

**CDDRL**

**WORKING PAPERS**

Number 002

June 2012

PROGRAM ON HUMAN RIGHTS

***Combating Human Trafficking:  
The South African Legal Context***

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## ABSTRACT

South Africa's international obligation to combat human trafficking in terms of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) requires the promulgation of comprehensive counter-trafficking legislation. The present counter-trafficking legislative response is fragmented. Transitional anti-trafficking provisions are included in the Children's Act, which criminalises all types of child trafficking, and in the Sexual Offences Amendment Act, which criminalises sex trafficking. However, these two pieces of legislation do not fully comply with the minimum standards set out in the Palermo Protocol, especially the core standards for a domestic criminal law response. For this reason, law reform is essential and needs to be finalised as a matter of urgency.

## 1. INTRODUCTION

In the light of the growing demand to finalise comprehensive counter-trafficking legislation, this article identifies South Africa's international obligations to combat human trafficking. Thereupon, the current anti-trafficking legislative framework is analysed and assessed against the main criminal law standards laid down in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('the Palermo Protocol').<sup>1</sup> Concluding that the current counter-trafficking response lacks full compliance with international standards, the need for law reform is essential.

## 2. INTERNATIONAL OBLIGATIONS TO COMBAT HUMAN TRAFFICKING

South Africa has signed and/or ratified numerous international instruments,<sup>2</sup> including the Palermo Protocol.<sup>3</sup> As a party to the Palermo Protocol, South Africa is obligated to build the minimum standards laid down in the protocol into its domestic legislation.<sup>4</sup>

The article focuses on those international minimum standards that pertain primarily to criminal law or the prosecution of traffickers. The first standard encompasses the Palermo Protocol's requirement that the

<sup>1</sup> [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf), accessed on 11 March 2011; see also JN Ezeilo 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' Report submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children GA A/HRC/10/16, 2009, available at <http://www2.ohchr.org/english/issues/trafficking/docs/HRC-10-16-pdf>, accessed on 1 November 2010, 7.

<sup>2</sup> Department of Foreign Affairs 'International agreements and/or conferences signed by South Africa in relation to the youth, children and people with disabilities, particularly with regard to the United Nations and the African Union', 2005, available at [http://www.dfa.gov.za/docs/2005pq/pq2\\_455.htm](http://www.dfa.gov.za/docs/2005pq/pq2_455.htm), accessed on 20 October 2008. For a broader discussion of the relevant international and African regional instruments with reference to South Africa's ratification of, and obligations in terms of, these instruments, see HB Kruger *Combating Human Trafficking: a South African Legal Perspective* LLD (Free State) (2010) 191-286.

<sup>3</sup> International Organization for Migration Handbook on Counter-Trafficking for South African Government & Civil Society Stakeholders (referred to hereafter as International Organization for Migration Handbook) (2009) 82, 103; Department of Foreign Affairs op cit (n4) 3; D Kassan 2007 'Trafficking in children' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 18-6; International Organization for Migration 'No experience necessary: The internal trafficking of persons in South Africa' (referred to hereafter as International Organization for Migration 'No experience necessary') Report for the International Organization for Migration, 2008, available at [http://iom.org.za/site/index.php?option=com\\_docman&task=doc\\_details&gid=123&Itemid=50](http://iom.org.za/site/index.php?option=com_docman&task=doc_details&gid=123&Itemid=50), accessed on 4 November 2008, 19; L Stuurman 'Anti-trafficking legislation can no longer be delayed' (2004) 3 *Eye on Human Trafficking* 5; T Leggett 'The risks of specialised human trafficking legislation' (2004) 3 *Eye on Human Trafficking* 4.

<sup>4</sup> Kassan op cit (n5) 18-10; Stuurman op cit (n5) 5.

essence of the human trafficking definition as it is formulated in the protocol be included in domestic responses.<sup>5</sup> The Palermo Protocol defines ‘trafficking in persons’ as follows:

‘...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.’<sup>6</sup>

Closely associated with the first standard is the second standard, which also deals with the concept ‘trafficking in persons’, but pertains to cases where children younger than eighteen are being trafficked. In the case of child trafficking, the protocol waives the means component of the definition. Thus, the protocol provides that only the prohibited conduct and the exploitative purpose need to be proven to constitute the crime of trafficking in persons where children are trafficked.<sup>7</sup>

The third key standard pertaining to criminal law is the obligation to criminalise intentional conduct constituting ‘trafficking in persons’, as defined in the Palermo Protocol, in domestic laws.<sup>8</sup> Linked to the third key standard is the fourth, which requires that, apart from criminalising the main crime of human trafficking, involvement in this crime must also be established as an offence.<sup>9</sup> Involvement in human trafficking encompasses attempts to commit human trafficking,<sup>10</sup> participation as an accomplice in human trafficking,<sup>11</sup> as well as organising or directing other persons to commit the offence.<sup>12</sup> Such conduct must therefore also be established as offences in domestic legislation. The core minimum standards in respect of criminal law issues discussed above are summarised in the table below.

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<sup>5</sup> Article 3(a); see also JG Raymond ‘The new UN Trafficking Protocol’ (2002) 25(5) *Women's International Forum* 491 at 498; United Nations Office on Drugs and Crime ‘Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the protocols thereto’, 2004, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>, accessed on 17 August 2010, 268. For a discussion and analysis of the definition, see Kruger op cit (n4) 41-82.

<sup>6</sup> Article 3(a).

<sup>7</sup> Article 3(c); see also A Lansink ‘Human rights focus on trafficked women: An international law and feminist perspective’ (2006) 70 *Agenda* 45 at 50; The Future Group ‘Faster, higher, stronger: Preventing human trafficking at the 2010 Olympics’, 2007, available at <http://www.thefuturegroup.org/>, accessed on 20 August 2008, 7; D Weissbrodt & Anti-Slavery International ‘Abolishing slavery and its contemporary forms’ (2002) *Report for the Office of the United Nations High Commissioner for Human Rights* HR/PUB/02/4, 22, 27-30; Kassan op cit (n5) 18-6; A Gallagher 2001 ‘Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis’ (2001) 23 *Human Rights Quarterly* 975 at 987; Ezeilo op cit (n2) 7; United Nations Office on Drugs and Crime ‘Model law for trafficking in persons’, 2009, available at [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf), accessed on 14 July 2010, 37; Kruger op cit (n4) 77-78.

<sup>8</sup> Article 5(1).

<sup>9</sup> Article 5(2); see also Kruger op cit (n4) 317-321.

<sup>10</sup> Article 5(2)(a); Human Sciences Research Council ‘Tsireledzani: Understanding the dimensions of human trafficking in South Africa’, 2010, available at <http://www.hsrc.ac.za/Document-3562.phtml>, accessed on 25 March 2010, 22.

<sup>11</sup> Article 5(2)(b).

<sup>12</sup> Article 5(2)(c).

### Core minimum standards to combat human trafficking that focus on criminal law issues

| International standards | Palermo Protocol | Member states must comply with international standards in domestic law |
|-------------------------|------------------|--|
| Standard 1              | Art 3(a)         | Definition of 'trafficking in persons' (adult victims)                 |
| Standard 2              | Art 3(c)         | Definition of 'trafficking in persons' (child victims)                 |
| Standard 3              | Art 5(1)         | Criminalise 'trafficking in persons' (human trafficking)               |
| Standard 4              | Art 5(2)         | Criminalise involvement in human trafficking                           |
|                         | Art 5(2)(a)      | 4.1 Attempt to commit human trafficking                                |
|                         | Art 5(2)(b)      | 4.2 Participation as an accomplice in human trafficking                |
|                         | Art 5(2)(c)      | 4.3 Organising/directing other persons to commit human trafficking     |

### 3. THE SOUTH AFRICAN COUNTER-TRAFFICKING LEGISLATION

A key initiative in combating human trafficking is the development of an effective national legislative framework to bring perpetrators to book. For this reason a legislative reform process was initiated in South Africa to bring its domestic laws in line with the minimum counter-trafficking standards laid down for domestic responses.<sup>13</sup> Currently, the law on this topic is still fragmented and consists mainly of three parts.<sup>14</sup> The first part of the South African legal response consists of existing common law and statutory crimes that may be applicable in some human trafficking cases in prosecuting trafficking agents for crimes other than human trafficking.<sup>15</sup> These legal remedies have no direct bearing on human trafficking. The second part of the domestic response consists of the interim anti-trafficking provisions in two pieces of legislation, namely the Children's Act 38 of 2005 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The last part of the South African response is the law reform proposed in the Prevention and Combating of Trafficking in Persons Bill B7-2010.<sup>16</sup>

<sup>13</sup> Kruger op cit (n4) 481-482; D Kassan & P Mahery 'Special child protective measures in the Children's Act' in T Boezaart (ed) Child Law in South Africa (2009) 200-201; D Minnie 'Sexual offences against children' in T Boezaart (ed) Child Law in South Africa (2009) 561.

<sup>14</sup> Kruger op cit (n4).

<sup>15</sup> Stuurman op cit (n5) 5.

<sup>16</sup> See Government Gazette no. 32906 of 29 January 2010, general notice 61, for a summary of the Bill.

### 3.1 Interim counter-trafficking provisions

#### 3.1.1 Children's Act 38 of 2005

Interim provisions on trafficking in children are included in the Children's Act 38 of 2005 ('the Children's Act')<sup>17</sup> in partial compliance with the Palermo Protocol.<sup>18</sup> Given that the Children's Act applies to children only, it does not fully comply with standard 1, namely the definition of 'trafficking in persons'. The Children's Act contains a definition of 'trafficking in relation to a child' only. The Act provides that:

"trafficking", in relation to a child –

- (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –
  - (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or
  - (ii) due to a position of vulnerability, for the purpose of exploitation; and
- (b) includes the adoption of a child facilitated or secured through illegal means.<sup>19</sup>

This definition is to a large extent similar to the provision in the Palermo Protocol pertaining to the trafficking of a child. However, apart from the similar action and purpose components of the definition, there are a number of differences between the definitional formulations. First, the definition in the Children's Act is somewhat broader than that of the protocol, in that the terms 'sale' and 'supply' are added as prohibited actions.

Secondly, adoption secured through illegal means is also included in the action component of the definition of trafficking in children.<sup>20</sup> The unqualified inclusion of illegal adoption in the Act may cause confusion. In agreement with Kassan,<sup>21</sup> it must be pointed out that an 'illegal adoption' means the 'exploitation of the adoptive system and laws and not necessarily the exploitation of the adopted child'.<sup>22</sup> For an illegal adoption to qualify as trafficking, an interpretation should be followed in line with that in the Palermo Protocol, namely that the primary intention of the illegal adoption must be to exploit the child.<sup>23</sup>

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<sup>17</sup> Kassan op cit (n5) 18–10; Kassan & Mahery op cit (n17) 200; Human Sciences Research Council op cit (n13) 41.

<sup>18</sup> [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf), accessed on 11 March 2011; A Dawes, R Bray & A van der Merwe (eds) *Monitoring Child Well-being – a South African Rights-based Approach* (2007) 250; Kassan & Mahery op cit (n17) 200; H Bosman-Sadie & L Corrie *A Practical Approach to the Children's Act* (2010) 285; Human Sciences Research Council op cit (n13) 42.

<sup>19</sup> Section 1.

<sup>20</sup> Section 1; Human Sciences Research Council op cit (n13). For a critical view on the insertion of the illegal adoption of a child into the definition of 'trafficking', see Kassan & Mahery op cit (n17) 202-203.

<sup>21</sup> Kassan op cit (n5) 18–12.

<sup>22</sup> *Ibid.*

<sup>23</sup> Kassan & Mahery op cit (n17) 202-203; Kassan op cit (n5) 18–12. The Official Interpretative Notes (*Travaux Préparatoires*) to the Palermo Protocol indicate that, 'where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol' – UN General Assembly (2000) para 66; see also AD Jordan 'The annotated guide to the complete UN trafficking protocol', 2002, available at <http://www.walnet.org/csis/papers/UN-TRAFFICK.PDF>, accessed on 13 November 2008, 9-10; Kruger op cit (n4) 71-72.

Thirdly, the definition of trafficking in the Children's Act also differs from the provision in the Palermo Protocol regarding the so-called 'means' element.<sup>24</sup> The 'means' element in the Palermo Protocol requires that the perpetrator must use at least one of the listed improper means, such as force, threat, fraud or deception, in committing the prohibited action.<sup>25</sup> In the case of the trafficking of adults, the Palermo Protocol requires the presence of the means element to constitute human trafficking, but not for the trafficking of a child under the age of eighteen years.<sup>26</sup> In providing special protection for children, the Palermo Protocol lays down that the prescribed action element, namely the recruitment, transportation, transfer, harbouring or receiving of a child for the purpose of exploitation, constitutes trafficking in persons, even if none of the means set out in the definition were used.<sup>27</sup> Unlike the protocol, the Children's Act provides that trafficking in children requires the prohibited action to be committed by 'any means, including the use of threat, force or other forms of coercion, abduction, fraud, [and] deception', for the purpose of exploitation.<sup>28</sup> One interpretation of 'any means' is that no means are required for child trafficking, and that the definition in the Children's Act thus corresponds with the definition in the Palermo Protocol. Then again, Kassan points out that a different interpretation of 'any means' is that the Children's Act does require one of the specified means to be present to constitute trafficking in children.<sup>29</sup> The latter interpretation is problematic, in that, if the means element is required for trafficking in children, it is not in line with the Palermo Protocol, which waives the means element in regard to child trafficking.<sup>30</sup> The formulation of the 'means' element in the definition of 'trafficking' in the Children's Act has therefore been 'criticised for creating a greater evidentiary burden' than is required by the Palermo Protocol.<sup>31</sup>

The third standard requires the criminalisation of human trafficking. The Children's Act criminalises the trafficking of children by natural or juristic persons for an exploitative purpose.<sup>32</sup> Unlike the international standard, this provision only applies to children who are trafficked and not to adult victims. It is to be welcomed that the Children's Act regards child trafficking as a serious offence, for which imprisonment of up to twenty years may be imposed.<sup>33</sup> Additional protection for children is provided, in that it is no defence for the perpetrator that the child, or the person having control over the child, has consented to the exploitation or illegal adoption or that the intended exploitation or adoption did not occur.<sup>34</sup>

As was pointed out in relation to standard four above, states parties are not only obligated to criminalise the main crime of human trafficking, but also any conduct constituting attempts to commit the crime, participation as accomplices, and organising or directing others to commit human trafficking.<sup>35</sup> The Children's Act does not include the criminalisation of attempts to commit human trafficking, because this is already covered in existing South African law. The attempt to commit any crime is recognised as a

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<sup>24</sup> Bosman-Sadie & Corrie op cit (n23) 285.

<sup>25</sup> Article 3(a); South African Law Reform Commission (2006) op cit (n21) 14; Kassan op cit (n5) 18–16. For a discussion of this element, see Kruger op cit (n4) 46-51.

<sup>26</sup> Article 3(a) and (c); South African Law Reform Commission (2006) op cit (n21) 14; Kassan op cit (n5) 18–16.

<sup>27</sup> Article 3(c); South African Law Reform Commission (2006) op cit (n21) 14.

<sup>28</sup> Section 1; Kassan & Mahery op cit (n17) 202.

<sup>29</sup> Kassan op cit (n5) 18–11; Kassan & Mahery op cit (n17) 202.

<sup>30</sup> Kassan op cit (n5) 18–11; Kassan & Mahery op cit (n17) 202.

<sup>31</sup> For a critical view on the 'means' element in the definition of 'trafficking' in the Children's Act 38 of 2005, see Kassan & Mahery op cit (n17) 202; Kassan op cit (n5) 18–11; Human Sciences Research Council op cit (n13) 42.

<sup>32</sup> Section 284(1); see also Kassan op cit (n5) 18–15-16; Kassan & Mahery op cit (n17) 203.

<sup>33</sup> Section 305(1) and (8); Kassan & Mahery op cit (n17) 203.

<sup>34</sup> Section 284(2); Kassan op cit (n5) 18–16; Kassan & Mahery op cit (n17) 203; Bosman-Sadie & Corrie op cit (n23) 287.

<sup>35</sup> Article 5(2); see also Kruger op cit (n4) 317-321.

substantive crime in the South African legal system.<sup>36</sup> Participation as an accomplice by unlawfully and intentionally furthering a crime committed by someone else is also punishable in our existing law.<sup>37</sup> Furthermore, the Riotous Assemblies Act 17 of 1956 ('Riotous Assemblies Act') criminalises conspiracy and incitement to commit a crime.<sup>38</sup> However, the Riotous Assemblies Act does not include the protocol's specific term 'organising' others to commit human trafficking.<sup>39</sup>

Apart from criminalising the crime of trafficking, the Children's Act also criminalises certain behaviour 'facilitating trafficking in children' in order to cast the net wide enough so as to include the various role players that usually profit from this crime.<sup>40</sup> On conviction of this crime of facilitating trafficking in children, a maximum of ten years' imprisonment may be imposed.<sup>41</sup> In short, the prohibited behaviour entails leasing any property for the purpose of harbouring a trafficked child or distributing information alluding to trafficking. Further, internet service providers are required to report any site on their servers that contains such prohibited information.<sup>42</sup>

Apart from creating trafficking offences, chapter 18 of the Children's Act also regulates other matters in regard to trafficking in children, such as the provision of international cooperation,<sup>43</sup> as well as extraterritorial jurisdiction.<sup>44</sup> Underpinning the best-interests-of-the-child principle, the Act further provides for the safety of the trafficked child and specific assistance in returning the child to the Republic,<sup>45</sup> as well as for referral<sup>46</sup> and repatriation<sup>47</sup> procedures. However, Kassan<sup>48</sup> maintains that the provisions for assisting trafficked children in the Children's Act<sup>49</sup> do not fully comply with all the types of assistance that states parties are obliged to render or consider in terms of the Palermo Protocol.<sup>50</sup>

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<sup>36</sup> Attempt to commit a common law crime is in itself a crime under the common law, while section 18(1) of the Riotous Assemblies Act 17 of 1956 criminalises an attempt to commit a statutory offence – J Burchell & J Milton *Principles of Criminal Law* 3 ed (2005) 619-641; CR Snyman *Criminal Law* 5ed (2008) 283-294; Kruger op cit (n4) 317-321.

<sup>37</sup> For a discussion of participation as an accomplice in South African law and the requirements for liability as an accomplice, see Snyman op cit (n42) 257-259, 273-278; Burchell & Milton op cit (n42) 599-605.

<sup>38</sup> Section 18(1) and (2); see also Kruger op cit (n5) 520-523; Snyman op cit (n42) 283-305; Burchell & Milton op cit (n42) 619-657.

<sup>39</sup> Kruger op cit (n4) 522-523.

<sup>40</sup> Section 285; Kassan & Mahery op cit (n17) 203-204; Bosman-Sadie & Corrie op cit (n23) 287-288.

<sup>41</sup> Section 305(6). If a person is convicted more than once of this offence, the sentence may be increased to a maximum of 20 years' imprisonment – section 305(7).

<sup>42</sup> Section 285; see also Kassan op cit (n5) 18-17-18; Kassan & Mahery op cit (n17) 203; Bosman-Sadie & Corrie op cit (n23) 287- 288.

<sup>43</sup> Section 283; Kassan op cit (n5)18-14-15; South African Law Reform Commission (2008) op cit (n21) 13; Bosman-Sadie & Corrie op cit (n23) 286; Human Sciences Research Council op cit (n13) 42.

<sup>44</sup> Section 291; South African Law Reform Commission (2008) op cit (n21) 13; Kassan op cit (n5)18-22; Kassan & Mahery op cit (n17); Human Sciences Research Council op cit (n13) 43.

<sup>45</sup> Section 286; South African Law Reform Commission (2008) op cit (n21) 13; Bosman-Sadie & Corrie op cit (n23) 288-289; Human Sciences Research Council op cit (n13) 42.

<sup>46</sup> Sections 288-289; Kassan op cit (n5) 18-20; South African Law Reform Commission (2008) op cit (n21) 13; Bosman-Sadie & Corrie op cit (n23) 290-291; Human Sciences Research Council op cit (n13) 42-43.

<sup>47</sup> Section 290; Kassan op cit (n5) 18-21; Bosman-Sadie & Corrie op cit (n23) 291.

<sup>48</sup> Kassan op cit (n5) 18-18.

<sup>49</sup> Section 286; Human Sciences Research Council op cit (n13) 42.

<sup>50</sup> Kassan op cit (n5) 18-18.

Finally, the counter-trafficking provisions in the Children's Act make it possible to prosecute offenders for any type of trafficking where a child is the victim. However, full compliance with the Palermo Protocol is lacking, because this Act applies to child victims only and therefore offers no remedy for trafficked adults.

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

Apart from the abovementioned provisions in the Children's Act, counter-trafficking provisions are also included in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Amendment Act'), in partial compliance with South Africa's international counter-trafficking obligations.<sup>51</sup>

Concerning the first minimum standard, the Sexual Offences Amendment Act defines the action and means components of the term 'trafficking' similarly to the term 'trafficking in persons' in the Palermo Protocol, namely:

'...the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of

- (i) a threat of harm;
- (ii) the threat or use of force, intimidation or other forms of coercion;
- (iii) abduction;
- (iv) fraud;
- (v) deception or false pretences;
- (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
- (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage.<sup>52</sup>

However, the exploitative purpose element in the Sexual Offences Amendment Act fails to comply with the Palermo Protocol, because it provides for an exploitative purpose of a sexual nature only, namely:

'...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.'<sup>53</sup>

The Sexual Offences Amendment Act also does not comply with standard two, which provides that the means component is waived and need not be proven when a child is trafficked. This Act lacks such a provision.

Regarding the third standard, the Sexual Offences Amendment Act does criminalise human trafficking by stipulating as follows:

'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.'<sup>54</sup>

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<sup>51</sup> Section 70(1); Minnie op cit (n17) 561; Human Sciences Research Council op cit (n13) 41.

<sup>52</sup> Section 70(2)(b); Human Sciences Research Council op cit (n13) 41.

<sup>53</sup> Section 70(2)(b).

<sup>54</sup> Section 1(1); Minnie op cit (n17) 561.

In sum, it is an offence to traffic a person ‘without the consent of’ the trafficked person. The issue of consent in the Act is approached differently from that in the Palermo Protocol. The latter provides that consent of the trafficked person is irrelevant where any of the prohibited means have been used or if the trafficked person is a child.<sup>55</sup> The Act expands on the ‘consent’ issue by providing that the consent has to be a ‘voluntary or uncoerced agreement’.<sup>56</sup> Unlike the protocol, the Act proceeds to list a number of circumstances which would negate valid consent, but stipulates that this is not an exhaustive list of circumstances.<sup>57</sup>

These circumstances include the use of the listed prohibited means, which brings the Act in line with the protocol on this point. The Act further provides that children below the age of twelve years are not able to consent validly, because their consent is not regarded as being given ‘voluntarily or without coercion’.<sup>58</sup> The question that arises is: What then is the position regarding alleged consent by children of age twelve to seventeen years? The formulation on this issue in the Sexual Offences Amendment Act differs from the provision in the Palermo Protocol, which does not differentiate between children under and over twelve years, but defines a child as any person under the age of eighteen years.<sup>59</sup> Hence, it is submitted that this issue needs to be addressed in the proposed counter-trafficking legislation to bring it in line with the provisions in the Palermo Protocol.

The fourth minimum standard identified above requires that conduct that amounts to involvement in human trafficking should also be criminalised in order to bring to book all agents playing a part in the trafficking process. The Sexual Offences Amendment Act does not need to criminalise attempts, incitement or conspiracy to commit human trafficking or participation in human trafficking, because, as explained above, these are already covered in existing law.<sup>60</sup> Nonetheless, the Act explicitly includes such provisions.

The Palermo Protocol’s obligation to criminalise the ‘organising and directing’ of others to commit human trafficking as part of the fourth standard, is complied with in, the Sexual Offences Amendment Act. The Act not only includes the organising and directing of trafficking, but also casts the net wider to include the commanding, supervising or controlling of the trafficking crime as well.<sup>61</sup>

In view of the fact that transporters often facilitate human trafficking by moving victims illegally across national borders, the Act further prohibits all ‘commercial carriers’<sup>62</sup> from bringing a passenger into, or removing a person from, South Africa without such passenger having travel documents for the lawful entry into, or departure from, the Republic.<sup>63</sup> This offence overlaps to some extent with the prohibition against assisting another to enter, remain in, or depart from, the Republic in contravention of the Immigration Act 13 of 2002 (‘the Immigration Act’).<sup>64</sup> However, the Sexual Offences Amendment Act is more stringent, in that it provides that the transporting offender is also liable for paying the cost of the transported person’s care, safekeeping and return from South Africa.<sup>65</sup>

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<sup>55</sup> Article 3(d).

<sup>56</sup> Section 71(3); Minnie op cit (n17) 561-562.

<sup>57</sup> Section 71(4).

<sup>58</sup> Section 71(4)(b)(iv).

<sup>59</sup> Article 3(d).

<sup>60</sup> See the discussion in 3.1 above.

<sup>61</sup> Section 71(2)(a); Minnie op cit (n17) 561.

<sup>62</sup> The term ‘commercial carrier’ is defined broadly in section 70(2)(a) to include a company or the owner, operator or master of any means of transport that engages in the transportation of goods or people for commercial gain.

<sup>63</sup> Section 71(6)(a); see also Minnie op cit (n17) 562; Human Sciences Research Council op cit (n13) 41.

<sup>64</sup> Section 49(2). See also Stuurman op cit (n5) 5.

<sup>65</sup> Section 71(6)(c); see also Minnie op cit (n17) 562.

Stuurman<sup>66</sup> highlights the problem that victims of human trafficking are often prosecuted. For example, trafficked persons who are in South Africa without valid documentation because their passports have been confiscated by their traffickers may be prosecuted under the Immigration Act,<sup>67</sup> while victims forced into prostitution may be prosecuted for prostitution.<sup>68</sup> It is to be welcomed that the Sexual Offences Amendment Act addresses this issue by stipulating that a victim of trafficking is ‘not liable for any criminal offence, including any migration-related offence, which was committed as a direct result of being trafficked’.<sup>69</sup>

As regards sanctions for trafficking offences established in the Sexual Offences Amendment Act, there is no specific penal provision included in the Act.<sup>70</sup> However, the trafficking offences in section 71(1) and (2) of the Sexual Offences Amendment Act are regarded as serious offences, because they are listed in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Accordingly, a court is obligated to impose a minimum sentence of imprisonment for life on offenders convicted of these trafficking offences,<sup>71</sup> unless the court finds that ‘substantial and compelling circumstances exist which justify the imposition of a lesser sentence’.<sup>72</sup>

Being operative from 16 December 2007, the anti-trafficking provisions in this Act are an important tool for prosecuting some agents of human trafficking. However, it is clear from the discussion above that the Act does not fully comply with the core international standards pertaining to criminal law, especially in that it covers trafficking for sexual exploitation only.

## 4. PROPOSED LAW REFORM

### 4.1 Investigation and consultative process

The crime of human trafficking as defined in the Palermo Protocol is not found in South African law.<sup>73</sup> Against the backdrop of international anti-trafficking developments and South Africa’s ratification of the Palermo Protocol,<sup>74</sup> the South African Law Reform Commission was mandated to investigate law reform

<sup>66</sup> Stuurman op cit (n5) 5.

<sup>67</sup> Kruger op cit (n4) 116-117.

<sup>68</sup> Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 criminalises prostitution; see also Kruger op cit (n4) 468.

<sup>69</sup> Section 71(5); Sexual Offences and Community Affairs Unit in the National Prosecuting Authority ‘Tsireledzani – prevent, respond and support, 2009, available at <http://www.info.gov.za/issues/humantrafficking/documents/tsireledzani.pdf>, accessed on 4 March 2010, 2; Human Sciences Research Council op cit (n13) 41.

<sup>70</sup> V Lotan ‘Brief outline of human trafficking: Thai cases no 1 and 2, 25-27 March 2009, Tsireledzani: Towards an Integrated Human Trafficking National Action Plan Conference, 11.

<sup>71</sup> Section 51(1); Human Sciences Research Council op cit (n13) 41.

<sup>72</sup> Section 51(3)(a).

<sup>73</sup> J Mnisi ‘Trafficking in persons – current legal framework in South Africa’, 6-8 October 2008, Training Workshop on Human Trafficking hosted by the National Prosecuting Authority, 2; see also United Nations Office on Drugs and Crime & Southern African Development Community Situational Assessment of Human Trafficking – A 2005 Situational Assessment of Human Trafficking in the SADC Region: A Survey of South Africa, Zimbabwe and Mozambique (2007) 8.

<sup>74</sup> South African Law Reform Commission op cit (n42) 12 in fn25; Department of Foreign Affairs op cit (n7) 3; Kassin op cit (n8) 18–6; International Organization for Migration op cit (n8) 19; International Organization for Migrations op cit (n8) 82; Kruger op cit (n7) 246-247.

concerning human trafficking.<sup>75</sup> In 2010 the Prevention and Combating of Trafficking in Persons Bill was introduced to Parliament in order to provide for the comprehensive combating of human trafficking.<sup>76</sup>

#### 4.2 Prevention and Combating of Trafficking in Persons Bill B7-2010

The Prevention and Combating of Trafficking in Persons Bill B7-2010 ('the Trafficking Bill')<sup>77</sup> deals comprehensively with various aspects to curb human trafficking. When promulgated, the new Act will repeal the transitional anti-trafficking provisions in the Sexual Offences Amendment Act and in the Children's Act.

The Trafficking Bill has been discussed extensively in Parliament and numerous proposed amendments had been included in the Working Draft of the Bill version 14 November 2011.<sup>78</sup> Given that the original Trafficking Bill introduced in 2010 will most probably undergo significant changes before its enactment, it would be more appropriate to deal with it once finalised. Nonetheless, the key features of the Bill are mapped out below.

The main purpose of the Trafficking Bill is:

'...  
to give effect to South Africa's obligations as a party to international instruments, such as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons), which address the issue of trafficking in persons, by bringing its domestic laws in line with the standards set by those instruments.'<sup>79</sup>

The 2010 Trafficking Bill is divided into eleven chapters and two schedules. Chapter 1 sets out the objectives of the Bill.<sup>80</sup> These objectives underpin a holistic approach and include the internationally accepted three 'Ps',<sup>81</sup> namely the prevention of human trafficking, the prosecution and appropriate punishment of offenders, and protection and assistance for victims of trafficking.<sup>82</sup> Importantly, chapter 1 also covers the definitions of various concepts, such as 'trafficking', 'child' and 'forced labour'.

While prevention issues are covered in chapter 2,<sup>83</sup> chapter 3 is of significant importance to criminal justice in that it creates a number of new offences, in particular human trafficking, while also providing for stringent

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<sup>75</sup> South African Law Reform Commission op cit (n23) 10; Human Sciences Research Council op cit (n3) 44.

<sup>76</sup> Smith op cit (n36) 11.

<sup>77</sup> See *Government Gazette* no. 32906 of 29-1-2010, general notice 61 of 2010, for an explanatory summary of the Prevention and Combating of Trafficking in Persons Bill.

<sup>78</sup> Parliamentary Committee: Justice and Constitutional Development (Parliamentary Portfolio Committee on Justice and Constitutional Development) 2011 'Prevention and Combating of Trafficking in Persons Bill:– Minutes of meeting of Portfolio Committee on Justice and Constitutional Development', 15 November 2011, available at <http://www.pmg.org.za/print/29827>, accessed on 22 November 2011, 1.

<sup>79</sup> *Government Gazette* no. 32906 of 29-1-2010, general notice 61 of 2010, 45.

<sup>80</sup> Clauses 1 and 2.

<sup>81</sup> United States of America Department of State 'Trafficking in persons report', 2010, available at <http://www.state.gov/documents/organization/142979.pdf>, accessed on 18 June 2010, 5; UN.GIFT (United Nations Global Initiative to Fight Human Trafficking) *The Vienna Forum Report: A Way Forward to Combat Human Trafficking* (2008) 28, 59; United States of America Department of State op cit (n127) 15; J Planitzer 'Guiding principles on memoranda of understanding between key stakeholders and law enforcement agencies on counter-trafficking cooperation – Report for International Organization for Migration and UN.GIFT' (2009) 5; Kruger op cit (n7) 341-342.

<sup>82</sup> Clause 2.

<sup>83</sup> Clause 3; Human Sciences Research Council op cit (n3) 44.

punishment.<sup>84</sup> In addition, other conduct is also criminalised, including conduct relating to debt bondage,<sup>85</sup> confiscation of, or tampering with, travel and other documents of trafficked persons,<sup>86</sup> using the services of trafficked victims,<sup>87</sup> facilitating human trafficking,<sup>88</sup> and carriers intentionally transporting trafficked victims across the borders of South Africa without the required documents.<sup>89</sup> The Trafficking Bill also lists a number of aggravating factors that the court must consider before sentencing a person convicted of any of the offences established in chapter 3.<sup>90</sup> Extraterritorial jurisdiction is also provided for, in that South African courts will have jurisdiction in respect of those acts which, although committed outside South Africa, would have been an offence under the Trafficking Bill had they been committed in South Africa.<sup>91</sup>

Chapters 4 to 8 introduce various innovative aspects pertaining to the victims of trafficking. While chapter 4 addresses the identification and protection of such victims,<sup>92</sup> chapter 5 makes provision for the status of foreign victims of trafficking.<sup>93</sup> Chapter 6 provides for services to be rendered to adult victims of trafficking and chapter 7 for compensation for victims as well as the state.<sup>94</sup> Importantly, chapter 8 prohibits the summary deportation of victims<sup>95</sup> and further provides for the repatriation of victims of trafficking.<sup>96</sup>

Lastly, chapter 9 contains general provisions, chapter 10 deals with the administration of the Trafficking Bill, and chapter 11 covers the laws to be repealed or amended, as well as the short title and commencement of the proposed legislation. As regards the schedules to the Trafficking Bill, Schedule 1 lists the laws that will be repealed and amended when the Trafficking Bill is enacted, while Schedule 2 contains the text of the Palermo Protocol.

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<sup>84</sup> Clause 4. Clause 4 also provides for the criminalisation of other conduct, such as inciting, instigating, commanding, aiding or procuring another person to commit an offence under chapter 3. The Prevention and Combating of Trafficking in Persons Bill also provides for the liability of juristic persons – see the definition of ‘person’ in clause 1.

<sup>85</sup> Clause 5; Human Sciences Research Council op cit (n3) 45. Debt bondage is defined in clause 1; see also Kruger op cit (n7) 61-65, 151-153.

<sup>86</sup> Clause 6; Human Sciences Research Council op cit (n3) 45. The conduct prohibited in clause 6 is most often employed by perpetrators to control their victims – Kruger op cit (n7) 150-151.

<sup>87</sup> Clause 7; Human Sciences Research Council op cit (n3) 45. The purpose of establishing this offence is primarily to combat the demand for the services of human trafficking – see also Kruger op cit (n7) 109-110.

<sup>88</sup> Clause 8. This clause criminalises various types of conduct facilitating human trafficking, such as conduct relating to the intentional leasing of property and to the use of the media. Internet service providers are also obligated to report internet addresses which facilitate human trafficking, to the South African Police Service; Human Sciences Research Council op cit (n3) 45.

<sup>89</sup> Clause 9. This clause brings the Bill in line with article 11(2) and (3) of the Palermo Protocol; see also Kruger op cit (n7) 327-328.

<sup>90</sup> Clause 11.

<sup>91</sup> Clause 10; see also Kruger op cit (n7) 336-338.

<sup>92</sup> Clauses 12-16; see also Kruger op cit (n7) 364-385.

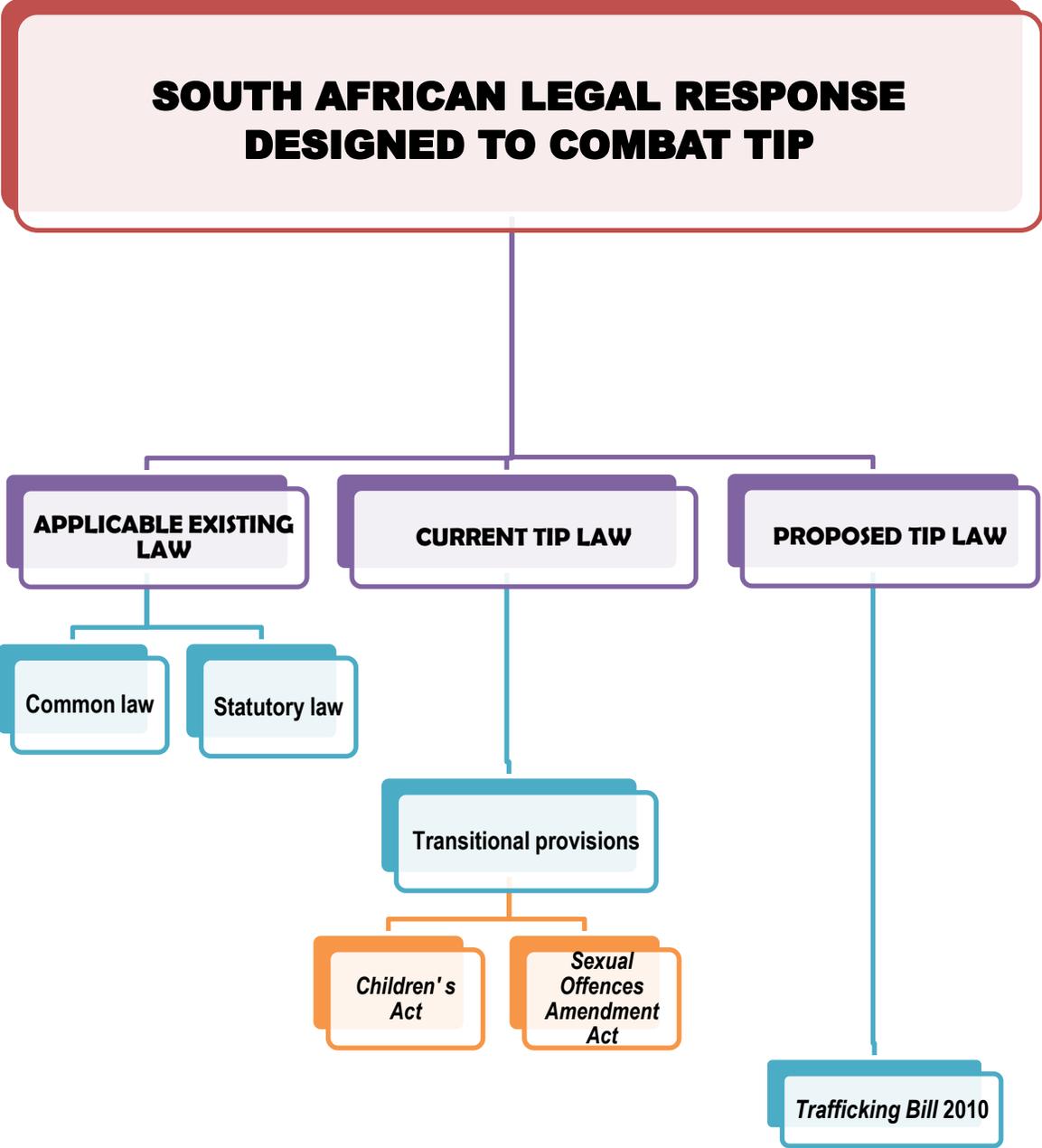
<sup>93</sup> Clauses 17-19.

<sup>94</sup> Clauses 27-28.

<sup>95</sup> Clause 29; see also Kruger op cit (n7) 370-373.

<sup>96</sup> Clauses 30-33.

The various parts of the South African legislative response to combat human trafficking may be summarised as follows:



Overview of the South African legal response for combating trafficking in persons (TIP)

## 5. CONCLUSION

‘No country can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error.’<sup>97</sup>

This article mapped out the current South African legislative response for combating human trafficking, with a specific focus on the broad criminal justice paradigm. Presently, the South African response consists of transitional provisions specifically dealing with certain aspects of trafficking in persons. These provisions in the Sexual Offences Amendment Act criminalise human trafficking, but only for the purpose of sexual exploitation.<sup>98</sup> The Children’s Act criminalises child trafficking for the purpose of any form of exploitation.<sup>99</sup> However, the protection in the trafficking provisions of the Act does not apply to trafficked adults, because the Children’s Act focuses on the protection of children only.<sup>100</sup> It follows from the discussion above that these two pieces of legislation do not fully comply with the minimum obligations set out in the Palermo Protocol. In particular, they are not aligned with the four core standards identified in this article, which are the key to any domestic criminal law response.

The Trafficking Bill has been debated at length in Parliament. Despite the differing views on certain aspects in the Trafficking Bill, it is now vital to finalise this Bill. Speedy enactment will enable the implementation of the counter-trafficking legislation – a crucial tool in combating this heinous crime more comprehensively.

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<sup>97</sup> A Gallagher & P Holmes ‘Developing an effective criminal justice response to human trafficking – lessons from the front line’ (2008) 18(3) *International Criminal Justice Review* 318.

<sup>98</sup> Sexual Offences and Community Affairs Unit in the National Prosecuting Authority ‘Tsireledzani – prevent, respond and support, 2009, available at <http://www.info.gov.za/issues/humantrafficking/documents/tsireledzani.pdf>, accessed on 4 March 2010, 2.

<sup>99</sup> See the definition of ‘trafficking’ in section 1 of the Children’s Act 38 of 2005; Kassin & Mahery op cit (n17) 202-203.

<sup>100</sup> Sexual Offences and Community Affairs Unit in the National Prosecuting Authority op cit (n92) 2; Kassin & Mahery op cit (n17) 200.