

## Trafficking in children in South Africa: An analysis of pending legislation

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This article provides an overview of contemporary trafficking in human beings, specifically children. The overview encompasses trafficking in Africa, southern Africa, and South Africa. Three pieces of pending South African legislation dealing with trafficking in persons are analyzed and proposals designed to improve that legislation are offered, from the perspective of prevention, prosecution, and protection of the victim.

It is incomprehensible that trafficking in human beings should take place in the 21<sup>st</sup> century - incomprehensible but true. Trafficking leaves no land untouched, including our own. COLIN POWELL<sup>1</sup>

### I. INTRODUCTION

While the above words were spoken by a former United States' Secretary of State, they have universal application – no country is untouched by trafficking, especially trafficking in children for purposes of sexual exploitation. Trafficking in human beings is generally referred to as the 21<sup>st</sup> century's slavery, and it has been asserted that slavery/trafficking is more common now than at any time in history, from the Roman Empire to the transatlantic slave trade.<sup>2</sup> This article will begin by giving an overview of contemporary trafficking in human beings, specifically children. The overview will comprise trafficking in Africa, southern Africa, and South Africa. Next, three pieces of pending South African legislation dealing with trafficking in persons will be analyzed. Finally, proposals to improve that legislation will be offered, from the perspective of prevention, prosecution, and protection of the victim.

### II. DEFINING TERMS

The term trafficking covers a multitude of sins. It can apply to children being exploited in myriad ways, among them: sexual exploitation, forced labour, organ removal, forced marriage, forced conscription (child soldiers), and illegal adoptions through abduction or sale of children. While none of these categories is necessarily exclusive of others,<sup>3</sup> this paper will deal only with trafficking for purposes of sexual exploitation. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, known as the Palermo Protocol, Article 3 defines trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of

<sup>1</sup> McIntosh, P. Trafficking in Children: West and Central Africa, U.S. Department of State, Bureau of African Affairs, at 1 (2003).

<sup>2</sup> Snyman, R. Victims of Human Trafficking, at 282, in *Victimology in South Africa*, Davis, L. and Snyman, R. (eds) (2005) (citing Burrell, I. 2000. *Slavery Still Common in the 21<sup>st</sup> Century*) [hereinafter *Victimology*].

<sup>3</sup> E.g., a child who is being victimized by illegal labour exploitation, may simultaneously be experiencing sexual exploitation from that same person/persons. See generally Robyn Pharoah, *Getting to Grips with Trafficking: Reflections on Human Trafficking Research in South Africa*, at 40, (PDF version). Institute for Security Studies, (2006) [hereinafter *ISS*].

others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>4</sup>

The convention negates the concept of “consent” where any of the means set out above have been used,<sup>5</sup> and most importantly states that:

...recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in paragraph (a) of this article.<sup>6</sup>

Under this protocol, a child is any person under eighteen years of age.<sup>7</sup> It should also be noted that the South African Constitution defines a child as anyone under 18.<sup>8</sup>

The Palermo definition does not cover every possible type of trafficking, and it should be noted that the UN Protocol itself deals only with organized crime’s involvement in trafficking.<sup>9</sup> Trafficking does not necessarily require that children be transported from one location to another or that international borders be crossed.<sup>10</sup> Trafficking can, therefore, occur both internationally or domestically, as is the case with South Africa.<sup>11</sup> As with other forms of child abuse, this crime deals with adults<sup>12</sup> not only failing to protect children who come under their control and supervision, but actively objectifying and exploiting them as “goods” or “services.”<sup>13</sup>

### III. SCOPE AND DYNAMICS

At its most general level, it is estimated that 12.3 million people are trafficked worldwide at any given time.<sup>14</sup> It has also been estimated that 1.2 million children are exploited through trafficking domestically and internationally, for all purposes, worldwide annually.<sup>15</sup> Data from the United States reflect that between 600,000 and 800,000 individuals are trafficked internationally each year. These figures were disaggregated in 2004, and it was discovered that up to half of the victims were

<sup>4</sup> *Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, Article 3(a), UNGAOR, 55<sup>th</sup> Sess., UN Doc A/55/383 (2000), [hereinafter Palermo Protocol], supplementing the United Nations Convention on Transnational Organized Crime [hereinafter OCC].

<sup>5</sup> *Id.*, at art. 3(b).

<sup>6</sup> *Id.*, at art. 3(c).

<sup>7</sup> *Id.*, at art. 3(d).

<sup>8</sup> Constitution of the Republic of South Africa 1996, sec. 28(3).

<sup>9</sup> ISS, *supra* note 3, at 9.

<sup>10</sup> Molo Songololo. *Trafficking in Children for Purposes of Sexual Exploitation – South Africa*, at 38 (PDF version) (2000) [hereinafter Molo].

<sup>11</sup> *Id.*

<sup>12</sup> This is not to say, however, that children do not recruit or otherwise participate in trafficking offenses. *See e.g.*, Molo, *supra*, note 10, at 3, noting that children may be trafficked into sexual exploitation by children already being exploited. *See also* INTERNATIONAL CENTER FOR MIGRATION POLICY DEVELOPMENT & THE AUSTRIAN MINISTRY OF THE INTERIOR, REGIONAL STANDARD FOR ANTI-TRAFFICKING TRAINING; POLICE TRAINING IN SEE 23-24, (2003) [hereinafter ICMPD training manual], (noting that traffickers may use children as instruments of their crimes, by using them as runners or lookouts). *See also* ISS, *supra* note 3, at 9 and Molo, *supra* note 10, at 31 and 51 (both noting presence of siblings in methods of trafficking).

<sup>13</sup> Innocenti Research Centre, *TRAFFICKING IN HUMAN BEINGS, ESPECIALLY WOMEN AND CHILDREN, IN AFRICA*, at 5-6 (PDF version) UNICEF, 2003 [hereinafter UNICEF]; Thanh-Dam Throng and Maria Belen Angeles, *Searching for Best Practices to Counter Human Trafficking in Africa: A Focus on Women and Children*, at 2, (PDF version) UNESCO (2005)[hereinafter UNESCO]. *See also* J Martens, M Pieczkowski & B van Vuuren-Smyth. *Trafficking in Women & Children for Sexual Exploitation in Southern Africa* pp. 65-66 (PDF version) (noting young girls in Malawi may be looked upon as “possessions” of value that families can sell), International Organization for Migration – Southern Africa, Pretoria: (2003) [hereinafter IOM].

<sup>14</sup> U.S. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT*, 2006, at I. Introduction – Focusing on Slave Labor and Sexual Slavery (online version, available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65983.htm>) (last visited April 17, 2007) [hereinafter 2006 TIP Report], citing International Labour Organization (ILO) statistic.

<sup>15</sup> Europol, *Legislation on Trafficking in Human Beings and Illegal Immigrant Smuggling*, at 5, (2005)(citing Organization for Security and Cooperation in Europe statistic). Available at [www.osce.org](http://www.osce.org)

children.<sup>16</sup> The majority of all transnational victims are trafficked for commercial sexual exploitation.<sup>17</sup> There are no definitive numbers on how many children are trafficked in South Africa.<sup>18</sup>

Countries involved in trafficking are divided into three categories: countries of origin, countries of transit, and countries of destination;<sup>19</sup> with victim status determining this designation. A country may be included in more than one category, and may be included in all three simultaneously. South Africa is designated as all three.<sup>20</sup>

Research done so far on trafficking in children in South Africa has been primarily carried out by three different organizations: Molo Songololo (Molo), the International Organization on Migration (IOM), and UNICEF.

The first study, put out by Molo Songololo in 2000, specifically dealt with trafficking in children for purposes of sexual exploitation in South Africa. The study reported that there are between 28,000 and 38,000 prostituted children in South Africa.<sup>21</sup> It also reported that 25% of the prostituted population in Cape Town comprised children.<sup>22</sup> It found that parents, particularly mothers, are among the primary traffickers in children,<sup>23</sup> and noted the close relationship between intrafamilial sexual abuse and exploitation.<sup>24</sup>

In 2003 both UNICEF and the IOM published studies on trafficking. The IOM study focused on trafficking in women and children for sexual exploitation in southern Africa, and found that South Africa is a main destination for southern Africa.<sup>25</sup> The victims, both children and adults, are recruited by coercion, force, or deception (most often concerning employment, marriage and education).<sup>26</sup> Tellingly, it found that victims are afraid of law enforcement and do not trust the police to assist them.<sup>27</sup> It also found trafficking in women and children for sexual exploitation to be a significant problem in southern Africa.<sup>28</sup>

IOM focused, in part, on child trafficking from Lesotho to the eastern Free State of South Africa.<sup>29</sup> It found that the child victims were both male and female, with half the children abducted and half deceived. Physical and/or sexual abuse at home, as well as death of a parent(s) from AIDS, were major sources of vulnerability.<sup>30</sup> It found that the abuse of these victims was not necessarily about sex or money, but power and control, and the need to humiliate, punish, and exploit.<sup>31</sup>

The UNICEF study dealt with trafficking throughout Africa and identified South Africa as a country of destination, transit and origin for victims, as well as having trafficking within its borders.<sup>32</sup>

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<sup>16</sup> 2006 TIP Report, *supra* note 14; Trafficking Victims Protection Reauthorization Act of 2005, Sec. 2 (2), codified at 22 USC 7101, et. seq. [hereinafter TVPRA 2005].

<sup>17</sup> *Id.*; ISS, *supra* note 3, at 37 & 39, citing ILO study showing 98% of sexual exploitation is perpetrated against women and children; United Nations Office on Drug and Crime, *Trafficking in Persons Global Patterns*, at 80 (PDF version) (2006) [hereinafter UNODC].

<sup>18</sup> South African Law Reform Commission, Discussion Paper 111, Project 131, *Trafficking in Persons*, at 26 (2006) [hereinafter SALRC 2006 Paper]; ISS, *supra* note 3, at 9.

<sup>19</sup> UNICEF, *supra* note 13, at 10.

<sup>20</sup> IOM, *supra* note 13, at 125; ISS, *supra* note 3, at 23; UNODC, *supra* note 17, pp. 17-20; UNESCO, *supra* note 13, at 14; Victimology, *supra* note 2, at 286-287.

<sup>21</sup> Molo, *supra* note 10, at 26. Currently, the Institute for Securities Studies (ISS) is mounting a two year (2006-2008) research project which will attempt to obtain figures on how many victims of trafficking for purposes of sexual exploitation there are in South Africa. This study is not, however, concentrating on children.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, at 29.

<sup>24</sup> *Id.*, at 28.

<sup>25</sup> IOM, *supra* note 13, at 125. *See also* UNICEF, *supra* note 13, at 16.

<sup>26</sup> IOM, *supra*.

<sup>27</sup> *Id.* *See also* 2006 TIP Report, *supra* note 14, at IDENTIFYING VICTIMS OF TRAFFICKING – The Reality.

<sup>28</sup> IOM, *supra* note 13, at 125.

<sup>29</sup> *Id.*, at 34-46.

<sup>30</sup> *Id.*, at 126.

<sup>31</sup> *Id.*, at 127.

<sup>32</sup> UNICEF, *supra* note 13, at 10-25.

It found that trafficking is a recognized problem in approximately half the countries in Africa,<sup>33</sup> with children trafficked at twice the rate of women.<sup>34</sup> Later studies of global patterns of trafficking would confirm that in Africa, children comprise the largest group of trafficking victims, comprising almost 60% of all reported trafficking.<sup>35</sup> Somewhat surprisingly, it found that not only might victims be sought out by traffickers, they might also seek out traffickers, in hopes of a better life elsewhere.<sup>36</sup>

The causes of trafficking spring from an array of sources: violence against women and children, concealment of incest and rape, discrimination and devaluation of women and children, greed, political instability, armed conflict, even natural disasters.<sup>37</sup> The victims may come from dysfunctional or non-existent families. Dysfunction can include ignorance. Parents, acting out of ignorance and hope, may give their children to traffickers who promise a better life to the child, often through education or employment, or a combination of the two.<sup>38</sup> Children who are AIDS orphans are similarly at risk from traffickers.<sup>39</sup> Poverty may also drive children into prostituting or trafficking themselves, as they literally have nothing of value to exist upon except their bodies.<sup>40</sup> Poverty, however, neither explains nor justifies adults trafficking in children, as most poor children's families do not traffic their children.<sup>41</sup> As one commentator states:

Sex trafficking isn't a poverty issue but a law enforcement issue. You can only carry out this trade at a significant level with the cooperation of local law enforcement. In the developing world, the police are not seen as a solution for anything. You don't run to the police, you run from the police.<sup>42</sup>

Family and parents are not always duped into parting with their child - sometimes parents simply sell their children for the money.<sup>43</sup> Friends or peers of the child may also recruit or assist in trafficking.<sup>44</sup> The fact that children, especially female children, may be looked upon as a burden rather than as asset, makes them a liability that may be discarded through being sold or trafficked.<sup>45</sup> In short, greed, betrayal, and often misogyny are also amongst the causes of trafficking in children.

Many traffickers are involved in other transnational crimes,<sup>46</sup> and the profits from trafficking in human beings make it the fastest growing source of profits for organized criminal enterprises worldwide.<sup>47</sup> Trafficking is third, behind only drug and gun running, in generating profits for organized crime. It is estimated that 9.5 billion US dollars annually is generated annually through

<sup>33</sup> *Id.*, at 9 (citing 49% of all African countries recognize trafficking as a problem, whereas in southern Africa only 33% of the countries recognize it as such).

<sup>34</sup> *Id.*

<sup>35</sup> UNODC, *supra* note 17, at 76. *See also* A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, at 42. International Labour Conference, Geneva 2005 (PDF version) [hereinafter ILO], citing Africa as the region with the highest proportion of forced child labour in the world.

<sup>36</sup> UNICEF, *supra* note 13, at 8. For a similar phenomenon occurring with other types of exploitation, *see* Lanning, K.V. *Compliant Child Victims: Confronting an Uncomfortable Reality*. APSAC Advisor, 14(2) (2002) [hereinafter Lanning].

<sup>37</sup> Molo, *supra* note 10, at 27; UNICEF, *supra* note 13, at 5-7; Victimology, *supra* note 2, at 283; UNESCO, *supra* note 13, at 32.

<sup>38</sup> UNICEF, *supra* note 13, at 9 (citing Human Rights Watch 2003); UNESCO, *supra* note 13, at 54

<sup>39</sup> UNICEF, *supra*, at 6.

<sup>40</sup> Molo, *supra* note 10, at 27; IOM, *supra* note 13, at 11.

<sup>41</sup> Leth, I. Child Sexual Exploitation from a Global Perspective, at 69, in *Medical, Legal & Social Science Aspects of Child Sexual Exploitation: A Comprehensive Review of Pornography, Prostitution and Internet Crimes*, Cooper, et.al. (eds) (2005) [hereinafter Leth]. *See also* ISS, *supra* note 3, at 32; IOM, *supra*, at 16.

<sup>42</sup> Cooper, S. Human Trafficking for Sexual Exploitation: The Role of Interpol, at 743, (citing Landesman P. The girls next door. *New York Times Magazine*. January 25, 2004), in *Medical, Legal & Social Science Aspects of Child Sexual Exploitation: A Comprehensive Review of Pornography, Prostitution and Internet Crimes*, Cooper, et.al. (eds) (2005) [hereinafter Cooper].

<sup>43</sup> Molo, *supra* note 10, at 29-31, cited also in ISS, *supra* note 3, at 30; UNICEF, *supra* note 13, at 9; Victimology, *supra* note 2, at 284.

<sup>44</sup> Molo, *supra*, at 31; ILO, *supra* note 36, at 51.

<sup>45</sup> UNICEF, *supra* note 13, at 6; UNESCO, *supra* note 13, at 56

<sup>46</sup> IOM, *supra* note 13, at 8. UNODC, *supra* note 17, at 68.

<sup>47</sup> US Trafficking Victims Protection Act of 2000, sec. 102(b) (8), codified at 22 USCS § 7101, et seq.

trafficking.<sup>48</sup> Traffickers engage in this crime because it is high profit, relatively low risk,<sup>49</sup> does not require a large capital investment and because, unlike other commodities such as drugs, people can be used and resold repeatedly.<sup>50</sup> The risk of detection is relatively low as many of the victims come from countries where the authorities are a source of fear rather than assistance.<sup>51</sup>

Even if the child is rescued, as with all types of child abuse, the child may not wish to disclose what happened to him or her.<sup>52</sup> This may be due to understandable reluctance to relive the abuse or to cultural taboos that were broken by the abuse and fear of resulting stigma that might attach.<sup>53</sup>

While the role of organized crime is well documented in trafficking research,<sup>54</sup> it must be noted that other types of traffickers are common.<sup>55</sup> Just as with other types of child abuse, it may be the case that in a large number of trafficking violations, it was “friends and family” who were in fact the traffickers, or knowingly assisted in the exploitation of the victimized child.<sup>56</sup>

Finally, although victims of sex trafficking experience a grotesque array of health problems as a consequence of exploitation, the global public health impact of sex trafficking has not yet been fully quantified.<sup>57</sup> Reviewing regional studies offers a sense of how physically and psychologically traumatizing sex trafficking is. For example, a study of women and girls trafficked for prostitution in East Africa reported widespread rape, physical abuse, sexually transmitted infections or diseases (STI/STD), and HIV/AIDS.<sup>58</sup> Less obvious, but potentially deadly, conditions such as cervical cancer may also occur as a result of being trafficked for sexual exploitation.<sup>59</sup> Some of the consequences may be grouped into the following categories:

- (1) Infectious diseases such as HIV, STDs, and TB;
- (2) Non-infectious diseases including cancer, stunted growth, malnutrition, dental health problems, skin diseases, neurological symptoms, gastrointestinal problems, lice;
- (3) Reproductive health problems, among them forced abortions, high-risk pregnancies and deliveries, gynecological infection, vaginal discharge, permanent damage to reproductive organs;
- (4) Substance abuse of alcohol, inhalants, and intravenous drugs;
- (5) Mental health problems, such as insomnia, anxiety, depression; Post Traumatic Stress Disorder; suicide, and;
- (6) Violence, including gang rape, broken bones, murder and death.<sup>60</sup>

It must also be observed that pregnancy-related death is the leading cause of mortality for 15-19-year-old girls worldwide (whether married or not), and those under 15 are five times as likely to die as

<sup>48</sup> 2006 TIP Report, *supra* note 14, at The Human and Social Costs of Trafficking-*Fueling Organized Crime*, citing Federal Bureau of Investigation statistic (last visited April 17, 2007). *See also* Miko, F.T. Trafficking in Women and Children: The U.S. and International Response,” *Congressional Research Service Report 98-649 C*, 10 May.

<sup>49</sup> Hughes, D. The “Natasha” Trade: the Transnational Shadow market of Trafficking in Women (2000), at 9, cited in IOM, *supra* note 13, at 17.

<sup>50</sup> 2006 TIP Report, *supra* note 14 at The Human and Social Costs of Trafficking (last visited April 17, 2007): IOM, *supra* note 13, at 8.

<sup>51</sup> *See* Cooper, *supra*, note 42.

<sup>52</sup> Summit, R. The Child Sexual Abuse Accommodation Syndrome, *Child Abuse & Neglect*, Vol 7 p. 177, at 186.

<sup>53</sup> Finkelhor, D. and Browne, A. The Traumatic Impact of Child Sexual Abuse: A Conceptualization, *Amer. J. Orthopsychiat.* 55(4), October 1985 at 532-533; Kreston, S. Investigation and Prosecution of the Prostitution of Children, at 748, in *Medical, Legal & Social Science Aspects of Child Sexual Exploitation: A Comprehensive Review of Pornography, Prostitution and Internet Crimes*, Cooper, et.al. (eds); Leth, *supra* note 41, at 7; Muller, K. and Hollely, K. Introducing the Child Witness (2000) at 106-35 (discussing the impact of child sexual abuse).

<sup>54</sup> *See e.g.* UNODC, *supra* note 17, at 80; IOM, *supra* note 13, at 16.

<sup>55</sup> ISS, *supra* note 3, at 51-53

<sup>56</sup> *See* IOM, *supra* note 13, at 126; Molo, *supra* note 10, 28-31.

<sup>57</sup> 2006 TIP Report, *supra* note 14, at I. Introduction - The Public Health Impacts of Sex Trafficking (last visited April 17, 2007). *See also* ISS, *supra* note 3, at 53-54; Leth, *supra* note 41, at 76.

<sup>58</sup> 2006 TIP Report, *supra*, citing Pearson, E. “Study on Trafficking in Women in East Africa.” GTZ. December 2003. *See also* Leth, *supra*, at 77.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* *See also* Leth, *supra* note 41, at 76-77.

women in their 20s.<sup>61</sup> While noting that the most egregious physical, sexual, and psychological trauma and abuses are often borne by children,<sup>62</sup> obviously, children also suffer additional harms, including the loss of education opportunity.<sup>63</sup> Children who are found to have been trafficked and are returned to their communities may be stigmatized and ostracized.<sup>64</sup> Children victimized by this crime are also robbed of the psychological, spiritual, cultural and social development that would have been enjoyed but for the exploitation.<sup>65</sup> They may also be re-victimized and re-trafficked.<sup>66</sup> Recovery from these types of abuse and their aftermath may take decades to achieve.

#### IV. SOUTH AFRICAN LAW AND PENDING LEGISLATION

##### A. Current State of the Law

South Africa does not currently have in force a law that specifically addresses trafficking of children for purposes of sexual exploitation. However, there are specific statutory offences that might be applied to trafficking,<sup>67</sup> and also provisions in the common law, such as abduction, kidnapping, rape and indecent assault, which might also be available.<sup>68</sup>

Twenty-first century crime cannot, however, best be dealt with by laws written in the 1900s. While there has been debate regarding whether South Africa needs a specific law criminalizing trafficking in persons,<sup>69</sup> it is unquestionably obligated to do so under its existing international agreements.<sup>70</sup> Both the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and the Optional Protocol to the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography have been signed and ratified by South Africa, and create an obligation to protect child victims of trafficking as well as prosecute those who traffic in children. The African Charter on the Rights and Welfare of the Child also specifically addresses trafficking in children.<sup>71</sup> Specific legislation has also been recommended by various non-governmental organizations that have studied this problem.<sup>72</sup>

In light of these obligations, three pieces of pending legislation have been created. Two pieces include trafficking in children within a larger framework of their ambit. First, the Criminal Law (Sexual Offenses and Related Matters) Amendment Bill (B50B/2003) of 2006 includes a clause on “transitional provisions relating to trafficking in persons for sexual purposes.”<sup>73</sup> It was included to comply with South Africa’s international obligations and to deal with this rapidly growing global phenomenon, pending the adoption of specific trafficking legislation.<sup>74</sup> The legislation criminalizes trafficking in persons, but only in the context of sexual exploitation (including pornography and prostitution), sexual grooming and/or sexual abuse.<sup>75</sup> While trafficking in children is not specifically

<sup>61</sup> Leth, *supra*, at 77, citing, UNICEF. *Early Marriage: Child Spouses*, Florence, Italy: Innocenti Research Centre (2001).

<sup>62</sup> 2006 TIP Report, *supra* note 14, at I. Introduction - The Human and Social Costs of Trafficking – *Public Health Costs* (last visited April 17, 2007).

<sup>63</sup> See ISS, *supra* note 3, at 55.

<sup>64</sup> Leth, *supra* note 41, at 79.

<sup>65</sup> Victimology, *supra* note 2, at 287.

<sup>66</sup> 2006 TIP Report, *supra* note 14, at I. Introduction - The Human and Social Costs of Trafficking.

<sup>67</sup> E.g., sec.14 of the Sexual Offenses Act 1957, dealing with statutory rape.

<sup>68</sup> Pithey, B. 2004, September. Do New Crimes Need New Laws, *SA Crime Quarterly*, 9:7-10.

<sup>69</sup> See e.g. Pithey, *supra*; T. Leggett, Hidden Agendas? The Risks of Human Trafficking Legislation, *SA Crime Quarterly*, 9 September 2004, pp.1-6; Singh, D. 2004, November. Piercing the veil on trafficking in women. *The Comparative and International Law Journal of South Africa*, 37(3):1-32.

<sup>70</sup> ISS, *supra* note 3, at 1.

<sup>71</sup> African Charter on the Rights and Welfare of the Child: Article 29: Sale, Trafficking and Abduction; Article 27: Sexual Exploitation, and; Article 16: Child Abuse and Torture. Ratified by South Africa in 2000.

<sup>72</sup> See Molo, *supra* note 10, at 86; IOM, *supra* note 13, at 18, 133-134; UNESCO, *supra* note 13, at 58 (quoting RAPCAN response to questionnaire).

<sup>73</sup> Criminal Law (Sexual Offenses and Related Matters) Amendment Bill B50B of 2003, accepted on 10-11-06 [hereinafter SOB].

<sup>74</sup> *Id.*, at sec. 65.

<sup>75</sup> *Id.*, at cl. 65(2)(g).

addressed, there is a reference to trafficking by means of abuse of power of a position of vulnerability.<sup>76</sup>

Second, while the Children's Act has been accepted as legislation, it is only scheduled to be implemented in 2008. It also covers trafficking in children,<sup>77</sup> as part of its larger focus, both civil and criminal, on child welfare law generally. The object of the Act is, in part, to: protect children from maltreatment, abuse, neglect, or degradation; give effect to the Republic's obligations concerning the welfare of children in terms of international instruments binding on the Republic; and to generally to promote the protection, development, and well-being of children.<sup>78</sup>

Finally, the South African Law Reform Commission (SALRC) issued a trafficking in persons discussion paper in 2006,<sup>79</sup> which drew on the earlier issue paper.<sup>80</sup> At the end of its introductory chapter, the Commission specifically made mention of the United States Trafficking In Persons (TIP) Report. As South Africa currently does not have a specific trafficking law, this is one factor contributing to its worrying rating in the 2006 TIP report.<sup>81</sup>

The TIP report divides countries into four categories: Tier 1; Tier 2; Tier 2 Watch List; and, Tier 3. The requirements for placement on the various tiers are as follows:

- **TIER 1:** Countries whose governments fully comply with minimum standards in regard to the elimination of trafficking in human beings,
- **TIER 2:** Countries whose governments do not fully comply with minimum standards but are making significant efforts to bring themselves into compliance with those standards;
- **TIER 2 SPECIAL WATCH LIST:** Countries whose governments do not fully comply with minimum standards but are making significant efforts to bring themselves into compliance with those standards, and:
  - The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or
  - There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
  - The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.
- **TIER 3:** Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.<sup>82</sup>

South Africa is designated as Tier 2 Watch List.<sup>83</sup> The report explains why:

South Africa is a source, transit, and destination country for men, women, and children trafficked for forced labor and sexual exploitation. South African women and girls are trafficked internally and occasionally by organized crime syndicates to European and Asian countries for sexual exploitation. Women from other African countries are trafficked to South Africa and, less frequently, onward to Europe for sexual exploitation. Men and boys are trafficked from neighboring countries for forced agricultural labor. Thai, Chinese, and Eastern European women are trafficked to South Africa for debt-bonded sexual exploitation.

The Government of South Africa does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. South Africa is placed on Tier 2 Watch List for its failure to show increasing efforts to address trafficking over

<sup>76</sup> *Id.*, at cl. 65(2)(f).

<sup>77</sup> Children's Act, B70B of 2003, ch. 18 [hereinafter Children's Act].

<sup>78</sup> *Id.*, at ss. 2(b),(c),(i).

<sup>79</sup> SALRC 2006 Paper, *supra* note 18.

<sup>80</sup> South African Law Reform Commission. 2004. *Trafficking in Persons. Issue Paper 25. Project 131.*

<sup>81</sup> See SALRC 2006 Paper, *supra* note 18, at 5, specifically referencing South Africa's ranking in US TIP report.

<sup>82</sup> 2006 TIP Report, *supra* note 14, at Trafficking Victims Protection Act (available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65994.htm>) (last accessed April 17, 2007).

<sup>83</sup> For a complete ranking of all nations, see 2006 TIP Report, *supra* note 14, at IV. Tier Placements (available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65985.htm>) (last accessed April 17, 2007).

the last year. The government did not provide comprehensive data on trafficking crimes investigated or prosecuted, or on resulting convictions or sentences during the year. The government should demonstrate continued progress toward the passage of comprehensive anti-trafficking legislation and develop national procedures for victim protection, including the screening of undocumented immigrants for signs of victimization before deportation. As it does for other types of crimes, the government should also regularly compile national statistics on the number of trafficking cases prosecuted and victims assisted.<sup>84</sup>

Noting this ranking, the SALRC stated:

South Africa was initially rated as a tier 2 country. However, the TIP Report of 2005 rates South Africa as a tier 2 Watch List country. This is because of a lack of evidence of increasing efforts to combat trafficking in persons over the year leading up to the TIP Report of 2005. This report further impresses on the government of South Africa the importance of passing comprehensive legislation on trafficking in persons as soon as possible.<sup>85</sup>

Accompanying the 2006 SALRC discussion paper is proposed draft legislation on trafficking in persons, the Combating of Trafficking in Persons Bill.<sup>86</sup> That bill, as well as the other pieces of proposed legislation, will be assessed against the following criteria to determine whether minimum standards have been met concerning:<sup>87</sup>

1. Prevention Initiatives, including: (1) education and awareness raising of the crime, specifically targeting vulnerable groups likely to be targeted for this offence, and; (2) long-term strategies for eradicating the underlying causes of trafficking in children.
2. Prosecution Strategies and Resourcing, including: (1) creation of trafficking as a distinct crime; (2) sanctions compatible with recognition of the gravity of the offence; (3) special investigation and prosecution units and/or training; (4) assertion of extraterritorial jurisdiction, and; (5) extradition and mutual legal assistance.
3. Victim Assistance and Protection, including: (1) protection of victim from immigration violations & summary deportation, as well as prosecution for crimes that occurred as a direct result of being trafficked, e.g. prostitution, and; (2) reintegration programs to assist victims being phased back into the community, including all appropriate mental health and medical assistance required to overcome the trauma, both psychological and physical, of being trafficked, and; (3) a repatriation provision, contingent on a “best interests of the child” assessment, to assess the child’s safety and well-being upon return.

## B. Analysis of Legislation

### (1) Children’s Act

The Children’s Act provides for the administration of justice in children’s courts and contains detailed provisions for children in need of care and protection as well as child abduction and trafficking. The act’s overarching purpose is to consolidate the currently fragmented child welfare law in South Africa.<sup>88</sup> The stated purposes of the trafficking chapter of this act is to give effect to the UN Protocol to Prevent Trafficking in Persons, and generally to combat trafficking in children.<sup>89</sup> The act defines trafficking in children as:

...the recruitment, sale, supply, transportation, transfer, harbouring, or receipt of children, within or across the borders of the Republic – (a) 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 the person having control over the child; or

<sup>84</sup> 2006 TIP Report, *supra* note 14, at VI. Country Narratives (available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65990.htm>) (last accessed April 17, 2007).

<sup>85</sup> SALRC 2006 Paper, *supra* note 18, at 5.

<sup>86</sup> *Id.*, at 268.

<sup>87</sup> This criteria is adapted in part from ABA/CEELI, AN INTRODUCTION TO THE HUMAN TRAFFICKING ASSESSMENT TOOL (PDF version) (2005) [hereinafter Assessment Tool].

<sup>88</sup> Victimology, *supra* note 2, at 148.

<sup>89</sup> Children’s Act, *supra* note 77, at sec. 281.



(b) due to a position of vulnerability, for the purpose of exploitation<sup>90</sup>

While this definition provides slightly more expansive coverage than the Palermo Protocol, a major shortcoming of this act is that there is no prevention provision whatsoever. The chapter begins almost immediately with criminalizing trafficking, but fails anywhere in the chapter to provide for either education and awareness raising or strategies for eliminating the causes.

Chapter 18 of this act specifically prohibits any person to traffic, or allow to be trafficked, any child.<sup>91</sup> It further prohibits the defenses of consent of the child and/or those in loco parentis, as well as failure to complete the underlying criminal act, i.e. sexual exploitation.<sup>92</sup> The sanctions provided in the act call for imprisonment not exceeding 20 years, a fine, or both.<sup>93</sup> Extra-territorial jurisdiction is also asserted over citizens or permanent residents who commit an act outside the Republic that would have constituted an offence in terms of this chapter had it been committed inside the Republic, holding that person(s) liable on conviction to the penalty set out above.<sup>94</sup>

These provisions do comply with the need for criminalization, proportionate sentencing and extra-territoriality. However, no provision is made for special investigation units or, in lieu thereof, specialized training for all front line professionals involved. Finally, there is provision for international co-operation, to facilitate the application of the principles of extradition and mutual legal assistance found in the Palermo Protocol.<sup>95</sup>

Victim services are overwhelmingly dedicated to issues of repatriation of victim children to their country of origin,<sup>96</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>97</sup> including the application of the child for asylum under the Refugee Act.<sup>98</sup> There is no mention of any long-term reintegration process, nor any mention of psychological or medical assistance being given. Nor is there any provision for the identification of the trafficked child as a victim of crime, nor for the preclusion of charging any child with any offenses they may have committed as a result of being trafficked.

## **(2) Sexual Offenses Amendment Bill (B50B/2003) of 2006**

The Sexual Offenses Bill clearly states that its clauses dealing with trafficking are simply transitional provisions until other legislation is passed. This bill is limited by the substance of its subject matter to criminalizing only trafficking for purposes of sexual exploitation and/or abuse. It also gives a different definition of trafficking than the Palermo Protocol. It 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, by means of—

- (a) a threat of harm;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) abduction;
- (d) fraud;
- (e) deception or false pretences;
- (f) 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
- (g) the giving or receiving of payments or benefits,

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<sup>90</sup> *Id.*, at sec. 1.

<sup>91</sup> *Id.*, at sec. 284(1). Behavior facilitating child trafficking is also criminalized at sec. 285(1)(a), (b). This article will not, however, deal with this aspect of child trafficking.

<sup>92</sup> *Id.*, at sec. 284(2).

<sup>93</sup> *Id.*, at sec. 305(8).

<sup>94</sup> *Id.*, at sec. 291.

<sup>95</sup> *Id.*, at ss. 283(1)(a),(b).

<sup>96</sup> *Id.*, at sec. 286.

<sup>97</sup> *Id.*, at ss. 290(1)(a),(b),(c).

<sup>98</sup> *Id.*, at sec. 289(2).

for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person...<sup>99</sup>

It specifically criminalizes trafficking for purposes of sexual exploitation, stating:

- (1) A person ("A") who trafficks 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,
  - (d) is guilty of an offence of involvement in trafficking in persons for sexual purposes.<sup>100</sup>

It defines a lack of consent as any of the contingencies listed in (a)-(g) above, or where the victim was incapable in law of appreciating the nature of the act, including where the victim was a child below the age of 12.<sup>101</sup> Like the Children's Act, it also has no prevention provisions whatsoever.

It does make trafficking a crime, but provides no specific sanction for violation of this crime. Therefore, sanctions will be governed by common law. As sentences of up to life are available for common law crimes such as rape and abduction, theoretically trafficking should warrant the same punishment. 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 United Nations Convention on Transnational Organized Crime (OCC).<sup>102</sup> There is no mention of specialized investigation and prosecution, or training for those involved in responding to this crime. Finally, there is no extra-territoriality asserted, nor are extradition, or mutual legal assistance, addressed.

A person who has been trafficked 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.<sup>103</sup> However, there is no reintegration or victim assistance proviso, nor is there any discussion of repatriation or the possibility of determining whether repatriation is in the best interests of the child.

### **(3) Combating of Trafficking in Persons Bill**

This bill begins by identifying poverty and unemployment as the main causes of trafficking. It defines trafficking as:

- 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.<sup>104</sup>

It 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>105</sup> It also calls for state action to discourage the demand that fosters the exploitation of victims of trafficking, especially women and children,<sup>106</sup> though it does not identify the cause or causes of such demand.<sup>107</sup>

<sup>99</sup> SOB, *supra* note 72, at cl.70(2)(b).

<sup>100</sup> *Id.*, at cls. 71(1), (2).

<sup>101</sup> *Id.*, at cls. 71(4)(b).

<sup>102</sup> *See discussion infra*, at 18-19.

<sup>103</sup> *Id.*, at cl. 71(5).

<sup>104</sup> Combating of Trafficking in Persons Bill, 1 [hereinafter Trafficking Bill].

<sup>105</sup> *Id.*, at cls. 37(a),(b).

<sup>106</sup> *Id.*, at cl. 37(c).

<sup>107</sup> For an analysis of the demand factors, *see* B. Anderson & J. O'Connell Davidson. *Is Trafficking in Human Beings Demand Driven?*, at pp.16-26. IOM Migration Research Series No. 15 (IOM 2003).

The bill specifically criminalizes trafficking,<sup>108</sup> including using the services of a victim of trafficking.<sup>109</sup> It affords a broader definition of trafficking than the other bills, including circumstances such as debt bondage, and the destruction or concealment of identification or travel documentation.<sup>110</sup> It provides sanctions that mirror those of the Children's Act for trafficking<sup>111</sup> and allows for up to two years imprisonment for using the services of a victim.<sup>112</sup> It also provides for monetary awards to the victim.<sup>113</sup> While there is no mention of specialized training or units, both international co-operation and extra-territorial jurisdiction are asserted.<sup>114</sup>

Finally, there is an array of victim services provided. Initially, the identification and protection of victims is dealt with, including a specific provision for dealing with a child victim.<sup>115</sup> The legal status of the victim is specifically dealt with, suspending any summary deportation of a victim,<sup>116</sup> 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.<sup>117</sup> Though the victim is accorded the same right to medical treatment as citizens,<sup>118</sup> there is no provision for any specialized treatment for children, in stark contrast to the providing of entire centres for adult victims.<sup>119</sup> Finally, the repatriation of child victims is addressed, making provision for ascertaining whether the child will be safe and cared for if returned to his or her country of origin.<sup>120</sup>

## (C) Critique and analysis

### (1) Children's Act and Sexual Offenses Amendment Bill

As both these pieces of proposed legislation would be simultaneously repealed by passage of the Trafficking Bill discussed *infra*, they will be assessed jointly. It must be noted at the start, that neither the Children's Act nor the Sexual Offenses Amendment Bill will bring South Africa into compliance with its international obligations. Both are intrinsically constrained by the scope of their mandate, and apply respectively only to child victims of trafficking or to victims, both children and adults, who have been trafficked for purposes of sexual exploitation. Furthermore, neither makes any mention of prevention initiatives. As such, both are found wanting from the beginning.

The Children's Act has additional flaws. Commentators have criticized it as a pale shadow of its original intent, and one suffering from critical excisions and general omissions.<sup>121</sup> In reference to its trafficking provisions, one such omission is its failure to recognize the importance of specialization for members of the multi-disciplinary team tasked with implementing this legislation. Neither dedicated units within law enforcement and prosecution, nor even specialized training to those who will deal with these cases is mandated. Without such specialization, or additional training, the best interest of child victims will not be served.

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. By failing to have measures in place to identify trafficked children as victims of crime, and to preclude their being charged with any offenses they may have committed as a result of being trafficked, this act does not afford the full protection of trafficked children that it sets out to do.

The Sexual Offenses Bill not only fails to provide for prevention, it fails to provide any specific assistance to child victims of trafficking and also fails to make provision for specialized personnel or

<sup>108</sup> Trafficking Bill, *supra*, note 104, at cl. 5(1).

<sup>109</sup> *Id.*, at cl. 8.

<sup>110</sup> *Id.*, at cls. 6,7.

<sup>111</sup> *Id.*, at cl. 38(1).

<sup>112</sup> *Id.*, at cl. 38(4).

<sup>113</sup> *Id.*, at cl. 27.

<sup>114</sup> *Id.*, at cls. 42, 43.

<sup>115</sup> *Id.*, at cl. 13.

<sup>116</sup> *Id.*, at cls. 15, 32.

<sup>117</sup> *Id.*, at cl. 11.

<sup>118</sup> *Id.*, at cl. 14.

<sup>119</sup> *Id.*, at cl. 21.

<sup>120</sup> *Id.*, at cl. 33(1).

<sup>121</sup> Victimology, *supra* note 2, at 148.

training. Additionally, by assigning different protection to children under the age of 12, it leaves a gaping chasm for disparate treatment of exploitation victims between the ages of 12 and 18. The bill categorically states that children under 12 cannot consent to trafficking. By implication then, those between 12 and 18 can. This not only fails to afford equal protection to all children, but fails to recognize both the Palermo Protocol's and the South African Constitution's definition of children as those under 18 years of age. Teenagers are as vulnerable to exploitation and adults abusing positions of power over them, as are younger children. In artificially dividing the younger children, who are "deserving" of absolute protection, from the older "undeserving" children, it reinforces a cultural bias against adolescent victims of sex crimes and exploitation,<sup>122</sup> and undermines the principle that children can neither legally nor genuinely consent to their own violation.

## **(2) Combating of Trafficking in Persons Bill**

### **(a) Prevention**

The Combating of Trafficking in Human Beings draft legislation has three main areas of concern. First, under the topic of prevention, by failing to acknowledge all the causes of trafficking, particularly trafficking in children, it fails to provide an all-encompassing plan for eradication of the crime. By ignoring the part that systemic misogyny and patriarchal culture plays in this crime, and in all crimes of violence against women and children, it misses a decisive opportunity to bring a crucial dynamic behind this crime into the open. As one report stated:

A second important root cause, related also to the context which makes children vulnerable to abuse and neglect more generally is the deeply patriarchal ethos which pervades South African society. Rigid social constructions of masculinity and femininity and a profoundly conservative ethos relegate women and children to positions of being "owned" (and therefore disposable at the whim of the "owner") ... 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>123</sup>

Additionally, until such time as poverty, unemployment, greed, gender discrimination, and child abuse and exploitation are brought to heel, victims and their families will continue to make a cost/benefit analysis of the risks inherent within trafficking, so that simply educating the community on trafficking issues will not have the hoped for ameliorative effect on the situation. Education alone will not stem the tide of trafficking. Not only must victims be warned, they must believe there is genuine opportunity to better their lives without resorting to being trafficked. Conversely, perpetrators must be promptly prosecuted and severely punished, to attack simultaneously both supply and demand. Deterrence is served equally by both prevention and prosecution.

### **(b) Prosecution**

The two concerns within this topic occur at the beginning and the end of the prosecution process. Initially, these cases should come to a specialist. Unfortunately, this bill, like the others, fails to require specialized personnel with specialized training. The value of such expertise cannot be overstated. While recognizing 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 recognized form of child abuse is beyond question, and has been recommended by NGOs worldwide.<sup>124</sup> Unique crime dynamics and victim needs must be understood and responded to in a tailored fashion. This will allow for better investigation, more successful prosecution and adjudication, and less secondary trauma to victims of this offense.

Ensuring specialization would follow other jurisdictions' practices and protocols. Within the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE) recommends

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<sup>122</sup> Lanning, *supra* note 36.

<sup>123</sup> UNESCO, *supra* note 13, at 56, quoting RAPCAN response to UNESCO questionnaire.

<sup>124</sup> See e.g., IOM, *supra* note 13, at 134; Assessment Tool, *supra* note 87, at 67-68; International Association of Prosecutors' Model Guidelines of the Effective Prosecution of Crimes Against Children (PDF version), at 4-5, specifically noting the United Nations' *Guidelines for Action on Children in the Criminal Justice System* calls on States to consider establishing specialized units to deal with cases involving offenses against children.

creation of specialized units within each member state to investigate and prosecute trafficking cases.<sup>125</sup> The OSCE 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. They should also establish or strengthen cooperation with their counterparts in other countries, as well as relevant regional and international organization.<sup>126</sup>

These units should focus particularly on combating trafficking in persons and, in its Action Plan to Combat Trafficking in Human Beings, the OSCE suggests these units comprise both women and men with advanced training in investigating offenses involving sexual assault or involving children, in order to promote competence, professionalism and integrity.<sup>127</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.<sup>128</sup> 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.<sup>129</sup>

Within the United States, at the federal level, there is specialization within the prosecution of these crimes, as the Child Exploitation and Obscenity Section of the US Department of Justice handles these cases exclusively. These specialized prosecutors also train state, local and federal law enforcement agencies and prosecutors on trafficking laws. The Federal Bureau of Investigation's Crimes Against Children Unit provides training to state and local law enforcement. Other federally funded organizations, such as the National Center for Prosecution of Child Abuse and the National Center for Missing and Exploited Children, provide similar trainings throughout the US to law enforcement, prosecutors and other members of the specialist multi-disciplinary teams assigned to these cases.<sup>130</sup> These same units and organizations also provide training and assistance on an international level, thereby furthering international cooperation and relationships with international organizations, such as Interpol, that also participate in responding to these crimes.

At the opposite end of the prosecution continuum, the second concern is the possibility of excessively lenient sanctions at sentencing. While the Trafficking Protocol does not provide specific guidance on the severity of sentence to be imposed, the underlying Convention on Transnational Organized Crime indicates that sanctions are to take into account the gravity of the offense, and that if it is a serious crime, that it be punished by at least a four year deprivation of liberty, or a more serious penalty.<sup>131</sup> This minimum sentence should only be given where a defendant pleads guilty, accepts responsibility for his or her actions, and assists in providing information regarding the criminal act(s) with which he or she was involved.<sup>132</sup> The OSCE warns that, in reality, sanctions for trafficking in human beings available in many countries have no deterrent effect upon traffickers because they are too weak.<sup>133</sup> It further states that legislative provisions should take into account the seriousness of trafficking, and should provide for additional penalty when aggravating circumstances are present, such as trafficking in children.<sup>134</sup> The European Council has suggested a minimum sentence of 8 years imprisonment where the trafficking victim was particularly vulnerable, including where the victim

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<sup>125</sup> Angelika Kartusch, Reference Guide for Anti-Trafficking Legislative Review, at 52 (2001)[hereinafter OSCE Guide].

<sup>126</sup> *Id.*, at 51.

<sup>127</sup> *Decision No. 557: OSCE Action Plan to Combat Trafficking in Human Beings* 4, OSCE Doc. PC. DEC/557 (July 24, 2003) [hereinafter OSCE Action Plan]. See also EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings (PDF version). Official Journal of the European Union (2005/C 311/01, 10)

<sup>128</sup> ICMPD Training Manual, *supra* note 12, at 5.

<sup>129</sup> *Id.*, at 68.

<sup>130</sup> ECPAT International. *Global Monitoring: United States of America*, at 28-29 (PDF version) (2006).

<sup>131</sup> OCC, *supra* note 4, at art. 11(1).

<sup>132</sup> See Assessment Tool, *supra* note 87, at 60.

<sup>133</sup> OSCE Guide, *supra* note 125, at 43.

<sup>134</sup> OSCE Action Plan, *supra* note 127, at 2.

was under the age of sexual majority under national law, and the trafficking was for the purpose(s) of sexual exploitation.<sup>135</sup>

With this in mind, the proportionality of proposed sanctions will be assessed. The Trafficking Bill provides for imprisonment of up to 20 years, or a fine, or both.<sup>136</sup> The 20-year maximum is in keeping with other common law jurisdictions,<sup>137</sup> though a very troubling provision elsewhere in the bill would appear to undercut this. In dealing with compensation, the bill states:

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.<sup>138</sup>

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 clearly inappropriate. It sends the message that detention can be avoided for a certain sum. The proper 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 scourge.

The fact that the bill has no specific provision for asset confiscation, seizure, and forfeiture further complicates the victim's chances of meaningful and immediate restitution.<sup>139</sup> As many of these children may be foreign, there is no serious likelihood of them seeking civil redress in the South African civil courts.<sup>140</sup> Criminal confiscation and liquidation of the perpetrator's property may be the only truly accessible, viable source of compensation for the victim.

Finally, there is a disquieting disparity between the sanctions available for those who supply the trafficking victim and the ultimate consumer of this criminal activity, those who use the services of the victim. The maximum punishment prescribed for those who intentionally and unlawfully benefit, financially or otherwise, from the services of a victim is two years.<sup>141</sup> This violates the principle of equal treatment for those supplying the trafficking victim and those using that same victim. Both supply and demand must be eradicated, with punishment meted out on both sides of the exploitation equation with equal severity.

### (c) Protection of child victims

Finally, while 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>142</sup> the United Nations has established the following seven measures for governments to follow with respect to protecting trafficked children:

- establish procedures for the rapid identification of child victims and ensure they are not prosecuted;
- adopt 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;
- protect the privacy and identity of child victims and prevent the dissemination of any information that would unveil their identity;
- take steps to locate family members when the child victim is unaccompanied;
- 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>135</sup> See Council Framework Decision 2002/629/JHA, art. 3, para 2, 2002 O.J. (L. 203/1) 1,2; see also OSCE Guide, *supra* note 125, at 43.

<sup>136</sup> Trafficking Bill, *supra* note 104, at sec. 38(1), in line with sec. 305(8) of the Children's Act.

<sup>137</sup> E.g., Canada and the United States-up to life; Australia -15 years, or 19 when children are victims; New Zealand - 15; United Kingdom (which does not have a specific trafficking law) 14 years.

<sup>138</sup> Trafficking Bill, *supra* note 104, at cl. 27(4).

<sup>139</sup> It is recognized that aspects of asset forfeiture are dealt with under the Prevention of Organized Crime Act (1998). For an example of a jurisdiction that specifically calls for both civil and criminal forfeitures, see 18 USC 2428, calling for mandatory forfeiture of real or personal property used, or intended for use, as well as derived from proceeds of, trafficking. This is in addition to incarceration imposed.

<sup>140</sup> See Trafficking Bill, *supra* note 14, at p. 292, fnt 9.

<sup>141</sup> *Id.*, at cl. 38(4).

<sup>142</sup> See Palermo Protocol at arts. 3(c) and 6(4).

- provide children with specialized care that includes appropriate physical, psychological, legal, and educational support as well as appropriate housing;
- ensure that personnel assigned to provide assistance to child victims are properly trained and educated (i.e. legal and psychological training).<sup>143</sup>

Using this standard, the first point, 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 steps to be taken immediately upon identification.<sup>144</sup> However, the bill fails to comply with ensuring children are not prosecuted, though any prosecution of a victim of trafficking must be authorized by the National Director of Public Prosecutions.<sup>145</sup> No measures are spelled out 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. While it is contemplated that some children cannot be returned to their country of origin due to safety concerns,<sup>146</sup> no particularized arrangements are spelled out regarding transition of the child into South Africa, other than those cited regarding assisting the child in applying for asylum,<sup>147</sup> nor for transitioning a South African child back into the community. Additionally, there are no provisions made for the privacy and the identity of the child being protected.

Finally, while there is a very basic provision for those health care services available to citizens being equally available to victims,<sup>148</sup> there is absolutely no provision for any specialized care that addresses the unique needs of child trafficking victims. No regard is given to the highly unique psychological, legal, educational or even physical care required for these victims. Just as no specialization is implemented for the child's care, neither is their specialized training for their care providers, which is also noticeable by its absence. 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-victimization through ignorance.

The final two criteria under this heading, protection from summary deportation and provision for repatriation are specifically addressed in the bill. 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>149</sup> or a visitor's permit for temporary residency, if they are cooperating with law enforcement and prosecutors.<sup>150</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. Regardless, repatriation of the child victim is contingent 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-victimization, and as such meets minimum requirements for compliance.<sup>151</sup>

## V. CONCLUSION

There can be no keener revelation of a society's soul than the way in which it treats its children.  
NELSON MANDELA

While all the pieces of (proposed) legislation are positive steps toward both fulfilling South Africa's international and domestic obligation to better protect its children against human rights abuses, none is without flaws.

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<sup>143</sup> *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council; Addendum: Recommended Principles and Guidelines on Human Rights and Human trafficking*, U.N. High Commissioner for Human Rights, Substantive Sess., Agenda Item 14(g), at 13.

<sup>144</sup> Trafficking Bill, *supra* note 104, at cls.12(1), 12(4)(b)(i).

<sup>145</sup> *Id.*, at cl. 11.

<sup>146</sup> *Id.*, at cl. 33(1).

<sup>147</sup> *Id.*, at cl. 13(2).

<sup>148</sup> *Id.*, at cl. 14.

<sup>149</sup> *Id.*, at cl. 15(1)(b).

<sup>150</sup> *Id.*, at cl. 16(1).

<sup>151</sup> *Id.*, at cls. 33(1)(a)-(d).

The Sexual Offenses Bill and the Children's Act are inherently constrained to address only fragments of the trafficking issue, with one addressing only trafficking for purposes of sexual exploitation, the other only trafficked children. Neither provides for any prevention initiatives, specialized training and personnel, and the victim services of both fail to fully address the needs of child victims. Neither succeeds in bringing South Africa into compliance with its international obligations.

The more comprehensive Trafficking Bill also has areas of concern. While it does address prevention, prosecution and protection of the victims, and should fulfill South Africa's international obligations, there are still noticeable gaps and omissions in its coverage. Most concerning is its under-inclusion of causes of trafficking, to give the impression that it is simply an economic crime, whereas it also has elements of traditional criminality (such as greed) and newly acknowledged causes, such as gender discrimination and the objectification of children.

It also has potential to allow criminals to avoid incarceration through payment of compensation to the victim. Clearly, this is a serious crime that must merit serious incarceration. The suggested minimum of four years, or eight when the trafficking involves a child, should not be eligible for suspension. This crime should go from being a low risk/high profit crime to one where the risk is high to dissuade individuals from engaging in this crime. Inclusion of a specific forfeiture provision would assist the victim in receiving monetary assistance while simultaneously imposing the threat of imprisonment and loss of monetary wealth upon the trafficker. Finally, by failing to impose equally severe sentencing on those who supply and those who demand children, the statute misses an opportunity to make it as perilous to exploit the child-victim as it is to supply the child.

Equally concerning is the lack of provision for specialized training and specialized personnel to address this newly recognized crime. Failure to provide a specially trained multi-disciplinary team (MDT) comprising specialist personnel<sup>152</sup> for this type of sexual abuse and exploitation, like all types of sexual abuse and exploitation, is an invitation to disaster. This is particularly so at a time when 24% of all prosecutions within South Africa are sex offenses and 40% of all prosecutions are for violence against women and children, with a 9% conviction rate for crimes of violence generally, but a 62% conviction rate where specialized sexual offenses units are in use.<sup>153</sup>

No other southern African nation has a specific crime of trafficking in human beings, leaving South Africa to set the benchmark for this region. It can also lead the way in providing more and better research on this issue.<sup>154</sup> It has already begun the long and arduous task of educating the principle criminal justice stakeholders, including magistrates, prosecutors, and law enforcement.<sup>155</sup> It now falls to the government to implement trafficking legislation that reflects a two-prong response to the problem; one that holds the victimizers unconditionally accountable for their criminal acts and results in sentences that reflect the heinous nature of the crime, and that simultaneously addresses the multiplicity of unique needs of those children victimized by such criminals.

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<sup>152</sup> This MDT should, at a minimum, comprise representatives of law enforcement, prosecution and social services. It could also be expanded to include within its core constituency medical personnel, psychological personnel and relevant NGO representation.

<sup>153</sup> Adv. Thoko Majokweni, Special Director of Public Prosecutions, Head: SOCA. Address at NPA Training, Pietermaritzburg (August 18, 2006). *See also* NPA Annual Report 2005-2006, at 44, citing sexual offenses conviction rate of 72% in specialized blue print courts and 68% in specialized dedicated courts.

<sup>154</sup> *See* ISS, *supra* note 3, at 35.

<sup>155</sup> *E.g.*, A module on trafficking is included in the 2007 training on Sexual Offenses provided by the Association of Regional Magistrates-South Africa to its constituencies across the country. Prosecutors in Pretoria, Pietermaritzburg and Durban requested and were provided with trainings on this crime in 2006 and 2007. International conferences on trafficking in children are being held in South Africa in 2007, attended by representatives of all relevant MDT members. *E.g.*, Southern Africa Network against Trafficking and Abuse of Children, Trafficking on Children in Southern Africa Conference, Benoni, 26-29 March 2007; Unit for Children's Rights, Faculty of Law-University of the Free State, Trafficking in Human Beings: National and International Perspectives Conference, Bloemfontein, August 17, 2007.