THE EFFECTIVENESS OF HUMAN CHILD TRAFFICKING LEGISLATION IN SOUTH AFRICA

by

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Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM

in the

Faculty of Law

of the

Nelson Mandela Metropolitan University

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January 2010
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THE EFFECTIVENESS OF HUMAN CHILD TRAFFICKING LEGISLATION IN SOUTH AFRICA

SUMMARY

Trafficking in human beings is a major problem worldwide.

Human trafficking is as a result of a complex set of interrelated push and pull factors. Push factors include inter alia poverty, a lack of opportunities, dislocation of families, gender, racial and ethnic inequalities and the break-up of families. Research shows that pull factors include the promise of a better life, consumer aspirations and lack of information on the risks involved, established patterns of migration, porous borders and fewer constraints on travel.

It is as a result of the global epidemic of this trafficking in persons that certain instruments on an international level as well as legislation on a national level have been enacted. The question which arises is: are these pieces of legislation effective in dealing with the scourge of human trafficking? Every legislation passed will have its strengths, as well as weaknesses but the main objective of such legislation should always be to combat, criminalise and prosecute the specific criminal act. Furthermore, the enacted legislation should be designed to effectively combat the challenges which threaten to exacerbate the criminal act. Failing to fulfil this intention will render such legislation nugatory.

This treatise will be looking at various international instruments that have been passed abd
adopted by various countries, which specifically deal with trafficking in humans generally and specifically in relation to the children. International instruments that will be discussed include inter alia, slavery Convention, Convention on the Rights of the child, Worst forms or Child Labour Convention, Parlemo Protocol, United Nations Transnational Organised Crime Protocol to mention but a few. All these instruments have in a way dealt with and made provisions for the criminalisation of the act of trafficking in humans and as the scourge of trafficking escalates the international governments strive to enact instruments that are going to be able to curtail this pandemic of trafficking.

As more focus will be on the South African legislation this treatise is also going to examine all the relevant piece of legislation that have been passed by the South African government in order to deal with human trafficking. These will include the discussion of the Constitution, Child Care Act, Children’s Act, Children’s Amendment Act, Criminal Law (Sexual Offences) and Related matters. Amendment Act Prevention of Organised Crime Act as well as the Prevention and combating of Trafficking in Persons Bill. The treatise will listen critically discuss the Bill in so far as its strengths and weaknesses are concerned.
CHAPTER 1
INTRODUCTION

Human trafficking is a reality as well as a global problem. Even though human trafficking cuts across genders, women and children are the most affected by this scourge. Children and women are trafficked mainly for economic gain as they are sold as commodities for various types of work, e.g., sexual exploitation, labour exploitation as well as armed conflicts.

Child labour exploitation exposes the children to every form of violence imaginable. ¹ The International Labour Organisation estimates around 127 million children are at work in East Asia and the Pacific. ² There are reports of child labourers, hung from trees and beaten with sticks, forced to over-exert and permanently harm themselves physically, raped by older children and adults of the same or opposite sex, maimed or even killed as a result of accidents and murdered. ³ A high incidence of child labour may contribute to poor working conditions for adults, which in turn contributes to the need for children to be economically active in the family. ⁴ This creates a cycle over generations of adults and children deprived of rights and opportunities, particularly the right to quality education and the opportunities it provides. ⁵

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¹ United Nations Global Study on Violence Against Children: (UNVAC) Issue 1 Labour July 2006 1.
² The End of Child Labour: Within Reach ILO, 2006
³ UNVAC 1
⁴ UNVAC 2
⁵ UNVAC 2
As trafficking in persons is a global problem various countries create and pass pieces of legislation which is an effort to curb the scourge as well as adherence to the obligations required by the Palermo Protocol. South Africa is one of those countries that have ratified the Palermo Protocol and in the process, of passing legislation which will comprehensively criminalise trafficking in persons. South Africa is considered as a country of destination and transit for victims of trafficking.

The question however arises as to whether the incoming legislation of anti-trafficking will have the desired effect in South Africa. The purpose of this treatise then, is to look at the South African legislation as a whole in so far as crime relating to trafficking is concerned as well as various international instruments.

Chapter 2 will entail a discussion of international instruments more so the ones that South Africa ratified. Chapter 3 will deal with an overall overview of legislation passed by South African government including the Constitution. Chapter 4 deals with the Prevention and Combating of Trafficking in Persons Bill, exploring the provisions as well as their relevance to the criminalisation of certain acts associated with the trafficking in persons. Chapter 5 will be the evaluation and assessment of the Bill discussed in Chapter 4, highlighting its strengths and weaknesses, if any. The overall discussion is concluded in Chapter 6.

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6 Constitution of the Republic of South Africa 1996
CHAPTER 2
INTERNATIONAL INSTRUMENTS

2.1 INTRODUCTION

"If the children and youth of a nation are afforded the opportunity to develop their capacity to the fullest, if they are given the knowledge to understand the world and the wisdom to change it, then the prospects for the future are bright. In contrast, a society which neglects its children, however well it may function in other respects, risks eventual disorganization and demise."

Bronfenbrenner Two Worlds of Childhood: US and USSR (1970) 1

Trafficking in human beings is a major problem worldwide. Action to combat trafficking in human beings is receiving worldwide attention because the trafficking threatens human rights and the fundamental values of democratic societies. 7 Various international instruments have been negotiated and ratified by certain countries and such instruments date back to 1904, 8 and were designed to try and curb as well as to deal with the scourge of trafficking in human beings. These international instruments or agreements prohibit or attempt to prohibit all forms of traffic in humans and obligate governments to take appropriate measures including legislation to curb this scourge. All the States or Governments who are in agreement with these international


instruments, in honour of such agreements attempt to achieve and ensure compliance with the requirements of the said agreements.

2.1.1 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TRAFFIC IN WOMEN AND CHILDREN (1904)

As stated above, such international instruments date back to 1904. The International Convention for the Suppression of the Traffic in Women and Children was adopted. South Africa which was then known as the Union of South Africa, ratified it. Article 2 provides:

"The High Contracting Parties agree to take all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes and who commit offences within the meaning of Article 1 of the Convention of 4 May 1910."

Article 3 of the 1910 Convention, provides that:

"The High Contracting Parties agree to take the necessary steps to secure the punishment of attempts to commit, and within legal limits, of acts preparatory to the commission of, the offences specified in Articles 1 and 2 of the Convention of 4 May 1910."
2.2 SLAVERY CONVENTION (1927)

In 1927, the Slavery Convention was adopted, and entered into force. In terms of Article 1(1) "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."  

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

2.3 CONVENTION FOR THE SUPPRESSION OF THE TRAFFIC IN PERSONS AND THE EXPLOITATION OF PROSTITUTION OF OTHERS (1949)

The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others was approved by the General Assembly Resolution 317(IV) in 1949, and entered into force in 1951. The parties to the Convention agree: "to punish any person who, to gratify the passions of another:

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12 Article 1(2) Slavery Convention.

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
(2) Exploits the prostitution of another person, even with the consent of that person." ¹⁴

2.4 CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1983)

Another international instrument which was created in an effort to curb trafficking in human beings, in particular children, is the Convention on the Civil Aspects of International Child Abduction, which was concluded and entered into force in 1983. ¹⁵ The States signatory to the Convention, "firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect." ¹⁶ The objects of the Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. ¹⁷

¹⁴ Article 1(1) & (2) Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.


¹⁶ Convention on the Civil Aspects of International Child Abduction.

¹⁷ Article 1(a)&(b) Convention on the Civil Aspects of International Child Abduction.
2.5 CONVENTION ON THE RIGHTS OF THE CHILD (1989)

More recently, efforts have been made to address trafficking of children and child prostitution, in the form of Convention on the Rights of the Child.  

In terms of Article 1, for the purposes of the Convention, "a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."  Child trafficking refers to the transport of a child from one place to another, whether within or across country-borders, where the trafficker experiences economic, or any other form of gain resulting from this movement. This process can be described as a transaction, regardless of whether or not money was exchanged at the time the child was handed over. In terms of the Anti Slavery Submissions, socio-economic and demographic factors have played a significant role in the rise of the incidents of child trafficking, debt and economic decline has placed millions below the poverty line, making children and their families more vulnerable to trafficking and other forms of exploitation.

The UN Convention on the Rights of the Child (CRC) is the most universally accepted

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18 1989.
human rights convention.  23 This Convention recognises the human rights of children and the standards to which all governments must aspire in realising these rights.  24 By ratifying the Convention, national governments commit themselves to protecting and ensuring children's rights.  25 The Convention elaborates the basic human rights which all children everywhere are entitled to, which are:

- the right to survival;
- to develop to the fullest;
- to protection from harmful influences, abuse and exploitation;
- full participation in family, cultural and social life; and

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24 Anti-Slavery: Submission 1999 Supra 20

25 Anti-Slavery: Submissions 1999 Supra 20
it includes the child's human right not to be trafficked or exploited.  

South Africa is one of the 192 countries which are parties to the Convention (CRC) and as stated above, has committed itself to protecting and ensuring the children's rights. There is a Constitution which is the supreme law of South Africa.  

As stated above, the interests of children are of paramount importance and should be protected internationally from any harm or potential harm. In terms of Article 3(1): "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Children are trafficked mainly for economic gain as they are sold as commodities for various types of work eg, sexual exploitation, labour exploitation as well as armed conflicts. The Convention on the Rights of the Child also deals with this. State Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. As such "State Parties shall take legislative, administrative,
social and educational measures to ensure the implementation." 31 Furthermore State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. 32 For these purposes, State Parties must in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practises;
(c) The exploitative use of children in pornographic performances and materials. 33

State Parties must take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purposes or in any form. 34 State Parties further undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. 35

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31 Article 32(2). (CRC).
32 Article 34.
33 Article 34 (supra).
34 Article 35.
35 Article 38(1).
2.6 OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY (2002)

Another international instrument designed to fight the trafficking of children was adopted and entered into force in 2002. 36 The State Parties must prohibit the sale of children, child prostitution and child pornography as provided for by the Protocol. 37

The Protocol provides definitions for the offences of the following:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. 38

To ensure prevention of the above acts against children, State Parties must "promote the strengthening of international co-operation in order to address the root causes such as poverty and underdevelopment, contributing to the vulnerability of children, to the sale


37 Article 1.

38 Article 2(a)(b)(c).
In keeping with the global trends, the South African Development Community continues to address the problem of human trafficking in the region. To date 11 of the 14 South African Development Community countries have ratified or acceded to the UN Protocol (Palermo Protocol), many are in the process of drafting legislation, and some are setting up counter-trafficking task teams and developing national plans of action, while initiating a regional dialogue on the topic, including International Organization for Migration's Migration Dialogue for Southern Africa (MIDSA), which brought together South African Development Community countries to develop a set of recommendations for developing legislative responses to human trafficking.

South Africa is one of the South African Development Community countries who are in the process of drafting legislation to counter trafficking in persons. Furthermore South Africa signed the Palermo Protocol on the 14th December 2000 and ratified it on 20 February 2004. Ratification is an act by which a State signifies an agreement to be legally bound by the terms of a particular treaty.

### 2.7 THE WORST FORMS OF CHILD LABOUR CONVENTION (1999)

The Worst Forms of Child Labour Convention was adopted in 1999. Each member

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39 Article 10(3).

40 See No 9 (Supra).


42 Combating of Trafficking in Persons Bill.
which ratifies this Convention must take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.  

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practises similar to slavery such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.  

This Convention was adopted under the auspices of the International Labour Organisation (ILO) and it recognised the children's right of protection against exploitation. This right is universally recognised but at the same time alarmingly infringed. The Convention commits State Parties to ensure protection of children against exploitation inter alia child trafficking and any type of work which may be hazardous, interfering with the child's education or that may be harmful to the development of the child.

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43 Article 1.

44 Article 3(a)(b)(c)(d).


46 Article 3 (supra).
Another recent effort to try eliminate and address the trafficking in persons was the adoption of the United Nations Transnational Organised Crime Protocol to Prevent and Suppress Trafficking in Persons, especially Women and Children, otherwise known as Palermo Protocol. This protocol was adopted in the year 2000, supplementing the United Nations Convention against Transnational Organised Crime. The purposes of the Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To prevent and assist the victims of such trafficking with full respect for their human rights; and

(c) To promote co-operation amongst State Parties in order to meet these objectives.

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 3(a) defines human 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 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 or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practises similar to slavery, servitude or the removal of organs."

47 Article 2 Palermo Protocol.
The Protocol also defines child trafficking as the:

"The recruitment, transport, transfer, harbouring or receipt of a child (anyone under 18 years of age) for the purpose of exploitation even if it does not involve force, fraud or coercion." 48

This is a critical point because in Africa child trafficking often occurs with the consent of parents and sometimes of the children themselves. 49 The Protocol in criminalizing the acts of trafficking in humans, provides that:

"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article of this Protocol, when committed intentionally." 50

Furthermore, the Protocol provides for assistance to and protection of victims of trafficking in persons. Article 6(1) provides that in appropriate cases and to the extent possible under its domestic law, each State Party must protect the privacy and identity of victims of trafficking in persons, including inter alia, by making legal proceedings relating to such trafficking, confidential. Another provision in the Protocol relates to prevention of trafficking in persons. State Parties must establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children from re victimization. 51

48 Article 3(c).


50 Article 5(1).

51 Article 9(1)(a)&(b).
As research has shown that human trafficking is a worldwide scourge and concern, where victims are secretly transported across borders and sold like commodities or trafficked within countries for exploitation, the Palermo Protocol makes provision for information exchange and training. In terms of Article 10, law enforcement, immigration or other relevant authorities of States Parties must, as appropriate, cooperate with one another by exchanging information in accordance with their domestic law to enable them to determine:

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

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

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

The Protocol draws increased attention and sends a message to traffickers regarding the consequences of their actions. After the Protocol was adopted, several countries passed laws against trafficking in persons addressing the major forms of trafficking. That the Palermo Protocol which came into effect in December 2003, inspired

52 Article 10(1)(a),(b),(c).


2.9 THE TRAFFICKING VICTIMS PROTECTION ACT (TVPA) (2000)

An example of a country which has passed law against trafficking is the United States of America - The Trafficking Victims Protection Act (TVPA) of 2000. With the passage of this Act, the United States took a lead role in combating human trafficking and set standards for other countries with respect to prevention of human trafficking, prosecution of traffickers and protection of victims.  

However, despite tremendous efforts by the federal as well as local governments, non-governmental organizations (NGO’s), and the research community working together to fight this form of modern day slavery, solutions remain elusive. The vast majority of victims of severe forms of trafficking are women and children. The most frequent challenge faced by law enforcement agencies investigating cases of human trafficking was a lack of victim co-operation and there is a belief from the law enforcement (majority) agencies that such lack of co-operation by the victims is due to fear of retaliation directed at them or their family as well as a lack of trust in the criminal justice system.

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56 Notes and Comments: Second Conference on Identifying and Serving Child Victims of Trafficking 343.
57 Notes and Comments 343
58 Notes and Comments 343
The Trafficking Victims Violence Prevention Act 2000 (TVPA) defines trafficking as:
The recruitment, harbouring, transportation, provision or obtaining of a person for one of three of the following purposes:

- Labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery; or
- A commercial sex act through use of force, fraud, or coercion; or
- If the person is under 18 years of age, any commercial sex act, regardless of whether any form of coercion is involved. 60

2.10 TRAFFICKING IN PERSONS REPORT (2008)

Another effort to combat trafficking is the Trafficking in Persons Report, it serves as the primary diplomatic tool through which the United States Government encourages partnership and increased determination in the fight against forced labour, sexual exploitation and modern-day slavery. 61 In terms of the Trafficking in Persons Report, countries are placed in tiers based on the efforts and inroads that they have achieved in dealing with human trafficking. There are four tiers. Tier 3 embraces all those countries who have not done anything to try and deal with human trafficking. Tier 2 Watch List includes those countries which have partially created some legislative measures to counter trafficking in humans. South Africa is placed in tier 2, Watch List. 62 A further characteristic of this Tier 2 Watch List is that the acts of human trafficking are

60 Notes and Comments supra.


increasing, but those countries have no effective measures in place. In Tier 2 and Tier 1, countries have legislative measures in place specifically adopted to combat trafficking in humans.

2.11 CONCLUSION

Sadly, despite these efforts, the trafficking in humans continue to thrive globally.
CHAPTER 3
SOUTH AFRICAN LEGISLATION

3.1 INTRODUCTION

The United States Office to Monitor and Combat Trafficking in Persons recently reported that South Africa is placed on Tier 2 Watch List for its failure to show increasing efforts to address trafficking in the past year. 63 This is, although South Africa ratified the Palermo Protocol, which obliges member states to criminalize trafficking, investigate and prosecute traffickers and undertake border control measures. 64

The South African government was urged to pass comprehensive anti-trafficking legislation and develop national strategies for victim protection, including the screening of undocumented immigrants for signs of victimisation prior to their being deported. 65

South Africa is considered mainly as a country of destination for victims of trafficking. It is also a transit point for trafficking operations between developing countries and Europe, the United States and Canada, because it has direct flight and shipping routes to most countries in the developed world. 66 The Commission further notes that compounded with this is the fact that South Africa is regarded as one of the countries in

64 Watson and Silkstone 110.
65 Watson and Silkstone 110.
the developing world, whose citizens do not attempt to enter other countries illegally in significant numbers.  

Also South Africa has been used as a transit country for purposes of trafficking in persons. An example is, in 2001 the French Consulate informed the police that a group of women and children were trafficked from the Democratic Republic of Congo and that the traffickers intended to use South Africa as a transit point to France. In many cases, women and children are lured to South Africa with promises of jobs, education or marriage, only to be sold and sexually exploited in the country's major urban centres, or in small towns and more rural environments.

In 2003, the International Organization for Migration's report, Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa, identified Lesotho, Mozambique, Malawi and a number of refugee-producing countries as key source countries for women and children trafficked to South Africa, with Malawian women also having been trafficked to European destinations. The report also revealed women from Thailand, China and Eastern Europe are also being trafficked to South Africa and the region.

One indication of trafficking routes and trends in the region is through assistance to

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67 SALRC 11.
68 SALRC 11.
70 IOM (Supra).
71 IOM (Supra).
victims of crime. 72 The International Organization of Migration and Southern African Counter-Trafficking Assistance Program (IOM-SACTAP) has identified and assisted approximately 200 victims of trafficking, who come from various parts of the Southern Africa Development Community, (SADC), Africa in more general as well as other parts of the world including those trafficked from the region to Europe, the Middle East and Asia. 73 Such variety of nationalities suggests that Southern Africa is a significant hub for global human trafficking operations. 74

With its youthful population, great economic disparities, and porous borders, the South Africa Development Community, hosts a diverse range of human trafficking activity, from the global operations of transnational criminal organizations to small scale local syndicates that recruit acquaintances, friends and family members. 75

To date South Africa has enacted various acts which inter alia provide for the combating of trafficking in humans. The legislation which will specifically deal with combating trafficking in persons is still in the form of a Bill yet to be passed in Parliament. 76

### 3.2 THE CONSTITUTION

There is a Bill of Rights as one of the provisions in the Constitution which applies to all

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72 IOM (Supra).
73 IOM (Supra).
74 IOM (Supra).
75 IOM (Supra).
76 The Bill (Supra).
organs of the State. The Bill of Rights provides for the specific protection of the rights of children. In terms of Section 7(1):

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human beings, equality and freedom." 77

Everyone has inherent dignity and the right to have their dignity respected and protected. 78

Modern-day slavery violates the fundamental right of all persons to life, liberty and the security of the person and to be free from slavery in all its forms. 79 It undermines the rights of a child to grow up in the protective environment of a family and to be free from sexual abuse and exploitation. 80

The Bill of Rights provides that:

- Every child has the right to be protected from maltreatment, neglect, abuse or degradation;
- to be protected from exploitative labour practises;
- not to be required or permitted to perform work or provide services that:
  - are inappropriate for a person of that child's age; or
  - places at risk the child's well being, education, physical or mental health or

77 Chapter 2: Bill of Rights: Constitution

78 Section 10: Bill of Rights.


80 Fitzgibbon (Supra) 86.
spiritual, moral or social development. \(^{81}\)

These provisions are in line with the various international agreements to which South Africa is a member state. Furthermore in line with international instruments, the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child". \(^{82}\)

### 3.3 THE CHILDREN'S ACT 2005

As stated above, South Africa has enacted, various acts which are designed to criminalize inter alia trafficking in humans. The Children's Act was assented to 8 June 2006. \(^{83}\) The Act was to inter alia give effect to certain rights of children as contained in the Constitution. The objects of this Act are inter alia:

- to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- to provide care and protection to children who are in need of care and protection;
- generally, to promote the protection, development and well being of children. \(^{84}\)

This Act also regards and recognise that the best interests of the child are paramount. Section 9 provides that in all matters concerning the care, protection and wellbeing of a child, the standard that the child's best interest is of paramount importance must be

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\(^{81}\) Section 28(1)(d), (e), (f)(i)(ii) Constitution.

\(^{82}\) Section 28(2) Constitution.


\(^{84}\) Section 2(f)(g)(i).
applied.

The Children's Act also contains a chapter which deals specifically with trafficking in children. The purposes of this chapter are:

(a) to give effect to the UN Protocol, to Prevent Trafficking in Persons; and
(b) generally to combat trafficking in children.

In terms of Section 282, the UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to provisions of this Act, that there will be international co-operation.

Following the international trends in making provisions for the prohibition of trafficking in children, the Act has a similar proviso. Section 284(1) provides:

"No person, natural or juristic or a partnership may traffic a child or allow a child to be trafficked."

Furthermore, it is no defence to a charge of contravening subsection (1) that:

(a) a child who is a victim of trafficking or a person having control over that child has consented to:-

(i) the intended exploitation; and

(ii) the adoption of the child facilitated or secured through illegal means; or

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85 Chapter 18.
86 Section 281(a)&(b).
87 Section 283.
(b) the intended exploitation or adoption of a child referred to in paragraph (a) did not occur. 88

Likewise, as the Palermo Protocol provides for assistance to and protection of victims of trafficking in persons, this Act has provision to that effect. In terms of Section 286(1):

"With due regard to the safety of a child and without delay:-

(a) the Director-General: Foreign Affairs must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking." 89

Again, the best interests of the child are regarded as paramount:

"if it is essential in the best interests of a child who has been trafficked, the Director-General must authorise an adult at State expense to escort the child from the place where the child was found to the place from which the child was trafficked." 90

Provision is also made for action to be taken against trafficking parents or people who have parental responsibilities and rights in respect of the child. If a court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child or allowed the child to be trafficked, the court may:

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

88 Section 284(2)(a)(i)(ii)&(b).
89 Section 286(1)(a).
90 Section 286(2)(a).
(b) place that child in temporary safe care pending an inquiry by a Children's Court.

Victims of trafficking are in terms of this Act repatriated. Section 290 provides that the Director-General may not return a child contemplated in Section 289(2) to his or her country of origin or the country from where the child has been trafficked without giving due consideration to:-

(a) The availability of care arrangements in the country to which the child is to be returned;
(b) The safety of the child in the country to which the child is to be returned; and
(c) The possibility that the child might be trafficked again, harmed or killed.  

3.4 CHILDREN'S AMENDMENT ACT (2007)

Subsequent to the Children's Act, Children's Amendment Act was passed.  

In terms of Section 141 no person may:

(a) use, procure or offer a child for slavery or practises similar to slavery, including but not limited to debt, bondage, servitude and serfdom, or forced or compulsory labour or provision of services;
(b) use, procure, offer or employ a child for purposes of commercial sexual exploitation;
(c) use, procure, offer or employ a child for trafficking;

91 Section 287(a)&(b).
92 Section 290(1)(a)(b)(c).
93 Act 41 of 2007.
(d) use, procure or offer a child or attempt to do so for the commission of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure Act, 1977 (Act No 51 of 1977);

(e) use, procure, offer or employ a child for child labour. ⁹⁴

The Amendment Act in so far as the protection of children against trafficking is more detailed and more specific than that of the Children's Act 2005.

3.5 CHILD CARE ACT (1983)

Another relevant legislation is the Child Care Act, it deals with child sexual exploitation. ⁹⁵ It defines the commercial sexual exploitation of children as:

"the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any person." ⁹⁶

The Act further states that:

"Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence." ⁹⁷

However, this Act does not criminalize third party involvement such as those who facilitate child sexual exploitation through coercion and force such as pimps and family members who benefit from children's sexual exploitation. ⁹⁸ It also does not criminalize

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⁹⁵ Section 50(A) Child Care Act 74 of 1983 as amended in 1999.
⁹⁶ Section 50(A)
⁹⁷ Section 50(A)(1)
those involved in other aspects of the sex industry who facilitate children's sexual exploitation as well as benefit from such as those in pornography.  99 In essence the Child Care Act 1983 does not protect or make provision for protection for children who have been trafficked.

Child sexual exploitation is one of the most virulent forms of this exploitation and includes child sexual abuse.  100 Commercial sexual exploitation of the children is the other and it includes child pornography, juvenile prostitution, trafficking in children, for sexual purposes, and child sex tourism.  101

3.6 CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT (2007)

Recent piece of legislation which has been passed by South Africa which is also  *inter alia* dealing with trafficking in human beings, more specifically children, is the Criminal Law (Sexual Offences and Related Matters) Amendment Act.  102

"A person (A) who commits an act of sexual penetration with a child (B) is, despite the consent of (B) to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."  103

This Act further prohibits sexual exploitation of children whether with or without

99 Human Trafficking in South Africa: Root, Causes and Recommendations (Supra) 47


101 Snell (Supra) 506.


103 Section 15(1)
consent of the children for financial or other reward, favour or compensation to the
children or to a third person. 104 This is also the case for a person who unlawfully and
intentionally offers the services of a child to a third person with or without consent of
the child for financial or other reward, favour or compensation to the person, child or
any other person for purposes of commission of sexual act with the child by the third
person in whatever manner of such commission. 105

It is further an offence for a person who intentionally receives financial or other reward,
favour or compensation from the commission of a sexual act with a child complainant.
106

Sexual grooming of children is also prohibited by the Act, 107 as well as exposure or
display of or causing exposure or display of child pornography or pornography to
children. 108 Use of children for or benefitting from child pornography and compelling
or causing children to witness sexual offences, sexual acts or self masturbation and
exposure or display of or causing exposure or display of genital organs, to children are
also prohibited by the Act. 109

3.7 PREVENTION OF ORGANISED CRIME ACT 1998

104 Section 17(1)(a)(b).
105 Section 17(2)(a)(b)(c)(d)(e).
106 Section 17(4).
108 Section 19(a)-(c).
109 Section 20 & Section 21.
Another relevant piece of legislation is the Prevention of Organised Crime Act 121 of 1998.

It is possible that a prosecution for the activities of trafficking may be conducted in terms of the above Act as Chapter 2 of the Act covers offences relating to racketeering activities.  

Broadly, it makes it an offence to be involved in racketeering and to receive, use and/or invest in any property derived from a pattern of racketeering activity.

The United Nations Children's Friend (UNICEF) executive director Ann Veneman, said that abuse of children cannot be tolerated during the World Cup or any other time, also noting that trafficked and sexually exploited children caught in an underworld of illegality and violence, virtually disappear.

3.8 CONCLUSION

While all the pieces of legislation are positive steps towards both fulfilling South Africa's international and domestic obligation to better protect its children against human rights abuses, none is without flaws. It has been argued that both the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act are constrained to only address some of the trafficking issues and

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111 Pithey (Supra) 8.

112 Sanpath (Supra) 122.

neither provides for any prevention initiatives, specialised training and personnel, and the victim services of both fail to fully address the needs of child victims. 114

Both have been criticised in not succeeding in bringing South Africa into compliance with its international obligations. 115 In the absence of a legal framework that specifically addresses trafficking, the law is blind to the special needs of these victims. 116 Trafficked women and children are particularly vulnerable. 117 The factors that make them so include, their displacement from all that is familiar to them, their social and cultural isolation, the careful monitoring of their movements and the fact that recourse to the law is often not possible. 118

Given the complexity of identifying the appropriate legal provisions that need to be applied to any particular case, it may be argued that there is a need for a single piece of legislation that encapsulates all the provisions in the different acts or legislations with alternations where necessary. 119 This would create the specific offence of trafficking and thereby provide the legal framework to investigate and prosecute trafficking with more ease and focus. 120

114 Kreston (Supra) 49.
115 Kreston (Supra) 49.
116 Watson Silkstone (Supra) 114.
117 Watson and Silkstone (Supra).
118 Watson and Silkstone (Supra).
119 Pithey (Supra) 9.
120 Pithey (Supra) 9
The Trafficking in Persons' Bill is the ideal single piece of legislation that encapsulates all the provisions relating to trafficking but sadly it is still a Bill and no clarity as to when it would be tabled before Parliament to be finally made law.

CHAPTER 4

PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL

4.1 INTRODUCTION

As stated in the previous chapter, South Africa is considered mainly as a country of
destination for victims of trafficking. It is also a transit point for trafficking operations between developing countries and Europe, the United States of America and Canada, because it has direct flight and shipping routes to most countries in the developed world. 121

As a result, South African government was urged to pass comprehensive anti-trafficking legislation and develop national strategies for victim protection including the screening of undocumented immigrants for signs of victimisation prior to their being deported. 122

In an effort to do this South Africa has passed various pieces of legislation which inter alia criminalise trafficking in humans. 123

However, the legislation which will specifically deal with combating trafficking in persons is still in the form of a Bill yet to be passed in Parliament. 124

Since the existing legislation does not cover all the aspects of the trafficking in humans, this Bill is more specific and comprehensive as opposed to the fragmented legislation regarding trafficking currently.

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122 J Watson and C Silkstone: “Human Trafficking as a form of gender-based violence-protecting the victim”: 2006 Agenda 70, 110

123 Children's Act 38 of 2005 (Chapter 98), Children’s Amendment Act 41 of 2007 (Section 141), Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sections 15, 17, 18, 19, 20, 21), Prevention of Organised Crime Act 121 of 1998 (Chapter 2).

The Bill emanates from an investigation by the South African Law Reform Commission (SALRC) into trafficking in persons which contained legislative proposals. According to the SALRC, persons are trafficked for sexual exploitation, forced labour or slavery or practises similar to slavery and servitude, forced marriages, begging, adoptions or the removal of organs or other body parts. As the current law regarding trafficking in persons in South Africa is fragmented, the SALRC is therefore of the opinion that legislation should be enacted to create a statutory offence of trafficking in persons, as well as other trafficking-related offences. The Bill also contains protective measures for victims of trafficking as well as measures to prevent trafficking in persons.

South Africa ratified the Palermo Protocol which obligates member states to criminalise trafficking, investigate and prosecute traffickers and undertake border control measures. Therefore the Bill's purpose is:

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

In an endeavour to cover all the elements of the crime of trafficking in persons the Bill is

125 The Bill 3.
126 The Bill 3-4.
127 The Bill 4.
128 Watson and Silkstone supra.
129 The Bill 6.
divided into various chapters.

4.2 DEFINITIONS AND OBJECTS OF THE ACT

There are various definitions contained in this chapter but for purposes of this article only the definition of abuse of vulnerability and of child will be mentioned.

4.2.1 ABUSE OF VULNERABILITY

The following is a comprehensive detail of the provisions contained in the Bill:

"abuse of vulnerability means any physical or psychological abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to taking advantage of the vulnerabilities of that person resulting from:-

(a) the person having entered or remained in the Republic illegally or without proper documentation;
(b) pregnancy;
(c) any disability of the person;
(d) addiction to the use of any dependency-producing substance;
(e) being a child; and
(f) socio-economic circumstances."

4.2.2 DEFINITION OF CHILD IN THE BILL

A "child" is defined as a person under the age of 18 years.

Research shows that sexual activity is often seen as a private matter, making communities reluctant to act and intervene in cases of sexual exploitation. These

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attitudes make children more vulnerable to sexual exploitation and myths such as the belief that HIV/AIDS can be cured through sex with a virgin, technological advances such as the Internet which has facilitated child pornography, and sex tourism targeting, all add to the children's vulnerability. 131 In addition, children may not feel able to report acts of violence for fear of retribution from their abuser. 132 The child victim may feel ashamed or guilty, believing that the violence was deserved and this often leads to the child being unwilling to speak about it. 133 This also is common in adult victims who hide violence out of fear of retribution from their abusers or out of shame or guilt.

4.2.3 PUBLIC AWARENESS

Chapter 2 of the Bill deals with public awareness. In terms of Clause 3(1) the Intersectorial Committee established by Clause 37 must and where appropriate after consultation with relevant non-governmental organisations, establish public awareness programmes or other measures for the prevention of trafficking in persons designed to:-

(a) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who depart for work abroad, on issues relating to trafficking in persons including:-

(i) common recruitment techniques used by traffickers;
(ii) tactics used to keep victims of trafficking in exploitative situations;
(iii) the forms of abuse to which victims of trafficking may be subjected; and

131 UNICEF supra 10


133 UNICEF supra 12
Furthermore the public awareness is also designed to inform and educate victims of trafficking on *inter alia* their rights as victims, legal or other measures in place to ensure their safety, recovery and repatriation as well as organisations, institutions or law enforcement agencies that may be approached for assistance or information.\(^{134}\)

Public awareness will also: "discourage the demand for and the supply of victims of trafficking that fosters the exploitation of those victims, especially women and children".\(^{135}\) The programmes or other measures referred to in subsection (1) must include appropriate measures aimed at reaching rural communities, be provided in a language understood by the persons at whom they are directed where possible.\(^{136}\)

### 4.3 PREVENTION OF TRAFFICKING IN PERSONS

#### 4.3.1 TRAFFICKING IN PERSONS

The Bill, in response to sexual exploitation, provides for offences and penalties in Chapter 2.

Clause 4(1) provides:

"*Notwithstanding the common law position regarding slavery, the slave trade and practices similar to slavery, any person who intentionally trafficks another person is guilty of the offence of trafficking in persons and is liable on conviction to a fine or imprisonment, including imprisonment for life. A person who performs any act which is aimed at committing the offence of trafficking in persons, incites, instigates, commands, directs, aids, advises, recruits, encourages or procures any other person to commit the\(^{134}\) Clause 3(1)(b)(i)(ii)(iii) The Bill 12.

\(^{135}\) Clause 3(1)(c).

\(^{136}\) Clause 3(2)(a)(b)
offence of trafficking in persons or conspires with any other person to commit the
offence of trafficking in persons or to aid in the commission thereof, is guilty of an
offence and liable on conviction to the punishment to which a person convicted of
actually committing the offence of trafficking in persons would be liable.” 137

It is also no defence that a child who is a victim of trafficking has consented to the
intended exploitation and that an adult person who is a victim of trafficking has
consented to the intended exploitation. 138

The above sections are in line with the provisions of the Palermo Protocol's definition of
human trafficking 139 as well as child trafficking. Child trafficking is defined as:

"The recruitment, transport, transfer, harbouring or receipt of a child (anyone under 18
years of age) for the purpose of exploitation, even if it does not involve force, fraud or
coercion.” 140

Research shows that traffickers exploit the aspirations of those living in poverty and
seeking better lives, using dramatic improvements in transport and communications to
sell men, women and children into situations of forced labour and sexual slavery with
virtually no risk of prosecution. 141 Traffickers also exploit the fact that in Africa child
trafficking often occurs with the consent of the parents and sometimes, of the children
themselves. 142

137  Clause 4(2)(a)(b)(c).
138  Clause 4(3)(a)(b).
139  Article 3(a) Palermo Protocol.
140  Article 3(c) Palermo Protocol.
141  Kathleen Fitzgibbon: "Modern-day Slavery? The scope of trafficking in persons in Africa":
African 2003 Review 12(1) 82 Review
4.3.2 DEBT BONDAGE

Debt bondage is also an offence attracting penalty under the Bill. Research shows that trafficking occurs if a child or his/her family is misled with false promises, coerced or otherwise forcibly recruited or handed over to transporters, alternatively, his/her family might be charged a large fee for placement in a job to ensnare the child into debt bondage. 143 Another harsh reality is the movement of young African women and children to Europe and to the Middle East for commercial sexual exploitation, unaware that their travel documents will be seized, that they incur an enormous debt they will have to repay, or that they will be the subject of brutal beatings if their earning levels are unsatisfactory. 144

A common occurrence, is that traffickers threaten to turn the women over to the police as undocumented workers or threaten to kill their family members if the entire debt is not repaid. 145 In an effort to prevent debt bondage, the Bill makes the following proviso:

"Any person who intentionally engages in conduct that causes another person to enter into debt bondage is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years." 146

4.3.3 DESTRUCTION, CONFISCATION, POSSESSION, CONCEALMENT OF OR

142 K Fitzgibbon (supra) 82.
143 K Fitzgibbon (supra) 84.
144 K Fitzgibbon (supra) 84.
145 K Fitzgibbon (supra) 85.
146 Clause 5 (The Bill).
TAMPERING WITH DOCUMENTS:

With regard to the confiscation of documents:

"Any person who intentionally destroys, confiscates, possesses, conceals or tampers with any actual or purported identification document, passport or other travel document of a victim of trafficking in furtherance of the offence of trafficking in persons is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 10 years." 147

4.3.4 USING SERVICES OF VICTIMS OF TRAFFICKING

Human trafficking is regarded as modern-day slavery which is thriving as a result of its profitability and it is the high profits that continue to fuel the trade of human beings worldwide. Children are trafficked mainly for economic gain as they are sold as commodities for various types of work eg, sexual exploitation, labour exploitation as well as in armed conflicts.

In terms of Clause 7 of the Bill:

"Any person who intentionally benefits, financially or otherwise, from the services of a person or uses or enables another person's usage of the services of that person he or she knows or ought reasonably to have known to be a victim of trafficking is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding five years."

4.3.5 CONDUCT FACILITATING TRAFFICKING IN PERSONS

Research shows that the traffickers establish safe-house network across the regions and

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147 Clause 6 (the Bill).
the victims are moved around. 148 The Bill prohibits any person who intentionally leases or subleases or allows to be used, any room, house, building or establishment he or she knows or ought reasonably to have known will be used for facilitating or promoting trafficking in persons. 149

4.3.6 LIABILITY OF CARRIERS
The Bill also provides for the liability of carriers. A carrier which brings a victim of trafficking into or removes a victim of trafficking from the Republic and upon entry into or departure from the Republic, the victim of trafficking does not have the travel documents required for lawful entry into or departure from the Republic is guilty of an offence and is liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years. 150

4.4 IDENTIFICATION AND PROTECTION OF VICTIMS OF TRAFFICKING
Furthermore the Bill does provide for identification of victims of trafficking.

4.4.1 REPORTING AND REFERRAL OF CHILD VICTIM OF TRAFFICKING
Identification and protection of victims of trafficking is also provided for in the Bill. Clause 11(1) provides *inter alia* for certain persons ie, immigration official, social worker, medical practitioner, labour inspector, nurse, teacher who on reasonable grounds suspects that a child is a victim of trafficking must within 24 hours report that

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148 K Fitzgibbon (supra) 85.

149 Clause 8(1) (the Bill).

150 Clause 9(1).
suspicions to a police official for investigation, if it is in the best interests of the child concerned. A police official to whom a report has been made in terms of sub-clause (1) or a police official who on reasonable grounds, suspects that a child is a victim of trafficking must within 24 hours refer that child to a designated child protection organisation or the provincial department of social development pending a police investigation into the matter.  

4.4.2 REPORTING AND REFERRAL OF ADULT VICTIM OF TRAFFICKING

The same procedure is applicable regarding reporting and referral of adult victim of trafficking, except that for adult victim, a social worker, social service professional, nurse, medical practitioner, traditional health practitioner or traditional healer may only report a matter to a police official as provided for in paragraph (a) if the person concerned has given his or her written consent, except where the person is mentally disabled; or in an altered state of consciousness, including under the influence of any medicine, drug or other substance to the extent that the person's consciousness or judgement is adversely affected.

4.4.3 CHILD VICTIM OF TRAFFICKING FOUND IN REPUBLIC

Furthermore to ensure protection of child victim of trafficking, a child who is a victim of trafficking may be placed in a temporary safe care in terms of Section 151 of the Children's Act, pending an investigation in terms of Section 155(2) of the Children's

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151 Clause 11(4).
152 Clause 12(1)(a).
153 Clause 12(1)(b)(i)(ii).
If such a child, an illegal foreign child is brought before the Children's Court, the court may order that the child be assisted in applying for asylum in terms of the Refugees Act 130 of 1998, and a finding in terms of Section 156 of the Children's Act that such child is a child in need of care and protection serves as authorization for allowing the child to remain in the Republic.

4.4.4 PROVISION OF HEALTH CARE SERVICES

Victims of trafficking who are foreigners are entitled to the same public health care services as those to which the citizens of the Republic have access.

4.4.5 CRIMINAL PROSECUTION AGAINST VICTIM OF TRAFFICKING PROHIBITED

It is also known that victims of trafficking hide violence they are subjected to. Children may not feel able to report acts of violence for fear of retribution from their abuser, the child victim may feel ashamed or guilty, believing that the violence was deserved which then often leads to the child to be unwilling to speak about it. To ensure that the child victim or an adult victim of trafficking feels free to speak about such violence, and cooperate with law enforcement agencies, the Bill prohibits criminal prosecution against a victim of trafficking. In terms of Clause 15:

154 Clause 13(1).
155 Clause 13(2).
156 Clause 13(3).
157 Clause 14.
158 UNICEF supra 13.
"No criminal prosecution may be instituted against a child who is found to be a victim of trafficking after an investigation in terms of Section 110(5)(c) of the Children's Act or an adult person who has been certified to be a victim of the trafficking in terms of Section 12(6)(a) for: -

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

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

(c) possessing and fabricated or falsified passport, identity document or other document used for facilitation of movement across borders; and

(d) being involved in an illegal activity to the extent that he or she has been compelled to do so

as a direct result of his or her situation as a victim of trafficking."

The Bill also provides for compensation to victim of trafficking, where upon, "the court may on its own accord or at the request of the complainant or the prosecutor in addition to any sentence which it may impose in respect of any offence under this Act, order a person convicted of that offence to pay appropriate compensation to any victim of the offence for: -

(i) damage to or loss or destruction of property; including money;
(ii) physical, psychological or other injury;
(iii) being infected with a life-threatening disease; or
(iv) loss of income or support;

resulting from the commission of that offence."^{159}

^{159} Clause 25(1)(a)(i)(ii)(iii)(iv).
Furthermore the court may in addition to any punishment which it may impose in respect of any offence in terms of this Act, in addition to any order for the payment of compensation to a victim in terms of Section 25 and upon application of the prosecutor, make an order for payment to the State of an amount in compensation for expenses incurred or reasonably expected to be incurred in connection with the care, accommodation, transportation and repatriation of the victim of the offence.\textsuperscript{160}

Deportation and repatriation of victims of trafficking to and from the Republic is also provided for in the Bill.\textsuperscript{161} Trafficking of child by parent, guardian or other person who has parental responsibilities and rights in respect of child is prohibited by the Bill. If a Children's Court has reason to believe that the parent or guardian of a child or any other person who has parental responsibilities and rights in respect of a child, has trafficked the child, the court may:

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

(b) place that child in temporary safe care, pending an inquiry by a Children's Court.\textsuperscript{162}

\subsection{4.5 CONCLUSION}

Research indicates that in trafficking a number of actions are involved and may include recruiters, intermediaries, transporters, employers of brothel/inn operators and even

\textsuperscript{160} Clause 26(1)(a)(b)(c).

\textsuperscript{161} Clause 27, 28, 29, 30 \& 31.

\textsuperscript{162} Clause 32 (1)(a)(b)
families. 163 Poverty stricken parents also have given children to traffickers to get out of
debt. 164

The Bill also provides for the establishment of Inter sectorial Committee on Prevention
and Combating of Trafficking in Persons which involves various stake holders of
various government departments, which inter alia is tasked with monitoring the
implementation of the Act and its compliance. 165

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163 K Fitzgibbon (supra) 84
164 K Fitzgibbon (supra) 84
165 Clause 37(1) & 38
CHAPTER 5
EVALUATION OF THE TRAFFICKING BILL

As stated above the existing legislation does not cover all the aspects of the trafficking in humans, however the Bill is more specific and comprehensive as opposed to the fragmented legislation regarding trafficking currently. The Bill allows for all forms of human trafficking to be prosecuted including labour exploitation and also sexual exploitation. This is in line with the obligation that the Palermo Protocol places on member States, namely to:

- criminalise trafficking
- investigate and
- prosecute

traffickers and to undertake border control measures.

The above must however be in accordance with the means of each country to provide measures to protect and assist victims; train law enforcement and border officials, inform and educate victims, potential victims and the general public as well as cooperate with each other and civil society.

The Bill is characterised by various strengths. The first strength that will be discussed is public awareness. The Bill provides for public awareness which aims at the prevention of trafficking in persons by inter alia informing and educating members of the public.

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166 Chapter 4 Page 1 (supra).
168 Human trafficking strategy (supra).
especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking.  

By way of example South Africa will be hosting a huge world event, the Soccer World Cup which then means there will be a considerable amount of people from all over the world. This will also be an opportunity for criminal elements to exploit any possible resources that might be at their disposal to further and complete their criminal activities. Therefore trafficking in persons might be on the rise as there will be opportunities for jobs and such job opportunities may be exploited by the traffickers in furtherance of their trafficking of people. According to research, due to the impact of a world event such as World Cup has, it is important that, when it comes to an issue such as human trafficking, the public is informed to be aware of promises of jobs for example.

It is, according to this research, prudent to regulate efforts to ensure that the public is educated about the issue so that when traffickers approach potential victims, there is a general awareness in the mind of the potential victim that the proposal might be a sham. Awareness raising will enable the vulnerable to make informed choices and the public will be alert that the event might be used as a bait to lure people into South Africa for job opportunities.

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169  Chapter 2 Clause 3(1)(a) The Bill.


171  Human trafficking and 2010 Soccer World Cup.

172  Human trafficking and 2010 Soccer World Cup.
It is often stated that understanding the psychological impact of trafficking is important in order to ensure that the appropriate protective measures are in place to protect the child and to understand the possible reactions of the child victim and the difficulties they might experience. 173

Secondly, another positive strength of the Bill is the provision of identification and protection of victims of trafficking inter alia reporting and referral of child victim of trafficking, child victim found in the Republic. 174 Thirdly, the Bill provides for health care services which is another strength. Regarding health care services, trafficked persons face numerous health risks exacerbated by prolonged exposure to repeated traumatic events and abuse and most trafficked persons are denied the right of access to health care. Clause 4 provides that "a foreigner who is a victim of trafficking is entitled to the same public health care services as those to which the citizens of the Republic have access". 175 Trafficked persons including children are exposed to a wide range of health risks which may include violence induced physical trauma for example injuries, burns or fractures, exposure to a wide range of diseases including the deadly HIV/AIDS, forced use of drug and alcohol which would in turn lead to deteriorating health of such victims if no health care intervention is obtained.

Another strong pointer of the Bill, is the provision for Recovery and Reflection period more especially regarding the status of foreign victims of trafficking. A 2006 study by

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173 Human trafficking and 2010 Soccer World Cup.
174 Chapter 4 of the Bill.
175 The Bill.
the International Organization for Migration (IOM), proves that the physical and mental health consequences of trafficking on women and adolescents are so serious that a `reflection delay' is necessary not only for their rehabilitation, but to also enable them to provide useful evidence to law enforcement officials for the prosecution of their traffickers.  

The latter being in line with the objectives and purpose of the Bill as envisaged and obligated by the Protocol (Palermo) to *inter alia* combat trafficking and provide for an offence of trafficking in persons and other offences associated with trafficking in persons. 'Reflection Delay' refers to a period, usually of about 3 months when trafficked persons are allowed to remain legally in the country irrespective of their immigration status, whilst they recover from their situation, and consider their options.  

Such period should afford rescued victims housing, legal, medical, psychological and material assistance, and the opportunity to make fully informed decisions about what they want to do next and to decide if they want to pursue civil or criminal action against their traffickers.  

The IOM further states, that while the physical symptoms evinced by the women reduced significantly over time as they received rehabilitative care, the psychological damage they suffered seemed a lot more permanent and significant recovery was only noticeable after at least ninety days.  

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176  Stolen Smiles: Study backing `Reflection Delay' shows high levels of psychological distress among trafficked women: EYE ON HUMAN TRAFFICKING Issue 18/2007 Page 4

177  Stolen Smiles (supra) 4.

178  Stolen Smiles (supra) 4.

179  Stolen Smiles (supra) 4.
A further positive strength is that the Bill also does not only criminalise the act of trafficking, but also transportation of the trafficked persons where it provides for liability of carriers.\(^{180}\) Transportation is vital to the process of human trafficking because it enables perpetrators to confuse and isolate their victims to the extent that exploitation can be committed with minimal resistance from the victim and without fear of reprisal from social service providers of law enforcement agencies to which victims can easily reach out in familiar environments.\(^{181}\) By transporting victims from the safety and comfort of their home communities, to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, victims are left isolated, disorientated, defenceless, depending on their traffickers, and therefore, susceptible to exploitation.\(^{182}\) Human trafficking is a reality and is a problem that cannot be looked at in isolation. This means that the government and the civil society have to work together in harmony to minimise, prevent as well as to combat the scourge of human trafficking in South Africa. The Bill approaches the combating of trafficking in persons in a holistic approach and will ensure that all the push and pull factors are dealt with properly. By way of example the Bill makes provision for reporting, identification and assessment of a person who is a victim of trafficking. The Department of Social Development then has to play a key role in the above by ensuring placements of victims of trafficking under approved programmes. Child victims, to be placed in safe care whether that will be on a temporary basis, counselling, accommodation and rehabilitation services to be provided as well as aim to

\(^{180}\) Clause 9(1).

\(^{181}\) Mia Im melback: What does it mean to `transport' a victim of trafficking? EYE ON HUMAN TRAFFICKING ISSUE 19/2008 Page 3.

\(^{182}\) Mia Im melback (supra) 3.
re-integrate the victim back into the families and communities. Human trafficking has devastating effects which victims may take a lifetime to recover from and children's lives can be easily shattered by a trafficking experience.

In addressing the impact of trafficking experience on children one cannot overlook the pre-trafficking experience factors that make them vulnerable. It is important to understand these vulnerability factors so as to ensure that the appropriate psychosocial interventions are in place and to prevent revictimisation and possible re-trafficking of the child. Therefore, the Bill by ensuring that it includes a diverse range of stakeholders in combating the trafficking in persons shows its commitment to carry out its main objective which is prevention, prosecution as well as combating trafficking in persons.

However, as the Bill has not yet been enacted, I could find no flaws or weaknesses at all.

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183 Jean Swanson-Jacobs (supra).
184 Jean Swanson-Jacobs (supra).
CHAPTER 6

CONCLUSION

Human trafficking has devastating effects which victims may take a lifetime to recover from and children's lives can be easily shattered by a trafficking experience. Despite the many prohibitions against trafficking in the form of international as well as national pieces of legislation, international networks that market women and children or prostitution continue to thrive as trafficking in persons is a multibillion dollar industry.

As previous pieces of legislation have been severely criticized for having flaws in that it was alleged that the Children's Act and the Criminal Law (Sexual Offences and Related Matters) Amended Act in particular, did not succeed in bringing South Africa into compliance with its international obligations. ¹⁸⁵

Even though the Prevention and Combating of Trafficking in Persons Bill is not yet enacted as legislation, it is an ideal single comprehensive piece of legislation which will definitely alleviate the scourge of trafficking in person in South Africa as it encapsulates all the provisions relating to trafficking.

This treatise constitutes an attempt at highlighting the effectiveness of the Trafficking and Combating of Trafficking in Persons Bill as a single comprehensive piece of

¹⁸⁵ Kreston (supra) 49.
legislation, more so that it encompasses a diverse range of stakeholders in combating trafficking in persons, therefore showing its commitment and determination to carry out its main objective which is uprooting and combating trafficking in persons.
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