

In the firing line: The South African legislative response designed to combat human trafficking

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ABSTRACT

Increasingly, it is being demanded that the comprehensive draft legislation pertaining to the combating of human trafficking in South Africa be finalised, demands that are based primarily on South Africa's international obligations to combat this crime. An assessment of whether the current anti-trafficking legislative framework complies with key criminal law standards laid down in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children reveals significant shortcomings. The existing counter-trafficking legislative response is fragmented and not in full compliance with international counter-trafficking standards. For this reason, law reform is necessary. It is therefore recommended that the enactment of the Prevention and Combating of Trafficking in Persons Bill B7 of 2010 be prioritised and finalised as a matter of urgency.

'No country can yet lay claim to genuine, extensive experience in dealing with trafficking as a criminal phenomenon. Most are developing and adapting their responses on the run, often under strong political pressure, and principally through trial and error.'¹

1. Introduction

In the light of the growing demand to finalise comprehensive counter-trafficking legislation, this article identifies South Africa's international obligations to combat human trafficking. Thereupon, the current anti-trafficking legislative framework is analysed and assessed against the main criminal law standards laid down in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

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¹ A Gallagher & P Holmes 'Developing an effective criminal justice response to human trafficking – lessons from the front line' (2008) 18 *International Criminal Justice Review* 318.

Children of 2000 ('the Palermo Protocol/the protocol').² Concluding that the current transitional legislation lacks full compliance with international counter-trafficking standards, this article emphasises the need for law reform.

2. International obligations to combat human trafficking

'Several United Nations conventions and regional instruments form the international legal framework within which States must define their own laws in order to address effectively the problem of human trafficking.'³

South Africa has signed and/or ratified numerous international instruments, as well as African regional instruments, relevant to human trafficking.⁴ In 2004, South Africa ratified the pioneering instrument in the fight against human trafficking, namely the Palermo Protocol.⁵

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_engpdf, accessed on 11 March 2011. The protocol was adopted on 15 November 2000 and entered into force on 25 December 2000; see also JN Ezeilo 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' a report submitted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children, GA A/HRC/10/16, (2009), available at <http://www2.obchcr.org/english/issues/trafficking/docs/HRC-10-16-pdf>, accessed on 1 November 2010, at 7.

³ United Nations Office on Drugs and Crime (UNODC) *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* (2006) 1.

⁴ Department of Foreign Affairs 'International agreements and/or conferences signed by South Africa in relation to the youth, children and people with disabilities, particularly with regard to the United Nations and the African Union', 2005, available at http://www.dfa.gov.za/docs/2005pq/pq2_455.htm, accessed on 20 October 2008. For a broader discussion of the relevant international and African regional instruments with reference to South Africa's ratification of, and obligations in terms of, these instruments, see HB Kruger *Combating Human Trafficking: a South African Legal Perspective* LLD (Free State) (2010) 191-286.

⁵ International Organization for Migration *Handbook on Counter-Trafficking for South African Government & Civil Society Stakeholders* (referred to hereafter as *International Organization for Migration Handbook*) (2009) 82, 103; Department of Foreign Affairs op cit (n4) 3; D Kassan 2007 'Trafficking in children' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) Chapter 18 page6; LG Bermudez 'No experience necessary: The internal trafficking of persons in South Africa' (referred to hereafter as *International Organization for Migration 'No experience necessary'*) 2008, 19, available at http://iom.org.za/web/index.php?option=com_docman&task=doc_details&gid=47&Itemid=11&lang=en, accessed on 4 November 2008; L Stuurman 'Anti-trafficking legislation can no longer be delayed' (2004) 3 *Eye on Human Trafficking* 5; T Leggett 'The risks of specialised human trafficking legislation' (2004) 3 *Eye on Human Trafficking* 4.

It is trite that provisions in international instruments have different tiers of obligation, ranging from purely optional and advisory provisions to mandatory provisions.⁶ The provisions in article 5(1) and (2) of the Palermo Protocol are formulated in mandatory language, that is, states parties 'shall' adopt the required legislative measures. Therefore, these provisions are mandatory minimum standards which must be complied with. As a party to the Palermo Protocol, South Africa is obligated to build the minimum standards laid down in the protocol into its domestic legislation.⁷

The present article focuses on those international minimum standards that pertain primarily to criminal law or the prosecution of traffickers. The first standard encompasses the Palermo Protocol's requirement that the essence of the human trafficking definition as it is formulated in the protocol be included in domestic responses.⁸ Addressing the differing meanings attached to the term 'trafficking in persons' before 2000, the Protocol contains the first internationally agreed-upon definition of human trafficking.⁹ The Palermo Protocol defines 'trafficking in persons' as follows:

'...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'¹⁰

⁶ In line with the UNODC 'Legislative Guides for the Implementation of the Convention against Transnational Organized Crime and the Protocols thereto' (UNODC Legislative Guides), the words 'required', 'enjoined' or 'obligated' used in the context of this study with reference to states parties indicate that a provision is mandatory. In the case of non-mandatory provisions, optional language is used, such as states parties are 'advised to', 'recommended to' or 'required to consider' – United Nations Office on Drugs and Crime 'Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto', 2004, available at www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf, accessed on 17 August 2010 248-249.

⁷ Kassan op cit (n5) Chapter 18 page 10; Stuurman op cit (n5) 5.

⁸ Article 3(a); see also JG Raymond 'The new UN Trafficking Protocol'(2002) 25 *Women's Studies International Forum* 491 at 498; UNODC Legislative Guides op cit (n6) 268. For a discussion and analysis of the definition, see Kruger op cit (n4) 41-82.

⁹ AT Gallagher *The International Law of Human Trafficking* (2010) 12-25; UNODC op cit (n3); UNODC Legislative Guides op cit (n6) 267. To avoid confusion, it must be noted that the terms 'human trafficking' and 'trafficking in persons' are commonly used as synonyms, and are therefore used interchangeably in this article—for a discussion of this issue see Kruger op cit (n4) 27-31.

¹⁰ Article 3(a) of the Palermo Protocol.

The Protocol’s rather complex definition of trafficking in persons can be broken down into three constituent parts, namely the action, the means and the exploitative purpose. Hence, any conduct that combines any of the listed actions and means and is carried out for an exploitative purpose constitutes human trafficking. Stated differently, the definitional components of the term ‘trafficking in persons’ consist of what is done (the prohibited act), how is it done (the means)¹¹ and why is it done (the purpose).¹² The Palermo Protocol does not define the concepts used in the definition, but requires that the essence of the human trafficking definition be included in domestic responses.¹³

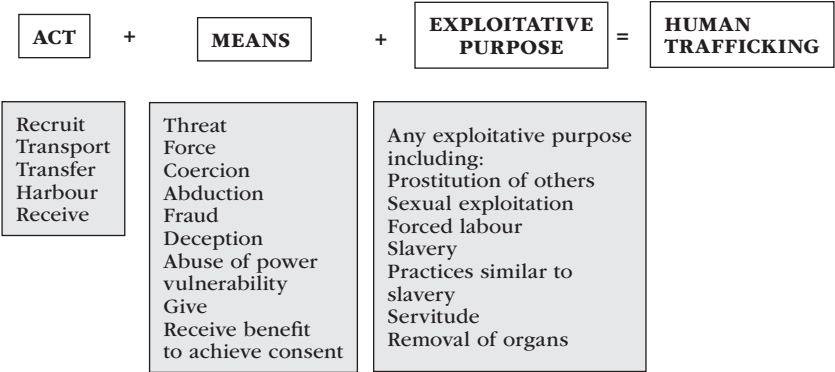


Figure 1: Constituent parts of human trafficking – Palermo Protocol definition

Closely associated with the first standard is the second standard, which also deals with the concept ‘trafficking in persons’, but pertains to cases where children younger than eighteen are being trafficked. In the case of child trafficking, the protocol waives the means component of the definition. Thus, the protocol provides that only the prohibited

¹¹ The means part of the definition consists of consent-nullifying conduct, such as the use of coercion or deception– AT Gallagher ‘Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis (2001) 23 *Human Rights Quarterly* 975 at 985-986. The Protocol therefore excludes a consent-based defence where one of the prohibited means was used to obtain such consent– UNODC op cit (n3) xv

¹² Gallagher op cit (9) 9-42; UNODC op cit (n3) xi; UNODC Legislative Guides op cit (n6) 270.

¹³ Raymond op cit (n8) 498.

conduct and the exploitative purpose need to be proven to constitute the crime of trafficking in persons where children are trafficked.¹⁴

The third key standard pertaining to criminal law is the obligation to criminalise intentional conduct constituting 'trafficking in persons', as defined in the protocol, in domestic laws.¹⁵ Linked to the third key standard is the fourth, which requires that, apart from criminalising the main crime of human trafficking, involvement in this crime must also be established as an offence.¹⁶ Involvement in human trafficking encompasses attempts to commit human trafficking,¹⁷ participation as an accomplice in human trafficking,¹⁸ as well as organising or directing other persons to commit the offence.¹⁹ Such conduct must therefore also be established as offences in domestic legislation. The core minimum standards in respect of criminal law issues discussed above are summarised in the table below.

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

| International standards | Palermo Obligation: Member states must comply with Protocol international standards in domestic law | |
|-------------------------|---|--|
| Standard 1 | Art 3(a) | Definition of 'trafficking in persons' (adult victims) |
| Standard 2 | Art 3(c) | Definition of 'trafficking in persons' (child victims) |
| Standard 3 | Art 5(1) | Criminalise 'trafficking in persons' (human trafficking) |

¹⁴ Article 3(c) of the Palermo Protocol; see also A Lansink 'Human rights focus on trafficked women: An international law and feminist perspective' (2006) 20 *Agenda* 45 at 49-50; B Perrin 'Faster, higher, stronger: Preventing human trafficking at the 2010 Olympics', 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578564, accessed on 20 August 2008, 7; D Weissbrodt & Anti-Slavery International 'Abolishing slavery and its contemporary forms' 2002, HR/PUB/02/4, 22, 27-30; Kassan op cit (n5) Chapter 18 page 6; Gallagher op cit (n11) 987; Ezeilo op cit (n2) 7. United Nations Office on Drugs and Crime 'Model law against trafficking in persons', 2009, available at http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf, accessed on 14 July 2010, 37; Kruger op cit (n4) 77-78.

¹⁵ Article 5(1) of the Palermo Protocol.

¹⁶ Article 5(2) of the Palermo Protocol; see also Kruger op cit (n4) 317-321.

¹⁷ Article 5(2)(a) of the Palermo Protocol; Human Sciences Research Council 'Tsireledzani: Understanding the dimensions of human trafficking in Southern Africa', 2010, available at <http://www.bsac.ac.za/Document3562.phtml>, accessed on 25 March 2010 at 22.

¹⁸ Article 5(2)(b) of the Palermo Protocol.

¹⁹ Article 5(2)(c) of the Palermo Protocol.

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

3. The South African counter-trafficking legislation

A key initiative in combating human trafficking is the development of an effective national legislative framework to bring perpetrators to book. Raymond rightly states that international treaties alone are not sufficient to combat the crime of human trafficking.²⁰ The provisions of treaties must be incorporated in an effective national legal response.

Realising its obligations, the South African government commenced with a legislative reform process of bringing its domestic laws in line with the minimum counter-trafficking standards laid down for domestic responses.²¹ However, towards the end of 2012, the law on this topic was still fragmented and consisted mainly of three parts.²² The first part of the South African legal response consists of existing common law and statutory crimes that may be applicable in some human trafficking cases in prosecuting trafficking agents for crimes other than human trafficking.²³ These legal remedies have no direct bearing on human trafficking. The second part of the domestic response consists of the interim anti-trafficking provisions in two pieces of legislation, namely the Children’s Act 38 of 2005 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The last part of the South African response is the law reform proposed in the Prevention and Combating of Trafficking in Persons Bill B7-2010

²⁰ Raymond op cit (n8) 500.

²¹ Kruger op cit (n4) 481-482; D Kassan & P Mahery ‘Special child protective measures in the Children’s Act’ in T Boezaart (ed) *Cbilde Law in South Africa* (2009) 200-201; D Minnie ‘Sexual offences against children’ in T Boezaart (ed) *Cbilde Law in South Africa* (2009) 561.

²² Kruger op cit (n4) 505.

²³ Stuurman op cit (n5) 5.

(Trafficking Bill).²⁴ The interim anti-trafficking provisions will now be examined. The other two parts of the South African legal response do not, however, fall within the scope of the present article.

3.1 Children's Act 38 of 2005

While the South African Law Reform Commission was still in the process of investigating law reform concerning human trafficking,²⁵ interim provisions on trafficking in children were included in the Children's Act 38 of 2005 ('the Children's Act').²⁶ The purpose of the trafficking provisions in chapter 18 of this Act is to combat trafficking in children in partial compliance with the Palermo Protocol,²⁷ which is incorporated into the law of the Republic.²⁸

It is important to assess whether the Children's Act complies with the core minimum standards laid down in the Palermo Protocol. Given that the Children's Act applies to children only, it does not fully comply with standard 1, namely the definition of 'trafficking in persons'. The Children's Act contains a definition of 'trafficking in relation to a child' only. The Act provides that:

"trafficking", in relation to a child –

- (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –
 - (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving

²⁴ See GG 32906 of 29 January 2010, GN 61, for a summary of the Bill.

²⁵ South African Law Reform Commission 'Trafficking in persons' Project 131(Issue Paper 25) (referred to hereafter as South African Law Reform Commission 2004), 2004, available at http://www.doj.gov.za/salrc/ipapers/ip25_prj131_2004.pdf, accessed on 11 March 2008, 1-3; South African Law Reform Commission 'Trafficking in Persons' Project 131 (Discussion Paper 111) (referred to hereafter as South African Law Reform 2006), 2006, available at <http://www.doj.gov.za/salrc/dpapers.htm>, accessed on 11 March 2008, 1; South African Law Reform Commission 'Report on trafficking in persons' Project 131 (Referred to hereafter as South African Law Reform Commission 2008), 2008, available at http://www.justice.gov.za/salrc/reports/r_pr131_trafficking_2008.pdf, accessed on 23 March 2008, 3; Kassan op cit (n5) Chapter 18 page 9.

²⁶ Kassan op cit (n5) Chapter 18 page 10; Kassan & Mahery op cit (n21) 200; Human Sciences Research Council op cit (n17) 43.

²⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children op cit (n2); A Dawes, R Bray & A van der Merwe (eds) *Monitoring Child Well-being – a South African Rights-based Approach* (2007) 250; Kassan & Mahery op cit (n21) 200; H Bosman-Sadie & L Corrie *A Practical Approach to the Children's Act* (2010) 285; Human Sciences Research Council op cit (n17) 42.

²⁸ See sections 281-282 of the Children's Act 38 of 2005; Kassan op cit (n5) Chapter 18 pages 13, 14; Dawes, Bray & Van der Merwe op cit (n27) 247; Kassan & Mahery op cit (n21) 200; Bosman-Sadie & Corrie op cit (n27) 285; Human Sciences Research Council op cit (n17) 42.

- or receiving of payments or benefits to achieve the consent of a person having control of a child; or
- (ii) due to a position of vulnerability, for the purpose of exploitation; and
- (b) includes the adoption of a child facilitated or secured through illegal means.²⁹

This definition is to a large extent similar to the provision in the Palermo Protocol pertaining to the trafficking of a child. Therefore, the Act would seem to comply with standard 2 laid down in the protocol. However, apart from the similar action and purpose components of the definition, there are a number of differences between the definitional formulations. First, the definition in the Children's Act is somewhat broader than that of the protocol, in that the terms 'sale' and 'supply' are added as prohibited actions.

Secondly, adoption secured through illegal means is also included in the action component of the definition of trafficking in children.³⁰ The unqualified inclusion of illegal adoption in the Act may cause confusion. In agreement with Kassan,³¹ it must be pointed out that an 'illegal adoption' means the 'exploitation of the adoptive system and laws and not necessarily the exploitation of the adopted child'.³² Even where a child is illegally adopted, the adoptive parents may not have the intention to exploit the child at all. Such illegal adoptions must be distinguished from illegal adoptions that constitute trafficking in children in terms of the Children's Act. For an illegal adoption to qualify as trafficking, an interpretation should be followed in line with that in the Palermo Protocol, namely that the primary intention of the illegal adoption must be to exploit the child.³³

Thirdly, the definition of trafficking in the Children's Act also differs from the provision in the Palermo Protocol regarding the

²⁹ Section 1 of the Children's Act 38 of 2005.

³⁰ Section 1 of the Children's Act 38 of 2005; Human Sciences Research Council op cit (n17) 42. For a critical view on the insertion of the illegal adoption of a child into the definition of 'trafficking', see Kassan & Mahery op cit (n21) 202-203.

³¹ Kassan op cit (n5) Chapter 18 page 12; for a further discussion see Gallagher op cit (9) 40-42.

³² Ibid.

³³ Kassan & Mahery op cit (n21) 202-203; Kassan op cit (n5) Chapter 18 page 12. The Official Interpretative Notes (*Travaux Préparatoires*) to the Palermo Protocol indicate that, 'where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, it will also fall within the scope of the Protocol' – UN General Assembly (2000) para [66]; see also AD Jordan 'The annotated guide to the complete UN trafficking protocol', 2002, available at <http://www.walnet.org/csis/papers/UN-TRAFFICK.PDF>, accessed on 13 November 2008, 9-10; Kruger op cit (n4) 71-72.

so-called 'means' element.³⁴ The 'means' element in the Palermo Protocol requires that the perpetrator must use at least one of the listed improper means, such as force, threat, fraud or deception, in committing the prohibited action.³⁵ In the case of the trafficking of adults, the Palermo Protocol requires the presence of the means element to constitute human trafficking, but not for the trafficking of a child under the age of eighteen years.³⁶ In providing special protection for children, the Palermo Protocol lays down that the prescribed action element, namely the recruitment, transportation, transfer, harbouring or receiving of a child for the purpose of exploitation, constitutes trafficking in persons, even if none of the means set out in the definition were used.³⁷ Unlike the protocol, the Children's Act provides that trafficking in children requires the prohibited action to be committed by 'any means, including the use of threat, force or other forms of coercion, abduction, fraud, [and] deception', for the purpose of exploitation.³⁸ One interpretation of 'any means' is that no means are required for child trafficking, and that the definition in the Children's Act thus corresponds with the definition in the Palermo Protocol. Then again, Kassan points out that a different interpretation of 'any means' is that the Children's Act does require one of the specified means to be present to constitute trafficking in children.³⁹ The latter interpretation is problematic, in that, if the means element is required for trafficking in children, it is not in line with the Palermo Protocol, which waives the means element in regard to child trafficking.⁴⁰ The formulation of the 'means' element in the definition of 'trafficking' in the Children's Act has therefore been 'criticised for creating a greater evidentiary burden' than is required by the Palermo Protocol.⁴¹

Having discussed standards one and two, the third standard, namely the criminalising of human trafficking, will now be dealt with. In short, the Children's Act creates two main trafficking offences. First, the trafficking of children by natural or juristic persons for

³⁴ Bosman-Sadie & Corrie op cit (n27) 285.

³⁵ Article 3(a) of the Palermo Protocol; South African Law Reform Commission (2006) op cit (n25) 15; Kassan op cit (n5) Chapter 18 page 16. For a discussion of this element, see Kruger op cit (n4) 46-51.

³⁶ Article 3(a) and (c) of the Palermo Protocol; South African Law Reform Commission (2006) op cit (n25) 14; Kassan op cit (n5) Chapter 18 page 16.

³⁷ Article 3(c) of the Palermo Protocol; South African Law Reform Commission (2006) op cit (n25) 15.

³⁸ Section 1 of the Children's Act 38 of 2005; Kassan & Mahery op cit (n21) 202.

³⁹ Kassan op cit (n5) Chapter 18 page 11; Kassan & Mahery op cit (n21) 202.

⁴⁰ Kassan op cit (n5) Chapter 18 page 11; Kassan & Mahery op cit (n21) 202.

⁴¹ For a critical view on the 'means' element in the definition of 'trafficking' in the Children's Act 38 of 2005, see Kassan & Mahery op cit (n21) 202; Kassan op cit (n5) Chapter 18 page 11; Human Sciences Research Council op cit (n17) 44.

an exploitative purpose is criminalised.⁴² Unlike the international standard, this provision only applies to children who are trafficked and not to adult victims. It is to be welcomed that the Children's Act regards child trafficking as a serious offence, for which imprisonment of up to twenty years may be imposed.⁴³ Additional protection for children is provided, in that it is no defence for the perpetrator that the child, or the person having control over the child, has consented to the exploitation or illegal adoption or that the intended exploitation or adoption did not occur.⁴⁴

As was pointed out in relation to standard four above, states parties are not only obligated to criminalise the main crime of human trafficking, but also conduct constituting attempts to commit the crime, participation as accomplices, and organising or directing others to commit human trafficking.⁴⁵ The Children's Act does not include the criminalisation of attempts to commit human trafficking, because this is already covered in existing South African law. The attempt to commit any crime is recognised as a substantive crime in the South African legal system.⁴⁶ Participation as an accomplice by unlawfully and intentionally furthering a crime committed by someone else is also punishable in our existing law.⁴⁷ Furthermore, the Riotous Assemblies Act 17 of 1956 ('Riotous Assemblies Act') criminalises conspiracy and incitement to commit a crime.⁴⁸ However, the Riotous Assemblies Act does not include the protocol's specific term 'organising' others to commit human trafficking.⁴⁹ The obligation to criminalise the 'organising' of trafficking is specifically included in the Protocol and is also underpinned by the United Nations Office on Drugs and Crime 'Legislative guides for the implementation of the

⁴² Section 284(1) of the Children's Act 38 of 2005; see also Kassan op cit (n5) Chapter 18 pages 15-16; Kassan & Mahery op cit (n21) 203.

⁴³ Section 305(1) and (8) of the Children's Act 38 of 2005; Kassan & Mahery op cit (n21) 203.

⁴⁴ Section 284(2) of the Children's Act 38 of 2005; Kassan op cit (n5) Chapter 18 page 16; Kassan & Mahery op cit (n21) 203; Bosman-Sadie & Corrie op cit (n27) 286-287.

⁴⁵ Article 5(2) of the Palermo Protocol; see also Kruger op cit (n4) 317-321.

⁴⁶ Attempt to commit a common-law crime is in itself a crime under the common law, while section 18(1) of the Riotous Assemblies Act 17 of 1956 criminalises an attempt to commit a statutory offence – J Burchell & J Milton *Principles of Criminal Law* 3 ed (2005) 619-641; CR Snyman *Criminal Law* 5ed (2008) 283-294; Kruger op cit (n4) 317-321.

⁴⁷ For a discussion of participation as an accomplice in South African law and the requirements for liability as an accomplice, see Snyman op cit (n46) 257-259, 273-278; Burchell & Milton op cit (n46) 599-605.

⁴⁸ Section 18(1) and (2) of the Riotous Assemblies Act 17 of 1957; see also Kruger op cit (n4) 520-523; Snyman op cit (n46) 283-305; Burchell & Milton op cit (n46) 619-657.

⁴⁹ Kruger op cit (n4) 522-523.

United Nations Convention against Transnational Organized Crime and the Protocols thereto' of 2004.⁵⁰ It is important to criminalise the organising of trafficking in order to reach the kingpins or master traffickers. They occupy positions of power as principal organisers of the trafficking ring and frequently enjoy anonymity as well as impunity, while profiting the most.⁵¹

Apart from criminalising the crime of trafficking, the Children's Act also criminalises certain behaviour 'facilitating trafficking in children' in order to cast the net wide enough so as to include the various role players that usually profit from this crime.⁵² On conviction of this crime of facilitating trafficking in children, a maximum of ten years' imprisonment may be imposed.⁵³ In short, the prohibited behaviour entails leasing any property for the purpose of harbouring a trafficked child or distributing information alluding to trafficking. Further, internet service providers are required to report any site on their servers that contains such prohibited information.⁵⁴

At first glance, it seems that the protocol and the Children's Act also differ with regard to their scope of application. On the one hand, the Palermo Protocol applies to the prosecution of offences established in the protocol,⁵⁵ where those offences are 'transnational in nature and involve an organised criminal group'.⁵⁶ On the other, the Children's Act applies to trafficking 'within or across the borders of the Republic'.⁵⁷ With the inclusion of these words, the Act not only covers transnational trafficking in children to and from other countries, but also in-country trafficking within the borders of the Republic.⁵⁸ However, it must be borne in mind that the Palermo Protocol is not an independent protocol and has to be interpreted together with the main convention, namely the United Nations Convention against Transnational Organized Crime

⁵⁰ UNODC Legislative Guides op cit (n6) 267.

⁵¹ Kruger op cit (n4) 95, 522-523; Gallagher op cit (n11) 977; Raymond op cit (n8) 493.

⁵² Section 285 of the Children's Act 38 of 2005; Kassan & Mahery op cit (n21) 203-204; Bosman-Sadie & Corrie op cit (n27) 287-288.

⁵³ Section 305(6) of the Children's Act 38 of 2005. If a person is convicted more than once of this offence, the sentence may be increased to a maximum of 20 years' imprisonment – section 305(7).

⁵⁴ Section 285; see also Kassan op cit (n5) Chapter 18 pages 16-18; Kassan & Mahery op cit (n21) 204; Bosman-Sadie & Corrie op cit (n27) 287-288.

⁵⁵ Article 5 of the Palermo Protocol.

⁵⁶ Article 4 of the Palermo Protocol.

⁵⁷ Section 1(a) of the Children's Act 38 of 2005; Bosman-Sadie & Corrie op cit (n27) 286.

⁵⁸ Section 1(a) of the Children's Act 38 of 2005; Kassan op cit (n5) Chapter 18 page 12.

(‘the Organized Crime Convention’) of 2000.⁵⁹ This convention provides that the offence of human trafficking must be established in domestic anti-trafficking legislation without requiring that transnational or organised crime elements be present.⁶⁰ Therefore, although the scope of application seems different, the Children’s Act in fact complies with the Palermo Protocol and the Organized Crime Convention.

Apart from creating trafficking offences, chapter 18 of the Children’s Act also regulates other matters in regard to trafficking in children, such as the provision of international cooperation,⁶¹ as well as extraterritorial jurisdiction.⁶² Underpinning the best-interests-of-the-child principle, the Act further provides for the safety of the trafficked child and specific assistance in returning the child to the Republic,⁶³ as well as for referral⁶⁴ and repatriation⁶⁵ procedures. However, Kassan⁶⁶ maintains that the provisions for assisting trafficked children in the Children’s Act⁶⁷ do not fully comply with all the types of assistance that states parties are obliged to render or consider in terms of the Palermo Protocol.⁶⁸ Finally, the Children’s Act also provides that, when a court has ‘reason to believe’ that parents or persons with parental responsibilities have trafficked a child, their parental responsibilities

⁵⁹ Available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf, accessed on 11 March 2008; see also Raymond op cit (n8) 492-493.

⁶⁰ Article 34(2) of the United Nations Convention against Transnational Organized Crime provides that offences in this instrument, and by implication also in the Palermo Protocol, should be ‘established in the domestic law of each states party independently of the transnational nature or the involvement of an organized criminal group...’. For a further discussion of this issue, see Kruger op cit (n4) 488-489; United Nations Office on Drugs and Crime op cit (n14) 34; UNODC op cit (n6) 258-259, 275-276.

⁶¹ Section 283 of the Children’s Act 38 of 2005; Kassan op cit (n5) Chapter 18 pages14-15; South African Law Reform Commission (2008) op cit (n25) 13; Bosman-Sadie & Corrie op cit (n27) 286; Human Sciences Research Council op cit (n17) 42.

⁶² Section 291 of the Children’s Act 38 of 2005; South African Law Reform Commission (2008) op cit (n25) 13; Kassan op cit (n5) Chapter 18 page 22; Kassan & Mahery op cit (n21) 206; Human Sciences Research Council op cit (n17) 45.

⁶³ Section 286 of the Children’s Act 38 of 2005; South African Law Reform Commission (2008) op cit (n25) 13; Bosman-Sadie & Corrie op cit (n27) 288-289; Human Sciences Research Council op cit (n17) 42.

⁶⁴ Sections 288-289 of the Children’s Act 38 of 2005; Kassan op cit (n5) Chapter 18 page 20; South African Law Reform Commission (2008) op cit (n25) 45; Bosman-Sadie & Corrie op cit (n27) 290-291; Human Sciences Research Council op cit (n17) 42-43.

⁶⁵ Section 290 of the Children’s Act 38 of 2005; Kassan op cit (n5) Chapter 18 page 21; Bosman-Sadie & Corrie op cit (n27) 291.

⁶⁶ Kassan op cit (n5) Chapter 18 page 18.

⁶⁷ Section 286 of the Children’s Act 38 of 2005; Human Sciences Research Council op cit (n17) 45.

⁶⁸ Kassan op cit (n5) Chapter 18 pages17-18.

and rights may be suspended, with the child being placed 'in temporary safe care, pending an inquiry by a children's court'.⁶⁹

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

3.2 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Apart from the abovementioned provisions in the Children's Act, counter-trafficking provisions are also included in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Amendment Act'). This Act criminalises sexual abuse or exploitation comprehensively in a single statute.⁷⁰ The Act aims to afford complainants involved in sexual offences 'the maximum and least traumatising protection that the law can provide ...'.⁷¹

Pending the adoption of legislation in full compliance with the Palermo Protocol, transitional anti-trafficking provisions are included in the Sexual Offences Amendment Act, in partial compliance with South Africa's international counter-trafficking obligations.⁷²

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

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

- (i) a threat of harm;
- (ii) the threat or use of force, intimidation or other forms of coercion;
- (iii) abduction;
- (iv) fraud;
- (v) deception or false pretences;
- (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or

⁶⁹ Section 287 of the Children's Act 38 of 2005; Kassan op cit (n5) Chapter 18 page 19; Bosman-Sadie & Corrie op cit (n27) 289; Human Sciences Research Council op cit (n17) 45.

⁷⁰ Section 2 of the Sexual Offences Amendment Act 32 of 2007; see also Minnie op cit (n21) 541-562; Human Sciences Research Council op cit (n17) 43; *State v Matyityi* 2011 (1) SACR 40 (SCA) 15, para [22].

⁷¹ Section 2(d) of the Sexual Offences Amendment Act 32 of 2007.

⁷² Section 70(1) of the Sexual Offences Amendment Act 32 of 2007; Minnie op cit (n21) 561; Human Sciences Research Council op cit (n17) 43.

- resistance to being trafficked, or unwillingness to participate in such an act; or
- (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage.⁷³

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

‘...any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic.’⁷⁴

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

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

‘A person (“A”) who traffics any person (“B”), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes.’⁷⁵

In sum, it is an offence to traffic a person ‘without the consent of’ the trafficked person. The issue of consent in the Act is approached differently from that in the Palermo Protocol. The latter provides that consent of the trafficked person is irrelevant where any of the prohibited means have been used or if the trafficked person is a child.⁷⁶ The Act expands on the ‘consent’ issue by providing that the consent has to be a ‘voluntary or uncoerced agreement’.⁷⁷ Unlike the protocol, the Act proceeds to list a number of circumstances which would negate valid consent, but stipulates that this is not an exhaustive list of circumstances.⁷⁸

These circumstances include the use of the listed prohibited means, which brings the Act in line with the protocol on this point. The Act further provides that children below the age of twelve years are not able to consent validly, because their consent is not regarded as being

⁷³ Section 70(2)(b)(vii) of the Sexual Offences Amendment Act 32 of 2007; Human Sciences Research Council op cit (n17) 41.

⁷⁴ Section 70(2)(b) of the Sexual Offences Amendment Act 32 of 2007.

⁷⁵ Section 7 1(1) of the Sexual Offences Amendment Act 32 of 2007; Minnie op cit (n21) 561.

⁷⁶ Article 3(d) of the Palermo Protocol.

⁷⁷ Section 71(3) of the Sexual Offences Amendment Act 32 of 2007; Minnie op cit (n21) 561-562.

⁷⁸ Section 71(4) of the Sexual Offences Amendment Act 32 of 2007.

given ‘voluntarily or without coercion’.⁷⁹ The question that arises is: What then is the position regarding alleged consent by children of age twelve to seventeen years? The formulation on this issue in the Sexual Offences Amendment Act differs from the provision in the Palermo Protocol, which does not differentiate between children under and over twelve years, but defines a child as any person under the age of eighteen years.⁸⁰ Hence, it is submitted that this issue needs to be addressed in the proposed counter-trafficking legislation to bring it in line with the provisions in the Palermo Protocol.

The fourth minimum standard identified above requires that conduct that amounts to involvement in human trafficking should also be criminalised in order to bring to book all agents playing a part in the trafficking process. The Sexual Offences Amendment Act does not need to criminalise attempts, incitement or conspiracy to commit human trafficking or participation in human trafficking, because, as explained above, these are already covered in existing law.⁸¹ Nonetheless, the Act explicitly includes such provisions, in that it broadly defines conduct that constitutes the offence of involvement in human trafficking to include any 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.’⁸²

The Palermo Protocol’s obligation to criminalise the ‘organising and directing’ of others to commit human trafficking as part of the fourth standard, is not specifically complied with in the Children’s Act.⁸³ However, the Sexual Offences Amendment Act not only includes the organising and directing of trafficking, but also casts the net wider to include the commanding, supervising or controlling of the trafficking crime as well.⁸⁴ The Act is also more comprehensive than the protocol, which only criminalises participating ‘as an accomplice’, in that it criminalises the performance of ‘any act which is aimed at committing,

⁷⁹ Section 71(4)(b)(iv) of the Sexual Offences Amendment Act 32 of 2007.

⁸⁰ Article 3(d) of the Palermo Protocol.

⁸¹ See the discussion in 3.1 above.

⁸² Section 71(2) of the Sexual Offences Amendment Act 32 of 2007.

⁸³ See 3.1 above.

⁸⁴ Section 71(2)(a) of the Sexual Offences Amendment Act 32 of 2007; Minnie *op cit* (n21) 561.

causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking'.⁸⁵

In view of the fact that transporters often facilitate human trafficking by moving victims illegally across national borders, the Act further prohibits all 'commercial carriers'⁸⁶ from bringing a passenger into, or removing a person from, South Africa without such passenger having travel documents for the lawful entry into, or departure from, the Republic..⁸⁷ This offence overlaps to some extent with the prohibition against assisting another to enter, remain in, or depart from, the Republic in contravention of the Immigration Act 13 of 2002 ('the Immigration Act').⁸⁸ However, the Sexual Offences Amendment Act is more stringent, in that it provides that the transporting offender is also liable for paying the cost of the transported person's care, safekeeping and return from South Africa.⁸⁹

Stuurman⁹⁰ highlights the problem that victims of human trafficking are often prosecuted. For example, trafficked persons who are in South Africa without valid documentation because their passports have been confiscated by their traffickers may be prosecuted under the Immigration Act,⁹¹ while victims forced into prostitution may be prosecuted for prostitution.⁹² It is to be welcomed that the Sexual Offences Amendment Act addresses this issue by stipulating that a victim of trafficking is 'not liable for any criminal offence, including

⁸⁵ Section 71(2)(b) of the Sexual Offences Amendment Act 32 of 2007; see also Minnie op cit (n21) 561.

⁸⁶ The term 'commercial carrier' is defined broadly in section 70(2)(a) of the Sexual Offences Amendment Act 32 of 2007 to include a company or the owner, operator or master of any means of transport that engages in the transportation of goods or people for commercial gain.

⁸⁷ Section 71(6)(a) of the Sexual Offences Amendment Act 32 of 2007; see also Minnie op cit (n21) 562; Human Sciences Research Council op cit (n17) 43.

⁸⁸ Section 49(2) of the Immigration Act 13 of 2002. See also Stuurman op cit (n5) 5.

⁸⁹ Section 71(6)(c) of the Sexual Offences Amendment Act 32 of 2007; see also Minnie op cit (n21) 562.

⁹⁰ Stuurman op cit (n5) 5. The fact that victims are often prosecuted for trafficking-related crimes committed during their period of victimisation is widely reported – see UNODC op cit (n3) xx; Kruger op cit (n4) 116-117. Importantly, the recent 2012 United States of America's Trafficking in Persons Report confirmed this problem. The report specifically recommended that the South African government address the problem with specific reference to labour trafficking victims, ensuring that they are not charged with immigration violations by screening all deportees for victimisation–US Department of State 'Trafficking in Persons Report: Country narratives: countries N through Z' 2012, 315-316, available at www.state.gov/documents/organization/192597.pdf, accessed on 20 June 2012.

⁹¹ Kruger op cit (n4) 116-117.

⁹² Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 criminalises prostitution; see also Kruger op cit (n4) 468.

any migration-related offence, which was committed as a direct result of being trafficked'.⁹³

As regards sanctions for trafficking offences established in the Sexual Offences Amendment Act, there is no specific penal provision included in the Act.⁹⁴ However, the trafficking offences in section 71(1) and (2) of the Sexual Offences Amendment Act are regarded as serious offences, because they are listed in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Accordingly, a court is obligated to impose a minimum sentence of imprisonment for life on offenders convicted of these trafficking offences,⁹⁵ unless the court finds that 'substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.⁹⁶

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

4. Conclusion

This article mapped out the current South African legislative response for combating human trafficking, with a specific focus on the broadcriminal justice paradigm. The South African response includes transitional anti-trafficking provisions in the Children's Act, which criminalises all types of child trafficking, and in the Sexual Offences Amendment Act, which criminalises sex trafficking. The Children's Act and the Sexual Offences Amendment Act both contain transitional provisions specifically dealing with certain aspects of trafficking in persons pending the promulgation of the Trafficking Bill.⁹⁷ In short, the Sexual Offences Amendment Act criminalises human trafficking,

⁹³ Section 71(5) of the Sexual Offences Amendment Act 32 of 2007; Sexual Offences and Community Affairs Unit in the National Prosecuting Authority 'Tsireledzani Prevent, Respond and Support, 2009 available at <http://www.info.gov.za/issues/humantrafficking/documents/tsireledzani.pdf>, accessed on 4 March 2010 at 2; Human Sciences Research Council op cit (n17) 41.

⁹⁴ V Lotan 'Brief outline of human trafficking: Thai cases no 1 and 2' (unpublished contribution delivered at Tsireledzani: Towards an Integrated Human Trafficking National Action Plan Conference, 25-27 March 2009, Durban at 11.

⁹⁵ Section 51(1) of the Criminal Law Amendment Act 105 of 1997; Human Sciences Research Council op cit (n17) 41.

⁹⁶ Section 51(3)(a) of Criminal Law Amendment Act 105 of 1997.

⁹⁷ South African Law Reform Commission (2008) op cit (n25) 13; Minnie op cit (n21) 561; Kassan & Mahery op cit (n21) 200-201.

but only for the purpose of sexual exploitation.⁹⁸ The Children's Act criminalises child trafficking for the purpose of any form of exploitation.⁹⁹ However, the protection in the trafficking provisions of the Act does not apply to trafficked adults, because the Children's Act focuses on the protection of children only.¹⁰⁰ It follows from the discussion above that these two pieces of legislation do not fully comply with the obligations set out in the Palermo Protocol. In particular, they are not fully aligned with the four core standards identified in this article, which are the key to any domestic criminal law response.

The recent 2012 United States of America's Trafficking in Persons Report¹⁰¹ points out that the current South African counter-trafficking laws do not conform with the Palermo Protocol and recommends that the proposed law reform should be finalised and implemented.¹⁰²

It is essential that the Prevention and Combating of Trafficking in Persons Bill addresses the gaps identified in the interim legislation above to ensure that it is fully compliant with the standards set in the Palermo Protocol. Regarding the first and second standards identified in this article, the Bill must include a definition of human trafficking with reference to adult as well as child victims, in line with the Protocol's definitional requirements. Minimum standards three and four pertaining to the Protocol's obligations to establish certain offences in domestic laws should also be dealt with meticulously. The Bill has to establish not only the main crime of human trafficking, but must also criminalise the involvement in human trafficking, including the attempt to traffic and participation in trafficking, as well as the organising or directing of others to commit the crime. To conclude, it is submitted that the most prominent gaps in criminal justice compliance with the Protocol in the current legislation must be addressed in the Trafficking Bill to ensure that all forms of trafficking of all types of victims are included in the trafficking definition and are also criminalised.

⁹⁸ Sexual Offences and Community Affairs Unit in the National Prosecuting Authority op cit (n93) 2.

⁹⁹ See the definition of 'trafficking' in section 1 of the Children's Act 38 of 2005; Kassin & Mahery op cit (n21) 202-203.

¹⁰⁰ Sexual Offences and Community Affairs Unit in the National Prosecuting Authority op cit (n93) 2; Kassin & Mahery op cit (n21) 201.

¹⁰¹ Since 2001, the US Department of State is required by law to submit an annual global report assessing governments' efforts to comply with the minimum standards laid down in the US Trafficking Victims Protection Act, as amended. The report found that the government of South Africa does not fully comply with these minimum standards for the elimination of trafficking, but is making significant efforts to do so. Accordingly, South Africa has been placed on tier 2 for the fourth consecutive year—US Department of State (n90) 40, 315-316.

¹⁰² US Department of State (n90) 316.

It is to be welcomed that the Parliamentary Portfolio Committee on Justice and Constitutional Development concluded its deliberations on the Trafficking Bill and approved it unanimously on 5 June 2012.¹⁰³ It is now vital to expedite the remaining procedures to finalise the Bill. Speedy enactment will enable the implementation of this counter-trafficking legislation – a crucial tool in combating this heinous crime more comprehensively.

¹⁰³ Parliamentary Monitoring Group *Prevention and Combating of Trafficking in Persons Bill [B7-2010]: finalisation & adoption* (2012), available at http://www.pmg.org.za/print/32739?utm_source=Drupal&utm_medium, accessed on 12 June 2012.