual abuse by means of digital cameras and cellphone cameras is used to

¹⁰² US Department of State 2010:12; US Department of State 2008:14, 24; US Department of State 2007:23, 28.

¹⁰³ US Department of State 2008:14.

¹⁰⁴ US Department of State 2008:14.

¹⁰⁵ US Department of State 2008:25; US Department of State 2007:23.

¹⁰⁶ Melvin 2006:27; US Department of State 2008:13; US Department of State 2007:23.

¹⁰⁷ US Department of State 2008:13; Dottridge and Weissbrodt 1999:253.

¹⁰⁸ US Department of State 2008:13; US Department of State 2007:23; Weissbrodt and Anti-Slavery International 2002:34-35; Dottridge and Weissbrodt 1999:266; Hodgkin and Newell 2002:527; Raymond 2002:492.

“groom”¹⁰⁹ and blackmail child victims, while huge profits are made by selling these images.¹¹⁰ “Cyber-sex” dens, showing images via a webcam on the internet of how persons are sexually abused, constitute a new market for traffickers.¹¹¹ By using trafficked persons to provide this service, clients pay not only for a once-off service, but can also watch “live” pornographic shows over and over again in the privacy of their own homes.¹¹²

b Labour exploitation

The Palermo Protocol prohibits human trafficking for any exploitative purpose, including human trafficking for the purpose of forced labour or services.¹¹³ Labour trafficking is a widespread phenomenon.¹¹⁴ Traffickers supply trafficked people to a wide range of markets, including the domestic,¹¹⁵ agricultural, mining, fishery, industrial, construction, textile, garment, manufacturing, tourism, catering, and entertainment

¹⁰⁹ The term “grooming” is usually used to indicate those acts of a perpetrator that are aimed at facilitating the commission of an illegal sexual act with another person – Burchell 2005:750. These acts are therefore performed with the intention to encourage or persuade the victim to engage in sexual activities or to reduce any resistance on the part of the victim. Examples of such acts are befriending victims, spoiling them with presents and other treats to gain their trust, and then increasingly introducing them to sexual activities. These grooming acts are criminalised in South African law in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*: section 18(2) – see also 4.2.2.14 in Chapter 7 below.

¹¹⁰ US Department of State 2007:23.

¹¹¹ US Department of State 2007:23.

¹¹² US Department of State 2007:23.

¹¹³ US Department of State 2010:8. The US Model Law distinguishes between the terms “labour” and “services” by describing labour as “work activities which would, but for the coercion, be otherwise legitimate and legal”, while “services” comprise “activities akin to an employment relationship, but are in market sectors that are not legitimate forms of ‘labor’” – US Department of State 2003:8-9.

¹¹⁴ US Department of State 2007:14, 16.

¹¹⁵ US Department of State 2008:22; US Department of State 2007:13; GAATW 1999a:14.

sectors of the economy.¹¹⁶ In 2008, the International Labour Organisation (ILO)¹¹⁷ released the following statistics:

Out of 12.3 million forced labour victims worldwide, around 2.4 million were trafficked. The figures present a conservative estimate of actual victims at any given point in time, estimated over a period of ten years.¹¹⁸

The concept “forced labour”, which is listed as a form of exploitation in the Palermo Protocol, is also prohibited by numerous other international and regional instruments.¹¹⁹ The definition of “forced labour” is essentially found in the two ILO forced-labour conventions.¹²⁰ The 1930 ILO Convention No. 29 Concerning Forced Labour¹²¹ defines the term “forced or compulsory labour” as:

¹¹⁶ ILO 2008:1, 5, 23; GAATW 1999a:11, 16; IOM 2007:24; US Department of State 2008:37; UN.GIFT 2008a:4; Melvin 2006:17, 24; Le Roux 2008:7; Foundation Against Trafficking in Women *et al.* 2001:5.

¹¹⁷ ILO 2008:1-33; UN.GIFT 2008a:2. The ILO emerged, together with the League of Nations, from the Treaty of Versailles in 1919 in order to work towards social reform in the international labour sector after World War I. After 1946, the ILO became an agency of the then newly formed United Nations Organisation – UN DPI 2000:3, 49. Having a tripartite structure made up of employers’ and workers’ organisations as well as governments, the ILO has, by way of numerous conventions, benchmarked many minimum international labour standards pertaining to issues such as fair working conditions, workplace safety, maternity protection and child labour – ILO *s.a.*:3-11; UN DPI 2000:49; Farrior 1997:223. The ILO aims to achieve, through its conventions, four binding principles, namely freedom of association, and the elimination of forced labour, child labour and discrimination in employment – Dottridge and Weissbrodt 1999:243.

¹¹⁸ ILO 2008:3.

¹¹⁹ Weissbrodt and Anti-Slavery International 2002:13, 14.

¹²⁰ These two treaties are the 1930 ILO Convention No. 29 Concerning Forced Labour <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008) and the 1957 Convention No. 105 Concerning the Abolition of Forced Labour <http://www.unhchr.ch/html/menu3/b/32.htm> (accessed 18/7/2008); Haysom 2002:179.

¹²¹ <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008). The 1957 Convention Concerning the Abolition of Forced Labour (No. 105) further expanded the prohibition of forced labour in article 1 – <http://www.unhchr.ch/html/menu3/b/32.htm> (accessed 18/7/2008). The 1957 Convention proscribed forced labour “for political purposes, for purposes of economic development, as a means of labour discipline or punishment for strike action and as a means of discrimination” – Weissbrodt and Anti-Slavery International 2002:13.

...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.¹²²

Dottridge and Weissbrodt¹²³ justifiably point out that this definition distinguishes forced labour from slavery, in that it does not include the concept of ownership, which is the key requirement for slavery. In addition, it must be noted that the prohibition of slavery in international instruments is absolute, while exceptions to the prohibition of forced labour are recognised.¹²⁴

According to Devenish,¹²⁵ forced labour predominantly involves “work done without consent and invariably without fair and just compensation”. In a human trafficking scenario, labour trafficking includes practices where trafficked persons do not perform services voluntarily, but are forced by physical assault, serious threats or other forms of coercion to

¹²² Article 2; Naidu 1987:109-110. The concept “forced labour” is also described and criminalised in section 112 of the US *Trafficking Victims Protection Act* of 2000, amending Chapter 77 of Title 18 of the United States Code as follows:

§ 1589 Forced labor

Whoever knowingly provides or obtains the labor or services of a person -

- (1) by threats of serious harm to, or physical restraint against, that person or another person;
- (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned for not more than 20 years, or both.

¹²³ Dottridge and Weissbrodt 1999:253; see the discussion of slavery in 2.2.2.3.2.c below.

¹²⁴ Nowak 2005:197. Weissbrodt and Anti-Slavery International 2002:12-14 indicate that section 2(2) of this Convention, as well as provisions in other international instruments, contains a list of exceptions to the prohibition of forced labour. For example, forced labour may be allowed for military service, prison labour, work performed as part of a citizen’s normal civic obligations or services rendered in national emergencies, such as war, famine, flood or epidemic diseases – Devenish 1998:55; Currie and De Waal 2005:313-314; Nowak 2005:201, 203-208. In contrast to these exceptions recognised in respect of forced labour, Haysom 2002:176, 179, 180-181 points out that the prohibition against slavery and servitude is absolute and that no limitations are countenanced in international instruments and international law.

¹²⁵ Devenish 1998:54; Nowak 2005:201. Currie and De Waal 2005:313 endorse this view by emphasising that the key definitional feature of forced labour is involuntariness.

perform services.¹²⁶ In reality, the freedom of people trafficked for forced labour is often restricted and varying degrees of ownership are exerted over them.¹²⁷

Labour trafficking typically consists of the transportation of trafficked persons to another place by force or false promises of well-paid employment. At the destination location, such trafficked persons are often exploited by debt bondage,¹²⁸ long working hours, dangerous and unhealthy work conditions, minimal wages or the withholding of wages, confiscation of travel and identification documents, confinement, and physical, sexual and psychological abuse.¹²⁹ Victims are often trafficked into the informal, unregulated sectors of the labour market,¹³⁰ such as domestic and entertainment sectors, where they can be easily exploited with a low risk of being detected.¹³¹ Particularly in these sectors, trafficked workers are often not protected under labour law and are difficult to identify, assist and estimate.¹³²

Apart from adults involved in labour trafficking, children are also trafficked for forced labour, even though most countries have domestic legislation

¹²⁶ IOM 2007:24; UN.GIFT 2008a:2.

¹²⁷ Melvin 2006:24; Dottridge and Weissbrodt 1999:253.

¹²⁸ See the discussion in 4 below.

¹²⁹ GAATW 1999a:14, 16.

¹³⁰ Wijers and Lap-Chew 1999:40. Typical examples of such more informal, unregulated sectors include the entertainment business, forced domestic labour in private households, and marital obligations – Wijers and Lap-Chew 1999:223. Employers of these trafficked persons tend to take advantage of gaps in law enforcement – US Department of State 2008:19.

¹³¹ US Department of State 2010:9; UN.GIFT 2008a:5-6; US Department of State 2009:18.

¹³² US Department of State 2010:9; US Department of State 2009:18; US Department of State 2008:19; UN.GIFT 2008a:6.

prohibiting child labour.¹³³ Global concern about child trafficking and forced child labour¹³⁴ led to the adoption of the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour in 1999.¹³⁵ This Convention specifically proscribes child trafficking and forced child labour as the “worst forms of child labour”.¹³⁶

c Slavery, practices similar to slavery and servitude

Another manifestation of human trafficking is trafficking for the purposes of slavery or slavery-like practices. Although exploitation for these purposes is explicitly prohibited by the Palermo Protocol, the concepts “slavery, practices similar to slavery and servitude” are also not defined in the Protocol.¹³⁷ Apart from “servitude”, definitions for these concepts are found in other international instruments.¹³⁸ In 1926, under the

¹³³ Banda 2008:15; US Department of State 2007:31; US Department of State 2009:19.

¹³⁴ US Department of State 2009:19. A typical example of such disturbing child trafficking practices for the purpose of forced labour is found on the estimated two million cocoa farms in West Africa – US Department of State 2007:31.

¹³⁵ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008); US Department of State 2008:21; Weissbrodt and Anti-Slavery International 2002:29; US Department of State 2009:19; Gallagher 2001:987.

¹³⁶ For a further discussion of this Convention and “the worst forms of child labour”, see 2.2.4 in Chapter 5 below.

¹³⁷ Slavery, servitude and forced labour are prohibited in almost all major international human rights instruments, but, since none of them define these terms, definitions are only found in subsidiary instruments – Haysom 1997:88; Devenish 1998:54; Haysom 2002:176; Bales and Robbins 2001:26.

¹³⁸ Haysom 2002:178; Naidu 1987:108; Gallagher 2001:987-988. Weissbrodt and Anti-Slavery International 2002:4 indicate that differing definitions of slavery have resulted owing to contradictory opinions on which practices should be categorised as slavery and which strategies would be the most appropriate to eradicate slavery.

auspices of the League of Nations,¹³⁹ the Slavery Convention¹⁴⁰ abolished slavery and became the first international instrument to define slavery as:

...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.¹⁴¹

Concomitantly, the Slavery Convention defined the “slave trade” so as to include:

...all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves.¹⁴²

The meaning of the term “servitude” is more problematic. Although other international human rights instruments prohibit servitude,¹⁴³ none of them

¹³⁹ Weissbrodt and Anti-Slavery International 2002:3. The forerunner of the United Nations was the League of Nations, an international organisation founded after World War I as a result of the Treaty of Versailles in 1919 – UN DPI 2000:3. With the primary purpose of avoiding future war, the League aimed at preventing war through settling disputes between countries by negotiation, diplomacy and international instruments. However, the League could not prevent World War II and was replaced in 1946 by the United Nations, which inherited a number of agencies and organisations founded by the League – UN DPI 2000:3.

¹⁴⁰ <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008). Haysom 2002:176 points out that, although slavery was abolished more than a century ago in many countries, such as Britain in 1807 and the United States of America in 1862, the Slavery Convention was the first international instrument to confirm the banning of the slave trade; see also Bassiouni 1990/1991:452.

¹⁴¹ Article 1(1); Dottridge and Weissbrodt 1999:243; Weissbrodt and Anti-Slavery International 2002:4; Allain 2008:67-68. For a more detailed discussion of slavery and its relationship to human trafficking, see 4 in Chapter 4 below.

¹⁴² Article 1(2). Regrettably, the Slavery Convention failed to establish effective procedures for enforcing the Convention – Weissbrodt and Anti-Slavery International 2002:5.

¹⁴³ See article 4 of the Universal Declaration of Human Rights <http://www.un.org/Overview/rights.html> (accessed 18/8/2008) and article 8(2) of the International Covenant on Civil and Political Rights <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008); UNODC 2009b:20; see also 2.4.1 and 2.4.4 in Chapter 5 below.

offers a precise definition of the term.¹⁴⁴ Haysom¹⁴⁵ points out that, apart from traditional slavery, which requires the powers attached to the right of ownership to be present,¹⁴⁶ numerous practices exist that “fall short of the condition of slavery, yet place the victim in a state of servitude”. The term “servitude” is generally used to cover such slavery-like practices. In other words, servitude differs from slavery in that it is a broader concept that does not require ownership.¹⁴⁷

The scope of the Slavery Convention was extended in 1956 by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Convention on Slavery),¹⁴⁸ in that the following practices are proscribed as forms of servitude:¹⁴⁹

¹⁴⁴ Jordan 2002:10; Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:7 in footnote 26; Gallagher 2001:987-988. Weissbrodt and Anti-Slavery International 2002:22 in footnote 111 confirm that the term “servitude” is not defined in international law.

¹⁴⁵ Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:5-6.

¹⁴⁶ Allain 2008:67-68; Bales 2004:58a. Dottridge and Weissbrodt 1999:248 explain that traditional slavery was referred to as “chattel slavery”, because owners were entitled to treat their slaves like any moveable possession (chattel) by buying or selling them. Condè 1999:137 largely follows the definition of the Slavery Convention and defines slavery as “the status of a person belonging to another person as a chattel (personal property) and thus having to do whatever the owner commands”.

¹⁴⁷ Weissbrodt and Anti-Slavery International 2002:7 in footnote 26.

¹⁴⁸ <http://www.unhchr.ch/html/menu3/b/30.htm> (accessed 12/3/2008).

¹⁴⁹ Currie and De Waal 2005:312. Rijken 2003:76 maintains that the concept “servitude” is defined in the 1966 International Covenant on Civil and Political Rights as slavery-like practices, which include serfdom, debt bondage and all forms of traffic in persons. However, the author disagrees with Rijken on this point, since the Covenant provides no definition of the concept, but only stipulates in article 8(2) that “no one shall be held in servitude” – <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008); see also Nowak 2005:193, 200; UNODC 2009b:20. Haysom 2002:178 argues that the 1956 Supplementary Slavery Convention is the only convention to offer some definition of servitude “by specifying certain conditions or statuses that are to be regarded as forms of servitude”. Another definition of “servitude” is given in section 103(5) of the US *Trafficking Victims Protection Act of 2000*:
The term “involuntary servitude” includes a condition of servitude induced by means of -
(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or

- (a) Debt bondage,¹⁵⁰ which refers to the status of a debtor who pledges his or her unlimited personal services as security for a debt, but, because the debt is continuously increased or the services are undervalued, the debt is seldom or never paid off.¹⁵¹
- (b) Serfdom,¹⁵² which refers to a condition under which a tenant, a so-called serf,¹⁵³ is bound to live and work on another person's land and provide prescribed services to the owner owing to his or her immutable serf status.¹⁵⁴

(B) the abuse or threatened abuse of the legal process. In essence, this definition of servitude entails a person staying in a condition owing to coercion by means of threat of harm, physical confinement or abuse of the legal process. Condè 1999:137 defines servitude as “a status/condition of a person being involuntarily subject to a master, having no liberty, and not being able to determine his own course of action or way of life” Although Condè maintains that servitude is different from slavery, his definition of servitude is however similar to that of slavery.

¹⁵⁰ Article 1(a) Debt bondage, that is to say, the status or condition arising from a pledge by the debtor of his or her personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

¹⁵¹ Currie and De Waal 2005:312; Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:11-12, 14-16; Rijken 2003:75; Stuurman 2004:5; see also 2.3 in Chapter 4 below. More recently, the ILO also denounced the practice of debt bondage, specifically relating to children. The 1999 ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour includes debt bondage among the “worst forms” prohibited in article 3(a) – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008).

¹⁵² Article 1(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determined service to such person, whether for reward or not, and is not free to change his status.

¹⁵³ US Department of State 2010:9. Dottridge and Weissbrodt 1999:251-252 state that, initially, the term “serfdom” or “peonage” referred to practices in Latin American countries where indigenous people were conquered and their lands seized. These practices entailed a landowner allowing a “serf” or “peon” to live and work on a piece of land in return for specific services, but, because the person's serf status was permanent and unchangeable, serfdom was considered a form of servitude. Against this background, serfdom was also regarded as the equivalent of “praedial slavery”, which entailed the use of slaves for agricultural production on farms or plantations – Dottridge and Weissbrodt 1999:251.

¹⁵⁴ Haysom 2002:178-179; Rijken 2003:75. For a further discussion of the various forms of serfdom and its linkage to the term “peonage”, see Weissbrodt and Anti-Slavery International 2002:11-12.

- (c) Practices relating to women¹⁵⁵ that constitute forced marriages¹⁵⁶ are also listed, namely the forced selling of women into marriage,¹⁵⁷ the transferral of wives for reward, and widows inherited by another person upon the death of their husbands.¹⁵⁸
- (d) Practices in which minors are delivered by their parents or guardians to other persons for exploitation or for the minor's labour, are also included.¹⁵⁹

Haysom points out that, since the Supplementary Convention on Slavery stipulates that a “person of servile status”¹⁶⁰ is a person in one of the abovementioned slavery-like practices, it is implied that the term “servitude” is used as an umbrella term to cover practices akin to slavery.¹⁶¹ Since servitude is generally seen as a broader concept than

¹⁵⁵ The UNODC Model Law correctly points out that, since article 1(c) of the Supplementary Convention on Slavery refers only to women as victims, it is apposite to consider the replacement of the definition of forced marriages with one that contains gender-neutral terms which include male victims as well – UNODC 2009b:18.

¹⁵⁶ Article 1(c) (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
(ii) The husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or
(iii) A woman on the death of her husband is liable to be inherited by another person.

¹⁵⁷ According to Weissbrodt and Anti-Slavery International 2002:35, it is not primarily “the payment which is an abuse, but its occurrence in a forced or non-consensual marriage”; see also 2.2.2.3.2.d below for a further discussion of forced marriages.

¹⁵⁸ Haysom 2002:178; Rijken 2003:75; Currie and De Waal 2005:312.

¹⁵⁹ Article 1(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

¹⁶⁰ Article 7 stipulates that a “person of servile status” means a person “in a condition or status resulting from any of the institutions or practices mentioned in article 1 of the Convention”.

¹⁶¹ Haysom 2002:178.

slavery,¹⁶² Nowak¹⁶³ states that servitude not only includes slavery-like practices mentioned in the Supplementary Convention on Slavery, but also all forms of trafficking in women and children.

d Forced marriages

As alluded to above,¹⁶⁴ the Supplementary Convention on Slavery¹⁶⁵ identifies three practices relating to forced marriages and prohibits these as forms of servitude. Although the Palermo Protocol does not list trafficking for the purpose of forced marriage as a form of “exploitation” in the definition of trafficking,¹⁶⁶ the listed types of exploitation are not an exhaustive list. Therefore trafficking for the purpose of forced marriage qualifies as an exploitative purpose.¹⁶⁷ This type of trafficking often intersects with other forms of exploitation listed in the trafficking definition, such as sexual exploitation, forced domestic labour and practices similar to slavery.¹⁶⁸

Trafficking for the purpose of forced marriage exists worldwide.¹⁶⁹ In

¹⁶² Gallagher 2001:988 in footnote 76.

¹⁶³ Nowak 2005:200; see also Jordan 2002:10.

¹⁶⁴ See 2.2.2.3.2.c above; see also UNODC 2009b:35.

¹⁶⁵ <http://www.unhchr.ch/html/menu3/b/30.htm> (accessed 12/3/2008).

¹⁶⁶ Palermo Protocol: section 3(a) – see 2.2.2.3.1 above.

¹⁶⁷ US Department of State 2010:15.

¹⁶⁸ SALRC 2006:33. Cases have been documented of “paper marriages” or “fake” husbands connected to trafficking rings that exploit these bought brides for labour or for commercial sexual purposes – US Department of State 2007:17; Weissbrodt and Anti-Slavery International 2002:36, 37; Foundation Against Trafficking in Women *et al.* 2001:5. For a discussion of the abuse of the *ukuthwala* tradition resulting in forced marriages, see 4.2.1.1 in Chapter 7 below.

¹⁶⁹ US Department of State 2010:15; IOM 2006:12; Pearson 2000:23; GAATW 1999a:15; GAATW 1999b:70-71; SALRC 2006:33; Wijers and Lap-Chew 1999:40-41; Singh 2004:341; Weissbrodt and Anti-Slavery International 2002:35-37; Dottridge and Weissbrodt 1999:274-

1995, the Beijing Platform for Action¹⁷⁰ recognised the existence of this type of trafficking and urged origin, transit and destination countries¹⁷¹ to address “trafficking in women and girls for prostitution and other forms of commercialised sex, forced marriages and forced labour in order to eliminate trafficking in women...”.¹⁷²

Traffickers use innovative measures to traffic persons into the commercial marriage market. For example, on a billboard on a South Korean roadside, a so-called “international marriage specialist”

276; Lee 2007:3. Significant escalations in brokered international marriages have been reported in some regions, for example in South Korea the number of international marriages has risen threefold in the last five years to 43 121. Several countries, such as Taiwan, recognise trafficking for the purpose of forced marriage as a significant problem and have adopted more stringent prevention measures to combat this type of exploitation by traffickers – US Department of State 2007:17.

¹⁷⁰ <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm> (accessed 30/6/2008). Together with the Beijing Declaration, this Platform for Action was adopted by consensus at the Fourth World Conference on Women: Action for Equality, Development and Peace held in Beijing from 4 to 15 September 1995 – Jayasuriha and Jayasuriha 1999:46. This conference was widely attended by “representatives from 189 Governments, 5000 representatives from 2100 non-governmental organisations and 5000 media representatives” – Jayasuriha and Jayasuriha 1999:46. In highlighting the fact that the Beijing Declaration was a solemn statement of commitment by the attending governments to implement the Platform for Action, the authors indicate that the main aim is to ensure that “a gender perspective is reflected in all policies and programmes” – Jayasuriha and Jayasuriha 1999:46.

¹⁷¹ For a clarification of the terms “origin, transit and destination countries”, see 9 in Chapter 1 above.

¹⁷² Beijing Declaration Platform for Action: Strategic Objective D3 130(b) – <http://www.un.org/womenwatch/daw/beijing/platform/violence.htm> (accessed 30/6/2008). Provisions to combat forced marriages are also included in other international instruments, for example in: article 16 of the Universal Declaration of Human Rights; article 1(c)(i) of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956; article 1(1) of the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage of 1962; and articles 16(1)(b) and 16(2) of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages explicitly stipulates in article 1(1) that “the full and free consent of both parties” is required for a legal marriage and also obligates states parties to specify a minimum age for marriage in order to eliminate child marriages. These provisions are important in combating human trafficking, since they are often violated when persons are trafficked for the purpose of forced marriage.

advertised that women could be bought like any other article of trade.¹⁷³ Other traffickers advertise women for marriage,¹⁷⁴ display prospective brides at trade shows or even offer organised tours to the source country for clients to choose whom they want to purchase from the paraded women.¹⁷⁵ Internet-based marriage brokers go a step further, providing access to this bride selection service in the comfort and anonymity of the client's residence or office.¹⁷⁶

e Removal of organs

The Palermo Protocol prohibits human trafficking for the purpose of organ removal, but does not cover the crime of organ trafficking without a person being trafficked for that purpose.¹⁷⁷ Stated differently, trafficking for body organs involves trafficking of people for the removal of their organs, but does not include the selling or trafficking in organs alone.¹⁷⁸

¹⁷³ US Department of State 2007:17 – the cryptic advertisement read: “Vietnamese – They Don’t Run Away! – International Marriage Specialist”; see also GAATW 1999a:15; Weissbrodt and Anti-Slavery International 2002:36.

¹⁷⁴ For a discussion on women advertised for marriage, usually under the description “mail-order brides”, and their vulnerability in becoming victims of trafficking, see Dottridge and Weissbrodt 1999:275-276; Weissbrodt and Anti-Slavery International 2002:36-37.

¹⁷⁵ GAATW 1999a:15; US Department of State 2007:17.

¹⁷⁶ US Department of State 2007:17.

¹⁷⁷ Section 3(a) of the Palermo Protocol; see 2.2.2.3.1 above; SALRC 2006:15. This provision of the Palermo Protocol links up with the Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which prohibits, in article 3(1)(a)(i)b, the “offering, delivering or accepting, by whatever means, a child for the purposes of transfer of organs of the child for profit” – <http://www.unhcr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008); Weissbrodt and Anti-Slavery International 2002:45. However, it must be noted that the removal of an organ from a child, with the valid consent of a parent, for legitimate medical or therapeutic reasons is not considered exploitation – UN General Assembly 2000: paragraph 65; Jordan 2002:9 in footnote 14; UNODC 2004:269.

¹⁷⁸ IOM 2007:24; IOM 2008:60; SALRC 2006:15; Jordan 2002:10; US Department of State 2010:8. Watson does not distinguish clearly between the two phenomena and conflates the crime of organ trafficking with human trafficking for the purposes of organ removal as is set out in the Palermo Protocol – Watson 2006:39-44; see also Weissbrodt and Anti-Slavery International 2002:44-45. Slabbert 2000:61-69, 177-180 discusses illegal means of obtaining human organs for transplants, focusing on trafficking in organs, and does not specifically cover human trafficking for the purpose of organ removal and transplants. For a discussion of

Therefore, although the two crimes may intersect, they are not identical.¹⁷⁹

It is reported that perpetrators traffic people in order to sell their organs at an exorbitant price to patients who desperately require an organ transplant.¹⁸⁰ This form of human trafficking is fuelled by the shortage of healthy organs for use in transplants,¹⁸¹ since the demand is not met by the limited number of donated organs and by the medical advances to provide compatible artificial organs.¹⁸² The global shortage of body parts has resulted in a black market for body parts.¹⁸³ Consequently, it is documented that traffickers recruit and exploit victims to provide for the demand for human organs.¹⁸⁴ Traffickers profit illegally from organ-related trafficking,¹⁸⁵ because “recipients of the organs must pay a much higher price than the donors receive, part of which benefits brokers,

property rights and ownership of human body parts, and the lacunae in South African law in this regard, see Slabbert 2009:499-517.

¹⁷⁹ UN.GIFT 2008b:3. When an organ is illegally removed from a deceased person and sold for profit, this is an example of organ trafficking, but it does not constitute human trafficking unless the person was killed for the purpose of removing the organ – UN.GIFT 2008b:6; Weissbrodt and Anti-Slavery International 2002:44-45.

¹⁸⁰ US Department of State 2009:17; UN.GIFT 2008b:2; Hodgkin and Newell 2002:523; Slabbert 2009:515-516; UN.GIFT 2008e:12. It is reported that a distinguishing feature of this type of trafficking is that “traffickers and organ ‘brokers’ come from atypical sectors and include doctors and other health-care practitioners, ambulance drivers and mortuary workers” – UN.GIFT 2008e:12; HSRC 2010:31.

¹⁸¹ US Department of State 2010:8; UN.GIFT 2008b:2; SALRC 2006:30; Dottridge and Weissbrodt 1999:282; Snyman 2005:284; UN.GIFT 2008e:12.

¹⁸² SALRC 2006:30; Snyman 2005:284. Watson 2006:34-35 also confirms the worldwide shortage of body organs available for life-saving transplants. For a discussion of the shortage of organs in South Africa and a number of other countries, see Slabbert 2000:20-24.

¹⁸³ Slabbert 2009:516.

¹⁸⁴ SALRC 2006:30; UN.GIFT 2008b:13; Shelley 2007:128-129; US Department of State 2009:17.

¹⁸⁵ According to UN.GIFT 2008b:9, financial gain from human organs is prohibited in the domestic law of most countries.

surgeons and hospital directors, who have been reported to be involved in the organised criminal network”.¹⁸⁶

Besides organs, traffickers have also found a market for other body tissue and parts, such as skin, bone, cartilage,¹⁸⁷ blood, corneas, hair and nails.¹⁸⁸ However, the Palermo Protocol only lists the removal of organs as a form of exploitation and does not mention other body parts. This apparent oversight by the drafters of the Protocol is overcome by the fact that the types of exploitation listed by the Protocol are not an exhaustive list.¹⁸⁹ Accordingly, trafficking for the exploitative purpose of removing body parts other than organs still falls within the scope of the Protocol’s definition of human trafficking. The demand for some of these body parts is created by a number of practitioners of witchcraft, by ritual sacrifices and by dubious traditional healers preparing traditional potions.¹⁹⁰ In South and southern Africa, people have been trafficked for their body parts, including skulls, hearts, eyes, tongues, hands, feet and genitals, to be used in muti, a traditional African potion.¹⁹¹ These potions are sold by deviant practitioners alleging that such potions increase wealth, influence, health or fertility.¹⁹²

¹⁸⁶ UN.GIFT 2008b:2; US Department of State 2010:8.

¹⁸⁷ Cartilage is a firm, flexible connective tissue forming the infant skeleton, which is mainly replaced by bone in adulthood – Reader’s Digest Oxford 1996:213.

¹⁸⁸ Ncube 2008:4; UN.GIFT 2008b:14; UN.GIFT 2008e:12.

¹⁸⁹ Article 3(a) – Addendum A; see also UNODC 2006:xii; Kamidi 2007:8; SALRC 2006:15; and the discussion in 2.2.2.3.1 above.

¹⁹⁰ US Department of State 2009:17; UN.GIFT 2008b:2; IOM 2008:60; UN.GIFT 2008e:12.

¹⁹¹ IOM 2008:60, 63; SALRC 2006:30; Snyman 2005:284-285. Muti is described as a traditional African medicine consisting of herbs as well as parts of animals and human beings used in traditional therapy or in witchcraft – Branford and Branford 1991:209.

¹⁹² UN.GIFT 2008b:2; IOM 2008:60.

This type of trafficking in body parts is not well known, but has been documented.¹⁹³ In their research, Weissbrodt and Anti-Slavery International¹⁹⁴ advocate further in-depth research on this issue, since no comprehensive global survey on this type of human trafficking is available.¹⁹⁵

f Illegal adoptions

Although not specifically mentioned as a form of exploitation in the Palermo Protocol,¹⁹⁶ the Official Interpretative Notes (*Travaux Préparatoires*) state that an illegal adoption, which amounts to a practice similar to slavery,¹⁹⁷ falls within the scope of the Protocol.¹⁹⁸ This form of human trafficking is not common, but exploitation of children by trafficking them for the purpose of illegal adoptions has been documented.¹⁹⁹ Bassiouni²⁰⁰ reports that many children were trafficked for this purpose from Asia and Latin America to North America and Western Europe. According to Shelley,²⁰¹ some administrators sold

¹⁹³ IOM 2008:60-63; Dottridge and Weissbrodt 1999:282; UN.GIFT 2008b:4; Ncube 2008:4; Hodgkin and Newell 2002:527; Snyman 2005:284; US Department of State 2009:17; UN.GIFT 2008e:12-14.

¹⁹⁴ Weissbrodt and Anti-Slavery International 2002:44-45.

¹⁹⁵ Dottridge and Weissbrodt 1999:282; Di Nicola 2007:66; Hodgkin and Newell 2002:57. UN.GIFT 2008b:4, 11 endorses the need for further research and reports that the lack of information on organ-related trafficking is a major obstacle in responding effectively to this form of trafficking. For a discussion of some responses to organ-related trafficking, such as Organs Watch, Initiative on Global Organ Trafficking and the Coalition for Organ-Failure Solutions, see UN.GIFT 2008b:11-12.

¹⁹⁶ Palermo Protocol: section 3(a); see 2.2.2.3.1 above.

¹⁹⁷ The concept “practice similar to slavery” is discussed in 2.2.2.3.2.c above.

¹⁹⁸ UN General Assembly 2000: paragraph 66; Gallagher 2006:176.

¹⁹⁹ US Department of State 2010:8; UN General Assembly 2000: paragraph 66; Bassiouni 1990/1991:458; Dottridge and Weissbrodt 1999:282; SALRC 2006:34; Hodgkin and Newell 2002:524; UNODC 2009b:38.

²⁰⁰ Bassiouni 1990/1991:458.

²⁰¹ Shelley 2007:129.

children out of orphanages in Eastern Europe in the 1990s. It has also been documented that “lawyers representing American couples send out brokers to search for potential baby donors in the poorest neighbourhoods of Guatemala”.²⁰² This demand for the adoption of children has opened up a market for traffickers to exploit. Child adoption is usually regulated and overseen by government agencies,²⁰³ but a lack of adequate legislation and legal controls, or the unsuccessful implementation thereof, enables traffickers to continue with this type of trafficking.²⁰⁴

g Forced military service

Apart from other forms of exploitation, it is documented that traffickers also traffic persons for military service in armed-conflict areas.²⁰⁵ Although many international instruments condemn the use of children in armed conflicts,²⁰⁶ it is estimated that more than 300 000 children under

²⁰² SALRC 2006:34.

²⁰³ SALRC 2006:34. For international guidelines on child adoption and the proscription of improper financial gain for international adoptions, see article 21 of the UN Convention on the Rights of the Child – <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008).

²⁰⁴ Bassiouni 1990/991:458.

²⁰⁵ US Department of State 2009:20-21. Happold 2005:1-4,119-125 states that, owing to international concern about child soldiering, international instruments were adopted and the enlisting of children under the age of 15 years into national armed forces was declared a war crime in article 8 of the Rome Statute of the International Criminal Court. However, despite these developments, the writer confirms that there are still “a large number of child soldiers in the world today and it is believed that their number is growing” – Happold 2005:1; see also Cohn and Goodwin-Gill 1994:23; Lee 2007:3; UNODC 2009b:35-37; US Department of State 2010:9.

²⁰⁶ In aiming to protect children, many international and regional human rights instruments prohibit the recruitment of children for use in armed conflicts, for example: article 38 of the Convention on the Rights of the Child <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008); article 2 of the 1990 African Charter on the Rights and Welfare of the Child http://www.africaunion.org/official_documents/Treaties%20Conventions%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008); and the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict http://www.unhchr.ch/html/menu2/6/protocol_child.htm (accessed 12/3/2008). For a discussion of these international instruments, see Happold 2005:34-85; Cohn and Goodwin-Gill 1994:67-70; UNODC 2009b:37.

18 years of age are exploited as child soldiers in about 30 conflict-stricken areas.²⁰⁷ Reports indicate that there are many child soldiers²⁰⁸ between 15 and 18 years of age, but some are as young as 7 years of age.²⁰⁹ Although these estimates do not give a breakdown indicating the number of trafficked child soldiers and the number of other child soldiers,²¹⁰ they do give an indication of the extent and gravity of the child-soldier phenomenon.²¹¹

Happold,²¹² as well as Cohn and Goodwin-Gill,²¹³ argues that shortages of soldiers experienced in government and other armed forces lead to forced recruitment. The demand for soldiers in conflict areas lures traffickers to provide trafficked persons.²¹⁴ In numerous conflict- and war-stricken areas, especially in Africa, Asia, the Americas and the Middle East,²¹⁵ national armies and rebel forces recruit by means of force,

²⁰⁷ US Department of State 2007:24; Happold 2005:1, 6. Furthermore, it is estimated that, between 1986 and 1996, “armed conflicts killed two million children, injured six million, traumatised over ten million, and left more than one million orphaned” – Happold 2005:6.

²⁰⁸ A child is defined as every human being below the age of 18 years in terms of article 1 of the 1989 United Nations Convention on the Rights of the Child <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008), as well as in terms of article 2 of the 1990 African Charter on the Rights and Welfare of the Child http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008).

²⁰⁹ US Department of State 2009:20-21; US Department of State 2008:21; US Department of State 2007:24; Happold 2005:7.

²¹⁰ Apart from children trafficked for military service, children participate in armed conflict for various other reasons – see the discussion by Cohn and Goodwin-Gill 1994:23-43.

²¹¹ Cohn and Goodwin-Gill 1994:23; Hodgkin and Newell 2002:527-258; US Department of State 2009:20-21; US Department of State 2010:10-11.

²¹² Happold 2005:9.

²¹³ Cohn and Goodwin-Gill 1994:24-25, 167.

²¹⁴ The risk factors contributing to human trafficking discussed in 2 in Chapter 3 below also make people susceptible to being trafficked for military service, for example poverty may drive a desperate child to take a firearm as a meal-ticket – Cohn and Goodwin-Gill 1994:23.

²¹⁵ Happold 2005:6-7; US Department of State 2007:23, 27.

coercion²¹⁶ or deception.²¹⁷ Despite the prohibition on using children in armed conflict by numerous international documents,²¹⁸ the militias²¹⁹ traffic children to be used as combatants, minelayers, spies, porters, guards, messengers, cooks, servants and sex slaves.²²⁰

The impact of trafficking for child soldiering is often devastating, because children are abused and forced to witness, or even commit, atrocities.²²¹ Child soldiers face multiple traumas ranging from physical²²² and psychological harm²²³ to being maimed, orphaned and displaced.²²⁴ These factors, combined with the lack of education and vocational training,²²⁵ often lead to their personal development being irreparably

²¹⁶ According to Cohn and Goodwin-Gill 1994:28, forced recruitment differs from coercive and abusive recruitment, since the latter covers those situations “where there is no proof of direct physical threat or intimidation, but the evidence supports the inference of involuntary enlistment”. Examples of such manipulation are indoctrination and pressurising children to revenge the atrocities committed by the enemy by fighting for their country and loved ones – Cohn and Goodwin-Gill 1994:30, 32; US Department of State 2009:20-21.

²¹⁷ Cohn and Goodwin-Gill 1994:23-29; US Department of State 2008:21; US Department of State 2007:24.

²¹⁸ Dottridge and Weissbrodt 1999:281; Weissbrodt and Anti-Slavery International 2002:40; Happold 2005:34-85; Cohn and Goodwin-Gill 1994:67-70.

²¹⁹ A “militia” is a military force, “especially one raised from the civil population and supplementing a regular army in an emergency” – Reader’s Digest Oxford 1996:947.

²²⁰ US Department of State 2010:9; US Department of State 2009:20-21; US Department of State 2008:21; US Department of State 2007:21, 24; Happold 2005:6, 11; Cohn and Goodwin-Gill 1994:95-96; US Department of State 2009:20-21; Allais 2006:9.

²²¹ Happold 2005:5-6; Allais 2006:10.

²²² Apart from children losing their lives in armed conflict, serious injuries, such as loss of sight and hearing, as well as loss of limbs, are also sustained – Happold 2005:17; Cohn and Goodwin-Gill 1994:112.

²²³ Happold 2005:17-19; Cohn and Goodwin-Gill 1994:105-112.

²²⁴ Cohn and Goodwin-Gill 1994:23; Happold 2005:10, 16-17.

²²⁵ Cohn and Goodwin-Gill 1994:112-114.

damaged.²²⁶

It is also very difficult to hold perpetrators accountable, because the government authorities that are supposed to protect children are often the very same authorities that illegally involve children in armed conflict.²²⁷ Although a few of the rebel leaders have been convicted and punished by national courts or the International Criminal Court, most perpetrators have not been held accountable for recruiting and using children in armed conflict.²²⁸

Some evidence exists of trafficking for forced military service, but comprehensive data and reliable statistics on the number of adults and children trafficked for military service are lacking. Cohn and Goodwin-Gill²²⁹ emphasise that more in-depth research is needed on this topic to clarify the dimensions of this type of trafficking.

h Begging

In some parts of the world, including China, India, Africa and the USA, traffickers trick people into forced begging on the street.²³⁰ To gain sympathy from the public, young children and babies, the elderly and disabled people are mainly targeted for this type of trafficking.²³¹ In

²²⁶ US Department of State 2007:24; Happold 2005:18.

²²⁷ For a further discussion of other reasons that frustrate the apprehension, prosecution and punishment of perpetrators, see US Department of State 2007:21.

²²⁸ US Department of State 2007:21.

²²⁹ Cohn and Goodwin-Gill 1994:176-177.

²³⁰ US Department of State 2008:33; Melvin 2006:24; Dottridge and Weissbrodt 1999:261; Shah 2007:451; Hodgkin and Newell 2002:523-524; ILO 1998:2; Snyman 2005:284; UNODC 2009b:35-36.

²³¹ GAATW 1999a:17; US Department of State 2008:33; ILO 1998:2.

practice, traffickers set daily money targets for their victims and, if these targets are not met, victims are punished.²³² In addition, victims are often deliberately deformed or underfed, as well as kept without shoes and proper clothing, in an attempt to obtain more money from empathetic community members.²³³ Victims also endure harsh circumstances on the street, ranging from fear of being arrested by the police, excessive hot or cold weather, long working hours, neglect and abuse by the public, to other competing beggars or their traffickers.²³⁴

i Crime or other exploitative purposes

Trafficking of people to be used as criminal agents has not been widely documented and more research on this issue is needed.²³⁵ Still, it is reported that traffickers use children as instruments to further various crimes, such as theft, housebreaking and, in particular, drug trafficking, where victims are exploited as drug couriers.²³⁶

Apart from trafficking children to commit crimes, other types of trafficking have also emerged. According to Lee, children are trafficked to be exploited as camel jockeys in the Gulf States.²³⁷ Trafficking of children for the purpose of street vending is also reported.²³⁸ Further reports disclose that unlicensed football agents recruit, for an exorbitant fee, African

²³² US Department of State 2008:33.

²³³ Hodgkin and Newell 2002:524; ILO 1998:1-2.

²³⁴ GAATW 1999a:17; US Department of State 2008:33; ILO 1998:2.

²³⁵ Kreston 2007:36 in footnote 12.

²³⁶ IOM 2008:56; Kreston 2007:36 in footnote 12; Snyman 2005:284; UN.GIFT 2008e:26; UNODC 2009b:35.

²³⁷ Lee 2007:3, 5; Hodgkin and Newell 2002:524; Snyman 2005:284.

²³⁸ IOM 2008:56.

youths with the false promise of introducing them to a top European football club.²³⁹ Subsequently, the youths are transported to Europe, but, soon, the victims are abandoned, while the trafficker disappears with the fee previously paid to him.²⁴⁰

To summarise, trafficking is not limited to a few forms of exploitation. The exploitative practices are varied, while new forms of exploitation in human trafficking emerge continuously.

2.2.3 Child trafficking

The concept “trafficking in children” or “child trafficking” is defined mainly in the same way as “trafficking in persons” is defined in the Palermo Protocol.²⁴¹ A child is defined as a person under the age of 18 years.²⁴² While trafficking of adults requires that the abovementioned three definitional parts of action, means and purpose be present, the means part is waived in cases where children are trafficked.²⁴³ Regarding the trafficking of children, the Palermo Protocol provides as follows:

²³⁹ Correspondent: African Research Bulletin 2008:17-445C.

²⁴⁰ The European Union has expressed concern about the trafficking of African children with false promises of a lucrative football career and is in the process of preparing an action plan – Correspondent: African Research Bulletin 2008:17-445C.

²⁴¹ Weissbrodt and Anti-Slavery International 2002:28; Gallagher 2001:988-990. Although “the sale or traffic in children for any purpose or in any form” was already prohibited in 1989 by article 35 of the Convention on the Rights of the Child <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008), and although the Optional Protocol to the Convention on the Rights of the Child deals specifically with the sale of children <http://www.unhchr.ch/html/menu2/6/crc/treaties/psc.htm> (accessed 12/3/2008), neither of these instruments defines “traffic in children” – see also the discussion of these instruments in Chapter 5 below.

²⁴² Article 3(d) of the Palermo Protocol provides that a “child” means any person under 18 years of age.

²⁴³ Gallagher 2001:987; Ezeilo 2009:7; UNODC 2004:270.

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.²⁴⁴

Lansink²⁴⁵ and others emphasise that the Palermo Protocol requires only two definitional parts for the trafficking of children, namely the proscribed actions and the purpose to exploit. Broader protection is thus provided for children, since, even if no coercive or deceptive means are used, but the action and exploitative purpose are present, the act still constitutes trafficking in persons.²⁴⁶

2.2.4 Consent issues

The question often arises whether the alleged offender may successfully raise the defence that the victim consented to the intended exploitation. As has been pointed out above,²⁴⁷ the Palermo Protocol requires the means part, namely the offender’s use of one of the proscribed coercive or deceptive means, to be present in order to constitute human trafficking.²⁴⁸ In line with international legal norms,²⁴⁹ the Protocol stipulates that consent to the intended exploitation obtained from a trafficked victim by using any of the prohibited means listed in the

²⁴⁴ See article 3(c) – Addendum A.

²⁴⁵ Lansink 2006:50; see also The Future Group 2007a:7; Weissbrodt and Anti-Slavery International 2002:22, 27-30; Kassan 2007:18–6.

²⁴⁶ Gallagher 2001:989.

²⁴⁷ See 2.2.2.2 above.

²⁴⁸ Section 3(a) – Addendum A.

²⁴⁹ UNODC 2009b:34.

Protocol²⁵⁰ is irrelevant, because it is not legally valid.²⁵¹ Lansink underpins that crime of trafficking adult persons “always contains a non-consensual element, as traffickers use coercive, deceptive and abusive means”.²⁵² Accordingly, the presence of the means part excludes consent of the victim.²⁵³ Jordan concludes:

Real consent is only possible and legally recognisable, when all the relevant facts are known and the person is free to consent or not.²⁵⁴

For this reason, a victim cannot legally consent to, for example, slavery, servitude or forced labour, since the definitions of these crimes entail that there is no real consent.²⁵⁵

Trafficked persons sometimes consent in the initial phase of the human trafficking process to be transported for employment elsewhere. However, as was pointed out earlier, they are often deceived about the nature or conditions of the work.²⁵⁶ Therefore, it is important to note that:

²⁵⁰ Article 3(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.

See also UN.GIFT 2008b:2; Gajic-Veljanoski and Stewart 2007:340; SALRC 2006:16.

²⁵¹ UNODC 2008:5-6; UNODC 2009b:34, 38; UNODC 2004:270.

²⁵² Lansink 2006:47.

²⁵³ UNODC 2009b:33; Defeis 2003/2004:488; UNODC 2008:5-6. It must be noted that accused persons still have the right to a full defence and to the presumption of innocence, while the burden of proof is on the prosecution, as in any criminal case, and not on the accused person – UN General Assembly 2000: paragraph 68; UNODC 2009b:34.

²⁵⁴ Jordan 2002:11.

²⁵⁵ Jordan 2002:11; see also UNODC 2009b:32, 34.

²⁵⁶ Shelley 2007:128; US Department of State 2009:13; see also the discussion in 2.2.2.2 above.

...consent of the victim at one stage of the process cannot be taken as consent at all stages of the process and without consent at every stage of the process, trafficking has taken place.²⁵⁷

There has been a long-standing debate on the consent issue in the case of sex trafficking. The discourse has focused on whether it still constitutes human trafficking if adults voluntarily migrate into the sex industry with none of the prohibited methods listed in the Palermo Protocol being used to obtain their consent. In other words, as Gallagher puts it, does “non-coerced, adult migrant prostitution” fall within the scope of the definition of human trafficking?²⁵⁸ Two views based on different perceptions of voluntary prostitution exist on this issue. On the one hand, abolitionists argue that forced as well as voluntary prostitution must be included in the definition of human trafficking, because all prostitution, even consensual prostitution, is coercive, reduces women to sex objects and always violates human rights.²⁵⁹ This view concludes that, since all prostitution is inherently sexual exploitation, a person cannot validly consent to such exploitation.²⁶⁰

On the other hand, others maintain, based on the right to privacy and self-determination, that sex work may be chosen like any other ordinary work and that only forced prostitution should be penalised.²⁶¹ According

²⁵⁷ UN.GIFT 2008b:5; see also Defeis 2003/2004:488; US Department of State 2009:13; UNODC 2008:5-6. In this regard, Gajic-Veljanoski and Stewart 2007:341 underpin that consent is of a continuous nature.

²⁵⁸ Gallagher 2001:984.

²⁵⁹ See the discussions in Lansink 2006:50-52, 55; Defeis 2003/2004:488; Rijken 2003:56-57; Raymond 2002:499; Gallagher 2001:984.

²⁶⁰ Gajic-Veljanoski and Stewart 2007:341.

²⁶¹ Rijken 2003:56-57. The different views on voluntary prostitution are also discussed in IOM 2006:12; GAATW 1999b:125.

to this view, an empowered, voluntary decision to do sex work, without the use of improper means, is not exploitative²⁶² and therefore the Palermo Protocol applies only to non-consensual prostitution.²⁶³

The two opposing views have led to different interpretations of the consent provision in article 3(b) of the Palermo Protocol. While there is consensus that trafficking for forced prostitution constitutes human trafficking, because of the use of prohibited means listed in the Protocol, the focal point of the debate is whether consensual prostitution also amounts to human trafficking.²⁶⁴ Jordan²⁶⁵ states that the consent provision merely confirms the international legal norm that “consent” obtained by means such as force, coercion, deception or abuse of power is not valid consent. In other words, the Palermo Protocol excludes “a consent-based defence in cases where the use of improper means of obtaining consent is established”.²⁶⁶

To summarise, while acknowledging the differing views on the consent issue in the case of adult prostitution, the crux is that human trafficking requires the means element to be present. The means part consists of consent-nullifying conduct, such as using force or deception.²⁶⁷

²⁶² GAATW 1999b:125; IOM 2006:12; Rijken 2003:67.

²⁶³ Weissbrodt and Anti-Slavery International 2002:23; Gallagher 2001:1002.

²⁶⁴ For a discussion of the conflicting views on whether the definition of human trafficking should protect all trafficked victims, irrespective of whether they consented or not, or only those who can prove that they have been forced or deceived, see Raymond 2002:494.

²⁶⁵ Jordan 2002:11; see also Gallagher 2001:985-986.

²⁶⁶ UNODC 2006:xv. If no improper means were used, Weissbrodt and Anti-Slavery International 2002:23 state that “adults who have migrated to work voluntarily in the sex industry may not be regarded as having been trafficked”.

²⁶⁷ See article 3(a) – Addendum A; Lansink 2006:47; see also the discussion by Gallagher 2001:984-985.

Consent of the victim can be a defence in domestic law, but as soon as any of the improper means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised.²⁶⁸

The consent issue in cases where children are trafficked also needs clarification.²⁶⁹ Given that the Palermo Protocol requires only two definitional parts, namely the action and exploitative purpose, to constitute the crime where children are trafficked,²⁷⁰ the UNODC Model Law emphasises that the child victim's consent is irrelevant.²⁷¹

Article 3 (c) of the Trafficking in Persons Protocol makes the consent of a child irrelevant and the capacity to consent may be further restricted under the domestic law of a particular State.

In line with the literature, it can be stated that a trafficked child's consent is never a valid defence in child trafficking cases.²⁷²

3. SCOPE OF HUMAN TRAFFICKING

There is a lack of quantitative information and understanding regarding the scope and development of the crime of human trafficking around the world. Even basic criminal justice data on trafficking in persons offences are not

²⁶⁸ UNODC 2008:6.

²⁶⁹ UNODC 2008:6; UNODC 2006:xv; Jordan 2002:12; UNODC 2009b:38.

²⁷⁰ See article 3(c) – Addendum A; UNODC 2009b:38.

²⁷¹ UNODC 2009b:38.

²⁷² UNODC 2008:6; UNODC 2006:xv; Jordan 2002:12; UNODC 2009b:38; Foundation Against Trafficking in Women *et al.* 2001:8.

publicly available for many countries and regions, making the compilation of accurate statistics on human trafficking elusive and unreliable.²⁷³

3.1 Introduction

The 2008 Trafficking in Persons Report (TIP Report) released by the USA recognises human trafficking as a worldwide problem that “plague[s] all nations, and no country, not even ours, is immune”.²⁷⁴ However, notwithstanding the increase in the literature on human trafficking, reliable information on the magnitude of the problem remains limited.²⁷⁵

Numerous sources provide general indications and estimates on the scope of human trafficking.²⁷⁶ A substantial body of the literature recognises that human trafficking is a multibillion-dollar industry and that about 800 000 new victims are trafficked across national borders annually.²⁷⁷ This figure does not include the millions who are trafficked within their own countries.²⁷⁸ Recently, the ILO estimated that the minimum number of persons in forced labour in the world at any given time as a result of human trafficking was 2,4 million.²⁷⁹ It is further

²⁷³ UN.GIFT 2008e:17.

²⁷⁴ US Department of State 2008:1; see also Truong and Angeles 2005:1; Gallagher and Holmes 2008:319; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:63.

²⁷⁵ Truong and Angeles 2005:1; Rijken 2003:79; Lee 2007:14; Di Nicola 2007:49, 60-61; Defeis 2003/2004:486, 490; Gallagher and Holmes 2008:319.

²⁷⁶ US Department of State 2009:7-8; Raymond 2002:492; Snyman 2005:282.

²⁷⁷ US Department of State 2007:8; Melvin 2006:15-16; Harrold 2006:101; McClain 2007:579; Kreston 2007:36-37; Gajic-Veljanoski and Stewart 2007:340; Di Nicola 2007:60. Others estimate that between 700 000 and 4 million new victims are trafficked per year – Haynes 2004:223; Morawska 2007:94. The accuracy of a number of estimates on the scope of human trafficking is questioned by a number of researchers – Gajic-Veljanoski and Stewart 2007:339; Di Nicola 2007:60-61; Horn 2010:11.

²⁷⁸ US Department of State 2007:8; see also Horn 2010:11.

²⁷⁹ ILO 2008:1; Di Nicola 2007:64.

estimated that approximately 80 percent of transnational victims are women and girls, and that up to 50 percent are minors.²⁸⁰ The majority of transnational victims are females trafficked into commercial sexual exploitation.²⁸¹

3.2 Difficulties in ascertaining the exact scope of the problem

As was pointed out above, the literature indicates that a wide range of often contested estimates exists on the magnitude of human trafficking.²⁸² Reviewing these estimates of the extent of the problem, Di Nicola points out that:

...a wide and contradictory range of figures can be found in research reports around the world, and they have been quoted and disseminated by researchers with no regards to the estimation criteria used.²⁸³

Research on the magnitude of human trafficking has often been criticised for lacking a scientific basis.²⁸⁴ Although there are ample indications that human trafficking exists and poses a grave and challenging problem,²⁸⁵ the exact extent remains debatable and uncertain.

²⁸⁰ Lansink 2006:46; US Department of State 2007:8; Kreston 2007:37; Melvin 2006:16; Gajic-Veljanoski and Stewart 2007:340; Harrold 2006:101; Di Nicola 2007:60; Horn 2010:11; UNODC 2009a:6.

²⁸¹ ILO 2008:3; US Department of State 2007:27; Melvin 2006:16; Di Nicola 2007: 60, 64.

²⁸² Gould 2006:19, 24; UNODC & SADC 2007a:x; Lee 2007:14.

²⁸³ Di Nicola 2007:61.

²⁸⁴ Gould 2006:19, 24; UNODC & SADC 2007a:x; Lee 2007:14.

²⁸⁵ Gallagher and Holmes 2008:319.

Though helpful as a starting point, general indications and estimates on the magnitude of human trafficking are not enough.²⁸⁶ Representative and more accurate data on the full scale of human trafficking is vital for a clear understanding of the phenomenon and for developing an effective legal response to deal with the problem.²⁸⁷

There are numerous reasons why it is difficult to ascertain the exact scope of human trafficking,²⁸⁸ but the literature particularly points out the lack of statistical data on the one hand and the relatively poor quality of data on the other.²⁸⁹

Regarding the paucity of data, Laczko and Gramegna found that:

...available information about the magnitude of the problem remains very limited. One of the biggest gaps in our understanding of trafficking is in the area of statistics and data collection. Despite the growing literature on human trafficking, much of the information on the actual number of persons trafficked is unclear and relatively few studies are based on extensive research.²⁹⁰

²⁸⁶ Gajic-Veljanoski and Stewart 2007:340 confirm that many estimates of human trafficking are imprecise. Apart from several studies that used well-grounded methodologies to estimate the scope of human trafficking, Di Nicola 2007:60-62 emphasises that statistics are too often issued without specifying the methods used to produce them, thus compromising their credibility.

²⁸⁷ “Documenting the issue of trafficking such as trends, patterns, forms and the magnitude of the problem is a vital source of information for advocating changes in policy and legislation” – GAATW 1999b:87; Di Nicola 2007:60-62.

²⁸⁸ For a further discussion on why producing reliable data on human trafficking has proven to be intricate, and for suggestions to address the problem, see Laczko and Gramegna 2003:179-193.

²⁸⁹ Rijken 2003:53; McClain 2007:592-593; Gould 2006:22; Guinn 2008:121; Laczko and Gramegna 2003:179-180; Shah 2007:452.

²⁹⁰ Laczko and Gramegna 2003:179-180; see also Raymond 2002:492. Guinn 2008:121 further underpins this problem by stating: “It is virtually impossible to obtain reliable data on trafficking in Latin America – or indeed anywhere else in the world.” The lack of reliable data on human trafficking results in compromised validity of the statistics and in findings based on such data – Gould 2006:24.

There are many reasons for the lack of data on human trafficking. First and foremost, the illegal, concealed and coercive character of the trade causes human trafficking to be an underreported crime.²⁹¹ The fact that human trafficking encompasses the commission of illegal acts causes trafficking activities to be hidden, and thus difficult to track and record for data purposes.²⁹² Consequently, official data probably just represents the tip of the iceberg.²⁹³ Because they are threatened with dire consequences if they escape or seek help, victims do not readily report trafficking.²⁹⁴ Trafficked victims are therefore very difficult to identify and access.²⁹⁵ Accordingly, the majority of cases are not discovered and incorporated in data collection and official crime statistics.

Secondly, at the national level, data is often not available, because only a few governments officially collect and analyse data on the scale of human trafficking.²⁹⁶ This trend can be attributed to the low priority that is given to the human trafficking trade in various countries.

²⁹¹ Rijken 2003:53; Laczko and Gramegna 2003:183; Horn 2010:11.

²⁹² Van de Glind and Kooimans 2008:150; Snyman 2005:282. Guinn 2008:121 confirms the difficulty of obtaining comprehensive data on human trafficking, stating that “the status of trafficking as an illegal enterprise plays a part in this difficulty...”; see also Rijken 2003:53; Gould 2006:22; US Department of State 2008:18; Melvin 2006:16; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339-340; Shah 2007:451-452; Horn 2010:11. In this regard, Di Nicola 2007:53 further points out that traffickers, victims and clients of trafficked victims all belong to so-called “hidden populations”, which are problematic for researchers to access because of the difficulty of tracing and interviewing them. This difficulty results in underreported statistics on the scope of the problem, which, in turn, complicates the recognition and combating of the problem by governments – Di Nicola 2007:54.

²⁹³ Kanics and Reiter 2001:112; Di Nicola 2007:53.

²⁹⁴ Haynes 2004:227, 245-246; Kreston 2007:39; Shelley 2007:116.

²⁹⁵ Gould 2006:23; see also Melvin 2006:37; UN.GIFT 2008c:6; UNODC 2006:xx, 86, 89, 103; Kanics and Reiter 2001:112, 118; Lee 2007:11; Foundation Against Trafficking in Women *et al.* 2001:12; Stuurman 2004:5; Haynes 2004:26, 224, 227; Morawska 2007:105-106; McClain 2007:585; Rijken 2003:73; Raymond 2002:500; Snyman 2005:287.

²⁹⁶ Laczko and Gramegna 2003:181-182.

Thirdly, data on convictions for human trafficking offences is scarce. Many factors contribute to this problem. One factor is that no data on convictions can be collected in many countries because of a lack of anti-trafficking legislation.²⁹⁷ Perpetrators may be convicted of other crimes, such as rape, assault, kidnapping, fraud or murder. Unfortunately, convictions for these crimes are seldom recorded as human trafficking-related crimes. Thus, even official data on traffickers' convictions is seldom a true reflection of the problem.²⁹⁸

Although a number of countries do have specific anti-trafficking laws, the conviction rate worldwide is still low.²⁹⁹ One explanation for this is that such laws are often not effectively enforced.³⁰⁰ But, even when these laws are implemented, difficulties are experienced in securing convictions. Trafficking convictions are often based on victim testimony, which may be problematic to obtain. In some cases, trafficking victims cannot testify because they are summarily deported as illegal migrants.³⁰¹ Or else, if identified as trafficking victims, they are often too terrified, or are unable,³⁰² to testify against traffickers.³⁰³ Furthermore,

²⁹⁷ Laczko and Gramegna 2003:183.

²⁹⁸ Di Nicola 2007:54.

²⁹⁹ UN.GIFT 2008c:2; UN.GIFT 2008b:10; UNODC 2006:xx; ILO 2008:1; The Future Group 2007a:16; Shelley 2007:132.

³⁰⁰ ILO 2008:11.

³⁰¹ Rijken 2003:74.

³⁰² Research by Zimmerman *et al.* 2006:20-21 found that, as a result of the trauma associated with human trafficking, trafficked persons have problems recalling and reconstructing traumatic experiences, which compromises the victim's ability to be an effective witness in trial proceedings against traffickers; see 3.2.4 in Chapter 3 below.

³⁰³ UN.GIFT 2008c:2; Laczko and Gramegna 2003:183; UNODC 2006:xx; ILO 2008:11. Brennan 2005:37 also points out challenges in conducting research with trafficked persons as a group, "who are both an extremely vulnerable population, as well as one that is extraordinarily diverse and geographically dispersed".

owing to the involvement of influential organised crime syndicates in particular, law enforcement is neutralised through bribes or intimidation to ensure that perpetrators are not arrested or successfully prosecuted.³⁰⁴ Accordingly, both the lack of prosecution and the difficulty in securing convictions contribute significantly to the lack of data on trafficking convictions.³⁰⁵

Apart from the lack of data, other data-related problems, such as the inferior quality of data, hamper a clear indication of the extent of human trafficking. Gould emphasises that:

...the lack of reliable data on human trafficking results in compromised validity of the statistics and findings based on such data.³⁰⁶

To compile reliable trafficking data, quality research is fundamental.³⁰⁷ However, producing such research is a demanding undertaking that involves overcoming many challenges.³⁰⁸ To begin with, owing to a lack of expertise, capacity and funding, not enough research has been conducted in order to provide comprehensive data on the global extent of human trafficking.³⁰⁹ Furthermore, to obtain reliable data on the scope of

³⁰⁴ Shelley 2007:117, 132; Singh 2004:345.

³⁰⁵ Haynes 2004:227, 245-246; Kanics and Reiter 2001:120-121. Global law enforcement data on human trafficking, reflecting prosecutions and convictions from 2003 to 2007, is provided by the 2008 US Trafficking in Persons Report, documenting 3 437 convictions worldwide in 2007 – US Department of State 2008:37.

³⁰⁶ Gould 2006:24.

³⁰⁷ Gould, as well as Laczko and Gramegna, rightfully criticises estimates on the scope of human trafficking without a scientific study to back up the estimates – Laczko and Gramegna 2003:181-182; Gould 2006:23.

³⁰⁸ Gajic-Veljanoski and Stewart 2007:339. For a further discussion as to why producing reliable data on human trafficking has proven to be difficult, and for suggestions to address the problem, see Laczko and Gramegna 2003:179-193.

³⁰⁹ McClain 2007:592-593; Laczko and Gramegna 2003:180; Brennan 2005:36.

the problem, methodologically sound research is required.³¹⁰ Brennan³¹¹ rightfully points out that such research is not an easy task, since multiple methodological challenges and ethical concerns are encountered in researching the human trafficking trade. For example, some estimates have been made on the scope of human trafficking without scientific studies to corroborate them, and inferences are often made based on small samples and limited data.³¹² Some trafficking estimates are justifiably criticised by pointing out methodological shortcomings in the research.³¹³

An additional factor hampering research and the measurement of human trafficking is the lack of a precise and universally accepted definition of human trafficking. Melvin argues that it is:

...crucial that an agreed upon definition exists among researchers, because without one, the current lack of reliable data on trafficking will continue and research will fail to reveal accurate accounts of trafficking occurrences.³¹⁴

Pharoah³¹⁵ emphasises that, “to conduct good research on any topic, one needs to define clearly what is being investigated”. Diverse definitions of

³¹⁰ Gajic-Veljanoski and Stewart 2007:339; Gould 2006:23; Lee 2007:14.

³¹¹ Brennan 2005:47. Brennan lists some of these challenges: “The first challenge is the diversity of trafficking contexts: trafficked persons come from a variety of source countries, end up scattered throughout sites in the United States, and are forced into different forms of labour and servitude. They speak different languages, have different socio-economic backgrounds, varying education and work histories, as well as differences in age, sex and race/ethnicity.” – Brennan 2005:38. For a discussion of these methodological challenges, see Brennan 2005:38-41.

³¹² Melvin 2006:41; Gajic-Veljanoski and Stewart 2007:339.

³¹³ Gould 2006:23; Gajic-Veljanoski and Stewart 2007:339.

³¹⁴ Melvin 2006:25.

³¹⁵ Pharoah 2006:13.

human trafficking exist, some linking or even conflating human trafficking with other phenomena such as human smuggling, prostitution, slavery and slavery-like practices.³¹⁶ Reflecting on this problem, Di Nicola argues that:

...if common legal definitions were used throughout the world, it would be easier to collect, share and compare data, thereby facilitating secondary research.³¹⁷

So, if the same legal definitions of human trafficking are not used in research, statistical data is to a large extent incomparable. Since 2000, the position has improved as a result of an internationally agreed-upon definition being accepted in the Palermo Protocol.³¹⁸ However, even with a more standardised definition, measuring remains a challenge, because the “human trafficking” concept has diverse manifestations, including a range of actions committed for various exploitative purposes.³¹⁹

Other data-related problems include the variety of valuable data that is collected by many institutions or governmental agencies, but which is not properly categorised, analysed, coordinated, stored in accessible databases and shared with appropriate authorities.³²⁰ Furthermore, a number of governments do collect data, but, regrettably, “mingle data relating to human trafficking, human smuggling and irregular migration”.³²¹

³¹⁶ Laczko and Gramegna 2003:180.

³¹⁷ Di Nicola 2007:51-52.

³¹⁸ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008); see also the discussion of this definition in 2 above.

³¹⁹ Truong and Angeles 2005:1; see also 2.2 above.

³²⁰ Laczko and Gramegna 2003:184-185.

³²¹ Laczko and Gramegna 2003:181; Gould 2006:24.

The factors pointed out above contribute to the problem that not enough credible, representative and accurate data exists on the real scope of human trafficking worldwide. These problems can be addressed and researchers, such as Laczko and Gramegna, suggest various measures to improve the reliability of data on the magnitude of human trafficking.³²² Suggested measures include raising awareness about the need and advantages for better data, investing resources in building financial and human capacity, promoting the systematic collection of data, and also the improved usage of existing data.³²³ Laczko and Gramegna conclude that, in order to benchmark good practice concerning the collection and analysis of trafficking data, further research is essential.³²⁴ By applying these measures, it is likely that the data on the full scope of human trafficking will develop into more reliable and accurate indicators.

4. PROFILING TRAFFICKERS AND TRAFFICKED PERSONS

In the search for a better understanding of human trafficking, questions are often asked about traffickers and the people they traffic.³²⁵ To answer the question, “Who are the traffickers?”, criminal profiling³²⁶ may be a

³²² Laczko and Gramegna 2003:179-193.

³²³ Laczko and Gramegna 2003:190-191.

³²⁴ Laczko and Gramegna 2003:187; see also HSRC 2010:155; Gould 2006:19, 25; UNODC 2009a:7.

³²⁵ UNODC 2009a:6.

³²⁶ According to UN.GIFT 2008b:2, criminal profiling, or “criminal intelligence analysis”, is “an investigative tool increasingly used by law enforcement around the world to assist in solving

valuable method to identify and investigate suspected offenders.³²⁷ Other related questions often asked are: “Who are the trafficked victims?” and “How can a trafficker or a trafficked person be identified?” Although an in-depth exploration of the profile of traffickers and trafficked persons falls outside the scope of this study, a brief overview of the characteristics of the two groups is provided to enhance the understanding of the human trafficking phenomenon.

violent crime. Profiling is conducted from both an investigative and behavioural perspective, to logically and systematically analyse offender’s methods, characteristics and traits.”

³²⁷ UN.GIFT 2008c:2.

4.1 Traffickers

In general, the profiles of traffickers are very diverse.³²⁸ Lee³²⁹ records that there is a “growing body of work that emphasises the diverse agents and beneficiaries of human trafficking”.

In short, there is no fixed, typical profile for traffickers. They are youths, adults or elderly people,³³⁰ strangers or family and friends,³³¹ married or single,³³² highly educated or without any education,³³³ of high social status or not,³³⁴ individuals or part of a small group, such as a family network,³³⁵ or even part of a highly sophisticated, transnational, organised crime network.³³⁶ Shelley confirms that trafficking groups come in “every size of organisation in between the family business and the multinational criminal organisation”.³³⁷ Furthermore, trafficking agents may be one-time offenders or part of an ongoing trafficking enterprise.³³⁸

³²⁸ Shelley 2007:120; Obokata 2006:46.

³²⁹ Lee 2007:6.

³³⁰ UN.GIFT 2008b:7; Morawska 2007:98.

³³¹ Obokata 2006:46; Raymond 2002:493; Kreston 2007:39.

³³² UN.GIFT 2008c:8.

³³³ UN.GIFT 2008c:9; Shelley 2007:118.

³³⁴ Shelley 2007:120.

³³⁵ Singh 2004:343; UN.GIFT 2008c:8, 14; Shelley 2007:118; Obokata 2006:46; Raymond 2002:493; Foundation Against Trafficking in Women *et al.* 2001:5; UN.GIFT 2008c:25.

³³⁶ GAATW 1999a:11; IOM 2006:20; Singh 2004:343; Raymond 2002:493; Gallagher 2001:977. Obokata 2006:46-47 reports that, apart from the Japanese organised criminal group called Yakuza that traffics Thai women into Japan for sexual exploitation, other organised criminal groups from Albania, China, Russia, Germany, Hong Kong and the United States of America are also involved in human trafficking.

³³⁷ Shelley 2007:120; Obokata 2006:46; UN.GIFT 2008c:25.

³³⁸ IOM 2006:20.

Since almost every country is an origin, transit or destination country,³³⁹ traffickers operate on every continent and are thus of diverse ethnicity and nationality.³⁴⁰ The 2009 annual US Trafficking in Persons Report underpins that “the nationalities of trafficked people are as diverse as the world’s cultures”.³⁴¹

As regards the sex of traffickers, they are both men and women.³⁴² However, it is noteworthy that, recently, female traffickers operating as recruiters, brothel managers, book-keepers and sometimes even as kingpins are becoming a more common occurrence.³⁴³ Female traffickers from the same ethnic group as the victim are often used in the recruiting phase, because they communicate in the same language as potential victims and thus gain trust more easily.³⁴⁴ The so-called “second wave” of trafficked women entails female victims being turned into trafficking agents by using threats, physical and emotional abuse or financial rewards.³⁴⁵ Female victims may also be persuaded to become traffickers owing to the Stockholm Syndrome, in terms of which victims develop sympathy for, and a dependency relationship with, the trafficker.³⁴⁶ In the 2009 Global Report on Trafficking in Persons, the United Nations Office

³³⁹ Shelley 2007:118-119.

³⁴⁰ UN.GIFT 2008c:7; Shelley 2007:120; Obokata 2006:46.

³⁴¹ US Department of State 2009:8.

³⁴² SALRC 2006:33; UN.GIFT 2008c:2.

³⁴³ Shelley 2007:120-121.

³⁴⁴ UN.GIFT 2008c:5, 12; Morawska 2007:98; UN.GIFT 2008e:15.

³⁴⁵ US Department of State 2008:11; UNODC 2009a:6; UN.GIFT 2008e:15.

³⁴⁶ UN.GIFT 2008c:5-6; Gajic-Veljanoski and Stewart 2007:343-344.

on Drugs and Crime (UNODC) reported that female offenders have a prominent role in present-day slavery.³⁴⁷

The responsibilities of traffickers are also diverse.³⁴⁸ Trafficking agents play different roles during the various phases of the trafficking process. On the supply side, they may be agents, recruiters, transporters, corrupt immigration, law enforcement or other government officials, or someone providing accommodation at the destination location, where the victim is exploited.³⁴⁹ On the demand side, perpetrators are clients “buying” services of trafficked persons, exploiting domestic, labour, sexual or other services.³⁵⁰ In addition, individual traffickers may fit into a broader hierarchical structure, for instance:

- (a) master traffickers occupy positions of power as the top organisers and managers, enjoy anonymity and profit the most;³⁵¹
- (b) primary traffickers are mainly responsible for the actual buying and selling of people at various locations;
- (c) secondary traffickers deliver human cargo to primary traffickers; and
- (d) grassroots intelligence gatherers constantly screen various locations to identify potential clients and victims and subsequently report this information to primary and master traffickers.³⁵²

³⁴⁷ UNODC 2009a:6.

³⁴⁸ UN.GIFT 2008c:10.

³⁴⁹ Obokata 2006:46; Department of State 2008:2.

³⁵⁰ IOM 2007:29-30; UN.GIFT 2008b:13; Foundation Against Trafficking in Women *et al.* 2001:5.

³⁵¹ UN.GIFT 2008e:15.

³⁵² UN.GIFT 2008c:10.

To summarise, traffickers have diverse profiles.³⁵³ They differ in age, in their role in the trafficking process, as well as in their economic, social, educational and cultural backgrounds. In spite of their differences, they do have one thing in common: they prey on other human beings to enrich themselves illegally.³⁵⁴

4.2 Trafficked persons

Agents ask me for profiles of traffickers and their victims. I tell them there is no one m.o. of a typical trafficker, there is no typical victim, and the paths that lead them here are varied.³⁵⁵

Just as the profiles of traffickers vary, so do the profiles of trafficked persons.³⁵⁶ In the case of Africa, for instance, it has been documented that there is an “immense diversity of people being trafficked from, to and through Africa”.³⁵⁷ Trafficked persons are from urban and rural areas, some highly educated and some lacking education.³⁵⁸ Zimmerman and others confirm that trafficked persons are not a homogeneous population at all, because their research findings are that victims “differ in age, culture, nationality, personality, marital status, and education level”.³⁵⁹

³⁵³ Lee 2007:16.

³⁵⁴ UN.GIFT 2008c:10.

³⁵⁵ Brennan 2005:38-39.

³⁵⁶ Brennan 2005:38-39.

³⁵⁷ IOM 2006:20.

³⁵⁸ IOM 2006:20; Brennan 2005:38-39.

³⁵⁹ Zimmerman *et al.* 2006:8.

Most trafficked persons are women and children, but men are trafficked as well.³⁶⁰

Despite their diversity, trafficked persons usually have a single feature in common, namely some kind of vulnerability. The victim's vulnerability, being the common denominator, may stem from various causes, such as poverty, unemployment, lack of education or vocational opportunities, dysfunctional families, gender and racial discrimination, the HIV/AIDS pandemic, natural disasters, armed conflict or just the desire to have a better life, to name but a few.³⁶¹

To conclude, although more research is needed on this issue, the literature indicates at this stage that there is a significant variety in the profiles of both traffickers and the people they traffic.³⁶² These diverse profiles contribute to the difficulty in identifying traffickers as well as victims of human trafficking.

³⁶⁰ UNODC 2009a:6; IOM 2006:20. Singh 2004:341 argues that the gendered nature of trafficking, derived from historical, discriminatory laws and customs against women, contributes to more women being trafficked.

³⁶¹ Shah 2007:442; Lansink 2006:48; Haynes 2004:26; Dottridge 2002:38; US Department of State 2007:35; Kreston 2007:38; Singh 2004:342-343. Factors causing vulnerabilities are discussed in 2 of Chapter 3 below.

³⁶² Zimmerman *et al.* 2006:8; IOM 2006:20; Lee 2007:16; Di Nicola 2007:54-55.

5. CONCLUSION

Despite increased research and publications on the human trafficking problem, Lee emphasises that there remain “considerable limitations in our knowledge and understanding of human trafficking”.³⁶³

To address these limitations, this Chapter examined three aspects in order to clarify the understanding of human trafficking. First, a clear-cut definition of the phenomenon is vital so as to ascertain what human trafficking is. After a myriad of definitions were used over the past century to describe human trafficking, the formulation of the first internationally accepted definition by the United Nations Palermo Protocol is a milestone.³⁶⁴ In a nutshell, the definition of trafficking in persons contains three distinctive definitional parts, namely the commission of prohibited acts by prescribed illegal means for the purpose of exploitation.³⁶⁵

Secondly, as regards the extent of human trafficking, clarity on the scope of the problem is imperative in order to design an effective strategy to address the problem. It has been shown that widely accepted estimates of the problem exist. However, more accurate data on the extent of human trafficking is not available, mainly because of the lack of statistical data or the poor quality of data.³⁶⁶

³⁶³ Lee 2007:2.

³⁶⁴ See 2.2 above.

³⁶⁵ See 2.2.2 above.

³⁶⁶ See 2.2 above.

Thirdly, the profiles of traffickers and trafficked persons have been outlined to give insight into the role players in a trafficking scenario. An overview of these profiles reveals that both offenders and victims in trafficking scenarios vary substantially.³⁶⁷ However, the following themes are repeatedly identified: traffickers engage in trafficking primarily to profit from the trafficking crime, while trafficked persons usually have some vulnerability, which traffickers prey on.³⁶⁸

The investigation in this Chapter indicates that human trafficking is not a simple, straightforward phenomenon and that more aspects should be examined to obtain further clarity.

³⁶⁷ See 4 above.

³⁶⁸ US Department of State 2008:28; US Department of State 2007:9.

CHAPTER 3

CAUSES AND CONSEQUENCES OF HUMAN TRAFFICKING

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CHAPTER 3

CAUSES AND CONSEQUENCES OF HUMAN TRAFFICKING

1. INTRODUCTION

Having dealt with the definition and scope of human trafficking, some other important aspects of human trafficking must also be clarified to ensure a thorough understanding of this phenomenon. Two of these aspects are causes and risk factors that feed both the cycle of trafficking and the ensuing consequences of human trafficking.

2. CAUSES OF, AND FACTORS CONTRIBUTING TO, HUMAN TRAFFICKING

2.1 Introduction

The causes of human trafficking are complex and fluctuate not only from one region to another, but also from time to time.¹ Instead of referring to the causes of human trafficking, the literature increasingly refers to risk factors that increase people's vulnerability to human trafficking.² A range

¹ US Department of State 2007:35; UNODC 2006:xvii; Kassan 2007:18–19; EU and AU 2006:2.

² UN.GIFT 2008e:16; Singh 2004:343; McClain 2007:606; ILO 2008:31; Snyman 2005:283-284; IOM 2007:28-29; US Department of State 2007:35; Melvin 2006:6, 38; Shapiro 2008:18;

of these risk factors or conditions has been identified, including poverty, dysfunctional families, the impact of armed conflict, political instability, gender inequality, economic disparities and natural disasters.³ These risk factors may increase people's vulnerability to various forms of exploitation and, in particular, make them easy targets for traffickers.⁴ In the search for a better life elsewhere, desperate people are easily "drawn into the control of criminals, who will take advantage of their situation and exploit them".⁵

Some of these risk factors contributing to human trafficking tend to drive people away from their home communities, while others attract them to different regions. Accordingly, factors contributing to human trafficking are usually divided into "push" and "pull" factors for victims and traffickers respectively.⁶ Using supply and demand dynamics to their benefit, traffickers exploit these push and pull factors to recruit people for human trafficking.⁷

Kassan 2007:18–19; US Department of State 2009:41. For a discussion on interventions to address factors increasing vulnerability, see OHCHR 2010:105-116.

³ UN.GIFT 2008e:16; Singh 2004:343; McClain 2007:606; ILO 2008:31; Snyman 2005:283-284; IOM 2007:28-29; US Department of State 2007:35; Melvin 2006:6, 38; Shapiro 2008:18; Kassan 2007:18–19; US Department of State 2009:41.

⁴ Shapiro 2008:18; Kanics and Reiter 2001:112; Snyman 2005:282.

⁵ UNODC 2006:xvii.

⁶ IOM 2007:28-29; Melvin 2006:6; Allais 2006:3.

⁷ Melvin 2006:38.

2.2 Push factors

Push factors refer to risk factors in the source countries that intensify the vulnerability of victims.⁸ In other words, push factors are those circumstances that make victims want to leave their home communities. The bulk of the literature identifies poverty as a major push factor.⁹ However, the conventional assumption that poverty is a major cause of trafficking has been challenged by indicating that many trafficked persons are not poor.¹⁰ Nonetheless, poverty remains a factor that may indeed increase a person's vulnerability to trafficking. People in need of an income for basic survival often fall prey to human trafficking owing to economic vulnerability and lack of economic power, which relates to "inequitable resource allocation and the absence of viable sources of income".¹¹ Linked to poverty are other risk factors such as unemployment and limited work opportunities, as well as inadequate educational and vocational training prospects, especially for women.¹² In this regard, people wishing to migrate legally to look for work in other countries can

⁸ Melvin 2006:6; Gajic-Veljanoski and Stewart 2007:341.

⁹ McClain 2007:602, 606; IOM 2006:20; Singh 2004:343; Melvin 2006:6; Shapiro 2008:18; Gajic-Veljanoski and Stewart 2007:341; Fariior 1997:214, 230; Morawska 2007:94; Snyman 2005:282.

¹⁰ There is increasing awareness that poverty is not the root cause of trafficking. The focus should be on what triggers a trafficking scenario, including criminality, corruption and demand – UN.GIFT 2008e:44. The International Organization for Migration's database on trafficking in south-eastern Europe challenged the conventional assumption that poverty is a major root cause of human trafficking by finding that only 17 percent of the 826 victims they interviewed in the Balkan region regarded themselves as "very poor" – Laczko and Gramegna 2003:189; see also Gould 2006:24; Fariior 1997:214 in footnote 6; UN.GIFT 2008e:44.

¹¹ Shah 2007:442; Lee 2007:8; Kassan 2007:18–19; Allais 2006:3; Fariior 1997:214. For a further discussion of perspectives on the intersections of poverty and trafficking, see Shah 2007:441-454.

¹² Lansink 2006:48; Haynes 2004:26; Dottridge 2002:38; US Department of State 2007:35; Kreston 2007:38; ILO 2008:21; Melvin 2006:6; Shapiro 2008:18; Shah 2007:449; Fariior 1997:230; Kassan 2007:18–19.

often not do so owing to strict visa and other border-control measures.¹³

It has been pointed out that:

...an ever increasing emphasis on border restrictions and enforcement measures may have the unintended side effects of expanding the business of human trade and pushing greater numbers of unauthorised migrants into the hands of exploitative organised crime networks.¹⁴

For this reason, migrants are vulnerable to traffickers, who promise them a safe crossing of national borders and employment in the destination country. Lee endorses this conclusion and adds:

...for many trapped in dire poverty, displaced by political turmoil, and turned away by increasingly restrictive immigration and asylum policies ... migration through irregular channels of smuggling and trafficking has become their only means of escape.¹⁵

Other push factors, pertaining mainly to social and family circumstances, are abuse and violence, especially against women and children, the impact of HIV/AIDS,¹⁶ misogyny,¹⁷ domestic violence, and life within a dysfunctional family or without a family at all.¹⁸ Furthermore, the impact of armed conflict,¹⁹ political instability, organised crime, corruption, and

¹³ Weekes 2006:30.

¹⁴ Lee 2007:12-13.

¹⁵ Lee 2007:7-8.

¹⁶ Snyman 2005:283 points out that parents who are terminally ill with AIDS are tempted to accept traffickers' false promises for a better life for their children and that "households that are headed by children due to their Aids orphan status are especially vulnerable to exploitation".

¹⁷ The term means hatred of women – Reader's Digest Oxford 1996:956.

¹⁸ IOM 2007:28-29; US Department of State 2007:35; Melvin 2006:38; Shapiro 2008:18; Snyman 2005:284; Kassan 2007:18–19; US Department of State 2009:41.

¹⁹ Melvin 2006:6; McClain 2007:606; Snyman 2005:283; Planitzer 2009:18.

natural disasters such as floods, earthquakes and tsunamis also encourages victims to consider leaving their home community in search of a better life.²⁰

Gender-based violence, which manifests itself in settings such as domestic violence, forced marriages and sexual exploitation, remains a significant push factor.²¹ The majority of persons trafficked to work in the sex industry and sweatshops are women and girls “due to their inferior and vulnerable status in most societies”.²² It is therefore acknowledged that human trafficking has a gendered nature.²³ Gender discrimination, which is imbedded in certain harmful cultural traditions such as widow inheritance²⁴ and female genital mutilation, renders women and girls especially vulnerable to human trafficking.²⁵ Some communities, specifically in Africa, still maintain stereotyped gender roles, underpinning the inferiority of women with resulting inequalities being part of daily life.²⁶

²⁰ US Department of State 2007:35; Kreston 2007:38; Melvin 2006:35; Gajic-Veljanoski and Stewart 2007:341; Lee 2007:7; Snyman 2005:283; Kassan 2007:18–19; US Department of State 2009:41; UN.GIFT 2008e:8.

²¹ Gender-based violence highlights the female’s subordinate status and is “an umbrella term for any harmful act that is perpetrated against a person’s will, and that is based on socially ascribed (gender) differences between males and females” – IOM 2006:11; Snyman 2005:283.

²² Defeis 2003/2004:485; Foundation Against Trafficking in Women *et al.* 2001:3.

²³ Foundation Against Trafficking in Women *et al.* 2001:3-4; US Department of State 2009:36; Allais 2006:3.

²⁴ The practice that a woman can be inherited on the death of her husband was already proscribed in article 1(c)(iii) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery – see 2.2.2.3.2.c in Chapter 2 above.

²⁵ McClain 2007:606; Lansink 2006:47-48; IOM 2006:11. Farrior 1997:229 argues that steps must be taken “to modify cultures that allow women and girls to be viewed as commodities to be trafficked”.

²⁶ Melvin 2006:6; Dottridge 2002:39; Defeis 2003/2004:485. In this regard, Lansink 2006:46 claims that the “lack of rights afforded to women serves as a primary causal factor at the root of both women’s migration and trafficking”.

In these societies, girls are less valued than boys.²⁷ Boys are perceived to be a longer-term asset for the family, since the role of girls is limited to managing household chores and because it is expected that girls will marry anyway and leave the parental household.²⁸ Thus investing in the education and skills training of girls is not considered worthwhile.²⁹ Owing to this gender-based discrimination, girls often grow up doing domestic chores in the home, with little or no schooling or other training, leaving them with marriage and domestic service as the only career options.³⁰ In addition, inherited traditions or indigenous law often limit, or totally exclude, women from owning or inheriting land.³¹ Consequently, these traditions significantly limit the economic opportunities for girls and women and increase their vulnerability.³² Thus a strong push factor has developed for women to leave the home community – paving the way for traffickers to deceive and exploit them.³³

Apart from the abovementioned push factors luring potential victims into human trafficking, certain push factors also apply to traffickers. Push factors influencing people to become traffickers include poverty, coupled with unemployment and limited career opportunities.³⁴

²⁷ UNODC 2006:xvii.

²⁸ Dottridge 2002:39-40. On this point, Lansink 2006:48 refers to General Recommendation 19 of the Committee on Elimination of All Forms of Discrimination Against Women, emphasising that “traditional attitudes that regard women as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence and coercion”.

²⁹ McClain 2007:601; Truong and Angeles:12; Melvin 2006:35.

³⁰ UNODC 2006:xvii; Lansink 2006:47-48; Dottridge 2002:39-40; US Department of State 2007:35.

³¹ Lansink 2006:47-48; Truong and Angeles 2005:12; Dottridge 2002:40; Singh 2004:343.

³² Lansink 2006:48; Truong and Angeles 2005:12; Defeis 2003/2004:485.

³³ Melvin 2006:35-36.

³⁴ IOM 2007:29; Kreston 2007:38.

2.3 Pull factors

Pull factors refer to the demand side of human trafficking and relate to destination countries or locations.³⁵ For example, the demand for cheap, submissive labour in destination locations lures traffickers to traffic people for such labour.³⁶ For victims, pull factors are the attraction of a perceived better life elsewhere, but without sufficient information about the risks.³⁷ Pull factors, which are linked primarily to the luring promise of a better life, include anticipated better employment, educational and skills opportunities, political stability, an absence of armed conflict, and the hope of escaping from abuse, violence, discrimination, HIV/AIDS or the consequences of natural disasters.³⁸

For traffickers, pull factors are often greed and the lure of quick money-making.³⁹ The trade in human beings is very profitable, because trafficked persons are seen as reusable commodities which provide an ongoing income owing to the fact that victims can be sold again and again.⁴⁰ With the International Labour Organisation (ILO) estimating that the annual profits generated from human trafficking are as high as 32 billion United States (US) dollars, human trafficking is indeed a luring,

³⁵ Gajic-Veljanoski and Stewart 2007:341.

³⁶ Melvin 2006:7, 36; Shapiro 2008:18; US Department of State 2010:30.

³⁷ Melvin 2006:7, 36 states that the spread of HIV/AIDS has increased the demand for younger, healthy women to be trafficked into the sex industry.

³⁸ Singh 2004:343; IOM 2007:29; McClain 2007:606; ILO 2008:31; Snyman 2005:284.

³⁹ Snyman 2005:283; Farrior 1997:214.

⁴⁰ Kreston 2007:38; Haynes 2004:227; International Crime and Terrorism 2004:1; Snyman 2005:283.

high-profit enterprise for individuals, groups and even for some countries.⁴¹

Apart from the high-profit attraction, another major pull factor for traffickers is the low risk of being apprehended.⁴² Haynes⁴³ confirms that traffickers prefer human trafficking as a criminal enterprise, because it is more lucrative and less risky than trafficking in illegal drugs and weapons. In other words, a strong pull factor for traffickers is the excessive profit coupled with the minimal risk of being arrested and convicted for this crime.⁴⁴ In addition, even when traffickers are convicted, the sentences are often not sufficiently stringent to deter perpetrators.⁴⁵

The risk of being apprehended for human trafficking is not high for a vast array of reasons. To begin with, the illegal movement of trafficked persons across borders is facilitated by porous borders or by bribing border officials.⁴⁶ Furthermore, other corrupt government officials, including law enforcement, labour and immigration officials, are also often part of the trafficking ring.⁴⁷ Further factors are inadequate

⁴¹ Farrior 1997:214; ILO 2008:1; UNODC 2006:xix; Haynes 2004:227; Kreston 2007:38-39; International Crime and Terrorism 2004:1; Snyman 2005:282-283.

⁴² ILO 2008:11; Melvin 2006:6, 36; Truong and Angeles 2005:2; UN.GIFT 2008b:10; Shapiro 2008:18; Kanics and Reiter 2001:120-121; Shelley 2007:132; Snyman 2005:283.

⁴³ Haynes 2004:227.

⁴⁴ Haynes 2004:227; UNODC 2006:xix; UN.GIFT 2008a:5.

⁴⁵ UN.GIFT 2008b:10; US Department of State 2008:27; Shelley 2007:132; Raymond 2002:492; US Department of State 2010:20.

⁴⁶ GAATW 1999a:13; UN.GIFT 2008c:14; Singh 2004:344; UNODC 2006:xxi; ILO 2008:11; Gajic-Veljanoski and Stewart 2007:341; Foundation Against Trafficking in Women *et al.* 2001:4.

⁴⁷ UN.GIFT 2008e:10; UNODC 2006:xxi; ILO 2008:11; Gajic-Veljanoski and Stewart 2007:341.

resources and untrained or insufficient law enforcement authorities, including police, immigration, labour and border-control officials.⁴⁸ In addition, many countries still lack anti-trafficking laws, or appropriate laws are not implemented effectively.⁴⁹ Even when perpetrators are prosecuted, the conviction rate remains low.⁵⁰ A significant factor contributing to the low conviction rate is that trafficking victims often do not participate in prosecution proceedings because they have been deported⁵¹ or are too traumatised and frightened to testify against their traffickers.⁵² Finally, the organised criminal networks, with expanded contacts in the immigration and law enforcement sectors, provide bribery resources and criminal expertise to ensure that the risk of being arrested and convicted remains minimal.⁵³

Another strong pull factor for traffickers is the demand from clients in destination locations for the services of trafficked persons.⁵⁴ Traffickers enrich themselves by supplying victims to satisfy the demand of clients. The demand is for various services, such as cheap labour, begging on the street,⁵⁵ illegal adoptions, forced marriages⁵⁶ and especially prostitution, sex tourism and child pornography in the commercial sex

⁴⁸ UNODC 2006:xvii; ILO 2008:11.

⁴⁹ UN.GIFT 2008c:2; UNODC 2006:xvii; ILO 2008:11; Shapiro 2008:18; Snyman 2005:283.

⁵⁰ UN.GIFT 2008c:2; UN.GIFT 2008b:10; UNODC 2006:xx; ILO 2008:1; The Future Group 2007a:16; US Department of State 2010:7, 45.

⁵¹ Rijken 2003:74; see the discussion in 3.2.5 below.

⁵² UN.GIFT 2008c:2; UN.GIFT 2008b:10; Laczko and Gramegna 2003:183; UNODC 2006:xx; ILO 2008:11.

⁵³ Singh 2004:345; Shelley 2007:132.

⁵⁴ IOM 2007:29-30; UN.GIFT 2008c:13; US Department of State 2010:30.

⁵⁵ US Department of State 2008:33; see also 2.2.2.3.2.h in Chapter 2 above.

⁵⁶ See 2.2.2.3.2.d in Chapter 2 above.

industry.⁵⁷ Owing to the exorbitant income possibilities, traffickers are attracted to provide trafficked persons to satisfy these exploitative markets in destination locations.

3. CONSEQUENCES OF HUMAN TRAFFICKING

3.1 Introduction

Human trafficking leaves a trail of destructive consequences that impact gravely not only on trafficked victims, but also more broadly on communities and countries that are affected in one way or another by this serious crime.

3.2 Consequences for trafficked victims

Trafficked victims experience various and often devastating consequences owing to trafficking exploitation. Drawing from their research with trafficked persons, Zimmerman *et al.*⁵⁸ emphasise that victims “suffer an extremely wide range of health problems, of which many are severe and enduring”. The findings of their 2006 study, which only included female victims, were startling in the breadth and depth of the harm the victims endured.⁵⁹ Physical and psychological health

⁵⁷ McClain 2007:584; see 2.2.2.3.2.a in Chapter 2 above.

⁵⁸ Zimmerman *et al.* 2006:22. This study by Zimmerman and others for the London School of Hygiene and Tropical Medicine on the physical and psychological health consequences of women trafficked in Europe led to a report which presents “some of the first-ever statistical data on trafficked women’s health outcomes” – Zimmerman *et al.* 2006:2.

⁵⁹ Zimmerman *et al.* 2006:13-14, 22; see also UN.GIFT 2008e:18.

problems commonly experienced by trafficked persons are often all-encompassing, owing to prolonged physical and emotional abuse, threats, appalling working conditions, malnourishment, as well as poor sanitation and personal hygiene.⁶⁰

3.2.1 Physical injuries

As a result of the abuse and violence during the trafficking process, trafficked persons experience various physical injuries, such as open wounds, bruises, cuts, broken bones, cigarette and iron burns, rectal trauma, as well as head injuries.⁶¹ Zimmerman *et al.* found that the “physical sites of women’s injuries spanned their entire bodies and included: head, face, mouth, nose, eyes, back, neck, spine, legs, hands, feet, kidneys, pelvis, abdomen and the genital area”.⁶² Sometimes, physical injuries cause long-term problems, permanent physical harm⁶³ or even the victim’s death.⁶⁴

3.2.2 Diseases and other health problems

A number of infectious diseases are also common among sex-trafficked persons, including tuberculosis and sexually transmitted diseases such as syphilis, human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS).⁶⁵ The high incidence of HIV/AIDS among

⁶⁰ UNODC 2006:154; IOM 2006:13; US Department of State 2008:5; Melvin 2006:28; US Department of State 2010:12.

⁶¹ Gajic-Veljanoski and Stewart 2007:345; Kreston 2007:39; IOM 2006:14.

⁶² Zimmerman *et al.* 2006:10.

⁶³ Infertility may result from unsafe abortions or chronic, untreated sexually transmitted infections – UNODC 2006:154.

⁶⁴ US Department of State 2008:5; US Department of State 2007:28; Lee 2007:10.

⁶⁵ UNODC 2006:154; US Department of State 2008:32, 34; US Department of State 2007:28; Silverman *et al.* 2008:932; Melvin 2006:28; Gajic-Veljanoski and Stewart 2007:346; Harrold 2006:101; Zimmerman *et al.* 2006:15; US Department of State 2010:12.

these trafficked victims is usually due to forced sex and the limited ability to negotiate condom-protected sex.⁶⁶ According to the 2007 US Trafficking in Persons Report, HIV prevalence among trafficked women in South Africa is disturbingly high at 70,4 percent.⁶⁷

Other health problems, such as pelvic and urinary tract infections,⁶⁸ cervical cancer, skin diseases, chronic headaches and debilitating fatigue, are reported by trafficked persons.⁶⁹ Reproductive health problems are also experienced, mainly due to sexual violence or other sexual exploitation.⁷⁰ These problems include gynaecological and pelvic infections, vaginal discharge, teen or unwanted pregnancies due to rape or forced sex, and high-risk pregnancies and deliveries.⁷¹ Another problem related to reproductive health is forced and unsafe abortions, which may result in serious or fatal complications such as infections,

⁶⁶ US Department of State 2007:35; GAATW 1999a:63, 66; Melvin 2006:29. Traffickers often force victims to engage in sex without condoms or clients demand, or even pay more for, unprotected sex – IOM 2006:36. Research confirms the high incidence of HIV/AIDS, indicating that up to 90 percent of children set free from brothels in Southeast Asia are infected with HIV – US Department of State 2007:35. According to the findings of their research with 246 sex-trafficked women from Nepal, Silverman *et al.* 2008:933 found that proper health care is urgently needed “to help reduce the alarmingly high rates of HIV and co-occurring STIs among victims of sex trafficking and to curb the spread of these co-occurring epidemics throughout the region”.

⁶⁷ US Department of State 2007:35. Regrettably, the report does not disclose its source for this statistical data.

⁶⁸ There is a higher risk of contracting urinary tract infections in situations of frequent sexual intercourse, such as the circumstances sex-trafficked persons find themselves in – GAATW 1999a:65.

⁶⁹ Zimmerman *et al.* 2006:12, 13-14; Kreston 2007:39. It must be noted that reported physical pain may be either “biological or physiological in origin, or somatic (i.e. non-psychiatric symptoms associated with psychological reactions)” – Zimmerman *et al.* 2006:14.

⁷⁰ IOM 2006:15; Zimmerman *et al.* 2006:15; Lee 2007:10.

⁷¹ GAATW 1999a:66; IOM 2006:15; Gajic-Veljanoski and Stewart 2007:346; Zimmerman *et al.* 2006:15.

dangerous bleeding, perforation of the uterus, scarring of the fallopian tubes, infertility and permanent cervical incompetence.⁷²

Further health problems commonly reported by trafficked persons include neurological symptoms related to the central nervous system,⁷³ as well as cardiovascular and gastrointestinal problems.⁷⁴ With regard to substance abuse, trafficked persons commonly experience dependency problems due to “being coerced into drug use by their traffickers or by turning to substance abuse to help cope with, or mentally escape, their desperate situations”.⁷⁵

After trafficked persons contract diseases and infections, a major problem experienced by them is the lack of appropriate healthcare services.⁷⁶ Special mention should be made of victims of organ-related trafficking, who may lack resources for follow-up medical checks and may encounter life-threatening medical complications, which are exacerbated by a lack of adequate healthcare.⁷⁷ In recent research, Silverman *et al.*⁷⁸ point out that, without access to expertise on medical conditions commonly experienced by trafficked persons, followed by accurate diagnosis and correct medication, treatable conditions are not

⁷² Odendaal *et al.* 2005:175-177; Gajic-Veljanoski and Stewart 2007:346; GAATW 1999b:66; Kreston 2007:39; Melvin 2006:29.

⁷³ Headaches, memory difficulty and dizzy spells were reported – Zimmerman *et al.* 2006:12.

⁷⁴ US Department of State 2007:33. Gastrointestinal problems such as abdominal pain, vomiting, diarrhoea and constipation were experienced – Zimmerman *et al.* 2006:12.

⁷⁵ UNODC 2006:154; US Department of State 2007:28; IOM 2006:14; GAATW 1999a:67; Gajic-Veljanoski and Stewart 2007:345.

⁷⁶ Gajic-Veljanoski and Stewart 2007:345; IOM 2006:14.

⁷⁷ UN.GIFT 2008b:16.

⁷⁸ Silverman *et al.* 2008:933.

cured or controlled. As a result of this lack of appropriate treatment, the suffering of trafficked persons increases and, by way of subsequent transmission, infectious diseases are spread even further.⁷⁹

3.2.3 Psychological and mental health-related problems

Besides physical harm, psychological and mental health problems are also common among trafficked persons.⁸⁰ Extended abuse coupled with physical violence and threats may lead to disorientation, confusion, phobias, chronic anxiety, panic attacks, insomnia, depression, memory loss, chronic fatigue, hostility and violent outbursts, attempted suicide, and stress disorders such as post-traumatic stress disorder.⁸¹ Psychological trauma may follow owing to exposure to premature, forced, perverse or violent sexual activity.⁸² Other consequences in the aftermath of trafficking include dissociation and personality disorders,⁸³ as well as “feelings of helplessness, shame, humiliation, shock, denial and disbelief”.⁸⁴ In addition, victims often experience secondary trauma, because of inappropriate or rushed treatment by officials in the criminal justice system and those providing social services, as well as the multiple recounting of their trafficking experience to various officials.⁸⁵

⁷⁹ Silverman *et al.* 2008:933.

⁸⁰ IOM 2006:14-15; US Department of State 2008:5.

⁸¹ Gajic-Veljanoski and Stewart 2007:345-346; GAATW 1999a:67; US Department of State 2007:33; UNODC 2006:155-156. For a more in-depth discussion of four psychological outcomes associated with trafficking exploitation, namely depression, anxiety, hostility and post-traumatic stress disorder, see Zimmerman *et al.* 2006:16-22.

⁸² IOM 2007:31; US Department of State 2010:12.

⁸³ US Department of State 2007:33.

⁸⁴ UNODC 2006:155. See also Zimmerman *et al.* 2006:18.

⁸⁵ Brennan 2005:38, 45.

3.2.4 Impact of memory problems on participation in legal and other procedures

Another consequence experienced by some trafficked persons is memory loss. Confirming the research results of other studies, Zimmerman *et al.* found that trafficked persons have problems recalling and reconstructing traumatic experiences, especially shortly after the event, but also even later on.⁸⁶ Peritraumatic dissociation, that is, the blocking out of events during a traumatic experience, may result in the inability to recall significant information that cannot be attributed to ordinary forgetfulness.⁸⁷ These recollection problems limit a victim's proper participation in legal and other procedures.⁸⁸

Research indicates that the acute mental problems which victims experience tend to subside to a large extent over time and with proper treatment.⁸⁹ Therefore, instead of summary deportation, good practice indicates that adequate assistance and a reflection period in the destination country enhance the victim's recovery and also improve the possibility of cooperating effectively in the prosecution of the perpetrator.⁹⁰

⁸⁶ Zimmerman *et al.* 2006:21.

⁸⁷ Zimmerman *et al.* 2006:21-22.

⁸⁸ Zimmerman *et al.* 2006:14.

⁸⁹ Zimmerman *et al.* 2006:12.

⁹⁰ ILO 2008:8; The Future Group 2007a:16; Rijken 2003:73-74; Haynes 2004:241; UNODC 2006:117, 120-121; US Department of State 2007:49; Lee 2007:12; Jordan 2002:26; Foundation Against Trafficking in Women *et al.* 2001:16; Gajic-Veljanoski and Stewart 2007:348-350; see also 3.9.1.2.6 in Chapter 6 below.

3.2.5 Additional consequences for children

In addition to the abovementioned consequences of human trafficking, trafficked children often experience additional consequences. For example, a lack of proper nutrition and exercise may impact on normal brain development and physical growth, such as attaining the required weight and height.⁹¹ In addition, as a result of being removed from their home community and being ostracised by their families, children lack parenting and a normal childhood.⁹² They must further adapt to unpleasant, unfamiliar surroundings and are most often deprived of schooling opportunities.⁹³ Without proper parenting and education, trafficked children also forego moral, spiritual, cultural and social developmental opportunities.⁹⁴

3.2.6 Prosecution of trafficked victims

Victims often face, as a direct consequence of being trafficked, detention and prosecution rather than protection.⁹⁵ Haynes points out the trend of regarding trafficked persons as criminals by prosecuting them for trafficking-related crimes committed during their period of victimisation:

⁹¹ GAATW 1999a:122.

⁹² GAATW 1999a:123; Shelley 2007:134.

⁹³ Shapiro 2008:18; IOM 2007:31; GAATW 1999a:123; Gallagher 2006:178.

⁹⁴ ILO 2008:7; IOM 2007:31; Snyman 2005:287. GAATW 1999a:123 lists some of the needs of children, which are often neglected owing to trafficking: "Children need to acquire normal emotional development according to their age. They need to learn healthy emotional management and expression. They need to be able to determine right from wrong according to their age, and be aware of their social culture and customs. In addition to training, the children need to be mentally stimulated and educated in religious and cultural traditions in order to help them lead happy lives."

⁹⁵ Melvin 2006:37; UN.GIFT 2008c:6; UNODC 2006:xx; Kanics and Reiter 2001:112; Lee 2007:11; Foundation Against Trafficking in Women *et al.* 2001:12; Stuurman 2004:5; US Department of State 2010:16.

As recently as the late 1980s government authorities in virtually all countries tended to treat trafficked persons as criminals, rather than victims of both a crime and of human rights violations.⁹⁶

Consequently, trafficked persons often do not receive government protection, because they are not identified as victims of the crime of human trafficking.⁹⁷ Instead, in destination countries, victims of this ghastly crime are frequently prosecuted for violating labour, migration and prostitution laws, even though such violations are a direct consequence of them being trafficked.⁹⁸

3.2.7 *Deportation of trafficked victims*

Another consequence faced by trafficked persons is the immediate deportation to their country of origin.⁹⁹ Many trafficked persons do not have a “regular status in the State of destination, either because they arrived illegally or because their residence permit has expired”.¹⁰⁰ Kanics and Reiter report that, owing to a lack of apposite training, authorities fail to identify trafficked persons as victims, but regard them instead as undesirable, undocumented migrants.¹⁰¹ Subsequently, migration laws

⁹⁶ Haynes 2004:26. Morawska 2007:105-106 also states that the major concern of many destination governments is to prosecute undocumented victims of trafficking, rather than punishing the real perpetrators of trafficking crimes.

⁹⁷ US Department of State 2007:36; UNODC 2006:103; Foundation Against Trafficking in Women *et al.* 2001:12. UN.GIFT 2008c:17 confirms that, “in order for a trafficked person to be meaningfully recognised as a victim and enjoy the protection this status does entail, the principle of non-punishment must be applied”. The case of *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC) illustrates that, when probable trafficked victims are not identified as such, they forego the protection and assistance that they are entitled to – see also 2.1 in Chapter 7 below.

⁹⁸ McClain 2007:585; Rijken 2003:73; Haynes 2004:224, 227; UNODC 2006:89, 103; Kanics and Reiter 2001:118; SALRC 2006:16; Raymond 2002:500; Snyman 2005:287; Foundation Against Trafficking in Women *et al.* 2001:12; see also 3.9.1.4 in Chapter 6 below.

⁹⁹ US Department of State 2010:6, 16.

¹⁰⁰ UNODC 2006:117; see also 3.9.1.5 in Chapter 6 below.

¹⁰¹ Kanics and Reiter 2001:113; Raymond 2002:500.

are implemented, resulting in victims being deported without delay to their country of origin.¹⁰² Forcing them to return to their home country without ascertaining whether it is safe for them to do so may result in the revictimisation and even re-trafficking of the victims.¹⁰³

McClain¹⁰⁴ emphasises that being deported straightaway further makes it practically impossible for trafficked persons to testify against the traffickers.¹⁰⁵ Consequently, these trafficked persons are denied the opportunity to contribute to the successful prosecution of the perpetrators.

3.2.8 Consequences regarding the return and integration process

Many trafficked survivors encounter integration obstacles on returning to their community of origin. Assistance and reintegration programmes for survivors are often limited, sporadic and not coordinated.¹⁰⁶ Owing to a lack of education and awareness-raising in origin communities, misconceptions and stereotypes about trafficked persons are rife.¹⁰⁷ Thus, instead of receiving assistance to rebuild their lives, survivors are too often shunned.¹⁰⁸ Notwithstanding the coercive circumstances

¹⁰² Kanics and Reiter 2001:113; UNODC 2006:103; Rijken 2003:73; GAATW 1999b:29-30; Kassan 2007:18–21; Stuurman 2004:5; US Department of State 2010:6, 16.

¹⁰³ ILO 2008:21; Haynes 2004:227; McClain 2007:585; Rijken 2003:73; Foundation Against Trafficking in Women *et al.* 2001:18; Stuurman 2004:5. For a clarification of the concept “revictimisation”, see 9 in Chapter 1 above.

¹⁰⁴ McClain 2007:585.

¹⁰⁵ UNODC 2006:117; Foundation Against Trafficking in Women *et al.* 2001:19.

¹⁰⁶ Gajic-Veljanoski and Stewart 2007:350.

¹⁰⁷ Brennan 2005:43.

¹⁰⁸ Melvin 2006:30.

trafficked persons were exposed to, Brennan¹⁰⁹ and other authors¹¹⁰ state that origin communities frequently stigmatise and reject trafficked persons, especially if they were involved with prostitution.¹¹¹ Consequently, trafficked survivors are, regrettably, most often ostracised within their own communities and families.¹¹²

Furthermore, victims are frequently not safe from reprisals by traffickers in their origin community.¹¹³

Critics have argued that it is counter-productive for state authorities to “rescue” trafficked persons out of their situation and simply return them to their home communities, often to the same conditions from which they originally left and back into the hands of the same recruiters or other traffickers.¹¹⁴

It is therefore important to realise that, without support, survivors may fall prey to being trafficked again.¹¹⁵

¹⁰⁹ Brennan 2005:42-43.

¹¹⁰ Rijken 2003:73; Kreston 2007:40; GAATW 1999b:72.

¹¹¹ The Future Group 2007b:2; Gajic-Veljanoski and Stewart 2007:344-435; Foundation Against Trafficking in Women *et al.* 2001:18.

¹¹² Haynes 2004:227; The Future Group 2007b:2; Morawska 2007:101; Foundation Against Trafficking in Women *et al.* 2001:18.

¹¹³ Brennan 2005:42; Rijken 2003:73; Dottridge and Weissbrodt 1999:257.

¹¹⁴ Lee 2007:8.

¹¹⁵ Pearson 2000:135-136; Kreston 2007:40; Foundation Against Trafficking in Women *et al.* 2001:18.

3.3 Consequences for countries affected by human trafficking

Human trafficking does not only result in harmful consequences for trafficked victims. Shelley emphasises that the destructive and costly effect of this crime goes further, undermining the economies, health, safety and security of source, transit and destination countries.¹¹⁶

3.3.1 Socio-economic consequences

First, human trafficking involves a detrimental economic corollary for all countries affected by this crime.¹¹⁷

Hidden trades like human trafficking also create an underground economy with its own complex systems of exchange, and this contributes to economic inequity and moral disorder.¹¹⁸

An example of how the economy is negatively influenced is the fact that employment opportunities are filled by trafficked persons, who are exploited to work for no or very little remuneration.¹¹⁹

A further impact on a country's economy is the fact that combating human trafficking has significant cost implications. In this regard, it must

¹¹⁶ Shelley 2007:134; US Department of State 2008:5.

¹¹⁷ US Department of State 2008:34.

¹¹⁸ Dougherty and Burke 2008:13. According to Shah 2007:447, the underground economic sector is officially unregulated and illegal, while the informal sector is also officially unregulated and not taxed, but the labour practices are in themselves legal. Trafficked persons are also exploited in the so-called "informal economy", which is described as "the disparate, irregular and fluid labour system functioning in the lower ranks of the economy" – Shah 2007:447.

¹¹⁹ Bales and Robbins 2001:36; Dougherty and Burke 2008:12; UN.GIFT 2008a:7. A typical example of such labour exploitation is the widespread use of trafficked children on the estimated two million cocoa farms in West Africa – US Department of State 2007:31.

be noted that the Palermo Protocol¹²⁰ calls upon states parties to provide a comprehensive array of services to victims, ranging from safety measures, legal aid, medical care and counselling to education.¹²¹ It is especially origin and destination countries which are required to cover the cost of providing extended, immediate assistance and protection to trafficked victims, as well as assisting in their long-term recovery process.¹²² From their research findings, Zimmerman *et al.*¹²³ confirm that the range and severity of the health problems experienced by trafficked persons pose a massive challenge for economic and human resources. Besides the resources needed to assist trafficking victims, extensive resources are needed for successful investigations, which are also costly.¹²⁴ Dedicated and specially trained investigative, prosecuting and other personnel are vital, while interpreters are often needed when interviewing victims or translators are often required to translate confiscated documents.¹²⁵ Where sophisticated, organised networks are involved, even more resources are needed, for example a comprehensive intelligence capacity and complex computer programs with knowledgeable experts to use them.¹²⁶

¹²⁰ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

¹²¹ Articles 6-8 – Addendum A; Dougherty and Burke 2008:12.

¹²² Jordan 2002:22; Zimmerman *et al.* 2006:2-3, 5. The assistance set forth in article 6(3) of the Palermo Protocol applies to both the destination country while the victim is in its territory and to the origin country once the victim has returned there – UN General Assembly 2000: paragraph 71.

¹²³ Zimmerman *et al.* 2006:2.

¹²⁴ Shelley 2007:123.

¹²⁵ Shelley 2007:123.

¹²⁶ Shelley 2007:123, 134.

Apart from economic consequences, countries also experience other harmful consequences as a result of human trafficking. Dougherty and Burke¹²⁷ are of the opinion that the trade in human beings for forced labour, forced marriages and commercial sex may contribute to dysfunctional families and has a demoralising impact on society as a whole. For example, where trafficked victims are parents, their children in origin communities are deprived of parental care and upbringing. It is submitted that such circumstances are likely to increase children's vulnerability in general and the likelihood of them becoming trafficked victims themselves. If trafficked victims do return to their families, it is generally without the money they thought they would bring home to maintain their children or parents.¹²⁸ Without there being awareness-raising and knowledge of the true nature of human trafficking, victims are stigmatised by communities, who blame the victims for leaving and find it difficult to welcome trafficked persons back into their midst.¹²⁹ Accordingly, the slim prospects of successfully reunifying families into healthy, functional units have a negative impact on the social welfare of countries affected by this crime.

As has been indicated above, human trafficking leaves a trail of socio-economic consequences. These consequences, including the threat to "the integrity of financial and labour markets and the long-term recovery costs of treating the victims", are the legacy of countries contaminated by this crime.¹³⁰

¹²⁷ Dougherty and Burke 2008:12.

¹²⁸ GAATW 1999a:14, 16.

¹²⁹ Haynes 2004:227; IOM 2007:31.

¹³⁰ IOM 2007:31.

3.3.2 *Involvement of organised criminal groups*

Obokata¹³¹ and Raymond¹³² confirm that various organised criminal groups are involved in human trafficking worldwide. Some sources report that the number and capacity of these criminal networks are escalating at a disturbing pace.¹³³ Among these criminal groups are the Russian Mafia, Chinese Triads, Japanese Yakuza, Hong Kong Triads, Italian Camorra and Chinese Snakeheads.¹³⁴ The increased involvement of organised criminal groups¹³⁵ in human trafficking poses a substantial threat not only to victims, but also to origin, transit and destination countries and communities.¹³⁶ First, the primary goal of criminal organisations is financial gain through illegal activities.¹³⁷ Accordingly, criminal gangs organising human trafficking are often simultaneously involved in other organised or serious crimes, such as human smuggling, sexual abuse, intimidation, violence, torture, fraud, extortion, corruption of officials, money-laundering, as well as the violation of labour and

¹³¹ Obokata 2006:46-47; see also Gallagher 2001:977; US Department of State 2010:297.

¹³² Raymond 2002:493. These criminal groups are widespread and have expanded over continents, for example an estimated 5 000 organised criminal groups constitute the Russian Mafia alone – Raymond 2002:493.

¹³³ IOM 2007:31; Kreston 2007:38.

¹³⁴ Obokata 2006:46-47; Raymond 2002:493.

¹³⁵ Melvin 2006:22, 30. For a discussion of the various definitions of “organised crime”, see Leong 2007:7-28; Rijken 2003:81-86; Burchell 2005:974-975; Watson 2006:25-28; Kruger 2008:4-5. From a study of 40 organised groups in 16 countries, 5 key structural models of organised crime groups were identified and discussed, namely rigid hierarchies, devolved hierarchies, hierarchical conglomerates, core criminal groups and organised criminal networks – UN.GIFT 2008c:14. An “organised criminal group” is defined in article 2(c) of the Convention Against Transnational Organised Crime – http://www.uncjin.org/Documents/Conventions/dcatoc/finaldocuments_2/convention_eng.pdf (accessed 11/3/2008) – as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. See also Snyman 2008:441-443; Burchell 2005:970-1019; Watson 2006:27-28.

¹³⁶ The Future Group 2007b:2; International Crime and Terrorism 2004:1, 3; Lee 2007:5; Shelley 2007:116.

¹³⁷ Melvin 2006:22; International Crime and Terrorism 2004:1.

immigration legislation.¹³⁸ These organised syndicates, which are usually also involved in drug and weapon trafficking, use human trafficking “to bring in initial cash flow to support the riskier traffic in drugs and arms”.¹³⁹ These increased criminal activities may destabilise communities and result in a serious international security and stability threat, with challenging law enforcement and social implications.¹⁴⁰

To summarise, a dangerous consequence of human trafficking for countries affected by such trafficking is that it brings with it:

...a greater presence of criminal organisations, which can lead to problems of national security, violations of national legislation and ultimately a decline in public confidence in the government.¹⁴¹

3.3.3 Corruption

Another serious consequence of human trafficking is the increase in corruption on a global level. Trafficking rings are expanding across international borders and are often closely connected with border and law enforcement officials.¹⁴² Corrupting officials and including them in the organised trafficking network¹⁴³ cripple the enforcement of border

¹³⁸ McClain 2007:581; UNODC 2006:xix; Kreston 2007:38; Morawska 2007:101; Shelley 2007:123; UN.GIFT 2008c:25; Gastrow 2001:47-48.

¹³⁹ Haynes 2004:226-227. According to International Crime and Terrorism 2004:1, “intelligence reports have noted that drug-traffickers and other criminal organisations are switching to human cargo to obtain greater profit with less risk”.

¹⁴⁰ Singh 2004:344-345; The Future Group 2007b:2; Dougherty and Burke 2008:13; Lee 2007:2.

¹⁴¹ IOM 2007:31.

¹⁴² Haynes 2004:226, 229; Brennan 2005:42; Foundation Against Trafficking in Women *et al.* 2001:4.

¹⁴³ Singh 2004:344; UNODC 2006:xxi; GAATW 1999a:13; UN.GIFT 2008b:14.

control¹⁴⁴ as well as the successful apprehension and prosecution of perpetrators.¹⁴⁵ From this perspective, Lee emphasises that:

...trafficking is seen as a serious and unambiguous threat to the peace and security of the developed world, and hence legitimises state response of increased surveillance and tighter immigration controls.¹⁴⁶

Human trafficking thrives to a large extent owing to the complicity of officials in the public and even private sectors.¹⁴⁷ Shelley¹⁴⁸ confirms that criminal networks are able to function effectively and with impunity because of their close links to law enforcement. Alerting the reader to the fact that organised crime has infiltrated the political sphere, Lee argues that the illicit movement of people succeeds owing to the conniving involvement of government officials.¹⁴⁹ For this reason, corruption is described as the grease that facilitates the thriving of human trafficking.¹⁵⁰

3.3.4 Global impact

The discussion above indicates that the crime of human trafficking is globalised. Countries worldwide, whether source, transit or destination countries, suffer from the consequences of human trafficking.¹⁵¹

¹⁴⁴ UN.GIFT 2008c:14; UNODC 2006:xvii; The Future Group 2007b:2.

¹⁴⁵ Haynes 2004:226-227; UNODC 2006:xx; Foundation Against Trafficking in Women *et al.* 2001:4.

¹⁴⁶ Lee 2007:6.

¹⁴⁷ UN.GIFT 2008e:25.

¹⁴⁸ Shelley 2007:122.

¹⁴⁹ Lee 2007:6; see also Shelley 2007:117; UN.GIFT 2008c:25-26.

¹⁵⁰ UN.GIFT 2008e:10.

¹⁵¹ Shelley 2007:118-119.

Importantly, the increasingly close relationship between organised criminal networks and human trafficking constitutes a global, multidimensional threat.¹⁵² To conclude, the impact of human trafficking goes beyond individual victims, challenging the health, safety, security and general well-being of all nations.¹⁵³

4. UNITED STATES ANNUAL TRAFFICKING IN PERSONS REPORT

Realising that human trafficking is a worldwide threat with serious, multidimensional consequences, the international community has recognised that global cooperation and effective international and national responses are called for.¹⁵⁴ For this reason, the US introduced the annual Trafficking in Persons Report (US TIP Report) in order to contribute to a global counter-trafficking response.

The annual US TIP Report is the most comprehensive worldwide report on governments' efforts to combat severe forms of human trafficking.¹⁵⁵ Since the US Congress found that anti-trafficking laws worldwide had been ineffective in eliminating human trafficking, the *Trafficking Victims Protection Act* of 2000 was enacted to fight this crime by preventing it from occurring, by punishing traffickers appropriately and by protecting

¹⁵² Singh 2004:343; US Department of State 2007:5; IOM 2007:31; Kreston 2007:38.

¹⁵³ US Department of State 2007:5; The Future Group 2007b:2; Gajic-Veljanoski and Stewart 2007:338; Allais 2006:2; Singh 2004:344-345; Dougherty and Burke 2008:13; Lee 2007:2.

¹⁵⁴ UN General Assembly Resolution 1994: paragraph 10; US Department of State 2009:5.

¹⁵⁵ US Department of State 2009:9; Gallagher and Holmes 2010:319.

victims efficiently.¹⁵⁶ For the purpose of raising global awareness and encouraging foreign governments to actively join the fight against human trafficking, the US Department of State is required by law to submit a TIP Report yearly, which it has done since 2001.¹⁵⁷ The annual TIP Reports contain an assessment of governments' compliance with the prescribed minimum standards set in the *Trafficking Victims Protection Act* of 2000 for the elimination of human trafficking.¹⁵⁸

Four minimum standards are set in terms of section 108(a) of the *Trafficking Victims Protection Act* of 2000 for countries to comply with, namely:

- (1) The government of the country should prohibit severe forms of trafficking in persons¹⁵⁹ and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion ... or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
- (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment

¹⁵⁶ US Department of State 2009:5; US Department of State 2008:5; McClain 2007:581.

¹⁵⁷ *Trafficking Victims Protection Act* of 2000: section 110(b); US Department of State 2009:6; US Department of State 2008:5; Truong and Angeles 2005:37.

¹⁵⁸ US Department of State 2009:6; US Department of State 2007:10; Gajic-Veljanoski and Stewart 2007:346-347; Gallagher and Holmes 2010:319.

¹⁵⁹ The term "severe forms of trafficking in persons" is defined in section 103(8) of the US *Trafficking Victims Protection Act* of 2000:

The term "severe forms of trafficking in persons" means

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Section 103(9) of the same Act defines the term "sex trafficking" as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act".

that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

- (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.¹⁶⁰

In evaluating foreign governments' efforts to combat human trafficking, the so-called three P's approach, namely prosecution, protection and prevention, is emphasised.¹⁶¹ Furthermore, it is required that the three

¹⁶⁰

In order to determine whether a country has made "serious and sustained efforts to eliminate severe forms of trafficking in persons" as is prescribed by section 108(a)(4), section 108(b) stipulates that the following factors should be considered:

- (1) Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons that take place wholly or partly within the territory of the country.
- (2) Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.
- (3) Whether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.
- (4) Whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons.
- (5) Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to the same extent as persons charged with other serious crimes (or, to the extent such extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).
- (6) Whether the government of the country monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's own country.
- (7) Whether the government of the country vigorously investigates and prosecutes public officials who participate in or facilitate severe forms of trafficking in persons, and takes all appropriate measures against officials who condone such trafficking.

See also Weekes 2006:33; McClain 2007:592.

¹⁶¹

US Department of State 2010:5; US Department of State 2009:6, 25-32; US Department of State 2008:5; US Department of State 2007:6; see also Snyman 2005:280; Melvin 2006:22, 43; Fredette 2009:112, 120-133; HSRC 2010:1.

R's, that is, the rescue, rehabilitation and reintegration of victims, are also addressed in a victim-centred approach to trafficking.¹⁶²

After assessing governments' anti-trafficking efforts against the minimum standards, the US Department of State ranks countries according to a progressive tier scale.¹⁶³ Stated differently, the tiers, ranging from Tier 1 to 3, represent a scale of compliance with the minimum standards set in the *Trafficking Victims Protection Act of 2000*.¹⁶⁴ Tier 1 represents full compliance,¹⁶⁵ while Tiers 2 and 3 indicate different degrees of deviation.¹⁶⁶ Governments that comply only partly with the minimum standards, but which make significant efforts to meet them, are placed in Tier 2.¹⁶⁷ If the minimum standards are not complied with and significant

¹⁶² US Department of State 2009:6; US Department of State 2008:5; US Department of State 2007:6.

¹⁶³ Truong and Angeles 2005:37; Melvin 2006:3.

¹⁶⁴ Melvin 2006:3-4; US Department of State 2009:6, 11. The US *Trafficking Victims Protection Act of 2000* provides for this categorisation in section 110(b): Reports to Congress.

(1) Annual Report. Not later than June 1 of each year, the Secretary of State shall submit to the appropriate congressional committees a report with respect to the status of severe forms of trafficking in persons that shall include -

(A) a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments fully comply with such standards; a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments do not yet fully comply with such standards but are making significant efforts to bring themselves into compliance; and a list of those countries, if any, to which the minimum standards for the elimination of trafficking are applicable and whose governments do not fully comply with such standards and are not making significant efforts to bring themselves into compliance.

¹⁶⁵ US *Trafficking Victims Protection Act of 2000*: section 110(b); Kreston 2007:41; US Department of State 2007:12, 27; Gajic-Veljanoski and Stewart 2007:347; US Department of State 2009:11; US Department of State 2010:22.

¹⁶⁶ Truong and Angeles 2005:37.

¹⁶⁷ Section 110(b)(3) of the US *Trafficking Victims Protection Act of 2000* provides the following guidelines regarding the concept "significant efforts":

In determinations under paragraph (1) or (2) as to whether the government of a country is making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking, the Secretary of State shall consider -

(A) the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking;

(B) the extent of noncompliance with the minimum standards by the government and, particularly, the extent to which officials or employees of the government have

efforts are not made to do so, a Tier 3 placing is allocated.¹⁶⁸

A further rating is called the Tier 2 Special Watch List.¹⁶⁹ Countries whose governments do not fully comply with the minimum standards, but which are making significant efforts to do so, are placed in this category if:

- (a) they were listed in Tier 2 in the previous year and moved up to Tier 1; or
- (b) they were listed in Tier 3 in the previous year and moved up to Tier 2; or
- (c) they are currently Tier 2 countries and
 - (i) the number of severe forms of trafficking is very significant or is increasing significantly; or
 - (ii) they failed to provide proof of increasing efforts¹⁷⁰ to combat trafficking from the previous year: or
 - (iii) the determination that the country is making significant efforts to comply with the minimum standards is based on commitments that additional measures will be taken in the forthcoming year.¹⁷¹

participated in, facilitated, condoned, or are otherwise complicit in severe forms of trafficking; and

(C) what measures are reasonable to bring the government into compliance with the minimum standards in light of the resources and capabilities of the government.

See also US Department of State 2009:11; US Department of State 2007:12, 27; Melvin 2006:4; US Department of State 2010:22.

¹⁶⁸ US *Trafficking Victims Protection Act* of 2000: section 110(b); Kreston 2007:40; Melvin 2006:4; US Department of State 2009:11; US Department of State 2010:22.

¹⁶⁹ US Department of State 2010:22; US Department of State 2009:11-13; US Department of State 2008:12.

¹⁷⁰ Evidence includes increased investigations, prosecutions and convictions with regard to trafficking crimes and increased assistance to victims – see *Trafficking Victims Protection Act* of 2000: section 108(b).

¹⁷¹ US Department of State 2009:11; US Department of State 2008:12-13; US Department of State 2007:12, 27.

Since 2004, the United States of America (USA) has attached penalties to the tier placements.¹⁷² In order to increase compliance with the set minimum standards, sanctions may be imposed on countries placed in Tier 3. These sanctions include the withholding of non-humanitarian and non-trade-related assistance.¹⁷³

The US TIP Reports¹⁷⁴ also include country narratives which indicate, among other things, the scope and nature of trafficking in each country and the particular government's efforts to address it. Not including the USA, the 2008 TIP Report covered the anti-trafficking efforts by

¹⁷² Truong and Angeles 2005:37; Gallagher and Holmes 2010:319.

¹⁷³ US Department of State 2009:13; Melvin 2006:3-4. These sanctions against Tier 3 governments are set out in section 110 of the *Trafficking Victims Protection Act* of 2000:

(a) Statement of Policy. It is the policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that - does not comply with minimum standards for the elimination of trafficking; and is not making significant efforts to bring itself into compliance with such standards.

See also Weekes 2006:33; Lansink 2006:52; US Department of State 2008:5, 13, 15. The term "nonhumanitarian, nontrade-related foreign assistance" is broadly defined in section 103(7) of the US *Trafficking Victims Protection Act* of 2000:

The term "nonhumanitarian, nontrade-related foreign assistance" means -

(A) any assistance under the Foreign Assistance Act of 1961, other than -

- (i) assistance under chapter 4 of part II of that Act that is made available for any program, project, or activity eligible for assistance under chapter 1 of part I of that Act;
- (ii) assistance under chapter 8 of part I of that Act;
- (iii) any other narcotics-related assistance under part I of that Act or under chapter 4 or 5 of part II of that Act, but any such assistance provided under this clause shall be subject to the prior notification procedures applicable to reprogrammings pursuant to section 634A of that Act;
- (iv) disaster relief assistance, including any assistance under chapter 9 of part I of that Act;
- (v) antiterrorism assistance under chapter 8 of part II of that Act;
- (vi) assistance for refugees;
- (vii) humanitarian and other development assistance in support of programs of nongovernmental organizations under chapters 1 and 10 of that Act;
- (viii) programs under title IV of chapter 2 of part I of that Act, relating to the Overseas Private Investment Corporation; and
- (ix) other programs involving trade-related or humanitarian assistance; and

(B) sales, or financing on any terms, under the Arms Export Control Act, other than sales or financing provided for narcotics-related purposes following notification in accordance with the prior notification procedures applicable to reprogrammings pursuant to section 634A of the Foreign Assistance Act of 1961.

For a further discussion, see Truong and Angeles 2005:37.

¹⁷⁴ US Department of State 2008:52-292; US Department of State 2007:50-212.

governments of 170 countries.¹⁷⁵ According to the 2010 TIP Report, 49 105 victims were globally identified worldwide in 2009, while only 4 166 successful prosecutions were reported.¹⁷⁶ Despite being criticised as “unscientific, inconsistent and incomplete”,¹⁷⁷ the annual US TIP Report remains an influential and detailed global report on anti-trafficking efforts of governments worldwide.¹⁷⁸

5. CONCLUSION

In striving towards a deeper insight into human trafficking, this Chapter examined and categorised some of the many causes and contributing factors which play a significant role in fuelling human trafficking. A range of risk factors renders people vulnerable to human trafficking.¹⁷⁹ Knowledge of these causes and risk factors is essential to understand and address human trafficking. Kanics and Reiter endorse this view, stating that:

...efforts to combat trafficking in human beings will mean little as long as its root causes remain inadequately addressed. The cycle of trafficking and re-trafficking will not be broken until economic and social conditions in countries of

¹⁷⁵ US Department of State 2008:1.

¹⁷⁶ US Department of State 2010:7.

¹⁷⁷ Gallagher and Holmes 2010:319; see also Weekes 2006:33; Di Nicola 2007:60-61. For a discussion of the problems related to reliable and sufficient information on trafficking in various countries, see Melvin 2006:3-4.

¹⁷⁸ US Department of State 2009:9; Laczko and Gramegna 2003:179; US Department of State 2007:5; Gallagher and Holmes 2010:319.

¹⁷⁹ UN.GIFT 2008e:16; Singh 2004:343; McClain 2007:606; ILO 2008:31; Snyman 2005:283-284; IOM 2007:28-29; US Department of State 2007:35; Melvin 2006:6, 38; Shapiro 2008:18; Kassan 2007:18–19; US Department of State 2009:41.

origin are improved. People who try to escape from poor living standards and become victims of trafficking are unlikely to stay in their home country on return, if the economic situation has not changed.¹⁸⁰

Apart from the factors contributing to human trafficking, the wide-ranging harmful consequences of human trafficking were identified. It has been shown that the harm to a victim's health and general well-being is most often profound and enduring.¹⁸¹ The literature further indicates that these far-reaching consequences not only have a detrimental effect on victims, but also negatively impact on various sectors, such as the economy, social welfare, safety, public health, and the corruption-free functioning of all countries affected by human trafficking.¹⁸²

As a result of the realisation that the causes and consequences of human trafficking have global dimensions, a variety of international responses emerged to combat this crime.¹⁸³ One of the significant responses has been the introduction of the annual TIP Reports compiled by the USA. The TIP Reports assess counter-trafficking efforts of governments all over the globe, determining their compliance with prescribed minimum standards to combat human trafficking.¹⁸⁴ After assessing the anti-trafficking interventions, the US Department of State ranks countries according to a progressive tier scale.¹⁸⁵ The purpose of the TIP Reports is not only to raise worldwide awareness regarding

¹⁸⁰ Kanics and Reiter 2001:120.

¹⁸¹ Zimmerman *et al.* 2006:2.

¹⁸² Singh 2004:343; US Department of State 2007:5.

¹⁸³ UN General Assembly Resolution 1994: paragraph 10; US Department of State 2009:5.

¹⁸⁴ US Department of State 2009:6; US Department of State 2007:10; Gajic-Veljanoski and Stewart 2007:346-347.

¹⁸⁵ Truong and Angeles 2005:37; Melvin 2006:3.

human trafficking, but also to address the global causes and consequences of this crime by encouraging all governments to participate in combating all forms of human trafficking.¹⁸⁶

¹⁸⁶ US Department of State 2009:5.

CHAPTER 4

DISTINCTIVE FEATURES OF THE CRIME OF HUMAN TRAFFICKING

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CHAPTER 4

DISTINCTIVE FEATURES OF THE CRIME OF HUMAN TRAFFICKING

1. INTRODUCTION

Not only does uncertainty exist as to what human trafficking is, but the phenomenon is also often confused with other crimes. Therefore, having discussed various aspects that clarify what human trafficking is, this Chapter strives to highlight the uniqueness of such crime and to distinguish it from other associated crimes.

2. DISTINGUISHING FEATURES OF THE CRIME OF HUMAN TRAFFICKING

2.1 A multifaceted crime

The identification of the defining features of human trafficking is not a simple exercise. Apart from the compound parts of the international definition of human trafficking discussed above,¹ David also points out that, unlike many other crimes, human trafficking is not a single, static incident.² Instead, it is a process often involving “multiple offenders and

¹ See 2.2 in Chapter 2 above; Raymond 2002:498; UNODC 2004:268.

² David 2007:2.

crime sites across several jurisdictions”.³ Another factor contributing significantly to the complexity of the trafficking crime is the fact that the crime presents itself in various forms, including sex trafficking, labour trafficking and trafficking for the removal of body parts.⁴ For this reason, the crime of human trafficking cannot simply be labelled, according to traditional categories, as a crime against property, against a person, against the state or against the public welfare.⁵ Looked at from various angles, the crime of human trafficking may fit into almost all of these categories. By criminalising human trafficking, the aim is to protect various legal interests, ranging from the interests of individual persons to the interests of the state, to the administration of justice and to community welfare. In-depth examination is therefore needed to clarify further distinctive features of this crime.

2.2 Human trafficking: a transnational crime?

2.2.1 Introduction

Since Part I of the study aims at clarifying the many features of human trafficking, the transnational feature of the crime is now examined. Further exploration reveals that there are different views on what constitutes a transnational crime.⁶ In this study, two forms of transnational crimes are identified, namely transnational organised crime on the one hand and transnational crimes on the other. These two forms

³ David 2007:2.

⁴ Shelley 2007:123-124; see also the discussion in 2.2.2.3.2 in Chapter 2 above.

⁵ Snyman 2002:301-304.

⁶ Rijken 2003:46. The literature sometimes also confuses the concept “transnational crime” with other crimes, such as international crimes, for example war crimes and crimes against humanity, or ordinary crimes with a cross-border or international element, for example theft by a Russian in Spain – Rijken 2003:48-49.

are not necessarily committed by organised criminal networks.⁷ The United Nations Convention Against Transnational Organized Crime (Organized Crime Convention)⁸ lays down the criteria for the first form of transnational crime, whereas Rijken⁹, who has done pioneering work in this area, developed four criteria for the second form of transnational crime.¹⁰ Whether human trafficking qualifies as one of the forms of transnational crimes, or as both, is now examined by determining if it meets the criteria set for each form.¹¹

2.2.2 *Criteria for transnational organised crime*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol),¹² explicitly stipulates that, unless otherwise stated therein, such Protocol applies only to trafficking offences that are both transnational in nature and involve an organised criminal group.¹³ The Palermo Protocol supplements the

⁷ Rijken 2003:46.

⁸ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008).

⁹ Rijken 2003:49-50.

¹⁰ Extensive research and publications on human trafficking as a transnational crime are lacking. The literature is also often vague on the topic. Shelley 2007:116-135 discusses human trafficking as a transnational crime without providing guidelines or criteria as to what constitutes a transnational crime if it is not committed by organised criminal networks. By stating that human trafficking is a transnational crime, it seems that the author is implying that all types of human trafficking qualify as such. This view is not shared by the author of the present study. Accordingly, Rijken's development of criteria for transnational crimes not committed by organised criminal groups is to be welcomed, since it allows more in-depth analysis and further opens up the debate on the topic.

¹¹ Rijken 2003:52.

¹² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

¹³ Article 4 – see Addendum A.

United Nations Organized Crime Convention,¹⁴ and this Convention provides the criteria for transnational organised crime.

The main purpose of the Organized Crime Convention is “to promote cooperation to prevent and combat transnational organised crime more effectively”.¹⁵ From this purpose it is clear that this Convention does not apply to transnational crime in general, but only to such crime committed by organised criminal groups.

The Convention defines an organised crime offence as transnational in nature if any one of the following criteria is met:

- (a) it is committed in more than one State;
- (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) it is committed in one State, but involves an organised criminal group that engages in criminal activities in more than one State; or
- (d) it is committed in one State, but has substantial effects in another State.¹⁶

To ascertain whether human trafficking qualifies as a “transnational organised crime” as specified in this Convention, a distinction must be drawn between cross-border and in-country trafficking. As regards cross-border trafficking, the different phases of this type of trafficking crime take

¹⁴ This Convention “extends tools for cooperation against organised crime to a global level, facilitating information sharing as well as law enforcement co-operation amongst parties” – International Crime and Terrorism 2004:3.

¹⁵ Article 1. In short, this Convention aims to combat transnational organised crime by criminalising corruption, obstruction of justice, participation in an organised criminal group and money-laundering, while also promoting cooperation by states parties with regard to a number of relevant aspects – Lee 2007:5, 19 in footnote 6; International Crime and Terrorism 2004:3.

¹⁶ Article 3(2).

place in more than one country, since victims are recruited in the source country, are moved through transit countries and are exploited in the destination country.¹⁷ Accordingly, cross-border human trafficking which is committed in more than one state complies with the criterion in article 3(2)(a) and may therefore be classified as transnational in nature in terms of this Convention.

Even in-country trafficking may sometimes comply with the criterion in article 3(2)(b) if the preparation or control occurs in another country. However, this may not often be the case. Human trafficking will only comply with the criterion in article 3(2)(c) when an “organised criminal group”¹⁸ as defined in the Convention is involved, and the group is involved with crimes in more than one state. It was indicated earlier that human trafficking is committed not only by organised criminal groups, but also by individuals.¹⁹ In the latter case, human trafficking will only constitute a transnational crime in terms of article 3(2)(d) if it is committed in one state, but has substantial effects in another, which may be difficult to prove.

From the analysis above it cannot be concluded that human trafficking in all its manifestations constitutes a transnational organised crime. Further, it cannot even be concluded that it is always transnational in nature.

¹⁷ Shelley 2007:122 confirms the existence of many large transnational trafficking organisations that even traverse several continents.

¹⁸ An “organised criminal group” is defined in article 2(c) of the Convention Against Transnational Organized Crime as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.

¹⁹ See 4.1 in Chapter 2 above; GAATW 1999a:11; IOM 2006:20; Singh 2004:343.

Every type of human trafficking must be analysed and compared with the relevant criteria before a conclusion can be reached.

Cross-border human trafficking committed by “organised criminal groups” does qualify as a transnational organised crime in terms of the Organized Crime Convention.²⁰ The fact that the part played by transnational organised crime in human trafficking is growing, is cause for concern.²¹ According to Lee and Shelley, human trafficking is emerging as a “crime of choice” for transnational organised groups, especially because of the high profits and the low risk involved, as well as the low initial cost to enter this trade and the large demand for trafficked persons.²²

Other forms of human trafficking not committed by organised criminal groups may still be transnational in nature. However, unless they comply with both requirements, that is, are transnational in nature and are committed by organised criminal groups, they do not fall within the scope of the Organized Crime Convention.

2.2.3 *Criteria for other transnational crimes*

While the Organized Crime Convention focuses on transnational crime committed by organised criminal groups only, another category of transnational crimes not necessarily committed by organised criminal groups can be identified. For this type of transnational crime, Rijken²³

²⁰ For a discussion of which crimes qualify as “transnational in nature” in terms of the Organized Crime Convention, see 2.3.6.2.3 in Chapter 5 below.

²¹ International Crime and Terrorism 2004:3.

²² Lee 2007:16; Shelley 2007:116.

²³ Rijken 2003:45-53, 87.

developed four criteria which must be met for the crime to qualify as a transnational crime.

The first criterion requires a certain level of organisation for the crime to be committed, although such organisation need not be carried out by an organised criminal group.²⁴ The perpetration of human trafficking is typified by a process involving various phases, namely the recruitment of the victim, followed by transportation and then eventual exploitation at the destination location.²⁵ Therefore, prior to recruitment, enquiries and contacts must be made to ascertain the details of the demand for trafficked persons, that is, when and where a particular type of service is required by persons of which age, sex and ethnic group. The recruitment and transportation phases also involve making arrangements for, among things, advertisements, the falsification of travel documents, transport, bus or flight tickets, escorts, and accommodation for the victims.²⁶ It is possible, but unlikely, that all these arrangements will be made by one person alone.²⁷ Usually, different role players execute the various parts of the crime. Accordingly, it can be concluded that human trafficking does indeed require a certain level of organisation, and thus it complies with the first requirement for a transnational crime.²⁸

²⁴ For a discussion of the various definitions of “organised crime”, see Leong 2007:7-28; Rijken 2003:81-86.

²⁵ UN.GIFT 2008c:11. It must be noted that the purpose to exploit is enough for a conviction on human trafficking and that actual exploitation need not have taken place – see the definition of “trafficking in persons” in article 3(a) of the Palermo Protocol; see also Rijken 2003:59, 64; SALRC 2006:15; Snyman 2005:282; 2.2.2.3.1 in Chapter 2 above.

²⁶ Singh 2004:344; UNODC 2006:xx; Rijken 2003:88.

²⁷ Singh 2004:343.

²⁸ Rijken 2003:88.

The second criterion for a transnational crime is that “it [must affect] more than one state, because citizens of more than one state are involved or part of the crime took place in more than one state”.²⁹ Cross-border human trafficking takes place when people are trafficked from one country to another, depending on where the market is for the services of the trafficked persons.³⁰ The trafficking ring is often based in different countries and continents.³¹ However, besides cross-country trafficking, it is possible that in-country trafficking within one and the same country may be perpetrated without involving another state in any way.³² Hence, the requirement that perpetration of the crime must involve more than one state is met in cross-country human trafficking, but not necessarily in in-country trafficking.³³ Every human trafficking case must therefore be analysed on the basis of its own facts to ascertain whether it complies with the second criterion.

The third criterion, which is linked to the second criterion, requires that the involvement of more than one state must aggravate the problems involved in prosecuting transnational crime.³⁴ Many obstacles can be identified which may complicate the prosecution of human trafficking where more than one state is involved. Examples of such obstacles are

²⁹ Rijken 2003:88.

³⁰ UN.GIFT 2008b:9; Rijken 2003:88; Haynes 2004:226.

³¹ Haynes 2004:226.

³² Rijken 2003:88.

³³ Rijken 2003:88.

³⁴ UNODC 2006:xx-xxi; Rijken 2003:88.

extradition³⁵ and extraterritorial jurisdiction³⁶ issues, difficulties in obtaining evidence from another state,³⁷ executing searches, taking evidence, effecting service of judicial documents, translating documents into foreign languages, interviewing witnesses speaking a foreign language, and applying international instruments in addition to national laws.³⁸ These obstacles arising from the involvement of more than one state may indeed aggravate prosecution problems in cross-border human trafficking trials. However, Rijken rightly states that, before a final, substantiated conclusion can be drawn in this regard, further research is needed to determine the nature and scope of the obstacles and whether they do in fact aggravate prosecution problems in human trafficking cases.³⁹

The last criterion that must be met in order for a crime to qualify as a transnational crime is that efficient solutions for combating the crime

³⁵ Extradition is “a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted” – UNODC 2006:45. Where perpetrators of human trafficking are based in, or have fled to, another state, extradition proceedings are instituted for handing them over to, and bringing them to justice in, the prosecuting state. While extradition was initially based on treaties, more recently, the practice of also signing bilateral extradition treaties has developed. Furthermore, numerous international, regional and multilateral instruments on extradition have been introduced which complicate prosecution by requiring additional knowledge of the content and implementation of these instruments. For a further discussion of extradition, see 3.6.4.2 in Chapter 6 below; UNODC 2006:45-47; Rijken 2003:4-5.

³⁶ It is not enough that the presence of the accused person can be secured through extradition – jurisdiction must also be asserted when the crime, or part of the crime, has been committed in another country. Accordingly, extraterritorial jurisdiction must be proven by the prosecution as well – UNODC 2006:47. For a further discussion of extraterritorial jurisdiction, see 3.4 in Chapter 6 below.

³⁷ Prosecution is often complicated by having to obtain evidence from another country, which delays the criminal proceedings and requires prosecutors to be knowledgeable about the treaties on mutual legal assistance in this regard – UNODC 2006:48.

³⁸ UNODC 2006:48. Various international instruments are applicable in the investigation and prosecution of human trafficking cases – see the discussion of these instruments in Chapter 5 below.

³⁹ Rijken 2003:88-89.

must lie beyond national borders and must require intercountry cooperation.⁴⁰

Bilateral, regional and global agreements reflect the realisation that transnational crimes can be addressed effectively only through collaboration from the States involved or affected.⁴¹

The literature is increasingly recognising that national laws of sovereign states alone are inadequate for combating human trafficking.⁴² Consequently, international criminal justice cooperation in human trafficking cases has been advocated widely and it has been stated unequivocally that “national authorities need assistance of other States for the successful investigation, prosecution and punishment of offenders...”⁴³

In measuring human trafficking against the criteria for transnational crimes, Rijken⁴⁴ rightly concludes that, apart from the possible reservation regarding the third criterion, human trafficking, and especially cross-border trafficking, indeed qualifies as a transnational crime.⁴⁵

2.2.4 *The transnational feature of human trafficking*

Having concluded that some forms of human trafficking indeed have a transnational feature, the question is whether it is necessary to ascertain

⁴⁰ Rijken 2003:88-89.

⁴¹ UNODC 2006:45.

⁴² UN.GIFT 2008b:9-10; UNODC 2006:45; International Crime and Terrorism 2004:3.

⁴³ UNODC 2006:47; see also 3.6 in Chapter 6 below.

⁴⁴ Rijken 2003:89.

⁴⁵ Rijken 2003:89; Lee 2007:16. Marks and Clapham 2005:423 agree with Rijken that cross-border trafficking is a form of transnational organised crime.

whether human trafficking is a form of transnational crime. Rijken argues that:

The relevance of determining whether a crime is transnational, lies in the fact that, when a crime is transnational, states are obliged to cooperate with other states to effectively combat the crime.⁴⁶

In other words, as indicated in the discussion above, solutions for transnational crimes must be sought beyond the national level.⁴⁷ A proper response must therefore include appropriate prosecution expertise and the knowledge that such crimes cannot be curbed by national laws only, but that intercountry cooperation as well is vital.⁴⁸ The Palermo Protocol, the leading international instrument on human trafficking, explicitly confirms that, to combat transnational human trafficking, cooperation among states parties is imperative.⁴⁹ In this regard, Rijken⁵⁰ and Burchell⁵¹ also underpin the view that transnational crimes cannot be effectively countered by national laws alone, but that cooperation between states as well is essential.⁵²

⁴⁶ Rijken 2003:47; see also 3.6 in Chapter 6 below.

⁴⁷ Rijken 2003:46.

⁴⁸ Rijken 2003:46; UN.GIFT 2008e:47; OHCHR 2002:15 – Guideline 11; SALRC 2006:10; 3.6 in Chapter 6 below.

⁴⁹ Article 2(c); Melvin 2006:33.

⁵⁰ Rijken 2003:45.

⁵¹ Burchell 2005:4 states that a body of law, referred to as “transnational criminal law”, developed primarily because of the need for cooperation between states to counter this type of crime.

⁵² International Crime and Terrorism 2004:3; OHCHR 2002:15 – Guideline 11; SALRC 2006:10; UNODC 2008:119; Planitzer 2009:5; UN.GIFT 2008e:29; David 2007:1.

Against the backdrop of the discussion above, it is important to recognise that certain forms of human trafficking are transnational crimes and that this distinguishing feature calls for a tailor-made legal response. Such a response must accommodate the complexities of transnational crimes and the fact that solutions must be sought beyond the national level.⁵³

2.3 Controlling victims and restricting liberty

A further distinctive feature of all forms of human trafficking is the exercise of control over trafficked persons. Stuurman⁵⁴ states that control and power over trafficked victims are unequivocally a key characteristic of human trafficking. Defeis⁵⁵ elaborates on this point by stating that trafficking consists of “actions in which offenders gain control of victims by coercive or deceptive means or by exploiting relationships”. Shelley⁵⁶ also agrees that, after recruited victims have been transported to the destination site, they are exploited, while maintaining control over them.

It is further argued that the exercise of control over the trafficked person distinguishes human trafficking from other crimes.⁵⁷ For example, what is the difference between forced labour, where people are also recruited by means of deception, force or coercion and subsequently exploited for profit, and trafficking for forced labour? Although exploitation by means of coercion or deception is part of both phenomena, it appears that being

⁵³ Rijken 2003:46.

⁵⁴ Stuurman 2004:5.

⁵⁵ Defeis 2003/2004:488; see also Foundation Against Trafficking in Women *et al.* 2001:6; UNODC 2009b:12-13; David 2007:2.

⁵⁶ Shelley 2007:125; see also UNODC 2004:288.

⁵⁷ Pearson 2000:9, 37.

controlled by the trafficker distinguishes labour trafficking from forced labour.⁵⁸

Underpayment, excessive working hours and dangerous or harsh working conditions constitute forced labour and are labour law violations.⁵⁹ However, even though workers in forced labour are abused, they are still free to leave or resign, while trafficked persons cannot do so because they are kept under the control of the trafficker.⁶⁰

Despite the consensus in the literature that control over victims is a key feature of human trafficking,⁶¹ the Palermo Protocol does not stipulate exercise of control over victims and the resultant restriction of their liberty as a definitional part of human trafficking.⁶² Nonetheless, in practice and as a rule, various physical, psychological and financial control mechanisms are used as tools to gain and retain continued control over victims and thus limit their freedom.⁶³ Zimmerman *et al.* conclude that loss of freedom is a defining feature of trafficking, since 77 percent of the trafficked women in their 2006 research study had no freedom of movement, while those who had some freedom were generally accompanied by minders to prevent their escape.⁶⁴

⁵⁸ Foundation Against Trafficking in Women *et al.* 2001:6; UNODC 2009b:12-13, 21; Zimmerman *et al.* 2006:10; Morawska 2007:100.

⁵⁹ Devenish 1998:54; Nowak 2005:201; Pearson 2000:9, 37.

⁶⁰ UNODC 2009b:15

⁶¹ Pearson 2000:9, 37.

⁶² See the discussion of the definitional parts of the crime of “trafficking in persons”, as defined in the Palermo Protocol, in 2.2.2 in Chapter 2 above.

⁶³ International Crime and Terrorism 2004:1; Shelley 2007:131; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:31-32; IOM 2009a:11-12; US Department of State 2003:1-2 – see section XXX.01(4); David 2007:2..

⁶⁴ Zimmerman *et al.* 2006:10; Morawska 2007:100; UNODC 2009b:21.

Various methods of controlling trafficked victims have been documented. First, violent and coercive methods are used. Most commonly, victims are initially physically assaulted and abused to instil fear and to provide the trafficker with the power of control.⁶⁵ Furthermore, traffickers wield power over victims by confinement⁶⁶ and by threats of violence to both victims and their families and friends.⁶⁷ Gajic-Veljanoski and Stewart⁶⁸ list blackmail as another method of control. For example, trafficked persons are photographed or video-taped in compromising or illegal situations and are then subsequently threatened with exposure of such acts to family, friends or law enforcement officials.⁶⁹ Furthermore, because victims often have no legal travel or identification documents, traffickers abuse the legal system by threatening them with arrest, prosecution or deportation if they escape and approach the authorities seeking help.⁷⁰

Secondly, it is widely reported that traffickers control victims by confiscating their identity and travel documents, such as identity cards, visas and passports.⁷¹ As a result, victims who enter a country legally

⁶⁵ Singh 2004:342; Haynes 2004:226; Shapiro 2008:18; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:31; IOM 2009a:12; David 2007:2.

⁶⁶ Melvin 2006:29; Singh 2004:342; Shapiro 2008:18; Dottridge and Weissbrodt 1999:257; Zimmerman *et al.* 2006:11; US Department of State 2003:1-2 – see section XXX.01(4).

⁶⁷ IOM 2007:30; Dougherty and Burke 2008:12; Brennan 2005:42; Gajic-Veljanoski and Stewart 2007:344; Morawska 2007:94; Shelley 2007:131; Weissbrodt and Anti-Slavery International 2002:31-32; Dottridge and Weissbrodt 1999:270; David 2007:2.

⁶⁸ Gajic-Veljanoski and Stewart 2007:344; see also IOM 2009a:12; US Department of State 2003:1 – see section XXX.01(1) and (4).

⁶⁹ IOM 2009a:12.

⁷⁰ GAATW 1999a:13; US Department of State 2007:20; US Department of State 2003:1 – see section XXX.01(4); UNODC 2004:288; David 2007:2.

⁷¹ Haynes 2004:226; US Department of State 2007:20; IOM 2007:30; Melvin 2006:29; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339; Morawska 2007:100; Stuurman 2004:5; UNODC 2009b:21. The term “travel documents” referred to in articles 8(4), 10(1)(a), 12(a) and 13 of the Palermo Protocol includes “any type of document required for entering or leaving a State under its domestic laws” – UN General Assembly 2000: paragraphs 75 and 78.

find themselves illegally in the destination location because their passports and visas have been seized by their traffickers.⁷²

Thirdly, debt bondage is another common tool used by traffickers to keep their victims entrapped.⁷³ In a nutshell, debt bondage involves the repayment of a debt by means of labour or service.⁷⁴ Debt bondage is prohibited as a slavery-like practice and is defined in article 1(a) of the 1956 Supplementary Slavery Convention⁷⁵ as a condition:

...arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.⁷⁶

According to Bales and Robbins, confusion arose because this definition of debt bondage stipulates that the value of the debtor's services is not applied to the liquidation of the debt.⁷⁷ The authors continue, stating that

⁷² Kanics and Reiter 2001:113; Shelley 2007:131; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:32; IOM 2009a:12.

⁷³ Dougherty and Burke 2008:12; US Department of State 2008:19-20; Stuurman 2004:5; David 2007:2. see also 2.2.2.3.2.c in Chapter 2 above. For a discussion of debt bondage and international efforts to combat it, see Weissbrodt and Anti-Slavery International 2002:14-16.

⁷⁴ Melvin 2006:24.

⁷⁵ <http://www.unhchr.ch/html/menu3/b/30.htm> (accessed 12/3/2008); see 2.2.2.3.2.c in Chapter 2 above and 2.1.3 in Chapter 5 below.

⁷⁶ Debt bondage is similarly defined in section 103(4) of the US *Trafficking Victims Protection Act* of 2000. International concern led the International Labour Organisation to include debt bondage among the worst forms of child labour in the 1999 Worst Forms of Child Labour Convention (No. 182) – see 2.2.2.3.2.b in Chapter 2 above and 2.2.4 in Chapter 5 below.

⁷⁷ Bales and Robbins 2001:34.

there are “two distinct forms of debt bondage, both meeting this criterion, but in different ways”.⁷⁸

In the first form of debt bondage, the labour power, or actually the very life of the debtor, becomes security for a debt, which can never be repaid.⁷⁹ The debtors are trapped in bondage, not because they have actually borrowed any money themselves, but because they have inherited debts or a servile status from their parents or grandparents.⁸⁰ This type of traditional debt bondage is practised in southern Asia, especially in India, where none of the work done by the enslaved family serves to diminish the debt.⁸¹ In practice, this means that families of the so-called lower castes⁸² are “owned” by the landlord, even though such ownership is illegal.⁸³ Accepting this state as a way of life that cannot be changed, the enslaved is under the total control of the landlord, and usually has been for generations.⁸⁴

The second form of debt bondage entails the work of the debtor being seemingly applied to the debt, but, through false accounting, exorbitant

⁷⁸ Bales and Robbins 2001:34; Bales 2004c:65 in footnote 2.

⁷⁹ Bales and Robbins 2001:34.

⁸⁰ Bales 2004c:60.

⁸¹ Bales and Robbins 2001:34; Bales 2004c:60; Singh 2004:343; US Department of State 2008:20.

⁸² The term “caste” refers to “any of the Hindu hereditary classes, distinguished by relative degrees of purity or pollution, whose members are socially equal with one another and often follow the same occupations” – Reader’s Digest Oxford 1996:216.

⁸³ Bales 2004c:61.

⁸⁴ US Department of State 2008:20.

interest, and fines and continuous additions, repayment remains almost forever out of reach.⁸⁵

Debt bondage used in human trafficking cases is related to this second form of debt bondage. For a trafficked person, debt bondage is an enormous debt that does not relate at all to the actual costs incurred by the trafficker.⁸⁶ For this reason, debt bondage is an almost never-ending cycle of debt, usually made up of the victim's own purchase price, excessive fees for transport costs, fines for being ill or not producing satisfactory services, as well as daily expenses on items such as food, accommodation, clothing, medicines, condoms and drugs.⁸⁷ Debt bondage thus keeps the trafficked person dependent and powerless – in other words, under the full control of the trafficker.⁸⁸

Fourthly, although victims may use drugs as a coping mechanism,⁸⁹ traffickers often administer drugs to victims to make them dependent on such drugs.⁹⁰ The resultant drug dependence and the fact that the trafficker provides these substances make victims compliant and facilitate the trafficker's control over them.⁹¹

⁸⁵ Singh 2004:341-342; Bales and Robbins 2001:34; US Department of State 2008:20. Bales 2004c:65 in footnote 2 summarises the two forms of debt bondage as follows: "In the first form the very nature of the agreement which transforms labor power into collateral practically disqualifies the debtor from ever repaying their debt. In the second form it is a violation of the agreement, when 'the value of those services as reasonably assessed is not applied towards the liquidation of the debt', that traps the debtor."

⁸⁶ Singh 2004:341; IOM 2007:30; IOM 2009a:11-12.

⁸⁷ Bales and Robbins 2001:34; US Department of State 2007:26; Haynes 2004:226; Singh 2004:342; Weissbrodt and Anti-Slavery International 2002:15; Shapiro 2008:18; The Future Group 2007b:2; Gajic-Veljanoski and Stewart 2007:341; Morawska 2007:100; David 2007:2.

⁸⁸ Singh 2004:342; Bales and Robbins 2001:35.

⁸⁹ Melvin 2006:29.

⁹⁰ Haynes 2004:226; Gajic-Veljanoski and Stewart 2007:341.

⁹¹ US Department of State 2007:28.

Furthermore, black magic or voodoo rituals are used to frighten, and thereby control, victims of trafficking.⁹² Traffickers entrench control over victims by employing these rituals, which may include body parts, such as locks of hair and nail clippings, being removed from the victim in order to cast so-called spells over the victims.⁹³

Isolating victims is another common strategy that traffickers use to control trafficked persons. Some victims are physically isolated.⁹⁴ Deprived of free movement, they are held in captivity, either by being locked up or by being closely monitored and escorted wherever they go.⁹⁵ Communication with their families and friends by, for example, telephone or written and electronic correspondence is more often than not prohibited or restricted.⁹⁶

Traffickers may also control victims by means of cultural or social isolation. Such isolation is brought about by the victims' illegal immigration status, by language barriers, by a lack of support networks, by moving and separating them from their families, and by their ignorance of the culture and laws of the destination location.⁹⁷

⁹² Gajic-Veljanoski and Stewart 2007:342. When a voodoo magician's shrine was raided in Nigeria, a register was confiscated containing the names of girls sold into prostitution. In their case, black magic was used to control them – US Department of State 2007:33; Oguejiofor 2008:52-53.

⁹³ Oguejiofor 2008:52-53.

⁹⁴ David 2007:2; Gajic-Veljanoski and Stewart 2007:344.

⁹⁵ Melvin 2006:29; Singh 2004:342; Shapiro 2008:18; Dottridge and Weissbrodt 1999:257; IOM 2006:38; Morawska 2007:100.

⁹⁶ UNODC 2009b:21.

⁹⁷ Morawska 2007:100; Gajic-Veljanoski and Stewart 2007:339; IOM 2006:39; Shelley 2007:131; IOM 2009a:12; UNODC 2009b:21; David 2007:2.

Stuurman⁹⁸ describes the plight of victims trafficked over international borders as follows:

Separated from their families, country and culture, usually not able to speak any language of the destination country and illegally resident in the country, they are at the mercy of their traffickers.

Lastly, traffickers also control their victims by moving them from one place to another in the destination location so as to limit their opportunities of becoming acquainted with people in the neighbourhood who may help them to escape.⁹⁹ According to Zimmerman *et al.*,¹⁰⁰ traffickers maintain control over women by creating an unpredictable and unsafe environment. These frequent relocation tactics disorientate victims, thereby facilitating control and exploitation by their traffickers.¹⁰¹

3. HUMAN TRAFFICKING VERSUS HUMAN SMUGGLING

3.1 Confusion between the two concepts

Although Harrold¹⁰² emphasises that human smuggling is “a separate crime with characteristics and elements distinct from human trafficking”,

⁹⁸ Stuurman 2004:5.

⁹⁹ Gajic-Veljanoski and Stewart 2007:344; Morawska 2007:100.

¹⁰⁰ Zimmerman *et al.* 2006:10.

¹⁰¹ IOM 2007:1.

¹⁰² Harrold 2006:100.

these crimes are often confused, or even blended, with each other.¹⁰³ It is important to distinguish clearly between the two phenomena to ensure efficient victim protection and law enforcement.¹⁰⁴ If people are not identified as trafficked victims, they cannot be protected and assisted as victims.¹⁰⁵ In addition, in order to prosecute perpetrators successfully, it must be clear whether they have been involved in human trafficking or in people smuggling.

3.2 Protocol Against the Smuggling of Migrants by Land, Sea and Air

A further Protocol supplementing the Organized Crime Convention,¹⁰⁶ namely the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol)¹⁰⁷ was adopted to prevent and combat migrant smuggling.¹⁰⁸ This Protocol applies only to international migrant smuggling involving an organised criminal group and its structure is similar to that of the Palermo Protocol.¹⁰⁹

¹⁰³ Melvin 2006:21; Rijken 2003:71-72; Dougherty and Burke 2008:12; Gould 2006:19; International Crime and Terrorism 2004:1; Shelley 2007:118; Gallagher 2001:1000.

¹⁰⁴ Haynes 2004:230; Rijken 2003:73.

¹⁰⁵ US Department of State 2007:36. For the challenges in distinguishing between trafficked persons and smuggled migrants, and the ramifications of more protection being granted to trafficked persons than to smuggled migrants, thus providing an incentive to classify irregular migrants rather as persons being smuggled than trafficked, see Gallagher 2001:997, 1000-1001.

¹⁰⁶ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008).

¹⁰⁷ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf (accessed 11/3/2008). For an in-depth discussion of this treaty, see UNODC 2004:323-396.

¹⁰⁸ Article 2; see also Gallagher 2001:995-996; HSRC 2010:21.

¹⁰⁹ Article 4. For an overview of the Migrant Smuggling Protocol, see Gallagher 2001:995-999.

3.3 Definitions of the two concepts

Clear definitions of human trafficking and of people smuggling facilitate differentiation between the two concepts.¹¹⁰ The definition of human trafficking in the Palermo Protocol was discussed above.¹¹¹ As regards migrant smuggling, the Migrant Smuggling Protocol provides the following definition:

“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹¹²

The Migrant Smuggling Protocol further clarifies the meaning of “illegal entry” by defining it as “crossing borders without complying with the necessary requirements for legal entry into the receiving State”.¹¹³

In a nutshell, human smuggling is based on an agreement where, for a fee, smugglers arrange the illegal entry of their clients into a country of which such clients are not citizens or permanent residents.¹¹⁴

¹¹⁰ Di Nicola 2007:51; Gallagher 2001:1004; UNODC 2004:340.

¹¹¹ See 2.2 in Chapter 2 above.

¹¹² Article 3(d); HSRC 2010:21; Gallagher and Holmes 2008:319.

¹¹³ Migrant Smuggling Protocol: article 3(b).

¹¹⁴ HSRC 2010:21.

3.4 Similarities between the two concepts

Various similarities can be identified between human trafficking and human smuggling. First, both phenomena constitute crimes, since they involve the violation of laws, such as migration, labour, prostitution or anti-human trafficking laws. Secondly, both human trafficking and human smuggling are illegal, profitable business enterprises involving human beings. In the case of human smuggling, the smuggler benefits from the payment made by the client to take him or her illegally across an international border, while, in human trafficking, the trafficker benefits from the exploitation of the victim.¹¹⁵ Thirdly, owing to the lure of the profit involved, organised criminal networks are often involved in both of these activities.¹¹⁶ Fourthly, both phenomena amount to a process whereby a person is usually moved from one location to another.¹¹⁷ When people are smuggled, the process consists of a business deal between the agent and the client, followed by transportation illegally across an international border. Subsequent to the recruitment of a trafficked victim, the trafficking process also usually, but not always, involves movement of the victim, namely movement to the destination location.¹¹⁸

¹¹⁵ HSRC 2010:21; UNODC 2004:340-341.

¹¹⁶ IOM 2007:27.

¹¹⁷ UNODC 2004:340; ILO 2008:11; UN.GIFT 2008b:4; Rijken 2003:65, 79; GAATW 1999a:9; Singh 2004:341; Dottridge and Weissbrodt 1999:243-244, 263; Shah 2007:442; HSRC 2010:21. However, a substantial part of the literature holds a different view, stating that the transportation or movement of trafficked victims is not a prerequisite for human trafficking – US Department of State 2008:6; US Department of State 2007:30-31; Harrold 2006:101. See also the discussion in 3.1.1.2.2.a in Chapter 6 below.

¹¹⁸ UN.GIFT 2008c:11; US Department of State 2009:7.

3.5 Differences between the two concepts

Apart from the separate definitions of human trafficking and migrant smuggling in the Palermo Protocol and Migrant Smuggling Protocol respectively,¹¹⁹ several other differences can also be identified between the two phenomena.¹²⁰ These differences are discussed below in order to clarify the distinctiveness of each of these crimes.

3.5.1 Purpose of the two phenomena

A crucial difference between human trafficking and people smuggling is the purpose of the respective criminal enterprises. Human trafficking has an additional definitional part separating it from migrant smuggling, in that the enterprise must be undertaken for an exploitative purpose.¹²¹ The trafficker recruits victims with a specific purpose in mind, namely to exploit them in some way to benefit the trafficker.¹²² In contrast, the purpose of human smuggling is to benefit from a service rendered to another person, namely the facilitation of the illegal crossing of an international border.¹²³

3.5.2 The means definitional part

Apart from the exploitative purpose part, the additional coercive or deceptive means part also separates human trafficking from migrant smuggling.¹²⁴ Unlike trafficked persons, smuggled migrants are not

¹¹⁹ UNODC 2004:340-341.

¹²⁰ Gallagher 2001:1000-1001, 1004.

¹²¹ UNODC 2006:xiii-xiv; Rijken 2003:72; Gallagher 2001:1001; UNODC 2004:340-341.

¹²² Lansink 2006:47; Gallagher and Holmes 2008:319.

¹²³ Rijken 2003:72; Gould 2006:19; HSRC 2010:21; Gallagher and Holmes 2008:319.

¹²⁴ Palermo Protocol: article 3(a); Gallagher 2001:1001.

deceived about the nature of the criminal enterprise and are also not coerced, but participate voluntarily.¹²⁵

3.5.3 *Consent of victims*

The difference regarding the means element also results in a difference in respect of consent issues. Given that smuggled migrants are not victims, but rather clients involved in an illegal business deal, they knowingly consent to be illegally smuggled across an international border by paying a smuggler to provide the service.¹²⁶ This is not true of trafficked persons. They do not consent, and, even if they ostensibly “consent”, their consent is nullified, because illegal coercive or deceptive means are used to obtain the consent.¹²⁷

3.5.4 *Relationship between the parties*

The difference between the two phenomena as far as the purpose and means parts are concerned brings about another distinction, namely in the nature of the relationship between the parties. Smuggled migrants are not victims, but rather participants in a criminal conspiracy to cross an international border illegally.¹²⁸ Stated differently, smuggling gives rise to a business relationship between the service provider and a client, because the smuggler delivers a service for a fee to the smuggled

¹²⁵ Melvin 2006:22; IOM 2007:28; Harrold 2006:101; Kamidi 2007:10; UNODC 2004:340-341.

¹²⁶ IOM 2007:28; Harrold 2006:101; Kamidi 2007:10; UNODC 2008:4; UNODC 2004:340-341. However, Rijken rightly points out that the consent of vulnerable, smuggled persons is often abused by forcing them to pay a substantially overpriced fee to the smuggler, which may lead to debt bondage – Rijken 2003:73.

¹²⁷ Lansink 2006:47; UNODC 2006:xiv-xv; Harrold 2006:101; UNODC 2008:4.

¹²⁸ Melvin 2006:22; Harrold 2006:100-101; UNODC 2004:340-341; Gallagher and Holmes 2008:319.

person.¹²⁹ The client is not deceived and voluntarily agrees, and often requests, to be smuggled illegally over an international border.¹³⁰ In contrast, in the case of human trafficking, the trafficker recruits a person by way of some form of coercion or deception for the purpose of exploitation.¹³¹ Accordingly, their relationship is that of a perpetrator and a victim.

Furthermore, the trafficking relationship also continues after the place of destination is reached, involving “ongoing exploitation of the victims to generate profit for the traffickers”.¹³² In contrast, where persons are smuggled, the relationship between the smuggling agent and the client usually ends once the border has been crossed and the destination is reached.¹³³ The different relationship between the parties is further highlighted by the different commodities dealt with. The International Organization for Migration (IOM) points out that, in the case of smuggling, the commodity is a service, while, in the case of trafficking, the commodity is a human being.¹³⁴

3.5.5 Control and restricted movement

Since the relationship between the smuggler and the smuggled person ends once the border has been crossed, the smuggled person’s

¹²⁹ IOM 2007:27; HSRC 2010:21. Gould 2006:19 states that the smuggler often renders this service for an exorbitant fee.

¹³⁰ Harrold 2006:101.

¹³¹ Melvin 2006:22.

¹³² UNODC 2008:5; Lee 2007:10-11.

¹³³ Kamidi 2007:9-10; Lansink 2006:47; UNODC 2006:xiv; HSRC 2010:21; UNODC 2008:4.

¹³⁴ IOM 2007:27.

movement is not restricted in the destination location.¹³⁵ The smuggled person is usually free to do and live as he or she pleases, completely independent of the smuggler.¹³⁶ Quite the opposite is true in a human trafficking scenario, in that traffickers usually strictly control their victims and restrict their movement in various ways.¹³⁷

3.5.6 *Crossing international borders*

An obvious difference between people trafficking and people smuggling lies in the crossing of an international border. While such illegal crossing of an international border is always part of human smuggling, this is not the case with human trafficking.¹³⁸ In cross-border human trafficking, international borders are also crossed, but in-country trafficking occurs without the crossing of any national borders.¹³⁹ An example of in-country trafficking is that where a person is trafficked from a rural town with limited opportunities to a city in the same country, because the victims perceive a better life to be awaiting them there.

Furthermore, while international borders are always crossed illegally in people smuggling, trafficked persons often cross such borders legally.¹⁴⁰ Trafficked persons may obtain valid travel documents, being deceived into thinking that they are *en route* to a lucrative job or educational opportunity. Smuggled persons, however, do not have travel documents,

¹³⁵ Kamidi 2007:10; HSRC 2010:21.

¹³⁶ The Future Group 2007a:7; Melvin 2006:22.

¹³⁷ See 2.3 above for a discussion of the methods traffickers utilise to control victims.

¹³⁸ Harrold 2006:101; Melvin 2006:22; UNODC 2006:xiv-xv; Lansink 2006:47; Kamidi 2007:10; UNODC 2008:4; HSRC 2010:21.

¹³⁹ Rijken 2003:73.

¹⁴⁰ UNODC 2008:4.

or, if they do, such documents are illegal because they have been falsified or stolen.¹⁴¹ On the other hand, trafficked persons do not necessarily have illegal travel documents.¹⁴²

3.5.7 Source of the profit

People smugglers make a profit by charging an often exorbitant fee for rendering a service, namely providing illegal entry into another country.¹⁴³ Smugglers earn money from fees for moving people illegally across international borders.¹⁴⁴ In contrast, the major source of revenue for traffickers is not fees, but the proceeds derived from the continuous exploitation of trafficked persons at the destination location.¹⁴⁵ Since smugglers only make a once-off, short-term profit, smuggling is less lucrative than people trafficking, whereas traffickers use people as “highly profitable, reusable, and expendable commodities”.¹⁴⁶

3.5.8 Type of crime

Human trafficking and human smuggling are different types of crime.¹⁴⁷ In trafficking, the crime is committed primarily against an individual.¹⁴⁸ In contrast, smuggling is referred to as a “victimless crime”, because the smuggled person is not really a victim, but a participant in the crime of

¹⁴¹ IOM 2007:28.

¹⁴² IOM 2007:28.

¹⁴³ International Crime and Terrorism 2004:1; Rijken 2003:72; IOM 2007:28; Kamidi 2007:10.

¹⁴⁴ UNODC 2008:5.

¹⁴⁵ UNODC 2006:xiv; Rijken 2003:72; UNODC 2008:5.

¹⁴⁶ Haynes 2004:232; Dougherty and Burke 2008:12; Kreston 2007:38.

¹⁴⁷ Harrold 2006:100; UNODC 2006:xiv.

¹⁴⁸ Lee 2007:11.

illegally crossing an international border.¹⁴⁹ For this reason, smuggling is primarily regarded as a crime committed against the state.¹⁵⁰

3.6 Overlapping of the two phenomena

According to Lee,¹⁵¹ the definitions of human trafficking and human smuggling in the relevant United Nations Protocols mark an important international consensus on the defining features of these two phenomena. Although numerous differences have been tabled to distinguish between human trafficking and human smuggling, in practice they often overlap with each other.¹⁵²

Many victims of trafficking begin their journey by consenting to be smuggled from one state to another. Smuggled migrants may later be deceived or coerced into exploitative situations and thus become victims of human trafficking.¹⁵³

Rijken¹⁵⁴ states that smuggling is often followed by exploitation similar to trafficking practices after arrival at the destination. Bales and Robinson¹⁵⁵ confirm this trend, explaining that smuggled persons, just like those trafficked, are often trapped in debt bondage. In a human smuggling scenario, debt bondage arises when smugglers demand that an agency

¹⁴⁹ IOM 2007:28; Rijken 2003:73.

¹⁵⁰ Lee 2007:11.

¹⁵¹ Lee 2007:11.

¹⁵² Di Nicola 2007:52; Lansink 2006:47; Weissbrodt and Anti-Slavery International 2002:25; HSRC 2010:21.

¹⁵³ UNODC 2006:xiv; Weissbrodt and Anti-Slavery International 2002:25; Gallagher 2001:1001. Lansink 2006:47 concurs, stating that, in practice, elements of both smuggling and trafficking are part of the event, which consequently blurs the distinction between the two concepts.

¹⁵⁴ Rijken 2003:72.

¹⁵⁵ Bales and Robbins 2001:36; Lee 2007:11.

fee to cross an international border be paid, but the agency fee remains undetermined and is continuously increased.¹⁵⁶ Furthermore, like smuggled persons, many trafficked persons enter the destination country without legal passports or residence permits and then remain illegally in the country, thus contributing to the confusion between smuggling and trafficking.¹⁵⁷ These intersections between the two phenomena make it difficult for law enforcement officials and victim-service providers to determine whether the crime of smuggling or of trafficking has been committed.¹⁵⁸

4. RELATIONSHIP OF HUMAN TRAFFICKING TO SLAVERY AND SLAVERY-LIKE PRACTICES

Similar to the situation regarding human trafficking and human smuggling discussed above, human trafficking is also linked with slavery and slavery-like practices.¹⁵⁹ To identify which practices constitute human trafficking, slavery or slavery-like practices, it is essential to clarify these concepts and the relationship between them.¹⁶⁰

¹⁵⁶ Bales and Robbins 2001:36.

¹⁵⁷ Rijken 2003:72.

¹⁵⁸ UNODC 2006:xiv; Lee 2007:11.

¹⁵⁹ Picarelli 2007:26.

¹⁶⁰ Bales and Robbins 2001: 20.

4.1 Distinguishing between slavery and slavery-like practices

Picarelli¹⁶¹ cautions that various meanings are attached to the term “slavery” and that the imprecise use of terminology fosters confusion. For example, slavery is often used synonymously with all forced labour practices coupled with coercive control, limited freedom and minimal payment.¹⁶² Furthermore, the literature does not often make a proper distinction between slavery and other slavery-like practices,¹⁶³ such as debt bondage,¹⁶⁴ peonage,¹⁶⁵ serfdom¹⁶⁶ and indentured servitude.¹⁶⁷ Consequently, distinguishing between slavery and the many forms of closely related slavery-like practices becomes a challenging undertaking.

Traditional slavery as defined in the 1926 Slavery Convention¹⁶⁸ referred to a condition where ownership was exercised over another person, thus entitling owners to treat slaves as mere possessions that could be bought

¹⁶¹ Picarelli 2007:27.

¹⁶² Picarelli 2007:27.

¹⁶³ See the discussion of the term “servitude”, referring to a variety of slavery-like practices, in 2.2.2.3.2.c of Chapter 2 above.

¹⁶⁴ See 2.3 above and 2.2.2.3.2.c in Chapter 2 above.

¹⁶⁵ Debt bondage and peonage are forms of forced labour “in which a person is not paid for labour in lieu of cancellation of a debt” – Picarelli 2007:27; see also 2.3 above and 2.2.2.3.2.c in Chapter 2 above.

¹⁶⁶ See 2.2.2.3.2.c in Chapter 2 above.

¹⁶⁷ Picarelli 2007:27. Indentured servitude is described as a form of unfree labour where servants agree to work for a fixed term in return for board and free passage. This forced labour practice was common in the 17th and 18th eighteenth centuries when labourers were transported from Britain or Europe to the Americas – Picarelli 2007:27, 30.

¹⁶⁸ <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008).

and sold.¹⁶⁹ This type of slavery is referred to as chattel slavery.¹⁷⁰ Weissbrodt and Anti-Slavery International¹⁷¹ indicate that the wording of this definition in the Slavery Convention can be interpreted broadly, since it includes “*any* or all powers of ownership” exercised over another, and the Convention’s purpose is set out as the abolition of slavery “in *all* its forms” (my emphasis).¹⁷² In spite of this, Rijken¹⁷³ and others¹⁷⁴ conclude that, in contrast to servitude, slavery has a narrow, traditional interpretation which includes the ownership rights of the slave owner and the destruction of the slave’s juridical personality. Bassiouni endorses this view as well and highlights that:

...the basic legal element in international instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial and limited in time, it is removed from the system of protections developed by these international instruments.¹⁷⁵

Accordingly, the slavery definition in the Slavery Convention is narrowly interpreted, focusing on ownership, on causing the restriction of freedom

¹⁶⁹ Slavery Convention: article 1(1); Allain 2008:67-68; Dottridge and Weissbrodt 1999:248; Weissbrodt and Anti-Slavery International 2002:7; Picarelli 2007:27-29; see also 2.2.2.3.2.c in Chapter 2 above.

¹⁷⁰ According to Weissbrodt and Anti-Slavery International 2002:7, traditional slavery, or “chattel slavery”, implied that owners were allowed to treat slaves as “if they were possessions, like livestock or furniture, and to sell or transfer them to others”. For a further discussion, see Picarelli 2007:27-29.

¹⁷¹ Weissbrodt and Anti-Slavery International 2002:3-5.

¹⁷² Article 2 The High Contracting Parties undertake ... so far as they have not already taken the necessary steps:
to prevent and suppress the slave trade;
to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

¹⁷³ Rijken 2003:75, 78.

¹⁷⁴ Nowak 2005:198; Smith 2007:222; Allain 2008:67-68.

¹⁷⁵ Bassiouni 1990/1991:459.

and on total physical control of another person.¹⁷⁶ Where full ownership is absent, the practices concerned are classified as slavery-like practices or forms of servitude.¹⁷⁷ However, Weissbrodt and Anti-Slavery International¹⁷⁸ rightly emphasise that, in practice, it is not always easy to distinguish between slavery and slavery-like practices.

4.2 Relationship of human trafficking to slavery

Slavery has not only been abolished by all general international human rights instruments,¹⁷⁹ but it is also internationally recognised as a distinct crime in customary international law.¹⁸⁰ In addition, Bassiouni¹⁸¹ and other authors¹⁸² confirm that slavery has attained the status of *ius*

¹⁷⁶ Bassiouni 1990/1991:459, 457-458; Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:4, 7; Allain 2008:67-68.

¹⁷⁷ Nowak 2005:198; Haysom 2002:178; Smith 2007:222-223. These slavery-like practices are also prohibited in international instruments – see 2.2.2.3.2.c in Chapter 2 above and 2 in Chapter 5 below.

¹⁷⁸ Weissbrodt and Anti-Slavery International 2002:6.

¹⁷⁹ Nowak 2005:196; Devenish 2005:77. Apart from the Slavery Conventions, the prohibition against slavery is encapsulated in: articles 8(1) and (2) of the 1966 UN International Covenant on Civil and Political Rights – <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008); article 4 of the 1948 Universal Declaration of Human Rights – <http://www.un.org/Overview/rights.html> (accessed 31/1/2005); and article 5 of the 1981 African Charter on Human and Peoples' Rights – <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed 12/3/2008).

¹⁸⁰ Viljoen 2007:26-27; Weissbrodt and Anti-Slavery International 2002:3; Dottridge and Weissbrodt 1999:243-244. Bales and Robbins 2001:19 describe customary international law as “the general practices of states, which over time becomes binding law”. For a further discussion of the historical background of slavery, see Bales 2004c:57-60. Bassiouni 1990/1991:447-448 points out that, according to international law sources, “slavery, slave-related practices and forced labour constitute:
- a ‘war crime’ when committed by a belligerent against the nationals of another belligerent;
- a ‘crime against humanity’ when committed by public officials against any person...
- a common international crime when committed by public officials or private persons against a person”.

¹⁸¹ Bassiouni 1990/1991:445.

¹⁸² Viljoen 2007:27-28; Devenish 2005:77; Brownlie 2003:488-489; Weissbrodt and Anti-Slavery International 2002:3; Rijken 2003:74; Bales and Robbins 2001:19; Dottridge and Weissbrodt 1999:243; Nowak 2005:197. In public international law, no limitation is allowed in respect of the prohibition against slavery as well as the prohibition against servitude, which refers to

cogens, which comprises peremptory norms in international law in respect of which no derogation is permitted.¹⁸³

Although human trafficking is recognised as a distinct crime,¹⁸⁴ it has been, and still is, linked and even conflated with slavery.¹⁸⁵ A substantial part of the literature describes human trafficking as a “modern-day form of slavery”.¹⁸⁶ This view raises the question whether the numerous international slavery conventions can be applied to human trafficking as well.¹⁸⁷ Accordingly, it is necessary to obtain clarity about the relationship between human trafficking and slavery. For purposes of comparing these two phenomena, the definition of “trafficking in persons” in the Palermo Protocol¹⁸⁸ and the definition of “slavery” in the 1926 Slavery

slavery-like practices – Haysom 2002:179; Naidu 1987:108; see also 2.2.2.3.2.c in Chapter 2 above.

¹⁸³ Weissbrodt and Anti-Slavery International 2002:3; Bales and Robbins 2001:19. Dugard 2005:43 points out that *ius cogens* originates from the 1969 Vienna Convention on the Law of Treaties – http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 22/7/2008), and specifically article 53 of this Convention.

Article 53 A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It is important to note that the Vienna Convention codified the customary rules of international law – Bassiouni 1990/1991:449.

¹⁸⁴ Rijken 2003:75.

¹⁸⁵ Farrior 1997:221; Rijken 2003:75; Gallagher and Holmes 2008:320.

¹⁸⁶ US Department of State 2007:8; see also US Department of State 2008:1; Dottridge and Weissbrodt 1999:260; Nowak 2005:195; Picarelli 2007:26; Weissbrodt and Anti-Slavery International 2002:19.

¹⁸⁷ Rijken 2003:75.

¹⁸⁸ Article 3(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.

See the discussion in 2.2 in Chapter 2 above.

Convention¹⁸⁹ are used.

4.2.1 *Overlapping of human trafficking and slavery*

The literature indicates that human trafficking and slavery overlap in more than one instance. Dottridge and Weissbrodt list significant characteristics of slavery, namely ownership, coercive control exercised by the owner, the restriction of freedom of movement and the absence of the slave's informed consent.¹⁹⁰ Most of these characteristics are also common in human trafficking scenarios. Traffickers also often use various means to place trafficked persons under their control,¹⁹¹ thus depriving them of freedom of movement.¹⁹² The force or deception used by traffickers to obtain a trafficked person's consent nullifies such consent.¹⁹³ Despite these significant similarities, the ownership and other features are not identical.

4.2.2 *Differences between human trafficking and slavery*

A closer examination of human trafficking compared with slavery reveals the following differences.

¹⁸⁹ <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008). Article 1(1) defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" – see also 2.2.2.3.2.c in Chapter 2 above and 2.1.2 in Chapter 5 below.

¹⁹⁰ Dottridge and Weissbrodt 1999:248; Weissbrodt and Anti-Slavery International 2002:7; Bassiouni 1990/1991:459; Allain 2008:67-68.

¹⁹¹ See 2.3 above.

¹⁹² Weissbrodt and Anti-Slavery International 2002:12; Bassiouni 1990/1991:458; Dottridge and Weissbrodt 1999:253.

¹⁹³ Palermo Protocol: article 3(b) – Addendum A; UN.GIFT 2008b:5; Gajic-Veljanoski and Stewart 2007:341.

4.2.2.1 Ownership

The key distinctive feature of traditional slavery is the ownership exercised over another person.¹⁹⁴ The definition in the Palermo Protocol distinguishes human trafficking from slavery by not including the concept of ownership.¹⁹⁵ Lee¹⁹⁶ also emphasises that human trafficking:

...as a contemporary form of slavery is marked not by legal ownership of one human being over another or long-term enslavement, but by temporary ownership, debt bondage, forced labour and hyper-exploitative contractual arrangements in the global economy.

However, a complicating factor is that, in practice, the control which traffickers exercise over trafficked persons resembles the ownership powers that are exercised over property.¹⁹⁷ The rights of ownership include the right to possess the property, the right to manage the property by deciding when, where, how and by whom the owned property is used, the right to the income derived from the owned property, and the right to dispose of, or pass on, the interest in the property to others by, for example, selling it.¹⁹⁸ Likewise, it has been documented that traffickers “manage” trafficked persons by deciding where, how and by whom they are used,¹⁹⁹ appropriate the income derived from the

¹⁹⁴ Allain 2008:67-68; Kamidi 2007:11; UNODC 2009b:21. Weissbrodt and Anti-Slavery International 2002:7 emphasise that traditional slavery implied that owners could treat slaves as mere possessions – see also UNODC 2009b:21.

¹⁹⁵ Article 3(a) – Addendum A.

¹⁹⁶ Lee 2007:3.

¹⁹⁷ See also 2.3 above.

¹⁹⁸ UNODC 2009b:21.

¹⁹⁹ Bales 2004a:4; Cockburn 2003:10.

trafficked person's services²⁰⁰, and, like owners of property, dispose of victims by reselling them or by abandoning them as "disposable people".²⁰¹

Notwithstanding this reality, it is wise that ownership is not included as a prerequisite for human trafficking, because this would narrow down the definition so that many of the role players in the trafficking ring would go unpunished. For example, while the trafficker often exercises control over the victim, other agents in the trafficking ring, such as the recruiter, the transporter and the kingpin, usually do not exercise ownership powers over the trafficked person.

On the same basis, labour trafficking can also be distinguished from slavery, because the definition of forced labour in the 1930 ILO Convention (No. 29)²⁰² does not include the concept of ownership.²⁰³ Again, Weissbrodt and Anti-Slavery International²⁰⁴ rightly point out that, in reality, forced labour is often accompanied with "a similar degree of restriction on the individual's freedom – often through violent means, making forced labour similar to slavery in its effects on the individual". While the definitions in international instruments distinguish forced labour and labour trafficking from slavery, the coercion and control in a real-life

²⁰⁰ McClain 2007:583; Kreston 2007:38; Haynes 2004:223; Gajic-Veljanoski and Stewart 2007:339; Horn 2010:10; McClain 2007:583; Harrold 2006:101; Singh 2004:341; Snyman 2005:282.

²⁰¹ Bales 2004a:4; UNODC 2009a:8-12, 78-292; US Department of State 2009:7-8, 58-307; US Department of State 2007:8-29.

²⁰² See 2.2.2.3.2.b in Chapter 2 above.

²⁰³ Dottridge and Weissbrodt 1999:253; Weissbrodt and Anti-Slavery International 2002:12.

²⁰⁴ Weissbrodt and Anti-Slavery International 2002:12; see also Bassiouni 1990/1991:458; Dottridge and Weissbrodt 1999:253, 256.

trafficking scenario diminish, and often eliminate, the difference between slavery and labour trafficking.

The Rome Statute of the International Criminal Court,²⁰⁵ which court aims to complement national criminal jurisdictions in the exercise of their jurisdiction over perpetrators of specified serious crimes,²⁰⁶ links slavery to human trafficking. “Enslavement”, which is listed as a crime against humanity, is defined in the Rome Statute as “the exercise of any or all powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.²⁰⁷ This definition of enslavement is similar to the definition of slavery in the 1926 Slavery Convention,²⁰⁸ but also includes human trafficking when ownership is exercised over the trafficked person.²⁰⁹ Accordingly, Marks and Clapham²¹⁰ conclude that human trafficking may be prosecuted under the crime of enslavement in the International Criminal Court.

The difference between slavery and human trafficking as regards the ownership element is therefore not absolute. As indicated above, the literature is not unanimous in this respect, but has various nuances concerning the issue.

²⁰⁵ http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 21/8/2008); see also 2.3.11 in Chapter 5 below.

²⁰⁶ Article 1; Kamidi 2007:23.

²⁰⁷ Article 7(2)(c) – http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 21/8/2008).

²⁰⁸ Article 1(1) – <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008); see also 2.2.2.3.2.c in Chapter 2 above.

²⁰⁹ Bales and Robbins 2001:26.

²¹⁰ Marks and Clapham 2005:423.

4.2.2.2 Legal personality

As regards traditional slavery, it is to be noted that, since slaves were reduced to mere property of their owners, they did not have legal personality.²¹¹ Smith²¹² endorses this view, maintaining that slavery is “essentially a narrow concept entailing the total eradication of the legal personality of the individual concerned”.

In contrast, the definition of trafficking in the Palermo Protocol does not strip trafficked persons of their legal personality. The control that is exercised by traffickers over trafficked persons by force, deception or the abuse of vulnerability is not deemed to constitute legal ownership. However, the situation in practice may be different. Nowak explains in this regard that:

[w]hen a 16 year old girl in Thailand is sold to the owner of a brothel, made addicted to drugs against her will and then forced to work in this condition as a prostitute, she may very well continue to possess *de jure* legal personality. *De facto*, however, she is nothing more than a mere tool in the hands of another person.²¹³

4.2.2.3 Immutable servile status

Another difference between slavery and human trafficking is that relating to the status of the victim. The duties of traditional slaves are allocated to

²¹¹ Nowak 2005:198. However, Dooling argues that a different legal position obtained in respect of slaves in the 18th century in the Cape Colony. Relying on Roman common law, Dooling argues that slaves were not only regarded as property, but were also granted legal personality. Still, since the principle of legal equality did not apply, slaves only had very limited legal rights – Dooling 1992:29, 55, 66, 72, 78-79, 82. The right to recognition of a person before the law is recognised in several human rights instruments, for example in article 6 of the 1948 Universal Declaration of Human Rights – <http://www.un.org/Overview/rights.html> (accessed 18/8/2008) – and article 16 of the International Covenant on Civil and Political Rights – <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008).

²¹² Smith 2007:222.

²¹³ Nowak 2005:195.

them, usually at birth, by virtue of their unchangeable servile status.²¹⁴ Although, in practice, trafficked persons' freedom may be restricted in a similar way to that of slaves, neither the Palermo Protocol nor the literature indicates that trafficked persons have an immutable servile status.

4.2.2.4 Intent of the perpetrators

The intent of the perpetrator may in some circumstances point to a significant difference between slavery and human trafficking. In the case of traditional slavery, the intent of the perpetrator is to exploit a person as a slave. On the other hand, the required exploitative intent for human trafficking prescribed in the Palermo Protocol is not limited to slavery only, but also covers other exploitative purposes, such as prostitution and the removal of organs.²¹⁵ Consequently, some forms of human trafficking are clearly distinguished from slavery, in that the perpetrators have different intentions.

4.2.2.5 *Modus operandi*

Apart from ownership, legal personality and intent, human trafficking differs from slavery with regard to the *modus operandi* used. In traditional slavery, slaves were held as property and were thus deemed to be rather valuable. In contrast, in human trafficking, the contemporary form of slavery, the services for which trafficked people are exploited, and not the people themselves, are seen as profitable, but, once these services cannot be delivered or are no longer required, the trafficked person has

²¹⁴ Haysom 2002:177. Serfs also have such an immutable status – Haysom 2002:178-179; Rijken 2003:75; see also 2.2.2.3.2.c in Chapter 2 above.

²¹⁵ Article 3(a) – Addendum A; see also UNODC 2006:xii; Bassiouni 1990/1991:459.

no value and is treated like a disposable commodity.²¹⁶ Morawska²¹⁷ endorses this view that, when victims are no longer of use to their so-called employers, they simply discard them. Therefore, unlike slave owners, who usually buy and keep slaves for themselves, often for the duration of the slave's life span, traffickers rather recruit, transport and sell victims to make a profit, and, when victims become a burden, they are simply disposed of.

Furthermore, while buyers and sellers are the main role players in the slave trade, trafficking often accommodates a trafficking network with many role players, ranging from master traffickers organising the crime to recruiters, transporters, assistants contacting and bribing the authorities, money collectors, book-keepers, people accommodating the victims, assistants guarding and managing trafficked victims, and clients paying for trafficked persons' services.²¹⁸

Another difference relates to the physical and psychological methods traffickers use to gain and maintain control over their victims.²¹⁹ Victim compliance is achieved by, for example, threatening victims and their families. Shelley²²⁰ states that traffickers' ability to control victims by intimidating "both the victim and the family at home differentiates contemporary trafficking from the slave trade of earlier centuries".

²¹⁶ Picarelli 2007:28.

²¹⁷ Morawska 2007:100.

²¹⁸ UN.GIFT 2008c:11; Laczko and Gramegna 2003:180; Morawska 2007:101.

²¹⁹ See 2.3 above.

²²⁰ Shelley 2007:132.

Having highlighted the differences between these two phenomena, it can be concluded that human trafficking is usually not included in the traditional concept of slavery as narrowly interpreted in terms of the Slavery Convention.²²¹

4.3 Relationship of human trafficking to slavery-like practices

Subsequent to the international ban on traditional slavery, perpetrators introduced a wide range of contemporary slavery-like practices, which are generally referred to as “modern slavery”.²²² Although human trafficking is generally not included in traditional slavery, many parallels exist between traditional and modern forms of slavery.²²³ In 1999, the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour²²⁴ declared that child trafficking is a practice similar to slavery.²²⁵ A substantial part of the literature also considers human trafficking to be a modern, slavery-like practice.²²⁶ The reason for categorising human trafficking as such a slavery-like practice is that major features inherent in slavery, such as people being treated as commodities, coercive control, the absence of

²²¹ Rijken 2003:76; Bassiouni 1990/1991:467-468 confirms this view, stating that the Slavery Convention’s definition of slavery with its focus on ownership is too limited to apply to new forms of slavery.

²²² UN Supplementary Slavery Convention: article 1; Nowak 2005:195.

²²³ Lee 2007:3; Picarelli 2007:45.

²²⁴ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008).

²²⁵ Article 3; US Department of State 2008:21; Weissbrodt and Anti-Slavery International 2002:29. Regrettably, this ILO Convention does not spell out what is covered by the concept “trafficking” – Weissbrodt and Anti-Slavery International 2002:29.

²²⁶ Nowak 2005:195; Rijken 2003:77; Lee 2007:4; Bassiouni 1990/1991:457; Whitaker 1984:iii; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:32; Smith 2007:222-223, 227.

informed consent and restriction of movement, are also common to human trafficking.²²⁷

Although a number of sources do not include human trafficking under traditional slavery, Rijken holds a different view. Recognising that the Supplementary Convention of 1957 extended the concept of slavery to include slavery-like practices as well, Rijken argues that human trafficking, in qualifying as such a slavery-like practice, is included in the concept of slavery.²²⁸ For this reason, Rijken further draws the conclusion that the Slavery Conventions are applicable to human trafficking.²²⁹ However, it must be pointed out that such a statement is too simplistic. The Slavery Conventions may perhaps be applicable to trafficking for the purpose of slavery, but they cannot be applicable to trafficking for other purposes, such as for the removal of organs.

In reflecting on the agreements and disagreements in the trafficking debate, this investigation indicates that the literature is divided and often vague concerning the relationship of human trafficking to slavery and slavery-like practices. However, in the light of the analysis of the relationship between these closely related phenomena, this study does not include contemporary human trafficking under the traditional term “slavery”, but rather categorises it as a form of slavery-like practice.

²²⁷ Rijken 2003:76; Nowak 2005:195; Dottridge and Weissbrodt 1999:248; Lee 2007:3; Weissbrodt and Anti-Slavery International 2002:7. Furthermore, since forced marriages are recognised as a slavery-like practice in article 1(c)(i) of the 1956 Supplementary Slavery Convention, trafficking for forced marriages also overlaps with this slavery-like practice – see 2.2.2.3.2.c in Chapter 2 above.

²²⁸ Rijken 2003:78, 89.

²²⁹ Rijken 2003:79, 89.

4.4 Difficulty in assessing the relationship between the phenomena

In the light of the controversy regarding this issue, the relationship of human trafficking to slavery and slavery-like practices is difficult to assess, especially because of the lack of clear-cut definitions of these multifaceted phenomena and the fact that the literature is divided on the issue.²³⁰ What makes it even more difficult to distinguish between these phenomena is the fact that, in practice, they are frequently linked and intertwined, and even overlap with each other. However, the differences identified between human trafficking and slavery indicate that human trafficking is not identical to traditional slavery. Nonetheless, many of the features common to human trafficking are also associated with slavery. Therefore, most sources agree that human trafficking, which is identified as a contemporary form of slavery, is to be regarded as a slavery-like practice.²³¹

5. SYNOPSIS OF THE DISTINCTIVE FEATURES OF HUMAN TRAFFICKING

In pursuit of a thorough understanding of human trafficking, this study focused on various facets of this phenomenon in the three Chapters making up Part I of such study. The distinctive features of the complex

²³⁰ Bales and Robbins 2001:20.

²³¹ Rijken 2003:76; Nowak 2005:195.

and multifaceted crime are therefore summarised to allow a holistic view of this criminal activity.

First, the human trafficking crime is identified by the internationally agreed-upon definition contained in the Palermo Protocol.²³² In this Protocol, the three distinctive parts of human trafficking are identified, namely the commission of proscribed acts by proscribed means for the purpose of exploitation.²³³ The prohibited actions are narrowed down to the “recruitment, transportation, transfer, harbouring or receipt of persons”.²³⁴ The second definitional part lists the proscribed means for committing the crime, which include force, coercion or deception, the abuse of power or vulnerability, or a combination of these methods.²³⁵ This part of the definition is often emphasised as a key feature, noting that “the common denominator of trafficking scenarios is the use of force, fraud or coercion to exploit a person for profit”.²³⁶ The third definitional part requires that traffickers must have an exploitative purpose when the crime is committed.²³⁷ “Exploitation” is a broad term encompassing all forms of exploitation.²³⁸ Furthermore, the term is usually interpreted to include exploitation resulting in some kind of profit for the trafficker.²³⁹

²³² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008) – Addendum A.

²³³ See 2.2.2 in Chapter 2 above.

²³⁴ Article 3(a) – Addendum A; see also 2.2.2.1 in Chapter 2 above; UN.GIFT 2008b:5.

²³⁵ See 2.2.2.2 in Chapter 2 above.

²³⁶ US Department of State 2009:7.

²³⁷ See 2.2.2.3 in Chapter 2 above.

²³⁸ Rijken 2003:60; Foundation Against Trafficking in Women *et al.* 2001:5.

²³⁹ Le Roux 2008:6; IOM 2007:23; Rijken 2003:65; Snyman 2008:479-481.

Apart from the definitional parts of the crime, the literature indicates that the control which traffickers exercise over their victims is widely acknowledged as a distinctive feature of the crime.²⁴⁰ The Palermo Protocol does not include control by traffickers over their victims as an element of the crime. However, in practice, traffickers do restrict the liberty of victims by means of stringent control throughout the trafficking process, thereby ensuring that victims do not run away and thus deprive traffickers of their ongoing profits.²⁴¹ Accordingly, it is submitted, it should be considered whether exercise of control over another and the consequent restrictions of liberty should not be included in the definition of human trafficking as pointers that a specific scenario constitutes human trafficking.

Another distinctive and complicating feature of human trafficking is the fact that this crime presents itself in a myriad of forms. The variety of exploitative purposes for which victims are trafficked divides the crime into various categories, such as sex trafficking, labour trafficking, trafficking for purposes of crime, slavery-like practices, the removal of body parts, the illegal adoption of children, and forced marriages. A further factor dividing the crime into the categories of either cross-border or in-country trafficking is whether or not a victim was trafficked across international borders.

Rather than comprising a single criminal event, human trafficking is more of a criminal process consisting of a number of criminal activities

²⁴⁰ Stuurman 2004:5; Defeis 2003/2004:488; Foundation Against Trafficking in Women *et al.* 2001:6; Shelley 2007:125; David 2007:2.

²⁴¹ Acknowledging the crucial role of ownership in a slavery scenario, Haysom 2002:178 suggests that an accessible definition would describe slavery as "occurring when the victim is under the control of another person and within that person's ownership".

perpetrated in three consecutive phases, namely in the recruitment, transportation and exploitation phases.²⁴² Therefore, human trafficking has been described as “a collection of crimes bundled together”.²⁴³ Linked to this feature of human trafficking is the fact that the crime can be committed by only one person, but, more often than not, is committed by a group or a criminal network made up of various role players.²⁴⁴

A further distinctive feature of some forms of human trafficking is the transnational nature of the crime. In this regard, a distinction is drawn between transnational crimes perpetrated by organised criminal groups and other transnational crimes not perpetrated by such groups.²⁴⁵ Unlike most forms of in-country trafficking, cross-border trafficking often complies with the criteria for both these forms of transnational crime.²⁴⁶ However, it is an oversimplification, and incorrect, to state that a distinctive feature of all types of human trafficking is their transnational nature. Therefore, although a transnational element is indeed a distinctive feature of many forms of trafficking, one must guard against the generalised conclusion that all forms of trafficking are characterised by a transnational feature.

Specific causes and consequences are associated with human trafficking. Traffickers prey on the vulnerable. Various causes and risk factors that contribute to making persons vulnerable to human trafficking

²⁴² UNODC 2006:xx; UN.GIFT 2008c:11.

²⁴³ UNODC 2006:xx.

²⁴⁴ Singh 2004:343; UNODC 2006:xix.

²⁴⁵ See the discussion in 2.2.2 and 2.2.3 above.

²⁴⁶ UNODC 2006:xx.

are part of the human trafficking scenario.²⁴⁷ Although the crime is committed primarily against individuals, the consequences affect not only the victims, but also origin, transit and destination countries, thus culminating in a global threat.²⁴⁸

To conclude, human trafficking is a complex crime with distinctive features. However, in practice, it is often difficult to distinguish it from other related crimes such as people smuggling, slavery and slavery-like practices.²⁴⁹

6. CONCLUSION

This Chapter focused on the distinctive features of human trafficking so as to inform the understanding of the phenomenon. Since the three formal parts of the crime provided for in the Palermo Protocol were dealt with in Chapter 2, this Chapter focused on other distinctive features.

In assessing whether human trafficking has a transnational nature, the present Chapter identified the criteria set for two types of transnational crime. First, it was shown that cross-border human trafficking committed by an “organised criminal group” does comply with the criteria set for transnational crimes in terms of the Organized Crime Convention, but that in-country trafficking committed by individuals does not. Secondly, as

²⁴⁷ See 2 in Chapter 3 above.

²⁴⁸ See 3 in Chapter 3 above.

²⁴⁹ Lansink 2006:47; UNODC 2006:xiv; Rijken 2003:72; Bales and Robbins 2001:36; see also 3 above.

regards other transnational crimes not committed by organised criminal groups, the human trafficking crime was also measured against the four criteria laid down by Rijken for these transnational crimes.²⁵⁰ The conclusion was provisionally drawn that cross-border human trafficking complies with Rijken's criteria and constitutes such a transnational crime in cases where the prosecution problems are aggravated, because more than one state is involved.²⁵¹ However, in-country trafficking does not meet the requirements for such transnational crimes.

In further examining the defining features of human trafficking, it was indicated that traffickers typically use various abusive measures to control victims and restrict their liberty.²⁵² This feature of the crime has the following result: brutalised victims remain vulnerable, dependent and powerless and are therefore easy prey for exploitation over and over again.

Having reflected on the distinctive features of the crime, the present Chapter compared human trafficking with human smuggling, slavery and slavery-like practices. Such comparison revealed significant similarities, but also an array of differences.²⁵³ By looking at the definitions of these phenomena in international instruments, it was possible to distinguish human trafficking from the other phenomena. However, in practice, they are often linked and even overlap with one another.²⁵⁴

²⁵⁰ Rijken 2003:45-53, 87.

²⁵¹ Rijken 2003:243.

²⁵² See 2.3 above.

²⁵³ See 3 and 4 above.

²⁵⁴ Weissbrodt and Anti-Slavery International 2002:12.

Part I of this study aimed to inject some conceptual clarity and critical insights into our understanding of the complex phenomenon of human trafficking. Having highlighted the key features of human trafficking, the study will proceed to draw on the background provided in Part I. Acknowledging that human trafficking is exceptionally multifaceted, the present study concedes that the issues covered in Part I are not dealt with exhaustively, but merely serve as a foundation for the rest of the study.

**PART II: STANDARDS FOR DOMESTIC LEGAL RESPONSES TO COMBAT HUMAN
TRAFFICKING**

CHAPTER 5

INTERNATIONAL AND AFRICAN REGIONAL FRAMEWORK ON HUMAN TRAFFICKING

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- 2.4.4 *The 1966 International Covenant on Economic, Social and Cultural Rights*
- 2.4.5 *The 1966 International Covenant on Civil and Political Rights*
- 2.4.6 *The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

- 3. **AFRICAN REGIONAL FRAMEWORK**
 - 3.1 **The 1981 African Charter on Human and Peoples' Rights**
 - 3.2 **The 1990 African Charter on the Rights and Welfare of the Child**
 - 3.3 **The 2001 Economic Community of West African States Declaration on the Fight Against Trafficking in Persons**
 - 3.4 **The 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa**
 - 3.5 **The 2004 Solemn Declaration on Gender Equality in Africa**
 - 3.6 **The 2006 African Youth Charter**
 - 3.7 **The 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children**
 - 3.8 **The 2008 Southern African Development Community Protocol on Gender and Development**
 - 3.9 **The 10 Year Southern African Development Community Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (2009-2019)**
 - 3.10 **Guidance from the African regional framework**

- 4. **CONCLUSION**

PART II: STANDARDS FOR DOMESTIC LEGAL RESPONSES TO COMBAT HUMAN TRAFFICKING

CHAPTER 5

INTERNATIONAL AND AFRICAN REGIONAL FRAMEWORK ON HUMAN TRAFFICKING

1. INTRODUCTION

The development of the treaties which form the international and African¹ regional framework on human trafficking is mapped out in this Chapter. These treaties enjoin states parties to comply with numerous obligations to combat human trafficking.

Several United Nations conventions and regional instruments form the international legal framework within which States must define their own laws in order to address effectively the problem of human trafficking.²

Obligations have to be drawn from the international and African regional human trafficking framework in order to address the main research problem of the study, namely to investigate whether the South African legal response designed to combat human trafficking is aligned with

¹ For an explanation as to why only African and not other regional instruments are included in the study, see 7 in Chapter 1 above.

² UNODC 2006:1.

these obligations. Accordingly, this Chapter addresses the second objective of the study, namely to identify the obligations drawn from the abovementioned human trafficking framework which must be complied with in domestic counter-trafficking responses.³ In line with the focus of the study, only those obligations relevant to legal and, more specifically, broad criminal justice concerns are covered.

Although the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol)⁴ is the landmark treaty on human trafficking, it is submitted that the international framework pertaining to human trafficking is not found in only one overarching instrument.⁵ As far back as 1815, numerous international and regional instruments evolved which culminated in the current framework on human trafficking.⁶ Accordingly, the Palermo Protocol can be seen as:

...part of a continuum of instruments that deal with trafficking and related activities, in particular slavery. These reflect the basic facts that both trafficking and legal responses to it have been evolving for a very long time.⁷

For this reason, the savings clause of the Palermo Protocol provides that such Protocol does not narrow down or affect pre-existing rights, obligations or responsibilities in terms of existing international law, including international humanitarian law and international human rights

³ The aims and objectives of the study are set out in 3 in Chapter 1 above.

⁴ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

⁵ UNODC 2004:255-256.

⁶ SALRC 2004:4; Farrior 1997:215.

⁷ UNODC 2004:339-340.

law.⁸ On this issue, the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides)⁹ advise domestic legislators to review customary international law and other relevant instruments in developing and implementing national legislation.¹⁰ In line with this recommendation, it is submitted that, to examine only the Palermo Protocol so as to identify minimum standards for domestic anti-trafficking responses would be too narrow an approach. This Chapter therefore adopts a broader, more comprehensive approach by including numerous instruments relevant to human trafficking. South Africa has ratified many of these instruments, thereby placing an obligation on itself “to bring its domestic laws and policies in line with the standards set by these instruments”.¹¹

2. INTERNATIONAL FRAMEWORK

International endeavours to eradicate slavery and, by implication, also modern-day slavery began more than a century ago. Although an in-depth assessment of all international instruments relevant to human trafficking falls outside the scope of this study, this Chapter charts prominent instruments forming the international legal framework on human trafficking. Given the connection of human trafficking with slavery

⁸ Article 14(1) of the Palermo Protocol; UNODC 2004:255-256.

⁹ <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html> (accessed 17/8/2010).

¹⁰ UNODC 2004:255-256. The UNODC Legislative Guides provide a list of instruments to be considered by drafters of national anti-trafficking legislation – UNODC 2004:256, 260-263.

¹¹ SALRC 2004:4.

and forced labour,¹² applicable international instruments on these topics are included, followed by the international instruments focusing more specifically on human trafficking. Apart from the Convention Against Transnational Organized Crime,¹³ the following are also covered: the Convention's Palermo Protocol, relevant child- and gender-specific instruments, as well as migration and human rights instruments.¹⁴ From these instruments that emerged over time to form the broad international and African regional framework on human trafficking, minimum standards are drawn for the purpose of domestic, counter-trafficking responses.

2.1 International instruments pertaining to slavery

Human trafficking is often regarded as a modern manifestation of slavery and is categorised as a slavery-like practice.¹⁵ In acknowledging the historical links between human trafficking and slavery, it is apposite to provide an overview of the development of international instruments on slavery.¹⁶

¹² Bruch 2004:6.

¹³ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008); Raymond 2002:492-493. For an overview of the process preceding the adoption of the Convention, see Gallagher 2001:975-977.

¹⁴ This is not an exhaustive list of international and regional instruments pertaining to human trafficking. Other instruments, such as humanitarian, social progress and development instruments, are also applicable, but do not fall within the scope of this study – see also UNODC 2008:16-28.

¹⁵ Nowak 2005:200; see also the discussion of the relationship between human trafficking and slavery and slavery-like practices in 4 of Chapter 4 above.

¹⁶ Farrior 1997:221; Dugard 2005:328. In this regard, Lee 2007:2 maintains that human trafficking is a historical phenomenon rather than a purely modern problem.

Bassiouni¹⁷ points out that slavery has gradually evolved from being morally unacceptable to an international crime. In the 19th century, the first international conventions to abolish the slave trade, which trade consisted mainly of European empires enslaving inhabitants from Africa, were developed.¹⁸ Initially, many states were reluctant to condemn slavery owing to the economic benefit of the slave trade and the escalating demand for slaves from countries such as the United States of America (USA).¹⁹ Since 1815, numerous international instruments²⁰ have been adopted to abolish slavery and related crimes.²¹

2.1.1 Initial international instruments on slavery

The first instrument to ban slavery, namely the Declaration Relative to the Universal Abolition of the Slave Trade (Vienna Declaration), was signed in Vienna and entered into force in 1815.²² Dottridge and Weissbrodt²³ state that “the abolitionist movement began as an effort to

¹⁷ Bassiouni 1990/1991:450.

¹⁸ Bassiouni 1990/1991:450.

¹⁹ Bassiouni 1990/1991:450.

²⁰ Bassiouni 1990/1991:454 divides these instruments relating to slavery into four categories:

- (a) specific international instruments dealing with slavery;
- (b) other international instruments referring to slavery and slave-related practices;
- (c) general human rights instruments, universal as well as regional, referring to slavery or slave-related practices;
- (d) international instruments on slavery under the law of armed conflicts.

According to Bassiouni 1990/1991:453, “seventy nine separate international instruments and documents have addressed the issue of slavery, the slave trade, slave-related practices, forced labor and their respective institutions”. For a more detailed discussion of these instruments, see Bassiouni 1990/1991:459-517.

²¹ The historical development of the main international instruments pertaining to slavery is dealt with in this Chapter, but instruments on slavery under the law of armed conflicts fall outside the scope of this study.

²² Weissbrodt and Anti-Slavery International 2002:3; Dottridge and Weissbrodt 1999:243; Bassiouni 1990/1991:459; Nowak 2005:197; Bassiouni 1986:421-422; Van de Glind and Kooimans 2008:151; Bales and Robbins 2001:19. For a further discussion of this Declaration, see Tomuschat 2003:13-14.

²³ Dottridge and Weissbrodt 1999:243; Weissbrodt and Anti-Slavery International 2002:3; Bales and Robbins 2001:19.

stop the Atlantic slave trade and to free slaves in the colonies of European countries and in the United States". Accordingly, the purpose of this Declaration was to abolish the slave trade and to obligate states parties to prevent, prohibit, prosecute and punish slavery.²⁴ However, the Declaration did not contain provisions to enforce the abolition of the slave trade. A few years later, the 1822 Declaration Respecting the Abolition of the Slave Trade reaffirmed the abolition of the slave trade.²⁵

As regards the African slave trade in particular, the 1841 Treaty for the Suppression of the African Slave Trade followed, its purpose being to give full effect to the provisions of the Vienna Declaration of 1815.²⁶

According to Lee:

...human trafficking has historical parallels with the traffic in and exploitation of black Africans in previous centuries, when the colonial slave trade was considered not only a lawful, but desirable branch of commerce by European empires.²⁷

A greater number of states signed the 1885 General Act of the Conference Respecting the Congo (General Act of Berlin), thereby undertaking to suppress slavery and the slave trade in the Congo.²⁸ In seeking to lay down more stringent penalties relating to slavery, the Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, Spirituous and Liquors (General Act and

²⁴ Bales and Robbins 2001:19; Bassiouni 1990/1991:459-460.

²⁵ Bassiouni 1990/1991:460.

²⁶ Bassiouni 1990/1991:460-461; Nowak 2005:197; Bassiouni 1986:423-424.

²⁷ Lee 2007:1.

²⁸ Bassiouni 1990/1991:461; Bassiouni 1986:425-426.

Declaration of Brussels) was adopted in 1890.²⁹ Similar to its predecessors, the 1890 Convention also implicitly recognised the penal nature of slavery by establishing not only a duty to prevent such practice, but also to prohibit, prosecute and punish proscribed conduct related to the slave trade.³⁰

The 1919 Treaty of Saint-Germain-en-Laye³¹ repealed both the 1885 General Act of Berlin and the 1890 General Act and Declaration of Brussels.³² The 1919 Treaty focused mainly on commercial equality arrangements between the parties to the Treaty, but also explicitly prohibited the slave trade and slavery in all its forms.³³

Although the 1904 International Agreement for the Suppression of the “White Slave Traffic” and the 1910 International Convention for the Suppression of the “White Slave Traffic” included the term “slave” in their titles, these instruments focused more on trafficking in women for purposes of prostitution and sexual exploitation³⁴ and are therefore discussed in 2.3 below.

²⁹ Nowak 2005:197; Bassiouni 1990/1991:462; Bassiouni 1986:427-430; Dottridge and Weissbrodt 1999:260; Weissbrodt and Anti-Slavery International 2002:18.

³⁰ Bassiouni 1990/1991:462. With the aim of further eradicating slavery, this Convention also regulated firearms and spirituous liquors in Africa – Bassiouni 1990/1991:463; Bassiouni 1986:429-430. The Convention was reaffirmed in the 1890 Treaty between Great Britain and Spain for the Suppression of the African Slave Trade – Bassiouni 1990/1991:463.

³¹ The full designation of this treaty is the Convention Revising the General Act of Berlin, February 26, 1885, and The General Act and Declaration of Brussels, July 2, 1890 – <http://www.jstor.org/stable/2213280> (accessed 22/9/2008). This Convention was adopted in 1919 and entered into force in 1920 – Bassiouni 1990/1991:465.

³² Article 13; Bassiouni 1990/1991:465 in footnote 261.

³³ Article 11; Bassiouni 1990/1991:465.

³⁴ Bruch 2004:8.

2.1.2 *The 1926 Slavery Convention*

The Slavery Convention,³⁵ which came into force in 1927, was a milestone in the quest to eradicate slavery, in that it was the first instrument to define slavery internationally.³⁶ This definition of slavery, in which slavery is deemed to be “the status of a person over whom any or all of the powers attaching to the right of ownership are exercised”, has not been replaced and is still acknowledged in the current international legal context.³⁷ Different views exist as to whether the slavery definition includes contemporary human trafficking. While Farrior³⁸ states that victims of trafficking for prostitution fall within the scope of the slavery definition, Bassiouni³⁹ rightly points out that the slavery definition, with its emphasis on ownership, is too limited to be applied to all slavery-like practices and to new forms of slavery.

Apart from containing the slavery definition, the Slavery Convention further provides that parties to the Convention, which include South Africa,⁴⁰ undertake:

³⁵ <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008); Brownlie and Goodwin-Gill 2006:307. When the League of Nations ceased to exist, the United Nations adopted this treaty in 1953, with only minor technical amendments, in the Protocol Amending the Slavery Convention – Harrold 2006:103; Brownlie and Goodwin-Gill 2006:307; Bales and Robbins 2001:19-23; UNODC 2004:262. According to Harrold 2006:102, the goal of this treaty was specifically to counter the enslavement of Africans.

³⁶ Article 1(1); see also the discussion in 2.2.2.3.2.c in Chapter 2 above; Weissbrodt and Anti-Slavery International 2002:4; Van de Glind and Kooimans 2008:151; Smith 2007:222.

³⁷ See the recent judgment on 7 January 2010 of the European Court of Human Rights in *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:29; see also Weissbrodt and Anti-Slavery International 2002:6; Bales and Robbins 2001:25; Dottridge and Weissbrodt 1999:247.

³⁸ Farrior 1997:221.

³⁹ Bassiouni 1990/1991:468; see also Farrior 1997:221.

⁴⁰ South Africa acceded to this Convention on 18 June 1927 – DFA 2005:1.

- (a) to prevent and suppress the slave trade; and
- (b) to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.⁴¹

Although the Convention does not contain a provision specifically criminalising slavery, it seems that states parties commit implicitly to the criminalisation of slavery and the slave trade and to the duty to prosecute and punish the proscribed conduct stringently.⁴² The utilisation of forced labour in such a way that it develops into “conditions analogous to slavery” is also not specifically criminalised, but parties undertake to adopt all measures necessary to prevent this as well.⁴³

Despite the Convention’s positive contribution to the outlawing of slavery and related practices, Bales and Robbins⁴⁴ point out that it has not created “an international body that [can] evaluate and pursue allegations of violations”. The mechanisms for enforcing the provisions of this Convention are therefore weak.⁴⁵

⁴¹ Article 2; Farior 1997:221; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:29.

⁴² Article 6 Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions.
See also *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:29.

⁴³ Article 5 The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

⁴⁴ Bales and Robbins 2001:22; see also Bassiouni 1990/1991:467-468; Farior 1997:221.

⁴⁵ For a further discussion of the weak enforcement mechanisms, see Farior 1997:221.

What is apposite for the purpose of this study is that Bassiouni⁴⁶ emphasises the call on parties to the Convention to “bring about, progressively, the complete abolition of slavery in all its forms” so that it becomes illegal to exercise ownership over another person. As regards international standard-setting, Harrold⁴⁷ rightly concludes that, although ratifying parties are called upon to “undertake to adopt all appropriate measures” to prevent and suppress the slave trade, a strong, mandatory standard for criminalising slavery is not clearly laid down.

In stronger terms, the Convention stipulates that all parties to the Convention:

...shall give to one another every assistance with the object of securing the abolition of slavery and the slave trade.⁴⁸

Thus, a clear obligation on parties to cooperate and assist one another in abolishing slavery is laid down.

2.1.3 *The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*

Parties to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention)⁴⁹ agreed that, although the 1926

⁴⁶ Bassiouni 1990/1991:467; see also Farrior 1997:221.

⁴⁷ Harrold 2006:103.

⁴⁸ Article 4; see also Bassiouni 1990/1991:467.

⁴⁹ This Convention came into force in 1957 and brought the 1926 Slavery Convention into the United Nations system – <http://www.unhchr.ch/html/menu3/b/30.htm> (accessed 12/3/2008); Farrior 1997:222; OHCHR 2008a:1, 4; Bassiouni 1990/1991:480; Brownlie and Goodwin-Gill 2006:312.

Slavery Convention remained operative,⁵⁰ a number of other practices analogous to slavery also had to be abolished.⁵¹

As regards the provision of clear definitions of crimes, the Convention confirms the definition of slavery as set out in the Slavery Convention.⁵² In addition, certain practices related to slavery are also defined in the Convention.⁵³ These practices are debt bondage,⁵⁴ serfdom,⁵⁵ some practices relating to women,⁵⁶ and practices in which minors are

⁵⁰ See Preamble – <http://www.unhcr.ch/html/menu3/b/30.htm> (accessed 12/3/2008).

⁵¹ Article 1; Bassiouni 1990/1991:481; Bassiouni 1986:486-489; Farrior 1997:221; Dottridge and Weissbrodt 1999:246; Weissbrodt and Anti-Slavery International 2002:5-6; Van de Glind and Kooimans 2008:151; Smith 2007:222; Bales and Robbins 2001:23, 25.

⁵² Article 7(a).

⁵³ Article 7(b) “A person of servile status” means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.

Article 7(c) also defines the term “slave trade” so as to include all acts involved in the “capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance”.

⁵⁴ Article 1(a) Debt bondage, that is to say, the status or condition arising from a pledge by the debtor of his or her personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

See the discussion in 2.2.2.3.2.c in Chapter 2 and in 2.3 in Chapter 4 above; Currie and De Waal 2005:312; Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:11-12, 14-16; Rijken 2003:75; ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, including debt bondage as among the “worst forms” as prohibited in article 3(a) – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008).

⁵⁵ Article 1(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determined service to such person, whether for reward or not, and is not free to change his status.

See the discussion in 2.2.2.3.2.c in Chapter 2 above; Dottridge and Weissbrodt 1999:251-252; Haysom 2002:178-179; Rijken 2003:75; Weissbrodt and Anti-Slavery International 2002:11-12.

⁵⁶ Article 1(c)(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

delivered by their parents or guardians to other persons for exploitation.⁵⁷ The Convention stipulates that a “person of servile status”⁵⁸ is a person who is subjected to one of these prohibited slavery-like practices.

Bassiouni⁵⁹ points out that, unlike the 1926 Slavery Convention, this Convention clearly criminalises slavery:

The act of enslaving another person ... shall be a criminal offence under the laws of the states parties to this Convention and persons convicted thereof shall be liable to punishment.⁶⁰

In addition, the Convention also criminalises other acts with historical links to contemporary human trafficking, namely inducing a person into

-
- (ii) The husband of a woman, his family or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman on the death of her husband is liable to be inherited by another person.

See the discussion in 2.2.2.3.2.c in Chapter 2 above; Haysom 2002:178; Rijken 2003:75; Currie and De Waal 2005:312.

⁵⁷ Article 1(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

See also Dottridge and Weissbrodt 1999:246-247; Weissbrodt and Anti-Slavery International 2002:5-6.

⁵⁸ Article 7(b); see also Bales and Robbins 2001:23.

⁵⁹ Bassiouni 1990/1991:481.

⁶⁰ Article 6(1).

servile status⁶¹ or transporting a slave to another country.⁶² Farrior⁶³ emphasises that this Convention clearly lays down an international obligation for states parties to impose domestic criminal sanctions on perpetrators who engage in slavery and prohibited slavery-like practices. However, South Africa did not ratify the Convention.⁶⁴ Accordingly, these obligations emanating from the Convention do not directly apply to non-parties such as South Africa.

The obligation on states to cooperate with one another to give effect to the provisions of the Conventions is not strongly formulated. While the 1926 Slavery Convention stipulates that parties “shall” render assistance to one another, this Convention only requires parties “to undertake” to

⁶¹ Article 6(2) Subject to the provisions of the introductory paragraph of article 1 of this Convention, the provisions of paragraph 1 of the present article shall also apply to the act of inducing another person to place himself or a person dependent upon him into the servile status resulting from any of the institutions or practices mentioned in article 1, to any attempt to perform such acts, to being accessory thereto, and to being a party to a conspiracy to accomplish any such acts.

⁶² Article 3(1) The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.
See also Bales and Robbins 2001:23-24. Article 5 further criminalises the branding, or marking in some other way, of slaves or persons of servile status in order to indicate their status.

⁶³ Farrior 1997:222. Regrettably, the Convention has no provisions for monitoring implementation. Furthermore, the enforcement provisions contained in article 8(2) and (3) are also weak, requiring only “a mild reporting mechanism similar to that of the 1926 [Slavery] Convention” – Farrior 1997:222-223. However, from 1974 onwards, states parties have had to submit regular reports on slavery and trafficking to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which reports are reviewed together with those reports submitted by parties to the Slavery Convention and the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (discussed in 2.3.5 below) – Farrior 1997:223.

⁶⁴ UN 2002:1-10.

cooperate with one another to give effect to the provisions of the Supplementary Slavery Convention.⁶⁵

2.2 International instruments pertaining to forced labour

In view of the link between forced labour and human trafficking for the purpose of forced labour,⁶⁶ international instruments on forced labour are included in the international framework on human trafficking. Although many international instruments refer to forced labour,⁶⁷ only some instruments of the International Labour Organisation (ILO) most relevant to this study are covered below. It is important to bear in mind that the ILO instruments address human trafficking “from a labour market perspective”.⁶⁸

2.2.1 *The 1930 ILO Convention Concerning Forced Labour*

Marks and Clapham⁶⁹ point out that human trafficking frequently violates the right not to be subjected to forced labour. ILO Convention No. 29 Concerning Forced Labour (Forced Labour Convention)⁷⁰ prohibits

⁶⁵ Article 8(1) The States Parties to this Convention undertake to co-operate with each other and with the United Nations to give effect to the foregoing provisions. See also Bassiouni 1990/1991:481; Farrior 1997:221.

⁶⁶ See the discussion in 2.2.2.3.2.c in Chapter 2 above.

⁶⁷ For example: article 5 of the 1926 Slavery Convention; article 8(3)(1) of the 1966 International Covenant on Civil and Political Rights; article 6(1) of the 1966 International Covenant on Economic, Social and Cultural Rights; and article 32(1) of the 1989 Convention on the Rights of the Child.

⁶⁸ HSRC 2010:28.

⁶⁹ Marks and Clapham 2005:423.

⁷⁰ <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008). This Convention was adopted in 1930 by the General Conference of the International Labour Organisation and entered into force in 1932 – Bassiouni 1990/1991:469; Brownlie and Goodwin-Gill 2006:502.

forced labour as a form of economic exploitation⁷¹ and is therefore relevant to human trafficking issues.⁷²

From the discussion so far, it is clear that human trafficking has links with slavery and with forced labour. However, it is important to note that there are three significant differences between slavery and forced labour. First, while the prohibition of slavery is unqualified, it must be borne in mind that the Forced Labour Convention allows exceptions to the general prohibition on forced labour.⁷³ These exceptions include compulsory military service, prison labour as a consequence of a conviction in a court of law, the normal civic obligations of a citizen, and work exacted during a national emergency.⁷⁴ Importantly, the exceptions are allowed for public purposes only, and comprehensive conditions must be met.⁷⁵ Provided that the conditions set out in the Forced Labour Convention are complied with, certain forms of forced labour are not *per se* a crime. In short, there is an absolute prohibition regarding slavery, but certain exceptions to the prohibition of forced labour are allowed.

Secondly, a further difference between acceptable forced labour in terms of the ILO Forced Labour Convention and slavery relates to the protection of worker rights. The ILO instrument provides that persons of whom acceptable forced labour is demanded still have the same worker

⁷¹ Brownlie and Goodwin-Gill 2006:502.

⁷² Farrior 1997:223; see also 2.2.2.3.2.b in Chapter 2 above.

⁷³ Article 5; see also Bassiouni 1990/1991:468; Bassiouni 1986:446-449; Bales and Robbins 2001:21; Dottridge and Weissbrodt 1999:253.

⁷⁴ Article 2; Van de Glind and Kooimans 2008:151; Smith 2007:224-225.

⁷⁵ Articles 1(2), 2(2), 5 and 9-21; Bassiouni 1990/1991:469-471.

rights as persons performing voluntary work.⁷⁶ Bassiouni⁷⁷ points out that, in an acceptable forced labour case, “with the exception of freedom of contract, the usual worker rights such as wages, safe working conditions, and maximum hours of work are maintained”.⁷⁸ On the other hand, persons subjected to traditional slavery could not enforce basic worker rights because the slaveholder owned the slave.⁷⁹

A third notable difference between the abovementioned slavery conventions and the ILO Forced Labour Convention pertains to the obligation on states parties to cooperate with one another to give effect to the provisions of conventions. While this obligation is included in the slavery conventions,⁸⁰ it is not part of the ILO Convention.

The Forced Labour Convention is of specific importance in this study for the purpose of definitional clarification and of standard-setting regarding the criminalisation of illegal forced labour. First, the Convention defines the concept “forced labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁸¹ This definition is

⁷⁶ Articles 13-17.

⁷⁷ Bassiouni 1990/1991:471.

⁷⁸ See articles 13 and 14.

⁷⁹ The definition of slavery in the 1926 Slavery Convention emphasises that the slaveholder has ownership rights over the slave – see the discussion in 2.1.2 above. Dottridge and Weissbrodt 1999:253 underpin the view that forced labour differs fundamentally from slavery in that it does not include the key concept of ownership.

⁸⁰ See 2.1.2 and 2.1.3 above.

⁸¹ Article 2(1); Dottridge and Weissbrodt 1999:253; Weissbrodt and Anti-Slavery International 2002:12; Smith 2007:222.

internationally recognised.⁸² Secondly, the Forced Labour Convention explicitly abolishes the use of forced labour in all its forms⁸³ and recognises the illegal use of forced labour as a crime under international law.⁸⁴ Accordingly, members who ratify the Convention are enjoined to prosecute and adequately punish the illegal use of forced labour:

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and strictly enforced.⁸⁵

In 1997, South Africa ratified the Forced Labour Convention⁸⁶ and therefore incurred the duty to criminalise illegal forced labour and to enforce adequate penalties.

2.2.2 *The 1957 ILO Convention Concerning the Abolition of Forced Labour*

Linked to the 1930 Forced Labour Convention, ILO Convention No. 105 Concerning the Abolition of Forced Labour⁸⁷ reinforces the prohibition of

⁸² See the discussion in 2.2.2.3.2.b in Chapter 2 above; Gallinetti and Kassan 2008:73; HSRC 2010:28.

⁸³ Article 1(1) Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

⁸⁴ Article 25 The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and strictly enforced.
Bassiouni 1990/1991:469; HSRC 2010:28.

⁸⁵ Article 25; Bassiouni 1990/1991:469; Bassiouni 1986:451; HSRC 2010:28.

⁸⁶ SALRC 2006:23 in footnote 75; ILOLEX 2006:1; HSRC 2010:28.

⁸⁷ <http://www.unhchr.ch/html/menu3/b/32.htm> (accessed 18/7/2008). This Convention was adopted in 1957 and entered into force in 1959 – Bassiouni 1990/1991:481; Brownlie and Goodwin-Gill 2006:527.

forced labour by specifying certain forms of forced labour that must be completely abolished. These forms of forced labour are those relating to political coercion, punishment for political views, education, economic development, labour discipline, discrimination, and so forth.⁸⁸ The implied duty to prosecute and to punish is incorporated in the duty to abolish these proscribed forms of forced labour completely and immediately.⁸⁹ South Africa ratified this Convention in 1997.⁹⁰

While the 1930 Forced Labour Convention aims at countering forced labour for economic exploitation, ILO Convention No. 105 Concerning the Abolition of Forced Labour focuses on proscribing forced labour as a means of political coercion.⁹¹ Given that human trafficking has a strong emphasis on economic exploitation, the former Convention seems to be more applicable to human trafficking than the latter.

2.2.3 *The 1973 ILO Convention Concerning Minimum Age for Admission to Employment*

ILO Convention No. 138 Concerning Minimum Age for Admission to Employment (Minimum Age Convention)⁹² is an international attempt to eradicate child labour. To abolish child labour, each member state ratifying this Convention:

⁸⁸ Article 1; Dottridge and Weissbrodt 1999:254.

⁸⁹ Article 2 Each member of the International Labour Organisation which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in article 1 of this Convention.
Bassiouni 1990/1991:482; Bassiouni 1986:491.

⁹⁰ ILOLEX 2006:1.

⁹¹ Brownlie and Goodwin-Gill 2006:527.

⁹² This ILO Convention was adopted in 1973 and came into force in 1976 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> (accessed 12/3/2008); Brownlie and Goodwin-Gill 2006:538.

...undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.⁹³

The Minimum Age Convention deals with various aspects of child labour. To begin with, the Convention stipulates that the minimum age for admission to employment “shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years”.⁹⁴ Furthermore, the minimum age for admission to work which is likely to be hazardous to a person’s health, safety or morals may not be less than 18 years.⁹⁵ In addition, national laws may permit children as young as 13 years to do “light work”, provided that such work does not interfere with schooling or is not detrimental to the child’s health or development.⁹⁶

That children are trafficked for forced labour has been well documented.⁹⁷ Given the fact that many of these trafficked children are very young, often of age five and upwards,⁹⁸ there is a link between child trafficking for labour purposes and child labour.⁹⁹ Trafficking young children for labour purposes also constitutes a child-labour violation.

⁹³ Article 1.

⁹⁴ Article 2(3); Dottridge and Weissbrodt 1999:277; Weissbrodt and Anti-Slavery International 2002:38. However, article 2(4) allows, at the initial stage, that the minimum age of employment may be lowered to 14 years in developing countries in certain circumstances – IOM 2008:20; Gallinetti and Kassan 2008:75.

⁹⁵ Article 3(1). Article 3(2) allows for the age limit to be lowered to 16 years in certain circumstances; see also Gallinetti and Kassan 2008:75.

⁹⁶ Article 7(1); see also Gallinetti and Kassan 2008:75.

⁹⁷ US Department of State 2007:31; Blagbrough 2008:184-185; see also 2.2.2.3.2.b in Chapter 2 above.

⁹⁸ Blagbrough 2008:180.

⁹⁹ Blagbrough 2008:180.

Accordingly, the obligation to eradicate child labour is also relevant in child trafficking cases where children are economically exploited.¹⁰⁰ Therefore, this ILO Convention is included in the international framework relating to human trafficking.

To enforce the various prohibitions on child labour, the Minimum Age Convention places the following obligation on ratifying states:

All necessary measures, including the provision of appropriate penalties, shall be taken by the competent authority to ensure the effective enforcement of the provisions of this Convention.¹⁰¹

South Africa ratified this Convention in 2000¹⁰² and is therefore obligated to enforce the provisions of the treaty by appropriate measures such as the criminalising of child-labour violations and providing adequate penalties for such violations.¹⁰³

2.2.4 *The 1999 ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*

The foundation laid in the earlier ILO Convention Concerning Minimum Age for Admission to Employment¹⁰⁴ to eradicate child labour was strengthened by the adoption of the 1999 ILO Convention No. 182

¹⁰⁰ Gallinetti and Kassan 2008:76.

¹⁰¹ Article 9.

¹⁰² ILOLEX 2006:1.

¹⁰³ In response to these obligations, South Africa criminalised various forms of child labour in section 43 of the *Basic Conditions of Employment Act 75* of 1997; see also Horn 2010:79 and the discussion in 4.2.2.4 in Chapter 7 below.

¹⁰⁴ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> (accessed 12/3/2008). Article 2 defines a child as a person under the age of 18 years.

Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention on the Worst Forms of Child Labour).¹⁰⁵ This latter Convention not only reinforced but also expanded the obligation to abolish child labour by requiring states to eliminate the most offensive forms of child labour within certain time frames.¹⁰⁶

As regards terminology clarification, the Convention describes the “worst forms of child labour” so as to include:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹⁰⁷

Article 3(a) of the Convention links human trafficking with the worst forms of child labour by explicitly including “trafficking of children” as a practice similar to slavery and in need of urgent elimination.¹⁰⁸ Furthermore,

¹⁰⁵ This Convention was adopted in 1999 and came into force in 2000 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008); Dottridge and Weissbrodt 1999:278; Weissbrodt and Anti-Slavery International 2002:38; Brownlie and Goodwin-Gill 2006:574.

¹⁰⁶ Gallinetti and Kassan 2008:243-244; Hodgkin and Newell 2002:524-525.

¹⁰⁷ Article 3 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008).

¹⁰⁸ Horn 2010:77; Gallinetti and Kassan 2008:243-244; Farrior 1997:223. Blagbrough 2008:180, 184-185 reports that “figures from a number of countries indicate the CDWs [Child Domestic Workers] can be counted in the millions worldwide”, indicating the huge demand for child

Kassan¹⁰⁹ rightly submits that, while the use of a child for the exploitative purposes of prostitution, pornographic or illicit activities is listed in article 3(b) and (c) above as worst forms of child labour, these forms of child abuse also constitute trafficking in children in terms of the definition in the Palermo Protocol.¹¹⁰ Regrettably, the Convention fails to define what constitutes “trafficking of children”.¹¹¹

The Convention obligates ratifying members to take immediate and effective time-bound measures to eliminate the worst forms of child labour.¹¹² Member states must implement the provisions of the Convention by way of effective measures, including the application of penal sanctions.¹¹³ By implication, member states must criminalise these worst forms of child labour and prosecute the perpetrators involved therein.¹¹⁴ Unlike the earlier Forced Labour Convention, this Convention further requires members to cooperate internationally to give effect to the provisions of the Convention.¹¹⁵

labour, which results in perpetrators trafficking children to exploit this profitable market. A further alarming example of child trafficking practices for the purpose of forced labour is that of cocoa farms in West Africa where, it is reported, between 10 000 and 15 000 children are working – US Department of State 2007:31; Gallinetti and Kassan 2008:242.

¹⁰⁹ Kassan 2007:18–5.

¹¹⁰ Article 3(c) – Addendum A; see also the discussion in 2.2.4 in Chapter 2 above.

¹¹¹ Weissbrodt and Anti-Slavery International 2002:29.

¹¹² Article 1; see also Hodgkin and Newell 2002:524-525; Kassan 2007:18–5; US Department of State 2008:21; Weissbrodt and Anti-Slavery International 2002:29; Kamidi 2007:22; Horn 2010:77-78; HSRC 2010:28-29.

¹¹³ While article 1 stipulates that each member ratifying this Convention must take immediate measures to eliminate these forms of child labour, article 7 obligates each member to take “all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention, including the provision and application of penal sanctions...”. See also Weissbrodt and Anti-Slavery International 2002:29; Horn 2010:78.

¹¹⁴ Horn 2010:79.

¹¹⁵ Article 8; Horn 2010:78.

South Africa ratified the Convention on 7 June 2000¹¹⁶ and is therefore obliged to comply with the obligations to cooperate internationally, to criminalise the worst forms of child labour, and to prosecute and punish the perpetrators involved in these forms of child labour.¹¹⁷

2.3 International instruments pertaining to human trafficking

The first international conference on human trafficking held in Paris in 1895, and the conferences held in London and Budapest four years later, paved the way for the development of further international instruments on this topic.¹¹⁸

2.3.1 The 1904 International Agreement for the Suppression of the “White Slave Traffic”

In 1904, the League of Nations adopted the International Agreement for the Suppression of the “White Slave Traffic” (1904 Agreement)¹¹⁹ to curb

¹¹⁶ SALRC 2006:23 in footnote 78; ILOLEX 2006:1; IOM 2008:20; HSRC 2010:28.

¹¹⁷ South Africa addressed these obligations in national legislation by criminalising forms of child labour, such as forced labour, in section 48 of the *Basic Conditions of Employment Act* 75 of 1997 and by criminalising the creation, possession, production and distribution of child pornography in section 2(b), read with section 27(1)(a), of the *Films and Publications Act* 65 of 1996 and in section 20 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 – see also 4.2.2.4, 4.2.2.12 and 4.2.2.14 in Chapter 7 below and Horn 2010:97,112-117. In addition, from 1 April 2010, trafficking of children was criminalised in section 284 of the *Children’s Act* 38 of 2005; see also 4.3.2.1 in Chapter 7 below.

¹¹⁸ Singh 2004:345; Snyman 2005:285; Bruch 2004:4 in footnote 13.

¹¹⁹ <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html> (accessed 12/3/2008); see also Defeis 2003/2004:485; Bassiouni 1990/1991:463-464; Bassiouni 1986:431-434; Snyman 2005:285. The Agreement entered into force in 1905 and was amended by the Protocol signed at Lake Success in 1949, which South Africa accepted in 1951 – DFA 2005:2; UNODC 2004:263. The League of Nations was mandated to perform specific duties toward the fulfilment of the 1904 Agreement and the Traffic Conventions of 1910, 1921 and 1933. The League of Nations ceased to exist in 1946 and was replaced by the United Nations, which was established in 1945 – Dugard 2005:20. Therefore, various Protocols and other instruments technically amended these instruments by indicating that the United Nations accepted the performance of the duties in place of the League of Nations – Bassiouni 1986:455-474; Bassiouni 1990/1991:472-477, 479.

the procurement of white women “for immoral purposes abroad”.¹²⁰ In view of the fact that adverse economic conditions at the time rendered women vulnerable to being forced into prostitution, this Agreement primarily aimed at halting the trade in white women across international borders into forced prostitution.¹²¹

Various aspects of this Agreement are open to criticism. First, protection is given to white women and girls only.¹²² Secondly, terminological clarity is lacking concerning the meaning of core concepts such as “criminal traffic”, “immoral purposes” and, especially, “white slave traffic”.¹²³ A third point of criticism that can be levelled against the 1904 Agreement is that the narrow perception that human trafficking can be equated with the trafficking of women for commercial sexual exploitation can be traced back to this and subsequent international agreements adopted in the early 20th century.¹²⁴ Furthermore, the Agreement does not include criminalisation provisions, but focuses mainly on the protection of women against “criminal traffic” known as the “White Slave Traffic”.¹²⁵ Apart from the reference in the Preamble to victims that have suffered “abuse or

¹²⁰ Article 1 Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad; this authority shall be empowered to correspond directly with the similar department established in each of the other Contracting States.

See also Singh 2004:345; HSRC 2010:18-19; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:30.

¹²¹ Farrior 1997:216; Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19; Rijken 2003:54; Defeis 2003/2004:485; Bales and Robbins 2001:22; HSRC 2010:18-19; Bruch 2004:2 in footnote 4.

¹²² See the Title and Preamble of the Agreement; Farrior 1997:216. Bruch 2004:3 points out that “the early emphasis on protecting white women now seems obviously racist and sexist”.

¹²³ Bales and Robbins 2001:23; Bruch 2004:8.

¹²⁴ Lee 2007:4.

¹²⁵ Farrior 1997:216; Rijken 2003:54; see also the Preamble to this Agreement.

compulsion”, coercion is not stipulated as an element of trafficking.¹²⁶ Lastly, although participating governments agreed to gather, coordinate and share relative information, to use it to detect “criminal traffic” and to facilitate the repatriation of trafficked women,¹²⁷ the provisions fall short of a strong obligation to cooperate internationally.

2.3.2 *The 1910 International Convention for the Suppression of the “White Slave Traffic”*

The adoption, in 1910, of the International Convention for the Suppression of the “White Slave Traffic” (1910 Traffic Convention)¹²⁸ built on the foundation laid in the 1904 Agreement. Similar to its predecessor, the Convention did not define key terms such as “white slave traffic”.¹²⁹ In this regard, Bales and Robbins submit that, from the 17th to 18th century, slavery was generally understood as an institution in terms of which black people were owned as property. In the early 20th century:

...trafficking in women was given a racialised definition as the *white* slave trade and relationships characterised by violent control and economic exploitation, but without the benefit of legal ownership, were termed “similar institutions and practices”.¹³⁰

¹²⁶ Rijken 2003:54 holds a different view on the coercion element. Without referring to the relevant articles in the 1904 Agreement, Rijken avers that this Agreement stipulates that coercion is an element of trafficking in adult women, but not for the trafficking of minors. The author of the present study disagrees with Rijken on this point, since no substantiation for Rijken’s view that coercion is a required element is to be found in the 1904 Agreement.

¹²⁷ Articles 1-4, 5.

¹²⁸ <http://www1.umn.edu/humanrts/instate/whiteslavetraffic1910.html> (accessed 15/4/2008). The Final Protocol, which forms part of the Convention, states in Part B that “under age” refers to women under the age of 20 years – http://www1.umn.edu/humanrts/instate/whiteslavetraffic_1910.html (accessed 15/4/2008). The 1910 International Convention for the Suppression of the “White Slave Traffic” was also amended by the United Nations Protocol signed at Lake Success in 1949 – UNODC 2004:263.

¹²⁹ Bruch 2004:8.

¹³⁰ Bales and Robbins 2001:23; Bruch 2004:2 in footnote 4.

Apart from its lack of definitions, the scope of the Convention is more comprehensive than that of the 1904 Agreement. The Convention is broader in that it, by implication, includes in-country trafficking, since it does not require that trafficking must be across international borders.¹³¹ Also, recognising that the narrow approach of the 1904 Agreement, which focused only on the protection of victims, was ineffective, the 1910 Convention included provisions to punish perpetrators.¹³² This Convention includes two offences, namely the procurement of underage girls¹³³ for immoral purposes, even with their consent,¹³⁴ as well as the use of fraud or compulsion to procure women and overaged girls for immoral purposes.¹³⁵ In other words, the trafficking of female children and trafficking for forced prostitution are criminalised.

Although not compelled to do so, contracting parties are at least urged to take legislative steps to punish these offences appropriately.¹³⁶

¹³¹ Article 1; Rijken 2003:54. Article 1 of the 1904 Agreement specifically refers to the procurement of women for immoral purposes “abroad”, while such reference is omitted in the 1910 Convention.

¹³² Bassiouni 1986:435-437; Rijken 2003:54; Farrior 1997:216. This Convention was amended by the Protocol signed at Lake Success in 1949, which South Africa accepted in 1951 – DFA 2005:2.

¹³³ The meaning of the phrase “a woman or girl under age” in article 1 is not further clarified in the Convention.

¹³⁴ Article 1 Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl under age for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

¹³⁵ Article 2 Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.
Rijken 2003:54 interprets articles 1 and 2 to mean that coercion is an element of the trafficking of adult women, but is not required for the trafficking of minors.

¹³⁶ Article 3 The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding articles engage to take or to propose to their respective legislatures the necessary steps to punish these offences according to their gravity.

Furthermore, the Convention stipulates that the offences created by it are deemed to be included in the list of offences for extradition.¹³⁷ While no comprehensive international cooperation is included, some communication between contracting parties is required.¹³⁸

2.3.3 *The 1921 International Convention for the Suppression of the Traffic in Women and Children*

The International Convention for the Suppression of the Traffic in Women and Children (1921 Traffic Convention), which was the first treaty to address trafficking under the auspices of the League of Nations,¹³⁹ was adopted in 1921.¹⁴⁰ The 1921 Traffic Convention aimed to strengthen the previous 1910 Traffic Convention by adding further measures to protect women and children against the dangers of trafficking¹⁴¹ and by expanding the criminalisation provisions.¹⁴²

As regards provisions concerning prosecution, the 1921 Convention not only underpinned the 1910 Traffic Convention, but also broadened the criminalisation of trafficking by including both attempts and preparatory

In 1949, the Protocol Amending the 1904 Agreement for the Suppression of the “White Slave Traffic” and the 1910 International Convention for the Suppression of the “White Slave Traffic” amended these two instruments as regards minor issues and became part of the 1910 Convention – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html> (accessed 15/04/2008); Bassiouni 1990/1991:463-464; UNODC 2004:263.

¹³⁷ Article 5.

¹³⁸ Article 7.

¹³⁹ The League of Nations was established in 1920 – Bruch 2004:6 in footnote 20, 9.

¹⁴⁰ <http://www.jstor.org/stable/2212987> (accessed 15/9/2008).

¹⁴¹ Provisions aimed at protection are included in articles 6 and 7. Such provisions include regulations requiring employment agencies to protect women and children seeking employment in other countries and awareness-raising by means of public notices; see also Farrior 1997:217; Rijken 2003:55.

¹⁴² Articles 2 and 3; Bruch 2004:8.

acts to commit the offences specified in the 1910 Traffic Convention.¹⁴³ In addition, contracting parties agreed for the first time to prosecute persons trafficking children of both sexes, and not only girls, as was the case in the previous 1904 and 1910 instruments.¹⁴⁴ The 1921 Traffic Convention thus expanded the scope of protection by recognising that underage boys could also be trafficked.¹⁴⁵ South Africa signed this Convention in 1922.¹⁴⁶

2.3.4 *The 1933 International Convention for the Suppression of the Traffic in Women of Full Age*

The International Convention for the Suppression of the Traffic in Women of Full Age (1933 Traffic Convention)¹⁴⁷ was adopted in 1933 with the purpose of supplementing the previous three instruments on trafficking¹⁴⁸ by securing “more completely the suppression of traffic in women and children”.¹⁴⁹

¹⁴³ Article 3 – <http://www.jstor.org/stable/2212987> (accessed 15/9/2008); Bassiouni 1990/1991: 465-466; Bassiouni 1986:441-444.

¹⁴⁴ Article 2 – <http://www.jstor.org/stable/2212987> (accessed 15/9/2008).

¹⁴⁵ Rijken 2003:55. In this regard, Snyman 2005:285 states that this Convention recognises that “males” can be trafficked victims. However, article 2 of the Convention only includes the prosecution of trafficking in “*children of both sexes*” (my emphasis). The author of the present study therefore disagrees with Snyman that the scope was broadened to include all males. Rather, it was broadened only to include underage boys.

¹⁴⁶ DFA 2005:1.

¹⁴⁷ http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008). Similar to other previous instruments under the League of Nations, this instrument was also technically amended by the 1947 United Nations Protocol signifying that the United Nations took over the responsibilities under this treaty from the League of Nations – UNODC 2004:263.

¹⁴⁸ The three instruments are the Agreement of 1904 and the Conventions of 1910 and 1921 on trafficking in women and children – see the Preamble to the 1933 Convention.

¹⁴⁹ See the Preamble to the 1933 Traffic Convention – http://www.oas.org/Juridico/mla/en/traites/entraites-inter-women_1933.pdf (accessed 12/3/2008); see also Bassiouni 1986:452-454; Bruch 2004:8. South Africa signed this Convention in 1935 – DFA 2005:1.

Parties to the 1933 Traffic Convention agreed to add a new crime. Whereas trafficking into forced prostitution was criminalised in previous instruments,¹⁵⁰ this treaty for the first time criminalised the voluntary procurement of adult women into prostitution.¹⁵¹ Stated differently, the trafficking of a woman of full age, “even with her consent”, was prohibited.¹⁵² Rijken¹⁵³ points out that coercion is not an element of the offence¹⁵⁴ and that consent as a defence to such trafficking is ruled out.¹⁵⁵ In addition, attempts to commit the offence were also criminalised.¹⁵⁶ Importantly, contracting parties also agreed to punish these offences “in accordance with the gravity of the offence”.¹⁵⁷ However, it must be noted that the Convention does not prohibit the trafficking of adult women into voluntary prostitution within the borders of the same country, but only if it is “carried out in another country”.¹⁵⁸

¹⁵⁰ Article 2 of the 1910 Traffic Convention.

¹⁵¹ Article 1 Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

See also Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19; Rijken 2003:55; Bruch 2004:9.

¹⁵² Article 1.

¹⁵³ Rijken 2003:55, 60.

¹⁵⁴ Article 1.

¹⁵⁵ Article 1; Fariior 1997:217.

¹⁵⁶ Section 1.

¹⁵⁷ Article 2; Bruch 2004:8.

¹⁵⁸ The requirement of cross-border trafficking is not included in article 2 of the 1910 Traffic Convention where trafficking in underage girls is concerned. See also Bassiouni 1990/1991:471-472; Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19; Rijken 2003:55; Bruch 2004:8.

Apart from agreeing to add a new crime, parties to the Convention also undertook to further strengthen anti-trafficking efforts by cooperating with one another. The undertaking to cooperate mainly covered the sharing of relevant information about offences on trafficking of women and children.¹⁵⁹

2.3.5 *The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*

In reflecting on the preceding four trafficking instruments introduced in the first half of the 20th century, it is clear that a focus on law enforcement and cooperation emerged. However, these treaties limited trafficking to women and children trafficked for purposes of prostitution and sexual exploitation only.¹⁶⁰ In 1949, the United Nations consolidated and replaced these earlier trafficking treaties by adopting the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Traffic in Persons Convention).¹⁶¹ Rijken¹⁶² identifies two major developments in the evolution of the trafficking crime up to the 1949 Convention. At first, only forced trafficking was criminalised, but, later, the trafficking of adult women into voluntary prostitution was also prohibited. Secondly, the criminalisation of the recruitment and transportation of trafficked persons (referred to as the

¹⁵⁹ Article 3.

¹⁶⁰ Bruch 2004:11.

¹⁶¹ See the Preamble and article 28 of the 1949 Convention – <http://www.unhchr.ch/html/menu3/b/33.htm> (accessed 11/3/2008). The Convention came into force in 1951. See also Snyman 2005:285; Farrior 1997:217; Rijken 2003:55; Defeis 2003/2004:485; Smith 2007:222; Bassiouni 1990/1991:477-478; Bassiouni 1986:475-477; Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19; HSRC 2010:19. Unlike other sources, the UNODC Legislative Guidelines document the year of this treaty as being 1950 and not 1949 – UNODC 2004:263.

¹⁶² Rijken 2003:57.

“procurement, enticing or leading away” of victims) was expanded to include the exploitation of the prostitution of others, thereby also prohibiting the keeping, managing or financing of brothels.¹⁶³

On the one hand, the 1949 Traffic in Persons Convention introduced a number of significant innovations. The first innovation pertained to who was protected from being trafficked. The previous four trafficking instruments protected only women and girls, but later included underage boys as well.¹⁶⁴ This Convention was the first to prohibit trafficking “in persons”, thus extending protection to adult males as well. The Convention further broadened the scope of protection by not only criminalising trafficking in persons and attempts thereto, but also intentional participation in these offences.¹⁶⁵ Unlike its predecessors, the Convention aimed for the total abolition of brothels by explicitly proscribing the keeping of a brothel and the renting or letting of a building for the purpose of prostitution.¹⁶⁶ In contrast with the 1933 Traffic Convention, trafficked persons did not need to be moved across international borders in order for the act concerned to constitute “trafficking” under this treaty.¹⁶⁷

The 1949 Traffic in Persons Convention also shared a number of similarities with its precursors. First, the treaty continued with the focus on law enforcement and cooperation by stipulating that information on

¹⁶³ Rijken 2003:57.

¹⁶⁴ Dottridge and Weissbrodt 1999:264-265.

¹⁶⁵ Article 4 To the extent permitted by domestic law, intentional participation in the acts referred to in articles 1 and 2 above shall also be punishable.

¹⁶⁶ Article 2; Fariior 1997:217; Defeis 2003/2004:485; Smith 2007:222.

¹⁶⁷ Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19.

offences created in the Convention be shared by parties to the Convention.¹⁶⁸ Again, the key concept “traffic”, as well as the concept “exploitation of the prostitution of others”, was not defined.¹⁶⁹ Also, like the previous instruments, this Convention linked trafficking with prostitution by criminalising trafficking in persons for the purpose of prostitution only.¹⁷⁰ The parties to the 1949 Traffic in Persons Convention agreed to punish any person who, to gratify the passions of another,:

- (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) exploits the prostitution of another, even with the consent of that person.¹⁷¹

Rijken¹⁷² concludes that this treaty also followed an abolitionist approach¹⁷³ to prostitution and punished both forced and voluntary procurement into prostitution.¹⁷⁴ The fact that this Convention and its precursors linked and almost conflated the concept of human trafficking

¹⁶⁸ Articles 13 and 15; Bruch 2004:9, 11.

¹⁶⁹ “Exploitation of prostitution” apparently included the conduct prohibited in article 2 of this treaty, namely the keeping of a brothel and the letting or renting of a building for such proscribed activities. While international instruments do not contain a definition of prostitution, Dottridge and Weissbrodt 1999:268 state that the term is usually interpreted according to its ordinary meaning, namely “any sexual act offered for reward or profit”.

¹⁷⁰ Lee 2007:4; Gould 2006:20.

¹⁷¹ Article 1; Dottridge and Weissbrodt 1999:261; Weissbrodt and Anti-Slavery International 2002:19; Defeis 2003/2004:485; Smith 2007:222; Bruch 2004:8.

¹⁷² Rijken 2003:55-56; Bruch 2004:9.

¹⁷³ Bruch 2004:11. The abolitionist approach does not tolerate forced or voluntary prostitution and regards all prostitution as abuse or even a form of slavery – Rijken 2003:56.

¹⁷⁴ Article 1(1) and (2); Dottridge and Weissbrodt 1999:259, 262.

to prostitution hampered the combating of other forms of human trafficking.¹⁷⁵ In this regard, Lee points out that:

Such conceptualisation of trafficking as exclusively linked to sexual exploitation meant that other forms of exploitation tend to be ignored in anti-trafficking initiatives even though there is increasing evidence that suggests global trafficking for labour exploitation is also prevalent...¹⁷⁶

Consequently, an international instrument on human trafficking which covered not only sexual exploitation, but all forms of exploitation, was still lacking.¹⁷⁷ In addition, a comprehensive, homogeneous definition of human trafficking was also needed, since the differing descriptions of the phenomenon led to confusion as to what constituted trafficking, thus hampering efforts to combat this crime.¹⁷⁸

Although the 1949 Traffic in Persons Convention created obligations to punish a number of offences relating to trafficking, the enforcement provisions were very weak.¹⁷⁹ Furthermore, the Convention had no monitoring mechanism.¹⁸⁰ Accordingly, Fariior¹⁸¹ states that the Convention took “a limited approach in its measures to stop trafficking”. This Convention, which was ratified by South Africa in 1951,¹⁸² remained

¹⁷⁵ Gould 2006:20; Dottridge and Weissbrodt 1999:259, 261; Weissbrodt and Anti-Slavery International 2002:20; Bruch 2004:11.

¹⁷⁶ Lee 2007:4; Dottridge and Weissbrodt 1999:261.

¹⁷⁷ Dottridge and Weissbrodt 1999:263; Weissbrodt and Anti-Slavery International 2002:20.

¹⁷⁸ Kurbiel 2004:74; Guinn 2008:122.

¹⁷⁹ Article 21 requires only limited reporting by states parties.

¹⁸⁰ Raymond 2002:492, 500 in footnote 3; Bruch 2004:10.

¹⁸¹ For a further discussion of this issue, see Fariior 1997:217-220; Defeis 2003/2004:485-486.

¹⁸² DFA 2005:2.

the only international instrument on human trafficking for the next 50 years up to the adoption of the Palermo Protocol¹⁸³ in 2000.

2.3.6 *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*

Ratified by South Africa on 15 December 1995,¹⁸⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁸⁵ is a comprehensive women's rights Convention, often referred to as the International Bill of Rights for Women.¹⁸⁶ According to Bonthuys and Domingo, CEDAW consists of "a compilation of women's rights in existing treaties together with additional rights or broader formulations of well-known human rights".¹⁸⁷ What is important for purposes of the present study is that the Convention specifically prohibits "traffic in women":

States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.¹⁸⁸

¹⁸³ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008); HSRC 2010:25; Bruch 2004:10.

¹⁸⁴ DFA 2005:2; SALRC 2006:22 in footnote 70. For information on the periodic reports South Africa has submitted under this treaty on the extent of trafficking in the country and on measures to combat trafficking in women and children, see HSRC 2010:26.

¹⁸⁵ This Convention was adopted in 1979 and came into force in 1981 – <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 11/3/2008); Brownlie and Goodwin-Gill 2006:388.

¹⁸⁶ Bonthuys and Domingo 2007:59; Viljoen 2007:126. For a further discussion of this treaty, see Viljoen 2007:126-131.

¹⁸⁷ Bonthuys and Domingo 2007:60.

¹⁸⁸ Article 6; Singh 2004:345; Marks and Clapham 2005:423; Farrior 1997:227; Defeis 2003/2004:486; Smith 2007:222; SALRC 2006:22; HSRC 2010:25; Bruch 2004:11-12.

Like earlier instruments on trafficking,¹⁸⁹ CEDAW also does not define the concept “traffic in women”. The Convention requires states parties to take legislative measures to suppress all forms of trafficking in women. By implication, therefore, states parties must criminalise such trafficking.

Being a human rights instrument, the Convention obligates states parties to protect those rights of trafficked victims that are typically violated in human trafficking, such as the right to freedom of movement,¹⁹⁰ to work, to free choice of profession, to equal remuneration,¹⁹¹ to marry, to choose a spouse, and to marry only with free and full consent.¹⁹² Furthermore, the Convention explicitly states that child marriages are not valid and that a minimum age for marriage must be specified.¹⁹³ These provisions are appropriate in cases of trafficking for the purpose of forced marriages or child marriages.¹⁹⁴

2.3.7 *The 1989 Convention on the Rights of the Child*

Regarded as a milestone in the legal protection of children, the Convention on the Rights of the Child¹⁹⁵ covers the full range of civil,

¹⁸⁹ See the discussion of the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1933 Convention for the Suppression of the Traffic in Women of Full Age in 2.3.3 and 2.3.4 above.

¹⁹⁰ Article 15(4).

¹⁹¹ Article 11(1). These rights are relevant to human trafficking, because they are often violated in labour trafficking.

¹⁹² Article 16(1)(a) and (b) – these rights are often not adhered to in trafficking for the purposes of forced or child marriages.

¹⁹³ Article 16(2).

¹⁹⁴ See 2.2.2.3.2.d in Chapter 2 above for a discussion of trafficking for the purpose of forced marriages.

¹⁹⁵ This Convention was adopted in 1989 and came into force in 1990 – <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008); Brownlie and Goodwin-Gill 2006:429.

political, economic, social and cultural rights of children.¹⁹⁶ South Africa ratified the Convention on 16 June 1995.¹⁹⁷

Various provisions encapsulated in this Convention are relevant to child trafficking. Apart from emphasising the best-interests-of-the-child principle,¹⁹⁸ the Convention also enshrines basic human rights often violated in child trafficking, such as the right to life, survival and development to the maximum extent possible,¹⁹⁹ liberty,²⁰⁰ privacy²⁰¹ and education.²⁰²

This Convention also contains numerous other provisions on separate strands of child exploitation that are applicable to child trafficking.²⁰³ In an all-encompassing provision, the Convention stipulates that states parties must protect a child against “all forms of exploitation prejudicial to any aspects of the child’s welfare”.²⁰⁴ In addition, provisions against specific forms of exploitation are also included. As far as labour trafficking is concerned, the treaty enshrines the right of the child to be protected against economic exploitation.²⁰⁵ The treaty’s prohibition of all forms of

¹⁹⁶ Cohn and Goodwin-Gill 1994:55.

¹⁹⁷ HSRC 2010:26; SALRC 2006:20 in footnote 55; DFA 2005:2.

¹⁹⁸ Article 3 provides more details on this principle.

¹⁹⁹ Article 6(1) and (2).

²⁰⁰ Article 37(b); for a further discussion of this article, see Schabas and Sax 2006:33-75; Hodgkin and Newell 2002:539-562.

²⁰¹ Article 16(1).

²⁰² Article 28.

²⁰³ Kassan 2007:18–3-4; Farrior 1997:233; Hodgkin and Newell 2002:521-528.

²⁰⁴ Article 36; HSRC 2010:26; Hodgkin and Newell 2002:533-538.

²⁰⁵ Article 32(1) prohibits children from performing work that is “likely to be hazardous or to interfere with the child’s education or to be harmful to the child’s health or physical, mental,

sexual exploitation and abuse is relevant to trafficking for sexual purposes.²⁰⁶

Marks and Clapham²⁰⁷ confirm that human trafficking invariably violates the right to humane treatment, and, therefore, the prohibition of torture and inhuman treatment is indeed applicable to human trafficking.²⁰⁸ Of further importance is the wide-ranging obligation to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, violence, abuse or exploitation” while in the care of parents or guardians.²⁰⁹ As regards child trafficking for the purpose of illegal adoptions or forced military service, the Convention contains relevant provisions, namely extended safeguards pertaining to adoption, especially intercountry adoptions,²¹⁰

spiritual, moral or social development”. Provisions on the regulation of working hours and conditions, as well as a minimum age for admission to employment, are also included. It is to be welcomed that these provisions must be enforced by way of penalties – article 32(c). Kamidi 2007:14-15 maintains that work described in this treaty as being hazardous or harmful to the child clarifies the meaning of “economic exploitation” and that child trafficking for abusive-labour purposes often falls into this category. See also Kassan 2007:18–4; Farior 1997:233; Dottridge and Weissbrodt 1999:280; Weissbrodt and Anti-Slavery International 2002:40; Hodgkin and Newell 2002:521; Smith 2007:222; SALRC 2006:21; HSRC 2010:26.

²⁰⁶ In article 34, all states parties undertake to protect children from all forms of sexual exploitation and abuse, including any unlawful sexual activity, prostitution or pornography. See also Kassan 2007:18–6; Farior 1997:233; Dottridge and Weissbrodt 1999:280; Weissbrodt and Anti-Slavery International 2002:28, 40; Hodgkin and Newell 2002:505-518, 521, 526; SALRC 2006:21; HSRC 2010:26.

²⁰⁷ Marks and Clapham 2005:423.

²⁰⁸ Article 37(a) stipulates that states parties must ensure that “no child shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”. For a further discussion of this article, see Schabas and Sax 2006:3-20; Hodgkin and Newell 2002:539-562.

²⁰⁹ Article 19(1) States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
See also SALRC 2006:20; HSRC 2010:26; Hodgkin and Newell 2002:527-278.

²¹⁰ Article 21 places a number of obligations upon states parties to ensure that the best-interests-of-the-child principle is realised in adoption matters – Hodgkin and Newell 2002:525. See also the discussion of the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions in 2.3.9 below.

and protective measures for children involved in armed conflicts.²¹¹

Of major importance to this study is the explicit provision on trafficking in children:

States Parties shall 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.²¹²

The broad approach to prevent child trafficking, either within a country or across international borders, “for any purpose and in any form” is welcomed as a safety net against trafficking.²¹³ However, some aspects are problematic. The treaty does not provide sufficient clarification of key concepts relevant to human trafficking. For example, the concepts “sale of children” and “traffic in children” are not defined, resulting in uncertainty as to what constitutes child trafficking.²¹⁴ In addition, the difference between “sale of” and “traffic in” children is not clarified. Also, the obligation on states parties is only to “prevent” trafficking in children and does not include the duty to prosecute and punish such behaviour as well.²¹⁵

²¹¹ Article 38 lays down the minimum age of 15 years for recruitment into armed forces as well as for direct participation in armed conflict; Hodgkin and Newell 2002:563-577.

²¹² Article 35; Kassan 2007:18–4; Farrior 1997:233; Weissbrodt and Anti-Slavery International 2002:28. Apart from the Convention’s banning of specific types of exploitation, article 36 goes further by providing a broader, non-specific safeguard, in that “all other forms of exploitation prejudicial to any aspects of the child’s welfare” are proscribed; Dottridge and Weissbrodt 1999:280; Weissbrodt and Anti-Slavery International 2002:40. Article 11 prohibits the “illicit transfer and non-return of children abroad”, which is usually undertaken by relatives and not for a profit motive – Hodgkin and Newell 2002:521.

²¹³ Dottridge and Weissbrodt 1999:280; Weissbrodt and Anti-Slavery International 2002:40; Hodgkin and Newell 2002:521; SALRC 2006:20; Farrior 1997:233.

²¹⁴ Kassan 2007:18–4; Kamidi 2007:16-17; SALRC 2006:20; HSRC 2010:27.

²¹⁵ Article 35; Hodgkin and Newell 2002:521-532.

2.3.8 *The 1990 Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families*

Migration issues, such as irregular migration involving undocumented entry and stay in a foreign country, are often linked to human trafficking.²¹⁶ Accordingly, treaties pertaining to migration may be used to protect trafficked persons in applicable circumstances.²¹⁷

A key treaty on migration is the Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (Convention on Migrants' Rights), which was adopted in 1990, but only entered into force in 2003.²¹⁸ Apart from other international instruments providing some protection for migrant workers,²¹⁹ this Convention calls for appropriate action "to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights".²²⁰ Thus, recognising the vulnerabilities of migrant workers, especially non-documented migrants, the treaty aims at:

²¹⁶ HSRC 2010:29.

²¹⁷ HSRC 2010:29.

²¹⁸ <http://www1.umn.edu/humanrts/instree/n8icprmw.htm> (accessed 12/3/2008); Viljoen 2007: 144; Brownlie and Goodwin-Gill 2006:462. For a further discussion of this treaty, see Viljoen 2007:144-146.

²¹⁹ The Convention Concerning Migration for Employment No. 97 of 1949 – <http://www.ilo.org/ilo-lex/cgi-lex/convde.pl?C097> (accessed 7/6/2007); the Convention Concerning Migrant Workers Convention No. 143 of 1975 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143> (accessed 7/6/2010); and the Convention Concerning Private Agencies No. 181 of 1997 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C181> (accessed 7/6/2010); see also HSRC 2010:29. South Africa has not ratified any of these instruments relating to migrants – HSRC 2010:29.

²²⁰ Preamble.

...preventing the exploitation of migrant workers through a set of binding international standards to address the treatment, welfare, and human rights of both documented and undocumented migrants.²²¹

Lee emphasises that the Convention provides “significant rights to victims of international trafficking under the rubric of rights accorded to undocumented migrant workers”.²²² These rights include the right not to be subjected to torture or degrading treatment or punishment,²²³ the right not to be held in slavery or servitude,²²⁴ and the right not to be subjected to forced labour.²²⁵ Regrettably, the Convention has limited authority in international law and even less authority in the domestic laws of most destination countries that have not signed this Convention.²²⁶ South Africa is one of the countries that has neither signed nor acceded to this Convention.²²⁷

2.3.9 *The 1993 Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*

The United Nations Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on

²²¹ Viljoen 2007:144-145. See also the Preamble and article 7; Brownlie and Goodwin-Gill 2006:462.

²²² Lee 2007:9.

²²³ Article 10; Marks and Clapham 2005:423.

²²⁴ Article 11(1); HSRC 2010:29.

²²⁵ Article 11(2); HSRC 2010:29.

²²⁶ Lee 2007:10.

²²⁷ OHCHR 2008c:1-2; HSRC 2010:29.

Inter-country Adoption)²²⁸ entered into force in 1995, but was only acceded to by South Africa in 2003.²²⁹ The treaty recognises that intercountry adoption may offer the advantage of a permanent family to those children for whom a suitable family cannot be found in their country of origin.²³⁰ Importantly, the Convention does not aim at promoting intercountry adoptions, but at ensuring that such adoptions are carried out legally “in the best interest of the child and with the respect for his or her fundamental rights recognised in international law”.²³¹

Hodgkin and Newell²³² point out the concern that intercountry adoptions may be exploited for the purpose of human trafficking.²³³ Acknowledging the possibility of the abuse of intercountry adoptions, the Convention provides that measures must be taken to prevent intercountry adoptions resulting in the abduction of, the sale of or trafficking in children.²³⁴ Given that human trafficking exploits people for an illegal profit, it is to be welcomed that the Convention prohibits the obtaining of “improper

²²⁸ This Convention was adopted in 1993 – http://www.hcch.net/index_en.php?act=conventions_pdfandcid=69 (accessed 16/10/2008); Weissbrodt and Anti-Slavery International 2002:40 in footnote 157.

²²⁹ HCCH 2008:3; HSRC 2010:27.

²³⁰ Preamble; article 1(b); Nicholson 2000:246-247. For a further discussion of this treaty, see Nicholson 2000:246-256.

²³¹ Article 1; see also Nicholson 2000:248; Hodgkin and Newell 2002:300. The treaty lays down comprehensive, legally binding international standards for supervision, communication and effective relationships between the authorities of the countries of the adoptive parents and the adopted child.

²³² Hodgkin and Newell 2002:300; see also Moodley 2006:145, 147-148.

²³³ Hodgkin and Newell 2002:300.

²³⁴ Preamble.

financial or other gain from an activity related to an intercountry adoption”.²³⁵

The Convention does not define the term “traffic in children”, nor does it require that conduct resulting in trafficking of children be criminalised. Nevertheless, the Convention strives to minimise abuses of intercountry adoptions, such as human trafficking, by:

...engendering cooperation between states to eliminate exploitation of children while facilitating the speedy conclusion of international placements where appropriate in the best interests of the child.²³⁶

Reflecting on these safeguards, Hodgkin and Newell²³⁷ maintain that this Convention is a valuable international tool in the fight against the international trafficking of children for the purpose of adoption. South Africa acceded to this Convention in 2003.²³⁸

²³⁵ Article 32(1). Article 32(2) allows only for the payment of costs, expenses and reasonable professional fees of persons involved in the adoption – see also Hodgkin and Newell 2002:525; Nicholson 2000:254-255; Moodley 2006:147; HSRC 2010:27. However, the treaty does not provide for punishment or other consequences for violation of this provision – Nicholson 2000:255.

²³⁶ Nicholson 2000:256; see also article 1(b) of the Convention.

²³⁷ Hodgkin and Newell 2002:525; Weissbrodt and Anti-Slavery International 2002:28 in footnote 157.

²³⁸ The *Children's Act* 38 of 2005 incorporated the Hague Convention on Inter-Country Adoption into South African domestic law, and sections 254 to 273 of the Act aim to give effect to the Convention.

2.3.10 The 1998 Rome Statute of the International Criminal Court

Adopted in 1998, the Rome Statute²³⁹ established the International Criminal Court as a permanent international judicial organ. This court's jurisdiction, which is complementary to national criminal jurisdictions, covers "the most serious crimes of international concern" as stipulated in the Rome Statute.²⁴⁰ South Africa ratified the Statute on 27 November 2000.²⁴¹

Enslavement, which is listed as a crime against humanity, falls within the jurisdiction of this court.²⁴² The Rome Statute defines "enslavement" as follows:

"Enslavement" means the exercise of any or all powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.²⁴³

This definition of "enslavement" becomes problematic when endeavouring to apply it to human trafficking scenarios. The Rome Statute follows a narrow approach in defining "enslavement" by focusing on the ownership element. The first part of the definition of "enslavement" is in fact similar to the definition of slavery in the 1926 Slavery

²³⁹ This Statute entered into force in 2002 – http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 21/8/2008); HSRC 2010:30; Viljoen 2007:75; Kamidi 2007:23.

²⁴⁰ Article 1.

²⁴¹ CICC 2008:1. Only ratifying states are bound by the Rome Statute – Viljoen 2007:75.

²⁴² Article 5(b); Bales and Robbins 2001:26; Dottridge and Weissbrodt 1999:271; Kamidi 2007:24.

²⁴³ Article 7(2)(c) – http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (accessed 21/8/2008); Dottridge and Weissbrodt 1999:243; Weissbrodt and Anti-Slavery International 2002:8; HSRC 2010:30.

Convention,²⁴⁴ requiring that ownership be exercised over another person. However, the last part of the definition specifically includes human trafficking in the definition of enslavement, but only when ownership powers are exercised over the trafficked person.²⁴⁵ Hence, the definition apparently does not include agents of human trafficking, who do not exercise ownership powers, although they may be actively involved in the trafficking crime by intentionally recruiting or transporting trafficked victims. The definition of “enslavement” is not in line with the 1949 Traffic in Persons Convention,²⁴⁶ in that no exercise of ownership powers over the trafficked persons is required by the latter.²⁴⁷ This issue once again underpins the fact that differing descriptions of human trafficking complicate the understanding of human trafficking and that a more uniform, internationally accepted definition is essential.

2.3.11 *The 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (Protocol on the Sale of Children)²⁴⁸ both supplements and fills some gaps in the substantive ambit of the Convention on the Rights of the Child.²⁴⁹ The treaty broadens the

²⁴⁴ Article 1(1) – <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008); see also 2.2.2.3.2.c in Chapter 2 above.

²⁴⁵ Bales and Robbins 2001:26; HSRC 2010:27; see also 4.2.2.1 in Chapter 4 above.

²⁴⁶ <http://www.unhchr.ch/html/menu3/b/33.htm> (accessed 11/3/2008).

²⁴⁷ See 2.3.5 above.

²⁴⁸ This Protocol was adopted by the United Nations in 2000 and entered into force in 2002 – <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008); Brownlie and Goodwin-Gill 2006:454.

²⁴⁹ Viljoen 2007:140.

measures that states parties should adopt to combat the sale of children, child prostitution and child pornography.²⁵⁰ South Africa acceded to the Protocol on 30 July 2003.²⁵¹

Concern is expressed in the Preamble to the Protocol about the increase in international traffic in children for the sale of children, child prostitution and child pornography. Unfortunately, the key concept “traffic in children” is yet again not defined in this treaty.²⁵²

States parties assume the obligation of prohibiting the sale of children.²⁵³ The Protocol clarifies this obligation by stipulating what constitutes the “sale of children”, which is defined as follows:

Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.²⁵⁴

The definition does not specifically require an exploitative purpose and other acts, such as the recruitment or harbouring of children, are also not included.²⁵⁵

²⁵⁰ Preamble; Kassan 2007:18–4; SALRC 2006:21.

²⁵¹ DFA 2005:3; SALRC 2006:21 in footnote 62; HSRC 2010:27.

²⁵² SALRC 2006:21; HSRC 2010:27.

²⁵³ Article 1 States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol. See also Kamidi 2007:18.

²⁵⁴ Article 2(a). In agreement with Kamidi 2007:18, the definition of key concepts, which enhances clarity, is to be welcomed; see also HSRC 2010:27.

²⁵⁵ In 2000, these requirements were included in the concept “trafficking in persons” as defined in the Palermo Protocol – see 3.2.2 in Chapter 2 above and 2.3.14.5.1 below.

The Protocol on the Sale of Children enjoins states parties to adopt domestic laws criminalising offences pertaining to the sale of children, in that the Protocol firmly obliges states parties to criminalise the following:

Offering, delivering or accepting, by whatever means, a child for the purpose of

- (a) sexual exploitation of the child;
- (b) transfer of organs of the child for profit;
- (c) engagement of the child in forced labour...²⁵⁶

States parties are further obligated to criminalise conduct linked to the sale of children for illegal adoptions, child prostitution and child pornography.²⁵⁷ The prohibited conduct in article 3 of the Protocol may overlap with the definition of child trafficking in article 3(c) of the Palermo Protocol.²⁵⁸ The gist of the offences “sale of children” and “child trafficking”, as defined in the two Protocols, is therefore linked, which gives rise to confusion and makes it problematic in ascertaining whether the two concepts constitute the same or two different offences.

Importantly, apart from the duty to prosecute the offences under this Protocol, the treaty also includes the duty to impose appropriate punishment by taking into account the gravity of the crime.²⁵⁹ In addition, states parties are obligated to seize and confiscate assets and other instrumentalities used to commit offences, as well as the proceeds

²⁵⁶ Article 3(1)(a); SALRC 2006:22 points out that, while article 35 of the Convention on the Rights of the Child only requires appropriate measures to prevent the sale of or traffic in children, this Protocol places a positive obligation on states parties to criminalise a number of activities relevant to child trafficking.

²⁵⁷ Article 3(1) and (2).

²⁵⁸ HSRC 2010:27.

²⁵⁹ Article 3(3) Each State Party shall make such offences punishable by appropriate penalties that take into account their grave nature.

derived from such offences.²⁶⁰ Apart from further provisions on extraterritorial jurisdiction²⁶¹ and extradition,²⁶² states parties are required to cooperate on an international level and to provide intercountry assistance on matters concerning offences created in this Protocol.

Unlike most other instruments, this Protocol has significant provisions pertaining to criminal justice proceedings. Recognising the vulnerability of child victims, the Protocol obligates states parties to adopt measures to protect the rights and interests of child victims “at all stages of the criminal justice process”.²⁶³ These measures include ensuring the safety of child victims,²⁶⁴ protecting privacy and identity,²⁶⁵ providing information on the legal process and on victim’s rights,²⁶⁶ allowing victims to present their views,²⁶⁷ accommodating the special needs of child victims and witnesses,²⁶⁸ and providing support services for victims throughout the legal process.²⁶⁹ These provisions lay down important obligations to protect and support victims, which, in turn, may facilitate victims’

²⁶⁰ Article 7.

²⁶¹ Article 4.

²⁶² Article 5.

²⁶³ Article 8(1).

²⁶⁴ Child victims, their families, and witnesses must be guaranteed safety from intimidation and retaliation – article 8(1)(f).

²⁶⁵ Article 8(1)(e).

²⁶⁶ Article 8(1)(b) stipulates that child victims must be informed of “their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases”.

²⁶⁷ Article 8(1)(c) allows child victims to present their views, needs and concerns.

²⁶⁸ Article 8(1)(a).

²⁶⁹ Article 8(1)(d).

willingness to cooperate in the prosecution of offenders.²⁷⁰ Proper protection and services for victims therefore also play an important role in enhancing justice in the criminal justice process.²⁷¹

The obligations set out in this Protocol must be considered and complied with in developing national legislation combating the sale of children, which offence is closely linked, and often overlaps, with child trafficking. In assessing the comprehensive provisions of this Protocol, Kamidi²⁷² describes it as “one of the best attempts to counter some manifestations of child trafficking”.

2.3.12 *The 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*

Concern regarding the involvement of children in armed conflict prompted the provision of effective protection for such children in a number of international treaties.²⁷³ While the Convention on the Rights of the Child sets the minimum age for conscription and direct participation in armed conflict at 15 years,²⁷⁴ the African Charter on the Rights and Welfare of the Child stipulates 18 as the minimum age.²⁷⁵ The 1999 ILO Convention on the Prohibition and Immediate Action for Elimination of

²⁷⁰ Weissbrodt and Anti-Slavery International 2002:24; Defeis 2003/2004:491; Jordan 2002:19-20; Gallagher 2001:991.

²⁷¹ Defeis 2003/2004:488.

²⁷² Kamidi 2007:19.

²⁷³ Olivier 2000:257.

²⁷⁴ Article 38(2) and (3) – http://www.unhchr.ch/html/menu3/b/k2_crc.htm (accessed 11/3/2008); Olivier 2000:259.

²⁷⁵ Article 22 – http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008); Olivier 2000:259.

the Worst Forms of Child Labour²⁷⁶ proscribes the forced recruitment of children below 18 years for use in armed conflict.²⁷⁷ These fragmented and inconsistent provisions concerning children in armed conflict in international instruments led to the call for a single, binding instrument on the issue.²⁷⁸ Supplementing the Convention on the Rights of the Child, the Optional Protocol on the Involvement of Children in Armed Conflict was adopted in 2000 and entered into force in 2002.²⁷⁹ South Africa ratified this treaty in 2002.²⁸⁰

Emphasising the best-interests-of-the-child principle and the need to increase the protection of children from involvement in armed conflict,²⁸¹ the Protocol raised the minimum age for compulsory recruitment into states parties' national armed forces to 18 years.²⁸² The same age limit applies to children participating in armed conflict.²⁸³ Although this Protocol does not explicitly address human trafficking, the prohibition of the recruitment and use of children below 18 years in armed conflict is

²⁷⁶ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008).

²⁷⁷ Articles 2, 3(a), 6(1) and 7(1); see also 2.2.2.3.2.g in Chapter 2 above; Dottridge and Weissbrodt 1999:281; Weissbrodt and Anti-Slavery International 2002:40; Happold 2005:71-81.

²⁷⁸ Olivier 2000:257.

²⁷⁹ <http://www.unhcr.ch/html/menu2/6/crc/treaties/opac.htm> (accessed 21/8/2008). For a discussion of this treaty, see Olivier 2000:257-263.

²⁸⁰ OHCHR 2008b:4; HSRC 2010:27.

²⁸¹ Preamble.

²⁸² Article 4(1); Viljoen 2007:141; Olivier 2000:260; HSRC 2010:27. The Protocol distinguishes to some extent between recruitment of children into national armed forces by states parties and recruitment by other armed groups – see article 3(1) and (3); Olivier 2000:261.

²⁸³ Article 4(1); Olivier 2000:260.

applicable to cases where children are trafficked for forced military service.²⁸⁴

2.3.13 The 2000 Convention Against Transnational Organized Crime

2.3.13.1 Introduction

Global concern about transnational organised crime resulted in the adoption of an international legal instrument known as the United Nations Convention Against Transnational Organized Crime (Organized Crime Convention) in 2000.²⁸⁵

The Organized Crime Convention is the international community's response to the need for a truly global approach. Its purpose is to promote cooperation to prevent and to combat transnational organised crime more effectively (art. 1). It seeks to increase the number of states that take effective measures against transnational organised crime and to build and strengthen international cooperation.²⁸⁶

The Convention provides for measures to combat transnational crime in general, while its three supplementary protocols deal with specific

²⁸⁴ See 2.2.2.3.2.g in Chapter 2 above.

²⁸⁵ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008); Raymond 2002:492-493. An overview of the process preceding the adoption of the Convention is provided by Gallagher 2001:975-977. For an in-depth discussion of this Convention, see UNODC 2004:1-242.

²⁸⁶ UNODC 2008:8; see also Gallagher 2001:978-979; HSRC 2010:19; Weissbrodt and Anti-Slavery International 2002:21; Gastrow 2001:7.

crimes, namely trafficking in persons,²⁸⁷ trafficking in firearms²⁸⁸ and smuggling of migrants.²⁸⁹ South Africa ratified the Convention in 2004.²⁹⁰

2.3.13.2 Scope of application

The Convention applies to the investigation and prosecution of offences established in this treaty,²⁹¹ namely participation in an organised criminal group, the laundering of crime proceeds, corruption, and the obstruction of justice.²⁹² In addition, “serious crime”, which is defined as an offence punishable by at least four years’ imprisonment, is also covered by the Convention.²⁹³ These offences share a distinguishing feature in that they aim at curbing the profit-making activities of organised criminal groups.²⁹⁴

The Convention requires that the offences established in this treaty must comply with two prerequisites: the offence must be “transnational in nature”, and an “organised criminal group” must be involved.²⁹⁵ Both

²⁸⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) U.N.Doc. A/55/383 (2000), Annex II – http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention%20traff_eng.pdf (accessed 11/3/2008). For a further discussion of this treaty, see UNODC 2004:243-319.

²⁸⁸ Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition – http://untreaty.un.org/English/notpubl/18-12_c_E.doc (accessed 11/3/2008). For a further discussion of this treaty, see UNODC 2004:397-509.

²⁸⁹ Protocol Against the Smuggling of Migrants by Land, Sea and Air – http://www.Uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf (accessed 11/3/2008); see also Raymond 2002:491-492, 500 in footnote 1; Gallagher 2001:975-976.

²⁹⁰ South Africa signed the Convention on 14 December 2000 and later ratified it on 20 February 2004 – SALRC 2006:11 in footnote 9; SALRC 2004:4-5.

²⁹¹ Article 3(1).

²⁹² Articles 5, 6, 8, and 23; HSRC 2010:19.

²⁹³ Article 2(b).

²⁹⁴ UNODC 2008:8; see also article 3(1) of the Organized Crime Convention; HSRC 2010:19.

²⁹⁵ Article 3(1); Gallagher 2001:979; Gastrow 2001:29-30.

these concepts are given a wide meaning in the treaty.²⁹⁶ In essence, the term “organised criminal groups” includes all structured groups that commit serious transnational crimes for profit.²⁹⁷ As regards the transnational requirement, a crime is defined as “transnational in nature” when it is committed in more than one state. In addition, the definition also classifies a crime as transnational in nature even if it is committed in only one state, as long as:

- (a) [a] substantial part of its preparation, planning, direction or control takes place in another State;
- (b) [it] involves an organised criminal group that engages in criminal activities in more than one State; or
- (c) [it] has substantial effects in another State.²⁹⁸

Applied to human trafficking, the two requirements pertaining to the transnational and organised crime elements are frequently met in transnational human trafficking. Where the penalty for such human trafficking crimes complies with the definition of “serious crime”,²⁹⁹ the Convention’s provisions apply to these forms of human trafficking.³⁰⁰ In this regard, Gallagher³⁰¹ points out that states parties to this treaty may

²⁹⁶ Articles 2(a) and 3(2); SALRC 2006:11; Gallagher 2001:978.

²⁹⁷ Article 2(a) “Organised criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.
Also see SALRC 2006:11.

²⁹⁸ Article 3(2); see also 2.2.2 in Chapter 4 above.

²⁹⁹ See 3.3.2 in Chapter 3 above; The Future Group 2007b:2; International Crime and Terrorism 2004:1, 3; Lee 2007:5; Shelley 2007:116; Marks and Clapham 2005:423.

³⁰⁰ Kassan 2007:18–6.

³⁰¹ Gallagher 2001:979.

use the Convention to combat a multitude of serious crimes, including human trafficking, even if the Palermo Protocol³⁰² is not ratified.

2.3.13.3 Obligations laid down in the Convention

Jordan³⁰³ points out that the Convention, together with the Palermo Protocol and the Official Interpretative Notes (*Travaux Préparatoires*)³⁰⁴ to the Protocol, encompasses the international obligations relevant to human trafficking. Although the United Nations did not combine the documents in one instrument, the three documents are closely linked³⁰⁵ and must be read together.³⁰⁶ The Convention lays down the following obligations for states parties:

2.3.13.3.1 *Criminalisation*

The successful prosecution of perpetrators is a vital component in the combating of organised crime. Accordingly, ratifying states are obliged to criminalise activities pertaining to participation in an organised criminal

³⁰² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

³⁰³ Jordan 2002:2.

³⁰⁴ http://www.odccp.org/crime_cicp_convention_documents.html (accessed 18/11/2008). The Official Interpretative Notes to the Palermo Protocol do not constitute a binding treaty and are therefore not specifically dealt with in the context of this Chapter. However, where appropriate, reference is made to this important document in the footnotes of this study.

³⁰⁵ Article 1 of the Palermo Protocol and article 37(4) of the main Convention stipulate that the Palermo Protocol supplements the main Convention and must be interpreted together with the Convention, taking into account the purpose of the Protocol – UNODC 2008:8. Furthermore, article 37(2) provides that only countries that have signed the Convention may sign the Protocol; see also Jordan 2002:2; Defeis 2003/2004:487; Gallagher 2001:978; see 2.3.14.3 below.

³⁰⁶ Jordan 2002:2 addresses the issue by combining the Palermo Protocol with relevant provisions of the main Convention and the Official Interpretative Notes in one document, called the Annotated Guide to the Complete UN Trafficking Protocol – <http://www.walnet.Org/csis/papers/un-traffick.pdf> (accessed 13/11/2008); see also UNODC 2008:8.

group, the laundering of the proceeds of crime, corruption, and the obstruction of justice.³⁰⁷

2.3.13.3.2 *Liability of natural and legal persons*

The Convention further obligates states parties to establish the liability of both natural and legal persons involved in transnational organised crime.³⁰⁸ This provision is important, since human trafficking is often committed by legal persons, for example by traffickers operating within a company or other legal institution.³⁰⁹

2.3.13.3.3 *Adequate sanctions*

Apart from the obligation to criminalise specific conduct, the Convention requires that appropriate, stringent sanctions also be imposed.³¹⁰ In addition to requiring sanctions that take into account the gravity of the offence,³¹¹ the treaty further enjoins states to impose “effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions” on legal persons committing crimes in terms of the Convention.³¹²

³⁰⁷ The offences are created in articles 5, 6, 8 and 23; see also Gallagher 2001:978.

³⁰⁸ Article 10(1) Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organised criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

(2) Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

(3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

³⁰⁹ SALRC 2006:11.

³¹⁰ SALRC 2006:12; Gallagher 2001:979.

³¹¹ Article 11(1).

³¹² Article 10(4).

2.3.13.3.4 *Seizure and confiscation*

Another important duty under the Convention is to put in place measures in domestic legal systems allowing for the identification, tracing, freezing or seizure of the proceeds of crime, or of instrumentalities used in crime, for the purpose of eventual confiscation.³¹³ In addition, domestic laws must permit the confiscation of the proceeds of crime covered by this treaty as well as instrumentalities used in such crimes.³¹⁴

2.3.13.3.5 *Judicial cooperation*

As indicated earlier,³¹⁵ the Convention is primarily an instrument of international cooperation that aims to combat transnational organised crime more successfully.³¹⁶ Accordingly, the Convention requires states parties to adopt various measures to strengthen international cooperation.³¹⁷ These measures cover cooperation for purposes of confiscations,³¹⁸ teamwork among law enforcement authorities,³¹⁹ and cooperation by way of the exchange of relevant information³²⁰ and expertise.³²¹ In addition, states parties are obligated to “afford one another the widest measure of mutual legal assistance” in investigations,

³¹³ Article 12(2).

³¹⁴ Article 12(1).

³¹⁵ See 2.3.13.1 above; Weissbrodt and Anti-Slavery International 2002:21.

³¹⁶ Gallagher 2001:978.

³¹⁷ Article 26.

³¹⁸ Article 13.

³¹⁹ Article 26.

³²⁰ Article 27.

³²¹ Article 28.

prosecutions and judicial proceedings pertaining to offences covered by this Convention.³²²

2.3.13.3.6 *Obligations pertaining to victims and criminal justice*

The Convention creates a number of obligations pertaining to victims of the offences covered in the Convention. Some of these obligations are relevant to this study, namely those that apply to trafficked victims and are also relevant to criminal justice and other legal issues.

a Compensation and restitution

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies.³²³

Victims of human trafficking often find it difficult to access remedies and need assistance in realising their right to adequate and appropriate remedies, which includes compensation.³²⁴ To address this problem, the Convention obligates states parties to ensure that victims have access to compensation and restitution for trafficking and other criminal acts to which they have been subjected.³²⁵

³²² Article 18; see also Gallagher 2001:998; Lee 2007:19 in footnote 6; SALRC 2006:12.

³²³ OHCHR 2002:13.

³²⁴ OHCHR 2002:13.

³²⁵ Article 25(2) Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
See also Gallagher 2001:980.

b Victims' views in criminal proceedings

Another obligation pertaining to victims and criminal justice focuses on accommodating and taking into account the views of victims during the criminal trial. The Convention stipulates that states must:

...enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.³²⁶

c Victim and witness protection

A further obligation that links the interests of victims and criminal justice pertains to the safety of victim witnesses during the investigation and prosecution of trafficking offenders. Underpinning similar provisions in the Protocol on the Sale of Children,³²⁷ this Convention also calls for the protection of victims and other witnesses testifying in criminal proceedings concerning offences covered in this treaty.³²⁸ Ratifying parties are obliged to provide “effective protection”, including relocation of witnesses, non-disclosure of their identity and whereabouts, as well as ensuring that:

³²⁶ Article 25(3) Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

See also Gallagher 2001:980.

³²⁷ See article 8 and the discussion in 2.3.11 above.

³²⁸ Article 24(1) Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

See also SALRC 2006:12; Gallagher 2001:980-981.

...a witness's testimony is given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.³²⁹

Jordan³³⁰ points out that this provision allows witnesses, who are too traumatised or too young to face their traffickers in court, to testify from another location, while the legal representative of the accused may still cross-examine the witness. Given the fact that traffickers invariably intimidate trafficked victims and witnesses, this is an important obligation that needs to be complied with in domestic criminal justice responses to human trafficking in order to ensure justice.

2.3.14 *The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*

2.3.14.1 Introduction

Although the discussion so far has indicated that a variety of international instruments exists pertaining to some aspects of human trafficking, it was recognised that a universal, comprehensive instrument to prevent and combat the crime more effectively was required.³³¹ Hence the groundbreaking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) was adopted by the United Nations in 2000 and came into force on 25

³²⁹ Article 24(2)(b); SALRC 2006:11.

³³⁰ Jordan 2002:24.

³³¹ Preamble – see Addendum A; Harrold 2006:105. Bassiouni 1990/1991:459 rightly indicates that what was needed was a comprehensive convention covering all traditional and contemporary slavery-like practices that would “obviate the problems of multiple international instruments with different parties, applicable to different contents and having different contents”.

December 2003.³³² On 7 July 2010, there were 139 parties, including South Africa, to this Protocol.³³³ Subsequent to the signing of the Protocol on 14 December 2000, South Africa ratified it on 20 February 2004.³³⁴

2.3.14.2 Relationship to the Organized Crime Convention

While the Organized Crime Convention aims at combating transnational organised crime in general, the Palermo Protocol is a supplementing Protocol addressing human trafficking comprehensively as a specific form of organised crime.³³⁵

The Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides)³³⁶ list five basic principles governing the relationship between the Convention and the Palermo Protocol.³³⁷

The first principle governing the relationship between the two treaties provides that only states that are parties to the main Convention may become a party to the supplementing Protocols.³³⁸ The Protocols are

³³² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008); Defeis 2003/2004:487; IOM 2008:19; Kamidi 2007:20; Raymond 2002:492; UNODC 2008:1-2; Ezeilo 2009:7; Bruch 2004:14.

³³³ UN 2010:1; Gallagher and Holmes 2010:318.

³³⁴ SALRC 2006:12 in footnote 25; DFA 2005:3; Kassan 2007:18–6; IOM 2008:19; IOM 2009a:82.

³³⁵ Article 1(1) – see Addendum A; Gallagher 2001:981-982; UNODC 2008:8; Defeis 2003/2004:487.

³³⁶ <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html> (accessed 17/8/2010).

³³⁷ UNODC 2004:253-255. See article 37 of the Convention and article 1 of the Palermo Protocol; UNODC 2008:12. These principles also apply to the relationship between the Convention and its other two Protocols.

³³⁸ Article 37(2) of the Convention; see also Defeis 2003/2004:487; UNODC 2008:11-12.

therefore not intended to be independent treaties, but supplements to the main Convention.³³⁹ Accordingly, a state can only be subject to the requirements of the Protocol if it is a party to the main Organized Crime Convention.

The second principle provides that the Protocol must be interpreted together with the Convention.³⁴⁰ The foundation for this principle is that the Protocol is not a stand-alone instrument, but supplements and complements the main Convention.³⁴¹ Accordingly, provisions using similar language should be interpreted as having a similar meaning, unless the purpose of the Protocol requires some modification of the meaning.³⁴²

The third principle entails that the provisions of the Convention apply *mutatis mutandis* to the Protocol.³⁴³ In other words, the general rule is that the Convention's provisions apply to the Protocol, allowing only for minor modifications of interpretation where necessary, but then only to the extent necessary.³⁴⁴ The only exception to this rule is where the Protocol specifically provides otherwise.³⁴⁵

³³⁹ UNODC 2004:253.

³⁴⁰ UNODC 2004:254; see also article 1(1) of the Palermo Protocol and the corresponding provision, namely article 37(4), in the main Convention.

³⁴¹ For a further explanation, see UNODC 2008:12; UNODC 2004:253-254.

³⁴² See article 37(4) of the Convention; UNODC 2008:12; UNODC 2004:254.

³⁴³ See article 1(2) of the Protocol and the corresponding provision, namely article 37(4), in the main Convention; see also Jordan 2002:6; SALRC 2006:12-13; UNODC 2008:8,11; UNODC 2004:254.

³⁴⁴ UNODC 2008:12.

³⁴⁵ Article 1(2) – Addendum A.

The fourth principle regulating the relationship between the Organized Crime Convention and the Palermo Protocol stipulates that Protocol offences are to be regarded as offences established in accordance with the main Convention.³⁴⁶ Linked to the *mutatis mutandis* requirement, this principle means that mandatory provisions in the Convention apply to Protocol offences as well.³⁴⁷ Importantly, Protocol offences criminalising human trafficking are therefore also included “within the scope of the basic Convention provisions governing forms of international cooperation, such as extradition (art. 16) and mutual legal assistance (art. 18)”.³⁴⁸

Finally, the fifth principle provides that requirements in the Convention and the Protocol constitute minimum standards.³⁴⁹ Stated differently, the requirements in these instruments must be complied with, while domestic responses may be more stringent.³⁵⁰ In addition, the Convention obligates states parties to broaden the scope of domestic responses by including domestic offences “independently of the transnational nature or

³⁴⁶ Article 1(3) – Addendum A; see also UNODC 2004:254; Jordan 2002:6; SALRC 2006:12-13; UNODC 2008:8, 11-12.

³⁴⁷ UNODC 2004:255. The Convention’s mandatory provisions therefore also apply to the Protocol offences, including obligations under articles 6 (criminalisation of the laundering of the proceeds of crime), 10 (liability of legal persons), 11 (prosecution, adjudication and sanctions), 12 to 14 (confiscation), 15 (jurisdiction), 16 (extradition), 18 (mutual legal assistance), 20 (special investigative techniques), 23 (criminalisation of the obstruction of justice), 24 to 26 (witness and victim protection, and enhancement of cooperation with law enforcement authorities), 27 (law enforcement cooperation), 29 and 30 (training and technical assistance), and 34 (implementation of the Convention) – UNODC 2008:12.

³⁴⁸ UNODC 2008:12; UNODC 2004:254-255.

³⁴⁹ UNODC 2004:255; HSRC 2010:20.

³⁵⁰ The Convention provides, in article 34(3), that domestic measures may be stricter or more severe than Convention provisions for preventing and combating transnational organised crime; see also HSRC 2010:20; UNODC 2004:255.

the involvement of an organised criminal group”.³⁵¹ Given that this provision applies to the Palermo Protocol as well, Jordan concludes that:

...domestic laws should go further than the Trafficking Protocol and include all domestic and cross-border trafficking and should punish individual traffickers as well as organised criminal groups.³⁵²

2.3.14.3 Scope of application

Article 4 of the Protocol³⁵³ sets out the circumstances in which the treaty will apply, as well as the exclusions to its application.³⁵⁴ The Palermo Protocol deals comprehensively with trafficking in persons, irrespective of age or gender, and covers all forms of trafficking.³⁵⁵ Although the treaty recognises that anyone can be a victim of trafficking, it points out that particular problems experienced by trafficked women and children must be borne in mind.³⁵⁶

The Palermo Protocol applies specifically to the internationally accepted three P’s, namely the prevention and prosecution of the crime as well as

³⁵¹ Article 34(2) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

See also UNODC 2004:255; SALRC 2006:13-14.

³⁵² Jordan 2002:13; see also HSRC 2010:20, 22.

³⁵³ Articles 2 and 3 of the Organized Crime Convention, which apply *mutatis mutandis* to the Protocol, must also be incorporated to determine the scope of the Palermo Protocol – UNODC 2004:258.

³⁵⁴ Article 4; UNODC 2004:257-259. For example, the application of the Protocol is limited to human trafficking matters and does not cover other transnational or organised crime – UNODC 2004:258.

³⁵⁵ UNODC 2004:257; Ezeilo 2009:7.

³⁵⁶ Article 2(a); UNODC 2004:257.

the protection of trafficked persons.³⁵⁷ As regards prosecution issues, the treaty's application is limited to those trafficking offences established in the Protocol.³⁵⁸ These offences must be both "transnational in nature" and be perpetrated by an "organised criminal group".³⁵⁹ Both these concepts are defined in the main Organized Crime Convention and have been discussed above.³⁶⁰ Kamidi³⁶¹ argues that the requirement that the crime must be "transnational in nature" seems to suggest that the Protocol applies only to cross-border trafficking and not to in-country trafficking. However, the Protocol's parent Convention defines an offence which is "transnational in nature" broadly.³⁶² The definition does not only cover offences committed in more than one state, such as cross-border trafficking, but also some offences committed in only one state, as long as they are, for example, planned or have substantial effects in another state.³⁶³ Hence, crossing international borders by way of physical movement from one country to another is not always required.³⁶⁴ In agreement with Rijken,³⁶⁵ it can be concluded that the Palermo Protocol

³⁵⁷ Article 4; see also Fredette 2009:112, 120-133; 3.7.1 in Chapter 6 below.

³⁵⁸ Article 4 – Addendum A; Gallagher 2001:981-982.

³⁵⁹ Article 4 – Addendum A; Gallagher 2001:983-984; HSRC 2010:21.

³⁶⁰ See the discussion of these concepts in 2.3.14 above and in 2.2.2 of Chapter 4 above. The concept "transnational" is defined in article 3(2) and "organised criminal group" in article 2(a) of the United Nations Convention Against Transnational Organized Crime – http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008); Weissbrodt and Anti-Slavery International 2002:21, 28.

³⁶¹ Kamidi 2007:20.

³⁶² Article 3(2) of the Organized Crime Convention; see also 2.3.13 above and 2.2.2 in Chapter 4 above.

³⁶³ See 2.3.13 above and 2.2.2 in Chapter 4 above.

³⁶⁴ IOM 2008:19; Raymond 2002:495.

³⁶⁵ Rijken 2003:67. Weissbrodt and Anti-Slavery International 2002:21 interpret the term "transnational" as requiring cross-border movement and argue that this Protocol thus differs from the 1949 Traffic in Persons Convention, which does not require this. The author of the present study agrees with Rijken's interpretation of the term "transnational" in the context of the Palermo Protocol, but not with the view of Weissbrodt and Anti-Slavery International.

applies to transnational offences, which include cross-border human trafficking as well as some types of in-country trafficking, as long as the offence is “transnational in nature” according to the definition in the main Convention. The Protocol thus applies to both cross-border and in-country trafficking, but not if the latter is committed by one or two individuals or has no transnational element.³⁶⁶

2.3.14.4 Purpose of the Protocol

The purpose of the Protocol is mainly twofold, namely, first, to cover the well-known three P’s by aiming to prevent and prosecute human trafficking as well as to protect victims, and, secondly, to promote cooperation among states parties in meeting these aims.³⁶⁷

2.3.14.5 Main obligations laid down in the Protocol

The landmark Palermo Protocol establishes a number of obligations with which states parties must comply in their domestic anti-trafficking legislation.

2.3.14.5.1 *Clear definition*

By 1975, the Working Group on Slavery had concluded that the definitions of slavery and slave-related practices in the existing conventions did not cover all contemporary manifestations thereof.³⁶⁸ For this reason, Bassiouni³⁶⁹ emphasises that a broader definition was

³⁶⁶ Jordan 2002:13.

³⁶⁷ Article 2 – Addendum A; Defeis 2003/2004:487; SALRC 2006:12; Gallagher 2001:983; UNODC 2004:257.

³⁶⁸ Bassiouni 1990/1991:457-458.

³⁶⁹ Bassiouni 1990/1991:456.

needed that was flexible enough to cover the “expanding range of contemporary practices”.

The strong call for the adoption of an internationally recognised definition of human trafficking in the late 1990’s sought to consolidate the diverse ways of understanding it.³⁷⁰

Unlike previous instruments, the Protocol provides a wide-ranging, internationally agreed-upon definition of human trafficking.³⁷¹ In the earlier discussion of this definition,³⁷² it was shown that the definition contains three basic parts, namely the proscribed acts which must be performed by any of the listed means for the purpose of exploiting the trafficked person.³⁷³ The definition encompasses the usual human trafficking process,³⁷⁴ which typically involves the recruitment and subsequent transportation and harbouring of victims, usually by means of coercion or deception, for the purpose of exploiting them to the benefit of the trafficker.³⁷⁵

³⁷⁰ Truong and Angeles 2005:17.

³⁷¹ UNODC 2006:ix; Laczko and Gramegna 2003:180; Rijken 2003:66; Kassan 2007:18–6; SALRC 2006:12; Snyman 2005:287. According to Harrold 2006:105, the Protocol was designed “specifically to address the contours of human trafficking as differentiated from the African slavery particularised in the previous League of Nations and UN treaties”.

³⁷² See 3.2.2 in Chapter 2 above.

³⁷³ According to article 3(a), “trafficking in persons” means “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.

³⁷⁴ Snyman 2005:281 states that human trafficking is not a single act, but a process consisting of “various actions that are committed over a period of time”.

³⁷⁵ UNODC 2006:xiii-xiv; Truong and Angeles 2005:2; Lee 2007:1; Di Nicola 2007:49-50.

The constituent parts of the crime are spelt out in more detail than in previous instruments.³⁷⁶ As regards the proscribed acts, previous instruments did not define “trafficking” and only prohibited victims from being “procured, enticed or led away”.³⁷⁷ The Palermo Protocol, on the other hand, explicitly prohibits the “recruitment, transportation, transfer, harbouring or receipt” of victims.³⁷⁸

The second part of the human trafficking definition consists of a comprehensive list of forbidden methods used in committing the proscribed acts, ranging from force and deception to less explicit means, such as abuse of victims’ vulnerability.³⁷⁹ The Palermo Protocol prohibits the commitment of the proscribed acts by means of:

...the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of 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...³⁸⁰

Previous trafficking instruments did not require such methods, except for the 1910 Convention for the Suppression of the “White Slave Traffic”,

³⁷⁶ Gallagher 2001:986-987.

³⁷⁷ Article 1 of the 1904 International Agreement for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html> (accessed 12/3/2008); articles 1 and 2 of the 1910 International Convention for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html> (accessed 15/04/2008); article 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children – <http://www.jstor.org/stable/2212987> (accessed 15/9/2008); article 1 of the 1933 International Convention for the Traffic in Women of Full Age – http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008); and article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others – <http://www.unhchr.ch/html/menu3/b/33.htm> (accessed 11/3/2008).

³⁷⁸ Article 3(a) – Addendum A.

³⁷⁹ Raymond 2002:495.

³⁸⁰ Article 3(a).

which banned the use of certain methods, but not as comprehensively as the Palermo Protocol. The 1910 Convention prohibited the procurement of women by “fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion”.³⁸¹ Not even the 1949 Traffic in Persons Convention, which is still in force, requires the use of forceful or deceptive methods.³⁸² Thus, in contrast to previous instruments, the Palermo Protocol forbids the use of numerous criminal means as an element of the trafficking crime in cases where adults are trafficked.³⁸³

The third part of the human trafficking definition focuses on the purpose of exploitation. All previous trafficking instruments limited the exploitative purpose to prostitution or sexual exploitation, also described as procurement for “immoral purposes” or “to gratify the passions of another person”.³⁸⁴ On this point, the Palermo Protocol has made a significant contribution. In contrast to its predecessors, the required exploitative purpose is not limited to a specific type of exploitation, thereby expanding it to include any type of exploitation. To emphasise the new approach, the Protocol, besides sexual exploitation, also lists other types of exploitation, namely “forced labour or services, slavery or practices

³⁸¹ Article 2; Weissbrodt and Anti-Slavery International 2002:31; Dottridge and Weissbrodt 1999:269.

³⁸² See articles 1-4.

³⁸³ Raymond 2002:495.

³⁸⁴ Article 1 of the 1904 International Agreement for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html> (accessed 12/3/2008); articles 1 and 2 of the 1910 International Convention for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html> (accessed 15/04/2008); article 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children – <http://www.jstor.org/stable/2212987> (accessed 15/9/2008); article 1 of the 1933 International Convention for the Traffic in Women of Full Age – http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008); and article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others – <http://www.unhchr.ch/html/menu3/b/33.htm> (accessed 11/3/2008).

similar to slavery, servitude or the removal of organs”.³⁸⁵ As was pointed out earlier,³⁸⁶ this expansion casts the net wide so as to include trafficking for any exploitative purpose. Consequently, traffickers, who were previously immune to prosecution for trafficking persons for purposes other than prostitution, can now be apprehended and prosecuted.

To recapitulate, the Palermo Protocol’s comprehensive definition of “trafficking in persons” is significantly different from measures to combat trafficking contained in earlier instruments. First, earlier instruments did not contain a definition of human trafficking at all, while the Protocol’s definition sets out three detailed parts of the crime. In addition, previous instruments applied to human trafficking for sexual exploitation only, while the definition in the Palermo Protocol includes all forms of exploitation.³⁸⁷ Whereas some previous measures protected only trafficked women and, later on, included children as well,³⁸⁸ the

³⁸⁵ Article 3(a) – Addendum A.

³⁸⁶ See 2.2.2.3.1 in Chapter 2 above.

³⁸⁷ See the discussion of the various forms of exploitation used in a human trafficking scenario in 2.2.2.3.2 of Chapter 2 above; UNODC 2006:xii. Rijken 2003:64-65 discusses the previous narrower definitions, where the purpose of human trafficking was limited to prostitution; see also Lee 2007:10; Weissbrodt and Anti-Slavery International 2002:18.

³⁸⁸ As has been shown in the earlier discussion above, the definitions in the following international counter-trafficking instruments applied to trafficked women only: the International Agreement for the Suppression of the “White Slave Traffic” of 1904 – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html> (accessed 12/3/2008); the International Convention for the Suppression of the “White Slave Traffic” of 1910 – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html> (accessed 15/04/2008); and the International Convention for the Traffic in Women of Full Age of 1933 – http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008). The International Convention for the Suppression of the Traffic in Women and Children of 1921 – <http://www.vilp.de/Enpdf/e158.pdf> (accessed 12/3/2008) – applied to trafficked women and children of both sexes and only the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others – <http://www.unhcr.ch/html/menu3/b/33.htm> (accessed 11/3/2008) – applies to all trafficked persons, irrespective of age or sex.

Protocol's definition recognises that all trafficked persons, irrespective of age or sex, may qualify as victims of trafficking.³⁸⁹

The important obligation established by the Protocol is that a clear definition of human trafficking must be part of domestic counter-trafficking responses. Jordan³⁹⁰ summarises this obligation by stating that states parties must incorporate the essence of the Protocol's definition "into national legislation using simple and clear language".

2.3.14.5.2 *Criminalisation*

One of the key features of the Palermo Protocol is its focus on law enforcement. The Protocol was developed by the United Nations Crime Commission, which is a law enforcement body.³⁹¹ Accordingly, Jordan³⁹² points out that the Palermo Protocol is predominantly a law enforcement instrument rather than a human rights instrument. For this reason, the Palermo Protocol focuses strongly on the criminalisation of human trafficking and related issues by imposing mandatory commitments concerning law enforcement.³⁹³

Marks and Clapham³⁹⁴ argue that the key obligation imposed by the Protocol on states parties is to enact legislation to criminalise the following behaviour:

³⁸⁹ UNODC 2006:xii; Weissbrodt and Anti-Slavery International 2002:26; Harrold 2006:105; Jordan 2002:3; UNODC 2008:95.

³⁹⁰ Jordan 2002:7.

³⁹¹ HSRC 2010:20; Jordan 2002:2.

³⁹² Jordan 2002:2.

³⁹³ Kassan 2007:18–7; Weissbrodt and Anti-Slavery International 2002:23; Defeis 2003/2004: 489; Harrold 2006:105; SALRC 2006:16; Snyman 2005:287.

³⁹⁴ Marks and Clapham 2005:424; see also HSRC 2010:22.

- (a) intentional trafficking in persons;³⁹⁵
- (b) attempting to commit trafficking in persons;³⁹⁶
- (c) participating as an accomplice in trafficking in persons;³⁹⁷ and
- (d) organising or directing persons to commit trafficking in persons.³⁹⁸

Another obligation pertaining to commercial carriers flows from the provision that border controls must be strengthened to prevent and detect human trafficking.³⁹⁹ States parties are obligated to introduce sanctions for commercial carriers, “including any transportation company or the owner or operator of any means of transport” that fails to ascertain that its passengers have the necessary travel documents to enter receiving states.⁴⁰⁰

³⁹⁵ Article 5(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.

This article must be read together with the definition of “trafficking in persons” in article 3(a) and (c) – Addendum A.

³⁹⁶ Article 5(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.

³⁹⁷ Article 5(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (b) participating as an accomplice in an offence established in accordance with paragraph 1 of this article.

³⁹⁸ Article 5(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (c) organising or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

³⁹⁹ Article 11(1) – Addendum A; Kassan 2007:18–8; Marks and Clapham 2005:424; Jordan 2002:31-32; Gallagher 2001:993-994.

⁴⁰⁰ Article 11(1)-(4) – Addendum A; Kassan 2007:18–8; SALRC 2006:19-20; Jordan 2002:31-32; Gallagher 2001:993-994.

2.3.14.5.3 *Adequate sanctions*

The effective combating of human trafficking requires not only the duty to criminalise human trafficking and associated conduct in domestic laws, but also to impose appropriate criminal punishment.⁴⁰¹ However, the Protocol is silent on this issue and does not contain an obligation to impose adequate criminal sanctions. To overcome this shortcoming, states parties must rely upon the mandatory-sanction provisions in the main Organized Crime Convention, which stipulate that appropriate sanctions in accordance with the gravity of the crime must be imposed.⁴⁰²

2.3.14.5.4 *Judicial cooperation*

To give effect to the provisions criminalising human trafficking, the Protocol calls upon ratifying states to take collaborative action.⁴⁰³ The treaty requires law enforcement, immigration and other relevant authorities of ratifying states to cooperate with one another in various areas.⁴⁰⁴ This cooperation pertains to matters such as exchanging information on identifying trafficked victims and perpetrators, travel documents used, and detecting organised criminal groups.⁴⁰⁵ While the Protocol does not contain comprehensive provisions on international

⁴⁰¹ Articles 5, 10(3) and (4); IOM 2008:20.

⁴⁰² See 2.3.13.3.3 above and articles 11(1) and 10(4) of the Convention Against Transnational Organized Crime – http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents2/convention_eng.pdf (accessed 11/3/2008). Similar sanction provisions are also part of earlier instruments – see article 3 of the 1910 International Convention for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instreet/whiteslavetraffic1910.html> (accessed 15/04/2008) – and article 2 of the 1933 International Convention for the Traffic in Women of Full Age – http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008).

⁴⁰³ Articles 8-13; Harrold 2006:105; Raymond 2002:495.

⁴⁰⁴ Article 10(1) – Addendum A; Raymond 2002:491, 495.

⁴⁰⁵ Article 10(1) – Addendum A; Weissbrodt and Anti-Slavery International 2002:24; Defeis 2003/2004:489; SALRC 2006:19; Raymond 2002:491; Kassan 2007:18–14-18; HSRC 2010:24.

cooperation and mutual legal assistance, such provisions are part of the Organized Crime Convention and are thus also applicable to this supplementing Protocol.⁴⁰⁶

2.3.14.5.5 Obligations to protect and assist victims

The Protocol further contains a number of provisions focusing predominantly on victim protection and assistance. Obligations are established regarding the special needs of victims, especially children, and concerning compensation for damage suffered by victims.⁴⁰⁷ However, most of the provisions on victim protection and assistance are formulated in optional language and therefore do not constitute mandatory obligations.

2.3.14.6 Criticism of obligations laid down in the Protocol

The Palermo Protocol's provisions focusing on prosecution and law enforcement issues are a significant contribution to international law. Although the Protocol is a landmark instrument in the combating of human trafficking, certain points of criticism relevant to this study are highlighted.⁴⁰⁸

The first point of criticism relates to the problem that trafficked persons are often not identified and protected as victims. Trafficked persons are granted more comprehensive protection and assistance in terms of the

⁴⁰⁶ Provisions on international cooperation and mutual legal assistance are to be found in articles 13 (international cooperation for purposes of confiscation of the proceeds of crime), 15 (extradition provisions) and 18 (mutual legal assistance) of the United Nations Convention Against Transnational Organized Crime – http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008) – see also 2.3.13.3.5 above.

⁴⁰⁷ Article 6(4) and (6); for a further discussion of obligations to protect and assist victims, see 3.9 in Chapter 6 below.

⁴⁰⁸ For a discussion of other shortcomings in the Palermo Protocol, see Gallagher 2001:993-995.

Palermo Protocol than are smuggled migrants in terms of the Migrant Smuggling Protocol, but they will only be accorded these benefits if they are identified as trafficked victims.⁴⁰⁹ Identification as victims is therefore crucial “for their appropriate access to support and assistance services, which in turn strengthen law enforcement and criminal justice responses to trafficking”.⁴¹⁰ Gallagher⁴¹¹ views the Protocol’s failure to provide guidance on the identification of trafficked persons as a major weakness. To address this problem, it is recommended that “national legal frameworks should provide tools for the identification of victims”.⁴¹²

Another related problem is the fact that trafficked persons are often undocumented in destination countries and, consequently, are treated as illegal immigrants and offenders, not as victims.⁴¹³ These victims are then prosecuted for “status-related offences, such as illegal migration, working without proper documentation and prostitution”.⁴¹⁴ Regrettably, the Protocol does not address this issue and has failed to provide that trafficked persons should not be prosecuted for crimes committed as a direct result of being trafficked.⁴¹⁵

⁴⁰⁹ See also 3.9.1.2.5.b in Chapter 6 below.

⁴¹⁰ UN.GIFT 2008e:37.

⁴¹¹ Gallagher 2001:994, 1000 and 1004.

⁴¹² UN.GIFT 2008e:30; UNODC 2004:289.

⁴¹³ McClain 2007:585; Rijken 2003:73; Haynes 2004:26, 224, 227; UNODC 2006:89, 103; Kanics and Reiter 2001:118; Morawska 2007:105-106; see also 3.2.6 in Chapter 3 above.

⁴¹⁴ Gallagher 2001:990-991.

⁴¹⁵ Marks and Clapham 2005:425; Hodgkin and Newell 2002:528; SALRC 2006:16; Jordan 2002:15. For further information on the background to this issue, see Gallagher 2001:990-991.

A further problem relates to the lack of provisions on seizure, confiscation and disposal of gains to the benefit of trafficked persons. Although this omission was agreed to because the relevant provisions in the Organized Crime Convention apply *mutatis mutandis* to the Protocol, Gallagher points out that:

...states parties will now not be required to use the proceeds from seizure and confiscation to fund assistance and compensation for victims of trafficking.⁴¹⁶

A major concern was raised regarding the realisation of victims' rights and protection. Although the Convention and its Protocols are primarily criminal justice instruments, it is argued that the Palermo Protocol aims to some extent to balance criminal justice concerns with a human rights approach to the protection and assistance of victims.⁴¹⁷ However, the stark difference between mandatory law enforcement provisions and the non-obligatory victim protection provisions attracted criticism.⁴¹⁸ Jordan therefore makes an important point in order to link the Protocol to other human rights instruments by stating that:

...the Trafficking Protocol only establishes certain minimum standards and must be supplemented by human rights obligations contained in international and regional human rights instruments.⁴¹⁹

For this reason, human rights instruments are indeed part of the global and regional normative framework on human trafficking and are therefore included in this Chapter.

⁴¹⁶ Gallagher 2001:991.

⁴¹⁷ Article 2(a) and (b) – Addendum A; UN.GIFT 2008e:2.

⁴¹⁸ Gallagher 2001:991, 1003; UNODC 2004:283.

⁴¹⁹ Jordan 2002:3.

2.4 Human rights instruments and human trafficking

2.4.1 *Introduction*

Although this study does not primarily examine human rights issues in human trafficking,⁴²⁰ it is realised that:

...keeping the best interests of the victim in the forefront of criminal justice responses not only [supports] the victim's human rights, but also [serves] the interests of the criminal justice system in achieving prosecutions.⁴²¹

The literature underpins the fact that a multitude of human rights are grossly violated during the trafficking process.⁴²² Gajic-Veljanoski and Stewart⁴²³ maintain that human trafficking constitutes the denial of a person's rights to liberty, integrity, security and freedom of movement, with such denial often being combined with violence, torture and degrading treatment as well. Apart from economic, social and cultural rights, Farrior⁴²⁴ further adds that human trafficking transgresses "civil and political rights, equality rights, and the right to be free from slavery and slavery-like practices".

Marks and Clapham⁴²⁵ emphasise the fact that human trafficking is a violation of multiple human rights and that international human rights standards must therefore be realised in counter-trafficking legal

⁴²⁰ See 7 in Chapter 1 above.

⁴²¹ UN.GIFT 2008e:36.

⁴²² Lee 2007:9; Marks and Clapham 2005:423; Farrior 1997:213; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8.

⁴²³ Gajic-Veljanoski and Stewart 2007:340.

⁴²⁴ Farrior 1997:213.

⁴²⁵ Marks and Clapham 2005:423.

responses, including the South African response. In this regard, Mugwanya⁴²⁶ points out that the essence of imposing obligations on states parties by way of global and regional treaties is to ensure the practical realisation of the rights and freedoms inscribed in these treaties. In this way, these rights become meaningful to those persons, including trafficked victims, whom they are designed to protect.⁴²⁷

Some human rights instruments refer or are relevant to human trafficking. These instruments are part of the international framework on this crime and have been dealt with above.⁴²⁸ Apart from these treaties, the following prominent human rights instruments are also included in the normative international framework on human trafficking:

2.4.2 *The 1948 Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (Universal Declaration),⁴²⁹ which is the fountainhead document on international human rights,⁴³⁰ provides a universally recognised minimum standard for all nations in observing human rights.⁴³¹ Article 1 of the Declaration stipulates that all

⁴²⁶ Mugwanya 2003:231.

⁴²⁷ Mugwanya 2003:231-232.

⁴²⁸ See, for example, 2.3.11 and 2.3.12 above.

⁴²⁹ This Declaration was adopted in 1948 by the UN General Assembly – <http://www.un.org/Overview/rights.html> (accessed 18/8/2008); Bassiouni 1990/1991:482; Brownlie and Goodwin-Gill 2006:23.

⁴³⁰ Condè 1999:154.

⁴³¹ Preamble; Bassiouni 1990/1991:482. The Universal Declaration of Human Rights is the first instrument to set forth a list of substantive human rights recognised by most states – Condè 1999:154-155. Nowak 2005:xx states that the Declaration is of “pioneering significance in that it gave substance to the term ‘human rights’ used in the United Nations Charter”. However, Bales and Robbins 2001:25 point out that it took almost two decades for the obligations in this Declaration “to be given international legal effect by the introduction of two binding covenants” – see the discussion thereof in 2.4.3 and 2.4.4 below. The Declaration and the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, together with their two Optional Protocols, form the “International Bill of Human Rights”, the core

human beings are born free and are equal in dignity and rights. Hence, Snyman⁴³² points out that the exploitation of people for human trafficking is in stark contrast to the letter and spirit of the above article.

Although the Declaration does not explicitly refer to human trafficking, it enshrines many rights usually violated by trafficking agents. Apart from the prohibition of all forms of slavery, the right to be free from slavery or servitude is underlined.⁴³³ While traditional slavery regarded a slave as a “mere possession” without legal personality,⁴³⁴ the Declaration also explicitly stipulates that everyone has the right to recognition as a person before the law.⁴³⁵ The Declaration also includes other rights relevant to trafficked persons, such as the right to life, liberty, security of the person, privacy, and freedom of movement.⁴³⁶ The Declaration’s provision that no one shall be subjected to torture or to cruel, inhuman or degrading treatment is also applicable to trafficked victims, who are often brutally abused and assaulted.⁴³⁷ The right to education is also violated when children are trafficked and consequently have to forego schooling or other educational opportunities.⁴³⁸ The Declaration enshrines a number of human rights pertaining to work, including the right to work, free choice

instrument on human rights protection worldwide – Nowak 2005:xix; Bales and Robbins 2001:26.

⁴³² Snyman 2005:281.

⁴³³ Article 4; Bassiouni 1990/1991:483; Dottridge and Weissbrodt 1999:249-250; Weissbrodt and Anti-Slavery International 2002:7; Bales and Robbins 2001:23.

⁴³⁴ See the discussion in 4.2.2.2 of Chapter 4 above.

⁴³⁵ Article 6.

⁴³⁶ Articles 3, 12, 13; Lee 2007:9; Dottridge and Weissbrodt 1999:250; Weissbrodt and Anti-Slavery International 2002:8.

⁴³⁷ Article 5; Marks and Clapham 2005:423; Dottridge and Weissbrodt 1999:250; Weissbrodt and Anti-Slavery International 2002:8.

⁴³⁸ Article 26.

of employment, fair working conditions and remuneration, reasonable working hours, and periodic holidays with pay.⁴³⁹ These rights are commonly violated when persons are trafficked for forced labour.⁴⁴⁰

Recognising human rights as principles of broad value to all people, the Universal Declaration requires all states to protect and realise the human rights of all people, including trafficked persons.⁴⁴¹ Consequently, the Declaration is also relevant to domestic anti-trafficking responses.

2.4.3 *The 1965 International Convention on the Elimination of All Forms of Racial Discrimination*

The International Convention on the Elimination of All Forms of Racial Discrimination⁴⁴² requires states parties to adopt all appropriate measures to eliminate racial discrimination.⁴⁴³ South Africa ratified this treaty in 1998.⁴⁴⁴

Given the explicit focus on the elimination of racial discrimination, the Convention does not include any direct reference to human trafficking.

⁴³⁹ Articles 23 and 24; Bassiouni 1990/1991:483; Lee 2007:9.

⁴⁴⁰ Marks and Clapham 2005:423.

⁴⁴¹ Snyman 2005:285; Lee 2007:9. According to Condè 1999:155, this Declaration was initially adopted as a declaration on human rights principles and not as a legally binding instrument, but, after being followed for more than five decades by most states, it has become part of “customary international law and is therefore binding upon all states”.

⁴⁴² This Convention was adopted in 1965 and came into force in 1969 – http://www.unhchr.ch/html/menu3/b/d_icerd.htm (accessed 6/10/2008). For a discussion of this treaty, see Viljoen 2007:92-100.

⁴⁴³ Article 2(1); Viljoen 2007:92. The concept “racial discrimination” is defined comprehensively in article 1 to mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

⁴⁴⁴ DFA 2005:2.

However, it has been documented that trafficked persons are often exposed to intolerances pertaining to racism, racial discrimination and xenophobia.⁴⁴⁵ The Convention may therefore be relevant in human trafficking scenarios where vulnerable racial and ethnic groups are targeted for trafficking.⁴⁴⁶

2.4.4 *The 1966 International Covenant on Economic, Social and Cultural Rights*

The United Nations adopted the International Covenant on Economic, Social and Cultural Rights⁴⁴⁷ to realise social justice by enshrining a wide range of rights.⁴⁴⁸ Together with the International Covenant on Civil and Political Rights, this treaty converted the ideals of the Universal Declaration into binding state obligations.⁴⁴⁹

Although the Covenant does not address human trafficking directly, it does have relevance to this phenomenon. Bassiouni⁴⁵⁰ argues that this Covenant “indirectly addresses the ability of a person to be subjected to slavery, servitude, or compulsory [labor]”, because the Covenant enshrines equal rights for both men and women to enjoy all economic,

⁴⁴⁵ The Declaration of the 2001 World Conference Against Racism, Racial Discrimination Xenophobia and Related Intolerance held in South Africa confirmed this fact – see Hodgkin and Newell 2002:524; Weissbrodt and Anti-Slavery International 2002:42-44.

⁴⁴⁶ Bassiouni 1990/1991:484. Racial discrimination is condemned and criminalised in articles 2, 5 and 6 of this Convention. The recent xenophobic violence in South Africa is an example of how racial and ethnic discrimination render people vulnerable and may subsequently lure traffickers to exploit them for human trafficking – Bake-Paterson 2008:7.

⁴⁴⁷ This Covenant was adopted in 1966 and came into force in 1976 – http://www.unhchr.ch/html/menu3/b/a_cescr.htm (accessed 6/10/2008).

⁴⁴⁸ Viljoen 2007:120. For a further discussion of this treaty, see Viljoen 2007:120-126.

⁴⁴⁹ Bales and Robbins 2001:25. Viljoen 2007:120 points out that article 2 of the treaty obligates a ratifying state to take steps “to the maximum of its available resources” to achieve “progressively the full realisation of the rights” in the Covenant.

⁴⁵⁰ Bassiouni 1990/1991:485.

social and cultural rights.⁴⁵¹ Especially relevant to labour trafficking,⁴⁵² this Covenant explicitly recognises the right to work freely chosen as well as the right to fair wages and to just, safe and healthy conditions of work.⁴⁵³

Farrior⁴⁵⁴ links the abovementioned rights in the Covenant to human trafficking by emphasising that persons, particularly women and girls, deprived of these rights become vulnerable to trafficking. In 1994, South Africa ratified this Covenant and is therefore obligated to comply with its provisions.⁴⁵⁵

2.4.5 *The 1966 International Covenant on Civil and Political Rights*

Adopted by the United Nations, the International Covenant on Civil and Political Rights⁴⁵⁶ is the landmark treaty on the main civil and political

⁴⁵¹ Article 3; Farrior 1997:231.

⁴⁵² Marks and Clapham 2005:423.

⁴⁵³ Articles 6 and 7; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8; Smith 2007:222; Bales and Robbins 2001:25.

⁴⁵⁴ Farrior 1997:231.

⁴⁵⁵ DFA 2005:2. However, Mugwanya 2003:420 maintains that South Africa only signed this treaty in 1994.

⁴⁵⁶ This Covenant was adopted in 1966 and came into force in 1976 – <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008); Bassiouni 1990/1991:485; Nowak 2005:193-209. This Covenant contains “classical human rights of the so-called ‘first generation’, which made their way into the domestic constitutional law of most nation States...” – Nowak 2005:xx. This Covenant is widely accepted, in that over three-quarters of all states of the world have accepted “the legal obligation to respect and to ensure by positive measures the rights recognised in the Covenant to all persons under their jurisdiction” – Nowak 2005:xxxix; Keith 1999:95.

rights.⁴⁵⁷ This Covenant underpins numerous human rights that were enumerated in the Universal Declaration.⁴⁵⁸

Although human trafficking is also not explicitly addressed, a number of rights included in this Covenant are relevant to human trafficking. Again, all forms of slavery as well as servitude are prohibited.⁴⁵⁹ Recognition of legal personality is included and the treaty forbids torture and cruel, inhuman or degrading treatment.⁴⁶⁰

The Covenant further enshrines several fundamental human rights that are often infringed in the human trafficking process, such as the right to life, liberty, security of the person, privacy, and freedom of movement.⁴⁶¹ Parties to this Covenant are required to ensure that victims whose rights are violated have an “effective remedy”.⁴⁶²

Relevant to labour trafficking, the Covenant unequivocally prohibits forced labour, but allows for exceptions such as prison labour, military service, and services during emergencies or as part of normal civil obligations.⁴⁶³ Bassiouni⁴⁶⁴ argues that, although the prohibition of forced

⁴⁵⁷ Viljoen 2007:100. For a further discussion of this treaty, see Viljoen 2007:100-120.

⁴⁵⁸ Bales and Robbins 2001:25. According to Nowak 2005:xx, the two Human Rights Covenants of 1966 gave more precise shape, as well as binding status, to the human rights contained in the 1948 Universal Declaration.

⁴⁵⁹ Article 8(1) and (2); Bassiouni 1990/1991:485; Fariior 1997:225; Bales and Robbins 2001:25.

⁴⁶⁰ Articles 7 and 16; Nowak 2005:157-192; Marks and Clapham 2005:423; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:7.

⁴⁶¹ Articles 6, 9(1) and 12; Nowak 2005:120-156, 210-240, 259-289, 377-405.

⁴⁶² Article 2; Fariior 1997:226.

⁴⁶³ Article 8(3); Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8; Bales and Robbins 2001:25.

⁴⁶⁴ Bassiouni 1990/1991:485.

labour is “riddled with qualifications, the desire to ensure freedom is not diluted”. Having ratified the Covenant in 1998,⁴⁶⁵ South Africa incurred the obligation to realise its provisions, including the human rights applicable to trafficked persons.

2.4.6 *The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in 1987⁴⁶⁶ and was ratified by South Africa in 1998.⁴⁶⁷ The treaty aims to combat torture and other cruel, inhuman or degrading treatment or punishment more effectively throughout the world.⁴⁶⁸

This Convention defines “torture” comprehensively as any act:

...by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed..., or intimidating or coercing him ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁴⁶⁹

⁴⁶⁵ DFA 2005:2. According to Mugwanya 2003:420, South Africa only signed this treaty in 1994.

⁴⁶⁶ <http://www.hrweb.org/legal/cat.htm> (accessed 6/10/2008); Brownlie and Goodwin-Gill 2006:405; Viljoen 2007:131. For a further discussion of this treaty, see Viljoen 2007:131-140.

⁴⁶⁷ DFA 2005:2.

⁴⁶⁸ Preamble and articles 2-16.

⁴⁶⁹ Article 1(1).

The last part of this definition indicates that the Convention applies specifically to the public sphere where public officials are involved in these proscribed acts. In this regard, Lee⁴⁷⁰ documents that transnational organised crime linked to human trafficking has penetrated the political and public sphere in many countries. Therefore, the provisions of this Convention will be applicable to public officials who are involved in human trafficking and whose conduct complies with the definition of “torture”.

Apart from providing definitional clarification, the Convention also explicitly obligates states parties to criminalise all acts of torture as well as attempt thereto and participation conduct.⁴⁷¹ In addition, these offences must be punished by way of penalties that “take into account their grave nature”.⁴⁷²

3. AFRICAN REGIONAL FRAMEWORK

Apart from the international framework, many regional instruments relevant to human trafficking materialised in the various regional human rights systems.⁴⁷³ Since the geographical focus of this study is human

⁴⁷⁰ Lee 2007:6 specifically refers to Latin America and the former Soviet states. Lee further avers that this link between transnational organised crime and public officials facilitates the illicit movement of people in the trafficking process.

⁴⁷¹ Article 4(1) and (2); Viljoen 2007:131-132.

⁴⁷² Article 4(2); Viljoen 2007:131-132.

⁴⁷³ There are three main regional human rights systems worldwide, namely the European system, established in 1949 by the Council of Europe, the Inter-American System, established in 1948 and operating within the framework of the Organisation of American States and covering South, Central and North America, and the African system, now functioning within the African Union established in 2002 and covering most of Africa – Viljoen 2007:10-16; Smith 2007:80-

trafficking in the South African context, this Chapter covers only African regional instruments on human trafficking.

3.1 The 1981 African Charter on Human and Peoples' Rights

The states members of the Organisation of African Unity (OAU)⁴⁷⁴ adopted the African Charter on Human and Peoples' Rights (the African Charter) in 1981.⁴⁷⁵ All African states, including South Africa, ratified this treaty.⁴⁷⁶

Apart from underpinning universal human rights instruments, the African Charter is the principal treaty providing a normative framework for human rights in the region.⁴⁷⁷ According to Mugwanya, this instrument:

...anchored the African regional system, providing a comprehensive catalogue of binding human and people's rights coupled with a specialised Commission to monitor respect for human rights...⁴⁷⁸

86; Mugwanya 2003:32-50; Condè 1999:126. Viljoen 2007:12, 16 points out that, while Asia has no human rights system, two fledgling Arab and Muslim regional systems have emerged; Mugwanya 2003:49-50.

⁴⁷⁴ The OAU came into being in 1963 as "the first pan-African intergovernmental organisation", taking the form of a loose association of independent African states – Viljoen 2007:162; Smith 2007:125. For a discussion of the OAU and how it was replaced by the African Union in 2002, see Viljoen 2007:163-177.

⁴⁷⁵ <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed 12/3/2008). The treaty entered into force on 21 October 1986 – Brownlie and Goodwin-Gill 2006:1007; SALRC 2006:24. For a further discussion of this Charter, see Viljoen 2007:236-253; Smith 2007:126-127; Mugwanya 2003:187-238; Viljoen 2000:216.

⁴⁷⁶ Centre for Reproductive Rights 2006:4; Kamidi 2007:24. South Africa ratified this Charter in 1996 – DFA 2005:2.

⁴⁷⁷ Viljoen 2007:235; Centre for Reproductive Rights 2006:2; Mugwanya 2003:238; HSRC 2010:36.

⁴⁷⁸ Mugwanya 2003:171.

The Charter includes several human rights typically violated when a person is trafficked, for example the right to equality, non-discrimination, life, liberty, integrity and security of the person, privacy, dignity and freedom of movement.⁴⁷⁹ Without specifically referring to human trafficking, the Charter is more directly relevant to human trafficking in that it prohibits “all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment”.⁴⁸⁰ Slavery and exploitation akin to slavery, such as human trafficking, impair the right to liberty and security of the person.⁴⁸¹ What is apposite to labour trafficking is that the Charter includes the right to work under “equitable and satisfactory” working conditions and the principle of equal pay for equal work.⁴⁸²

Although the Charter does not contain a specific provision on human trafficking, it is aligned with international human rights instruments by underpinning the obligatory protection of human rights. Accordingly, the mandatory protection of human rights must also ground domestic anti-trafficking responses in Africa, primarily serving trafficked victims, but also indirectly contributing to the successful prosecution of offenders.⁴⁸³

⁴⁷⁹ Articles 2-6 and 12; SALRC 2006:24. For a discussion of how the African Commission on Human and People’s Rights has dealt with violations of these articles, see Mugwanya 2003:278-283, 294-296.

⁴⁸⁰ Article 5; Mugwanya 2003:280, 282; Bassiouni 1990/1991:487-488; Marks and Clapham 2005:423; Kamidi 2007:24; SALRC 2006:24.

⁴⁸¹ Kamidi 2007:24.

⁴⁸² Article 15.

⁴⁸³ Gallagher 2001:991, 1004; see also 2.3.14.6 and 2.4.1 above; Ezeilo 2009:8; UN.GIFT 2008e:1, 36.

3.2 The 1990 African Charter on the Rights and Welfare of the Child

Supplementing the Convention on the Rights of the Child with regional specificities,⁴⁸⁴ the African Charter on the Rights and Welfare of the Child (African Children’s Charter) was adopted in 1990, but only entered into force in 1999.⁴⁸⁵ While both instruments cover children’s rights comprehensively, Viljoen⁴⁸⁶ points out that the Convention on the Rights of the Child is a global instrument with numerous compromises, while the African Children’s Charter is a regional human rights instrument focusing on issues of particular importance to children in Africa.⁴⁸⁷ South Africa ratified this Charter in 2000.⁴⁸⁸

Apart from reaffirming some general fundamental rights,⁴⁸⁹ the African Children’s Charter includes specific obligations regarding child labour,⁴⁹⁰ a phenomenon that is often encountered in human trafficking. The broad obligation is on states parties to protect children from all forms of economic exploitation, including work that is hazardous or work that interferes with “the child’s physical, mental, spiritual, moral, or social

⁴⁸⁴ Viljoen 2000:224; Smith 2007:128.

⁴⁸⁵ This regional treaty was adopted by the Organisation of African Unity – http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE_%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008); Brownlie and Goodwin-Gill 2006:1042; Kamidi 2007:25; SALRC 2006:24; UNODC 2008:25; SADC 2009:7; HSRC 2010:30.

⁴⁸⁶ Viljoen 2007:261-262.

⁴⁸⁷ SADC 2009:7; Kamidi 2007:25. For a comparison between these two instruments, see Viljoen 2000:218-219, 224; Viljoen 2007:262. See Viljoen 2000:214-231 and Viljoen 2007:260-266 for a discussion of the African Children’s Charter.

⁴⁸⁸ DFA 2005:3; Kassan 2007:18–9.

⁴⁸⁹ For example, the right to life is included in article 5 and the right to privacy in article 10.

⁴⁹⁰ Article 15; SALRC 2006:24-25.

development”.⁴⁹¹ In addition, minimum wages, appropriate working conditions as well as relevant provisions in the International Labour Organisation’s instruments pertaining to children must be adhered to.⁴⁹² In contrast to the Convention on the Rights of the Child,⁴⁹³ this treaty provides that the prohibition of the economic exploitation of children pertains to both the formal and informal sectors of the economy. This is of significant importance, since children are often trafficked for forced labour into the informal, unregulated sector where they are easily exploited because they are not protected by labour law.⁴⁹⁴

Given the abuse that trafficked persons are exposed to, the Charter’s obligations in this regard are important. States parties commit themselves to protect children from all forms of torture, inhuman or degrading treatment, abuse, neglect or maltreatment.⁴⁹⁵ Other relevant provisions prohibit child marriages⁴⁹⁶ and the direct participation of children in armed conflict,⁴⁹⁷ while appropriate measures must be taken to ensure that intercountry adoptions do not result in human trafficking.⁴⁹⁸

⁴⁹¹ Article 15(1); Kamidi 2007:25.

⁴⁹² Article 15(2).

⁴⁹³ <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008).

⁴⁹⁴ Wijers and Lap-Chew 1999:40, 223; UN.GIFT 2008a:5-6; Blagbrough 2008:188; US Department of State 2008:19; Kamidi 2007:25. Children trafficked to perform domestic labour in private households are a typical example of such informal, unregulated sectors of the labour market. See also 2.2.2.3.2.b in Chapter 2 above.

⁴⁹⁵ Article 16(1); Marks and Clapham 2005:423; SALRC 2006:25.

⁴⁹⁶ Article 21(2) stipulates that the minimum age for marriage is 18 years. For a discussion of trafficking for purposes of forced or child marriages, see 2.2.2.3.2.d in Chapter 2 above.

⁴⁹⁷ Article 22. For a discussion of trafficking for purposes of military service, see 2.2.2.3.2.g in Chapter 2 above.

⁴⁹⁸ Article 24(d). For a discussion of trafficking for purposes of illegal adoption, see 3.2.2.3.2.f in Chapter 2 above.

What is pertinent to this study is the Charter's obligation on states parties to prevent:

- (a) the abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.⁴⁹⁹

The specific reference to trafficking in children is to be welcomed, but, regrettably, the concept "traffic of children" is not defined. Furthermore, the difference between trafficking in children and the sale of children is not clarified. However, being a comprehensive regional human rights instrument, the African Children's Charter underpins international human rights law, and the implied obligation that the protection of fundamental rights, especially pertaining to children, is an integral part of domestic anti-trafficking responses.

3.3 The 2001 Economic Community of West African States Declaration on the Fight Against Trafficking in Persons

In the same way as the Palermo Protocol has to a large extent combined international counter-trafficking provisions in international instruments into a single, binding global treaty, an anti-trafficking protocol to the African Charter may advance regional standard-setting as regards the combating of human trafficking.⁵⁰⁰ In 2001, the Economic Community of

⁴⁹⁹ Article 29; Kamidi 2007:25; SALRC 2006:24; UNODC 2008:25. For a discussion of trafficking for purposes of begging, see 2.2.2.3.2.h in Chapter 2 above.

⁵⁰⁰ Mugwanya 2003:347 has a similar argument and suggests that protocols should be adopted "to protect specific vulnerable groups such as the aged, disabled and other minorities" – trafficked persons are also part of a vulnerable group.

West African States (ECOWAS) took the first step in this regard by adopting a subregional counter-trafficking initiative.⁵⁰¹

The Preamble to the Declaration on the Fight Against Trafficking in Persons⁵⁰² emphasises that effective counter-trafficking action must include the prevention of trafficking, the prosecution and punishment of perpetrators, as well as the protection of trafficked victims. The Declaration calls upon member states to combat human trafficking in West Africa by way of measures such as the criminalisation of human trafficking⁵⁰³ as well as the provision of victim protection and assistance.⁵⁰⁴ Banda⁵⁰⁵ emphasises that much can be learnt from the ECOWAS initiative, especially the establishment of specialist anti-trafficking units within law enforcement agencies and within the prosecutorial services.⁵⁰⁶

⁵⁰¹ UNODC 2008:27; HSRC 2010:37; for a discussion of the ruling against Niger by the ECOWAS Court of Justice in the case of *Hadijatou Mani Koraou v Niger* and its importance regarding the combating of human trafficking, see HSRC 2010:37-39.

⁵⁰² <http://www.achpr.org/english/SpecialMechanisms/Women/ECOWASdeclaration.pdf> (accessed 3/11/2008); Viljoen 2007:512.

⁵⁰³ Paragraph 5.

⁵⁰⁴ Paragraphs 5 and 6.

⁵⁰⁵ Banda 2008:15-16.

⁵⁰⁶ Paragraph 11 – <http://www.achpr.org/english/SpecialMechanisms/Women/ECOWASdeclaration.pdf> (accessed 3/11/2008); see also 3.11 in Chapter 6 below. In paragraph 19 of the Declaration, member states further directed the ECOWAS Secretariat to prepare a subregional counter-trafficking convention, focusing especially on trafficking in women and children.

3.4 The 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

Supplementing the regional African Charter on Human and People's Rights, the Protocol on the Rights of Women in Africa⁵⁰⁷ was adopted by the African Union in 2003. According to Viljoen,⁵⁰⁸ this legally binding instrument significantly advanced standard-setting, focusing on the principle of equality between women and men and on the effective implementation thereof in domestic legislation.⁵⁰⁹ Acknowledged as the core regional human rights treaty on the rights of women in Africa, the Protocol, Banda states,⁵¹⁰ reflects many of the international gains made in the field of women's rights.⁵¹¹ South Africa ratified this Protocol in 2004.⁵¹²

This milestone regional treaty contains numerous provisions that have a direct or indirect bearing on human trafficking. While the right to life,⁵¹³

⁵⁰⁷ This Protocol entered into force in 2005 after 15 African governments ratified it – <http://www.africa-union.org/root/au/Documents/Treaties/Text/ProtocolontheRightsofWomen.pdf> (accessed 14/10/2008); DFA 2005:3; Centre for Reproductive Rights 2006:1; Brownlie and Goodwin-Gill 2006:1029; Viljoen 2007:268; Smith 2007:128; Kamidi 2007:26.

⁵⁰⁸ Viljoen 2007:272.

⁵⁰⁹ Brownlie and Goodwin-Gill 2006:1029; HSRC 2010:30.

⁵¹⁰ Banda 2008:22.

⁵¹¹ Apart from identifying key shortcomings in the African Charter pertaining to women's rights, the Centre for Reproductive Rights 2006:2-3 highlights that the Protocol clarified ratifying states' obligations concerning women's rights and added women's rights omitted from the African Charter. Although the African Charter does not focus on women's rights extensively, article 18(3) requires states parties to "eliminate every discrimination against women" and to protect "the rights of the woman and the child as stipulated in international declarations and conventions".

⁵¹² DFA 2005:3.

⁵¹³ Article 4(1).

dignity, integrity and security of the person⁵¹⁴ are recognised, discrimination against women,⁵¹⁵ child marriages,⁵¹⁶ child labour⁵¹⁷ and child participation in armed conflicts⁵¹⁸ are also prohibited. All forms of exploitation and cruel, inhuman and degrading treatment are also proscribed.⁵¹⁹ Obligating states parties to protect women from all forms of violence,⁵²⁰ this treaty defines “violence against women” broadly to include all acts perpetrated against women causing physical, sexual, psychological and economic harm.⁵²¹ Invariably, such harm is experienced by trafficked persons, especially women.⁵²² Similar to other human rights instruments, this human rights treaty underlines the obligation to protect human rights with specific reference to women, an obligation that is also relevant to human trafficking responses.

More directly focused on human trafficking is the Protocol’s obligation on states parties to:

⁵¹⁴ Article 4(1).

⁵¹⁵ Article 2.

⁵¹⁶ Article 6(a) and (b) stipulates 18 years as the minimum age of marriage for women and requires the full consent of both parties to marriage, thus prohibiting forced marriages; Centre for Reproductive Rights 2006:13-14.

⁵¹⁷ Article 13(g).

⁵¹⁸ Article 11(4).

⁵¹⁹ Articles 4(1) and 3(1); Marks and Clapham 2005:423.

⁵²⁰ Article 3(4).

⁵²¹ Article 1(j); Centre for Reproductive Rights 2006:8-9. Article 4(2)(a) specifically lists unwanted or forced sex as a form of violence against women. This type of violence is often experienced by women trafficked for sexual exploitation – see 3.2.2 in Chapter 3 above; US Department of State 2007:35; GAATW 1999a:63, 66; Melvin 2006:29.

⁵²² For a discussion of the consequences of human trafficking for victims, see 3.2 in Chapter 3 above. See also Zimmerman *et al.* 2006:13-14, 22; UN.GIFT 2008e:18; UNODC 2006:154; IOM 2006:13; US Department of State 2008:5; Melvin 2006:28.

...prevent and condemn trafficking in women, prosecute perpetrators of such trafficking and protect those women most at risk.⁵²³

Although the concept “trafficking” is yet again not defined, this Protocol takes a holistic approach to addressing human trafficking by including the obligation to prevent and prosecute the crime, as well as to protect trafficked victims.⁵²⁴

3.5 The 2004 Solemn Declaration on Gender Equality in Africa

Concerned about gender equality, the member states of the African Union adopted the Solemn Declaration on Gender Equality in Africa in 2004.⁵²⁵ Apart from agreeing to launch, within a year from adoption, a campaign for the prohibition of the recruitment of child soldiers and of the abuse of girl children as wives and sex slaves,⁵²⁶ the member states agreed to:

...initiate, launch and engage within two years sustained public campaigns against gender based violence as well as the problem of trafficking in women and girls.⁵²⁷

In this African instrument promoting gender equality, member states committed themselves to report annually on the progress made

⁵²³ Article 4(g); Kamidi 2007:26; SALRC 2006:25; UNODC 2008:22.

⁵²⁴ Banda 2008:15; Marks and Clapham 2005:424.

⁵²⁵ <http://www.africa-union.org/root/au/Conferences/Past/2006/October/WG/doc.htm> (accessed 14/10/2008); AU 2006b:1.

⁵²⁶ Paragraph 3.

⁵²⁷ Paragraph 4.

concerning issues raised in this Declaration, which specifically include the trafficking of women and girls.⁵²⁸

3.6 The 2006 African Youth Charter

The African Youth Charter⁵²⁹ was adopted to empower youths, that is, persons between the ages of 15 and 35.⁵³⁰ South Africa⁵³¹ and other member states of the African Union that ratified or acceded to the African Youth Charter are obligated to recognise the rights, freedoms and duties enshrined in this Charter and to adopt legislative and other measures to give effect to the provisions in the Charter.⁵³² Apposite to this study is the specific reference to trafficking, in that states parties are obligated:

...to enact and enforce legislation that protect[s] girls and young women from all forms of violence, genital mutilation, incest, rape, sexual abuse, sexual exploitation, trafficking, prostitution and pornography.⁵³³

This obligation to protect young women against trafficking is indeed welcomed, especially because these women are often vulnerable owing to inequalities in status and education or employment opportunities.⁵³⁴

⁵²⁸ Paragraph 12; AU 2006b:1. By 2006, the first reports of seven member states, including South Africa, had been submitted – AU 2006b:1.

⁵²⁹ <http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf> (accessed 14/7/2010).

⁵³⁰ Preamble to, and definitions in, the African Youth Charter.

⁵³¹ SADC 2010:2.

⁵³² Article 1 – <http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf> (accessed 14/7/2010).

⁵³³ Article 23(I); see also SADC 2009:6.

⁵³⁴ Defeis 2003/2004:485; see also Pharoah 2006:37; Truong and Angeles 2005:4; US Department of State 2007:9; Singh 2004:341; Rijken 2003:66; Snyman 2005:284; Foundation Against Trafficking in Women *et al.* 2001:3.

However, the literature confirms that males, especially the boy child, are also trafficked.⁵³⁵ Therefore, it is unfortunate that young males, and especially young boys, are not included in the protection afforded against trafficking.

3.7 The 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children

In 2006, Europe and Africa jointly established the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (Ouagadougou Action Plan).⁵³⁶ Recognising that the effective combating of human trafficking requires comprehensive regional and international cooperation between countries of origin, transit and destination, this instrument serves as a framework for action among the parties in order to prevent human trafficking, punish offenders and protect trafficked victims.⁵³⁷

The Ouagadougou Action Plan incorporates many of the minimum standards set out in the two main international instruments on human trafficking, namely the United Nations Organized Crime Convention and the Palermo Protocol. Apart from requiring the ratification and implementation of the Organized Crime Convention and the Palermo Protocol, the Ouagadougou Action Plan further enjoins states to adopt

⁵³⁵ US Department of State 2010:36; Ezeilo 2009:8; Rijken 2003:66; Truong and Angeles 2005:4; Di Nicola 2007:52; Snyman 2005:280, 284.

⁵³⁶ EU and AU 2006:2 – http://ec.europa.eu/justice_home/doc_centre/immigration/docs/OUAGADOUGOU.pdf (accessed 17/7/2010).

⁵³⁷ EU and AU 2006:2; SADC 2009:7-8.

anti-trafficking legislation complying with these two instruments.⁵³⁸ Domestic legislation should therefore define and criminalise human trafficking and ensure effective prosecution as well as deterrent penalties.⁵³⁹ Furthermore, legislative provisions need to provide for the liability of legal persons and the confiscation of instruments and proceeds of trafficking crimes.⁵⁴⁰ As regards victims of crime, domestic legislation must protect and support victims in line with international human rights instruments, provide victims with information on legal proceedings, and ensure “safety and security of victims and witnesses at all stages of legal proceedings”.⁵⁴¹ Broader than the Organized Crime Convention and the Palermo Protocol, the Ouagadougou Action Plan also requires the adoption of measures to avoid prosecution of trafficked persons.⁵⁴² This joint European and African Action Plan, which calls for compliance with most international minimum standards to counter human trafficking, is a progressive step in combating this complex crime.

3.8 The 2008 Southern African Development Community Protocol on Gender and Development

Subregionally, the Southern African Development Community (SADC)⁵⁴³ adopted the Protocol on Gender and Development (SADC Gender

⁵³⁸ EU and AU 2006:4-5.

⁵³⁹ EU and AU 2006:5.

⁵⁴⁰ EU and AU 2006:5.

⁵⁴¹ EU and AU 2006:5.

⁵⁴² EU and AU 2006:5.

⁵⁴³ For a discussion of the Southern African Development Community (SADC), established in 1993 and with a membership of 14 countries by 2007, see Viljoen 2007:492; Gastrow 2001:11-12.

Protocol)⁵⁴⁴ in 2008.⁵⁴⁵ South Africa signed the Protocol on 17 August 2008.⁵⁴⁶ Apart from dealing with numerous other issues, the Protocol also includes provisions specifically focusing on human trafficking. It is to be welcomed that the SADC Gender Protocol underpins international standards by adopting a definition of the concept “human trafficking” in line with the Palermo Protocol, namely:

...the recruitment, transportation, harbouring or receipt of persons, by means of threat, abuse of power, position of vulnerability, force or other forms of coercion, abduction, fraud or deception to achieve the consent of a person having control over another person for the purpose of amongst other things, sexual and financial exploitation.⁵⁴⁷

According to Ncube⁵⁴⁸ of the SADC Secretariat, this Protocol is significant in that it introduces subregional benchmarks for human trafficking linked to a time frame.⁵⁴⁹ The Protocol requires states parties to comply with certain obligations, such as the adoption of anti-trafficking legislation, by 2015.⁵⁵⁰ The Protocol also obligates states parties to provide mechanisms enabling all law enforcement authorities to combat human trafficking on a national, regional and international level.⁵⁵¹ In addition, harmonised data-collection mechanisms,⁵⁵² joint counter-

⁵⁴⁴ www.genderlinks.org.za/attachment_view.php?pa_id=614 (accessed 14/10/2008).

⁵⁴⁵ Ncube 2008:4; SADC 2009:8. The SADC Declaration on Gender and Development of 1997 was the precursor to this Protocol – Kamidi 2007:26; HSRC 2010:37.

⁵⁴⁶ SADC 2008:22.

⁵⁴⁷ Article 1(2).

⁵⁴⁸ Ncube 2008:4; SADC 2009:8.

⁵⁴⁹ Article 20(5)(a)-(e); SADC 2009:8; HSRC 2010:37.

⁵⁵⁰ Article 20(5)(a).

⁵⁵¹ Article 20(5)(b); HSRC 2010:37.

⁵⁵² Article 20(5)(c); HSRC 2010:37.

trafficking actions by origin, transit and destination countries,⁵⁵³ and awareness-raising are also required within the same time frame.⁵⁵⁴

3.9 The 10 Year Southern African Development Community Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (2009-2019)

The 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (SADC Plan of Action),⁵⁵⁵ aims to promote cooperation and to provide support to SADC member states in combating trafficking within the SADC region.⁵⁵⁶ A number of strategic priorities for action are charted to be implemented over 10 years from 2009 to 2019.⁵⁵⁷ What is apposite to this study is that the ratification, domestication and implementation of the Organized Crime Convention, the Palermo Protocol and the SADC Gender Protocol are specified as a strategic priority for member states to act upon.⁵⁵⁸ Another issue not always dealt with is the importance of monitoring and evaluation. It is to be welcomed that a strategic priority is included in the SADC Plan of Action on monitoring, reporting and evaluating the implementation of this regional strategic plan at regional and national levels.⁵⁵⁹

⁵⁵³ Article 20(5)(d); HSRC 2010:37.

⁵⁵⁴ HSRC 2010:37.

⁵⁵⁵ www.santac.org/.../Final%20Draft%20of%20the%20Ten%20Year%20Strategic%20Plan%20of (accessed 14/07/2010).

⁵⁵⁶ SADC 2009:13. For an overview of the purpose and objectives of the SADC Plan of Action, see SADC 2009:13-14.

⁵⁵⁷ SADC 2009:2, 14-19.

⁵⁵⁸ SADC 2009:14 – see the strategic priorities for action on legislation and policy measures.

⁵⁵⁹ SADC 2009:18.

Apart from including victim support and protection for witnesses, it is important to note that the SADC Plan of Action further expands protection to include those people who report cases of human trafficking.⁵⁶⁰ This is a valuable addition, for it encourages those people brave enough to report human trafficking to do so knowing that their safety is secured.

Another strategic priority for action confirms the importance of coordination and regional cooperation among member states. This cooperation includes the sharing of appropriate information and experiences among relevant sectors of member states, including law enforcement, border control and immigration authorities.⁵⁶¹

In line with the ECOWAS Declaration on the Fight Against Trafficking in Persons,⁵⁶² the strategic priority on training for skills enhancement and capacity building of the SADC Plan of Action provides that member states be supported in establishing or strengthening institutional mechanisms, specifically public and private specialised units, agencies or institutions.⁵⁶³ Although the ECOWAS Declaration as well as the SADC Plan of Action are not legally binding instruments, both acknowledge the need for expertise and specialisation in order to combat human trafficking effectively.

⁵⁶⁰ SADC 2009:16.

⁵⁶¹ SADC 2009:17.

⁵⁶² <http://www.achpr.org/english/SpecialMechanisms/Women/ECOWASdeclaration.pdf> (accessed 3/11/2008) – see paragraph 11; see also 3.3 above.

⁵⁶³ SADC 2009:15 – see Strategic Priority for Action 5.1: activity 3.

3.10 Guidance from the African regional framework

In reviewing the African regional framework on human trafficking, it is to be noted that a comprehensive, binding African treaty on human trafficking has yet to be agreed to. This notwithstanding, a number of African human rights treaties underpin international law by endorsing the obligation to protect human rights and also to protect such rights in domestic anti-trafficking interventions. Other African instruments, although not all binding instruments, took the first steps in sanctioning international minimum standards pertaining to human trafficking, such as the adoption of anti-trafficking legislation which defines and criminalises human trafficking⁵⁶⁴ and ensures effective prosecution and deterrent penalties for offenders.⁵⁶⁵

4. CONCLUSION

Farrior⁵⁶⁶ emphasises that human trafficking falls within the purview of a range of international and regional instruments. Exploring the development of these instruments informs the understanding of present-day human trafficking.⁵⁶⁷ Evolving from chattel slavery, these instruments illuminate how human trafficking has developed into its contemporary

⁵⁶⁴ Articles 1(2) and 20(5)(a) of the SADC Protocol on Gender and Development – www.genderlinks.org.za/attachment_view.php?pa_id=614 (accessed 14/10/2008); see also EU and AU 2006:5; 3.7 above.

⁵⁶⁵ Article 4(g) of the Protocol on the Rights of Women in Africa – <http://www.africa-union.org/root/au/Documents/Treaties/Text/ProtocolontheRightsofWomen.pdf> (accessed 14/10/2008).

⁵⁶⁶ Farrior 1997:213.

⁵⁶⁷ Picarelli 2007:27.

form whilst retaining some of the core elements of historical forms of slavery and servitude.⁵⁶⁸ Indeed, the targeting and controlling of vulnerable people for profitable exploitation have remained consistent throughout history.⁵⁶⁹

Apart from enhancing comprehension, these instruments form the international and African regional normative framework pertaining to human trafficking.⁵⁷⁰ From this framework, obligations are drawn to combat human trafficking more efficiently.

The focus of the next Chapter is to clarify these obligations as minimum standards for domestic counter-trafficking responses.

⁵⁶⁸ Lee 2007:13-14; Picarelli 2007:45.

⁵⁶⁹ Picarelli 2007:45.

⁵⁷⁰ Picarelli 2007:27.

CHAPTER 6

PURSUING STANDARDS FOR DOMESTIC LEGAL RESPONSES TO COMBAT HUMAN TRAFFICKING

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 - 3.1.1.1 Defining human trafficking
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CHAPTER 6

PURSUING STANDARDS FOR DOMESTIC LEGAL RESPONSES TO COMBAT HUMAN TRAFFICKING

1. INTRODUCTION

In the previous Chapter, numerous international and regional instruments relevant to human trafficking were dealt with, with the Convention Against Transnational Organized Crime (Organized Crime Convention)¹ and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol),² being at the fore. These instruments strive to combat specific crimes, including human trafficking, more effectively by laying down obligations that states parties must or should comply with in domestic legislation.

It is important to note that the provisions in the various instruments pertaining to human trafficking have different tiers of obligation.³ Besides mandatory provisions indicating minimum standards,⁴ there are

¹ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008); Raymond 2002:492-493. For an overview of the process preceding the adoption of the Convention, see Gallagher 2001:975-977.

² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

³ UNODC 2004:248.

⁴ In line with the Legislative Guides for the Implementation of the Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides), the

provisions that states parties must consider or endeavour to apply, as well as provisions that are purely optional.⁵ In this Chapter, the various provisions are identified and categorised thematically.⁶ Thereafter, a synopsis distinguishing between the mandatory and optional provisions is provided.⁷

2. RATIFICATION OF HUMAN TRAFFICKING INSTRUMENTS AND ADOPTION OF NATIONAL COUNTER-TRAFFICKING LEGISLATION

There is a growing acceptance among states of their responsibility to ratify international and regional instruments on human trafficking in the quest to better combat human trafficking.⁸ By ratifying these instruments, states parties accept to be bound by a comprehensive set of obligations and to develop domestic legislation to respond to human trafficking “in a nuanced and effective way to meet the complex nature of the crime”.⁹

words “required”, “enjoined” or “obligated” used in the context of this study with reference to states parties indicate that a provision is mandatory – UNODC 2004:248-249. In the case of non-mandatory provisions, optional language is used, such as states parties are “advised to”, “recommended to” or “required to consider” – UNODC 2004:248-249.

⁵ UNODC 2004:248.

⁶ See 3.1-3.11 below; see also the discussion in OHCHR 2010:75-81.

⁷ See 4.1-4.2 below.

⁸ Gallagher and Holmes 2008:318; Foundation Against Trafficking in Women *et al.* 2001:9. For further matters to be considered in ratifying, or acceding to, the Palermo Protocol, see UNODC 2004:250.

⁹ UN.GIFT 2008e:29; Gallagher and Holmes 2008:318; Vienna Convention on the Law of Treaties 1969: articles 1(a) and 26 – http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 22/7/2008); Centre for Reproductive Rights 2006:19 in endnote 3; Foundation Against Trafficking in Women *et al.* 2001:9. The UNODC Legislative

The literature indicates that a lack of specific, adequate counter-trafficking legislation is a major hindrance in combating this crime.¹⁰

Accordingly, the need:

...to harmonise legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards¹¹

is emphasised.

A national legal framework that is aligned with standards laid down in relevant international instruments must thus be adopted to combat human trafficking.¹² To guide the development of such domestic counter-trafficking legislation, these international instruments contain a network of obligations which set:

...mandatory minimum standards upon which States can build responses to the challenges of their domestic contexts.¹³

The clarification of these standards is of critical importance in developing new counter-trafficking laws.¹⁴ Furthermore, these minimum standards

Guides state that, instead of incorporating the text of the Legislative Guides, as well as that of international instruments, verbatim in national law, domestic responses should rather reflect the spirit and meaning of the various provisions – UNODC 2004:249; see also Gallagher and Holmes 2008:323.

¹⁰ OHCHR 2002:8 – Introduction to Guideline 4.

¹¹ OHCHR 2002:8 – Guideline 4.

¹² OHCHR 2002:8 – Guideline 4.

¹³ UN.GIFT 2008e:29. It must be borne in mind that not all provisions are mandatory in nature – see the explanation in 1 above. Jordan 2002:2 points out that the Organized Crime Convention as well as its Palermo Protocol and the Official Interpretative Notes (*Travaux Préparatoires*) to the Protocol comprise “the complete set of international obligations specifically addressing the trafficking of human beings”. Although this is true to a large extent, it is submitted that this view is too narrow and that certain obligations in other international instruments are also relevant in the effective combating of human trafficking – see 3.1.2 below; UNODC 2004:xvi; UNODC 2009b:9, 11, 13-15, 18-21.

also serve as a yardstick to measure the compliance of existing laws with international standards.¹⁵ For this reason, this Chapter strives to identify and categorise the minimum standards laid down in international and regional instruments on human trafficking that need to be complied with in domestic laws.

Although the main focus of this Chapter is on identifying mandatory minimum standards set in binding instruments with regard to domestic counter-trafficking responses, some reference will also be made to other non-binding, but important, sources that underpin these standards. Two of these leading sources, which are aligned with the focus of this study, have been developed by the United Nations Office on Drugs and Crime (UNODC).

By means of a global participatory process, the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides)¹⁶ were published in 2004. The primary aim of this comprehensive work is to assist states seeking to ratify and/or implement the Organized Crime Convention and its three supplementary Protocols. Although provisions that contain legislative implementation obligations are discussed in such source, it does not provide definitive legal

¹⁴ Gallagher and Holmes 2008:320.

¹⁵ For an example of a checklist that may be used for quickly assessing the compliance of domestic legislation with the requirements of the Palermo Protocol and the Organized Crime Convention, see UNODC 2008:96.

¹⁶ <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html> (accessed 17/8/2010).

interpretations of the articles contained in the aforementioned instruments.¹⁷

Subsequently, in 2009, the UNODC Model Law Against Trafficking in Persons (UNODC Model Law)¹⁸ was made available as a guide for drafting domestic counter-trafficking legislation. Besides providing commentary on various provisions, this document identifies mandatory as well as optional provisions that the Palermo Protocol requires states parties to include in their counter-trafficking legislation.¹⁹ Importantly, it is pointed out that states are obligated to develop domestic legislation to implement not only the Palermo Protocol, but also the Organized Crime Convention.²⁰ The present study underpins this view that not only the Protocol, but also the broad international framework on human trafficking should be reviewed and considered in developing an effective legislative response to human trafficking.²¹

Another non-binding, but authoritative, source produced by the United Nations High Commissioner for Human Rights is the 2002 Recommended Principles and Guidelines on Human Rights and Human

¹⁷ UNODC 2004:xvi. The UNODC Legislative Guides also “list items that are mandatory or optional for states parties and relate each article and provision to other regional or international instruments and to examples of how states with different legal traditions have implemented the Convention and the Protocols thereto” – UNODC 2004:xvi.

¹⁸ http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf (accessed 14/7/2010); UNODC 2009b:1. Some reference is also made to the Model State Anti-Trafficking Criminal Statute (US Model Law) developed by the US Department of State in 2003 – http://www.justice.gov/crt/crim/model_state_law.pdf (accessed 17/9/2010).

¹⁹ UNODC 2009b:1. Importantly, the UNODC Model Law is not intended to be incorporated “as a whole without a careful review of the whole legislative context of a given state”. Accordingly, the Model Law “cannot stand alone and domestic legislation implementing the Convention is essential for it to be effective” – UNODC 2009b:2.

²⁰ UNODC 2009b:2.

²¹ See 3.1.2 below; see also Jordan 2002:9; UNODC 2004:xvi; UNODC 2009b:14-17, 20-22.

Trafficking (HCHR Principles and Guidelines),²² with a comprehensive commentary to this source published in 2010.²³ The HCHR Principles and Guidelines contain principles and detailed guidelines for domesticating international and regional minimum standards on human trafficking in national laws from a human rights perspective.²⁴ This document is divided into two sections. The first part contains 17 principles, which provide:

... a solid basis for the development, implementation and evaluation of a rights-based response to human trafficking. The principles have been designed for use as a checklist against which laws, policies and interventions can be measured.²⁵

Linked to these principles, the second part of the document contains 11 guidelines, which provide practical guidance on how to translate the

²² OHCHR 2002:2 – http://www.stopvaw.org/Trafficking_Explore_the_Issue.html (accessed 17/11/2008). The HCHR Principles and Guidelines were presented as an addendum to the High Commissioner's report to the Economic and Social Council (E/2002/68/Add.1) – Addendum C; UNODC 2008:10. A growing global acceptance of a human rights-based approach to combating human trafficking has emerged and the HCHR Principles and Guidelines are acknowledged and cited in various international documents, such as the UNODC Legislative Guides – UN General Assembly 2010b:4. The significance of a rights-based approach enshrined in the HCHR Principles and Guidelines was underpinned at a two-day seminar on opportunities and challenges in the development of rights-based domestic responses to human trafficking attended by 59 states members of the United Nations in Geneva on 27 and 28 May 2010 – UN General Assembly 2010a:1, 3, 5-6.

²³ The development of a comprehensive commentary on the HCHR Principles and Guidelines has been finalised in December 2010 – OHCHR 2010:1-255; see also UN General Assembly 2010a:4.

²⁴ OHCHR 2002:2; SALRC 2006:6-7; Raymond 2002:498; UN General Assembly 2010a:13. The HCHR Principles and Guidelines cover the broad spectrum of human trafficking, namely the prevention of trafficking, the prosecution and punishment of traffickers, as well as the provision of protection and assistance for trafficked persons – OHCHR 2002:3, Principle 2; HSRC 2010:30; Gallagher and Holmes 2008:318-319.

²⁵ UN General Assembly 2010b:4.

principles into domestic responses.²⁶ The combination of these principles and guidelines provides:

...a framework for good practice and, using accepted international legal standards, provide[s] more specific and detailed guidance for States in areas such as legislation, criminal justice responses, victim detention and victim protection and support.²⁷

It is submitted that reference to relevant non-binding documents may be useful in so far as they underpin, and shed light on, minimum standards drawn from the international and regional framework on human trafficking. In addition, other recommendations and emerging good practices flowing from these non-binding sources are also charted in the present study so that they can be considered for possible inclusion in domestic responses.

3. TOWARDS STANDARDS FOR DOMESTIC COUNTER-TRAFFICKING LEGISLATION

A multitude of minimum standards can be drawn from the instruments reviewed in Chapter 5. States parties incur the duty to domesticate these standards in counter-trafficking responses.²⁸ By exploring the international and African regional framework on human trafficking, this

²⁶ UN General Assembly 2010b:4.

²⁷ UN General Assembly 2010b:4; HSRC 2010:30.

²⁸ UN.GIFT 2008e:29.

Chapter aims to identify, specifically, those standards that are aligned with the focus of this study.²⁹ In this Chapter, the minimum standards are therefore narrowed down to cover only those standards pertaining to the combating of human trafficking from a legal perspective.

3.1 Defining core concepts

3.1.1 *Human trafficking*

As was pointed out earlier,³⁰ the lack of a clear definition of the human trafficking phenomenon has led to confusion and to an ineffective response for combating the crime.³¹

3.1.1.1 Defining human trafficking

The first important obligation in the Palermo Protocol is the duty to define “trafficking in persons” clearly in national counter-trafficking laws.³² In aiming at harmonising global understanding of the concept of human

²⁹ See 7 in Chapter 1 above; see also UN.GIFT 2008e:29.

³⁰ See 2.1 and 2.2.1 in Chapter 2 above.

³¹ Di Nicola 2007:51; UN.GIFT 2008e:27. A clear definition of human trafficking is also lacking in some significant African regional instruments. The 1990 African Charter on the Rights and Welfare of the Child – http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008) – as well as the 2003 Protocol on the Rights of Women in Africa – <http://www.africa-union.org/root/au/Documents/Treaties/Text/ProtocolontheRightsofWomen.pdf> (accessed 14/10/2008) – both contain anti-trafficking provisions, but without defining the meaning of the concept of trafficking in persons. However, in article 1(2), the Southern African Development Community (SADC) Protocol on Gender and Development – www.genderlinks.org.za/attachment_view.php?pa_id=614 (accessed 14/10/2008) – took a new direction by defining the concept of human trafficking in line with the international standard set in the Palermo Protocol – see also 3.8 in Chapter 5 above.

³² For a discussion of different and narrower trafficking definitions in international instruments preceding that in the Palermo Protocol, see 2.1-2.3.13 in Chapter 5 and 2.2.1 in Chapter 2 above; see also UNODC 2006:xii; Rijken 2003:64-65; Lee 2007:10; Weissbrodt and Anti-Slavery International 2002:18.

trafficking, the Palermo Protocol contains the first definition of “trafficking in persons” agreed on by the international community.³³

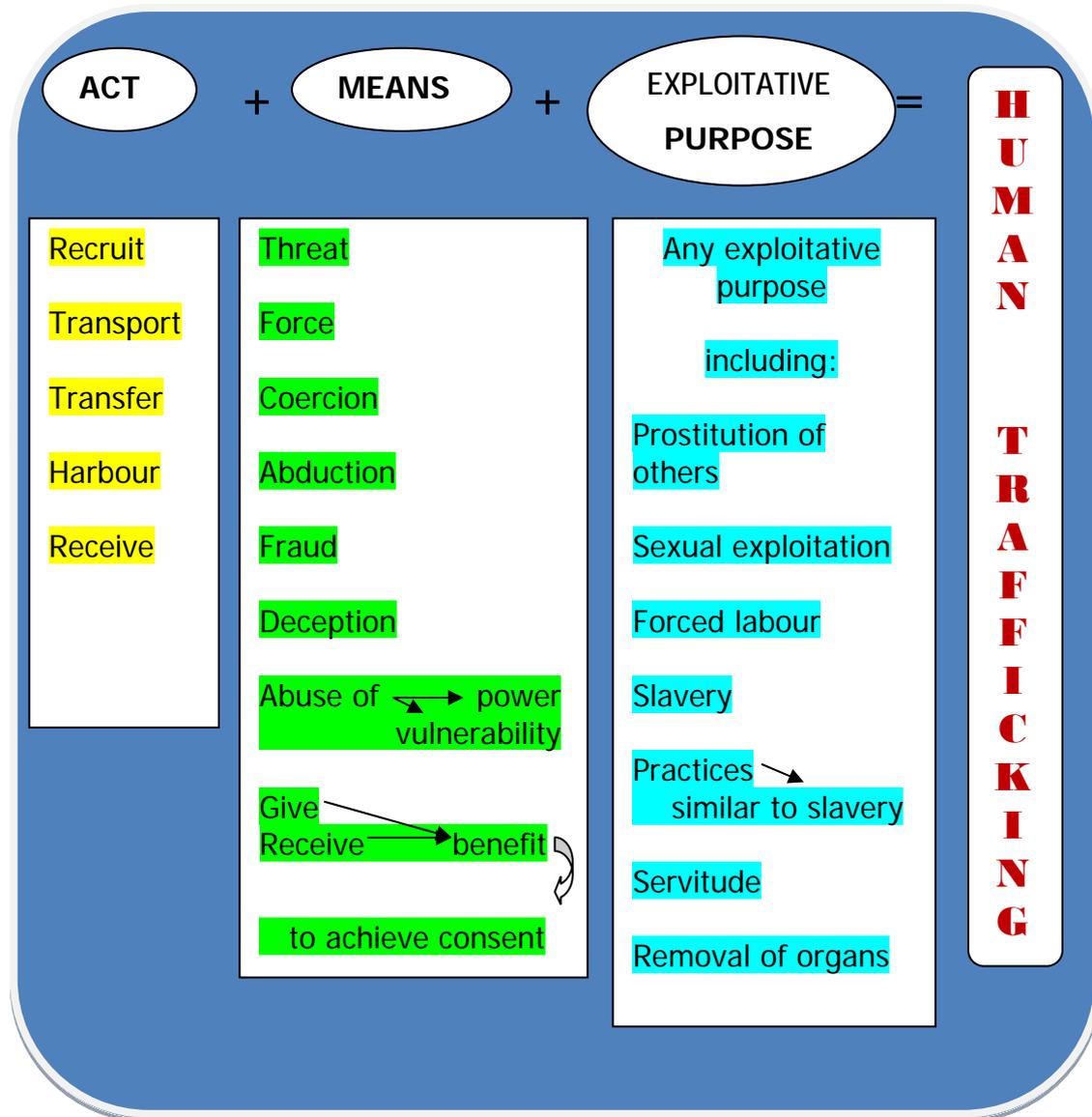


Figure 2: Constituent parts of human trafficking – Palermo Protocol definition

³³ UNODC 2006:xi; UNODC 2008:1; Laczko and Gramegna 2003:180; Rijken 2003:66; SALRC 2006:12; UN.GIFT 2008e:29; UNODC 2004:267, 269. Melvin, who holds a different view, points out that researchers and institutions still disagree to some extent on the interpretation of the definition in the Palermo Protocol and that it therefore cannot be concluded that this definition is unanimously accepted across the world – Melvin 2006:1, 24, 33. The United States of America (USA) also does not have a definition identical to that in the Palermo Protocol, but provides for a definition of a “severe form” of trafficking in persons in the *Trafficking Victims Protection Act of 2000* – US Department of State 2003:6.

As indicated in Figure 2, the definition of trafficking in persons contains three constituent parts, which are generally referred to as the action, the means and the exploitative purpose. The Palermo Protocol requires that the essence of the human trafficking definition³⁴ be included in domestic responses.³⁵

Having clarified the definitional parts of the human trafficking crime involving adult victims, it must be noted that the definitional requirements differ where a child is trafficked. As pointed out earlier,³⁶ the Protocol specifies that, where children younger than 18 are trafficked, the means part of the definition is waived and that only the prohibited conduct and the exploitative purpose need to be present to constitute the crime of trafficking in persons.³⁷ The HCHR Principles and Guidelines underpin this provision of the Protocol pertaining to child trafficking and require such provision to be included in domestic legislation.³⁸

Compliance with the obligation to include a clear definition of human trafficking in national anti-trafficking legislation is also underpinned by the UNODC Model Law,³⁹ as well as by the HCHR Principles and Guidelines, which require that “the crime of trafficking [be] precisely

³⁴ See the analysis of the definition in 2.2 in Chapter 2 above.

³⁵ Raymond 2002:498; UNODC 2004:268.

³⁶ See 2.2.3 in Chapter 2 above; OHCHR 2002:13 – Guideline 8.1; UNODC 2009b:9-23.

³⁷ Article 3(c) – Addendum A; see also Lansink 2006:50; The Future Group 2007a:7; Weissbrodt and Anti-Slavery International 2002:22, 27-30; Kassan 2007:18–6; Gallagher 2001:987; Ezeilo 2009:7; UNODC 2009b:37; 2.2.4 in Chapter 2 above.

³⁸ OHCHR 2002:13 – Guideline 8.1.

³⁹ UNODC 2009b:31-35.

defined in national law...”.⁴⁰ The value of having a clear definition of trafficking is that it enables state authorities to ascertain whether or not a particular instance constitutes human trafficking.⁴¹ Rijken⁴² further states that a definition clarifying the elements of the crime of human trafficking will contribute to the effective prosecution of trafficking in persons.

3.1.1.2 Definitional challenges in respect of domestic responses

The Palermo Protocol provides a detailed definition of human trafficking, but the understanding of the definition is complicated by the different interpretations that can be given to the range of terms used in the definition.⁴³ The Protocol’s failure to define the terms used in the definition may contribute to terminological confusion.⁴⁴ For this reason, the writer agrees with Jordan’s recommendation that these undefined concepts in the definition of the Palermo Protocol should be defined in domestic legislation.⁴⁵

3.1.1.2.1 *Issues regarding the “transportation” concept*

Two aspects of the concept “transport”, which is included in the action part of the trafficking definition, are problematic.

⁴⁰ OHCHR 2002:8 – Guideline 4.1.

⁴¹ UNODC 2008:2.

⁴² Rijken 2003:53.

⁴³ Jordan 2002:7.

⁴⁴ UNODC 2006:xii; Weissbrodt and Anti-Slavery International 2002:22 in footnote 111.

⁴⁵ Jordan 2002:9; see also 3.1.2 below.

a Transportation as a mandatory requirement

First, there are differing views as to whether the transportation of a trafficked person to another location is a mandatory requirement to constitute human trafficking.⁴⁶ One point of view holds explicitly, or at least by implication, that the movement of a trafficked person to another place is a mandatory prerequisite for human trafficking.⁴⁷ The International Organization for Migration (IOM), for example, states in its training manual for the South African government and civil society stakeholders that it is “an essential element of the crime of trafficking that a victim has to be transported from one place to another, although not necessarily across a national border”.⁴⁸ According to Lee, the definition of trafficking in the Palermo Protocol:

⁴⁶ Immelback 2008:3 points out the various possible interpretations of “transportation” with reference to practical examples, thus highlighting the lack of legal certainty and the problems in combating human trafficking.

⁴⁷ Rijken 2003:66. Referring to the term “transportation”, which is included in the definition of human trafficking in the Palermo Protocol, Pearson 2000:9 argues that “some form of physical movement or transportation is needed”, for the purpose of such transportation is to move victims to unfamiliar places away from home and thus place them under the control of traffickers. See also IOM 2009a:6, 9; ILO 2008:11; UN.GIFT 2008b:4; Rijken 2003:65, 57, 79; GAATW 1999a:9; Singh 2004:341; Dottridge and Weissbrodt 1999:243-244, 263; Shah 2007:442; Lee 2007:1; Laczko and Gramegna 2003:180; Jordan 2002:7; UNODC 2004:340; HSRC 2010:21. UN General Assembly Resolution 49/166 of 1994 condemned human trafficking and described it as “the illicit and clandestine movement of persons across national and international borders ... with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates... .” – UN General Assembly Resolution 1994: Preamble; Rijken 2003:67; Dottridge and Weissbrodt 1999:263. Gajic-Veljanoski and Stewart 2007:340 describe the trafficking process by stating that it “begins in source countries from which recruited women are legally or illegally transported to destination countries”. The Human Rights Standards for the Treatment of Trafficked Persons defines trafficking as all acts involved in the recruitment, transportation within or across borders, purchase, sale, receipt or harbouring of a person by using deception or coercion for the purpose of placing such person in involuntary servitude or in slavery-like conditions “in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage” – Foundation Against Trafficking in Women *et al.* 2001:3. The last part of this definition requiring a trafficked person to be held in another place implies that transportation is a compulsory part of this definition of trafficking.

⁴⁸ IOM 2009a:9. The same IOM source also states that, “under international law, child trafficking is a crime involving the movement of children for the purpose of their exploitation” – IOM 2009a:6.

...identifies several key elements of trafficking: recruitment and facilitated movement of a person within or across national frontiers by means of coercion, threats or deception for the purpose of exploitation.⁴⁹

Furthermore, the United Nations Global Initiative to Fight Human Trafficking highlights the difference between trafficking for the purpose of organ removal and trafficking in organs alone by stating that, “to constitute the crime of trafficking in persons for the purposes of organ removal, the actual person *has to be transported* for the purpose of removing their organs”⁵⁰ (my emphasis).

The question is: why do supporters of this view regard transportation or movement of the trafficked person as essential to constitute human trafficking? The literature indicates that the movement of trafficked persons from familiar surroundings to a foreign location has a specific purpose, namely to render victims vulnerable and thus facilitate the exercise of control over them, as well as cause them to be dependent on traffickers for food, shelter and other necessities.⁵¹ Stated differently, traffickers move victims to unfamiliar environments where they can control and exploit them with the minimal threat that the victim will escape.⁵² Such movement renders victims vulnerable for various reasons. For example, by being cut off from family and friends, they are isolated and disconnected from their support networks, usually have no money to return home and are often unfamiliar with the language,

⁴⁹ Lee 2007:10.

⁵⁰ UN.GIFT 2008b:4.

⁵¹ Pearson 2000:9, 37; Singh 2004:342; Bales and Robbins 2001:35.

⁵² US Department of State 2008:28; US Department of State 2007:9.

culture, environment and sources of assistance in the destination location.⁵³ Left without a safety net, these vulnerable victims are preyed upon by human traffickers, who find it much easier to exploit them and to keep them dependent and under their control.⁵⁴ Thus, moving trafficked persons away from familiar surroundings is an important strategy for traffickers, for it reduces the victims' chances of seeking help or escaping, while at the same time facilitating the exploitation of trapped victims.⁵⁵

In contrast to the first view, others argue that the movement of victims is not an essential element of human trafficking.⁵⁶ According to the approach of the US Model Law, the core of the concept "trafficking in persons" is the denial of the victim's liberty.⁵⁷ The 2010 annual US Trafficking in Persons Report (US TIP Report) also emphasises that it is irrelevant whether victims:

...were transported into the exploitative situation, or were simply born into a state of servitude. At the heart of this phenomenon are the myriad forms of enslavement - not the activities involved in international transportation.⁵⁸

⁵³ IOM 2006:20.

⁵⁴ Pearson 2000:9, 34; IOM 2006:20.

⁵⁵ IOM 2006:20. For the same reason, it may be argued that transportation is the mandatory requirement that distinguishes crimes such as forced prostitution, slavery, servitude and forced marriages from trafficking for those purposes.

⁵⁶ US Department of State 2008:6; US Department of State 2007:30-31; Harrold 2006:101.

⁵⁷ US Department of State 2003:8-9.

⁵⁸ US Department of State 2010:8.

For this reason, the criminal provisions focus on the coercive nature of the service rather than on the movement of the trafficked person.⁵⁹ The 2008 annual US TIP Report⁶⁰ further argues that, although such movement often forms part of the human trafficking process, it is not required either by the international definition in the Palermo Protocol⁶¹ or by the American definition in section 103(8) of the *Trafficking Victims Protection Act* of 2000.⁶² According to this view, force, fraud or coercion exercised in relation to the trafficked person in order to exploit him or her for profit is the defining element of human trafficking, while transportation is incidental.⁶³ To sum up, those holding the second point of view maintain that “movement of persons is implied, though it is not essential to constituting human trafficking, as localised trading within a single

⁵⁹ US Department of State 2003:8.

⁶⁰ US Department of State 2008:6; US Department of State 2007:30-31; Harrold 2006:101. With reference to the definitions of “severe forms of trafficking” in the US *Trafficking Victims Protection Act* of 2010, the 2007 and 2008 TIP Reports explicitly state that “a victim need not be physically transported from one location to another in order for the crime to fall within these definitions” – US Department of State 2008:6; US Department of State 2007:7; see also Pharoah 2006:8-9; Shapiro 2008:18.

⁶¹ Article 3(a) – Addendum A.

⁶² US Department of State 2008:6, 19; Harrold 2006:101. In contrast to the Palermo Protocol, which uses the term “trafficking in persons”, the US *Trafficking Victims Protection Act* of 2000 uses the term “severe forms of trafficking in persons” and defines this in section 103(8) as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

In section 103(9), the term “sex trafficking” is defined as the recruitment, harbouring, transportation, provision, or obtaining of a person for the purpose of commercial sex, and section 103(3) clarifies the term “commercial sex act” as any sex act on account of which anything of value is given to or received by any person.

⁶³ US Department of State 2008:6, 19; US Department of State 2007:31; Melvin 2006:22. The 2007 US TIP Report stated that the requirement of transportation must “create an artificial and unfounded distinction between victims who are exploited without being moved and those who are moved prior to and during their exploitation” – US Department of State 2007:31; see also Raymond 2002:495.

country or even a specific area within that country may meet all the requirements of trafficking in humans”.⁶⁴ An analysis of the formulation of the definition of “trafficking in persons” in the Palermo Protocol⁶⁵ provides evidence that the term “transport” is listed as an alternative to the other forms of action and not as a mandatory requirement.

Legislatures implementing domestic legislation must take note of the contrasting views as to whether “transportation” is essential to prove the crime of human trafficking. Thereafter, the “transportation” issue must be clarified in legislation so as to enhance legal certainty.

b Interpretation of the concept “transportation”

Another problem with the concept “transportation” pertains to the interpretation of the concept. If only the literal meaning of the term “transportation”, namely moving someone or something from one place to another,⁶⁶ is taken into account, would transportation over a minimal distance suffice? What would the position be if the perpetrator only transported the victim down the road from where the victim lives, or even for only a couple of metres? As regards transportation over a minimal distance, a victim who is transported over a short distance that entails the crossing of a national border into a foreign country can indeed be rendered vulnerable as a result of such transportation. From these examples, it is clear that the undefined concept of transportation in the

⁶⁴ Snyman 2005:281.

⁶⁵ Article 3(a) – Addendum A.

⁶⁶ Reader’s Digest Oxford 1996:1626.

Palermo Protocol needs clarification in national anti-trafficking legislation to avoid legal uncertainty that may complicate prosecution of the crime.

3.1.1.2.2 *Interpretation of the concept “deception”*

In relation to the second part of the human trafficking definition, the interpretation of the concept “deception” needs clarification. Trafficked persons are more often than not deceived about numerous aspects, including the intentions of the traffickers and the fact that their passports or other documents may be confiscated. Singh⁶⁷ points out that, apart from being deceived about the nature of employment or services to be delivered, trafficked persons may also be misinformed about the conditions under which they will work or render services.⁶⁸ For example, victims may be misled about their working hours, the place where they will work, the health risks,⁶⁹ the remuneration and the level of violence.⁷⁰ Importantly, victims are also deceived about the loss or restriction of their freedom and about the fact that they will eventually be controlled by the traffickers.⁷¹ For this reason, the UNODC Model Law includes, in one of

⁶⁷ Singh 2004:341; Weissbrodt and Anti-Slavery International 2002:22.

⁶⁸ UNODC 2009b:12.

⁶⁹ Even when trafficked persons voluntarily consent to do sex work, they are often significantly deceived regarding their working conditions. The literature indicates that traffickers frequently require that victims render unprotected sexual services, which places them at risk of being infected by sexually transmitted diseases such as syphilis, human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) – UNODC 2006:154; US Department of State 2007:28, 35; US Department of State 2008:32, 34; US Department of State 2010:12; Silverman *et al.* 2008:932; Melvin 2006:28-29; Gajic-Veljanoski and Stewart 2007:346; Harrold 2006:101; Zimmerman *et al.* 2006:15; GAATW 1999a:63, 66; IOM 2006:36; Silverman *et al.* 2008:933; see also 3.2.2 in Chapter 3 above.

⁷⁰ Rijken 2003:63; Gajic-Veljanoski and Stewart 2007:343; Shelley 2007:128; Foundation Against Trafficking in Women *et al.* 2001:6.

⁷¹ Stuurman 2004:5; Defeis 2003/2004:488; Foundation Against Trafficking in Women *et al.* 2001:6; Shelley 2007:125; UNODC 2004:288.

its proposed definitions of deception, deception about the extent to which trafficked persons will be free to leave their place of residence.⁷²

To summarise, traffickers use different types of deception, and the degree thereof varies from full to partial deception.⁷³ For this reason, it is submitted that, in the absence of a definition in the Palermo Protocol, the concept “deception” must be interpreted broadly to cover the various forms of deception used by traffickers. The UNODC Model Law underpins this submission by suggesting that a broad definition of deception, such as one in which deception is defined as “conduct that is intended to deceive a person”, be included in domestic anti-trafficking legislation.⁷⁴

3.1.1.2.3 *Interpretation of the concept “abuse of a position of vulnerability”*

Besides the concepts already discussed, one of the means listed in the trafficking definition, namely “abuse of a position of vulnerability”, is a broad concept that needs clarification.⁷⁵ Different, but comparable, definitions of the concept “abuse of a position of vulnerability” are to be found in the laws of various countries.⁷⁶ The UNODC Model Law suggests that the concept be defined as “taking advantage of the

⁷² Section 270(1)(b) and (c) of the Australian Criminal Code of 1995 goes even further by defining deception in the context of sex trafficking to include deceit about the extent to which a person will be free to leave the place where services are provided or even to cease to provide the sexual services – UNODC 2009b:13.

⁷³ Gajic-Veljanoski and Stewart 2007:343; Le Roux 2008:3; Shelley 2007:127.

⁷⁴ UNODC 2009b:12-13; see also Rijken 2003:63; Gajic-Veljanoski and Stewart 2007:343; Shelley 2007:128; Foundation Against Trafficking in Women *et al.* 2001:6.

⁷⁵ UNODC 2009b:10.

⁷⁶ UNODC 2009b:10-11.

vulnerable position a person is placed in as a result of” certain factors, such as having entered the country illegally, pregnancy, disability, physical or mental disease, dependency on any substance, reduced capacity to form judgements by virtue of being a child, illness or infirmity, or any other relevant factor placing a person in a vulnerable position.⁷⁷ Other factors include socio-economic circumstances and promises or the giving of benefits to those having authority over a person.⁷⁸ Importantly, the Official Interpretative Notes to the Palermo Protocol state that “abuse of a position of vulnerability” refers not only to a specific situation, but also to “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.⁷⁹ In the light of the different interpretations of the concept “abuse of a position of vulnerability”, it is necessary to provide a comprehensive definition of this concept in domestic law and to clarify its meaning, thereby enhancing legal certainty.

3.1.1.2.4 *Interpretation of the concept “exploitation”*

The third part of the human trafficking definition, namely the exploitative purpose, includes the concept “exploitation”. Rijken points out that the exploitation part distinguishes human trafficking from kidnapping, in that kidnapping entails the deprivation of a person’s freedom of movement, usually by means of forceful or deceptive movement, but without exploitation of the victim being a requirement of the latter.⁸⁰ Nonetheless,

⁷⁷ UNODC 2009b:9-10.

⁷⁸ UNODC 2009b:10.

⁷⁹ UN General Assembly 2000:12.

⁸⁰ Rijken 2003:65; see also Snyman 2008:479-481.

the Protocol does not clarify the meaning of the term “exploitation”. Accordingly, the term may be interpreted in different ways. The main reason why people are trafficked is because traffickers want to make a profit.⁸¹ In reality, traffickers typically exploit trafficked persons for the sole purpose of personal gain, usually to make a financial profit, to obtain free services or for any other benefit.⁸² Can it then be assumed that it is irrelevant whether the benefit is for the trafficker personally or for another person or institution?⁸³

Furthermore, the general meaning of the term “exploit” involves taking advantage of another person for the exploiter’s own end, but does not explicitly include a benefit for the exploiter.⁸⁴ The question which arises is whether the term “exploitation” requires that the offender’s purpose include the gaining of a financial or other benefit that is not legally due to him or her or another person.⁸⁵ Or does it suffice if the purpose is to abuse the victim, without obtaining any financial or other benefit? In other words, would the “abuse” of a person without obtaining any financial or other benefit constitute “exploitation” as required in the third part of the trafficking definition? For example, would it still constitute human trafficking if A were to recruit B by deception and to transport her to a

⁸¹ IOM 2007:23.

⁸² Le Roux 2008:6.

⁸³ Shelley 2007:120 documents cases where human trafficking was not committed exclusively for personal profit, but to fund a cause such as a revolution, rebellion or a terrorist movement.

⁸⁴ Reader’s Digest Oxford 1996:509.

⁸⁵ Pharoah 2006:33 seemingly supports this interpretation in that she states that the “notion of trafficking implies that someone derives a financial benefit from labour or services of the trafficked person”. In a somewhat different formulation, the UNODC Model Law stipulates that the term “exploitation” generally refers to particularly severe and abusive working conditions that are contrary to human dignity – UNODC 2009b:36.

place where A rapes and then abandons her? Does the forced sexual penetration in rape constitute “exploitation”? Would it make any difference if A were only assaulted? Stated differently, would the “gratification” that the offender obtains by forced sexual penetration or by hurting another, physically qualify as the “exploitation” required for the trafficking crime? Or is exploitation, which includes an illegal financial or other benefit, not specifically the distinguishing factor between child abuse and child trafficking?⁸⁶ Against the backdrop of these ambiguities, it is submitted that domestic legislation needs to clarify the meaning of the term “exploitation” to avoid confusion.

3.1.1.2.5 *The “removal of organs” concept*

Finally, it must be noted that one of the forms of exploitation listed in the Palermo Protocol is exploitation for the purpose of the removal of “organs”. Although it is acknowledged that the types of exploitation listed in the Protocol do not constitute an exhaustive list, it is submitted, in contrast to Jordan’s proposal,⁸⁷ that legislatures should choose a broader formulation in domestic legislation by listing exploitation for the removal of “body parts” instead of only for organs.⁸⁸

3.1.2 ***Defining other concepts related to human trafficking***

Apart from the obstacles created by the undefined terms that are part of the trafficking definition, the lack of clarification in the Palermo Protocol

⁸⁶ Pharoah 2006:32.

⁸⁷ Jordan 2002:7.

⁸⁸ Such a broader formulation of this type of exploitation will bring trafficking for body parts in multi-related crimes within the scope of the human trafficking offence – see the discussion in 2.2.2.3.2.e in Chapter 2 above; IOM 2008:60, 63; SALRC 2006:30; Snyman 2005:284-285; HSRC 2010:8-9.

of concepts related to human trafficking is also problematic. This challenge is, however, to some extent ameliorated by definitions provided in other existing international instruments.⁸⁹ It is recommended that the essence of the internationally accepted definitions of these concepts, which are incorporated in the UNODC Model Law, be included in domestic legislation to ensure legal certainty.⁹⁰ These concepts include “debt bondage”,⁹¹ “forced labour”,⁹² “forced or servile marriages”,⁹³ “serfdom”,⁹⁴ “slavery”,⁹⁵ “child”,⁹⁶ and “organised criminal group”.⁹⁷ Although not included in the UNODC Model Law, a definition of the concept “transnational” crime should also be part of domestic anti-trafficking legislation. This concept is often linked with human trafficking and is comprehensively clarified in the Organized Crime Convention.⁹⁸ Reliance on other instruments for definitions of concepts related to human trafficking confirms that, in moulding domestic anti-trafficking legislation, standards and guidance must be drawn from the broad human trafficking framework and not only from the Palermo Protocol.

⁸⁹ Jordan 2002:9. For the definitions of “slavery” and “forced labour”, see 2.1.2 and 2.2.1 in Chapter 5 above; UNODC 2009b:14-17, 20-22.

⁹⁰ UNODC 2009b:9.

⁹¹ UNODC 2009b:13-14; see also 2.2.2.3.2.c in Chapter 2 and 2.1.3 in Chapter 5 above.

⁹² UNODC 2009b:14-17; see also 2.2.2.3.2.b in Chapter 2 and 2.2.1 in Chapter 5 above.

⁹³ UNODC 2009b:17-18; see also 2.2.2.3.2.d in Chapter 2 and 2.1.3 in Chapter 5 above.

⁹⁴ UNODC 2009b:19; see also 2.2.2.3.2.c in Chapter 2 and 2.1.3 in Chapter 5 above.

⁹⁵ UNODC 2009b:20-22; see also 2.2.2.3.2.c in Chapter 2 and 2.1.2 in Chapter 5 above.

⁹⁶ UNODC 2009b:11; see also 2.3.7 in Chapter 5 above.

⁹⁷ UNODC 2009b:18; see also 2.2.2 in Chapter 4 above.

⁹⁸ Article 3(2) of the Organized Crime Convention; see also 2.3.7 in Chapter 5 above.

Apart from these related concepts being defined in other international instruments, a number of other concepts lack internationally recognised definitions. Recognising the need for definition clarification, the UNODC Model Law⁹⁹ as well as the US Model Law¹⁰⁰ provide guidelines in this regard. These largely undefined concepts include “abuse of a position of vulnerability”,¹⁰¹ “coercion”,¹⁰² “deception”,¹⁰³ “servitude”,¹⁰⁴ “exploitation of prostitution of others”,¹⁰⁵ “sexual exploitation”,¹⁰⁶ “commercial carrier”¹⁰⁷ and “victim of trafficking”.¹⁰⁸ In the light of the above discussion, it is submitted that the Protocol’s obligation to clarify the human trafficking concept by implication also calls upon countries to clarify other terms and offences related to this phenomenon in their domestic laws. Referring to these concepts related to human trafficking, Jordan articulates the recommendation well that “any government that

⁹⁹ UNODC 2009b:9-23 in article 1. Understandably, the UNODC Model Law does not include definitions of general terms such as “attempt”, “accomplice”, “legal and natural persons” and “aiding and abetting”, for they are usually already incorporated in domestic laws – UNODC 2009b:9.

¹⁰⁰ US Department of State 2003:1-2.

¹⁰¹ UNODC 2009b:9-11; see also 2.2.2.2 in Chapter 2 above.

¹⁰² UNODC 2009b:11-12; Rijken 2003:63; Singh 2004:341; IOM 2007:22; see also 2.2.2.2 in Chapter 2 above.

¹⁰³ UNODC 2009b:12-13; see also 2.2.2.2 in Chapter 2 above.

¹⁰⁴ UNODC 2009b:20. For a discussion of the confusion caused by the different meanings associated with the term “servitude”, see 2.2.2.3.2.c in Chapter 2 above; see also Currie and De Waal 2005:312; Nowak 2005:193, 200; Haysom 2002:178.

¹⁰⁵ UN General Assembly 2000:12; UNODC 2009b:14; see also 2.2.2.3.2.a in Chapter 2 above.

¹⁰⁶ UN General Assembly 2000:12; UNODC 2009b:20; see also 2.2.2.3.2.a in Chapter 2 above.

¹⁰⁷ UNODC 2009b:11.

¹⁰⁸ UNODC 2009b:22-23; see also 9 in Chapter 1 above.

decides to include these undefined terms in their domestic law will have to define them clearly”.¹⁰⁹

3.2 Criminalisation of trafficking conduct

The Palermo Protocol, being primarily a law enforcement instrument,¹¹⁰ obligates states parties to criminalise human trafficking and related conduct in their national legal systems.¹¹¹

3.2.1 Criminalisation of human trafficking

While the Palermo Protocol’s definition of human trafficking is meant to provide global consensus on what human trafficking is,¹¹² the Protocol further requires that the conduct prohibited in the said definition be criminalised.¹¹³ The Palermo Protocol places a mandatory obligation on states parties to adopt legislation that establishes intentional human trafficking, as defined in article 3 of the Protocol, as a separate substantive offence.¹¹⁴ While it is important that the domestic definition of “trafficking in persons” should reflect the meaning of the treaty rather than the verbatim language used in order to give effect to the treaty,¹¹⁵

¹⁰⁹ Jordan 2002:9; UN.GIFT 2008e:29.

¹¹⁰ Jordan 2002:2.

¹¹¹ UN.GIFT 2008e:29; UNODC 2009b:31-38.

¹¹² UNODC 2004:269.

¹¹³ Article 5(1) – Addendum A; David 2007:1; UNODC 2008:3, 94; UN.GIFT 2008e:29; UNODC 2004:273; Gallagher and Holmes 2008:320; HSRC 2010:22.

¹¹⁴ Article 5(1) – see also Table 1 in 4.1 below setting out the mandatory provisions; UNODC 2008:95; UNODC 2004:266, 269-270. In line with this obligation, the HCHR Principles and Guidelines also require the criminalisation of trafficking – OHCHR 2002:4 in Principle 12; OHCHR 2010:186-188.

¹¹⁵ Jordan 2002:7; UNODC 2004:270, 276-277.

the Protocol's definition of trafficking in persons provides "a common basis for the formulation of domestic criminal offences".¹¹⁶

The UNODC Legislative Guides state that the Palermo Protocol only requires that intentional trafficking conduct be criminalised.¹¹⁷ However, states may provide for broader and stricter measures in terms of the Organized Crime Convention,¹¹⁸ and therefore negligent conduct need not, but may be, criminalised in domestic legislation.¹¹⁹

The Organized Crime Convention establishes another requirement with which states parties must comply, namely with regard to the non-inclusion of transnationality and the involvement of organised criminal groups in domestic offences covered by the Convention.¹²⁰ Since the Palermo Protocol does not include provisions in this regard, the question is whether the international obligation to criminalise human trafficking in national laws applies only to human trafficking which is transnational in nature and also involves an organised criminal group.¹²¹ The answer to this question is to be found mainly in the Organized Crime Convention. This Convention applies to specified offences, which are required to be transnational in nature and must also involve an organised criminal group. However, the Convention clearly specifies that offences in terms

¹¹⁶ UNODC 2006:xi; UNODC 2008:3.

¹¹⁷ UNODC 2004:25.

¹¹⁸ Article 34(3).

¹¹⁹ UNODC 2004:276.

¹²⁰ UNODC 2004:25.

¹²¹ For a further discussion of the different views on this issue, see Fredette 2009:116-118.

of this treaty must be established in domestic laws “independently of the transnational nature or the involvement of an organised criminal group”.¹²² Given that trafficking offences established in the Palermo Protocol are regarded as offences established in terms of the Convention,¹²³ domestic laws must criminalise trafficking offences irrespective of whether the transnational or organised crime elements are present.¹²⁴

To summarise, the obligation to criminalise human trafficking requires that comprehensive domestic offences must be drafted. These offences must be broad enough to deal with the trafficking of women, men and children for any exploitative purpose, while covering trafficking across international borders and within a country, regardless of organised criminal involvement.¹²⁵

3.2.2 Criminalisation of involvement in human trafficking

The Protocol obligates states parties to criminalise certain conduct which does not constitute the main crime of human trafficking, but involvement in the crime.¹²⁶ More specifically, forms of conduct comprising an attempt

¹²² Article 34(2) of the Organized Crime Convention; see also UNODC 2009b:14; UNODC 2004:25, 258, 275-276. The only exception where one or both of the transnational or organised crime elements must be present is where the conduct to be criminalised specifically requires these elements, such as the criminalisation of participation in an organised criminal group in article 5(1) of the Organized Crime Convention – UNODC 2004:285 in footnote 11.

¹²³ Article 34(2) of the Convention is applicable to the Palermo Protocol, because the latter provides that “the offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention” – article 1(3) in Addendum A.

¹²⁴ UNODC 2009b:14; UNODC 2004:258-259, 275-276.

¹²⁵ UN.GIFT 2008e:30-31; UNODC 2004:259.

¹²⁶ Article 5(2) – Addendum A; HSRC 2010:22.

to commit human trafficking¹²⁷ or to participate in human trafficking,¹²⁸ as well as conduct directed at the commission of the offence,¹²⁹ are also to be established as offences.

With regard to participation in human trafficking, the Protocol criminalises conduct constituting “participation as an accomplice”.¹³⁰ Different connotations are attached to the concept “accomplice”, which may cause confusion. Snyman emphasises that the meaning of the term “accomplice” may be ambiguous, because the following different meanings may be attached to it.¹³¹ The broader meaning of the term “accomplice” includes everyone who furthers or assists the commission of a crime by another person in any way.¹³² This meaning is so broad as to include even a perpetrator, co-perpetrator or an accessory after the fact.¹³³ On the other hand, the narrower legal interpretation of the term “accomplice” distinguishes an accomplice from a perpetrator as well as from an accessory after the fact.¹³⁴ According to the narrow interpretation, the perpetrator complies with all the definitional elements

¹²⁷ Article 5(2)(a) – Addendum A; HSRC 2010:22.

¹²⁸ Article 5(2)(b) – Addendum A.

¹²⁹ Article 5(2)(c) – Addendum A.

¹³⁰ Article 5(2)(a) and (b) – Addendum A; UNODC 2008:95; UNODC 2009b:45.

¹³¹ Snyman 2008:273; UNODC 2009b:45.

¹³² Snyman 2008:273.

¹³³ Snyman 2008:273. For a discussion of the difference between an accomplice and an accessory after the fact, see Burchell 2005:611-623; Snyman 2008:257-281.

¹³⁴ Burchell also recognises the difference between an accomplice and an accessory after the fact by stating that the latter is someone who, “after completion of the crime, unlawfully and intentionally associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice” – Burchell 2005:572-618.

of a crime, whereas the accomplice does not.¹³⁵ The accomplice does participate in the crime, but his or her conduct does not constitute the specific unlawful conduct, also referred to by some as the *actus reus*,¹³⁶ required for a conviction of a specific crime.¹³⁷ The accomplice therefore commits a separate crime to that committed by the perpetrator.¹³⁸ The accomplice intentionally furthers the commission of the crime by the perpetrator, in that the means, information or other assistance are provided in order to commit the crime.¹³⁹ Accordingly, a requirement in respect of an accomplice's liability is its accessory nature, in that the accomplice must further the commission of a crime committed by another person.¹⁴⁰ Although it is not required that the main perpetrator be tried and convicted, nobody can be convicted as an accomplice if the alleged perpetrator is acquitted on the merits of the case.¹⁴¹

The different schools of thought on the causal element pertaining to accomplice liability are a further complicating factor that may cloud understanding of the term "accomplice".¹⁴² Thus, the meaning of

¹³⁵ Burchell 2005:599.

¹³⁶ The use of the term *actus reus* may cause confusion, in that some use it to refer to the conduct element only, while others interpret it as including both the conduct and unlawfulness elements of a crime – see Burchell 2005:138. To avoid uncertainty, Snyman convincingly criticises the use of the term and points out that modern English writers on criminal law also avoid the use of the term – Snyman 2008:33-34.

¹³⁷ Burchell 2005:599.

¹³⁸ Burchell 2005:602-603.

¹³⁹ Burchell 2005:599; UNODC 2009b:45.

¹⁴⁰ Burchell 2005:599; Snyman 2008:273-274.

¹⁴¹ Snyman 2008:274.

¹⁴² Burchell 2005:601-603. One view requires that, for accomplice liability, there must be "a causal relationship between the assistance of the accomplice and the commission of the offence by the perpetrator" – Burchell 2005:601. This causal link is referred to as "furthering or

“participation as an accomplice” in human trafficking should be unambiguous in domestic law so as to distinguish accomplices from accessories after the fact and also from other forms of facilitating the human trafficking crime.

As far as conduct directed at the commission of human trafficking is concerned, the Palermo Protocol requires that attempts¹⁴³ as well as “organising or directing other persons” to commit human trafficking be established as an offence.¹⁴⁴ Given that organised criminal groups are increasingly involved in human trafficking worldwide,¹⁴⁵ this obligation ensures that organisers operating as “master traffickers” who profit the most and who usually escape liability, are also apprehended.¹⁴⁶

The UNODC Model Law provides guidance on including ancillary offences relating to human trafficking,¹⁴⁷ but it is not clear why the liability of accessories after the fact is omitted. Also, while the Protocol only criminalises conduct involving organising or directing others to commit human trafficking, it is submitted that other terms such as to “conspire”,

assisting” the commission of the crime. Another school of thought maintains that a causal link between the conduct of the accomplice and the consequence of the crime (e.g. the death of the deceased) need not exist, but only “a causal connection between the alleged accomplice’s conduct and the conduct of the perpetrator” – Burchell 2005:601-603. For a different view, see the discussion in Snyman 2008:276-277.

¹⁴³ Article 5(2)(a) provides that, besides completed offences, attempts to commit human trafficking also be criminalised; for a further discussion, see UNODC 2004:271; HSRC 2010:22. The UNODC Model Law and the US Model Law also criminalise such attempts – UNODC 2009b:46-47; US Department of State 2003:10.

¹⁴⁴ Article 5(2)(c); HSRC 2010:22.

¹⁴⁵ Melvin 2006:22, 30; Raymond 2002:493; Obokata 2006:46-47; Gallagher 2001:977.

¹⁴⁶ UN.GIFT 2008c:10; UN.GIFT 2008e:15.

¹⁴⁷ UNODC 2009b:45-47.

“incite”, “procure”, “instigate” or “demand” should also be part of domestic laws.¹⁴⁸

In many jurisdictions, including South Africa, ancillary offences are already included in the national criminal law.¹⁴⁹ In such jurisdictions which already contain adequate, comprehensive provisions on offences pertaining to participation, attempt, incitement and conspiracy, further provisions in this regard need not be included in domestic counter-trafficking legislation.¹⁵⁰

3.2.3 *Criminalisation of conduct related to human trafficking*

Unlike the other two Protocols to the Organized Crime Convention, the Palermo Protocol only requires the criminalisation of the central offence of trafficking, but not the criminalisation of other related conduct.¹⁵¹ Given that human trafficking is usually a crime involving related criminal conduct by a number of trafficking agents during the trafficking process, it is convincingly argued that conduct related to human trafficking needs to be criminalised as well.¹⁵²

¹⁴⁸ Snyman 2008:294, 298; Burchell 2005:642-644.

¹⁴⁹ Burchell 2005:570-657; Snyman 2008:257-305.

¹⁵⁰ UNODC 2009b:45-46.

¹⁵¹ UNODC 2004:267.

¹⁵² UN.GIFT 2008c:10; Obokata 2006:46; US Department of State 2008:2; IOM 2007:29-30; UN.GIFT 2008b:13; Foundation Against Trafficking in Women *et al.* 2001:5; David 2007:2; Gallagher and Holmes 2008:322.

3.2.3.1 Criminalisation of the laundering of the proceeds of crime

Organised criminal groups very often try to avoid confiscation of their unlawfully acquired assets by hiding the illegal source of such assets.¹⁵³ To curb this trend, the Organized Crime Convention obligates the criminalisation of the laundering of the proceeds of crime.¹⁵⁴ Accordingly, each state party must establish four offences pertaining to money-laundering, namely the conversion or transfer of property knowing full well that such conversion or transfer constitutes the proceeds of crime for the purpose of concealing their illicit origin, concealing or disguising the proceeds of crime, and the acquisition, possession or use of the proceeds of crime.¹⁵⁵ Finally, participating in, as well as conspiring or attempting to commit, these offences must also be established as an offence in domestic legislation.¹⁵⁶

The Organized Crime Convention stipulates that these money-laundering provisions must be made applicable to the “widest range of predicate offences”.¹⁵⁷ Predicate offences are described as those offences in respect of which the illegal profits are subject to the Convention’s money-laundering offences, including offences established under the Convention and its Protocols, as well as “serious offences”, which are

¹⁵³ UNODC 2008:113.

¹⁵⁴ Article 6; UNODC 2004:272-273; see also Table 1 setting out the mandatory provisions in 4.1 below. Article 2(e) of the Convention defines “proceeds of crime” as any property derived from or obtained, directly or indirectly, through the commission of an offence. The term “property” is given a broad meaning, namely “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets” – article 2(d).

¹⁵⁵ Article 6(1); UNODC 2008:113; UNODC 2006:40; HSRC 2010:23.

¹⁵⁶ Article 6(1); UNODC 2008:113; UNODC 2006:40.

¹⁵⁷ Article 6(2).

defined in the Convention as offences punishable under domestic law by the imposition of four years' imprisonment or more.¹⁵⁸

To conclude, criminalising the laundering of the proceeds of crime related to human trafficking offences is a mandatory part of the comprehensive strategy to combat human trafficking.¹⁵⁹ States parties are therefore required to criminalise the laundering of the proceeds of a comprehensive range of trafficking offences in domestic law.¹⁶⁰

3.2.3.2 Criminalisation of corruption

Corrupt activities are frequently part of human trafficking, especially where organised crime syndicates are involved. The literature indicates that trafficking rings have the resources to corrupt border, law enforcement and other officials so as to ensure the success of their trafficking operations.¹⁶¹ While the Palermo Protocol does not contain specific provisions on the criminalisation of corruption, the Organized Crime Convention does.¹⁶²

The Organized Crime Convention requires states parties to criminalise the intentional offering or giving of an undue advantage to a public

¹⁵⁸ Articles 2(b) and 6(2)(b); UNODC 2008:113.

¹⁵⁹ UNODC 2008:113; UNODC 2006:39.

¹⁶⁰ Gallagher and Holmes 2008:323; UNODC 2004:272-273.

¹⁶¹ Haynes 2004:226, 229; Brennan 2005:42; Foundation Against Trafficking in Women *et al.* 2001:4; Singh 2004:344; UNODC 2006:xxi; GAATW 1999a:13; UN.GIFT 2008b:14; Shelley 2007:122.

¹⁶² Article 8; HSRC 2010:22.

official.¹⁶³ In addition, the solicitation or acceptance of such an undue advantage on the part of a public official must also be established as a corruption offence.¹⁶⁴ Further, participation as an accomplice in these offences must also be criminalised.¹⁶⁵ States parties are also called upon to consider establishing other forms of corruption as offences.¹⁶⁶

3.2.3.3 Criminalisation of the unlawful disclosure of the identity of trafficked victims and/or witnesses

The UNODC Model Law states that the unlawful disclosure of information acquired in the course of official duties which enables a trafficked victim or witness to be identified may be criminalised.¹⁶⁷ Establishing this offence is a way of enforcing the provisions laid down in the Palermo Protocol¹⁶⁸ and the Organized Crime Convention¹⁶⁹ in order to protect the privacy and identity of victims and witnesses.¹⁷⁰

¹⁶³ Article 8(1)(a). Article 8(4) of the Organized Crime Convention provides that “public official” means “a public official or a person who provides a public service as defined in domestic law and as applied in the criminal law of the state party in which the person in question performs that function”.

¹⁶⁴ Article 8(1)(b).

¹⁶⁵ Article 8(3).

¹⁶⁶ Article 8(2).

¹⁶⁷ UNODC 2009b:48.

¹⁶⁸ Article 6(1); see also 3.7 above.

¹⁶⁹ Article 24; see also 3.8.1.1.1 and 3.9 above.

¹⁷⁰ UNODC 2004:282.

3.2.3.4 Criminalisation of component acts, component offences and offences related to human trafficking

The Palermo Protocol does not require states parties to criminalise component acts and component offences,¹⁷¹ or offences related to human trafficking, in domestic laws.¹⁷² Component acts and component offences are part of the trafficking definition. To clarify this, component acts refer to the recruitment, transportation, transfer, harbouring or receipt of persons, while component offences pertain to the means part and include the use of force, coercion or deception.¹⁷³ Offences related to human trafficking refer to the exploitative conduct listed under the concept “exploitation” in the trafficking definition.¹⁷⁴ These related offences include exploitative conduct such as the exploitation of the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery and practices similar to slavery, servitude and debt bondage.¹⁷⁵

To ensure that, as far as possible, all trafficking agents are brought to book, the HCHR Principles and Guidelines require the adoption of domestic legislation that criminalises not only human trafficking, but also its component acts and offences, as well as offences related to

¹⁷¹ The HCHR Principles and Guidelines describe “component acts” and “component offences” of trafficking so as to include the recruitment, transportation, transfer, harbouring or receipt of persons of 18 years and older by any of the listed means in the Palermo Protocol for the purpose of exploitation – see OHCHR 2002:2 in footnote 2. As regards children, these component acts need not be accompanied by force, deception or any of the listed means in terms of article 3(c) of the Palermo Protocol – Addendum A.

¹⁷² OHCHR 2002:2 in footnote 3; Jordan 2002:8 in footnote 13.

¹⁷³ OHCHR 2002:4 in footnote 2.

¹⁷⁴ OHCHR 2002:4 in footnote 3.

¹⁷⁵ OHCHR 2002:4 in footnote 3; see also OHCHR 2002:4 – Principle 12; SALRC 2006:8; Gallagher and Holmes 2008:322.

trafficking.¹⁷⁶ The UNODC Model Law agrees with this approach and points out that, unlike the Palermo Protocol, other binding human rights conventions also require the criminalisation of these acts and offences.¹⁷⁷

3.2.3.5 Criminalisation of the use of the services of trafficked victims
As has been indicated,¹⁷⁸ the demand for cheap labour and other services fuels human trafficking.¹⁷⁹ Neither the Organized Crime Convention nor the Palermo Protocol contains mandatory provisions to criminalise conduct that constitutes the demand for the services of trafficked persons.¹⁸⁰ However, under prevention measures, the Palermo Protocol obligates states parties to take legislative or other measures to discourage the demand that fosters all forms of exploitation leading to trafficking.¹⁸¹ One measure for complying with this obligation is to criminalise the use of the services of trafficked victims. Accordingly, in line with the UNODC Model Law,¹⁸² it is recommended that a provision criminalising the use of the services of trafficked victims be included in domestic laws to ensure an effective counter-trafficking response.

¹⁷⁶ OHCHR 2002:8 – Guideline 4.1; UNODC 2004:277; UNODC 2008:95. The UNODC Model Law also requires that offences established in the Organized Crime Convention, including participation in an organised criminal group, laundering of the proceeds of crime, and corruption, be included in domestic legislation as well – UNODC 2009b:29.

¹⁷⁷ UNODC 2009b:43; UNODC 2004:277; see also the discussion of the various instruments in Chapter 5 above. Therefore, the UNODC Model Law recommends that states need to ensure that the various forms of “exploitation” are always punishable under domestic law, even if other elements of trafficking are not committed or proven – UNODC 2009b:43.

¹⁷⁸ See 3.2 in Chapter 3 above.

¹⁷⁹ Gajic-Veljanoski and Stewart 2007:341; Melvin 2006:7, 36; Shapiro 2008:18.

¹⁸⁰ OHCHR 2010:102.

¹⁸¹ Article 9(5) – Addendum A; UNODC 2009b:83.

¹⁸² UNODC 2009b:42-44, 83; see also OHCHR 2010:102-104.

3.2.3.6 Liability of commercial carriers

Various means of transportation by air, sea, river or road are often used in the trafficking process to move trafficked persons away from their home communities.¹⁸³ The Palermo Protocol aims to prevent the cooperation of trafficking agents with transporters in the commission of trafficking offences. For this reason, the Protocol calls upon states parties to place a duty on commercial carriers to ascertain that their passengers are in possession of the required travel documents when crossing international borders.¹⁸⁴ It should be noted that “commercial carriers” is broadly defined to include “any transportation company or the owner or operator of any means of transport”.¹⁸⁵

The Palermo Protocol provides that, “where appropriate”, the prevention measures in article 11(2) “shall include” a duty being placed on commercial carriers to ascertain that all their passengers are in possession of the required travel documents for entry into the receiving state.¹⁸⁶ The Protocol provides, in a mandatory tone, that states parties “shall adopt” legislative or other measures to prevent collaboration with transporters, but limits the obligation “to the extent possible” for the state party concerned.¹⁸⁷ This limitation renders the obligation optional in nature.¹⁸⁸ Although the Protocol’s provision on commercial carriers does

¹⁸³ UN.GIFT 2008c:13; Singh 2004:344; Le Roux 2008:4; Shelley 2007:130.

¹⁸⁴ Article 11(2)-(3) – Addendum A.

¹⁸⁵ Article 11(3) – Addendum A.

¹⁸⁶ Article 11(2)-(4). What should be noted is that the obligation only entails ensuring that passengers have the required documents in their possession and not determining the validity of the documents – UNODC 2009b:49.

¹⁸⁷ Article 11(2) – Addendum A.

¹⁸⁸ UNODC 2009b:49.

not lay down a mandatory minimum standard with which states parties must comply, the UNODC Model Law points out that this remains a significant issue to be addressed.¹⁸⁹ Therefore, it should be noted that the Protocol further underlines the concern pertaining to commercial carriers by stating that sanctions are to be implemented when commercial carriers violate the said duty.¹⁹⁰ For this reason, it is recommended that states parties seriously consider the enforcement, in domestic counter-trafficking legislation, of this duty with regard to commercial carriers by criminalising the failure to comply with the duty.

3.2.3.7 Criminalisation of unlawful conduct pertaining to travel and identity documents

The Palermo Protocol calls on states parties, but only “within available means”, to ensure that travel and identity documents are of such high quality that they cannot be readily falsified or unlawfully altered, used or created. Although this provision is not obligatory,¹⁹¹ the UNODC Model Law suggests that applicable offences should be created to combat the unlawful handling of travel and identity documents.¹⁹² Given that trafficking agents often make use of falsified travel documents or withhold valid travel documents so as to control victims, it is strongly advisable to include provisions criminalising the unlawful creation,

¹⁸⁹ UNODC 2009b:49.

¹⁹⁰ Article 11(4) – Addendum A. The UNODC Model Law points out that, apart from a provision in criminal law, non-compliance with such duty may also be punished in civil law – UNODC 2009b:49.

¹⁹¹ UNODC 2009b:47.

¹⁹² UNODC 2009b:48.

altering or handling of travel and identity documents in domestic legislation.¹⁹³

3.2.4 *Liability of natural and legal persons*

The Organized Crime Convention explicitly places a duty on states parties to ensure the criminal liability of not only natural persons, but also legal persons for participating in offences established in the Convention.¹⁹⁴ Again, this provision of the main Convention is also applicable to the supplementing Palermo Protocol.¹⁹⁵ The obligation concerning the liability of legal persons is essential where legal persons such as travel agencies, employment agencies, hotels and escort services are involved in human trafficking.¹⁹⁶ This obligation ensures that legal persons will not escape with impunity, but will be prosecuted and punished for their involvement in human trafficking.

3.3 Law enforcement, prosecution and sanctions

The Organized Crime Convention provides for deterrent sanctions as a minimum standard to combat offences in terms of this Convention, which includes human trafficking.¹⁹⁷ This requirement concerning punishment also impacts on the prosecution and adjudication of human trafficking, in

¹⁹³ UNODC 2009b:47-48.

¹⁹⁴ Article 10(1)-(3); HSRC 2010:23. The HCHR Principles and Guidelines also underline this obligation by stipulating that national legislation must provide for the criminal liability of natural as well as legal persons for trafficking offences – OHCHR 2002:8 – see Guideline 4.2; UNODC 2004:273.

¹⁹⁵ Article 1(2) of the Palermo Protocol; see also UNODC 2009b:29; UNODC 2004:270.

¹⁹⁶ OHCHR 2002:8 – Guideline 4.2. For a further discussion of the Convention's provision on the liability of legal persons, see UNODC 2008:112.

¹⁹⁷ Article 11(1) of the Organized Crime Convention; article 1(3) of the Palermo Protocol.

that effective prosecution and adjudication are a prerequisite for implementing the standard of deterrent sanctions.¹⁹⁸

3.3.1 *Appropriate sanctions*

Punishment that fails to take into consideration the seriousness of the human trafficking crime does not deter perpetrators.¹⁹⁹ While the Palermo Protocol lacks an obligation in respect of punishment, the Organized Crime Convention firmly obligates the imposition of sanctions “that take into account the gravity of that offence”.²⁰⁰ Applied to its Protocols, this provision of the Convention is specifically pertinent to human trafficking, for this crime not only has severe consequences for victims,²⁰¹ but also for the communities and countries affected and for global security.²⁰²

Apart from the general obligation to punish perpetrators adequately, the Organized Crime Convention goes further by stating:

¹⁹⁸ *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:64-65; David 2007:3; Gallagher and Holmes 2008:320, 327-328; OHCHR 2010:196-200.

¹⁹⁹ UN.GIFT 2008e:27. The Vienna Forum Report recommends that “domestic law must cover most aspects of human trafficking, specifying severe punishment for traffickers and corrupt criminal justice and governmental officials” – UN.GIFT 2008e:12.

²⁰⁰ Article 11(1); David 2007:1; UN.GIFT 2008e:27; UNODC 2008:112; UNODC 2004:273; Gallagher and Holmes 2008:322. Note the development in recent instruments requiring states to impose apposite and stringent sanctions for trafficking and related offences as compared with earlier instruments discussed in Chapter 5 above, which did not require such sanctions – see, for instance, article 3 of the 1910 International Convention for the Suppression of the “White Slave Traffic” – <http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html> (accessed 15/04/2008); article 2 of the 1933 International Convention for the Traffic in Women of Full Age – http://www.oas.org/Juridico/mla/en/traites/en_traites-inter-women_1933.pdf (accessed 12/3/2008).

²⁰¹ See 3.2 in Chapter 3 above; Zimmerman *et al.* 2006:13-14, 22; UNODC 2006:154; IOM 2006:13; US Department of State 2008:5; Melvin 2006:28.

²⁰² See 3.3 in Chapter 3 above; Shelley 2007:134; US Department of State 2008:5; IOM 2007:31; US Department of State 2007:5; The Future Group 2007b:2; Gajic-Veljanoski and Stewart 2007:338; Allais 2006:2.

Each state party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.²⁰³

In line with this obligation, the HCHR Principles and Guidelines also require effective and proportionate sanctions to be imposed on natural and legal persons convicted of human trafficking or of its component or related offences.²⁰⁴

Appropriate sanctions regarding human trafficking are essential.²⁰⁵ The literature confirms that human trafficking is one of the fastest-growing criminal activities with an estimated profit of between 10²⁰⁶ and 32²⁰⁷ billion United States (US) dollars per year.²⁰⁸ Sentencing perpetrators to non-substantial fines does not have a deterrent effect. For this reason, it is critical that liable legal persons incur punishments which are indeed “effective, proportionate and dissuasive”.²⁰⁹

Although the Palermo Protocol does not include it as one of its purposes,²¹⁰ the UNODC Model Law emphasises the necessity for

²⁰³ Article 11(4); UNODC 2008:112; Gallagher and Holmes 2008:322.

²⁰⁴ See Principle 15 and Guideline 4.3 – OHCHR 2002:4, 8; OHCHR 2010:213-218; SALRC 2006:8; Jordan 2002:14; articles 10 and 11(1) of the Organized Crime Convention.

²⁰⁵ UNODC 2009b:3; Gallagher and Holmes 2008:322.

²⁰⁶ McClain 2007:583; Kreston 2007:38; Haynes 2004:223; Gajic-Veljanoski and Stewart 2007:339.

²⁰⁷ ILO 2008:5.

²⁰⁸ Horn 2010:10; Gajic-Veljanoski and Stewart 2007:339; McClain 2007:583; Kreston 2007:38; Harrold 2006:101; Singh 2004:341; Haynes 2004:223; Snyman 2005:282.

²⁰⁹ Article 11(4).

²¹⁰ Article 2 – Addendum A.

proper punishment. Accordingly, it recommends that adequate sanctions be included as a specific purpose of domestic counter-trafficking legislation.²¹¹ In agreement with the UNODC Model Law, it is submitted that sanctions for trafficking offences:

...should fulfil at least the threshold set for trafficking in persons to constitute a serious crime as defined in the Convention, that is, punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.²¹²

The Model State Anti-Trafficking Criminal Statute of the United States of America (US Model Law) was developed by the US Department of State as a tool for drafting modern anti-trafficking legislation.²¹³ The US Model Law proposes that lengthy terms of imprisonment ranging from five years up to life imprisonment be imposed for various trafficking crimes.²¹⁴

In recognising the necessity for adequate sanctions drawn from binding and non-binding instruments, it is submitted that, apart from adding adequate sanctions as a specific purpose, a provision for imposing “effective, proportionate and dissuasive” punishment on all trafficking agents, irrespective of whether they are natural or legal persons, should be part of domestic anti-trafficking laws.²¹⁵

²¹¹ UNODC 2009b:5.

²¹² Article 2(b) of the Convention; UNODC 2009b:34-35.

²¹³ US Department of State 2003:7.

²¹⁴ US Department of State 2003:2-3.

²¹⁵ See Principle 15 and Guideline 4.3 – OHCHR 2002:4, 8; UNODC 2009b:3.

3.3.2 Factors to be considered in sentencing

Besides the mandatory provisions on sanctions,²¹⁶ it is submitted that it may be useful to include a provision listing aggravating circumstances to be taken into account in sentencing.²¹⁷ Both the US Model Law²¹⁸ and the UNODC Model Law²¹⁹ advocate this approach. The latter points out that aggravating circumstances include the situation where the offender is either a public official or in a position of trust or authority in relation to the victim,²²⁰ as well as that where the victim is a child, is physically or mentally handicapped, or is seriously or fatally injured.²²¹

3.3.3 Law enforcement and prosecution

Effective law enforcement by means of proficient prosecution and adjudication in human trafficking cases is essential to comply with the obligation of deterrent sanctions.²²² Therefore, the Organized Crime Convention contains a number of provisions pertaining to effective law enforcement. It is submitted, and can also be inferred from the text of the

²¹⁶ See 3.3.1 and 3.3.2 above.

²¹⁷ UNODC 2009b:38-40.

²¹⁸ US Department of State 2003:3-4 – section XXX.02(4), 11.

²¹⁹ UNODC 2009b:39-40.

²²⁰ Examples of people in such positions include police officials, social workers, teachers or the parents of a child – UNODC 2009b:39-40.

²²¹ UNODC 2009b:39.

²²² UNODC 2004:20. The UNODC Legislative Guides also point out that effective law enforcement may further be enhanced by article 26 of the Organized Crime Convention, in that states parties are called upon to encourage participants in organised criminal groups to assist law enforcement authorities – UNODC 2004:20. For a discussion of emerging good practices in law enforcement responses to human trafficking and investigations that build a broad base of evidence, see David 2007:1-6; Gallagher and Holmes 2008:326-327.

Convention,²²³ that the call for effective law enforcement refers to law enforcement in the broad sense, including the investigation, prosecution and adjudication of the crime.²²⁴ In this regard, the Convention provides that a state party:

...shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximise the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.²²⁵

Furthermore, the Convention obligates states parties to cooperate with one another in order “to enhance the effectiveness of law enforcement action to combat the offences covered in this Convention”.²²⁶

Unlike the Organized Crime Convention, the Palermo Protocol does not contain a specific obligation concerning law enforcement. However, the purpose of the Protocol includes the combating of the crime and the criminalisation of human trafficking conduct. Accordingly, the requirement to ensure effective law enforcement is implied.²²⁷ As was pointed out earlier,²²⁸ the Palermo Protocol supplements the Organized Crime Convention and must be interpreted together with the Convention,

²²³ The heading of article 11 of the Organized Crime Convention is “Prosecution, adjudication and sanctions”; see also article 11(2).

²²⁴ Articles 11, 27 and 29(1).

²²⁵ Article 11(2).

²²⁶ Article 27(1); see also David 2007:3-6.

²²⁷ Article 2.

²²⁸ See 2.3.13.3 and 2.3.14.2 in Chapter 5 above.

while the provisions of the Convention also apply *mutatis mutandis* to the Protocol.²²⁹ For this reason, the Convention's provisions on effective law enforcement apply to the Palermo Protocol as well.

The duty to ensure effective implementation by way of successful law enforcement and prosecution, and specifically regarding child trafficking, is also emphasised in another international instrument. The International Labour Organisation (ILO) Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour²³⁰ requires the elimination of the “worst forms of child labour”, including the sale and trafficking of children.²³¹ This treaty stipulates that members “shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention”.²³² This obligation to enforce laws on the elimination of child trafficking requires that crimes created in domestic laws be implemented successfully in practice.

In line with the abovementioned binding instruments, the HCHR Principles and Guidelines include as a principle that states must effectively investigate, prosecute and adjudicate trafficking, including its

²²⁹ Article 1(1) and (2) of the Protocol and the corresponding provision, namely article 37(4), in the main Convention; see also Jordan 2002:6; SALRC 2006:12-13; 3.12 below. What should be noted is that states are also required to be a party to the parent Convention in order to become a party to the Protocol – Defeis 2003/2004:487.

²³⁰ This Convention was adopted in 1999 and came into force in 2000 – <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008); Dottridge and Weissbrodt 1999:278; Weissbrodt and Anti-Slavery International 2002:38; Brownlie and Goodwin-Gill 2006:574.

²³¹ Articles 1 and 3(a).

²³² Article 7.

component acts and related conduct, regardless of whether it is committed by government or by non-state actors.²³³

3.3.4 *Prescription of the right to institute a prosecution*

The Organized Crime Convention also obligates legislatures to include in domestic law a “long statute of limitation period in which to commence proceedings for any offence covered by this Convention”.²³⁴ This obligation pertaining to the prescription of the right to institute a prosecution is important in human trafficking cases, especially where criminal proceedings cannot commence against alleged offenders because they are evading justice, for example by fleeing to other countries.²³⁵

3.4 Extraterritorial jurisdiction

The Organized Crime Convention lays down standards for states parties concerning jurisdiction. First, the Convention requires territorial jurisdiction to be established over Convention offences according to the accepted general principle that all states have territorial jurisdiction where an offence is committed within their territory or on a vessel or aircraft registered in the state.²³⁶ In these cases, the decisive factor is the place where the offence is committed.²³⁷

²³³ OHCHR 2002:4 – Principle 13; see also OHCHR 2002:10 – Guideline 5.3; SALRC 2006:8.

²³⁴ Article 11(6); UNODC 2004:26.

²³⁵ Article 11(6) of the Organized Crime Convention; UNODC 2004:26.

²³⁶ Article 15(1)(a) and (b); UNODC 2009b:25.

²³⁷ Joubert 2007:37; UNODC 2009b:25.

Apart from territorial jurisdiction, the Organized Crime Convention also contains specific obligations regarding extraterritorial jurisdiction.²³⁸ The extension of territorial jurisdiction is essential, for human trafficking is often transnational in nature.²³⁹ The Convention provides for a broadened jurisdictional basis for the prosecution of a state's own citizens who have committed a Convention crime in another country, but for which they have not been extradited on the ground of nationality.²⁴⁰ It is mandatory that such state party submit such a case against its citizens without undue delay to its own competent authorities for prosecution.²⁴¹ A national of a state is then prosecuted in his or her own country, although the crime was committed in another country.²⁴² In the absence of a provision on extraterritorial jurisdiction in the Palermo Protocol, the Convention's mandatory provisions on jurisdiction apply to the Protocol as the minimum standard with which states parties must comply.²⁴³ In optional terms, the Convention stipulates that states parties "may" also establish extraterritorial jurisdiction so that domestic anti-trafficking legislation applies to Convention offences committed outside the state's territory, on condition that such offences are committed by one of its own

²³⁸ Articles 15 and 16(10); see also the commentary in UNODC 2009b:25-27.

²³⁹ The Preamble of the UNODC Model Law typifies human trafficking as a "national as well as a transnational crime, where criminals work across boundaries, and that therefore the response to human trafficking also has to rise above jurisdictional limitations" – UNODC 2009b:4.

²⁴⁰ Article 15(3); UNODC 2009b:25-26.

²⁴¹ Article 16(10).

²⁴² Article 16(10); UNODC 2009b:25.

²⁴³ The *mutatis mutandis* requirement is to be found in article 1(2) of the Palermo Protocol, and article 37(4) is the corresponding provision in the Organized Crime Convention.

nationals²⁴⁴ or against one of its own nationals.²⁴⁵ The jurisdictional obligations laid down in the Organized Crime Convention are included in the UNODC Model Law in provisions similar to those in the Convention.²⁴⁶

3.5 Confiscation and asset forfeiture

Kruger points out that conventional criminal law measures and penalties have proved to be inadequate in combating and deterring organised crime.²⁴⁷ It is internationally accepted that criminals should be stripped of the proceeds of their crimes so that the incentive for crime is removed.²⁴⁸ The criminal justice approach of taking the profit out of crime also focuses not primarily on the “foot soldiers”, but rather on the kingpins of criminal syndicates by “cutting off their life-blood funds by confiscating or forfeiting their assets...”.²⁴⁹ For this reason, a domestic counter-trafficking response must include “strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property”.²⁵⁰

²⁴⁴ The extraterritorial jurisdiction also applies to a stateless person who has his or her habitual residence in that state at the time when he or she committed the Convention offence in another country – article 15(2)(b).

²⁴⁵ Article 15(2). In addition, jurisdiction may also be extended to cases where, although the offence was not completed, an attempt was made in another state to commit a Convention crime in the territory of the jurisdictional state – article 15(c).

²⁴⁶ UNODC 2009b:25-27 in articles 6 and 7.

²⁴⁷ Kruger 2008:5; UNODC 2004:140-141.

²⁴⁸ UNODC 2004:140-141; Kruger 2008:5-6.

²⁴⁹ Kruger 2008:8; UNODC 2004:140-141.

²⁵⁰ UNODC 2008:113; see also UNODC 2004:140-142; HSRC 2010:22..

In line with this approach, the Organized Crime Convention sets minimum standards pertaining to confiscation matters that must be complied with by states parties. First of all, measures must be in place to trace, seize and freeze²⁵¹ property for eventual confiscation.²⁵² Domestic legislation must also be enacted to the greatest extent possible within domestic legal systems to enable the confiscation of two main items, namely the proceeds of crime derived from Convention crimes as well as instrumentalities used to commit these crimes.²⁵³ Aligned with these obligations, the HCHR Principles and Guidelines also enjoin states, in appropriate cases, to freeze and confiscate the assets of natural and legal persons involved in trafficking.²⁵⁴

After confiscating the instrumentalities and proceeds of crime in terms of the Organized Crime Convention, states parties are further required to dispose of these in accordance with their domestic legal system.²⁵⁵ The treaty has no mandatory provision prescribing that these confiscated

²⁵¹ Article 2(f) of the Organized Crime Convention provides that “freezing” or “seizure” means “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority”; see also UNODC 2004:143.

²⁵² Article 12(2); UNODC 2008:146. The term “confiscation”, which includes forfeiture where applicable, means “the permanent deprivation of property by order of court or other competent authority – article 2(g). Article 12(3)-(9) contains related provisions regulating the situation where the proceeds of crime are transformed into other property or are intermingled with other property and states that courts may order that bank or financial records be made available or be seized – UNODC 2008:146.

²⁵³ Article 12(1); UNODC 2004:273-274. UNODC 2008:146, Guideline 4.4 of the HCHR Principles and Guidelines, underpins article 12 of the Organized Crime Convention – OHCHR 2002:8; SALRC 2006:8.

²⁵⁴ OHCHR 2002:4 – Principle 16; SALRC 2006:8.

²⁵⁵ Article 14(1); UNODC 2004:143.

proceeds be utilised in the interest of trafficked persons.²⁵⁶ The only exception is where a particular state party having jurisdiction over the Convention offence requests the return of the confiscated items from a state in which territory such items are present. In such cases, the Convention stipulates that the requested state “shall ... give priority consideration” to the return of the confiscated items in order that they may be channelled as compensation to the victims or be returned to the legitimate owners.²⁵⁷

The importance of confiscation measures as mandatory components of domestic counter-trafficking responses is increasingly being emphasised:

Economic enforcement, such as asset freezing and seizure and taxation to penalise traffickers, is vital in the fight against human trafficking.²⁵⁸

The Palermo Protocol does not explicitly provide for confiscation and asset forfeiture. Nonetheless, the identified obligations pertaining to confiscation in the parent Convention apply and place an obligatory duty on states parties in this regard.

²⁵⁶ On this issue, the HCHR Principles and Guidelines provide that confiscated assets are to be set aside, to the extent possible, for supporting and compensating trafficked victims – see Principle 16 and Guideline 4.4 in OHCHR 2002:4, 8; Jordan 2002:17-18.

²⁵⁷ Article 14(2).

²⁵⁸ UN.GIFT 2008e:26.

3.6 Judicial cooperation

3.6.1 *Need for judicial cooperation*

As indicated above,²⁵⁹ various factors such as the cross-border and hidden nature of the crime, widespread corruption, trafficking networks and the multiple forms of trafficking contribute to the complexity of this crime. These factors make the investigation and prosecution of human trafficking exceptionally challenging. Against this background, judicial cooperation on a national level among government officials, non-government organisations (NGOs) and other civil institutions is crucial.²⁶⁰

However, human trafficking is often a regional and global phenomenon which cannot be dealt with effectively only at the national level.²⁶¹ Therefore, apart from cooperation at the national level, international, multilateral and bilateral cooperation is also needed to combat this crime.²⁶²

The fight against criminal organisations involved in human trafficking calls for broad, multi-agency, flexible and cooperative approaches, both nationally and internationally.²⁶³

In its broadest form, effective cooperation among all counter-trafficking agents is required to combat human trafficking effectively.²⁶⁴ However,

²⁵⁹ See the explanation of the complexities of human trafficking in Chapters 2-4 above.

²⁶⁰ UN.GIFT 2008e:47.

²⁶¹ UN.GIFT 2008e:47.

²⁶² OHCHR 2002:15 – Guideline 11; SALRC 2006:10; Gallagher and Holmes 2008:323.

²⁶³ UNODC 2008:119.

the judicial focus of this study narrows down the scope so as to address cooperation pertaining to criminal justice issues only.

In acknowledging this need for effective and continuous cooperation among all counter-trafficking agents, it has been proposed in recent publications that the commonly known three P's counter-trafficking approach²⁶⁵ consisting of the prevention of the crime, the prosecution of trafficking agents and the protection of trafficked persons be expanded.²⁶⁶ In 2008, the Vienna Forum to Fight Human Trafficking recommended that, alongside the three P's, a fourth "P", referring to "partnerships", be added to ensure that cooperative partnerships are included as an essential element of human trafficking responses.²⁶⁷

3.6.2 *Judicial cooperation on a national level*

Judicial cooperation on a national level requires a victim-centred, coordinated, interagency approach among all relevant stakeholders.²⁶⁸ These stakeholders include the police, prosecution, judiciary, border authorities, health services, social services, legal services and labour authorities, as well as NGOs, civil society and international and intergovernmental organisations providing specialised services pertaining to criminal justice.²⁶⁹ It must be noted that the Palermo

²⁶⁴ Planitzer 2009:5; UN.GIFT 2008e:29; David 2007:1.

²⁶⁵ Palermo Protocol: Preamble, article 4; Fredette 2009:112, 120-133; US Department of State 2010:5; HSRC 2010:1; US Department of State 2009: 6, 25-32; Snyman 2005:280; US Department of State 2008:5; US Department of State 2007:6; Melvin 2006:22, 43.

²⁶⁶ UN.GIFT 2008e:28, 59; Planitzer 2009:5.

²⁶⁷ UN.GIFT 2008e:28, 59; Planitzer 2009:5.

²⁶⁸ Planitzer 2009:5; UNODC 2008:176; UN.GIFT 2008e:27, 47; UNODC 2009b:86.

²⁶⁹ Planitzer 2009:26.

Protocol does not obligate, but calls on, states parties to train law enforcement and other relevant officials, stipulating that such training “should encourage cooperation” with non-governmental and other relevant organisations as well as civil society.²⁷⁰ The HCHR Principles and Guidelines also highlight the need for law enforcement authorities to partner with non-governmental agencies to ensure that trafficked persons receive the necessary assistance.²⁷¹

3.6.3 *Judicial cooperation on an international level*

Apart from collaboration on a national level, the international framework on human trafficking obligates international judicial cooperation, especially among countries of origin, transit and destination.²⁷² Human trafficking that takes place over international borders cannot be addressed by domestic laws alone, but necessitates states joining forces.²⁷³

A growing number of bilateral, regional and global agreements reflect the realisation that transnational crime must be addressed through international cooperation. As criminal groups operate across borders, judicial systems must do the same.²⁷⁴

²⁷⁰ Article 10(2). The Palermo Protocol, in article 9(3), also calls upon states parties to cooperate with civil society and NGOs in establishing policies and other measures to prevent human trafficking and stipulates that states parties “shall consider” implementing measures for the physical, psychological and social recovery of victims in cooperation with these organisations and civil society – see article 6(3); see also Planitzer 2009:17.

²⁷¹ OHCHR 2002:10 – Guideline 5.9.

²⁷² David 2007:1; UNODC 2008:7; Planitzer 2009:17-18; UNODC 2009b:83; Gallagher and Holmes 2008:323.

²⁷³ UNODC 2008:7.

²⁷⁴ UNODC 2008:7.

Further emphasising the importance of international criminal justice cooperation, both the Organized Crime Convention²⁷⁵ and the Palermo Protocol²⁷⁶ unequivocally, and respectively, state their purpose of promoting international cooperation in combating transnational organised crime and human trafficking.²⁷⁷ Cooperation on an international level is therefore a crucial component of all domestic judicial responses to human trafficking. In view of the fact that human trafficking is often transnational in nature, national laws must provide for mechanisms, such as extradition and mutual legal assistance, to enable and streamline criminal justice cooperation.²⁷⁸

Apart from the Organized Crime Convention and the Palermo Protocol, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography²⁷⁹ also underpins the importance of judicial cooperation. This Optional Protocol enjoins states parties to cooperate²⁸⁰ internationally and to render mutual legal assistance²⁸¹ in the investigation, prosecution and punishment of those responsible for offences such as the selling of children.²⁸²

²⁷⁵ Article 1.

²⁷⁶ Article 2(c).

²⁷⁷ UNODC 2008:120-121; UN.GIFT 2008e:47.

²⁷⁸ UN.GIFT 2008e:31; see also UNODC 2008:9; UN.GIFT 2008e:47; Gallagher and Holmes 2008:323.

²⁷⁹ <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008); see also 2.3.11 in Chapter 5 above.

²⁸⁰ Article 10(1)-(2).

²⁸¹ Article 6.

²⁸² For a further discussion of other instruments and sources underlining judicial cooperation, see Planitzer 2009:18.

Other non-binding sources also underpin the obligation regarding judicial cooperation in human trafficking cases. The Vienna Forum Report on Human Trafficking recommends that the cooperation between state authorities and civil society organisations needs to be institutionalised so as to enhance a victim-centred and human rights approach to human trafficking by way of such regulated cooperation.²⁸³ Concomitantly, the HCHR Principles and Guidelines emphasise judicial cooperation in joint investigations and judicial processes relating to trafficking crimes. This cooperation includes assistance in various matters, such as in identifying and interviewing witnesses, obtaining and preserving evidence, producing and serving legal documents to secure evidence and witnesses, and the enforcement of judgments.²⁸⁴ In addition, the HCHR Principles and Guidelines emphasise the importance of cooperation among the relevant authorities and NGOs in identifying and assisting trafficked persons and underline the need for formalised cooperation.²⁸⁵

3.6.4 *Specific types of cooperation*

3.6.4.1 Information exchange

The exchange of relevant information is invaluable for effective cooperation.²⁸⁶ The complexity of investigating and prosecuting human trafficking cases makes it critical to streamline information exchange among relevant authorities in combating this crime.²⁸⁷

²⁸³ UN.GIFT 2008e:27.

²⁸⁴ OHCHR 2002:16 – Guideline 11.8.

²⁸⁵ OHCHR 2002:6 – Guideline 2.3.

²⁸⁶ David 2007:2.

²⁸⁷ UN.GIFT 2008e:47; UNODC 2008:151; David 2007:2.

To enhance effective law enforcement, the Organized Crime Convention obligates states parties to establish channels of communication to ensure “secure and rapid exchange of information on all aspects of the offences covered by this Convention”.²⁸⁸ In addition, measures must be adopted to exchange information on the early identification of Convention offences and on the means and methods used by organised criminal groups.²⁸⁹

Supplementing the Convention, the Palermo Protocol places the obligation to exchange information on all relevant authorities, including law enforcement and immigration authorities.²⁹⁰ Apart from mandatory cooperation with state agencies, cooperation is also encouraged with non-governmental, civil and international organisations in combating human trafficking.²⁹¹ The information to be shared pertains to issues relevant to effective investigations and prosecutions, including the identification of victims as well as traffickers, the types of travel documents used to cross international borders and the *modus operandi* of traffickers.²⁹² However, the danger exists that the sharing of sensitive information may compromise confidentiality and the safety of victims.²⁹³

²⁸⁸ Article 27(1)(a). Although not in mandatory terms, the Organized Crime Convention also requires cooperation by collecting, exchanging and analysing relevant information, specifically on organised crime – article 28 of the Convention; see also UNODC 2008:153.

²⁸⁹ Article 27(e)-(f).

²⁹⁰ Article 10.

²⁹¹ Palermo Protocol: articles 6(3), 9(3) and 10(2); see also article 37(2) of the Model Law Against Trafficking in Persons – UNODC 2009b:88-89. The Organized Crime Convention focuses on the sharing of such information that has specific relevance to organised crime issues – article 27(1)(e).

²⁹² Palermo Protocol: article 10(1); UNODC 2009b:88, 153; UN.GIFT 2008e:29.

²⁹³ UNODC 2008:153.

Accordingly, it is to be welcomed that the Palermo Protocol limits the duty of information sharing to such sharing that is in accordance with domestic laws.²⁹⁴ In addition, received information may be used only within the restrictions placed on it by the sending state.²⁹⁵

3.6.4.2 Extradition

Extradition is a formal and often treaty-based process of bringing a perpetrator to justice by returning or delivering the fugitive to the jurisdiction in which he or she is wanted.²⁹⁶ Extradition proceedings are indispensable in facilitating international cooperation in the combating of human trafficking. States opting to institute criminal prosecutions against the perpetrators of transnational crimes or to enforce sentences against convicted perpetrators may find that the offenders are in a foreign state. In these cases, extradition proceedings are essential:

...to bring them to justice in the prosecuting State. Extradition is a formal process, leading to the surrender by the requested State of the person sought in the requesting State.²⁹⁷

Human trafficking, especially the cross-border form of this crime, involves trafficking activities carried out in different countries or even continents.²⁹⁸ Accordingly, extradition may be essential to secure the

²⁹⁴ Article 10(1); UNODC 2008:153.

²⁹⁵ Article 10(3); UNODC 2008:153.

²⁹⁶ UNODC 2004:195-196.

²⁹⁷ UNODC 2008:124.

²⁹⁸ Shelley 2007:122; UNODC 2004:195-196.

presence of trafficking agents who are in another country when they are wanted for prosecution or for the enforcement of a sentence.²⁹⁹

Although the Palermo Protocol does not deal with extradition, the extradition provisions in the Organized Crime Convention are applicable and lay down minimum standards for extradition.³⁰⁰ In regulating the extradition process, the Organized Crime Convention places various duties on states parties pertaining to extradition. The Convention requires states parties, when requested to surrender a person who is in their territory for prosecution of a crime covered by the Convention, to extradite such a person.³⁰¹ In addition, extradition may be requested to enforce a sentence in relation to an extraditable offence.³⁰² The extradition obligation for these purposes applies among states parties to the offences covered by the Convention and its Protocols.³⁰³ These offences for which extradition is sought must be criminal offences in the domestic law of both the requesting and the requested state party in order to meet the requirement of dual criminality.³⁰⁴

States parties that do not require a treaty basis for extradition because they regard the Convention as the legal basis for cooperation on

²⁹⁹ UNODC 2008:121-122; . David 2007:2.

³⁰⁰ Article 16 of the Organized Crime Convention; David 2007:1; UNODC 2008:124; UNODC 2004:274. The basis for the Convention provisions being applicable to the Palermo Protocol was explained earlier in 2.3.14.2 in Chapter 5 above – see also article 37 of the Organized Crime Convention and article 1 of the Palermo Protocol.

³⁰¹ Article 16(1). The OHCHR 2002:16 confirms the duty to extradite a person on request for offences related to human trafficking – see Guideline 11.9.

³⁰² Article 16(12).

³⁰³ UNODC 2008:124.

³⁰⁴ Article 16(1); UNODC 2008:124.

extradition must make Convention offences extraditable in their national laws.³⁰⁵ Other states parties that make extradition conditional on the existence of a treaty are required to notify the Secretary General of the United Nations whether they consider the Convention to be the legal basis as regards cooperation in matters of extradition.³⁰⁶ If such states decline to use the Convention as the basis for cooperation, they are obliged to conclude relevant treaties on extradition.³⁰⁷ In short, the Convention therefore requires that offences covered by it, including human trafficking, be extraditable offences under national law and extradition treaties.³⁰⁸ This obligation is also included as a principle in the HCHR Principles and Guidelines.³⁰⁹

The Convention further imposes a duty to ensure prosecution and punishment where extradition is refused on the grounds of nationality. States refusing requested extradition solely because the person sought for extradition is a national of the requested state are obliged to submit the case to their own authorities for prosecution without undue delay.³¹⁰ In less mandatory terms, the Convention provides that, where extradition

³⁰⁵ Article 16(6); UNODC 2004:274; UNODC 2008:125.

³⁰⁶ Article 16(5)(a); UNODC 2008:125.

³⁰⁷ Article 16(5)(b); UNODC 2008:125.

³⁰⁸ Article 16(3) and (6); UNODC 2004:274; UNODC 2008:122.

³⁰⁹ Principle 14 provides that “states shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law” – OHCHR 2002:4; see also the discussion in OHCHR 2010:203-208.

³¹⁰ Article 16(10); UNODC 2004:274; Gallagher and Holmes 2008:323. This obligation is referred to as *aut dedere aut iudicare* – UNODC 2008:125-126. It is submitted that states refusing extradition on grounds other than nationality should also refer such cases for prosecution by their own authorities – UNODC 2008:125.

sought for the enforcement of a sentence is refused on the ground of nationality, the requested state “shall consider” enforcing the sentence itself.³¹¹

Finally, the Convention promotes the adoption of measures to facilitate extradition.³¹² For this reason, states parties “shall seek” to enter into bilateral and multilateral agreements to ensure effective extradition.³¹³

3.6.4.3 International cooperation for the purposes of confiscation

It was indicated earlier that the effective combating of human trafficking includes stripping trafficking agents of the profits of their crime by freezing, seizing and confiscating the instrumentalities and proceeds of their crime.³¹⁴ In some cases, these instrumentalities and proceeds of crime are in a state other than the one having jurisdiction over the offence.³¹⁵ In such cases, international cooperation is vital to enable states to give effect to “foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property”.³¹⁶

³¹¹ Article 16(12).

³¹² UNODC 2008:122.

³¹³ Article 16(17).

³¹⁴ UNODC 2008:113, 145; see also 2.5 above.

³¹⁵ UNODC 2008:145.

³¹⁶ UNODC 2008:145. Article 12 of the Organized Crime Convention deals with the freezing, seizure and confiscation of the instrumentalities and proceeds of those crimes covered by this treaty – see also 2.5 above; UNODC 2008:146. Article 13 of the Organized Crime Convention lays down obligations for international cooperation for the purpose of confiscation. The HCHR Principles and Guidelines also underpin the obligation to assist in identifying, tracing, seizing, freezing and confiscating assets – OHCHR 2002:16 – see Guideline 11; OHCHR 2010:219-220.

The various methods and approaches used to confiscate the instrumentalities and proceeds of crime complicate international cooperation on confiscation issues.³¹⁷ The Organized Crime Convention therefore aims “to bring States into conformity with one another to the extent possible within their respective legal systems”.³¹⁸ Despite the differences in the seizure, freezing and confiscation of assets, states parties are nonetheless required to ensure a broad domestic ability to comply with the obligations of the Convention.³¹⁹

The Convention allows states to comply with the obligation to deal with a foreign request to confiscate assets in one of two ways.³²⁰ First, the requested state may submit the foreign request to confiscate or to identify, trace and freeze the proceeds of crime to its domestic authorities as the basis for applying for a domestic order.³²¹ Secondly, a more direct method is also available to the requested state. This method provides that the requested state may treat the foreign request to confiscate or to identify, trace and freeze the proceeds of crime as if it were a domestic order.³²² The domestic authorities of the requested state may thus give effect to the request right away and therefore save costs and time by implementing this method.³²³

³¹⁷ UNODC 2008:188.

³¹⁸ UNODC 2008:189.

³¹⁹ UNODC 2008:189.

³²⁰ UNODC 2008:146.

³²¹ Article 13(1)(a).

³²² Article 13(1)(b).

³²³ UNODC 2008:146.

The Convention further deals with the disposal of confiscated assets in the last phase of the confiscation process.³²⁴ Without a strong mandatory directive, requested states are not obligated, but only required, to give priority consideration to the return of confiscated assets to the requesting state in order to be utilised in the interests of victims or legitimate owners.³²⁵

3.6.4.4 Mutual legal assistance

Apart from extradition, mutual legal assistance is another important measure to facilitate effective international cooperation. States parties frequently cannot investigate, prosecute and punish trafficking offenders without the legal assistance of other states.³²⁶ Mutual legal assistance is typically indispensable where human trafficking activities are committed in more than one country or where trafficking agents reside in, or travel between, foreign states.³²⁷ Building on other relevant international and regional initiatives,³²⁸ the Organized Crime Convention obligates states parties to provide one another with:

...the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings regarding offences covered by the Convention.³²⁹

³²⁴ Article 14; UNODC 2008:147; see also OHCHR 2010:221.

³²⁵ Article 14(2); see also 2.5 above.

³²⁶ UNODC 2008:135; see also OHCHR 2010:208-210..

³²⁷ UNODC 2008:122.

³²⁸ UNODC 2008:135.

³²⁹ Article 18(1) of the Organized Crime Convention; UNODC 2004:274; UNODC 2008:122.

The Convention further lays down a minimum standard for affording legal assistance, stating that it must be provided “to the fullest extent possible”.³³⁰ There is a specific obligation on law enforcement authorities to ensure close cooperation as regards improvement of communication and the conducting of inquiries into offences covered by the Convention.³³¹ To streamline the provision of mutual legal assistance, states are required to designate a central authority to receive and execute requests for mutual legal assistance.³³²

The obligation to render mutual legal assistance requires that states parties ensure that mechanisms are in place to enable them to assist each other not only in the investigation of trafficking offences, but also throughout the prosecution and punishment of trafficking agents.³³³ These mechanisms include entering into bilateral and multilateral treaties on mutual legal assistance in criminal proceedings as well as the adoption of laws facilitating such assistance.³³⁴ To bolster the effective investigation and prosecution of trafficking offenders, legal assistance and cooperation between criminal justice and other counter-trafficking

³³⁰ Article 18(2); UNODC 2008:136. For a further discussion on other aspects of mutual legal assistance, see UNODC 2008:143-144.

³³¹ Article 27(1); UNODC 2008:155.

³³² Article 18(13).

³³³ UNODC 2008:122; UN.GIFT 2008e:28.

³³⁴ Article 18(2); UNODC 2008:122. The IOM Vienna Forum has developed the “Guiding Principles on Memoranda of Understanding between Key Stakeholders and Law Enforcement Agencies on Counter-Trafficking Cooperation” to serve as a practical tool for helping all stakeholders to develop formalised counter-trafficking agreements on a national and international level – Planitzer 2009:5, 17-62, 69-126.

agents have to be fed into an institutionalised framework so as to ensure consistent and lasting cooperation.³³⁵

Legal assistance may be requested for various purposes. The Convention stipulates broadly that any type of legal assistance, provided that it is not in conflict with the national law of the requested state party, may be applied for.³³⁶ To be more specific, the Convention specifically allows for assistance in taking evidence or statements, examining objects and sites, executing searches and seizures, providing information and evidence, identifying and tracing the proceeds of crime or instrumentalities, and facilitating the appearance of witnesses.³³⁷

In 2006, the Conference of the Parties to the Organized Crime Convention³³⁸ confirmed that the Convention was being successfully used by a number of states:

...as a basis for granting requests for extradition, mutual legal assistance and international cooperation for the purposes of confiscation, and encouraged states parties to make greater use of the Convention as a legal basis for international cooperation in extradition and mutual legal assistance, particularly

³³⁵ UN.GIFT 2008e:28.

³³⁶ Article 18(3)(i). In article 18(21), the Convention lists the circumstances in which mutual legal assistance may be refused, while article 18(9) provides for declining to render such assistance based on the absence of dual criminality; UNODC 2008:136; UNODC 2004:274.

³³⁷ Article 18(3); UNODC 2008:136; UNODC 2004:274. Other forms of legal assistance and cooperation pertain to the transfer of sentenced persons (article 17) and joint investigations by states parties (article 19), but these provisions are not mandatory and therefore do not set minimum standards that fall within the scope of this study.

³³⁸ A Conference of the Parties to the Organized Crime Convention was established in terms of article 32 to improve the capacity of states parties to combat transnational organised crime as well as to review the implementation of the Convention – UNODC 2008:121.

where bilateral agreements and domestic laws did not provide for such cooperation.³³⁹

To summarise, by setting out specific requirements for various forms of international cooperation, the Organized Crime Convention and the Palermo Protocol lay down minimum standards for international cooperation in combating Convention crimes. By complying with these standards in domestic laws, the Convention's fundamental purpose of effective international cooperation to combat specific crimes is fulfilled, in that states parties are assisted "to harmonise their legislation and eliminate differences that can hamper prompt and effective international cooperation".³⁴⁰ Accordingly, it is important that states that wish to work together to combat human trafficking become parties to the Convention Against Transnational Organized Crime and its supplementary Palermo Protocol.³⁴¹

3.7 Human rights approach

The Palermo Protocol explicitly states that one of its aims is to protect and assist victims "with full respect for their human rights".³⁴² According to Raymond, the Protocol aims to integrate "the protection of human

³³⁹ UNODC 2008:121; see also article 16(4) of the Organized Crime Convention; UN.GIFT 2008e:48.

³⁴⁰ UNODC 2008:9, 189; see also UN.GIFT 2008e:47.

³⁴¹ UNODC 2008:9, 121.

³⁴² Articles 2(b) and 14; see also the Preamble to the Palermo Protocol; UNODC 2009b:86. It must be pointed out that the treaty does not exclusively provide for victims' rights, but does stipulate that assistance to victims is to be provided "in a manner not prejudicial to the rights of the defence" – Article 6(2)(b); see also UN General Assembly 2000: paragraph 68.

rights and assistance to victims with effective prevention, prosecution, and judicial cooperation”.³⁴³

In contrast to Raymond, Bruch³⁴⁴ is of the view that the Protocol’s emphasis is more on law enforcement and not on human rights. To substantiate this view, the stark contrast between the mandatory provisions on law enforcement on the one hand and the discretionary provisions on victim protection and assistance on the other are pointed out.³⁴⁵ For example, while victims have the fundamental right to privacy, which includes the non-disclosure of their identities to protect them from retaliation, the Protocol only calls upon ratifying states to protect privacy and identity “in appropriate cases” and “to the extent possible”.³⁴⁶ Furthermore, states parties are required to adopt measures to provide victims with information on court and administrative proceedings, but only “in appropriate cases”.³⁴⁷ The meaning of the phrase “in appropriate cases” is vague and the Protocol does not provide guidance to clarify such meaning.

³⁴³ Raymond 2002:493; see also SALRC 2006:13.

³⁴⁴ Bruch 2004:14-16; see also Jordan 2002:2-3; SALRC 2006:13; Defeis 2003/2004:490; Gallagher 2001:990-991.

³⁴⁵ Bruch 2004:14-16; Kassan 2007:18–18.

³⁴⁶ Article 6(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.
See also Jordan 2002:19; SALRC 2006:17; Gallagher 2001:990; HSRC 2010:20; UNODC 2009b:59; UNODC 2004:282-284.

³⁴⁷ Article 6(2) – Addendum A; SALRC 2006:17; Jordan 2002:19; UNODC 2009b:54-55. For a discussion of the types of information with which trafficked victims are to be provided in regulations or victims’ charters, see UNODC 2009b:54-55.

Therefore, stringent mandatory obligations to protect human rights are lacking in the Protocol. For this reason, Weissbrodt and Anti-Slavery International³⁴⁸ warn that the discretionary nature of protection provisions in the Protocol may jeopardise the effective protection of victims' human rights in practice.³⁴⁹

Furthermore, Gallagher points out that the discretionary nature of victim protection and human rights provisions in the Palermo Protocol is not in line with international human rights law.³⁵⁰ However, in a saving clause, the Protocol provides that “nothing in the Protocol shall affect the rights, obligations and responsibilities of states and individuals under international law”, which includes international human rights law.³⁵¹ Therefore, binding global and regional human rights instruments must be relied upon to protect the rights of trafficked persons.³⁵² Accordingly, the human rights instruments discussed in Chapter 5 are an integral part of the global and regional normative framework on human trafficking. This point of view is underpinned by the recent judgment of the European Court of Human Rights in *Rantsev v Cyprus and Russia* in 2010³⁵³. In

³⁴⁸ Weissbrodt and Anti-Slavery International 2002:24; see also Kamidi 2007:21; Gallagher 2001:990; Marks and Clapham 2005:425; Snyman 2005:287.

³⁴⁹ Jordan 2002:2-3; SALRC 2006:13; Defeis 2003/2004:490; Gallagher 2001:990-991.

³⁵⁰ Gallagher 2001:990.

³⁵¹ Article 14(1); see also HSRC 2010:25; UNODC 2009b:6, 86. Article 14(2) of the Protocol also underpins the international principles of non-discrimination in interpreting and implementing provisions in the Protocol – UNODC 2004:256-257.

³⁵² Article 14 explicitly stipulates that “nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law”. Parties to the human rights instruments discussed in this Chapter are therefore obligated to protect the rights of trafficked persons – Jordan 2002:3, 6; see also HSRC 2010:20; UNODC 2009b:6; Foundation Against Trafficking in Women *et al.* 2001:1-2; and the discussion in 2.4 in Chapter 5 above.

³⁵³ *Rantsev v Cyprus and Russia* 2010 (Application no. 25965/04), judgment delivered on 7 January 2010, Strasbourg.

this case, the Court awarded a substantial amount in costs to Rantsev against the Republic of Cyprus and the Russian Federation for violating human rights and other articles of the Convention for the Protection of Human Rights and Fundamental Freedoms in the alleged trafficking of Rantsev's daughter to Cyprus and her subsequent death.³⁵⁴

It is internationally recognised that numerous human rights of trafficked persons are violated during the human trafficking process.³⁵⁵ Among the rights most commonly infringed are the right to life,³⁵⁶ dignity, equality, liberty, integrity, decent work freely chosen, security and freedom of movement, the right to protection against discrimination, arbitrary detention, commercial sexual exploitation, violence, torture and degrading treatment, and the right to be protected against forced labour, forced marriage, slavery and slavery-like practices.³⁵⁷ It is therefore essential to protect and promote the human rights of all trafficked persons.³⁵⁸

In the absence of comprehensive human rights standards in the Organized Crime Convention and the Palermo Protocol, such standards drawn from international and regional human rights instruments must be

³⁵⁴ *Rantsev v Cyprus and Russia* 2010 (Application no. 25965/04) 2010:79-80.

³⁵⁵ Lee 2007:9; Marks and Clapham 2005:423; Fariior 1997:213; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8; Gajic-Veljanoski and Stewart 2007:340; Marks and Clapham 2005:423; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:64; OHCHR 2010:52-56.

³⁵⁶ *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:48.

³⁵⁷ Lansink 2006:55; Fariior 1997:213; Lee 2007:9; UN General Assembly 2010a:4; UN General Assembly 2010b:9; see also 2.4.1 in Chapter 5 above; *Rantsev v Cyprus and Russia* 2010 (Application no. 25965/04):79-80.

³⁵⁸ Foundation Against Trafficking in Women *et al.* 2001:5.

incorporated in domestic counter-trafficking responses.³⁵⁹ On this issue, Lansink states that it is:

...imperative that victims of trafficking receive protection and assistance in accordance with generally accepted standards of international human rights law.³⁶⁰

For this reason, it is justifiable not to limit the human trafficking framework to the Organized Crime Convention and the Palermo Protocol. Instead, the comprehensive normative framework on human trafficking mapped out in the previous Chapter guarantees that, apart from law enforcement standards, other standards, such as minimum human rights standards, are also built into domestic counter-trafficking responses.³⁶¹

Recognising the necessity for human rights standards in domestic counter-trafficking responses, the United Nations High Commissioner for Human Rights developed the Recommended Principles and Guidelines on Human Rights and Human Trafficking (HCHR Principles and Guidelines).³⁶² Emphasising that human rights must be integrated in all human trafficking interventions, this document serves as a rights-based guide for national, regional and international counter-trafficking

³⁵⁹ Marks and Clapham 2005:423; Foundation Against Trafficking in Women *et al.* 2001:5; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:64; see also 2.4 and 3.1 in Chapter 5 above.

³⁶⁰ Lansink 2006:55; Foundation Against Trafficking in Women *et al.* 2001:5.

³⁶¹ See 2.4, 3.1 and 3.2 in Chapter 5 above.

³⁶² See 2 above; UNODC 2008:10, 115-117; OHCHR 2002:2.

responses.³⁶³ At the outset, the HCHR Principles and Guidelines require the primacy of human rights in all anti-trafficking interventions. The first principle in this document reads as follows:

The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.³⁶⁴

As one of its guidelines, the HCHR Principles and Guidelines further provide that legal proceedings, such as the prosecution of traffickers in cases in which trafficked persons are involved should not be harmful to “their [the trafficked victims’] rights, dignity or physical or psychological well-being”.³⁶⁵ Stated differently, counter-trafficking measures may not adversely impact on the human rights of trafficked persons.³⁶⁶

Although the HCHR Principles and Guidelines do not have the binding status of internationally agreed-upon treaties, the approach of the document is widely supported.³⁶⁷ Already in 1999 the Foundation Against Trafficking in Women *et al.* compiled the Human Rights Standards for the Treatment of Trafficked Persons by drawing such standards from international human rights instruments and formally recognised international norms.³⁶⁸ The purpose of this human rights document is to

³⁶³ OHCHR 2002:2; UN General Assembly 2010a:4.

³⁶⁴ OHCHR 2002:3 – Principle 1; SALRC 2006:7. In line with this Principle, Guideline 1 emphasises that the protection of human rights must be at the centre of all anti-trafficking efforts.

³⁶⁵ OHCHR 2002:11 – Guideline 6.4. This Guideline underpins the primacy of human rights incorporated in Principle 1 of the HCHR Principles and Guidelines; see also David 2007:3-6.

³⁶⁶ OHCHR 2002:3 – Principle 3; Lansink 2006:54.

³⁶⁷ UN General Assembly 2010a:4.

³⁶⁸ Foundation Against Trafficking in Women *et al.* 2001:3.

protect the human rights of trafficked persons and to promote respect for such rights.³⁶⁹ It emphasises the following:

In furtherance of achieving full implementation of the rights of trafficked persons, we urge states to take all necessary measures to adopt and amend laws, where necessary, and to implement laws and policies extending universally-accepted basic human rights of all persons to all trafficked persons.³⁷⁰

Lansink³⁷¹ also advocates a human rights approach, focusing on the needs of trafficked persons, their protection and the safeguarding of their human rights. However, she emphasises that such human rights and victim-centred approach does not “diminish the importance of a criminal justice approach to human trafficking, but rather integrates human rights into prevention, protection and prosecution”.³⁷² Recently, Ezeilo, the present Special Rapporteur on Trafficking in Persons, further underpinned the importance of “an integrated approach that places human rights at the core of all efforts” to combat human trafficking.³⁷³

3.8 Obligations pertaining to trafficked persons

Instruments forming the international and regional framework on human trafficking further require compliance with a number of obligations which

³⁶⁹ Foundation Against Trafficking in Women *et al.* 2001:3.

³⁷⁰ Foundation Against Trafficking in Women *et al.* 2001:5.

³⁷¹ Lansink 2006:55.

³⁷² Lansink 2006:55.

³⁷³ Ezeilo 2009:8; see also UN.GIFT 2008e:1; Lansink 2006:54.

have specific reference to trafficked persons.³⁷⁴ However, given the focus of the present study,³⁷⁵ only those obligations that pertain to victims, and which also link up with the judicial aspects of human trafficking, are covered in this Chapter.

3.8.1 *Victim protection and assistance*

Owing to the abuse and prolonged exploitation of victims that typically go hand in hand with human trafficking, protecting and assisting these victims is essential.³⁷⁶ The UNODC Legislative Guides emphasise that the intention of the Convention and the Protocol is not to provide comprehensively for victim protection and assistance, but only to supplement the existing general rules pertaining to victims and other witnesses by adding certain provisions that are specifically relevant to trafficked persons.³⁷⁷

Obokata³⁷⁸ rightly points out that a holistic approach, which includes victim protection and assistance, is needed to combat human trafficking successfully. Therefore, it is important to bear in mind that the criminal justice response is only a part of this comprehensive counter-trafficking approach³⁷⁹ and must not be overemphasised at the expense of victims'

³⁷⁴ See the discussion of the various instruments, especially in 2.2.4, 2.3 and 2.4 in Chapter 5 above.

³⁷⁵ See 7 in Chapter 1 above.

³⁷⁶ Gallagher and Holmes 2008:330.

³⁷⁷ UNODC 2004:283; see also HSRC 2010:23..

³⁷⁸ Obokata 2006:101-104.

³⁷⁹ David 2007:6.

interests.³⁸⁰ Nonetheless, the primary focus of this study is not on prevention or protection issues, but on combating the crime from a legal and broad criminal justice perspective.³⁸¹ While bearing in mind the specific focus of the study, it is also acknowledged that prevention, protection and prosecution issues do not exist in separate ring-fenced units, but to a large extent overlap and are intertwined.³⁸² Thus, protection and assistance for victims also impact on the successful prosecution of perpetrators and on the criminal justice process.³⁸³ Trafficked persons are often not willing to cooperate in the prosecution of traffickers because they fear retaliation from the perpetrators and often experience a lack of appropriate protection and assistance.³⁸⁴ Therefore, it is rightly concluded that:

...a critical component in the effective detection, investigation and prosecution of traffickers is the willingness of trafficked persons to assist in prosecutions.³⁸⁵

The proper recognition of trafficked persons' rights, coupled with the provision of protection and assistance, may serve as an incentive to report human trafficking and to testify against traffickers.³⁸⁶ For this reason, the provision of adequate, effective protection and assistance for

³⁸⁰ Obokata 2006:101-104; Gallagher and Holmes 2008:320.

³⁸¹ See 7 in Chapter 1 above.

³⁸² US Department of State 2010:5.

³⁸³ Gallagher 2001:991; UN.GIFT 2008e:36; UNODC 2009b:55; Gallagher and Holmes 2008:320.

³⁸⁴ Gallagher and Holmes 2008:333; Foundation Against Trafficking in Women *et al.* 2001:12.

³⁸⁵ Foundation Against Trafficking in Women *et al.* 2001:4; see also UNODC 2004:288.

³⁸⁶ Gallagher 2001:991, 1004; UN.GIFT 2008e:1, 36; Foundation Against Trafficking in Women *et al.* 2001:4, 12; US Department of State 2007:36; Gallagher and Holmes 2008:332.

trafficked persons is of crucial importance to victims in the first place, but often to a successful prosecution as well.³⁸⁷

3.8.1.1 Protection of trafficked persons

A number of obligations relating to victim protection and assistance are part of the international and regional framework on human trafficking.³⁸⁸

To start with, provisions in respect of victim protection are explored.

3.8.1.1.1 *Protection of physical safety*

It is of paramount importance to trafficked persons that their physical safety is guaranteed, since victims are very often exposed to threats of retaliation and actual retaliation by perpetrators.³⁸⁹ According to the HCHR Principles and Guidelines, the primary responsibility of law enforcement authorities is therefore “to ensure the safety and immediate well-being of trafficked persons”.³⁹⁰ As was pointed out above,³⁹¹ the European Court of Human Rights, in *Rantsev v Cyprus and Russia*, confirmed the responsibility of states to ensure the physical protection of trafficked persons.³⁹² Notwithstanding the emphasis on the importance of

³⁸⁷ Mandatory and optional provisions in articles 6-8 of the Palermo Protocol, in conjunction with articles 24 and 25 of the Organized Crime Convention, pertain to victim protection and assistance – UNODC 2004:282-283; see also UN.GIFT 2008e:36-37; Gallagher 2001:991; Foundation Against Trafficking in Women *et al.* 2001:4, 10-12; David 2007:3.

³⁸⁸ David 2007:1.

³⁸⁹ Singh 2004:342; Haynes 2004:226; Shapiro 2008:18; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:31; IOM 2009a:12; IOM 2007:30; Dougherty and Burke 2008:12; Brennan 2005:42; Gajic-Veljanoski and Stewart 2007:344; Morawska 2007:94; Shelley 2007:131; Snyman 2005:287; UNODC 2009b:56, 59.

³⁹⁰ OHCHR 2002:9.

³⁹¹ See 3.7 above.

³⁹² *Rantsev v Cyprus and Russia* (Application no. 25965/04), judgment delivered on 7 January 2010, Strasbourg:79-80.

ensuring the physical protection of trafficked persons, the Palermo Protocol does not contain a mandatory obligation in this regard. The Protocol only requires that states parties “shall endeavour” to provide for the physical safety of victims.³⁹³ While the Protocol lacks stringent mandatory provisions for the protection of trafficked victims,³⁹⁴ the Organized Crime Convention still applies to human trafficking cases and requires that states parties take appropriate measures to protect victims. However, this obligation is also qualified, in that states must protect victims, but only “within [their] means”.³⁹⁵

Unlike the Organized Crime Convention and the Palermo Protocol, the HCHR Principles and Guidelines firmly support adequate protection for all trafficked persons from a human rights perspective.³⁹⁶ A general, broad guideline calls upon states to ensure that trafficked persons are provided with protection from “further exploitation and harm”.³⁹⁷ In addition, such protection must not be made conditional on the trafficked person’s willingness or capacity to cooperate in legal proceedings against the perpetrators.³⁹⁸ From this principle flows the guideline that states must ensure that “protection of trafficked persons is built into anti-

³⁹³ Article 6(5); David 2007:1; Weissbrodt and Anti-Slavery International 2002:24; Jordan 2002:22; Kassan 2007:18–18; UNODC 2004:282, 285. Although the safety provision is not mandatory, it covers all trafficked persons and not just those who are willing to be witnesses – Jordan 2002:22.

³⁹⁴ UNODC 2004:283.

³⁹⁵ Article 25(1); UNODC 2004:285.

³⁹⁶ OHCHR 2002:10 – introduction to Guideline 6; SALRC 2006:9.

³⁹⁷ OHCHR 2002:3 – Principle 8.

³⁹⁸ OHCHR 2002:3 – Principle 8. The UNODC Model Law underpins this approach – UNODC 2009b:56.

trafficking legislation”.³⁹⁹ Further emphasising the importance of victims’ safety, the HCHR Principles and Guidelines require that victims be protected against “harm, threats and intimidation by traffickers and associated persons”.⁴⁰⁰ Linked to the protection against threats from perpetrators is the requirement to provide safe and adequate shelters that meet the needs of trafficked persons.⁴⁰¹ Such shelters should be provided for all trafficked persons and “not made contingent on the willingness of victims to give evidence in criminal proceedings”.⁴⁰² In addition, protection is to be provided against public disclosure of victims’ identities, while their privacy is also to be respected.⁴⁰³ The HCHR Principles and Guidelines also emphasise that the safety of a trafficked persons should be ensured not only during the investigation and trial process, but also thereafter.⁴⁰⁴ In further detail, the HCHR Principles and Guidelines propose that protection programmes may include aspects such as the identification of safe places and shelters in destination countries, access to independent legal counsel, the protection of identity⁴⁰⁵ and also options relating to continued stay, resettlement or repatriation.⁴⁰⁶

³⁹⁹ OHCHR 2002:9 – Guideline 4.6.

⁴⁰⁰ OHCHR 2002:11 – Guideline 6.6; SALRC 2006:9.

⁴⁰¹ OHCHR 2002:10 – Guideline 6.1; SALRC 2006:9.

⁴⁰² OHCHR 2002:10 – Guideline 6.1.

⁴⁰³ OHCHR 2002:11 – Guideline 6.6; SALRC 2006:9. Guideline 6.6 also stipulates that, while on the one hand victims’ rights are to be protected, on the other the right of the accused person to a fair trial is also to be considered – OHCHR 2002:11.

⁴⁰⁴ OHCHR 2002:10 – Guideline 5.8; SALRC 2006:9.

⁴⁰⁵ UNODC 2009b:64-66.

⁴⁰⁶ OHCHR 2002:9 – Guideline 5.8.

Of paramount importance is the requirement that appropriate measures be adopted to safeguard the rights and interests of trafficked children during all stages of criminal proceedings against trafficking offenders and also during procedures for obtaining compensation.⁴⁰⁷ What must be noted is that this guideline underpins article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.⁴⁰⁸

According to the UNODC Legislative Guides, the same Organized Crime Convention provisions for protecting witnesses, including the relocation of victims and the non-disclosure of identities, may be needed to ensure the physical safety of non-witness trafficked persons. Pursuant to article 34(3) in the Organized Crime Convention, it is submitted that protection that is broader than that provided for in the Palermo Protocol and the Organized Crime Convention be included in domestic law relating to trafficked victims, even when they are not witnesses.

3.8.1.1.2 *Protection of privacy and identity*

Linked with victims' right to privacy, the Palermo Protocol enjoins states parties to protect the privacy and identity of trafficked persons, including making legal proceedings pertaining to their trafficking confidential.⁴⁰⁹ To implement this provision, the UNODC Legislative Guides point out that domestic law must ensure that "courts have the authority to shield the

⁴⁰⁷ OHCHR 2002:13 – Guideline 8.8; SALRC 2006:10; Foundation Against Trafficking in Women *et al.* 2001:10-11.

⁴⁰⁸ <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008); see also 2.3.11 in Chapter 5 above.

⁴⁰⁹ Article 6(1); UNODC 2004:283; HSRC 2010:23.

identities” of victims by, for example, excluding the public or media from legal proceedings or by limiting the publication of information that may disclose the identity or whereabouts of victims.⁴¹⁰ This issue links up with the physical safety of witnesses and also with the Organized Crime Convention provision⁴¹¹ that allows witnesses to testify in safety outside courtrooms through communications technology such as video links.⁴¹²

As has been pointed out above,⁴¹³ this duty to protect privacy and identity is however not formulated in unconditional mandatory terms.⁴¹⁴ Acknowledging that the non-disclosure of victims’ identities is often essential to protect them from retaliation, it is submitted that states parties include “more strict and severe measures”⁴¹⁵ than is required by the Protocol and Convention.

3.8.1.1.3 *Protection against detention and prosecution*

The literature confirms that trafficked persons are often prosecuted for acts violating labour, migration and prostitution laws, even though their conduct stems directly from their situation as victims.⁴¹⁶ Yet, the issue of

⁴¹⁰ UNODC 2004:283; Foundation Against Trafficking in Women *et al.* 2001:11.

⁴¹¹ Article 24(2)(b).

⁴¹² UNODC 2004:283-284.

⁴¹³ See the criticism of the non-obligatory protection of the right to privacy in 3.7.1 above.

⁴¹⁴ Article 6(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.

See also Jordan 2002:19; SALRC 2006:17; Gallagher 2001:990; HSRC 2010:20; UNODC 2009b:59, 64-66; UNODC 2004:282-284; 3.13.3 and 2.3.14.2 in Chapter 5 above.

⁴¹⁵ Article 34(3).

⁴¹⁶ Melvin 2006:37; UN.GIFT 2008c:6; UNODC 2006:xx, 86, 89, 103; Kanics and Reiter 2001:112, 118; Lee 2007:11; Foundation Against Trafficking in Women *et al.* 2001:11-12;

non-prosecution of trafficked persons is not specifically dealt with in the Palermo Protocol or the Organized Crime Convention. However, the matter falls squarely within the scope of the binding obligations laid down by international and regional human rights instruments to protect and realise the basic human rights of trafficked persons.⁴¹⁷ Consequently, it is submitted that this dilemma should be addressed adequately in domestic counter-trafficking legislation by ensuring that victims are not prosecuted for crimes that are the direct result of them being trafficked.⁴¹⁸

The HCHR Principles and Guidelines include the principle of non-prosecution of trafficked persons.⁴¹⁹ A number of guidelines in the HCHR Principles and Guidelines emphasise that immunity must be guaranteed to trafficked persons by ensuring that, in national legislation, they are not detained, prosecuted or punished for the violation of laws which is a direct consequence of their situation as trafficked persons.⁴²⁰ In other words, victims are not to be prosecuted for offences such as immigration offences or prostitution if their involvement in such crimes was the direct result of them being trafficked.⁴²¹ The UNODC Model Law also supports the non-liability of trafficked victims and the fact that victims should not

Stuurman 2004:5; Haynes 2004:26, 224, 227; Morawska 2007:105-106; McClain 2007:585; Rijken 2003:73; Raymond 2002:500; Snyman 2005:287; see also 3.2.6 in Chapter 3 above.

⁴¹⁷ Foundation Against Trafficking in Women *et al.* 2001:3-5.

⁴¹⁸ David 2007:1; Foundation Against Trafficking in Women *et al.* 2001:11; HSRC 2010:22.

⁴¹⁹ OHCHR 2002:4 – Principle 7; OHCHR 2010:131-133; see also UNODC 2009b:40; Foundation Against Trafficking in Women *et al.* 2001:11.

⁴²⁰ See Guidelines 2.5, 2.6, 4.5 and 5.5 – OHCHR 2002:7, 9-10; see also UN.GIFT 2008e:29; UNODC 2009b:40.

⁴²¹ UNODC 2009b:40-42.

be held in a detention facility.⁴²² The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children⁴²³, which was jointly adopted by Europe and Africa in 2006, also endorses measures to avoid the prosecution of trafficked persons.⁴²⁴ Further, the 2008 Vienna Forum Report recommends that the principle of non-punishment of trafficked victims be considered a best practice, that is, that protection measures be adopted so that a trafficked person may be “meaningfully recognised as a victim”.⁴²⁵

It follows from the above discussion that the provision of immunity from prosecution for trafficked persons is not a specific mandatory obligation identified in international trafficking instruments. Still, it is convincingly maintained by the abovementioned authoritative sources that such immunity is a vital protection measure aligned with the protection of fundamental human rights. It is therefore strongly recommended that protection against prosecution for trafficked persons be included in domestic counter-trafficking legislation.

3.8.1.1.4 *Protection against summary deportation*

Apart from trafficked persons often being prosecuted, they also face another dilemma, namely summary deportation. As alluded to above,⁴²⁶

⁴²² UNODC 2009b:40, 58. For a further discussion of other instruments underpinning non-prosecution of trafficked victims, and for some examples of such a provision in domestic laws, see UNODC 2009b:40-42.

⁴²³ EU and AU 2006:2 – http://ec.europa.eu/justice_home/doc_centre/immigration/docs/OUAGADOUGOU.pdf (accessed 17/7/2010).

⁴²⁴ EU and AU 2006:5.

⁴²⁵ UN.GIFT 2008e:30.

⁴²⁶ See 3.2.7 in Chapter 3 above.

many persons trafficked across international borders are regarded as undocumented migrants in the destination country. The reason for this assumption is the illegal entry of trafficked persons into the destination country, the expiry of their work or residence permits or the fact that their passports have been confiscated by the trafficking agent.⁴²⁷ These unidentified victims are therefore seen as undesirable, undocumented migrants⁴²⁸ and, very often, in terms of immigration laws, are deported without delay to their countries of origin.⁴²⁹

In contrast to the summary deportation approach, it is pointed out that investigation and prosecution in trafficking cases:

...is more effective when the victim has continued presence in the country and accesses care and protection from a service provider as early in the process as possible.⁴³⁰

Hence, several countries, such as Germany, Belgium, Norway, the USA, Italy, the Netherlands, Spain and Canada, make provision for a so-called “reflection period”,⁴³¹ followed by a temporary or permanent residence permit⁴³² in the destination country.⁴³³ Inasmuch as the granting of a

⁴²⁷ UNODC 2006:117.

⁴²⁸ Kanics and Reiter 2001:113; Raymond 2002:500.

⁴²⁹ Kanics and Reiter 2001:113; UNODC 2006:103; Rijken 2003:73; GAATW 1999b:29-30; Kassan 2007:18–21; Stuurman 2004:5.

⁴³⁰ UNODC 2008:175; see also Foundation Against Trafficking in Women *et al.* 2001:17.

⁴³¹ OHCHR 2010:150-152.

⁴³² GAATW 1999b:17-28 gives a brief explanation of the difference between visas and temporary and permanent residence permits.

⁴³³ ILO 2008:8; The Future Group 2007a:16; Rijken 2003:73-74; Haynes 2004:241; UNODC 2006:117, 120-121; US Department of State 2007:49; Lee 2007:12; Jordan 2002:26;

reflection period, coupled with a temporary or permanent residence permit, is to be welcomed, it is regrettable that such permits are often only granted if victims are willing to testify against the alleged perpetrator.⁴³⁴

Rijken convincingly argues that revictimisation may occur where victims are forced to return to their country of origin, thus having to face the dangers of being re trafficked, of retaliation by traffickers and of rejection by their home community.⁴³⁵ In addition, immediate deportation in essence deprives trafficked persons of the opportunity to contribute to the successful prosecution of perpetrators by testifying against them.⁴³⁶

Despite the compelling arguments for the protection of victims against summary deportation, neither the main Convention nor the Palermo Protocol contains such a provision. The Palermo Protocol does, however, have a relevant provision stipulating that states parties are obligated to return victims to their countries of origin “with due regard for the safety” of such persons.⁴³⁷

Foundation Against Trafficking in Women *et al.* 2001:16; UNODC 2004:291. In the USA, these temporary visas for trafficked victims are called T-visas. For a discussion and a comprehensive table comparing trafficking victim assistance programmes, which include the provision of temporary visas in eight destination countries, see Gajic-Veljanoski and Stewart 2007:348-350.

⁴³⁴ OHCHR 2010:142-143. Rijken and Haynes suggest that these residence permits primarily serve the cause of the criminal justice process, since such permits are predominantly granted if victims, despite being traumatised and fearful of retaliation by traffickers, are willing to testify against their traffickers – Rijken 2003:73; Haynes 2004:241-242; Gajic-Veljanoski and Stewart 2007:350.

⁴³⁵ Rijken 2003:73; see also ILO 2008:21; Haynes 2004:227; McClain 2007:585; Foundation Against Trafficking in Women *et al.* 2001:18; Stuurman 2004:5.

⁴³⁶ UNODC 2006:117; Foundation Against Trafficking in Women *et al.* 2001:17, 19; UNODC 2009b:74; UNODC 2004:286-287.

⁴³⁷ Article 8(2).

The HCHR Principles and Guidelines emphasise the importance of not deporting trafficked persons overhastily. This document states, as a guideline, that protection against summary deportation is to be included in protection provisions in counter-trafficking legislation.⁴³⁸ It is therefore submitted that protection against summary deportation must also be included in counter-trafficking responses.⁴³⁹

3.8.1.2 Assistance for trafficked persons

Apart from protection provisions, the international and regional framework on human trafficking also contains provisions on victim assistance.⁴⁴⁰

3.8.1.2.1 *Victim participation in the criminal justice process*

Supplementing a similar mandatory provision in the Organized Crime Convention,⁴⁴¹ the Protocol requires that victims be assisted to present their views and concerns for consideration at appropriate stages of criminal or other judicial proceedings against offenders.⁴⁴² Victims' views may, for example, be allowed during plea-bargaining proceedings or as

⁴³⁸ OHCHR 2002:9 – Guideline 4.6; OHCHR 2010:133-139. This Guideline 4.6 links up with Principle 11 of the HCHR Principles and Guidelines, which require that a safe return be provided to trafficked persons and that, if serious safety risks exist, other legal alternatives to repatriation be made available – OHCHR 2002:4.

⁴³⁹ Foundation Against Trafficking in Women *et al.* 2001:17, 19.

⁴⁴⁰ David 2007:1.

⁴⁴¹ Article 25(3); see also 2.3.13.3.6.b in Chapter 5 above.

⁴⁴² Article 6(2)(b); see also UNODC 2009b:57, 59, 64; UNODC 2004:282, 284-285, 287; OHCHR 2010:154-155.

victim impact statements made after conviction but prior to sentencing.⁴⁴³ Importantly, the Protocol stipulates that, in assisting victims to present their views, the rights of accused persons should not be prejudiced.⁴⁴⁴

3.8.1.2.2 *Provision of victims with information*

As indicated above,⁴⁴⁵ the Protocol requires that victims be provided with information on relevant court and administrative proceedings.⁴⁴⁶ The UNODC Model Law proposes that the types of information which need to be provided include information on victim's rights, legal remedies, benefits and assistance, access to legal services, residence status and protection from risks and retaliation.⁴⁴⁷ To make legal remedies accessible to victims, legal and other information, as well as all other assistance, should be provided in a language victims understand.⁴⁴⁸ In strong terms, the HCHR Principles and Guidelines emphasise that states should ensure that:

...entitlement to such information, assistance and support is not discretionary, but is available as a right for all persons who have been identified as trafficked.⁴⁴⁹

⁴⁴³ UNODC 2009b:64; UNODC 2004:284.

⁴⁴⁴ Article 6(2)(b). The corresponding provision in the Convention is article 25(3); see also UNODC 2009b:57.

⁴⁴⁵ See 3.7 above.

⁴⁴⁶ Article 6(2)(a); UNODC 2004:282, 284; HSRC 2010:23.

⁴⁴⁷ UNODC 2009b:54-55.

⁴⁴⁸ Guidelines 4.8 and 6.5 – OHCHR 2002:9, 11; see also UNODC 2009b:55.

⁴⁴⁹ OHCHR 2002:9 – Guideline 4.8.

3.8.1.2.3 *Compensation and other remedies for trafficked persons*

The Palermo Protocol contains a mandatory provision on victim assistance pertaining to compensation. The Protocol clearly obligates states parties to adopt measures in their domestic legal systems that provide trafficked victims with “the possibility of obtaining compensation for damage suffered”.⁴⁵⁰ The Organized Crime Convention also requires access to compensation and restitution for victims, but without restricting it to “damage suffered”.⁴⁵¹ If the term “damage suffered” in the Protocol is interpreted not to include compensation for pain and suffering, the provisions in the parent Convention may be used to broaden the scope of compensation available to victims.

The UNODC Model Law⁴⁵² and the UNODC Legislative Guides⁴⁵³ explain that states parties may use any or all of a number of options in order to comply with the obligation pertaining to compensation.⁴⁵⁴ First, the right of trafficked victims to sue offenders for civil damages, irrespective of whether criminal proceedings are also instituted, must be built into domestic laws.⁴⁵⁵ This provision need not be included in anti-trafficking legislation if such a provision already exists in the general domestic laws of the state.⁴⁵⁶ Secondly, apart from any other punishment imposed on

⁴⁵⁰ Article 6(6); see also UNODC 2004:282; Gallagher 2001:990; David 2007:1; UNODC 2009b:57; HSRC 2010:23.

⁴⁵¹ Article 25(2); see also 2.3.13.3.6.a in Chapter 5 above.

⁴⁵² UNODC 2009b:66-72.

⁴⁵³ UNODC 2004:286.

⁴⁵⁴ UNODC 2009b:66-72; UNODC 2004:286.

⁴⁵⁵ UNODC 2009b:66; UNODC 2004:286; Foundation Against Trafficking in Women *et al.* 2001:16-17.

⁴⁵⁶ UNODC 2009b:66.

the offender, a criminal court may also order a convicted offender to pay compensation to the trafficked victim.⁴⁵⁷ Again, such provision need not be included if it is already part of domestic law. To make reparation to the victim for injury, loss or damage caused by the offender, an order for compensation may include payment for medical and psychological treatment, legal fees, loss of income, and non-material damages for pain and suffering suffered by the victim as a result of the trafficking crime committed against him or her.⁴⁵⁸ Money recovered by means of restitution benefits the victim, but also prevents offenders from profiting from their crime.⁴⁵⁹ Thirdly, where compensation is not fully available from the offender, the UNODC Model Law proposes that compensation for material and non-material damages suffered by victims be paid out from a government victim fund.⁴⁶⁰

Underpinning the minimum standard for providing access to compensation for trafficked persons, the HCHR Principles and Guidelines go further by stating that, in principle, trafficked persons are to be given access not only to compensation, but, more broadly, also “to effective and appropriate legal remedies”.⁴⁶¹ David also states that a key obligation for states parties is to “provide adequate and appropriate

⁴⁵⁷ UNODC 2009b:67-68; UNODC 2004:286. The US Model Law stipulates that restitution is mandatory and that a court must order restitution for the amount of loss identified – US Department of State 2003:4 – section XXX.02(5).

⁴⁵⁸ UNODC 2009b:69.

⁴⁵⁹ US Department of State 2003:11.

⁴⁶⁰ UNODC 2009b:69-72; UNODC 2004:286.

⁴⁶¹ Principle 17 – Addendum C; OHCHR 2010:228-230; Foundation Against Trafficking in Women *et al.* 2001:16-17.

remedies to victims of trafficking”.⁴⁶² Therefore, it is required that domestic laws include the victim’s right to pursue legal proceedings against alleged perpetrators as well as the provision of assistance in criminal and civil proceedings against perpetrators.⁴⁶³

3.8.1.2.4 *Special needs of victims, especially children*

The Palermo Protocol calls upon states parties, in applying the victim assistance and protection provisions of the Protocol, “to take into account” the age, gender and special needs of victims, especially children.⁴⁶⁴ In the light of the Protocol’s saving clause,⁴⁶⁵ this optional provision on the needs of victims should be interpreted consistent with existing human rights law. Therefore, binding human rights instruments, such as the Convention on the Rights of the Child,⁴⁶⁶ must be relied upon to ensure that the special needs of trafficked persons are prioritised.⁴⁶⁷

⁴⁶² David 2007:1.

⁴⁶³ See Guidelines 4.9.and 6.5 – OHCHR 2002:9, 11.

⁴⁶⁴ Article 6(4); see also Guidelines 5.2 and 5.6 in OHCHR 2002:9-10; UNODC 2004:289; UNODC 2009b:58, 60. Gallagher emphasises that, apart from the advantage for victims themselves, proper victim assistance is also important to the criminal justice process, because victims whose needs are disregarded are not likely to testify or cooperate in the prosecution of offenders – Gallagher 2001:989-991.

⁴⁶⁵ Article 14; see also 3.7 above.

⁴⁶⁶ <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008); see also 2.3.7 in Chapter 5 above; UNODC 2009b:6-7, 59; Foundation Against Trafficking in Women *et al.* 2001:4. Relevant articles in the Convention on the Rights of the Child include articles 1-4, 12 and 13. Article 14 of the Palermo Protocol explicitly stipulates that “nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law”. Parties to the human rights instruments discussed in this Chapter are therefore obligated to protect the rights of trafficked persons – Jordan 2002:3, 6; see also HSRC 2010:20; UNODC 2009b:6 and the discussion in 2.4 in Chapter 5 above.

⁴⁶⁷ Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography obligates states parties to “adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by (a) recognising the vulnerability of child victims and adapting procedures to recognize their

For this reason, human rights instruments discussed in the previous Chapter are an integral part of the global and regional normative framework on human trafficking.

Unlike the Palermo Protocol, the HCHR Principles and Guidelines contain comprehensive guidance on special protection and assistance for child victims. First, in line with binding international human rights instruments,⁴⁶⁸ the HCHR Principles and Guidelines,⁴⁶⁹ the UNODC Model Law⁴⁷⁰ as well as the UNODC Legislative Guides⁴⁷¹ underpin the principle that the best interests of trafficked children “shall be considered paramount at all times”.⁴⁷² Furthermore, the HCHR Principles and Guidelines require that trafficked children must be identified as victims of trafficking⁴⁷³ and must be provided with appropriate assistance and protection, while fully considering their “vulnerabilities, rights and needs”.⁴⁷⁴

special needs, including their special needs as witnesses...”. – <http://www.unhchr.ch/html/menu/2/6/crc/treaties/opsc.htm> (accessed 12/3/2008).

⁴⁶⁸ Article 3 of the Convention on the Rights of the Child – <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed 11/3/2008). The African Charter on the Rights and Welfare of the Child formulates this principle in even stronger terms than the Convention on the Rights of the Child by stating in article 4 that, in all actions concerning the child, the best interests of the child must be “the” primary consideration, and not only “a” primary consideration – http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (accessed 12/3/2008).

⁴⁶⁹ OHCHR 2002:4 – Principle 10; OHCHR 2010:164-165.

⁴⁷⁰ UNODC 2009b:59.

⁴⁷¹ UNODC 2004:289-290.

⁴⁷² OHCHR 2002:4 – Principle 10; HSRC 2010:30.

⁴⁷³ See also article 3(2) in the UNODC Model Law – UNODC 2009b:6.

⁴⁷⁴ OHCHR 2002:4 – Principle 10.

The HCHR Principles and Guidelines contain further guidance on the protection and support of child victims in Guideline 8.⁴⁷⁵ First, it is pointed out that “the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation” is the reason why they should be dealt with separately from adult trafficked persons in terms of laws and other interventions.⁴⁷⁶ Thus, apart from the guidance provided on the protection and support for trafficked victims in general,⁴⁷⁷ additional or adapted measures specifically suitable for children are recommended. These measures include specialised policies and programmes adopted to protect and support trafficked children, such as “appropriate physical, psychosocial, legal, educational, housing and health-care assistance”,⁴⁷⁸ rapid identification of child victims of trafficking⁴⁷⁹ and immunity from prosecution.⁴⁸⁰

Linked with privacy and identity protection,⁴⁸¹ the UNODC Model Law provides that, in the case of child victims and witnesses, in-court proceedings are to be conducted *in camera*; in other words, as a closed hearing without the media and general public or public disclosure of the victim’s identifying particulars.⁴⁸² In addition, the UNODC Model Law

⁴⁷⁵ OHCHR 2002:12-13.

⁴⁷⁶ OHCHR 2002:12 – see the introduction to Guideline 8.

⁴⁷⁷ See Guideline 6 in OHCHR 2002:10-11.

⁴⁷⁸ OHCHR 2002:13 – Guideline 8.7; HSRC 2010:23.

⁴⁷⁹ OHCHR 2002:13 – Guideline 8.2.

⁴⁸⁰ OHCHR 2002:13 – Guideline 8.3; see also Jordan 2002:15.

⁴⁸¹ OHCHR 2002:13 – Guideline 8.9.

⁴⁸² UNODC 2009b:61-62; Foundation Against Trafficking in Women *et al.* 2001:14.

submits that, in order to avoid direct confrontation between victim and suspected offender inside the courtroom, child victims and witnesses may testify in court out of sight of the accused by means of communications technology such as a video link, depending on the criminal system of the state concerned.⁴⁸³

Apposite to this study and the link between criminal justice and victim assistance is the Preamble to the UNODC Model Law, which recognises that:

...children who are victims or witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, gender, level of maturity and special needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process.⁴⁸⁴

3.8.1.2.5 *Other non-mandatory assistance*

a Assistance towards victim recovery

A number of provisions included in the Palermo Protocol on rendering assistance to victims are mainly optional in nature.⁴⁸⁵ For example, the Protocol only requires that states “shall consider” implementing measures to provide for the physical, psychological and social recovery

⁴⁸³ UNODC 2009b:61-63. The UNODC Legislative Guides also underline the importance of protecting child victims from direct contact with alleged offenders during the investigation as well as the prosecution phases – UNODC 2004:290.

⁴⁸⁴ UNODC 2009b:4; UNODC 2004:290-291.

⁴⁸⁵ UNODC 2004:283.

of victims.⁴⁸⁶ Similarly, the Organized Crime Convention also only requires a state party to adopt measures “within its means” in order to provide assistance and protection for victims.⁴⁸⁷ Understandably, the high cost of the comprehensive measures listed in the Protocol that are aimed at victim recovery and rehabilitation have precluded such measures from being made mandatory.⁴⁸⁸

The HCHR Principles and Guidelines support adequate victim assistance in a number of provisions,⁴⁸⁹ including access to primary healthcare and counselling for victims.⁴⁹⁰ What should be noted is that, in the research report on the physical and psychological health consequences experienced by trafficked women, Zimmerman⁴⁹¹ and her research team underpin the viewpoint of Gallagher⁴⁹² that rendering proper victim assistance indeed impacts on the prosecution of perpetrators:

Providing appropriate physical healthcare and psychological support can foster health improvements that enable a woman to cooperate effectively in legal proceedings, such as acting as a reliable witness against traffickers.⁴⁹³

⁴⁸⁶ Article 6(3); UNODC 2004:282; Defeis 2003/2004:489; Jordan 2002:2-3; HSRC 2010:20; UNODC 2009b:56.

⁴⁸⁷ Article 25(1); UNODC 2004:283.

⁴⁸⁸ UNODC 2004:288.

⁴⁸⁹ OHCHR 2002:9, 11; SALRC 2006:9.

⁴⁹⁰ OHCHR 2002:11 – Guideline 6.2; see also UNODC 2009b:56; Foundation Against Trafficking in Women *et al.* 2001:19-20.

⁴⁹¹ Zimmerman *et al.* 2006:23.

⁴⁹² Gallagher 2001:991; see also UN.GIFT 2008e:36; UNODC 2009b:55; US Department of State 2003:12; UNODC 2004:288.

⁴⁹³ Zimmerman *et al.* 2006:23; US Department of State 2003:12; see also 3.2.4 in Chapter 3 above.

b Identification of victims

The early identification of trafficked victims is essential if they are to be granted the protection and assistance provided for in the Palermo Protocol and other instruments.⁴⁹⁴ As alluded to above,⁴⁹⁵ the Protocol's lack of guidance on the identification of trafficked persons is a major point of criticism.⁴⁹⁶ To address this issue, it is submitted that guidance be built into domestic responses regarding the identification of victims.⁴⁹⁷ The UNODC Legislative Guides propose that domestic legislators consider the inclusion of processes to facilitate the identification of persons as trafficked victims.⁴⁹⁸ One option is to allow courts or tribunals to certify a person as a trafficked victim based on criminal, civil or other proceedings and irrespective of whether the victim participates in such proceedings.⁴⁹⁹ A judicial or administrative determination that a person is a victim can also be made based on the application of either the victim or officials, such as migration, border control, law enforcement and prosecution officials who encounter the victim in the course of exercising their duties.⁵⁰⁰

⁴⁹⁴ OHCHR 2010:73; UN.GIFT 2008e:37; Gallagher and Holmes 2008:328-332; see also 2.3.14.6 in Chapter 5 above.

⁴⁹⁵ See 2.3.14.6 in Chapter 5 above.

⁴⁹⁶ Gallagher 2001:994, 1000, 1004.

⁴⁹⁷ UN.GIFT 2008e:30.

⁴⁹⁸ UNODC 2004:289.

⁴⁹⁹ UNODC 2004:289.

⁵⁰⁰ UNODC 2004:289.

c Residency status in destination countries

Linked to protection against summary deportation⁵⁰¹ is the issue of allowing trafficked persons to remain temporarily or permanently in destination countries.⁵⁰² Although there is no obligation to include measures on the status of victims in domestic legislation,⁵⁰³ the UNODC Model Law advises that victims be allowed a recovery and reflection period of not less than 90 days in the destination country.⁵⁰⁴ Such a recovery and reflection period serves both the interests of the prosecution, in that summary deportation is avoided, and the interests of victims as far as their physical and mental recovery is concerned.⁵⁰⁵

Research pertaining to trafficked women confirms that, directly after the trafficking experience, they experience numerous and concurrent physical and mental health problems.⁵⁰⁶ These problems may significantly compromise their ability to provide detailed evidence relating to the crime and to make sound decisions on, for example, whether to cooperate in the prosecution against traffickers.⁵⁰⁷ Zimmerman *et al.* further underline that memory loss, caused by the trauma associated with human trafficking, may have far-reaching consequences for a victim:

⁵⁰¹ See 3.8.1.1.3 above.

⁵⁰² UNODC 2004:291; Foundation Against Trafficking in Women *et al.* 2001:2.

⁵⁰³ UNODC 2004:291.

⁵⁰⁴ UNODC 2009b:73-74; see also David 2007:3; Zimmerman *et al.* 2006:12.

⁵⁰⁵ UNODC 2009b:73-74; Foundation Against Trafficking in Women *et al.* 2001:17-19; OHCHR 2010:150-152.

⁵⁰⁶ Zimmerman *et al.* 2006:12; Foundation Against Trafficking in Women *et al.* 2001:17-19.

⁵⁰⁷ Zimmerman *et al.* 2006:22; David 2007:2.

Memory loss or unclear or confused recollections can have serious practical repercussions for women whose residency status (e.g. asylum claim) and social benefits might depend on their credibility with authorities, and will likely pose significant challenges during law enforcement and judicial proceedings.⁵⁰⁸

Accordingly, memory and trauma problems may negatively impact on the victim's participation in administrative, legal or other procedures that require intellectual functioning.⁵⁰⁹ For example, memory loss may lead to trafficked persons providing different versions of the same trafficking event. This may cause serious problems in the criminal justice process, since investigating officers, prosecutors and presiding officers may interpret these inconsistencies as indicative of a lack of credibility.⁵¹⁰ This issue must therefore be informed by research, especially in view of the fact that Zimmerman *et al.* indicate that "memory difficulty is a fundamental element of a psychological portrait of a trafficking survivor".⁵¹¹

What must be noted is that research findings illustrate that, over a period of 90 days, the physical and mental health problems of trafficked women improve substantially.⁵¹² Therefore, taking into consideration the fact that trafficked victims as well as legal proceedings will most probably benefit from temporary residency in the destination country, it is submitted that, in the interests of justice, such a provision should be included in

⁵⁰⁸ Zimmerman *et al.* 2006:22; David 2007:2.

⁵⁰⁹ Zimmerman *et al.* 2006:14.

⁵¹⁰ David 2007:3.

⁵¹¹ Zimmerman *et al.* 2006:22; David 2007:2-3.

⁵¹² Zimmerman *et al.* 2006:12; David 2007:3.

domestic counter-trafficking responses.⁵¹³ In the light of the above discussion, it appears that a temporary reflection and recovery period for victims will indeed enhance the viability of prosecutions, in that immediate deportations are avoided and victims who are willing and able to testify against perpetrators will be available to do so.⁵¹⁴

As regards the immigration status of trafficked victims in receiving states, the Protocol only requires ratifying states “to consider” the adoption of measures allowing trafficked persons to remain temporarily or permanently in receiving states.⁵¹⁵ This provision is thus not mandatory. However, a provision allowing victims the option of residency in the country of destination, even if it is only temporarily, is widely supported.⁵¹⁶ Thus, apart from provisions on immunity against prosecution and on summary deportation, it is also submitted that effective domestic counter-trafficking responses should include provisions allowing persons identified as trafficked victims to reside temporarily or permanently in destination countries in appropriate circumstances.⁵¹⁷

⁵¹³ UNODC 2004:291.

⁵¹⁴ Jordan 2002:26; SALRC 2006:18; David 2007:2.

⁵¹⁵ Article 7(1) – Addendum A; Defeis 2003/2004:489, 491; SALRC 2006:18; Gallagher 2001:990; Foundation Against Trafficking in Women *et al.* 2001:17-19.

⁵¹⁶ US Department of State 2007:49; OHCHR 2002:11 – Guideline 6.7; UNODC 2009b:75-76; UNODC 2004:291.

⁵¹⁷ UNODC 2009b:73-74.

3.9 Witness protection

Direct witnesses of a crime are almost always a crucial element of a successful prosecution. Therefore, offering them effective protection is of paramount importance.⁵¹⁸ Despite this fact, it has already been pointed out above⁵¹⁹ that the Protocol does not place a mandatory obligation on ratifying states to ensure the safety of victims and witnesses.⁵²⁰ This shortcoming is likely to impact on the criminal justice system, since victims and other witnesses whose safety is not guaranteed will hardly be willing to testify against traffickers and face retaliation afterwards.⁵²¹ To improve on the low number of trafficking convictions worldwide, the effective protection of witnesses needs to be prioritised.⁵²² Given that the protection provisions in the Palermo Protocol are mainly optional in nature,⁵²³ it is important to bear in mind that the Organized Crime Convention, which establishes more stringent obligations to protect witnesses,⁵²⁴ applies *mutatis mutandis* to the Protocol.⁵²⁵ Accordingly,

⁵¹⁸ UNODC 2008:173. While recognising the importance of direct witnesses in trafficking prosecutions, overreliance on victim testimony must also be avoided – OHCHR 2002:10.

⁵¹⁹ See 3.8.1.1 above.

⁵²⁰ Article 6(5); see also Defeis 2003/2004:491; SALRC 2006:12, 17.

⁵²¹ Weissbrodt and Anti-Slavery International 2002:24; Defeis 2003/2004:491; Jordan 2002:19-20; Gallagher 2001:991.

⁵²² US Department of State 2008:27; Haynes 2004:227, 245-246; UN.GIFT 2008b:10; Shelley 2007:132; Raymond 2002:492; OHCHR 2002:9; Gallagher and Holmes 2008:332-334.

⁵²³ Article 6(5); Raymond 2002:493; SALRC 2006:13.

⁵²⁴ See articles 24 and 25 of the Convention; UNODC 2004:275 and 2.3.13.3.6-2.3.13.3.8 in Chapter 5 above.

⁵²⁵ Article 1(2) – Addendum A; see also 2.3.14.2 in Chapter 5 above.

Jordan⁵²⁶ advises that the Convention's provisions be used to at least partly ameliorate the weaknesses in the Protocol.

Article 24(1) of the Convention obligates states parties to adopt measures to provide effective protection for witnesses against intimidation and retaliation.⁵²⁷ However, a state party is only obligated to adopt measures "within its means".⁵²⁸ Although not a mandatory provision, it is to be welcomed that the protection is broader than the corresponding provision in the Palermo Protocol,⁵²⁹ in that it covers all witnesses as well as "their relatives and persons close to them".⁵³⁰ Unfortunately, this protection is not available for all trafficked persons, but only to those who testify in criminal proceedings concerning Convention crimes.⁵³¹

Underpinning the protection provision in the Convention, the HCHR Principles and Guidelines emphasise the importance of protecting all witnesses, irrespective of whether they are trafficked victims or not, in domestic legislation.⁵³² Apart from the protection enshrined in domestic legislation, trafficked persons cooperating voluntarily in the prosecution

⁵²⁶ Jordan 2002:20.

⁵²⁷ UNODC 2009b:59; Foundation Against Trafficking in Women *et al.* 2001:10-12.

⁵²⁸ Article 24(1); UNODC 2009b:59.

⁵²⁹ Article 6(5) Each state party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

The Palermo Protocol therefore does not cover other witnesses, who are not trafficked persons, in this protection provision.

⁵³⁰ Article 24(1); UNODC 2009b:59.

⁵³¹ Article 24(1); UNODC 2009b:58.

⁵³² OHCHR 2002:9 – Guideline 4.10; see also SALRC 2006:8; Jordan 2002:23-24.

of perpetrators further have the “right to remain lawfully within the country of destination for the duration of any legal proceedings”.⁵³³

3.10 Protection for persons reporting human trafficking

Apart from including protection for witnesses in human trafficking cases, the 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (SADC Plan of Action),⁵³⁴ includes an innovative intervention. The Strategic Priority for Action on Victim Support and Witness Protection of the SADC Plan of Action expands protection to include not only witnesses, but also those people who report cases of human trafficking.⁵³⁵ This innovation stipulates that support be provided to member states to:

...establish or strengthen mechanisms in the relevant sectors to improve support to victims and protection of witnesses and those who report cases of trafficking in persons.⁵³⁶

The SADC Plan of Action thus recognises that persons, who may not be witnesses, but who report human trafficking, may indeed risk their safety by exposing perpetrators. The protection extended to these persons is indeed likely to encourage those brave enough to report human trafficking to do so and thus contribute to the effective combating of this

⁵³³ OHCHR 2002:9 – Guideline 4.7.

⁵³⁴ <http://www.santac.org/.../Final%20Draft%20of%20the%20Ten%20Year%20Strategic%20Plan%20of> (accessed 14/07/2010).

⁵³⁵ SADC 2009:16.

⁵³⁶ SADC 2009:16 – see Strategic Priority for Action on Victim Support and Witness Protection: Activity 1; see also SADC 2009:17 – Output 1.

crime. Although protection for persons reporting human trafficking is not part of international minimum standards, it is submitted that providing such protection certainly merits consideration for inclusion in domestic counter-trafficking responses.

3.11 Specialised anti-trafficking units

Neither the Palermo Protocol nor the Organized Crime Convention requires the establishment of specialised or dedicated human trafficking units to enhance the successful combating of human trafficking. Therefore, specialisation, or specialised units, is not identified as a minimum standard to combat this crime.

However, as was alluded to above,⁵³⁷ already in 2001 the subregional Declaration on the Fight Against Trafficking in Persons⁵³⁸, adopted by the Economic Community of West African States (ECOWAS), called for the establishment of specialist anti-trafficking units within law enforcement agencies and within the prosecutorial services.⁵³⁹ In 2009, support for this intervention was also received from another African initiative. The 10 Year SADC Strategic Plan of Action on Combating Trafficking in

⁵³⁷ See 3.3 in Chapter 5 above.

⁵³⁸ <http://www.achpr.org/english/SpecialMechanisms/Women/ECOWASdeclaration.pdf> (accessed 3/11/2008) – see paragraph 11; Viljoen 2007:512.

⁵³⁹ In paragraph 11 of the Declaration, member states committed themselves to “create specialised anti-trafficking units within law enforcement agencies and within the prosecutorial services, with a special view to fight the involvement of organized criminal groups”; see also Banda 2008:15-16. In paragraph 19, member states in addition directed the ECOWAS Secretariat to prepare a subregional counter-trafficking convention. The Foundation Against Trafficking in Women *et al.* 2001:17-19 also emphasise the necessity for “specialised police and prosecutorial units that are trained to deal with the complexities, gender issues and victim sensitivities involved in trafficking” – Foundation Against Trafficking in Women *et al.* 2001:11.

Persons, Especially Women and Children (SADC Plan of Action),⁵⁴⁰ mapped out a number of strategic priorities for counter-trafficking action to be implemented over 10 years from 2009 to 2019.⁵⁴¹ Strategic Priority 5.1 on Training and Capacity Building provides that SADC member states are to be supported in establishing or strengthening institutional mechanisms to combat human trafficking, with specific reference to public and private specialised units, agencies or institutions.⁵⁴² Therefore, both the ECOWAS Declaration and the SADC Plan of Action emphasise the need for expertise and specialisation to combat the multifaceted crime of human trafficking successfully.

Further underpinning the need for specialisation in combating human trafficking, the HCHR Principles and Guidelines encourage the establishment of:

...specialist anti-trafficking units (comprising of both women and men), in order to promote competence and professionalism.⁵⁴³

The 2010 annual US TIP Report again recently emphasised that specially trained experts are needed to combat the complex and

⁵⁴⁰ www.santac.org/..Final%20Draft%20of%20the%20Ten%20Year%20Strategic%20Plan%20of (accessed 14/07/2010).

⁵⁴¹ SADC 2009:2, 14-19.

⁵⁴² SADC 2009:15 – see Strategic Priority for Action 5.1 on Training and Capacity Building: Activity 3.

⁵⁴³ Guideline 5.4 – Addendum C; see also the discussion in Gallagher and Holmes 2008:323-326. In 2001, the Economic Community of West African States (ECOWAS) adopted the Declaration on the Fight Against Trafficking in Persons, a subregional counter-trafficking initiative which calls for the establishment of such specialised anti-trafficking units (paragraph 11) – <http://www.achpr.org/english/SpecialMechanisms/Women/ECOWASdeclaration.pdf> (accessed 3/11/2008); Viljoen 2007:512; see also Gastrow 2001:40-42.35-37.

multifaceted crime of human trafficking.⁵⁴⁴ Therefore, it is submitted that the ECOWAS initiative to establish specialised or dedicated units, supported by a number of other authoritative interventions and sources,⁵⁴⁵ is a step in the right direction in complying with the obligation to ensure effective prosecution and law enforcement. For this reason, it is recommended that a provision on the establishment of a specialised or dedicated unit be included in domestic anti-trafficking responses.

Apart from dedicated police and/or prosecution units, the UNODC Model Law also advises that a national, multidisciplinary anti-trafficking structure, with coordination, implementation and monitoring responsibilities, be established.⁵⁴⁶ It is submitted that such a body developing and coordinating comprehensive policies and facilitating cooperation between relevant government agencies as well as between government and non-governmental agencies will be a significant one to enhance “an adequate response to trafficking and enable the development of best practices”.⁵⁴⁷

⁵⁴⁴ US Department of State 2010:15.

⁵⁴⁵ Foundation Against Trafficking in Women *et al.* 2001:11; David 2007:4.

⁵⁴⁶ UNODC 2009b:84.

⁵⁴⁷ UNODC 2009b:84.

4. SYNOPSIS OF MINIMUM STANDARDS AND GUIDELINES

For ease of reference, the mandatory and non-mandatory provisions identified above⁵⁴⁸ are now divided into two tables, with the relevant sources cited.

4.1 Charting minimum standards for domestic counter-trafficking responses

Numerous mandatory obligations to combat human trafficking from a judicial perspective have been identified in the discussion above. These obligations constitute minimum standards with which domestic counter-trafficking responses need to comply. To facilitate the use of these standards, they are categorised in Table 1 to serve as a practical guide with which countries can compare their responses.

⁵⁴⁸ See 3.1-3.12 above.

Table 1: Minimum standards with which domestic counter-trafficking responses need to comply

STANDARD NO.	DESCRIPTION OF MINIMUM STANDARD
1	Define “trafficking in persons” in national counter-trafficking legislation
2	Criminalisation of trafficking conduct 2.1: Criminalisation of human trafficking 2.2: Criminalisation of conduct constituting involvement in human trafficking
3	Criminalisation of conduct related to human trafficking 3.1: Criminalisation of component acts and component offences related to human trafficking 3.2: Criminalisation of the laundering of the proceeds of crime 3.3: Criminalisation of corruption
4	Liability of natural and legal persons
5	Appropriate sanctions
6	Prescription of the right to institute a prosecution
7	Extraterritorial jurisdiction
8	Confiscation, seizure and asset forfeiture
9	Judicial cooperation
10	Human rights-based approach
11	Witness protection
12	Victim participation in the criminal justice process
13	Provision of victims with information
14	Compensation for victims
15	Special needs of victims, especially children

4.2 Charting guidelines to be considered for domestic counter-trafficking responses

Apart from the mandatory obligations laid down in international and regional instruments pertaining to human trafficking, other principles, guidelines and good practices have also been identified and explored in other sources. Although these sources do not have the same status as internationally or regionally agreed-upon instruments, they are nonetheless authoritative and often supplement and support one another. Some of the practices identified in these non-binding sources may indeed enhance the successful combating of human trafficking. Accordingly, it is recommended that countries give profound consideration to their inclusion in their counter-trafficking legislation. These recommended guidelines are, as in 4.1 above, set out as a checklist in Table 2.

Table 2: Recommended guidelines for enhancing the successful combating of human trafficking

GUIDELINE NO.	DESCRIPTION OF GUIDELINE
1	<i>Defining other concepts related to human trafficking</i>
2	<i>Criminalisation of the use of trafficked persons' services</i>
3	<i>Criminalisation of conduct pertaining to travel and identity documents</i>
4	<i>Liability of commercial carriers</i>
5	<i>Factors to be considered in sentencing</i>
6	<i>Victim protection: physical safety</i>
7	<i>Victim protection: privacy and non-disclosure of identity</i>
8	<i>Victim protection against prosecution and detention</i>
9	<i>Protection against summary deportation</i>
10	<i>Assistance towards victim recovery</i>
11	<i>Identification of victims</i>
12	<i>Residency status in destination countries</i>
13	<i>Protection for persons reporting human trafficking</i>
14	<i>Specialised anti-trafficking units</i>

5. CONCLUSION

The call to stop contemporary forms of slavery is universal.⁵⁴⁹

In this Chapter, minimum international standards for combating human trafficking from a judicial perspective were drawn mainly from the two most prominent international instruments on human trafficking, namely the Organized Crime Convention and the Palermo Protocol. Some additional standards for combating human trafficking in other relevant international and regional instruments were also identified. The purpose of setting these standards is to pave the way for a more effective domestic response for combating human trafficking. These minimum standards are therefore categorised in order to serve as a yardstick against which domestic counter-trafficking responses may be measured.

Apart from the mandatory obligations drawn from the international and regional human trafficking framework, some other principles, guidelines and best practices for combating human trafficking were also identified in non-binding, but authoritative sources. Furthermore, recommendations were made for the inclusion of some of these principles, guidelines and best practices in domestic counter-trafficking legislation.

In the next Chapter, the South African legal response to human trafficking is set out and assessed in order to ascertain, first, whether it

⁵⁴⁹ UNODC 2004:164.

complies with the minimum standards, and, secondly, whether it is in line with the other recommendations highlighted in this Chapter.

PART III: THE SOUTH AFRICAN LEGAL PERSPECTIVE

CHAPTER 7

THE SOUTH AFRICAN LEGAL RESPONSE TO COMBAT HUMAN TRAFFICKING

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4.2.2	Statutory offences
4.2.2.1	<i>Riotous Assemblies Act 17 of 1956</i>
4.2.2.2	<i>Identification Act 68 of 1997</i>
4.2.2.3	<i>Immigration Act 13 of 2002</i>
4.2.2.4	<i>Basic Conditions of Employment Act 75 of 1997</i>
4.2.2.5	<i>Child Care Act 74 of 1983</i>
4.2.2.6	<i>Children's Act 38 of 2005</i>
4.2.2.7	<i>Prevention of Organised Crime Act 121 of 1998</i>
4.2.2.8	<i>Prevention and Combating of Corrupt Activities Act 12 of 2004</i>
4.2.2.9	<i>Drugs and Drug Trafficking Act 140 of 1992</i>
4.2.2.10	<i>Human Tissue Act 65 of 1983</i>
4.2.2.11	<i>National Health Act 61 of 2003</i>
4.2.2.12	<i>Domestic Violence Act 116 of 1998</i>
4.2.2.13	<i>Films and Publication Act 65 of 1996</i>
4.2.2.14	<i>Sexual Offences Act 23 of 1957</i>
4.2.2.15	<i>Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007</i>
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4.3	The South African counter-trafficking response
4.3.1	Legislative reform process
4.3.2	Current counter-trafficking provisions
4.3.2.1	Children's Act 38 of 2005
4.3.2.2	Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
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4.3.2.3.2	<i>Prescription of the right to institute a prosecution</i>
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4.4.2	Prevention and Combating of Trafficking in Persons Bill B7-2010
5.	CONCLUSION

PART III: THE SOUTH AFRICAN LEGAL PERSPECTIVE

CHAPTER 7

THE SOUTH AFRICAN LEGAL RESPONSE TO COMBAT HUMAN TRAFFICKING

No country can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error.¹

1. INTRODUCTION

The crime of human trafficking or “trafficking in persons”, as defined in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol),² is not found in the South African common law, including components of the

¹ Gallagher and Holmes 2008:318.

² http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention%20traff_eng.pdf (accessed 11/3/2008).

South African criminal law.³ Against the backdrop of international anti-trafficking developments and South Africa's ratification of the Palermo Protocol,⁴ the South African Law Reform Commission commenced with research into the phenomenon of human trafficking in 2003⁵ and subsequently recommended the enactment of counter-trafficking legislation.⁶

2. HUMAN TRAFFICKING IN SOUTH AFRICA

Only by understanding the depth, breadth and scope of the [human trafficking] problem can we address the second issue, namely, how to counter it.⁷

Chapters 2 to 4 of the present study aimed at enhancing understanding of the phenomenon of human trafficking in general. With this knowledge as a foundation, the focus now shifts to the South African context. The nature and scale of the human trafficking problem within the South African context need to be clarified before a legal response to combat it is developed and evaluated.⁸

³ Mnisi 2008:2; see also UNODC and SADC 2007b:8.

⁴ SALRC 2006:12 in footnote 25; DFA 2005:3; Kassan 2007:18–6; IOM 2008:19; IOM 2009a:82; see also 2.3.14.1 in Chapter 5 above.

⁵ See 4.4.1 below; SALRC 2004:1-3; SALRC 2006:1; SALRC 2008:7; Kassan 2007:18–9.

⁶ SALRC 2008:ix.

⁷ UNODC 2009a:6; HSRC 2010:167.

⁸ Di Nicola 2007:49-50, 60-62; Mouton 2001:50; HSRC 2010:10; GAATW 1999b:87.

2.1 Scope and nature of the human trafficking crime in South Africa

The exact scope of human trafficking within the South African context is uncertain and difficult to determine.⁹ There are few official statistics based on verified data regarding the magnitude of human trafficking within and across the borders of South Africa.¹⁰ In March 2010, the National Director of Public Prosecutions (NDPP) instructed the National Prosecuting Authority (NPA) “to collect data of crimes involving human trafficking”.¹¹ Since no electronic database existed at the time, the data was collected manually.¹² Further, it must be borne in mind that, since interim trafficking provisions came into operation only in December 2007, various pieces of legislation were used prior to this date to prosecute perpetrators for human trafficking offences and related crimes, including the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)*, the *Children’s Act 38 of 2005 (Children’s Act)* and the *Sexual Offences Act 23 of 1957*.¹³

⁹ DoJ & CD 2010a:2; see also HSRC 2010:167; Dawes *et al.* 2007:247; Stuurman 2004:5; Leggett 2004b:4.

¹⁰ HSRC 2010:167; SALRC 2008:2; Dawes *et al.* 2007:247.

¹¹ Parliamentary Committee: Justice and Constitutional Development 2010g:2.

¹² Parliamentary Committee: Justice and Constitutional Development 2010g:2.

¹³ Parliamentary Committee: Justice and Constitutional Development 2010g:2.

An accurate assessment of the scope of human trafficking in South Africa is not possible without comprehensive, systematic and reliable official statistics on a national level.¹⁴

Many reasons can be identified for this lack of accurate statistics.¹⁵ First of all, without comprehensive counter-trafficking legislation, official statistics on human trafficking pertaining to adults reflect only those cases reported and prosecuted under the recently enacted *Sexual Offences Amendment Act*.¹⁶ The Department of Justice and Constitutional Development recently reported that, according to the data drawn from the Integrated Case Management System from December 2007 to September 2010, a total of 20 cases of trafficking in persons for sexual purposes in terms of section 71(1) and (2) of the *Sexual Offences Amendment Act* were registered.¹⁷ Of this total, seven cases were registered in the Eastern Cape, three in the Free State, one in Kwazulu-Natal and seven in Mpumalanga.¹⁸ Given that only trafficking for sexual exploitation is criminalised in this Act, the trafficking of adults for other exploitative purposes cannot be prosecuted. However, depending on the

¹⁴ HSRC 2010:167; Dawes *et al.* 2007:247. For a discussion of indicators in respect of the monitoring of child trafficking and child labour, see Dawes *et al.* 2007:461-467.

¹⁵ See also the discussion in 3.2 in Chapter 2 above.

¹⁶ SALRC 2008:2; Stuurman 2004:5; Leggett 2004b:4. HSRC 2010:10 states that, by 2010, only 19 cases of contravening the interim anti-trafficking provision, namely section 71 of Act 32 of 2007, had reportedly been listed on the police Crime Administration System (CAS). Such statement was made by the HSRC on the basis of an informal communication between it and Commissioner C de Kock of the South African Police Service.

¹⁷ DoJ & CD 2010a:1; see also the National Prosecuting Authority's presentation to the Justice and Constitutional Development Portfolio Committee, entitled "Human Trafficking Statistics and Case Analysis", on 16 November 2010 – NPA 2010b:1-8.

¹⁸ DoJ & CD 2010a:2.

facts of the case, a prosecution in human trafficking cases may be instituted under other existing crimes, such as migration- or labour-related offences, kidnapping, murder, abduction, and assault, but then the statistics are compromised, because they do not reflect these cases as trafficking cases.¹⁹ The anti-trafficking provisions in the *Children's Act* came into operation on 1 April 2010,²⁰ and, therefore, official statistics on child trafficking criminal cases can be compiled from this date onwards, provided that the official database captures such data and that it is made public.

In South Africa, the lack of [comprehensive] legislation and an absence of systematic, national-level data collection on the prevalence and trends of human trafficking have obstructed the compilation of reliable statistics on trafficking to quantify the magnitude of the problem as a national and regional phenomenon.²¹

¹⁹ Molo Songololo 2008:vii; SALRC 2008:2, 5; Leggett 2004b:4; Pharoah 2006:23; HSRC 2020:10. Further examples of convictions of crimes other than human trafficking were provided by the National Prosecuting Authority (NPA) for the information of the Parliamentary Portfolio Committee on Justice and Constitutional Development on 17 November 2010 – Parliamentary Committee: Justice and Constitutional Development 2010g:2. In the unreported case of *S v Amien*, case no. 27/50/98, judgment delivered on 2 November 2002, Cape Town Regional Court, Amien Andrews was convicted of running a brothel in terms of the *Sexual Offences Act* 23 of 1957 and of two counts of common law rape – Parliamentary Committee: Justice and Constitutional Development 2010g:2; *S v Andrews* case no. 27/50/98:1, 4, 14-15. Other cases related to this issue which were also pointed out by the NPA were *S v Maswanganye*, *S v Wiphatawaitaya*, *S v Sawatka and Others*, *S v Eloff and Another* and *S v Sayed and Another* – Parliamentary Committee: Justice and Constitutional Development 2010g:2-3. This problem of human trafficking cases prosecuted under other crimes is also experienced in other parts of the world – Di Nicola 2007:54.

²⁰ Government Gazette no. 33076 of 1/4/10, Proclamation no. R.12, 2010 – Commencement of remaining sections of the *Children's Act*, 2005 (Act no. 38 of 2005).

²¹ HSRC 2010:10.

For this reason, obtaining official statistics on criminal cases involving all types of trafficking will be possible only once comprehensive, anti-trafficking legislation is promulgated and implemented.

Nonetheless, even after comprehensive anti-trafficking legislation has been promulgated which allows official data on human trafficking cases to be captured, determining the scope of the problem will still be complicated by other factors as well. These factors, which cause difficulties worldwide in obtaining reliable statistics, include the clandestine nature of the crime and the underreporting thereof as a result of victims' fear of reprisal and stigmatisation.²²

Another significant stumbling block in compiling reliable statistics on the magnitude of human trafficking in South Africa, and also worldwide, is the challenge of identifying trafficking cases.²³ In this regard, the recent judgment delivered on 7 January 2010 in *Malachi v Cape Dance Academy International (Pty) Ltd and Others*²⁴ is deserving of mention. The case dealt primarily with the arrest and detention of a civil debtor and makes no mention of human trafficking.²⁵ However, the facts of the case

²² SALRC 2008:2; SALRC 2004:3; Rijken 2003:53; Laczko and Gramegna 2003:183; Horn 2010:11; Van de Glind and Kooimans 2008:150; Snyman 2005:282; Guinn 2008:121; Rijken 2003:53; Gould 2006:22; US Department of State 2008:18; Melvin 2006:16; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339-340; Shah 2007:451-452; Di Nicola 2007:53; UN.GIFT 2008c:2; UNODC 2006:xx; ILO 2008:11; Brennan 2005:37; Dawes *et al.* 2007:247, 253.

²³ Gould 2006:23; Dawes *et al.* 2007:247.

²⁴ *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC).

²⁵ In this case, the Court declared section 30(3) of the *Magistrates' Courts Act* 32 of 1944 and the common law rule of arrest *tamquam suspectus de fuga* unconstitutional and invalid and

are of interest in the present study, for they point strongly to a typical human trafficking scenario. The applicant, a citizen of the Republic of Moldova, arrived in South Africa in March 2009 and was subsequently employed as an exotic dancer at a nightclub.²⁶ On her arrival, the applicant had to hand over her passport to her employer, who kept it for the entire period of her employment and indicated that it would be returned only after she had paid him \$2 000 for her air ticket and R20 000 as a levy.²⁷ The applicant was not earning enough from her employment to enable her to pay off the amounts allegedly owed to her employer. Within four months after her arrival in South Africa, she wished to return to her home country, but was arrested and incarcerated at Pollsmoor Prison on the basis of a prospective civil claim of R100 000.²⁸ As far as can be ascertained, this case was never investigated as one that possibly involved a criminal charge of human trafficking. However, from the limited amount of information gathered from the case, especially the low remuneration coupled with the substantial alleged debt of R100 000 that the employer claimed for transport and as a levy,²⁹ as well as the retention of the passport as security for the payment of the alleged

referred the court order to the Constitutional Court for confirmation – *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC):701 paragraph 66.

²⁶ *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC):680 paragraph 3.

²⁷ *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC):681 paragraph 3.

²⁸ *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC):681 paragraph 3.

²⁹ For a discussion of how traffickers use debt bondage to control their victims, see Dougherty and Burke 2008:12; US Department of State 2008:19-20; Stuurman 2004:5; Weissbrodt and Anti-Slavery International 2002:14-16; see also 2.2.2.3.2.c in Chapter 2 above.

debt,³⁰ it seems that control by debt bondage and other typical features of human trafficking were present.³¹ Thus, on these facts alone, a criminal investigation into a possible charge of human trafficking would have been in the interests of justice. If this case was indeed an instance of human trafficking, it illustrates that trafficked victims are often not identified, and, accordingly, are not afforded the protection and assistance that they are entitled to.³²

Apart from the challenge of identifying human trafficking cases, the lack of comprehensive and methodologically sound research³³ and the challenge of progressing toward an effective, coordinated intersectoral response³⁴ designed to combat this crime further hamper clarification of the dimensions of human trafficking.

The abovementioned obstacles encountered in South Africa and globally³⁵ complicate the quest for reliable statistics on the scope of

³⁰ Haynes 2004:226; US Department of State 2007:20; IOM 2007:30; Melvin 2006:29; Kanics and Reiter 2001:112-113; Gajic-Veljanoski and Stewart 2007:339; Morawska 2007:100; Stuurman 2004:5; UNODC 2009b:21; Shelley 2007:131; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:32; IOM 2009a:12.

³¹ See the discussion in 2.3 in Chapter 4 above.

³² Gould 2006:23. This problem that victims of trafficking are often not identified as such was emphasised and addressed by the European Court of Human Rights in the ground-breaking case of *Rantsev v Cyprus and Russia* (Application no. 25965/04), judgment delivered on 7 January 2010, Strasbourg; see also see 3.7 in Chapter 6.

³³ Gould 2006:23; Laczko and Gramegna 2003:181-182; Gajic-Veljanoski and Stewart 2007:339; Lee 2007:14.

³⁴ SALRC 2008:2; SALRC 2004:3.

³⁵ See the discussion in 3 in Chapter 2 above; UN.GIFT 2008e:17; HSRC 2010:5.

human trafficking. Accordingly, as in other parts of the world,³⁶ the exact magnitude of the phenomenon in South Africa is uncertain and debatable.³⁷

Despite the barriers to obtaining accurate data on the extent of human trafficking in South Africa, various sources suggest that this phenomenon is indeed a reality that is of concern country-wide.³⁸ The annual United States (US) Trafficking in Persons Reports (US TIP Reports) of 2009 and 2010 state that human trafficking is a challenging problem in South Africa and categorise South Africa as “a source, transit, and destination country for trafficked men, women and children”.³⁹ In the South African context, victims are seemingly trafficked for a variety of exploitative purposes,

³⁶ UN.GIFT 2008e:17; US Department of State 2009:7-8; Raymond 2002:492; Snyman 2005:282.

³⁷ HSRC 2010:167; Stuurman 2004:5; Leggett 2004b:4.

³⁸ UNODC and SADC 2007b:8-9; US Department of State 2009:260-262; Molo Songololo 2008:vii; HSRC 2010:i-xi, 6-10; *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court; *S v Mudaly and Others*, pending case no. 41/890/2007, Durban Regional Court. As regards human trafficking within the borders of South Africa, see the study on in-country trafficking by the International Organization for Migration undertaken in 2008 – IOM 2008:8-18, 28-67; *S v Ndukauba and Others*, case no. 27/9847/09, in which the accused is standing trial in Port Elizabeth on charges of in-country trafficking for sexual purposes in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)* and other offences – personal communications with the prosecutor, Advocate Z Swanepoel, National Prosecuting Authority (NPA), Port Elizabeth; Wilson and Mphandle 2010:1.

³⁹ US Department of State 2010:297; US Department of State 2009:260; see also Molo Songololo 2008:vii; SALRC 2008:1; Dawes *et al.* 2007:259.

such as for sexual⁴⁰ and labour exploitation,⁴¹ crime,⁴² begging,⁴³ street vending,⁴⁴ forced marriages⁴⁵ and, allegedly, for the removal of body parts for medical as well as muti purposes.⁴⁶ Apart from in-country trafficking carried out by groups as well as individuals, it has been documented that organised crime syndicates are involved in some human trafficking ventures, for example in the Johannesburg area.⁴⁷ An increasing number of cases of labour trafficking on the mines and on farms have also been documented.⁴⁸ Traffickers typically control victims by locking them up, making them drug-dependent, using physical force or

⁴⁰ Molo Songololo 2008:vi; HSRC 2010:16; *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court; see also *S v Mudaly and Others*, pending case no. 41/890/2007, Durban Regional Court; *S v Ndukauba and Others*, pending case no. 27/9847/09, Port Elizabeth Regional Court.

⁴¹ US Department of State 2010:297; Molo Songololo 2008:vi; HSRC 2010:16.

⁴² US Department of State 2010:297. It has been reported that persons are trafficked for purposes of crime, such as to steal or to be used as courier “mules” for drug trafficking – UNODC and SADC 2007b:13; see also Molo Songololo 2008:vi.

⁴³ US Department of State 2010:297; UNODC and SADC 2007b:13.

⁴⁴ US Department of State 2010:297.

⁴⁵ It has been reported that the indigenous tradition known as *ukuthwala* is abused in order to force young girls to marry adult men – US Department of State 2009:260. The abuse of this tradition may overlap with trafficking for the purpose of forced marriage. For a further discussion of *ukuthwala*, see 4.2.1.2 below.

⁴⁶ SALRC 2008:2; HSRC 2010:16; Dawes *et al.* 2007:259-260; Fellows 2008:7, 37, 46. For a discussion of trafficking for muti purposes, see 2.2.2.3.2.e in Chapter 2 above; SALRC 2006:30; Snyman 2005:284-285. For a discussion of trafficking within the borders of South Africa for muti purposes, see IOM 2008:60-63.

⁴⁷ UNODC and SADC 2007b:9, 13, 17; US Department of State 2009:260; IOM 2008:9; US Department of State 2010:297; HSRC 2010:9.

⁴⁸ US Department of State 2010:297-298.

threats, confiscating travel documents or demanding payment of excessive amounts for so-called “job debts”.⁴⁹

2.2 In-country and cross-border trafficking

As regards the South African context, cases of cross-border as well as in-country trafficking have been documented.⁵⁰ As far as in-country trafficking is concerned, it has been reported that victims, mostly black or coloured people younger than 30, are often recruited from informal settlements or rural areas and subsequently transported to urban centres such as Johannesburg, Pretoria, Durban, Cape Town and Bloemfontein.⁵¹

Apart from internal trafficking, cross-border trafficking has also been documented.⁵² South African women are reported to be trafficked from

⁴⁹ IOM 2008:8; UNODC and SADC 2007b:9-10, 13; US Department of State 2009:260; Stuurman 2004:5; US Department of State 2010:297; see also *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court; *S v Mudaly and Others*, pending case no. 41/890/2007, Durban Regional Court; *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC). For a discussion on how traffickers usually control their victims, see 2.3 in Chapter 4 above.

⁵⁰ US Department of State 2009:260; UNODC and SADC 2007b:9; Molo Songololo 2008:vi; *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court. Internal trafficking within the borders of South Africa was confirmed and assessed in the 2008 qualitative research report of the International Organization for Migration – IOM 2008:11-18, 28-63.

⁵¹ US Department of State 2010:297; IOM 2008:8; US Department of State 2009:260; see also UNODC and SADC 2007b:8; HSRC 2010:7-8, 16-17.

⁵² UNODC and SADC 2007b:7, 11-12; US Department of State 2009:260; Molo Songololo 2008:vii; HSRC 2010:6-7, 14-16; *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court.

South Africa, as the source country,⁵³ to Europe, the Middle East and the United States of America (USA) for purposes of domestic and sexual exploitation.⁵⁴ Moreover, since South Africa is also a destination country,⁵⁵ it has been reported that people from Thailand,⁵⁶ Taiwan, Russia,⁵⁷ the Ukraine, India,⁵⁸ the People's Republic of China, the Democratic Republic of Congo,⁵⁹ Mozambique,⁶⁰ Malawi,⁶¹ Lesotho,⁶²

⁵³ US Department of State 2009:260; see also Molo Songololo 2008:vii.

⁵⁴ US Department of State 2010:297; US Department of State 2009:260; UNODC and SADC 2007b:11.

⁵⁵ US Department of State 2009:260; see also Molo Songololo 2008:vii; Parliamentary Committee: Justice and Constitutional Development 2010g:9.

⁵⁶ *S v Sayed and Another*, unreported case no. 041/2713/2008, judgment dated 18 March 2010, Durban Regional Court. In *S v Mudaly and Others*, unreported pending case no. 41/890/2007, the accused recruited Thai women to work as prostitutes at the After Dark Escort Agency. The women's passports were confiscated by the accused and were retained until each woman had paid a debt of R60 000, which was allegedly the transport cost to South Africa, to the accused. The accused could not be charged with human trafficking, because the offences were committed before the trafficking provisions in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)* and in the *Children's Act 38 of 2005 (Children's Act)* came into operation. The accused has been charged with various offences in terms of the *Prevention of Organised Crime Act 121 of 1998* and other applicable legislation and the case is still pending – personal communications with the prosecutor, Advocate V Lotan, NPA, Durban.

⁵⁷ See the facts in *Malachi v Cape Dance Academy International (Pty) Ltd and Others* 2010 (7) BCLR 678 (WCC) and the discussion of this case in 2.1 above.

⁵⁸ In *S v Patel and Others*, unreported case, case no. unavailable (Ortia CAS no. 49/04/06), the accused as well as the victims were from India – NPA 2010c:1. One of the accused, Siddique Goder, pleaded guilty and was sentenced, while the case against the other two accused (Patel and Mulla) is still pending – NPA 2010b:3.

⁵⁹ Parliamentary Committee: Justice and Constitutional Development 2010g:9.

⁶⁰ On 12 May 2008, in *S v Dos Santos*, the accused, a 28-year-old Mozambican woman, appeared in the Pretoria magistrate's court on charges of trafficking Mozambican girls under the age of 18 years in terms of section 71(1) of the 2007 *Sexual Offences Amendment Act 32 of 2007*. At the time of writing, the state witnesses had testified and the state's case had been closed, but the case was still pending – personal communications with the prosecutor, Advocate A van Deventer, NPA, Pretoria; see also Tshisela 2008:1; Parliamentary Committee: Justice and Constitutional Development 2010g:9.

⁶¹ Parliamentary Committee: Justice and Constitutional Development 2010g:9.

⁶² Parliamentary Committee: Justice and Constitutional Development 2010g:9.

Swaziland⁶³ and Zimbabwe are trafficked to South Africa, mainly for commercial sexual exploitation, domestic servitude and other exploitative work.⁶⁴ The fact that some of these victims are trafficked onward to Europe makes South Africa a transit country as well.⁶⁵

2.3 Research on human trafficking in South Africa

A discussion of the research studies and other publications on human trafficking within South Africa and across South Africa's borders falls outside the scope of this study. However, briefly, a number of reports and articles have been published in the last decade by institutions⁶⁶ such as the International Organization for Migration (IOM),⁶⁷ Molo Songololo,⁶⁸ the United Nations Children's Fund (UNICEF),⁶⁹ the United Nations Educational, Scientific and Cultural Organization (UNESCO),⁷⁰ the United Nations Office on Drugs and Crime (UNODC)⁷¹ and the Southern African

⁶³ Parliamentary Committee: Justice and Constitutional Development 2010g:9.

⁶⁴ US Department of State 2010:297; US Department of State 2009:260; UNODC 2009a:128; UNODC and SADC 2007b:7, 11-12.

⁶⁵ US Department of State 2009:260; Molo Songololo 2008:vii.

⁶⁶ For an overview of the publications by the institutions referred to in this paragraph, see Pharoah 2006:23-24.

⁶⁷ See IOM 2003, 2004, 2006, 2007, 2008, 2009a and 2009b.

⁶⁸ See Molo Songololo 2000 and 2008.

⁶⁹ See UNICEF 2005.

⁷⁰ See UNESCO 2006 and 2007.

⁷¹ See UNODC 2004, 2006, 2008, 2009a and 2009b.

Development Community (SADC),⁷² as well as by individual writers.⁷³ The latest research report on the dimensions of human trafficking in southern Africa was published by the Human Sciences Research Council in March 2010.⁷⁴ Although these publications are not analysed and discussed individually, reference is made to them in this study where applicable.

2.4 Ranking by the US Department of State

As mentioned above,⁷⁵ from 2001 onwards, the United States (US) Department of State has released an annual Trafficking in Persons Report (US TIP Report), ranking countries based on their ability to meet the minimum standards for the elimination of human trafficking laid down in the US *Trafficking Victims Protection Act* of 2000.⁷⁶ Having been ranked in Tier 2 from 2001 to 2004, South Africa dropped to the Tier 2 Watch List for the following four consecutive years.⁷⁷ However, the 2009 US TIP Report concluded that, although the South African government had not yet fully complied with the minimum standards for the elimination

⁷² See UNODC and SADC 2007a and 2007b.

⁷³ See Gallinetti 2010; Gould 2006, 2008; Gould *et al.* 2010; Horn 2010; Kassin 2007; Kreston 2007; Lansink 2006; Leggett 2004a and 2004b; Moodley 2006; Pharoah 2006; Pithey 2004; Qaba 2004; Snyman 2005; Stuurman 2004; Weekes 2006.

⁷⁴ HSRC 2010:1-206. For a critical view of this report, see Gould *et al.* 2010:37-45.

⁷⁵ See 4 in Chapter 3 above.

⁷⁶ IOM 2008:12; see also the discussion in 5 in Chapter 4 above.

⁷⁷ IOM 2008:12; US Department of State 2009:260-263; Molo Songololo 2008:vii.

of trafficking, it was making significant efforts to do so.⁷⁸ Accordingly, South Africa was ranked as a Tier 2 country in 2009.⁷⁹ South Africa maintained this ranking in the 2010 US Tip Report. While the 2010 US Tip Report acknowledged the progress made, such as the first conviction of traffickers, the creation of a national Child Protection Strategy and the training of officials from various government sectors, concern was expressed that only one trafficking conviction had been reported and that the comprehensive anti-trafficking bill had not been passed and enacted.⁸⁰

3. OBLIGATIONS TO COMBAT HUMAN TRAFFICKING

3.1 International and regional obligations

South Africa has signed and/or ratified numerous international instruments, as well as African regional instruments, relevant to human trafficking.⁸¹ In 2004, South Africa ratified the pioneering instrument in the fight against human trafficking, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

⁷⁸ Section 108(a); see also 4 in Chapter 3 above; US Department of State 2009:260.

⁷⁹ US Department of State 2009:260.

⁸⁰ US Department of State 2010:297-298.

⁸¹ See 2 and 3 in Chapter 5 above.

(Palermo Protocol).⁸² As a party to the Palermo Protocol, South Africa is now obligated to build the requirements of the Palermo Protocol into its domestic legislation.⁸³ Consequently, the South African anti-trafficking legal framework must be measured against international and African regional standards drawn from the Palermo Protocol and other relevant instruments in order to assess the country's compliance.

3.2 National obligations

Apart from international and regional obligations to combat human trafficking, the *Constitution of the Republic of South Africa* 1996 also creates national human rights obligations relevant to human trafficking. Given that the Constitution is the supreme law of the Republic, any law or conduct inconsistent with it is invalid.⁸⁴ The Bill of Rights in the Constitution enshrines the rights of all people in South Africa and therefore places an explicit obligation on the government to “respect, protect, promote and fulfil” these rights.⁸⁵ Therefore, although the Constitution does not specifically refer to human trafficking, it is clear that the state's duty to uphold fundamental rights also applies to the rights of trafficked persons.

⁸² IOM 2009a:82, 103; DFA 2005:3; Kassan 2007:18–6; IOM 2008:19; Stuurman 2004:5; Leggett 2004b:4.

⁸³ Kassan 2007:18–10; IOM 2009a:82; Stuurman 2004:5.

⁸⁴ Section 2.

⁸⁵ Section 7(1)-(2). The rights in the Bill of Rights are subject only to the limitations contained in section 36 or elsewhere in the Bill – see section 7(3).

Lee⁸⁶ and others⁸⁷ confirm that the rights of trafficked persons are extensively infringed upon during the trafficking process. These violated human rights typically include the right to dignity⁸⁸ and freedom of movement⁸⁹ and the provision that no one may be subjected to slavery, servitude or forced labour.⁹⁰ The physical harm often inflicted upon trafficked persons violates the right to freedom and security of the person, which includes the right to be free from all forms of violence inflicted by either public or private sources, as well as the rights not to be tortured in any way or to be treated in a cruel, inhuman or degrading way.⁹¹

Agarwal⁹² reports that “trafficked children are often beaten and abused, and the violence occurs at all stages of the trafficking cycle”. This abusive treatment violates the specific rights of children enshrined in the South African Constitution, such as the right to be protected from maltreatment, neglect, abuse or degradation,⁹³ the right to basic nutrition, shelter, basic health services and social services,⁹⁴ and the right to be

⁸⁶ Lee 2007:9.

⁸⁷ Marks and Clapham 2005:423; Farrior 1997:213; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8, 23; Raymond 2002:493.

⁸⁸ Section 10; see also SALRC 2008:3.

⁸⁹ Section 21; Gajic-Veljanoski and Stewart 2007:340; SALRC 2008:3.

⁹⁰ Section 13; SALRC 2008:3; Farrior 1997:213.

⁹¹ Section 12; SALRC 2008:3.

⁹² Agarwal 2008:228-229.

⁹³ Section 28(1)(d); SALRC 2008:3; Agarwal 2008:228-229.

⁹⁴ Section 28(1)(c); Agarwal 2008:228-229.

protected from exploitative labour practices.⁹⁵

As is recognised in the Palermo Protocol, the protection of trafficked victims, which includes the protection of their internationally recognised human rights, forms an integral part of the effective combating of trafficking in persons.⁹⁶ Hence, the South African Constitution places a national obligation on the government to respect, protect and fulfil the rights of all people, including victims of trafficking.⁹⁷

4. THE SOUTH AFRICAN LEGAL FRAMEWORK

4.1 Introduction

Kamidi⁹⁸ points out that, to some extent, prosecutors will find their “hands tied” regarding trafficking until comprehensive counter-trafficking legislation is passed in South Africa.⁹⁹ However, it must be borne in mind that various crimes are often committed during the trafficking process:

⁹⁵ Section 28(1)(e); SALRC 2008:3.

⁹⁶ See the Preamble to the Palermo Protocol.

⁹⁷ SALRC 2008:3.

⁹⁸ Kamidi 2007:46.

⁹⁹ In 2007, “trafficking in persons” was criminalised for the first time in South Africa in sections 70 to 71 of the *Sexual Offences Amendment Act* 32 of 2007. Sections 281 to 291 of the *Children’s Act* 38 of 2005 prohibiting trafficking in children came into force on 1 April 2010 – Government Gazette no. 33076 of 1/4/10, Proclamation no. R.12 – Commencement of remaining sections of the *Children’s Act*, 2005 (Act no. 38 of 2005).

Human trafficking is in fact better understood as a collection of crimes bundled together rather than a single offence; a criminal process rather than a criminal event.¹⁰⁰

Thus, even without comprehensive counter-trafficking legislation, there are numerous existing common law crimes and statutory offences that can be utilised to prosecute offenders for acts committed during the trafficking process.¹⁰¹ Whether a trafficking agent can be successfully prosecuted in terms of existing crimes will depend on the facts of the particular case. Even when comprehensive counter-trafficking legislation comes into force, the prosecution must still, in addition to a charge of human trafficking, prosecute perpetrators for all other relevant crimes to ensure that human trafficking and related activities are met with the full force of the law. For this reason, the arsenal of related crimes that may be used to prosecute traffickers for crimes other than human trafficking is charted to emphasise that such crimes remain a component in the South African legal response for combating human trafficking.

4.2 Applicable common law and statutory framework

4.2.1 Common law crimes

Although there is no common law provision dealing specifically with contemporary human trafficking, numerous common law crimes may be applicable to activities in a human trafficking scenario.¹⁰²

¹⁰⁰ UNODC 2006:xx.

¹⁰¹ Mnisi 2008:2; Kassan 2007:18–10; SALRC 2008:14; SOCA Unit (NPA) 2009:2.

¹⁰² IOM 2009a:90; Smith 2008:5; Mnisi 2008:24-26.

4.2.1.1 Abduction

A perpetrator who traffics a minor to be exploited for the purpose of sexual intercourse or a forced marriage may be convicted of the common law crime of abduction.¹⁰³ A prosecution for this crime will be successful where a perpetrator unlawfully and intentionally removes an unmarried minor from the control of his or her parents or guardian without their consent.¹⁰⁴ The intention of the perpetrator in taking the minor must be that he or she, or even somebody else, wishes to marry or have sexual intercourse with the minor.¹⁰⁵ It is important to note that, since this crime punishes a wrong committed against the custodian of the minor and not against the minor, the consent of the minor to the acts of the perpetrator is no defence.¹⁰⁶

Ukuthwala, which is a custom widely practised in Nguni communities in South Africa, is a method of initiating negotiations for a marriage

¹⁰³ Statutory versions of the common law crime of abduction were also introduced into our law by sections 12 and 13 of the *Sexual Offences Act 23* of 1957. For a discussion of these statutory crimes and how they differ from their common law counterpart, see Milton 1996:567-572. The statutory forms of abduction do not replace common law abduction and also do not substantially differ from it – Burchell 2005:764. The abduction offences in sections 12(2) and 13 of the *Sexual Offences Act 23* of 1957 were repealed in 2007 by the *Sexual Offences Amendment Act 32* of 2007 – see the Schedule to this Act.

¹⁰⁴ Snyman 2008:403; Milton 1996:554. Burchell defines the crime as the unlawful taking of a minor out of the control of a custodian with the intention of enabling someone to marry or have sexual intercourse with that minor – Burchell 2005:762; Hunt 1970:541.

¹⁰⁵ Hunt 1970:548-549; Snyman 2008:403. Proof of the intention to marry or have intercourse with the minor suffices. Thus proof that the marriage or intercourse took place is not required – Snyman 2008:405. For a discussion of the difference between seduction and abduction and other aspects of this crime, see Snyman 2008:403-407; Burchell 2005:762-767; Milton 1996:553-572; Hunt 1970:537-554.

¹⁰⁶ Snyman 2008:404; Burchell 2005:764-765; Milton 1996:554-555. If the minor did not consent to the taking, the perpetrator may also be convicted of kidnapping – Snyman 2008:404; Hunt 1970:546-547.

proposal by means of a type of “mock abduction” of the bride-to-be.¹⁰⁷ This tradition entails the girl to be married being taken and kept, unharmed, at the kraal of the suitor’s father pending the outcome of the marriage negotiations with her family.¹⁰⁸ Although the *ukuthwala* procedure is usually planned and agreed to, the girl, who is “forcibly” taken, pretends to resist as part of seemingly upholding her maidenly dignity.¹⁰⁹ At the suitor’s home, the girl should be placed in the care of the women and be treated with respect and consideration.¹¹⁰ According to Koyana and Bekker, the suitor is not allowed at this stage, according to customary law, to have intercourse with the *thwalaed* girl.¹¹¹

Whether *ukuthwala* constitutes the crime of abduction is presently the subject of debate. On the one hand, South African customary law recognises *ukuthwala* as a legitimate means of marriage negotiation.¹¹² Koyana and Bekker¹¹³ are of the view that *ukuthwala* is lawful in the communities in which it is practised and that the aim is usually to negotiate a marriage with the consent of the girl and her parents, and not primarily to have intercourse with the girl.¹¹⁴ The right to participate in the

¹⁰⁷ Koyana and Bekker 2007:139; Olivier *et al.* 1995:9; Burchell 2005:763; McQuoid-Mason 2009:716.

¹⁰⁸ Olivier *et al.* 1995:9. For a further discussion of the three forms of *ukuthwala*, see Olivier *et al.* 1995:9-10.

¹⁰⁹ Koyana and Bekker 2007:139.

¹¹⁰ Koyana and Bekker 2007:141.

¹¹¹ Koyana and Bekker 2007:141.

¹¹² Koyana and Bekker 2007:141.

¹¹³ Koyana and Bekker 2007:142; see also Burchell 2005:767.

¹¹⁴ For a different view indicating that *ukuthwala* may also be used for other purposes, see

cultural life of one's choice is also enshrined in the *Constitution of the Republic of South Africa* 1996.¹¹⁵ However, this right may not be exercised "in a manner inconsistent with any provision of the Bill of Rights".¹¹⁶ On the other hand, *ukuthwala* has been viewed as criminal abduction by the courts where the tradition was abused to force an unwilling girl into marriage.¹¹⁷

In 2009, it was reported that the *ukuthwala* tradition had been abused in the Eastern Cape to force girls as young as 12 to marry adult men.¹¹⁸ Such abuse of this tradition overlaps with trafficking for the purpose of forced marriage and is also in conflict with the Constitution.¹¹⁹ Such illegal conduct may be successfully prosecuted on a charge of abduction.¹²⁰ Furthermore, offenders may also be prosecuted under existing statutory sexual crimes, such as rape and sexual assault, in terms of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)*.¹²¹

McQuoid-Mason 2009:716.

¹¹⁵ Section 30.

¹¹⁶ Section 30; see also McQuoid-Mason 2009:717.

¹¹⁷ Burchell 2005:764; Koyana and Bekker 2007:142; McQuoid-Mason 2009:716-717.

¹¹⁸ McQuoid-Mason 2009:716; US Department of State 2009:260; US Department of State 2010:297.

¹¹⁹ For a discussion of the violation of the various constitutional rights as a result of *ukuthwala* being abused to force a woman into marriage, see McQuoid-Mason 2009:718-719.

¹²⁰ Burchell 2005:763 in footnote 10.

¹²¹ For a discussion of the relevance of a prosecution in terms of *the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, see McQuoid-Mason 2009:719-723.

4.2.1.2 Kidnapping

Kidnapping is one of the means used to “recruit” persons for human trafficking.¹²² According to Snyman, kidnapping consists in “unlawfully and intentionally depriving a person of his or her freedom of movement and/or if such person is a child, the custodians of their control over the child”.¹²³

This crime protects two interests, namely personal freedom of movement as well as parental control over minors.¹²⁴ These interests are often violated in human trafficking cases. Custodians may be deprived of control over their minor children by traffickers, who take and traffic their children without the custodians’ consent. Since it is the custodian’s interest that is violated, the child’s consent does not legalise the perpetrator’s conduct.¹²⁵ Perpetrators may also be convicted of kidnapping where they violate a trafficked person’s freedom of movement by either physically moving the trafficked person, using force or deception, to another place or by keeping the victim locked up.¹²⁶

¹²² SALRC 2008:14.

¹²³ Snyman 2008:479. Other writers state that kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his or her custodians of control – Burchell 2005:758; Milton 1996:539-541; Hunt 1970:470.

¹²⁴ Snyman 2008:481. For a further discussion of the elements of this crime, see Milton 1996:544-548; Hunt 1970:470-475.

¹²⁵ Burchell 2005:760; Hunt 1970:473.

¹²⁶ SALRC 2008:14; Stuurman 2004:5; see also Snyman 2008:481; Burchell 2005:760; Hunt 1970:471-473.

Unlike kidnapping, human trafficking requires that the perpetrator traffic a person with an exploitative purpose.¹²⁷ Whereas kidnapping focuses mainly on the violation of the right to freedom of movement, human trafficking more often than not includes the violation of several other human rights, such as the right to dignity, life and security of the person. Accordingly, Stuurman¹²⁸ rightly points out that trafficking in persons, as defined in the Palermo Protocol, is significantly broader than the common law crime of kidnapping. For this reason, the crime of kidnapping is not broad enough to deal with trafficking cases adequately, and, therefore, more comprehensive trafficking crimes must be created.

4.2.1.3 Murder and attempted murder

A perpetrator who causes the death of a trafficked person may be charged with murder.¹²⁹ In cases where traffickers or their clients, while knowing that they are HIV-positive,¹³⁰ rape a trafficked person, they may be convicted of attempted murder. Such a conviction is possible, irrespective of whether or not the victim is infected with the human immunodeficiency virus (HIV) as a result of being raped.¹³¹ Furthermore, where evidence is presented that the victim died of acquired immune

¹²⁷ Palermo Protocol: article 3(a); Rijken 2003:65; Snyman 2008:479-481; see also 3.1.1.2 in Chapter 6 above.

¹²⁸ Stuurman 2004:5.

¹²⁹ Murder is defined as “the unlawful and intentional causing of the death of another human being” – Snyman 2008:447. For a further discussion of this crime, see Burchell 2005:667-671; Milton 1996:309-359; Hunt 1970:323-368.

¹³⁰ The abbreviation HIV is commonly used to refer to the human immunodeficiency virus.

¹³¹ In *S v Nyalungu* [2005] JOL 13254 T, an HIV-positive accused was, in addition to being convicted on a charge of rape, convicted of attempted murder for raping the complainant while knowing full well that he was HIV-positive; see also SALRC 2008:16.

deficiency syndrome (AIDS)¹³² contracted as a direct result of being raped by the perpetrator, a conviction of murder can be secured.¹³³

4.2.1.4 Culpable homicide

In some trafficking cases victims die, not because the perpetrators have the intent to kill them, but because their deaths are caused by the perpetrators' negligent conduct. Such cases of unlawfully and negligently causing the death of another human being can be prosecuted on a charge of culpable homicide.¹³⁴ For example, where the trafficking agents force their victims to be transported in a closed container on a truck, as a result of which they die owing to a lack of oxygen, the perpetrators may be prosecuted for the crime of culpable homicide.

4.2.1.5 Common assault

Briefly stated, a perpetrator can be convicted of assault where his or her conduct results in the impairment of another's bodily integrity.¹³⁵ This result can be caused in two distinct ways, namely by applying force or by inspiring the belief that force is imminently to be applied to the victim.¹³⁶

¹³² Infectious diseases such as AIDS are common among persons trafficked for sexual exploitation – UNODC 2006:154; US Department of State 2008:32, 34; US Department of State 2007:28; Silverman *et al.* 2008:932; Melvin 2006:28; Gajic-Veljanoski and Stewart 2007:346; Harrold 2006:101; Zimmerman *et al.* 2006:15.

¹³³ SALRC 2008:16.

¹³⁴ Burchell defines this crime as the unlawful, negligent killing of another human being – Burchell 2005:674; see also Snyman 2008:451; Milton 1996:363-401; Hunt 1970:373.

¹³⁵ Snyman 2008:460.

¹³⁶ Milton 1996:406-408, 420-428; SALRC 2008:15. Common assault is defined as “any unlawful and intentional act or omission
(a) which results in another person's bodily integrity being directly or indirectly impaired,
or

Traffickers typically subject their victims to various forms of physical abuse in order to control them and force them to submit to their demands.¹³⁷ These perpetrators may therefore be prosecuted for assault where they unlawfully and intentionally use their own body or an instrument to apply force directly to the person of the victim, for example by punching or kicking the victim.¹³⁸ Traffickers are also known to force trafficked victims to take alcohol and drugs to make them compliant and dependent on the trafficker.¹³⁹ With reference to case law, Snyman¹⁴⁰ and Hunt¹⁴¹ confirm that this indirect application of force also constitutes the crime of assault.

Apart from the direct or indirect application of force, assault is also committed where the perpetrator's conduct inspires a belief in the trafficked person that force is immediately to be applied to him or her.¹⁴² An example of this form of assault occurs when the perpetrator threatens to shoot trafficked persons should they dare to escape.¹⁴³

(b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place" – Snyman 2008:455; Hunt 1970:429.

¹³⁷ SALRC 2008:15; see also Zimmerman *et al.* 2006:2, 10, 13-14, 22; Gajic-Veljanoski and Stewart 2007:345; Kreston 2007:39; IOM 2006:14.

¹³⁸ Burchell 2005:684; Snyman 2008:456.

¹³⁹ US Department of State 2007:28; Haynes 2004:226; Gajic-Veljanoski and Stewart 2007:341.

¹⁴⁰ Snyman 2008:457. In contrast, Lansdown, by way of a single reference to *R v Hanson* (1849), submits that to administer poison with the intent to harm a person does not constitute assault – Lansdown *et al.* 1957:1572.

¹⁴¹ Hunt 1970:437.

¹⁴² Burchell 2005:680, 686; Snyman 2008:458; Milton 1996:422-428; Hunt 1970:438-445.

¹⁴³ Burchell 2005:687.

4.2.1.6 Assault with intent to cause grievous bodily harm

Assault with intent to cause grievous bodily harm is a form of assault qualified by a certain intention, but it is still a separate, substantive crime.¹⁴⁴ Unlike the crime of assault, a conviction for assault with intent to cause grievous bodily harm requires that the state must prove that the perpetrator actually had the intent to cause grievous bodily harm to the victim.¹⁴⁵ Based on case law, Snyman points out specific factors which may indicate such intent, namely “the nature of the weapon or instrument used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack, and the nature of the injuries inflicted, if any”.¹⁴⁶

It is important to note that it is not required that the perpetrator actually cause grievous bodily harm.¹⁴⁷ It suffices if the intent to cause such harm is proven, even where only a slight injury, or no injury at all, is caused, for instance where the trafficker shoots at the victim, but misses.¹⁴⁸ On the other hand, if the perpetrator inflicts a serious injury without intending to cause grievous bodily harm, he or she cannot be convicted of this crime.¹⁴⁹ The fact that serious and continuous assaults are usually

¹⁴⁴ Hunt 1970:450; Snyman 2008:461.

¹⁴⁵ Snyman 2008:461-462; Burchell 2005:688-691; Hunt 1970:451-453.

¹⁴⁶ Snyman 2008:462; see also SALRC 2008:15; Burchell 2005:689-690; Hunt 1970:452-453. For a discussion of the case law on factors indicating the intent to do grievous bodily harm, see Snyman 2008:462, especially footnotes 40-42.

¹⁴⁷ Burchell 2005:690; Hunt 1970:451.

¹⁴⁸ SALRC 2008:14, 16.

¹⁴⁹ Burchell 2005:690; Hunt 1970:451; SALRC 2008:16.

inflicted on trafficked persons¹⁵⁰ justifies prosecution for assault with the intent to cause grievous bodily harm in many human trafficking cases.

4.2.1.7 Extortion

The crime of extortion is committed where a person “unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure, which induces her to hand over the advantage”.¹⁵¹ Traffickers often use such unlawful pressure in the form of threats or intimidation to compel unwilling trafficked victims to submit to their demands.¹⁵² For example, perpetrators may threaten victims with physical harm or reprisal against their families in order to obtain an advantage, such as the provision of services not legally due to the perpetrator.¹⁵³ Also, where trafficked victims are forced into crime or exploitative sexual activities, some are threatened that photos or video recordings of such conduct will be sent to their families or to law enforcement authorities.¹⁵⁴ The advantage that traffickers obtain by exerting this unlawful pressure is to exploit the victim further to their

¹⁵⁰ Zimmerman *et al.* 2006:2, 10, 13-14, 22; Gajic-Veljanoski and Stewart 2007:345; Kreston 2007:39; IOM 2006:14.

¹⁵¹ Snyman 2008:426; see also Burchell 2005:826-832; Milton 1996:681-697; Hunt 1970:652.

¹⁵² Defeis 2003/2004:488; Foundation Against Trafficking in Women *et al.* 2001:6; SALRC 2008:17; IOM 2007:30; Dougherty and Burke 2008:12; Brennan 2005:42; Gajic-Veljanoski and Stewart 2007:344; Morawska 2007:94; Shelley 2007:131; Weissbrodt and Anti-Slavery International 2002:31-32; Dottridge and Weissbrodt 1999:270.

¹⁵³ SALRC 2008:17.

¹⁵⁴ SALRC 2008:17. Burchell views such threats to disclose embarrassing information as a form of pressure to obtain an advantage which is not legally due to the perpetrator – Burchell 2005:829.

benefit.¹⁵⁵ In these circumstances, prosecution for the crime of extortion is apposite.

However, the prosecution faces a problem where the extortion has taken place outside the borders of South Africa. In such cases, as with kidnapping committed outside South Africa, it is not possible to prosecute perpetrators for these common law crimes.¹⁵⁶ To address this problem, comprehensive counter-trafficking legislation which provides for extraterritorial jurisdiction is required.¹⁵⁷

4.2.1.8 *Crimen iniuria*

According to Burchell, *crimen iniuria* consists in the unlawful and intentional “impairing [of] the dignity or privacy of another person”.¹⁵⁸ While bodily integrity and reputation are protected by crimes such as assault and criminal defamation respectively, *crimen iniuria* protects “dignity” (*dignitas*).¹⁵⁹ The term *dignitas* is a technical term with a much wider meaning than that usually understood by the term “dignity”. *Dignitas* includes both privacy and dignity. The courts have not given a

¹⁵⁵ The advantage that is being extorted need not be only of a patrimonial nature; other advantages such as sexual gratification also qualify – Burchell 2005:831; Hunt 1970:653; see also section 1 of the *General Law Amendment Act* 139 of 1992.

¹⁵⁶ SALRC 2008:17.

¹⁵⁷ See the discussion on extraterritorial jurisdiction in 3.4 in Chapter 6 above.

¹⁵⁸ Burchell 2005:746; see also Snyman 2008:469; Milton 1996:492; Hunt 1970:486.

¹⁵⁹ Hunt 1970:485.

precise definition of “dignity”, but have held that it includes both self-respect and mental tranquillity.¹⁶⁰

In brief, what is punished by *crimen iniuria* is any conduct that results in the victim’s dignity or privacy being impaired. A person’s dignity may be impaired in countless ways,¹⁶¹ which makes this crime applicable in many, if not most, trafficking cases. A conviction may follow where a trafficker violates a victim’s dignity by using vulgar and abusive language or conduct, such as spitting in the victim’s face.¹⁶² A victim’s sexual dignity may be impaired by explicit conduct, such as unwanted kissing, the touching of private parts¹⁶³ and forced participation in other sexual acts.¹⁶⁴ Further, Burchell points out that conduct which invites sexual impropriety or prepares a person for sexual acts may also constitute *crimen iniuria*.¹⁶⁵

At the beginning of the trafficking process, traffickers often pretend to be the victim’s friend or lover. Frequently, they do this by communicating via cellphone or internet chatrooms, the purpose being to persuade the

¹⁶⁰ For a discussion of the relevant case law, see Snyman 2008:470; Hunt 1970:495-497. An analysis of this crime is also provided by Burchell 2005:746-757; Milton 1996:492-518; Hunt 1970:479-509.

¹⁶¹ Burchell 2005:749-753.

¹⁶² Hunt 1970:503-504.

¹⁶³ Hunt 1970:501. Sexual abuse of the victim by the trafficker can also be punished as rape, compelled rape, sexual assault, and so forth, in terms of the *Sexual Offences Amendment Act* 32 of 2007. This Act is discussed in 4.2.2.14 below.

¹⁶⁴ Snyman 2008:472-473.

¹⁶⁵ Burchell 2005:750.

victim gradually to submit to sexual acts.¹⁶⁶ The use of this modern form of sexual “grooming” constitutes behaviour that impairs dignity; hence such perpetrators may be prosecuted for *crimen iniuria*.¹⁶⁷

Furthermore, a trafficker may also be convicted of this crime for violations of privacy, such as voyeuristic peeping,¹⁶⁸ eavesdropping,¹⁶⁹ electronic surveillance¹⁷⁰ and reading private communications, such as letters, cellphone messages or e-mails.

4.2.1.9 Criminal defamation

Criminal defamation differs from *crimen iniuria* in that it criminalises “the unlawful and intentional publication of matter concerning another which tends seriously to injure his reputation”.¹⁷¹ This criminalisation of such publication protects a person’s *fama* (good name or reputation) from defamatory conduct which tends to expose a victim to hatred or ridicule, thus diminishing the esteem in which the victim is held by others.¹⁷² The

¹⁶⁶ US Department of State 2008:13; US Department of State 2007:23; Weissbrodt and Anti-Slavery International 2002:34-35; Dottridge and Weissbrodt 1999:266; Hodgkin and Newell 2002:527; Raymond 2002:492; GAATW 1999a:13. The sexual “grooming” of potential victims involves those acts of a perpetrator, such as providing luxurious gifts and outings, that are aimed at facilitating the commission of an illegal sexual act with another person – Burchell 2005:750.

¹⁶⁷ Burchell 2005:750.

¹⁶⁸ Milton 1996:513-514; Burchell 2005:753; *R v Holliday* 1927 CPD 395.

¹⁶⁹ Milton 1996:514.

¹⁷⁰ Examples of such surveillance are e-mail or telephone tapping and unauthorised accessing (also known as “hacking” – Buys and Cronjé 2004:320, 327) of electronic data – Burchell 2005:753.

¹⁷¹ Snyman 2008:475; Milton 1996:520; Hunt 1970:518.

¹⁷² Snyman 2008:476. For a further discussion of this crime, see Milton 1996:524-535; Hunt 1970:518-530.

required “publication” of the defamatory conduct is interpreted to mean that the defamatory conduct of the perpetrator must come to the notice of someone other than the complainant.¹⁷³ Therefore, traffickers may be charged with this crime when they provide information in order to injure the reputation of victims, for example by informing victims’ families or employers that they perform sexual services, are thieves, are drug couriers or are participants in pornography, while not disclosing that they have been coerced or deceived into these situations.¹⁷⁴

Again, it must be stressed that this crime, like the other common law crimes discussed so far, is not comprehensive enough to deal adequately with human trafficking. These common law crimes can be used only in certain circumstances to prosecute some of the criminal acts performed by different agents during the human trafficking process.

4.2.1.10 Fraud and related crimes

As was pointed out earlier,¹⁷⁵ one of the typical recruitment methods used to lure persons into the trafficking trap is deception.¹⁷⁶ Raymond points out that the vast majority of victims are being trafficked through false promises or other forms of deception and not by forceful methods

¹⁷³ Milton 1996:533; Snyman 2008:476; Burchell 2005:744; Hunt 1970:527.

¹⁷⁴ Molo Songololo 2008:vi.

¹⁷⁵ See 2.2.2.2. in Chapter 2 above.

¹⁷⁶ UN.GIFT 2008c:12; IOM 2006:20; IOM 2007:22; Gajic-Veljanoski and Stewart 2007:342; Shelley 2007:128.

such as kidnapping or abduction.¹⁷⁷ The literature indicates that deceptive methods used to recruit potential trafficking victims vary, but most often include lucrative job or educational opportunities.¹⁷⁸

The well-known crime of fraud may be used to prosecute trafficking offenders for misrepresentations made to trafficked persons. Misrepresentation, which constitutes the conduct element of fraud, entails deceiving someone by means of a falsehood, or, as Snyman explains it, is the situation where one person represents to another that “a fact or a set of facts exists which in truth does not exist”.¹⁷⁹ A trafficker who unlawfully and intentionally makes a misrepresentation to a trafficked person, which then causes the latter actual prejudice or even potential prejudice, may be convicted of fraud.¹⁸⁰ Other species of fraud, namely forgery and uttering, which entail the forging of a document or presenting a forged document as a genuine document to another, may also find application in trafficking cases.¹⁸¹ For example, when trafficking agents forge passports or other travel documents, or present such forged documents to government officials as valid documents, a prosecution on

¹⁷⁷ Raymond 2002:497.

¹⁷⁸ UN.GIFT 2008c:12; IOM 2006:20; IOM 2007:22, 25; Gajic-Veljanoski and Stewart 2007:342-343; Shelley 2007:128; Raymond 2002:497; Singh 2004:341; Weissbrodt and Anti-Slavery International 2002:22; UNODC 2009b:12-13; Rijken 2003:63; Foundation Against Trafficking in Women *et al.* 2001:6; US Department of State 2009:8; US Department of State 2007:10; The Future Group 2007b:2.

¹⁷⁹ Snyman 2008:532.

¹⁸⁰ For a discussion of the definitional elements of fraud, see Snyman 2008:531-540; Burchell 2005:833-844.

¹⁸¹ For a discussion of the definitional elements of forgery and uttering, see Snyman 2008:540-543; Burchell 2005:845-848.

a charge of forgery or uttering, or both crimes, may be instituted against the offenders.

4.2.1.11 Slavery

Picarelli and others often refer to human trafficking as a modern manifestation of slavery.¹⁸² It is thus appropriate to clarify whether slavery is recognised as an existing common law crime in South African law which could be used to prosecute certain criminal activities related to human trafficking.

The *Constitution of the Republic of South Africa* 1996 provides a normative framework concerning slavery by stipulating that no one may be subjected to slavery, servitude or forced labour.¹⁸³ However, enshrining this human right does not in itself create the crime of slavery in South African law.

The literature concurs that slavery is recognised as an international crime in international customary law.¹⁸⁴ Universal jurisdiction only applies to

¹⁸² Picarelli 2007:26; US Department of State 2007:8; US Department of State 2008:1; Dottridge and Weissbrodt 1999:260; Nowak 2005:195; Weissbrodt and Anti-Slavery International 2002:19.

¹⁸³ Section 13.

¹⁸⁴ Viljoen 2007:26-27; Weissbrodt and Anti-Slavery International 2002:3; Dottridge and Weissbrodt 1999:243-244; SALRC 2008:17; Bassiouni 1986:419-420; Bassiouni 1990/1991:447; see also 4.2 in Chapter 4 above. For a comprehensive analysis of enslavement as an international crime, see Bassiouni 1990/1991:445-491. Dugard 2005:29 describes customary international law as the common law of the international community. For a discussion of the two main requirements, namely settled practice and the acceptance of an obligation to be bound, before a custom is recognised as a customary rule, see Dugard 2005:29-33.

international crimes under customary international law.¹⁸⁵ Given that slave-trading qualifies as such an international crime, all states have the right to prosecute this crime, because the crime not only violates the domestic legal order of a state, but also the international order.¹⁸⁶ In other words, national courts may exercise jurisdiction over international crimes, acting “as the agent of the international community in the prosecution of an enemy of all mankind”.¹⁸⁷ In addition, slavery has attained the status of *ius cogens*, which consists of peremptory norms in international law in respect of which no derogation is permitted.¹⁸⁸

Having clarified the position of slavery in international customary law, it now needs to be determined whether international customary law recognising slavery as an international crime finds application in South African law. Dugard¹⁸⁹ points out that the South African courts follow the monist approach¹⁹⁰ of incorporating international customary law into the common law of South Africa. Underpinning this point, the Constitution

¹⁸⁵ Dugard 2005:157.

¹⁸⁶ Dugard 2005:156-157; SALRC 2008:17. Piracy *iure gentium*, which is recognised as an international crime, but without a universally recognised definition, has a link with slavery in that “shipping or conveyance by sea of slaves is an act of piracy” – Lansdown *et al.* 1957:1061-1062.

¹⁸⁷ Dugard 2005:156.

¹⁸⁸ Dugard 2005:43-44; Bales and Robbins 2001:19; Viljoen 2007:27-28; Devenish 2005:77; Brownlie 2003:488-489; Weissbrodt and Anti-Slavery International 2002:3; Rijken 2003:74; Dottridge and Weissbrodt 1999:243; Nowak 2005:197. For a discussion of the concept *ius cogens* (peremptory norms) in international law, see Dugard 2005:43-46.

¹⁸⁹ Dugard 2005:51-52; SALRC 2008:17.

¹⁹⁰ The monist approach maintains that international law may be directly applied by domestic courts without an act of adoption by the courts or transformation of international law into local law by legislation – Dugard 2005:47.

confirms that “customary international law is law in the Republic, unless it is inconsistent with the Constitution or an act of Parliament”.¹⁹¹ Against this background, Dugard¹⁹² concludes that slavery is an international crime which is incorporated in the law of South Africa.

Despite the conclusion that slavery is a common law crime in South African law, current South African criminal law textbooks do not include slavery when dealing with South African common law crimes.¹⁹³ Although the crime of slavery is excluded from their textbooks, Snyman,¹⁹⁴ Burchell¹⁹⁵ and Milton¹⁹⁶ do not state that such a crime is not part of

¹⁹¹ Section 232; see also SALRC 2008:17.

¹⁹² Apart from confirming that slave-trading is an international customary law crime, Dugard also states that slave-trading was “at one time classified as a species of piracy” – Dugard 2005:159-160. The argument continues that, since piracy is a crime in terms of section 24 of the *Defence Act* 42 of 2002, slave-trading is therefore a crime under South African law as well – Dugard 2005:160.

¹⁹³ Snyman 2008:401-482, Burchell 2005:661-908, Milton 1996:1-817 and Hunt 1970:1-785 do not include the common law crime of slavery in their criminal law textbooks – see also SALRC 2008:17. An earlier source published in 1921 also does not include slavery as a crime, but refers to a few cases dating back to the 1800s that make some mention of slavery – Lloyd 1921:398; see also Burchell 2005:759. In their comprehensive work on South African criminal law and procedure published in 1957, Lansdown and others include “slave-trading” as an offence against the “safety and tranquillity of the state” – Lansdown *et al.* 1957:987, 1062-1063. However, the writers (Lansdown *et al.* 1957:1062-1063) do not refer to “slave-trading” as a common law crime recognised in international customary law. Instead, they refer to slave-trading being criminalised in enactments dating from 1806 and state that “the courts of the Union [of South Africa] have jurisdiction for the punishment of all slave-trade offences” included in 5 *Georgii IV*, chapter 113, the *Slave Trade Act*, 1824 (26 & 27 *Victoriae*, chapter 40) and the *African Slave Trade Treaty Act*, 1863 (36 & 37 *Victoriae*, chapter 88). Dooling points out that, in the 18th century, the slave trade was a legal trade in the Cape Colony, but that slaves were not completely right-less and that slave owners were not completely above the law. This position concerning the legal status of slaves was based on the courts’ use of Roman common law, which never denied slaves legal personality and held that slaves were not only property but persons too – Dooling 1992:29, 55, 66, 72, 78-79, 82.

¹⁹⁴ Snyman 2008:401-482.

¹⁹⁵ Burchell 2005:661-908.

¹⁹⁶ Milton 1996:1-817.

South African law. On this issue, the South African Law Reform Commission states that a court of law may rule that a common law crime has fallen into desuetude and is no longer recognised as a crime, but only if the common customs observed by society and the *boni mores* do not require the act to be punished under criminal law anymore.¹⁹⁷ Such a judicial decision in respect of the crime of slavery has not been reported in South Africa.¹⁹⁸ Therefore, although the crime of slavery is omitted by the abovementioned writers and no reported cases of such a crime could be traced, neither the legislature nor a court of law has determined that the crime of slavery has fallen into desuetude.¹⁹⁹ For this reason, it is submitted that the crime of slavery, as recognised in international customary law, is also part of South African law.

In the light of the discussion above, it follows that the crime of slavery may be used in appropriate cases to prosecute perpetrators involved in human trafficking activities.²⁰⁰ However, no such prosecutions have yet been reported. This issue should be clarified by way of further research and the subsequent consideration by prosecuting authorities to use this crime in future human trafficking cases. Nevertheless, before utilising the crime of slavery in human trafficking cases, it must be noted that a substantial part of the literature follows a narrow interpretation of the

¹⁹⁷ SALRC 2008:17; see also Du Plessis 1999:244-245.

¹⁹⁸ SALRC 2008:17.

¹⁹⁹ SALRC 2008:17. Although a statute cannot be abolished by disuse, our courts may rule that a part of common law or customary law has become abrogated by disuse, for example in *Green v Fitzgerald* 1914 AD 88, the Court found that the rule that adultery is a crime had been abolished by disuse – Kleyn and Viljoen 2002:83, 89; see also Du Plessis 1999:244-245.

²⁰⁰ SALRC 2008:17.

international definition of slavery, focusing on full ownership, restriction of freedom, and total physical control of another person.²⁰¹ Thus, where full ownership over another person is lacking, the practice is not classified as slavery, but as slavery-like practices or forms of servitude.²⁰² It is foreseen that it will be exceptionally difficult to prove full ownership on the part of the different trafficking agents over the trafficked person in the human trafficking process. For this reason, if the crime of slavery is used in future prosecutions in South Africa, and the same narrow interpretation of slavery is followed, the crime may have very limited application in human trafficking cases.²⁰³

4.2.2 Statutory offences

Apart from common law crimes, many existing statutory offences may also be used to prosecute perpetrators involved in trafficking activities for crimes other than human trafficking.²⁰⁴

²⁰¹ Rijken 2003:75, 78; Nowak 2005:198; Smith 2007:222; Bassiouni 1990/1991:459; Dottridge and Weissbrodt 1999:248; Weissbrodt and Anti-Slavery International 2002:7; Picarelli 2007: 7-29; see also 2.2.2.3.2.c in Chapter 2 above. Slavery is defined in the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery as “the status of a person over whom any or all of the powers attaching to the right of ownership are exercised” – <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008).

²⁰² Nowak 2005:198; Haysom 2002:178; Smith 2007:222-223. These slavery-like practices are also prohibited in international instruments – see 2.2.2.3.2.c in Chapter 2 and 2 in Chapter 5 above.

²⁰³ According to Bassiouni 1990/1991:459, 457-458, the narrow interpretation of the definition of slavery renders the crime of slavery too limited to apply effectively to new forms of slavery such as human trafficking.

²⁰⁴ Smith 2008:6; Mnisi 2008:9; Kassan 2007:18–10.

4.2.2.1 *Riotous Assemblies Act 17 of 1956*

As was pointed out in the first part of this study, there are often many people involved in a human trafficking scenario.²⁰⁵ Therefore, the prosecution net should be cast wide to include those who either conspire with others to commit a crime against a trafficked person or who incite or command others to commit a crime against such a victim.²⁰⁶ The *Riotous Assemblies Act 17 of 1956* may be used successfully to accomplish this purpose, as well as to prosecute offenders for attempting to commit human trafficking.²⁰⁷

4.2.2.2 *Identification Act 68 of 1997*

The *Identification Act 68 of 1997* requires South African citizens and persons who are lawfully and permanently resident in the Republic to obtain an identity card after the age of 16 years has been attained.²⁰⁸ Where role players in the human trafficking team imitate or alter identity cards, or are merely in possession of such cards, they may be

²⁰⁵ See 4.1 in chapter 2 above; Shelley 2007:118, 120; Obokata 2006:46; Raymond 2002:493; Foundation Against Trafficking in Women *et al.* 2001:5; Singh 2004:343; UN.GIFT 2008c:8.

²⁰⁶ IOM 2009a:89; SALRC 2008:20.

²⁰⁷ Section 18(2) Any person who -
(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands, or procures any other person to commit any offence, whether at common law or against a statute or statutory regulation,
shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.
See also 2.3.2 in Chapter 8 below.

²⁰⁸ Section 15; see also sections 3, 7(1) and 8.

successfully prosecuted in terms of this Act²⁰⁹ and, on conviction, be imprisoned for up to five years.²¹⁰

In cases where human trafficking agents confiscate valid identity cards and travel documents of trafficked persons in order to maintain control over them,²¹¹ prosecution seems not to be possible in terms of this Act.²¹² This loophole for traffickers again highlights the need for more comprehensive legislation designed to prosecute the variety of criminal acts committed by agents during the trafficking process.

4.2.2.3 *Immigration Act 13 of 2002*

In cases where persons are trafficked across international borders, the provisions of the *Immigration Act 13 of 2002 (Immigration Act)* are often

²⁰⁹ Section 18(1) No person shall - ...
(d) having come into possession of an identity card, a certificate or a temporary identity certificate belonging to another person, present it as his or her own or belonging to any person other than the person to whom it belongs;
(e) imitate, alter, deface, destroy or mutilate any identity card or any part thereof, certificate or temporary identity certificate, or cause it to be done or allow it to be done; ...
(i) possess any identity card or any part thereof, a certificate or temporary identity certificate which has been imitated, altered, defaced or mutilated or any particulars of which are incorrect.

²¹⁰ Section 18(2) Any person who -
(a) contravenes a provision of subsection (1); ... shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

²¹¹ Haynes 2004:226; US Department of State 2007:20; IOM 2007:30; Melvin 2006:29; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339; Morawska 2007:100; see also the discussion in 2.3 in Chapter 4 above.

²¹² Stuurman 2004:5.

violated. This Act regulates entry into, and departure from, South Africa.²¹³

Traffickers who enter, remain in, or depart from, South Africa in contravention of this Act may therefore be prosecuted.²¹⁴ Strikingly, the maximum term of imprisonment for this offence is only three months.²¹⁵

Traffickers often assist their victims to illegally enter, remain in, or depart from, a country.²¹⁶ This conduct is also criminalised in the Act, but the maximum term of imprisonment is also short, being only one year.²¹⁷ In addition, trafficking agents who knowingly employ an illegal foreigner or a foreigner in violation of this Act may, on conviction, also be imprisoned for up to one year only.²¹⁸ For the offence of aiding and abetting

²¹³ Section 49; IOM 2009a:87.

²¹⁴ Section 49(1)(a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months.

²¹⁵ Section 49(1)(a).

²¹⁶ UN.GIFT 2008c:11; Harrold 2006:101; Melvin 2006:22; UNODC 2006:xiv-xv; Lansink 2006:47; Kamidi 2007:10.

²¹⁷ Section 49(2) Anyone who knowingly assists a person to enter or remain in, or depart from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year.
See also 4.3.3 below.

²¹⁸ Section 49(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year.

foreigners,²¹⁹ the penalty is a maximum of 18 months' imprisonment.²²⁰ The literature emphasises that stringent sentences are needed to deter traffickers.²²¹ It is therefore submitted that the lenient sanctions for these offences are insufficient to dissuade offenders.

Corrupting and bribing officials for the purpose of executing the trafficking crime is often part of the *modus operandi* of traffickers. Such illegal conduct, which includes bribing or threatening officials so as to obtain a passport or to cross borders without a passport, can also be prosecuted under the *Immigration Act*.²²²

The Act further contains several provisions criminalising illegal conduct related to passports and other documents, conduct which traffickers are often guilty of.²²³ It has been reported that fabricated or falsified travel

²¹⁹ The aiding, abetting, assisting, enabling or in any manner helping of a foreigner by, for example, "entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation" in terms of section 42(1)(iii) of the Act is criminalised. On 18 March 2010, two accused were convicted in the unreported case of *S v Sayed and Another* in case no. 041/2713/2008 in the Durban Regional Court on two charges of aiding and abetting foreigners in terms of section 49(6) of the *Immigration Act* 13 of 2002. The convictions were for entering into a debt-bondage agreement in Durban with Thai women, recruited in Thailand, to pay the accused R60 000 generated from prostitution activities at the brothel, whereafter the women were allowed to retain some of the profit for themselves; see also 4.2.2.7 below.

²²⁰ Section 49(6) Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 18 months.

²²¹ UN.GIFT 2008b:10; US Department of State 2008:27; Shelley 2007:132; Raymond 2002:492.

²²² Section 49(10) Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or to breach such officer's duties shall be guilty of an offence.
See also SALRC 2008:20.

²²³ Section 49(15) Any person who -
(a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the

documents are used when traffickers themselves or their victims cannot cross international borders legally.²²⁴ The *Immigration Act* criminalises the use of such fabricated or falsified passports for the purpose of crossing a South African border or assisting a victim to do so.²²⁵ A further provision prohibits a person from being in possession of another person's travel or identity document or of a blank, falsified or fabricated passport.²²⁶ Importantly, this provision may be used where perpetrators use false travel documents or where they hold the travel or identity

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- Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use -
 - (i) any permit, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he or she is not entitled to use; or
 - (ii) any fabricated or falsified permit, certificate, written authority or other document; or
 - (b) without sufficient cause has in his or her possession -
 - (i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or any endorsement under this Act or required to be submitted in terms of this Act;
 - (ii) any form officially printed for purposes of issuing any permit, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form;
 - (iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; or
 - (iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding four years.

²²⁴ Stuurman 2004:5.

²²⁵ Section 49(15)(a).

²²⁶ Section 49(15)(b).

documents of their victims as a tool for controlling them.²²⁷ For these offences, imprisonment of up to four years may be imposed. However, Stuurman points out that this Act does not “deal with related issues, such as the protection of victims of trafficking or the confiscation, or destruction, of their travel and identity documents”.²²⁸ Therefore, more comprehensive legislative measures are needed to address criminal acts usually committed during the trafficking cycle.

4.2.2.4 *Basic Conditions of Employment Act 75 of 1997*

Early in this study, it was indicated that people are trafficked for various exploitative purposes.²²⁹ In cases where people are trafficked specifically for labour exploitation, the provisions in the *Basic Conditions of Employment Act 75 of 1997 (Basic Conditions of Employment Act)* may find application.²³⁰ The purpose of this Act is to “give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment”.²³¹ Accordingly, the Act sets minimum employment standards regarding a range of labour matters, including maximum

²²⁷ Haynes 2004:226; US Department of State 2007:20; IOM 2007:30; Melvin 2006:29; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339; Morawska 2007:100; Stuurman 2004:5; UNODC 2009b:21; see also 2.3 in Chapter 4 above.

²²⁸ Stuurman 2004:5.

²²⁹ See 2.2.2.3.2.in Chapter 2 above.

²³⁰ SOCA Unit (NPA) 2009:2.

²³¹ See section 2 and the long title of the Act; IOM 2009a:88.

working hours,²³² overtime,²³³ sick leave,²³⁴ meal intervals²³⁵ and annual leave.²³⁶ Many of these provisions are commonly violated in labour trafficking cases.²³⁷

Consequently, this Act may be used to prosecute perpetrators for a range of labour offences committed during the trafficking process. First, what is relevant to this study is that the Act explicitly prohibits all forms of forced labour.²³⁸ Moreover, no one may, for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour.²³⁹ Regrettably, the maximum penalty for these offences is three years' imprisonment,²⁴⁰ which is inadequate in serious cases of prolonged forced labour.

Secondly, there are also provisions in this Act which specifically protect children. Section 43(1) of the Act prohibits the employment of a child

²³² Section 9.

²³³ Section 10.

²³⁴ Section 22.

²³⁵ Section 14.

²³⁶ Section 20.

²³⁷ Pearson 2000:9, 37; GAATW 1999a:14, 16; Devenish 1998:54; Nowak 2005:201.

²³⁸ Section 48(1) Subject to the Constitution, all forced labour is prohibited.
See also SALRC 2008:21.

²³⁹ Section 48(2) No person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour in contravention of subsection (1).

(3) A person who contravenes subsection (1) or (2) commits an offence.
See also SALRC 2008:21.

²⁴⁰ Section 93(2).

under the age of 15 years,²⁴¹ except if a permit is obtained from the Department of Labour to employ the child in the performance of advertising, sports, artistic or cultural activities.²⁴²

As regards older children aged 15 to 18 years, it is stipulated that they may not be employed to do work inappropriate for their age or that places the child's well-being at risk.²⁴³ This prohibition can, for example, be used against traffickers who traffic children for the removal of their body parts or to be used as child soldiers.²⁴⁴ It has been pointed out that child soldiers face multiple traumas²⁴⁵ and that the impact of trafficking for child soldiers is often devastating.²⁴⁶ Accordingly, such "work" places the

²⁴¹ Section 43(1) No person may employ a child -
(a) who is under 15 years of age; or
(b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older.

See also SOCA Unit (NPA) 2009:2; Dawes *et al.* 2007:249, 255-258.

²⁴² Section 50(2)(b); Dawes *et al.* 2007:249.

²⁴³ Section 43(2) No person may employ a child in employment -
(a) that is inappropriate for a person of that age;
(b) that places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.
(3) A person who employs a child in contravention of subsection (1) or (2) commits an offence.

Mnisi 2008:34 gives examples of cases where provisions of this Act were successfully implemented. In the unreported case of *S v Barnard*, a Mossel Bay farmer was sentenced to three years' imprisonment and to a R12 000 fine for employing three 12-year-old boys and a 13-year-old girl. In another unreported case, namely *S v Mantana*, the accused was found guilty of employing 19 children in breach of the laws stipulating the age limit. In addition, he was also convicted of causing five other youths to perform duties inappropriate for their age, although they were within the required age limit, placing at risk their physical, mental, spiritual, moral and social well-being.

²⁴⁴ This type of exploitation is discussed in 2.2.2.3.2.e and 2.2.2.3.2.g in Chapter 2 above.

²⁴⁵ Apart from losing their lives in armed conflict, frequently reported injuries are loss of sight and hearing, as well as loss of limbs – Happold 2005:17; Cohn and Goodwin-Gill 1994:112.

²⁴⁶ Happold 2005:5-6, 17-19; Cohn and Goodwin-Gill 1994:23, 105-112.

well-being of children at risk, for which the perpetrators can be prosecuted in terms of this Act.²⁴⁷

The concept “forced labour” is not defined in the *Basic Conditions of Employment Act* or any other South African legislation.²⁴⁸ The definition of forced labour in the 1930 ILO Convention No. 29 Concerning Forced Labour²⁴⁹ is still internationally accepted.²⁵⁰ According to Devenish,²⁵¹ the gist of forced labour is “work done without consent and invariably without fair and just compensation”. This type of labour practice is common in human trafficking scenarios, where trafficked persons do not perform services willingly, but are compelled by assaults, threats and other coercive measures to perform services without being fairly compensated for it.²⁵²

To conclude, it is possible to prosecute trafficking agents in terms of the *Basic Conditions of Employment Act* for contravening the labour

²⁴⁷ Section 43(2) and (3).

²⁴⁸ SALRC 2008:21.

²⁴⁹ <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008). The 1957 Convention Concerning the Abolition of Forced Labour (No. 105) further expanded the prohibition of forced labour in article 1 – <http://www.unhchr.ch/html/menu3/b/32.htm> (accessed 18/7/2008). The 1957 Convention proscribes forced labour “for political purposes, for purposes of economic development, as a means of labour discipline or punishment for strike action and as a means of discrimination” – Weissbrodt and Anti-Slavery International 2002:13.

²⁵⁰ Article 2 defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. See also Naidu 1987:109-110 and the discussion in 2.2.1 in Chapter 5 above.

²⁵¹ Devenish 1998:54; Nowak 2005:201. Currie and De Waal 2005:313 endorse this view by emphasising that the key definitional feature of forced labour is involuntariness.

²⁵² IOM 2007:24; UN.GIFT 2008a:2.

provisions in this Act. However, the concern remains that, in serious human trafficking cases, stringent sentences are necessary, whereas this Act provides only for a maximum term of imprisonment of three years for contravening the provisions discussed above.²⁵³

4.2.2.5 *Child Care Act 74 of 1983*

Although the provisions of the *Child Care Act 74 of 1983* (*Child Care Act*) were repealed *in toto* by the *Children's Act 38 of 2005* on 1 April 2010, the Act may still be used by the prosecution in trafficking cases occurring prior to this date.²⁵⁴ Aiming at the protection and welfare of children, the *Child Care Act* criminalised various forms of abusive behaviour towards children. As a rule, trafficked children are subjected to exploitation. Therefore, in prohibiting the ill-treatment of children, this Act may be used to prosecute perpetrators who exploited and ill-treated trafficked children.²⁵⁵ In addition, since the Act prohibited the commercial sexual exploitation of children,²⁵⁶ it may therefore find application in cases where children were trafficked for such exploitation.

²⁵³ The maximum penalties for the contravention of the provisions in this Act are set out in section 93.

²⁵⁴ Schedule 4 to the *Children's Act 38 of 2005*; Kassan 2007:18–10.

²⁵⁵ Section 50(1) Any parent or guardian of a child or any person having the custody of a child who -
(a) ill-treats that child or allows it to be ill-treated; or
(b) abandons that child,
or any other person who ill-treats a child, shall be guilty of an offence.

²⁵⁶ Section 50A(1) "Commercial sexual exploitation" means the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person.

4.2.2.6 *Children's Act* 38 of 2005

In line with the standard that children are entitled to special care and assistance as laid down in the 1948 Universal Declaration of Human Rights,²⁵⁷ the *Children's Act* 38 of 2005 (*Children's Act*) regulates the care and protection of children comprehensively.²⁵⁸ One of the main aims of the *Children's Act* is to give effect to certain rights of children as contained in the Constitution.²⁵⁹ The offences created in this Act²⁶⁰ are in operation and include the criminalisation of the abuse or deliberate neglect of a child by persons with parental responsibilities as well as by others who voluntarily care for the child.²⁶¹ The Act defines "abuse" broadly to mean:

...any form of harm or ill-treatment deliberately inflicted on a child, and includes –

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the

²⁵⁷ See article 25(2) of this Declaration – <http://www.un.org/Overview/rights.html> (accessed 18/8/2008); Bassiouni 1990/1991:482; Brownlie and Goodwin-Gill 2006:23.

²⁵⁸ Long title of, and Preamble to, the Act; Bosman-Sadie and Corrie 2010:2-313; Boezaart 2009:3. For a discussion of the trafficking provisions contained in the *Children's Act* see 4.3.2.1 below.

²⁵⁹ Long title of, and Preamble to, the Act; see also Human 2009:243-290; Bosman-Sadie and Corrie 2010:14-15.

²⁶⁰ Section 305; Bosman-Sadie and Corrie 2010:303-306.

²⁶¹ Section 305(3); Minniet 2009:540-541.

child psychologically or emotionally.²⁶²

It has been reported that not only strangers but also parents and family members are involved in child trafficking.²⁶³ During the trafficking process, children are often exposed to the ill-treatment prohibited in section 305(3) of this Act, such as physical and sexual abuse, labour exploitation, and circumstances that are psychologically and emotionally harmful.²⁶⁴ This section can therefore be applied to persons with parental responsibilities and to caregivers who ill-treat trafficked children in their care.²⁶⁵

4.2.2.7 *Prevention of Organised Crime Act 121 of 1998*

In short, organised crime involves the cooperation of several persons in order to commit crimes. To combat organised crime is challenging because of the effective organisation of these criminal groups and because of their criminal expertise, resourcefulness, efficient use of the latest technology and expansion over regions and even continents.²⁶⁶ For this reason, the criminal justice system adopted an innovative approach aimed at eliminating the organisation and the proceeds of crime rather than punishing only the individual criminal.²⁶⁷ Ackerman J summarised

²⁶² Section 1; Bosman-Sadie and Corrie 2010:2; Minnie 2009:540-541.

²⁶³ Obokata 2006:46; Raymond 2002:493; Kreston 2007:39; SALRC 2004:1.

²⁶⁴ IOM 2006:14-15; US Department of State 2008:5; GAATW 1999a:122.

²⁶⁵ Minniert 2009:540-541.

²⁶⁶ Kruger 2008:1, 3-4. Gastrow 2001:11-19, 39-65 analyses organised crime in general in the Southern African Development Community (SADC), with some reference to trafficking in women and children – Gastrow 2001:40-42; see also HSRC 2010:9.

²⁶⁷ Kruger 2008:1.

this new paradigm in *NDPP and Another v Mohamed and Others* as follows:

It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice... . [I]t is now widely accepted in the international community that criminals should be stripped of the proceeds of their crime, the purpose being to remove the incentive for crime, not to punish them.²⁶⁸

This approach has been adopted by the *Prevention of Organised Crime Act* 121 of 1998 (*Prevention of Organised Crime Act*) (POCA).²⁶⁹ With the key aim of curbing the scourge of organised crime,²⁷⁰ the Act covers various issues related to organised crime activities, such as racketeering, gang-related offences, money-laundering and asset forfeiture.²⁷¹ This Act criminalises organised crime activities and defines a “criminal gang” widely to include:

...any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol,

²⁶⁸ *NDPP and Another v Mohamed and Others* 2002 (2) SACR 196 (CC):203-204 paragraphs 15-16.

²⁶⁹ For an in-depth discussion of this Act, see Kruger 2008:11-162; Burchell 2005:970-1019.

²⁷⁰ Preamble to the Act; Kruger 2008:9. For a study undertaken on organised crime in the SADC region, see Gastrow 2001:1-89.

²⁷¹ Kruger 2008:8, 11-124; Burchell 2005:973, 976-1011; IOM 2009a:87; Gastrow 2001:31-33; *S v De Vries and Others* 2009 (1) SACR 613 (C): 619D-624H, 628H-629F

and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.²⁷²

Raymond,²⁷³ Dawes *et al.*²⁷⁴ and Obokata²⁷⁵ report that organised criminal groups are increasingly associated with human trafficking, primarily in order to make huge illegal profits.²⁷⁶ The increased involvement of organised criminal groups in human trafficking poses a substantial threat not only to victims but also to national and international security and stability.²⁷⁷

In appropriate circumstances, the *Prevention of Organised Crime Act* may be used as a tool to deal with money-laundering and with criminal gang and racketeering activities in human trafficking cases.²⁷⁸ In the ground-breaking case of *S v Sayed and Another*,²⁷⁹ the prosecution secured a conviction on charges of managing an enterprise,²⁸⁰ money-

²⁷² Section 1.

²⁷³ Raymond 2002:493. These criminal groups are widespread and expand over continents, for example an estimated 5 000 organised criminal groups constitute the Russian Mafia alone – Raymond 2002:493. As regards organised crime in the South African context, criminal gang activity is rife, especially in the Western Cape, where it is estimated that there are about 100 000 gang members on the Cape Flats – Kruger 2008:54-55.

²⁷⁴ Dawes *et al.* 2007:259.

²⁷⁵ Obokata 2006:46-47.

²⁷⁶ Melvin 2006:22; International Crime and Terrorism 2004:1.

²⁷⁷ Singh 2004:344-345; The Future Group 2007b:2; Dougherty and Burke 2008:13; Lee 2007:2.

²⁷⁸ IOM 2009a:87; Mnisi 2008:21; HSRC 2010:52. Gastrow 2001:41, in a study on organised crime in the SADC countries, confirms the cross-border trafficking in women and children in South Africa.

²⁷⁹ Judgment was delivered on 18 March 2010 in *S v Sayed and Another*, unreported case no. 041/2713/2008 in the Durban Regional Court.

²⁸⁰ Section 2(1) Any person who -

laundering,²⁸¹ and acquiring, using or possessing the proceeds of illegal activities²⁸² in terms of this Act.²⁸³ The convictions pertained to trafficking-related activities where Thai women were recruited in Thailand to work as sex workers at a brothel in South Africa.²⁸⁴ The accused, who managed the brothel, retained the passports of the Thai women as security until the women complied with the terms of their so-called

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- (f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;
within the Republic or elsewhere, shall be guilty of an offence.

- ²⁸¹ Section 4 Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and -
- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect -
- (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
[Para. (i) substituted by s. 6(b) of Act 24 of 1999.]
- (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -
- (aa) to avoid prosecution; or
- (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
- shall be guilty of an offence.

- ²⁸² Section 6 Any person who -
- (a) acquires;
- (b) uses; or
- (c) has possession of,
- property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

²⁸³ *S v Sayed and Another*, unreported case no. 041/2713/2008:1-2.

²⁸⁴ *S v Sayed and Another*, unreported case no. 041/2713/2008:5.

“contract” by generating the amount of R60 000 each from prostitution for the accused.²⁸⁵

In addition, the Act may also be utilised to take the profit out of human trafficking. This can be done by recovering the proceeds of unlawful activities, as well as by the civil forfeiture of criminal assets that have either been used to commit an offence or are the proceeds of such an offence.²⁸⁶ For example, the brothel or building accommodating the persons trafficked into forced prostitution is an instrumentality of the offence of keeping a brothel²⁸⁷ and may be forfeited in terms of this Act.²⁸⁸

²⁸⁵ HSRC 2010:52; *S v Sayed and Another*, unreported case no. 041/2713/2008:5-6. In *S v Mudaly and Others*, unreported pending case no. 41/890/2007 in Durban, the accused is also standing trial for offences in terms of the *Prevention of Organised Crime Act 121 of 1998* – personal communications with the prosecutor in the case, Advocate V Lotan, NPA.

²⁸⁶ The Act provides for various restraint orders (section 26), confiscation orders (section 18) and realisation orders (sections 30-33), as well as for civil preservation (sections 38-39) and forfeiture orders (section 50) for the recovery of property; see also Kruger 2008:59-124; SALRC 2008:23; SOCA Unit (NPA) 2009:2. The Asset Forfeiture Unit (AFU) within the NPA deals with the seizure of “criminal assets that are proceeds of crime or have been involved in the commission of a crime either through a criminal or civil process” – NPAa 2010:33-35; HSRC 2010:52-53.

²⁸⁷ *Sexual Offences Act 23 of 1957*: section 2.

²⁸⁸ In *National Director of Public Prosecutions v Geysler and Another* 2008 (2) SACR 103 (SCA): paragraphs 16-17, 31, 36, the Court found that immovable property bought, revamped and used only for the purpose of the offence of keeping a brothel in contravention of section 2 of the *Sexual Offences Act 23 of 1957* constituted an instrumentality of the offence of keeping a brothel. For this reason, the specific building may be forfeited under the *Prevention of Organised Crime Act 121 of 1998*, and such forfeiture is not disproportionate, but serves the remedial purpose of the Act to curb crime that is undertaken as a business – Mnisi 2008:22. The Supreme Court of Appeal provided further clarity by stating that “in giving meaning to ‘instrumentality of an offence’ the focus is not on the state of mind of the owner, but on the role the property plays in the commission of the crime” – *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA):226 paragraph 21; see also Mnisi 2008:23.

4.2.2.8 *Prevention and Combating of Corrupt Activities Act 12 of 2004*

Corrupt activities are typically part of human trafficking offences.²⁸⁹ Such corrupt activities can be punished under the *Prevention and Combating of Corrupt Activities Act 12 of 2004*, which provides for the strengthening of measures to prevent and combat corruption.²⁹⁰ The Act unbundles the crime of corruption by creating a general, broad and all-encompassing offence of corruption, as well as various specific offences relating to different corrupt activities.²⁹¹

The gist of the general offence of corruption is the offering or giving of a benefit to another to act illegally or dishonestly, or to violate a legal duty, as well as the receiving of, or agreement to receive, a benefit for such a purpose.²⁹² Other offences in the Act include the corruption of public officers, judicial officers, prosecutors and witnesses.²⁹³ Corruption used to facilitate human trafficking can indeed be punished by means of these anti-corruption offences.

²⁸⁹ Haynes 2004:226, 229; Brennan 2005:42; Foundation Against Trafficking in Women *et al.* 2001:4; Singh 2004:344; UNODC 2006:xxi; GAATW 1999a:13; UN.GIFT 2008b:14; Shelley 2007:122.

²⁹⁰ Long title of the Act.

²⁹¹ Sections 3-21; Snyman 2008:411-426; Burchell 2005:891-895.

²⁹² Section 3; Snyman 2008:411-423; Burchell 2005:892-893.

²⁹³ Sections 4-21; Snyman 2008:423-426; Burchell 2005:893-895.

On conviction of most of the abovementioned offences, the Act provides for stringent sentences by stipulating that such convicted person is liable to:

- (a) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;
- (b) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or
- (c) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.²⁹⁴

4.2.2.9 *Drugs and Drug Trafficking Act 140 of 1992*

McClain and others report that criminal gangs involved in human trafficking also commit other serious crimes, such as drug trafficking.²⁹⁵ To facilitate the smooth running of their trafficking operation, traffickers often administer drugs to their victims to make them compliant and facilitate control over them.²⁹⁶

The *Drugs and Drug Trafficking Act 140 of 1992* criminalises the possession of, as well as the trafficking in, certain drugs²⁹⁷ and can thus be used to punish traffickers involved in such drug-related offences. The punishment for drug trafficking offences is severe and imprisonment of

²⁹⁴ Section 26(1) provides for these sentences on conviction in terms of sections 3-16, 18 or 21; Burchell 2005:895.

²⁹⁵ McClain 2007:581; UNODC 2006:xix; Kreston 2007:38; Morawska 2007:101; Shelley 2007:123.

²⁹⁶ Haynes 2004:226; Gajic-Veljanoski and Stewart 2007:341; US Department of State 2007:28.

²⁹⁷ Sections 4 and 5.

up to 25 years can be imposed for trafficking in dangerous and undesirable dependence-producing substances such as cannabis, heroin and morphine.²⁹⁸

4.2.2.10 *Human Tissue Act 65 of 1983*

The trafficking of persons for the removal of their body parts is a documented form of human trafficking.²⁹⁹ Apart from using this form of trafficking for illegal organ and tissue transplants, the 2008 study of the International Organization for Migration (IOM) on in-country trafficking in South Africa suggests the existence of trafficking for body parts, including eyes, tongues and genitals, to be used in traditional African potions.³⁰⁰

For the interim period until Chapter 8 of the *National Health Act 61 of 2003* comes into operation, the *Human Tissue Act 65 of 1983*³⁰¹ regulates organ transplants and sets requirements for the removal of tissue, blood and gametes from the bodies of living persons.³⁰² Apart from payment to authorised persons or institutions, the Act prohibits payment for the “acquisition or supply of any tissue or gamete for or to

²⁹⁸ Section 17.

²⁹⁹ IOM 2008:60-63; Dottridge and Weissbrodt 1999:282; UN.GIFT 2008b:4; Ncube 2008:4; Hodgkin and Newell 2002:527; Snyman 2005:284; Fellows 2008:7, 46.

³⁰⁰ IOM 2008:60-63; see also SALRC 2006:30; Snyman 2005:284-285; Fellows 2008:7, 29-31, 46; and the discussion in 2.2.2.3.2.e in Chapter 2 above.

³⁰¹ The *Human Tissue Act 65 of 1983* has been repealed by section 93(1) of the *National Health Act 61 of 2003*. Although most sections of the *National Health Act* have been in force since 2005, Chapter 8 of this Act, which contains provisions relevant to the present study, is not yet in operation – Government Gazette no. 27503 of 18 April 2005, Proclamation no. R.19; Government Gazette no. 33187 of 14 May 2010, Proclamation no. R.20.

³⁰² Sections 18-23; Slabbert 2009:510-511; Fellows 2008:42.

another person” for medical or dental purposes.³⁰³ In applicable cases, this Act may be used to prosecute persons for conduct related to the trafficking of persons for the removal of their body parts.³⁰⁴ While this Act prohibits the removal of tissue from living bodies in any other manner or for any other purpose than is prescribed in the Act, the punishment for such an offence is a fine of up to R2 000 or imprisonment for a period not exceeding one year, or both.³⁰⁵ This punishment is not sufficiently severe at all to deter traffickers who practise, and profit from, this type of trafficking.³⁰⁶

4.2.2.11 *National Health Act 61 of 2003*

Similar to the *Human Tissue Act 65 of 1983 (Human Tissue Act)*, the *National Health Act 61 of 2003* also criminalises commerce in human tissue.³⁰⁷ Apart from other provisions, payment for the acquisition or

³⁰³ Section 28(1) No person except -
(a) an authorized institution or, in the case of tissue or gametes imported in terms of this Act, the importer concerned, may receive any payment in respect of the import, acquisition or supply of any tissue or gamete for or to another person for any of the purposes referred to in section 4 (1) or 19;
(b) a prescribed institution or person may receive any payment in respect of the import or acquisition for or the supply to another person of blood or a blood product,
and any such payment which has been received, shall be refundable to the person who made it.
(2) The provisions of subsection (1) shall not prevent a medical practitioner or dentist from receiving remuneration for professional services rendered by him to any person.

The purposes for which the Act allows the removal of tissue or other body parts are stipulated in sections 4(1) and 19; see also Fellows 2008:42.

³⁰⁴ UN.GIFT 2008b:2; Hodgkin and Newell 2002:523.

³⁰⁵ Section 34; Fellows 2008:42.

³⁰⁶ Parliamentary Committee: Justice and Constitutional Development 2010b:8; Fellows 2008:42.

³⁰⁷ Section 60; Slabbert 2009:511.

supply of tissue, blood, blood products or gametes is strictly regulated.³⁰⁸

The Act stipulates that it is an offence “to sell or trade in tissue, gametes, blood or blood products” and provides for imprisonment of up to five years for the commission of such offence.³⁰⁹ In applicable circumstances, conduct related to trafficking for the removal of body parts may be prosecuted under this Act, when the relevant sections of the Act comes into operation.

A concern is the fact that the Act does not criminalise the possession of human tissue or human blood. Cases where a person is found in possession of for example, a human head, genitals or other human body

³⁰⁸ Section 60(1) No person, except -
(a) a hospital or an institution contemplated in section 58 (1) (a), a person or an institution contemplated in section 63 and an authorised institution or, in the case of tissue or gametes imported or exported in the manner provided for in the regulations, the importer or exporter concerned, may receive payment in respect of the acquisition, supply, importation or export of any tissue or gamete for or to another person for any of the purposes contemplated in section 56 or 64;
(b) a person or an institution contemplated in section 63 or an authorised institution, may receive any payment in respect of the importation, export or acquisition for the supply to another person of blood or a blood product.
(2) The amount of payment contemplated in subsection (1) may not exceed an amount which is reasonably required to cover the costs involved in the importation, export, acquisition or supply of the tissue, gamete, blood or blood product in question.
(3) This section does not prevent a health care provider registered with a statutory health professional council from receiving remuneration for any professional service rendered by him or her.

³⁰⁹ Section 60(4) It is an offence for a person -
(a) who has donated tissue, a gamete, blood or a blood product to receive any form of financial or other reward for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide such donation; and
(b) to sell or trade in tissue, gametes, blood or blood products, except as provided for in this Chapter.
(5) Any person convicted of an offence in terms of subsection (4) is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

See also Slabbert 2009:511.

parts, are problematic. The law is not clear on how to deal with instances where a person is found in possession of tissue or human blood, but it cannot be proven that the person found in possession of such tissue or blood has killed the person to whom such tissue or blood belongs or has the intention to sell or trade in such tissue or blood.³¹⁰

Another concern is that the *National Health Act* does not provide for stringent punishment. Although the penalty for trading in human tissue or blood is increased from a maximum term of imprisonment of one year in terms of the *Human Tissue Act* to five years under this Act, it is doubtful whether the penalty is of such a nature that it will successfully deter individual offenders or members of society in general from committing this crime.

4.2.2.12 *Domestic Violence Act 116 of 1998*

In certain circumstances, a trafficked victim may qualify for the protection provided for in the *Domestic Violence Act 116 of 1998 (Domestic Violence Act)*.³¹¹ This Act provides protection in the form of a protection order to a person who qualifies as a “complainant”.³¹² A “complainant” is defined as any person who is, or has been, in a “domestic relationship” with the respondent (trafficker) and who is subjected to an act of

³¹⁰ Personal communications with Advocate L Stuurman, South African Law Reform Commission.

³¹¹ For a further discussion of this Act, see Hoosen 1999:143-149; Anderson 2001:40-41; Kruger 2004:152-173.

³¹² Section 4(1) Any complainant may in the prescribed manner apply to the court for a protection order.

“domestic violence”.³¹³ Both the terms “domestic relationship”³¹⁴ and “domestic violence”³¹⁵ are broadly defined in the Act.

First, an act of “domestic violence” includes intimidation and numerous forms of abuse such as physical, sexual, emotional, psychological, verbal and economic abuse.³¹⁶ These abuses are of the same kind that trafficked victims most often have to endure from their traffickers and

³¹³ Section 1 defines the term “complainant” as “any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant”.

³¹⁴ Section 1 “Domestic relationship” means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence.

³¹⁵ Section 1 “Domestic violence” means -

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

³¹⁶ Section 1.

thus it may be proven that the victim was subjected to an act of “domestic violence”.

Secondly, numerous relationships qualify as a “domestic relationship” in terms of this Act. In some circumstances, the relationship between a trafficker and the trafficked victim may also constitute such a “domestic relationship”. For example, a “domestic relationship” exists where a complainant and a respondent are in an “actual or perceived romantic relationship of any duration”.³¹⁷ Such relationship may exist where the trafficker pretends to be the victim’s boyfriend as a disguised method of recruiting and controlling the victim for exploitative purposes.³¹⁸ Another example is that where the parties are family members related by consanguinity, affinity or adoption.³¹⁹ Thus, perpetrators who traffic their children or other family members will also fall within a “domestic relationship”. Also, a “domestic relationship” exists where a complainant (victim) and a respondent (trafficker) share, or recently shared, the same residence, for example where the perpetrator is a brothel owner sharing, or who previously shared, the same residence with the victim of trafficking.³²⁰

From the above discussion it is clear that, in certain circumstances, the trafficked person may qualify as a “complainant” in terms of this Act and

³¹⁷ Section 1.

³¹⁸ SALRC 2008:22.

³¹⁹ Section 1.

³²⁰ SALRC 2008:22.

may obtain a protection order against a trafficker to protect him or her from further acts of “domestic violence”. If the trafficker does not comply with a protection order that prohibits him or her from subjecting the victim to acts of domestic violence, he or she may then be prosecuted in terms of the *Domestic Violence Act*.³²¹

The protection afforded in terms of the *Domestic Violence Act* may be applicable in some human trafficking cases and may then be useful, in particular, in preventing the offender from contacting the trafficked person and subjecting the victim to any form of domestic violence.

4.2.2.13 *Films and Publication Act 65 of 1996*

The *Films and Publication Act 65 of 1996*, as amended, regulates the creation, production, possession and distribution of specific publications and films by means of classification, the imposition of age restrictions and the provision of consumer advice.³²² In addition, children are specifically protected against sexual exploitation or degradation by criminalising the exploitative use of children in pornographic publications and films or on the internet.³²³ The Act provides for numerous offences, including the possession or creation of a film or publication which

³²¹ Section 17 Notwithstanding the provisions of any other law, any person who -
(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7 ...
is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

³²² Section 2(a); Minnie 2009:537-538.

³²³ Section 2(b), read with section 27; Minnie 2009:537-538.

contains child pornography.³²⁴ Moreover, it is also punishable for a person with knowledge of an offence involving child pornography not to report it to the South African Police Service.³²⁵

Perpetrators involved in sex trafficking may distribute or possess child pornography, which includes the storage thereof on computer or by way of an electronic data-storage medium such as a memory stick or a compact disc.³²⁶ They may even use trafficked persons to create child pornography in publications, films or on the internet in order to advertise the services their victims provide.³²⁷ Such conduct can be successfully

³²⁴ Section 27(1)(a) Any person shall be guilty of an offence if he or she -
(i) is in possession of;
(ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
(iii) imports or in any way takes steps to procure, obtain or access; or
(iv) knowingly exports, broadcasts or in any way distributes or causes to be exported, broadcast or distributed, a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.

³²⁵ Section 27(2)(a) A person shall be guilty of an offence if he or she, having knowledge of the commission of an offence under subsection (1) or having reason to suspect that such an offence has been or is being committed -
(i) fails to report such knowledge or suspicion as soon as possible to a police official of the South African Police Service.

See also Minnie 2009:538.

³²⁶ Section 1 defines the term “possession”, in relation to a film or publication, and without derogating from its ordinary meaning, to include “keeping or storing in or on a computer or computer system or computer data storage medium and also having custody, control or supervision on behalf of another person”.

³²⁷ The term “child pornography” is broadly defined in section 1 of the Act and includes “any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years -
(i) engaged in sexual conduct;
(ii) participating in, or assisting another person to participate in, sexual conduct; or
(iii) showing or describing the body, or parts of the body, of such a person in a manner or

prosecuted under this Act. It is to be welcomed that persons convicted of creating a film or publication which contains child pornography or who are in possession of or distribute such material can be sentenced to imprisonment for up to 10 years.³²⁸

4.2.2.14 *Sexual Offences Act 23 of 1957*

Some provisions of the *Sexual Offences Act 23 of 1957*³²⁹ are still in operation and may apply in cases of human trafficking for sexual exploitation. The Act proscribes the keeping of a brothel,³³⁰ which is defined as any house or place kept for the purposes of having unlawful carnal intercourse or any other lewd or indecent purpose.³³¹ The Act further provides that certain persons are “deemed to keep a brothel”,³³² for example a person managing, or assisting in the managing, of a brothel or knowingly receiving money at a brothel.³³³ This section casts the net wide so that perpetrators sharing in the profits or assisting in the

in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.

³²⁸ Section 30(1)(A).

³²⁹ A number of sections of this Act were repealed by the *Sexual Offences Amendment Act 32 of 2007*, namely sections 9, 11, 12(2), 13-15, 18, 18A, 20A – see the Schedule to this Act.

³³⁰ Section 2; Minnie 2009:535. In the unreported case of *S v Sayed and Another*, case no. 041/2713/2008, referred to in 4.2.2.7 above, the accused were convicted of several offences in terms of the *Sexual Offences Act 23 of 1957*, including the keeping of a brothel.

³³¹ Section 1; Minnie 2009:534-535; see also *National Director of Public Prosecutions v Geyser and Another* 2008 (2) SACR 103 (SCA):116 where the Court ordered, in terms of the provisions of the *Prevention of Organised Crime Act 121 of 1998*, the forfeiture to the state of the immovable property used as a brothel in a criminal enterprise.

³³² Section 3(b)-(c).

³³³ Section 3.

running of a brothel as part of a trafficking scenario can also be prosecuted.

Offences that may find application in a human trafficking scenario, as was illustrated in *S v Sayed and Another*,³³⁴ are the procurement³³⁵ of a female in order to have unlawful carnal intercourse,³³⁶ living on the earnings of prostitution³³⁷ or the facilitation of prosecution.³³⁸ In addition,

³³⁴ In the unreported case of *S v Sayed and Another*, case no. 041/2713/2008, the accused were convicted on 18 March 2010 in the Durban Regional Court of contravening sections 2, 12A(1), 10, 17, 20(1)(a) and (c) of the *Sexual Offences Act* 23 of 1957; see also 4.2.2.7 above.

³³⁵ Minnie 2009:535. In *R v V* 1950 (4) SA 64 (SR):65, as regards the crime of procuring a woman to have unlawful sexual intercourse with another in terms of section 9(a) of the Criminal Law Amendment Act (S.R.), the Court explained the meaning of “to procure” as “to obtain a woman, to cause or bring about her availability for intercourse”; see also *S v Sayed and Another*, case no. 041/2713/2008:14.

³³⁶ Section 10 Any person who -

- (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- (c) procures or attempts to procure any female to become a common prostitute; or
- (d) procures or attempts to procure any female to become an inmate of a brothel; or
- (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,

shall be guilty of an offence.

³³⁷ Section 20(1) Any person who -

- (a) knowingly lives wholly or in part on the earnings of prostitution; or...
- (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,

shall be guilty of an offence.

This section was amended by the *Sexual Offences Amendment Act* 32 of 2007 – see section 68, read with the Schedule to this Act; Snyman 2008:353.

³³⁸ Section 12A(1) Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward, performs for

permitting premises to be used for purposes of prostitution is also criminalised in this Act.³³⁹

4.2.2.15 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

Human trafficking, especially for sexual exploitation, invariably involves sexual abuse of the trafficked person. With a multitude of sexual offences now included in a single statute, namely the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)*, this Act may be used successfully to prosecute and punish perpetrators involved in human trafficking for purposes of various acts of sexual exploitation.³⁴⁰

Although a detailed discussion of the wide array of offences contained in this Act falls outside the scope of this study, a brief overview is however given. Far-reaching law reforms were introduced by replacing the common law offences of rape and indecent assault with the extended

reward any act which is calculated to enable such other person to communicate with any such person, shall be guilty of an offence.

See also Minnie 2009:536.

³³⁹ Section 17 Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any offence against any provision of this Act, shall be guilty of an offence.

³⁴⁰ Minnie 2009:541-562; for a discussion of the trafficking provisions contained in the *Sexual Offences Amendment Act* see 4.3.2.2 below. As is pointed out in 4.2.1.1 above, the abuse of the *ukuthwala* tradition may overlap with human trafficking and also constitutes a number of offences which may be successfully prosecuted in terms of the *Sexual Offences Amendment Act 32 of 2007*; see also the discussion by McQuoid-Mason 2009:719-723.

statutory offences of rape³⁴¹ and sexual assault.³⁴² The exceptionally broad definitions of the prohibited conduct in both the offences of rape³⁴³ and sexual assault³⁴⁴ have increased the protection against sexual

³⁴¹ Section 3 Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.

For a discussion of the statutory offence of rape, see Snyman 2008:355-369; Minnie 2009:546-547; see also *State v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010):15 paragraph 22.

³⁴² Section 5 (1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.
(2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually violated, is guilty of the offence of sexual assault.

For a discussion of the statutory offence of sexual assault, see Snyman 2008:371-378; Minnie 2009:547-548.

³⁴³ The offence of rape prohibits “sexual penetration”, which is defined in section 1 to include “any act which causes penetration to any extent whatsoever by -
(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
(c) the genital organs of an animal, into or beyond the mouth of another person”.

See also Minnie 2009:546-547.

³⁴⁴ The offence of sexual assault prohibits “sexual violation”, which is defined in section 1 to include “any act which causes -

- (a) direct or indirect contact between the -
(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
(ii) mouth of one person and -
(aa) the genital organs or anus of another person or, in the case of a female, her breasts;
(bb) the mouth of another person;
(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could -
(aaa) be used in an act of sexual penetration;
(bbb) cause sexual arousal or stimulation; or
(ccc) be sexually aroused or stimulated thereby; or
(dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
(iii) mouth of the complainant and the genital organs or anus of an animal;

misconduct significantly. In addition, a number of offences against persons of 18 years and older are also provided for.³⁴⁵ These offences include engaging the sexual services of such persons³⁴⁶ or compelling them to witness sexual offences, sexual acts or self-masturbation,³⁴⁷ as well as the exposure of the genital organs, anus or female breasts (“flashing”)³⁴⁸ and the exposure of child pornography to persons 18 years

-
- (b) the masturbation of one person by another person; or
 - (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration”.

See also Minnie 2009:547-548.

³⁴⁵ Sections 8-11; see the discussion in Snyman 2008:381-387.

³⁴⁶ Section 11 A person (“A”) who unlawfully and intentionally engages the services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”) -

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
- (b) by committing a sexual act with B,

is guilty of engaging the sexual services of a person 18 years or older.

³⁴⁷ Section 8(1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.

- (2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch -
 - (a) A while he or she engages in a sexual act with C or another person (“D”); or
 - (b) C while he or she engages in a sexual act with D,
 is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.
- (3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation.

³⁴⁸ Section 9 A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of the genital organs, anus or female breasts of A or C to a complainant 18 years or older (“B”), without the consent of B, is

or older.³⁴⁹

Importantly, numerous offences have also been introduced to provide special protection for children.³⁵⁰ What is particularly useful for the purpose of prosecuting agents involved in child sex trafficking are the broadly defined offences of sexual exploitation,³⁵¹ promoting child sex tours³⁵² and sexual grooming of children.³⁵³ Burchell emphasises that the

guilty of the offence of exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a person 18 years or older.

³⁴⁹ Section 10 A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, exposes or displays or causes the exposure or display of child pornography to a complainant 18 years or older (“B”), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography to a person 18 years or older.

³⁵⁰ Sections 15-22; see the discussion in Snyman 2008:392-398; Minnie 2009:550-562.

³⁵¹ Section 17(1) 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”) -
(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
(b) by committing a sexual act with B,
is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child.

See also Minnie 2009:553-555.

³⁵² Section 17(6) A person (“A”), including a juristic person, who -
(a) makes or organises any travel arrangements for or on behalf of a third person (“C”), whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a child complainant (“B”), with or without the consent of B, irrespective of whether that act is committed or not; or
(b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual act with B,
is guilty of an offence of promoting child sex tours.

³⁵³ Section 18(2) A person (“A”) who -
(a) supplies, exposes or displays to a child complainant (“B”) -
(i) an article which is intended to be used in the performance of a sexual act;
(ii) child pornography or pornography; or

grooming of children so as to encourage and prepare them to commit sexual offences has become a serious concern in South Africa.³⁵⁴ Minnie points out that “grooming is a complex process to define”.³⁵⁵ Offenders use various methods to overcome a child’s resistance and to lure him or

-
- (iii) a publication or film, with the intention to encourage, enable, instruct or persuade B to perform a sexual act;
 - (b) commits any act with or in the presence of B or who describes the commission of any act to or in the presence of B with the intention to encourage or persuade B or to diminish or reduce any resistance or unwillingness on the part of B to -
 - (i) perform a sexual act with A or a third person (“C”);
 - (ii) perform an act of self-masturbation in the presence of A or C or while A or C is watching;
 - (iii) be in the presence of or watch A or C while A or C performs a sexual act or an act of self-masturbation;
 - (iv) be exposed to child pornography or pornography;
 - (v) be used for pornographic purposes as contemplated in section 20(1); or
 - (vi) expose his or her body, or parts of his or her body to A or C in a manner or in circumstances which violate or offend the sexual integrity or dignity of B;
 - (c) arranges or facilitates a meeting or communication with B by any means from, to or in any part of the world, with the intention that A will commit a sexual act with B;
 - (d) having met or communicated with B by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces B -
 - (i) to travel to any part of the world in order to meet A with the intention to commit a sexual act with B; or
 - (ii) during such meeting or communication or any subsequent meeting or communication to -
 - (aa) commit a sexual act with A;
 - (bb) discuss, explain or describe the commission of a sexual act; or
 - (cc) provide A, by means of any form of communication, including electronic communication, with any image, publication, depiction, description or sequence of child pornography of B himself or herself or any other person; or
 - (e) having met or communicated with B by any means from, to or in any part of the world, intentionally travels to meet or meets B with the intention of committing a sexual act with B,
- is guilty of the offence of sexual grooming of a child.

See also Minnie 2009:555-558.

³⁵⁴ Burchell 2005:739.

³⁵⁵ Minnie 2009:556-558.

her into sexual acts. Youths are ensnared into a so-called “friendship” or “love relationship” by means of communications, especially via the internet, and by way of meetings where gifts such as clothing, jewellery, music compact discs and cellphones are given freely as a token of “affection”.³⁵⁶ Once a trust relationship is established, children are typically provided with alcohol and drugs and are gradually introduced to sexual acts, which eventually develop into a demand for abusive sexual services.³⁵⁷

Other offences designed to protect children include the prohibition against children being used for child pornography³⁵⁸ and against children being exposed to child pornography or pornography.³⁵⁹ The Act also

³⁵⁶ Burchell 2005:739; Fritz 2009:5; Minnie 2009:556-558.

³⁵⁷ Fritz 2009:5; Burchell 2005:698, 739-740; Minnie 2009:556-558.

³⁵⁸ Section 20(1) A person (“A”) who unlawfully and intentionally uses a child complainant (“B”), with or without the consent of B, whether for financial or other reward, favour or compensation to B or to a third person (“C”) or not -
(a) for purposes of creating, making or producing;
(b) by creating, making or producing; or
(c) in any manner assisting to create, make or produce, any image publication, depiction, description or sequence in any manner whatsoever of child pornography,
is guilty of the offence of using a child for child pornography.
(2) Any person who knowingly and intentionally in any manner whatsoever gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as the result of the commission of any act contemplated in subsection (1), is guilty of the offence of benefiting from child pornography.

See also Minnie 2009:559.

³⁵⁹ Section 19 A person (“A”) who unlawfully and intentionally exposes or displays or causes the exposure or display of -
(a) any image, publication, depiction, description or sequence of child pornography or pornography;
(b) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of a sexual nature of a child, which may be disturbing or harmful to, or age-inappropriate for children, as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or in terms of any other legislation; or

provides special protection, similar to the protection for children, for persons who are mentally disabled.³⁶⁰

4.2.2.16 *Intimidation Act 72 of 1982*

To ensure their illegal profit, it is vital for traffickers that trafficked victims comply with their exploitative commands. Where victims are unwilling to comply, traffickers typically force them to submit to the exploitation by intimidating them through assault or threats of harm to themselves or to their loved ones.³⁶¹

The *Intimidation Act 72 of 1982 (Intimidation Act)* criminalises the conduct of a person who:

- (a) without lawful reason and with intent to compel or induce any person to do any act, assaults, injures or causes damage to any person; or in any manner threatens to kill, assault, injure or cause damage to any person; or
- (b) acts or conducts him or herself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences

-
- (c) any image, publication, depiction, description or sequence containing a visual presentation, description or representation of pornography or an act of an explicit sexual nature of a person 18 years or older, which may be disturbing or harmful to, or age-inappropriate, for children, as contemplated in the Films and Publications Act, 1996, or in terms of any other law, to a child ("B"), with or without the consent of B, is guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.

See also Minnie 2009:558-559.

³⁶⁰ Sections 23-26; Snyman 2008:398-400.

³⁶¹ SALRC 2008:21.

thereof would be that a person perceiving the act, conduct, utterance or publication fears for his or her own safety or the safety of his or her property or the security of his or her livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.³⁶²

At first glance it may appear that these provisions are applicable to trafficking agents as regards all intimidating acts committed against trafficked persons or their loved ones.³⁶³ However, it must be noted that the long title of this Act specifically stipulates that only certain forms of intimidation are criminalised by the *Intimidation Act*. In this regard, it was decided in *S v Motshari*³⁶⁴ that the literal rule of interpretation of section 1 of this Act:

...considered in isolation could lead to some absurdity. One has to cast this section in the context and scheme of the entire statute and to a lesser extent have regard to the historical development of this legislation.³⁶⁵

Accordingly, the Court held that the provisions of the *Intimidation Act* were not applicable to a quarrel between lovers in their dwelling, because such conduct did not involve riotous behaviour pertaining to an assembly of people, an industrial action or a security situation.³⁶⁶ Thus the

³⁶² Section 1(1).

³⁶³ Mnisi 2008:31.

³⁶⁴ *S v Motshari* 2001 (1) SACR 550 (NC).

³⁶⁵ *S v Motshari* 2001 (1) SACR 550 (NC):554B-C.

³⁶⁶ *S v Motshari* 2001 (1) SACR 550 (NC):550F-G, 551E-554B.

application of this Act to intimidating conduct in the trafficking process may be limited.

4.2.2.17 *International Co-operation in Criminal Matters Act 75 of 1996*
International judicial cooperation, in particular among countries of origin, transit and destination, is essential to combat human trafficking effectively, especially cross-border trafficking.³⁶⁷ The *International Co-operation in Criminal Matters Act 75 of 1996* contributes in this regard by facilitating cooperation between South Africa and foreign countries in criminal matters.³⁶⁸ These criminal matters include the mutual provision of evidence.³⁶⁹ In cases where it is in the interests of justice, the Act provides for the issuing of a letter requesting assistance from a foreign state in obtaining evidence from a person who is present in such a foreign state.³⁷⁰

This Act also facilitates the mutual execution of sentences and compensatory orders.³⁷¹ For example, where a person who is sentenced to the payment of a fine or of compensation to another person only has property in a foreign state from which the fine or compensation can be

³⁶⁷ David 2007:1; UNODC 2008:7; Planitzer 2009:17-18; UNODC 2009b:83; see also 3.6 in Chapter 6 above.

³⁶⁸ See the long title of the *International Co-operation in Criminal Matters Act 75 of 1996*.

³⁶⁹ See sections 2-12.

³⁷⁰ Article 2.

³⁷¹ See sections 13-18 of this Act.

recovered, the court may issue a letter of request in which assistance is sought in this regard from the relevant foreign state.³⁷²

Importantly, the Act further provides for the confiscation and transfer of the proceeds of crime between the Republic and foreign states.³⁷³ In terms of these provisions, assistance may be requested from a foreign state in order to execute a confiscation order, issued in South Africa, in a foreign state in which the person against whom the order is made owns property.³⁷⁴ A foreign state may, on the same basis, request South Africa to execute a foreign confiscation order in the Republic.³⁷⁵ These provisions may be used to ensure justice in some human trafficking cases, especially where confiscation orders against influential organised crime networks can only be enforced in another country in which the perpetrators own property.³⁷⁶

³⁷² Section 13.

³⁷³ Sections 19-26.

³⁷⁴ Section 19.

³⁷⁵ Section 20.

³⁷⁶ A number of sources have reported the involvement of organised criminal networks in human trafficking activities – Obokata 2006:46-47; Raymond 2002:493; Melvin 2006:22; International Crime and Terrorism 2004:1; Singh 2004:344-345; The Future Group 2007b:2; Dougherty and Burke 2008:13; Lee 2007:2. Kruger 2008:1, 8 emphasises the international approach that the proceeds of crime should be confiscated by state authorities to remove the incentive for crime; see also the discussion of the *Prevention of Organised Crime Act 121 of 1998* in 4.2.2.7 above; *NDPP and Another v Mohamed and Others* 2002 (2) SACR 196 (CC):203-204 paragraphs 15-16; Burchell 2005:970-1019.

4.3 The South African counter-trafficking response

Stuurman notes that applicable, existing legal remedies in South African common law and legislation lack full compliance with international counter-trafficking obligations.³⁷⁷ Hence, in response to the international obligations to combat human trafficking, different sectors in South Africa embarked upon counter-trafficking initiatives.³⁷⁸ This study does not cover all these initiatives, but focuses on significant legal initiatives pertaining in particular to criminal justice.

In 2003, the South African Police Service (SAPS) launched its own initiative by establishing a Human Trafficking Desk within the Organised Crime Unit of the SAPS.³⁷⁹ This Desk received a broad mandate, namely to manage, within the SAPS, coordination, liaison, training, monitoring and evaluation regarding human trafficking matters.³⁸⁰

Among a number of anti-trafficking initiatives pertaining to the broad criminal justice sector,³⁸¹ a national milestone was the establishment of

³⁷⁷ Stuurman 2004:5.

³⁷⁸ SALRC 2008:4; Smith 2008:11-21, 25; HSRC 2010:i.

³⁷⁹ HSRC 2010:10-11; SALRC 2008:4-5; UNODC 2009a:127.

³⁸⁰ HSRC 2010:10-11; SALRC 2008:4-5.

³⁸¹ Civil society stakeholders contribute indirectly to the criminal justice response by offering victims access to assistance and the possibility of reporting the crime by providing counter-trafficking helplines. In 2004, the International Organization for Migration (IOM) initiated a toll-free National Human Trafficking Helpline, namely 0800 555999, functioning from 07:00 to 22:00 daily, for reporting trafficking cases and for obtaining victim assistance – IOM 2004:1; SALRC 2008:6. Childline provides a 24-hour, toll-free child helpline at 0800 055555 or 0800 122333 – personal communication with M Ntsiuoa, social worker, Childwelfare/Childline FS on 18-3-2010, UFS, Bloemfontein. The Salvation Army also provides assistance at 08000 RESCU – personal communication with M. Venter, Co-ordinator: Anti-Human Trafficking Task

the National Inter-Sectoral Task Team on Human Trafficking by the government in December 2003.³⁸² Chaired by the Sexual Offences and Community Affairs Unit (SOCA) within the National Prosecuting Authority (NPA), the 10-member task team represents core governmental stakeholders, namely the NPA, the Departments of Justice and Constitutional Development, Labour, Home Affairs and Social Development, the SAPS Organised Crime Unit and the Border Police within the SAPS, as well as the International Organization for Migration (IOM), the United Nations Office on Drugs and Crime (UNODC) and the non-governmental organisation (NGO) Molo Songololo.³⁸³ The National Inter-Sectoral Task Team also meets quarterly with other stakeholders involved in the managing of trafficking and, collectively, they form the Trafficking in Persons Consultative Forum.³⁸⁴

The National Inter-Sectoral Task Team was mandated to develop and implement a coordinated national strategy for dealing with human trafficking.³⁸⁵ The objective of this National Strategy to Combat Human Trafficking through prevention, response, and support for victims is

Team, Salvation Army Southern Africa on 16-2-2010, Pretoria. Current facilities that can be utilised in trafficking cases, such as dedicated courts, Thuthuzela Rape Care Centres and other victim-support structures, are presently being upgraded – Smith 2007:17.

³⁸² HSRC 2010:11; Smith 2008:12; Molo Songololo 2008:xi; Leggett 2004b:4; NPA 2010a:48; NPA 2007:48; NPA 2006:43.

³⁸³ NPA 2010a:48; SALRC 2008:5; Molo Songololo 2008:ix; HSRC 2010:11.

³⁸⁴ SALRC 2008:5; Smith 2008:12; HSRC 2010:11. For a discussion of the Programme Steering Committee on Human Trafficking, see HSRC 2010:11.

³⁸⁵ NPA 2010a:48.

primarily to ensure full compliance with the Palermo Protocol.³⁸⁶ The six-pillar strategy covers information, capacity building and development, victim assistance and integration, policy and legislation development, liaison and consultation, and, finally, monitoring and evaluation.³⁸⁷ The national strategy is to be implemented by coordinating the efforts of the various sectors dealing with human trafficking, including relevant government departments, law enforcement agencies, civil society and other stakeholders.³⁸⁸

The three-year “Programme of Assistance to the South African Government to Prevent, React to Human Trafficking and Provide Support to Victims of Crime” (“Programme of Assistance to the South African Government”) is part of the national strategy and has five result areas.³⁸⁹ Linked to the information pillar of the national strategy, the first result area focuses on the deepening of knowledge and understanding of trafficking in South Africa by means of a multidisciplinary research study.³⁹⁰ Finalised in March 2010, the research study, entitled “Tsireledzani: Understanding the Dimensions of Human Trafficking in southern Africa”, covers various aspects of human trafficking in South

³⁸⁶ HSRC 2010:i. In 2009, at a conference in Durban hosted by the SOCA Unit within the NPA, the Tsireledzani initiative was launched and commenced the process of developing an integrated Human Trafficking National Action Plan – HSRC 2010:11-12.

³⁸⁷ NPA 2007:48; NPA 2006:43; NPA 2010a:48; SALRC 2008:5, 24-25.

³⁸⁸ IOM 2009a:103.

³⁸⁹ Smith 2008:12; NPA 2010a:48; PCU 2010:6.

³⁹⁰ This result area also covers the development of an intersectoral database, namely the Trafficking Information Management System (TIMS) – Smith 2008:13-14; SALRC 2008:24; see also the discussion in HSRC 2010:155-164; NPA 2010a:28; PCU 2010:7-8.

Africa.³⁹¹ The issues covered in Chapter 3 of the report, especially the relevant international and regional instruments, as well as the South African national legislative and policy framework on human trafficking, are of importance to the present study.³⁹²

The second result area of the “Programme of Assistance to the South African Government” aims at developing a coordinated, cross-sectoral response to human trafficking.³⁹³ To actualise this response, the Programme Coordinating Unit (PCU) was established in 2008 to support the National Task Team in the establishment of Provincial Task Teams³⁹⁴ and the development of a Human Trafficking National Action Plan.³⁹⁵ This result area also includes the establishment of the Victim Assistance Programme and regional cooperation mechanisms, as well as an Expert Response Team to monitor effectiveness.³⁹⁶

Focusing on capacity building and training, result area three covers the development of a SAQA-accredited (South African Qualifications Authority) curriculum for the “Train-the-Trainer” programme.³⁹⁷ The

³⁹¹ HSRC 2010:i-xi provides an executive summary of the research report. For comments on, and a critical review of, the research report, see Gould *et al.* 2010:37-45; see also NPA 2010a:28; NPA 2009:28; PCU 2010:7.

³⁹² HSRC 2010:18-51.

³⁹³ Smith 2008:16-17; SALRC 2008:24; PCU 2010:8-10.

³⁹⁴ HSRC 2010:12; NPA 2008:34; PCU 2010:6, 8.

³⁹⁵ Smith 2008:16; SALRC 2008:6; SOCA Unit (NPA) 2009:1; HSRC 2010:12; NPA 2009:28; PCU 2010:9.

³⁹⁶ Smith 2008:16-17; NPA 2010a:28; PCU 2010:8-9.

³⁹⁷ NPA 2010a:28; NPA 2009:28; PCU 2010:10-11.

curriculum includes a generic module on human trafficking as well as content-specific modules relevant to the key governmental stakeholders.³⁹⁸ This curriculum is for use in multidisciplinary training at numerous counter-trafficking workshops country-wide focusing on five key government departments, namely the Departments of Home Affairs, Social Development, Health, Justice and Constitutional Development, and the SAPS.³⁹⁹ Training support, as well as monitoring and evaluation of the training and trainees, also resorts under this focus area.

Result area four covers prevention, public education and awareness-raising by implementing prevention and public awareness programmes, as well as “low cost-high impact” regional prevention and awareness strategies.⁴⁰⁰ The last result area deals with the evaluation as well as annual financial and compliance audits.⁴⁰¹

To conclude, apart from supporting efforts to comply with the Palermo Protocol, the objectives of these detailed result areas are:

...to achieve greater capacity in South Africa to combat trafficking in persons, prosecute perpetrators and assist victims; and to develop a more effective, multi-sectoral and coordinated response to trafficking in persons.⁴⁰²

³⁹⁸ Smith 2008:18; SALRC 2008:24.

³⁹⁹ Smith 2008:18, 25; SALRC 2008:6.

⁴⁰⁰ Smith 2008:20; SALRC 2008:24; PCU 2010:11-13.

⁴⁰¹ Smith 2008:21; SALRC 2008:24; PCU 2010:13.

⁴⁰² SALRC 2008:24.

4.3.1 *Legislative reform process*

Human trafficking is a complex phenomenon that requires states to arm themselves with legislation to confront it as a serious crime committed by criminals and perpetrated against victims.⁴⁰³

A key initiative to combat human trafficking is the development of an effective national legal framework to bring perpetrators to book. For this reason, the charting, analysis and evaluation of the South African counter-trafficking legal framework is essential. Raymond rightly states that international and regional treaties alone are not sufficient to combat the crime of human trafficking.⁴⁰⁴ The provisions of treaties must be incorporated in an effective national legal response. Kassan⁴⁰⁵ emphasises that the ratification of international and regional instruments addressing the issue of human trafficking placed an obligation on South Africa to bring its domestic laws and policies in line with the standards laid down in these instruments. South African law must therefore be reviewed and, if necessary, amended, or new laws must be enacted, to give effect to the anti-trafficking standards, especially those drawn from the Palermo Protocol.⁴⁰⁶

Realising its obligations, the South African government commenced with the process of bringing its domestic laws in line with the minimum

⁴⁰³ UN.GIFT 2008e:29.

⁴⁰⁴ Raymond 2002:500.

⁴⁰⁵ Kassan 2007:18–3.

⁴⁰⁶ SALRC 2008:3-4, 11.

standards laid down for domestic responses. As a result, several legislative provisions relating to human trafficking have been enacted. However, the law on this topic is still fragmented. The *Children's Act 38 of 2005 (Children's Act)* and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)* both contain transitional provisions specifically dealing with certain aspects of trafficking in persons pending the promulgation of the *Prevention and Combating of Trafficking in Persons Bill*.⁴⁰⁷ In short, the *Sexual Offences Amendment Act* criminalises human trafficking, but only for the purpose of sexual exploitation.⁴⁰⁸ The *Children's Act* criminalises child trafficking for the purpose of any form of exploitation.⁴⁰⁹ The protection in the trafficking provisions of the Act does not apply to trafficked adults, because the *Children's Act* focuses on the protection of children only.⁴¹⁰ These trafficking provisions in the abovementioned two pieces of legislation will be repealed by their incorporation into the proposed comprehensive anti-trafficking legislation once it is enacted.⁴¹¹

⁴⁰⁷ SALRC 2008:11; Minnie 2009:561, Daksha and Mahery 2009:200-201.

⁴⁰⁸ SOCA Unit (NPA) 2009:2.

⁴⁰⁹ See the definition of "trafficking" in section 1 of the *Children's Act 38 of 2005*; Daksha and Mahery 2009:202-203.

⁴¹⁰ SOCA Unit (NPA) 2009:2; Daksha and Mahery 2009:200.

⁴¹¹ SALRC 2008:13; Minnie 2009:561, Daksha and Mahery 2009:201.

4.3.2 Current counter-trafficking provisions

4.3.2.1 Children's Act 38 of 2005

While the South African Law Reform Commission (SALRC) was still in the process of investigating law reform concerning human trafficking,⁴¹² interim provisions on trafficking in children were included in the *Children's Act 38 of 2005 (Children's Act)* in partial compliance with the Palermo Protocol.⁴¹³

The purpose of the trafficking provisions in Chapter 18 of this Act is to combat trafficking in children and to give effect to the Palermo Protocol,⁴¹⁴ which is incorporated into the law of the Republic.⁴¹⁵

In short, the *Children's Act* creates two main trafficking offences. First, the trafficking of children by natural or juristic persons for an exploitative purpose is criminalised.⁴¹⁶ Such trafficking is regarded as a serious offence and, therefore, imprisonment of up to 20 years may be imposed.⁴¹⁷ Additional protection for children is provided, in that it is no

⁴¹² SALRC 2004:1-3; SALRC 2006:1; SALRC 2008:7; Kassan 2007:18–9.

⁴¹³ SALRC 2006:3; Kassan 2007:18–10; Daksha and Mahery 2009:200; HSRC 2010:41.

⁴¹⁴ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008); Dawes *et al.* 2007:250; Daksha and Mahery 2009:200; Bosman-Sadie and Corrie 2010:285; HSRC 2010:42.

⁴¹⁵ See sections 281-282 of the *Children's Act 38 of 2005*; Kassan 2007:18–13, 14; Dawes *et al.* 2007:247; Daksha and Mahery 2009:200; Bosman-Sadie en Corrie 2010:285; HSRC 2010:42.

⁴¹⁶ Section 284(1) No person, natural or juristic, or a partnership may traffic a child or allow a child to be trafficked.
See also SALRC 2008:12; Kassan 2007:18–15-16; Daksha and Mahery 2009:203; Bosman-Sadie and Corrie 2010:286-287; HSRC 2010:42.

⁴¹⁷ Section 305(1) and (8); Kassan and Mahery 2009:203.

defence for the perpetrator that the child, or the person having control over the child, has consented to the exploitation or illegal adoption or that the intended exploitation or adoption did not occur.⁴¹⁸ The Palermo Protocol's obligation to criminalise attempts, participation as accomplices, and organising or directing others to commit this crime is covered by existing legislation on attempt, conspiracy, and incitement to commit a crime.⁴¹⁹

Apart from criminalising the crime of trafficking, the Act also criminalises certain behaviour facilitating trafficking in children in order to cast the net wide enough so as to include the various role players that usually profit from this crime.⁴²⁰ On conviction of this crime of facilitating trafficking in children, a maximum of 10 years' imprisonment may be imposed.⁴²¹ In short, the prohibited behaviour entails leasing any property for the purpose of harbouring a trafficked child or distributing information alluding to trafficking. Further, internet service providers are required to report any site on their servers that contains such prohibited information.⁴²²

⁴¹⁸ Section 284(2); Kassan 2007:18–16; Kassan and Mahery 2009:203; Bosman-Sadie and Corrie 2010:287.

⁴¹⁹ Section 18 of the *Riotous Assemblies Act* 17 of 1956; Snyman 2008:283-305; Burchell 2005:619-657; see also 4.2.2.1 above.

⁴²⁰ Section 285; Daksha and Mahery 2009: 203-204; Bosman-Sadie and Corrie 2010:287-288.

⁴²¹ Section 305(6). If a person is convicted more than once of this offence, the sentence may be increased to a maximum of 20 years' imprisonment – section 305(7); SALRC 2008:12.

⁴²² Section 285(1) No person, natural or juristic, or a partnership, may -
(a) knowingly lease or sublease or allow any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and
(b) advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of

The definition in the *Children's Act* of the term “trafficking”⁴²³ in relation to a child is similar to the definition of “trafficking in persons” contained in the Palermo Protocol.⁴²⁴ However, there are a number of differences between the definitional formulations. First, the definition in the *Children's Act* is somewhat broader, in that the terms “sale” and “supply” are added as prohibited actions. Secondly, adoption secured through illegal means is also included in the definition of trafficking in children.⁴²⁵ In agreement with Kassan,⁴²⁶ it must be pointed out that an “illegal adoption” means the “exploitation of the adoptive system and laws and not necessarily the exploitation of the adopted child”.⁴²⁷ Even where a child is illegally adopted, the adoptive parents may not have the intention to exploit the

information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.

- (2) Every Internet service provider operating in the Republic must report to the South African Police Service any site on its server that contains information in contravention of subsection (1).

See also Kassan 2007:18–17-18; Daksha and Mahery 2009:203; Bosman-Sadie and Corrie 2010:287-288; HSRC 2010:42.

- ⁴²³ Section 1 “trafficking”, in relation to a child -
- (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic -
- (i) by any means, including the use of threat, force or 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 a child; or
- (ii) due to a position of vulnerability, for the purpose of exploitation; and
- (b) includes the adoption of a child facilitated or secured through illegal means.

⁴²⁴ Article 3(a) – Addendum A; Kassan 2007:18–10-11, 16; Dawes *et al.* 2007:251-252; Bosman-Sadie and Corrie 2010:285; HSRC 2010:42.

⁴²⁵ Section 1; SALRC 2008:13; HSRC 2010:42. For a critical view on the insertion of the illegal adoption of a child into the definition of “trafficking”, see Daksha and Mahery 2009:202-203.

⁴²⁶ Kassan 2007:18–12.

⁴²⁷ Kassan 2007:18–12.

child at all. Such illegal adoptions must be distinguished from illegal adoptions that constitute trafficking in children in terms of the *Children's Act*. For an illegal adoption to qualify as trafficking, an interpretation should be followed in line with that in the Palermo Protocol, namely that the primary intention of the illegal adoption must be to exploit the child.⁴²⁸

Thirdly, the definition of trafficking in the *Children's Act* also differs from the provision in the Palermo Protocol regarding the so-called "means" element.⁴²⁹ The "means" element in the Palermo Protocol requires that the perpetrator must use at least one of the listed improper means, such as force, threat, fraud or deception, in committing the prohibited action.⁴³⁰ In the case of the trafficking of adults, the Palermo Protocol requires the presence of the means element to constitute human trafficking, but not for the trafficking of a child under the age of 18 years.⁴³¹ In providing special protection for children, the Palermo Protocol lays down that the prescribed action element, namely the recruitment, transportation, transfer, harbouring or receiving of a child for the purpose of exploitation, constitutes trafficking in persons, even if none of the means set out in the

⁴²⁸ Daksha and Mahery 2009:202-203; Kassan 2007:18–12. The Official Interpretative Notes (*Travaux Préparatoires*) to the Palermo Protocol indicate that, "where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol" – UN General Assembly 2000: paragraph 66; see also Jordan 2002:9-10; 2.2.2.3.2.f in Chapter 2 above.

⁴²⁹ Bosman-Sadie and Corrie 2010:285.

⁴³⁰ Article 3(a) – Addendum A; SALRC 2006:14; Kassan 2007:18–16. For a discussion of this element, see 2.2.2.2 in Chapter 2 above.

⁴³¹ Article 3(a) and (c) – Addendum A; SALRC 2006:14; Kassan 2007:18–16.

definition were used.⁴³² Unlike the Protocol, the *Children's Act* provides that trafficking in children requires the prohibited action to be committed by “any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception” for the purpose of exploitation.⁴³³ One interpretation of “any means” is that no means are required for child trafficking, and thus the definition in the *Children's Act* corresponds with the definition in the Palermo Protocol. Then again, Kassan points out that a different interpretation of “any means” is that the *Children's Act* does require one of the specified means to be present to constitute trafficking in children.⁴³⁴ The latter interpretation is problematic, in that, if the means element is required for trafficking in children, it is not in line with the Palermo Protocol, which waives the means element in regard to child trafficking.⁴³⁵ The formulation of the “means” element in the definition of “trafficking” in the *Children's Act* has therefore been “criticised for creating a greater evidentiary burden” than is required by the Palermo Protocol.⁴³⁶

A fourth difference pertains to the definition of the term “exploitation” in the *Children's Act*, which is similar, but not identical, to that in the Protocol. Both definitions of “exploitation” implicitly cover trafficking for purposes of all types of exploitation. However, the Protocol stipulates that

⁴³² Article 3(c) – Addendum A; SALRC 2006:14.

⁴³³ Section 1; Daksha and Mahery 2009:202.

⁴³⁴ Kassan 2007:18–11; Daksha and Mahery 2009:202.

⁴³⁵ Kassan 2007:18–11; Daksha and Mahery 2009:202.

⁴³⁶ For a critical view on the “means” element in the definition of “trafficking” in the *Children's Act* 38 of 2005, see Daksha and Mahery 2009:202; Kassan 2007:18–11; HSRC 2010:42.

the term “exploitation” “includes at a minimum” certain examples of exploitative purposes.⁴³⁷ The *Children’s Act* also covers these examples of exploitation, but adds other examples as well, namely debt bondage, forced marriage, child labour and the removal of body parts.⁴³⁸

At first glance it seems that the Protocol and the *Children’s Act* also differ with regard to their scope of application. On the one hand, the Palermo Protocol applies to the prosecution of offences established in the Protocol,⁴³⁹ where those offences are “transnational in nature and involve an organised criminal group”.⁴⁴⁰ On the other, the *Children’s Act* applies to trafficking “within or across the borders of the Republic”.⁴⁴¹ With the inclusion of these words, the Act not only covers transnational trafficking in children to and from other countries, but also in-country trafficking within the borders of the Republic.⁴⁴² However, as has been indicated above,⁴⁴³ it must be borne in mind that the Protocol has to be interpreted together with the Organized Crime Convention, which provides that the offence of human trafficking must be established in domestic anti-trafficking legislation without requiring that transnational or organised

⁴³⁷ Article 3(a) – Addendum A; Daksha and Mahery 2009:202.

⁴³⁸ The Palermo Protocol recognises the removal of “organs” as an example of an exploitative purpose, which is a narrower concept than the removal of “body parts” listed in the *Children’s Act* – SALRC 2008:13.

⁴³⁹ Article 5.

⁴⁴⁰ Article 4.

⁴⁴¹ Section 1(a); Bosman-Sadie and Corrie 2010:286.

⁴⁴² Section 1(a); Kassan 2007:18–12.

⁴⁴³ See the discussion in 3.2.1 above.

crime elements be present.⁴⁴⁴ Therefore, although the scope of application seems different, the broader scope of the *Children's Act* in fact complies with the Palermo Protocol and the Organized Crime Convention.

Apart from creating trafficking offences, Chapter 18 of the Act also regulates other matters in regard to trafficking in children, such as the provision of international cooperation⁴⁴⁵ as well as extraterritorial jurisdiction.⁴⁴⁶ Underpinning the best-interests-of-the-child principle, the Act further provides for the safety of the trafficked child and specific assistance in returning the child to the Republic,⁴⁴⁷ as well as for referral⁴⁴⁸ and repatriation⁴⁴⁹ procedures. However, Kassan⁴⁵⁰ maintains that the provisions for assisting trafficked children in the *Children's Act*⁴⁵¹ do not fully comply with all the types of assistance that states parties are obliged to render or consider in terms of the Palermo Protocol.⁴⁵² Finally,

⁴⁴⁴ Article 34(2) of the Organized Crime Convention; see also UNODC 2009b:14; UNODC 2004:258-259, 275-276. Article 34(2) of the Convention is applicable to the Palermo Protocol, because article 1(3) of the Protocol provides that offences established in terms of the Protocol must be regarded as offences established in accordance with the Convention.

⁴⁴⁵ Section 283; Kassan 2007:18–14-15; SALRC 2008:13; Bosman-Sadie and Corrie 2010:285-286; HSRC 2010:42.

⁴⁴⁶ Section 291; SALRC 2008:13; Kassan 2007:18–22; Daksha and Mahery 2009:206; HSRC 2010:43.

⁴⁴⁷ Section 286; SALRC 2008:13; Bosman-Sadie and Corrie 2010:288-289; HSRC 2010:42.

⁴⁴⁸ Sections 288-289; Kassan 2007:18–20; SALRC 2008:13; Bosman-Sadie and Corrie 2010:290-291; HSRC 2010:42-43.

⁴⁴⁹ Section 290; Kassan 2007:18–21; Bosman-Sadie and Corrie 2010:291.

⁴⁵⁰ Kassan 2007:18–18.

⁴⁵¹ Section 286; HSRC 2010:42.

⁴⁵² Kassan 2007:18–18.

the *Children's Act* also provides that, when a court has “reason to believe” that parents or persons with parental responsibilities have trafficked a child, their parental responsibilities and rights may be suspended, with the child being placed “in temporary safe care, pending an inquiry by a children’s court”.⁴⁵³

The counter-trafficking provisions in the *Children's Act* make it possible to prosecute offenders for any type of trafficking where a child is the victim. What must be borne in mind, however, is that these provisions remain interim provisions and will be repealed by their incorporation into the proposed counter-trafficking legislation.⁴⁵⁴

4.3.2.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)* criminalises sexual abuse or exploitation comprehensively in a single statute.⁴⁵⁵ The Act aims to afford complainants involved in sexual offences “the maximum and least traumatising protection that the law can provide ... by establishing a co-operative response between all government

⁴⁵³ Section 287; Kassan 2007:18–19, 204; Bosman-Sadie and Corrie 2010:289; HSRC 2010:42-43.

⁴⁵⁴ SALRC 2006:3; Kassan 2007:18–10; Daksha and Mahery 2009:201.

⁴⁵⁵ Section 2; see also Minnie 2009:541-562; HSRC 2010:41; *State v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010):15 paragraph 22.

departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences”.⁴⁵⁶

Pending the adoption of legislation in full compliance with the Palermo Protocol, transitional anti-trafficking provisions are included in the *Sexual Offences Amendment Act* in partial compliance with South Africa’s international counter-trafficking obligations.⁴⁵⁷ Being operative from 16 December 2007, the anti-trafficking provisions in this Act are an important tool for prosecuting agents of human trafficking.

In partial compliance with the Palermo Protocol,⁴⁵⁸ the *Sexual Offences Amendment Act* criminalises conduct constituting trafficking in persons for sexual exploitation. The Act prohibits a person from trafficking any other person, without the consent of that person, for the purpose of sexual exploitation.⁴⁵⁹

The action and means elements of the term “trafficking” are defined similarly to those in the Palermo Protocol⁴⁶⁰ and include:

⁴⁵⁶ Section 2(d).

⁴⁵⁷ Section 70(1); Minnie 2009:561; HSRC 2010:41.

⁴⁵⁸ Article 5(1) of the Palermo Protocol; Minnie 2009:561.

⁴⁵⁹ Section 71(1) A person (“A”) who traffics any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.
See also Minnie 2009:561; UNODC 2009a:127; HSRC 2010:41.

⁴⁶⁰ Article 3(1) of the Palermo Protocol.

...the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of –

- (i) a threat of harm;
- (ii) the threat or use of force, intimidation or other forms of coercion;
- (iii) abduction;
- (iv) fraud;
- (v) deception or false pretences;
- (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
- (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage.⁴⁶¹

However, the exploitative purpose element in the *Sexual Offences Amendment Act* fails to comply with the Palermo Protocol, because it provides for an exploitative purpose of a sexual nature only, including:

...any form or manner of exploitation, grooming or abuse of a sexual nature 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.⁴⁶²

The issue of consent in the *Sexual Offences Amendment Act* is approached differently from that in the Palermo Protocol. The latter provides that consent of the trafficked person is irrelevant where any of

⁴⁶¹ Section 70(2)(b); HSRC 2010:41.

⁴⁶² Section 70(2)(b).

the prohibited means have been used or if the trafficked person is a child, who is defined as a person under the age of 18 years.⁴⁶³ On the other hand, the *Sexual Offences Amendment Act* stipulates that:

A person (“A”) who traffics any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.⁴⁶⁴

In sum, it is an offence to traffic a person “without the consent of” the trafficked person. By implication, this formulation of the offence may be interpreted so as to mean that, in certain circumstances, a person may validly consent to being trafficked.⁴⁶⁵ The Act expands on the “consent” issue by providing that the “consent” has to be a “voluntary or uncoerced agreement”.⁴⁶⁶ Unlike the Protocol, the Act proceeds to list a number of circumstances which would negate valid consent, but stipulates that this is not an exhaustive list of circumstances.⁴⁶⁷ These circumstances

⁴⁶³ Article 3(d) – Addendum A.

⁴⁶⁴ Section 1(1); Minnie 2009:561.

⁴⁶⁵ If this interpretation is correct, it conflicts with the statement on page 2 of the SOCA Unit's web page at <http://www.info.gov.za/issues/humantrafficking/documents/tsireledzani.pdf> (accessed 4/3/2010) that “consent by the victims is not a defence to the crime of human trafficking”.

⁴⁶⁶ Section 71(3); Minnie 2009:561-562.

⁴⁶⁷ Section 71(4) Circumstances in which B does not voluntarily or without coercion agree to being trafficked, as contemplated in subsection (3), include, but are not limited to, the following -

- (a) where B submits or is subjected to such an act as a result of any one or more of the means or circumstances contemplated in subparagraphs (i) to (vii) of the definition of trafficking having been used or being present; or
- (b) where B is incapable in law of appreciating the nature of the act, including where B is, at the time of the commission of such act -
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance,

include the use of the listed prohibited means, which brings the Act in line with the Protocol on this point. The Act further provides that children below the age of 12 years are not able to consent validly, because their consent is not regarded as being given “voluntarily or without coercion”.⁴⁶⁸ The question that arises is: what then is the position regarding alleged consent by children of age 12 to 17 years. The formulation on this issue in the *Sexual Offences Amendment Act* differs from the provision in the Palermo Protocol, which does not differentiate between children under and over 12 years, but defines a child as any person under the age of 18 years.⁴⁶⁹ Hence, it is submitted that this issue needs to be addressed in the proposed counter-trafficking legislation to bring it in line with the provisions in the Palermo Protocol.

Apart from requiring states parties to criminalise the main crime of human trafficking, the Palermo Protocol further requires the criminalisation of related crimes. The Protocol’s requirement that attempts to commit human trafficking be criminalised is already covered in South African law, since the attempt to commit any crime is recognised as a substantive crime in the South African legal system.⁴⁷⁰ As regards the obligation to

-
- to the extent that B’s consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

⁴⁶⁸ Section 71(4)(b)(iv).

⁴⁶⁹ Article 3(d) – Addendum A.

⁴⁷⁰ Attempt to commit a common law crime is in itself a crime under the common law, while section 18(1) of the *Riotous Assemblies and Criminal Law Amendment Act* 17 of 1956 criminalises an attempt to commit a statutory offence – Burchell 2005:619-641; Snyman 2008:283-294; see also 3.2.2 in Chapter 6 and 4.2.2.1 above.

prohibit the organising and directing of human trafficking, the *Sexual Offences Amendment Act* complies with such obligation, but goes further by also prohibiting a person from ordering, commanding, supervising or controlling the trafficking crime.⁴⁷¹ The Act is also more comprehensive than the Protocol, which only criminalises participating “as an accomplice”, in that it criminalises the performance of “any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking”.⁴⁷² A further aspect in respect of which the Act is broader than the Protocol, and one that is to be welcomed, is that the Act introduces the crime of involvement in trafficking of persons in order to bring to book all agents playing a part in the trafficking process. In this regard, the Act provides that any person who:

...incites, instigates, commands, aids, advises, recruits, encourages or procures any other person to commit, cause, bring about, promote, perform, contribute towards or participate in trafficking, is guilty of an offence of involvement in trafficking in persons for sexual purposes.⁴⁷³

In view of the fact that transporters often facilitate human trafficking by moving victims illegally across national borders, the Act prohibits all “commercial carriers”⁴⁷⁴ from bringing a passenger into, or removing a

⁴⁷¹ Section 71(2)(a); Minnie 2009:561.

⁴⁷² Section 71(2)(b); see also Minnie 2009:561.

⁴⁷³ Section 71(2)(c); Minnie 2009:561.

⁴⁷⁴ The term “commercial carrier” is defined broadly in section 70(2)(a) to include a company or the owner, operator or master of any means of transport that engages in the transportation of goods or people for commercial gain.

person from, South Africa without such passenger having travel documents for the lawful entry into, or departure from, the Republic.⁴⁷⁵ This offence overlaps to some extent with the prohibition against assisting another to enter, remain in, or depart from, the Republic in contravention of the *Immigration Act* 13 of 2002 (*Immigration Act*).⁴⁷⁶ However, the *Sexual Offences Amendment Act* provides that the transporting offender is also liable for paying the cost of the transported person's care, safekeeping and return from South Africa.⁴⁷⁷

Stuurman⁴⁷⁸ highlights the problem that victims of human trafficking are often prosecuted. For example, trafficked persons who are in South Africa without valid documentation because their passports have been confiscated by their traffickers may be prosecuted under the *Immigration Act*,⁴⁷⁹ while victims forced into prostitution may be prosecuted for prostitution.⁴⁸⁰ The *Sexual Offences Amendment Act* addresses this

⁴⁷⁵ Section 71(6)(a) A commercial carrier commits an offence if the carrier brings a person into or removes a person from the Republic and, upon entry into or departure from the Republic, the person does not have the travel documents required for lawful entry into or departure from the Republic.

See also Minnie 2009:562; HSRC 2010:41.

⁴⁷⁶ Section 49(2) Anyone who knowingly assists a person to enter or remain in, or depart from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year.

See also Stuurman 2004:5.

⁴⁷⁷ Section 71(6)(c); see also Minnie 2009:562.

⁴⁷⁸ Stuurman 2004:5.

⁴⁷⁹ See 4.2.2.3 above.

⁴⁸⁰ Section 11 of the *Sexual Offences Amendment Act* 32 of 2007 criminalises prostitution; see also 4.2.2.15 above.

issue by stipulating that a victim of trafficking is “not liable for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked”.⁴⁸¹

As regards sanctions for trafficking offences established in the *Sexual Offences Amendment Act*, there is no specific penal provision included in the Act.⁴⁸² However, the trafficking offences in section 71(1) and (2) of the *Sexual Offences Amendment Act* are regarded as serious offences, because they are listed in Part I of Schedule 2 of the *Criminal Law Amendment Act* 105 of 1997. Accordingly, a court is obligated to impose a minimum sentence of imprisonment for life on offenders convicted of these trafficking offences,⁴⁸³ unless the court finds that “substantial and compelling circumstances exist which justify the imposition of a lesser sentence”.⁴⁸⁴

4.3.2.3 Other relevant legislative provisions

4.3.2.3.1 *Bail applications*

After an arrest on a trafficking offence established in the *Sexual Offences Amendment Act*, the accused may apply for bail in terms of the *Criminal Procedure Act* 51 of 1977 (*Criminal Procedure Act*).⁴⁸⁵ The fact that

⁴⁸¹ Section 71(5); SOCA Unit (NPA) 2009:2; HSRC 2010:41.

⁴⁸² Lotan 2009:11.

⁴⁸³ Section 51(1); HSRC 2010:41.

⁴⁸⁴ Section 51(3)(a).

⁴⁸⁵ Sections 59 and 60.

section 71(1) and (2) of the *Sexual Offences Amendment Act* is listed in Schedule 6 of the *Criminal Procedure Act* means that the accused person will not be released on bail unless evidence is provided that “exceptional circumstances exist which in the interests of justice permit his or her release”.⁴⁸⁶

4.3.2.3.2 *Prescription of the right to institute a prosecution*

The *Criminal Procedure Act* 51 of 1977 (*Criminal Procedure Act*) provides that the right to institute a prosecution for all offences lapses after the expiry of a period of 20 years from the time when the offence was committed, unless some other period is expressly provided for by law.⁴⁸⁷ However, the *Criminal Procedure Act* specifically stipulates that this provision does not apply to a number of offences, including trafficking in persons for sexual purposes in terms of section 71(1) or (2) of the *Sexual Offences Amendment Act*.⁴⁸⁸

⁴⁸⁶ Section 60(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -
(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.

See also IOM 2009a:86; Lotan 2009:16.

⁴⁸⁷ Section 18; see also Joubert 2007:65; Kruger 2008:147-148.

⁴⁸⁸ Section 18(h); see also IOM 2009a:85-86; Lotan 2009:16.

4.4 Proposed law reform

4.4.1 *Investigation and consultative process*

Law reform concerning human trafficking began with the request by the South African Law Reform Commission (SALRC) to include a comprehensive investigation into human trafficking as part of its research programme.⁴⁸⁹ In 2003, this request was approved by the Minister of Justice and Constitutional Development.⁴⁹⁰

In 2004, the consultative process started with the publication of the Issue Paper on Trafficking in Persons.⁴⁹¹ The main aim of the Issue Paper was to identify aspects relating to human trafficking in need of law reform and to elicit comment and suggestions from relevant stakeholders in this regard.⁴⁹² A further aim was also to disseminate information on human trafficking to the public at large by covering the international framework, substantive law and procedural matters pertaining to this crime in the Issue Paper.⁴⁹³

⁴⁸⁹ SALRC 2004:1-3; SALRC 2006:1; SALRC 2008:7; Kassan 2007:18–9; Leggett 2004b:4.

⁴⁹⁰ SALRC 2004:2-3; SALRC 2006:2; SALRC 2008:7; Kassan 2007:18–9.

⁴⁹¹ Issue Paper 25 of Project 131 on Trafficking in Persons is available on the internet: http://www.doj.gov.za/salrc/ipapers/ip25_prj131_2004.pdf; see also SALRC 2004:1-77; SALRC 2008:8; Smith 2008:11; Stuurman 2004:5.

⁴⁹² SALRC 2008:8; SALRC 2006:2; SALRC 2004:(iii).

⁴⁹³ SALRC 2008:8; SALRC 2006:2; SALRC 2004:(iii). Having received various submissions from government departments and civil society on the Issue Paper, an interdepartmental meeting was held to canvass further views of stakeholders on specific issues relating to their line functions – SALRC 2006:2-3. For more information on the issues discussed, see SALRC 2008:8-9.

Having taken into account the submissions received on the Issue Paper as well as further research, the Discussion Paper on Trafficking in Persons (Project 131) was published in 2006.⁴⁹⁴ The SALRC finalised an extensive consultative process before reporting its preliminary recommendations for law reform on human trafficking in the Discussion Paper and for inclusion in the draft Bill.⁴⁹⁵

In 2008, the SALRC published the Report on Trafficking in Persons (Project 131).⁴⁹⁶ Informed by the submissions on the Discussion Paper, the Report and accompanying amended draft Bill contained the SALRC's final recommendations for law reform regarding human trafficking.⁴⁹⁷ Subsequently, the parliamentary legislative review process commenced.⁴⁹⁸

The *Prevention and Combating of Trafficking in Persons Bill* B7-2010 (*Trafficking Bill*)⁴⁹⁹ deals comprehensively with various aspects of curbing the trafficking crime. When promulgated, the *Trafficking Bill* will protect all victims from all types of exploitation and will repeal the transitional anti-trafficking provisions in the *Sexual Offences Amendment Act* and in the

⁴⁹⁴ SALRC 2006:2; SALRC 2008:9; Smith 2008:11; HSRC 2010:44.

⁴⁹⁵ SALRC 2008:9; HSRC 2010:44.

⁴⁹⁶ SALRC 2008:9-10; HSRC 2010:44.

⁴⁹⁷ SALRC 2008:10; HSRC 2010:44.

⁴⁹⁸ Smith 2007:11. The Minister of Justice and Constitutional Development received further submissions on the draft *Prevention and Combating of Trafficking in Persons Bill* of 2009.

⁴⁹⁹ See Government Gazette no. 32906 of 29-1-2010, General Notice 61 of 2010, for an explanatory summary of the *Trafficking Bill*.

Children's Act. An overview of the *Trafficking Bill* is given in the next section, with such Bill being analysed and assessed in the next Chapter.

4.4.2 Prevention and Combating of Trafficking in Persons Bill B7-2010

The Department of Justice and Constitutional Development introduced the *Trafficking Bill* to Parliament in order to provide for the comprehensive combating of human trafficking. The main purpose of the *Trafficking Bill* is:

to give effect to South Africa's obligations as a party to international instruments, such as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons), which address the issue of trafficking in persons, by bringing its domestic laws in line with the standards set by those instruments.⁵⁰⁰

The *Trafficking Bill* is divided into 11 Chapters and 2 Schedules. Chapter 1 covers the definitions of various concepts used in the Bill and also sets out the objectives of the Bill.⁵⁰¹ These objectives underpin a holistic approach and include the internationally accepted three "P's",⁵⁰² namely provision for the prosecution and appropriate punishment of offenders, the prevention of human trafficking, and protection and assistance for victims of trafficking.⁵⁰³ Chapter 2, which deals with prevention and, in particular, public awareness,

⁵⁰⁰ Government Gazette no. 32906 of 29-1-2010, General Notice 61 of 2010:45.

⁵⁰¹ Clauses 1 and 2.

⁵⁰² US Department of State 2010:5; UN.GIFT 2008e:28, 59; US Department of State 2010:15; Planitzer 2009:5; see also 7 in Chapter 1 and 3.6.1 in Chapter 6 above.

⁵⁰³ Clause 2.

is not part of the main focus of this study.⁵⁰⁴

Chapter 3 is of significant importance to criminal justice and contains the essence of domestic legal responses for combating human trafficking.⁵⁰⁵ This Chapter creates a number of new offences, in particular human trafficking, while also providing for stringent punishment.⁵⁰⁶ In addition, other conduct is also criminalised, including conduct relating to debt bondage,⁵⁰⁷ confiscation of, or tampering with, travel and other documents of trafficked persons,⁵⁰⁸ using the services of trafficked victims,⁵⁰⁹ facilitating human trafficking,⁵¹⁰ and carriers intentionally transporting trafficked victims across the borders of South Africa without the required documents.⁵¹¹ The *Trafficking Bill* also lists a number of aggravating factors that the court must consider before sentencing a person convicted of any of

⁵⁰⁴ Clause 3; HSRC 2010:44.

⁵⁰⁵ See 3.2 in Chapter 6 above; HSRC 2010:45..

⁵⁰⁶ Clause 4. Clause 4 also provides for the criminalisation of other conduct, such as inciting, instigating, commanding, aiding or procuring another person to commit an offence under Chapter 3. The *Trafficking Bill* also provides for the liability of juristic persons – see the definition of “person” in clause 1.

⁵⁰⁷ Clause 5; HSRC 2010:45. Debt bondage is defined in clause 1; see also 2.2.2.3.2.c in Chapter 2 and 2.1.3 in Chapter 5 above.

⁵⁰⁸ Clause 6; HSRC 2010:45. The conduct prohibited in clause 6 is most often employed by perpetrators to control their victims – see 2.3 in Chapter 4 above.

⁵⁰⁹ Clause 7; HSRC 2010:45. The purpose of establishing this offence is primarily to combat the demand for the services of human trafficking – see also 2.3 in Chapter 3 above.

⁵¹⁰ Clause 8. This clause criminalises various types of conduct facilitating human trafficking, such as conduct relating to the intentional leasing of property and to the use of the media. Internet service providers are also obligated to report internet addresses which facilitate human trafficking, to the South African Police Service; HSRC 2010:45.

⁵¹¹ Clause 9; see also 3.2.3.6 in Chapter 6 above.

the offences established in Chapter 3.⁵¹² Extraterritorial jurisdiction is also provided for, in that South African courts will have jurisdiction in respect of those acts which, although committed outside South Africa, would have been an offence under the *Trafficking Bill* had they been committed in South Africa.⁵¹³

Chapters 4 to 8 constitute an innovative part of the *Trafficking Bill* and deal with various aspects concerning the victims of trafficking. While Chapter 4 addresses the identification and protection of such victims,⁵¹⁴ Chapter 5 makes provision for the status of foreign victims of trafficking.⁵¹⁵ Chapter 6 provides for services to be rendered to adult victims of trafficking and Chapter 7 for compensation for victims as well as the state.⁵¹⁶ Importantly, Chapter 8 prohibits the summary deportation of victims⁵¹⁷ and further provides for the repatriation of victims of trafficking.⁵¹⁸

Lastly, Chapter 9 contains general provisions, Chapter 10 deals with the administration of the *Trafficking Bill*, and Chapter 11 deals with the laws to be repealed or amended, as well as with the short title and commencement of the proposed legislation. As regards the Schedules to the *Trafficking Bill*, Schedule 1 covers the laws that will be repealed and amended when the

⁵¹² Clause 11.

⁵¹³ Clause 10; see also 3.4 in Chapter 6 above.

⁵¹⁴ Clauses 12-16; see also 3.8.1.2.5.b and 3.8.1.1 in Chapter 6 above.

⁵¹⁵ Clauses 17-19.

⁵¹⁶ Clauses 27-28.

⁵¹⁷ Clause 29; see also 3.2.7 in Chapter 3 and 3.8.1.1.4 in Chapter 6 above.

⁵¹⁸ Clauses 30-33.

Trafficking Bill is enacted, while Schedule 2 contains the text of the Palermo Protocol.

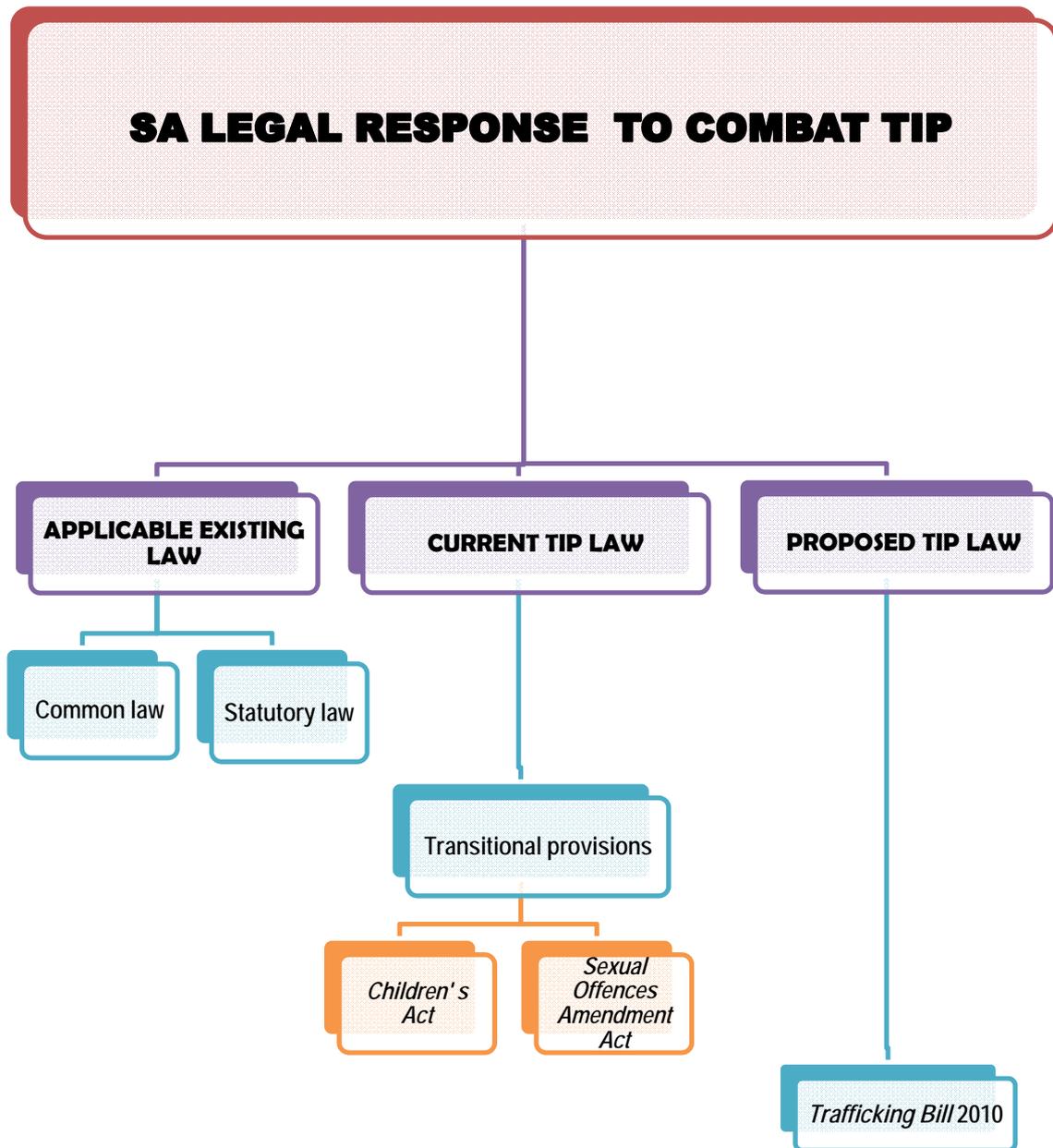


Figure 3: Overview of the South African legal response for combating trafficking in persons (TIP)

5. CONCLUSION

This Chapter mapped out the current South African legal response for combating human trafficking, with a specific focus on prosecution within the broad criminal justice paradigm.

The South African legal response on this issue remains fragmented. Categorised in three parts, the South African counter-trafficking response first of all encompasses the existing common law and statutory law that may be applicable to some trafficking cases, especially where the specific form of trafficking has not yet been criminalised. In addition, the existing law also plays a vital role in supplementing transitional trafficking provisions so as to ensure that, where applicable, offenders are also prosecuted for offences other than human trafficking. Secondly, the South African response includes transitional anti-trafficking provisions in the *Children's Act* which criminalise all types of child trafficking and in the *Sexual Offences Amendment Act* which criminalise sex trafficking. The last part of the national trafficking response pertains to the proposed law reform initiative, namely the 2010 *Trafficking Bill*, which criminalises human trafficking comprehensively.

In the next Chapter, the South African legal response as outlined is measured against international and African regional minimum standards for combating human trafficking.

CHAPTER 8

RECOMMENDATIONS AND CONCLUSION: ASSESSMENT OF THE SOUTH AFRICAN LEGAL RESPONSE TO COMBAT HUMAN TRAFFICKING

1. COMPLIANCE OF THE SOUTH AFRICAN LEGAL RESPONSE WITH MINIMUM STANDARDS FOR COMBATING HUMAN TRAFFICKING
 - 1.1 Introduction
 - 1.2 A fragmented domestic response
2. THE SOUTH AFRICAN *TRAFFICKING BILL*: COMPLIANCE ASSESSMENT AND RECOMMENDATIONS
 - 2.1 Introduction
 - 2.2 Minimum standards laid down for combating human trafficking
 - 2.2.1 **Standard 1: Define “trafficking in persons” in national counter-trafficking legislation**
 - 2.2.2 **Standard 2: Criminalisation of trafficking conduct**
 - 2.2.2.1 Standard 2.1: Criminalisation of human trafficking
 - 2.2.2.2 Standard 2.2: Criminalisation of conduct constituting involvement in human trafficking
 - 2.2.3 **Standard 3: Criminalisation of conduct related to human trafficking**
 - 2.2.3.1 Standard 3.1: Criminalisation of component acts and component offences related to human trafficking
 - 2.2.3.2 Standard 3.2: Criminalisation of the laundering of the proceeds of crime
 - 2.2.3.3 Standard 3.3: Criminalisation of corruption
 - 2.2.4 **Standard 4: Liability of natural and legal persons**
 - 2.2.5 **Standard 5: Appropriate sanctions**
 - 2.2.6 **Standard 6: Prescription of the right to institute a prosecution**
 - 2.2.7 **Standard 7: Extraterritorial jurisdiction**
 - 2.2.8 **Standard 8: Confiscation, seizure and asset forfeiture**
 - 2.2.9 **Standard 9: Judicial cooperation**
 - 2.2.10 **Standard 10: Human rights-based approach**
 - 2.2.11 **Standard 11: Witness protection**
 - 2.2.12 **Standard 12: Victim participation in the criminal justice process**
 - 2.2.13 **Standard 13: Provision of victims with information**
 - 2.2.14 **Standard 14: Compensation for victims**
 - 2.2.15 **Standard 15: Special needs of victims, especially children**

2.3	Guidelines to be considered for inclusion in domestic responses
2.3.1	<i>Guideline 1: Defining other concepts related to human trafficking</i>
2.3.2	<i>Guideline 2: Criminalisation of the use of trafficked persons' services</i>
2.3.3	<i>Guideline 3: Criminalisation of conduct pertaining to travel and identity documents</i>
2.3.4	<i>Guideline 4: Liability of commercial carriers</i>
2.3.5	<i>Guideline 5: Factors to be considered in sentencing</i>
2.3.6	<i>Guideline 6: Victim protection: physical safety</i>
2.3.7	<i>Guideline 7: Victim protection: privacy and non-disclosure of identity</i>
2.3.8	<i>Guideline 8: Victim protection against prosecution and detention</i>
2.3.9	<i>Guideline 9: Protection against summary deportation</i>
2.3.10	<i>Guideline 10: Assistance towards victim recovery</i>
2.3.11	<i>Guideline 11: Identification of victims</i>
2.3.12	<i>Guideline 12: Residency status in destination countries</i>
2.3.13	<i>Guideline 13: Protection for persons reporting human trafficking</i>
2.3.14	<i>Guideline 14: Specialised anti-trafficking units</i>
3.	CONCLUSION

CHAPTER 8

RECOMMENDATIONS AND CONCLUSION: ASSESSMENT OF THE SOUTH AFRICAN LEGAL RESPONSE TO COMBAT HUMAN TRAFFICKING

1. COMPLIANCE OF THE SOUTH AFRICAN LEGAL RESPONSE WITH MINIMUM STANDARDS FOR COMBATING HUMAN TRAFFICKING

1.1 Introduction

The primary goal of designing domestic counter-trafficking laws is to create the most effective legislative tool possible to combat human trafficking. In pursuing this goal, minimum standards to combat human trafficking holistically and more effectively have been drawn from the multiple international and African regional instruments that constitute the broad framework on human trafficking. Measuring the South African legal response to combat human trafficking against these minimum standards is an important step in assessing the strength and effectiveness of this legal tool in the battle against the trafficking scourge within and across the borders of South Africa.

1.2 A fragmented domestic response

The comparison of the South African counter-trafficking response with the identified minimum anti-trafficking standards is complicated by the fragmented nature of the current domestic response.¹ Although the domestic response is not encompassed in a single piece of legislation, it can be broadly categorised in three parts.²

The first part of the South African legal response consists of existing common law and statutory crimes that may be applicable in some human trafficking cases in prosecuting trafficking agents for crimes other than human trafficking.³ However, these applicable legal remedies have no direct bearing on human trafficking and do not deal with the trafficking crime adequately, nor do they comply with international counter-trafficking obligations.⁴

The second part of the domestic response consists of the interim anti-trafficking provisions in two pieces of legislation. On the one hand, the *Children's Act 38 of 2005 (Children's Act)* criminalises all forms of trafficking in children.⁵ However, because the purpose of the Act is to deal exclusively with the protection of children, no protection is provided for adults against trafficking or any other abuse. On the other hand, the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Amendment Act)* criminalises the trafficking of

¹ See 4 in Chapter 7 above.

² See 4.2, 4.3 and 4.4 in Chapter 7 above.

³ Stuurman 2004:5.

⁴ Stuurman 2004:5; see also the Preamble to the South African *Trafficking Bill* of 2010.

⁵ Section 284, read with the definition of "trafficking" in section 1.

children and adult persons for purposes of sexual exploitation, but does not criminalise any of the other forms of trafficking.⁶ The *Sexual Offences Amendment Act* also does not provide for the prevention of human trafficking or for victim protection and assistance. The interim provisions in both pieces of legislation therefore lack full compliance with international counter-trafficking standards laid down in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). Given that the anti-trafficking provisions in both Acts are interim provisions that will be repealed when the comprehensive trafficking legislation comes into force, a detailed comparison of these provisions with the minimum standards for combating human trafficking is not made here.

The last part of the South African response is the law reform proposed in the *Prevention and Combating of Trafficking in Persons Bill B7-2010 (Trafficking Bill)*.⁷ Since the *Trafficking Bill* will most probably come into force within the foreseeable future, it is apposite to assess the compliance of the *Trafficking Bill* with the minimum standards and recommended guidelines set out in Chapter 6 above.

⁶ Section 71, read with the definition of “trafficking” in section 70(2)(b).

⁷ See also Government Gazette no. 32906 of 29/1/2010, General Notice 61, for a summary of the Bill.

2. THE SOUTH AFRICAN TRAFFICKING BILL: COMPLIANCE ASSESSMENT AND RECOMMENDATIONS

2.1 Introduction

In assessing the compliance of the South African *Trafficking Bill* with minimum standards drawn from instruments forming the broad framework for combating human trafficking, the same structural format for categorising standards is followed in this Chapter as was used in Chapter 6 above.

2.2 Minimum standards laid down for combating human trafficking

2.2.1 *Standard 1: Define “trafficking in persons” in national counter-trafficking legislation*

In accommodating the internationally accepted definition of “trafficking in persons”,⁸ the Palermo Protocol sets the standard on this issue and requires that the essence of the human trafficking definition⁹ be included in domestic responses.¹⁰

⁸ For a discussion of different and narrower trafficking definitions in international instruments preceding that in the Palermo Protocol, see 2.1-2.3.13 in Chapter 5 and 2.2.1 in Chapter 2 above; see also UNODC 2006:xii; Rijken 2003:64-65; Lee 2007:10; Weissbrodt and Anti-Slavery International 2002:18.

⁹ Article 3(a); see also the analysis of the definition in 2.2 in Chapter 2 above.

¹⁰ Raymond 2002:498; UNODC 2004:268.

Table 3: Human trafficking definition: comparison between the Palermo Protocol and the South African Trafficking Bill B7-2010

DEFINITION: TRAFFICKING	PALERMO PROTOCOL: Article 3(a)	SOUTH AFRICAN TRAFFICKING BILL: Clause 1
Acts	recruitment, transportation, transfer, harbouring or receipt of persons;	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;
Means	threat or use of force;	(a) a threat of harm;
	other forms of coercion;	(b) threat or use of force, intimidation , and other forms of coercion;
	the abuse <u>of a position</u> of vulnerability;	(c) the abuse of vulnerability;
	fraud;	(d) fraud;
	deception;	(e) deception or false pretences;
		(f) debt bondage;
	abduction;	(g) abduction;
		(h) kidnapping;
	the abuse of power;	(i) the abuse of power;
giving or receiving of payments or benefits to achieve the consent of a person having control over another person;	(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;	
Exploitative purpose	for the purpose of exploitation.	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.

*Key to table: ~Normal text: identical in both the Palermo Protocol and the Trafficking Bill;
~Text in bold italics: only in the Trafficking Bill;
~Underlined text in italics: only in the Palermo Protocol.

As is indicated in Table 3, the South African *Trafficking Bill's* definition of “trafficking” is almost identical to the formulation of the definition of “trafficking in persons” in the Palermo Protocol. Accordingly, South Africa complies with the international standard regarding the inclusion, in

domestic legislation, of a definition of human trafficking in line with the Protocol's definition.

The additions made by the *Trafficking Bill* to the definition in the Palermo Protocol need to be analysed. First, the action part of the definition of "trafficking" in the *Trafficking Bill* includes additional concepts to those found in the Protocol. These additional concepts, including "procurement", "capture", "removal", "sale", "lease", "disposal" and "adoption", expand the scope of the action part beyond what is required in the Palermo Protocol.

A point to be considered is the relevance and meaningfulness of the added concepts. With regard to the concept "procurement", *R v V*¹¹ interpreted "to procure" as "to obtain a woman, to cause or bring about her availability for intercourse" in terms of section 9(a) of the *Criminal Law Amendment Act* (Southern Rhodesia).¹² The Court further referred to a similar provision in English law in which the "statute was aimed, not at people who merely provided opportunity for girls to prostitute themselves, but at those who get girls by some fraud or persuasion, or by inviting them to it".¹³ If the concept "procurement" in the *Trafficking Bill* is similarly interpreted to mean obtaining, causing or bringing about the availability of a person for trafficking by any of the listed prohibited means, such concept appears to be broad enough to include the term "capture". If this broad meaning is given to "procurement", it is submitted that the term "capture" should be omitted. Also, in reviewing the inclusion of the concept "removal", it is to be noted that the meaning of "removal"

¹¹ *R v V* 1950 (4) SA 64 (SR).

¹² *R v V* 1950 (4) SA 64 (SR):65.

¹³ *R v V* 1950 (4) SA 64 (SR):65.

is linked to the terms “transport” and “transfer”. In the context of trafficking, “removal” implies “transport” or “transfer” by some measure of force or coercion. Given that the forceful means is already included in the means part of the trafficking definition, it seems superfluous to include the term “removal” in the definition in the *Trafficking Bill*. In the interest of legal certainty, it is submitted that the legislature should clarify the meaning of the concept “procurement” and consider omitting the term “removal” from the *Trafficking Bill*.

Secondly, unlike the Palermo Protocol, the *Trafficking Bill* has added a new phrase to the action part of the trafficking definition. The *Trafficking Bill* provides that the prohibited actions as set out in the action part be committed not only in respect of the trafficked person, but also in respect of “an immediate family member of the person trafficked”.¹⁴ This phrase, which was not part of the draft *Prevention and Combating of Trafficking in Persons Bill* (draft *Trafficking Bill* of 2009)¹⁵ published by the Department of Justice and Constitutional Development for comment in May 2009, was inserted by the Office of the Chief State Law Advisor to which the Bill was submitted for certification.¹⁶ The addition was apparently made because the family of trafficked victims is often threatened in order to compel victims to submit to the demands of their traffickers. If the legislature deems it fit to cover this issue in the definition of trafficking, it is submitted that, instead of including it in the action part of the definition, such addition should be included in the means part so

¹⁴ Clause 1.

¹⁵ See Government Gazette no. 32222 of 8/5/2009, General Notice 431 of 2009, Publication of draft *Prevention and Combating of Trafficking in Persons Bill* of 2009.

¹⁶ See the differences between the draft *Prevention and Combating of Trafficking in Persons Bill* published in the Government Gazette no. 32222 of 8/5/2009, General Notice 431 of 2009 and the *Prevention and Combating of Trafficking in Persons Bill* B7-2010.

as to read: “a threat of harm to that person or an immediate family member of that person”.

Thirdly, the means part is formulated more broadly than in the Palermo Protocol, in that concepts such as “intimidation”, “kidnapping” and “debt bondage”¹⁷ are added to the definition of “trafficking” in the *Trafficking Bill*.¹⁸ With reference to the types of means listed under (j) and (k) in the *Trafficking Bill*,¹⁹ it should be noted that (j), which follows the wording of the Protocol by providing for the giving or receiving of payments or benefits to obtain the consent of certain persons, is superfluous. The formulation of (k) includes the “giving or receiving of payments ... or benefits or any other advantage”, which need not be made to a specific person or for a specific purpose.²⁰ It is therefore submitted that the means listed in (k) are broad enough to incorporate (j) and that the latter may therefore be omitted.

Finally, apart from following the Protocol’s trafficking definition by requiring an exploitative purpose as the third part of the trafficking

¹⁷ Debt bondage is often used by trafficking agents as a form of control over the victim in order to keep him or her in an exploitative situation – see 2.2.2.3.2.c in Chapter 2; 2.3 in Chapter 4 and 2.1.3 in Chapter 5 below.

¹⁸ These additional concepts were not part of the draft *Prevention and Combating of Trafficking in Persons Bill* published by the Department of Justice and Constitutional Development for comment in May 2009 (draft *Trafficking Bill* of 2009), but were included in the 2010 *Trafficking Bill* by the Office of the Chief State Law Advisor – see the differences between the draft *Prevention and Combating of Trafficking in Persons Bill* published in the Government Gazette no. 32222 of 8/5/2009, General Notice 431 of 2009 and the *Prevention and Combating of Trafficking in Persons Bill* B7-2010.

¹⁹ Clause 1 – Addendum B; see also Table 3 above.

²⁰ The Office of the Chief State Law Advisor included (k) in the means part of the definition of trafficking in the 2010 *Trafficking Bill* and thus aligned it with the definition of trafficking in the *Sexual Offences Amendment Act* – personal e-mail communication with Advocate L Stuurman of the SALRC on 18-10-2010.

definition,²¹ the *Trafficking Bill* contains a noteworthy additional phrase. Unlike the Palermo Protocol and the *Children’s Act*, the *Trafficking Bill* also adds sexual grooming or sexual abuse to the types of exploitation listed in the exploitation part.²² The addition of sexual grooming and sexual abuse to the exploitation part of the definition of trafficking correlates with the provision in the *Sexual Offences Amendment Act*.²³ However, the addition of these concepts emphasises sexual exploitation at the cost of other forms of exploitation. It can be argued that the addition of these concepts is superfluous, because the *Trafficking Bill’s* term “sexual exploitation”,²⁴ which includes sexual grooming and sexual abuse, is already included in the concept “exploitation” in the Bill.²⁵ Since the Bill maintains the essence of the formulation in the Palermo Protocol on this issue, it is submitted that the additional phrase relating to sexual grooming and sexual abuse should be omitted.

The Palermo Protocol further stipulates, in a mandatory provision, that, where a child is trafficked, only the action and exploitative purpose parts of the definition need to be present to constitute the crime of “trafficking in persons”.²⁶ In line with the Protocol, the *Trafficking Bill* also provides

²¹ See Table 3 above; see also article 3(a) of the Palermo Protocol and the corresponding provision, namely clause 1, of the *Trafficking Bill*.

²² See Table 3 above. This addition was not part of the draft *Trafficking Bill* of 2009 and was included in the 2010 *Trafficking Bill* by the Office of the Chief State Law Advisor to which the Bill was submitted for certification.

²³ This offence was not part of the draft *Trafficking Bill* of 2009 and was included in the 2010 *Trafficking Bill* by the Office of the Chief State Law Advisor.

²⁴ Clause 1.

²⁵ Cause 1.

²⁶ Article 3(c) – Addendum A.

that, where a child, who is any person under the age of 18,²⁷ is trafficked, the means part of the definition is waived and that the presence of the prohibited conduct and exploitative purpose in themselves constitute the crime of trafficking in persons.²⁸

On the issue of victims consenting to being trafficked, the *Trafficking Bill* is at one with the Protocol, in that it provides that consent obtained from a trafficked person by any of the listed means is irrelevant. Notably, the *Trafficking Bill* specifies that this provision, which stipulates that the means part of the definition excludes valid consent, is applicable to consent given by adult victims only.²⁹ Unlike the Protocol, the *Trafficking Bill* further explicitly provides that the consent of a trafficked child, or of the person having control or authority over such child, does not provide a defence for the trafficker. Children are therefore granted broader protection in the *Trafficking Bill* in that, even if none of the listed means referred to in the definition of trafficking was used, a child's consent is not legally valid and does not provide a trafficker with a defence.

To conclude, the South African domestic response not only complies with the minimum standard requiring the inclusion of a clear definition of human trafficking in national anti-trafficking legislation,³⁰ but also provides a more comprehensive and detailed definition. Accordingly, the *Trafficking Bill* is aligned with the provision in the Convention Against

²⁷ See article 3(d) in the Protocol and clause 1 in the *Trafficking Bill*; see also section 28(3) of the *Constitution of the Republic of South Africa*, 1996.

²⁸ Clause 4(3)(a); see also article 3(c) of the Palermo Protocol; Lansink 2006:50; The Future Group 2007a:7; Weissbrodt and Anti-Slavery International 2002:22, 27-30; Kassan 2007:18-6; Gallagher 2001:987; Ezeilo 2009:7; UNODC 2009b:37; OHCHR 2002:13 – Guideline 8.1; UNODC 2009b:9-23; 2.2.3 in Chapter 2 above.

²⁹ Article 4(3)(b) of the *Trafficking Bill* complies with article 3(b) of the Protocol.

³⁰ See also OHCHR 2002:8 – Guideline 4.1.

Transnational Organized Crime (Organized Crime Convention)³¹ that states parties may adopt “more strict or severe measures” than are provided for in the Organized Crime Convention and, by implication, in the Palermo Protocol.

Standard 1: Define “trafficking in persons” in national counter-trafficking legislation

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X
Recommendation: Omit the means listed in (j) of the definition of “trafficking” in clause 1 of the <i>Trafficking Bill</i> .			

2.2.2 Standard 2: Criminalisation of trafficking conduct

2.2.2.1 Standard 2.1: Criminalisation of human trafficking

One of the principal minimum standards set in the Palermo Protocol is the requirement of criminalising intentional trafficking conduct³² as defined in the Protocol. While existing South African law does not fully comply with this minimum standard,³³ the *Trafficking Bill* stipulates that it is an offence if one person traffics another person, irrespective of the age of the victim or the type of trafficking involved.³⁴ Furthermore, the

³¹ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 11/3/2008); Raymond 2002:492-493. For an overview of the process preceding the adoption of the Convention, see Gallagher 2001:975-977.

³² Article 5(1) – Addendum A.

³³ SOCA Unit (NPA) 2009:2; see also 4.3.2 in Chapter 7 above.

³⁴ Clause 4(1) of the *Trafficking Bill*. Unlike the Protocol, the *Trafficking Bill* does not specifically state that intention is the required form of fault for this offence. In *S v Van Zyl* 2000 (1) SACR 259 (C), the Court found that, in the absence of a clear indication that negligence (*culpa*) is sufficient for criminal liability, intent (*dolus*) is the exclusive form of fault required by the legislature. For a different view, and for a further discussion of intention as an element in statutory offences, see Burchell 2005:499-501; see also *S v Naidoo* 1974 (4) SA 574 (N):596A-D; Snyman 2008:203, 209. While accepting that fault is an element of the trafficking offence and that it is therefore not a strict liability offence, the *Trafficking Bill* does

Trafficking Bill makes provision for the requirement of non-inclusion of transnationality and the involvement of organised criminal groups in domestic offences.³⁵ In the definition of the term “trafficking”, the *Trafficking Bill* clearly states that trafficking conduct committed both “within or across the borders of the Republic” is included in the definition, while the involvement of organised criminal groups is excluded.³⁶

Standard 2.1: Criminalisation of human trafficking

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.2.2 Standard 2.2: Criminalisation of conduct constituting involvement in human trafficking

The *Trafficking Bill* establishes the offence of involvement in the trafficking of persons.³⁷ This offence is divided into three parts, namely conduct constituting attempts to commit trafficking, conduct inciting or directing others to commit the crime, and conduct amounting to conspiring with others to commit the crime. The question is whether this offence complies with the Palermo Protocol’s obligation to criminalise conduct amounting to attempts to commit human trafficking, as well as participation in the crime and organising or directing others to commit the crime. Table 4 facilitates the comparison of the provisions in the *Trafficking Bill* with the requirements set in the Palermo Protocol.

not provide that intent is the only form of fault required for this offence – Burchell 2005:499-500.

³⁵ Article 34(2) in the Organized Crime Convention; see also 3.2.1 in Chapter 6 above; UNODC 2009b:14; UNODC 2004:25, 258, 275-276.

³⁶ Clause 1.

³⁷ This offence was not part of the draft *Trafficking Bill* of 2009 and was included in the 2010 *Trafficking Bill* by the Office of the Chief State Law Advisor.

Table 4: Criminalisation of involvement in human trafficking: comparison between the Palermo Protocol and the South African Trafficking Bill – B7-2010

	PALERMO PROTOCOL	SA TRAFFICKING BILL
Criminalising involvement in trafficking	Article 5(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:	Clause 4 (2) A person is guilty of an offence of involvement of trafficking in persons ... if that person
Attempt	(a) Subject to the basic concepts of its legal system, attempting to commit human trafficking	(a) performs any act aimed at committing human trafficking
Participation	(b) Participating as an accomplice in human trafficking	
Inciting, commanding, directing and aiding another	(c) Organising or directing other persons to commit human trafficking	(b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit human trafficking
Conspiring with another		(c) conspires with any other person to commit human trafficking

The South African legal system does not only prohibit completed crimes, but also:

...certain preceding forms of conduct directed at the commission of a crime, namely attempt, conspiracy and incitement to commit a crime.³⁸

These three crimes are recognised as substantive crimes in the South African legal system, and, in terms of the *Riotous Assemblies Act 17 of 1956 (Riotous Assemblies Act)*, attempt, conspiracy and incitement are applicable to all statutory offences.³⁹ For this reason, the Protocol's obligation to criminalise attempts to commit human trafficking in domestic legislation is complied with by section 18(1) of the *Riotous Assemblies*

³⁸ Snyman 2008:283.

³⁹ Section 18.

Act and therefore need not be included as a provision in the *Trafficking Bill*.

The *Trafficking Bill's* formulation of the attempt offence is not an identical replication of the Protocol's phrasing and needs to be analysed and examined in more detail. Notably, instead of using the Protocol's terminology of "attempting" to commit human trafficking, the *Trafficking Bill* provides that it is an offence if a person "performs any act aimed at committing human trafficking". At first glance, it seems as if the formulations in the Protocol and the *Trafficking Bill* are fairly similar. However, it must be borne in mind that, for a conviction of attempting to commit a crime, South African law requires that the unlawful conduct "is not merely preparatory, but has reached at least the commencement of the execution of the intended crime".⁴⁰ The language of the *Trafficking Bill*, in stipulating that "any act aimed at" the commission of the crime suffices, seems to be broader than the requirement of the existing attempt offence. It is doubtful whether the legislature intended to create a crime broader than the existing attempt crime, in that the phrase "any act aimed at" the commission of human trafficking also includes conduct that is merely preparatory. Unless the legislator has a specific reason for choosing the formulation in the *Trafficking Bill*, it is submitted that the current wording should be replaced with the well-known term "attempt" in order to enhance clarity.

The *Riotous Assemblies Act* also criminalises the conduct of a person who "conspires with any other person to aid or procure" the commission

⁴⁰ Snyman 2008:285.

of any offence⁴¹ or “incites, instigates, commands, or procures any other person” to commit any offence.⁴² Accordingly, the provision in the *Trafficking Bill* criminalising conspiracy⁴³ is a duplication of the same provision in the *Riotous Assemblies Act*,⁴⁴ while the incitement offence⁴⁵ is also to a large extent superfluous. However, the *Trafficking Bill* does broaden the incitement offence somewhat by including not only the conduct listed in the *Riotous Assemblies Act*, but also other conduct, namely directing, aiding, promoting, advising, recruiting and encouraging others to commit human trafficking. This expansion of the incitement offence may be helpful in prosecuting perpetrators in trafficking cases.

Table 4 above indicates that the Protocol’s requirement in article 5(2)(c) of criminalising the directing of others to commit human trafficking has been met in clause 4(2)(b) of the *Trafficking Bill*. However, the Protocol’s specific term “organising” others to commit the offence is not included in the *Trafficking Bill*. The inclusion of this term is important in order to reach the kingpins who do not commit the trafficking actions themselves, but organise others to do so. These organisers, who are often part of an organised criminal syndicate, typically profit significantly, and with impunity, from trafficking offences.⁴⁶ Although the *Trafficking Bill* criminalises a number of actions that may be associated with the term “organising”, namely inciting, instigating, commanding, aiding, promoting,

⁴¹ Section 18(2)(a).

⁴² Section 18(2)(b).

⁴³ Clause 4(2)(c).

⁴⁴ Section 18(2)(a).

⁴⁵ Clause 4(2)(b).

⁴⁶ Melvin 2006:22, 30; Raymond 2002:493; Obokata 2006:46-47; Gallagher 2001:977; UN.GIFT 2008c:10; UN.GIFT 2008e:15; see also 3.2.2 in Chapter 6 above.

advising, recruiting, encouraging or procuring, none of these terms has the exact same meaning as the term “organising”. It is therefore recommended that the term “organising” be included in clause 4(2)(b) of the *Trafficking Bill* in order to make such Bill fully compliant with the Protocol on this issue.

As regards the Protocol’s requirement of criminalising “participation as an accomplice”, no such provision is incorporated in the *Trafficking Bill*. However, the inclusion of such a provision is not necessary, since South African criminal law provides for the conviction of a person as an accomplice in respect of all offences where such person intentionally furthers the commission of the crime by the perpetrator.⁴⁷

Standard 2.2: Criminalisation of conduct constituting involvement in human trafficking

	Not compliant	Partly compliant	Compliant
Assessment of compliance		X	
<p>Recommendations:</p> <ul style="list-style-type: none"> (a) Omit clause 4(2)(a) of the <i>Trafficking Bill</i> – attempt provision already contained in section 18 of the <i>Riotous Assemblies Act</i>. However, if the legislature retains clause 4(2)(a), replace the wording of this clause with “(a) attempts to commit the offence of human trafficking”. (b) Include the term “organising” in clause 4(2)(b) of the <i>Trafficking Bill</i>. (c) Omit clause 4(2)(c) (conspiracy offence) in the <i>Trafficking Bill</i> – conspiracy provision already contained in section 18 of the <i>Riotous Assemblies Act</i>. 			

⁴⁷

Snyman 2008:257-260, 273-278.

2.2.3 Standard 3: *Criminalisation of conduct related to human trafficking*

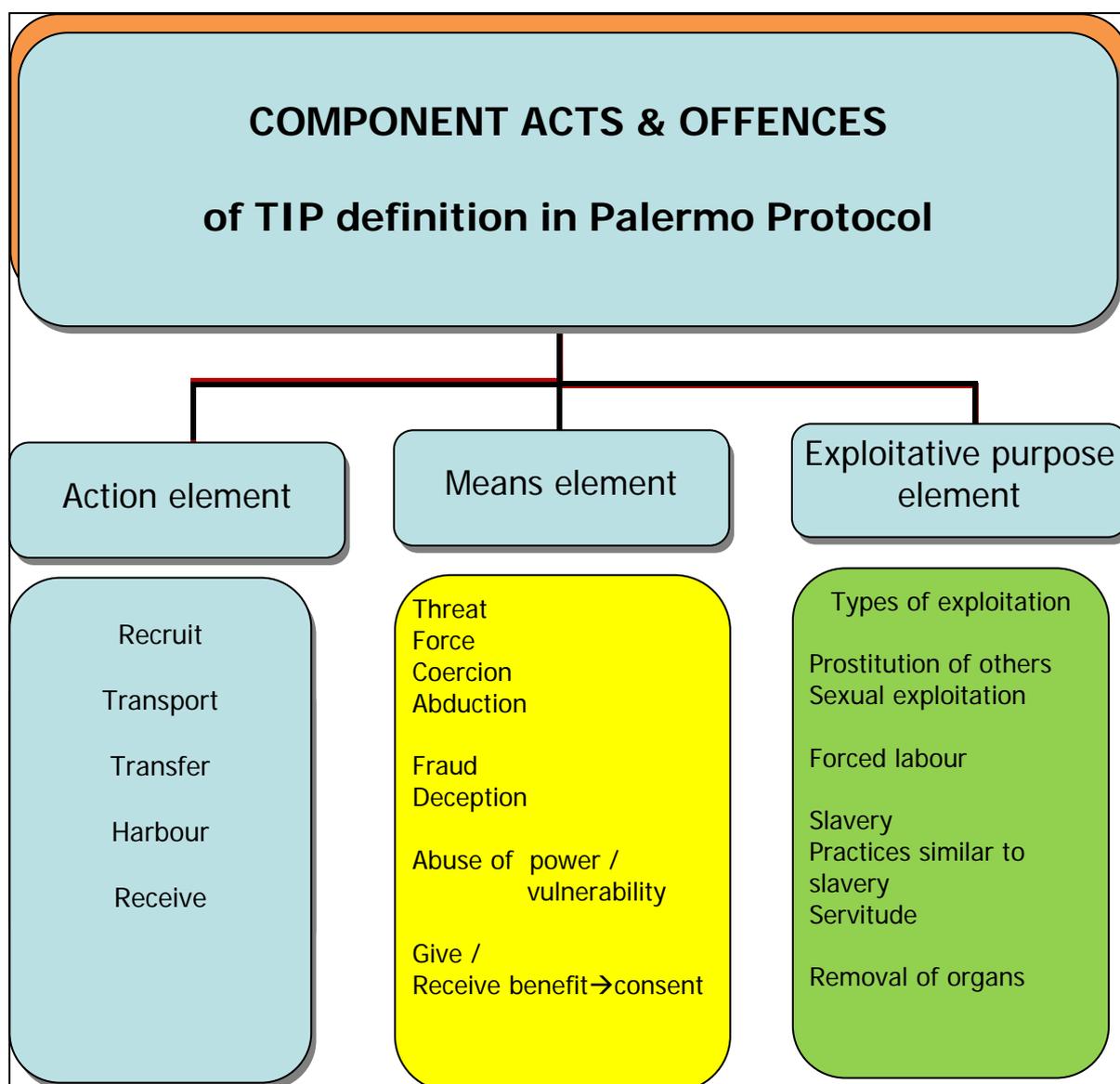
2.2.3.1 Standard 3.1: Criminalisation of component acts and component offences related to human trafficking

As was pointed out above,⁴⁸ the Palermo Protocol does not require that component acts⁴⁹ pertaining to the three main parts of human trafficking, namely the action, the means and the exploitative purpose, be criminalised.

⁴⁸ See 3.2.3.3 in Chapter 6 above.

⁴⁹ OHCHR 2002:2 in footnote 2.

Figure 4: Component acts and offences forming part of the “trafficking in persons” definition – Palermo Protocol



With regard to component acts pertaining to the action part of the definition, the Protocol has a provision on the “transport” component acts, but not on the other component acts, namely the “recruitment”, “transfer”, “harbouring” or “receipt of persons” over 18.⁵⁰ In essence, the Protocol calls upon states parties to require commercial carriers to

⁵⁰ OHCHR 2002:4 in footnote 2; see also the definition of “trafficking in persons” in article 3(a) of the Palermo Protocol – Addendum A.

ascertain that their trafficked passengers have legal travel documents for transporting them over international borders.⁵¹ However, this duty prohibiting certain conduct pertaining to the transportation of trafficked persons is not formulated in mandatory terms in the Protocol.⁵² Furthermore, the Protocol only makes this provision applicable to commercial carriers that transport trafficked persons across international borders and not to other carriers that transport passengers as part of an in-country trafficking offence without crossing any international borders. The *Trafficking Bill* is in line with this provision in the Protocol, in that the Bill criminalises the intentional act by which a “carrier”⁵³ brings a victim of trafficking into, or removes such victim from, the Republic without the required travel documents.⁵⁴

Similar to component acts and offences pertaining to the action part of the trafficking definition, the Palermo Protocol also does not obligate states parties to criminalise component acts and offences pertaining to the means part of the definition. Nonetheless, several component acts and offences, which are listed under the means part of the Protocol’s trafficking definition, are criminalised in existing South African criminal law. Abduction,⁵⁵ various forms of coercive or violent conduct,⁵⁶ as well

⁵¹ Article 11(2) and (3).

⁵² Article 11(2) and (3); see also the discussion in 3.2.3.5 in Chapter 6 above and Guideline 4 below.

⁵³ The term “carrier” is defined broadly in clause 1 of the *Trafficking Bill – Addendum B*.

⁵⁴ Clause 9; see also Guideline 6 below.

⁵⁵ See the discussion of the common law crime of fraud in 4.2.1.1 in Chapter 7 above.

⁵⁶ See the discussion of murder in 4.2.1.3, culpable homicide in 4.2.1.4, common assault in 4.2.1.5, assault with the intent to cause grievous bodily harm in 4.2.1.1, and extortion in 4.2.1.7 in Chapter 7 above.

as deceptive conduct⁵⁷ are established common law crimes in South Africa.

The component acts and offences pertaining to the third part of the trafficking definition involve conduct relating to the exploitation of victims. Although not an exhaustive list,⁵⁸ the Protocol lists some examples of exploitative conduct, namely sexual exploitation, forced labour or services, slavery, slavery-like practices, servitude and the removal of organs.⁵⁹ Although these forms of exploitative conduct or component offences are not criminalised by the Palermo Protocol, existing international and African regional instruments that form part of the broad framework on human trafficking prohibit such conduct.⁶⁰ For example, forced labour is proscribed by various instruments of the International Labour Organisation (ILO),⁶¹ slavery and slave-like practices by the instruments pertaining specifically to slavery and such practices,⁶² child abuse and child prostitution especially by child-specific instruments,⁶³ and sexual exploitation by various instruments, including women-specific

⁵⁷ See the discussion of the common law crime of abduction in 4.2.1.1 in Chapter 7 above.

⁵⁸ UNODC 2009b:35.

⁵⁹ UNODC 2009b:43.

⁶⁰ UNODC 2009b:43; UNODC 2004:277; OHCHR 2002:2 in footnote 3; OHCHR 2002:4 – Principle 12; SALRC 2006:8; see also the discussion of various instruments in Chapter 5 above.

⁶¹ See 2.2 in Chapter 5 above.

⁶² See 2.1 in Chapter 5 above. The 1999 ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention on the Worst Forms of Child Labour) also identifies “slavery and practices similar to slavery” as one of the worst forms of child labour which must be criminalised by member states – 2.2.4 in Chapter 5 above.

⁶³ See 2.3.7, 2.3.9, 2.3.11, 2.3.12 and 3.5 in Chapter 5 above. The ILO Convention on the Worst Forms of Child Labour lists a number of practices that must be acknowledged as “worst forms of child labour” and be prohibited – see 2.2.4 in Chapter 5 above; see also the ILO Convention Concerning Minimum Age for Admission to Employment – 2.2.3 in Chapter 5 above.

and human rights instruments.⁶⁴ In line with the standards laid down in these instruments, the UNODC Model Law Against Trafficking in Persons (UNODC Model Law) as well as the Principles and Guidelines on Human Rights and Human Trafficking (HCHR Principles and Guidelines)⁶⁵ require that component acts and conduct related to trafficking be established as offences in domestic responses.⁶⁶ The UNODC Model Law recommends that states need to “ensure that ‘exploitation’ is always punishable under domestic law even if other elements of trafficking were not committed”.⁶⁷

In drawing the obligation to criminalise component and exploitative acts related to human trafficking from international instruments other than the Palermo Protocol, the South African legal context is examined in this regard. Existing South African criminal law recognises exploitative conduct listed in the trafficking definition, such as “exploitation of the prostitution of others” and other sexual exploitation,⁶⁸ slavery⁶⁹ and forced labour,⁷⁰ as a criminal offence.

⁶⁴ See 2.3.5, 2.3.6, 2.4, 3.1 and 3.4 in Chapter 5 above.

⁶⁵ OHCHR 2002:2 – http://www.stopvaw.org/Trafficking_Explore_the_Issue.html (accessed 17/11/2008).

⁶⁶ OHCHR 2002:2 in footnote 3.

⁶⁷ UNODC 2009b:43; UNODC 2004:277.

⁶⁸ See the comprehensive criminalisation of a multitude of exploitative sexual conduct in the *Sexual Offences Amendment Act* and the discussion of this Act in 4.2.2.15 in Chapter 7 above.

⁶⁹ See the discussion of the common law crime of slavery in 4.2.1.10 in Chapter 7 above.

⁷⁰ See the *Basic Conditions of Employment Act 75 of 1997* and the discussion of this Act in 4.2.2.4 in Chapter 7 above.

The position relating to the criminalisation of exploitative conduct referred to as “practices similar to slavery” and “servitude” is more challenging.⁷¹ The HCHR Principles and Guidelines require that all conduct “related to” human trafficking must be criminalised, which includes these two concepts.⁷² While “servitude” is proscribed by international human rights instruments,⁷³ a definition of the term is lacking in international law, which causes uncertainty.⁷⁴ On the one hand, the Palermo Protocol seems to regard “practices similar to slavery” and “servitude” as different forms of exploitation by listing both of them in article 3(a). On the other, others view servitude as a broad, overarching term covering the different “practices similar to slavery”.⁷⁵ While recognising other forms of exploitation related to servitude as crimes, South African law does not identify “servitude” as a crime.⁷⁶ Whether there is a need to establish such a crime in South African law in addition to the criminalisation of forced labour and various other labour offences which already exist in the *Basic Conditions of Employment Act 75 of 1997*,⁷⁷ is arguable.

⁷¹ OHCHR 2002:2 in footnote 3; OHCHR 2002:4 – Principle 12; SALRC 2006:8; see also the discussion in 2.2.2.3.2.c in Chapter 2 above.

⁷² The HCHR Principles and Guidelines state that conduct “related to” human trafficking includes all forms of exploitation listed under the concept “exploitation” in article 3(a) of the Palermo Protocol – OHCHR 2002:2 in footnote 3; see also OHCHR 2002:4 – Principle 12; SALRC 2006:8.

⁷³ See article 4 of the Universal Declaration of Human Rights <http://www.un.org/Overview/rights.html> (accessed 18/8/2008) and article 8(2) of the International Covenant on Civil and Political Rights <http://www.hrweb.org/legal/cpr.htm> (accessed 21/7/2008); UNODC 2009b:20; 2.4.1 and 2.4.4 in Chapter 5 below.

⁷⁴ Jordan 2002:10; Haysom 2002:178; Weissbrodt and Anti-Slavery International 2002:7 in footnote 26; Gallagher 2001:987-988; Condè 1999:137. Weissbrodt and Anti-Slavery International 2002:22 in footnote 111 point out that the term “servitude” is not defined in international law.

⁷⁵ Haysom 2002:178; see also Weissbrodt and Anti-Slavery International 2002:5-6; Gallagher 2001:988 in footnote 76; Nowak 2005:200; Jordan 2002:10.

⁷⁶ Neither Snyman 2008:1-559 nor Burchell 2005:1-1019 refers to “servitude” as a crime in South African law in their textbooks on criminal law.

⁷⁷ See the discussion of the *Basic Conditions of Employment Act 75 of 1997* in 4.2.2.4 in Chapter 7 above.

The criminalisation of conduct constituting “practices similar to slavery” is also complicated by different interpretations of this concept.⁷⁸ Without defining the concept, a number of instruments prohibit “practices similar to slavery”⁷⁹ or list practices that resort under this concept.⁸⁰ The concept “debt bondage”, which in essence entails the pledging of services as security for a debt, is commonly referred to as a practice similar to slavery and is proscribed by the ILO Convention on the Worst Forms of Child Labour.⁸¹ Having ratified this Convention,⁸² South Africa is obligated to criminalise “debt bondage” regarding children.⁸³ However, a crime called “debt bondage” is not found in South African law. This gap has been addressed in the *Trafficking Bill*, which not only defines the concept “debt bondage”⁸⁴ comprehensively, but also establishes it as an offence pertaining to children as well as adults.⁸⁵

⁷⁸ Haysom 2002:178; see also Weissbrodt and Anti-Slavery International 2002:5-6.

⁷⁹ The 1999 ILO Convention on the Worst Forms of Child Labour includes “practices similar to slavery” as one of the worst forms of child labour and obligates member states to criminalise it as a matter of urgency – 2.2.4 in Chapter 5 above.

⁸⁰ See articles 1 and 6(1) of the Supplementary Convention on Slavery – see the discussion in 2.1.3 in Chapter 5 above; Bassiouni 1990/1991:481; Bassiouni 1986:486-489; Farrior 1997:221; Dottridge and Weissbrodt 1999:246; Weissbrodt and Anti-Slavery International 2002:5-6; Van de Glind and Kooimans 2008:151; Smith 2007:222; Bales and Robbins 2001:23, 25.

⁸¹ <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (accessed 10/4/2008); see also 2.2.4 in Chapter 5 above. The concept “debt bondage” is also defined in article 1(a) and is criminalised in article 6(1) of the Supplementary Convention on Slavery, but South Africa has not ratified this instrument and is therefore not bound by it – see 2.1.3 in Chapter 5 above.

⁸² SALRC 2006:23 in footnote 78; ILOLEX 2006:1; IOM 2008:20; HSRC 2010:28.

⁸³ The concept “debt bondage” is listed in the ILO Convention on the Worst Forms of Child Labour as one of the “worst forms of child labour” that must be prohibited.

⁸⁴ Clause 1; see also Guideline 1 below.

⁸⁵ Clause 5.

The ILO Convention on the Worst Forms of Child Labour further requires member states to criminalise “serfdom” pertaining to children.⁸⁶ Serfdom entails a person, who has the permanent status as a serf (tenant),⁸⁷ being bound to live and work on another person’s land.⁸⁸ Although South Africa is bound to comply with the ILO Convention on the Worst Forms of Child Labour⁸⁹ and its requirement that serfdom involving children be criminalised, a crime called “serfdom” is not part of South African law.⁹⁰

Another practice listed in the Supplementary Convention on Slavery includes the delivering of children by their parents or guardians to other persons for exploitation.⁹¹ This type of exploitation may also fall under the binding provisions of the Convention on the Rights of the Child, which prohibits child exploitation in general as well as specific forms of exploitation.⁹² Under South African law, this conduct may be prosecuted as the abuse or neglect of children,⁹³ with a penalty of up to 10 years’

⁸⁶ The term “serfdom” is defined in article 1(b) of the Supplementary Convention on Slavery – see the discussion in 2.1.3 in Chapter 5 above.

⁸⁷ US Department of State 2010:9; Dottridge and Weissbrodt 1999:251-252.

⁸⁸ Haysom 2002:178-179; Rijken 2003:75. For a further discussion of the various forms of serfdom and its link to the term “peonage”, see Weissbrodt and Anti-Slavery International 2002:11-12.

⁸⁹ South Africa has ratified this ILO Convention – SALRC 2006:23 in footnote 78; ILOLEX 2006:1; IOM 2008:20; HSRC 2010:28.

⁹⁰ Neither Snyman 2008:1-559 nor Burchell 2005:1-1019 refers to “serfdom” as a crime in South African criminal law in their textbooks on criminal law.

⁹¹ Article 1(d) of the Supplementary Convention on Slavery; see also Dottridge and Weissbrodt 1999:246-247; Weissbrodt and Anti-Slavery International 2002:5-6; 2.1.3 in Chapter 5 above.

⁹² Articles 19(1), 32, 34, 36, 37(1); HSRC 2010:26; Hodgkin and Newell 2002:521-528, 533-538; Kassan 2007:18–3-4; Farrior 1997:233; see also 2.3.7 in Chapter 2 above.

⁹³ Article 305(3) of the *Children’s Act* provides that the parents or caregivers of a child are guilty of an offence if they abuse or deliberately neglect the child or abandon the child. The term “abuse” is broadly defined in section 1 of the Act to mean any form of harm or ill-treatment deliberately inflicted on a child, and includes –

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;

imprisonment under the *Children's Act*.⁹⁴

Finally, different practices constituting forced marriage are also included in the Supplementary Convention on Slavery. These practices entail the forced selling of women into marriage,⁹⁵ the transfer of wives for reward⁹⁶ and the inheriting of widows by another person upon the death of such widows' husbands.⁹⁷ Forced marriages are also prohibited in several other international instruments, which require the full and free consent of both parties and the attainment of a minimum age for marriage in order to combat child marriages.⁹⁸ Applied to the South African context, the *Children's Act* may find application in these circumstances by protecting children from forced marriages as well as from being given in marriage before reaching the legal minimum age for marriage.⁹⁹ On this issue, it

-
- (c) bullying by another child;
 - (d) a labour practice that exploits a child; or
 - (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

⁹⁴ Section 305(6).

⁹⁵ Article 1(c)(i) of the Supplementary Convention on Slavery. Apart from the payment, it is more the fact that the woman does not have the right to refuse to be given in marriage on payment to her family or others that constitutes the main abuse – Weissbrodt and Anti-Slavery International 2002:35; see also 2.2.2.3.2.d in Chapter 2 above for a further discussion of forced marriages.

⁹⁶ Article 1(c)(ii) of the Supplementary Convention on Slavery.

⁹⁷ Article 1(c)(ii) of the Supplementary Convention on Slavery; see also Haysom 2002:178; Rijken 2003:75; Currie and De Waal 2005:312.

⁹⁸ Article 16(2) of the 1948 Universal Declaration of Human Rights provides that “marriage shall be entered into only with the free and full consent of the intending spouse” – <http://www.un.org/Overview/rights.html> (accessed 31/1/2005). In addition, forced marriage is also prohibited in articles 1 and 2 of the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages – <http://www.unhchr.ch/html/menu3/b/63.htm> (accessed 2/7/2008) and article 16(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women – <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 11/3/2008); see also US Department of State 2010:15.

⁹⁹ Article 12(2) of the *Children's Act*.

may be necessary to review certain traditional customs pertaining to marriage and the abuse of marriage.¹⁰⁰

Thus the *Trafficking Bill*, together with relevant existing common law and statutory provisions, criminalises most component acts and component offences related to human trafficking.

Standard 3.1: Criminalisation of component acts and component offences related to human trafficking

	Not compliant	Partly compliant	Compliant
Assessment of compliance		X	
<p>Recommendation:</p> <p>While international instruments prohibit “servitude” and “serfdom”, such crimes are not part of South African law. It is submitted that, in the light of the existence of a number of offences related to these concepts, such concepts seem to be redundant and should not be transformed into new offences in South African law until research has been undertaken to substantiate the establishment of such offences.</p>			

2.2.3.2 Standard 3.2: Criminalisation of the laundering of the proceeds of crime

The Palermo Protocol does not contain any provisions on the laundering of the proceeds of crime. The Organized Crime Convention sets the mandatory standard for states parties to criminalise money-laundering conduct pertaining to the conversion or transfer of property in order to conceal its illegal origin, pertaining to the concealment of crime proceeds, and pertaining to the acquisition, possession or use of crime

¹⁰⁰ For a discussion of the abuse of the *ukuthwala* tradition resulting in forced marriages, see 4.2.1.1 above in Chapter 7 above.

proceeds.¹⁰¹ The Convention directs states to apply these money-laundering provisions to “predicate offences”,¹⁰² which include offences established under the Convention and its Protocols, as well as “serious offences” punishable under domestic law by at least four years’ imprisonment.¹⁰³ In the light of these provisions in the Organized Crime Convention, the UNODC Model Law underpins the fact that offences such as the laundering of the proceeds of crime are to be included in domestic legislation.¹⁰⁴

In considering the South African counter-trafficking response, it should be noted that the *Trafficking Bill* does not include provisions regarding the laundering of the proceeds of crime. However, such provisions are part and parcel of the *Prevention of Organised Crime Act* 121 of 1998,¹⁰⁵ which covers money-laundering and related issues comprehensively.¹⁰⁶ The provisions in this Act may therefore be applied to human trafficking cases so as to recover the proceeds of unlawful trafficking activities and to bring about the civil forfeiture of criminal assets that have been used either to commit an offence or are the proceeds of such an offence.¹⁰⁷ The duty to criminalise the laundering of the proceeds of a comprehensive range of trafficking offences in domestic law is therefore

¹⁰¹ Article 6; see also UNODC 2004:272-273; UNODC 2006:39-40; UNODC 2008:113; and the discussion in 3.2.3.1 in Chapter 6 above.

¹⁰² Article 6(2).

¹⁰³ Articles 2(b) and 6(2)(b); UNODC 2008:113.

¹⁰⁴ UNODC 2009b:29.

¹⁰⁵ For an in-depth discussion of this Act, see Kruger 2008:11-162; Burchell 970-1019.

¹⁰⁶ Kruger 2008:8, 11-124; Burchell 2005:973, 976-1011; IOM 2009a:87.

¹⁰⁷ IOM 2009a:87; Mnisi 2008:21. The Act provides for restraint orders (section 26), confiscation orders (section 18) and realisation orders (sections 30-33), as well as for civil preservation orders (sections 38-39) and forfeiture orders (section 50) for the recovery of property; see also Kruger 2008:59-124; SALRC 2008:23; SOCA Unit (NPA) 2009:2.

complied with by means of the applicable provisions in the *Prevention of Organised Crime Act 121 of 1998*.¹⁰⁸

Standard 3.2: Criminalisation of the laundering of the proceeds of crime

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.3.3 Standard 3.3: *Criminalisation of corruption*

The Organized Crime Convention requires states parties to criminalise specified corrupt activities involving public officials.¹⁰⁹ In essence, states parties must criminalise the intentional offering or giving of an undue advantage to a public official,¹¹⁰ as well as the solicitation or acceptance of such an undue advantage by such official.¹¹¹

The *Trafficking Bill* does not contain provisions on corruption offences, but corrupt activities are criminalised in other existing South African legislation. The *Prevention and Combating of Corrupt Activities Act 12 of 2004* includes a wide range of offences to combat various corrupt activities.¹¹² The general offence of corruption in this Act¹¹³ complies with the requirement set in the Organized Crime Convention to criminalise the

¹⁰⁸ UNODC 2004:272-273.

¹⁰⁹ Article 8; see the discussion in 3.2.3.2 in Chapter 6 above.

¹¹⁰ Article 8(1)(a).

¹¹¹ Article 8(1)(b).

¹¹² See 4.2.2.8 in Chapter 7 above; Kruger 2008:8, 11-124; Burchell 2005:973, 976-1011; IOM 2009a:87.

¹¹³ Section 3; Snyman 2008:411-423; Burchell 2005:892-893.

offering or giving of an undue benefit to a public official, as well as the solicitation or acceptance of such an undue advantage by such official.¹¹⁴ The provision in the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 is in fact broader than the corresponding Convention provision, which deals only with the corruption of public officials. The Act covers the corruption of specific persons, such as public officers,¹¹⁵ judicial officers,¹¹⁶ and prosecutors,¹¹⁷ but, broadly, also the corruption of “any person”.¹¹⁸

Furthermore, the Convention’s call to consider the inclusion of other forms of corruption in domestic legislation¹¹⁹ is also complied with by Act 12 of 2004. The Act contains numerous offences in respect of various corrupt activities ranging from the general offence of corruption to offences relating to specific corrupt activities pertaining to contract, witnesses, and evidential material in court proceedings and other matters.¹²⁰ As was pointed out above,¹²¹ the Act also provides for stringent penalties up to imprisonment for life.¹²²

¹¹⁴ Article 8(1). The Organized Crime Convention’s requirement in article 8(3) that participation as an accomplice in these offences must also be criminalised is complied with, because, in terms of South African criminal law, a conviction as an accomplice is included in all offences – Snyman 2008:257-260, 273-278.

¹¹⁵ Section 4; Snyman 2008:423.

¹¹⁶ Section 8; Snyman 2008:424.

¹¹⁷ Section 9; Snyman 2008:424.

¹¹⁸ Section 3(1); Snyman 2008:411-423; Burchell 2005:892-893.

¹¹⁹ Article 8(2).

¹²⁰ Articles 11-16; Snyman 2008:424.

¹²¹ See 4.2.2.8 in Chapter 7 above.

¹²² Section 26(1) provides for these sentences on conviction of contravening sections 3-16, 18 or 21; Burchell 2005:895.

Standard 3.3: Criminalisation of corruption

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.4 Standard 4: Liability of natural and legal persons

In terms of the Organized Crime Convention,¹²³ states parties are obligated to ensure the criminal liability of not only natural persons, but also legal persons for participating in offences established in the Convention.¹²⁴ The *Trafficking Bill* specifically complies with this minimum standard by providing that, where the term “person” is used in the Bill, it includes “a natural person, a juristic person and a partnership, unless the context indicates otherwise”.¹²⁵

Standard 4: Liability of natural and legal persons

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.5 Standard 5: Appropriate sanctions

The minimum standard concerning appropriate and deterrent sanctions is drawn from the Organized Crime Convention.¹²⁶ Although states parties have the authority to determine the severity of the punishment for

¹²³ Article 10(1)-(3).

¹²⁴ See the discussion in 3.2.4 in Chapter 6 above; OHCHR 2002:8 – Guideline 4.2; UNODC 2004:273.

¹²⁵ Clause 1 – Addendum B.

¹²⁶ Article 11(1); see also David 2007:1; UN.GIFT 2008e:27; UNODC 2008:112; UNODC 2004:273; 3.3.1 in Chapter 6 above.

Convention offences,¹²⁷ they are obligated to take into account the gravity of the offence.¹²⁸ The Legislative Guides for the Implementation of the Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides) explain that, while the primacy of national law is affirmed by the Convention,¹²⁹ states have the duty to ensure that:

...the grave nature of the offence and the need to deter its commission is taken into account in prosecution, adjudication and correctional practices and decisions.¹³⁰

The Convention further requires that “effective, proportionate and dissuasive criminal or non-criminal sanctions” be imposed on liable legal persons.¹³¹

In comparing the proposed South African legal response with regard to the international standard pertaining to deterrent sanctions, it is to be noted that the *Trafficking Bill* acknowledges the seriousness of the human trafficking offence by providing that imprisonment for life may be imposed upon conviction.¹³² Other crimes related to human trafficking

¹²⁷ Article 11(6); UNODC 2004:20.

¹²⁸ Article 11(1) of the Organized Crime Convention.

¹²⁹ Article 11(6) of the Organized Crime Convention.

¹³⁰ UNODC 2004:20.

¹³¹ Article 11(4); UNODC 2008:112.

¹³² Clause 4(1) – Addendum B. The Supreme Court of Appeal recently emphasised that sentences imposed for violent crimes must be appropriate and not “so disturbingly lenient that it has the effect of trivialising violence” – *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA):432G.

also carry lengthy terms of imprisonment,¹³³ such as a maximum of 15 years' imprisonment for debt bondage and using the services of trafficked victims.¹³⁴ Accordingly, it is submitted that the sanctions provided in respect of trafficking offences in the *Trafficking Bill* comply with the international standard relating to appropriate and deterrent sanctions. The sanctions in the *Trafficking Bill* also meet the submission of the UNODC Model Law that sanctions for trafficking crimes must comply with the prerequisite of maximum imprisonment for at least four years to constitute a serious crime in terms of the Organized Crime Convention.¹³⁵

Standard 5: Appropriate sanctions

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.6 *Standard 6: Prescription of the right to institute a prosecution*

The Organized Crime Convention also places a duty on states parties to provide, in domestic law, for a long statute of limitation period in which to commence proceedings relating to offences covered by the Convention.¹³⁶ This obligation pertaining to the prescription of the right to

¹³³ In terms of clauses 6 and 8 of the *Trafficking Bill*, a maximum of 10 years' imprisonment may be imposed for unlawful conduct pertaining to travel documents and for conduct facilitating human trafficking.

¹³⁴ Clauses 5 and 7 – Addendum B. In human trafficking cases where the impact of the crime on victims is often severe and enduring, the recent judgment of the Supreme Court of Appeal is of significant importance in that the Court emphasised that an appropriate sentence “also needs to be victim-centred” – *State v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010):10 paragraph 16.

¹³⁵ Article 2(b) of the Convention; UNODC 2009b:34-35.

¹³⁶ Article 11(6); UNODC 2004:26.

institute a prosecution is important in human trafficking cases, especially when criminal proceedings cannot commence against alleged offenders because they are evading justice, for example by fleeing to other countries.¹³⁷ The *Trafficking Bill* does not contain a provision in this regard, but the issue is dealt with by the *Criminal Procedure Act 51 of 1977 (Criminal Procedure Act)*. Section 18 of this Act provides that the right to institute a prosecution for an offence usually lapses after 20 years from the time when the offence was committed.¹³⁸ However, the same section provides that certain crimes, such as sex trafficking in terms of the *Sexual Offences Amendment Act*, have no prescription period.¹³⁹ When the *Trafficking Bill* is enacted, it will amend section 18 of the *Criminal Procedure Act* by replacing the reference to the trafficking provision in the *Sexual Offences Amendment Act* with the trafficking provision as in the *Trafficking Bill*.¹⁴⁰

Standard 6: Prescription of the right to institute a prosecution

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.7 Standard 7: Extraterritorial jurisdiction

The Organized Crime Convention sets minimum standards for states parties regarding the establishment of territorial¹⁴¹ as well as

¹³⁷ Article 11(6) of the Organized Crime Convention; UNODC 2004:26.

¹³⁸ Kriegler and Kruger 2002:30; Joubert 2007:65.

¹³⁹ See also IOM 2009a:85-86. Although the interim trafficking provisions in the *Children's Act* came into force on 1 April 2010, these provisions were not included in section 18 of the *Criminal Procedure Act*.

¹⁴⁰ See Schedule 1 in the *Trafficking Bill* – Addendum B.

¹⁴¹ Article 15(1)(a) and (b); UNODC 2009b:25.

extraterritorial jurisdiction¹⁴² over Convention offences. In line with this standard, the *Trafficking Bill* provides that South African courts in certain circumstances have extraterritorial jurisdiction in respect of offences established in the *Trafficking Bill*, even though such offences are committed outside South Africa.¹⁴³ According to the *Trafficking Bill*, extraterritorial jurisdiction is established on condition that 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;
- (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.¹⁴⁴

Standard 7: Extraterritorial jurisdiction

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

¹⁴² Articles 15 and 16(10); UNODC 2009b:25-27; see also 3.5 in Chapter 6 above.

¹⁴³ Clause 10. For a discussion of the exceptions to the general principle that South African courts exercise jurisdiction with regard to offences committed on South African territory only, see Joubert 2007:37-38.

¹⁴⁴ Clause 10(1).

2.2.8 Standard 8: Confiscation, seizure and asset forfeiture

The Palermo Protocol does not provide for the confiscation of the proceeds and instrumentalities of crime derived from offences covered by the Protocol. However, the Organized Crime Convention has mandatory requirements in this regard.¹⁴⁵ As pointed out above,¹⁴⁶ the Protocol supplements the Organized Crime Convention¹⁴⁷ and Protocol offences are therefore regarded as offences established in accordance with the Convention.¹⁴⁸ Furthermore, the provisions of the Convention, including those pertaining to confiscation issues, apply *mutatis mutandis* to the Protocol.¹⁴⁹

Although South Africa is a ratifying party to the Palermo Protocol and the Organized Crime Convention, the *Trafficking Bill* does not contain any provisions on confiscation matters as required by the Convention. However, as has been pointed out above,¹⁵⁰ the *Prevention of Organised Crime Act 121 of 1998 (Prevention of Organised Crime Act)* may be used to recover the proceeds and instrumentalities of criminal activities related to human trafficking. In *S v Sayed and Another*,¹⁵¹ a conviction pertaining to human trafficking activities was secured on several charges in terms

¹⁴⁵ Articles 12-14; see 3.5 in Chapter 6 above.

¹⁴⁶ See 3.12 in Chapter 6 above; 2.3.13.3 and 2.3.14.2 in Chapter 5 above; article 1(1) and (2) of the Protocol and the corresponding article 37(4) in the Convention; Jordan 2002:6; SALRC 2006:12-13.

¹⁴⁷ Article 1(1) of the Palermo Protocol; UNODC 2004:227, 277.

¹⁴⁸ Article 1(3); UNODC 2004:267.

¹⁴⁹ Article 1(2); UNODC 2004:267.

¹⁵⁰ See 4.2.2.7 in Chapter 6 above.

¹⁵¹ Judgment was delivered on 18 March 2010 in *S v Sayed and Another*, unreported case no. 041/2713/2008 in the Durban Regional Court.

of this Act.¹⁵² The *Prevention of Organised Crime Act* contains comprehensive provisions on confiscation and forfeiture matters, including various restraint,¹⁵³ confiscation¹⁵⁴ and forfeiture orders.¹⁵⁵ The minimum standard laid down by the Organized Crime Convention, namely that confiscation and forfeiture measures must be included in national legislation, is complied with by the provisions in the *Prevention of Organised Crime Act*.

Standard 8: Confiscation and asset forfeiture measures

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.9 Standard 9: Judicial cooperation

A number of international instruments,¹⁵⁶ in particular the Palermo Protocol¹⁵⁷ and the Organized Crime Convention,¹⁵⁸ have mandatory provisions on especially international cooperation. These minimum standards pertaining to cooperation as discussed above¹⁵⁹ must be complied with in all domestic judicial responses to human trafficking.

¹⁵² See the discussion in 4.2.2.7 in Chapter 6 above.

¹⁵³ Sections 24A-29A.

¹⁵⁴ Sections 18-24; see also Kruger 2008:59-124; SALRC 2008:23; SOCA Unit (NPA) 2009:2.

¹⁵⁵ Sections 48-57; see also Kruger 2008:59-124; SALRC 2008:23; SOCA Unit (NPA) 2009:2.

¹⁵⁶ The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography also requires international cooperation and mutual legal assistance in the investigation, prosecution and punishment of offences pertaining to the selling of children – see 3.6.3 in Chapter 6 and 2.3.11 in Chapter 5 above. Planitzer 2009:18 further discusses other instruments requiring international cooperation.

¹⁵⁷ Articles 6, 9(3) and 10 – Addendum A; see also the discussion in the UNODC Model Law – UNODC 2009b:88-89.

¹⁵⁸ Articles 13, 16 and 18; UNODC 2004:193-228.

The *Trafficking Bill* contains a provision on international cooperation, which provides mainly for the president of a country to enter into, amend or revoke agreements with foreign states pertaining to cooperation in human trafficking matters.¹⁶⁰ However, provisions complying with the requirement to ensure specific types of cooperation in human trafficking matters, including information exchange¹⁶¹ and other mutual legal assistance,¹⁶² are lacking.

Existing legislation may be used to comply with some of the obligations pertaining to international cooperation. With regards to extradition, it was pointed out in Chapter 6¹⁶³ that the Organized Crime Convention obligates states parties to comply with various duties pertaining to extradition.¹⁶⁴ The *Extradition Act 67* of 1962 is applicable to this obligation in that it provides for the extradition of persons accused or convicted of certain offences and related matters.¹⁶⁵ Furthermore, the *International Co-operation in Criminal Matters Act 75* of 1996¹⁶⁶ may be used to facilitate cooperation between South Africa and foreign countries in various criminal matters.¹⁶⁷ These

¹⁵⁹ See 3.6 in Chapter 6 above.

¹⁶⁰ Clause 35.

¹⁶¹ See 3.6.4.1 in Chapter 6 above; David 2007:2; *Rantsev v Cyprus and Russia* (Application no. 25965/04) 2010:32.

¹⁶² See 3.6.4.4 in Chapter 6 above.

¹⁶³ See 3.6.4.2 in Chapter 6 above.

¹⁶⁴ Article 16 of the Organized Crime Convention; David 2007:1; UNODC 2008:124; UNODC 2004:274.

¹⁶⁵ See articles 1-22.

¹⁶⁶ See 4.2.2.17 in Chapter 7 above.

¹⁶⁷ See the long title of the *International Co-operation in Criminal Matters Act 75* of 1996; Kruger 2008:147.

matters include mutual provision of evidence,¹⁶⁸ the mutual execution of sentences and compensatory orders,¹⁶⁹ and the confiscation and transfer of the proceeds of crime between the Republic and foreign states.¹⁷⁰ Although these provisions may be used to comply with a number of minimum standards laid down for international cooperation in human trafficking cases, both the UNODC Model Law Against Trafficking in Persons (UNODC Model Law)¹⁷¹ and the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto (UNODC Legislative Guides)¹⁷² propose that more comprehensive provisions on cooperation be included in domestic counter-trafficking responses.

Standard 9: Judicial cooperation

	Not compliant	Partly compliant	Compliant
Assessment of compliance		X	
Recommendation: Insert a more comprehensive provision on cooperation to comply with the minimum standards set for cooperation, including the exchanging and sharing of information.			

¹⁶⁸ See sections 2-12.

¹⁶⁹ See sections 13-18 of this Act.

¹⁷⁰ Sections 19-26; Kruger 2008:147.

¹⁷¹ http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf (accessed 14/7/2010) – see UNODC 2009b:88-89.

¹⁷² <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html> (accessed 17/8/2010) – 195-236.

2.2.10 Standard 10: Human rights-based approach

Neither the Palermo Protocol nor the Organized Crime Convention contains comprehensive human rights standards.¹⁷³ However, the Protocol's savings clause emphasises that rights under international law, including international human rights law, are not affected by the provisions in the Protocol.¹⁷⁴ In the light of international recognition of the fact that a range of human rights is usually violated during the human trafficking process,¹⁷⁵ binding global and regional human rights instruments must be relied upon to protect the rights of trafficked persons.¹⁷⁶

In assessing whether minimum human rights standards are included in the proposed domestic response set out in the *Trafficking Bill*, it should be noted that the Bill does not contain any provision on human rights. The *Trafficking Bill* does not even follow the Protocol's explicit formulation that its purpose is to protect and assist trafficked persons "with full respect for their human rights".¹⁷⁷ However, the Preamble to the *Trafficking Bill* states that the Bill of Rights in the *Constitution of the Republic of South Africa* 1996 enshrines human rights and lists numerous rights that are relevant to trafficking cases in particular.¹⁷⁸ This

¹⁷³ Gallagher 2001:990.

¹⁷⁴ Article 14(1); see also HSRC 2010:25; UNODC 2009b:6, 86. Article 14(2) of the Protocol also underpins the international principles of non-discrimination in interpreting and implementing provisions in the Protocol – UNODC 2004:256-257.

¹⁷⁵ Lee 2007:9; Marks and Clapham 2005:423; Farrior 1997:213; Dottridge and Weissbrodt 1999:249; Weissbrodt and Anti-Slavery International 2002:8; Gajic-Veljanoski and Stewart 2007:340; Lansink 2006:55; UN General Assembly 2010a:4.

¹⁷⁶ Jordan 2002:3, 6; see also HSRC 2010:20; UNODC 2009b:6; Marks and Clapham 2005:423; and 2.4 and 3.1 in Chapter 5 above.

¹⁷⁷ Article 2(b) – Addendum A.

¹⁷⁸ Preamble.

reference to the Constitution and the protection of human rights forms the basis for accepting that the human rights standards laid down in human rights instruments are an integral part of the South African response to human trafficking.¹⁷⁹

Standard 10: Human rights-based approach

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.11 Standard 11: Witness protection

From the earlier analyses of the Protocol,¹⁸⁰ it is clear that this instrument does not place a mandatory obligation on states parties to ensure the safety of witnesses.¹⁸¹ The protection provided in the witness protection provision in the Organized Crime Convention, which applies *mutatis mutandis* to the Protocol,¹⁸² places a mandatory obligation on states parties to protect witnesses, but limits the obligation to only those circumstances in which it is “within the means” of the state party concerned.¹⁸³ The provision requires that effective protection for

¹⁷⁹ HSRC 2010:51. The constitutional duty to respect and promote human rights is translated into various pieces of legislation as well as policy documents, such as the National Victim Empowerment Programme, the Service Charter for Victims of Crime in South Africa, and the Minimum Standards – Centre for Child Law UP 2008:1-52; For an overview of the Service Charter for Victims of Crime and the Minimum Standards on Services for Victims of Crime – see HSRC 2010:49-50. The courts emphasise and enforce the protection of the fundamental rights enshrined in the Constitution, in particular the rights of children, which include unaccompanied foreign children in South Africa – *Centre For Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T):56B-58F.

¹⁸⁰ See 3.9 in Chapter 6 above.

¹⁸¹ Article 6(5); see also Defeis 2003/2004:491; SALRC 2006:12, 17.

¹⁸² Article 1(2) – Addendum A; see also 2.3.14.2 in Chapter 5 above.

¹⁸³ Article 24(1); UNODC 2004:168.

witnesses, as well as for “relatives and other persons close to them”, be provided against potential retaliation and intimidation.¹⁸⁴

It is important to clarify exactly for whom states must provide witness protection. Although the Convention does not define the term “witness”, it requires that protection must be provided “for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention, and, as appropriate, for their relatives or other persons close to them”.¹⁸⁵ In agreement with the UNODC Legislative Guides,¹⁸⁶ it is submitted that witness protection schemes should extend protection to those persons who do not in fact testify, but who provide relevant information or assist in the investigation.

In comparing the South African legal response to the Convention’s requirement to protect witnesses, it is to be noted that the *Trafficking Bill* does not contain any provision on this matter. Witness protection provisions have most probably been left out of the *Trafficking Bill* because legislative measures relating to this matter are already in place.

The *Criminal Procedure Act 52 of 1977* contains a number of protective measures for state witnesses during the trial.¹⁸⁷ These measures include the non-disclosure of the identities of witnesses in certain circumstances,¹⁸⁸ testifying behind closed doors¹⁸⁹ or even outside the

¹⁸⁴ Article 24(1).

¹⁸⁵ Article 24(1); UNODC 2004:167-168.

¹⁸⁶ UNODC 2004:168.

¹⁸⁷ See the discussion of Joubert 2007:13-14.

¹⁸⁸ Section 153(2)(b) of the *Criminal Procedure Act 51 of 1977*; Kriegler and Kruger 2002:394-398; Joubert 2007:13.

courtroom by means of closed-circuit television¹⁹⁰ or through an appointed intermediary.¹⁹¹ Furthermore, the *Witness Protection Act* 112 of 1998 (*Witness Protection Act*) introduced a national witness protection programme in order to contribute to an effective criminal law system by providing protection for witnesses and related persons through the Office for Witness Protection.¹⁹²

The question to be answered is whether the *Witness Protection Act* complies with the obligations laid down for witness protection in the normative international framework on human trafficking. The purpose of the Witness Protection Programme is to provide not only protection, but also support and related services for vulnerable witnesses and related persons in specified judicial proceedings.¹⁹³ Threatened and intimidated witnesses and related persons are protected by placing them in a protection programme in order to ensure that they will be able to testify in criminal and other prescribed judicial proceedings.¹⁹⁴

In terms of this Act, protection for witnesses means any protection and may include “the relocation or change of identity of, or other related assistance or services provided to a protected person”.¹⁹⁵ In addition, disclosure of a protected person’s identity and whereabouts or other

¹⁸⁹ Section 153(2)(a) of the *Criminal Procedure Act* 51 of 1977; Kriegler and Kruger 2002:394-398.

¹⁹⁰ Section 158(3)(e) of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13.

¹⁹¹ Section 170A of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13; see also 2.2.15 below.

¹⁹² Sections 2 and 4 of the Act; HSRC 2010:53.

¹⁹³ NPA 2010a:31; HSRC 2010:53.

¹⁹⁴ NPA 2010a:31; HSRC 2010:53, 69.

¹⁹⁵ See the definition of the term “protection” in section 1 of the Act.

specified information is prohibited and punishable with imprisonment of up to 30 years.¹⁹⁶ These provisions comply with the requirements in the Organized Crime Convention.¹⁹⁷

The two categories of people who may be granted protection in terms of this Act are also in line with the provisions of the Convention.¹⁹⁸ First, protection is available for witnesses, that is, “any person who is or may be required to give evidence, or who has given evidence” in specified proceedings.¹⁹⁹ The definition of witnesses is somewhat broader than in the Convention, in that it includes persons who “may be” required to give evidence. However, it falls short of the recommendation of the UNODC Legislative Guides, which require that protection be expanded to “any person who has, or may have, information that is, or may be, relevant to the investigation or prosecution of an offence covered by the Convention”.²⁰⁰

Complying with the Convention in this regard,²⁰¹ the *Witness Protection Act* provides that the testimony of witnesses must relate to specified judicial proceedings, including criminal proceedings.²⁰² These criminal proceedings must pertain to offences referred to in the Schedule to the

¹⁹⁶ Section 22(1).

¹⁹⁷ Section 24(2)(a) provides that physical protection for witnesses may include relocation and limited disclosure, or non-disclosure, “of information concerning the identity and whereabouts of such persons”.

¹⁹⁸ Article 24(1) provides that effective protection be ensured, first, for witnesses testifying in the criminal trial and, secondly, for their relatives and persons close to them.

¹⁹⁹ See the definition of the term “witness” in section 1 of the Act.

²⁰⁰ UNODC 2004:168.

²⁰¹ Article 24(1).

²⁰² See section 7(1) and the definition of the term “proceedings” in section 1 of the Act.

Act.²⁰³ It is to be welcomed that Schedule 1 to the *Trafficking Bill*, when it is enacted, provides for the amendment of the *Witness Protection Act* to include the offence of human trafficking and any trafficking-related offence committed by a carrier as offences in respect of which a witness or related person may be placed under protection.²⁰⁴

Apart from witnesses, protection is also available in terms of the *Witness Protection Act* in appropriate circumstances for “related persons”, who are broadly defined to include:

... any member of the family or household of a witness, or any other person in a close relationship to, or association with, such witness.²⁰⁵

This definition of “related persons” seems broad enough to cover “relatives and other persons close to them”,²⁰⁶ which is the standard laid down in the Organized Crime Convention.²⁰⁷

The National Prosecuting Authority (NPA) reports annually on the functioning and performance of the national Witness Protection Programme introduced in terms of the *Witness Protection Act*. The annual report of the NPA states that, even with a lack of capacity in respect of personnel, 389 witnesses²⁰⁸ were accommodated in the

²⁰³ See the definition of the term “proceedings” in section 1 of the Act.

²⁰⁴ Schedule 1 to the *Trafficking Bill*.

²⁰⁵ Section 1. It must be borne in mind that witnesses and related persons are not placed in the Witness Protection Programme automatically. They must first apply for protection in terms of section 7 and then the Director of the Office for Witness Protection, after having considered the application, will decide whether or not to approve the application in terms of section 10(3).

²⁰⁶ Article 24(1).

²⁰⁷ Article 24(1).

²⁰⁸ A total of 743 persons, including witnesses and related persons, were accommodated on the programme in 2010 – NPA 2010a:31.

Witness Protection Programme for the year ending March 2010. A further significant achievement is that none of the witnesses or related persons protected by the programme have been harmed or killed since 2002.²⁰⁹ Although 28 percent of the protected persons “walked off” or abandoned the programme up to the year ending March 2010, this year is the first one in five years during which no formal grievance has been lodged by a protected person.²¹⁰

The protection available by means of the Witness Protection Programme in terms of the *Witness Protection Act* complies with the provision in the Convention and also with the HCHR Principles and Guidelines,²¹¹ both of which require that protection for all witnesses, whether they are trafficked victims or not, must be guaranteed by law.²¹²

Standard 11: Witness protection

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X
<p>Recommendation:</p> <p>It is recommended that the protection for witnesses be expanded in appropriate cases to any person who has, or may have, information that is, or may be, relevant to the investigation or prosecution of an offence listed in the Schedule to the <i>Witness Protection Act</i>.</p>			

²⁰⁹ NPA 2010a:31.

²¹⁰ NPA 2010a:31.

²¹¹ OHCHR 2002:2 – http://www.stopvaw.org/Trafficking_Explore_the_Issue.html (accessed 17/11/2008).

²¹² OHCHR 2002:9 – Guidelines 4.7 and 4.10; see also SALRC 2006:8; Jordan 2002:23-24.

2.2.12 Standard 12: Victim participation in the criminal justice process

In line with the Organized Crime Convention,²¹³ the Palermo Protocol obligates states parties to render assistance to victims of trafficking in order 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.²¹⁴

The *Trafficking Bill* does not contain a specific provision that gives effect to the minimum standard of assisting victims to participate in the criminal justice process. However, such victim participation in the criminal justice process is an integral part of South African law.²¹⁵

A number of opportunities are available to victims of trafficking to participate in the criminal justice process. First, before the commencement of the trial, they may cooperate in the investigation process by, for example, providing information relevant to the case. Victims' views may also be allowed during plea-bargaining proceedings.²¹⁶ In essence, plea bargaining is the negotiation of an agreement on plea and sentencing between a prosecutor, duly authorised to do so, and a legally represented accused.²¹⁷ It is important

²¹³ Article 25(3); see also 2.3.13.3.6.b in Chapter 5 above.

²¹⁴ Article 6(2)(b) – Addendum A; see also UNODC 2009b:57, 59, 64; UNODC 2004:282, 284-285, 287.

²¹⁵ The South African law of evidence and the law on criminal procedure play a vital role regarding the issue of victim participation in criminal proceedings – see the discussion in Joubert 2007:12, 253-256.

²¹⁶ *Criminal Procedure Act* 51 of 1977: section 105A; Joubert 2007:215, 216.

²¹⁷ *Criminal Procedure Act* 51 of 1977: section 105A; Joubert 2007:216.

to note that the *Criminal Procedure Act* specifically provides for the participation of the victim.²¹⁸ During the criminal proceedings, victims may testify at the trial itself,²¹⁹ as well as after conviction, but before sentencing of the offender.²²⁰ They may also give their views in victim-impact statements.²²¹

It is to be welcomed that existing South African law which forms part of the broad legal counter-trafficking response provides opportunities for trafficked victims to participate in criminal proceedings against the perpetrator. However, it must be borne in mind that it remains the prosecutor's prerogative to manage the state's case and to decide whether or not to call persons to testify.²²²

A criminal prosecution at the instance of the state is, in essence, a contest between the state and the accused; the role of the victim ... is in principle confined to that of an ordinary witness who is called upon to testify on the question concerning guilt or innocence and, should there be a conviction, on the question of sentencing.²²³

²¹⁸ Section 105A(1)(b)(iii) provides that the prosecutor may enter into a plea and sentence agreement in terms of this Act "after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding –
(aa) the contents of the agreement; and
(bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss."

²¹⁹ See the provisions in sections 179-253 of the *Criminal Procedure Act* 51 of 1977 and the discussion of these sections in Kriegler and Kruger 2002:459-514.

²²⁰ Section 274(1) of the *Criminal Procedure Act* 51 of 1977; Kriegler and Kruger 2002:459-514, 686-692.

²²¹ The use of victim-impact statements in South Africa is discussed by Van der Merwe 2005:357-357. For a further analysis of victim-impact statements, see Van der Merwe 2005:343-396.

²²² Joubert 2007:254; Kriegler and Kruger 2002:690.

²²³ Joubert 2007:12.

The prosecutor is therefore not obliged to call a victim of trafficking to testify.²²⁴

Standard 12: Victim participation in the criminal justice process

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X
<p>Recommendation:</p> <p>Although South African law provides a number of opportunities for complainants or victims to participate in the criminal justice process, this is not an enforceable right with which victims are provided. It remains the prerogative of the prosecutor to manage the state's case. Accordingly, it is recommended that, in terms of clause 36(7) of the <i>Trafficking Bill</i>, the National Director of Public Prosecutions issue directives with which all members of the prosecuting authority must comply in order to ensure that victim participation in the criminal justice process is realised in the interests of justice.</p>			

2.2.13 Standard 13: Provision of victims with information

The Palermo Protocol requires that each state party ensure that victims are provided with information on relevant court proceedings in appropriate cases.²²⁵ The provision of such information is also recognised as a mandatory requirement by authoritative sources such as the UNODC Legislative Guides²²⁶ and the HCHR Principles and Guidelines.²²⁷ The UNODC Model Law recommends that victims of trafficking be provided with several types of information, such as information on the protection of their physical safety, their rights, legal remedies, benefits and assistance, and access to legal services.²²⁸ It

²²⁴ Joubert 2007:254.

²²⁵ Article 6(2)(a); see also 3.7 in Chapter 6 above.

²²⁶ UNODC 2004:282.

²²⁷ OHCHR 2002:9 – Guideline 4.8.

²²⁸ UNODC 2009b:54-55.

must be noted that such information will only be helpful to the victim where it is provided in a language that the victim understands.²²⁹

The *Trafficking Bill* does not contain a specific provision ensuring that victims are provided with information on relevant court proceedings. However, such provision of information is included as a victim’s right to receive information in the Service Charter for Victims of Crime (Victims’ Charter).²³⁰

Standard 13: Provision of victims with information

	Not compliant	Partly compliant	Compliant
Assessment of compliance		X	
<p>Recommendations:</p> <p>Although the <i>Trafficking Bill</i> does not provide for the provision of relevant information for victims of trafficking, such provision is explicitly incorporated in policy documents such as the National Victim Empowerment Programme, the Service Charter for Victims of Crime in South Africa, and the Minimum Standards on Services for victims of Crime. To enhance the enforcement of the provision of such information for victims, it is recommended that:</p> <ul style="list-style-type: none"> (a) in terms of clause 36(7) of the <i>Trafficking Bill</i>, the National Director of Public Prosecutions issue directives with which all members of the prosecuting authority must comply in order to ensure that victims are provided with the relevant information; (b) in terms of clause 36(1) of the <i>Trafficking Bill</i>, and with specific reference to 36(1)(d) on the treatment of victims and 36(1)(e) on the measures to be taken to provide information in a language understood by the victim, the National Commissioner of the South African Police Service issue national instructions with which all police officials must comply in order to ensure that victims are provided with the relevant information; 			

²²⁹ Guidelines 4.8 and 6.5 – OHCHR 2002:9, 11; see also UNODC 2009b:55.

²³⁰ DoJ & CD 2004b:10-11; DoJ & CD 2004a:19-22; DoJ & CD 2008:4; HSRC 2010:49-50. Human rights enshrined in the *Constitution of the Republic of South Africa* 1996 are given effect to in various pieces of legislation as well as policy documents, such as the National Victim Empowerment Programme, the Service Charter for Victims of Crime in South Africa, and the Minimum Standards – Centre for Child Law UP 2008:1-52; *State v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010):10 paragraph 16; see also Standard 10 in 2.2.1 above. For an overview of the Service Charter for Victims of Crime and the Minimum Standards on Services for Victims of Crime – see HSRC 2010:49-50.

(c) in terms of clause 36(2) of the *Trafficking Bill*, and with specific reference to 36(2)(b) on the treatment of victims and 36(2)(c) on the measures to be taken regarding the provision of information in a language understood by the victim, the Director General: Home Affairs issue directives with which all immigration officers must comply in order to ensure that victims are provided with the relevant information;

(d) in terms of clause 36(5) of the *Trafficking Bill*, and with specific reference to 36(5)(b) on the treatment of victims and 36(5)(c) on the measures to be taken regarding the provision of information in a language understood by the victim, the Director General: Labour issue directives with which all labour inspectors must comply in order to ensure that victims are provided with the relevant information.

2.2.14 Standard 14: Compensation for victims

The Palermo Protocol lays down a minimum standard for domestic legal responses in this regard which requires states parties to provide victims of trafficking with access to compensation for damage suffered.²³¹ The Organized Crime Convention provides for a broader remedy, in that victims are provided with access to compensation and restitution without restricting these only to damages suffered.²³² Accordingly, access to compensation for pain and suffering is also included. The obligation to provide compensation may be met by way of different court orders, such as a compensation order made in civil proceedings or an order by a criminal court against a convicted offender to pay compensation to the trafficked victim over and above any punishment imposed on the offender.²³³

In assessing whether the South African legal response complies with the minimum standard requiring provision of access to compensation for victims of trafficking, the provisions pertaining to compensation in

²³¹ Article 6(6); see also UNODC 2004:282; Gallagher 2001:990; David 2007:1; UNODC 2009b:57.

²³² Article 25(2); see also 2.3.13.3.6.a in Chapter 5 above.

²³³ UNODC 2009b:67-68; UNODC 2004:286. The US Model Law stipulates that restitution is mandatory and that a court must order restitution for the amount of loss identified – US Department of State 2003:4 – section XXX.02(5).

existing legislation as well as in the *Trafficking Bill* need to be examined. First, the existing *Criminal Procedure Act* provides that a criminal court may, at the request of the injured party, order the convicted person to compensate the victim for damages caused or for the loss of property as a result of the commission of the crime.²³⁴ Clause 27(1)(a) of the *Trafficking Bill* contains a similar, but broader provision. Apart from any sentence that a court may impose in terms of this Bill, it may also order the convicted person to pay compensation to the victim, not only for damages or the loss or destruction of property but also for:

- (ii) physical, psychological or other injury;
 - (iii) being infected with a life-threatening disease; or
 - (iv) loss of income or support,
- suffered by the victim as a result of the commission of the offence.²³⁵

This provision in the *Trafficking Bill* is to be welcomed, as it is substantially broader than the provision in the *Criminal Procedure Act*.²³⁶ The South African counter-trafficking response thus complies with the Protocol standard and also with the UNODC Model Law, which provides that compensation may include payment for medical and psychological treatment, legal fees, loss of income, and non-material damages for pain and suffering suffered by the victim as a result of the trafficking crime committed against him or her.²³⁷ However, as to why only victims of

²³⁴ Section 300(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.
See also section 300(1)(a) to 300(5); Joubert 2007:12, 45, 307.

²³⁵ Clause 27(1)(a).

²³⁶ Section 300.

²³⁷ UNODC 2009b:69.

trafficking have access to this expanded remedy, while victims of other serious crimes such as rape do not, may be difficult to justify.

The *Trafficking Bill* further provides that, in cases where the “amount of damage, injury or loss suffered exceeds an order for compensation in terms of [clause 27] subsection (1), a civil action may be instituted by the victim for the recovery of the excess”.²³⁸

Standard 14: Compensation for victims

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X

2.2.15 Standard 15: Special needs of victims, especially children

Informed by research that the provision of proper victim protection and assistance impacts significantly on the successful prosecution of perpetrators,²³⁹ this study includes a victim-centred approach in its criminal justice focus on human trafficking. Accordingly, minimum standards, as well as recommended guidelines on victim protection and assistance, have also been drawn from the broad framework of instruments on human trafficking.

One of the essential minimum standards for combating human trafficking as far as victim protection and assistance are concerned is the accommodation of the special needs of victims, and, in particular, the

²³⁸ Clause 27(2).

²³⁹ Gallagher 2001:989-991; Zimmerman *et al.* 2006:23; UN.GIFT 2008e:36; UNODC 2009b:55, 58, 60; US Department of State 2003:12; UNODC 2004:288-289; OHCHR 2002:9-10.

needs of children.²⁴⁰ In an optional provision, the Palermo Protocol calls on states parties to take the age, gender and special needs of victims into account.²⁴¹ However, other binding human rights instruments that form part of the framework on human trafficking obligate states parties to ensure that the special needs of trafficked persons are catered for.²⁴² These special needs encompass the physical, psychological, healthcare, socio-economic, legal, educational and housing needs of trafficked persons, their need for protection, and other needs.²⁴³

Apart from the obligation to protect the rights of all trafficked persons,²⁴⁴ it is mandatory for states parties to attend specifically to the rights and special needs of children, who require additional protection, especially because of their vulnerabilities.²⁴⁵ In this regard, the HCHR Principles and Guidelines also emphasise the necessity for additional or adapted measures for children.²⁴⁶ Important to this study, the UNODC Model Law points out that the special needs of victims and, in particular, children must be taken into account in criminal court proceedings. During the trial,

²⁴⁰ See the discussion of this issue pertaining to the special needs of victims in 3.8.1.2.4 in Chapter 6 above.

²⁴¹ Article 6(4) – Addendum A.

²⁴² See the general discussion of relevant human rights instruments that form part of the broad normative framework on human trafficking in 2.3.6, 2.3.7, 2.3.11 and 2.4 in Chapter 5 above.

²⁴³ OHCHR 2002:13 – Guideline 8.7.

²⁴⁴ Jordan 2002:3, 6; HSRC 2010:20; UNODC 2009b:6.

²⁴⁵ UNODC 2009b:6-7, 59; OHCHR 2002:12 – introduction to Guideline 8. See also articles 1-4, 12 and 13 of the Convention on the Rights of the Child, and, more specifically, article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which obligates states parties to protect the rights and interests of child victims at all stages of the criminal justice process by “recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses...”. – <http://www.unhcr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008).

²⁴⁶ See Guideline 6 in OHCHR 2002:10-11 and Guideline 8 in OHCHR 2002:12-13.

the need for assistance, support and protection may be provided for in various ways,²⁴⁷ such as conducting in-court proceedings *in camera*²⁴⁸ and allowing victims to testify outside the courtroom by means of communications technology such as closed-circuit television.²⁴⁹

To assess whether the South African counter-trafficking response complies with the standard in respect of providing for the special needs of victims of trafficking, the provisions in the *Trafficking Bill* as well as other existing laws are examined. Apart from other provisions dealing with victim matters,²⁵⁰ Chapters 4 to 6 of the *Trafficking Bill* provide specifically for victims, including issues relating to victim identification, protection and services, and the status of foreign victims of trafficking.²⁵¹

In addition, the *Criminal Procedure Act*²⁵² contains a number of provisions that address the special needs victims of trafficking during trial proceedings.²⁵³ A court may, for example, direct that, in certain circumstances, especially where protection from harm is required, the identities of witnesses not be revealed²⁵⁴ or that witnesses testify behind closed doors.²⁵⁵ In addition, the court may allow witnesses to testify by

²⁴⁷ OHCHR 2002:13 – Guideline 8.9.

²⁴⁸ UNODC 2009b:61-62; Foundation Against Trafficking in Women *et al.* 2001:14.

²⁴⁹ UNODC 2009b:61-63. The UNODC Legislative Guides emphasise that especially child victims need to be shielded from direct contact with alleged offenders before and during the trial proceedings – UNODC 2004:290.

²⁵⁰ See clauses 27 and 29-33.

²⁵¹ Clauses 12-26.

²⁵² Act 51 of 1977.

²⁵³ Joubert 2007:13-14; see also 2.2.11 above.

²⁵⁴ Section 153(2)(b) of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13.

²⁵⁵ Section 153(2)(a) of the *Criminal Procedure Act* 51 of 1977.

means of closed-circuit television²⁵⁶ or through an appointed intermediary.²⁵⁷ Furthermore, the Minister of Justice may introduce regulations to assist and support witnesses at court, including making provision for the counselling of witnesses and for appropriate reception facilities for courtrooms.²⁵⁸ The provisions of the *Witness Protection Act* 112 of 1998 may also be used where the safety of a victim, who qualifies as a witness, is endangered and such witness needs protection.²⁵⁹

Standard 15: Special needs of victims, especially children

	Not compliant	Partly compliant	Compliant
Assessment of compliance			X
<p>Recommendations:</p> <p>Although existing South African law and the <i>Trafficking Bill</i> provide for the special needs of victims, addressing these needs properly in practice is essential. Accordingly, it is recommended that:</p> <ul style="list-style-type: none"> (a) in terms of clause 36(7) of the <i>Trafficking Bill</i>, the National Director of Public Prosecutions issue directives with which all members of the prosecuting authority must comply in order to ensure that the special needs of victims, and especially children, are catered for; (b) in terms of clause 36(1) of the <i>Trafficking Bill</i>, the National Commissioner of the South African Police Service issue national instructions with which all police officials must comply in order to ensure that the special needs of victims, and especially children, are catered for; (c) in terms of clause 36(2) of the <i>Trafficking Bill</i>, the Director General: Home Affairs issue directives with which all immigration officers must comply in order to ensure that the special needs of victims, and especially children, are catered for; (d) in terms of clause 36(5) of the <i>Trafficking Bill</i>, the Director General: Labour issue directives with which all labour inspectors must comply in order to ensure that the special needs of victims, and especially children, are catered for. 			

²⁵⁶ Section 158(3)(e) of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13.

²⁵⁷ Section 170A of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13.

²⁵⁸ Section 191A of the *Criminal Procedure Act* 51 of 1977; Joubert 2007:13.

²⁵⁹ See the discussion in 3.9 in Chapter 6 and 2.2.11 above.

2.3 Guidelines to be considered for inclusion in domestic responses

Apart from the mandatory minimum standards laid down by the normative framework on human trafficking, a number of good practices and guidelines have emerged in order to enhance the effectiveness of human trafficking responses.²⁶⁰ These guidelines, although not binding minimum standards, should be considered for inclusion in domestic responses for combating human trafficking more effectively.

2.3.1 *Guideline 1: Defining other concepts related to human trafficking*

The Palermo Protocol requires that human trafficking be defined in domestic responses, but contains no provision on other concepts which are part of the trafficking definition or are related to human trafficking.²⁶¹ As alluded to above,²⁶² uncertainty exists about the interpretation of some concepts related to human trafficking, and, therefore, it is recommended that these concepts be clarified in domestic legislation.²⁶³

Clarifying concepts related to human trafficking is a real challenge, since many of these related concepts are part of other existing international instruments pertaining to slavery, labour and human rights which constitute different fields of international law.²⁶⁴ As indicated in Chapter

²⁶⁰ David 2007:1-6.

²⁶¹ See 3.1.1.2 in Chapter 6 above.

²⁶² See 3.1.1.2 in Chapter 6 above.

²⁶³ Jordan 2002:9; UN.GIFT 2008e:29.

²⁶⁴ Gallinetti 2010:14.

5, these instruments also relate to human trafficking, and the intersection of the various international instruments contributes to diverse and complex binding obligations with overlapping concepts.²⁶⁵ A further complicating factor is the use of the same, or similar, concepts in different instruments without clarifying their meaning.²⁶⁶ The challenge with regard to domestic responses is to pursue a holistic and coordinated approach in complying with varied obligations from different instruments and to enhance legal certainty by clarifying core concepts.

In addressing the problem of clarifying concepts, the *Trafficking Bill* provides detailed definitions of two of the listed means in the trafficking definition, namely “abuse of vulnerability”²⁶⁷ and “debt bondage”.²⁶⁸ However, no clarification of other concepts, such as “exploitation”, “transportation” and “sexual grooming”,²⁶⁹ is provided. Furthermore, the *Trafficking Bill* provides legal certainty by defining numerous concepts

²⁶⁵ Gallinetti 2010:14.

²⁶⁶ See the earlier reference to the lack of definitions of core concepts or the differing interpretations of concepts such as “servitude”, “slavery”, “sexual exploitation”, “debt bondage”, “serfdom”, “peonage”, “white slave traffic” and “traffic in persons” in 2.2.2.3.2.a-e in Chapter 2, 4 in Chapter 4 and 2.1-2.3 in Chapter 5 above.

²⁶⁷ In clause 1, the *Trafficking Bill* provides that the concept “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.”

²⁶⁸ The definition of “debt bondage” is also set out in clause 1 – Addendum B.

²⁶⁹ Section 18 of the *Sexual Offences Amendment Act* lists the instances that constitute the sexual grooming of a child – see 4.2.2.15 in Chapter 7 above. See also the submission in 2.2.1 above that the inclusion of sexual grooming and abuse in the exploitation part of the trafficking definition of the *Trafficking Bill* is superfluous.

listed as forms of exploitation, such as slavery, servitude,²⁷⁰ debt bondage, forced labour, forced marriage, sexual exploitation and the removal of body parts.²⁷¹

Whereas definitions of related concepts exist in other instruments, the *Trafficking Bill* has not adopted the exact wording of these instruments, but has rather opted to clarify the core meaning of the definitions in its own formulation. In relation to the concept “debt bondage”, the *Trafficking Bill* is aligned with the definition in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,²⁷² but is broader in that the pledge of services as security for a debt is also applicable if the debt, when reasonably assessed, is “manifestly excessive” or the value of the services, when reasonably assessed, is not used to settle the debt.²⁷³

²⁷⁰ Diverse meanings are associated with the term “servitude” in the international literature – see 2.2.2.3.2.c in Chapter 2 above. See also Currie and De Waal 2005:312; Nowak 2005:193, 200; Haysom 2002:178.

²⁷¹ Clause 1.

²⁷² This Convention defines debt bondage in article 1(a) as “the status or condition arising from a pledge by the debtor of his or her personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined”; see also 2.1.3 in Chapter 5 above.

²⁷³ The *Trafficking Bill* provides, in clause 1, that “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.

“Forced labour” is another concept related to human trafficking and has also been defined in a much earlier instrument. The international definition of “forced labour” in the 1930 ILO Convention No. 29 Concerning Forced Labour²⁷⁴ includes “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”.²⁷⁵ Maintaining the gist of this definition, the *Trafficking Bill* defines “forced labour” more broadly to include labour or services obtained or maintained through forms of coercion or “physical restraint to that person or another person”.²⁷⁶

At the Justice and Constitutional Development Portfolio Committee it was recommended that the lack of valid consent should be part of the “forced labour” definition.²⁷⁷ To accommodate this suggestion, the definition could possibly be amended as follows:

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

- (a) without the consent of that person; and
- (b) 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.²⁷⁸

Although forced labour has already been established as an offence in the *Basic Conditions of Employment Act 75 of 1997* (*Basic Conditions of*

²⁷⁴ <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008).

²⁷⁵ Article 2; Naidu 1987:109-110.

²⁷⁶ Clause 1.

²⁷⁷ See the minutes of the meeting of this Committee held on 15 September 2010 – Parliamentary Committee: Justice and Constitutional Development 2010b:8.

²⁷⁸ The inclusion of paragraph (a) in the proposed “forced labour” definition is in line with the requirement of “for which the said person has not offered himself voluntarily” in the international definition of “forced labour” of the 1930 ILO Convention Concerning Forced Labour – <http://www.unhchr.ch/html/menu3/b/31.htm> (accessed 14/7/2008).

Employment Act), the concept “forced labour” has not been defined in this Act. Therefore, the fact that “forced labour” is defined in the *Trafficking Bill*, but not in the earlier *Basic Conditions of Employment Act*, is unsatisfactory, in that it is uncertain whether the international definition or the definition in the Bill, or another definition, will be used. For this reason, it is submitted that the definition of “forced labour” should be standardised in South African law to enhance legal certainty. This standardisation may be accomplished by including the definition of “forced labour”, as proposed above, in the *Basic Conditions of Employment Act*. This definition should then also be adopted in the *Trafficking Bill* and in all existing and future legislation dealing with “forced labour”.²⁷⁹

In relation to slavery, the *Trafficking Bill* again does not follow the precise wording of the definition of slavery, that is, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, in the Slavery Convention.²⁸⁰ In reflecting on this definition, Haysom²⁸¹ suggests that “a more accessible definition would describe slavery as occurring when the victim is under the control of another person and within that person’s ownership”. In line with this comment, the *Trafficking Bill* includes the “control” element and defines the concept “slavery” as “reducing a person by any means to a state of

²⁷⁹ The legislature may alternatively also consider defining “forced labour” in the *Trafficking Bill* instead of in the *Basic Conditions of Employment Act* and to use that definition as the standard in all other applicable legislation.

²⁸⁰ <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (accessed 12/3/2008). For a more detailed discussion of slavery and its relationship to human trafficking, see 4 in Chapter 4 above.

²⁸¹ Haysom 2002:178.

submitting to the control of another as if that other person was the owner of that person”.²⁸²

The *Trafficking Bill* has further adopted definitions pertaining specifically to the South African context, instead of maintaining only generic formulations. In both the definitions of “sexual exploitation” and “removal of body parts”, reference is made to applicable South African legislation, which enhances the understanding and practical implementation of these concepts.

2.3.2 Guideline 2: Criminalisation of the use of trafficked persons’ services

Neither the Organized Crime Convention nor the Palermo Protocol obligates states parties to criminalise conduct that constitutes the demand for the services of trafficked persons. However, the Protocol requires states parties to discourage the demand that fosters all forms of exploitation leading to trafficking²⁸³ by, for example, criminalising the use of the services of trafficked victims.²⁸⁴ In line with this approach, the UNODC Model Law²⁸⁵ recommends that the use of the services of trafficked victims be established as an offence in domestic laws so as to contribute to the effective combating of this crime.

The proposed South African law reform complies with this recommendation by criminalising the use of, or benefiting from, the

²⁸² Clause 1.

²⁸³ Article 9(5) – Addendum A; UNODC 2009b:83.

²⁸⁴ See the discussion in 3.2.3.4 in Chapter 6 above.

²⁸⁵ UNODC 2009b:42-44, 83.

services of trafficked persons. The *Trafficking Bill* provides that any person who intentionally benefits 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.

With regard to the penalty for this crime, it is to be welcomed that the maximum penalty for the crime has been increased significantly, thereby taking into account the gravity of the offence.²⁸⁶ Whereas the draft *Trafficking Bill* of 2009 provided only for a term of imprisonment of up to 5 years²⁸⁷ on conviction of this offence, the *Trafficking Bill* has increased the penalty to a maximum term of imprisonment of 15 years.²⁸⁸ This amendment is significant, because, apart from combating the supply side of human trafficking, it is equally essential to address the demand side by criminalising the use of the services of trafficked persons, coupled with proportionate and deterrent sanctions.²⁸⁹

2.3.3 Guideline 3: Criminalisation of conduct pertaining to travel and identity documents

Unlawful conduct pertaining to travel and identity documents is very often part of the trafficking crime.²⁹⁰ Therefore, in line with the provisions in the

²⁸⁶ David 2007:1; UN.GIFT 2008e:27; UNODC 2008:112; UNODC 2004:273; article 11(1) of the Organized Crime Convention; see also the discussion in 3.4 in Chapter 6 above.

²⁸⁷ Clause 7 of the draft *Trafficking Bill* of 2009.

²⁸⁸ Clause 7 of the *Trafficking Bill* – Addendum B.

²⁸⁹ See 3.4 in Chapter 6 above and the discussion of Standard 5 on appropriate sentencing in 2.2.5 above.

²⁹⁰ Haynes 2004:226; US Department of State 2007:20; IOM 2007:30; Melvin 2006:29; Kanics and Reiter 2001:112; Gajic-Veljanoski and Stewart 2007:339; Morawska 2007:100; Stuurman 2004:5; UNODC 2009b:21; Rijken 2003:63.

Palermo Protocol²⁹¹ and the UNODC Model Law,²⁹² it is recommended that offences, if they do not already exist in domestic law, be created to criminalise the unlawful creation, altering or handling of travel and identity documents.

The South African response to this issue is twofold. First, existing legislation has established numerous offences pertaining to illegal conduct in respect of travel and identity documents. As has been pointed out above,²⁹³ the *Identification Act* 68 of 1997 may be used successfully against trafficking agents who unlawfully possess, imitate or alter identity cards,²⁹⁴ with a sanction on conviction of up to five years' imprisonment.²⁹⁵

In cases where persons are trafficked across international borders, the provisions of the *Immigration Act* 13 of 2002 are applicable to traffickers who unlawfully enter, remain in or depart from South Africa, or assist their victims to do so, and such traffickers may be prosecuted.²⁹⁶ Regrettably, the sanctions for these offences are not stringent enough and will most likely not deter perpetrators.²⁹⁷ This Act further establishes numerous offences prohibiting illegal conduct with regard to passports and other documents, ranging from the use and possession of fabricated

²⁹¹ Article 12 – Addendum A.

²⁹² UNODC 2009b:47-48.

²⁹³ See 4.2.2.2 in Chapter 7 above.

²⁹⁴ Section 18(1).

²⁹⁵ Section 18(2).

²⁹⁶ Section 49(1) and (2).

²⁹⁷ Section 49(1)(a) and (2); see also the discussion on this issue in 4.2.2.3 in Chapter 7 above.

or falsified passports²⁹⁸ to the possession of another person's travel or identity document.²⁹⁹ Nonetheless, Stuurman points out that a number of issues, especially the confiscation or destruction of documents, need to be addressed more comprehensively.³⁰⁰

The second part of the South African response to unlawful conduct pertaining to travel and identity documents in a trafficking scenario is included in the *Trafficking Bill*. The Bill addresses this issue comprehensively by criminalising the possession as well as the destruction, confiscation and concealment of, or tampering with, the identity or travel documents of a trafficked person.³⁰¹ The gravity of this offence is reflected in the stringent sanction, which is a term of imprisonment of up to 15 years.³⁰²

2.3.4 Guideline 4: Liability of commercial carriers

In acknowledging that trafficking agents often collude with commercial transporters to transport trafficked persons away from their home communities as part of the trafficking process,³⁰³ the Palermo Protocol requires, in an optional provision, that states parties address this issue.³⁰⁴ The recommendation is that commercial carriers that cross international borders be expected to ascertain whether their passengers

²⁹⁸ Section 49(15)(a).

²⁹⁹ Section 49(15)(b).

³⁰⁰ Stuurman 2004:5.

³⁰¹ Clause 6 – Addendum B.

³⁰² Clause 6 – Addendum B.

³⁰³ UN.GIFT 2008c:13; Singh 2004:344; Le Roux 2008:4; Shelley 2007:130.

³⁰⁴ UNODC 2009b:49.

are in possession of the required travel documents.³⁰⁵ As indicated earlier,³⁰⁶ the Protocol states that compliance with this duty is to be enforced by establishing sanctions for the violation of the duty.

The *Trafficking Bill* makes specific provision for the liability of carriers.³⁰⁷ First, an offence is established in respect of transporting trafficked victims over South African borders where such victims are not in possession of a passport or valid visa as required for lawful entry into or departure from South Africa.³⁰⁸ On conviction of this offence, a penalty³⁰⁹ of five years' imprisonment or a fine not exceeding R1 million may be imposed. As regards travel documents, the *Trafficking Bill* requires that a visa must be "valid", whereas the same "requirement" is not laid down for a passport.³¹⁰ It is submitted that this discrepancy should be rectified by deleting the word "valid", because it goes without saying that the passport and visa referred to in the *Trafficking Bill* must be valid documents.

The *Trafficking Bill* also introduces a further sanction pertaining to carriers transporting trafficked persons over the South African border. In addition to a criminal sanction in terms of clause 9(1) of the Bill, carriers are also liable to pay the expenses incurred³¹¹ in connection with the

³⁰⁵ Article 11(2)-(3) – Addendum A.

³⁰⁶ See 3.2.3.5 in Chapter 6 above.

³⁰⁷ Clause 9 – Addendum B.

³⁰⁸ Clause 9(1) – Addendum B.

³⁰⁹ Clause 9(1) – Addendum B.

³¹⁰ Clause 9(1) – Addendum B.

³¹¹ Clause 9(3) states that carriers are not only liable to pay for actual expenses incurred, but also for expenses "reasonably expected to be incurred" for the care, accommodation, transportation and repatriation of the victim.

“care, accommodation, transportation and repatriation of the victim, as provided for in section 28”.³¹² This civil sanction is stringent and may contribute towards deterring carriers from violating their duty concerning the travel documents of trafficked passengers.

Unlike the Protocol, which refers to “commercial carriers”,³¹³ the *Trafficking Bill* uses the term “carrier”. The meaning of the term “carrier” is broader than its counterpart in the Protocol. “Carrier” includes a company or the owner, agent, operator or even the “lessor, driver, charterer or master of any means of transport”.³¹⁴ This broad interpretation of the term “carrier” is to be welcomed, because it brings seemingly all natural and legal persons providing transport in the abovementioned circumstances within the scope of this provision.

In strengthening efforts to curb collusion between carriers and trafficking agents, the legislature may consider placing a further obligation on carriers, namely that of reporting cases where they reasonably suspect that their passengers are trafficking victims. This obligation should not only be placed on carriers who transport passengers across the borders of South Africa, but also on carriers transporting passengers within the country. Furthermore, the suspicion should be reported even where such passengers have valid travel documents. As regards this matter, the following provisions could be added after subsection (1):

- (2) A carrier who, on reasonable grounds, suspects that any of its passengers is a victim of trafficking must immediately report that

³¹² Clause 9(3) – Addendum B.

³¹³ Article 11(2) and (3) – Addendum A.

³¹⁴ Clause 1 – Addendum B.

suspicion to a police official for investigation as contemplated in sections 12 or 13.

- (3) A carrier 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.

2.3.5 Guideline 5: Factors to be considered in sentencing

Apart from the minimum standard set for appropriate punishment,³¹⁵ both the UNODC Model Law³¹⁶ and the US Model Law³¹⁷ recommend that a list of aggravating circumstances to be taken into account in sentencing be included in domestic anti-trafficking responses. The proposed South African response complies with this recommendation, in that the *Trafficking Bill* lists a range of aggravating factors that a court must consider before sentencing the perpetrator.³¹⁸ These factors include involvement in organised crime, the conditions in which the victim was kept, the abuse suffered by the victim and its impact on the victim, as well as the fact that the victim is a child.³¹⁹

2.3.6 Guideline 6: Victim protection: physical safety

Neither the Palermo Protocol³²⁰ nor the Organized Crime Convention³²¹ contains strong mandatory provisions for the protection of trafficked

³¹⁵ See 3.2.5 above.

³¹⁶ UNODC 2009b:38-40.

³¹⁷ US Department of State 2003:3-4 – section XXX.02(4), 11.

³¹⁸ Clause 11 – Addendum B.

³¹⁹ Clause 11(a)-(h) – Addendum B.

³²⁰ Article 6(5) – Addendum A; David 2007:1; Weissbrodt and Anti-Slavery International 2002:24; Jordan 2002:22; Kassan 2007:18–18; UNODC 2004:282-283, 285; Jordan 2002:22.

³²¹ Article 25(1); UNODC 2004:285.

victims.³²² The lack of such protection is problematic, because, unlike most other victims of crime, victims of trafficking are often not willing to testify because of a real fear that they or their loved ones may be harmed.³²³ The fact that victims refrain from testifying does not even protect them from being harmed or killed. As a result, it is of vital importance that the physical safety of trafficked persons, even though they are not witnesses, is safeguarded against threats of, and potential, retaliation by perpetrators.³²⁴

In the light of this reality, the HCHR Principles and Guidelines emphasise the safeguarding of the safety and immediate well-being of all trafficked persons.³²⁵ This approach is also in line with obligations in human rights instruments to uphold fundamental human rights, which include the right to freedom and security of the person and to be free from all forms of violence.³²⁶

In view of the importance of ensuring the safety of trafficked victims, the UNODC Legislative Guides rightly point out that, in appropriate cases, similar protection as provided for witnesses by the Organized Crime Convention may be required to ensure the physical safety of non-witness

³²² See the discussion in 3.8.1.1.1 in Chapter 6 above.

³²³ UN.GIFT 2008c:2; UN.GIFT 2008b:10; Laczko and Gramegna 2003:183; UNODC 2006:xx; ILO 2008:11.

³²⁴ Singh 2004:342; Haynes 2004:226; Shapiro 2008:18; Dottridge and Weissbrodt 1999:270; Weissbrodt and Anti-Slavery International 2002:31; IOM 2009a:12; IOM 2007:30; Dougherty and Burke 2008:12; Brennan 2005:42; Gajic-Veljanoski and Stewart 2007:344; Morawska 2007:94; Shelley 2007:131; Snyman 2005:287; UNODC 2009b:56, 59.

³²⁵ OHCHR 2002:9 – Guideline 4.6; OHCHR 2002:10 – introduction to Guideline 6; SALRC 2006:9.

³²⁶ See the discussion of human rights instruments in 2.4 in Chapter 5 above; see also articles 3 and 5 of the Universal Declaration of Human; articles 7 and 9(1) of the International Covenant on Civil and Political Rights; articles 4 and 6 of the African Charter on Human and Peoples' Rights; and article 16(1) of the African Charter on the Rights and Welfare of the Child.

trafficked persons.³²⁷ Legislatures therefore need to extend the protection provided for witnesses to such victims or to “adopt parallel provisions” for non-witness victims and witnesses.³²⁸ Pursuant to article 34(3) in the Convention, it is submitted that protection which is broader than that provided for in the Protocol and the Convention be included in domestic law pertaining to trafficked victims who are not witnesses.

Applied to the South African context, this means that trafficked victims who are not willing or able to be witnesses are not entitled to be placed under protection in the Witness Protection Programme. Also, it remains unlikely that many trafficked victims will obtain protection in terms of the *Witness Protection Act* because they qualify as “related persons”. There is therefore a loophole in the *Trafficking Bill*, in that effective protection for non-witness victims is not provided for.

A possible recommendation might be that the *Trafficking Bill* should provide that, notwithstanding the provisions of the *Witness Protection Act* discussed above,³²⁹ a victim of trafficking who refuses to testify against his or her traffickers could still qualify for protection if the Director of the Office for Witness Protection on reasonable grounds concludes that there is an imminent risk to the safety of that victim.

The HCHR Principles and Guidelines also provide for the protection of witnesses, more specifically during the criminal justice process.³³⁰

³²⁷ UNODC 2004:169-170.

³²⁸ UNODC 2004:169-170.

³²⁹ See 2.2.11 above.

³³⁰ OHCHR 2002:10 – Guideline 5.8.

Appropriate measures are required to ensure the safety of an individual trafficked person not only during the investigation and trial process, but also thereafter.³³¹ In further detail, the HCHR Principles and Guidelines propose that protection programmes may include aspects such as the identification of safe places and shelters in destination countries, access to independent legal counsel, protection of identity³³² and also options for continued stay, resettlement or repatriation.³³³ Of paramount importance is the requirement that appropriate measures be adopted to safeguard the rights and interests of trafficked children during all stages of the criminal proceedings against trafficking offenders and also during procedures for obtaining compensation.³³⁴ It should be noted that this guideline underpins article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.³³⁵

2.3.7 Guideline 7: Victim protection: privacy and non-disclosure of identity

The relevant provisions in the Palermo Protocol³³⁶ and the Organized Crime Convention³³⁷ aim at protecting the privacy and identity of victims and witnesses.³³⁸ Although these provisions are not strictly mandatory,

³³¹ OHCHR 2002:10 – Guideline 5.8; SALRC 2006:9.

³³² UNODC 2009b:64-66.

³³³ OHCHR 2002:9 – Guideline 5.8.

³³⁴ OHCHR 2002:13 – Guideline 8.8; SALRC 2006:10.

³³⁵ <http://www.unhcr.ch/html/menu2/6/crc/treaties/opsc.htm> (accessed 12/3/2008); see also 2.3.11 in Chapter 5 above.

³³⁶ Article 6(1).

³³⁷ Article 24(2)(a).

³³⁸ UNODC 2004:282; see also 3.8.1.1.2 and 3.10 in Chapter 6 above.

their importance is widely recognised.³³⁹ The *Trafficking Bill* does not contain obligations to protect the privacy and identity of victims. However, the existing *Criminal Procedure Act 51 of 1977*, as amended, already contains a number of provisions to protect witnesses during a criminal trial. The court may, in certain circumstances, order that a witness testify behind closed doors³⁴⁰ or that the identity of a person not be disclosed.³⁴¹ Furthermore, it is also possible for a witness to testify by means of closed-circuit television or other electronic media in appropriate circumstances.³⁴² In the case of child witnesses under the age of 18, the court may under certain conditions allow the witness to testify outside the courtroom by means of an intermediary.³⁴³

As pointed out above,³⁴⁴ the *Witness Protection Act* provides comprehensive protection for witnesses and related persons, with such persons being placed under protection in the Witness Protection Programme in terms of this Act. The Act enforces the protection of these protected persons by criminalising the conduct of a person who:

- (a) wilfully or negligently allows any unauthorised person to gain access to any protected person;
- (b) wilfully or negligently discloses, in contravention of any provision of this Act -
 - (i) the identity of any protected person;

³³⁹ UNODC 2009b:48.

³⁴⁰ Section 153(2)(a); see also Kriegler and Kruger 2002:394-398; Joubert 2007:13, 240. Section 153(5) provides that criminal proceedings may be conducted by excluding the public in cases where witnesses are younger than 18; Kriegler and Kruger 2002:395, 398.

³⁴¹ Section 153(2)(b); Kriegler and Kruger 2002:394-397.

³⁴² Section 158(2)(a); see also Kriegler and Kruger 2002:415-417; Joubert 2007:13, 240.

³⁴³ Section 170A. For a discussion of this provision, see Kriegler and Kruger 2002:443-446; Joubert 2007:13.

³⁴⁴ See 2.2.11 above.

- (ii) information that a particular protected person is under protection;
- (iii) the place of safety or location where any person is under protection or has been relocated in terms of this Act;
- (iv) any information which could lead to the identification of any such person or any such place of safety;
- (v) any information which undermines or compromises or could undermine or compromise the integrity of a witness protection programme in terms of this Act; or
- (vi) any information relating to the relocation or change of identity of a protected person.³⁴⁵

These offences are regarded as very serious offences and may be punished by imprisonment of up to 30 years.³⁴⁶

The provisions protecting the privacy and identity of witnesses in the *Criminal Procedure Act 51 of 1977* and the *Witness Protection Act 112 of 1998* should be used in applicable circumstances in trafficking cases. However, these provisions provide protection in certain circumstances for witnesses only, and not for victims who are not willing or able to testify. In line with the approach of the UNODC Model Law,³⁴⁷ it is recommended that the criminalisation of the unlawful disclosure of information acquired in the course of official duties that allows the identification of a trafficked victim be considered for inclusion in the *Trafficking Bill*.

³⁴⁵ Section 22(1).

³⁴⁶ Section 22(1).

³⁴⁷ UNODC 2009b:48.

2.3.8 Guideline 8: Victim protection against prosecution and detention

The non-prosecution of trafficked persons for conduct which is a direct consequence of them being trafficked is not specifically dealt with in the Palermo Protocol or the Organized Crime Convention.

In line with basic human rights enshrined in human rights instruments,³⁴⁸ the HCHR Principles and Guidelines underpin the principle of non-prosecution of trafficked persons³⁴⁹ and emphasise that immunity must be guaranteed to trafficked persons by ensuring, in national legislation, that they are not detained, prosecuted or punished for violating laws which is a direct consequence of their situation as trafficked persons.³⁵⁰ In other words, victims are not to be prosecuted for offences such as immigration offences or prostitution if their involvement in these crimes was a direct result of them being trafficked.³⁵¹ The UNODC Model Law also supports the non-liability of trafficked victims and the fact that victims should not be held in a detention facility.³⁵² The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children³⁵³, also endorses measures to avoid the prosecution of trafficked persons.³⁵⁴ Also, the 2008 Vienna Forum Report

³⁴⁸ See the discussion of human rights instruments in 2.4 in Chapter 5 above.

³⁴⁹ OHCHR 2002:4 – Principle 7; see also UNODC 2009b:40.

³⁵⁰ See Guidelines 2.5, 2.6, 4.5 and 5.5 – OHCHR 2002:7, 9-10; see also UN.GIFT 2008e:29; UNODC 2009b:40.

³⁵¹ UNODC 2009b:40-42.

³⁵² UNODC 2009b:40, 58. For a further discussion of other instruments underpinning non-prosecution of trafficked victims, and for some examples of such a provision in domestic laws, see UNODC 2009b:40-42.

³⁵³ EU and AU 2006:2 – http://ec.europa.eu/justice_home/doc_centre/immigration/docs/OUAGA DOUGOU.pdf (accessed 17/7/2010).

³⁵⁴ EU and AU 2006:5.

recommended that the principle of non-punishment of trafficked victims be considered a best practice, requiring protection measures to be adopted for a trafficked person to be “meaningfully recognised as a victim”.³⁵⁵

It is to be welcomed that the good practice of not prosecuting or detaining trafficked victims is complied with in the proposed South African law reform. The *Trafficking Bill* clearly and rightly provides that a criminal prosecution may not be instituted against a child found to be a victim of trafficking or an adult certified to be such a victim 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.³⁵⁶

Following from the above discussion, it is clear that the provision of immunity from prosecution for trafficked persons is not a specific mandatory obligation identified in international trafficking instruments. Still, it is convincingly maintained by the abovementioned authoritative sources that such immunity is a vital protection measure aligned with the protection of fundamental human rights.

³⁵⁵ UN.GIFT 2008e:30.

³⁵⁶ Clause 16(1).

2.3.9 **Guideline 9: Protection against summary deportation**

Victims of trafficking need protection against summary deportation, in particular for the following two reasons. First, immediate deportation often denies victims of trafficking immediate essential services,³⁵⁷ including healthcare and counselling, and also exposes them to major risks in their country of origin, such as reprisals or re-trafficking by trafficking agents and rejection by their family and home community.³⁵⁸ Secondly, summary deportation significantly complicates a trafficked person's opportunity to cooperate in the criminal investigation and to testify against trafficking offenders, thus depriving them of the opportunity to play their part in the successful prosecution of perpetrators.³⁵⁹

Regardless of this reality, neither the Organized Crime Convention nor the Palermo Protocol lays down a minimum standard that states parties must protect victims against summary deportation. The HCHR Principles and Guidelines however caution against immediate deportation and strongly recommend that domestic counter-trafficking legislation provides for protection against such deportation.³⁶⁰

³⁵⁷ UNODC 2008:175; Foundation Against Trafficking in Women *et al.* 2001:17.

³⁵⁸ Rijken 2003:73; see also ILO 2008:21; Haynes 2004:227; McClain 2007:585; Foundation Against Trafficking in Women *et al.* 2001:18; Stuurman 2004:5.

³⁵⁹ UNODC 2006:117; Foundation Against Trafficking in Women *et al.* 2001:17, 19; UNODC 2009b:74; UNODC 2004:286-287.

³⁶⁰ OHCHR 2002:9 – Guideline 4.6. This Guideline links up with Principle 11 of the HCHR Principles and Guidelines, which require that a safe return be provided for trafficked persons and that, if serious safety risks exist, other legal alternatives to repatriation be made available – OHCHR 2002:4; see also Foundation Against Trafficking in Women *et al.* 2001:17, 19; UNODC 2009b:74.

As regards the South African counter-trafficking response, the approach recommended in the HCHR Principles and Guidelines is followed. The *Trafficking Bill* underpins the need to protect victims against summary deportation and therefore prohibits such deportation.³⁶¹

2.3.10 Guideline 10: Assistance towards victim recovery

The Palermo Protocol³⁶² as well as the Organized Crime Convention³⁶³ call upon states parties to consider the rendering of assistance to victims, including assistance for their physical, psychological and social recovery and rehabilitation.³⁶⁴ The HCHR Principles and Guidelines also underpin such victim assistance.³⁶⁵ Compliance with this guideline is of primary importance to the victim, but is also likely to encourage victims to cooperate in legal proceedings against the perpetrator.³⁶⁶ The *Trafficking Bill's* provisions on victim protection and assistance, as well as the rendering of services, comply to some extent with this guideline by contributing, at least indirectly, to the recovery of victims.³⁶⁷

³⁶¹ Clause 29, read with clause 30.

³⁶² Article 6(3) – Addendum A.

³⁶³ Article 25(1).

³⁶⁴ UNODC 2004:282-283; Defeis 2003/2004:489; Jordan 2002:2-3; HSRC 2010:20; UNODC 2009b:56. See also the discussion in 3.8.1.2.5 in Chapter 6 above.

³⁶⁵ OHCHR 2002:9, 11; see also SALRC 2006:9; UNODC 2009b:56; Foundation Against Trafficking in Women *et al.* 2001:19-20.

³⁶⁶ Zimmerman *et al.* 2006:23; US Department of State 2003:12; Gallagher 2001:991; UN.GIFT 2008e:36; UNODC 2009b:55; UNODC 2004:288.

³⁶⁷ See clauses 12-26, 33. Professional services at Thuthuzela Care Centres may also be provided to victims that have been trafficked for sexual exploitation – HSRC 2010:52.

2.3.11 **Guideline 11: Identification of victims**

It is essential to identify victims of trafficking as early as possible in order to provide them with appropriate protection and assistance, and also to initiate legal proceedings against perpetrators.³⁶⁸ Although the Palermo Protocol does not provide guidance as regards the identification of trafficked persons,³⁶⁹ the UNODC Legislative Guides recommend the inclusion, in domestic counter-trafficking responses, of specific measures to facilitate the identification of trafficked victims.³⁷⁰ The *Trafficking Bill* provides that the Intersectoral Committee on Prevention and Combating of Trafficking in Persons³⁷¹ will be responsible for developing and reviewing guidelines on the identification of victims of trafficking and traffickers.³⁷² To address the urgent need for these guidelines, it is submitted that once the Intersectoral Committee is established this responsibility is prioritised.³⁷³ The *Trafficking Bill* makes some provision for the reporting and referral of victims of trafficking,³⁷⁴ but it is submitted that designated officials of the prosecution, police and other relevant authorities should issue directives and national instructions in terms of clause 36 of the Bill to assist in the early identification of victims of trafficking.

³⁶⁸ UN.GIFT 2008e:37; David 2007;1-2; HSRC 2010:171.

³⁶⁹ Gallagher 2001:994, 1000, 1004.

³⁷⁰ UNODC 2004:289.

³⁷¹ Clause 40 of the *Trafficking Bill* provides for the establishment of the Intersectoral Committee.

³⁷² Clause 41(1)(c).The *Trafficking Bill* further makes provision for the reporting and referral of victims of trafficking – Clauses 12 and 13.

³⁷³ HSRC 2010:12.

³⁷⁴ Clauses 12 and 13.

2.3.12 Guideline 12: Residency status in destination countries

The Palermo Protocol does not contain a mandatory obligation requiring states parties to ensure that, in their domestic responses, victims of trafficking are provided with residency status.³⁷⁵ However, the UNODC Model Law recommends that trafficked victims be allowed a recovery and reflection period of not less than 90 days in the destination country.³⁷⁶ As is the case with other assistance and services rendered to trafficked victims, a recovery and reflection period serves both the interests of the victim and the prosecution, in that the victim remains available to cooperate during the course of the investigation.³⁷⁷

The issue of allowing trafficked persons to remain temporarily or permanently in destination countries is addressed in the *Trafficking Bill*.³⁷⁸ It is to be welcomed that the Bill contains provisions allowing not only for a recovery and reflection period,³⁷⁹ but also for temporary and permanent residence in South Africa for foreign victims of trafficking.³⁸⁰

³⁷⁵ The Palermo Protocol calls on states parties “to consider” the adoption of measures allowing trafficked persons to remain temporarily or permanently in receiving states – article 7(1) – Addendum A; see also Defeis 2003/2004:489, 491; SALRC 2006:18; Gallagher 2001:990; Foundation Against Trafficking in Women *et al.* 2001:17-19; UNODC 2004:291.

³⁷⁶ UNODC 2009b:73-76; see also US Department of State 2007:49; OHCHR 2002:11 – Guideline 6.7; UNODC 2004:291.

³⁷⁷ UNODC 2009b:73-74; Foundation Against Trafficking in Women *et al.* 2001:17-19; Zimmerman *et al.* 2006:12, 22; Jordan 2002:26; SALRC 2006:18.

³⁷⁸ UNODC 2004:291.

³⁷⁹ Clause 17.

³⁸⁰ Clauses 18 and 19.

specialised anti-trafficking units as a minimum standard for combating this crime. Other authoritative sources,³⁸⁴ however, including two African initiatives³⁸⁵ as well as the HCHR Principles and Guidelines, emphasise the importance of specialisation and the establishment of specialist anti-trafficking units within law enforcement agencies and within the prosecuting authority in order to improve the likelihood of combating human trafficking successfully.³⁸⁶

The *Trafficking Bill* does not comply with the guideline that provision be made for specialist anti-trafficking units. The Tsireledzani Programme Coordinating Unit (PCU)³⁸⁷ however appears to acknowledge the importance of specialisation and expertise in dealing with human trafficking and is therefore planning to establish an Expert Response Team (ERT).³⁸⁸ The PCU reported in March 2010 that it was endeavouring to place police investigators (South African Police Service), prosecutors (National Prosecuting Authority), immigration inspectors (Department of Home Affairs), social workers (Department of Social Development), forensic health specialists (Department of Health)

³⁸⁴ Foundation Against Trafficking in Women *et al.* 2001:11; US Department of State 2010:15; Guideline 5.4 of the HCHR Principles and Guidelines – Addendum C; see also Gastrow 2001:35-37.

³⁸⁵ See the Declaration on the Fight Against Trafficking in Persons adopted by the Economic Community of West African States (ECOWAS) and the 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (SADC Plan of Action), discussed in 3.11 in Chapter 6 above.

³⁸⁶ Guideline 5.4 of the HCHR Principles and Guidelines – Addendum C.

³⁸⁷ HSRC 2010:12; NPA 2008:34; PCU 2010:6, 8; see also 4.3 in Chapter 7.

³⁸⁸ PCU 2010:8-9. A number of specialised units and sections, namely the Sexual Offences and Community Affairs (SOCA) Unit, the Organised Crime Section, the Asset Forfeiture Unit and the Office for Witness Protection already exist within the NPA and may be involved in human trafficking cases – HSRC 2010:52-53; NPA 2010a:27-35.

and labour inspectors (Department of Labour) “on 24-hour call” in order to react promptly and efficiently to reported cases of human trafficking.³⁸⁹ The research report on human trafficking in southern Africa recommended that human trafficking cases should be assigned to specialised units to deal with both the investigation as well as the prosecution of these cases.³⁹⁰ Accordingly, it is submitted that the establishment of a national specialised centre or regional specialised units dealing with human trafficking should be considered for inclusion in the South African domestic response for combating human trafficking.

3. CONCLUSION

Conventions and Instruments – with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ... at the fore – require the implementation of [domestic] laws which can properly respond to trafficking in as nuanced and effective a way as the crime is complex and injurious.³⁹¹

The eventual aim of domestic legislative responses to human trafficking is to combat this crime by means of effective implementation of these national legal measures. A prerequisite for accomplishing this aim is, first, to develop a comprehensive domestic legal response for implementation – a legal response that is aligned with international standards.

³⁸⁹ PCU 2010:8-9.

³⁹⁰ HSRC 2010:64, 170-171.

³⁹¹ UN.GIFT 2008d:2.

In endeavouring to achieve such a response in the South African context, this study set out, first, to examine the multifaceted phenomenon of human trafficking. The aim of Part I of the study was to inform the comprehension of human trafficking by analysing the definition of human trafficking and other critical issues, such as the global scope of the problem and the causes and wide-ranging consequences of the crime. By mapping out the distinctive features of human trafficking, a distinction could be made between human trafficking and other related crimes, namely human smuggling, slavery and slavery-like practices.³⁹²

With Part I having laid the foundation for the study, Part II examined the normative framework on human trafficking, which comprises the leading United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,³⁹³ but also a range of other international and regional African instruments. From this framework, minimum standards to combat human trafficking were drawn, thus providing a yardstick against which domestic counter-trafficking responses may be measured. Apart from the mandatory obligations drawn from these instruments, further non-mandatory, but significant, guidelines were charted for consideration for inclusion in domestic responses to enhance the effective combating of human trafficking.

Thereafter, the South African legal response for combating human trafficking was examined. Such response can be divided into three parts, namely: the existing law that may be applicable to human trafficking; the interim trafficking provisions in the *Children's Act* 38 of

³⁹² Weissbrodt and Anti-Slavery International 2002:12.

³⁹³ http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (accessed 11/3/2008).

2005 and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*; and the proposed comprehensive law reform in the *Prevention and Combating of Trafficking in Persons Bill (B7-2010)*. Since the *Trafficking Bill* is to be enacted in the near future, the Bill was assessed for compliance with the minimum standards drawn from the international and African regional framework on human trafficking. In addition, the South African *Trafficking Bill* was also compared with significant non-mandatory guidelines which aim at enhancing the combating of trafficking. Finally, while the current South African legal response is not fully compliant with international and African regional standards and guidelines on combating human trafficking, it is submitted that the proposed law reform will result in major progress being made towards achieving this aim. Gallagher and Holmes rightly emphasise:

A strong national legal framework around trafficking is widely recognized as the foundation and scaffolding of an adequate and appropriate criminal justice response.³⁹⁴

Therefore, the recommendations made pertaining to the *Trafficking Bill* aim at contributing to the further development, modification and fine-tuning of the South African legal response designed to bring about compliance with the broad normative framework on human trafficking for the efficient and effective combating of human trafficking.

³⁹⁴ Gallagher and Holmes 2008:321.

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ADDENDUM A

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Advance copy of the authentic text. The copy certified by the
Secretary-General will be issued at a later time.



**UNITED NATIONS
2000**

**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN
PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING
THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL
ORGANIZED CRIME**

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.

http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traffeng.pdf

2008-07-14

ADDENDUM B

Prevention and Combating of Trafficking in Persons Bill B7-2010

REPUBLIC OF SOUTH AFRICA

**PREVENTION AND
COMBATING OF TRAFFICKING IN
PERSONS BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Gazette No. 32906 of 29 January 2010)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 7—2010]

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BILL

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:—

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CHAPTER 1

DEFINITIONS AND OBJECTS OF ACT

Definitions 40

- 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— 45

- (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; 5
- (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; 10
- “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; 15
- “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); 20
- “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 25
- (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; 30
- (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; 35
- “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; 40
- (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; 45
- “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; 50
- “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; 55
- “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); 60
- “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; 5

“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; 10

“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); 15

“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; 20

“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; 25

“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; 30

“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); 35

“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— 40

- (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; 45
- (e) deception or false pretences;
- (f) debt bondage;
- (g) abduction;
- (h) kidnapping;
- (i) the abuse of power; 50
- (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 55

“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. 60

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; 5
 - (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; 10
 - (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.

CHAPTER 2 15

PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS

Public awareness

3. (1) The Intersectoral Committee established by section 40 must, and where appropriate, after consultation with relevant non-governmental organisations, establish public awareness programmes or other measures for the prevention and combating of trafficking in persons designed to— 20
- (a) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who apply for South African passports or who depart abroad, on issues relating to trafficking in persons, including—
 - (i) common recruitment techniques used by traffickers;
 - (ii) practices used to keep victims of trafficking in exploitative situations;
 - (iii) the forms of abuse to which victims of trafficking may be subjected; and
 - (iv) organisations, institutions or law enforcement agencies that may be approached for assistance or information; 25
 - (b) inform and educate victims of trafficking on—
 - (i) their rights as victims;
 - (ii) legal or other measures in place to ensure their safety, recovery and repatriation; and 35
 - (iii) organisations, institutions or law enforcement agencies that may be approached for assistance or information; and
 - (c) discourage the demand for and the supply of victims of trafficking that fosters the exploitation of those victims, especially women and children. 40
- (2) The programmes or other measures referred to in subsection (1) must—
- (a) include appropriate measures aimed at reaching rural communities;
 - (b) where possible, be provided in a language understood by the persons at whom they are directed; and
 - (c) be reviewed every second year in order to determine their effectiveness. 45
- (3) The Director-General: Justice and Constitutional Development must take all reasonable steps within available resources to ensure that the programmes or other measures referred to in subsection (1) are implemented throughout the Republic. 55

CHAPTER 3

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 50

4. (1) A person is guilty of an offence of trafficking in persons if that person trafficks 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. 55

- (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 person—
- (a) performs any act aimed at committing an offence under this Chapter; 5
 - (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. 10
- (3) It is no defence to a charge of contravening subsection (1) or (2) that—
- (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 15
 - (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. 20
- (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; 25
 - (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. 30
- (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. 35
- (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 40

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. 45

Using services of victims of trafficking 50

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. 55

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 5
 - (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. 10
- (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 15
 - (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; 20
 - (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. 25
- (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. 30
- (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 35

- 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. 40
- (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. 45

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— 50
- (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; 55

- (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 5
- (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). 10
- (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). 15
- (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. 20
- (6) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions.

Factors to be considered in sentencing

- 11.** If a person is convicted of any offence under this Act, the court that imposes the sentence must consider, but is not limited to, the following aggravating factors: 25
- (a) The significance of the role of the convicted person in the trafficking process;
- (b) previous convictions relating to the crime of trafficking in persons;
- (c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance;
- (d) the conditions in which the victim was kept; 30
- (e) whether the victim was held captive for any period;
- (f) whether the victim suffered abuse and the physical and psychological effects the abuse had on the victim;
- (g) whether the offence formed part of organised crime; and
- (h) whether the victim was a child. 35

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. 40
- (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. 45
- (3) A person referred to in subsection (1) or (2)—
- (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 50
- (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 55

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). 5

(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. 10

(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— 15

- (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. 20

(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. 25

(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. 30

(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. 35

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

- (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. 40

(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. 45

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

- (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. 50

(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. 55

(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 to— 60

- (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). 5

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. 10
- (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. 15

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. 20

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— 25
- (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; 30
 - (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. 35
- (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 40
 - (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. 45

CHAPTER 5

STATUS OF FOREIGN VICTIMS OF TRAFFICKING

Recovery and reflection period 50

- 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. 5

(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. 10 15

(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— 20

- (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. 25

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— 30

- (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 35
- (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. 40

(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. 45

(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. 50

(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.

Permanent residence 55

19. A victim of trafficking is entitled to apply for a permanent residence permit in terms of section 27 of the Immigration Act, after five years' continuous residence in the Republic from the date on which a visitor's permit referred to in section 18 was issued to him or her, upon proof by that victim to the satisfaction of the Director-General:

Home Affairs that he or she 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.

CHAPTER 6

SERVICES TO ADULT VICTIMS OF TRAFFICKING

5

Accreditation of organisation to provide service

20. (1) An adult victim of trafficking may only be referred in terms of section 13(4) to an organisation that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection (4)(a).

(2) The Minister of Social Development— 10

(a) must prescribe a system for the accreditation of organisations who will provide services to adult victims of trafficking; and

(b) may prescribe the circumstances in which accredited organisations qualify for financial assistance, within available resources.

(3) The system for accreditation referred to in subsection (2) must contain— 15

(a) criteria for the evaluation of the programmes offered by organisations to ensure that they comply with the minimum norms and standards referred to in section 21;

(b) mechanisms to monitor the programmes in question; and

(c) measures for the removal of organisations from the system, where appropriate. 20

(4) (a) The Minister of Social Development must issue a prescribed certificate to each organisation that is accredited in terms of this section.

(b) A certificate of accreditation referred to in paragraph (a) is valid for a maximum of four years from the date of accreditation. 25

(c) A quality assurance process must be conducted in the prescribed manner in respect of each accredited organisation.

(d) The Minister of Social Development must compile a report containing the particulars of each accredited organisation or organisation removed from the system within 30 days of accreditation or removal. 30

(e) The Director-General: Social Development must, without undue delay, provide a copy of the report referred to in subsection (4)(d) to—

(i) the relevant roleplayers in his or her Department;

(ii) the National Director of Public Prosecutions who must distribute the report to all prosecutors; and 35

(iii) the National Commissioner of the South African Police Service, who must distribute the report to all relevant roleplayers in the South African Police Service,

who are involved in the administration of this Act.

Minimum norms and standards

40

21. (1) The Minister of Social Development must, after consultation with interested parties, the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Basic Education, Finance, Health, Home Affairs, Justice and Constitutional Development, Labour, Police and State Security, prescribe minimum norms and standards for accredited organisations. 45

(2) The norms and standards referred to in subsection (1) must deal with—

(a) the safety of victims of trafficking, especially those at risk of harm;

(b) access to and provision of adequate health care;

(c) the provision of separate facilities for male and female victims of trafficking;

(d) hygienic and adequate toilet facilities; 50

(e) access to refuse disposal services or other adequate means of disposal of refuse generated at the facility;

(f) the drawing up of action plans for emergencies; and

(g) the manner in which information relating to a victim of trafficking's particulars should be kept confidential. 55

- (3) An accredited organisation that provides services to adult victims of trafficking who have children in their care must, in addition to the norms and standards referred to in subsection (1), provide—
- (a) a safe environment for children;
 - (b) proper care for sick children or children that become ill; and 5
 - (c) safe storage of anything that may be harmful to children.

Programme offered by accredited organisation

- 22.** (1) An accredited organisation—
- (a) must offer a programme aimed at—
 - (i) the provision of accommodation to adult victims of trafficking; 10
 - (ii) the provision of counselling to adult victims of trafficking; and
 - (iii) the reintegration of adult victims of trafficking into their families and communities; and
 - (b) may offer a programme aimed at—
 - (i) the provision of rehabilitation services to adult victims of trafficking; or 15
 - (ii) the provision of education and skills development training to adult victims of trafficking.
- (2) An accredited organisation may refer an adult victim of trafficking to an organisation that offers a programme referred to in subsection (1)(b) for purposes of obtaining those rehabilitation services or education and skills development training. 20
- (3) An accredited organisation that provides services to an adult victim of trafficking who has a child in his or her care must offer a programme aimed at the reception, care and development of that child.
- (4) Subject to subsection (5), a child referred to in subsection (3) may be cared for at any other premises only with the explicit consent of the adult victim in whose care he or she is. 25
- (5) A child referred to in subsection (3) must be referred to a designated child protection organisation or the provincial department of social development for investigation in terms of section 155(2) of the Children's Act, to determine whether the child is in need of care and protection. 30

Access to programme offered by accredited organisation

- 23.** A person who has been certified to be a victim of trafficking in terms of section 13(7)(a) is entitled to access to a programme offered by an accredited organisation.

Plan to address needs of victim of trafficking

- 24.** An accredited organisation must, having due regard to the views of a person who has been certified to be a victim of trafficking in terms of section 13(7)(a), draw up a plan to address the immediate and long-term needs of that victim. 35

Return of adult victim of trafficking within Republic

- 25.** An accredited organisation may not return an adult victim of trafficking to an area within the Republic from where he or she has been trafficked, without giving due consideration to— 40
- (a) the safety of the person during the process of returning him or her; and
 - (b) the possibility that the person might be harmed, killed or trafficked again if returned to that area.

Information management 45

- 26.** (1) An accredited organisation must collect information on victims of trafficking relating to—
- (a) the number of foreign victims of trafficking who have accessed a programme referred to in section 22;
 - (b) the number of South African citizens or permanent residents who are victims of trafficking and who have accessed a programme referred to in section 22; 50
 - (c) the number of victims who have accessed a programme referred to in section 22 and who have not been reported to the South African Police Service;

- (d) the countries from which foreign victims have been trafficked;
 - (e) the countries to which South African citizens or permanent residents have been trafficked;
 - (f) the purposes for which the victims have been trafficked;
 - (g) the methods used to recruit and transport the victims; 5
 - (h) the methods and routes used for trafficking the victims to and from the Republic; and
 - (i) the types of travel documents that victims have used or attempted to use to cross the borders of the Republic and how these documents were obtained.
- (2) An accredited organisation must provide an annual report on the information referred to in subsection (1) to the Director-General: Social Development on a date determined by him or her. 10
- (3) The Director-General: Social Development must provide an annual report on the information referred to in subsection (2) to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee. 15

CHAPTER 7

COMPENSATION

Compensation to victim of trafficking

27. (1) (a) The court may, subject to paragraph (c), on its own accord or at the request of the complainant or the prosecutor, in addition to any sentence which it may impose in respect of any offence under this Act, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for— 20
- (i) damage to or the loss or destruction of property, including money;
 - (ii) physical, psychological or other injury;
 - (iii) being infected with a life-threatening disease; or 25
 - (iv) loss of income or support,
- suffered by the victim as a result of the commission of that offence.
- (b) Appropriate compensation includes expenses reasonably expected to be incurred in relation to the matters referred to in subparagraphs (i) to (iv) of subsection (1)(a).
- (c) A magistrate's court established under section 2 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), may not make an order for the payment of compensation, as provided for in paragraph (a) which exceeds the monetary jurisdiction determined by the Minister from time to time by notice in the *Gazette*, as provided for in section 300 of the Criminal Procedure Act. 30
- (2) In cases where the amount of the damage, injury or loss suffered exceeds an order for compensation made in terms of subsection (1), a civil action may be instituted by the victim for the recovery of the excess. 35
- (3) (a) Where the court makes an order for compensation to be paid in terms of this section, it must also determine the time within which payment is to be made and the method of payment, including whether it is to be paid in instalments or not and if it is to be paid in instalments, the intervals between the payment of instalments. 40
- (b) A magistrate or judge may, on application of the convicted person on good cause shown, vary the conditions and instalments according to which compensation is to be made.
- (c) A court that has acted in terms of paragraph (b), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made regarding the payment of compensation and substitute it with a new order. 45
- (4) (a) An order for the payment of compensation as provided for in subsection (1) has the effect of a civil judgment of a magistrate's court and the person in whose favour the compensation order was made is deemed to be the judgment creditor and the convicted person against whom the compensation order was made is deemed to be the judgment debtor. 50
- (b) The judgment creditor referred to in paragraph (a) may, where a compensation order has not been complied with, file with the clerk of the court or registrar of the court which made the compensation order, an affidavit setting out the details of the compensation order and stating that the compensation order has not been complied with or has not been complied with in full, as the case may be, and the amount outstanding, 55

and must request that clerk of the court or registrar to furnish him or her with a certified copy of that compensation order.

(c) The clerk of the court or registrar of the court that made the compensation order must, after having inspected the court record concerned to verify the contents of the affidavit referred to in paragraph (b), furnish the judgment creditor with a certified copy of the compensation order in question and record on the court record that the judgment creditor has been furnished with a certified copy of the compensation order in question. 5

(d) The judgment creditor must file the certified copy of the compensation order with the clerk of the civil court of the magisterial district in which he or she or the judgment debtor resides, carries on business or is employed. 10

(e) The compensation order must then be executed in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and the Magistrates' Courts Rules, regarding warrants of execution against movable and immovable property and the issuing of emolument attachment orders and garnishee orders.

(5) (a) Where the court makes an order for compensation to be paid in terms of this section, it may, in its discretion, issue a warrant addressed to the sheriff authorising him or her to recover the amount of the compensation by the attachment and sale of any movable property belonging to the person in question. 15

(b) The amount which may be recovered in terms of paragraph (a) must be sufficient to cover, in addition to the amount of the compensation, the costs and expenses of the warrant and of any attachment and sale of property. 20

(c) If the proceeds of the sale of the movable property are insufficient to satisfy the amount referred to in paragraph (b), a High Court may issue a warrant, or in the case of a compensation order being made by a magistrate's court, authorise that magistrate's court to issue a warrant for the levy against the immovable property of the person in question of the amount unpaid. 25

Compensation to State

28. (1) The court may—

(a) in addition to any penalty which it may impose in respect of any offence in terms of this Act; 30

(b) in addition to any order for the payment of compensation to a victim in terms of section 27; and

(c) upon application by the prosecutor, make an order for payment by the convicted person to the State of an amount in compensation for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim of the offence. 35

(2) An order for the payment of compensation as provided for in subsection (1) has the effect of a civil judgment of a magistrate's court and the provisions of section 27(4) apply with the changes required by the context. 40

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. 45

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; 50

(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. 55

- (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; 5
 - (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— 10
 - (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. 15
- (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. 20

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 25
 - (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— 30
- (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; 35
 - (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; 40
 - (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; 45
 - (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; 50
 - (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 55
 - (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. 5

(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 10**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— 15

- (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. 20

(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— 25

- (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. 30

(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. 35

(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. 40

National instructions and directives

36. (1) The National Commissioner of the South African Police Service must, after consultation with the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, National Intelligence Agency, and Social Development, the Chief Executive Officer: Government Communication and Information System and the National Director of Public Prosecutions, issue national instructions as provided for in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), regarding the following matters with which all police officials must comply in the execution of their functions in terms of this Act: 45

- (a) The division or divisions within the police to be tasked with the investigation of trafficking cases; 50
- (b) the manner in which the reporting of an alleged trafficking case is to be dealt with;
- (c) the manner in which trafficking cases are to be investigated;

- (d) the manner in which victims of trafficking should be identified, interviewed and treated with particular attention to the vulnerability of child victims;
- (e) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
- (f) the referral of victims of trafficking to social, health care and psychological services; 5
- (g) measures to be taken to ensure the safety of victims of trafficking or other potential witnesses if there is a likelihood that harm might result to them as a result of the reporting and consequent investigation of and prosecution of the case; 10
- (h) the circumstances in which consultation with the prosecuting authority is required with the view to guiding the investigation of trafficking cases for purposes of obtaining the required evidence and to identify relevant witnesses;
- (i) measures to be taken in order to ensure the detection of trafficking in persons at South African ports of entry and borders; 15
- (j) the kind of information that must be obtained from a victim of trafficking with the view to provide such information to the prosecuting authority for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 27; and 20
- (k) the collection and analysis of information on reported cases of trafficking in persons, including information relating to—
 - (i) the countries from which victims are being trafficked to the Republic;
 - (ii) the countries to which South African citizens and other residents are being trafficked; 25
 - (iii) the nationality of victims transiting the Republic and the countries to which they are being trafficked;
 - (iv) the purposes for which the persons who have been identified as victims of trafficking have been trafficked;
 - (v) the profiles of the traffickers and their victims, including their age, gender, nationality and sex; 30
 - (vi) the routes used by traffickers to enter and exit the Republic;
 - (vii) the methods used by traffickers to recruit and transport their victims;
 - (viii) the types of travel documents that traffickers and their victims have used or attempted to use to cross the borders of the Republic and how those documents were obtained; and 35
 - (ix) the link between trafficking operations and those involved in other forms of organised crime.

(2) The National Commissioner of the South African Police Service must provide an annual report on the information referred to in subsection (1)(k) or any other relevant information to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee. 40

(3) The Director-General: Home Affairs must, after consultation with the Directors-General: Health, International Relations and Cooperation, Justice and Constitutional Development, Labour, National Intelligence Agency, and Social Development, the Chief Executive Officer: Government Communication and Information System, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, issue directives regarding the following matters with which all immigration officers must comply in the execution of their functions in terms of this Act: 45

- (a) The manner in which the reporting of an alleged trafficking case is to be dealt with; 50
- (b) the manner in which victims of trafficking must be identified, interviewed and treated, with particular attention to the vulnerability of child victims;
- (c) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic; 55
- (d) the referral of victims of trafficking to social, health care and psychological services;
- (e) the referral of victims of trafficking or other potential witnesses to the South African Police Service or relevant institutions or organisations if there is a likelihood that the victims or witnesses may be harmed or killed; and 60
- (f) the collection and analysis of information on victims of trafficking who have been repatriated to the Republic in terms of section 32 relating to—

- (i) the number of victims who have been repatriated to the Republic and the countries to which they have been trafficked;
 - (ii) the profiles of the victims, including the age, gender and sex of the victims;
 - (iii) the purposes for which the victims were trafficked; 5
 - (iv) the routes used by traffickers to exit the Republic and to enter the countries to which the victims were trafficked;
 - (v) the methods used by traffickers to recruit and transport the victims; and
 - (vi) the types of travel documents that traffickers and their victims have used or attempted to use to exit the Republic and to enter the countries to which the victims were trafficked and how these documents were obtained. 10
- (4) (a) The Minister of Home Affairs must—
- (i) submit all directives provided for in subsection (3) to Parliament 30 days before they are issued; and 15
 - (ii) after the expiry of the 30-day period, publish them in the *Gazette*.
- (b) The Director-General: Home Affairs must provide an annual report on the information referred to in subsection (3)(f) or any other relevant information to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee. 20
- (5) The Director-General: Labour must, after consultation with the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, National Intelligence Agency, and Social Development, the Chief Executive Officer: Government Communication and Information System, the National Director of Public Prosecutions and the National Commissioner of the South African Police Service, issue directives regarding the following matters with which all labour inspectors must comply in the execution of their functions in terms of this Act: 25
- (a) The manner in which the reporting of an alleged trafficking case is to be dealt with;
 - (b) the manner in which victims of trafficking should be identified, interviewed and treated, with particular attention to the vulnerability of child victims; 30
 - (c) measures to be taken in instances where foreign victims of trafficking are not conversant with any of the official languages of the Republic;
 - (d) the referral of victims of trafficking to social, health care and psychological services; and 35
 - (e) the referral of victims of trafficking or potential witnesses to the South African Police Service or relevant institutions or organisations if there is a likelihood that the victim or witnesses may be harmed or killed.
- (6) (a) The Minister of Labour must—
- (i) submit any directives provided for in subsection (5) to Parliament 30 days before they are issued; and 40
 - (ii) after the expiry of the 30-day period, publish them in the *Gazette*.
- (b) The Director-General: Labour must provide an annual report on any relevant information to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee. 45
- (7) The National Director of Public Prosecutions must, after consultation with the Minister, the Directors-General: Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, National Intelligence Agency, and Social Development, the National Commissioner of the South African Police Services and the Chief Executive Officer: Government Communication and Information System, issue directives regarding all matters which are necessary or expedient to be provided for and which are to be followed by all members of the prosecuting authority who are tasked with the institution and conducting of prosecutions in cases relating to trafficking in persons, including the following: 50
- (a) The manner in which cases relating to trafficking in persons should be dealt with; 55
 - (b) the criteria to be used and the circumstances in which the prosecution must apply to court for an order that a witness and, in particular, child complainants give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, if the court does not make an order on its own accord in terms of subsection (2)(a) of that section or if an application in terms of subsection (2)(b) of that section is not made; 60

- (c) the criteria to be used and the circumstances in which the prosecution must request the court to consider appointing a competent person as an intermediary as provided for in section 170A of the Criminal Procedure Act, in respect of a child witness;
- (d) the circumstances in which the prosecution must request the court to consider directing that the proceedings may not take place in open court as provided for in section 153 of the Criminal Procedure Act; 5
- (e) the circumstances in which the prosecution must request the court to consider directing that the identity of a witness should not be revealed or that it should not be revealed for a period specified by the court as provided for in section 153 of the Criminal Procedure Act; 10
- (f) the circumstances in which the prosecution must request the court to consider prohibiting the publication of the identity of the complainant in the case as provided for in section 154 of the Criminal Procedure Act or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; 15
- (g) the need to inform victims of trafficking about their right to and the process to claim compensation in terms of section 27;
- (h) the kind of information that must be obtained from a victim of trafficking for purposes of determining the quantum of the damages suffered by the victim for which he or she may claim compensation in terms of section 27; 20
- (i) the collection and analysis of information relating to—
- (i) the number of trafficking prosecutions, convictions and the form of sentences imposed on traffickers;
 - (ii) the number of victims of trafficking awarded compensation orders in terms of section 27; and 25
 - (iii) the number of cases where the courts did not provide compensation orders in terms of section 27 and the reasons for doing so.
- (8) (a) The Minister must—
- (i) submit any directives provided for in subsection (7) to Parliament 30 days before they are issued; and 30
 - (ii) after the expiry of the 30-day period, publish them in the *Gazette*.
- (b) The National Director of Public Prosecutions must provide an annual report on the information referred to in subsection (7)(i) or any other relevant information determined by the Intersectoral Committee established by section 40 as determined by the Intersectoral Committee. 35
- (9) The National Commissioner of the South African Police Service, the National Director of Public Prosecutions and the Directors-General: Home Affairs, Labour and Social Development must each develop training courses, which must—
- (a) include training on the national instructions or directives, as the case may be, referred to in this section; and 40
 - (b) provide for and promote the use of uniform norms, standards and procedures, to ensure that all police officials, prosecutors and other functionaries are able to deal with matters relating to trafficking in persons in an appropriate, efficient and sensitive manner. 45
- (10) The national instructions or directives referred to in this section must provide that adequate disciplinary steps are taken against any police official, prosecutor or other functionary who fails to comply with any duty imposed on him or her in terms of this Act or the national instructions or directives issued in terms of this Act.
- (11) Any national instruction or directive issued under this section may be amended or withdrawn in like manner. 50

Legitimacy and validity of documents

37. The Director-General: Home Affairs must, 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, verify, within a reasonable time, the legitimacy and validity of travel or identity documents issued or purported to have been issued by the Department of Home Affairs and suspected of being used in the commission of an offence in terms of this Act. 55

Annual report on abuse or deliberate neglect of child and findings by children’s court that child is in need of care and protection

38. The Director-General: Social Development must submit to the Intersectoral Committee established by section 40, as determined by the Intersectoral Committee, an annual report on all cases of abuse or deliberate neglect of a child and all findings by a children’s court that a child is in need of care and protection because of abuse or deliberate neglect of the child as contained in Part A of the National Child Protection Register provided for in Part 2 of Chapter 7 of the Children’s Act insofar as those cases and findings relate to child victims of trafficking. 5

CHAPTER 10 10

ADMINISTRATION OF ACT

National Policy Framework

39. (1) The Minister must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Home Affairs, Health, International Relations and Cooperation, Labour, Police, Social Development, and State Security and the National Director of Public Prosecutions adopt a national policy framework, relating to all matters dealt with in this Act, in order to— 15

- (a) ensure a uniform, coordinated and cooperative approach by all government departments, organs of state and institutions in dealing with matters relating to the trafficking in persons; 20
- (b) guide the implementation and administration of this Act; and
- (c) enhance service delivery as envisaged in this Act by the development of a plan within available resources.

(2) The Minister must—

- (a) within two years after the commencement of this Act, adopt and table the policy framework in Parliament; 25
- (b) publish the policy framework in the *Gazette* within two months after it has been tabled in Parliament;
- (c) review the policy framework within three years after its publication in the *Gazette* and at least once every five years thereafter; and 30
- (d) amend the policy framework when required, in which case the amendments must be tabled in Parliament and published in the *Gazette* within two months after it has been tabled in Parliament.

Establishment of Intersectoral Committee on Prevention and Combating of Trafficking in Persons 35

40. (1) There is hereby established a Committee to be known as the Intersectoral Committee on the Prevention and Combating of Trafficking in Persons.

(2) The Intersectoral Committee consists of the—

- (a) Director-General: Justice and Constitutional Development, who is the chairperson of the Committee; 40
- (b) National Commissioner of the South African Police Service;
- (c) Director-General: Home Affairs;
- (d) Director-General: International Relations and Cooperation;
- (e) Director-General: Social Development;
- (f) Director-General: Health; 45
- (g) Director-General: Labour;
- (h) Director-General: National Intelligence Agency;
- (i) National Director of Public Prosecutions; and
- (j) Chief Executive Officer: Government Communication and Information System. 50

(3) A member of the Intersectoral Committee may designate a senior official as an alternate to attend a meeting of the Committee in his or her place.

(4) (a) The members of the Intersectoral Committee must designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy chairperson acts as chairperson. 55

- (b) If neither the chairperson nor the deputy chairperson is available, the members present at a meeting must elect a person from their own ranks to preside at that meeting.
- (5) The Intersectoral Committee may invite—
- (a) representatives from the Commission for Gender Equality, the South African Human Rights Commission and the National House of Traditional Leaders to its meetings with the view to obtaining their views on issues relating to the responsibilities, functions and duties of the Committee; 5
 - (b) representatives from the non-governmental sector and civil society to its meetings with the view to fostering cooperation between government and civil society in the implementation of this Act; and 10
 - (c) persons to its meetings, when necessary, for technical assistance, support or advice.
- (6) The Intersectoral Committee must—
- (a) meet at least twice every year on a date and at the time and place determined by the chairperson; and 15
 - (b) report in writing to the Minister within one month of every meeting.

Responsibilities, functions and duties of Intersectoral Committee

- 41.** (1) The Intersectoral Committee is responsible for—
- (a) developing a draft national policy framework, referred to in section 39(1), which must include guidelines for— 20
 - (i) the implementation of the priorities and strategies contained in the national policy framework;
 - (ii) measuring progress on the achievement of the national policy framework objectives;
 - (iii) ensuring that the different organs of state comply with the roles and responsibilities allocated to them in terms of the national policy framework and this Act; and 25
 - (iv) monitoring the implementation of the national policy framework and this Act;
 - (b) the establishment of an integrated information system to facilitate the effective monitoring and implementation of this Act and to recommend interventions relating to trafficking in persons by collating and analysing the information obtained in terms of sections 26(3), 36(1)(k), 36(3)(f), 36(7)(i) and 38 with the view to determining, among others— 30
 - (i) from which countries victims are being trafficked to the Republic; 35
 - (ii) to which countries South African citizens and other residents are being trafficked;
 - (iii) the nationality of victims transiting the Republic and the countries to which they are being trafficked;
 - (iv) the number of victims that have been repatriated to the Republic and the countries to which they were trafficked; 40
 - (v) the purposes for which persons who have been identified as victims of trafficking have been trafficked;
 - (vi) the profiles of the traffickers and their victims, including the age, gender, nationality and sex of the victims; 45
 - (vii) which routes are used by traffickers to cross the borders of the Republic;
 - (viii) which routes are used by traffickers to enter the countries to which South African citizens and other residents were trafficked;
 - (ix) the methods used by traffickers to recruit and transport their victims;
 - (x) the types of travel documents traffickers and their victims have used or attempted to use to cross the borders of the Republic and to enter the countries to which South African citizens and other residents were trafficked and how these documents were obtained; 50
 - (xi) whether there is a link between trafficking operations and those involved in other forms of organised crime; 55
 - (xii) the number of trafficking prosecutions, convictions and the form of sentences imposed on perpetrators;
 - (xiii) the number of victims of trafficking who are awarded compensation orders in terms of section 27 of the Act; and

- (xiv) the number of cases the courts refrained from providing compensation orders and the reasons for doing so:

Provided that information which identifies victims of trafficking must be kept confidential; and

- (c) developing and reviewing guidelines on the identification of victims of trafficking and traffickers. 5

(2) The Intersectoral Committee may make recommendations to the Minister with regard to the amendment of the national policy framework.

Report to Parliament

42. The Minister must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Home Affairs, International Relations and Cooperation, Labour, Police, Social Development, and State Security and the National Director of Public Prosecutions— 10

- (a) within one year after the commencement of this Act, submit— 15
 - (i) reports to Parliament by each Department or institution referred to in this section on the implementation of this Act;
 - (ii) a report to Parliament reflecting information relating to trafficking in persons referred to in subsection 41(1)(b); and
- (b) every year thereafter submit reports referred to in paragraph (a)(i) and a report referred to in paragraph (a)(ii) to Parliament. 20

Regulations

43. (1) The Minister of Home Affairs must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, International Relations and Cooperation, Justice and Constitutional Development, Labour, Police, Social Development and State Security make regulations regarding— 25

- (a) the certificate to be issued to a person who is certified to be a victim of trafficking as provided for in section 13(7)(a);
- (b) the manner in which a foreigner who has been certified to be a victim of trafficking will be granted approval to remain in the Republic for a non-renewable recovery and reflection period and the conditions upon which that approval is granted, as provided for in section 17(1); 30
- (c) the manner in which the Director-General: Social Development must request an extension of the recovery and reflection period as provided for in section 17(4); 35
- (d) the manner in which any extension of the recovery and reflection period must be granted as provided for in section 17(4); and
- (e) the manner in which a person must be informed of arrangements that have been made for his or her reception in the country to which he or she is to be returned, as provided for in section 30(2)(b)(ii). 40

(2) (a) The Minister of Social Development must, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, Police and State Security make regulations regarding— 45

- (i) the form of the written consent referred to in section 13(1)(b);
- (ii) the assessment of a person to determine whether he or she is a victim of trafficking as provided for in section 13(5)(b);
- (iii) the system of accreditation of organisations to provide services to adult victims of trafficking, as provided for in section 20(2)(a); 50
- (iv) the form of the certificate of accreditation to be issued to an organisation which provides services to adult victims of trafficking, as provided for in section 20(4)(a);
- (v) the manner in which the quality assurance process must be conducted in respect of each accredited organisation, as provided for in section 20(4)(c); 55 and
- (vi) the minimum norms and standards for accredited organisations, as provided for in section 21(1).

(b) The Minister of Social Development may, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Finance, Health, Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, Police and State Security make regulations regarding the circumstances in which accredited organisations qualify for financial assistance, as provided for in section 20(2)(b). 5

(3) Any regulation made under this section—

- (a) must be submitted to Parliament prior to publication thereof in the *Gazette*;
- (b) which may result in expenditure for the State, must be made in consultation with the Minister of Finance; and 10
- (c) may provide that any person who contravenes a provision thereof or fails to comply therewith, is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding one year.

(4) The Minister may, after consultation with the Minister in The Presidency responsible for performance monitoring and evaluation, the Ministers of Health, Home Affairs, International Relations and Cooperation, Labour, Police, Social Development and State Security and the National Director of Public Prosecutions, make regulations regarding any matter that this Act requires or permits to be prescribed. 15

Delegation of powers and assignment of duties by National Commissioner of South African Police Service or Director-General to senior officials 20

44. (1) The National Commissioner of the South African Police Service or any Director-General referred to in this Act may, subject to subsection (4), delegate any power or assign any duty conferred on or assigned to him or her by this Act to an official in the employ of his or her Service or Department above the rank of director.

(2) A delegation or assignment in terms of subsection (1)— 25

- (a) is subject to any limitations, conditions and directions which the National Commissioner or Director-General may impose;
- (b) must be in writing; and
- (c) does not divest the National Commissioner or Director-General of the responsibility concerning the exercise of the power or the performance of the duty. 30

(3) The National Commissioner or Director-General may—

- (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and 35
- (b) at any time withdraw a delegation or assignment.

(4) The National Commissioner or Director-General may not delegate a power or assign a duty conferred on or assigned to him or her by section 36, 37 or 38 of this Act.

Delegation of powers and assignment of duties by National Commissioner of South African Police Service or Director-General to provincial commissioner or provincial head 40

45. (1) The National Commissioner of the South African Police Service or any Director-General referred to in this Act may, subject to subsection (4), delegate any power or assign any duty conferred on or assigned to him or her by this Act to a provincial commissioner of the South African Police Service or to a provincial head of the corresponding provincial department, respectively, by agreement with that provincial commissioner or provincial head, as the case may be. 45

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any limitations, conditions and directions which the National Commissioner or Director-General may impose; 50
- (b) must be in writing;
- (c) may include the power to delegate or assign; and
- (d) does not divest the National Commissioner or Director-General of the responsibility concerning the exercise of the power or the performance of the duty. 55

(3) The National Commissioner or Director-General may—

- (a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and

(b) at any time withdraw a delegation or assignment.

(4) The National Commissioner or a Director-General may not delegate a power or assign a duty conferred on or assigned to him or her by section 36, 37 or 38 of this Act.

Delegation of powers and assignment of duties by provincial commissioners of South African Police Service or provincial heads 5

46. (1) A provincial commissioner of the South African Police Service or a provincial head to whom a power or duty has been delegated or assigned in terms of section 45, may delegate that power or assign that duty to an officer at director level or above in the employ of the South African Police Service or provincial department concerned.

(2) A delegation or assignment in terms of subsection (1)— 10

(a) is subject to any limitations, conditions and directions which the provincial commissioner or provincial head may impose;

(b) must be in writing; and

(c) does not divest the provincial commissioner or provincial head of the responsibility concerning the exercise of the power or the performance of the duty. 15

(3) The provincial commissioner or provincial head may—

(a) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this section, subject to any rights that may have accrued to a person as a result of the decision; and 20

(b) at any time withdraw a delegation or assignment.

CHAPTER 11

MISCELLANEOUS MATTERS

Laws repealed or amended

47. The laws referred to in the second column of Schedule 1 are hereby repealed or amended to the extent indicated in the third column of the Schedule. 25

Short title and commencement

48. This Act is called the Prevention and Combating of Trafficking in Persons Act, 2010, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1

Laws repealed or amended

(Section 47)

Number and year of law	Short title	Extent of repeal or amendment
Act No. 68 of 1969	Prescription Act, 1969	<p>The amendment of section 12 by the substitution for subsection (4) of the following subsection:</p> <p>“(4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18 (2), 20 (1), 23, 24 (2) and 26 (1) [and 71(1) or (2)] of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and an alleged offence as provided for in sections 4, 5 and 7 of the <u>Prevention and Combating of Trafficking in Persons Act, 2010</u>, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.”.</p>
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p>1. The amendment of section 18 by the substitution for paragraph (h) of the following paragraph:</p> <p>“(h) trafficking in persons [for sexual purposes by a person] as provided for in section [71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007] 4 of the <u>Prevention and Combating of Trafficking in Persons Act, 2010</u>.”.</p> <p>2. The insertion of the following section after section 261:</p> <p>“Trafficking in persons</p> <p>261A. (1) In this section—</p> <p>‘Basic Conditions of Employment Act’ means the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);</p> <p>‘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);</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p><u>‘Immigration Act’</u> means the Immigration Act, 2002 (Act No. 13 of 2002); and</p> <p><u>‘Prevention and Combating of Trafficking in Persons Act’</u> means the Prevention and Combating of Trafficking in Persons Act, 2010.</p> <p>(2) If the evidence on a charge of trafficking in persons provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act or any attempt to commit that offence, does not prove the offence of trafficking in persons, but the offence of—</p> <p>(a) assault with intent to do grievous bodily harm;</p> <p>(b) common assault;</p> <p>(c) rape as provided for in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any attempt to commit that offence;</p> <p>(d) compelled rape as provided for in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any attempt to commit that offence;</p> <p>(e) sexual assault as provided for in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any attempt to commit that offence;</p> <p>(f) compelled sexual assault as provided for in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any attempt to commit that offence;</p> <p>(g) compelled self-sexual assault as provided for in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any attempt to commit that offence;</p> <p>(h) debt bondage as provided for in section 5 of the Prevention and Combating of Trafficking in Persons Act or any attempt to commit that offence;</p> <p>(i) the possession, destruction, confiscation, concealment of or tampering with documents as provided for in section 6 of the Prevention and Combating of Trafficking in Persons Act or any attempt to commit that offence;</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>(j) <u>using the services of a victim of trafficking as provided for in section 7 of the Prevention and Combating of Trafficking in Persons Act or any attempt to commit that offence;</u></p> <p>(k) <u>entering or remaining in, or departing from the Republic as provided for in section 49(1)(a) of the Immigration Act;</u></p> <p>(l) <u>knowingly assisting a person to enter or remain in, or depart from, the Republic as provided for in section 49(2) of the Immigration Act;</u></p> <p>(m) <u>employing a child as provided for in section 43 of the Basic Conditions of Employment Act; or</u></p> <p>(n) <u>forced labour as provided for in section 48 of the Basic Conditions of Employment Act,</u> <u>the accused may be found guilty of the offence so proved.”.</u></p> <p>3. The amendment of Schedule 1 by the substitution for the item “[Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking Act, 2010.”.</u></p> <p>4. The amendment of Part II of Schedule 2 by the substitution for the item “[Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act, 2010.”.</u></p> <p>5. The amendment of Part III of Schedule 2 by the insertion of the following item after the item “Childstealing”: <u>“Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act, 2010.”.</u></p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>6. The amendment of Schedule 5 by the substitution for the item “[Any trafficking related offence by a commercial carrier as contemplated in section 71 (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Any trafficking-related offence by a carrier as provided for in section 9 of the Prevention and Combating of Trafficking in Persons Act, 2010.”</u>.</p> <p>7. The amendment of Schedule 6 by the substitution for the item “[Trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act, 2010.”</u>.</p>
Act No. 105 of 1997	Criminal Law Amendment Act, 1997	<p>1. The amendment of Part I of Schedule 2 by the substitution for the item “[Trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act, 2010.”</u>.</p> <p>2. The amendment of Part III of Schedule 2 by the substitution for the item “[Any trafficking related offence by a commercial carrier as contemplated in section 71 (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item: <u>“Any trafficking-related offence by a carrier as provided for in section 9 of the Prevention and Combating of Trafficking in Persons Act, 2010.”</u>.</p>

Number and year of law	Short title	Extent of repeal or amendment
Act No. 112 of 1998	Witness Protection Act, 1998	<p>The amendment of the Schedule by the substitution for item 10A of the following item:</p> <p>“10A. Trafficking in persons [for sexual purposes by a person or commercial carrier as contemplated in section 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007] as provided for in section 4 or any trafficking-related offence committed by a carrier as provided for in section 9 of the <u>Prevention and Combating of Trafficking in Persons Act, 2010.</u>”.</p>
Act No. 121 of 1998	Prevention of Organised Crime Act, 1998	<p>The amendment of Schedule 1 by the insertion after item 33 of the following item:</p> <p>“33A. Trafficking in persons as provided for in section 4 of the <u>Prevention and Combating of Trafficking in Persons Act, 2010.</u>”.</p>
Act No. 56 of 2001	Private Security Industry Regulation Act, 2001	<p>The amendment of the Schedule by the substitution for the item “[Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item:</p> <p>“<u>Trafficking in persons as provided for in section 4 of the Prevention and Combating of Trafficking in Persons Act, 2010.</u>”.</p>
Act No. 13 of 2002	Immigration Act, 2002	<p>1. The amendment of section 27 by—</p> <p>(a) the substitution for paragraphs (f) and (g) of the following paragraphs:</p> <p>“(f) has proven to the satisfaction of the Director-General that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Director-General; [or]</p> <p>(g) is the relative of a citizen or permanent resident within the first step of kinship; or”;</p> <p>(b) the addition of the following paragraph after paragraph (g):</p> <p>“(h) is a victim of trafficking referred to in section 18 of the <u>Prevention and Combating of Trafficking in Persons Act, 2010</u>, subject to any prescribed requirements.”.</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>2. The amendment of section 29 by—</p> <p>(a) the substitution for paragraph (b) of subsection (1) of the following paragraph:</p> <p style="padding-left: 40px;">“(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, murder, torture, drug-related charges, money laundering, <u>trafficking in persons</u> or kidnapping;” and</p> <p>(b) the insertion of the following subsections after subsection (1):</p> <p style="padding-left: 40px;">“(1A) <u>A visa or temporary residence permit issued to a foreigner before he or she became a prohibited person in terms of subsection (1)(b) must be withdrawn.</u></p> <p style="padding-left: 40px;">(1B) <u>Subsection (1)(b) does not prohibit the relevant authorities from bringing a person to the Republic for prosecution if a warrant for his or her arrest is outstanding in the Republic.</u>”.</p> <p>3. The amendment of section 35 by—</p> <p>(a) the addition of the following paragraph in subsection (3):</p> <p style="padding-left: 40px;">“(e) <u>a list of all the children on board of the conveyance indicating which children are unaccompanied.</u>”; and</p> <p>(b) the insertion after subsection (3) of the following subsection:</p> <p style="padding-left: 40px;">“(3A) <u>If an immigration officer has reason to believe that any passenger on board the conveyance is a victim of trafficking, he or she must immediately report the matter, in terms of section 12(1) or 13(1) of the Prevention and Combating of Trafficking in Persons Act, 2010, to a police official.</u>”.</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>4. The amendment of section 49 by the substitution for subsection (15) of the following subsection:</p> <p>“(15) Any <u>natural or juristic person, or a partnership who—</u></p> <p>(a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use—</p> <p>(i) any permit, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, [or] she <u>or it</u> is not entitled to use; or</p> <p>(ii) any fabricated or falsified permit, certificate, written authority or other document; or</p> <p>(b) without sufficient cause has in his, [or] her <u>or its</u> possession—</p> <p>(i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act;</p> <p>(ii) any form officially printed for purposes of issuing any permit, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form;</p> <p>(iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; [or]</p> <p>(iv) any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders; <u>or</u></p>

Number and year of law	Short title	Extent of repeal or amendment
		<p><u>(c) has in his or her possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding four years.</u>”.</p> <p>5. The amendment of Schedule 1 by the substitution for the item “[Trafficking in persons for sexual purposes by a person as contemplated in sections 71(1), (2) or (6) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007]” of the following item:</p> <p>“<u>Trafficking in persons as provided for in sections 4 and 9 of the Prevention and Combating of Trafficking in Persons Act, 2010.</u>”.</p>
Act No. 38 of 2005	Children’s Act, 2005	<p>1. The amendment of the Table of Contents by the deletion of the following:</p> <p><i>(a)</i> “CHAPTER 18</p> <p>TRAFFICKING IN CHILDREN</p> <p>281. Purposes of Chapter 282. UN Protocol to Prevent Trafficking in Persons to have force of law 283. International co-operation 284. Trafficking in children prohibited 285. Behaviour facilitating trafficking in children prohibited 286. Assistance to child who is victim of trafficking 287. Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child 288. Reporting of child who is victim of trafficking 289. Child who is victim of trafficking found in Republic 290. Repatriation of child who is victim of trafficking 291. Extra-territorial jurisdiction”; and <i>(b)</i> “Schedule 3”.</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>2. The amendment of section 1 by—</p> <p>(a) the substitution for the definition of “commercial sexual exploitation” of the following definition:</p> <p>“commercial sexual exploitation”, in relation to a child means [—</p> <p>(a)] the procurement of a child to perform sexual activities for financial or other reward, including acts of prostitution or pornography, irrespective of whether that reward is claimed by, payable to or shared with the procurer, the child, the parent or caregiver of the child, or any other person [; or</p> <p>(b) trafficking in a child for use in sexual activities, including prostitution or pornography”; and</p> <p>(b) the repeal of the definitions of “trafficking” and “UN Protocol to Prevent Trafficking in Persons”.</p> <p>3. The repeal of Chapter 18.</p> <p>4. The repeal of section 305(1)(r) and (s) and subsection (8).</p> <p>5. The repeal of Schedule 3.</p>
Act No. 32 of 2007	Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007	<p>1. The amendment of the long title by the deletion of “* making interim provision relating to the trafficking in persons for sexual purposes;”.</p> <p>2. The amendment of the Index by the deletion in Chapter 7 Part 6 of the following:</p> <p>“Transitional provisions relating to trafficking in persons for sexual purposes</p> <p>70. Application and interpretation</p> <p>71. Trafficking in persons for sexual purposes”.</p>

Number and year of law	Short title	Extent of repeal or amendment
		<p>3. The amendment of section 1 by the substitution for the definition of “sexual offence” of the following definition: “‘sexual offence’ means any offence in terms of Chapters 2, 3 and 4 and section[s] 55 [and 71(1), (2) and (6)] of this Act <u>and any offence referred to in Chapter 3 of the Prevention and Combating of Trafficking in Persons Act, 2010, which was committed for sexual purposes;</u>”.</p> <p>4. The amendment of Chapter 7 by the deletion of the heading of Part 6.</p> <p>5. The repeal of sections 70 and 71.</p>
Act No. 75 of 2008	Child Justice Act, 2008	<p>The amendment of Schedule 3 by the substitution for item 13 of the following item: “[Trafficking in persons for sexual purposes referred to in section 71(1) and involvement in trafficking in persons for sexual purposes referred to in section 71(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007] <u>Any offence provided for in sections 4, 5, 6, 7 or 8 of the Prevention and Combating of Trafficking in Persons Act, 2010.</u>”.</p>

SCHEDULE 2

(Section 1)

Text of United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons

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. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001). 5

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, 10

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, 15

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected, 20

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, 25

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: 30

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. 35

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein. 40

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: 45

- (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 5

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; 10
15
- (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; 20
- (d) “Child” shall mean any person under eighteen years of age.

Article 4 25

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. 30

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. 35
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; 40
 - (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 45

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. 50
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 25

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 35

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. 5

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures: 10

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization. 15

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. 20

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. 25

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. 30

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: 35

- (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; 40
- (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. 45

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. 55

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. 5
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. 10
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. 15
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. 20
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. 25

Article 12

Security and control of documents

- Each State Party shall take such measures as may be necessary, within available means: 30
- (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. 35

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. 40

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. 45 50
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. 55

Article 15

Settlement of disputes

1. State Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation. 5
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. 10
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. 15
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. 20

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. 25
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. 30
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. 35
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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. 45

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. 50
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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. 5
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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. 20
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. 25
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. 30

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. 35
2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it. 40

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol. 45
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. 50

MEMORANDUM ON OBJECTS OF THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL, 2010

1. PURPOSE OF BILL

The purpose of the Bill is to give effect to South Africa's obligations as a party to international instruments, such as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons), which address the issue of trafficking in persons, by bringing its domestic laws in line with the standards set by those instruments. The Bill is a result of an investigation and a report by the South African Law Reform Commission (SALRC) on Trafficking in Persons (project 131).

2. OBJECTS OF BILL

The objects of the Bill are to—

- (a) give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons;
- (b) provide for the prosecution of persons and for appropriate penalties;
- (c) provide for the prevention of trafficking in persons and for the protection and assistance of victims of trafficking;
- (d) provide for effective enforcement measures; and
- (e) combat trafficking in persons.

3. DISCUSSION OF BILL

3.1 Clause 1: Definitions

(a) Some of the definitions in the Bill describe the core elements of trafficking in persons and are used where offences are created. The following definitions are examples: "abuse of vulnerability"; "debt bondage"; "exploitation"; "forced marriage"; "forced labour"; "removal of body parts"; "servitude"; "sexual exploitation"; and "slavery".

(b) The definition of "trafficking" goes beyond the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons to ensure that any conduct relating to trafficking is included.

3.2 Clause 2: Objects of the Act

Clause 2 sets out the objects of the Act as indicated in paragraph 2 above.

3.3 Clause 3: Public awareness

Clause 3 is aimed at the prevention of trafficking in persons and provides for the establishment of public awareness programmes and other measures for the prevention and combating of trafficking in persons.

3.4 Clause 4: Trafficking in persons

Clause 4 criminalises trafficking in persons and the liability for the offence is extended to include juristic persons and partnerships. This clause provides that a person who trafficks another person, performs any act which is aimed at committing an offence under Chapter 3, or incites, instigates, commands, directs, aids, advises, recruits, encourages or procures any other person to commit an offence under this chapter or who conspires with any other person to commit such an offence, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or both.

3.5 Clause 5: Debt bondage

Clause 5 criminalises conduct that causes another person to enter into debt bondage, which is a form of control over a victim of trafficking.

3.6 Clause 6: Possession, destruction, confiscation, concealment of or tampering with documents

Clause 6 criminalises the possession and the intentional destruction, confiscation, concealment of or tampering with identification or travel documents of a victim of trafficking because it is a form of control over a victim of trafficking.

3.7 Clause 7: Using the services of victims of trafficking

An effective strategy to combat the trafficking in persons should include measures to combat the demand for the services of victims of trafficking. Clause 7 states that any person who intentionally benefits, financially or otherwise, from the services of a victim of trafficking, knowing or ought reasonably to have known that the person is a victim of trafficking, is guilty of an offence.

3.8 Clause 8: Conduct facilitating trafficking in persons

The purpose of clause 8 is to combat the demand for the services of victims of trafficking. Clause 8 criminalises conduct which facilitates or promotes the trafficking in persons which includes the intentional lease of property and the use of media and information technology for the purposes of trafficking persons. Internet service providers are required to take reasonable steps to prevent the use of their services for the hosting of information that facilitates trafficking in persons and must report internet addresses which facilitate trafficking in persons, to the South African Police Service (SAPS).

3.9 Clause 9: Liability of carriers

Clause 9 criminalises the act by which a carrier brings a victim of trafficking into or removes the victim from the Republic, knowing that the victim does not have the required passport and, where applicable, a valid visa.

3.10 Clause 10: Extra-territorial jurisdiction

The crime of trafficking in persons is regarded as an international crime. Clause 10 gives the courts in the Republic extra-territorial jurisdiction in respect of an act committed outside the Republic which would have constituted an offence if committed in the Republic. The High Court is provided with universal jurisdiction in respect of an offence in terms of the Bill if the person to be charged 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. This means that the High Court has jurisdiction irrespective of where the offence was committed, by whom it was committed, or against whom it was committed.

3.11 Clause 11: Factors to be considered in sentencing

Clause 11 lists factors the court must consider when imposing a sentence. The serious nature of trafficking in persons and the related offences should be impressed on the courts so as to ensure appropriate sentences. Clause 11 provides, among others, for the following factors: The significance of the perpetrator's role in the trafficking process; previous convictions relating to the crime of trafficking in persons; the conditions in which the victim was kept and the period the victim was held captive; the kind of abuse suffered and the effects thereof on the victim; whether the offence was part of the activities of an organised criminal group; and whether the victim was a child.

3.12 Clause 12: Reporting and referral of child victim of trafficking

Clause 12(1) places a duty on everyone to report a child who they reasonably suspect to be a victim of trafficking to a police official for investigation, despite any law, policy or code of conduct prohibiting the disclosure of personal information. The phrase "despite any law, policy or code of conduct" seeks to enable professional persons to report child victims without fear of contravening the law, policies and codes of conduct

relevant to their professions. A police official to whom a report is made or who suspects a child to be a victim of trafficking, must refer that child to a designated child protection organisation or provincial department of social development, pending a police investigation. It is an offence if a person mentioned in subclause (1) fails to report a suspicion that a child is a victim of trafficking in persons or if a police official fails to comply with the duties imposed on him or her in terms of this clause.

3.13 Clause 13: Reporting and referral of adult victim of trafficking

Clause 13(1) places a duty on immigration officers, labour inspectors, social workers, social service professionals, medical practitioners, nurses, traditional health practitioners, traditional healers or traditional leaders who, on reasonable grounds, suspect that an adult person is a victim of trafficking, to immediately report that suspicion to a police official for investigation. Certain categories of persons who are required to report, must obtain the written consent of the adult person concerned, except where the person is mentally disabled or in an altered state of consciousness. The reason for this provision is that an adult person has the right to decide to lay a charge against the perpetrator. These persons must also, by virtue of their profession and their relationship with the alleged victim, have to respect the privacy of their “patients” and treat information they obtain in the course of their duties with the necessary confidentiality. This is not necessarily the case with immigration officers, labour inspectors and police officials who are required to uphold the law and ensure that transgressors are brought to book. Clause 13 further provides that a person other than those mentioned in subclause (1) (for example a member of the public) may report an adult person who is reasonably suspected to be a victim of trafficking to a police official for further investigation. A police official to whom a report is made or who suspects that an adult person is a victim of trafficking, must refer that adult to an accredited organisation or provincial department of social development, pending a police investigation. Such an organisation must assess whether the adult is a victim of trafficking and issue him or her with a certificate to that effect. Failure by the persons mentioned in subclause (1) and by police officials to comply with the duties imposed on them in terms of this clause, is an offence.

3.14 Clause 14: Child victim of trafficking found in Republic

Clause 14 is aimed at the protection of a child victim of trafficking and provides for child victims to be placed in temporary safe care as provided for in the Children’s Act, 2005 (Act No. 38 of 2005), pending an investigation in terms of that Act. The children’s court may order that an illegal foreign child be assisted to apply for asylum. A finding that an illegal foreign child is in need of care and protection serves as authorisation for allowing the child to remain in the Republic for the duration of the court’s order.

3.15 Clause 15: Provision of health care services

Clause 15 aims to inform a foreign victim of trafficking that he or she is entitled to the same public health care services as those to which a citizen of the Republic has access.

3.16 Clause 16: Criminal prosecution against victim of trafficking prohibited

Clause 16 is aimed at protecting victims by prohibiting the prosecution of persons who are found to be victims of trafficking for certain offences committed by them as a direct result of their situation as victims of trafficking. This will enable law enforcement agencies to investigate and prosecute traffickers by using the victims as witnesses. Provision is also made for a criminal case to be postponed and withdrawn, or for the discharge of the victim, where the prosecutor suspects that the person who is prosecuted, is a victim of trafficking.

3.17 Clause 17: Recovery and reflection period

Clause 17 is aimed at allowing victims to recover from the abuse to which they have been subjected and to reflect on their way forward, including whether to co-operate with authorities. Clause 17 provides that a person who has been certified as a victim of trafficking may remain in the country for a non-renewable period of 90 days. If during this period, the victim is unwilling to co-operate with authorities regarding the

investigation and prosecution of a trafficker, his or her circumstances must be investigated to determine whether it is safe to return the victim to the country of origin or country from where he or she has been trafficked, which circumstances must be taken into account when deciding whether to repatriate the foreigner upon expiry of the 90-day period. The granting of the recovery and reflection period is not dependent on the willingness of the victim to co-operate with law enforcement agencies and does not prevent or prejudice the competent authority from conducting an investigation, provided that due regard is given to the emotional state of the victim.

3.18 Clause 18: Temporary residence

Clause 18 addresses the status of a victim of trafficking who is willing to co-operate with authorities in the investigation and prosecution of a trafficker or whose circumstances indicate that it is not safe to return him or her to the country of origin or country from where he or she has been trafficked. Despite the provisions of the Immigration Act, 2002, the Director-General: Home Affairs may renew a visitor's permit for the duration of the investigation and prosecution of a case of trafficking in persons and a holder of a visitor's permit which has been extended on humanitarian grounds may work and study in the Republic.

3.19 Clause 19: Permanent residence

Clause 19 entitles a victim of trafficking to apply for permanent residence after five years of continuous residence in the Republic from the date on which a visitor's permit was issued to him or her. The victim must prove that he or she may be harmed, killed or trafficked again if returned to his or her country of origin or country from where he or she has been trafficked.

3.20 Clause 20: Accreditation of organisation to provide service

Clause 20 deals with the accreditation of an organisation to provide services to adult victims of trafficking. Whilst child victims of trafficking are covered by all the protective measures set out in the Child Care Act, 1983 (Act No. 74 of 1983), and the Children's Act, currently there is not a similar system in place for adult victims of trafficking. The Minister of Social Development must by means of regulations establish and maintain a system of accreditation of organisations to provide services to adult victims of trafficking, and may prescribe the circumstances in which accredited organisations may qualify for financial assistance subject to available resources.

3.21 Clause 21: Minimum norms and standards

Clause 21 requires the Minister of Social Development to prescribe the minimum norms and standards with which accredited organisations must comply. These norms and standards must deal with, among others, the safety of victims, access to adequate health care and, where victims have children in their care, a safe environment for those children.

3.22 Clause 22: Programme offered by accredited organisation

Clause 22 provides that the contents of a programme to be offered by an accredited organisation must include the provision of accommodation, counseling and reintegration services and may include the provision of rehabilitation services and education and skills development training. It must also offer a programme aimed at the reception, care and development of a child in the care of an adult victim of trafficking. An accredited organisation may refer an adult victim to an organisation, which might not necessarily be an accredited organisation that offers rehabilitation services or education and skills development training.

3.23 Clause 23: Access to programme offered by accredited organisation

Clause 23 provides that a person who has been issued with a certificate, is entitled to access the programmes offered by an accredited organisation.

3.24 Clause 24: Plan to address needs of victim of trafficking

Clause 24 provides that an accredited organisation must draw up a plan to address the needs of a victim. This plan is necessary to manage the victim's needs in a structured manner.

3.25 Clause 25: Return of adult victim of trafficking within Republic

Clause 25 provides that an accredited organisation may not return an adult victim of trafficking to an area within the Republic from where he or she has been trafficked without giving due consideration to the safety of the person during the process of returning him or her and to the possibility that the person may be harmed, killed or trafficked again if returned to that area. This provision seeks to adequately address the safety of adult victims of trafficking within the Republic.

3.26 Clause 26: Information management

Clause 26 provides that an accredited organisation must collect information on victims of trafficking and must report annually on the information to the Director-General: Social Development who, in turn, must report annually on the information to the Intersectoral Committee established under clause 40. The clandestine nature of trafficking in persons and the lack of a co-ordinated response to the problem make it difficult to provide reliable statistics on the number of persons trafficked to and from the Republic. The collecting of information and information sharing is therefore important to effectively address the problem. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons also requires State Parties to share information.

3.27 Clause 27: Compensation to victim of trafficking

Clause 27 provides for compensation orders by the court. Our current criminal justice system does not provide for victims of trafficking to claim damages from their traffickers, although provisions in some Acts allow victims to claim compensation for offences in terms those Acts. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons requires State Parties to put measures in place that offer victims of trafficking the possibility of compensation. Clause 27 provides that the court may, in addition to any sentence it may impose in terms of the Bill, order that the person convicted of the offence pay compensation to a victim for damages, injuries (physical or psychological), being infected with a life-threatening disease or loss of income or support. The clause further provides that an order for the payment of compensation has the effect of a civil judgment of the magistrate's court and creates a mechanism for the recovery of the compensation. It also makes provision for an alternative option in that the court making the compensation order may, in its discretion, issue a warrant of execution, authorising the sheriff to recover the amount of the compensation by the attachment and sale of movable property.

3.28 Clause 28: Compensation to State

Clause 28 provides that the court may, in addition to any punishment in terms of this Bill or in addition to any order for compensation to a victim of trafficking and on application by the prosecutor, make an order for payment by the convicted person to the State to compensate for expenses in connection with the care, accommodation, transportation and repatriation of a victim of the offence.

3.29 Clause 29: Summary deportation of victim of trafficking prohibited

Clause 29 prohibits the summary deportation of a victim of trafficking. The immediate deportation of victims of trafficking denies them essential services such as health care and counseling. It also deprives authorities of the opportunity to obtain information to investigate and prosecute traffickers. Victims of trafficking should not be returned to their countries if it is unsafe for them to return.

3.30 Clause 30: Repatriation of victim of trafficking from Republic

Clause 30 provides for structured repatriation procedures for victims of trafficking which take cognisance of the safety of victims during the repatriation process and in the

countries to which they are to be returned. Clause 30 does not prohibit the voluntary return of an adult victim of trafficking to his or her country of origin or country from where he or she has been trafficked.

3.31 Clause 31: Assistance to foreign victim of trafficking

Clause 31 provides for a process to ensure the safety of a victim in the country to which he or she is to be returned. It places a duty on the Director-General: Social Development to take reasonable steps to find suitable family members or an organisation that renders assistance to victims of trafficking in the country to which a victim of trafficking is to be returned and to provide that information to the Director-General: Home Affairs.

3.32 Clause 32: Repatriation of victim of trafficking to Republic

Clause 32 provides for the reception of a victim of trafficking who is repatriated to the Republic. The risks to the safety and life of a victim of trafficking who is returned to the Republic must be assessed, travel documents must be issued and victims must be referred to a designated social worker for investigation in terms of the Children's Act in the case of a child victim or to an accredited organisation or the provincial department of social development, in the case of an adult victim.

3.33 Clause 33: Escorting of child victim of trafficking

Clause 33 allows the Director-General: Social Development to authorise at State expense an adult to escort a child victim from the place the child was found to the place from where the child was trafficked, if it is considered in the best interest of the child.

3.34 Clause 34: Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child

Clause 34 provides that if a children's court has reason to believe that a 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 suspend such rights and responsibilities and place the child in temporary safe care, pending a children's court inquiry. This, however, does not exclude that person's liability for committing the offence of trafficking in persons.

3.35 Clause 35: International co-operation

Clause 35 provides for the President to enter into agreements with foreign states in respect of trafficking in persons matters. The agreements may not be in conflict with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. Clause 35 lays the foundation for bilateral, regional and multilateral agreements on trafficking in persons between the Republic and other States which is in accordance with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons.

3.36 Clause 36: National instructions and directives

Clause 36 compels the National Commissioner of the South African Police Service to issue national instructions relating to matters with which all police officials must comply in the execution of their functions in terms of this Act. The National Director of Public Prosecutions and the Directors-General of Home Affairs and Labour are also compelled to issue directives with which prosecutors and officials must comply. The clause further provides for the development of training courses which must include training on the national instructions and directives. It provides for and promotes the use of uniform norms, standards and procedures to ensure that all functionaries are able to deal with matters relating to trafficking in an appropriate, efficient and sensitive manner. The national instructions and directives must provide that adequate disciplinary steps are taken against any functionaries who fail to comply with any duty imposed on them in terms of the Bill, national instructions or directives.

3.37 Clause 37: Legitimacy and validity of documents

Clause 37 provides that the Director-General: Home Affairs must, at the request of a State which is a party to the UN Protocol to Prevent, Suppress and Punish Trafficking in

Persons or to an agreement relating to trafficking in persons, verify the legitimacy and validity of travel or identity documents issued or purported to have been issued by the Department of Home Affairs and suspected of being used in the commission of an offence under the Bill. Since the Republic has ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, it is obliged to adopt measures to prevent trafficking in persons, ensure the protection of victims of trafficking and the prosecution of traffickers, including assisting other State Parties in this regard. International co-operation with State Parties that are not parties to the above-mentioned Protocol is, however, also necessary for the effective combating, prevention and prosecution of trafficking in persons.

3.38 Clause 38: Annual report on abuse or deliberate neglect of child and findings by children's court that child is in need of care and protection

Clause 38 requires the Director-General: Social Development to submit an annual report to the Intersectoral Committee on all cases of abuse or deliberate neglect of children and all findings by children's courts that a child is in need of care and protection, insofar as such cases and findings relate to child victims of trafficking.

3.39 Clause 39: National Policy Framework

Clause 39 provides that the Minister must, after consultation with specified Ministers of Cabinet and the National Director of Public Prosecutions, adopt a national policy framework relating to all matters dealt with in this Bill.

3.40 Clause 40: Establishment of Intersectoral Committee on Prevention and Combating of Trafficking in Persons

Clause 40 provides for the establishment of an Intersectoral Committee on Prevention and Combating of Trafficking in Persons. The Intersectoral Committee consists of specified senior government officials who may invite representatives from the Commission for Gender Equality, the South African Human Rights Commission and the National House of Traditional Leaders to its meetings to obtain their views on issues relating to the responsibilities, functions and duties of the Committee. The Committee may also invite representatives from the non-governmental sector and civil society to its meetings with the view to fostering co-operation between government and civil society in the implementation of the Bill and other persons, where necessary, for technical assistance, support or advice.

3.41 Clause 41: Responsibilities, functions and duties of Intersectoral Committee

Clause 41 sets out the responsibilities, functions and duties of the Intersectoral Committee, which includes developing a draft national policy framework referred to in section 39(1); the establishment of an integrated information system to facilitate the effective monitoring and implementation of this Bill and to recommend interventions relating to trafficking in persons; and developing and reviewing guidelines on the identification of victims of trafficking and traffickers.

3.42 Clause 42: Report to Parliament

Clause 42 compels the Minister to annually submit reports to Parliament regarding the implementation of the Bill and aspects relating to trafficking in persons.

3.43 Clause 43: Regulations

Clause 43 provides that the Minister of Home Affairs and the Minister of Social Development must make certain regulations with regard to aspects of this Bill which fall under their respective Departments. Clause 43(4) empowers the Minister of Justice and Constitutional Development, after consultation with specified Ministers, to make regulations regarding any matter that the Bill requires or permits to be prescribed.

3.44 Clauses 44-46: Delegation of powers and assignment of duties

In order to ensure the smooth administration of the Bill, clauses 44 to 46 provide for the delegation and assignment of certain powers and duties.

3.45 Clause 47: Laws repealed or amended

Clause 47 provides for the repeal or amendment of certain laws to bring them in line with the provisions of the Bill and to deal more effectively with trafficking in persons. Certain consequential amendments to the provisions of various other Acts are necessitated by the provisions of the Bill.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

4.1 During its investigations, the SALRC consulted widely on the Bill. Responses were received from, among others, the legal fraternity, various Government Departments, individual magistrates, academics and numerous non-governmental organisations (NGOs). The SALRC submitted the Bill to the Directors-General of the Departments of Foreign Affairs (International Relations and Cooperation), Home Affairs, Social Development, Labour, Health and Safety and Security (Police) for their consideration and input. These Departments were informed that, given the fact that the Bill imposes certain duties on them, the Commission would like to provide them with another opportunity to comment on the Bill before it is approved by the Commission. These Departments' attention was drawn to the provisions of the Bill impacting on their line functions. Inputs on the proposed Bill were received from the Departments of Foreign Affairs, Home Affairs, Social Development, Labour and Safety and Security. Foreign Affairs and Social Development stated that they agree with the contents of the Bill and that they had no further inputs. Inputs received from the other departments were incorporated into the Bill where necessary.

4.2 When the Bill was published for public comments in May 2009, comments were received from numerous NGOs and civil society organisations, the Departments of Home Affairs and Social Development, the Commission for Gender Equality, a Provincial House of Traditional Leaders and the South African Women Lawyers Association.

5. IMPLICATIONS FOR PROVINCES

The Bill requires a police official to refer victims of trafficking to a child protection organisation or an accredited organisation, as the case may be, or to a provincial department of social development, to be taken care of.

6. FINANCIAL IMPLICATIONS FOR STATE

There will be substantial financial implications for the government departments which will be involved in the implementation of the Act, once it has been passed. The Department of Justice and Constitutional Development has commenced with the process of costing the Bill to determine what the financial implications will be for each of the departments involved.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provisions to which the procedure set out in sections 74 or 76 of the Constitution applies.

7.2 We are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

ADDENDUM C

Recommended Principles and Guidelines on Human Rights and Human Trafficking



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Social and human rights questions: human rights

Recommended Principles and Guidelines on Human Rights and Human Trafficking

Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council**

Addendum

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* E/2002/100.

** The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B, by which the Assembly decided that, if a report is submitted late, the reason should be included in a footnote to the document.

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Recommended Principles on Human Rights and Human Trafficking¹

The primacy of human rights

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

Preventing trafficking

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.
5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.
6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

Protection and assistance

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.
9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States

¹ The term “trafficking”, as used in the present Principles and Guidelines, refers to 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. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (article 3 (a)).

shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.

10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.

11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

Criminalization, punishment and redress

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts² and related conduct.³

13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.

14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.

16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

² For the purposes of the present Principles and Guidelines, the “component acts” and “component offences” of trafficking are understood to include the recruitment, transportation, transfer, harbouring or receipt of persons over eighteen years of age by means of threat, force, coercion or deception for the purpose of exploitation. The recruitment, transportation, transfer, harbouring or receipt of a person under eighteen years of age constitute component acts and component offences of trafficking in children. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, articles 3 (a) and 3 (c).

³ For the purposes of the present Principles and Guidelines, conduct and offences “related to” trafficking are understood to include: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 3 (a).

Recommended Guidelines on Human Rights and Human Trafficking

Guideline 1: Promotion and protection of human rights

Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.
2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programmes.
3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.
4. Taking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.
5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.
6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.
7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions. Consideration should be given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.
8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.⁴

⁴ The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.

10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights-based anti-trafficking strategies.

Guideline 2: Identification of trafficked persons and traffickers

Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.

States are also obliged to exercise due diligence in identifying traffickers,⁵ including those who are involved in controlling and exploiting trafficked persons.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.
2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.
3. Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.
4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.

⁵ The term “traffickers”, where it appears in the present Principles and Guidelines, is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.

5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.
7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

Guideline 3: Research, analysis, evaluation and dissemination

Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis. It is essential that all parties involved in developing and implementing these strategies have and maintain a clear understanding of the issues.

The media has an important role to play in increasing public understanding of the trafficking phenomenon by providing accurate information in accordance with professional ethical standards.

States and, where appropriate, intergovernmental and non-governmental organizations, should consider:

1. Adopting and consistently using the internationally agreed definition of trafficking contained in the Palermo Protocol.⁶
2. Standardizing the collection of statistical information on trafficking and related movements (such as migrant smuggling) that may include a trafficking element.
3. Ensuring that data concerning individuals who are trafficked is disaggregated on the basis of age, gender, ethnicity and other relevant characteristics.
4. Undertaking, supporting and bringing together research into trafficking. Such research should be firmly grounded in ethical principles, including an understanding of the need not to re-traumatize trafficked persons. Research methodologies and interpretative techniques should be of the highest quality.
5. Monitoring and evaluating the relationship between the intention of anti-trafficking laws, policies and interventions, and their real impact. In particular,

⁶ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime, defines trafficking in persons as: "... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (article 3 (a)). The Protocol further states that 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 above (article 3 (c)).

ensuring that distinctions are made between measures which actually reduce trafficking and measures which may have the effect of transferring the problem from one place or group to another.

6. Recognizing the important contribution that survivors of trafficking can, on a strictly voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact.

7. Recognizing the central role that non-governmental organizations can play in improving the law enforcement response to trafficking by providing relevant authorities with information on trafficking incidents and patterns taking into account the need to preserve the privacy of trafficked persons.

Guideline 4: Ensuring an adequate legal framework

The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.

States should consider:

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.

2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services.

3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.

4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.
7. Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings.
8. Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked.
9. Ensuring that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law.
10. Guaranteeing that protections for witnesses are provided for in law.
11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.

Guideline 5: Ensuring an adequate law enforcement response

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.

An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.

States and, where applicable, intergovernmental and non-governmental organizations should consider:

1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.
2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and

children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness.

3. Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony.

4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.

5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

6. Implementing measures to ensure that “rescue” operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.

7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combating trafficking and protecting the rights of victims.

8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent legal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

9. Encouraging law enforcement authorities to work in partnership with non-governmental agencies in order to ensure that trafficked persons receive necessary support and assistance.

Guideline 6: Protection and support for trafficked persons

The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counselling. Trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.
3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.
4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.
5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.
6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.
7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).
8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

Guideline 7: Preventing trafficking

Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.

States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programmes, should consider:

1. Analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.
2. Developing programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.
3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.
4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.
5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.
7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

Guideline 8: Special measures for the protection and support of child victims of trafficking

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.
2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.
3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.
4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.
5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.
6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.
7. Adopting specialized policies and programmes to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.
8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.
9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.
10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

Guideline 9: Access to remedies

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including

compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Ensuring that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature.
2. Providing information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands.
3. Making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel

The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organizations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation. They are also required to investigate thoroughly all allegations of trafficking and related exploitation and to provide for and apply appropriate sanctions to personnel found to have been involved in trafficking.

States and, where appropriate, intergovernmental and non-governmental organizations, should consider:

1. Ensuring that pre- and post-deployment training programmes for all peacekeeping, peace-building, civilian policing, humanitarian and diplomatic staff adequately address the issue of trafficking and clearly set out the expected standard of behaviour. This training should be developed within a human rights framework and delivered by appropriately experienced trainers.
2. Ensuring that recruitment, placement and transfer procedures (including those of private contractors and sub-contractors) are rigorous and transparent.
3. Ensuring that staff employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect they may have been trafficked. This obligation also covers complicity in trafficking through corruption or affiliation with any person or group of persons who could reasonably be suspected of engaging in trafficking and related exploitation.

4. Developing and adopting specific regulations and codes of conduct setting out expected standards of behaviour and the consequences of failure to adhere to these standards.
5. Requiring all personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions to report on any instances of trafficking and related exploitation that come to their attention.
6. Establishing mechanisms for the systematic investigation of all allegations of trafficking and related exploitation involving personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions.
7. Consistently applying appropriate criminal, civil and administrative sanctions to personnel shown to have engaged in or been complicit in trafficking and related exploitation. Intergovernmental and non-governmental organizations should, in appropriate cases, apply disciplinary sanctions to staff members found to be involved in trafficking and related exploitation in addition to and independently of any criminal or other sanctions decided on by the State concerned. Privileges and immunities attached to the status of an employee should not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.

Guideline 11: Cooperation and coordination between States and regions

Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.

States and, where applicable, intergovernmental and non-governmental organizations, should consider:

1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare.
2. Offering, either on a bilateral basis or through multilateral organizations, technical and financial assistance to States and relevant sectors of civil society for the purpose of promoting the development and implementation of human rights-based anti-trafficking strategies.
3. Elaborating regional and subregional treaties on trafficking, using the Palermo Protocol and relevant international human rights standards as a baseline and framework.
4. Adopting labour migration agreements, which may include provision for minimum work standards, model contracts, modes of repatriation, etc., in accordance with existing international standards. States are encouraged effectively to enforce all such agreements in order to help eliminate trafficking and related exploitation.

5. Developing cooperation arrangements to facilitate the rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of residence.
6. Establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation.
7. Developing procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned States. In recognition of the value of direct contacts, provision should be made for direct transmission of requests for assistance between locally competent authorities in order to ensure that such requests are rapidly dealt with and to foster the development of cooperative relations at the working level.
8. Ensuring judicial cooperation between States in investigations and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. This cooperation should include assistance in: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgements.
9. Ensuring that requests for extradition for offences related to trafficking are dealt with by the authorities of the requested State without undue delay.
10. Establishing cooperative mechanisms for the confiscation of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.
11. Exchanging information and experience relating to the implementation of assistance, return and integration programmes with a view to maximizing impact and effectiveness.
12. Encouraging and facilitating cooperation between non-governmental organizations and other civil society organizations in countries of origin, transit and destination. This is particularly important to ensure support and assistance to trafficked persons who are repatriated.

ADDENDUM D

QUALITATIVE, SEMISTRUCTURED INTERVIEWS AND DISCUSSIONS

Semistructured interviews and discussions were conducted with the following persons, to whom I wish to express my sincere appreciation for their cooperation and valuable input:

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