

# SOUTH AFRICA'S LEGAL COMPLAINT WITH ITS INTERNATIONAL OBLIGATIONS IN RESPECT OF CHILD TRAFFICKING

Dissertation submitted in fulfillment of the  
requirements for the degree Magister Legum at the  
North-West University, Potchefstroom Campus

by

γ

Wilmarie Horn

13062727

LLMV

Study Supervisor: Ms. Debra Horsten

Co-Supervisor: Mrs. Ilze Booysen

May 2009

## Acknowledgements

**First and foremost I would like to thank my Heavenly Father for the talents He had given me, His unfailing love and mercy, and motivation when no words could encourage a despondent heart. Thank you Lord, for without You, I am nothing.**

On completion of this dissertation I wish to extend a sincere word of gratitude to the following persons and institutions for their contributions:

- Debra Horsten, Ilze Booysen and Linda Stewart-Jansen van Rensburg for their advice on the design, structure and content of this dissertation. I dearly appreciate the time, exceptional knowledge, expertise and experience that you applied in helping me write this dissertation.
- My parents, Willie and Marieta Horn, for your unceasing support and kind words of encouragement. You have taught me that nothing is impossible, although it may be difficult. You have made me an independent person, able to spread my wings and soar to the highest crests of this world.
- My brother, Willie, for always making me laugh with some or other anecdote.
- The rest of my family who all supported me through the writing of this dissertation.
- My cat, Astro Peter-Pan, for patiently sitting on my lap through hours of research and the writing of this dissertation.
- My friends, for the thousands of cups of coffee, the love and the support that you have given me.
- Professor Robbie Robinson for the trouble he went through in getting contact persons in the field of child trafficking.

- Professor Carol Allais for the additional materials on child trafficking you supplied so generously.
- The staff of the Ferdinand Postma Library who are always willing to assist, even when I was 2000 kilometres away.

I dedicate this dissertation to all the children in the world, suffering abuse at the hands of traffickers. May they somehow find peace and be healed.

Opinions and conclusions contained in this dissertation are that of the author and should not necessarily be connected with this institution.

## Table of contents

<b>Abbreviations and acronyms .....</b>	<b>1</b>
<b>1. Introduction .....</b>	<b>2</b>
<b>1.1 International and regional perspectives .....</b>	<b>3</b>
<b>1.2 National perspective.....</b>	<b>6</b>
<b>1.3 Current and proposed legal measures .....</b>	<b>7</b>
1.3.1 <i>Current legal measures .....</i>	<i>8</i>
1.3.2 <i>Proposed legislation .....</i>	<i>9</i>
<b>1.4 Exposition of the study .....</b>	<b>10</b>
1.4.1 <i>Aims of the study.....</i>	<i>10</i>
1.4.2 <i>Exposition of the chapters .....</i>	<i>10</i>
<b>1.5 Concluding remarks .....</b>	<b>11</b>
<b>2. International and regional framework .....</b>	<b>12</b>
<b>2.1 Role of international law in South Africa .....</b>	<b>12</b>
<b>2.2 Development of international law relating to child trafficking.....</b>	<b>15</b>
<b>2.3 United Nations conventions and protocols.....</b>	<b>21</b>
2.3.1 <i>Convention on the Rights of the Child of 1989 .....</i>	<i>21</i>
2.3.1.1 <i>Background of the CRC .....</i>	<i>21</i>
2.3.1.2 <i>Content of the CRC.....</i>	<i>23</i>
2.3.2 <i>Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.....</i>	<i>32</i>
2.3.2.1 <i>Background of the Optional Protocol on Children .....</i>	<i>32</i>
2.3.2.2 <i>Content of the Optional Protocol on Children.....</i>	<i>33</i>
2.3.3 <i>Convention against Transnational Organised Crime.....</i>	<i>36</i>
2.3.3.1 <i>Background of the Convention against Transnational Organised Crime.....</i>	<i>36</i>

2.3.3.2	Content of the Convention against Transnational Organised Crime.....	37
2.3.4	<i>Palermo Protocol</i> .....	40
2.3.4.1	Background of the Palermo Protocol .....	40
2.3.4.2	Content of the Palermo Protocol.....	42
2.3.5	<i>International Covenant on Civil and Political Rights</i> .....	56
2.3.6	<i>International Covenant on Economic, Social and Cultural Rights</i> .....	57
2.3.7	<i>Rome Statute of the International Criminal Court</i> .....	58
<b>2.4</b>	<b><i>International Labour Organisation instruments</i></b> .....	<b>59</b>
2.4.1	<i>Convention Concerning Forced or Compulsory Labour 29 of 1930</i> .....	59
2.4.2	<i>Convention Concerning the Minimum Age for Admission to Employment 138 of 1973</i> .....	60
2.4.3	<i>Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 182 of 1999</i> .....	62
<b>2.5</b>	<b><i>Hague Convention on Protection of Children in Respect of Inter-country Adoption of 1993</i></b> .....	<b>65</b>
<b>2.6</b>	<b><i>Regional instruments</i></b> .....	<b>68</b>
2.6.1	<i>African Charter on the Rights and Welfare of the Child of 1990</i> .....	68
<b>2.7</b>	<b><i>Concluding remarks</i></b> .....	<b>73</b>
<b>3.</b>	<b>National Framework</b> .....	<b>74</b>
3.1	<i>Introduction</i> .....	74
3.2	<i>Constitution of the Republic of South Africa, 1996</i> .....	81
3.3	<i>Current legal measures</i> .....	87
3.3.1	<i>Sexual Offences Act 23 of 1957</i> .....	88
3.3.2	<i>Child Care Act 74 of 1983</i> .....	89
3.3.3	<i>Prevention of Organised Crime Act 121 of 1998</i> .....	91

3.3.4	<i>Films and Publications Act 65 of 1996</i> .....	93
3.3.5	<i>Criminal Law (Sexual Offences and Related Matters)</i> <i>Amendment Act 32 of 2007</i> .....	94
3.3.6	<i>Children's Act 38 of 2005</i> .....	100
3.3.7	<i>Children's Amendment Act 41 of 2007</i> .....	109
3.3.8	<i>Other legislation</i> .....	110
<b>3.4</b>	<b><i>Proposed legislation</i></b> .....	<b>115</b>
3.4.1	<i>Trafficking in Persons Bill B of 2006</i> .....	117
3.4.1.1	Prevention of child trafficking .....	123
3.4.1.2	Prosecution of child traffickers .....	125
3.4.1.3	Protection of child victims of trafficking .....	128
<b>3.5</b>	<b><i>Concluding remarks</i></b> .....	<b>131</b>
<b>4.</b>	<b>Conclusion and recommendations</b> .....	<b>133</b>
	<b>Bibliography</b> .....	<b>i-xviii</b>
	<b>Abstract</b> .....	<b>xix</b>

The exploitation of childhood constitutes the evil, the most hideous, the most unbearable to the human heart.

Albert Thomas, first Director of the ILO\*

---

\* As quoted by Allais C "An overview of human trafficking in Sub-Saharan Africa" in the RECLISA Conference on *Putting Children First* 4-6 July 2006 Johannesburg 1.

## **Acronyms and abbreviations**

AIDS - Acquired IMMUNE Deficiency Syndrome

ECPAT - End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (previously End Prostitution in Asian Tourism)

EU - European Union

HIV - Human Immunodeficiency Virus

ICMPD - International Centre for Migration Policy Development

ILO - International Labour Organisation

IOM - International Organisation for Migration

MDT - Multi-Disciplinary Team

NGO - Non-governmental Organisation

OAU - Organisation of the African Union

OHCHR - United Nations Office of the High Commissioner of Human Rights

OSCE - Organisation for Security and Co-operation in Europe

SAJHR - South African Journal on Human Rights

SAMP - South African Migration Project

SOCA - Sexual Offences and Community Affairs

TECL - Towards the Elimination of the Worst Forms of Child Labour

UN - United Nations

UNICEF - United Nations Children's Fund

UNODC - United Nations Office on Drugs and Crime



## 1 Introduction

Trafficking in children, commonly referred to as modern-day slavery,<sup>1</sup> violates the fundamental rights of children, including the right to family- or parental care, or to appropriate alternative care when removed from the family environment; the right to be protected from maltreatment, neglect abuse or degradation; and to be protected from exploitative labour practices.<sup>2</sup> It is a fact that child trafficking causes physical and psychological harm to the children involved.<sup>3</sup> Contemporary trafficking in children is an organised trade with global linkages and is often connected to organised crime, prostitution, modern-day slavery, pornography and exploitation in general.<sup>4</sup> Modern-day technology, including the internet and

---

<sup>1</sup> Mattar MY "Trafficking in persons, especially women and children, in countries of the Middle East: The scope of the problem and the appropriate legislative responses 2002-2003 *Fordham International Law Journal* 721; Council of Europe 2005 <http://www.coe.int/trafficking.pdf>; King T "The modern slave trade" 2002 *University of California, Davis Journal of International Law* 298; Solomons 2006 [www.parliament.gov.za/content/womens\\_parliament\\_report.pdf](http://www.parliament.gov.za/content/womens_parliament_report.pdf); Kreston S "Trafficking in children in South Africa: an analysis of pending legislation" 2007 *Child Abuse Research in South Africa* 35; National Human Trafficking Resource Centre 2007 [http://www.wacf.hhs.gov/trafficking/about/victim\\_assist.html](http://www.wacf.hhs.gov/trafficking/about/victim_assist.html); Perry CS "The menace of human trafficking in Africa and the U.S Congressional response through the Office of the United States Executive Director of the African Development Bank" 2004-2005 *Loyola University Chicago International Law Review* 179; Esquibel *Human trafficking: A violation of human rights, a universal issue* 5; Bravo KE "Exploring the analogy between modern trafficking in Humans and the Trans-Atlantic slave trade" 2007 *Boston University International Law Journal* 260; Baker KL "Don't forget the family: A proposal for expanding immediate protection to families of human trafficking survivors" 2006-2007 *Fordham International Law Journal* 839.

<sup>2</sup> As guaranteed by section 28 of the *Constitution of the Republic of South Africa*, 1996, (henceforth referred to as the Constitution). See Fitzgibbon K "Modern-Day Slavery? The Scope of Trafficking in Persons in Africa" 2003 *African Security Review* 86; UNICEF 2006 <http://www.childtrafficking.org/eng/publication.html>; Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Müller, Hollely and van der Merwe *Prosecuting the Child Sex Offender* 19.

<sup>3</sup> Bevilacqua E "Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?" 1998-1999 *ILSA Journal of International and Comparative Law* 172; UNICEF 2006 <http://www.childtrafficking.org/eng/publication.html>; Silolo 2006 [www.cjei.org/publications.IAW.ppt](http://www.cjei.org/publications.IAW.ppt); ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>4</sup> King 2002 *University of California, Davis Journal of International Law* 307; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 1; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Rassam AY "Contemporary forms of slavery and the evolution of the prohibition of

extensive transport infrastructures, also makes it easier than before to deal in humans as commodities.<sup>5</sup> Accordingly, the trafficking of persons, and particularly children, is one of the most egregious violations of human rights which the international community now confronts.<sup>6</sup>

### 1.1 *International and regional perspectives*

Internationally, human trafficking has become the third-largest profit-making criminal enterprise after drugs and weapon trading, generating an estimated seven billion US dollars annually.<sup>7</sup> It is estimated that about 12 300 000 people are trafficked worldwide annually and 1 200 000 of these are children.<sup>8</sup> A further estimation reveals that of these 12 300 000 people, 800

---

slavery and the slave trade under Customary International Law" 1998-1999 *Virginia Journal of International Law* 305.

<sup>5</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 1; Nagle LE "Selling souls: The effect of globalisation on human trafficking and forced servitude" 2008 *Wisconsin International Law Journal* 160.

<sup>6</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 1; UNODC 2005 [www.unodc.org/palermo/theconvention.html](http://www.unodc.org/palermo/theconvention.html); Skinner A *Crime so Monstrous* 7; Esquibel *Human trafficking: A violation of human rights, a universal issue* 50; Tavella AM "Sex trafficking and the 2006 World Cup in Germany" 2007-2008 *Northwestern Journal of International Human Rights* 197; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf); Defeis EF "Protocol to Prevent, Suppress and Punish Trafficking in Persons: A new approach" 2003-2004 *ILSA International and Comparative Law* 485; King 2002 *University of California, Davis Journal of International Law* 293, 317; Nagle 2008 *Wisconsin International Law Journal* 135.

<sup>7</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 1, 28; Martens, Pieczkowski and van Vuuren-Smyth 2003 [www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf](http://www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf); Nagle 2008 *Wisconsin International Law Journal* 131; Allais 2005 [www.freerepublic.com/focus/f-news/132243/posts](http://www.freerepublic.com/focus/f-news/132243/posts); TAHA 2006 [www.info.gov.za/issues/humantrafficking/documents/frequently\\_asked\\_questions.pdf](http://www.info.gov.za/issues/humantrafficking/documents/frequently_asked_questions.pdf); Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt); Bravo 2007 *Boston University International Law Journal* 218; Hosken 2007 <http://www.humantrafficking.org/updates/562>; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 197; Anon 2005 [http://www.stopchildtrafficking.org/site/southern\\_africa.172.0.html](http://www.stopchildtrafficking.org/site/southern_africa.172.0.html); Kreston 2007 *Child Abuse Research in South Africa* 38; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Perry 2004-2005 *Loyola University Chicago International Law Review* 187; Esquibel *Human trafficking: A violation of human rights, a universal issue* 5.

<sup>8</sup> Skinner A *Crime so Monstrous* 7; Kreston "Trafficking in Human Beings: An Overview and Global Perspective" 1; Bravo 2007 *Boston University International Law Journal* 209; Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt); Rassam AY "International Law and contemporary forms of slavery: An economic and social-rights based approach" 2004-2005 *Penn State International Law Review* 811; Anon 2005 <http://www.stop>

000 people are trafficked internationally, with approximately 400 000 of this number being children, 80% of which are female children.<sup>9</sup> The remaining 11 500 000 people are trafficked within a specific country's borders.<sup>10</sup> Only estimated numbers are available as trafficking is an under-reported offence and takes place furtively.<sup>11</sup>

Over the years there have been several international attempts to combat trafficking in persons by the introduction of treaties and conventions, which attempt to prevent and punish trafficking and also to protect the victims of trafficking.<sup>12</sup> These include the *United Nations Convention on the Rights of the Child* of 1989;<sup>13</sup> the *United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and*

---

childtrafficking-org/site/southern\_africa.172.0.html; Kreston 2007 *Child Abuse Research in South Africa* 36; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Dorevitch A and Foster M "Obstacles on the road to protection: Assessing the treatment of sex-trafficking victims under Australia's Migration and Refugee Law" 2008 *Melbourne Journal of International Law* 2.

<sup>9</sup> Kreston "Trafficking in Human Beings: An Overview and Global Perspective" 1; Kreston 2007 *Child Abuse Research in South Africa* 36; Smith L and Mattar MY "Creating international consensus on combating trafficking in persons: U.S. policy, the role of the UN, and global responses and challenges" 2004 *Fletcher Forum of World Affairs* 158; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Dorevitch and Foster 2008 *Melbourne Journal of International Law* 2.

<sup>10</sup> Kreston "Trafficking in Human Beings: An Overview and Global Perspective" 1; Rassam 2004-2005 *Penn State International Law Review* 811.

<sup>11</sup> Gould C "Countering Human Trafficking: Considerations and Constraints: Cheap Lives" 2006 *SA Crime Quarterly* 22; Pharoah R "Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa" 2006 *Institute for Security Studies Monographs* 20; Laczko F and Gramegna MA "Developing better indicators of human trafficking" 2003-2004 *Brown Journal of World Affairs* 179; UNICEF 2005 [www.childtrafficking.org/eng/publication](http://www.childtrafficking.org/eng/publication); UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/132243/posts](http://www.freerepublic.com/focus/f-news/132243/posts); SAPA 2006 [http://www.polity.org.za/article.php?a\\_id=45941](http://www.polity.org.za/article.php?a_id=45941); Dorevitch and Foster 2008 *Melbourne Journal of International Law* 2; IRIN 2006 <http://www.alertnet.org/thenews/newsdesk/IRIN/aa81a2cd1e8e8709442c642d058C5299.htm>.

<sup>12</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 2; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 6; Rassam 1998-1999 *Virginia Journal of International Law* 305.

<sup>13</sup> *Convention on the Rights of the Child*, Nov. 20, 1989, G.A. Res. 14/25, U.N. G.A.O.R. 44<sup>th</sup> Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1448 (1989), 1577 U.N.T.S. 3 (1989) (entered into force Nov. 2, 1990), (henceforth referred to as the CRC). The CRC was signed by South Africa on Jan. 29, 1993, and was ratified on June 16, 1995. See Mattar 2002-2003 *Fordham International Law Journal* 723.

*Child Pornography* of 2000;<sup>14</sup> the *International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* of 1999;<sup>15</sup> the *United Nations Convention against Transnational Organised Crime* of 2000;<sup>16</sup> the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime* of 2000.<sup>17</sup> The *African Charter on the Rights and Welfare of the Child* of 1990,<sup>18</sup> which is a regional instrument, also addresses the issue of child trafficking. These and other instruments relating to child trafficking will be discussed in detail in chapter two.<sup>19</sup>

<sup>14</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/54/49 (entered into force Jan. 18, 2000), (henceforth referred to as the *Optional Protocol on Children*). The *Optional Protocol on Children* was ratified by South Africa on July 1, 2003.

<sup>15</sup> *I.L.O. Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, June 17, 1999, 38 I.L.M. 1207 (1999) (adopted on June 17, 1999, and entered into force Nov. 19, 2000), (henceforth referred to as *Convention 182*). South Africa ratified *Convention 182* on June 7, 2000.

<sup>16</sup> *United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 29, 2003), (henceforth referred to as the *Convention against Transnational Organised Crime*). The *Convention against Transnational Organised Crime* was signed by South Africa on Dec. 14, 2000, and ratified on Feb. 20, 2004.

<sup>17</sup> *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001), (entered into force Dec. 25, 2003), (henceforth referred to as the *Palermo Protocol*). The *Palermo Protocol* was signed by South Africa on Dec. 14, 2000, and ratified on Feb. 20, 2004.

<sup>18</sup> *African Charter on the Rights and Welfare of the Child* OAU Doc CAB/LEG/24.9/49 of July 1990 (entered into force on Nov. 29, 1999), (henceforth referred to as the *African Children's Charter*). The *African Children's Charter* was signed by South Africa on Oct. 10, 1997, and ratified on Jan. 7 2000.

<sup>19</sup> Distinction must be made between an international instrument and a regional instrument. An international instrument regulates the interrelationship of different states and their rights and duties with regard to each other; whereas a regional instrument regulates the interrelationship of different countries of a continent and their rights and duties with regard to each other.

## 1.2 National perspective

South Africa is the main southern African destination for human trafficking and 60% of the trafficking victims in South Africa are children, including young girls under the age of fifteen.<sup>20</sup> South Africa has become a lucrative market for traffickers because it serves as the economic heart of Africa and provides a market for the services of victims of trafficking.<sup>21</sup> It is also a transit point for trafficking operations between developing and developed countries, because it has direct flight and shipping routes to most countries in the developed world.<sup>22</sup>

While child trafficking has a devastating impact on individual victims, its impact also undermines the safety and security of all nations involved as it is a global health risk<sup>23</sup> and also fuels the growth of organised crime.<sup>24</sup>

---

<sup>20</sup> Martens and Attwood *Daily News* 5; Martens, Pieczkowski and van Vuuren-Smyth 2003 [www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf](http://www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); Kreston 2006 [www.cjei.org/publications/LAWJ.ppt](http://www.cjei.org/publications/LAWJ.ppt); Goliath "Human Trafficking: Southern African Perspective" 3-4.

<sup>21</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 27; SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March 2004 11; Martens, Pieczkowski and van Vuuren-Smyth 2003 [www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf](http://www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); Goliath "Human Trafficking: Southern African Perspective" 3-4.

<sup>22</sup> South Africa is served by a road network of 754 600 kilometre, 30 000 kilometre of railway lines and ten international-standard airports. See Juta's Statutes Editors *The Constitution of the Republic of South Africa* 5<sup>th</sup> ed (Juta Law Cape Town 2007) vi; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 27; Ellis *The Star* 7; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Goliath "Human Trafficking: Southern African Perspective" 3-4.

<sup>23</sup> HIV – AIDS is a reality. Children sold to work in the sex industry are more vulnerable to contracting the disease. This epidemic will worsen because persons making use of child prostitutes believe the children to be untainted, resulting in unprotected sex and the spread of the virus. Unwanted pregnancies will also increase, leading to an increase in back street abortions. Back street abortions not only lead to serious health problems due to insanitary conditions and unqualified medical practitioners, but can result in death in many cases. See Esquibel *Human trafficking: A violation of human rights, a universal issue* 69-70, 77; Rassam 1998-1999 *Virginia Journal of International Law* 324; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 215; Fitzgibbon 2003 *African Security Review* 87.

Limited research on the issue of trafficking in persons within South Africa and across its borders makes it difficult to give an accurate overview of the extent of the problem.<sup>25</sup> Moreover, as the act of trafficking in persons often takes place clandestinely, it is difficult to obtain statistics on such activities.<sup>26</sup>

### 1.3 Current and proposed legal measures

South Africa has ratified the *Convention against Transnational Organised Crime* and the Palermo Protocol. In terms of the Constitution,<sup>27</sup> South Africa is obliged to criminalise trafficking in persons in accordance with these instruments.<sup>28</sup>

<sup>24</sup> Allais "An overview of human trafficking in Sub-Saharan Africa" 12; Esquibel *Human trafficking: A violation of human rights, a universal issue* 69-70; Allais 2005 [www.freerepublic.com/focus/f-news/132243/posts](http://www.freerepublic.com/focus/f-news/132243/posts).

<sup>25</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 26; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 28; Laczko and Gramegna 2003-2004 *Brown Journal of World Affairs* 179; RAPCAN 2003 [http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf); UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>.

<sup>26</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 26; Gould 2006 *SA Crime Quarterly* 22; Pharoah 2006 *Institute for Security Studies Monographs* 20; UNICEF 2005 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html); UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/132243/posts](http://www.freerepublic.com/focus/f-news/132243/posts); TAHA 2006 [www.info.gov.za/issues/humantrafficking/documents/frequently\\_asked\\_questions.pdf](http://www.info.gov.za/issues/humantrafficking/documents/frequently_asked_questions.pdf); IRIN 2006 <http://www.alertnet.org/thenews/newsdesk/IRIN/aa81a2cd1e8e8709442c642d058C5299.htm>; Dorevitch and Foster 2008 *Melbourne Journal of International Law* 2.

<sup>27</sup> Ss 231(4), 232 of the Constitution.

<sup>28</sup> A 5 of the Palermo Protocol; A 5 of the *Convention against Transnational Organised Crime*. See Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 2-3; Hosken 2007 <http://www.humantrafficking.org/updates/562>; Kreston 2007 *Child Abuse Research in South Africa* 40; Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RS\\_A.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RS_A.pdf).

### 1.3.1 Current legal measures

There is no common law or statutory provision dealing with trafficking *per se*.<sup>29</sup> A trafficker may however currently be prosecuted for a variety of both common law and statutory offences in South Africa.<sup>30</sup> The common law offences for which a trafficker may be prosecuted include *inter alia* abduction, kidnapping, assault and fraud.<sup>31</sup> The once common law offences of rape and indecent assault are now statutory offences under the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*.<sup>32</sup> Several other statutory offences can be applicable when dealing with traffickers. Other statutory offences applicable to the crime of trafficking may be regulated by the *Sexual Offences Act 23 of 1957*, the *Child Care*

<sup>29</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32-33; Brits E "SA child trafficking horror" *Die Burger* 16 December 2003 2; Pillay 2001 [www.mg.co.za/articledirect.aspx?articleid=154786&area=farchives\\_print\\_edition](http://www.mg.co.za/articledirect.aspx?articleid=154786&area=farchives_print_edition); Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); Truong 2006 [http://www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Silva 2007 [http://www.iol.co.za/index.php?click\\_id=13&set\\_id=1&art\\_id=vn20070503102106664c109535](http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20070503102106664c109535); Hosken 2007 <http://www.humantrafficking.org/updates/562>; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>30</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32-33; Qaba "Prosecuting Trafficking without Trafficking Laws" 2; Kreston 2007 *Child Abuse Research in South Africa* 40; Pithey B "Do New Crimes need New Laws" 2004 *SA Crime Quarterly* 9; Hosken 2007 [www.humantrafficking.org/updates/562](http://www.humantrafficking.org/updates/562); Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Silva 2007 [http://www.iol.co.za/index.php?click\\_id=13&set\\_id=1&art\\_id=vn20070503102106664c109535](http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20070503102106664c109535); Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>31</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32-33; Davel *Child Law in South Africa* 367-369; Snyman *Criminal Law* 430, 436-437, 445; Hosken 2007 [www.humantrafficking.org/updates/562](http://www.humantrafficking.org/updates/562); SAPA 2006 [www.polity.org.za/article.php?a\\_id=45941](http://www.polity.org.za/article.php?a_id=45941); Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html); Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf); Goliath "Human Trafficking: Southern African Perspective" 15.

<sup>32</sup> A trafficker may be prosecuted for the crimes of rape and sexual assault.

Act 74 of 1983,<sup>33</sup> the *Children's Amendment Act* 41 of 2007, the *Prevention of Organised Crime Act* 121 of 1998, the *Films and Publications Act* 65 of 1996, the *Immigration Act* 13 of 2002, as amended, the *Riotous Assemblies Act* 17 of 1956, the *Intimidation Act* 72 of 1982, and the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.<sup>34</sup> Chapter 18 of the *Children's Act* 38 of 2005, regulating child trafficking, has been signed but has not yet come into operation.<sup>35</sup> The existing legal measures that can be applied to prosecute offences relating to trafficking in persons are not sufficient to combat trafficking or to protect victims effectively.<sup>36</sup>

### 1.3.2 Proposed legislation

Current efforts to counteract human trafficking fall into three categories, namely prevention and deterrence, law enforcement and prosecution of traffickers and the protection of trafficked persons, rehabilitation and assistance in social reintegration.<sup>37</sup> No specific legislation against trafficking in persons has been passed in South Africa – trafficking as such has not yet been criminalised.<sup>38</sup> The *Combating of Trafficking in Persons Bill* B of 2006 is a work-in-progress. Research is still needed to adapt this

<sup>33</sup> The *Child Care Act* will be wholly repealed once the *Children's Act* 38 of 2005, (henceforth referred to as the *Children's Act*) comes into operation. Until such time the *Child Care Act* still regulates some matters concerning children.

<sup>34</sup> See Qaba "Prosecuting Trafficking without Trafficking Laws" 2-3; Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

<sup>35</sup> Chapter 18 of the *Children's Act* is not yet into operation due to budgetary implications, including the training of officials to deal with child victims of trafficking and setting up of child care centres which are specifically aimed at rehabilitating child victims of trafficking. Other resource problems may include the lack of financial support for trafficking awareness campaigns and the lack of knowledge and skills in order to train border officials to detect and identify trafficked children.

<sup>36</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 34.

<sup>37</sup> Truong 2006 [http://www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 1; UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html).

<sup>38</sup> Pillay 2001 [www.mg.co.za/articledirect.aspx?articleid=154786%area=farchives\\_print\\_edition](http://www.mg.co.za/articledirect.aspx?articleid=154786%area=farchives_print_edition); Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kreston 2007 *Child Abuse Research in South Africa* 40; Hosken 2007 <http://www.humantrafficking.org/updates/56>



instrument to provide the most effective form of protection to children against trafficking before it can be implemented.

#### **1.4 *Exposition of the study***

##### **1.4.1 *Aims of the study***

The aims of this study are to analyse international and national legal measures currently in place to address the issue of child trafficking in South Africa; including the prevention of child trafficking, the protection of child victims of trafficking and the prosecution of traffickers. The study will further aim to evaluate future legal measures and policy which relate to child trafficking. Lastly a conclusion will be reached on the question whether South Africa is in compliance with its international and constitutional obligations with regard to child trafficking. The research will consist of a literature review of legislation, case law, journal articles, text books, electronic sources, internet sources and conference contributions.

##### **1.4.2 *Exposition of the chapters***

The starting point of the study is an analysis of the international and regional framework and South Africa's international obligation to criminalise trafficking (Chapter 2). Chapter 3 deals with current and proposed South African legal measures, in terms of which a trafficker may be prosecuted, a child victim of trafficking be protected, as well as trafficking in children can be prevented. Chapter 4 will include a conclusion and some recommendations on the prevention of child trafficking, the protection of child victims of trafficking and the prosecution of child traffickers.

### 1.5 Concluding remarks

Child trafficking is a violation of the fundamental rights of the child who is trafficked.<sup>39</sup> Constitutional imperatives and South Africa's international legal obligations flowing from, *inter alia*, the ratification of the Palermo Protocol, emphasise the necessity of undertaking a comprehensive review of legal measures relating to child trafficking.<sup>40</sup> This study is therefore aimed at addressing trafficking in children within the South African context by evaluating legislative measures, aided by international guidelines and principles, in order to facilitate the effective prosecution of traffickers, the protection of child victims of trafficking and the prevention of trafficking in children, to ensure that South Africa is in compliance with its international and constitutional obligations.

---

<sup>39</sup> Section 28 of the Constitution provides for the protection of fundamental rights of children, including the right to family- or parental care, or to appropriate alternative care when removed from the family environment, the right to be protected from maltreatment, neglect abuse or degradation and to be protected from exploitative labour practices. See UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html).

<sup>40</sup> SALRC Project 110 in Discussion Paper 103 "Review of the Child Care Act" of 28 February 2002 1.

## 2 International and regional framework

### 2.1 Role of international law in South Africa

International law must be taken into consideration when a court, tribunal or forum interprets the Bill of Rights, as set out in section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996,<sup>41</sup> and it is thus necessary to evaluate international and regional instruments and their application in South Africa.<sup>42</sup> In *S v Makwanyane*<sup>43</sup> the Court held that, although a court must take international law into consideration when interpreting the Bill of Rights, it is under no obligation to follow it. South Africa has signed and ratified a number of international and regional instruments.<sup>44</sup> These instruments must be taken into consideration when interpreting the Bill of Rights, and, *inter alia*, in the determination of the best interests of the child. The court made a distinction between binding and non-binding international

---

<sup>41</sup> Henceforth referred to as the Constitution. In *S v Makwanyane* 1995 3 SA 391 (CC) the Court stated that international agreements and customary international law provide a framework within which the Bill of Rights can be evaluated and understood. See Blake RC "The world's law in one country: the South African constitutional court's use of public international law" 1998 *SALJ* 669, 674; Botha N "International Law and the South African interim Constitution" 1994 *SAPL* 249; Dugard J "The role of international law in interpreting the Bill of Rights" 1994 *SAJHR* 213; Keightley R "Public International Law and the Final Constitution" 1996 *SAJHR* 415; Horsten *The social security rights of children in South Africa* 37; Sloth-Nielsen J "Children's rights in the South African courts: An overview since ratification of the UN Convention of the Rights of the Child" 2002 *International Journal of Children's Rights* 139; Van der Vyfer JD "Constitutionality of the Age of Majority Act" 1997 *SALJ* 754; Slye RC "International law, human rights beneficiaries, and South Africa: Some thoughts on the utility of International Human Rights Law" 2001 *Chicago Journal of International Law* 66.

<sup>42</sup> See *K v K* 1999 4 SA 691 (C) 702 G/H – H/I and 704C where Van Heerden AJ stated that both constitutional and international law enshrined the 'best interests of the child' standard as the primary consideration in all matters concerning children in South Africa.

<sup>43</sup> *S v Makwanyane* 1995 3 SA 391 (CC) 414.

<sup>44</sup> Signature can be defined as the formal and official affixing of names to the text of an instrument by the representatives of the negotiating states, either as a means of expressing the definitive consent of the state to be bound by the terms of the instrument or as an expression of provisional consent subject to ratification, acceptance or approval. Ratification can be defined as the approval of an instrument, usually by the head of state. See Martin *Dictionary of Law* 407, 464 for definitions. Once a State has signed and ratified an international instrument, it is obliged to incorporate the international principles into national law. See note 50.

law and stated that both must be considered in the interpretation of the Bill of Rights.<sup>45</sup> In *Government of the Republic of South Africa v Grootboom*<sup>46</sup> the Constitutional Court confirmed the importance of international law in the interpretation of the Bill of Rights.<sup>47</sup> Thus section 39(1)(b) places an obligation on courts to consider international law principles when dealing with constitutional matters. Section 39, however, cannot be read in isolation. Sections 231, 232 and 233 of the Constitution, concerning the use of international law in South Africa, may be applicable in the prosecution of traffickers.<sup>48</sup>

Section 231(4) states that international agreements bind the Republic, and only become law when enacted into law by national legislation.<sup>49</sup> South Africa is thus obliged to criminalise trafficking by incorporating international principles into national trafficking legislation,<sup>50</sup> in order for international

---

<sup>45</sup> A binding instrument is signed and ratified by a state, and thus the state is bound to obey the international principles and incorporate such principles into national law. A non-binding instrument is not ratified by a state and thus has no obligation to incorporate such international principles into national law. Non-binding instruments can be taken cognisance of to serve as a guide to judicial policy in the formulation of a rule of law. See *S v Makwanyane* 1995 3 SA 391 (CC) 413-414; Dugard 1994 *SAJHR* 209; Horsten *The social security rights of children in South Africa* 39; Dugard *International Law* 265.

<sup>46</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 26.

<sup>47</sup> Section 28 of the Constitution, dealing specifically with children, is part and parcel of the Bill of Rights, and should thus be interpreted with due regard to the applicable international law principles. See Sloth-Nielsen 2002 *International Journal of Children's Rights* 148-149; Blake 1998 *SALJ* 670.

<sup>48</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 34.

<sup>49</sup> This principle has its foundation the proposition that the making and ratification of treaties fall within the province of the executive, whereas the making and alteration of the law fall within the province of the legislature. International human rights norms will then have a double statutory basis in national law. See Barrie GN "Legitimate expectation and international treaties" 1997 *SALJ* 475; Olivier M "South Africa and international human rights agreements: Procedure, policy and practice (Part 1)" 2003 *TSAR* 303; Dugard 1994 *SAJHR* 214; Van der Vyfer 1997 *SALJ* 755; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 All SA 24 (A) 28; *S v Tuhadeleni and Others* 1969 1 All SA 327 (A) 337; *Maluleke v Minister of Internal Affairs* 1981 1 SA 707 (B) 713; *Binga v Administrator-General, South-West Africa, and Others* 1984 3 SA 949 (SWA) 950H – 951C; and *Tshwete v Minister of Home Affairs (RSA)* 1988 4 SA 586 (A) 606E.

<sup>50</sup> A 5 of the Palermo Protocol obliges State Parties to criminalise trafficking. As South Africa is a member state to this protocol, it is obliged to criminalise trafficking as such.

principles to have domestic effect.<sup>51</sup> Given that South Africa has signed and ratified a number of international and regional instruments that directly address trafficking in persons,<sup>52</sup> it can be argued that these instruments may have persuasive authority in the interpretation of the national law that currently operates in this country.<sup>53</sup>

Customary international law is given constitutional endorsement by section 232 of the Constitution.<sup>54</sup> Section 232 of the Constitution states that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The constitutionalisation of this rule has elevated the status of customary international law,<sup>55</sup> and customary international law is no longer subject to subordinate legislation.<sup>56</sup> Customary international law is part of South African law and courts are required to ascertain and administer rules of customary international law without the need for proof thereof.<sup>57</sup>

---

Incorporation of international instruments means that international principles are taken up into national legislation, and thus, after incorporation of such principles, forms part of national law.

<sup>51</sup> Keightley 1996 SAJHR 412; Slye 2001 *Chicago Journal of International Law* 67.

<sup>52</sup> South Africa has ratified the CRC, the *African Children's Charter*, the *Convention against Transnational Organised Crime* and the Palermo Protocol, all which address trafficking in persons.

<sup>53</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 34.

<sup>54</sup> Customary international law is international law which fulfils the requirements of *usus* (settled practice) and *opinio juris* (general acceptance of an obligation to be bound). See Horsten *The social security rights of children in South Africa* 39; Dugard *International Law* 28; Barrie GN "International human rights conventions: Public international law applicable to the protection of rights" 1995 *SALJ* 79; Olivier M "The status of international law in South African municipal law: Section 231 of the 1993 Constitution" 1993 *South African Yearbook of International Law* 11; Keightley 1996 SAJHR 406; Dugard 1994 SAJHR 208; Dugard J "International Law and the South African Constitution" 1997 *European Journal of International Law* 79; Slye 2001 *Chicago Journal of International Law* 67.

<sup>55</sup> Dugard 1997 *European Journal of International Law* 79; Horsten *The social security rights of children in South Africa* 39; Keightley 1996 SAJHR 406-407.

<sup>56</sup> Only a provision of the Constitution or an Act of Parliament that is clearly inconsistent with customary international law will trump it, as emphasised in section 233 of the Constitution. Dugard 1997 *European Journal of International Law* 79; Keightley 1996 SAJHR 406-407.

<sup>57</sup> Dugard 1997 *European Journal of International Law* 79; *South African Islands Development Corporation Ltd v Buchan* 1971 1 SA 234 (C) 238.

Section 233 reads that when a court interprets any legislation, the court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>58</sup> The effect of these sections is that international law has persuasive authority in the courts – not binding authority – unless passed in domestic law.<sup>59</sup>

Section 39(b), read together with section 233, ensure that courts will be guided by international principles and the interpretation placed upon these principles by international courts in general.<sup>60</sup> The provisions of the Constitution seek to ensure that South African law will evolve in accordance with international law.<sup>61</sup>

## **2.2 Development of international law relating to child trafficking**

Internationally, trafficking in persons pre-dates the modern era.<sup>62</sup> Currently, forty five of Africa's fifty four countries are involved in human trafficking, of

<sup>58</sup> See Slye 2001 *Chicago Journal of International Law* 66; Dugard 1997 *European Journal of International Law* 85.

<sup>59</sup> It does however open the way for the introduction into evidence of international instruments to which South Africa is a party. In *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 2 SA 279 (T) 280 it was held that a court can take cognisance of treaties between two sovereign States which is not incorporated into municipal law, as well as the contents thereof, as facts, just as it can take cognisance of any fact properly proved before it. See *S v Makwanyane and Another* 1995 3 SA 391 (CC) 394; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 34; Sloth-Nielsen 2002 *International Journal of Children's Rights* 139.

<sup>60</sup> Dugard 1997 *European Journal of International Law* 85.

<sup>61</sup> Dugard 1997 *European Journal of International Law* 92.

<sup>62</sup> As early as the 1440's, Portugal and Spain imported slaves and established trading posts in Africa. Arab and African traders trafficked Africans to markets in Arabia, Iran and Asia. In Southern Africa, the Dutch 'imported' people from East Africa and South East Asia. As colonisation expanded, so did trafficking in persons and the phenomenon spread to inland territories. Solomons "Trafficking in South Africa – A Front Line Perspective" 2; BBC World Service 2006 <http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9chapter4.shtml>; United States Department of State 2008 <http://gvnet.com/humantrafficking/Spain.htm>; Becker 1999 <http://www.innercity.org/holt/slavechron.html>; Lifson 2002 <http://www.neh.gov/news/humanities/2002-03/voices.html>; Esquibel *Human trafficking: A violation of human rights, a universal issue* 5; Nagle LE "Selling souls: The effect of globalisation on human trafficking and forced servitude" 2008 *Wisconsin International Law Journal* 137.

which forty four of the forty five are 'origin' or sending countries.<sup>63</sup> Africa alone accounts for 31.4% of the world's human trafficking business.<sup>64</sup> Data from the United Nations Office on Drugs and Crime shows that worldwide human beings are trafficked from one hundred and twenty seven countries to be exploited in one hundred and thirty seven countries.<sup>65</sup> Thousands of children are being reduced to commodities in a trade of human rights violations.<sup>66</sup> An estimated one million children (mainly girls but also a significant number of boys) enter the multi-billion dollar commercial sex trade every year, working in conditions comparable to slavery.<sup>67</sup> Child trafficking is one of the fastest growing enterprises in the global economy.<sup>68</sup> Over the past two decades, child trafficking has become an issue of considerable concern for the international community.<sup>69</sup> The United Nations

---

<sup>63</sup> South Africa is deemed to be one of the origin countries in Africa. See Kiremire 2004 [www.childtrafficking.com/docs.kiremire\\_2004\\_trafficking\\_research\\_report.pdf](http://www.childtrafficking.com/docs.kiremire_2004_trafficking_research_report.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts).

<sup>64</sup> Kiremire 2004 [www.childtrafficking.com/docs.kiremire\\_2004\\_trafficking\\_research\\_report.pdf](http://www.childtrafficking.com/docs.kiremire_2004_trafficking_research_report.pdf).

<sup>65</sup> South Africa is one of the receiving countries where children are exploited. See UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf).

<sup>66</sup> Human rights that are violated include the right to equality, human dignity, freedom and security of the person, the right not to be treated or punished in a cruel, inhumane and degrading manner and the rights of children to protection. See Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>; National Human Trafficking Resource Centre 2007 [http://www.acf.hhs.gov/trafficking/about/victim\\_assist.html](http://www.acf.hhs.gov/trafficking/about/victim_assist.html); Kiremire 2004 [www.childtrafficking.com/docs.kiremire\\_2004\\_trafficking\\_research\\_report.pdf](http://www.childtrafficking.com/docs.kiremire_2004_trafficking_research_report.pdf).

<sup>67</sup> UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc); Fitzpatrick J "Trafficking as a human rights violation: The complex intersection of legal framework for conceptualizing and combating trafficking" 2002-2003 *Michigan Journal of International Law* 1144; Kiremire 2004 [www.childtrafficking.com/docs.kiremire\\_2004\\_trafficking\\_research\\_report.pdf](http://www.childtrafficking.com/docs.kiremire_2004_trafficking_research_report.pdf).

<sup>68</sup> Anon 2002 [www.news24.com/news24/south\\_africa](http://www.news24.com/news24/south_africa); Benjamin 2006 <http://www.stolenchildhood.net/entry/child-trafficking-rampant-in-south-africa>; Bronwyn 2005 [www.mzansiafrika.blogspot.com](http://www.mzansiafrika.blogspot.com); Mattar MY "Trafficking in persons, especially women and children, in countries of the Middle East: The scope of the problem and the appropriate legislative responses 2002-2003 *Fordham International Law Journal* 721.

<sup>69</sup> Pharoah R "Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa" 2006 *Institute for Security Studies Monographs* 1; Bruch EM "Models wanted" The search for an effective Response to human trafficking" 2004 *Stanford Journal of International Law* 3; Asquith and Turner 2008 [http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf); Mattar 2002-2003 *Fordham International Law Journal* 721; King T "The modern slave trade"

Children's Fund recognises child trafficking as a global problem and draws its standpoint from the *United Nations Convention on the Rights of the Child* of 1989.<sup>70</sup> It views trafficking of children as a fundamental violation of children's rights.<sup>71</sup> All United Nations agencies cooperate in lobbying for the strengthening of legislation and law enforcement to protect the rights of children as trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level.<sup>72</sup> The need for international co-operation at all levels, legislative, administrative and judicial, in addressing the protection of trafficked children is becoming one of the greatest priorities of the world.<sup>73</sup>

Internationally, several instruments relating to trafficking were introduced as far back as 1904 when the *International Agreement for the Suppression of the White Slave Traffic* was adopted in Paris,<sup>74</sup> and 1910 with the adoption

---

2002 *University of California, Davis Journal of International Law* 295, 317; Esquibel *Human trafficking: A violation of human rights, a universal issue* 50.

<sup>70</sup> *Convention on the Rights of the Child*, Nov. 20, 1989, G.A. Res. 44/25, U.N. G.A.O.R. 44<sup>th</sup> Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989), 28 I.L.M 1448 (1989), 1577 U.N.T.S. 3 (1989) (entered into force Nov. 2, 1990), (henceforth referred to as the CRC). UNICEF 2003 <http://www.unicef-irc.org/publications/pdf/insight9e.pdf>; UNICEF 2006 <http://www.childtrafficking.org>; Anon 2005 [http://www.stopchildtrafficking.org/site/southern\\_africa.172.0.html](http://www.stopchildtrafficking.org/site/southern_africa.172.0.html); Benjamin 2006 <http://http://www.stolenchildhood.net/entry/child-trafficking-rampant-in-south-africa/entry/child-trafficking-rampant-in-south-africa>.

<sup>71</sup> Action to combat child is receiving world-wide attention because trafficking threatens the human rights and the fundamental values of children and democratic societies as a whole. See Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726) and Council of Europe 2005 [www.coe.int/trafficking.pdf](http://www.coe.int/trafficking.pdf); ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>72</sup> UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html).

<sup>73</sup> SALRC Project 110 in Discussion Paper 103 "Review of the Child Care Act" of 28 February 2002 581; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>74</sup> *International Agreement for the Suppression of the White Slave Traffic*, May 18, 1904, 92 U.N.T.S. 19, (henceforth referred to as the *International Agreement for the Suppression of the White Slave Traffic* of 1904). See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 6; Gould C "Countering Human Trafficking: Considerations and Constraints: Cheap Lives" 2006 *SA Crime Quarterly* 20; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf); Mattar 2002-2003 *Fordham International Law Journal* 722; Rassam AY "Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under Customary International Law" 1998-1999 *Virginia Journal of International Law* 337.



of the *League of Nations Convention for the Suppression of the White Slave Traffic*.<sup>75</sup> The *International Agreement for the Suppression of the White Slave Traffic* of 1904 did not actually link slavery to prostitution as such, but it sought to address the fraudulent recruitment of women for prostitution in another country.<sup>76</sup> This was followed by the adoption of two Conventions by the League of Nations, namely the *International Convention to Combat the Traffic in Women and Children* of 1921<sup>77</sup> and the *International Convention for the Suppression of the Traffic in Women of Full Age* of 1933.<sup>78</sup> Subsequent amendments to these instruments broadened the scope of trafficking to include recruitment within the country of girls and boys, but remained primarily concerned with the trafficking of unwilling women.<sup>79</sup> However, from 1933 onwards, prostitution became recognised as an integral part of trafficking.<sup>80</sup> The *International Convention for the Suppression of the Traffic in Women of Full Age* of 1933 condemned all recruitment for prostitution in another country and obliged signatories to

---

<sup>75</sup> *International Convention of the Suppression of the White Slave Traffic*, May 4, 1910, 98 U.N.T.S. 101; 211 Consol. T.S. 45, 103 B.F.S.P 244. See Gould 2006 *SA Crime Quarterly* 20; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 6; Davel *Child Law in South Africa* 16; Mattar 2002-2003 *Fordham International Law Journal* 722; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf); Rassam 1998-1999 *Virginia Journal of International Law* 337.

<sup>76</sup> Pharoah 2006 *Institute for Security Studies Monographs* 4; Bruch 2004 *Stanford Journal of International Law* 2; Rassam 1998-1999 *Virginia Journal of International Law* 337.

<sup>77</sup> *International Convention for the Suppression of the Traffic in Women and Children*, Sept. 30, 1921, 9 L.N.T.S. 416, (henceforth referred to as the *International Convention to Combat the Traffic in Women and Children* of 1921). The *International Convention to Combat the Traffic in Women and Children* of 1921 extended protective measures in the 1904 and 1910 instruments to minors of either sex and raised the age limit for protection from twenty to twenty one years of age. Rassam 1998-1999 *Virginia Journal of International Law* 337-338.

<sup>78</sup> *International Convention for the Suppression of the Traffic in Women of Full Age*, Oct. 11, 1933, 53 U.N.T.S. 49, (henceforth referred to as the *International Convention for the Suppression of the Traffic in Women of Full Age* of 1933). See Gould 2006 *SA Crime Quarterly* 20; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 6; Mattar 2002-2003 *Fordham International Law Journal* 722.

<sup>79</sup> Pharoah 2006 *Institute for Security Studies Monographs* 4; Vrancken P and Chetty K "International child sex tourism: A South African perspective" 2009 *Journal of African Law* 114-118.

<sup>80</sup> Pharoah 2006 *Institute for Security Studies Monographs* 4.

punish anyone who procures, entices or leads away, even with her consent, a women or a girl of full age for immoral purposes to be carried out in another country.<sup>81</sup> Eleven years later the United Nations adopted the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949,<sup>82</sup> which emphasised the views of the *International Convention for the Suppression of the Traffic in Women of Full Age* of 1933.<sup>83</sup> The *United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949 was signed by only a few countries, but provided the model for domestic legislation, as it combined and replaced earlier agreements.<sup>84</sup> This Convention, however, failed to provide a definition of trafficking in persons and focused mainly on the punishment of traffickers.<sup>85</sup>

Other international instruments dealing with the issue of trafficking in persons include the *Slavery, Servitude, Forced Labour and Similar*

---

<sup>81</sup> Pharoah 2006 *Institute for Security Studies Monographs* 4; Rassam 1998-1999 *Virginia Journal of International Law* 338; Rassam AY "International Law and contemporary forms of slavery: An economic and social-rights based approach" 2004-2005 *Penn State International Law Review* 830.

<sup>82</sup> *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Dec.2, 1949, 96 U.N.T.S. 271, 282 (entered into force July 25, 1951), (henceforth referred to as the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949). South Africa ratified the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949 on Dec. 17, 2004.

<sup>83</sup> Pharoah 2006 *Institute for Security Studies Monographs* 4; Council of Europe 2005 [www.coe.int/trafficking.pdf](http://www.coe.int/trafficking.pdf); UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf).

<sup>84</sup> The henceforth referred to as the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949 does not define exploitation and limits trafficking only for the purpose of prostitution. Rassam 2004-2005 *Penn State International Law Review* 830; Gould 2006 *SA Crime Quarterly* 20; Pharoah 2006 *Institute for Security Studies Monographs* 4; Bruch 2004 *Stanford Journal of International Law* 9; Rassam 1998-1999 *Virginia Journal of International Law* 338; Smith L and Mattar MY "Creating international consensus on combating trafficking in persons: U.S. policy, the role of the UN, and global responses and challenges" 2004 *Fletcher Forum of World Affairs* 157.

<sup>85</sup> UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Bruch 2004 *Stanford Journal of International Law* 9. South Africa was only party to the *Slavery Convention* of 1926; the *Protocol Amending the Slavery Convention* of 1953, and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* of 1950. See Davel *Child Law in South Africa* 197.

*Institutions and Practices Convention* of 1926,<sup>86</sup> and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* of 1956.<sup>87</sup> None of the earlier international instruments are specifically aimed at addressing child trafficking and thus offer little protection for children vulnerable to trafficking.

In more recent years, the international community has improved the normative framework designed to prevent and combat this serious violation of children's rights. Governments across regions are creating new legislation, action plans and mechanisms to combat the phenomenon of child trafficking in a vigorous manner.<sup>88</sup> The *Convention against Transnational Organised Crime*<sup>89</sup> and the *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*<sup>90</sup> constitute the first serious attempts by the international community to answer to the global challenge of transnational organised crime with a global response in the form of international law.<sup>91</sup> It is evident

---

<sup>86</sup> *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, Sept. 25, 1926, 46 Stat. 2183, U.S. No. 778, 60 L.N.T.S. 253 (entered into force March 9, 1927). See Rassam 2004-2005 *Penn State International Law Review* 812.

<sup>87</sup> *Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, adopted by a Conference of Plenipotentiaries, Sept 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 40 (entered into force Apr. 30, 1957). See Mattar 2002-2003 *Fordham International Law Journal* 725; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 155-157; Rassam 2004-2005 *Penn State International Law Review* 829.

<sup>88</sup> UNICEF 2005 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html).

<sup>89</sup> *United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 29, 2003), (henceforth referred to as the *Convention against Transnational Organised Crime*).

<sup>90</sup> *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001), (entered into force Dec. 25, 2003), (henceforth referred to as the Palermo Protocol).

<sup>91</sup> With the drafting by the United Nations of the Palermo Protocol, combating in human trafficking, especially trafficking in children, has become an important political priority for governments worldwide. Organisations such as Anti-Slavery International, Coalition Against the Trafficking in Women (CATW), Global Alliance Against Trafficking in Women (GAATW), Human Rights Watch (HRW), Amnesty International

that the international community is ready to address the problem of trafficking, especially trafficking in children, as the different international instruments discussed below will illustrate.

## 2.3 *United Nations conventions and protocols*

### 2.3.1 *Convention on the Rights of the Child of 1989*<sup>92</sup>

#### 2.3.1.1 Background of the CRC

The CRC is the most universally accepted human rights convention with the highest number of ratifications by member states, the exceptions being the United States of America and Somalia.<sup>93</sup> Currently, one hundred and ninety

---

(AI) and End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes (previously End Prostitution in Asian Tourism) (ECPAT) have been active in laying the groundwork for governments' acceptance of human trafficking as a global reality. The International Labour Office International Programme on the Elimination of Child Labour (ILO-IPEC) was created in 1992 specifically to address issues of child labour and child trafficking. See Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); Pharoah 2006 *Institute for Security Studies Monographs* 1.

<sup>92</sup> *Convention on the Rights of the Child*, Nov. 20, 1989, G.A. Res. 44/25, U.N. G.A.O.R. 44<sup>th</sup> Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989), 28 I.L.M 1448 (1989), 1577 U.N.T.S. 3 (1989) (entered into force Nov. 2, 1990), (henceforth referred to as the CRC). South Africa signed the CRC on Jan. 29, 1993, and ratified it on June 16, 1995. For the text see Van Bueren *International Documentation on Children* 7; Wallace and Dale-Risk *International Human Rights* 133. The states that ratified the CRC include Bangladesh, Belize, Benin, Bhutan, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Holy Sea, Kenya, Mauritius, Mongolia, Saint Kitts and Nevis, Senegal, Sierra Leone, Sudan, Sweden, Togo and Vietnam. See Davel *Child Law in South Africa* 8; 217; Centre for Human Rights *The Rights of the Child* 3; Wallace and Dale-Risk *International Human Rights* 137.

<sup>93</sup> Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); Kreston 2006 [www.cjei.org/publications/lAWJ.ppt](http://www.cjei.org/publications/lAWJ.ppt); Detrick *Commentary on the UN CRC* 719; OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 144-145; Davel *Child Law in South Africa* 14; Defeis EF "Protocol to Prevent, Suppress and Punish Trafficking in Persons: A new approach" 2003-2004 *ILSA International and Comparative Law* 486; Jullien K "The recent international efforts to end commercial sexual exploitation of children" 2002-2003 *Denver Journal of International Law and Policy* 589; Bevilacqua E "Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?" 1998-1999 *ILSA Journal of International and Comparative Law* 176.

one states are parties to the CRC.<sup>94</sup> The CRC recognises the human rights of children and sets the standards to which all governments must aim for in the realisation of the rights of children.<sup>95</sup> Furthermore, it elaborates on the basic human rights to which all children everywhere are entitled to, which are: an inherent right to life,<sup>96</sup> the right to survival and to develop to the maximum extent possible;<sup>97</sup> to protection from harmful influences, abuse and exploitation;<sup>98</sup> and to full participation in family,<sup>99</sup> cultural and social life.<sup>100</sup> It also includes the child's human right not to be trafficked or exploited.<sup>101</sup>

By ratifying this instrument, national governments, including South Africa, have committed themselves to protecting and ensuring the realisation of children's rights, and they have agreed to hold themselves accountable for this commitment.<sup>102</sup> In order for South Africa to fulfil its international obligations under the CRC, South Africa is bound to the monitoring, promoting, protecting and reporting of the status of South African children.<sup>103</sup>

<sup>94</sup> Dugard *International Law* 325; Detrick *Commentary on the UN CRC* 719.

<sup>95</sup> Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); Bevilacqua 1998-1999 *ILSA Journal of International and Comparative Law* 175; Kreston 2006 [www.cjei.org/publications/lAWJ.ppt](http://www.cjei.org/publications/lAWJ.ppt); OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); Centre for Human Rights *The Rights of the Child* 5; Jullien 2002-2003 *Denver Journal of International Law and Policy* 589.

<sup>96</sup> A 6(1) of the CRC.

<sup>97</sup> A 6(2) of the CRC.

<sup>98</sup> A 19, 32, 34, 36 and 37 of the CRC.

<sup>99</sup> A 9 of the CRC.

<sup>100</sup> A 31 of the CRC.

<sup>101</sup> A 32, 34 and 35 of the CRC.

<sup>102</sup> OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); Sloth-Nielsen 2002 *International Journal of Children's Rights* 138.

<sup>103</sup> Article 4 of the CRC provides directly that State Parties shall take all legal, administrative and other measures for the implementation of the rights recognised in the CRC. See Sloth-Nielsen 2002 *International Journal of Children's Rights* 138; SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 2; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 17-18.

### 2.3.1.2 Content of the CRC

Article 1 of the CRC states that a child means “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”. This provision allows for a lower age to be incorporated into domestic legislation. According to section 28(3) of the Constitution, a child is deemed to be a person under the age of eighteen years, and thus South Africa is in compliance with article 1 of the CRC.

Article 3(1) of the CRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>104</sup> The concept of the child’s best interests should not be viewed merely legalistically, but should be a primary consideration in all actions concerning the child.<sup>105</sup> The reference to all actions concerning the child infers a wide application of the principle of the best interests of the child.<sup>106</sup> It can thus be accepted that the best interests of the child standard is applicable in conjunction with each of the CRC’s substantive provisions as well as with respect to actions that are not covered by express obligations of the CRC.<sup>107</sup> However, the Committee on the Rights of the Child has not yet attempted to propose criteria by which the best interests of the child should be judged in general or in relation to particular circumstances, but what is clear is that consideration of the best

---

<sup>104</sup> See Albrecht *Intercountry adoption: A Swiss perspective* 29; Hodgkin and Newell *Implementation Handbook for the CRC* 37; Sloth-Nielsen 2002 *International Journal of Children’s Rights* 138; UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html); Community Law Centre 2007 <http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article-40-july07.pdf>.

<sup>105</sup> There is no universally accepted definition of the best interests of the child. The ‘best interests of the child’ standard is incorporated into section 28(2) of the Constitution. See Hodgkin and Newell *Implementation Handbook for the CRC* 42; Community Law Centre 2007 <http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article-40-july07.pdf>; Kreston 2006 [www.cjei.org/publications/lawj.ppt](http://www.cjei.org/publications/lawj.ppt).

<sup>106</sup> Detrick *Commentary on the UN CRC* 90; Albrecht *Intercountry adoptions: A Swiss perspective* 29.

<sup>107</sup> Detrick *Commentary on the UN CRC* 90.

interests of the child must embrace both short- and long-term consequences for the child.<sup>108</sup> Whether dealing with the prevention of child trafficking; the protection of child victims of trafficking; or the prosecution of traffickers, the best interests of the child must always be granted primary consideration.

Article 6 of the CRC refers to the child's right to life and maximum survival and development. Article 6(1) reads that State Parties must recognise that every child has the inherent right to life and article 6(2) states that State Parties shall ensure, to the maximum extent possible, the survival and development of the child.<sup>109</sup> Article 6 is one of the articles designated as a general principle, guaranteeing the child the fundamental right to life, which is upheld as a universal human rights principle in other international instruments,<sup>110</sup> and to survival and development to the maximum extent possible.<sup>111</sup> As the right of the child to survival and development is linked to the right to life these rights can be seen as complimentary rights rather than mutually exclusive.<sup>112</sup> State Parties should also take specific and effective legislative and other measures to prevent the disappearance and trafficking of children.<sup>113</sup> This is something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life.<sup>114</sup> Child victims of trafficking are deprived of normal childhood development through abuse at the hands of their traffickers,<sup>115</sup> abuse which often leads to death and deprivation of their right to survival.

---

<sup>108</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 40; 42.

<sup>109</sup> South Africa incorporated article 6(1) of the CRC into the Constitution. Section 11 of the Constitution states that "everyone has a right to life". The term 'everyone' includes children.

<sup>110</sup> See for example the *Universal Declaration of Human Rights* adopted by the General Assembly Resolution 21 7A (111) of Dec. 10, 1948.

<sup>111</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 85; Centre for Human Rights *The Rights of the Child* 5.

<sup>112</sup> Detrick *Commentary on the UN CRC* 130.

<sup>113</sup> A 35 of the CRC.

<sup>114</sup> Detrick *Commentary on the UN CRC* 128.

<sup>115</sup> VandenBerg M "Complicity, corruption, and human rights: Trafficking in human beings" 2002 *Case Western Reserve Journal of International Law* 329.

Article 19 deals with violence and injury to or abuse of children whilst in the care of parents or guardians.<sup>116</sup> Article 19(1) of the CRC reads that State 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) or any other person who has the care of the child.<sup>117</sup> This provision does not limit the responsibility of the state only in regard to parents, but obliges State Parties to take measures to prevent sexual abuse by any person responsible for the care of the child.<sup>118</sup> Article 19(2) further states that such protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.<sup>119</sup> Thus, article 19 obliges State Parties to protect children from, *inter alia*, all forms of physical and mental violence, exploitation and sexual abuse,<sup>120</sup> and asserts children's equal human right to physical and personal integrity.<sup>121</sup> As a principle, this article is linked to the right to life and to maximum survival and

<sup>116</sup> OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html).

<sup>117</sup> See OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 22; Detrick *Commentary on the UN CRC* 318; Hodgkin and Newell *Implementation Handbook for the CRC* 237; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 18; Vrancken and Chetty 2009 *Journal of African Law* 126.

<sup>118</sup> Van Bueren G "Child sexual abuse and exploitation: A suggested human rights approach" 1994 *International Journal of Children's Rights* 46.

<sup>119</sup> See SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 22; Detrick *Commentary on the UN CRC* 318; Hodgkin and Newell *Implementation Handbook for the CRC* 237; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 18.

<sup>120</sup> Stuurman "Trafficking in Children" 1.

<sup>121</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 237.



development guaranteed under article 6.<sup>122</sup> Article 19(2) sets out possible protective measures, which constitute a non-exhaustive list, and acknowledges that social and educational measures are relevant to the protection of the child from violence, abuse and exploitation.<sup>123</sup> Other CRC articles cover in more detail the child's right to protection from certain forms of violence and exploitation that may take place in the context of trafficking or to protection in wider society.<sup>124</sup> Child victims of trafficking are exposed to all forms of abuse and governments should provide legislative and other measures not only to prevent such abuse, but also to assist the child victim in his or her rehabilitation after such experience.

Article 32(1) of the CRC provides that State Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous to or to interfere with the child's health or physical, mental, spiritual, moral or social development. Article 32(2) reads that State Parties shall take legislative, administrative, social and educational measures to ensure the implementation of article 32(1). Furthermore, State Parties must provide for a minimum age or minimum ages for admission to employment; for appropriate regulation of the hours and conditions of employment and for penalties or other sanctions to ensure the effective enforcement of article 32(2).<sup>125</sup> Article 32(1) states that economic exploitation of children should be prohibited at all costs, but only prohibits children from certain forms of work, namely hazardous work, work that interferes with the child's education and work that is harmful to the child's health, physical, mental, spiritual, moral or social development.<sup>126</sup> It

---

<sup>122</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 237.

<sup>123</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 237, 247.

<sup>124</sup> For example, article 34 protects children from sexual exploitation and sexual abuse, including 'organised' abuse and involvement of children in prostitution and pornography. Further examples can be found in articles 35, 36, and 37 which will be discussed further on. See Hodgkin and Newell *Implementation Handbook for the CRC* 242.

<sup>125</sup> A 32(2)(a)-(c) of the CRC.

<sup>126</sup> A 32(1) of the CRC.

should be noted that article 32(1) uses the term 'work', which includes both employment and work not within an employment relationship.<sup>127</sup> The main purpose of child trafficking is exploitation in the form of forced labour in the sex industry. The exploitation of children clearly interferes with the child's education and is harmful to the child's health, physical, mental, spiritual, moral and social development, thus placing a positive obligation on State Parties to prevent such exploitation.<sup>128</sup>

In terms of the sexual exploitation of children, articles 34 and 35 of the CRC cover all forms of sexual exploitation and abuse and are very clear with regard to the obligations of states.<sup>129</sup>

Article 34 of the CRC reads that State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse, including the use of children in the sex trade such as prostitution and pornography.<sup>130</sup> State Parties must take all appropriate national, bilateral and unilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials.<sup>131</sup> Any form of commercial

---

<sup>127</sup> Detrick *Commentary on the UN CRC* 563; Van Bueren *International Law on the Rights of the Child* 264.

<sup>128</sup> Article 32 of the CRC is incorporated into national legislation through the *Basic Conditions of Employment Act* 75 of 1997, (henceforth referred to as the *BCEA*). See paragraph 3.3.8 of this study.

<sup>129</sup> OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html).

<sup>130</sup> All forms of exploitation are intrinsically abusive, the distinguishing feature of sexual exploitation is that it generally involves notions of commercial gain. See Van Bueren 1994 *International Journal of Children's Rights* 52. Article 34 of the CRC is incorporated into national legislation through the *Films and Publications Act* 65 of 1996 (henceforth referred to the *Films and Publications Act*), prohibiting sexual exploitation of children in the pornography industry. See paragraph 3.3.4 of this study. It is also incorporated into the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (henceforth referred to the *Criminal Law Amendment Act*), which explicitly prohibits child trafficking for sexual purposes. See paragraph 3.3.5 of this study.

<sup>131</sup> See OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The

sexual exploitation jeopardises the health, safety and morals of any child subjected thereto or participating therein.<sup>132</sup> The second part of article 34 indicates that the specific steps to be taken by the State Parties for the implementation of this right include, in particular, the prevention of the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials.<sup>133</sup> The provisions of article 34 concerning sexual exploitation are closely related to articles 32, 33 and 35, which also address specific forms of exploitation of children, and to article 36, which obliges State Parties to protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.<sup>134</sup> The provisions of article 34 are also closely related to article 39, which deals with the right of a child victim to, *inter alia*, physical and psychological recovery and social reintegration where such child was a victim of any form of abuse or exploitation.<sup>135</sup>

Article 35 of the CRC calls for the implementation of measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any

---

Substantive Law" of 12 August 1999 18, 144-145; Detrick *Commentary on the UN CRC* 588; Hodgkin and Newell *Implementation Handbook for the CRC* 455; Jullien 2002-2003 *Denver Journal of International Law and Policy* 589; Vrancken and Chetty 2009 *Journal of African Law* 126.

<sup>132</sup> SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 145.

<sup>133</sup> Detrick *Commentary on the UN CRC* 593; Hodgkin and Newell *Implementation Handbook for the CRC* 455.

<sup>134</sup> Article 33 relates to the use of children in drug trafficking, which is covered by article 32, and the abuse of narcotics by children and is thus not applicable to the case of trafficking in children. Article 35 concerns the abduction of, the sale of or traffic in children for any purpose or in any form and will be discussed at a later stage. Article 36 accords to the child the right to be protected against all forms of exploitation prejudicial to any aspects of the child's welfare, over and above the specific forms of exploitation dealt with in articles 32 to 35, including the exploitation of gifted children, the exploitation of children by the media and the exploitation of children by researchers or for the purpose of medical or scientific experiments and will thus not be applicable to the case of trafficking in children. See Detrick *Commentary on the UN CRC* 589, 614; Hodgkin and Newell *Implementation Handbook for the CRC* 481.

<sup>135</sup> See Detrick *Commentary on the UN CRC* 589.

form.<sup>136</sup> Although this provision specifically refers to the trafficking of children, it fails to stipulate what constitutes trafficking of children.<sup>137</sup> Thus the reason for certain provisions of the CRC that are relevant to the issue of trafficking becomes clear. State Parties are obliged to protect children from all forms of physical or mental violence, including sexual abuse.<sup>138</sup> Article 21 provides protection for children in that international adoption must not involve improper financial gain.<sup>139</sup> Article 35 acts as a safety net to ensure that children are safe from being abducted or procured for the purposes of or for any other purpose.<sup>140</sup> Articles 32 and 34 through 36 of the CRC are especially pertinent to the efforts to combat trafficking.<sup>141</sup>

Article 37 of the CRC reads that State Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.<sup>142</sup> State Parties must further ensure that no child shall be

---

<sup>136</sup> Article 35 is incorporated nationally through the *Criminal Law Amendment Act* (but only for sexual purposes) and Chapter 18 of the *Children's Act* 38 of 2005 (henceforth the *Children's Act*). See paragraphs 3.3.5 and 3.3.6 respectively. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 20-21; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 157; OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); Detrick *Commentary on the UN CRC* 598; Hodgkin and Newell *Implementation Handbook for the CRC* 471; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 18; Stuurman "Trafficking in Children 1; Kennard HC "Curtailling the sale and trafficking of children: A discussion of The Hague Conference Convention in respect of inter-country adoptions" 1993-1994 *University of Pennsylvania International Business Law* 631; Albrecht *Intercountry adoptions: A Swiss perspective* 36; Jullien 2002-2003 *Denver Journal of International Law and Policy* 589; Vrancken and Chetty 2009 *Journal of African Law* 126; Tiefenbrun S "Child soldiers, slavery and the trafficking of children" 2007-2008 *Fordham International Law Journal* 441.

<sup>137</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 20-21; Stuurman "Trafficking in Children 1.

<sup>138</sup> A 19 of the CRC. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 20-21.

<sup>139</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 471.

<sup>140</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 471; Jullien 2002-2003 *Denver Journal of International Law and Policy* 590.

<sup>141</sup> Bravo KE "Exploring the analogy between modern trafficking in Humans and the Trans-Atlantic slave trade" 2007 *Boston University International Law Journal* 233.

<sup>142</sup> Degrading treatment is defined as treatment that arouses in the victim a feeling of fear, anguish, and inferiority capable of humiliating and debasing the victim and possibly breaking his physical or moral resistance. Inhuman treatment is defined as treatment that causes intense physical and mental suffering. See Martin *Dictionary of Law* 142; 252.

deprived of his or her liberty unlawfully or arbitrarily and that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.<sup>143</sup> Article 37 thus provides the child with the right to be protected from torture, other cruel, inhuman or degrading punishment and unlawful or arbitrary deprivation of liberty.<sup>144</sup> Child victims of trafficking are exposed to cruel, inhuman or degrading treatment or punishment, and governments are obliged to protect the human dignity and liberty of children by preventing the above practices.

Article 37(a) is closely related to article 39, which deals with the right of a child victim of torture or any other form of cruel, inhuman or degrading treatment or punishment to the promotion of his or her physical and psychological recovery and social reintegration.<sup>145</sup> Article 39 of the CRC provides that State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman and degrading treatment or punishment, as well as armed conflict. Article 39 further prescribes that such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. Article 39 thus places an obligation upon State Parties to take appropriate measures to promote the physical and psychological recovery and social reintegration of child victims of trafficking in the circumstances as set out above.<sup>146</sup>

When considering the CRC as a whole, it is clear that the CRC provides immense legal protection for children and their rights. The CRC forms a

---

<sup>143</sup> See SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 19; Detrick *Commentary on the UN CRC* 619-620; Hodgkin and Newell *Implementation Handbook for the CRC* 487.

<sup>144</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 487.

<sup>145</sup> Detrick *Commentary on the UN CRC* 621.

<sup>146</sup> SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 19; Stuurman "Trafficking in Children 1; Detrick *Commentary on the UN CRC* 668.

universal benchmark on the rights of the child,<sup>147</sup> one which adequately protects children from being trafficked and the ensuing exploitation of such children. The CRC was one of the first international human rights agreements signed by the De Klerk-government.<sup>148</sup> As a party to the CRC, South Africa is obliged to address the socio-economic conditions which force children into trafficking situations such as illegal employment and the sex trade.<sup>149</sup> South Africa has adhered to its international commitments as prescribed by the CRC,<sup>150</sup> in that the government has submitted its first country report, as is required to the United Nations Committee on the Rights of the Child in 1997.<sup>151</sup> The report contains an overview of the measures taken by the South African Government, building on the work previously undertaken by civil society, to meet the requirements of the UN Convention. It spells out the constitutional rights of the child and list legislation passed, as well as legislation currently tabled in Parliament or in preparation. The report also mentions other measures such as other international instruments that South Africa has ratified, policy developments, and research Projects affecting children.<sup>152</sup> Further, South Africa's ratification of the CRC obliges the state to monitor, promote, protect and report the status of South African children. The 'best interests of the child' principle as set out in article 3 is incorporated into section 28(2) of the Constitution. Other principles of the CRC are also incorporated into section 28 of the

---

<sup>147</sup> Detrick *Commentary on the UN CRC* 721.

<sup>148</sup> Signature took place on 29 January 1993; Davel *Child Law in South Africa* 198; Sloth-Nielsen J "New child care and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261.

<sup>149</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 20-21; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 147.

<sup>150</sup> Contra the submission by the Department of Public Safety and Security, Gauteng Provincial Government who argues that the 'South African Government has not yet fully succeeded in ensuring that the UN Convention on the Rights of the Child is complied with'. See SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 22.

<sup>151</sup> In accordance with article 44 of the CRC; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 22.

<sup>152</sup> It should be noted, however, that according to Childline, the NGO sector was not satisfied with this report and therefore compiled their own. See SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 22.

Constitution, dealing specifically with children,<sup>153</sup> and other national legislation.<sup>154</sup>

### 2.3.2 *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 2000*<sup>155</sup>

#### 2.3.2.1 Background of the Optional Protocol on Children

The main aim of the Optional Protocol on Children is to strengthen the provisions of the CRC in the area of sexual exploitation of children.<sup>156</sup> The Protocol gives special emphasis to the criminalisation of serious violations of children's rights, namely the sale of children, child prostitution and child pornography<sup>157</sup> and illegal adoption.<sup>158</sup> Similarly the text stresses the value of international cooperation as a means of combating these transnational activities,<sup>159</sup> and of public awareness, information and education campaigns<sup>160</sup> in the enhancement of the protection of children from these serious violations of their rights.<sup>161</sup> It is important to note that as an optional protocol to the CRC, this text must always be read and interpreted in light of

---

<sup>153</sup> See paragraph 3.2 of this study.

<sup>154</sup> See paragraph 3.3 of this study.

<sup>155</sup> *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/54/49 (entered into force Jan, 18, 2000), (henceforth referred to as the Optional Protocol on Children). The Optional Protocol on Children was ratified by South Africa on July 1, 2003. See OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html); Davel *Child Law in South Africa* 209; UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 22.

<sup>156</sup> OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html).

<sup>157</sup> A 1 of the Optional Protocol on Children. See UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

<sup>158</sup> A 3 of the Optional Protocol on Children. See UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

<sup>159</sup> A 10 of the Optional Protocol on Children. See UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>160</sup> Aa 8, 9 and 12 of the Optional Protocol on Children. See UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

<sup>161</sup> UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

the CRC as a whole.<sup>162</sup> The Optional Protocol on Children covers the same grounds as articles 32 to 36 of the CRC which prohibit the selling of children, child prostitution and child pornography, but it does make significant improvements in the enforcement of law and in creating child-centred proceedings.<sup>163</sup>

### 2.3.2.2 Content of the Optional Protocol on Children

Article 1 of the Optional Protocol on Children reads that State Parties shall prohibit the sale of children, child prostitution and child pornography, thus placing an obligation on State Parties to act positively in criminalising these activities. Countries that ratify the Optional Protocol on Children agree to include in their criminal code the sale of children, illegal adoption and child prostitution and pornography.<sup>164</sup> Because of this obligation, South Africa is compelled to include the above offences in national legislation.

The Optional Protocol on Children does not define trafficking or child trafficking *per se*. Instead the term 'sale of children' is defined, which constitutes one of the forms of trafficking in children.<sup>165</sup> The sale of children is defined as any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any consideration.<sup>166</sup> The Optional Protocol on Children defines child prostitution as the use of a child in sexual activities for remuneration or any other form of consideration.<sup>167</sup> This definition does not afford sufficient

---

<sup>162</sup> UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

<sup>163</sup> Davel *Child Law in South Africa* 209.

<sup>164</sup> A 3 of the Optional Protocol on Children. See OHCHR 2005 [www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html).

<sup>165</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 22; Stuurman "Trafficking in Children" 2.

<sup>166</sup> A 2(a) of the Optional Protocol on Children.

<sup>167</sup> A 2(b) of the Optional Protocol on Children.



protection against child trafficking as the actions involved in child trafficking include more than just the 'sale of children'.<sup>168</sup>

Article 3 places an obligation on each State Party to ensure that, at a minimum, certain acts and activities are fully covered under its criminal law, whether such offences are committed domestically or transnationally or on an individual or organised basis.<sup>169</sup> In the context of the sale of children, these acts and activities include the offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child; transfer of organs of the child for profit; and engagement of the child in forced labour.<sup>170</sup> State Parties must also criminalise the act of improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption, the offering, obtaining, procuring or providing a child for child prostitution, and the production, distribution, dissemination, importing, exporting, offering, selling or possession for the above purposes child pornography.<sup>171</sup> These acts or activities that must be criminalised by State Parties also include the offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2,<sup>172</sup> and the production, distribution, dissemination, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.<sup>173</sup>

The Optional Protocol on Children promotes international law enforcement co-operation<sup>174</sup> with provisions covering diverse issues such as

---

<sup>168</sup> See article 3 of the Palermo Protocol for the actions that may constitute trafficking, at paragraph 2.3.4 of this study. Excluding detailed requirements on the actions of child trafficking may also be interpreted positively. The less requirements there are to be met, the less there is to prove in the prosecution of traffickers.

<sup>169</sup> See UNICEF 2006 [www.unicef.org/pathtraining/documents.doc](http://www.unicef.org/pathtraining/documents.doc).

<sup>170</sup> A 3(1)(a)(i) of the Optional Protocol on Children.

<sup>171</sup> A 3(1)(a)(ii) of the Optional Protocol on Children.

<sup>172</sup> A 3(1)(b) of the Optional Protocol on Children.

<sup>173</sup> A 3(1)(c) of the Optional Protocol on Children.

<sup>174</sup> A 10 of the Optional Protocol on Children.

jurisdiction;<sup>175</sup> extradition;<sup>176</sup> mutual assistance in investigations, criminal or extradition proceedings,<sup>177</sup> and seizure and confiscation of assets.<sup>178</sup> The Protocol also calls on State Parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.<sup>179</sup> Unlike the CRC, in terms of which State Parties commit themselves to take only appropriate measures to prevent certain practices, the Optional Protocol on Children places an explicit obligation on State Parties to make certain activities relating to the sale of children a criminal offence.<sup>180</sup> These activities that must be criminalised are only minimums set by the Optional Protocol on Children, and governments may choose to criminalise additional acts relating to the sale of children, child prostitution and child pornography.<sup>181</sup>

South Africa, as a ratifying state,<sup>182</sup> is obliged to protect the rights and interests of children by criminalising the sale of children, child prostitution and child pornography.<sup>183</sup> The prohibition on child pornography is incorporated into national legislation through the *Films and Publications Act*.<sup>184</sup> Illegal adoption, as set out by article 3 of the Optional Protocol on Children, is incorporated into Chapter 16 of the *Children's Act*, although not yet in operation.<sup>185</sup> South Africa is in compliance with the international obligations set forth in the Optional Protocol on Children, as the *Criminal Law Amendment Act* comprehensively and extensively reviews, amends and implements all aspects of the law relating to sexual offences, including

---

<sup>175</sup> A 4 of the Optional Protocol on Children.

<sup>176</sup> A 5 of the Optional Protocol on Children.

<sup>177</sup> A 6 of the Optional Protocol on Children.

<sup>178</sup> A 7 of the Optional Protocol on Children.

<sup>179</sup> A 8 of the Optional Protocol on Children.

<sup>180</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 22.

<sup>181</sup> Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt).

<sup>182</sup> See note 155.

<sup>183</sup> A 1 of the Optional Protocol on Children.

<sup>184</sup> See paragraph 3.3.4 of this study.

<sup>185</sup> See note 33 and paragraph 3.3.6 of this study.

sexual offences in relation to children.<sup>186</sup> Chapter 18 of the *Children's Act* criminalises child trafficking, but this chapter is not yet in operation.<sup>187</sup>

### 2.3.3 *Convention against Transnational Organised Crime of 2000*<sup>188</sup>

#### 2.3.3.1 Background of the Convention against Transnational Organised Crime

The *Convention against Transnational Organised Crime* is the main international instrument in the fight against transnational organised crime, which includes the offence of trafficking.<sup>189</sup> The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organised crime, namely the Palermo Protocol, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime*,<sup>190</sup> and the *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* of Nov. 15, 2000. Countries must become parties to the

---

<sup>186</sup> See paragraph 3.3.5 of this study.

<sup>187</sup> See note 33.

<sup>188</sup> *United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 29, 2003), (henceforth referred to as the *Convention against Transnational Organised Crime*). South Africa signed the *Convention against Transnational Organised Crime* on Dec. 14, 2000, and ratified it on Feb. 29, 2004.

<sup>189</sup> Mattar MY "Incorporating the five basic elements of a model antitrafficking in persons legislation in domestic laws: From the United Nations Protocol to the European Convention" 2005-2006 *Tulane Journal of International and Comparative Law* 413; Fitzpatrick 2002-2003 *Michigan Journal of International Law* 1148; UNODC 2008 [www.unodc.org/unodc/en/treaties/CTOC/index.html](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>190</sup> *Protocol Against the Smuggling by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime*, U.N. G.A.O.R., 55<sup>th</sup> Sess., Annex III, U.N. Doc. A/55/383; 40 I.L.M. 335, 384-85 (2001), (entered into force Jan. 28, 2004), (henceforth referred to as the *Smuggling Protocol*). South Africa signed the Protocol on Dec. 14, 2000, and ratified it on Feb. 20, 2004.

*Convention against Transnational Organised Crime* itself before they can become parties to any of the Protocols.<sup>191</sup>

The *Convention against Transnational Organised Crime* applies to the prevention, investigation and prosecution of offences that are transnational in nature and involve organised criminal groups.<sup>192</sup> The *Convention against Transnational Organised Crime* gives a wide meaning to organised crime, as it covers all structured groups that commit serious crime.<sup>193</sup> A structured group is not necessarily a formal organisation, membership or structure, but is more than merely a group which is randomly formed for the immediate commission of an offence.<sup>194</sup> The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition by member states of the seriousness of the problems posed by it, as well as the need to encourage and enhance close international cooperation in order to tackle such problems.<sup>195</sup>

#### 2.3.3.2 Content of the Convention against Transnational Organised Crime

States that ratify the Convention commit themselves to taking a series of measures against transnational organised crime, including the criminalisation of participation in an organised criminal group,<sup>196</sup> the

---

<sup>191</sup> UNODC 2008 [www.unodc.org/unodc/en/treaties/CTOC/index.html](http://www.unodc.org/unodc/en/treaties/CTOC/index.html); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>192</sup> A 3 of the *Convention against Transnational Organised Crime*. See Stuurman "Trafficking in Children" 2-3; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 413; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>193</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11; Kramer "United Nations Convention against Transnational Organised Crime and its Protocols" 3; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>194</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11; Kramer "United Nations Convention against Transnational Organised Crime and its Protocols" 3.

<sup>195</sup> UNODC 2008 [www.unodc.org/unodc/en/treaties/CTOC/index.html](http://www.unodc.org/unodc/en/treaties/CTOC/index.html); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>196</sup> A 5 of the *Convention against Transnational Organised Crime*.

criminalisation of the laundering of the proceeds of crime,<sup>197</sup> measures against corruption,<sup>198</sup> measures to enable the confiscation and seizure of assets gained through crime,<sup>199</sup> measures to negotiate extradition agreements,<sup>200</sup> mutual legal assistance,<sup>201</sup> and special investigative techniques.<sup>202</sup>

Article 10 of the *Convention against Transnational Organised Crime* calls on State Parties to establish the liability of legal persons for participation in serious crimes involving an organised criminal group. This is an important provision as not all traffickers are natural persons.<sup>203</sup> Some traffickers operate within a company or partnership and have assets that can be confiscated.<sup>204</sup>

Article 24(1) of the Convention provides for the protection of witnesses in criminal proceedings and, as appropriate, for their relatives and other persons close to them from potential retaliation or intimidation.<sup>205</sup> Article 24(2)(a) states that such measures may include the establishment of procedures for the physical protection of such persons, including relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning their identity and whereabouts. Further measures may include the insurance that a witness's testimony is given in a manner that ensures the safety of the witness, such as permitting

---

<sup>197</sup> A 6 of the *Convention against Transnational Organised Crime*.

<sup>198</sup> A 9 of the *Convention against Transnational Organised Crime*.

<sup>199</sup> A 12 of the *Convention against Transnational Organised Crime*.

<sup>200</sup> A 16(4) of the *Convention against Transnational Organised Crime*.

<sup>201</sup> A 18 of the *Convention against Transnational Organised Crime*. See Bravo 2007 *Boston University International Law Journal* 226.

<sup>202</sup> A 20 of the *Convention against Transnational Organised Crime*.

<sup>203</sup> International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_anno\\_protocol.pdf](http://www.oas.org/atip/reports/traff_anno_protocol.pdf); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11.

<sup>204</sup> International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_anno\\_protocol.pdf](http://www.oas.org/atip/reports/traff_anno_protocol.pdf); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11.

<sup>205</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11.

testimony to be given through the use of communications technology such as video links or other adequate means.<sup>206</sup> The provisions on witness protection are formulated in stronger terms than those in article 6(1) of the Palermo Protocol and, unlike the Palermo Protocol, provide protection to all witnesses and not just witnesses who are victims of trafficking.<sup>207</sup>

With regard to victim protection, article 25(1) of the Convention obliges State Parties to take appropriate measures, within available means, to provide assistance and protection to victims of offences covered by the *Convention against Transnational Organised Crime*. This is in contrast with article 6(3) of the Palermo Protocol which requires States only to consider providing certain protective measures to victims of trafficking.<sup>208</sup> South Africa is thus obliged, as a ratifying state, to take appropriate measures, within available means, to provide assistance and protection to victims of offences mentioned in the *Convention against Transnational Organised Crime*.<sup>209</sup> These 'victims' would naturally also include child victims of such offences. South Africa is further obliged to provide protection for witnesses in trafficking cases. This must include protection of the witness's identity, and where necessary, relocation of such witnesses to places of safety.<sup>210</sup>

---

<sup>206</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 11.

<sup>207</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12; Article 6(1) of the Palermo Protocol states that in appropriate cases and to the extent possible, States Parties must protect the privacy and identity of victims of trafficking, including making legal proceedings related to such trafficking confidential.

<sup>208</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12; Article 6(3) of the Palermo Protocol reads that States Parties shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, the provision of appropriate housing, counselling and information in a language victims understand, and employment, educational and training opportunities.

<sup>209</sup> Once in operation, Chapter 18 of the *Children's Act*, together with the *Trafficking in Persons Bill B* of 2006, will provide sufficient legal protection and assistance to child victims of trafficking.

<sup>210</sup> Article 24 of the *Convention against Transnational Organised Crime* is incorporated into national legislation through the *Witness Protection Act 112* of 1998. See paragraph 3.3.8 of this study.

Confiscation and seizure of assets obtained unlawfully,<sup>211</sup> is nationally incorporated into the *Prevention of Organised Crime Act* 121 of 1998.<sup>212</sup>

#### 2.3.4 Palermo Protocol<sup>213</sup>

##### 2.3.4.1 Background of the Palermo Protocol

The Palermo Protocol is the first international instrument which deals comprehensively with the issue of trafficking in persons,<sup>214</sup> and it is also the first global legally binding instrument with an agreed definition on trafficking in persons.<sup>215</sup> In adopting a broad view of the activities that might constitute trafficking, the Palermo Protocol is also the first international instrument to extend the concept of human trafficking to beyond that of prostitution.<sup>216</sup> The Palermo Protocol has its roots in the international effort to combat

---

<sup>211</sup> Article 12 of the *Convention against Transnational Organised Crime*.

<sup>212</sup> See paragraph 3.3.3 of this study.

<sup>213</sup> *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001), (entered into force Dec. 25, 2003). South Africa signed the Palermo Protocol on Dec. 14, 2000, and ratified it on Feb. 20, 2004. Currently, the Palermo Protocol is signed by one hundred and seventeen States and ratified by ninety two member states. See UNODC 2008 [www.unodc/en/treaties/CTOC/index.html](http://www.unodc/en/treaties/CTOC/index.html); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12-13; Zeindl-Cronin 2006 [www.info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf).

<sup>214</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12-13; Stuurman "Trafficking in Children" 3; Gallagher A "Recent legal developments in the field of human trafficking: A critical review of the 2005 European Convention and related articles: 2006 *European Journal of Migration and Law* 165; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-375_Ebook[1].pdf); Bravo 2007 *Boston University International Law Journal* 225.

<sup>215</sup> Bruch 2004 *Stanford Journal of International Law* 14; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 158; UNODC 2008 [www.unodc/en/treaties/CTOC/index.html](http://www.unodc/en/treaties/CTOC/index.html); Pharoah 2006 *Institute for Security Studies Monographs* 6; Council of Europe 2005 <http://www.coe.int/trafficking.pdf>; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Everts D "Human trafficking: The ruthless trade in human misery" 2003-2004 *Brown Journal of World Affairs* 150; Defeis 2003-2004 *ILSA International and Comparative Law* 488; Laczko F and Gramegna MA "Developing better indicators of human trafficking" 2003-2004 *Brown Journal of World Affairs* 180; Gallagher 2006 *European Journal of Migration and Law* 165; Vrancken and Chetty 2009 *Journal of African Law* 118. See paragraph 2.2 of this study.

<sup>216</sup> Pharoah 2006 *Institute for Security Studies Monographs* 6.

organised crime and was drafted as a mechanism to address what was seen as the key areas of interest and profitability for criminal networks.<sup>217</sup> The objective behind the Protocol is to aid in the unification in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases.<sup>218</sup> An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for the human rights of such victims.<sup>219</sup> Victims and witnesses are also dealt with in the parent Convention, the *Convention against Transnational Organised Crime*, but the protection of, and assistance to, victims is specified as a core purpose of the Palermo Protocol in recognition of the severe needs of trafficking victims and the importance of victim assistance.<sup>220</sup>

The Palermo Protocol seems, by its very link with the *Convention against Transnational Organised Crime*, to suggest that trafficking (of adults and children) is usually carried out by 'organised crime' and members of organised criminal groups.<sup>221</sup> As trafficking in persons, especially children, for forced labour or sexual exploitation, becomes increasingly linked to transnational organised crime, it was decided that a separate legal

---

<sup>217</sup> Pharoah 2006 *Institute for Security Studies Monographs* 8; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Smith and Mattar 2004 *Fletcher Forum of World Affairs* 159.

<sup>218</sup> Defeis 2003-2004 *ILSA International and Comparative Law* 489; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 159; UNODC 2008 [www.unodc.org/en/treaties/CTOC/index.html](http://www.unodc.org/en/treaties/CTOC/index.html); Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 1; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Rassam 2004-2005 *Penn State International Law Review* 812.

<sup>219</sup> A 2(b) of the Palermo Protocol. See UNODC 2008 [www.unodc.org/en/treaties/CTOC/index.html](http://www.unodc.org/en/treaties/CTOC/index.html); Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 1; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>220</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 1; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>221</sup> UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html).



instrument was needed to fight it.<sup>222</sup> Summarily, the Palermo Protocol aims to unite nations in adopting measures to prevent trafficking in persons, especially women and children, as well as to prosecute international traffickers; to increase cooperation among nations to combat trafficking more effectively; to protect victims of trafficking and help them return safely to their own or a third country; and to inform and educate the public about trafficking and its negative consequences for both traffickers and victims.<sup>223</sup>

#### 2.3.4.2 Content of the Palermo Protocol

The Palermo Protocol can be divided into three parts. Part one consists of the general provisions (articles 1 to 5), including the purpose and scope of the Palermo Protocol; its relationship with its parent convention, the *Convention against Transnational Organised Crime*; the definition of human trafficking; and the criminalisation of thereof.<sup>224</sup> Part two concerns the protection of victims (articles 6 to 8) and includes assistance and protection to victims of trafficking, their status in the receiving state and repatriation.<sup>225</sup> Part three (articles 9 to 13), concerns the prevention of human trafficking including measures to be taken in the prevention of human trafficking (such as border measures, training, information exchange and document security) and co-operation between member states.<sup>226</sup>

---

<sup>222</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 10.

<sup>223</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 10; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Esquibel *Human trafficking: A violation of human rights, a universal issue* 40.

<sup>224</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 1, 6.

<sup>225</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 6; Vrancken and Chetty 2009 *Journal of African Law* 119.

<sup>226</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 6; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 418; Vrancken and Chetty 2009 *Journal of African Law* 119.

Although the Palermo Protocol is the principle international instrument on trafficking in persons, it must be read with the *Convention against Transnational Organised Crime*, as the Convention requires State Parties to legislate on various matters relevant to the issue of trafficking in persons.<sup>227</sup> Thus, article 1 of the Palermo Protocol stipulates that it must be interpreted together with the *Convention against Transnational Organised Crime*. Article 1 must be read together with article 37(4) which provides that any protocol to the *Convention against Transnational Organised Crime* must be interpreted together with the *Convention against Transnational Organised Crime*, taking into account the purpose of that protocol.

The purpose of the Palermo Protocol is set out in article 2 which offers a framework for solving the problem of human trafficking.<sup>228</sup> The purposes of the Palermo Protocol are to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist victims of trafficking, with full respect for their human rights; and to promote international co-operation to achieve such goals.<sup>229</sup>

Trafficking is defined in article 3 of the *Palermo Protocol*. The provision reads as follows:

- (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

<sup>227</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12-13; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 1; Defeis 2003-2004 *ILSA International and Comparative Law* 487.

<sup>228</sup> Gallagher 2006 *European Journal of Migration and Law* 165; Baker KL "Don't forget the family: A proposal for expanding immediate protection to families of human trafficking survivors" 2006-2007 *Fordham International Law Journal* 843; Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt); Zeindl-Cronin 2006 [www.info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf).

<sup>229</sup> See Zeindl-Cronin 2006 [www.info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf); Baker 2006-2007 *Fordham International Law Journal* 843; Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13; Stuurman "Trafficking in Children" 8; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 6; Defeis 2003-2004 *ILSA International and Comparative Law* 487.

abuse of power or of a position of vulnerability or of the giving and 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.

The definition contained in the Protocol is extremely broad, and purposefully so.<sup>230</sup> It seeks to assist State Parties in the formulation of domestic legislation with the legal means to prosecute all those involved in the process of recruiting individuals and transferring them into situations of extreme exploitation.<sup>231</sup> The definition sets only minimum standards which countries can exceed or supplement in accordance with their available resources.<sup>232</sup>

This definition of trafficking has three elements. These three elements are:<sup>233</sup>

- (a) the action, which includes the recruitment, transportation, transfer, harbouring or receipt of persons;
- (b) the means, which includes by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of

---

<sup>230</sup> Gould 2006 *SA Crime Quarterly* 20; Baker 2006-2007 *Fordham International Law Journal* 843.

<sup>231</sup> Gould 2006 *SA Crime Quarterly* 20.

<sup>232</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 3.

<sup>233</sup> Kolberg *A Comparison of the South African and Norwegian Approach to Trafficking* 11; Baker 2006-2007 *Fordham International Law Journal* 843; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); UNICEF 2006 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15-16; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

- power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control of another person; and
- (c) the purpose, which includes for the purpose of exploitation.

Article 3(c) of the Protocol provides special protection to children in that it stipulates that the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation must be considered 'trafficking in persons' even if it does not involve any of the means set forth in the definition.<sup>234</sup> Because of the many elements contained in the above definition that would have to be proved, the definition might complicate the prosecution of traffickers.<sup>235</sup> Trafficking is a process that consists of three stages, namely the recruitment of a person, the transportation of a person and the exploitation of a person.<sup>236</sup> The Palermo Protocol does not define the terms 'exploitation of the prostitution of others' and 'sexual exploitation' as countries have different laws and policies on prostitution.<sup>237</sup> The term 'abuse of vulnerability' is not defined in the Palermo Protocol itself but is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.<sup>238</sup> Furthermore, the 'abuse of a position of vulnerability' makes it clear that trafficking can occur without any use of force and that victims of trafficking,

---

<sup>234</sup> Article 3(d) defines a child as a person under the age of eighteen years. Fitzpatrick 2002-2003 *Michigan Journal of International Law* 1150.

<sup>235</sup> In the case of child trafficking, a presumption exists in favour of a child victim of trafficking in that the means set forth in the definition do not have to be proved. It would thus be easier to prosecute traffickers as fewer elements have to be proved to get a conviction of such trafficker. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 14, Nikolovska "Identifying and Assisting Victims of Trafficking" 8; International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf).

<sup>236</sup> Nikolovska "Identifying and Assisting Victims of Trafficking" 1; Laczko and Gramegna 2003-2004 *Brown Journal of World Affairs* 181; Zeindl-Cronin 2006 [www/info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf).

<sup>237</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15.

<sup>238</sup> Pharoah 2006 *Institute for Security Studies Monographs* 81; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 386; Rassam 2004-2005 *Penn State International Law Review* 840.

especially children, may be told what to do by someone close to them, such as a parent or guardian.<sup>239</sup>

It is important to note that the removal of organs for legitimate medical reasons should not be considered exploitation.<sup>240</sup> The Palermo Protocol does not apply to the transportation of organs alone. A case of trafficking in persons can only be established if a person is transported for the purpose of removing his or her organs.<sup>241</sup> The Palermo Protocol does not cover the removal of body parts, other than organs.<sup>242</sup> The trafficking in persons for purposes of removing their body parts, including organs, to be used in *muti*<sup>243</sup> of witch doctors is quite prevalent in Africa, as is the case in South Africa,<sup>244</sup> and context sensitive instruments are needed in this regard.<sup>245</sup>

Trafficking is clearly distinguished from the smuggling of persons, which is defined in the Smuggling Protocol<sup>246</sup> as the procurement, or order to obtain, directly or indirectly, a financial or other material benefit, from the illegal entry of a person into a country of which they are not a national or a

---

<sup>239</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15, International Human Rights Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf); Solomons 2006 [www.parliament.gov.za/content/womens\\_parliament\\_report.pdf](http://www.parliament.gov.za/content/womens_parliament_report.pdf).

<sup>240</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15; Geis G and Brown GC "The transnational traffic in human body parts" 2008 *Journal of Contemporary Justice* 212.

<sup>241</sup> A 3(a) of the Palermo Protocol. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15; Geis and Brown 2008 *Journal of Contemporary Justice* 214; International Human Rights Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf).

<sup>242</sup> A 3(a) of the Palermo Protocol. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15, International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf).

<sup>243</sup> *Muti* is defined as "African medicines, spells and herbs, parts of animals or human bodies, used in traditional therapy or in witchcraft or in magic" as in Branford and Branford *A Dictionary of South African English* 209.

<sup>244</sup> If the removal of body parts or organs lead to death, the trafficker will be charged with murder. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 15; Geis and Brown 2008 *Journal of Contemporary Justice* 219.

<sup>245</sup> See paragraphs 3.3.6 and 3.4.1 respectively.

<sup>246</sup> See note 190.

permanent resident.<sup>247</sup> In the case of trafficking, the exploitation of a victim takes place in a destination country, whereas smuggling involves helping people cross border posts illegally.<sup>248</sup> The potential victim, in the case of trafficking, usually agrees to travel on the basis of false information and in the case of smuggling the client agrees to travel with full information about the journey, the destination and the costs involved.<sup>249</sup> Another difference between smuggling and trafficking is the relationship between the smuggler and the client and the trafficker and the victim. The relationship between the trafficker and the victim continues to exist in the country of destination, in the form of exploitation of the victim.<sup>250</sup> In the case of smuggling, the

<sup>247</sup> A 3(a) of the Smuggling Protocol. See Pharoah 2006 *Institute for Security Studies Monographs* 7; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 370; Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); Council of Europe 2005 <http://www.coe.int/trafficking.pdf>; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Truong 2006 [http://www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Everts 2003-2004 *Brown Journal of World Affairs* 150; Obokata T "Smuggling of human beings from a human rights perspective: Obligations of non-state and state actors under International Human Rights Law" 2005 *International Journal of Refugee Law* 396; Fitzpatrick 2002-2003 *Michigan Journal of International Law* 1150; Bravo 2007 *Boston University International Law Journal* 227.

<sup>248</sup> Nikolovska "Identifying and Assisting Victims of Trafficking" 9; Pharoah 2006 *Institute for Security Studies Monographs* 7; Allais 2005 [www.freerepublic.com/focus/f-news/1322431/posts](http://www.freerepublic.com/focus/f-news/1322431/posts); Everts 2003-2004 *Brown Journal of World Affairs* 150; Council of Europe 2005 <http://www.coe.int/trafficking.pdf>; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Zeindl-Cronin 2006 [www.info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>249</sup> Nikolovska "Identifying and Assisting Victims of Trafficking" 9; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Zeindl-Cronin 2006 [www.info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Tavella AM "Sex trafficking and the 2006 World Cup in Germany" 2007-2008 *Northwestern Journal of International Human Rights* 199; Nagle 2008 *Wisconsin International Law Journal* 133.

<sup>250</sup> Nikolovska "Identifying and Assisting Victims of Trafficking" 9; Pharoah *Institute for Security Studies Monographs* 7; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Nagle 2008 *Wisconsin International Law Journal* 133.

relationship between the smuggler and the client ends once the border post is crossed in the country of destination.<sup>251</sup>

Article 4 applies to the prevention, investigation and prosecution of offences, as outlined in article 5, when they are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences.<sup>252</sup> However, article 34(2) of the *Convention against Transnational Organised Crime* makes it clear that the crime of trafficking in persons can be established in the domestic laws of a country irrespective of the transnational nature of the crime or the involvement of an organised criminal group.<sup>253</sup> This is an important provision as the crime of trafficking in persons is not limited to cross-border trafficking, but also occurs within the borders of a country.<sup>254</sup> Furthermore, the crime of trafficking in persons is also committed by individuals and not only organised criminal groups.<sup>255</sup>

Article 5(1) of the Protocol obliges State Parties to criminalise the crime of trafficking in persons when committed intentionally.<sup>256</sup> State Parties are further compelled by article 5(2) to criminalise an attempt to commit the crime of trafficking, the participation as an accomplice in the crime of

---

<sup>251</sup> Nikolovska "Identifying and Assisting Victims of Trafficking" 9; Pharoah *Institute for Security Studies Monographs* 7; UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf); Nagle 2008 *Wisconsin International Law Journal* 133.

<sup>252</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13-14.

<sup>253</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13-14; UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>254</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13-14.

<sup>255</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13-14.

<sup>256</sup> See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 16; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7; Defeis 2003-2004 *ILSA International and Comparative Law* 489; Esquibel *Human trafficking: A violation of human rights, a universal issue* 40; Bravo 2007 *Boston University International Law Journal* 226; Baker 2006-2007 *Fordham International Law Journal* 843.

trafficking, and organising and directing other persons to commit the crime of trafficking. Domestically, states may commit themselves to a broader scope of criminalisation.<sup>257</sup> It is important to note that victims of trafficking who, for instance, agree to work illegally or to travel with false or without any documentation, should not be punished for their participation in the crime.<sup>258</sup>

Article 6 of the Palermo Protocol addresses the human rights elements necessary for the protection of victims of trafficking. Article 6(1) provides that, in appropriate cases and to the extent possible, State Parties must protect the privacy and identity of victims of trafficking, including making legal proceedings relating to such trafficking confidential.<sup>259</sup> This is an important provision as the safety of victims of trafficking and their families may be at risk should the identity of the victims be disclosed.<sup>260</sup> Article 6(2) reads that State Parties must ensure that victims of trafficking are provided, in appropriate cases, with information on relevant court and administrative proceedings, and with assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.<sup>261</sup> This provision requires that victims of trafficking be provided with information through a translator or in writing in a language that they understand as well as with interpreters during court proceedings. Article 6(3) stipulates that State Parties shall consider implementing measures to provide for the physical, psychological and social recovery of

---

<sup>257</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7.

<sup>258</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 16; International Human Rights Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf).

<sup>259</sup> See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 16-17; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7; Defeis 2003-2004 *ILSA International and Comparative Law* 489.

<sup>260</sup> However, it should be kept in mind that traffickers could infer, from the nature of the complaint, the identity of a specific victim. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 16-17.

<sup>261</sup> See Rassam 2004-2005 *Penn State International Law Review* 841; Baker 2006-2007 *Fordham International Law Journal* 843.



victims of trafficking, including, in appropriate cases, the provision of appropriate housing, counselling and information in a language victims understand, and employment, educational and training opportunities.<sup>262</sup> This provision addresses the most important and urgent needs of victims of trafficking.<sup>263</sup> Although the words shall consider and in appropriate cases do not place a positive obligation on State Parties to provide the mentioned services to victims, State Parties cannot neglect their responsibility in this regard as one of the purposes of the Protocol is to assist and protect victims of trafficking.<sup>264</sup> States are also obliged to provide certain protection measures and assistance to victims of trafficking in accordance with other human rights instruments to which they are parties such as the CRC and the *African Children's Charter*.<sup>265</sup> It should also be kept in mind that the provision of protective measures and assistance to victims of trafficking stands independently from any efforts aimed at prosecuting traffickers.<sup>266</sup> Article 6(4) states that each State Party shall take into account, in applying the provisions of the 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. The provision requires governments to ensure that assistance and protection are gender and child sensitive, which is particularly important in cases involving sexual assault.<sup>267</sup> This could even include the formation of special units to deal

---

<sup>262</sup> See Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 402; Esquibel *Human trafficking: A violation of human rights, a universal issue* 40; Rassam 2004-2005 *Penn State International Law Review* 841.

<sup>263</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 17; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 401; Defeis 2003-2004 *ILSA International and Comparative Law* 489.

<sup>264</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 17; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13; Rassam 2004-2005 *Penn State International Law Review* 841; Baker 2006-2007 *Fordham International Law Journal* 843.

<sup>265</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 13.

<sup>266</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 17.

<sup>267</sup> International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf)

with child victims of trafficking.<sup>268</sup> This provision must be implemented in a manner that is consistent with the provisions of the CRC and in accordance with the principle that decisions about the child are made in accordance with the 'best interests' of the child.<sup>269</sup> Article 6(6) further reads that State Parties must ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.<sup>270</sup> This provision does not place an obligation on State Parties to establish a compensation fund for victims of trafficking. State Parties are only obliged to enable victims to claim compensation from offenders.<sup>271</sup>

Article 7(1) of the Palermo Protocol reads that State Parties must consider whether to allow victims of trafficking to remain in their territories, temporarily or permanently, in appropriate cases.<sup>272</sup> Although this provision does not place a positive obligation on governments to grant immigration status to victims of trafficking, it is important for governments to realise that the summary deportation of victims could lead to the unsuccessful prosecution of traffickers.<sup>273</sup> This is because, in most cases, the testimony of a victim is needed to secure a conviction.<sup>274</sup> When considering whether

---

<sup>268</sup> International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf)

<sup>269</sup> International Human Rights Law Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf)

<sup>270</sup> See Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 396; Defeis 2003-2004 *ILSA International and Comparative Law* 489.

<sup>271</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 17; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 392.

<sup>272</sup> See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 18; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7; Defeis 2003-2004 *ILSA International and Comparative Law* 489; Piotrowicz R "Victims of people trafficking and entitlement to international protection" 2005 *Australian Year Book of International Law* 162; Esquibel *Human trafficking: A violation of human rights, a universal issue* 41; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 160; Rassam 2004-2005 *Penn State International Law Review* 841.

<sup>273</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 18; Piotrowicz 2005 *Australian Year Book of International Law* 162; Baker 2006-2007 *Fordham International Law Journal* 843.

<sup>274</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 18.

victims of trafficking should be allowed to remain in the territory of a State, article 7(2) states that appropriate consideration must be given to humanitarian and compassionate factors.<sup>275</sup>

Article 8(1) provides that a State Party must facilitate and accept the return of a victim of trafficking who is its national or permanent resident, with due regard for the safety of that person.<sup>276</sup> Likewise, article 8(2) reads that the State Party returning the victim of trafficking must ensure that such return is with due regard for the safety of that person. This imposes a positive obligation upon governments to ensure that there is no danger of reprisal or other forms of harm (such as arrest for leaving the country or working in the sex industry) awaiting victims of trafficking upon returning home.<sup>277</sup> Article 8(4) further provides for the issuing of travel documents or other authorisation necessary for victims to travel to and re-enter their countries of origin.

Article 9 of the Palermo Protocol emphasises the need for the prevention of trafficking in persons, including the protection of victims from revictimisation, the alleviation of factors that make persons vulnerable to being trafficked and the discouragement of the demand that fosters exploitation of persons.<sup>278</sup> States are encouraged to carry out research, information and mass-media campaigns, social and economic initiatives and adopt or

---

<sup>275</sup> See Smith and Mattar 2004 *Fletcher Forum of World Affairs* 160.

<sup>276</sup> See Rassam 2004-2005 *Penn State International Law Review* 841.

<sup>277</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 18; International Human Rights Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf); Piotrowicz 2005 *Australian Year Book of International Law* 164, 166; Bravo 2007 *Boston University International Law Journal* 226.

<sup>278</sup> A 9(1) of the Palermo Protocol. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 18-19; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7-8; Mashau *Towards a strategy for poverty alleviation in Mashau* 2, 8, 11, 21; Esquibel *Human trafficking: A violation of human rights, a universal issue* 41; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 159; Rassam 2004-2005 *Penn State International Law Review* 841.

strengthen measures to prevent trafficking through fighting poverty, unemployment, lack of equal opportunity and to discourage demand.<sup>279</sup>

Article 10(1) calls on State Parties to exchange information in order to determine 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; the type of travel documents that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and the means and methods used by organised criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and amongst individuals and groups engaged in such trafficking, and possible measures for detecting them. Article 10(2) states that training on prevention of trafficking in persons must be provided to law enforcement, immigration and other relevant officials. The training should focus on methods used in preventing trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from traffickers.<sup>280</sup> It is important to ensure that efforts aimed at preventing trafficking in persons do not violate the rights of individuals to enter and leave a country freely.<sup>281</sup> Training must also take

---

<sup>279</sup> Aa 9(2)-(5) of the Palermo Protocol. See Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 7-8; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 404; King 2002 *University of California, Davis Journal of International Law* 299; Esquibel *Human trafficking: A violation of human rights, a universal issue* 11; Rassam 1998-1999 *Virginia Journal of International Law* 323; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 159; Rassam 2004-2005 *Penn State International Law Review* 841; Baker 2006-2007 *Fordham International Law Journal* 843.

<sup>280</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 19; Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 8.

<sup>281</sup> International Human Rights Group 2002 [www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf); SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 19.

into account human rights aspects and child- and gender sensitive issues, as mentioned before.<sup>282</sup>

Article 11 of the Palermo Protocol calls on State Parties to strengthen border controls as may be necessary to prevent and detect trafficking in persons. State Parties must further adopt measures to prevent any means of transport operated by commercial carriers from being used in the commission of the crime of trafficking in persons or any attempt to commit such a crime. Measures taken by State Parties in this regard must include establishing the obligation of commercial carriers to ascertain that all passengers are in possession of the travel documents required for entry into a country.<sup>283</sup> Furthermore, consideration must be given to the denial of entry or revocation of visas of persons implicated in the commission of the crime of trafficking in persons or any attempt to commit such a crime.<sup>284</sup>

Article 12 of the Protocol obliges each State Party to take such measures as may be necessary, within available means, to ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, or readily falsified, replicated, issued or unlawfully altered. State Parties must further ensure the integrity and security of travel or identity documents issued by or on behalf of the State and to prevent their unlawful action creation, issuance and use.<sup>285</sup>

Article 14 of the Palermo Protocol provides a further safeguard in that it protects other fundamental interests. These fundamental interests include

---

<sup>282</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 8.

<sup>283</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 19-20; Vrancken and Chetty 2009 *Journal of African Law* 119.

<sup>284</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 19-20.

<sup>285</sup> A 12(b) of the Palermo Protocol.

those of trafficking victims who are also asylum seekers, and the principle of non-discrimination.<sup>286</sup>

The Palermo Protocol constructs an identity for trafficked persons as victims of severe human rights abuses and provides human rights recommendations for the victims.<sup>287</sup> Children are only mentioned in article 3(c) and (d);<sup>288</sup> and briefly in article 6(4) of the Palermo Protocol.<sup>289</sup> Despite recommendations from the United Nations Human Rights Committee, the United Nations High Commissioner for Human Rights, United Nations Children's Fund, the International Organisation for Migration and others to address the special needs and legal status of children, the Protocol fails to do so.<sup>290</sup> In order to rectify this shortcoming in the Palermo Protocol, governments should incorporate relevant provisions into their domestic trafficking legislation from the CRC,<sup>291</sup> the Optional Protocol on Children<sup>292</sup> and *Convention 182*.<sup>293</sup>

South Africa, as a ratifying state of the Palermo Protocol, is obliged to criminalise trafficking,<sup>294</sup> investigate and prosecute traffickers and undertake

---

<sup>286</sup> Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 3-4.

<sup>287</sup> Rassam 2004-2005 *Penn State International Law Review* 841; Fitzpatrick 2002-2003 *Michigan Journal of International Law* 1143, 1151.

<sup>288</sup> Article 3(c) of the Palermo Protocol 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 in subparagraph (a) of this article. Article 3(d) of the Palermo Protocol states that 'child' shall mean any person under eighteen years of age.

<sup>289</sup> A 6(4) of the Palermo Protocol states that 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.

<sup>290</sup> International Human Rights Law Group 2002 [www.oas.org/atip/traff\\_annoprotocol.pdf](http://www.oas.org/atip/traff_annoprotocol.pdf).

<sup>291</sup> See paragraph 2.3.1 of this study.

<sup>292</sup> See paragraph 2.3.2 of this study.

<sup>293</sup> See paragraph 2.4.3 of this study.

<sup>294</sup> Trafficking is criminalised in the *Criminal Law Amendment Act*, but only for sexual purposes; and in the *Children's Act*, relating to children only. Once in operation, the *Trafficking Bill* will comprehensively criminalise trafficking to fully comply with article 5 of the Palermo Protocol. See paragraphs 3.3.5, 3.3.6 and 3.4.1 of this study.

border control measures in accordance with the means of each country.<sup>295</sup> Further preventative measures which should be incorporated include the training of officials to deal with trafficking situations and measures promoting information exchange and document security. Protective measures which should be incorporated include the assistance and protection of victims of trafficking.

### 2.3.5 *International Covenant on Civil and Political Rights of 1966*<sup>296</sup>

Article 7 of the ICCPR provides that no person shall be tortured or be treated or punished in a cruel, inhuman or degrading manner. Article 8 reads that no one shall be held in slavery and that the slave-trade in all its forms shall be prohibited.<sup>297</sup> Article 8 further states that no one shall be held in servitude,<sup>298</sup> and that no one shall be required to perform forced or compulsory labour.<sup>299</sup> Child trafficking results in cruel, inhuman and degrading treatment and State Parties, including South Africa, are thus obliged to prevent such treatment. Child trafficking can be classified as a form of slave trade, and together with forced labour, is expressly prohibited by the ICCPR. No express provision in respect of children is made, but it can be inferred that the term “no one” includes children. South Africa incorporated article 7 of the ICCPR into the Constitution stating that every child has the right to be protected from maltreatment, neglect, abuse or degradation.<sup>300</sup> Article 8 of the ICCPR is incorporated into section 13 of the

---

<sup>295</sup> Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

<sup>296</sup> *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. G.A.O.R., 21<sup>st</sup> Sess., 999 U.N.T.S. 171 (opened for signature Dec. 16, 1966, and entered into force March 23, 1976), (henceforth referred to as the ICCPR). The ICCPR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. South Africa ratified the ICCPR on March 10, 1999. See Hodgkin and Newell *Implementation Handbook for the CRC* 623.

<sup>297</sup> A 8(1) of the ICCPR.

<sup>298</sup> A 8(2) of the ICCPR.

<sup>299</sup> A 8(3) of the ICCPR.

<sup>300</sup> S 28(1)(d) of the Constitution.

Constitution which states that no one may be subjected to slavery, servitude or forced labour.

Article 24 specifically focuses on children. The article provides that every child shall have, without any discrimination, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.<sup>301</sup> Although not directly linked to the prohibition of child trafficking, this article obliges State Parties, including South Africa, to provide the necessary protection for children in all circumstances.<sup>302</sup>

#### 2.3.6 *International Covenant on Economic, Social and Cultural Rights of 1966*<sup>303</sup>

Article 10(3) of the ICESCR provides for special measures of protection and assistance which must be taken on behalf of all children without any discrimination.<sup>304</sup> It further states that children and young persons should be protected from economic and sexual exploitation and that their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punished by law.<sup>305</sup> Child trafficking is thus implicitly prohibited by this provision of the ICESCR.

In terms of the ICESCR, South Africa, as a ratifying state, has a duty to take special measures of protection and assistance on behalf of the children by

---

<sup>301</sup> A 24(1) of the ICCPR.

<sup>302</sup> Necessary protection can include information dissemination in educating children about trafficking, instituting special investigation units into child trafficking and child centres specialising in treating child victims of trafficking.

<sup>303</sup> *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3, (henceforth referred to as the ICESCR). The ICESCR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. South Africa ratified the ICESCR on Oct. 3, 1994. See Hodgkin and Newell *Implementation Handbook for the CRC* 623.

<sup>304</sup> The ICESCR does not stipulate what these special measures should consist of.

<sup>305</sup> By implication this includes specific forms of 'employment'; sexual exploitation, including child prostitution and child pornography. Van Bueren 1994 *International Journal of Children's Rights* 52-53.



protecting children from economic and sexual exploitation. Sections 28(e) and (f) of the Constitution protect children from exploitative and hazardous labour practices. It can be inferred that economic and sexual exploitation are included under the term 'exploitative labour practices'.

### 2.3.7 *Rome Statute of the International Criminal Court of 1998*<sup>306</sup>

The *Rome Statute* includes 'enslavement' in its list of crimes against humanity.<sup>307</sup> It further defines 'enslavement' as the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children.<sup>308</sup> As child trafficking is a contemporary form of slavery, article 7 will also afford some measure of protection to child victims of trafficking. South Africa must criminalise and define trafficking in national legislation to include the term 'enslavement'.

---

<sup>306</sup> *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15 – July 16, 1998, U.N. Doc. No. A/CONF. 183/9 (1998), (henceforth referred to as the *Rome Statute*). South Africa ratified the *Rome Statute* on Nov. 27, 2000. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 22-23; Mattar 2002-2003 *Fordham International Law Journal* 721; Jessberger F "Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court" 2001 *African Journal of Criminal Justice* 345.

<sup>307</sup> A 7(1)(c) of the *Rome Statute*. See Mattar 2002-2003 *Fordham International Law Journal* 721; Muhammad PM "The Trans-Atlantic slave trade: A forgotten crime against humanity as defined by international law" 2003-2004 *American University International Law Review* 934, 940; Bravo 2007 *Boston University International Law Journal* 229.

<sup>308</sup> A 7(2)(c) of the *Rome Statute*. See Muhammad 2003-2004 *American University International Law Review* 940; Bravo 2007 *Boston University International Law Journal* 229; Smith and Mattar 2004 *Fletcher Forum of World Affairs* 157.

## 2.4 International Labour Organisation instruments

### 2.4.1 Convention Concerning Forced or Compulsory Labour 29 of 1930<sup>309</sup>

The *Forced Labour Convention* commits all State Parties to suppressing the use of forced or compulsory labour.<sup>310</sup> It aims to end all practices which involve work which is carried out under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>311</sup> Problems such as exploitation of children through debt bondage and other modern forms of slavery, such as child prostitution, are examined in the framework of this Convention.<sup>312</sup> The *Forced Labour Convention* defines 'forced or compulsory labour' as 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.<sup>313</sup> As the *Forced Labour Convention* was recalled by *Convention 182*, more emphasis will be placed on the latter Convention and the *Forced Labour Convention* will only aid as an introduction to *Convention 182*.<sup>314</sup>

---

<sup>309</sup> I.L.O Convention 29 Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932), (henceforth referred to as the *Forced Labour Convention*). The *Forced Labour Convention* was ratified by South Africa on March 5, 1997. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 23.

<sup>310</sup> A 1 of the *Forced Labour Convention*. See Rassam 2004-2005 *Penn State International Law Review* 836.

<sup>311</sup> A 2(1) of the *Forced Labour Convention*.

<sup>312</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 430.

<sup>313</sup> A 2 of the *Forced Labour Convention*. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 23; Kittichaisaree K *International Criminal Law* (Oxford University Press London 2004) 107, 114; Bravo 2007 *Boston University International Law Journal* 237.

<sup>314</sup> South Africa ratified *Convention 182* on June 7, 2000.

#### 2.4.2 *Convention Concerning the Minimum Age for Admission to Employment 138 of 1973*<sup>315</sup>

*Convention 138*, which has been upheld by the Committee on the Rights of the Child as a relevant standard, is an amalgamation of principles that had been progressively established in various earlier instruments and applies to all sectors of economic activity, whether children are employed for wages or not.<sup>316</sup> *Convention 138* is supplemented by International Labour Organisation Recommendation 146 of 1973,<sup>317</sup> which sets out a broad framework and essential policy measures for the prevention and elimination of child labour.<sup>318</sup>

*Convention 138* requires ratifying states to set a minimum age for employment and to pursue a national policy aimed at the abolition of child labour.<sup>319</sup> The age in question should be no less than that for completion of compulsory schooling and in any case not less than fifteen years; however this can initially be set at fourteen in developing countries under certain circumstances.<sup>320</sup> In South Africa, the minimum age for admission to employment set at the age of fifteen years,<sup>321</sup> and thus complies with article 1 of *Convention 138*.

Article 3(1) of *Convention 138* states that the minimum age for admission to any type of employment or work which is likely to be hazardous to the child

---

<sup>315</sup> I.L.O *Convention 138 Concerning the Minimum Age for Admission to Employment* (1973) (adopted on June 26, 1973, and entered into force June 19, 1976) [accessed at <http://fletcher.tufts.edu/multi/texts/BH623.txt>], (henceforth referred to as *Convention 238*). *Convention 138* was ratified by South Africa on March, 30, 2000. Currently, *Convention 138* is ratified by one hundred and fifty State Parties. See SALRC Project 110 in Discussion Paper 103 "Review of the Child Care Act" of 28 February 2002 582.

<sup>316</sup> Hodgkin and Newell *Implementation Handbook for the CRC* 430.

<sup>317</sup> ILO "Child Labour - Targeting the Intolerable" 24-26.

<sup>318</sup> SALRC Project 110 in Discussion Paper 103 "Review of the Child Care Act" of 28 February 2002 582; Hodgkin and Newell *Implementation Handbook for the CRC* 431.

<sup>319</sup> Aa 1 and 2 of *Convention 138*. See Jullien 2002-2003 *Denver Journal of International Law and Policy* 587; Vrancken and Chetty 2009 *Journal of African Law* 123.

<sup>320</sup> A 2(3) of *Convention 138*.

<sup>321</sup> S 43 of the *BCEA*.

shall not be less than eighteen years.<sup>322</sup> Article 3(2) determines that such types of employment or work must be determined by national laws or policy. If the health, safety and morals of the children are fully protected and the child receives adequate specific instruction or vocational training in that specific area of employment or work, article 3(3) states that the minimum age of admission to employment may be lowered to the age of sixteen, after consultation with all parties involved.

'Light work', which is not clearly defined, carries a minimum age of thirteen, or twelve in the case of countries which use fourteen as the general minimum age.<sup>323</sup> Article 7(2) of *Convention 138* requires that such work should not interfere with schooling or any other aspect of the child's healthy development.

Article 9 obliges State Parties to take all necessary measures to ensure the effective enforcement of the provisions of *Convention 138*. These measures include the provision of appropriate penalties<sup>324</sup> and the identification, in national laws or regulations or by the competent authority of persons responsible for compliance.<sup>325</sup> It also includes the prescription, in national laws or regulations or by the competent authority, that employers must keep registers or other documents of the names and ages of persons employed or working for them who are less than eighteen years of age.<sup>326</sup>

In relation to child trafficking, *Convention 138* is of immense value as children should not be exploited in the sex industry or economically. By setting a minimum age for employment, recruiting children into hazardous

---

<sup>322</sup> See Jullien 2002-2003 *Denver Journal of International Law and Policy* 587; Van Bueren 1994 *International Journal of Children's Rights* 55.

<sup>323</sup> A 7(1) of *Convention 138*.

<sup>324</sup> A 9(1) of *Convention 138*.

<sup>325</sup> A 9(2) of *Convention 138*.

<sup>326</sup> A 9(3) of *Convention 138*.

working environments is thus prohibited. The health, safety and morality of children should not be undermined by any kind of employment.

South Africa is obliged, as a ratifying state of *Convention 138*, to take appropriate measures to prevent and eliminate the worst forms of child labour. South Africa is further obliged to set a minimum age for employment, which has been set at fifteen years of age.<sup>327</sup> Furthermore, ratifying states are obliged to take all necessary measures to ensure that *Convention 138* is enforced effectively. The *BCEA* complies with this obligation as it sets out different circumstances under which children are allowed to work.<sup>328</sup>

#### 2.4.3 *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 182 of 1999*<sup>329</sup>

Prior to the entry into force of *Convention 182* in 1999, the ILO had been addressing child trafficking in the context of migrant workers in the framework of the *Forced Labour Convention*.<sup>330</sup> *Convention 182* views child trafficking as a practice similar to slavery, urgently requiring elimination.<sup>331</sup>

Article 1 of *Convention 182* obliges each member state that ratifies the Convention to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of

---

<sup>327</sup> S 43 of the *BCEA*.

<sup>328</sup> See *BCEA* at paragraph 3.3.8 of this study.

<sup>329</sup> *I.L.O Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, June 17, 1999, 38 I.L.M. 1207 (1999) (adopted on June 17, 1999, and entered into force Nov. 19, 2000), (henceforth referred to as *Convention 182*). *Convention 182* ratified by South Africa on June 7, 2000. By August 2005, there were one hundred and fifty six ratifications for this convention, forty-nine of which are from Africa, making it the fastest pace of ratification since the ILO was founded in 1919. See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 23-24; Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726).

<sup>330</sup> See Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726).

<sup>331</sup> Truong 2006 [www.polity.org.za/article.php?a\\_id=82726](http://www.polity.org.za/article.php?a_id=82726).

urgency.<sup>332</sup> Article 2 defines a child as a person under the age of eighteen years.

*Convention 182* makes it clear which labour practices are inappropriate for children and may form part of the crime of child trafficking. Article 3 states that the term 'the worst forms of child labour' comprises 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.<sup>333</sup> It further comprises the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances<sup>334</sup> or 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.<sup>335</sup> Lastly, the term includes 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.<sup>336</sup> Unlike the *Forced Labour Convention*, *Convention 182* considers prostitution as a worst form of child labour.<sup>337</sup>

Article 7 calls on State Parties to take effective measures to prevent the employment of children into such forms of labour,<sup>338</sup> to provide assistance for the removal of children from these forms of labour and for their rehabilitation and social re-integration;<sup>339</sup> to identify and reach out to children at risk,<sup>340</sup> and to take account of the special situation of girls.<sup>341</sup>

---

<sup>332</sup> See Jullien 2002-2003 *Denver Journal of International Law and Policy* 587; Bravo 2007 *Boston University International Law Journal* 237.

<sup>333</sup> A 3(a) of *Convention 182*. See Jullien 2002-2003 *Denver Journal of International Law and Policy* 588; Bravo 2007 *Boston University International Law Journal* 237.

<sup>334</sup> A 3(b) of *Convention 182*. See Jullien 2002-2003 *Denver Journal of International Law and Policy* 588; Bravo 2007 *Boston University International Law Journal* 237.

<sup>335</sup> A 3(c) of *Convention 182*. See Bravo 2007 *Boston University International Law Journal* 237.

<sup>336</sup> A 3(d) of *Convention 182*.

<sup>337</sup> Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt).

<sup>338</sup> A 7(a) of *Convention 182*.

<sup>339</sup> A 7(b) of *Convention 182*.

<sup>340</sup> A 7(d) of *Convention 182*.

State Parties are required to assist each other through enhanced international co-operation, including support for social and economic development, poverty eradication programmes and universal education.<sup>342</sup>

Child trafficking for the purposes of the worst forms of child labour should therefore be criminalised in State Parties' national legislation. South Africa, as a ratifying state of *Convention 182*, is obliged in terms of article 1 of the Convention to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour. Many of these worst forms of child labour have been incorporated into national legislation, for example the *Films and Publications Act*.<sup>343</sup> The *BCEA* sets out different circumstances under which a child is not allowed to work.<sup>344</sup> South Africa is further obliged to take effective measures to prevent the employment of children into such worst forms of labour. Further measures must be taken to provide assistance for the removal of children from these forms of labour and for their rehabilitation and social re-integration. Special situations of girls should also be taken cognisance of. South Africa is also obliged to assist other State Parties, through international co-operation, including support for social and economic development, poverty eradication programmes and universal education.

---

<sup>341</sup> A 7(e) of *Convention 182*.

<sup>342</sup> A 8 of *Convention 182*.

<sup>343</sup> See paragraph 3.3.4 of this study.

<sup>344</sup> See paragraph 3.3.8 of this study.

## 2.5 *Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption of 1993*<sup>345</sup>

The Hague Convention is the most comprehensive international document regulating inter-country adoptions,<sup>346</sup> and was designed to specifically implement article 21 of the CRC.<sup>347</sup> Inter-country adoption of children is not a new phenomenon, nor is the sale and trafficking of children during the adoption process.<sup>348</sup> Inter-country adoption can facilitate child trafficking, as some adopted children are in reality sold for vast amounts of profit. Another example where inter-country adoption can facilitate child trafficking is that the adoptive parents may only want to adopt the child for exploitation in the

---

<sup>345</sup> *Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 32 I.L.M. 1134 (1993), (entered into force May 1, 1995), (henceforth referred to as the Hague Convention). South Africa ratified the Hague Convention on Aug. 21, 2003.

<sup>346</sup> Inter-country adoption or international adoption is the practice by which adult citizens of a nation adopt a child who is a citizen of a different nation. See Couzens M "A very long engagement: The Children's Act 38 of 2005 and The Hague Convention on the protection of children and cooperation in respect of intercountry adoption" 2009 *Potchefstroomse Elektroniese Regs tydskrif* 54; Mattar 2002-2003 *Fordham International Law Journal* 726.

<sup>347</sup> Article 21 of the CRC reads as follows:

State Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in the view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognise that inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

<sup>348</sup> Kennard 1993-1994 *University of Pennsylvania International Business Law* 623; Mosikatsana 2003 *SALJ* 103; Albrecht *Intercountry adoption: A Swiss perspective* 13; Mattar 2002-2003 *Fordham International Law Journal* 726.



sex industry, in order to benefit financially from such adopted child. The Hague Convention provides a legal framework to address the problem of black market adoptions, which, if implemented in national legislation, should help curtail the sale and trafficking of children.<sup>349</sup>

In respect of inter-country adoption and child trafficking, article 35 of the CRC calls upon States to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.<sup>350</sup> The types of measures by which this goal is to be met are unclear.<sup>351</sup> Recognising the importance of this goal The Hague Conference's Inter-country Adoption Convention Project sought to develop a system of cooperation among participating countries that would give substance to the directive of the CRC provision.<sup>352</sup>

Article 1 of the Hague Convention states that the three objectives of the Convention are to ensure that inter-country adoptions occur when they are in the best interests of the child; to create a system of cooperation among States, to assure that the agreements made by them are respected and help prevent the sale of children; and to secure recognition of adoptions that meet the requirements of the Convention. Article 4 states that an adoption may take place if consent to such adoption is freely given and must not have been induced by payment or compensation of any kind. Article 6(1) states that each Contracting State is to create a Central Authority which will discharge the duties which are imposed by the Convention upon such authorities.<sup>353</sup> These duties include the prevention of improper financial or other gain in connection with an adoption and to deter all practices contrary

---

<sup>349</sup> Kennard 1993-1994 *University of Pennsylvania International Business Law* 648; Mosikatsana 2003 *SALJ* 115.

<sup>350</sup> See paragraph 2.3.1.2 of this study.

<sup>351</sup> Kennard 1993-1994 *University of Pennsylvania International Business Law* 631.

<sup>352</sup> Kennard 1993-1994 *University of Pennsylvania International Business Law* 631.

<sup>353</sup> The *Child Care Act* is inadequate to regulate inter-country adoptions because it does not make provision for central authorities, and thus do not comply with this international duty. See Mosikatsana 2003 *SALJ* 114.

to the objects of the Convention.<sup>354</sup> Article 32 states that no one involved in the inter-country adoption process is to derive improper financial gain, that remuneration for services is not to be unreasonably high, and that only costs to be reimbursed are those that are reasonable.

Throughout the Hague Convention the role of the Central Authorities is emphasised in curtailing both the sale of children and the accompanying improper financial gain collected by the adoption agencies and agents.<sup>355</sup> Illegal acts and malpractices are not only to be condemned as such, but moreover considering the damage it causes a particular child and children in general, such acts and practices have to be combated internationally by all available resources.<sup>356</sup>

South Africa will comply with the international obligations required by the Hague Convention, once Chapter 16 of the *Children's Act* comes into operation.<sup>357</sup> The *Child Care Act* regulates inter-country adoptions at this stage. It should be noted that the *Child Care Act* does not provide adequate protection to children being adopted internationally. The *Child Care Act* does not address the aspect of inter-country adoption for the purpose of child trafficking.

---

<sup>354</sup> A 8 of the Hague Convention. See Couzens 2009 *Potchefstroomse Elektroniese Regs tydskrif* 69.

<sup>355</sup> Aa 1(b), 4(c)-(d), 8, 11(a) and 32 of the Hague Convention. Despite the Hague Convention's emphasis on eliminating baby selling as a profit-making activity, the Convention fails to define improper financial gain anywhere in the text. Article 32 also leaves open the question of who is to define 'reasonable' in any given State. The Hague Convention provides no guidance for what constitutes 'costs and expenses' and who should determine these costs and expenses. Remuneration is not to be unreasonably high in relation to services rendered, but the Convention does not render guidelines as to what services are generally appropriate and who should make such decision. See Kennard 1993-1994 *University of Pennsylvania International Business Law* 623; 635; 644-645; Couzens 2009 *Potchefstroomse Elektroniese Regs tydskrif* 69.

<sup>356</sup> Albrecht *Intercountry adoption: A Swiss perspective* 15.

<sup>357</sup> See paragraph 3.3.6 of this study.

## 2.6 Regional instruments

### 2.6.1 African Charter on the Rights and Welfare of the Child of 1990<sup>358</sup>

The *African Charter on Human and People's Rights* of 1981<sup>359</sup> is the primary human rights instrument of the Organisation of African Unity.<sup>360</sup> However, the *African Charter* do not make any reference to trafficking whatsoever and thus for purposes of this study the *African's Children Charter* will be used as the pivotal regional instrument.

The *African Children's Charter*, which has been ratified by South Africa,<sup>361</sup> is the first regional declaration and treaty on the rights of the child.<sup>362</sup> The entry into force of the *African Children's Charter* must be welcomed, as it improves the level of protection for children in those states that have ratified it.<sup>363</sup>

Article 1 of the *African Children's Charter* reads that member states of the Organisation of the African Union who are parties to the *African Children's Charter* shall recognise the rights, freedoms and duties enshrined in the

---

<sup>358</sup> *African Charter on the Rights and Welfare of the Child* OAU Doc CAB/LEG/24.9/49 of July 1990 (entered into force on Nov. 29, 1999), (henceforth referred to as the *African Children's Charter*). The Charter required the ratification of fifteen OAU member states before it could enter into force. Almost a decade passed before the required number of states ratified the Charter. South Africa signed the *African Children's Charter* on Oct. 10, 1997, ratified it on Jan. 7, 2000 and deposited the *African Children's Charter* in January 2000. See Heyns and Killander *Key Human Rights Document of the AU* 56; Van Bueren *International Documentation on Children* 33 *et seq*; Davel *Child Law in South Africa* 214; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 24-25; Mosikatsana TL "www.buyababy.com: Inter-country adoption" 2003 SALJ 112.

<sup>359</sup> *African Charter on Human and People's Rights*, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58, 60 (1982), (henceforth referred to as the *African Charter*).

<sup>360</sup> *African Charter on Human and People's Rights*, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58, 60 (1982).

<sup>361</sup> See note 358.

<sup>362</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 20.

<sup>363</sup> Davel *Child Law in South Africa* 231.

*African Children's Charter* and shall undertake to the necessary steps, in accordance with their constitutional processes and with the provisions of the *African Children's Charter*, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the *African Children's Charter*. Article 1 thus places an obligation on State Parties to act positively in adopting measures to ensure that the rights, freedoms and duties as set out in the *African Children's Charter* are met.

Article 2 defines a child as any person under the age of eighteen years. This article must be read together with article 4 of the Charter which states that in all actions concerning the child, undertaken by any person or authority, the best interests of the child shall be the primary consideration.<sup>364</sup> It should be noted that article 4 differs from its counterpart in the CRC as the best interests of the child shall be 'the' primary concern and not only 'a' primary concern as set out in article 3(1) of the CRC. According to the *African Children's Charter*, the best interests of the child is the only determining factor and paramount in all actions concerning the child.<sup>365</sup> The 'best interests of the child' is thus defined as the criterion against which a State Party has to measure all aspects of its law and policy regarding children,<sup>366</sup> also when considering the implementation and enforcement of national trafficking legislation.

Article 5(1) of the *African Children's Charter* reads that every child has an inherent right to life and that this right shall be protected by law.<sup>367</sup> Article 5(2) further ensures, to the maximum extent possible, the survival, protection and development of the child by the State Parties. It differs from article 6 of the CRC in that the State Parties to the CRC only 'recognise' the

---

<sup>364</sup> Thus the best interests of any person under the age of eighteen years shall be the primary consideration in all actions affecting such person.

<sup>365</sup> Kreston 2006 [www.cjei.org/publications/LAWJ.ppt](http://www.cjei.org/publications/LAWJ.ppt).

<sup>366</sup> Davel *Child Law in South Africa* 219.

<sup>367</sup> South Africa incorporated article 5(1) of the *African Children's Charter* into the Constitution. Section 11 of the Constitution states that "everyone has a right to life". The term 'everyone' includes children.

inherent right to life of the child, whereas article 5(1) is more mandatory, demanding of State Parties the recognition of the inherent right to life and the protection thereof.

Article 15(1) of the *African Children's Charter* states that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. Article 15(2) demands that State Parties provide for, through legislation, minimum ages for admission to every form of employment;<sup>368</sup> appropriate regulation of hours and conditions of employment;<sup>369</sup> appropriate penalties or other sanctions to ensure the effective enforcement of the article;<sup>370</sup> and to promote the dissemination of information on the hazards of child labour to all sectors of the community.<sup>371</sup> The wording of article 15 is virtually identical to that of article 32 of the CRC. It adds a requirement that legislative and administrative measures should cover both the formal and informal sectors of employment, and that information on the hazards of child labour should be made available to all sectors of the community.<sup>372</sup>

Article 16(1) obliges State Parties to take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.<sup>373</sup> These protective measures include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for

---

<sup>368</sup> A 15(2)(a) of the *African Children's Charter*.

<sup>369</sup> A 15(2)(b) of the *African Children's Charter*.

<sup>370</sup> A 15(2)(c) of the *African Children's Charter*.

<sup>371</sup> A 15(2)(d) of the *African Children's Charter*.

<sup>372</sup> A 15(2) of the *African Children's Charter*.

<sup>373</sup> See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 24-25; Kreston 2006 [www.cjei.org/publications/IAWJ.ppt](http://www.cjei.org/publications/IAWJ.ppt); Stuurman "Trafficking in Children" 2; Heyns and Killander *Key Human Rights Document of the AU* 61; Van Bueren *International Documentation on Children* 38.

those who have the care of the child, as well as for other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.<sup>374</sup> Article 16 follows the wording of article 19 of the CRC and protects children against abuse and torture.<sup>375</sup>

An interesting aspect of the *African Children's Charter* is that the rights of children are placed in cultural perspective.<sup>376</sup> Children are, for instance, protected against harmful social and cultural practices.<sup>377</sup> Article 21(1) of the *African Children's Charter* requires that State Parties shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.<sup>378</sup> These social or cultural practices include those customs and practices prejudicial to the health or life of the child,<sup>379</sup> and those customs and practices discriminatory to the child on the grounds of sex.<sup>380</sup> Article 21(2) further prohibits child marriage and the betrothal of girls and boys.<sup>381</sup> In the African culture, children are often sent away to either earn an income for the family, to ensure better living circumstances for the child, or to be married in terms of an arrangement between the parents, which can make the child vulnerable to trafficking.

Article 27 of the *African Children's Charter* ensures that State Parties undertake to protect the child from all forms of sexual exploitation and

---

<sup>374</sup> A 16(2) of the *African Children's Charter*.

<sup>375</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 20.

<sup>376</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23-24.

<sup>377</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23-24.

<sup>378</sup> See Heyns and Killander *Key Human Rights Document of the AU* 62; Van Bueren *International Documentation on Children* 40.

<sup>379</sup> A 21(a) of the *African Children's Charter*.

<sup>380</sup> A 21(b) of the *African Children's Charter*.

<sup>381</sup> See Heyns and Killander *Key Human Rights Document of the AU* 62; Van Bueren *International Documentation on Children* 40.

sexual abuse. State Parties must also, in particular, take measures to prevent the inducement, coercion or encouragement of a child to engage in any sexual activity;<sup>382</sup> the use of children in prostitution or other sexual practices;<sup>383</sup> and the use of children in pornographic activities, performances and materials.<sup>384</sup> Article 27 thus repeats the content of the prohibition on the sexual exploitation of children contained in article 34 of the CRC.<sup>385</sup>

Article 29 requires that State Parties take appropriate measures to prevent 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;<sup>386</sup> and the use of children in all forms of begging.<sup>387</sup> Article 29 acts as a safety net, as children are protected from physical, sexual and economic abuse or exploitation by other provisions of the *African Children's Charter*.<sup>388</sup>

South Africa, as a ratifying state of the *African Children's Charter*, is obliged to give effect to the provisions contained therein. South Africa is obliged to provide for minimum ages for admission to every employment and regulation of hours and conditions of employment, in an effort to prevent labour exploitation.<sup>389</sup> The *African Children's Charter* further obliges member states, including South Africa, to take specific measures to protect children from all forms of torture, inhuman or degrading treatment and physical or mental injury or abuse, neglect or maltreatment.<sup>390</sup> State Parties, including South Africa, further commits themselves to protect

---

<sup>382</sup> A 27(a) of the *African Children's Charter*.

<sup>383</sup> A 27(b) of the *African Children's Charter*.

<sup>384</sup> A 27(c) of the *African Children's Charter*.

<sup>385</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of 31 May 1997 23; SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 20.

<sup>386</sup> A 29(a) of the *African Children's Charter*.

<sup>387</sup> A 29(b) of the *African Children's Charter*.

<sup>388</sup> Aa 15, 16, and 27 of the *African Children's Charter*. See Davel *Child Law in South Africa* 221.

<sup>389</sup> See paragraph 3.3.8 of this study.

<sup>390</sup> Ss 12(1) and 28(1)(d) of the Constitution.

children from all forms of sexual exploitation and sexual abuse.<sup>391</sup> Furthermore, South Africa is obliged to criminalise child trafficking and to take appropriate measures to prevent child trafficking as set out in article 29 of the *African Children's Charter*.<sup>392</sup>

## 2.7 Concluding remarks

Children's rights, especially the right not to be sold or to be susceptible to trafficking, are protected by a number of general international instruments. When read together, the Palermo Protocol, CRC and the *African Children's Charter* provide a sound framework for combating trafficking in children internationally. South Africa has ratified various international instruments which recognise trafficking in persons as a global problem. South Africa is clearly under an international obligation to criminalise the act of trafficking in children and to bring its national trafficking legislation and policies in line with the standards set by these international instruments.<sup>393</sup> In terms of the Constitution, South Africa is obliged to take international law into account,<sup>394</sup> as international law will have persuasive authority in a court of law.

The following discussion on current and proposed national legal measures will determine whether or not South Africa has complied with its international obligations.

---

<sup>391</sup> Article 27 of the *African Children's Charter* is incorporated into national legislation through the *Films and Publications Act* 65 of 1996 (henceforth referred to the *Films and Publications Act*), prohibiting sexual exploitation of children in the pornography industry. See paragraph 3.3.4 of this study. It is also incorporated into the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007 (henceforth referred to the *Criminal Law Amendment Act*), which explicitly prohibits child trafficking for sexual purposes. See paragraph 3.3.5 of this study.

<sup>392</sup> Article 29 is incorporated nationally through the *Criminal Law Amendment Act* (but only for sexual purposes) and Chapter 18 of the *Children's Act*. See paragraphs 3.3.5 and 3.3.6 respectively.

<sup>393</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 29; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>394</sup> Ss 39, 231(4), 232 and 233 of the Constitution. See paragraph 2.1 of this study.



### 3 National framework

#### 3.1 Introduction

South Africa does not have legislation that specifically prohibits human trafficking,<sup>395</sup> despite the fact that law enforcement agencies and research institutions have identified South Africa as one of the countries in the southern part of Africa that is used by organised traffickers of human beings, and especially children, as a destination, transit and country of origin of victims in pursuing this detestable trade.<sup>396</sup> In recognition of this lack of legislation, South Africa has signed and ratified the Palermo Protocol thereby committing itself to criminalising and developing legislation to combat trafficking.<sup>397</sup> Thus, in accordance with its means, South Africa must provide measures to protect and assist victims, train law enforcement and border officials, inform and educate victims, potential victims and the general public and cooperate with each other and civil society.<sup>398</sup>

---

<sup>395</sup> Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 3, 29.

<sup>396</sup> Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; United States Department of State 2008 <http://www.unhcr.org/refworld/docid/484f9a3c3d.html>; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; Goliath "Human Trafficking: Southern African Perspective" 3, 6; Pharoah R "Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa" 2006 *Institute for Security Studies Monographs* 23; Tavella AM "Sex trafficking and the 2006 World Cup in Germany" 2007-2008 *Northwestern Journal of International Human Rights* 214-215.

<sup>397</sup> *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001), (entered into force Dec. 25, 2003). South Africa signed the Palermo Protocol on Dec. 14, 2000, and ratified it on Feb. 20, 2004. Article 5 of the Palermo Protocol obliges member states to criminalise trafficking, to investigate and prosecute traffickers and to undertake border control measures in the act of prevention of trafficking See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 12-13; Pharoah 2006 *Institute for Security Studies Monographs* 1; Goliath "Human Trafficking: Southern African Perspective" 7; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>; Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

<sup>398</sup> Aa 6, 9, 10 and 11 of the Palermo Protocol. See Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

There are no official statistics on the number of persons trafficked to and from South Africa.<sup>399</sup> Limited research on the issue of trafficking in persons within South Africa and across its borders makes it difficult to give an accurate overview of the extent of the problem.<sup>400</sup> Moreover, as the act of trafficking in persons often takes place clandestinely, it is difficult to obtain statistics on trafficking activities.<sup>401</sup> Systematic victim identification procedures of undocumented migrants before their deportation have also been delayed,<sup>402</sup> and therefore, South African trafficking cases are limited. In June 2007, a South African man was arrested for allegedly trafficking a Zimbabwean woman to South Africa with the promise of employment. Prior to his arrest, the victim was deported without being identified as a trafficking victim. The victim later related her ordeal to a counsellor during processing at International Organisation for Migration's Beitbridge, Zimbabwe repatriation centre. Zimbabwean authorities notified the South African Police Service, who arrested the offender. The offender remains in custody under charges of violating migration laws and the *Sexual Offences Act* as a trial date has yet to be set.<sup>403</sup> In *National Director of Public Prosecutions v*

---

<sup>399</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 26; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 2; Pharoah 2006 *Institute for Security Studies Monographs* 75.

<sup>400</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 26; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 28.

<sup>401</sup> Fitzgibbon K "Modern-Day Slavery? The Scope of Trafficking in Persons in Africa" 2003 *African Security Review* 85; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 26; Gould C "Countering Human Trafficking: Considerations and Constraints: Cheap Lives" 2006 *SA Crime Quarterly* 22; Pharoah 2006 *Institute for Security Studies Monographs* 20; Cheung CC "Protecting sex trafficking victims: Establishing the Persecution element" 2007 *Asian American Law Journal* 32; UNICEF 2005 [www.childtrafficking.org/eng/publication.html](http://www.childtrafficking.org/eng/publication.html); UNODC 2006 [www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf); Allais 2005 [www.freerepublic.com/focus/f-news/132243/posts](http://www.freerepublic.com/focus/f-news/132243/posts); TAHA 2006 [www.info.gov.za/issues/humantrafficking/documents/frequently\\_asked\\_questions.pdf](http://www.info.gov.za/issues/humantrafficking/documents/frequently_asked_questions.pdf); IRIN 2006 <http://www.alertnet.org/thenews/newsdesk/IRIN/aa81a2cd1e8e8709442c642d058C5299.htm>.

<sup>402</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf).

<sup>403</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; United States Department of State 2008 <http://www.unhcr.org/refworld/docid/484f9a3c3d.html>.

*Phillips and Others*,<sup>404</sup> the accused was charged with running a brothel, living off the proceeds of prostitution, procuring women to have sex with clients and employing illegal immigrants.<sup>405</sup> It should be noted, however, that the term 'trafficking' is not used in the above and that the accused were charged with other common law or statutory crimes. Furthermore, since the Department of State 2007 Trafficking In Persons Report, the Department of Home Affairs referred one child victim of trafficking to International Organisation for Migration for assistance.<sup>406</sup> The Department of Social Development provided the child victim with shelter accommodation, schooling, and basic needs.<sup>407</sup>

With the *Constitution of the Republic of South Africa Act* 200 of 1993 and the *Constitution of the Republic of South Africa*, 1996<sup>408</sup> as a background, attempts were made to effect interim amendments to the principal piece of legislation affecting children, the *Child Care Act* 74 of 1983<sup>409</sup> in the period 1994 to 1996.<sup>410</sup> This was a process that commenced before either Constitutions were finalised, but the need for changes became that much more necessary in the light of the newly enshrined constitutional principles and values.<sup>411</sup> In a general sense, child protection refers to the protection of children from threats to their physical or mental health, and to their

---

<sup>404</sup> *National Director of Public Prosecutions v Phillips and Others* 2002 4 SA 60 (W); *Phillips and Others v National Director of Public Prosecutions* 2003 6 SA 447 (SCA).

<sup>405</sup> See Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba "Prosecuting Trafficking without Trafficking Laws" 4; Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf).

<sup>406</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>.

<sup>407</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>.

<sup>408</sup> Henceforth referred to as the Constitution.

<sup>409</sup> Henceforth referred to as the *Child Care Act*.

<sup>410</sup> Sloth-Nielsen J "The Child's Rights to Social Services, the Right to Social Security, and the Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 *SAJHR* 210-232; Davel *Children's Rights* 107.

<sup>411</sup> The challenge is to develop a systematic and coherent approach to child law consistent with South Africa's constitutional and international legal obligations of equity and non-discrimination and embodying the ideals of concern for the best interests of all children; participation of children in decisions affecting their interests; and the protection of children in especially difficult circumstances. See Davel *Children's Rights* 110; Sloth-Nielsen 2001 *SAJHR* 211.

overall well-being.<sup>412</sup> The causes of child abuse and neglect in South Africa are overwhelmingly triggered by family breakdown and parental poverty, and that this is the most obvious threat to the fulfilment of children's rights, including their rights to protection from ill-treatment.<sup>413</sup> It is implicit that insofar as children have been removed, abandoned and orphaned, the state does in fact bear the primary responsibility to provide for their basic material needs.<sup>414</sup> However, the current child protection system in its present form is so inadequate that many children referred to help are at risk of being worse off after referral than before.<sup>415</sup>

The idea of children being traded, exploited and abused challenges the very notion of civilisation and demands a response from governments and law enforcement agencies.<sup>416</sup> Initial steps to address the trafficking in children can be seen in various processes, such as the investigation by the South African Law Reform Commission, which resulted in a comprehensive *Trafficking in Persons Bill* B of 2006,<sup>417</sup> and the establishment of a Human Trafficking Desk within the Organised Crime Unit at the South African Police Service.<sup>418</sup>

<sup>412</sup> Sloth-Nielsen 2001 *SAJHR* 221; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>413</sup> Sloth-Nielsen 2001 *SAJHR* 223; Mashau *Towards a strategy for poverty alleviation in Mashau* 2, 8, 11, 21; Davel *Children's Rights* 11; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 37; Bevilacqua E "Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?" 1998-1999 *ILSA Journal of International and Comparative Law* 172; RAPCAN 2003 [http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf); ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>414</sup> Sloth-Nielsen 2001 *SAJHR* 227; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>415</sup> Sloth-Nielsen 2001 *SAJHR* 223.

<sup>416</sup> Gould 2006 *SA Crime Quarterly* 19; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>417</sup> Henceforth referred to as the *Trafficking Bill*.

<sup>418</sup> Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html); Pharoah 2006 *Institute for Security Studies Monographs* 1.

In South Africa, combating child trafficking has become a priority for the National Prosecuting Authority.<sup>419</sup> However, the National Prosecuting Authority has encountered unique problems in ensuring an adequate response to the occurrences of trafficking in children, in the absence of specific legislation to regulate this type of activity.<sup>420</sup> Underlying the push for legislation is the assumption that trafficking is a unique and significant problem that cannot be adequately dealt with by existing laws,<sup>421</sup> as child trafficking cases present, as a whole, a host of other offences in the criminal justice system, for example sexual exploitation, forced labour and murder.<sup>422</sup> Prosecutions have proceeded on an *ad hoc* basis based on facts, for crimes such as kidnapping, sexual assault and rape, which do not individually attract sentences as heavy as a specific trafficking in children offence would impose.<sup>423</sup>

The challenge in combating child trafficking entails in part, the action that the State has to take in its fulfilment of its international obligations to protect and promote human rights and its human rights treaty obligations.<sup>424</sup> The

---

<sup>419</sup> Gould 2006 *SA Crime Quarterly* 24; Pharoah 2006 *Institute for Security Studies Monographs* 1.

<sup>420</sup> The absence of legislation specific to human trafficking limits prosecutors to dealing only with the perpetrator directly linked to the offences resulting from the trafficking of the victim, to the exclusion of the perpetrators behind the scenes, which is problematic as this is often an organised crime activity. The National Prosecution Service (NPS) is also not in a position to record statistics, due to lack of definition in the current legal framework. See Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

<sup>421</sup> Pharoah 2006 *Institute for Security Studies Monographs* 1.

<sup>422</sup> Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html).

<sup>423</sup> The South African Government is therefore, in terms of the CRC, bound to take measures to protect children from sexual exploitation and to ensure that every child is protected from economic exploitation and from any work that is likely to be hazardous (dangerous) or to interfere with the child's education or work that is harmful to the child's health or physical, mental, spiritual, moral or social development. See SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 147; Qaba 2007 [www.info.gov.za/issues/humantrafficking/strategy.html](http://www.info.gov.za/issues/humantrafficking/strategy.html); Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf); Goliath "Human Trafficking: Southern African Perspective" 15.

<sup>424</sup> Thipanyane 2002 [www.againstchildabuse.org/humantrafficking/human\\_rights\\_implications\\_and\\_the\\_role\\_of\\_the\\_south\\_african\\_human\\_rights\\_commission](http://www.againstchildabuse.org/humantrafficking/human_rights_implications_and_the_role_of_the_south_african_human_rights_commission); Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

Department of States in the United States has instituted a four tier system according to which thirty five African countries, which ratified the Palermo Protocol, are assessed in their compliance with the international obligation to implement trafficking legislation.<sup>425</sup> Tier one countries are those countries whose governments fully comply with the minimum standards in regard to elimination of trafficking in human beings.<sup>426</sup> Tier two countries are those countries whose governments do not fully comply with the minimum standards but are making significant efforts to bring themselves into compliance with those standards.<sup>427</sup> A tier two special watch list was compiled. Countries on this list are countries whose governments do not fully comply with the minimum standards but are making significant efforts to bring themselves in compliance with those standards, however, the number of trafficking victims is severe or increasing; or governments fail to provide evidence of increasing efforts to combat trafficking in persons.<sup>428</sup>

---

<sup>425</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 4; Kenny 2006 [www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Allais "An overview of human trafficking in Sub-Saharan Africa" 11.

<sup>426</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; Kreston S "Trafficking in children in South Africa: an analysis of pending legislation" 2007 *Child Abuse Research in South Africa* 41; Allais "An overview of human trafficking in Sub-Saharan Africa" 11; Perry CS "The menace of human trafficking in Africa and the U.S Congressional response through the Office of the United States Executive Director of the African Development Bank" 2004-2005 *Loyola University Chicago International Law Review* 185; Esquibel *Human trafficking: A violation of human rights, a universal issue* 52; Tiefenbrun 2007-2008 *Fordham International Law Journal* 455; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 204; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 4.

<sup>427</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 4; Kreston 2007 *Child Abuse Research in South Africa* 41; Allais "An overview of human trafficking in Sub-Saharan Africa" 11; Esquibel *Human trafficking: A violation of human rights, a universal issue* 53; Tiefenbrun 2007-2008 *Fordham International Law Journal* 455; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 204.

<sup>428</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; Kreston 2007 *Child Abuse Research in South Africa* 41; Allais "An overview of human trafficking in Sub-Saharan Africa" 11; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 4; Perry 2004-2005 *Loyola University Chicago International Law Review* 185; Esquibel *Human trafficking: A violation of human rights, a universal issue* 53; Tiefenbrun 2007-2008 *Fordham International Law Journal* 455; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 204.

Tier three countries are those countries whose governments do not fully comply with minimum standards and are not making significant efforts to do so.<sup>429</sup> South Africa is on the tier two special watch list because of the fact that South Africa is a source, transit and destination country for forced labour and sexual exploitation. Another reason for South Africa's placement is the fact that the government does not fully comply with the minimum standards for elimination of trafficking, as South Africa fails to show increasing efforts to address trafficking.<sup>430</sup> The government did not provide comprehensive data on trafficking crimes investigated, prosecuted or any resulting convictions or sentences.

This chapter will investigate current and proposed legal measures relating to the combating of child trafficking, starting with the relevant provisions of the Constitution, as the Constitution is the supreme law of the Republic of South Africa.<sup>431</sup>

---

<sup>429</sup> United States Department of State 2007 <http://www.state.gov/g/tip/rls/rpt/101438.htm>; Kreston 2007 *Child Abuse Research in South Africa* 41; Allais "An overview of human trafficking in Sub-Saharan Africa" 11; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 4; Mattar 2002-2003 *Fordham International Law Journal* 746; Esquibel *Human trafficking: A violation of human rights, a universal issue* 53; Tiefenbrun 2007-2008 *Fordham International Law Journal* 455; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 204.

<sup>430</sup> Kreston 2007 *Child Abuse Research in South Africa* 41-42; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 5; Goliath "Human Trafficking: Southern African Perspective" 11; Tavella 2007-2008 *Northwestern Journal of International Human Rights* 204.

<sup>431</sup> Section 2 of the Constitution states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled." As a result, the Bill of Rights applies to all the organs of state (section 8(1) of the Constitution) and, whenever applicable, to all natural and juristic persons (section 8(2) of the Constitution). See Ngwenya C "Health care decision-making and the competent minor: The limits of self-determination" 1996 *Acta Juridica* 145; Vrancken P and Chetty K "International child sex tourism: A South African perspective" 2009 *Journal of African Law* 131; Pieterse M "Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements" 2003 *SALJ* 5-6.

### 3.2 Constitution of the Republic of South Africa, 1996

The Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, particularly in the field of human rights.<sup>432</sup> Most of the rights in the Bill of Rights<sup>433</sup> pertain to 'everyone', thus including children. Section 28(3) of the Constitution defines a child as "a person under the age of eighteen years". Therefore only persons below eighteen years of age are entitled to the rights enshrined in section 28 of the Constitution, in addition to other rights in the Bill of Rights. Because the Constitution is the supreme law in the Republic of South Africa,<sup>434</sup> it will prevail over other legislation that would lower the age if not in the best interest of the child.<sup>435</sup>

Section 10 of the Constitution guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. Child trafficking and the ensuing abuse and exploitation of children severely affect the human dignity of those trafficked,<sup>436</sup> and can thus be seen as a violation of the child's fundamental right to human dignity.

Section 12 of the Constitution relates to freedom and security of the person.<sup>437</sup> Relevant to child trafficking are the following subsections:

Everyone has the right to freedom and security of the person, which includes the right –

---

<sup>432</sup> S 39 of the Constitution. See Dugard *International Law* 60; Blake RC "The world's law in one country: the South African constitutional court's use of public international law" 1998 *SALJ* 674; Botha N "International Law and the South African interim Constitution" 1994 *SAPL* 249; Dugard J "The role of international law in interpreting the Bill of Rights" 1994 *SAJHR* 213; Horsten *The social security rights of children in South Africa* 37.

<sup>433</sup> Chapter 2 of the Constitution.

<sup>434</sup> S 2 of the Constitution. See note 431.

<sup>435</sup> Detrick *Commentary on the UN CRC* 58.

<sup>436</sup> Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf).

<sup>437</sup> See Malherbe R "Advancing social change: Recent human rights developments in South Africa" 2003 *TSAR* 447-450.



- (a) not to be deprived of freedom arbitrarily or without just cause;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way;
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

Child trafficking infringes the child's right to freedom and security of the person in an arbitrary manner by, for example in the case of debt bondage. Trafficked children also suffer physical, emotional and psychological violence at the hands of their traffickers, which could constitute torture or cruel, inhuman or degrading treatment or punishment which is expressly prohibited by section 12.

Section 13 of the Constitution provides that no one may be subjected to slavery, servitude or forced labour. As mentioned in earlier, child trafficking is a contemporary form of slavery,<sup>438</sup> and this practice is thus expressly prohibited by the Constitution.

Probably the most important of the constitutional provisions applicable to child trafficking is section 28 as it provides special protection for children.<sup>439</sup>

The relevant subsections read:

- (1) Every child has the right –
  - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that –
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

<sup>438</sup> See paragraph 1 of this study; Council of Europe 2005 <http://www.coe.int/trafficking.pdf>; Solomons 2006 [www.parliament.gov.za/content/womens\\_parliament\\_report.pdf](http://www.parliament.gov.za/content/womens_parliament_report.pdf).

<sup>439</sup> Children have certain rights that are not qualified by the concept of progressive realisation and available resources. See Sachs A "Enforcement of social and economic rights" 2006-2007 *American University International Law Review* 675; Mosikatsana TL "Law of Persons and Family Law" 1996 *Annual Survey of South African Law* 174; Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf).

Section 28(1)(b) guarantees the right of every child to care, whether it is family, parental or alternative care, while section 28(1)(c) guarantees the basic necessities of every child. Trafficked children are deprived of this parental or family care and more often than not denied the basic rights of nutrition, shelter and appropriate health care. The State has a direct duty to meet the socio-economic needs of children who lack family care, as do unaccompanied (trafficked) foreign children.<sup>440</sup> Child trafficking leads to maltreatment,<sup>441</sup> neglect,<sup>442</sup> abuse<sup>443</sup> and degradation<sup>444</sup> and this is explicitly prohibited by section 28(1)(d) of the Constitution.<sup>445</sup> The right to be protected against maltreatment, neglect, abuse and degradation imposes a duty on both private persons and the state to refrain from these forms of treatment.<sup>446</sup> It primarily requires the state to act positively to prevent abuse, maltreatment, neglect or degradation.<sup>447</sup> This second obligation in terms of section 28(1)(d) can be explained in the light of two contexts. Firstly, the state is required to intervene in situations of ongoing

---

<sup>440</sup> *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50(T) 57B-C; Pieterse 2003 SALJ 5.

<sup>441</sup> Maltreatment can be defined as extreme cruelty to a person. See Hornby *Oxford Advanced Learner's Dictionary* 716.

<sup>442</sup> Neglect is a criminal offence when a parent or guardian neglects their child in a way that is likely to cause unnecessary suffering or injury to health, when the parent or guardian is aware of (or reckless as to) the likely consequences of the neglect. It is further defined as a failure to take care of somebody. See Martin *Dictionary of Law* 327; Hornby *Oxford Advanced Learner's Dictionary* 785.

<sup>443</sup> Abuse is defined as unfair, cruel or violent treatment of somebody. See Hornby *Oxford Advanced Learner's Dictionary* 5.

<sup>444</sup> Degradation can be defined as a situation where one person is treated in a way that makes them seem not worth any respect or humiliated. See Hornby *Oxford Advanced Learner's Dictionary* 306.

<sup>445</sup> Child victims of trafficking are often abused physically and emotionally. The lack of basic necessities is also common among child victims of trafficking, for example starvation and the lack of proper shelter. Child victims of trafficking who are exposed to sexual exploitation are humiliated and degraded in the sense that they are forced to perform involuntary sexual acts.

<sup>446</sup> Davel *Child Law in South Africa* 188; Chetty N and Reddi M "The Criminal Law (Sexual Offences) Amendment Bill: Is it an adequate weapon in the war against the sexual abuse of children?" 2005 SALJ 512.

<sup>447</sup> The provision reads that a child has a right to be protected against these forms of treatment; whereas section 30(1)(d) of the interim Constitution stated a child should not be subjected to such treatment. The fact that children must be protected against such treatment imposes a positive obligation to protect children against such treatment. Also see Davel *Child Law in South Africa* 188; Mosikatsana 1996 *Annual Survey of South African Law* 174-175.

maltreatment, abuse, neglect and degradation of a child; for example by removing a child from an abusive environment.<sup>448</sup> Secondly, the state must act to prevent abuse in the general context of legislative and policy protection of rights.<sup>449</sup> The state is thus under a constitutional duty to create legislative and other measures that prospectively protect children against abuse, neglect, maltreatment, abuse and degradation;<sup>450</sup> these forms of treatment usually being the result of trafficking in children. This explicitly gives rise to an obligation to enact legislation specifically dealing with child trafficking. Sections 28(1)(e) and (f) afford children protection against exploitation.<sup>451</sup> Section 28(1)(e) imposes a positive obligation on the state to protect children against exploitative labour practices,<sup>452</sup> while section 28(1)(f) imposes a negative duty on the state and private individuals to desist from engaging children in exploitative labour practices.<sup>453</sup> It should be noted that these sections do not place an absolute ban on child labour.

Section 28(2) states that a child's best interests are of paramount importance in every matter concerning a child.<sup>454</sup> Section 28 constitutionalises the common law rule, laid down in the early case of *Fletcher v Fletcher*.<sup>455</sup> The best interests of the child principle is a standard employed in determining whether the decision reached is in accordance

---

<sup>448</sup> Davel *Child Law in South Africa* 188; Mosikatsana 1996 *Annual Survey of South African Law* 175.

<sup>449</sup> Davel *Child Law in South Africa* 189; Mosikatsana 1996 *Annual Survey of South African Law* 175.

<sup>450</sup> Davel *Child Law in South Africa* 189.

<sup>451</sup> SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The Substantive Law" of 12 August 1999 147; Mosikatsana 1996 *Annual Survey of South African Law* 1174-175.

<sup>452</sup> As with section 28(1)(d), the right states that children should be protected "against" exploitative labour practices. See Davel *Child Law in South Africa* 190; Mosikatsana 1996 *Annual Survey of South African Law* 175; Burman S "The best interests of the South African child" 2003 *International Journal of Law, Policy and the Family* 37.

<sup>453</sup> Davel *Child Law in South Africa* 190; Mosikatsana 1996 *Annual Survey of South African Law* 175.

<sup>454</sup> This section is in compliance with article 3(1) of the CRC and article 4 of the *African Children's Charter*.

<sup>455</sup> *Fletcher v Fletcher* 1948 1 SA 130 (A). See Davel *Child Law in South Africa* 194.

with the needs of the child in question.<sup>456</sup> The ordinary meaning of the words clearly indicates that the reach of this section cannot be limited to the rights mentioned in section 28(1), and section 28(2) must be interpreted to extend beyond those provisions.<sup>457</sup> Section 28(2) creates a standard that is independent of the rights specified in section 28(1).<sup>458</sup> The best interests of the child standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child.<sup>459</sup> Fourie J has described the best interests of the child standard as the golden thread which runs throughout the whole fabric of South African law relating to children.<sup>460</sup> In *De Reuck v Director of Public Prosecutions*,

<sup>456</sup> In respect of the 'best interests of the child' standard in the common law, it was held in *K v K* 1999 4 SA 691 (C) at 702G/H – H/I and 704C that the Court's paramount consideration in exercising its discretion as the upper guardian of minor children was always the best interest of the child or children in the particular circumstances of the individual case. See Silolo 2006 <http://cjei.org/publications.IAW.ppt>; Davel *Child Law in South Africa* 5. The standard is thus used in reforming or developing a particular rule of law pertaining to or likely to affect children. The Constitutional Court described this standard in *Minister for Welfare and Population Development v Fitzpatrick and Others* 1998 11 BCLR 1357 (CC). See Davel *Child Law in South Africa* 137; Burman 2003 *International Journal of Law, Policy and the Family* 28.

<sup>457</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 428; Sloth-Nielsen J "Children's rights in the South African courts: An overview since ratification of the UN Convention of the Rights of the Child" 2002 *International Journal of Children's Rights* 139; Community Law Centre 2007 <http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article-40-july07.pdf>.

<sup>458</sup> The best interest standard has never been given an exhaustive content in either South African law, in comparative international or foreign law. See *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 428C/E.

<sup>459</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 428F. When determining the best interests of a child, the following factors can be taken into consideration, namely the ascertainable wishes and feelings of the child concerned; the child's physical, emotional and educational needs; the likely effect on the child of any change in the child's circumstances; the child's age, sex, background, and any characteristics of the child which a court may consider relevant; and any harm which the child has suffered or is at risk of suffering. See Ramolotja MA "Determining the best interests of the child" 1999 *Codicillus* 11; *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) 214A; Davel *Child Law in South Africa* 194.

<sup>460</sup> *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 2 SA 56 (C) 65. The 'best interests of the child' has been confirmed in a number of cases, for example *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 5 SA 184 (SCA) 191D-192C; *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50 (T) 56B-57A; *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 2 SA 363 (CC) 372E; *Du Toit and Another v Minister of Welfare and Population Development and*

*Witwatersrand Local Division, and Others*<sup>461</sup> it was held that when dealing with a hierarchy of values, the child's rights and interests were the most important.<sup>462</sup> In *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)*<sup>463</sup> it was held that, where the interests of children were at stake, it was important that their interests were fully aired before the Court so as to avoid substantial injustice to them and possibly other children. In *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others*<sup>464</sup> it was held that the best interests of the child standard provides a benchmark in the review of all proceedings in which decision are taken regarding children.

---

*Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) 201G; *Hay v B and Others* 2003 3 SA 492 (W) 494I-495A; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W) 456A; *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 429D-E/F; *K v K* 1999 4 SA 691 (C) 702G/H-H/I and 704C; *Hlophe v Mahlalela and Another* 1998 1 SA 449 (T) 459D/E-G. See Müller, Hollely and van der Merwe *Prosecuting the Child Sex Offender* 19.

<sup>461</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W).

<sup>462</sup> The Court placed emphasis on the fact the Constitution regards a child's best interest as of paramount importance and further held that it is the single most important factor to be considered when balancing or weighing competing rights concerning children. See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W) 457A/B; *Hay v B and Others* 2003 3 SA 492 (W) 494I-495A and *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 2 SA 363 (CC) 372E. In the context of child trafficking, whether providing measures to prevent trafficking, to protect children and child victims of trafficking or prosecute traffickers, the best interests of the child must be the determining factor in each individual situation.

<sup>463</sup> *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) 201G. This would be the case where a child victim is to assist the Court in the prosecution of his or her traffickers.

<sup>464</sup> *Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 2 SA 56 (C) 65B. See Müller, Hollely and van der Merwe *Prosecuting the Child Sex Offender* 19.

### 3.3 Current legal measures

One of the biggest shortcomings in South African law is the lack of legal measures relating to child trafficking.<sup>465</sup> Although South Africa has committed itself through a number of international agreements to eradicate this cross-border crime, no law specifically targeting trafficking has yet been implemented.<sup>466</sup>

There is no common law provision dealing with trafficking *per se*.<sup>467</sup> Depending on the circumstances of a particular case, a trafficker may currently be prosecuted for a variety of common law offences in South Africa,<sup>468</sup> including abduction,<sup>469</sup> kidnapping,<sup>470</sup> and assault.<sup>471</sup> What has

<sup>465</sup> Brits *Die Burger* 2; S "Trafficking in children in South Africa: an analysis of pending legislation" 2007 *Child Abuse Research in South Africa* 40; RAPCAN 2003 [http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf).

<sup>466</sup> Ellis *The Star* 7.

<sup>467</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32.

<sup>468</sup> Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kreston 2007 *Child Abuse Research in South Africa* 40; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>469</sup> The unlawful and intentional removal of an unmarried minor from the control of her/his parents or guardian with the intention of having sexual intercourse with the minor. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32 – 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>470</sup> The unlawful and intentional deprivation of a person of her/his freedom of movement. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32 – 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>471</sup> The unlawful and intentional application of force to another person. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32 –

been said about child trafficking in the common law can be found in the case of *Hlophe v Mahlalela and Another*,<sup>472</sup> where it was held that any arrangement that smacked of sale of or the trafficking in children would not be enforced.<sup>473</sup> In addition, there are specific statutory offences that may be applied to child trafficking cases,<sup>474</sup> which will be discussed below.

### 3.3.1 *Sexual Offences Act 23 of 1957*

The *Sexual Offences Act* creates a number of offences relating to sexual intercourse or sexually indecent acts.<sup>475</sup> This Act can be successfully used in the prosecution of persons when individuals have been removed from where they would choose to be (geographically), and forced to provide sexual services to other persons, for example forced prostitution.<sup>476</sup> The *Sexual Offences Act* can also be used to prosecute persons involved in activities that may constitute trafficking.<sup>477</sup> Section 2 of the *Sexual Offences Act* makes it illegal to keep a brothel.<sup>478</sup> Section 9 creates the offence of procuring a child to have unlawful carnal intercourse with another person. Section 12 criminalises the detaining of a female against her will, either with

---

33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Qaba 2007 [www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf); Smith 2008 [www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf).

<sup>472</sup> *Hlophe v Mahlalela and Another* 1998 1 SA 449 (T).

<sup>473</sup> *Hlophe v Mahlalela and Another* 1998 1 SA 449 (T) 458E/F – 459C.

<sup>474</sup> See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kreston 2007 *Child Abuse Research in South Africa* 40; Qaba "Prosecuting Trafficking without Trafficking Laws" 2; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 33.

<sup>475</sup> Snyman *Criminal Law* 362; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>.

<sup>476</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>.

<sup>477</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>.

<sup>478</sup> Section 1 of the *Sexual Offences Act* defines a brothel as "any house or place kept for the purposes of prostitution or for persons to visit for the purposes of having unlawful carnal intercourse or any other lewd or indecent purpose".

the intention that she has sexual intercourse with a male, or with the intention that she be detained in a brothel. Section 13 creates an offence which is almost identical with the common law offence of abduction. This section provides that any person who takes or detains any unmarried male or female under the age of twenty one years out of the custody and against the will of his or her parents or guardian, with the intent that that person or any other person may have unlawful carnal intercourse with the unmarried male or female; commits an offence.<sup>479</sup> Section 14 prohibits illicit sexual offences with youths,<sup>480</sup> while section 20 prohibits living off the earnings of prostitution or assisting in the commission of indecent acts.

These sections of the *Sexual Offences Act* may be used to prosecute traffickers, as traffickers often traffic children for the purpose of sexual exploitation. Because trafficking of children involves the removal of the child from his or her family environment, section 13 can be used to prosecute traffickers in this regard.

### 3.3.2 *Child Care Act 74 of 1983*

The *Child Care Act* is still in operation as the *Children's Act* has not yet come into full operation. Once in full operation, the *Children's Act* will repeal the *Child Care Act*, the latter being specifically aimed at the protection and welfare of children.<sup>481</sup>

The *Child Care Act*, like the *Sexual Offences Act*, can be used in the prosecution of persons when children have been removed from where they

---

<sup>479</sup> S 13(1) of the *Sexual Offences Act*. As the age of majority was lowered from twenty one years to eighteen years on 1 July 2007 by the *Children's Act*; this provision has to be amended as to comply with the new age of majority.

<sup>480</sup> Chetty and Reddi 2005 SALJ 503-504.

<sup>481</sup> Schedule 4 of the *Children's Act*. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba "Prosecuting Trafficking without Trafficking Laws" 3.



would choose to be, and forced to provide sexual services to other persons and to prosecute activities that may constitute trafficking.<sup>482</sup>

Section 1 of the *Child Care Act* defines a child as any person under the age of eighteen years. There are, however, circumstances in which certain provisions of the *Child Care Act* apply to persons over the age of eighteen years.<sup>483</sup>

The *Child Care Act* does not comprehensively define child abuse but rather provided instances of punishable behaviour.<sup>484</sup> For example, section 50(1) provides for the prevention of ill treatment of children in that any person, who ill-treats or abandons a child or allows a child to be ill-treated, be guilty of an offence. No attempt is made to define what is meant by the term 'ill-treatment'. It is further provided in section 50(2) that children are entitled to certain basic necessities.<sup>485</sup> Child trafficking not only leads to ill-treatment of children but also to the denial of basic necessities, such as education, health care and shelter. Section 50A specifically provides for protection against the commercial sexual exploitation of children,<sup>486</sup> which is one of the

---

<sup>482</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 33; Qaba "Prosecuting Trafficking without Trafficking Laws" 3.

<sup>483</sup> For example, section 15(4) of the *Child Care Act* reads that a children's court may make an order in respect of any person who, at the commencement of the relevant children's court inquiry, was under the age of eighteen years, but has attained the age of eighteen years before the date of the order.

<sup>484</sup> SALRC Project 108 in Issue Paper 10 "Sexual Offences Against Children" of 31 May 1997 18.

<sup>485</sup> S 50(2) of the *Child Care Act* reads that "any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence".

<sup>486</sup> Section 50A of the *Child Care Act* reads that "(1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence. (2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence, fails to report such occurrence at a police station, shall be guilty of an offence. (3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment".

main purposes of child trafficking. Section 51 prohibits the unlawful removal of children, while section 52A prohibits the employment of certain children.

Chapter 3 of the *Child Care Act* provides mechanisms for the protection of children. It specifically provides that any child who appears to have no parent or guardian or, whose parent or guardian cannot be traced or who has been abandoned or is without visible means of support or lives in circumstances likely to cause or be conducive his or her seduction, abduction or sexual exploitation or who lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child, must be brought before a children's court for an inquiry to determine whether the child is a child in need of care and whether the child should be removed to a place of safety.<sup>487</sup> Keeping the said provision in mind, the Court in *Centre for Child Law and Another v Minister of Home Affairs and Others*<sup>488</sup> highlighted the fact that there exists a crisis in the handling of unaccompanied foreign children, which is being aggravated by an insufficiency of resources, inadequate administrative systems and procedural oversight in the handling of children.

### 3.3.3 *Prevention of Organised Crime Act 121 of 1998*

Chapter 2 of the *Prevention of Organised Crime Act* covers offences relating to racketeering activities.<sup>489</sup> Broadly speaking, it makes it an

---

<sup>487</sup> S 14(4) of the *Child Care Act*. Also see *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50(T).

<sup>488</sup> *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50(T) 56A-B and 59H.

<sup>489</sup> The term racketeering activities is not defined in the *Prevention of Organised Crime Act*. A pattern of racketeering activity is defined in section 1 as the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within ten years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1. Offences in Schedule 1 include, *inter alia*, child stealing, murder, rape, kidnapping, assault and sexual assault. The consequences of child trafficking include the latter of the offences as set out in

offence to be involved in racketeering activities, and to receive, use and/or invest in, any property derived from a pattern of racketeering activity.<sup>490</sup> Section 2 is specifically aimed at the prohibition and criminalisation of certain activities that form a pattern of racketeering.<sup>491</sup> Section 3 is aimed at criminalisation of knowledge of property that forms part of criminal activities and which is likely to have the effect of concealing, or disguising the nature, source, location, disposition or movement of the said property.<sup>492</sup> In terms of the *Prevention of Organised Crime Act*, a number of other provisions may also be of use in the context of child trafficking.<sup>493</sup> Examples of these provisions can be found in Chapter 3 which deals with the proceeds of unlawful activities<sup>494</sup> and Chapter 4 which deals with criminal gang activities. Of importance in Chapter 4 is section 9 which relates to criminalisation of criminal activities run by gang members.<sup>495</sup>

---

Schedule 1. See Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba "Prosecuting Trafficking without Trafficking Laws" 3.

<sup>490</sup> In November 2007 racketeering charges were filed against the suspected trafficker in a December 2006 sex trafficking case involving Thai women. See Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba "Prosecuting Trafficking without Trafficking Laws" 3; United States Department of State 2007 <http://www.state.gov/g/tip/ris/rpt/101438.htm>.

<sup>491</sup> S 2 of the *Prevention of Organised Crime Act*. These activities include, *inter alia*, receiving or retaining any property derived, directly or indirectly, from a pattern of racketeering activity; or acquiring or maintaining, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity. See Silolo 2006 <http://cjej.org/publications.IAW.ppt>.

<sup>492</sup> S 3 of the *Prevention of Organised Crime Act*; Silolo 2006 <http://cjej.org/publications.IAW.ppt>.

<sup>493</sup> Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Qaba "Prosecuting Trafficking without Trafficking Laws" 3.

<sup>494</sup> Offences concerned in Chapter 3 includes money laundering, assisting another to benefit from proceeds of unlawful activities and the acquisition, possession or use of proceeds of unlawful activities. In the context of child trafficking the selling or exploitation of children for profit would be deemed an offence in terms of Chapter 3. See Dugard J "South African International Law miscellany" 1999 *Annual Survey of South African Law* 105.

<sup>495</sup> Section 9(1) states that any person who actively participates in or is a member of a criminal gang and who wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang; threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang; or threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in

Child trafficking can be organised by criminal gangs and this section can thus be used in prosecuting the involvement of traffickers. Further examples can be found in Chapters 5 and 6 which deal with the forfeiture of assets obtained unlawfully.<sup>496</sup> Proceeds generated by the act of trafficking in children may be confiscated in terms of these chapters.

### 3.3.4 *Films and Publications Act 65 of 1996*

The prohibition of some of the worst labour practices as depicted by *Convention 182* have been implemented into the *Films and Publications Act*.<sup>497</sup> This includes child trafficking for the purpose of sexual exploitation in the pornography industry. The *Films and Publications Act* defines child pornography to include 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 eighteen years engaged in sexual conduct, participating in, or assisting another to participate in, sexual conduct, or showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such manner that it is capable of being used for the purpose of sexual exploitation.<sup>498</sup> It was held in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*<sup>499</sup> that the very existence of child pornography necessarily implied that the child featured in the material had been abused and degraded. The *Films and Publications Act* aims to prohibit the practice of using children for pornographic purposes, by making

---

response to any act or alleged act of violence, shall be guilty of an offence. See Silolo 2006 <http://cjej.org/publications.IAW.ppt>; Qaba "Prosecuting Trafficking without Trafficking Laws" 3.

<sup>496</sup> Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Qaba "Prosecuting Trafficking without Trafficking Laws" 3; Dugard 1999 *Annual Survey of South African Law* 105.

<sup>497</sup> See paragraph 2.4.3 of this study.

<sup>498</sup> S 1 of the *Films and Publications Act*. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf).

<sup>499</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W) 473G.

the exploitative use of children in pornographic publications, films or on the internet, punishable.<sup>500</sup>

The *Films and Publications Act* also aims to provide for the classification of certain films and publications and deals with matters arising from the production, possession and distribution of such classified films in respect of children.<sup>501</sup> Section 1(a) allows for the classification of publications if they contain a visual presentation, simulated or real, of a person depicted as being under the age of eighteen participating in sexual conduct.

Section 27 provides for the offences of possession, production and distribution of child pornography. This Act may be used in prosecuting child traffickers when child victims of trafficking are exploited in pornography industry.

### 3.3.5 *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*

The *Criminal Law Amendment Act* is a fairly new piece of legislation which only came into operation in 2008. The aim of the *Criminal Law Amendment Act* is to comprehensively and extensively review and amend all aspects of the law and the implementation of the law relating to sexual offences in a single piece of legislation.<sup>502</sup>

Section 1 of the *Criminal Law Amendment Act* defines a child as a person under the age of eighteen years. Section 1 further states, with reference to

---

<sup>500</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W) 458B.

<sup>501</sup> Silolo 2006 <http://cjej.org/publications.IAW.ppt>.

<sup>502</sup> SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Goliath "Human Trafficking: Southern African Perspective" 22; Anderson A "South Africa" 2008 *University of Botswana Law Journal* 197.

statutory rape<sup>503</sup> or statutory sexual assault,<sup>504</sup> that a child is a person twelve years or older but under the age of sixteen years.<sup>505</sup>

The *Criminal Law Amendment Act* contains a transitional provision relating to trafficking of persons for purposes of sexual exploitation.<sup>506</sup> Section 70 was included to comply with South Africa's international obligations and to deal with the rapidly growing global phenomenon of child trafficking, pending the adoption of specific trafficking legislation.<sup>507</sup> Section 70(1) states that the provisions regulating the trafficking in persons for sexual purposes are provisionally provided for in partial compliance of South Africa's international obligations, and to deal with the rapidly growing phenomena globally.

<sup>503</sup> Rape is defined in section 3 of the *Criminal Law Amendment Act* as "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". See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 32 – 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Anderson *University of Botswana Law Journal* 197; Community Agency for Social Enquiry 2005 <http://www.case.org.za/Child%20sexual%20abuse%20and%20exploitation%20in%20South%20Africa.pdf>.

<sup>504</sup> Section 5 defines sexual assault as follows:  
(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.

<sup>505</sup> The reason for such differentiation is to be found in the legal principle that a child below the age of twelve cannot consent to sexual intercourse. A child above the age of twelve years but below the age of sixteen years can consent to sexual intercourse but such consent will be invalid and not carry any weight. Section 3 allows for a trafficker to be prosecuted for the crime of rape, which is relevant in the child trafficking context as child victims are often raped when exploited by traffickers in the sex industry. See Chetty and Reddi 2005 *SALJ* 502, 510.

<sup>506</sup> Ss 70 and 71 of the *Criminal Law Amendment Act*. The transitional provision will be repealed once the *Trafficking Bill* comes into operation. See Kreston 2007 *Child Abuse Research in South Africa* 40; Silolo 2006 <http://cjei.org/publications.IAW.ppt>; SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Qaba "Prosecuting Trafficking without Trafficking Laws" 4-5; Pharoah 2006 *Institute for Security Studies Monographs* 1; Kotu-Rammopo 2008 [www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe); Goliath "Human Trafficking: Southern African Perspective" 23.

<sup>507</sup> Kreston 2007 *Child Abuse Research in South Africa* 40; SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf).

Section 70(2)(b) of the *Criminal Law Amendment Act* defines trafficking as the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic. This action can be done by means of a threat of harm; the threat or use of force, intimidation or other forms of coercion; abduction; fraud; deception or false pretences; 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 the giving or receiving of payments, compensation, rewards, benefits or any other advantage. Section 70(2)(b) further states that trafficking can take place for the purpose of 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. The *Criminal Law Amendment Act* criminalises trafficking in persons, but only in the context of sexual exploitation (including pornography and prostitution), sexual grooming and/or sexual abuse.<sup>508</sup> Traffickers exploiting child victims in the making of pornography can be prosecuted in terms of the *Criminal Law Amendment Act*. Child pornography is defined in section 1 and any real or simulated image, description or presentation of a person, who is depicted, described or presented as being under the age of eighteen years, of an explicit sexual nature, whether such image, description or presentation is intended to stimulate erotic or aesthetic or not.<sup>509</sup> Such image, description or presentation includes acts that constitute sexual offences, sexual penetration, sexual violation or self-masturbation.<sup>510</sup> While the *Films and*

---

<sup>508</sup> S 70(2) of the *Criminal Law Amendment Act*.

<sup>509</sup> S 1 of the *Criminal Law Amendment Act*.

<sup>510</sup> S 1 of the *Criminal Law Amendment Act*. It also includes an image, a description or a presentation displaying the genital organs of such person in a state of arousal or stimulation, unduly displaying the genital organs or anus of such person or displaying

*Publications Act* gives a broad definition of what constitutes child pornography, in that it only refers to the concept of sexual conduct,<sup>511</sup> the *Criminal Law Amendment Act* attempts to afford more protection to children exposed to child pornography in that it describes the conduct which constitutes 'sexual conduct'. Specific acts of sexual conduct pertaining to child pornography are depicted, thus eliminating any defence of non-sexual conduct.

When compared with the definition of trafficking as defined in the *Children's Act*, four more actions are present in the definition in the *Criminal Law Amendment Act*, namely the procurement, capture, removal and disposal of persons. The *Criminal Law Amendment Act* also gives two more means, namely the use of intimidation or false pretences, by which a person can be trafficked. The *Criminal Law Amendment Act* applies to all persons and not just children, as is the case with the *Children's Act*. Child trafficking is not specifically addressed, but there is a reference to trafficking by means of abuse of power of a position of vulnerability,<sup>512</sup> from which it can be inferred that children are also protected because of their vulnerable position in society. As one of the means of trafficking, the *Children's Act* uses the

---

any form of stimulation of sexual nature of such person's breasts. An image, description or a presentation of such person engaged in sexually suggestive or lewd acts, a person engaged in or as the subject of sadistic or masochistic acts of sexual a sexual nature or a person engaged in any conduct or activity characteristically associated with sexual intercourse is also included. The definition further states that the showing or describing such person participating in, assisting or facilitating another person to participate in or being in the presence of another person who commits or in any other manner being involved in any act as contemplated in the previous parts of the provision to be deemed child pornography. Finally the definition states that the showing or describing the body or parts of the body, of such person in a manner or in circumstances which, within the context, violate or offend the sexual integrity or dignity of that person or any category of persons under the age of eighteen years or is capable of being used for the purposes of violating or offending the sexual integrity or dignity of that person, any person or a group or categories of persons, shall be deemed as child pornography.

<sup>511</sup> See paragraph 3.3.5 of this study. Similarly, article 2(c) of the Optional Protocol on Children gives a broad definition of child pornography in that it means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

<sup>512</sup> S 70(2)(b)(vi) of the *Criminal Law Amendment Act*.



phrase 'due to a position of vulnerability', whereas the *Criminal Law Amendment Act* uses the phrase 'by abusing a position of vulnerability', both being indicative that abuse must be present when considering a position of vulnerability. In comparison with the definition of trafficking as defined in the *Trafficking Bill*, the *Criminal Law Amendment Act* names one more action, namely the disposal of persons; and one more means by which a person can be trafficked, namely the use of false pretences. The *Criminal Law Amendment Act* uses the phrase 'abuse of position of vulnerability', similar to the phrase in the *Trafficking Bill* which states 'by abusing vulnerability'. When faced with a position of vulnerability, the *Criminal Law Amendment Act* requires that such position must be abused.

The *Criminal Law Amendment Act* criminalises trafficking specifically for sexual purposes, stating in section 71 that:

- (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.
- (2) A person who—
  - (a) orders, commands, organises, supervises, controls or directs trafficking;
  - (b) performs any act which is aimed at committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking; or
  - (c) 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.

Victims of trafficking are protected from prosecution by the *Criminal Law Amendment Act* for actions committed by them as a result of being trafficked. Section 71(5) of the *Criminal Law Amendment Act* states that a victim of trafficking is not liable to stand trial for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked.

The term 'consent' is elaborated upon in section 71(3), which reads that consent means voluntary or uncoerced agreement. Instances in which a person does not voluntarily or without coercion agree to being trafficked as

contemplated above include, but are not limited to,<sup>513</sup> circumstances in which a person is incapable in law of appreciating the nature of the act, including where the person is at the time of the commission of such act<sup>514</sup> a child.<sup>515</sup> The *Criminal Law Amendment Act* contains no preventative provisions and fails to provide any specific assistance to child victims of trafficking.<sup>516</sup> However, there is no reintegration or victim assistance provision, nor is there any discussion of repatriation or the possibility of determining whether repatriation is in the best interests of the child.<sup>517</sup>

Section 71(4)(b)(iv) of the *Criminal Law Amendment Act* states that children under the age of twelve cannot consent to trafficking. By implication, children between the ages of twelve and eighteen can thus consent to trafficking.<sup>518</sup> By assigning different protection to children under the age of twelve,<sup>519</sup> it leaves a huge gap for unequal treatment of victims of exploitation between the ages of twelve and eighteen.<sup>520</sup> This not only fails to afford equal protection to all children, but fails to recognise both the Palermo Protocol's and the South African Constitution's definition of children as those under eighteen years of age.<sup>521</sup> Teenagers are as vulnerable to exploitation and adults abusing positions of power over them, as are younger children.<sup>522</sup> In artificially dividing the younger children, who

---

<sup>513</sup> Submitting or being subjected to such an act as a result of any or more of the means or circumstances contemplated in the definition of trafficking having been used or being present.

<sup>514</sup> Other instances include the person being asleep; unconscious; a mentally disabled person or a person in an altered state of consciousness, which includes that the person is under the influence of any medicine, drug, alcohol or other substance, to the extent that the person's consciousness or judgement is adversely affected.

<sup>515</sup> S 71(4) of the *Criminal Law Amendment Act*.

<sup>516</sup> Kreston 2007 *Child Abuse Research in South Africa* 43, 45.

<sup>517</sup> Kreston 2007 *Child Abuse Research in South Africa* 43-44; Qaba "Prosecuting Trafficking without Trafficking Laws" 4-5.

<sup>518</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>519</sup> Protection in the instance where it is stated that they cannot consent to being trafficked and thus this element of the offence need not be proven.

<sup>520</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>521</sup> A 3(d) of the Palermo Protocol and section 28(3) of the Constitution state that "child" shall mean any person under the age of eighteen years. See Kreston 2007 *Child Abuse Research in South Africa* 45-46.

<sup>522</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

are deserving of absolute protection, from the older undeserving children, a cultural bias against adolescent victims of sex crimes and exploitation is reinforced, and the principle that children can neither legally nor genuinely consent to their own violation is undermined.<sup>523</sup>

The *Criminal Law Amendment Act* does criminalise trafficking, but provides no specific sanctions if such crime is committed. Sanctions will therefore be governed by common law.<sup>524</sup> As sentences of up to life imprisonment are available for common law crimes such as rape and abduction, theoretically trafficking should warrant the same punishment.<sup>525</sup> However, should the case remain in the district courts for sentencing, the maximum sentence of three years will fall below the suggested minimum sentence of four years set out by the *Convention against Transnational Organised Crime*.<sup>526</sup> There is also no mention of specialised investigation and prosecution, or training for those involved in responding to the crime of trafficking.<sup>527</sup> Lastly, extradition is not addressed in the *Criminal Law Amendment Act*.<sup>528</sup>

### 3.3.6 *Children's Act 38 of 2005*

The *Children's Act* was signed by the President on 8 June 2006, but the commencement of certain sections, including the sections relating to child trafficking, has yet to be fixed by the President.<sup>529</sup> Thus, the *Child Care Act*

---

<sup>523</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

<sup>524</sup> Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>525</sup> Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>526</sup> *United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 29, 2003). A 2(b) of the *Convention against Transnational Organised Crime*. See Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>527</sup> Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>528</sup> Extradition is defined as "the act of officially sending somebody back that has been accused or found guilty of a crime to the country where the crime was committed". See Hornby *Oxford Advanced Learner's Dictionary* 411; Martin *Dictionary of Law* 194; Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>529</sup> The following sections of the *Children's Act* came into operation on 1 July 2007: sections 1 up to and including 11, 13 up to and including 21, 27, 30, 31, 35 up to and

of 1983 is still in operation and continues to regulate aspects relating to child care, until commencement of the relevant sections of the *Children's Act*.<sup>530</sup> The *Children's Act* gives effect to the rights in the Constitution, relating to the care and protection of children.<sup>531</sup> The Act's overarching purpose is to consolidate the currently fragmented child welfare law in South Africa.<sup>532</sup> The object of the *Children's Act* is, in part, to protect children from maltreatment, abuse, neglect, or degradation; to give effect to the Republic's obligations concerning the welfare of children in terms of international instruments binding on the Republic; and generally to promote the protection, development, and well-being of children.<sup>533</sup>

The *Children's Act* criminalises child trafficking.<sup>534</sup> Section 1 of the *Children's Act* defines trafficking, in relation to a child, to mean –

- (a) the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across 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; and
- (b) includes the adoption of a child facilitated or secured through illegal means

The *Children's Act* has extended the definition of trafficking to include the adoption of a child facilitated or secured through illegal means.<sup>535</sup> The three elements constituting the crime of trafficking as set out in the Palermo

---

including 134, 305(1)(b), 305(1)(c), 305(3), 305(4), 305(5), 305(6), 305(7), 307 up to and including 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of Schedule 4. See GN 13 in GG 30030 of 29 June 2007. Chapter 18 of the *Children's Act*, relating to child trafficking, is not yet in operation. See note 33.

<sup>530</sup> Item 4 of Schedule 4 of the *Children's Act* states that the whole of the *Child Care Act* will be repealed when the *Children's Act* comes into operation.

<sup>531</sup> S 28 of the Constitution. See SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Vrancken and Chetty 2009 *Journal of African Law* 132.

<sup>532</sup> Kreston 2007 *Child Abuse Research in South Africa* 42; SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf).

<sup>533</sup> S 2(b),(c)(i) of the *Children's Act*. Section 1 of the *Children's Act* defines a child as a person under the age of eighteen years.

<sup>534</sup> Ss 281, 282 and 284 of the *Children's Act*.

<sup>535</sup> This is in compliance with the Hague Convention. See paragraph 2.5 of this study.

Protocol, namely the action, the means and the purpose of the trafficking, are also present in the definition given in the *Children's Act*.

Section 1 of the *Children's Act* defines exploitation, in general, and specifically commercial sexual exploitation.<sup>536</sup> The *Children's Act* defines exploitation to include all forms of slavery or practices similar to slavery, including debt bondage or forced marriage, sexual exploitation, servitude, forced labour, child labour and the removal of body parts.<sup>537</sup> The removal of body parts is defined as the removal of any organ or other body part from a living person in contravention of the *National Health Act* 61 of 2003.<sup>538</sup> It goes beyond the Palermo Protocol definition, in that it recognises not only the 'removal of organs' but also the 'removal of body parts', as not only organs but also other body parts are used in the making of *muti*.<sup>539</sup>

The term 'child sexual exploitation' involves financial exploitation as well exploitation through taking unfair advantage of a child's vulnerability.<sup>540</sup> The sexual exploitation of children is generally regarded as the use of a child for sexual purposes in exchange for cash or favours between the customer, intermediary or agent and others (parent, family member, procurer, and teacher) that profit from the trade in children for these purposes.<sup>541</sup> It has also been described as the act of engaging or offering the services of a child to perform sexual acts for money or other consideration with that

---

<sup>536</sup> Pharoah 2006 *Institute for Security Studies Monographs* 6; Kreston 2007 *Child Abuse Research in South Africa* 42.

<sup>537</sup> S 1 of the *Children's Act*.

<sup>538</sup> S 1 of the *Children's Act*.

<sup>539</sup> See paragraph 2.3.4.2 of this study.

<sup>540</sup> Koen 2006 [www.womensnet.co.za](http://www.womensnet.co.za); Grobler *Hulpverlening aan die gemolesteerde kind met behulp van speltherapie: 'n Pastorale studie* 46.

<sup>541</sup> UNICEF 2001 [www.unicef.org/eng/publication.html](http://www.unicef.org/eng/publication.html); Koen 2006 [www.womensnet.co.za](http://www.womensnet.co.za). Commercial sexual exploitation of children is defined in section 1 the *Child Care Amendment Act* 13 of 1999 as 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 a child, the procurer or any other person.

person or any other person.<sup>542</sup> Within this description, the child is therefore not committing the act of prostitution but it is the person exploiting the child as well as those who facilitate the exploitation who commit the act of prostitution.<sup>543</sup> According to section 1 of the *Children's Act* commercial sexual exploitation, in relation to a child means 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, payable to or shared with the procurer, the child, the parent or care-giver of the child, or any other person or the trafficking of a child for use in sexual activities, including prostitution or pornography.

According to section 1 of the *Children's Act*, 'child labour' means work by a child which is exploitative, hazardous or otherwise inappropriate for a person of that age and places at risk the child's wellbeing, education, physical and mental health or spiritual, moral, emotional or social development. The significance of these provisions is that the circumstances of the work in question are not only dangerous but also have an impact on the emotional and physical development of a child, thus affording double protection to child labourers.

Until the coming into operation of certain parts, including section 1, of the *Children's Act* on 1 July 2007, there was no statutory definition of child abuse in South African law.<sup>544</sup> The *Children's Act* not only defines abuse in relation to a child, but also sexual abuse, thus providing a clearer definition of child abuse, and affording more protection to children. According to section 1 of the *Children's Act*, abuse, in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child. Harm or ill-treatment, in this context, includes assaulting a child or inflicting any other

---

<sup>542</sup> Koen 2006 [www.womensnet.co.za](http://www.womensnet.co.za); Grobler *Hulpverlening aan die gemolesteerde kind met behulp van speltherapie: 'n Pastorale studie* 45-46.

<sup>543</sup> Koen 2006 [www.womensnet.co.za](http://www.womensnet.co.za).

<sup>544</sup> The definition of abuse is a first in South African law.

form of deliberate injury to a child, sexually abusing a child or allowing a child to be sexually abused, a labour practice that exploits a child, or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally. Sexual abuse, in relation to a child, is further defined to mean sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; encouraging, inducing or forcing a child to be used for sexual gratification of another person; using a child in or deliberately exposing a child to sexual activities or pornography; or procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child.<sup>545</sup>

Since the *Fitzpatrick* case<sup>546</sup> inter-country adoptions have become legal in South Africa.<sup>547</sup> Chapter 16 of the *Children's Act* regulates inter-country adoption.<sup>548</sup> Section 1 of the *Children's Act* states that an adoption facilitated or secured illegal means constitutes child trafficking. The *Children's Act* responds to the concerns raised by the absence of a regulatory framework for inter-country adoptions by incorporating the Hague

<sup>545</sup> S 1 of the *Children's Act* states that an adoption facilitated or secured illegal means constitutes child trafficking

<sup>546</sup> *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 3 SA 139 (C); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC).

<sup>547</sup> The Constitutional Court confirmed a finding of unconstitutionality pertaining to section 18(4)(f) of the *Child Care Act* which prohibited the adoption of South African children by foreigners. The Constitutional Court reasoned that an absolute prohibition on adoptions by foreigners was contrary to the best interests of the child because it deprived the court of the flexibility needed when assessing what is in the best interests of each child. See *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC) at 710 and 721; Couzens M "A very long engagement: The Children's Act 38 of 2005 and The Hague Convention on the protection of children and cooperation in respect of intercountry adoption" 2009 *Potchefstroomse Elektroniese Regs tydskrif* 55; Malherbe 2003 TSAR 460. See note 345.

<sup>548</sup> S 254 of the *Children's Act*. Chapter 16 of the *Children Act* is not yet in operation, and the *Child Care Act* will regulate all child-related matters (including inter-country adoption) until it is wholly repealed by the coming into operation of the *Children's Act*. The provisions of the *Child Care Act* are not suitable to regulate inter-country adoptions. All procedural requirements in respect of adoptions in the *Child Care Act* are tailored to regulate intra-country adoptions. See Mosikatsana TL "www.buyababy.com: Inter-country adoption" 2003 SALJ 115.

Convention.<sup>549</sup> Section 256 of the *Children's Act* states that the provisions of the Hague Convention are law in the Republic of South Africa. Sec 249 further incorporates article 32 of the Hague Convention in that no one may derive improper financial or other gain from an activity related to an inter-country adoption. The *Children's Act* clarifies what constitutes legitimate expenses which may be received by some of those involved in inter-country adoption.<sup>550</sup> According to section 259(3)(a) accredited organisations may receive the prescribed fees and payments necessary in respect of inter-country adoptions.<sup>551</sup> Internet adoption services are a matter of grave concern. This underlines the importance of the strict legislative requirement that applications for adoption may only be submitted through Central authorities or accredited bodies.<sup>552</sup> Adoption agencies whose employees or agents who become involved in illegal adoptions will be persecuted and may have their accreditations revoked.<sup>553</sup> According to section 287, if a court has reasons to believe that the parents or guardians have contributed to the illegal adoption, a children's court inquiry will be held.<sup>554</sup> Section 288 states that illegal adoptions are subject to mandatory reporting, and certain professionals are under a duty to report the cases known to them to a designated social worker.<sup>555</sup>

---

<sup>549</sup> S 256(1) of the *Children's Act*. *Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 32 I.L.M. 1134 (1993), (entered into force May 1, 1995), (henceforth referred to as the Hague Convention). The Hague Convention is attached as schedule 1 to the *Children's Act*. See Couzens 2009 *Potchefstroomse Elektroniese Regstydskrif* 58.

<sup>550</sup> See note 355.

<sup>551</sup> Reg 128(6) of the *Children's Act* Draft Regulations sets out a list of fees payable to accredited organisations that may be established and published in the *Government Gazette*.

<sup>552</sup> S 259 of the *Children's Act*. Section 252 of the *Children's Act* prohibits the publication of children's photographs or their personal details.

<sup>553</sup> S 284 of the *Children's Act*. See Couzens 2009 *Potchefstroomse Elektroniese Regstydskrif* 60.

<sup>554</sup> Pending this inquiry, parental rights and responsibilities may be suspended and the child placed in temporary care. See Couzens 2009 *Potchefstroomse Elektroniese Regstydskrif* 60.

<sup>555</sup> These professionals include immigration officials, police officials, social workers, social service professionals, medical practitioners and registered nurses.



The trafficking provisions are contained in Chapter 18, the purpose of this Chapter being to give effect to the Palermo Protocol, and to combat trafficking in children.<sup>556</sup> Section 283 of the *Children's Act* states that the State President may enter into an agreement with a foreign state not party to the Palermo Protocol in respect of any matter pertaining to child trafficking so as to ensure international communication and co-operation.<sup>557</sup> Section 284 prohibits trafficking in children by any person (natural or juristic), or a partnership. Section 284(1) of the *Children's Act* specifically prohibits any person from trafficking, or allowing to be trafficked, any child. Section 284(2) prohibits the defences of consent of the child and, or, those *in loco parentis*, as well as failure to complete the underlying criminal act, for example sexual exploitation.<sup>558</sup> Behaviour facilitating child trafficking is also criminalised in section 285(1)(a) and (b) of the *Children's Act*.<sup>559</sup> The *Children's Act* further provides for assistance to a child who is a victim of child trafficking.<sup>560</sup> Victim services are overwhelmingly dedicated to issues

<sup>556</sup> Ss 281 and 282 of the *Children's Act*. The Palermo Protocol is attached as schedule 3 to the *Children's Act*. See Kreston 2007 *Child Abuse Research in South Africa* 42; Qaba "Prosecuting Trafficking without Trafficking Laws" 4; Silolo 2006 <http://www.cjei.org/publications.IAW.ppt>; Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Vrancken and Chetty 2009 *Journal of African Law* 133.

<sup>557</sup> This is also to facilitate the application of the principles of extradition and mutual legal assistance found in the Palermo Protocol. See sections 283(1)(a) and (b) of the *Children's Act*; Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>558</sup> See Kreston 2007 *Child Abuse Research in South Africa* 43; Qaba "Prosecuting Trafficking without Trafficking Laws" 4; SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Silolo 2006 <http://www.cjei.org/publications.IAW.ppt>; Vrancken and Chetty 2009 *Journal of African Law* 133.

<sup>559</sup> Section 285 of the *Children's Act* states the following –

(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 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).

<sup>560</sup> S 286 of the *Children's Act*.

of repatriation of victim children to their country of origin,<sup>561</sup> or providing mechanisms for them to remain in South Africa if it is not in the child's best interest to return to their country of citizenship,<sup>562</sup> including the application of the child for asylum under the *Refugee Act*.<sup>563</sup> Section 287 relates to the suspension of parental responsibilities and rights where the child is trafficked by his or her parent, guardian, or other person who has parental responsibilities and rights in respect of the child. Section 288 sets out a list of persons who must report child trafficking victims, including an immigration official, a social worker, a social service professional, a medical practitioner or a registered nurse. Section 289 of the *Children's Act* sets out the procedures to be followed when dealing with a child victim of trafficking.<sup>564</sup>

Section 290 of the *Children's Act* deals with the repatriation of a child who is a victim of trafficking; whereas section 291 provides for extra-territorial jurisdiction which is also asserted over citizens or permanent residents who commit an act outside the Republic that would have constituted an offence in terms of Chapter 18 had it been committed inside the Republic, holding such persons liable on conviction to the penalty set out below in section 305.<sup>565</sup> These provisions do comply with the need for criminalisation,

---

<sup>561</sup> S 286 of the *Children's Act*.

<sup>562</sup> S 290(1)(a),(b),(c) of the *Children's Act*. See Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>563</sup> S 289(2) of the *Children's Act* and section 32 of the *Refugees Act*. See Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>564</sup> Section 289 of the *Children's Act* states the following –

(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); and

(b) may, pending such investigation, be placed in temporary safe care.

(2) If, after an investigation contemplated 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 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.

<sup>565</sup> Kreston 2007 *Child Abuse Research in South Africa* 43; Qaba "Prosecuting Trafficking without Trafficking Laws" 4; SOCA Unit 2006 <http://www.info.gov.za/issues/>

proportionate sentencing and extraterritoriality in accordance with international obligations contained in article 5 of the Palermo Protocol.<sup>566</sup>

Section 305(6) and (7) of the *Children's Act* provides that a person who is guilty of an offence is liable to a fine or imprisonment not exceeding ten years or if convicted more than once liable to fine or imprisonment for a period not exceeding twenty years or both.<sup>567</sup> It is further stated clearly in this section that a person is guilty of an offence if that person commits an act in contravention of the prohibitions set out in sections 285(1) or 284(1).<sup>568</sup> Chapter 9 of the *Children's Act* provides for the administration of justice in children's courts and contains comprehensive provisions for children in need of care and protection.

The *Children's Act* does not mention of any long-term reintegration process,<sup>569</sup> nor does it mention psychological or medical assistance to be given to children.<sup>570</sup> Though prescribing many victim services, without a long-term reintegration process, including psychological or medical assistance, the unique needs of trafficked children cannot be properly met.<sup>571</sup> There is also no provision for the identification of the trafficked child as a victim of crime.<sup>572</sup> By failing to have measures in place to identify trafficked children as victims of crime, and to prevent their being charged with any offences they may have committed as a result of being trafficked, the *Children's Act* does not afford the full protection of trafficked children

---

humantrafficking/documents/laws\_bills.pdf; Silolo 2006 <http://www.cjei.org/publications.IAW.ppt>; Vrancken and Chetty 2009 *Journal of African Law* 133-134.

<sup>566</sup> Kreston 2007 *Child Abuse Research in South Africa* 43.

<sup>567</sup> See Vrancken and Chetty 2009 *Journal of African Law* 134.

<sup>568</sup> S 305(1)(r),(s) of the *Children's Act*.

<sup>569</sup> Article 39 of the CRC provides for the physical and psychological recovery and social reintegration where such child was a victim to any form of abuse or exploitation.

<sup>570</sup> This can be seen as contrary to article 6(3)(c) of the Palermo Protocol which states that each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims trafficking in persons, and, in particular, the provision of medical, psychological and material assistance.

<sup>571</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>572</sup> As required by article 16(2) of the *African Children's Charter* and article 7(d) of *Convention 182*

that it sets out to do.<sup>573</sup> The *Children's Act* has also been criticised for a number of other flaws.<sup>574</sup> In reference to its trafficking provisions, one such omission is its failure to recognise the importance of specialisation for members of the multi-disciplinary team tasked with implementing this legislation.<sup>575</sup> Neither dedicated units within law enforcement and prosecution, nor even specialised training to those who will deal with these cases is mandated. Without such specialisation, or additional training, the best interest of child victims will not be served.<sup>576</sup>

### 3.3.7 *Children's Amendment Act 41 of 2007*

The objective of the *Children's Amendment Act 41 of 2007*<sup>577</sup> is to amend the *Children's Act*.<sup>578</sup> Amendments include sections to provide for partial care of children,<sup>579</sup> to provide for early childhood development<sup>580</sup> and provisions regarding the protection of children.<sup>581</sup> Section 191 (2)(e) of the *Children's Amendment Act* specifically provides for a child and youth care centre which must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for the reception and temporary safe care of

---

<sup>573</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>574</sup> Commentators have criticised it as a pale shadow of its original intent, and one suffering from critical excisions and general omissions. It can be inferred from this that the *Children's Act* was meant to be more comprehensive, but does not live up to this encompassing ideal. Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>575</sup> Article 10(2) of the Palermo Protocol reads that "State 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 organisations, other relevant organisations and other elements of civil society".

<sup>576</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>577</sup> Henceforth referred to as the *Children's Amendment Act*.

<sup>578</sup> SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf).

<sup>579</sup> S 76 up to and including 90 of the *Children's Amendment Act*.

<sup>580</sup> S 91 up to and including 103 of the *Children's Amendment Act*.

<sup>581</sup> S 104 up to and including 141 of the *Children's Amendment Act*.

trafficked or commercially sexually exploited children.<sup>582</sup> This is necessary for the reintegration of child victims into society and treatment of physical, mental and emotional abuse of child victims of trafficking. The *Children's Amendment Act* is also aimed at creating certain new offences relating to children and providing for matters connected therewith, for example trafficking in children.<sup>583</sup>

### 3.3.8 Other legislation

A number of other pieces of legislation may be used to prosecute activities that may constitute trafficking conduct.<sup>584</sup>

The *Immigration Act* prohibits the entry of certain persons into the Republic,<sup>585</sup> while various provisions of the *Intimidation Act*<sup>586</sup> and the

---

<sup>582</sup> See SOCA Unit 2006 [http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf); Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>.

<sup>583</sup> Section 285 is amended to include –  
 (1) An internet service provider that identifies a site on its server that contains information in contravention of section 285(1)(b) of the Act, must submit information concerning such site to the South African Police Service that has jurisdiction in a form substantially corresponding with Form 79.  
 (2) Upon receipt of the information contained in the form referred to in subregulation (1), the South African Police Service must investigate the matter with a view to laying a charge in terms of section 285(1) of the Act.

<sup>584</sup> Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>.

<sup>585</sup> Section 29 of the *Immigration Act* specifies the prohibited persons from entering the Republic; whereas section 30 of the *Immigration Act* specifies the undesirable persons prohibited from entering the Republic. These persons include, *inter alia*, persons convicted of murder, kidnapping etc. By allowing prohibited or undesirable persons into the Republic, such person could revert to child trafficking. Prohibiting undesirable persons entry into the Republic is a measure of preventing child trafficking.

<sup>586</sup> Section 1 of the *Intimidation Act* states that any person who-  
 (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-  
     (i) assaults, injures or causes damage to any person; or  
     (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or  
 (b) acts or conducts himself 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 thereof would be, that a person perceiving the act, conduct, utterance or publication-

*Prevention and Combating of Corrupt Activities Act* <sup>587</sup> *Corruption Act* may be used creatively as the context dictates.<sup>588</sup> The *Riotous Assemblies Act* may be invoked in framing conspiracy<sup>589</sup> and incitement charges.<sup>590</sup> Section 18 of the *Riotous Assemblies Act* may further be invoked, in respect of an attempt to commit an offence and may be invoked in the context of child trafficking as such.<sup>591</sup> A person who attempts to traffic a child may thus be prosecuted in terms of section 18.

The *Immigrations Amendment Act*<sup>592</sup> provides that no person shall enter into or depart from South Africa other than at a port of entry and that a foreigner who does not have permanent residency to be in the country may only enter by having a passport or temporary residence permit.<sup>593</sup> This provision is necessary to control persons entering and leaving South Africa

- 
- (i) fears for his own safety or the safety of his property or the security of his 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 shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment". This section can be used in the context of child trafficking in the sense that child victims of trafficking are often assaulted, physically injured or fear for their livelihood at the hands of their traffickers. Thus a trafficker will be guilty of an offence if he or she commits one of the above mentioned offences.

<sup>587</sup> Section 1 of the *Prevention and Combating of Corrupt Activities Act* may be used to prosecute corrupt border officials who accept bribes from traffickers in the process of transporting child victims of trafficking illegally across the borders.

<sup>588</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 33; Qaba 2006 <http://www.gov.info.za/issues/humantrafficking/strategy.html>; Qaba "Prosecuting Trafficking without Trafficking Laws" 3; Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf).

<sup>589</sup> Conspiracy to injure a third party (child victim of trafficking) is a delict if it causes damage to the person (child) against whom the conspiracy is aimed. Traffickers will conspire in the process of trafficking a child, from the point of getting the child, the transportation of the child and the subsequent exploitation of the child victim of trafficking. See Martin *Dictionary of Law* 107.

<sup>590</sup> A trafficker may persuade, force or even make use of a threat to convince other persons (for example border officials) to take part in the offence of trafficking. See Kenny 2006 [http://www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf); Qaba "Prosecuting Trafficking without Trafficking Laws" 3; Qaba "Prosecuting Trafficking without Trafficking Laws" 3.

<sup>591</sup> See SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 74.

<sup>592</sup> *Immigrations Amendment Act* 19 of 2004, (henceforth referred to as the *Immigrations Amendment Act*).

<sup>593</sup> S 9 of the *Immigrations Amendment Act*.

with regard to the prevention of child trafficking.<sup>594</sup> Section 29 further states that foreigners who have warrants outstanding or a conviction from South Africa or another country relating to genocide, terrorism, murder, torture, drug trafficking, money laundering or kidnapping may be prohibited from acquiring temporary or permanent residency. A foreigner who is associated with being a member of a group using crime or terrorism to pursue its ends shall also be prohibited from entering the country.<sup>595</sup> Section 30 provides that a foreigner who is a fugitive from justice is termed an undesirable person and may be refused entry into the country. Section 35 further provides that an immigration officer may arrest an illegal foreigner without a warrant and detain him or her in a manner and at a place prescribed and determined by the District-General. These border control provisions can all be used in the attempt to prevent child trafficking. Certain persons with outstanding warrants or convictions who are questionable in character may be refused entry into South Africa.<sup>596</sup> This provision may be used as a preventative measure in respect of crime in general and also the lucrative market for child trafficking. A member of a criminal group may also be refused entry into South Africa.<sup>597</sup> This is an important preventative measure as child traffickers are commonly known to operate in organised criminal groups. An immigration officer also has the authority to arrest any illegal foreigner in the event of a suspicion that the person is a child trafficker.

The *Witness Protection Act*<sup>598</sup> may also play a role in the crime of child trafficking as rescued child victims (as witnesses) will need protection when testifying in court against their traffickers. The Witness Protection Unit was redesigned and transformed specifically to meet the challenges of the crime

---

<sup>594</sup> Without border control measures, a trafficker will be able to traffic children freely across the borders.

<sup>595</sup> S 29 of the *Immigrations Amendment Act*.

<sup>596</sup> S 38 of the *Immigrations Amendment Act*.

<sup>597</sup> S 30 of the *Immigrations Amendment Act*.

<sup>598</sup> *Witness Protection Act* 112 of 1998.

of trafficking, and is guided by the principles set out in the Constitution and the fundamental rights found in the Bill of Rights.<sup>599</sup>

The *Domestic Violence Act*<sup>600</sup> can also be applicable in the context of child trafficking when taking into consideration the fact that a parent of a child victim has certain responsibilities in respect of such child victim.<sup>601</sup> Domestic violence allows for the inclusion of a variety of forms of abuse, intimidation, harassment, as well as any other controlling behaviour.<sup>602</sup> These forms of violence are used to control child victims of trafficking and to submit them to the will of their traffickers, in the event of the traffickers being the parents or guardians of the child victim. Although the *Domestic Violence Act* 116 of 1998<sup>603</sup> does not define the term 'child abuse', it may be of some assistance in identifying various forms of abuse. Section 1 of the *Domestic Violence Act* recognises abuse as including 'emotional, verbal and psychological abuse', 'physical abuse' and 'sexual abuse'.<sup>604</sup> According to this section 'emotional, verbal and psychological abuse' is defined as a pattern of degrading or humiliating conduct towards a complainant.<sup>605</sup> Physical abuse means any act or threatened act of physical violence towards a complainant, while sexual abuse is defined as any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant.<sup>606</sup> The term 'child' is not used in any of the definitions relating to the forms of 'abuse' and the definitions are

---

<sup>599</sup> Chapter 2 of the Constitution. This is in compliance with article 24 of the *Convention against Transnational Organised Crime* and article 6(1) of the Palermo Protocol with regard to protection of witnesses. See Adam "The Role of Witness Protection in Trafficking Prosecutions" 1-2.

<sup>600</sup> *Domestic Violence Act* 116 of 1998.

<sup>601</sup> Silolo 2006 <http://cjei.org/publications.IAW.ppt>.

<sup>602</sup> S 1 of the *Domestic Violence Act*. See Silolo 2006 <http://cjei.org/publications.IAW.ppt>.

<sup>603</sup> Henceforth referred to as the *Domestic Violence Act*.

<sup>604</sup> See Bonthuys E "Spoiling the child: Domestic violence and the interests of children" 1999 SAJHR 315.

<sup>605</sup> S 1 of the *Domestic Violence Act*. These include repeated insults, ridicule or name calling; repeated threats to cause emotional pain or the repeated exhibition of obsessive progressiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security.

<sup>606</sup> S 1 of the *Domestic Violence Act*.



directed at the 'complainant'. This in turn does not provide adequate protection for children who are vulnerable to abuse. Child abuse can thus be interpreted as these forms of abuse relating to persons under eighteen, however, children require additional protection.

The *Promotion of Equality and Prevention of Unfair Discrimination Act*<sup>607</sup> aims to give effect to the spirit of the Constitution, including the equal enjoyment of all rights and freedoms by every person and the promotion of equality<sup>608</sup> and the values of non-racialism and non-sexism.<sup>609</sup> The Act also aims to promote constitutional values as to prevent unfair discrimination<sup>610</sup> and protect the human dignity of all persons.<sup>611</sup> This is important in the context of child trafficking as the human dignity of child victims is violated in the event of physical and emotional abuse.

The *Refugees Act*<sup>612</sup> provides for principles and standards relating to refugees.<sup>613</sup> Section 32 explicitly states that any unaccompanied foreign minor who is found under circumstances that indicate that he or she is in need, must be brought before the Children's Court and assisted to apply for asylum.<sup>614</sup> This provision applies to foreign child victims who find themselves in South Africa.

The *Basic Conditions of Employment Act* 75 of 1997<sup>615</sup> CEA makes it an offence to employ children under fifteen years or who are under minimum

---

<sup>607</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

<sup>608</sup> S 1(a) of the Constitution.

<sup>609</sup> S 1(b) of the Constitution.

<sup>610</sup> S 9 of the Constitution.

<sup>611</sup> S 10 of the Constitution.

<sup>612</sup> *Refugees Act* 130 of 1998.

<sup>613</sup> Silolo 2006 <http://cjei.org/publications.IAW.ppt>; RAPCAN 2003 [http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf).

<sup>614</sup> The child will then be placed in temporary safe care until a durable long-term solution can be decided upon.

<sup>615</sup> Henceforth referred to as the *BCEA*.

school leaving age.<sup>616</sup> Thus trafficking children for the purpose exploitative labour practices is an offence in terms of this provision. No child may be employed in any kind of work that is inappropriate for the age of that child and which places the child's well being, education, physical or mental health, spiritual, moral or social development at risk,<sup>617</sup> as this constitutes an exploitative labour practice. Section 48 further prohibits forced labour.<sup>618</sup>

### 3.4 *Proposed legislation*

Whether existing statutory legislation and common law already cover the offences that are included in the Palermo Protocol's definition of trafficking,<sup>619</sup> is not the determining factor.<sup>620</sup> In South Africa, some have argued that there is no need for introduction of trafficking legislation and that virtually all elements of trafficking are already illegal, and simply generating more legislation is unlikely to revolutionise the situation.<sup>621</sup> However, given the complexity of identifying the appropriate legal provisions that need to be applied to any particular case, it may be argued that there exists need for a single piece of legislation that encapsulates all the above provisions, with alterations where necessary.<sup>622</sup> This would create the specific crime of trafficking, and thereby provide the legal framework to investigate and prosecute trafficking with more ease and focus.<sup>623</sup> A separate penal provision against trafficking could make the regulatory

---

<sup>616</sup> S 43 of the *BCEA*.

<sup>617</sup> S 43 of the *BCEA*. For example, employment of trafficked children in the sex industry is prohibited as this kind of employment is not appropriate for children and will be detrimental to the child's well being, physical and mental health, spiritual, moral and social development and educational opportunities.

<sup>618</sup> Trafficked children are forced into employment, usually with little or no remuneration.

<sup>619</sup> A 3 of the Palermo Protocol.

<sup>620</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 57.

<sup>621</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 37; Pithey 2004 *SA Crime Quarterly* 9; Legget 2004 [http://iom.org.za/site/index.php?option=com\\_docman&task=doc\\_view&gid=71](http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=71).

<sup>622</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 37; Pithey 2004 *SA Crime Quarterly* 9.

<sup>623</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 37-38; Pithey 2004 *SA Crime Quarterly* 9.

framework clearer and easier to work with, and could shorten the time needed to investigate possible traffickers, and it may shorten the length of trails.<sup>624</sup> In addition, the principle of legality demands a clear regulatory framework.<sup>625</sup> Although South African legislation on trafficking in children must also adhere to international standards, it must be relevant to local circumstances.<sup>626</sup>

The introduction of trafficking legislation is not only a proclamation stating that trafficking is unacceptable, but may also work as a good example that other countries will follow and copy.<sup>627</sup> This is important because the movement to combat trafficking must take place on an international level due to the fact that traffickers often operate across borders and trafficking in children affects their human rights on a global scale.<sup>628</sup> No other southern African nation has a specific crime of trafficking in human beings, and specifically trafficking in children, leaving South Africa to set the benchmark for this region.<sup>629</sup> It can also lead the way in providing more, better and accurate research on this issue.<sup>630</sup> It is now government's responsibility to implement trafficking legislation that reflects a two-prong response to the problem of child trafficking; one that holds the traffickers completely accountable for their criminal acts and results in sentences that reflect the atrocious nature of the crime, and that simultaneously addresses the

---

<sup>624</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 39.

<sup>625</sup> The principle of legality (*nullum crimen sine lege* or no crime without a law) means that an act is lawful if it is not prohibited by law or precedent. See Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 39.

<sup>626</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 45; Stuurman 2004 [http://iom.org.za/site/index.php?option=com\\_docman&task=doc\\_view&gid=71](http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=71).

<sup>627</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 42.

<sup>628</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 42.

<sup>629</sup> Kreston 2007 *Child Abuse Research in South Africa* 50.

<sup>630</sup> Kreston 2007 *Child Abuse Research in South Africa* 50.

multiplicity of unique needs of those children victimised by such traffickers.<sup>631</sup>

While there has been debate regarding whether South Africa needs a specific law criminalising trafficking in persons, it is unquestionably obligated to do so under existing international agreements.<sup>632</sup> Both the Palermo Protocol and the Optional Protocol on Children create obligations to prevent child trafficking, to protect child victims of trafficking and prosecute those who traffic in children.<sup>633</sup> Although these instruments have highlighted the problem of trafficking in persons, their enforcement remains a challenge to the authorities.<sup>634</sup> In light of these obligations the *Trafficking Bill* has been created.<sup>635</sup>

#### 3.4.1 *Trafficking in Persons Bill B of 2006*

The South African Law Reform Commission issued a trafficking in persons discussion paper in 2006,<sup>636</sup> which drew on the earlier issue paper,<sup>637</sup> and the *Trafficking Bill* was the result of this action. The relevant trafficking

---

<sup>631</sup> Kreston 2007 *Child Abuse Research in South Africa* 50; Asquith and Turner 2008 [http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf).

<sup>632</sup> Pithey B "Do New Crimes need New Laws" 2004 *SA Crime Quarterly* 2004 *SA Crime Quarterly* 9; Singh D. "Piercing the Veil on trafficking in Women" 2004 *The Comparative and International Law Journal of South Africa* 3; Kreston 2007 *Child Abuse Research in South Africa* 40; Pharoah 2006 *Institute for Security Studies Monographs* 40; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 29; SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March 2004 4.

<sup>633</sup> Refer to paragraph 3.3.2.1 for the Optional Protocol on Children and paragraph 3.3.41 for the Palermo Protocol. See Kreston 2007 *Child Abuse Research in South Africa* 40; Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 29; SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March 2004 4.

<sup>634</sup> Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking* 29; SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March 2004 4.

<sup>635</sup> As discussed in paragraph 3.3.5 of this study, the transitional provisions in the *Criminal Law Amendment Act* also aim to eradicate trafficking, with emphasis on sexual exploitation, in an attempt to comply with international obligations. See Kreston 2007 *Child Abuse Research in South Africa* 40.

<sup>636</sup> SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006.

<sup>637</sup> SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March 2004.

provisions in the *Children's Act* and the *Criminal Law Amendment Act* will be simultaneously repealed by passage of the *Trafficking Bill*.<sup>638</sup> The *Trafficking Bill* begins by identifying, in the Preamble, poverty and unemployment as the main causes of trafficking.

Child trafficking covers a wide range of forms. These forms include different actions,<sup>639</sup> means,<sup>640</sup> and purposes<sup>641</sup> for which a child is trafficked. Clarity concerning the term child trafficking is needed to form the basis of criminal laws adopted by national legislatures.<sup>642</sup>

The *Trafficking Bill* defines trafficking as follows:<sup>643</sup>

- (a) the recruitment, sale, supply, procurement, capture, removal, transportation, transfer, harbouring or receipt of persons, within or across the borders of the Republic—
  - (i) by any means, including the use of threat, force, intimidation 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 or authority over another person; or
  - (ii) by abusing vulnerability,
- for the purpose of exploitation;
- (b) includes the adoption of a child facilitated or secured through illegal means.

The definition of trafficking as defined in the *Children's Act*, shows similarities with the definition of the *Trafficking Bill*. However, the definition contained in the *Trafficking Bill* contains three additional actions, namely the procurement, capture and removal of persons. The definition contained in the *Children's Act* pertains only to children, whereas the one set out in the *Trafficking Bill* pertains to all persons, including children. One of the means

---

<sup>638</sup> S 47 and Schedule 1 of the *Trafficking Bill*.

<sup>639</sup> For example recruitment, sale, supply of children etc.

<sup>640</sup> For example coercion, deception, abuse of power etc.

<sup>641</sup> The main purpose being exploitation of the child.

<sup>642</sup> This clarity concerning the term 'child trafficking' envisaged in national legislation must include the different actions and means by which a child can be trafficked, as well as the different purposes for which a child may be trafficked. The *Trafficking Bill* proposes in clause 1 that a child be defined as a person under the age of eighteen years. See Zikkenheiner "International Perspectives and the Role of Organised Crime in Trafficking" 3.

<sup>643</sup> Cl 1 of the *Trafficking Bill*.

of trafficking involves a position of vulnerability. A further difference between the two definitions is that of a position of vulnerability. The *Children's Act* uses the phrase 'due to a position of vulnerability', indicating only that a vulnerable disposition must be present. The *Trafficking Bill* uses the phrase 'by abusing vulnerability', thus being indicative that the vulnerable position of a person must be abused. South Africa will adopt a broader definition of trafficking that does not require the involvement of organised crime groups. The requirement of involvement of organised crime groups is not always present in South African trafficking situations. Children may be sold by parents or guardians with the hope of giving the child a better chance in life in more favourable conditions than the poverty stricken circumstances in which they are living.<sup>644</sup>

The *Trafficking Bill* defines exploitation to include all forms of slavery or practices similar to slavery, including debt bondage or forced marriage, sexual exploitation, servitude, forced labour, child labour and the removal of body parts.<sup>645</sup> The *Trafficking Bill* defines sexual exploitation as the participation of a person in prostitution or other sexual acts, or the production of pornographic material as a result of being subjected to threat, force, intimidation or other forms of coercion or any other practice in terms of which it cannot be said that the person participated voluntarily.<sup>646</sup>

---

<sup>644</sup> Pharoah 2006 *Institute for Security Studies Monographs* 6; Goliath "Human Trafficking: Southern African Perspective" 26; Mashau *Towards a strategy for poverty alleviation in Mashau* 2, 8, 11, 21; King T "The modern slave trade" 2002 *University of California, Davis Journal of International Law* 299, 305; Jullien K "The recent international efforts to end commercial sexual exploitation of children" 2002-2003 *Denver Journal of International Law and Policy* 583; Bevilacqua 1998-1999 *ILSA Journal of International and Comparative Law* 172; Bravo KE "Exploring the analogy between modern trafficking in Humans and the Trans-Atlantic slave trade" 2007 *Boston University International Law Journal* 289; Nagle LE "Selling souls: The effect of globalisation on human trafficking and forced servitude" 2008 *Wisconsin International Law Journal* 138, 145.

<sup>645</sup> Cl 1 of the *Trafficking Bill*.

<sup>646</sup> Cl 1 of the *Trafficking Bill*.

Certain terms used in the definitions of 'exploitation' need further clarification, including 'slavery', 'debt bondage' and 'the removal of body parts'. Neither the terms 'slavery' nor 'debt bondage' are defined in the *Children's Act* or the *Criminal Law Amendment Act*. The only definitions of these terms can thus be found in the *Trafficking Bill*. Clause 1 of the *Trafficking Bill* defines slavery as the exercise of any or all of the powers attaching to the right of ownership over a person. Clause 1 of the *Trafficking Bill*, which defines 'debt bondage' as -

the status or condition that arises from a pledge by a person—

- (a) of his or her personal services; or
- (b) of 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:

- (i) the debt owed or claimed to be owed is manifestly excessive;
- (ii) the value of those services as reasonably assessed is not applied toward the liquidation of the debt or purported debt; or
- (iii) the length and nature of those services are not respectively limited and defined.

The *Trafficking Bill*, like the *Children's Act*, defines the removal of body parts as the removal of any organ or other body part from a living person in contravention of the *National Health Act* 61 of 2003.<sup>647</sup> This definition goes beyond the Palermo Protocol definition, in that it recognises not only the 'removal of organs' but also the 'removal of body parts', as not only organs but also other body parts are used in the making of *muti*.<sup>648</sup>

Clause 1 of the *Trafficking Bill* defines the term 'forced labour' as labour or services obtained or maintained through threats, the use of force, intimidation or other forms of coercion, or physical restraint. It can therefore be inferred that forced labour practices involve some form of abuse of the child, which requires that the term 'abuse' also be defined.

---

<sup>647</sup> Cl 1 of the *Trafficking Bill*.

<sup>648</sup> See paragraph 2.3.4.2 of this study.

The *Trafficking Bill* goes further by defining what is meant by 'abuse of vulnerability'. Clause 1(e) of the *Trafficking Bill* defines the term 'abuse of vulnerability' for the purpose of the definition of trafficking, to mean such 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 reduced capacity to form judgements by virtue of being a child.<sup>649</sup>

The only South African definition of a 'victim of trafficking' can be found in clause 1 of the *Trafficking Bill* where a 'victim of trafficking' is defined as any person who is a victim of the offence of trafficking in persons.<sup>650</sup> Neither the *Criminal Law Amendment Act*, the *Child Care Act* nor the *Children's Act* define a 'victim of trafficking' or a 'child victim of trafficking'. A definition of who is deemed to be a victim of trafficking is necessary in order to make a distinction between a victim of trafficking and a person who is smuggled across a border.

The *Trafficking Bill* specifically criminalises trafficking,<sup>651</sup> including using the services of a victim of trafficking.<sup>652</sup> The *Trafficking Bill* also criminalises other acts relating to the crime of trafficking in persons, for example debt bondage,<sup>653</sup> the destruction, confiscation, possession and concealment of

---

<sup>649</sup> Cl 1 of the *Trafficking Bill*.

<sup>650</sup> The *United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, G.A. Res 40/34, art 1, U.N. Doc A/Res/40/34 (Nov. 29, 1985) defines 'victims of a crime' as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States. See Mattar MY "Incorporating the five basic elements of a model antitrafficking in persons legislation in domestic laws: From the United Nations Protocol to the European Convention" 2005-2006 *Tulane Journal of International and Comparative Law* 380.

<sup>651</sup> Cl 5(1) of the *Trafficking Bill*.

<sup>652</sup> Cl 8 of the *Trafficking Bill*.

<sup>653</sup> Cl 6 of the *Trafficking Bill*.



documents;<sup>654</sup> and conduct facilitating trafficking in persons.<sup>655</sup> The *Trafficking Bill* also sets out a definition of trafficking, which is broader than the definition set out in the Palermo Protocol.<sup>656</sup> This definition is broader definition of trafficking in the sense that it includes circumstances such as debt bondage, and the destruction or concealment of identification or travel documentation.<sup>657</sup>

The *Trafficking Bill* has a prevention component, addressing both informing and educating persons at risk of becoming victims of trafficking, as well as informing and educating victims of trafficking on their rights.<sup>658</sup> The *Trafficking Bill* also calls for state action to discourage the demand that fosters the exploitation of victims of trafficking, especially women and children,<sup>659</sup> though it does not identify the cause or causes of such demand.<sup>660</sup> Clause 27 of the *Trafficking Bill* provides for monetary awards to the victim for, *inter alia*, damage to or the loss or destruction of property, including money; physical, psychological or other injury and loss of income or support.<sup>661</sup> Clause 38(1) of the *Trafficking Bill* provides sanctions that are similar to those stipulated in the *Children's Act* for trafficking.<sup>662</sup> Clause 38(4) further allows for up to two years imprisonment for using the services of a victim. While there is no mention of specialised training or units, both

---

<sup>654</sup> Cl 7 of the *Trafficking Bill*.

<sup>655</sup> Cl 9 of the *Trafficking Bill*.

<sup>656</sup> See paragraph 2.3.4.2 of this study.

<sup>657</sup> CIs 6 and 7 of the *Trafficking Bill*.

<sup>658</sup> Cl 37(a),(b) of the *Trafficking Bill*. See Kreston 2007 *Child Abuse Research in South Africa* 44.

<sup>659</sup> Cl 37(c) of the *Trafficking Bill*. See Kreston 2007 *Child Abuse Research in South Africa* 44.

<sup>660</sup> Kreston 2007 *Child Abuse Research in South Africa* 44.

<sup>661</sup> See Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>662</sup> S 305 of the *Children's Act*. Clause 38(1) of the *Trafficking Bill* states that "a person convicted of trafficking in persons is liable to a fine or imprisonment for a period not exceeding twenty years or to both such fine or imprisonment". See Kreston 2007 *Child Abuse Research in South Africa* 45; Stuurman "Recommendations for New Legislation in South Africa" 1.

international co-operation and extra-territorial jurisdiction are asserted in clauses 42 and 43 respectively.<sup>663</sup>

The *Trafficking Bill* proposes certain victim services which are to be provided.<sup>664</sup> Initially, the identification and protection of victims is dealt with in clause 13, including a specific provision for dealing with a child victim.<sup>665</sup> In clause 15 the legal status of the victim is specifically dealt with, suspending any summary deportation of a victim, though whether or not the victim will be prosecuted for any crimes committed as a direct result of being trafficked is left to the discretion of the Director of Public Prosecution, as set out in clause 11. Though the victim is accorded the same right to medical treatment as citizens as can be seen in clause 14, there is no provision for any specialised treatment for children, in severe contrast to the providing of entire centres for adult victims.<sup>666</sup> Clause 33(1) provides for repatriation of child victims, and makes provision for ascertaining whether the child will be safe and cared for if returned to his or her country of origin.

While the *Trafficking Bill* does address prevention, prosecution and protection of the victims, and should fulfil South Africa's international obligations, there are still noticeable gaps and omissions in its coverage.<sup>667</sup> The *Trafficking Bill* has three main areas of concern, which will be discussed below.

#### 3.4.1.1 Prevention of child trafficking

By failing to acknowledge all the causes of trafficking, particularly trafficking in children, the *Trafficking Bill* fails to provide an all-encompassing plan for

---

<sup>663</sup> See Goliath "Human Trafficking: Southern African Perspective" 27.

<sup>664</sup> Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>665</sup> See Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>666</sup> Cl 21 of the *Trafficking Bill*. See Kreston 2007 *Child Abuse Research in South Africa* 45.

<sup>667</sup> Kreston 2007 *Child Abuse Research in South Africa* 50.

eradication of the crime.<sup>668</sup> Causes of trafficking should be included, for example gender discrimination and poverty, as to avoid the impression that it is only an economic crime. By ignoring the role that universal misogyny plays in the crime of trafficking, and in all crimes of violence against women and children, the *Trafficking Bill* fails to make use of the opportunity to bring a vital dynamic behind this crime into the open.<sup>669</sup> It has been acknowledged that a second important root cause, which makes children vulnerable to abuse and neglect more generally, as well as in the case of trafficking, is the deeply patriarchal culture which encompasses the South African society.<sup>670</sup> Rigid social constructions of masculinity and femininity and an extremely traditional culture consign women and children to positions of being owned, and therefore disposable at the impulse of the owner.<sup>671</sup> There is a sense of entitlement around sex and sexual activity – almost as though that's what women and children are there for, and they shouldn't complain about it.<sup>672</sup>

---

<sup>668</sup> Kreston 2007 *Child Abuse Research in South Africa* 46; RAPCAN 2003 [http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf).

<sup>669</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

<sup>670</sup> Kreston 2007 *Child Abuse Research in South Africa* 46; Mogosetsi *Black men's experiences regarding women's and children's rights: A social work perspective* 13; Truong and Angeles 2005 <http://unesdoc.unesco.org/images/0013/001384/138447E.pdf>; SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30 June 2006 56; Coetzee D "South African education and the ideology of patriarchy" 2001 *South African Journal of Education* 300; UNICEF 2003 <http://www.unicef-irc.org/publications/pdf/insight9e.pdf>; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>; UNESCO 2007 [http://portal.unesco.org/shs/en/ev.php-url\\_id=11357&url\\_do=do\\_printpage&url\\_section=201.html](http://portal.unesco.org/shs/en/ev.php-url_id=11357&url_do=do_printpage&url_section=201.html); Community Agency for Social Enquiry 2005 <http://www.case.org.za/Child%20sexual%20abuse%20and%20exploitation%20in%20South%20Africa.pdf>.

<sup>671</sup> Kreston 2007 *Child Abuse Research in South Africa* 46; Mogosetsi *Black men's experiences regarding women's and children's rights: A social work perspective* 13, 16; Bonthuys E and Curren E "Customary law and domestic violence in rural South African communities: Notes and comments" 2005 *SAJHR* 607-635; Oraegbunam IKE "From patriarchy to women empowerment: Socio-religious challenges and prospects" 2006 *Gender and Behaviour* 863; Hawthorne S "Men's patriotic wars against women's intimate lives: Patriarchy, the institution of heterosexuality and patriotism" 2006 *African Safety Promotion* 22-23; Truong and Angeles 2005 <http://unesdoc.unesco.org/images/0013/001384/138447E.pdf>; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>.

<sup>672</sup> "A woman's use is twofold: animal sex and motherhood". See Oraegbunam 2006 *Gender and Behaviour* 854; Bravo 2007 *Boston University International Law Journal* 247; Kreston 2007 *Child Abuse Research in South Africa* 46; Truong and Angeles

Furthermore, until poverty, unemployment, gender discrimination, and child abuse and exploitation are properly addressed, victims and their families will continue to make a cost or benefit analysis of the risks inherent to trafficking.<sup>673</sup> Simply educating the community on trafficking issues will not eradicate the problem and education alone will not prevent child trafficking.<sup>674</sup> Not only must potential victims be educated about trafficking, but they must believe that there exists the opportunity to better their lives without resorting to being trafficked. On the other hand, perpetrators must be promptly prosecuted and severely punished, to eradicate simultaneously both supply and demand, as deterrence is served by both prevention and prosecution.<sup>675</sup>

#### 3.4.1.2 Prosecution of child traffickers

The two concerns that are raised about the prosecution of traffickers occur at the beginning and the end of the prosecution process.<sup>676</sup> Initially, trafficking cases should come to a specialist, but unfortunately, the *Trafficking Bill*, like the *Children's Act* and the *Criminal Law Amendment Act*, fails to require specialised personnel with specialised training. While recognising that not all jurisdictions, particularly rural ones, may be able to support personnel exclusively dedicated to pursuing traffickers, nevertheless, the need for specialist training in this newly recognised form of child abuse is beyond question.<sup>677</sup> Unique crime dynamics and victim

---

2005 <http://unesdoc.unesco.org/images/0013/001384/138447E.pdf>; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>.

<sup>673</sup> Mashau *Towards a strategy for poverty alleviation in Mashau* 2, 8, 11, 21; UNESCO 2007 <http://unesdoc.unesco.org/images/0015/001528/152823E.pdf>.

<sup>674</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

<sup>675</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

<sup>676</sup> Kreston 2007 *Child Abuse Research in South Africa* 46.

<sup>677</sup> The value of such expertise cannot be emphasised enough. Kreston 2007 *Child Abuse Research in South Africa* 46; Martens, Pieczkowski and van Vuuren-Smyth 2003 <http://www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf>; International Association of Prosecutors 2002 [http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model\\_Guidelines.htm](http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model_Guidelines.htm); Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

needs must be understood and responded to in an adapted fashion, as this will allow for better investigation, more successful prosecution and adjudication, and less secondary trauma to victims of the offence of trafficking.<sup>678</sup> Ensuring specialisation would follow other jurisdictions' practices and protocols.<sup>679</sup> The Organisation for Security and Co-operation in Europe suggests that tasks of such units should include the development and use of effective investigation and prosecution methods, as well as the co-ordination of anti-trafficking activities in co-operation with other national authorities.<sup>680</sup> They should also establish or strengthen cooperation with their counterparts in other countries, as well as relevant regional and international organisation.<sup>681</sup> These units should focus particularly on combating trafficking in persons and these units should comprise of both women and men with advanced training in investigating offences involving sexual assault or involving children, in order to promote competence, professionalism and integrity.<sup>682</sup>

At the opposite end of the prosecution field, the second concern is the possibility of excessively lenient sanctions at sentencing.<sup>683</sup> Clause 38(1) of

---

<sup>678</sup> Kreston 2007 *Child Abuse Research in South Africa* 46; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>679</sup> Within the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE) recommends creation of specialised units within each member state to investigate and prosecute trafficking cases. See Kreston 2007 *Child Abuse Research in South Africa* 46; Kartusch 2001 [http://www.osce.org/publications/odihr/2001/09/12357\\_136\\_en.pdf](http://www.osce.org/publications/odihr/2001/09/12357_136_en.pdf).

<sup>680</sup> Kreston 2007 *Child Abuse Research in South Africa* 46-47; Kartusch 2001 [http://www.osce.org/publications/odihr/2001/09/12357\\_136\\_en.pdf](http://www.osce.org/publications/odihr/2001/09/12357_136_en.pdf).

<sup>681</sup> Kreston 2007 *Child Abuse Research in South Africa* 47; Kartusch 2001 [http://www.osce.org/publications/odihr/2001/09/12357\\_136\\_en.pdf](http://www.osce.org/publications/odihr/2001/09/12357_136_en.pdf); UNODC 2008 [http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-9375_Ebook[1].pdf).

<sup>682</sup> Topics of instruction might include knowledge of international and national anti-trafficking laws, evidence gathering, proper contact with the victim and victim protection issues. The accompanying specialist prosecution training might include instruction on types of evidence found in these cases, admissibility issues and the role victim contact and protection can play in securing victim cooperation and testimony. See Kreston 2007 *Child Abuse Research in South Africa* 47; OSCE 2003 [http://www.osce.org/documents/pc/2003/07/724\\_en.pdf](http://www.osce.org/documents/pc/2003/07/724_en.pdf); ICMPD 2003 [http://www.icmpd.org/fileadmin/IIMS-documents/ICMPD/POL\\_SEE/Summary\\_Report\\_2nd\\_seminar.pdf](http://www.icmpd.org/fileadmin/IIMS-documents/ICMPD/POL_SEE/Summary_Report_2nd_seminar.pdf).

<sup>683</sup> Kreston 2007 *Child Abuse Research in South Africa* 47.

the *Trafficking Bill* provides for imprisonment of up to twenty years, or a fine, or both, which corresponds with sanctions set out in section 305(8) of the *Children's Act*. The twenty-year maximum is in keeping with other common law jurisdictions,<sup>684</sup> though a very troubling provision elsewhere in the *Trafficking Bill* would appear to demean this. In dealing with compensation, the Bill states:<sup>685</sup>

The court may suspend the sentence imposed for any offence under this Act on condition of the payment of appropriate compensation to the victim of the offence provided that the court finds it appropriate to do so.

Allowing even the possibility of a trafficker avoiding imprisonment on condition of the payment of appropriate monetary compensation to the victim of the offence is unacceptable.<sup>686</sup> This creates the impression that imprisonment can be avoided for a certain sum of money. The appropriate remedy is both imprisonment and compensation, as this alone reflects the seriousness of the crime, the harm done to the victim, as well as serving the community's interest in eradicating this inhumane crime.<sup>687</sup>

The fact that the *Trafficking Bill* has no specific provision for asset confiscation, seizure, and forfeiture further complicates the victim's chances of meaningful and immediate restitution.<sup>688</sup> As many of these children may be foreign, there is no serious likelihood of them seeking civil redress in the

---

<sup>684</sup> For example, in Canada and the United States, it is up to life imprisonment; in New Zealand it is fifteen years; in Australia it is fifteen years, or nineteen years when children are victims; and in the United Kingdom, which does not have specific trafficking legislation, it is fourteen years. See Kreston 2007 *Child Abuse Research in South Africa* 47-48.

<sup>685</sup> CI 27(4) of the *Trafficking Bill*.

<sup>686</sup> Kreston 2007 *Child Abuse Research in South Africa* 48.

<sup>687</sup> Kreston 2007 *Child Abuse Research in South Africa* 48.

<sup>688</sup> Imprisonment is not the only appropriate criminal sanction that can be imposed on a trafficker. Effective anti-trafficking legislation must also provide for the forfeiture of assets. See article 12 of the *Convention against Transnational Organised Crime*; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 378; Kreston 2007 *Child Abuse Research in South Africa* 48.

South African civil courts.<sup>689</sup> Criminal confiscation and liquidation of the trafficker's property may be the only truly accessible, viable source of compensation for the victim.<sup>690</sup>

Lastly, there is a disturbing disparity between the sanctions available for those who supply the trafficking victim and the ultimate consumer of this criminal activity, who use the services of the victim.<sup>691</sup> The maximum punishment prescribed for those who intentionally and unlawfully benefit, financially or otherwise, from the services of a victim is two years, as set out in clause 38(4) of the *Trafficking Bill*. Both supply and demand must be eradicated, with punishment meted out on both sides of the exploitation equation with equal severity.<sup>692</sup>

#### 3.4.1.3 Protection of child victims of trafficking

The Palermo Protocol gives no specific guidance as to the special measures that should be undertaken to provide for the special needs of children who have been trafficked,<sup>693</sup> the United Nations has established the seven measures for governments to follow with respect to protecting trafficked children.<sup>694</sup> The first of these measures is the establishment of procedures for the rapid identification of child victims to ensure that they are not prosecuted. The second measure entails the adoption of measures to protect the rights and interests of children during all stages of the criminal proceedings against their traffickers as well as during any compensation proceedings. Thirdly, the privacy and the identity of child victims should be

---

<sup>689</sup> Kreston 2007 *Child Abuse Research in South Africa* 48; United States Department of State 2006 <http://www.state.gov/g/tip/rls/tiprpt/2006/65983.htm>.

<sup>690</sup> Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 394-395; Kreston 2007 *Child Abuse Research in South Africa* 48.

<sup>691</sup> Kreston 2007 *Child Abuse Research in South Africa* 48.

<sup>692</sup> Kreston 2007 *Child Abuse Research in South Africa* 48.

<sup>693</sup> See articles 3(c) and 6(4) of the Palermo Protocol; Mattar 2005-2006 *Tulane Journal of International and Comparative Law* 366.

<sup>694</sup> UNICEF 2006 <http://www.childtrafficking.org>.

protected. The fourth measure is to take steps to locate family members when the child victim is unaccompanied. The fifth measure is to establish adequate care arrangements that respect the rights and dignity of the trafficked children when it is not possible to return them to their country of origin.<sup>695</sup> The sixth measure is to provide children with specialised care that includes appropriate physical, psychological, legal, and educational support as well as appropriate housing.<sup>696</sup> Lastly it must be ensured that personnel assigned to provide assistance to child victims are legally and psychologically trained and educated.<sup>697</sup>

Using this standard, the first measure, regarding identifying child victims, may be seen to be addressed in part by the designation of certain mandated reporters within the child care professional community and procedures that has to be taken immediately upon identification of child victims.<sup>698</sup> However, the *Trafficking Bill* fails to ensure that child victims are not prosecuted, though any prosecution of a victim of trafficking must be authorised by the National Director of Public Prosecutions.<sup>699</sup> No measures are stipulated to protect the child victim's rights, such as appointing a guardian *ad litem* or appointing counsel for the child, nor are steps set out to locate family members of the child victims.<sup>700</sup> While it is contemplated that some children cannot be returned to their country of origin due to safety concerns,<sup>701</sup> no specific arrangements are stipulated regarding transition of the child into South Africa, other than those cited regarding assisting the

---

<sup>695</sup> UNICEF 2006 <http://www.childtrafficking.org>; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>696</sup> UNICEF 2006 <http://www.childtrafficking.org>; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>697</sup> Kreston 2007 *Child Abuse Research in South Africa* 48; Economic and Social Council 2001 <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/6508dd49face738ac1256aaa002880c3?Opendocument>; UNICEF 2006 <http://www.childtrafficking.org>; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>698</sup> Cl 12(1), (4)(b)(i) of the *Trafficking Bill*.

<sup>699</sup> Cl 11 of the *Trafficking Bill*.

<sup>700</sup> Kreston 2007 *Child Abuse Research in South Africa* 49.

<sup>701</sup> Cl 33(1) of the *Trafficking Bill*.



child in applying for asylum,<sup>702</sup> nor for transitioning a South African child back into the community.<sup>703</sup> Additionally, there are no provisions made for the privacy and the identity of the child being protected.<sup>704</sup>

While there is a very basic provision for those health care services available to citizens being equally available to victims,<sup>705</sup> there is no provision for any specialised care that addresses the unique needs of child victims of trafficking.<sup>706</sup> No regard is given to the highly unique psychological, legal, educational or even physical care required for these victims.<sup>707</sup> Just as no specialisation is implemented for the child's care, neither is there specialised training for their care providers, which is also noticeable by its absence.<sup>708</sup> If the front line carers are not properly trained, particularly in the dynamics of trafficking and the child victim's rights, it will be impossible for them to provide proper assistance to these survivors, potentially resulting in re-victimisation through ignorance.<sup>709</sup>

Lastly, summary deportation and provision for repatriation are specifically addressed in the *Trafficking Bill*.<sup>710</sup> Child victims of trafficking are entitled to apply for a non-renewable sixty-day suspension of deportation, regardless of whether they cooperate with pending trafficking investigations,<sup>711</sup> or a

---

<sup>702</sup> Cl 13(2) of the *Trafficking Bill*.

<sup>703</sup> Kreston 2007 *Child Abuse Research in South Africa* 49.

<sup>704</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>705</sup> Cl 14 of the *Trafficking Bill*.

<sup>706</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf); Asquith and Turner 2008 [http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf).

<sup>707</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf); Asquith and Turner 2008 [http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf).

<sup>708</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; Asquith and Turner 2008 [http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf).

<sup>709</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; ILO 2006 <http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf>.

<sup>710</sup> Kreston 2007 *Child Abuse Research in South Africa* 49.

<sup>711</sup> Cl 15(1)(b) of the *Trafficking Bill*.

visitor's permit for temporary residency, if they are cooperating with law enforcement and prosecutors.<sup>712</sup> However, without guaranteed legal representation, in at least the form of a guardian *ad litem*, these provisions may prove difficult for children to access.<sup>713</sup> Regardless, repatriation of the child victim is dependant on an assessment of the child's safety, both during repatriation and once in the country to which the child is returned, including the possibility of re-victimisation, and as such meets minimum requirements for compliance.<sup>714</sup>

### 3.5 Concluding remarks

The existing legal measures that can be applied to prosecute offences relating to trafficking in children are not sufficient to combat trafficking or to protect victims of trafficking effectively. The need for comprehensive legislation in relation to trafficking in children is evident. By ratifying the Palermo Protocol, South Africa is obliged to criminalise trafficking.

Chapter 18 of the *Children's Act* criminalises child trafficking. However, as the provisions of this chapter are not yet in operation, it cannot be used to prosecute traffickers or effectively protect children from trafficking. Child trafficking, through illegal adoptions, is addressed in Chapter 16 of the *Children's Act*, thus incorporating the Hague Convention into national law. Once Chapter 16 and 18 of the *Children's Act* comes into operation, international obligations to criminalise child trafficking will be partially complied with.

The *Criminal Law Amendment Act* criminalises trafficking in persons, but not child trafficking specifically, and only in the context of sexual

---

<sup>712</sup> Cl 16(1) of the *Trafficking Bill*.

<sup>713</sup> Kreston 2007 *Child Abuse Research in South Africa* 49; Pearson 2002 [http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf).

<sup>714</sup> Cl 33(1)(a)-(d) of the *Trafficking Bill*.

exploitation. It can only be inferred that children are also protected by this Act as reference is made to trafficking by means of abuse of a position of vulnerability.<sup>715</sup>

It must be noted, that neither the *Children's Act* nor the *Criminal Law Amendment Act* will bring South Africa into compliance with its international obligations. The *Trafficking Bill*, once promulgated will bring South Africa in compliance with international obligations. However, rules, regulations and policies will have to be created to ensure effective protection of child victims of trafficking, the prevention of child trafficking and the prosecution of child traffickers.

---

<sup>715</sup> Children are viewed to hold a vulnerable position in society.

#### 4 Conclusion and recommendations

In keeping with the aim of this study, namely to determine whether South Africa complies with its international obligation to criminalise child trafficking by using current and proposed legal measures with regard to child trafficking as a threshold, the current legal situation and shortcomings will be summarised.

Various international instruments, with regard to child trafficking, which have been ratified by South Africa demand that certain international obligations must be complied with. The most prominent of these is the Palermo Protocol that calls on ratifying states, including South Africa, to criminalise the offence of trafficking and to implement national legislation, policies and measures to prevent trafficking, prosecute traffickers and protect victims of trafficking.<sup>716</sup>

Section 28 of the Constitution provides only a framework and this framework needs to be filled in by comprehensive trafficking legislation to prevent child trafficking, prosecute traffickers and protect child victims of trafficking, in accordance with the obligation placed on South Africa by the Palermo Protocol to criminalise trafficking. The current legal measures are fragmented and complications may arise in searching for applicable legislation in child trafficking cases.

It is recommended that the trafficking provisions of the *Criminal Law Amendment Act*<sup>717</sup> must be applied, and Chapter 18 of the *Children's Act*<sup>718</sup>

---

<sup>716</sup> A 5 of the Palermo Protocol. *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001) (entered into force Dec. 25, 2003).

<sup>717</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

<sup>718</sup> *Children's Act* 38 of 2005.

must become fully operable, until such time that the *Trafficking Bill*<sup>719</sup> becomes legislation and the former are repealed. Enactment of the provisions of the *Criminal Law Amendment Act* and future enactment of Chapter 18 of the *Children's Act*, however flawed,<sup>720</sup> will constitute a step in the right direction to fulfil South Africa's international obligation of criminalising child trafficking. The *Trafficking Bill* must be promulgated as law and, together with necessary rules and regulations, will bring South Africa in line with international minimum standards and enable South Africa to fully comply with its international obligations in an effort to eliminate child trafficking.

The principles embodied in the Constitution and the international instruments with regard to child trafficking, should underlie all legislative reform. South Africa has legislative and policy frameworks, but is lacking in the administrative, social and educational frameworks or measures, as well as implementation obligations. A strategy for South Africa will only be sustainable if the different departments of state, the business sector, non-governmental organisations, private individuals and the justice system, work together to combat child trafficking. Most importantly, child protection units dealing specifically with child victims of trafficking must be instituted as to ensure the protection and reintegration of child victims into society.

To fully comply with international obligations, proposed legislation, must include at a minimum, a comprehensive definition of trafficking; measures to prevent child trafficking, trained officials to investigate and prosecute such crime; and support and protection for child victims of trafficking. The proposed trafficking legislation should address both inter-country and cross-border trafficking in persons and the scope of the proposed trafficking legislation should not be limited to offences that are transnational in nature

---

<sup>719</sup> *Trafficking Bill B* of 2006.

<sup>720</sup> See paragraphs 2.4.1 of this study.

and which involve organised criminal groups as provided for in article 4 of the Palermo Protocol. Further measures must include protection for foreign children who have been trafficked to South Africa and mechanisms for repatriation procedures.

There are no common law provisions in South Africa that deal with child trafficking *per se*. The statutory provisions that are currently in place in South Africa to address child trafficking is inadequate and do not fully comply with the international obligation to criminalise such offence.<sup>721</sup> Although significant efforts are being made, South Africa does not fully comply with the international minimum standards for the elimination of child trafficking.<sup>722</sup>

Trafficking is a growing and extremely complex problem. International cooperation between international organisations, different countries and non-governmental organisations must work together in an effort to combat the trafficking of children. There is no doubt that South Africa needs comprehensive and achievable anti-child trafficking legislation. However, enacting laws without giving the law enforcement agents the necessary education and training to deal with child trafficking cases, will not address the problem. The challenge lies therein that the government provides sufficient funding to enable the implementation and enforcement of all trafficking legislation in order to fully comply with international obligations. Enacting trafficking legislation alone will not address the child trafficking situation in South Africa effectively. One of the root causes of trafficking, namely poverty, will never be eliminated completely<sup>723</sup> and alternative measures must be investigated to eradicate child trafficking. Limited state

---

<sup>721</sup> Thus, the reason for South Africa's placement on the Tier Two Watch List for a fourth consecutive year for its failure to show increasing efforts to address trafficking.

<sup>722</sup> This is another reason for South Africa's placement on the Tier Two Watch List for a fourth consecutive year. See paragraph 3.1 of this study.

<sup>723</sup> Greater equality in resource allocation will alleviate poverty to a certain extent. This can be done through better security of tenure, restitution and land reform programmes.

resources and financial implications will not only constrain attempts to eradicate this root cause, but will also constrain preventative and protective measures.

Financial input is needed to instruct trafficking officials and to construct safe child care centres for child victims of trafficking. Basic necessities of child victims must be immediately met, including water, food, shelter and education.<sup>724</sup> Skills and training must be provided to trafficking officials working in such centres, in order to provide the appropriate medical and physiological care for child victims of trafficking. Medical practitioners and psychologists must be specifically trained to help child victims of trafficking who suffered physical and emotional abuse at the hands of their traffickers. Reintegration programmes must be initiated in order for child victims of trafficking to return and function normally in society, without the fear of being trafficked again. The identity of child victims of trafficking must be protected at all times. Child victims of trafficking do not always understand the language of a country, in the case of cross-border trafficking. Interpreters must be trained to specifically communicate with such children on an empathetic level.

Police units, specialising in trafficking, must be incorporated in order to investigate offences of trafficking and thus enabling more effective prosecution of traffickers.<sup>725</sup> It is recommended that training should be provided for border officials to identify and assist child victims of trafficking. Children travelling alone or with another person, other than a parent, should be investigated for possible trafficking. Passports and other travelling

---

<sup>724</sup> The State does not have the necessary resources to meet these needs of child victims of trafficking.

<sup>725</sup> In order for effective prosecution of traffickers, the necessary trafficking legislation must first be enacted to provide for the offence of trafficking. Without such promulgation, traffickers will once again be prosecuted for common law and certain statutory crimes.

documents must be closely inspected to prevent forgery of such documents.

As state resources are limited in South Africa, child trafficking trust funds can be created. Private donations from individuals or companies can then be made to such trusts. These donations must be used to care for the basic needs of child victims. Donations can also be applied for educating and training of trafficking officials<sup>726</sup> The public should be made aware of such opportunity to donate by newspaper, radio and television advertisements. A further initiative to gain financial resources would be for a company to donate a certain amount of money to such trafficking trust funds every time one of their products is bought.<sup>727</sup>

*Data collection on trafficking activities must take place on an effective scale in order to determine the extent of trafficking.*<sup>728</sup> This will enable the government to develop programmes aimed at satisfying the specific needs of child victims of trafficking and the best manner to proceed in investigating and prosecuting traffickers. Another problem is that of language. Data collection will also be useful in determining the trafficking network in South Africa, and appropriate prevention strategies and measures can be developed to prevent these clandestine networks from functioning. People, and especially children, must be actively made aware of what trafficking is and what the consequences of such offence are. This can be done through information brochures,<sup>729</sup> billboards, newspaper and television

---

<sup>726</sup> This will include border officials, interpreters, specialised trafficking police units, medical practitioners, social workers and psychologists.

<sup>727</sup> For example, for every Elizabeth Anne product bought, a certain amount of the purchasing price is donated to the Avril Elizabeth Children's Home.

<sup>728</sup> One of the reasons South Africa is on the Tier Two Watch list is failure to provide comprehensive data on investigations on trafficking, prosecutions and conviction of traffickers. See paragraph 3.1 of this study.

<sup>729</sup> Air France dispenses information brochures to passengers who are boarding planes heading for possible sex tourism destinations. In these brochures passengers are made aware of the fact that they may possibly be victims of trafficking and the risks and consequences attached to human trafficking.



advertisements and spokespersons visiting schools and educating the children on the drastic effects of trafficking.<sup>730</sup> Awareness campaigns should be relevant to local circumstances.<sup>731</sup>

In conclusion, it is clear that South Africa does not fully comply with its international obligations with regard to child trafficking. Once the above law reform has taken place, and the necessary rules, regulations and policies are adopted and implemented, South Africa will fully comply with international obligations to criminalise child trafficking.

There is a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of child trafficking see little of life before they see the very worst of life – an underground of brutality and lonely fear. New energy must be showed in fighting an old evil.<sup>732</sup>

---

<sup>730</sup> In the United States of America a website was created ([www.assetcampaign.org](http://www.assetcampaign.org)) to prevent the use of child labour in the production of consumer goods, child labour being one of the purposes of trafficking. Companies are required to respond to e-mails stating whether or not they are making use of child labour in the manufacturing of their products. Sadly, only eighteen of the hundred and sixty four companies responded thus far, denying the use of child labour in their manufacturing process. The use of such information can lead to a choice by society whether or not to buy products from companies making use of child labour.

<sup>731</sup> In Haiti, for example, billboards proclaim the effects of trafficking, but most of the population is illiterate. Thus the awareness campaigns are ineffective in such society as the billboards cannot be read and understood. In 2007, South Africa's soccer team, the Kaizer Chiefs, wore t-shirts bearing a counter-trafficking message and the IOM's national trafficking hotline phone number during a nationally televised pre-game warm up. See Tavella AM "Sex trafficking and the 2006 World Cup in Germany" 2007-2008 *Northwestern Journal of International Human Rights* 216. With the view on the 2010 Fifa Soccer World Cup being held in South Africa, the same strategy can be implemented in warm up games in an effort to create public awareness of child trafficking.

<sup>732</sup> As quoted by Smith L and Mattar MY "Creating international consensus on combating trafficking in persons: U.S. policy, the role of the UN, and global responses and challenges" 2004 *Fletcher Forum of World Affairs* 155-156.

## Bibliography

### Books

#### B

- Branford and Branford *A Dictionary of South African English*  
Branford J and Branford W *A Dictionary of South African English*  
(Oxford University Press Cape Town 1991)

#### C

- Centre for Human Rights *The Rights of the Child*  
Centre for Human Rights *The Rights of the Child* (United Nations  
Geneva 2006)

#### D

- Davel *Child Law in South Africa*  
Davel CJ *Introduction to Child Law in South Africa* (Juta Cape  
Town 2000)  
Detrick *Commentary on the UN CRC*  
Detrick S *A commentary on the United Nations Convention on the  
Rights of the Child* (Martinus Nijhoff Publishers London 1999)  
Dugard *International Law*  
Dugard J *International Law – A South African Perspective* 3<sup>rd</sup> ed  
(Juta Cape Town 2005)

#### H

- Heyns and Killander *Key Human Rights Document of the AU*  
Heyns C and Killander M *Compendium of Key Human Rights  
Documents of the African Union* 2<sup>nd</sup> ed (Pretoria University Law  
Press Pretoria 2006)  
Hodgkin and Newell *Implementation Handbook for the CRC*  
Hodgkin R and Newell P *Implementation Handbook for the  
Convention on the Rights of the Child* 2<sup>nd</sup> ed (Atar South Africa 1998)  
Hornby *Oxford Advanced Learner's Dictionary*  
Hornby AS *Oxford Advanced Learner's Dictionary of Current English*  
6<sup>th</sup> ed (Oxford University Press Oxford 2000)  
Juta's Statutes Editors *The Constitution of the Republic of South Africa*  
Juta's Statutes Editors *The Constitution of the Republic of South  
Africa* 5<sup>th</sup> ed (Juta Law Cape Town 2007)

#### K

- Kittichaisaree *International Criminal Law*  
Kittichaisaree K *International Criminal Law* (Oxford University Press  
London 2004)

#### M

- Martin *Dictionary of Law*  
Martin EA (ed) *A Dictionary of Law* (Oxford University Press Oxford  
2002)

Müller, Hollely and van der Merwe *Prosecuting the Child Sex Offender*  
Müller K, Hollely K and van der Merwe A *Prosecuting the Child Sex Offender* (Printrite Port Elizabeth 2001)

## **S**

Skinner A *Crime so Monstrous*  
Skinner EB A *Crime so Monstrous* (Mainstream Publishing Edinburgh 2008)

Snyman *Criminal Law*

Snyman CR *Criminal Law* 4<sup>th</sup> ed (LexisNexis Butterworths Durban 2002)

## **V**

Van Bueren *International Documentation on Children*

Van Bueren G *International Documentation on Children* (Martinus Nijhof Publishers Dordrecht 1993)

Van Bueren *International Law on the Rights of the Child*

Van Bueren G *The International Law on the Rights of the Child* (Martinus Nijhof Publishers Dordrecht 1995)

## **W**

Wallace and Dale-Risk *International Human Rights*

Wallace R and Dale-Risk K *International Human Rights Text and Materials* (Sweet and Maxwell London 2001)

## **Case law**

*Bannatyne v Bannatyne* (Commission for Gender Equality as Amicus Curiae) 2003 2 SA 363 (CC)

*Binga v Administrator-General, South-West Africa, and Others* 1984 3 SA 949 (SWA)

*Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 6 SA 50(T)

*De Gree and Another v Webb and Others* (Centre for Child Law as Amicus Curiae) 2007 5 SA 184 (SCA)

*De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 1 SACR 448 (W)

*Du Toit and Another v Minister of Welfare and Population Development and Others* (Lesbian and Gay Equality Project as Amicus Curiae) 2003 2 SA 198 (CC)

*Fitzpatrick v Minister of Social Welfare and Pensions* 2000 3 SA 139 (C)

*Fletcher v Fletcher* 1948 1 SA 130 (A)

*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)

*Hay v B and Others* 2003 3 SA 492 (W)

*Hlophe v Mahlalela and Another* 1998 1 SA 449 (T)

*K v K* 1999 4 SA 691 (C)

*Maluleke v Minister of Internal Affairs* 1981 1 SA 707 (B)

*Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 7 BCLR 713 (CC); 2000 3 SA 422 (CC)

*National Director of Public Prosecutions v Phillips and Others* 2002 4 SA 60 (W)

*Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 All SA 24 (A)

*Petersen v Maintenance Officer, Simon's Town Maintenance Court, and Others* 2004 2 SA 56 (C)

*Phillips and Others v National Director of Public Prosecutions* 2003 6 SA 447 (SCA).

*S v Makwanyane* 1995 3 SA 391 (CC)

*S v Tuhadeleni and Others* 1969 1 All SA 327 (A)

*South African Islands Development Corporation Ltd v Buchan* 1971 1 SA 234 (C)

*Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 2 SA 279 (T)

*Tshwete v Minister of Home Affairs (RSA)* 1988 4 SA 586 (A)

### ***Contributions at conferences***

#### *Published papers*

Allais C "An overview of human trafficking in Sub-Saharan Africa"  
in the RECLISA Conference on *Putting Children First* 4-6 July 2006  
Johannesburg 1-13

Goliath P "Human Trafficking: Southern African Perspective"  
in IAWJ International Biennial Conference on *Equal Justice for all: Access, Discrimination, Violence, Corruption* 25-28 March 2008  
Panama 1-38

ILO "Child Labour - Targeting the Intolerable"  
in International Labour Conference 86<sup>th</sup> session 1998 Geneva, 24-26

Kramer K "United Nations Convention against Transnational Organised Crime and its Protocols" in the Seminar for SADC Countries on the *Ratification and Implementation of the United Nations Convention against Transnational Organised Crime* 23-25 September 2003  
Johannesburg 1-10

#### *Unpublished papers*

Adam D "The Role of Witness Protection in Trafficking Prosecutions"  
(Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives Conference 17 August 2007 Bloemfontein) 1-3

- Kreston S "Trafficking in Human Beings: An overview and Global Perspective" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives 17 August 2007 Bloemfontein) 1-4
- Nikolovska M "Identifying and Assisting Victims of Trafficking" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives 17 August 2007 Bloemfontein) 1-17
- Qaba NR "Prosecuting Trafficking without Trafficking Laws" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives 17 August 2007 Bloemfontein) 1-5
- Solomons P "Trafficking in Children in South Africa – A Front Line Perspective" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives Conference 17 August 2007 Bloemfontein) 1-6
- Stuurman L "Trafficking in Children" (Unpublished paper delivered at the Conference on Aspects of the Children's Act 38 of 2005 24 October 2007 Pretoria) 1- 10
- Stuurman L "Recommendations for New Legislation in South Africa" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives Conference 17 August 2007 Bloemfontein) 1-8
- Zikkenheiner W "International Perspectives and the Role of Organised Crime in Trafficking" (Unpublished paper delivered at the Conference on Trafficking in Human Beings: National and International Perspectives 17 August 2007 Bloemfontein) 1-10

### ***Government publications***

GN 13 in GG 30030 of 29 June 2007

### ***International Labour Organisation instruments***

*I.L.O Convention 138 Concerning the Minimum Age for Admission to Employment*

*I.L.O Convention 138 Concerning the Minimum Age for Admission to Employment* (1973) (adopted on June, 26, 1973, and entered into force June 19, 1976) [accessed at <http://fletcher.tufts.edu/multi/texts/BH623.txt>]

*I.L.O Convention 29 Concerning Forced or Compulsory Labour*

*I.L.O Convention 29 Concerning Forced or Compulsory Labour*, June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932)

*I.L.O Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*

*I.L.O Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, June 17, 1999, 38 I.L.M. 1207 (1999) (adopted on June 17, 1999, and entered into force Nov. 19, 2000)

### **League of Nations instruments**

*International Agreement for the Suppression of the White Slave Traffic*

*International Agreement for the Suppression of the White Slave Traffic*, May 18, 1904, 92 U.N.T.S. 19; 35 Stat. 1979 1 L.N.T.S. 83

*International Convention of the Suppression of the White Slave Traffic*

*International Convention of the Suppression of the White Slave Traffic*, May 4, 1910, 98 U.N.T.S. 101; 211 Consol. T.S. 45, 103 B.F.S.P. 244

*Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*

*Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention*, Sept. 25, 1926, 46 Stat. 2183, U.S. No. 778, 60 L.N.T.S. 253 (entered into force March 9, 1927)

*International Convention for the Suppression of the Traffic in Women and Children*

*International Convention for the Suppression of the Traffic in Women and Children*, Sept. 30, 1921, 9 L.N.T.S. 416

*International Convention for the Suppression of the Traffic in Women of Full Age*

*International Convention for the Suppression of the Traffic in Women of Full Age*, Oct. 11, 1933, 53 U.N.T.S. 49; 150 L.N.T.S. 431

### **Regional instruments**

*African Charter on Human and People's Rights*

*African Charter on Human and People's Rights*, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58, 60 (1982)

*African Charter on the Rights and Welfare of the Child*

*African Charter on the Rights and Welfare of the Child* OAU Doc CAB/LEG/24.9/49 of July 1990 (entered into force on Nov. 29, 1999)

### **United Nations instruments**

*Convention on the Rights of the Child*

*Convention on the Rights of the Child*, Nov. 20, 1989, G.A. Res. 14/25, U.N. G.A.O.R. 44<sup>th</sup> Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1448 (1989), 1577 U.N.T.S. 3 (1989) (entered into force Nov. 2, 1990)

*Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*

*Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Dec.2, 1949, 96 U.N.T.S. 271, 282 (entered into force July 25, 1951)

*International Covenant on Civil and Political Rights*

*International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. G.A.O.R., 21<sup>st</sup> Sess., 999 U.N.T.S. 171 (opened for signature Dec. 16, 1966, and entered into force March 23, 1976)

*International Covenant on Economic, Social and Cultural Rights*

*International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3

*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

*Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/54/49

*Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime*

*Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime*, U.N. G.A.O.R., 55<sup>th</sup> Sess., Annex III, U.N. Doc. A/55/383; 40 I.L.M. 335, 384-85 (2001) (entered into force Jan. 28, 2004)

*Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*

*United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* of Nov. 15, 2000

*Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*

*Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, U.N. Doc. A/Res/55/25 (2001) (entered into force Dec. 25, 2003)

*Rome Statute of the International Criminal Court*

*Rome Statute of the International Criminal Court*, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1988, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999

*Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*

*Supplementary Convention to the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, adopted by a Conference of Plenipotentiaries, Sept 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 40 (entered into force Apr. 30, 1957)

*United Nations Convention against Transnational Organised Crime*

*United Nations Convention against Transnational Organised Crime*, G.A. Res. 25, Annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) (entered into force Sept. 29, 2003)

*United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*

*United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, G.A. Res 40/34, art 1, U.N. Doc A/Res/40/34 (Nov. 29, 1985)

### **Internet Sources**

Allais C 2005 Human trafficking as 21<sup>st</sup> century form of slavery  
<http://www.freerepublic.com/focus/f-news/1322431/posts> [date of use 23 January 2008]

Anon 2000 Southern Africa  
[http://www.stopchildtrafficking.org/site/Southern\\_Africa](http://www.stopchildtrafficking.org/site/Southern_Africa) [date of use 23 January 2008]

Anon 2002 Child traffic claims "false"  
[http://www.news24.com/News24/South\\_Africa](http://www.news24.com/News24/South_Africa) [date of use 23 January 2008]

Anon 2005 Child Trafficking Projects in southern Africa offering Refuge  
[http://www.stopchildtrafficking-org/site/southern\\_africa.172.0.html](http://www.stopchildtrafficking-org/site/southern_africa.172.0.html)  
[date of use 23 January 2008]

Asquith S and Turner E 2008 Recovery and reintegration of children from the effects of Sexual Exploitation and related trafficking  
[http://www.oakfnd.org/activities/2007/recovery\\_and\\_reintegration\\_english.pdf](http://www.oakfnd.org/activities/2007/recovery_and_reintegration_english.pdf) [date of use 12 March 2009]

BBC World Service 2006 Story of Africa  
<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9chapter4.html> [date of use 23 June 2008]

Becker E 1999 Chronology of the history of slavery  
<http://www.innercity.org/holt/slavechron.html> [date of use 23 June 2008]

Benjamin J 2006 Child trafficking rampant in South Africa  
<http://www.stolenchildhood.net/entry/child-trafficking-rampant-in-south-africa> [date of use 25 January 2008]

Bronwyn K 2005 Child trafficking  
<http://www.mzansiafrika.blogspot.com> [date of use 25 January 2008]



- Community Agency for Social Enquiry 2005 Child sexual abuse and exploitation in South Africa  
<http://www.case.org.za/Child%20sexual%20abuse%20and%20exploitation%20in%20South%20Africa.pdf> [date of use 20 April 2009]
- Community Law Centre 2007 Submissions on minimum sentences  
<http://www.communitylawcentre.org.za/Childrens-Rights/01Article-40/article-40-archives/article-40-july07.pdf> [date of use 12 March 2009]
- Council of Europe 2005 Council of Europe Convention on action against human beings and its explanatory report  
<http://www.coe.int/trafficking.pdf> [date of use 30 April 2008]
- Economic and Social Council 2001 Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council  
<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/6508dd49fae738ac1256aaa002880c3?Opendocument> [date of use 13 November 2008]
- Hosken G 2007 Child trafficking a concern in South Africa  
<http://www.humantrafficking.org/updates/562> [date of use 23 January 2008]
- ICMPD 2003 Programme for the development of an anti-trafficking training module for police  
[http://www.icmpd.org/fileadmin/IIMS-documents/ICMPD/POL\\_SEE/Summary\\_Report\\_2nd\\_seminar.pdf](http://www.icmpd.org/fileadmin/IIMS-documents/ICMPD/POL_SEE/Summary_Report_2nd_seminar.pdf) [date of use 13 November 2008]
- ILO 2006 Child-friendly standards and guidelines for the recovery and integration of trafficked children  
<http://www.ilo.org/public/english/region/asro/bangkok/library/download/pub06-04.pdf> [date of use 12 March 2009]
- International Association of Prosecutors 2002 Model guidelines for the effective prosecution of crimes against children  
[http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model\\_Guidelines.htm](http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model_Guidelines.htm) [date of use 13 November 2008]
- International Human Rights Law Group 2002 The annotated guide to the complete UN Trafficking Protocol  
[www.oas.org/atip/reports/traff\\_annoprotocol.pdf](http://www.oas.org/atip/reports/traff_annoprotocol.pdf) [date of use 30 April 2008]
- IRIN 2006 South Africa: Open borders for child traffickers  
<http://www.alertnet.org/thenews/newsdesk/IRIN/aa81a2cd1e8e8709442c642d058C5299.htm> [date of use 23 January 2008]
- Kartusch A 2001 Reference guide for anti-trafficking legislative review with particular emphasis on South Eastern Europe  
[http://www.osce.org/publications/odihr/2001/09/12357\\_136\\_en.pdf](http://www.osce.org/publications/odihr/2001/09/12357_136_en.pdf) [date of use 13 November 2008]

Kenny M 2006 Trafficking in persons for the purpose of sexual exploitation: Relevant case studies and practical application of the current legal framework

[www.info.gov.za/issues/humantrafficking/documents/case\\_studies.pdf](http://www.info.gov.za/issues/humantrafficking/documents/case_studies.pdf) [date of use 30 April 2008]

Kiremire MK 2004 Research report on children and young women in prostitution, pornography and trafficking for commercial sexual exploitation, labour and crime in Zambia

[www.childtrafficking.com/docs.kiremire\\_2004\\_trafficking\\_research\\_report.pdf](http://www.childtrafficking.com/docs.kiremire_2004_trafficking_research_report.pdf) [date of use 28 April 2008]

Koen K 2005 Children on the edge: Strategies towards an integrated approach to combat child sexual exploitation in South Africa

<http://www.womensnet.co.za> [date of use 26 January 2008]

Kotu-Rammopo M 2008 South Africa's strategy to counter human trafficking  
[www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe](http://www.npa.gov.za/UploadFiles/HumanTraffickingProgramMeMe) [date of use 12 March 2009]

Kreston S 2006 Trafficking in human beings: International conventions, protocols and charters

[www.cjei.org/publications/lAWJ.ppt](http://www.cjei.org/publications/lAWJ.ppt) [date of use 30 April 2008]

Legget T 2004 Hidden Agendas – The risk of human trafficking legislation

[http://iom.org.za/site/index.php?option=com\\_docman&task=doc\\_view&gid=71](http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=71) [date of use 15 November 2008]

Lifson A 2002 Voices of the slave trade

<http://www.neh.gov/news/humanities/2002-03/voices.html> [date of use 23 June 2008]

Martens J, Pieczkowski M and van Vuuren-Smyth B 2003 Seduction, sale and slavery: Trafficking in women and children for sexual exploitation in Southern Africa

<http://www.queensu.ca/samp/migrationresources/gender/documents/martens.pdf> [date of use 25 January 2008]

National Human Trafficking Resource Centre 2007 Fact sheet: victim assistance

[http://www.wacf.hhs.gov/trafficking/about/victim\\_assist.html](http://www.wacf.hhs.gov/trafficking/about/victim_assist.html) [date of use 12 March 2009]

OHCHR 2005 Focal point on sexual exploitation, violence and abuse of Children

[www.againstsexualexploitation.org/en/instruments/crc-op1.html](http://www.againstsexualexploitation.org/en/instruments/crc-op1.html) [date of use 25 January 2008]

OSCE 2003 Decision No. 557 OSCE Action plan to combat trafficking in human beings

[http://www.osce.org/documents/pc/2003/07/724\\_en.pdf](http://www.osce.org/documents/pc/2003/07/724_en.pdf) [date of use 13 November 2008]

Pearson E 2002 Human trafficking, human rights: Redefining victim protection

[http://www.childtrafficking.com/Docs/anti\\_slavery\\_2002\\_redefini.pdf](http://www.childtrafficking.com/Docs/anti_slavery_2002_redefini.pdf) [date of use 12 March 2009]

- Pillay R 2001 SA needs laws on human trafficking  
[http://www.mg.co.za/articledirect.aspx?articleid=154786&area=farchives\\_print\\_edition](http://www.mg.co.za/articledirect.aspx?articleid=154786&area=farchives_print_edition) [date of use 25 January 2008]
- Proudlock P and Jamieson L 2008 Guide to the Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007)  
[http://www.sangonet.org.za/portal/index.php?option=com\\_content&task=view&id=9482&Itemid=389](http://www.sangonet.org.za/portal/index.php?option=com_content&task=view&id=9482&Itemid=389) [date of use 12 March 2009]
- Qaba N 2007 Human trafficking strategy: South Africa's response to human trafficking  
[www.info.gov.za/issues/human\\_trafficking/strategy.html](http://www.info.gov.za/issues/human_trafficking/strategy.html) [date of use 30 April 2008]
- Qaba N 2007 Human trafficking in Africa: South Africa's integrated strategy  
[www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf](http://www.parlimen.govmy/billindexbi/pdf/DR20072007E.pdf) [date of use 12 March 2009]
- RAPCAN 2003 Department of Social Development  
[http://www.ci.org.za/depts/ci/plr/pdf/subs/sub\\_traffic\\_rapcan.pdf](http://www.ci.org.za/depts/ci/plr/pdf/subs/sub_traffic_rapcan.pdf) [date of use 12 March 2009]
- SAPA 2006 Human trafficking to be criminalised  
[http://www.polity.org.za/article.php?a\\_id=45941](http://www.polity.org.za/article.php?a_id=45941) [date of use 23 January 2008]
- Silolo P 2006 South African legal framework regarding trafficking in children  
[www.cjei.org/publications.IAW.ppt](http://www.cjei.org/publications.IAW.ppt) [date of use 30 April 2008]
- Silva B 2007 2010 Child trafficking concerns highlighted  
[http://www.iol.co.za/index.php?click\\_id=13&set\\_id=1&art\\_id=vn20070503102106664c109535](http://www.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20070503102106664c109535) [date of use 23 January 2008]
- Smith P 2008 South Africa's Strategy to address human trafficking in persons  
[www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority\\_RSA.pdf](http://www.againstchildabuse.org/eng/content/download/1131/6266/file/NationalProsecutionAuthority_RSA.pdf) [date of use 12 March 2009]
- SOCA Unit 2006 Human trafficking: Statutory law and relevant bills  
[http://www.info.gov.za/issues/humantrafficking/documents/laws\\_bills.pdf](http://www.info.gov.za/issues/humantrafficking/documents/laws_bills.pdf) [date of use 30 April 2008]
- Solomons P 2006 Womens parliament report  
[www.parliament.gov.za/content/womens\\_parliament\\_report.pdf](http://www.parliament.gov.za/content/womens_parliament_report.pdf) [date of use 30 April 2008]
- Stuurman L 2004 Anti-trafficking legislation can no longer be delayed  
[http://iom.org.za/site/index.php?option=com\\_docman&task=doc\\_view&gid=71](http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=71) [date of use 15 November 2008]
- TAHA 2006 Fast facts on trafficking  
[www.info.gov.za/issues/humantrafficking/documents/frequently\\_asked\\_questions.pdf](http://www.info.gov.za/issues/humantrafficking/documents/frequently_asked_questions.pdf) [date of use 30 April 2008]
- Thipanyane T 2002 Human rights implications and the role of the South African Human Rights Commission  
[www.againstchildabuse.org/humantrafficking/human\\_rights\\_implications\\_and\\_the\\_role\\_of\\_the\\_south\\_african\\_human\\_rights\\_commission](http://www.againstchildabuse.org/humantrafficking/human_rights_implications_and_the_role_of_the_south_african_human_rights_commission) [date of use 25 January 2008]

- Truong TD 2006 Poverty, gender and human trafficking in sub-Saharan Africa: Rethinking best practices in migration management  
<http://www.polity.org.za> [date of use 14 December 2007]
- Truong TD and Angeles MB 2005 Searching for best practices to counter human trafficking in Africa: A focus on women and children  
<http://unesdoc.unesco.org/images/0013/001384/138447E.pdf> [date of use 13 November 2008]
- UNESCO 2007 Human trafficking in South Africa: Root causes and recommendations  
<http://unesdoc.unesco.org/images/0015/001528/152823E.pdf> [date of use 12 March 2009]
- UNESCO 2007 Countering human trafficking in Lesotho and in South Africa  
[http://portal.unesco.org/shs/en/ev.php-url\\_id=11357&url\\_do=do\\_print\\_page&url\\_section=201.html](http://portal.unesco.org/shs/en/ev.php-url_id=11357&url_do=do_print_page&url_section=201.html) [date of use 12 March 2009]
- UNICEF 2001 Profiting from abuse: An investigation into the sexual exploitation of our children  
<http://www.unicef.org/eng/publication> [date of use 25 January 2008]
- UNICEF 2003 Trafficking in human beings, especially women and children, in Africa  
<http://www.unicef-irc.org/publications/pdf/insight9e.pdf> [date of use 15 November 2008]
- UNICEF 2005 Trafficking for sexual exploitation and other exploitative purposes  
<http://www.childtrafficking.org/eng/publication.html> [date of use 23 January 2008]
- UNICEF 2006 Reference guide on protecting the rights of child victims of trafficking in Europe  
<http://www.childtrafficking.org> [date of use 14 December 2007]
- UNICEF 2006 Guidelines on the protection of child victims of trafficking  
<http://www.childtrafficking.org> [date of use 14 December 2007]
- UNICEF 2006 South Africa  
<http://www.unicef.org/southafrica/protection.html> [date of use 25 January 2008]
- United States Department of State 2006 Trafficking in persons report  
<http://www.state.gov/g/tip/rls/tiprpt/2006/65983.htm> [date of use 13 November 2008]
- United States Department of State 2007 Trafficking in persons report  
<http://www.state.gov/g/tip/rls/rpt/101438.htm> [date of use 23 June 2008]
- United States Department of State 2008 Human trafficking and modern-day slavery  
<http://gvnet.com/humantrafficking/Spain.htm> [date of use 23 June 2008]

- United States Department of State 2008 Trafficking in Persons Report 2008 – South Africa  
<http://www.unhcr.org/refworld/docid/484f9a3c3d.html> [date of use 12 March 2009]
- UNODC 2006 Trafficking in persons: Global patterns  
[www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf](http://www.unodc.org/documents/human-trafficking/ht-globalpatterns-en.pdf) [date of use 30 April 2008]
- UNODC 2008 United Nations toolkit to combat trafficking in persons: Global programme against trafficking in human beings  
[http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375\\_Ebook\[1\].pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook[1].pdf) [date of use 12 March 2009]
- Wilson B 2001 Child slavery: Africa's growing problem 2001  
[www.europe.cnn.com](http://www.europe.cnn.com) [date of use 23 January 2008]
- Zeindl-Cronin T 2006 The international instruments regulating the management of trafficking in human beings  
[www://info.gov.za/issues/humantrafficking/documents/international\\_instruments.pdf](http://www.info.gov.za/issues/humantrafficking/documents/international_instruments.pdf) [date of use 30 April 2008]

### ***Journal articles***

- Anderson A "South Africa" 2008 *University of Botswana Law Journal* 197-206
- Baker KL "Don't forget the family: A proposal for expanding immediate protection to families of human trafficking survivors" 2006-2007 *Fordham International Law Journal* 836-872
- Barrie GN "International human rights conventions: Public international law applicable to the protection of rights" 1995 *SALJ* 66-80
- Barrie GN "Legitimate expectation and international treaties" 1997 *SALJ* 474-479
- Bevilacqua E "Child sex tourism and child prostitution in Asia: What can be done to protect the rights of children abroad under international law?" 1998-1999 *ILSA Journal of International and Comparative Law* 171-184
- Blake RC "The world's law in one country: the South African constitutional court's use of public international law" 1998 *SALJ* 668-684
- Bonthuys E "Spoiling the child: Domestic violence and the interests of children" 1999 *SAJHR* 308-327
- Bonthuys E and Curren E "Customary law and domestic violence in rural South African communities: Notes and comments" 2005 *SAJHR* 607-635
- Botha N "International Law and the South African interim Constitution" 1994 *SAPL* 245-256
- Bravo KE "Exploring the analogy between modern trafficking in Humans and the Trans-Atlantic slave trade" 2007 *Boston University International Law Journal* 207-295

- Bruch EM "Models wanted" The search for an effective Response to human trafficking" 2004 *Stanford Journal of International Law* 1-45
- Burman S "The best interests of the South African child" 2003 *International Journal of Law, Policy and the Family* 28-40
- Chetty N and Reddi M "The Criminal Law (Sexual Offences) Amendment Bill: Is it an adequate weapon in the war against the sexual abuse of children?" 2005 *SALJ* 501-512
- Cheung CC "Protecting sex trafficking victims: Establishing the persecution element" 2007 *Asian American Law Journal* 31-56
- Coetzee D "South African education and the ideology of patriarchy" 2001 *South African Journal of Education* 300-304
- Couzens M "A very long engagement: The Children's Act 38 of 2005 and The Hague Convention on the protection of children and cooperation in respect of intercountry adoption" 2009 *Potchefstroomse Elektroniese Regs tydskrif* 54-93
- Defeis EF "Protocol to Prevent, Suppress and Punish Trafficking in Persons: A new approach" 2003-2004 *ILSA International and Comparative Law* 485-492
- Dorevitch A and Foster M "Obstacles on the road to protection: Assessing the treatment of sex-trafficking victims under Australia's Migration and Refugee Law" 2008 *Melbourne Journal of International Law* 1-58
- Dugard J "The role of international law in interpreting the Bill of Rights" 1994 *SAJHR* 208-215
- Dugard J "International Law and the South African Constitution" 1997 *European Journal of International Law* 77-92
- Dugard J "South African International Law miscellany" 1999 *Annual Survey of South African Law* 99-118
- Everts D "Human trafficking: The ruthless trade in human misery" 2003-2004 *Brown Journal of World Affairs* 149-158
- Fitzgibbon K "The scope of trafficking in persons in Africa: modern-day slavery?" 2003 *African Security Review* 81-89
- Fitzpatrick J "Trafficking as a human rights violation: The complex intersection of legal framework for conceptualizing and combating trafficking" 2002-2003 *Michigan Journal of International Law* 1143-1167
- Gallagher A "Recent legal developments in the field of human trafficking: A critical review of the 2005 European Convention and related articles: 2006 *European Journal of Migration and Law* 163-190
- Geis G and Brown GC "The transnational traffic in human body parts" 2008 *Journal of Contemporary Justice* 212-224
- Gould C "Countering human trafficking: considerations and constraints: cheap lives" 2006 *SA Crime Quarterly* 19-25
- Hawthorne S "Men's patriotic wars against women's intimate lives: Patriarchy, the institution of heterosexuality and patriotism" 2006 *African Safety Promotion* 20-31

- Jessberger F "Prosecuting Pinochets in South Africa: Implementing the Rome Statute of the International Criminal Court" 2001 *African Journal of Criminal Justice* 344-362
- Jullien K "The recent international efforts to end commercial sexual exploitation of children" 2002-2003 *Denver Journal of International Law and Policy* 579-606
- Keightley R "Public International Law and the Final Constitution" 1996 *SAJHR* 405-418
- Kennard HC "Curtailling the sale and trafficking of children: A discussion of The Hague Conference Convention in respect of inter-country adoptions" 1993-1994 *University of Pennsylvania International Business Law* 623-649
- King T "The modern slave trade" 2002 *University of California, Davis Journal of International Law* 293-321
- Kreston S "Trafficking in children in South Africa: an analysis of pending legislation" 2007 *Child Abuse Research in South Africa* 35-50
- Laczko F and Gramegna MA "Developing better indicators of human trafficking" 2003-2004 *Brown Journal of World Affairs* 179-194
- Malherbe R "Advancing social change: Recent human rights developments in South Africa" 2003 *TSAR* 432-464
- Mattar MY "Trafficking in persons, especially women and children, in countries of the Middle East: The scope of the problem and the appropriate legislative responses 2002-2003 *Fordham International Law Journal* 721-760
- Mattar MY "Incorporating the five basic elements of a model antitrafficking in persons legislation in domestic laws: From the United Nations Protocol to the European Convention" 2005-2006 *Tulane Journal of International and Comparative Law* 357-419
- Mosikatsana TL "Law of Persons and Family Law" 1996 *Annual Survey of South African Law* 174-193
- Mosikatsana TL "www.buyababy.com: Inter-country adoption" 2003 *SALJ* 103-136
- Muhammad PM "The Trans-Atlantic slave trade: A forgotten crime against humanity as defined by international law" 2003-2004 *American University International Law Review* 883-947
- Nagle LE "Selling souls: The effect of globalisation on human trafficking and forced servitude" 2008 *Wisconsin International Law Journal* 131-162
- Ngweni C "Health care decision-making and the competent minor: The limits of self-determination" 1996 *Acta Juridica* 132-147
- Obokata T "Smuggling of human beings from a human rights perspective: Obligations of non-state and state actors under International Human Rights Law" 2005 *International Journal of Refugee Law* 394-415
- Olivier M "The status of international law in South African municipal law: Section 231 of the 1993 Constitution" 1993 *South African Yearbook of International Law* 1-13

- Olivier M "South Africa and international human rights agreements: Procedure, policy and practice (Part 1)" 2003 *TSAR* 293-310
- Oraegbunam IKE "From patriarchy to women empowerment: Socio-religious challenges and prospects" 2006 *Gender and Behaviour* 852-866
- Perry CS "The menace of human trafficking in Africa and the U.S Congressional response through the Office of the United States Executive Director of the African Development Bank" 2004-2005 *Loyola University Chicago International Law Review* 179-192
- Pieterse M "Reconstructing the private/public dichotomy? The enforcement of children's constitutional social rights and care entitlements" 2003 *SALJ* 1-19
- Piotrowicz R "Victims of people trafficking and entitlement to international protection" 2005 *Australian Year Book of International Law* 159-180
- Pithey B "Do New Crimes Need New Laws?" 2004 *SA Crime Quarterly* 7-10
- Pharoah R "Getting to grips with trafficking: Reflections on Human Trafficking Research in South Africa" 2006 *Institute for Security Studies Monographs* 1-89
- Ramolotja MA "Determining the best interests of the child" 1999 *Codicillus* 10-13
- Rassam AY "Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under Customary International Law" 1998-1999 *Virginia Journal of International Law* 303-352
- Rassam AY "International Law and contemporary forms of slavery: An economic and social-rights based approach" 2004-2005 *Penn State International Law Review* 809- 856
- Sachs A "Enforcement of Social and Economic Rights" 2006-2007 *American University International Law Review* 673-708
- Singh D "Piercing the Veil on trafficking in Women" 2004 *The Comparative and International Law Journal of South Africa* 1-32
- Sloth-Nielsen J "New child care and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261-279
- Sloth-Nielsen J "The Child's Rights to Social Services, the Right to Social Security, and the Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 *SAJHR* 210-232
- Sloth-Nielsen J "Children's rights in the South African courts: An overview since ratification of the UN Convention of the Rights of the Child" 2002 *International Journal of Children's Rights* 137-156
- Slye RC "International law, human rights beneficiaries, and South Africa: Some thoughts on the utility of International Human Rights Law" 2001 *Chicago Journal of International Law* 59-80
- Smith L and Mattar MY "Creating international consensus on combating trafficking in persons: U.S. policy, the role of the UN, and global responses and challenges" 2004 *Fletcher Forum of World Affairs* 155-178



- Tavella AM "Sex trafficking and the 2006 World Cup in Germany" 2007-2008 *Northwestern Journal of International Human Rights* 196-217
- Tiefenbrun S "Child soldiers, slavery and the trafficking of children" 2007-2008 *Fordham International Law Journal* 415-496
- Van Bueren G "Child sexual abuse and exploitation: A suggested human rights approach" 1994 *International Journal of Children's Rights* 45-59
- VandenBerg M "Complicity, corruption, and human rights: Trafficking in human beings" 2002 *Case Western Reserve Journal of International Law* 323-334
- Van der Vyfer JD "Constitutionality of the Age of Majority Act" 1997 *SALJ* 750-759
- Vrancken P and Chetty K "International child sex tourism: A South African perspective" 2009 *Journal of African Law* 111-141

### **Legislation**

- Basic Conditions of Employment Act* 75 of 1997
- Child Care Act* 74 of 1983
- Child Care Amendment Act* 13 of 1999
- Children's Act* 38 of 2005
- Children's Amendment Act* 41 of 2007
- Combating of Trafficking in Persons Bill* of 2006
- Constitution of the Republic of South Africa*, 1996
- Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007
- Domestic Violence Act* 116 of 1998
- Films and Publications Act* 65 of 1996
- Immigration Act* 13 of 2002
- Immigrations Amendment Act* 19 of 2004
- Intimidation Act* 72 of 1982
- Prevention of and Combating of Corrupt Activities Act* 12 of 2004
- Prevention of Organised Crime Act* 121 of 1998
- Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000
- Refugees Act* 130 of 1998
- Riotous Assemblies Act* 17 of 1956
- Sexual Offences Act* 23 of 1957
- South African Citizenship Act* 88 of 1995
- South African Passports and Travel Documents Act* 4 of 1994

### **Newspaper reports**

- Brits E "SA child trafficking horror" *Die Burger* 16 December 2003 2
- Ellis E "SA's slave trade shame" *The Star* 30 July 2004 7
- Martens T and Attwood V "Women and children trafficked at SA border" *Daily News* 18 September 2007 5

Matari M "Bose gees wat kinders teister" *Beeld* 7 January 2002 3  
SAPA "Regerings doen nie belofte gestand om kinderseks te keer" *Beeld*  
20 November 2000 3  
Van der Fort S "SA kinderprostitute is vars, sê toeris" *Rapport* 20 October  
2001 5

### ***South African Law Reform publications***

#### *Issue papers*

SALRC Project 108 in Issue Paper 10 "Sexual Offences against Children" of  
31 May 1997  
SALRC Project 131 in Issue Paper 25 "Trafficking in Persons" of 31 March  
2004

#### *Discussion papers*

SALRC Project 107 in Discussion Paper 85 "Sexual Offences: The  
Substantive Law" of 12 August 1999  
SALRC Project 110 in Discussion Paper 103 "Review of the Child Care Act"  
of 28 February 2002  
SALRC Project 131 in Discussion Paper 111 "Trafficking in Persons" of 30  
June 2006

### ***Theses and dissertations***

Albrecht *Intercountry adoption: A Swiss perspective*  
Albrecht S *Intercountry adoption: A Swiss perspective* (Magister  
Legum University of Cape Town 2005)  
Esquibel *Human trafficking: A violation of human rights, a universal issue*  
Esquibel M *Human trafficking: A violation of human rights, a  
universal issue* (Honors in the Major Florida State University College  
of Social Sciences 2005)  
Grobler *Hulpverlening aan die gemolesteerde kind met behulp van  
spelterapie: 'n Pastorale studie*  
Grobler L *Hulpverlening aan die gemolesteerde kind met behulp van  
spelterapie: 'n Pastorale studie* (Magister Artium in Praktiese  
Teologie NWU 2005)  
Horsten *The social security rights of children in South Africa*  
Horsten DA *The social security rights of children in South Africa*  
(Magister Legum PU for CHE 2003)

Kolberg *Comparison of the South African and Norwegian Juristic Approach to Trafficking*

Kolberg LK *The United Nations Protocol against Trafficking in Persons, Especially Women and Children – A comparison of the South African and Norwegian Juristic Approach to Trafficking* (LLM – dissertation University of Cape Town 2005)

Mashau *Towards a strategy for poverty alleviation in Mashau*

Mashau TD *Towards a strategy for poverty alleviation in Mashau* (Masters of Development and Management NWU 2006)

Mogosetsi *Black men's experiences regarding women's and children's rights: A social work perspective*

Mogosetsi SE *Black men's experiences regarding women's and children's rights: A social work perspective* (Magister Artium in Social Work PU for CHE 2003)

### ***Other international instruments***

*Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*

*Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 32 I.L.M. 1134 (1993), (entered into force May 1, 1995)

*Universal Declaration of Human Rights*

*Universal Declaration of Human Right* adopted by the General Assembly Resolution 21 7A (111) of Dec. 10, 1948

## **Abstract**

Trafficking in children, commonly referred to as modern-day slavery, violates the fundamental rights of children, including the right to family- or parental care, or to appropriate alternative care when removed from the family environment; the right to be protected from maltreatment, neglect abuse or degradation; and to be protected from exploitative labour practices. The aims of this study are to analyse international and national legal measures currently in place to address the issue of child trafficking in South Africa; including the prevention of child trafficking, the protection of child victims of trafficking and the prosecution of traffickers. The study will further aim to evaluate future legal measures and policy which relate to child trafficking. Lastly a conclusion will be reached on the question whether South Africa is in compliance with its international and constitutional obligations with regard to child trafficking.