

**THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS ACT 7
OF 2013:
A CRITICAL ANALYSIS OF ITS POTENTIAL IMPACT ON CHILD TRAFFICKING
PROSECUTIONS IN SOUTH AFRICA**

by

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May this study help prosecutors help others!

DECLARATION

I **Valisha Dafel** declare that

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- (ii) This dissertation has not been submitted for any degree or examination at any other university.
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LIST OF ACRONYMS AND ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child, 1990
CRC	Convention on the Rights of the Child, 1989
ECPAT	End Child Prostitution and Trafficking
HSRC	Human Sciences Research Council (SA)
ILO	International Labour Organisation
ILO Convention 182	ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention No.182, 1999
IOM	International Organisation for Migration
Organised Crime Convention	United Nations Convention against Transnational Organised Crime, 2000
OPAC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000
OPCRC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, 2000
OSCE	Organisation for Security and Cooperation in Europe
Palermo Protocol	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000
SALRC	South African Law Reform Commission

US TIP Report Trafficking Act	Trafficking in Persons Report (USA) Prevention and Combating of Trafficking in Persons Act 7 of 2013
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children’s Fund
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNODC	United Nations Office on Drugs and Crime

Table of Contents

ACKNOWLEDGEMENTS	i
DECLARATION	ii
LIST OF ACRONYMS AND ABBREVIATIONS	iii
CHAPTER 1	
INTRODUCTION.....	1
1.1 Background to the study	1
1.2 Aims of the research and the research questions.....	4
1.3 Rationale of the study	6
1.4 Statement of the problem.....	6
1.5 Research methodology.....	6
1.6 Limitations of the study.....	6
1.7 Importance of the study.....	7
1.8 Chapter outline.....	7
CHAPTER 2	
UNDERSTANDING CHILD TRAFFICKING AND THE CHALLENGES IT RAISES FOR PROSECUTORS.....	10
2.1 Introduction.....	10
2.2 What is child trafficking?.....	11
2.3 The extent and scope of child trafficking	13
2.4 Factors causing vulnerability of children to trafficking.....	15
2.5 The exploitative purposes of child trafficking	18
2.5.1 Sexual exploitation.....	18
2.5.2 Forced child labour.....	21
2.5.3 Forced begging.....	21
2.5.4 Organ trafficking.....	22
2.5.5 Child marriages.....	23
2.5.6 Debt bondage.....	23

2.5.7	Criminal purpose	24
2.5.8	Child soldiers.....	24
2.6	The role of organised crime in child trafficking	26
2.6.1	Introduction.....	26
2.6.2	What is organised crime?	26
2.6.3	The extent and scope of organised crime in South Africa	28
2.7	The perpetrators of child trafficking.....	30
2.8	The <i>modus operandi</i> of traffickers	31
2.9	Challenges in the prosecution of child trafficking as an organised crime	34
2.10	Conclusion	37

CHAPTER 3

INTERNATIONAL AND REGIONAL FRAMEWORK RELEVANT TO FIGHTING

CHILD TRAFFICKING AS AN ORGANISED CRIME

3.1	Introduction.....	40
3.2	The purpose and scope of application of the various international instruments.....	41
3.3	The establishment of a comprehensive definition of trafficking in persons	44
3.4	The obligation to criminalise all aspects of trafficking in persons against all persons including children.....	45
3.4.1	Criminalising participation and involvement in trafficking related offences	46
3.4.2	The criminalisation of the laundering of proceeds of crime	49
3.4.3	The criminalisation of corruption.....	49
3.4.4	The criminalisation of carriers and border measures	50
3.5	The obligation to provide sanctions for offences.....	51
3.6	The confiscation and seizure of proceeds of crime	51
3.7	The requirement of international cooperation.....	52
3.8	The establishment of jurisdiction	54
3.9	Protection and assistance to victims of trafficking.....	55
3.10	Providing training and technical assistance.....	58
3.11	Conclusion	58

CHAPTER 4

SOUTH AFRICA'S RESPONSE TO CHILD TRAFFICKING:

THE CURRENT APPLICABLE LAW 64

4.1	Introduction.....	64
4.2	A comprehensive trafficking definition in compliance with the international framework.....	66
4.3	The criminalisation of all aspects of trafficking	71
4.3.1	The criminalisation of the offence of trafficking in persons	71
4.3.2	The criminalisation of the facilitation of trafficking in persons	71
4.3.3	The criminalisation of a wide range of forms of participation in trafficking in persons.....	73
4.3.4	The criminalisation of the use of carriers in child trafficking.....	74
4.3.5	Debt bondage	75
4.3.6	The criminalisation of the laundering of the proceeds of crime.....	76
4.3.7	The criminalisation of corruption.....	76
4.3.8	The criminalisation of tampering with documents	77
4.4	Effective sanctions for trafficking and related offences	78
4.5	Aggravating factors and previous convictions	80
4.6	Compensation for victims	81
4.7	Extraterritorial jurisdiction	82
4.8	Confiscation, seizure and asset forfeiture of proceeds of crime	83
4.9	Assistance and protection to victims	84
4.10	International investigative and judicial cooperation in trafficking cases.....	85
4.11	A specialist law enforcement capacity to investigate human trafficking	86
4.12	Prevention measures.....	87
4.13	Conclusion	87

CHAPTER 5

CONCLUSION..... 91

BIBLIOGRAPHY 96

CHAPTER ONE

INTRODUCTION

*“That even one young person be denied the benefits of childhood, that one young woman be subjected to the brutal humiliation of sexual exploitation and that one man become the slave of a cruel taskmaster in another country are clear signals that we must renew both our resolve as well as our initiatives to protect those who are vulnerable”.*¹

1.1 Background to the study

“Trafficking in persons, or human trafficking, involves the recruitment, transportation, transfer, harbouring or receipt of a person (a woman, man or a child), often over international borders, but also frequently within the boundaries of a country, for the purpose of exploitation”.² “It is a crime that ruthlessly exploits women, children and men for numerous purposes, including forced labour and sex,”³ “and has been described as modern day slavery”.⁴ It is estimated that as many as “27 million men, women and children around the world are victims of what is now often described under the umbrella term ‘human trafficking’”.⁵ A great concern is the increase in child victims.⁶ Research indicates that 27 percent of identified victims detected globally are children.⁷

“Human trafficking is regarded as the fastest growing criminal industry in the world today, tied with arms trafficking as the second largest international illegal industry, behind drug dealing”.⁸ It makes billions of dollars in earnings for traffickers.⁹ According to Warnath, “trafficking of women and children is not a new problem, it has

¹ UNODC 2008 *An Introduction to Human Trafficking: Vulnerability, Impact and Action* at 81.

² UN GIFT 2010 *Human Trafficking and Business: Good practices to prevent and combat human trafficking* at 7.

³ US TIP Report (2012) at 1.

⁴ J Srikantiah ‘Perfect victims and real survivors: The iconic victim in domestic human trafficking law’ (2007) 87 *Boston University Law Review* 157 at 162.

⁵ UNODC 2012 *Global Report on Trafficking in Persons* at 7.

⁶ US TIP Report (2012) at 3.

⁷ *Ibid* at 7.

⁸ Washington State Office of the Attorney General (no date) *Crime and Safety: Human Trafficking*.

⁹ US TIP Report (2012) at 3.

occurred throughout history. What is new is the growing involvement of organised crime and increasing sophistication of its methods”.¹⁰

The rescue of 26 Thai females during December 2006 from a Gentlemen’s club in Durban, under the control of an organised crime group involved in human trafficking; the liberation of 20 females (including numerous girls under the age of 18 years) from a holiday lodge in Point Road, Durban during February 2012, and the conviction and life sentence of a Mozambiquan woman in Gauteng for child trafficking in March 2013, are some of the cases that has highlighted the problem of trafficking and in particular child trafficking.¹¹ The investigation and prosecution of such matters is a new and somewhat novel experience for the investigator, prosecutor and the judiciary. However, as with any other perpetrator of crime, traffickers must be brought to justice.

South Africa’s ratification of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter referred to as the “Palermo Protocol”),¹² obliged South Africa to pass legislation that deals with all forms of trafficking, which is applicable to all persons. On 29 July 2013, the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (hereafter referred to as the “Trafficking Act”), was signed into law by the State President. This Act which is yet to come into operation, is the first statute that addresses the scourge of trafficking in persons holistically and comprehensively.¹³ The Act establishes the offence of trafficking and other related offences, creates penalties for trafficking, protects victims of trafficking and recognises the role played by organised crime networks in child trafficking. The Act generally aims to prevent and combat any form

¹⁰ S Warnath in A Aronowitz ‘Smuggling and trafficking in human beings: The phenomenon, the markets that drive it and the organisations that promote it’ (2001) 9 *European Journal on Criminal Policy and Research* 163.

¹¹ *S v Kogilan Mudaly*, unreported case no CC 21/11, convicted on 21 November 2012, Durban High Court; *S v Dos Santos* ‘SAPS applauds life sentence to a human trafficking suspect’ 2011 *SAPS Journal Online*; *S v Zweni and others* pending case no 41/362/2012, Durban Regional Court. In *Zweni’s* case, nine females under the age of 18 years, were alleged to have been trafficked for purposes of prostitution by the accused.

¹² The Palermo Protocol was adopted by the UN in 2000 and came into force on 25 December 2003. SA ratified the protocol on 20 February 2004. The Palermo Protocol provides the international standard against which domestic legislation is measured, when addressing all forms of human trafficking.

¹³ ‘Human trafficking bill signed into law’ *South African Government News Agency* 29 July 2013.

of trafficking, which includes all forms of slavery, sexual exploitation, forced labour, child labour, servitude and the removal of body parts.

Although South Africa passed *interim* legislation in the form of Chapter 18 of the Children's Act 38 of 2005 (hereafter referred to as the "Children's Act")¹⁴ and Section 70 and 71 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter referred to as the "Sexual Offences Amendment Act"), both statutes present certain challenges. Despite the Children's Act prohibiting all forms of exploitation against children, it applies exclusively to the trafficking of children. It must be mentioned, that there have been no cases the author has dealt with in practice, where a child or children have been trafficked in isolation, without the presence of adult victims of trafficking. As a result, the Children's Act would not be a sustainable solution in effectively addressing the problem of child trafficking.

The Sexual Offences Amendment Act although applicable to any person, criminalises trafficking for the purpose of sexual exploitation only. The trafficking provisions in both Acts will be repealed once the Trafficking Act becomes operational. Prosecutors currently use both statutes to prosecute child traffickers. The selection of either of these laws depends on the facts and circumstances of each case.

The prosecution of a child trafficking case can be quite challenging. Challenges include the failure to identify suspects and victims properly, resulting in the misclassification of such matters. The lack of prioritisation and allocation of skilled staff and resources to deal with child trafficking matters is a further challenge. In addition, an absence of adequate facilities to meet the needs of the victim, reliance by law enforcement on traditional investigative techniques and lack of awareness and understanding of trafficking by prosecutors, pose further challenges. Other challenges include an absence of specialised units, staffed with trained and dedicated prosecutors and investigators, who specifically focus on trafficking matters and a failure to recognise that particular conduct by a trafficker is in fact part of the activities of an organised crime network. If not adequately addressed, such

¹⁴ The Children's Act 38 of 2005 was assented to on 8 June 2006. Chapter 18 of this Act sets out the trafficking provisions. The purpose of the Act is to give effect to the Palermo Protocol, and generally to combat trafficking in children.

challenges may result in prosecutors being ill equipped to prosecute trafficking matters.

As trafficking in person's legislation is relatively new in South Africa, there is a lack of national precedent and case law on this issue. This poses an additional challenge for prosecutors. Prosecutors operate with little or no guidance on prosecutorial techniques and learn from trial and error. Moreover, until the Trafficking Act becomes operational, prosecutors have to look at other statutes or common law to address a specific type of exploitation. Although this study focuses on prosecutors as the target group, investigators tasked to investigate child trafficking matters share such challenges.

1.2 Aims of the research and the research questions

The study of the potential impact of the Trafficking Act on the prosecution of child trafficking matters from an organised crime perspective is fairly new. Recognising this gap in research from a legal and prosecutorial perspective, this study aims to make a contribution to research on this topic. The purpose of this study is to provide a critical analysis of the relevant provisions of the Trafficking Act, in so far as they relate to the prosecution of child traffickers from an organised crime perspective, so as to determine its potential impact on the prosecution of child trafficking cases in South Africa. Due to limitations in terms of time and space, only those provisions, which affect the prosecution of child trafficking from an organised crime perspective, are considered.

The key research questions of this study are:

- i) What does international law require of States in terms of dealing with child trafficking as an organised crime?
- ii) What are the specific challenges raised by the organised crime aspects of child trafficking for South African prosecutors?

- iii) What are the challenges to prosecuting child trafficking as an organised crime under the current applicable legal framework?
- iv) Does the Trafficking Act address the challenges and potential challenges in the prosecution of child trafficking as an organised crime?
- v) Does the Trafficking Act bring South Africa in line with the country's international obligations in this regard?

In addressing the problem of child trafficking, it is essential that prosecutors have a comprehensive understanding of the multiple factors that create the problem, as well as knowledge of the relevant international instruments that are available. Chapter 2 provides an overview of child trafficking, which is a background against which the challenges to prosecuting child trafficking, must be understood. In addressing the second key research question, a discussion of some of the challenges raised by the organised crime aspects of child trafficking are set out.

Chapter 3 addresses the first research question and aims to examine certain international and regional instruments that address child trafficking from an organised crime perspective. In answering key research questions, three, four and five, the aim is to examine South Africa's current legislative response to child trafficking. This objective is discussed in chapter 4. The key provisions of the Children's Act and the Sexual Offences Amendment Act as they relate to child trafficking and how these laws respond to the organised crime aspects of child trafficking, are critically analysed.

Where applicable, a brief discussion of other statutes, which may be used by prosecutors to address the involvement of organised crime groups in trafficking, is included. An analysis of the pertinent provisions of Trafficking Act and its potential impact on the prosecution of child trafficking matters from an organised crime perspective, is included and measured against the minimum requirements of the international framework.

In concluding this study, an evaluation is made in chapter 5 as to whether the Trafficking Act closes the gaps identified in the interim trafficking legislation,

addresses the identified prosecutorial challenges, and whether the Act brings South Africa law in line with its international obligations. Conclusions are drawn as to the impact of the Trafficking Act on the prosecution of child traffickers and recommendations are made regarding aspects of the Trafficking Act, which are not adequately dealt with in the Act.

1.3 Rationale of the study

Because of personal experience in the prosecution of child trafficking matters, it has become clear that organised crime plays a significant role in the trafficking of children. Research aimed at the prosecution of child trafficking matters from an organised crime perspective in South Africa is limited. It is for this reason that the main rationale of this study is to contribute to research aimed at the prosecution of child traffickers from an organised crime perspective.

1.4 Statement of the problem

Child trafficking is in most instances an organised crime. An effective fight against organised crime requires a response to the organised crime features of trafficking. The current legal framework is inadequate in this regard. However, new legislation in the form of the Trafficking Act is on the brink of coming into operation. It is therefore important to establish whether the new law addresses the challenges to the prosecution of trafficking raised under the current legal framework.

1.5 Research methodology

The methodology employed in this study is an extensive literature review, using primary and secondary sources and with brief references to personal professional experience.

1.6 Limitations of the study

A limitation of this study is the fact that no field visits were carried out to assess the implementation of the existing trafficking legislation by prosecutors.

1.7 Importance of the study

This study will be of interest and relevance to prosecutors involved in the prosecution of child trafficking matters, by providing a better understanding of the potential impact of the Trafficking Act, in the prosecution of child trafficking cases from an organised crime perspective. In addition, this study will contribute to any other research done in this field.

1.8 Chapter outline

Chapter 1: Introduction

This chapter introduces the subject matter of child trafficking and outlines the background of the study, its aims and rationale. The research problem is outlined and thereafter the research methodology and limitations of the study are set out. The chapter concludes with the potential value and importance of the study and a chapter outline, which provides a brief synopsis of the study.

Chapter 2: Understanding child trafficking and the challenges it raises for prosecutors

To ensure a comprehensive understanding of child trafficking, this chapter provides an overview of literature that explores the definition of child trafficking, the nature and crime of child trafficking and the extent of the problem. A discussion of some of the factors that cause vulnerability of children to trafficking and the various exploitative purposes of child trafficking, are examined. As child trafficking is a lucrative source of income for organised crime syndicates, it is important to include a discussion of the role of organised crime groups, its various perpetrators and their *modus operandi*. The chapter concludes with identifying certain features that make child trafficking challenging to prosecute.

Chapter 3: International and regional framework relevant to fighting child trafficking as an organised crime

There are various international instruments pertaining to child trafficking. For purposes of this study, the 2000 United Nations Convention against Transnational Organised Crime (hereafter referred to as the “Organised Crime Convention”); the Palermo Protocol; the 1989 UN Convention on the Rights of the Child (hereafter referred to as the “CRC”); the 1990 African Charter on the Rights and Welfare of the Child (hereafter referred to as the “ACRWC”); the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (hereafter referred to as the “OPCRC”); the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (hereafter referred to as “OPAC”) and the 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention No.182 (hereafter referred to as the “ILO Convention 182”), are used as the international standard against which the provisions of the Trafficking Act are measured.

This chapter explores the theoretical framework around child trafficking and outlines what is required of States in terms of dealing with child trafficking as an organised crime. An assessment of the limitations and weaknesses in the relevant instruments are discussed. The chapter closes with identifying the key legal components that South African counter-trafficking legislation should contain, as defined by international law.

Chapter 4: South Africa’s response to child trafficking: The current applicable law

Chapter 4 focuses on an analysis of the current counter-trafficking laws in South Africa, within the context of the international framework. An evaluation is made as to whether such laws respond adequately to the organised crime aspects of child trafficking, from a prosecution perspective. Brief discussions of other relevant statutes that address key issues not addressed in the current counter-trafficking legislation, but are nonetheless applicable to organised crime, are included.

The chapter concludes with a discussion of whether the current legal framework suitably addresses the organised crime aspects of child trafficking from a prosecution perspective, if it meets the minimum standards as laid down in the relevant international anti-trafficking framework and whether it addresses the challenges and potential challenges in the prosecution of child trafficking as an organised crime.

Chapter 5: Conclusions and Recommendations

In this chapter, an assessment is made as to whether the Trafficking Act closes the gaps identified in the interim trafficking legislation, namely the Children's Act and the Sexual Offences Amendment Act and if the Act brings South Africa law in line with its international obligations. Conclusions are drawn regarding the potential impact of the Trafficking Act on the prosecution of child traffickers. Recommendations and suggestions are made on certain aspects, which the Trafficking Act still needs to address or which are not adequately dealt with in the Act.

CHAPTER 2

UNDERSTANDING CHILD TRAFFICKING AND THE CHALLENGES IT RAISES FOR PROSECUTORS

2.1 Introduction

“Child sexual trafficking is a crime for which few “hard” facts are known or ascertainable, and for which the “known” facts are constantly changing”.¹

Child trafficking is a clandestine, multi-faceted and organised crime that is extremely difficult to detect and prevent, especially in light of its cross-border nature.² Personal experience has shown that direct reports of child trafficking are exceptional and children will rarely identify themselves as victims of trafficking. Most often, the underlying crimes of *inter alia* kidnapping, rape, assault and prostitution offences are reported to the police. Prosecutors play a crucial role in bringing criminals to book, and in doing so must be able to identify and protect trafficked victims, as the successful prosecution of traffickers is heavily reliant on the evidence of the victims. Accordingly, it is essential that prosecutors establish a relationship of trust and cooperation with the child victim from the outset of a case, which is maintained throughout the prosecution process.

According to Bosman, in understanding the nature of a problem, the “who”, “what”, “where” and “why” of trafficking must be clarified.³ It is therefore essential that prosecutors have a proper knowledge and understanding of the problem of child trafficking prior to undertaking such a prosecution. This will increase their ability to effectively use the legal tools⁴ available to prosecute a child trafficking case. This chapter aims to provide an overview of literature that examines child trafficking, its

¹ J Walters and PH Davis ‘Human Trafficking, Sex Tourism and Child Exploitation on the Southern Border’ (2011) 2(1) *Journal of Applied Research on Children: Informing Policy for Children at Risk* 1.

² L Norris ‘Child Trafficking in the UK: An Examination of Contemporary Approaches’ (2008) *Internet Journal of Criminology* 1.

³ C Bosman ‘Trafficking of Ukranian Women: Best practices in trafficking prevention efforts from Ukraine’ (2004) *Human Rights Law Review Special Issue* 38.

⁴ Legal tools include legislation, interviewing techniques, rules of evidence and criminal procedure.

exploitative purposes, extent and causes. A brief profile of victims and traffickers are included. Some of the challenges prosecutor's encounter in the prosecution of child trafficking matters are identified and discussed. As the focus of this study is the prosecution of child trafficking in the context of organised crime, it is essential that a discussion of the role of organised crime groups alongside trafficking is included in this chapter.

2.2 What is child trafficking?

Child trafficking simply defined is “the movement of a child for the purpose of exploitation or financial gain or benefit of another”.⁵ It has been stated that “the term trafficking, covers a ‘multitude of sins’ and applies to children being exploited in a myriad of ways, among them sexual exploitation; forced labour; organ removal; forced marriage; forced conscription and illegal adoptions through abduction or sale of children”.⁶

Child trafficking knows no national or international boundaries and exists in all corners of the world. As such, “the transnational nature of child trafficking and the number of actors involved makes it one of the most challenging problems facing prosecutors”.⁷ Experts maintain that when considering the problem of child trafficking, it is important to do so in the correct context, acknowledging that child trafficking is modern day slavery.⁸ The offence of child trafficking penalises adults not only for their failure to protect children who are under their control, but also for treating them as objects and exploiting them as “goods” or “services”.⁹ Bacquet *et al* state that it is much easier to move humans across borders than drugs or weapons,

⁵ ECPAT 2010 *UK Briefing child trafficking – begging and organised crime*.

⁶ S Kreston ‘Trafficking in Children in South Africa: an analysis of pending legislation’ (2007) 8(1) *South African Professional Society on the Abuse of Children* 35.

⁷ A Heyden ‘Trafficking of Ukrainian Women: Best Practices in Trafficking Prevention Efforts from Ukraine’ (2004) *Human Rights Law Review Special Issue* 38.

⁸ MQ McGough ‘Ending Modern-Day Slavery: Using Research to Inform US Anti-Human Trafficking Efforts’ (2013) 271 *NIJ Journal* 26 at 27.

⁹ Kreston *op cit* note 6 at 36.

which are seized when found.¹⁰ “Human beings however, can be constantly re-used and re-trafficked”.¹¹ Child trafficking is therefore a serious violation of human rights.

The Palermo Protocol is the first international instrument that comprehensively addresses all aspects of trafficking, and provides the first universally agreed upon and legally binding definition of human trafficking.¹² For this reason, it is used as one of the key instruments in the international framework against which the provisions of the current counter trafficking laws are measured. Article 3 of the Palermo Protocol defines trafficking in persons as:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.

The above definition makes it clear that trafficking covers the actions of *any* person involved in the movement of another person for the purpose of exploitation and is divided into three parts:

“The action of: recruitment, transportation, transfer, harbouring or receipt of persons;

¹⁰ C Bacquet *et al* 2007 *Human Trafficking in South Africa Root Causes and Recommendations* UNESCO Policy Paper No 14.5 (E) at 33.

¹¹ *Ibid.*

¹² See article 3 of the Palermo Protocol. M Dotteridge and A Jordan ‘UN Trafficking Protocol: An Imperfect Approach’ 2010 (1) *Centre for Human Rights and Humanitarian Law, Washington College of Law* 3.

By means of: threats, use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim;

For the purpose of exploitation: this includes at a minimum, exploiting the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or similar practices and the removal of organs”.¹³

At least one component from each of these three sections must be present for the definition of trafficking to be applicable.¹⁴ Regarding children, it is only necessary that the elements of an act and exploitation of the child are present. Under article 3(c) of the Palermo Protocol, consent and the presence or absence of improper means of trafficking become completely irrelevant if the victim is a child under 18 years of age.

There is no express definition of child exploitation set out in the Palermo Protocol. However, the European Commission is instructive in this regard and describes child exploitation as procuring or offering a child for illicit activities (including the trafficking or production of drugs and begging); using children in armed conflict; work that by its nature is likely to harm the health and safety of children, the employment or use for work of a child who has not reached the applicable working age for the said employment or work; other forms of exploitation and illegal adoption.¹⁵ This definition can be used as a guideline in clarifying exploitation. Chapter 3 looks at the key provisions of the Palermo Protocol.

2.3 The extent and scope of child trafficking

“Given the clandestine nature of trafficking in persons, its true extent is difficult to ascertain”.¹⁶ Statistics on the magnitude of the trafficking are limited.¹⁷ However,

¹³ UNODC 2006 *Trafficking in Persons: Global Patterns* Anti- Human Trafficking Unit 51

¹⁴ *Ibid.*

¹⁵ OSCE 2013 *Resource Police Training Guide: Trafficking in Human Beings* at 57.

¹⁶ *United States - Canada Bi-National Assessment of Trafficking in Persons* 2006 at 1.

¹⁷ F Laczko and MA Gramegna ‘Developing Better Indicators of Human Trafficking’ (2003) 10(1) *Brown Journal of World Affairs* 179 at 180.

there is an estimated 29.8 million people in slavery worldwide.¹⁸ About 1.2 million children are trafficked for sexual exploitation each year.¹⁹

“Females comprise approximately 80 percent of all trafficked persons of which 70 percent are placed into the sex trafficking industry each year”.²⁰ Importantly, “50 percent of trafficked victims are minors”.²¹ “From 2003 to 2006, 20 percent of all detected victims were children, and between 2007 and 2010, the number had risen to 27 percent”.²² “Of every three child victims, two are girls and one is a boy”.²³ Regarding children trafficked for prostitution; girls under the age of 18 years constitute an estimated 10 - 30 percent of the total number of trafficked females.²⁴ Runaways and abandoned children are the largest “at risk” group, who often end up in the company of violent, sexually exploiting, or drug-abusing groups.²⁵

“South Africa has been described as a country of destination, transit and origin for victims and also has internal trafficking within the country”.²⁶ There are no accurate indicators of the number of children trafficked each year to, through and from Southern Africa to South Africa and other States.²⁷ However, research conducted by Molo Songololo indicates that there are approximately 28,000 to 38,000 child victims of sexual exploitation in South Africa.²⁸ Child trafficking affects Africa and has become so extremely profitable, that traffickers operate centres in Europe, North America and Southeast Asia and source their human cargo into a much larger international network for trafficking children.²⁹ “Two thirds of the victims detected in

¹⁸ The Global Slavery Index 2013.

¹⁹ K Moser ‘Prevention, Prosecution and Protection: A look at the United States Trafficking Victims Protection Act’ (2012) 3(6) *International Journal of Business and Social Science* 223.

²⁰ TS Green ‘Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap between U.S. Immigration Laws and Human Trafficking Laws’ (2008) 12(2) *UC Davis Journal of Juvenile Law & Policy* 317.

²¹ US TIP Report (2007) at 8.

²² US TIP Report (2012) at 1.

²³ *Ibid* at 7.

²⁴ E Kelly in S Scarpa ‘Universalism and Regionalism: The Synergy to Fight Against Trafficking in Human Beings’ (2004) 2 *Human Rights Law Review* 4.

²⁵ Walters and Davis *op cit* note 1 at 5.

²⁶ UNICEF 2005 *Trafficking in Human Beings, Especially in Women and Children in Africa* at 10-15.

²⁷ DN Swart ‘Problems surrounding the combating of women and child trafficking in Southern and South Africa’ (2011) 12(1) *Child Abuse Research: A South African Journal* 26.

²⁸ Molo Songololo 2000 (hereinafter referred to as “Molo Songololo”) *Trafficking in Children for Purposes of Sexual Exploitation – South Africa* at 26.

²⁹ BN Lawrence and L Richard *New African Histories Trafficking in Slavery’s Wake Law and Experience of Women and Children in Africa* (2012) at 1-2.

Africa and the Middle East are children, with almost half the victims being exploited in forced labour and for sexual purposes”.³⁰

It is unclear how much human trafficking profits organised crime in Southern Africa. However, the global estimate is a staggering US\$7 - \$10 billion per year, making it one of the main profit sources for organised crime worldwide.³¹ The International Labour Organisation (hereafter referred to as “ILO”) estimates that the criminal profits of human trafficking could exceed \$31 billion dollars, making it the second largest source of illegal income worldwide after drug trafficking.³² Trafficking people for forced labour or sexual exploitation is one of the fastest growing areas of illegal activity,³³ with an estimated cost of \$20 billion annually.³⁴ “Modern day slavery thrives because of its profitability”³⁵ and this factor makes it extremely attractive to organised groups to become involved in trafficking people.

2.4 Factors causing vulnerability of children to trafficking

“Children should not be treated merely as small adults: they are uniquely vulnerable in ways that differ from the vulnerability of adults”.³⁶

Bales is of the view that “there can be no uniform answer to the question what causes trafficking?”³⁷ “There is no one characteristic such as poverty or lack of education that marks a child as being ‘more likely’ to be trafficked - it depends on the context”.³⁸ Traffickers target children of all ages.³⁹ “Regardless of sex, age, immigration status, or nationality, certain commonalities exist among victims of trafficking, such as their vulnerability to force, fraud or coercion,”⁴⁰ even though the

³⁰ US TIP Report (2012) at 4.

³¹ IOM 2003 *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* by J Martens, M Pieczkowski and B Van Vuuren-Smith 3rd ed at 16.

³² EM Gozdzik and M Bump 2005 *Data and Research on Human Trafficking: A Global Survey* 43 (1/2) International Migration IOM at 14.

³³ Ibid.

³⁴ ILO’s Global Report ‘Cost of Coercion’ in US Department of State TIP Report (2013) at 1.

³⁵ Bacquet et al op cit note 10 at 3.

³⁶ UNODC 2008 *An Introduction to Human Trafficking: Vulnerability, Impact and Action* at 71.

³⁷ K Bales ‘What predicts Human Trafficking?’ (2007) 31(2) *International Journal of Comparative and Applied Criminal Justice* 1.

³⁸ Dotteridge and Jordan op cit note 12 at 3.

³⁹ E Herzfeld 2002 *Human trafficking into and within the United States: A review of literature* at 7.

⁴⁰ Ibid.

root causes every so often vary from one country to another.⁴¹ Child trafficking involves a process of recruitment and exploitation. Prosecutors must prove these elements during criminal prosecutions. It is therefore essential that prosecutors have an understanding of the factors that contribute to a child's vulnerability to being trafficked.

Such factors include conflict, globalisation, crime, social violence, porous borders, corrupt State officials and lack of adequate legislation and resolve to enforce existing laws.⁴² Kara credits economic inequalities amongst nations as the most important factor for human trafficking.⁴³ Bales submits that war and civil strife may lead to massive displacements of populations, leaving orphans and street children extremely vulnerable to trafficking.⁴⁴ Kreston argues that poverty, violence, discrimination against women and children, greed and even natural disasters contribute to trafficking of persons.⁴⁵ Such conditions and circumstances make children susceptible and vulnerable to trafficking,⁴⁶ as they literally have nothing of value to live upon, besides their bodies.⁴⁷ Many children fall prey to this practice, as they seek a better life or enhanced economic opportunities.⁴⁸

Parents, acting out of lack of knowledge or ignorance or hope, give their children to traffickers who promise a better life to the child,⁴⁹ only to exploit them later. "In South Africa, HIV and AIDS play a role in the increased demand for younger, presumably uninfected sex workers, often from rural areas".⁵⁰ Young girls especially virgins, are perceived as "clean" and able to cure or delay the disease.⁵¹ "The rising numbers of AIDS orphans and family breakdown all contribute to the creation of a ripe environment for human trafficking".⁵²

⁴¹ UNODC 2006 *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* at xviii.

⁴² *Ibid.*

⁴³ S Kara *Sex Trafficking: Inside the Business of Modern Slavery* (2009) 4.

⁴⁴ Bales op cit note 41.

⁴⁵ Kreston op cit note 6 at 38.

⁴⁶ J Srikantiah 'Perfect victims and real survivors: The iconic victim in domestic human trafficking law' (2007) 87 *Boston University Law Review* 163.

⁴⁷ Molo Songololo op cit note 28 at 27.

⁴⁸ Bales op cit note 44.

⁴⁹ UNICEF 2005 op cit note 26 at 6.

⁵⁰ Bacquet et al op cit note 10 at 39.

⁵¹ *Ibid.*

⁵² *Ibid* at 23.

Girls are particularly vulnerable to trafficking, due to gender discrimination in society.⁵³ In many cultures, girls are less valued than boys and are required to sacrifice their education and take over domestic responsibilities, such as caring for their parents and siblings.⁵⁴ Traffickers take advantage of the unequal position of girls in the source and transit countries, where females are treated as property, servants, commodities, and sexual objects.⁵⁵ “These factors tend to exert pressures on victims that ‘push’ them into migration and hence into the control of traffickers”.⁵⁶ As organised criminals, traffickers are able to assess countries’ economic status, gauge people’s vulnerability⁵⁷ and take advantage of their weaknesses.

Child trafficking is driven in large part by the profits made by the different actors in the trafficking chain.⁵⁸ Such profits are realised due to the demand for cheap labour and services mainly in developed countries.⁵⁹ Demand motivates recruiters, who prey on a victim’s misery, hopelessness and desperation.⁶⁰ “By most accounts, child trafficking is a highly attractive business for criminal groups because it is low in risks and high in profits”.⁶¹

As mentioned earlier, this aspect is an attractive “pull” factor for criminal groups and demand for trafficked children continues because of the different services they provide.⁶² “Organised crime groups and local traffickers exploit children for the sex industry, agricultural and industrial labour, and organ harvesting”.⁶³ To sum up, “children, who are disproportionately affected by the push factors associated with trafficking, constitute the majority of trafficking victims”.⁶⁴

⁵³ Scarpa op cit note 24 at 4.

⁵⁴ UNODC 2006 op cit note 41 at xviii.

⁵⁵ A Neill O’ Richard 2000 *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organised Crime* at 1.

⁵⁶ UNODC 2008 *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* at 454. Push factors are those circumstances that cause victims to leave their homes, communities and countries.

⁵⁷ MA Rahman ‘Human Trafficking in the era of Globalization: The case of Trafficking in the Global Market Economy’ (2011) 2(1) *Transcience Journal* 54 at 64.

⁵⁸ UNODC 2008 op cit note 36 at 71.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ SW Stoecker 2000 *The Rise in Human Trafficking and the Role of Organised Crime* at 2.

⁶² Lawrance and Richard op cit note 29 at 8. Pull factors refer to the demand side of trafficking in persons.

⁶³ Bacquet et al op cit note 10 at 7.

⁶⁴ United States - Canada Bi-National Assessment of Trafficking in Persons op cit note 16 at 4.

The implications of the above mentioned factors on child trafficking prosecutions means that a greater level of skill and experience is required from prosecutors as compared to other crimes. Prosecutors must be capable of dealing with traumatised victims and referring them to the proper organisations for therapy, counselling and protection. Due to the cross cultural nature of cross border trafficking, problems around language and interpretation arises. Prosecutors must be able to network with the different foreign departments and organisations to facilitate the use of interpreters. Importantly, prosecutors must understand the reasons why victims are susceptible to trafficking, in order to present such factors during the trial process

2.5 The exploitative purposes of child trafficking

Child exploitation has various forms and includes *inter alia* sexual exploitation, forced labour, child soldiers and criminal activities. Such activities may involve the co-ordinated efforts of three or more individuals to achieve some common benefit, and often involves more than one country.⁶⁵ “As such, human trafficking is considered to be a form of transnational organised crime”.⁶⁶ As this study focusses on the organised crime aspects of child trafficking, only those forms of child trafficking wherein organised crime is involved, are discussed.

2.5.1 Sexual exploitation

Human sex trafficking has been described as “exploitation in its rawest form”.⁶⁷ Research indicates that sexual exploitation is the most common form of trafficking in human beings⁶⁸ and is the largest specific sub-category of transnational trafficking.⁶⁹ Levi submits that child trafficking for sexual exploitation is an organised crime, where children are traded as commodities, like drugs and arms.⁷⁰ Children are a particularly vulnerable group of sex trafficking victims that suffer enormous harm.⁷¹

⁶⁵ BA Forster ‘Human Trafficking: A Transnational Organised Criminal Activity’ 2013 (3)1 *American International Journal of Contemporary Research* 1.

⁶⁶ *Ibid.*

⁶⁷ CP Keleher 2010 *The Illinois Predator Accountability Act: A Sleeping Giant*.

⁶⁸ UNODC 2014 *Human Trafficking FAQs*.

⁶⁹ US TIP Report (2007) at 27.

⁷⁰ A Westcott ‘Why is there a lack of recognition for British children who are victim to internal trafficking for sexual exploitation?’ (2013) 1 *Plymouth Law and Criminal Justice Review* 191 at 196.

⁷¹ Green *op cit* note 20 at 312.

According to UNICEF, as many as 2 million children are subject to prostitution in the global commercial sex trade.⁷² At this point, it is important to draw a distinction between prostitution and trafficking for the purposes of sexual exploitation. Prostitution is described as “the practice or occupation of engaging in sexual activity with someone for payment”.⁷³ “Commercial sexual exploitation of children occurs when individuals buy, trade, or sell sexual acts with a child”.⁷⁴

“Literally, sexual exploitation implies the act of misusing or mistreating another person through sex, and includes forced marriage, sex work, forced pregnancy for the purpose of selling the child and personal gratification”.⁷⁵ The sex trafficking business is dependent on supply and demand; the supply source is borne out of poverty, hopelessness and lack of knowledge present in the country of origin where traffickers target vulnerable children.⁷⁶ “Their bodies are sought by purchasers in the destination countries, where the demand of male sex buyers creates a strong multi-billion dollar profit incentive for traffickers”.⁷⁷

“Organised criminal gangs are engaging in prostitution rings using the internet to recruit and exploit children into a life of sexual slavery”.⁷⁸ “Children are targeted through social networking sites, on telephone chat-lines, in clubs, on the street, through friends and at shopping malls”.⁷⁹ Other vulnerable persons include teenagers, who are easy targets for exploitation in the sex industry, as seen with the phenomenon of “lover boys” in Europe.⁸⁰ “Child victims are only useful in the sex industry for a short period of time and once they are no longer attractive or young enough, they may be abandoned, further victimised in other ways or, in some cases,

⁷² US TIP Report (2009) at 22.

⁷³ Oxford Dictionaries Language Matters.

⁷⁴ *Commercial Sexual Exploitation of Children: A Fact Sheet*.

⁷⁵ TM Lutya 2012 *Human Trafficking of Young Women and Girls for Sexual Exploitation in South Africa* at 7.

⁷⁶ Green op cit note 20 at 323.

⁷⁷ Ibid.

⁷⁸ Testimony: Hon. Benjamin L. Cardin *Helsinki Commission Hearing* 2013.

⁷⁹ Walters and Davis op cit note 1 at 7.

⁸⁰ US TIP Report (2012) at 15. “Lover boys” are pimps who recruit girls by pretending to be in love with them while hiding their true aim of sexual exploitation. Exploitation begins when a lover boy targets a girl, seduces her into believing they are in a serious relationship. Gradually the lover boy drives his victim, often a girl under 18 years old, into extreme social isolation and dependence, and eventually into sexual exploitation.

killed to prevent disclosure”.⁸¹ The disposal of “old” victims creates a demand for new prostitutes and children and the outcome is a never-ending cycle of supply and demand.⁸²

Children can also be trafficked for sexual relations with a tourist. “Child sex tourism involves people who travel from their own country often to developing countries, looking for anonymity and the availability of children in prostitution, and engage in commercial sex acts with such children”.⁸³ Child pornography is often involved in such cases, and perpetrators use drugs to procure or control the minors.⁸⁴ “The explosion of the internet and the growing use of digital and cell phone cameras, has given perpetrators additional tools to exploit children”.⁸⁵

In South Africa, certain cities are regarded as key areas for under age sex tourism, involving children between the ages of 10 and 14 years and include Cape Town, Durban, Johannesburg and Port Elizabeth.⁸⁶ Young children are recruited to protect clients from HIV exposure including other STD’s.⁸⁷ “Trafficking for sexual exploitation appears to have a strong link to organised crime syndicates dominated by Nigerian, Chinese, Moroccan, and Eastern European syndicates, with Nigerian syndicates being widely acknowledged for involvement in the internal trafficking of South African females for the purpose of commercial sexual exploitation”.⁸⁸ According to Jordan, boys are also victims of sex trafficking and are harmed as much as girls are, by commercial sexual exploitation.⁸⁹

⁸¹ Walters and Davis op cit note 1 at 7.

⁸² Ibid.

⁸³ US TIP Report (2007) at 28.

⁸⁴ Ibid.

⁸⁵ Ibid at 23.

⁸⁶ HSRC 2010 *Tsireledzani: Understanding the Dimensions of Human Trafficking in South Africa* at xix.

⁸⁷ S Dillon ‘What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children’ (2008) 17 *UCLA Women’s Law Journal* 121 at 128.

⁸⁸ IOM 2008 *No Experience Necessary: The Internal Trafficking of Persons in South Africa* at 36.

⁸⁹ DM Hughes ‘Combating Sex Trafficking: A Perpetrator-Focused Approach’ (2008) 6(1) *University of St. Thomas Law Journal* 28. For example, in Bangalore, India, a 16-year-old boy, was kidnapped, forced to undergo a sex change operation and then used for prostitution by a trafficking ring that exploited eunuchs.

2.5.2 Forced child labour

Trafficking is driven by the worldwide demand for low-cost, vulnerable and illicit labour.⁹⁰ “Labour trafficking rings operate transnationally, bringing hundreds of migrant children into the country under what seems like legitimate businesses, but end up enslaving them”.⁹¹

Child labour is often defined as work that robs children of their childhood, their potential and self-respect, and is harmful to their physical and emotional development.⁹² It includes employing children to work on cannabis farms, in begging, in criminal activities, in the farming sector, in the food industry and in factories.⁹³ Minors recruited for forced labour are mostly preferred to adults, as they are easily manipulated, cheaper, and less likely to demand better working conditions.⁹⁴

2.5.3 Forced begging

Traffickers deceive children into forced begging with false promises of a better life in the city or in foreign countries.⁹⁵ “Earnings through the manipulation of pity and charity can lead to the mutilation of the child’s body, for purposes of gains from donation”.⁹⁶ The employer of the child collects the income at the end of the day.⁹⁷ This makes children prime targets for organised criminal gangs and others seeking to exploit them for profit. Bales points to the case of Mauritania, where children are recruited to beg on principal streets, with containers for coins they make, and send to their masters.⁹⁸ “These beggars barely make three square meals a day, but their masters ensure their upkeep as long as they go out to beg daily”.⁹⁹ It has been submitted that forced begging is a form of forced labour since it is “work or service

⁹⁰ US TIP Report (2007) at 8.

⁹¹ Cardin op cit note 78.

⁹² Child labour refers to work that is mentally, physically, socially or morally dangerous and harmful to children; interferes with their schooling by depriving them of the opportunity to attend school; obliging them to leave school prematurely; or requiring them to attempt to combine school attendance with excessively long and heavy work. IOM’s *What is child labour?*

⁹³ OSCE op cit note 15 at 67.

⁹⁴ Herzfeld op cit note 39.

⁹⁵ US TIP Report (2008) at 33.

⁹⁶ DT Truong 2001 *Human Trafficking and Organised Crime* at 13.

⁹⁷ Ibid at 9.

⁹⁸ Bales in Rahman op cit note 57 at 63.

⁹⁹ Ibid.

which is exacted from any person under the menace of any penalty and for which the said person has not offered himself / herself voluntarily”.¹⁰⁰

2.5.4 Organ trafficking

“Organ trafficking represents a grave form of transnational organised crime and involves *inter alia* brokers, traffickers, organisers, facilitators, organ recipients, clinics, medical professionals and nurses”.¹⁰¹ In South Africa, there have been reports of *muti* rituals, involving the removal of the heart, tongue and genitals from children.¹⁰² Victims are procured through abduction, trickery or even buying the child from parents or guardians.¹⁰³ The belief that certain body parts can improve health and/or wealth, is found chiefly in parts of East and Southern Africa.¹⁰⁴

An example of a case where children were exploited for their organs, occurred in an Egyptian charity trusted with the welfare of homeless children.¹⁰⁵ At least 32 children, under the age of 13, were taken to private hospitals which paid up to 20 000 Egyptian pounds for each organ.¹⁰⁶ The sudden increase in death rates among children in these homes, led a group of Egyptian parliamentarians raising the alarm.¹⁰⁷ This case highlights “the link between corruption and organ trafficking and involves ‘white collar criminals’ such as administrators and medical professionals”.¹⁰⁸ Such activities can form part of the activities of an organised criminal group as defined under Article 2 of the Organised Crime Convention, if it involves three or more persons, existing for a period and acting in concert. The aim must be the commission of one or more serious crimes (such as organ trafficking), in order to obtain a financial or material benefit.

¹⁰⁰ OSCE op cit note 15 at 79.

¹⁰¹ Testimony: Dr. Maria Grazia Giammarinaro *Helsinki Commission Hearing* 2013 at 11.

¹⁰² HSRC op cit note 86 at 160. “*Muti*” is a broad term encompassing various forms of traditional “medicine” prepared and disbursed by healers without formal medical training. US TIP Report (2012) at 39.

¹⁰³ Ibid.

¹⁰⁴ US TIP Report (2012) at 39.

¹⁰⁵ Truong op cit note 96 at 11.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Testimony: Dr. Maria Grazia Giammarinaro op cit note 101.

2.5.5 Child marriages

It is estimated that millions of girls under eighteen years of age, are forced into marriage.¹⁰⁹ “Girls, often sold by their parents or kidnapped from their villages, are forced into marriage, prostitution or concubinage”.¹¹⁰ In certain countries such as South Korea, Japan and Taiwan, the use of internet marriage brokers to find a spouse is becoming a frequent practice.¹¹¹ Girls are marketed as commodities over the internet as potential brides at trade shows.¹¹²

Non-governmental organisations have reported cases of foreign females recruited into commercial sexual exploitation by “bogus” husbands who work for criminal trafficking rings.¹¹³ “Prostitution of a child can take the form of temporary marriages, where girls are given in marriage to men in exchange for money”.¹¹⁴ Dottridge submits that this is simply child prostitution passed off as “marriage” and qualifies as trafficking under the Palermo Protocol.¹¹⁵ It is submitted that where the activities of the marriage brokering agency involves the coordinated efforts of three or more individuals to achieve the advantage of offering a child in marriage in exchange for money, it can be a form of organised crime, as defined under Article 2 of the Organised Crime Convention.

2.5.6 Debt bondage

One form of coercion is the use of a bond or debt to ensure that the victim remains enslaved. Organised crime groups involved in sex trafficking use debt bondage as a

¹⁰⁹ E Warner ‘Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls’ (2004) 12(2) *American University Journal of Gender, Social Policy & the Law* 233 at 237. In the *Mvuleni Jezile* case in the Western Cape, a 14-year-old girl was forced into a marriage with the accused by her uncle and grandmother. The girl was abducted, assaulted and raped by the accused on diverse occasions. The accused was convicted of human trafficking, rape and assault. (SA breaking news ‘*Man could get life for abducting and forcing teen into marriage*’ 27 January 2014)).

¹¹⁰ US TIP Report (2007).

¹¹¹ *Ibid* at 17.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ Dottridge and Jordan *op cit* note 12 at 5.

¹¹⁵ *Ibid*.

means to control the victims.¹¹⁶ “This practice involves using children as instruments of legal tender in order to pay off debt, by working for a debtor in various forms, until such time the debt was paid off”.¹¹⁷ Victims are usually lured, procured, or kidnapped to their new place of work by the trafficker and on arrival must repay the travel and subsistence costs incurred.¹¹⁸ Females are frequently forced into prostitution in order to repay this money.¹¹⁹ “Most often the debt can never be repaid because costs for food, rent, medicines, and condoms are added every day”.¹²⁰ Dotteridge and Jordan state that debt bondage (also known as bonded labour) is a form of forced labour and a practice similar to slavery.¹²¹

2.5.7 Criminal purpose

The trafficking and exploitation of children into criminal activities, is a profitable business where children are regularly sold amongst different criminal groups, with the “price” of the child based on the child’s earning potential.¹²² “Children as young as 5 years old are trained and forced into committing criminal activities such as pick-pocketing, organised begging, shoplifting, distraction burglary,¹²³ as well as street crimes such as DVD selling, bag snatching robbery and mugging”.¹²⁴ In such cases, children are the victims of such crimes and not the offenders.¹²⁵

2.5.8 Child soldiers

Armed groups that are part of the armed forces of a State or armed groups, which are distinct from the armed forces of a State, who recruit children as soldiers, can be equated with organised crime groups. This occurs when their activities involve the common efforts and cooperation of three or more individuals, who through force and

¹¹⁶ In *S v Kogilan Mudaly*, unreported case no CC 21/11, convicted on 21 November 2012, Durban High Court. Victims had to pay back the transportation and accommodation costs incurred by the trafficker in bringing them to South Africa before they were released.

¹¹⁷ Rahman op cit note 57 at 67.

¹¹⁸ Bales op cit note 44 at 3.

¹¹⁹ Ibid.

¹²⁰ US TIP Report (2007) at 26.

¹²¹ Dotteridge and Jordan op cit note 12 at 5.

¹²² Europol 2011 *Children Trafficked and Exploited in Europe by Criminal Gangs*.

¹²³ Ibid.

¹²⁴ ECPAT op cit note 5 at 16.

¹²⁵ Ibid.

violence achieve the benefit of using a child in armed conflict. Child soldiering consists of the illegal recruitment or use of children through force, fraud, or coercion by armed forces as soldiers or other forms of labour.¹²⁶ In several countries, soldiers unlawfully recruit children through abduction or force as combatants, spies, porters and sex slaves.¹²⁷ “Young girls can be forced to marry or have sex with male combatants”.¹²⁸

“While most child soldiers are between the ages of 15 and 18 years, some are as young as 7 or 8 years old, which is illegal under international law”.¹²⁹ UNICEF estimates that more than 300,000 children, under 18 years of age are currently exploited in more than 30-armed conflicts worldwide.¹³⁰ This problem affects many countries in Africa and Asia.¹³¹ Rebel leaders can be held liable for unlawfully recruiting and using children in armed conflict. For example, the Congolese leader of a rebel movement was convicted of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.¹³² He received a sentence of 14 years imprisonment.¹³³ In illustrating the international recognition of this crime, the case of *The Prosecutor vs. Charles Ghankay Taylor*, must be mentioned. The accused, a former President of Liberia, was sentenced to 50 years imprisonment for war crimes, which included the use of child soldiers in armed conflict.¹³⁴

“While serving as combatants, ex-child soldiers are deprived of significant portions of their early life, in which to grow, develop, mature and be educated”.¹³⁵ “Victims may apply to the International Criminal Court to be recognised as a victim for the purposes of reparations”.¹³⁶

¹²⁶ US TIP Report (2013) at 37.

¹²⁷ US TIP Report (2007) at 21 and US TIP Report (2013) at 37.

¹²⁸ Ibid.

¹²⁹ US TIP Report (2009) at 20.

¹³⁰ US TIP Report (2007) at 24.

¹³¹ US TIP Report (2009) at 21.

¹³² US TIP Report (2007) at 21.

¹³³ International Criminal Court *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06.

¹³⁴ The New York Times ‘50 Year Sentence Upheld for Ex-President of Liberia’ 26 September 2013.

¹³⁵ E Birchall, E Francq and A Pijnenburg 2011 *The International Criminal Court and Reparations for Child Victims of Armed Conflict* at 3.

¹³⁶ Ibid at 4-6. This may include an order against a convicted person for restitution, compensation and rehabilitation.

Having highlighted the various forms of exploitation of children, the role of organised crime groups in child trafficking, is now examined.

2.6 The role of organised crime in child trafficking

2.6.1 Introduction

Understanding the dynamics of organised crime is necessary to establish its relationship with child trafficking and to conduct effective prosecutions against traffickers. “The diversity of actors engaged in child trafficking reveals the complexity and danger of this heinous crime, and demonstrates that many people might be willing to enslave others for personal profit”.¹³⁷ Prosecutors face numerous challenges in the prosecution of trafficking cases. A proper understanding of how organised trafficking groups work, who their members are, their roles, *modus operandi* and the circumstances under which they exploit their victims, will allow prosecutors to effectively address the role of organised crime groups, in child trafficking operations. This section introduces the problem of organised crime, its defining features and the extent to which organised crime groups are involved in child trafficking.

2.6.2 What is organised crime?

Organised crime manifests in many forms and includes *inter alia* weapons, drugs and human trafficking. “It involves the cooperation of several persons or groups, in a concern where the main activity is professional crime”.¹³⁸ Child trafficking is one such activity, which is linked to transnational criminal groups, small criminal nets and local gangs.¹³⁹ “These organisations may be formal or informal”.¹⁴⁰ The transnational nature of organised crime allows criminal networks to establish ties across borders and overcome cultural and language differences in the commission of their crimes.¹⁴¹

¹³⁷ Testimony Hon. Benjamin L. Cardin op cit note 78.

¹³⁸ A Kruger ‘*Organised Crime and Proceeds of Crime Law in South Africa*’ (2008) 4.

¹³⁹ Herzfeld op cit note 39 at 3.

¹⁴⁰ Kruger op cit note 138.

¹⁴¹ Ibid.

Research has revealed that there are continuing debates about the precise nature and definition of organised crime. Consequently, numerous definitions of organised crime have emerged. Interpol's definition of organised crime reads: "any group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption".¹⁴² The Council of Europe defines organised crime as illegal activities carried out by structured groups of three or more persons, existing for a prolonged period of time, and having the aim of committing serious crimes through concerted action, by using intimidation, violence, corruption or other means, in order to obtain, directly or indirectly, a financial or other material benefit.¹⁴³

In the context of trafficking in persons, although the Organised Crime Convention does not define the concept "organised crime" or "transnational organised crime", it does offer an important legal definition of an "organised criminal group," that provides a useful starting point for a discussion of this issue. Article 2 of the Organised Crime Convention defines an organised criminal group as:

"a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit".

For purposes of this study, the term "organised criminal group" as defined in the Organised Crime Convention is used. In identifying an organised criminal group, the following questions *inter alia* must be asked:

- i) "Does the group consist of three or more persons?"
- ii) How long has this group existed for?
- iii) Are the perpetrators acting in concert with each other and with a common purpose of committing a serious crime/s?

¹⁴² Ibid.

¹⁴³ Ibid.

iv) Is the goal a financial or other material benefit?”¹⁴⁴

There is no formal definition of “organised crime” in South African law. However, the key statute that deals with organised crime is the Prevention of Organised Crime Act 121 of 1998 (hereafter referred to as “POCA”). Interestingly, POCA does not define the concepts of “organised crime”, “organised crime group or network” or “transnational organised crime”. What POCA does define are the concepts of a criminal gang¹⁴⁵ and an enterprise¹⁴⁶ that are broad enough to embrace organised crime activities.

2.6.3 The extent and scope of organised crime in South Africa

The involvement of organised crime groups in child trafficking is driven by the extremely high profits and relatively low risks involved. “Organised child trafficking does not require a large capital investment and unlike other commodities such as drugs, children can be used and resold repeatedly”.¹⁴⁷ This has provided an incentive for traffickers to pursue child trafficking.

Organised crime fills needs not met by lawful market institutions¹⁴⁸ such as providing prohibited sexual services in return for payment. They weaken financial systems through money laundering,¹⁴⁹ and use legal fiscal organisations such as financial and banking institutions to hide the illegal nature of their profits. “There is one feature the traditional gangsters and the new organised criminals share: they are laden with cash”.¹⁵⁰ Personal experience has revealed that in the majority of

¹⁴⁴ F David 2008 *Prosecuting trafficking in persons: known issues, emerging responses* Australian Institute of Criminology at 5.

¹⁴⁵ See section 1 of Act 121 of 1998. A “criminal gang” is described as a formal or informal ongoing organisation, association or group of three or more persons with an identifiable name or sign or symbol, which has crime as one of its activities committed by gang members individually or collectively.

¹⁴⁶ An “enterprise” includes any individual partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact although not a juristic person or legal entity.

¹⁴⁷ Kreston op cit note 6 at 39.

¹⁴⁸ JP Bjelopera and KM Finklea 2012 *Organized Crime: An Evolving Challenge for U.S. Law Enforcement* at 1.

¹⁴⁹ UNODC 2014 *Organised Crime*.

¹⁵⁰ Testimony: Martina Vandenburg op cit note 105.

trafficking cases dealt with, the motive is profit and benefiting from the exploitation of another person.

Gail Wannenberg of the South African Institute of International Affairs views human trafficking as the second most lucrative form of organised crime in sub-Saharan Africa, after narcotics.¹⁵¹ There are estimates of at least 500 organised crime groups in South Africa that facilitate the cross-border flow of illegal goods and people.¹⁵² “The more notorious West African/Nigerian networks, Chinese triad groups and the Russian and Bulgarian mafia manage global trafficking empires that traffic women and children across certain borders where they have developed networks of official and unofficial contacts”.¹⁵³

Regarding transnational trafficking, research reveals that the main supply source outside of the African continent, for victims destined for South Africa, is Thailand.¹⁵⁴ “Thai organised crime groups recruit girls in Thai villages, often from families who have incurred debts with local criminal groups, and transport them to South Africa for debt repayment”.¹⁵⁵ These groups are well organised, often with contacts in South Africa, that are able to provide victims with travel documents and visas.¹⁵⁶ Moreover, they have criminal connections in Thailand, who are able to implement threats made in South Africa against victims’ families.¹⁵⁷

According to Bermudez, organised crime syndicates often use local South Africans as recruiters.¹⁵⁸ South African citizens were identified as having close bonds with some of these groups.¹⁵⁹ “Nigerian organised crime syndicates operating in Pretoria, Port Elizabeth, Johannesburg and Bloemfontein are primarily involved in trafficking local black South African females into commercial sexual exploitation”.¹⁶⁰ Syndicates in the rural regions of the Western and Northern Cape, also recruit boys for forced

¹⁵¹ Lawrance and Richard op cit note 29 at 2.

¹⁵² IOM 2003 op cit note 31 at 16.

¹⁵³ Ibid.

¹⁵⁴ HSRC op cit note 86 at 155.

¹⁵⁵ IOM 2003 op cit note 31 at 95.

¹⁵⁶ HSRC op cit note 86 at xiv.

¹⁵⁷ IOM 2003 op cit note 31 at 95.

¹⁵⁸ L Bermudez in HSRC op cit note 86 at 154.

¹⁵⁹ HSRC op cit note 86 at xiv. *S v Emmanuel Uche and others*, pending case no 41/2382/2010, Durban Regional Court.

¹⁶⁰ L Bermudez in HSRC op cit note 86 at 155.

labour in Cape Town.¹⁶¹ In *S v Uche and Others*, the accused employed two local persons from Kwazulu-Natal to recruit two young females' to "house sit" for him in Pretoria. On arrival in Pretoria, the accused forced the females to take drugs against their will and to go out onto the street and conduct prostitution for him.¹⁶² It must be noted, that statistical data on trafficking that is perpetrated by individual traffickers who are not part of an organised crime group and trafficking perpetrated by an organised crime group, is not clear.

A short summary of the perpetrators of child trafficking and their *modus operandi* follows.

2.7 The perpetrators of child trafficking

"Traffickers are the link between supply and demand: on the one hand increasing supply through the recruitment, deception, transportation and exploitation process and on the other, boosting demand by providing easy access to victims".¹⁶³ As mentioned earlier, child trafficking implicates a number of role-players and includes everyone involved in the trafficking process.¹⁶⁴ "Traffickers range from international and national large-scale organised crime networks to small-scale informal networks,"¹⁶⁵ "less well-organised local networks, family members and parents who collude with traffickers, either through their ignorance of the trafficker's intention or sometimes with knowledge that their child will be exploited".¹⁶⁶

Legal persons such as employment organisations, strip clubs or "mail-order bride" agencies can commit child trafficking.¹⁶⁷ "Transporters, receivers, pimps and brothel-keepers, corrupt border guards and producers of false documentation, who all benefit as the trafficked persons pass through their hands, commit human trafficking".¹⁶⁸ Criminal groups frequently collaborate with each other and even with

¹⁶¹ HSRC op cit note 86 at 155.

¹⁶² *Uche and others supra* note 159.

¹⁶³ Bacquet op cit note 10 at 26.

¹⁶⁴ Ibid.

¹⁶⁵ Srikantiah op cit note 46 at 163.

¹⁶⁶ HSRC op cit note 86 at *xiv*.

¹⁶⁷ SALRC (2006) op cit note 32 at 68.

¹⁶⁸ Bacquet op cit note 10 at 26.

skilled criminal entrepreneurs who provide expert services, such as money laundering and document fraud to traffickers.¹⁶⁹ “Men make up the majority of traffickers, whilst, globally, women’s role is more commonly that of recruiter or intermediary rather than primary perpetrator”.¹⁷⁰ Bacquet submits that traffickers have different roles over varying lengths of time and may have an extensive or limited role in the trafficking process.¹⁷¹ Albanese identifies the following roles that exist in organised trafficking:

- i) “Investors or arrangers who provide money for trafficking operations and oversee the criminal enterprise,
- ii) Recruiters who find the children and may collect fees from their families,
- iii) Transporters who move the children through the origin, transit, and destination countries,
- iv) Public officials who receive bribes to provide identity documents and facilitate exiting and entering countries,
- v) Debt collectors in destination countries who collect trafficking fees, which can be \$30,000 or more per person,
- vi) Money movers who launder trafficking proceeds”.¹⁷²

To sum up, traffickers have different roles and motives for committing child trafficking. Despite this diversity, they have one common goal and that is to make as much money as possible on the exploitation of children.

2.8 The *modus operandi* of traffickers

The techniques that traffickers use to facilitate trafficking are usually simple and unsophisticated.¹⁷³ “Some traffickers engage in specific country-to-country trafficking, and operate in source countries they are familiar with through prior

¹⁶⁹ Picarelli J *Human Trafficking and Organised Crime in the US and Western Europe* in C Friesendorf (ed) 2009 *Strategies against Human Trafficking: the Role of the Security Sector* at 116.

¹⁷⁰ HSRC op cit note 86 at xiv.

¹⁷¹ Bacquet op cit. note 10 at 26

¹⁷² J Albanese 2007 *Commercial Sexual Exploitation of Children: What Do We Know and What Do We Do About It?* at 6.

¹⁷³ Peter Andreas in John Picarelli *Human Trafficking and Organised Crime in the US and Western Europe* in C Friesendorf (ed) 2009 *Strategies against Human Trafficking: the Role of the Security Sector* at 130.

citizenship or ethnic heritage and often traffic people to a destination they reside in or within which they maintain some form of business dealings”.¹⁷⁴ They frequently use commercial carriers to move people and seemingly legitimate methods to evade immigration controls.¹⁷⁵ “They often engage in visa shopping to obtain a visa for the trafficked person and then have the trafficked person overstay his/her visa once in the destination state”.¹⁷⁶ Once the visa/permit expires, traffickers use this as a threat over victims to prevent them escaping.

Trafficking in persons in the context of organised crime can be divided into three parts, namely the recruiter’s, the transporter’s and the exploiter’s environment.¹⁷⁷ These groups are often unconnected, except for informal arrangements to supply victims of trafficking to destination markets.¹⁷⁸ “The logical start of a trafficking ring is the recruitment of victims through promises of work, marriage, a better life in a new country or any number of other schemes, and arrange for their travel”.¹⁷⁹ The recruiter’s objective is to guarantee a steady supply of victims of trafficking and their undetected delivery to those working within the transporters environment.¹⁸⁰ “These criminal groups prey on vulnerable persons such as children, the poor, the uneducated, the unemployed and those affected by political instability and natural disasters”.¹⁸¹

The aim of those functioning within the transporters environment is to ensure the safe delivery of victims to those working within the exploiter’s environment.¹⁸² These criminal groups usually depend on known routes and crooked border officials.¹⁸³ Their purpose is to exploit the victims by selling their services to clients.¹⁸⁴ “After relocation, victims are enslaved and held in place through *inter alia* debt bondage, physical threats and drug dependency”.¹⁸⁵ In *S v Zweni and others*, the accused

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ SALRC (2006) op cit note 167 at 76.

¹⁷⁸ Ibid.

¹⁷⁹ Peter Andreas op cit note 173 at 129.

¹⁸⁰ SALRC (2006) op cit note 167 at 76.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Peter Andreas op cit note 173 at 129.

used “*muti*” to instil fear in the victims and to prevent them from escaping.¹⁸⁶ In addition, organised crime groups physically and sexually abuse victims and give them drugs in order to initiate and control them.¹⁸⁷

“Many children are drawn into criminal schemes through drug addiction,¹⁸⁸ where they become dependent on their suppliers and perform criminal acts in order to support their habits”.¹⁸⁹ “The dependency on drugs is frequently created, the logic being that the victims will rely on the traffickers for their next fix thus reducing the flight risk of the victims”.¹⁹⁰ “Other tactics include debt bondage, the use of armed guards and dogs to instil fear; creation of the perception that the criminal syndicate has close links with the police, threats of violence towards the victims and or members of their families, and rape and physical assault to maintain a constant state of fear”.¹⁹¹ In *Mudaly’s* case, for example, the victims were required to pay a debt bond of R60 000,00 to the manager of the Gentlemen’s club where they worked as prostitutes.¹⁹² This debt was to cover costs for expenses incurred on behalf of the victims by the trafficker, for flight tickets, arranging passports and accommodation.¹⁹³

A recent review of cases reveals the following features of the *modus operandi* of organised human trafficking into the United States and Europe:¹⁹⁴

- i) “High-quality altered and/or forged documents;
- ii) Numerous front companies or other commercial interests;
- iii) Advanced technology (e.g. satellite phones, GPS, laptop computers, digital surveillance equipment);
- iv) Extensive corruption;
- v) Rapid modification or adaptation of trafficking operations to reflect changing risks;
- vi) Trafficked persons travelling extremely long distances in larger numbers;

¹⁸⁶ *S v Zweni and others* pending case no 41/362/2012, Durban Regional Court.

¹⁸⁷ HSRC op cit note 86 at 156.

¹⁸⁸ Stoecker op cit note 61 at 7.

¹⁸⁹ *Ibid.*

¹⁹⁰ HSRC op cit note 86 at 156.

¹⁹¹ *Ibid.*

¹⁹² *Mudaly* supra note 116.

¹⁹³ *Ibid.*

¹⁹⁴ Peter Andreas op cit note 173.

- vii) The same lawyers for different criminal cases;
- viii) Sophisticated methods of laundering funds from the trafficking network”.¹⁹⁵

In addition, personal experience with child trafficking cases has highlighted other features such as:

- i) Removal of travel documents and identity documents by the “employer”;
- ii) Prior arrests for prostitution related offences and the bail or admission of guilt or fine is paid by the ‘employer/boss’;
- iii) All earnings are taken away by the trafficker with the victim receiving nothing;
- iv) Victims are required to work 24 hours a day 7 days a week and even when sick;
- v) Drug addiction by victims.

2.9 Challenges in the prosecution of child trafficking as an organised crime

The prosecution of child trafficking can be quite challenging. If not adequately addressed, such challenges may result in prosecutors being ill equipped to prosecute trafficking matters. Challenges include *inter alia* the fact that child trafficking cases cannot be treated as ordinary “run of the mill” cases. “These prosecutions can be complex and difficult, requiring skills that generalist prosecutors may not possess”.¹⁹⁶ Basic skills include prosecutors being able to identify those persons who are victims and those who are not. Other skills include the ability to communicate and deal with foreign, traumatised and problematic child victims, the proper referral of the victim to the relevant authorities for protection and assistance, and at the same time ensuring that the criminal investigation, is properly conducted.

Importantly, prosecutors must be able to identify the structure of an organised crime group, if the offence is transnational in nature and to work with partners and other relevant role players such as police, social services and other agencies. A lack of the

¹⁹⁵ Ibid.

¹⁹⁶ KH Heinrich ‘Ten Years after the Palermo Protocol: Where are Protections for Human Trafficking Victims?’ (2010) 18(1) *Human Rights Brief* 2 at 5; *Zweni supra* note 186.

above-mentioned attributes, results in weak prosecutions, incorrect charges, poor sentences against perpetrators and even acquittals against perpetrators.

A failure to properly identify suspects and victims in child trafficking cases, can result in misclassification of such matters. Persons who are genuine victims of trafficking and who require protection, may be at risk of being prosecuted, while the real perpetrators escape arrest. Convictions often depend on the strength of a victims' evidence and their ability to confront their traffickers in court. This means that prosecutors and law enforcement must spend countless hours working to gain a victims' trust, obtain the full account of the crime, and prepare for trial.¹⁹⁷

Prosecutors may encounter victims who are reluctant to cooperate, due to fear of retaliation from their trafficker or their distrust of law enforcement.¹⁹⁸ Prosecutors may have trouble in dealing with child victims of trafficking, if they are unfamiliar with the emotional and psychological problems that such victims experience. A lack of adequate facilities and services such as drug rehabilitation treatment centres, safe and secure accommodation facilities and counselling services to meet the needs of the victim, adds to the problem.

The international nature of trafficking offences can complicate and even thwart prosecutions.¹⁹⁹ For example, while the prosecution may occur in the country where the exploitation occurred, key evidence may be available in the country of origin.²⁰⁰ This process may involve a request for mutual legal assistance to the other country and/or extradition, which can be time consuming. Personal experience has shown that where the investigation and trial of a trafficking case takes time to reach finality, witnesses become frustrated and traumatised and do not want to testify. Prosecutors will *inter alia* have to decide whether they will use the mutual legal assistance route, which is a time consuming process,²⁰¹ or proceed to trial on the available evidence.

¹⁹⁷ Ibid.

¹⁹⁸ McGough op cit note 8 at 30.

¹⁹⁹ David op cit note 144 at 2.

²⁰⁰ Ibid.

²⁰¹ Ibid.

A lack of awareness, understanding and training on how to prosecute child trafficking cases may result in incorrect charges or lesser charges put to a trafficker. Trafficking prosecutions should target those persons who manage and profit the most from the trafficking operations. Those who are responsible for planning and orchestrating criminal activities are most often not the persons who carry out the planned activities.²⁰² Organised crime uses modern business organisation systems, which makes it problematic to trace those who are in leadership positions, and who at the end of the day benefit from the spoils of the crime.²⁰³ “Whilst studies have demonstrated that authorities require more training to recognise trafficking cases in general, they also require more specialised training to recognise different types of trafficking organisations”.²⁰⁴

Child trafficking is complex to investigate and prosecute. Currently there are no specialised units staffed with trained and dedicated prosecutors and investigators, who specifically focus on trafficking matters. As a result, very few trafficking cases have come through the court process. In order to make an impact on child trafficking cases, it is essential for specialised units to be established. At present, investigators and prosecutors within the organised crime components of both the South African Police Service and the NPA deal with other serious criminal matters, in addition to trafficking cases. A heavy workload contributes to poor and incomplete investigations, leading to loss of evidence, weak prosecutions and low conviction rates.

Another challenge is the reliance by law enforcement on traditional investigative techniques in trying to investigate organised crime groups that are well organised and resourced. Personal experience has revealed that proactive²⁰⁵ investigations are essential in addressing organised crime groups involved in trafficking and have been

²⁰² *Savoi and others v the NDPP and Another* (8006/12) [2013] ZAKZPHC Kwa-Zulu Natal High Court, Pietermaritzburg at paragraph 46 and 47.

²⁰³ *Ibid.*

²⁰⁴ Picarelli *op cit* note 169 at 116.

²⁰⁵ A proactive investigation describes an investigation, which is initiated by the police, rather than waiting for a victim to report that they have been exploited (reactive). Proactive investigations may be long term and involves the use of surveillance techniques, interception and monitoring of suspects phones, and the use of undercover agents to detect and investigate the crime.

successful in apprehending traffickers.²⁰⁶ Proactive investigations are valuable in addressing organised crime groups and targets key criminal figures rather than reacting to the crimes after they have been committed or reported.²⁰⁷

2.10 Conclusion

“Effective prosecutions help to curb the impunity of traffickers, impunity which perpetuates the crime of child trafficking”.²⁰⁸ This goal is challenging and is dependent on prosecutors having a proper knowledge and understanding of the concept of child trafficking, who its victims are and its perpetrators. Given the importance of these issues, this chapter examined the abovementioned aspects of child trafficking to provide a deeper understanding of this problem.

First, the definition of trafficking in persons as defined in the Palermo Protocol was “unpacked” and its elements briefly examined. Importantly, where children are concerned, it is only necessary that the elements of an act and exploitation of the child are present, to qualify as a trafficking case. The consent and the presence or absence of improper means of trafficking, becomes completely irrelevant if the victim is a child under 18 years of age.

“Child trafficking is a crime which relies on secrecy and exists in the shadows”.²⁰⁹ Hence, its true extent is difficult to estimate. Research however indicates, that globally at least 50 percent of trafficked victims are minors. In Africa and the Middle East, two thirds of detected victims are children, with almost half the victims exploited in forced labour and for sexual purposes. As regards South Africa, very little is known about the actual extent and scope of human trafficking. The earnings received from trafficking globally are staggering, making it one of the largest profit sources for organised crime worldwide. Consequently, it is argued that modern day

²⁰⁶ See *Zweni's* case supra note 186 and *Mudaly* supra note 116. In both matters, the police conducted surveillance on the suspects and the premises that were used to accommodate the victims. Traps and undercover agents were utilised to detect and investigate the crimes that were committed at the premises.

²⁰⁷ UNODC 2006 *Policing Crime Investigation Criminal Justice Assessment Toolkit* at 10.

²⁰⁸ AT Gallagher and N Karlebach *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice* Background Paper (2011) at 3.

²⁰⁹ Walters and Davis op cit note 1 at 1.

²⁰⁹ Norris op cit note 2 at 13.

slavery thrives because of its huge profits and this factor makes it extremely attractive for organised groups to get involved in this crime.

There are a number of factors that contributes to the vulnerability of children to trafficking. In short, poverty, gender discrimination, war, violence, unemployment, natural disasters and globalisation are some of the factors that “push” victims into the control of traffickers. Organised criminals have the ability to assess countries’ economic profiles, map children’s vulnerability and take advantage of their weaknesses. Victims are mostly drawn from the most vulnerable populations of the world. The implication of this on child trafficking prosecutions, means that prosecutors must be able to understand the reasons why victims are susceptible to trafficking in order to be able to present such factors during the trial process.

In striving towards a deeper understanding of the problem of child trafficking, its various exploitative purposes were examined. Trafficking for sexual exploitation and forced labour are the two fastest growing areas of criminal activity. There are other forms of trafficking where children are trafficked for their organs, for begging, for criminal purposes, for use in war as soldiers and for marriage.

The examination in this study reveals that organised crime syndicates have links *inter alia* to trafficking for sexual exploitation, forced labour, organ trafficking, illegal marriages and criminal purpose. In keeping with the focus of this study, a link was established between the different purposes of child trafficking and the role of organised crime groups in such exploitation. It was shown that organised crime groups can be and are involved in the different forms of exploitation of children where it involves three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain a financial or material benefit.

An analysis of the different role-players such as the recruiter, transporter, exploiter and kingpin, reveals a diversity of actors in the trafficking process. Their involvement in trafficking must be addressed in a criminal prosecution, best conducted by specialised and experienced prosecutors who have an organised crime background,

a proper understanding of the crime of child trafficking and the ability to guide investigations.

The key identifying feature that makes child trafficking challenging to prosecute is the lack of knowledge, training and skills of prosecutors to deal with trafficking cases. Empowering prosecutors with the necessary skills and training will assist in effective prosecutions against perpetrators and ultimately more convictions. As mentioned before, child trafficking is often an international crime and requires an international response which includes international cooperation, joint investigations, confiscation of assets and mutual legal assistance. Prosecutors must have a proper understanding of the different legal processes involved in international cooperation, and must be capable of determining whether such cooperation is necessary for the case.

A trafficking prosecution is difficult if not impossible without the testimony of the victim. As mentioned before, children are particularly vulnerable to reprisals and threats from traffickers. Prosecutors must be able to refer child witnesses to the relevant designated child protection organisations or to the witness protection program. The examination in this chapter points out the multi-faceted, organised nature of child trafficking that makes it extremely difficult to detect and prosecute, and a proper knowledge and understanding of this phenomenon cannot be underestimated. Chapter 4 looks at whether the Trafficking Act addresses such challenges.

In addition to having a proper understanding of the problem of child trafficking, knowledge of the international framework relevant to child trafficking from an organised crime perspective, is essential. This is discussed in chapter 3.

CHAPTER 3

INTERNATIONAL AND REGIONAL FRAMEWORK RELEVANT TO FIGHTING CHILD TRAFFICKING AS AN ORGANISED CRIME

3.1 Introduction

Prosecutors face a number of challenges when prosecuting child trafficking cases. This includes the complex, transnational and organised nature of the offence, the diversity of perpetrators in the trafficking chain, lack of international cooperation mechanisms and the vulnerability of child victims. This chapter seeks to examine certain international and regional instruments that address child trafficking from an organised crime perspective and seeks to analyse the extent to which the above issues are dealt with in the international framework. In doing so, the first research question regarding the international law requirements of States in terms of dealing with child trafficking as an organised crime, is addressed.

“The international community has established a number of crime control instruments, thereby developing an area of international law that is sometimes referred to as transnational criminal law”.¹ A key instrument is the Organised Crime Convention², which aims at promoting international cooperation to prevent and combat transnational organised crime effectively.³ Most notable, however, was its accompanying protocol (the Palermo Protocol), which contained the first internationally recognised and agreed upon definition of human trafficking.⁴ For this reason, the Palermo Protocol is used in this study as one of the key instruments under the international trafficking framework, against which the South African counter trafficking response is measured.⁵ The instruments included in this chapter

¹ AT Gallagher 2010 *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* at 22.

² South Africa signed the Organised Crime Convention on 14 December 2000 and ratified it on 20 February 2004. The Organised Crime Convention is referred to as the “parent agreement” and its principle provisions apply *mutatis mutandis* to the Palermo Protocol. US TIP Report (2006) at 11.

³ Article 1 of the Organised Crime Convention.

⁴ The Palermo Protocol is one of three Protocols attached to the Organised Crime Convention. The UN General Assembly adopted the Organised Crime Convention and the Palermo Protocol in November 2000.

⁵ SALRC (2006) at 6.

as part of the international trafficking framework are the 1989 UN Convention on the Rights of the Child (hereafter referred to as the “CRC”) and the 1990 African Charter on the Rights and Welfare of the Child (hereafter referred to as the “ACRWC”), which are important human rights instruments. The 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (hereafter referred to as the “OPCRC”), the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (hereafter referred to as “OPAC”) and the 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention No.182 (hereafter referred to as the “ILO Convention 182”), will be examined only as it relates to the organised crime aspects of child trafficking.

For ease of reference, the analysis of the international framework occurs within the context of specific obligations taken from the international framework. Such obligations describe conduct that must be criminalised and measures that should be incorporated into domestic laws. An analysis of the relevant obligations follows.

3.2 The purpose and scope of application of the various international instruments

The Organised Crime Convention applies to offences that are transnational in nature,⁶ involves an organised criminal group⁷ and is a serious crime.⁸ All three concepts apply to the prevention, investigation and prosecution of participation in an organised criminal group, money laundering, corruption and the obstruction of justice.⁹ As child trafficking constitutes a serious crime that is committed transnationally by an organised criminal group, “States can use the Organised Crime

⁶ Article 3(2) of the Organised Crime Convention. An offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another State.

⁷ See chapter 2 part 2.6.2 for the definition of “organised criminal group”.

⁸ Article 2(b) of the Organised Crime Convention describes “serious crime” as conduct constituting an offence punishable by imprisonment of at least four years or a more serious penalty.

⁹ Article 3(1) of the Organised Crime Convention.

Convention to address this crime, and facilitate the investigation and prosecution of this offence across borders, where necessary”.¹⁰

It must be noted, that the provisions of the Organised Crime Convention apply to the Palermo Protocol *mutatis mutandis* and become relevant when addressing the organised crime aspects of child trafficking.¹¹ According to Jordan, most governments focus only on the Palermo Protocol, which is insufficient.¹² “All provisions of the Organised Crime Convention that are *relevant* to the issue of human trafficking are part of the Palermo Protocol”.¹³

The purpose of the Palermo Protocol is to prevent and combat trafficking in persons especially women and children, to protect and assist victims, and to promote international cooperation.¹⁴ The Protocol applies to transnational offences and involves organised criminal groups that intentionally commit offences established under the protocol.¹⁵ Both instruments however, allow States to tackle the problem of trafficking comprehensively.¹⁶ “Both instruments have varying levels of legal obligation, where certain provisions are mandatory; some require consideration and others are optional”.¹⁷

As regards the CRC and the ACRWC, while many of their provisions are relevant to child trafficking,¹⁸ both are essentially human rights instruments that focus on promoting and protecting the rights of the child, rather than addressing transnational organised crime. Nonetheless, both instruments provide a comprehensive legal framework to address issues around the exploitation of children. Notably, the broad principle of the best interests of the child being a primary consideration in all actions,

¹⁰ UNODC 2006 *Toolkit to Combat Trafficking in Persons – Global Programme against Trafficking in Human Beings* at 3.

¹¹ A Jordan ‘UN Trafficking Protocol: An Imperfect Approach’ 2010 (1) Centre for Human Rights and Humanitarian Law, Washington College of Law 2. See Article I of the Palermo Protocol. The complete Trafficking Protocol consists of three documents: the Palermo Protocol, relevant sections of the Organised Crime Convention and the Interpretative Notes.

¹² *Ibid*

¹³ *Ibid*.

¹⁴ Article 2 of the Palermo Protocol.

¹⁵ Article 4 of the Palermo Protocol.

¹⁶ UNODC 2006 *op cit* note 10 at 2.

¹⁷ AT Gallagher 2010 *The International Law of Human Trafficking* at 72.

¹⁸ Article 1 the CRC defines a child as a human being below the age of eighteen years. Article 12 gives children a right to voice their opinions and have their views taken into account in matters affecting them. Article 6 establishes the right to life, survival and development of a child. Article 39 relates to children who are exposed to different forms of violence, exploitation and abuse, including child victims of trafficking and child labour.

is a key principle under the CRC,¹⁹ and does become relevant when addressing protection and assistance to the trafficked victim. Importantly, Article 1 the CRC defines a child as a human being below the age of eighteen years. This definition is carried throughout the international framework in this study.

The ILO Convention 182 aims at prohibiting and eliminating the worst forms of child labour.²⁰ The broad definition of worst forms of child labour includes various forms of exploitation of children that may be applicable to a trafficking situation. OPAC addresses the recruitment and use of children in national and cross border hostilities by armed groups that are distinct from the armed forces of a State.²¹ As mentioned in chapter 2, part 2.5.8 criminal rebel groups that recruit children as soldiers, using force and violence, can fall within the definition of an organised crime group, where their activities involve the common efforts and cooperation of three or more individuals.

“The explosion of the internet and its misuse has resulted in countless paedophile and child pornography websites making its way onto the screens of personal computers”.²² Concern over the increase in international traffic in children for the purposes of sale, prostitution, child pornography, sex tourism and the growing availability of child pornography on the internet led to the adoption of the OPCRC.²³ The OPCRC does not specifically deal with the issue of child trafficking and only refers to trafficking in its preamble.²⁴ Nevertheless, it provides a definition of “sale of children”²⁵ that is wide enough to include most situations in which children are trafficked.²⁶ Having ratified this instrument, South Africa is obliged to criminalise the sale of children, child prostitution and child pornography.

¹⁹ Article 3 of the CRC.

²⁰ The ILO Convention 182 describes “worst forms of child labour” as: all forms of slavery or slavery like practices, the sale and trafficking of children, debt bondage, serfdom, forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, pornographic performances or producing pornography; the use, procuring or offering of a child for criminal activities, in particular drug trafficking and any work which is likely to harm the health, safety or morals of children.

²¹ See preamble to OPAC.

²² UNICEF 2009 Innocentia Research Centre *Handbook on the Optional Protocol on the sale of children, child prostitution and child pornography* at viii.

²³ See Preamble to the OPCRC.

²⁴ *Ibid.* The OPCRC entered into force on 18 January 2002 and was ratified by South Africa on 1 July 2003. 21.

²⁵ Article 2 defines “sale of children” as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

²⁶ Gallagher *op cit* note 17 at 67. The link is confirmed by the practice of the CRC Committee, which reveals a marked tendency to associate sale of children with trafficking.

In sum, the CRC and the ACRWC focus on protecting the human rights of children, rather than on criminalising specific conduct. The ILO Convention 182, the OPCRC, OPAC, the Organised Crime Convention and the Palermo Protocol contain measures that address specific criminal conduct.

3.3 The establishment of a comprehensive definition of trafficking in persons

The definition of trafficking in persons was briefly discussed in the previous chapter under part 2.2, necessitating only a short evaluation at this point. The three distinct but interconnected elements of the trafficking process namely the action, means and the exploitative purpose must be present for a case to qualify as a trafficking offence.²⁷ The “action” element is fulfilled by a variety of activities, which includes the recruitment, transportation, transfer, harbouring, or receipt of persons.²⁸ The “means” element, which includes threats, force, coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or the giving or receiving payments or benefits to achieve the consent of a person having control over another person” does not apply to children.²⁹

Finally, the aim of trafficking must be for the purpose of exploitation, which includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.³⁰ “The words ‘for the purpose of’ brings in a *mens rea* element into the trafficking definition, implying that trafficking occurs where the perpetrator *intended* that the action would lead to one of the specified end results,”³¹ such as sexual exploitation. Importantly, proving the *mens rea* element does not require that the intended aim be actually achieved - trafficking can happen without actual exploitation taking place.³² “It is sufficient that such exploitation was the intention of the conduct”.³³ This factor assists prosecutors in child trafficking prosecutions, as actual exploitation need not be proved nor is required to be present.

²⁷ Article 3(a) of the Palermo Protocol.

²⁸ *Ibid.*

²⁹ Article 3 of the Palermo Protocol.

³⁰ See chapter 2 part 2.5, which discusses the various forms of exploitation.

³¹ Gallagher *op cit* note 17 at 34.

³² *Ibid.*

³³ *Ibid.*

It must be noted that where one of the means set forth in Article 3 (a) is used, it is irrelevant whether the person expressed his/her consent or not.³⁴ With regard to children, it poses an even stricter rule, which states that child trafficking is the recruitment, transportation, transfer and harbouring of a minor even if none of the means set forth in Article 3(a) are used.³⁵ In this regard, Jordan submits that children cannot agree to work in prostitution, pornography, or certain forms of labour at any age.³⁶

Jordan is of the opinion that governments should adopt a simple and clear definition of trafficking into their criminal law, in order to ensure that prosecutors can successfully obtain convictions of perpetrators.³⁷ It has been argued that the above definition makes the prosecution of trafficking cases challenging, as it contains several elements that would have to be proved by the prosecution.³⁸ On the other hand, “the broad definition of trafficking in persons is regarded as one of the Palermo Protocol’s key achievements, in that it is gender neutral and goes beyond sex trafficking by including different types of labour exploitation, even when within the borders of the victim’s own country”.³⁹

The OPCRC and the ILO Convention 182 provide broad definitions of sale of children and worst forms of child labour respectively, that encompass most situations in which children are trafficked. The definition of organised crime was examined in chapter two part 2.6.2, and will not be discussed any further.

3.4 The obligation to criminalise all aspects of trafficking in persons against all persons including children

The successful prosecution of traffickers is crucial in the fight against organised crime groups involved in child trafficking. Hence, “criminalising trafficking is an important step forward in ending impunity for criminal groups involved in

³⁴ Article 3(b) of the Palermo Protocol.

³⁵ Article 3(c) of the Palermo Protocol.

³⁶ Jordan op cit note 11 at 8.

³⁷ Ibid.

³⁸ International Human Rights Law Group ‘The Annotated Guide to the complete UN Trafficking Protocol’ in *SALRC* 2006 at 15.

³⁹ AT Gallagher ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway’ (2009) 49 *VA. J. INT’L L.* 791.

trafficking”.⁴⁰ State parties are obliged to criminalise *inter alia* trafficking in persons and its related crimes, which must apply to both natural and legal persons.

The Organised Crime Convention and by extension the Palermo Protocol, requires State parties to establish the liability⁴¹ of legal persons for participation in serious crimes involving an organised criminal group for offences⁴² established under the Convention. In addition, legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.⁴³ This obligation is important in ensuring legal accountability of companies and businesses engaging in child trafficking, which hide and operate behind the façade of legitimate businesses such as accommodation establishments and entertainment clubs, which operate within a company.⁴⁴

3.4.1 Criminalising participation and involvement in trafficking related offences

Child trafficking implicates a number of actors with varying roles. These persons participate in the affairs of the criminal organisation through *inter alia* controlling the criminal group (for example the kingpin or manager) or recruiting the victim, financing the criminal operations, transporting the victim or exploiting the victim. The Organised Crime Convention addresses the different role players in the trafficking chain, and requires criminalisation of the participation⁴⁵ of persons involved in organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group.⁴⁶ The Palermo Protocol contains a similar provision and obliges State parties to punish the attempt to commit or take part in, or organise offences related to trafficking.⁴⁷

The CRC contains provisions relating to child trafficking and includes protecting children from economic, sexual or any other type of exploitation⁴⁸ and from

⁴⁰ AT Gallagher N and Karlebach 2011 *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice* (Background Paper) at 6.

⁴¹ Article 10 of the Organised Crime Convention. This liability may be criminal, civil or administrative.

⁴² See articles 5, 6, 8 and 23 of the Organised Crime Convention.

⁴³ Article 10(4) of the Organised Crime convention.

⁴⁴ *S v Zweni and others* pending case no 41/362/2012, Durban Regional Court.

⁴⁵ Article 5 of the Organised Crime Convention.

⁴⁶ Article 5(1)(b) of the Organised Crime Convention.

⁴⁷ Article 5 of the Palermo Protocol.

⁴⁸ Article 19 and 36 of the CRC.

performing hazardous work that interferes with their all-round development.⁴⁹ In addition, the CRC addresses preventing the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in pornographic performances and materials⁵⁰ and protecting children from involvement in drug trafficking. Child trafficking for the purpose of forced labour, sexual exploitation or for criminal purposes violates these rights.

The OPCRC requires State parties to prohibit specific acts relating to the sale of children, child prostitution and child pornography, including attempts, participation and complicity in these offences.⁵¹ Importantly, the OPCRC includes acts, which are committed domestically, transnationally or on an individual or organised basis.⁵² This provision together with the inclusion of holding legal persons liable⁵³ for such offences is noteworthy, as it recognises the international nature of the relevant offences, and persons and organised crime groups operating behind the facade of legitimate businesses who commit such crimes.⁵⁴ In this regard, “the OPCRC goes beyond the CRC by adopting an explicit criminal justice approach to these issues”.⁵⁵

The OPCRC further prohibits acts such as the offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation, prostitution, transfer of the child’s organs for profit, engagement of the child in forced labour and dealing in child pornography.⁵⁶ This provision may be applied to organised crime groups that are involved in any manner whatsoever in the exploitation of a child. With reference to the ILO Convention 182, it is mandatory for member States to take effective measures to prohibit and eliminate the worst forms of child labour⁵⁷ as a matter of

⁴⁹ Article 32 of the CRC.

⁵⁰ Articles 19 and 34 of the CRC.

⁵¹ Article 3 of the OPCRC. Article 2 defines “child prostitution” as “the use of a child in sexual activities for remuneration or any other form of consideration”. “Child pornography” is defined as “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”.

⁵² Article 3(1) of the OPCRC.

⁵³ Article 3(4) of the OPCRC.

⁵⁴ *Zweni supra* note 44.

⁵⁵ Gallagher op cit note 17 at 67.

⁵⁶ Article 3(b) of the OPCRC.

⁵⁷ Worst forms of child labour is described as all forms of slavery or slavery like practices, the sale and trafficking of children, debt bondage, serfdom, forced or compulsory labour and recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, pornographic performances or producing pornography; the use, procuring or offering of a child for criminal activities, in particular drug trafficking and any work which is likely to harm the health, safety or morals of children.

urgency.⁵⁸ States are required to establish laws that prohibit the worst forms of child labour and which are accompanied by penal or other appropriate sanctions.⁵⁹ As mentioned earlier, the definition of worst forms of child labour encompasses various forms of exploitation that are applicable in a trafficking situation.

Under OPAC, State parties must specifically prohibit armed groups, which are distinct from the armed forces of a State, to recruit or use in hostilities persons under the age of 18 years under any circumstances.⁶⁰ Although OPAC makes it mandatory for State parties to prohibit and criminalise such practices,⁶¹ it omits to mention anything regarding sanctions for this offence. The activities of rebel groups that are distinct from a State's army, and who use force and violence to recruit children as soldiers, can fall under the definition of an organised crime group, where their acts involve the common efforts and cooperation of three or more persons.

Although the ACRWC does not specifically address the role of organised crime groups involved in child trafficking in Africa, State parties are required to prevent the abduction, sale of, or traffic in children for any purpose or in any form by any person and the use of children in begging.⁶² As discussed under chapter two part 2.5.3, children are prime targets for begging by organised criminal gangs seeking to exploit them for profit through begging. Moreover, the ACRWC requires State parties to protect children against torture, inhuman or degrading treatment, physical or mental injury or abuse, neglect or maltreatment,⁶³ and from all forms of sexual exploitation, including the use of children in pornographic activities.⁶⁴ The trafficking process involves an abuse of many of the rights of children as protected in the CRC and the ACRWC.

The ACRWC prohibits the use of children in armed conflicts.⁶⁵ The criminal acts of rebel groups and armed forces of a State, who recruit children as soldiers, can be equated with the criminal acts of organised crime groups, if their activities involve the common efforts and cooperation of three or more individuals, who through force and

⁵⁸ Article 1 of the ILO Convention 182.

⁵⁹ Article 7(1) of ILO Convention 182.

⁶⁰ Article 4 of OPAC.

⁶¹ Article 4(1) of OPAC.

⁶² Article 29 of the ACRWC.

⁶³ Article 16(1) of the ACRWC.

⁶⁴ Article 27 of the ACRWC.

⁶⁵ Article 22 of the ACRWC.

violence, exploit and use a child in armed conflict. Although not part of this study, the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa mandates State parties to take measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.⁶⁶

3.4.2 The criminalisation of the laundering of proceeds of crime

Organised crime groups are involved in trafficking due to its staggering profits and low risks. These groups make massive amounts of money from the exploitation of trafficked victims. In addition, they undermine financial structures through money laundering⁶⁷ and use legitimate financial organisations (such as banks) to hide the illegal source of their profits.

The Organised Crime Convention requires State parties to criminalise money laundering and related offences of dealing with property, in order to conceal its source, and the acquisition, possession or use of proceeds of crime.⁶⁸ The Palermo Protocol does not contain any provisions on the laundering of proceeds of crime. In this regard, the Organised Crime Convention applies *mutatis mutandis* to the Palermo Protocol on the money laundering provisions as mentioned above. Neither, the OPCRC, OPAC, the ILO nor the two human rights instruments namely the CRC and the ACRWC contain any specific provisions on the issue of the laundering of proceeds of crime. As such, their application is limited considerably in dealing with the proceeds of crime derived from the organised crime of child trafficking.

3.4.3 The criminalisation of corruption

“Corruption is central to the success of traffickers and therefore organised crime groups consider it a necessary investment”.⁶⁹ Organised crime groups target public employees who have skills and access to certain information, or particular job

⁶⁶ Article 11 of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. This protocol was signed on 11 July 2003, and became effective on 25 November 2005.

⁶⁷ UNODC 2014 *Organised Crime*.

⁶⁸ Article 6 of the Organised Crime Convention.

⁶⁹ UNODC 2011 *The Role of Corruption in Trafficking in Persons* at 7.

responsibilities that lend themselves to specific schemes,⁷⁰ such as immigration officials and police officers. State parties are required to criminalise the promise, offering or giving to a public official, and the solicitation or acceptance by such an official, of an undue advantage, for the official or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.⁷¹

“Participation as an accomplice” in corruption is criminalised.⁷² In addition, States parties are required to take legislative, administrative and prosecutorial measures to promote integrity and to prevent, detect and punish the corruption of public officials.⁷³ The Organised Crime Convention and by extension the Palermo Protocol, are the only two instruments in this study, that address the issue of corruption.

3.4.4 The criminalisation of carriers and border measures

“Modern organised crime group’s prey upon weaknesses in international transportation and customs security regimens”.⁷⁴ To prevent the use of commercial carriers in a trafficking crime, the Palermo Protocol obliges State parties to prevent the use of carriers in the commission of offences established under the protocol.⁷⁵ The problem with this provision is that it relates to offences that are transnational in nature, and does not specifically address the use of domestic carriers in child trafficking. Kruger submits that the Organised Crime Convention defines a transnational offence broadly, and crossing international borders is not always required in a trafficking matter.⁷⁶

⁷⁰ JP Bjelopera and KM Finklea 2012 *Organised Crime: An Evolving Challenge for U.S. Law Enforcement* at 27.

⁷¹ Article 8(1) of the Organised Crime Convention.

⁷² Article 8(3) of the Organised Crime Convention.

⁷³ Article 9(1) of the Organised Crime Convention.

⁷⁴ Bjelopera and Finklea op cit note 70 at 1.

⁷⁵ Article 11(2) and (3) of the Palermo Protocol. Article 11(3) stipulates that carriers are required to ascertain that all passengers are in possession of the necessary travel documents to enter a receiving State.

⁷⁶ See discussion in HB Kruger *Combatting Human Trafficking: A South African Legal Perspective* at 249-252. See also Article 34(2) of the Organised Crime Convention, which provides that offences established in terms of the Organised Crime Convention, shall be established in the domestic law of each State party independently of the transnational nature, or the involvement of an organised criminal group, as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organised criminal group.

3.5 The obligation to provide sanctions for offences

Sanctions play a key role in deterring organised crime groups in the commission of offences. The Organised Crime Convention requires State parties to ensure that offences are “liable to sanctions that take into account the gravity of that offence and with due regard to the need to deter the commission of such offences”.⁷⁷ Interestingly, the requirement that State parties impose appropriate penalties for trafficking, was omitted from the Palermo Protocol.⁷⁸ Absent a specific provision on sanctions, the relevant provisions of the Organised Crime Convention apply *mutatis mutandis*, and State parties must ensure that sanctions adopted within domestic laws are proportionate to the gravity of the offences.⁷⁹

Notably, offences established under the OPCRC are punishable by appropriate penalties that take into account their grave nature.⁸⁰ The ILO Convention 182 makes it mandatory for member States to take all necessary measures to ensure the provision and application of penal sanctions or, as appropriate, other sanctions.⁸¹ These articles are important, as sanctions act as a deterrent against organised crime groups. In addition, prosecutors can use the involvement of organised crime groups in child trafficking, as an aggravating factor, in arguing for a lengthy punishment.

3.6 The confiscation and seizure of proceeds of crime

Confiscating the assets of criminal organisations is an effective financial method of restraining the growth of organised crime groups. It deprives criminal groups of the benefits of their criminal acts, and ensures that crime does not pay. Research has indicated that the most profitable activities of international organised crime includes child trafficking. An important obligation placed upon State parties is the adoption of measures to enable confiscation of the proceeds of crime from trafficking related offences. The Organised Crime Convention contains such provisions, and allows for the identification, tracing, freezing or seizure of proceeds or instrumentalities of crime.⁸² Moreover, there are detailed provisions on the development of regulatory

⁷⁷ Article 11 of the Organised Crime Convention.

⁷⁸ Gallagher op cit note 17 at 80.

⁷⁹ Ibid.

⁸⁰ Article 3(3) of the OPCRC.

⁸¹ Article 7(1) of the ILO Convention 182.

⁸² Article 12 of the Organised Crime Convention.

regimes to prevent and control money laundering and confiscation and sharing of confiscated assets.⁸³ State parties shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available.⁸⁴ States may not decline to act under this obligation on the ground of bank secrecy.⁸⁵ These provisions encourage the unveiling of bank privacy.

Furthermore, this article provides that State parties must consider the requirement that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, as long as such a requirement is consistent with the principles of their domestic law, and with the nature of the judicial and other proceedings.⁸⁶ The difficulty with this provision is that it shifts the burden to the accused, and may be in conflict with domestic constitutional law principles.

“Proceeds of child trafficking also comprise of property and profits from the services and exploitation of the victim and from child pornography”.⁸⁷ “Material benefits include crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members”.⁸⁸ In this regard the OPCRC makes provision for the seizure and confiscation of the proceeds derived from the established offences under the OPCRC.⁸⁹

3.7 The requirement of international cooperation

“Transnational criminal rings are becoming more powerful with increased global mobility, and the means and resources of any State are not enough to seriously harm them”.⁹⁰ In this regard, “the Organised Crime Convention provides an innovative new tool to address the scourge of organised crime as a global problem”.⁹¹ Cooperation between countries is an important factor in preventing and combating child trafficking. The lack of communication and collaboration can hinder

⁸³ Article 13 and 14 of the Organised Crime Convention.

⁸⁴ Article 12(6) of the Organised Crime Convention.

⁸⁵ Ibid.

⁸⁶ Article 12(7) of the Organised Crime Convention.

⁸⁷ Gallagher op cit note 17 at 400.

⁸⁸ *Legislative Guide for the Palermo Protocol* 2004 at 259.

⁸⁹ Article 7 of the OPCRC.

⁹⁰ Ibid.

⁹¹ KA Anan *Foreword to the Organised Crime Convention* at iv.

the actions of law enforcement agencies against transnational organised crime and trafficking.⁹² “States should assist each other in the fight against complex and harmful transnational offences against children”.⁹³

The Organised Crime Convention obliges State parties to adopt measures to enhance effective law enforcement in this area through *inter alia* provision for extradition,⁹⁴ mutual legal assistance⁹⁵ and transfer of proceedings.⁹⁶ In the area of law enforcement cooperation, there is provision for the exchange of intelligence, other operational information, and the use of modern investigative methods, with the appropriate safeguards.⁹⁷

Likewise, the Palermo Protocol requires State parties to cooperate with each other regarding the alleviation of factors that make women and children, vulnerable to trafficking.⁹⁸ As mentioned before, child trafficking is often an international crime and cooperation on issues such as the identification of perpetrators or victims of trafficking travel documents used by such persons to cross international borders, the *modus operandi* of organised criminal groups involved in trafficking and detection of organised crime groups⁹⁹ is essential to prevent and combat this crime. The CRC includes diplomatic efforts and requires State parties to take appropriate national, bilateral and multilateral measures to prevent child trafficking.¹⁰⁰

The OPCRC highlights the importance of assistance and cooperation between State parties in connection with mutual legal assistance in criminal investigations, obtaining of evidence, extradition proceedings,¹⁰¹ and requests from another State party for seizure or confiscation of goods.¹⁰² The OPCRC requires States to promote international cooperation through multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of perpetrators, for offences established under the OPCRC.¹⁰³ These articles are important

⁹² Gallagher op cit note 17 at 75.

⁹³ UNODC 2006 op cit note 10. Ibid.

⁹⁴ Article 16 of the Organised Crime Convention.

⁹⁵ Article 18 of the Organised Crime Convention.

⁹⁶ Article 21 of the Organised Crime Convention.

⁹⁷ Article 27 of the Organised Crime Convention.

⁹⁸ Article 9(4) of the Palermo Protocol.

⁹⁹ Article 10(1) of the Palermo Protocol.

¹⁰⁰ Article 35 of the CRC.

¹⁰¹ Article 6 of the OPCRC.

¹⁰² Article 7(b) of the OPCRC.

¹⁰³ Article 10 of the OPCRC.

investigative and prosecutorial tools in the fight against transnational organised crime.

Under OPAC, State parties are required to strengthen cooperation with each other through technical and financial assistance in the implementation of the protocol, and in the rehabilitation and social reintegration of victims of armed conflict,¹⁰⁴ through existing multilateral, bilateral or other programmes.¹⁰⁵ The requirement of international cooperation and/or assistance is also included under the ILO Convention 182.¹⁰⁶ However, this Convention does not make mention of specific issues such as extradition, mutual legal assistance or joint investigations between States.

In closing the discussion on international cooperation, the words of the former Secretary General of the UN Kofi A. Anan are apt: “with enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully”.¹⁰⁷

3.8 The establishment of jurisdiction

Child trafficking is frequently an international offence. The Organised Crime Convention and by extension the Palermo Protocol, require State parties to exercise extraterritorial jurisdiction over Convention offences, when the offence is committed in the territory of that State, including marine vessels or aircrafts of that State, at the time that the offence is committed.¹⁰⁸ In agreement with Gallagher, this article is important, as it aims to reduce or eliminate “safe havens” for traffickers and organised crime groups, by ensuring that all parts of the crime can be punished wherever they took place.¹⁰⁹ Moreover, it prevents perpetrators from escaping the net of prosecution and facilitates the ease of prosecution for trafficking offences committed abroad.

¹⁰⁴ Article 7(1) of OPAC.

¹⁰⁵ Article 7(2) of OPAC.

¹⁰⁶ Article 8 of ILO Convention 182.

¹⁰⁷ Anan op cit note 91 at iv.

¹⁰⁸ Article 15 of the Organised Crime Convention.

¹⁰⁹ Gallagher and Karlebach op cit note 40 at 8.

Notably, the OPCRC makes provision for the extradition of a perpetrator for offences under the OPCRC.¹¹⁰ This article is particularly relevant where sex tourists exploit children. However, a weakness of the OPCRC is that extradition only applies to those offences defined in paragraph 1 of article 3, and does not cover attempts, complicity, or participation, which is covered by paragraph 2 of article 3. The failure to include attempts or complicity or participation in OPCRC offences for purposes of extradition, ignores the roles of the different role-players involved in the exploitation of the child. In this respect, the OPCRC is limited, in that it does not address certain aspects relevant for trafficking.

3.9 Protection and assistance to victims of trafficking

The investigation, prosecution and conviction of traffickers is difficult, if not impossible, without the cooperation and testimony of a victim, particularly when the victim is a child. Gallagher and Karlebach submit that child victims occupy an especially precarious situation in the criminal justice system, due to their vulnerability to intimidation and reprisals from traffickers, and they may be unwilling to assist in criminal investigations for fear of harm to themselves or their families.¹¹¹ “This can be particularly difficult for young girls who have suffered sexual and other forms physical abuse at the hands of their exploiters”.¹¹²

The Organised Crime Convention contains mandatory provisions for the protection of witnesses against retaliation or intimidation and as appropriate, for their relatives and other persons close to them.¹¹³ It makes provision for the use of modern technology, such as electronic mail for the transmission of requests, or video link for the giving of testimony.¹¹⁴ In addition, State parties shall establish appropriate procedures to provide access to compensation and restitution for victims.¹¹⁵

The Palermo Protocol provides that State parties “shall endeavour” to provide for the physical safety of victims of trafficking.¹¹⁶ However, Gallagher criticises these

¹¹⁰ Article 4 and 5 of the OPCRC.

¹¹¹ Gallagher and Karlebach op cit note 40 at 12.

¹¹² Ibid at 13.

¹¹³ Article 24 of the Organised Crime Convention.

¹¹⁴ Article 24(b) of the Organised Crime Convention.

¹¹⁵ Article 25 (2) of the Organised Crime Convention.

¹¹⁶ Article 6(3) of the Palermo Protocol.

provisions as having little in the way of “hard” or detailed obligation by State parties.¹¹⁷ Nonetheless, States parties must endeavour to:

- i) Protect the identity and privacy of victims of trafficking.¹¹⁸
- ii) Ensure victims of trafficking have access and input in court and administrative proceedings.¹¹⁹ This includes providing information through a translator, or in writing, in a language that they understand.¹²⁰
- iii) Provide for the physical safety of trafficking victims within their territory.¹²¹
- iv) Ensure that domestic law provides victims with the possibility of obtaining compensation.¹²²
- v) Provide support benefits such as counselling, housing, education, medical and psychological assistance and an opportunity for victims to obtain legal status allowing them to remain in the receiving State party, either temporarily or permanently.¹²³

These measures address the main needs of victims of trafficking.¹²⁴ Gallagher and Karlebach emphasise the necessity of witness support and protection extending to the trial process itself.¹²⁵ “Measures may include keeping the trial proceedings confidential, for example, by excluding members of the public or the media or by limiting the publication of information that would expose the identity of the victim”.¹²⁶ Furthermore, “the particular physical, psychological and psychosocial harm suffered by trafficked children, and their increased vulnerability to exploitation, require them to be dealt with separately from trafficked adults in terms of laws, policies and programmes”.¹²⁷ In addition, State parties shall take into account the age, gender and special needs of victims of trafficking in persons, in particular, the special needs of children, including appropriate housing, education and care.¹²⁸ South Africa is therefore obliged to take measures to provide assistance and protection to child victims of trafficking.

¹¹⁷ Gallagher op cit note 17 at 81-82.

¹¹⁸ Article 6(1) of the Palermo Protocol.

¹¹⁹ Article 6(2) of the Palermo Protocol.

¹²⁰ SALRC 2006 at 17.

¹²¹ Article 6(5) of the Palermo Protocol.

¹²² Article 6(6) of the Palermo Protocol.

¹²³ Articles 6-8 of the Palermo Protocol.

¹²⁴ SALRC 2006 17.

¹²⁵ Gallagher and Karlebach op cit note 40 at 13.

¹²⁶ Legislative Guide for the Palermo Protocol op cit note 88 at 259.

¹²⁷ Gallagher op cit note 1, principle 10, guideline 8.

¹²⁸ Article 6(4) of the Palermo Protocol.

The OPCRC recognises the vulnerability and special needs of child victims and makes it mandatory for State parties to protect them at all stages of the criminal justice process.¹²⁹ This provision enhances the protection of the rights of the child already provided for in the CRC. Under the ILO Convention 182, States are to provide appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration.¹³⁰ In addition, States must identify and reach out to children at special risk¹³¹ and take account of the special situation of girls.¹³² OPAC also recognises the need to strengthen the physical and psychosocial rehabilitation and social reintegration of children involved in armed conflict, and requires State parties to provide children with appropriate assistance for their recovery,¹³³ through technical and financial assistance.¹³⁴

The CRC is clear on the point that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them.¹³⁵ “Children, like all other victims, have a legitimate role to play in criminal and civil actions against their exploiters as well as a right to use that system to protect their own interests”.¹³⁶ “They have a right to be heard, a right to information and a right to be kept informed”.¹³⁷ Gallagher submits that as the CRC applies to all children under the jurisdiction or control of a State, non-citizen child victims of trafficking are entitled to the same protection as nationals of the receiving State.¹³⁸

In agreement with Gallagher, this article is significant in that foreign children trafficked to South Africa, will benefit from the same protections enjoyed by South African child victims. Although the CRC is weak by itself in tackling trafficking, it is helpful in assisting child victims, and dealing with borderline children, such as children who might be both victims of trafficking, while at the same time perpetrators of some crimes, such as prostitution and criminal activity.

¹²⁹ Article 8 of the OPCRC.

¹³⁰ Article 7(2) (b) of the ILO Convention 182.

¹³¹ Article 7(2) (d) of the ILO Convention 182.

¹³² Article 7(2) (e) of the ILO Convention 182.

¹³³ See Preamble and article 6 of OPAC.

¹³⁴ Article 7(1) of OPAC.

¹³⁵ Article 3 of the CRC.

¹³⁶ Gallagher and Karlebach op cit note 40 at 14.

¹³⁷ Ibid at 14.

¹³⁸ Gallagher op cit note 17 at 64.

3.10 Providing training and technical assistance

The prosecution of a child trafficking case from an organised crime perspective can be complex and difficult, requiring skills that generalist prosecutors may not possess. The Organised Crime Convention obliges States to develop training programmes for *inter alia* law enforcement officers and prosecutors who investigate and prosecute *inter alia* trafficking offences.¹³⁹ The Palermo Protocol requires States to provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking.¹⁴⁰

These provisions are important, in that they aim to empower law enforcement agencies and prosecutors with tools to address organised crime traffickers. As mentioned earlier, a challenge faced by prosecutors is the reliance by law enforcement on traditional investigative techniques when investigating organised crime groups that are well organised and resourced. Equipping the relevant agencies with current and up to date resources, skills and training, can contribute to making an impact on organised crime groups involved in child trafficking.

3.11 Conclusion

This chapter explored the theoretical framework of this study, and addressed the first research question namely, what does international law require of States in terms of dealing with child trafficking as an organised crime? In addressing this question, the key legal obligations as required by the international trafficking framework for inclusion in domestic legislation, were identified and examined.

First, a comprehensive definition of trafficking in persons is required in domestic legislation. The key instrument that established the first internationally agreed upon definition of trafficking in persons is the Palermo Protocol. Importantly, where children are concerned, only the actions and purpose elements of the trafficking definition are required to be present. Although the ILO Convention 182 does not specifically define trafficking in persons, its broad definition of worst forms of child labour may be applicable to the various forms of exploitation, which trafficked children are exposed to.

¹³⁹ Article 29 of the Organised Crime Convention.

¹⁴⁰ Article 10(2) of the Palermo Protocol.

OPAC addresses the recruitment and use of children in national and cross border hostilities by armed groups that are distinct from the armed forces of a State. Although the forced recruitment of children to become soldiers is not specifically included in the Palermo Protocol definition of trafficking, the ILO Convention 182 and OPAC address it. The OPCRC does not specifically deal with the issue of child trafficking. However, it provides a definition of “sale of children” that is wide enough to encompass most situations in which children are trafficked.

Secondly, the international framework requires the criminalisation of all aspects of trafficking in persons. As mentioned before, organised crime groups involved in child trafficking, involve various role players who participate in the trafficking chain in a variety of ways. Criminalisation must include the participation in, or involvement or facilitating, organising, directing or aiding and abetting a trafficking related offence. Such crimes must apply to both legal and natural persons. In addition, any attempt to commit a trafficking related offence, must be prohibited. The Organised Crime Convention and by extension the Palermo Protocol, address all the above aspects.

Likewise, the OPCRC requires the criminalisation of attempts, participation, complicity in offences, the offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation, prostitution, transfer of the child’s organs for profit, engagement of the child in forced labour, and dealing in child pornography. In this regard, the OPCRC goes further than the CRC by adopting an explicit criminal justice approach to trafficking issues.

The ILO Convention 182 requires States to criminalise the worst forms of child labour and OPAC specifically obliges State parties to prohibit armed groups that are distinct from the armed forces of a State, who recruit or use children in armed conflict. The ACRWC requires State parties to prevent the abduction, sale of, or traffic in children for any purpose or in any form by any person and the use of children in begging. Significantly, the Organised Crime Convention, the Palermo Protocol and the OPCRC, include acts that are committed domestically, transnationally or on an individual or organised basis.

As can be seen, the international framework requires the criminalisation of a wide range of conduct against the various perpetrators, in the trafficking process. Such

crimes must include sanctions that take into account the gravity of the crimes. The Organised Crime Convention and by extension the Palermo Protocol, the OPCRC and ILO Convention 182 require State parties to ensure that offences are accompanied by penal sanctions. In addition, the Palermo Protocol calls for State parties to take measures to prevent the use of carriers in the commission of offences established under the protocol. In sum, trafficking in all its forms and by all participants, must be criminalised.

Thirdly, measures must be in place to seize and confiscate the proceeds of trafficking and to criminalise money laundering. This ensures that traffickers do not enjoy their illegal gains for personal use and for maintaining the operation of their trafficking operations. The Organised Crime Convention and by extension the Palermo Protocol, require State parties to criminalise the offences of dealing with property in order to conceal its nature and source, and the acquisition, possession or use of proceeds of crime. In addition, it provides for the identification, tracing, freezing or seizure of proceeds or instrumentalities of child trafficking. Similarly, the OPCRC makes provision for the seizure and confiscation of the proceeds derived from child prostitution, child pornography and the sexual exploitation of children. These provisions ensure that crime does not pay.

Fourthly, States are required to criminalise corruption particularly involving public officials. The Organised Crime Convention is the only instrument that requires State parties to take measures to promote the integrity, and to prevent, detect and punish corruption of public officials. Fifth, is the key obligation to promote international cooperation among States in preventing and combating child trafficking. The Organised Crime Convention and the Palermo Protocol, require States to cooperate on issues such as extradition, mutual legal assistance, and the exchange of intelligence, the *modus operandi* of organised criminal groups and the alleviation of factors that make women and children, vulnerable to trafficking. Extraterritorial jurisdiction must be asserted, where citizens, permanent residents or a legal entity of South Africa commit trafficking offences abroad.

The CRC and the OPCRC include diplomatic efforts by requiring State parties to take appropriate national, bilateral and multilateral measures to prevent child trafficking and offences established under the OPCRC. Under OPAC, State parties

are required to strengthen cooperation with each other through technical and financial assistance in implementing the provisions of the protocol. The requirement of international cooperation and/or assistance is also included under the ILO Convention 182. The obligation of international cooperation between States is vital in making an impact on transnational child trafficking.

Sixth, is the obligation to establish extraterritorial jurisdiction in respect of offences under the international framework. This requirement aims at punishing all parts of the crime of trafficking wherever they take place, and prevents traffickers escaping the net of prosecution. The Organised Crime Convention and by extension the Palermo Protocol, and the OPCRC, require States to include extraterritorial jurisdiction in their domestic legislation.

The investigation, prosecution and conviction of traffickers is difficult, if not impossible, without the cooperation and testimony of the victims. The next significant obligation under the international framework is the establishment of measures that protect and assist victims of trafficking, including compensation afforded to such victims. Both the Organised Crime Convention and the Palermo Protocol contain mandatory and optional measures regarding the protection of victims before, during and after the investigation and prosecution stages.

The CRC establishes that the best interests of child victims of trafficking are to be a primary consideration in all matters that affect them. The OPCRC enhances the protections of the rights of the child already provided for in the CRC, by requiring protection of the child at all stages of the criminal justice process. The ILO Convention 182 makes provision to assist witnesses. OPAC focusses on strengthening the physical and psychosocial rehabilitation and social reintegration of children involved in armed conflict. The ACRWC requires State parties to protect children from cruel and inhumane treatment, and from all forms of sexual exploitation, including the use of children in pornographic activities. Significantly, both foreign and local children must be able to benefit from victim protection and assistance measures established under domestic laws. Finally, in addressing the organised crime aspects of child trafficking, the requirements of training and technical assistance are necessary. The Organised Crime Convention and the

Palermo Protocol, require States to develop and strengthen training programmes for law enforcement agencies that deal with trafficking matters.

In evaluating the effectiveness of the international framework, it must be noted that although the ACRWC and the CRC provide a broad human rights framework to address issues around the exploitation of children, both instruments are ineffective to tackle the crime of child trafficking on their own. They do not address the various participants in child trafficking nor the organised crime aspects of this crime. Both instruments focus primarily on the protection of the rights of the child. The Organised Crime Convention, the Palermo Protocol and the OPCRC, attack the problem of trafficking from a predominantly criminal perspective.

“The Palermo Protocol has been criticised as a law enforcement tool that is weak on human rights protections and requires governments to adopt and enforce criminal laws but only *hopes* that they will address the human rights issues involved”.¹⁴¹ “While the Palermo Protocol uses mandatory language such as “State parties *shall*,” the victim protection measures contain weaker language, such as “*in appropriate cases*” and “*to the extent possible*.”¹⁴² This fails to place a positive obligation on State parties to provide the mentioned services to victims.¹⁴³

Consequently, most national laws have strong criminal provisions, but weak or no provisions on prevention or victim protection. Prosecutions are dependent on the testimony of the child victims. As such, children must have the necessary support, protection and assistance from the State, to enable them to testify and secure convictions against traffickers. While acknowledging this weakness, it must be noted that the Organised Crime Convention (which applies *mutatis mutandis* to the Palermo Protocol), contains stronger mandatory provisions for protecting victims during the investigation and prosecution stages, and covers this flaw in the Palermo Protocol.

Although, the Palermo Protocol does not contain specific provisions on issues such as money laundering, confiscation and seizure of proceeds of crime, criminalisation

¹⁴¹ Jordan op cit note 11 at 1.

¹⁴² Jordan op cit note 11 at 5.

¹⁴³ SALRC 2006 op cit note 5 at 17.

of corruption and obstruction of justice, such limitations are addressed in its parent convention (the Organised Crime Convention).

Leaving aside the limitations, the OPCRC has much in common with the Organised Crime Convention and the Palermo Protocol. State parties are for example, required to prohibit, criminalise and appropriately punish the relevant acts, protect victims, establish appropriate jurisdiction over offenses and extradite offenders. It can be concluded that these three instruments not only complement each in certain areas, but also provide States with key legal tools to prevent, combat and prosecute organised crime groups involved in child trafficking.

Although the various instruments under the international framework of this study have a specific area of focus and application, the areas of commonality identified above, allow the instruments to be utilised by State parties, to address the organised crime aspects of child trafficking, in their domestic legislation. In determining whether the international framework adequately addresses the organised crime aspects of child trafficking, it can be said that the international trafficking framework offers significant opportunities for States to address the organised crime aspects of trafficking in their domestic legislation. Whether these international instruments are successful in combating child trafficking, is dependent on a State's commitment to comply with their provisions in national legislation and political will.

In determining whether South Africa complies with its international obligations in addressing the organised crime aspects of trafficking, its domestic counter trafficking laws must be in line with the identified key legal components captured in the international instruments referred to in this chapter. An important criterion for judging a legal framework's effectiveness is if national legislation criminalises all aspects of trafficking as defined by the international community. Whether the new Trafficking Act brings South Africa in line with its international obligations, is dealt with in chapter 4 of this study.

CHAPTER 4

SOUTH AFRICA'S RESPONSE TO CHILD TRAFFICKING: THE CURRENT APPLICABLE LAW

“Most national anti-trafficking laws are less than a decade old and no country can lay claim to genuine, extensive experience in dealing with human trafficking as a criminal phenomenon, as most countries are developing and adapting their criminal justice responses on the run, and principally through ‘trial and error’.”¹

4.1 Introduction

“A strong national legal framework around trafficking is the foundation and scaffolding of an adequate and appropriate criminal justice response, where full and effective criminalisation of trafficking is required”.² Since the establishment of the Palermo Protocol, most States have enacted trafficking laws, based on the language of the protocol.³ South Africa is no exception and in recognition of this problem, has generated three statutes designed to address trafficking in persons, and child trafficking. They are the Children’s Act, which addresses all forms of exploitation against children, the Sexual Offences Amendment Act, which only criminalises trafficking for sexual exploitation against any person, and the Trafficking Act,⁴ which is the first comprehensive piece of legislation that addresses all forms of trafficking against all persons.

This chapter addresses the third, fourth and fifth research questions as to whether the current and incoming legal framework, is suitable to deal with the challenges in

¹ A Gallagher and P Holmes ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line’ (2008) 18(3) *International Criminal Justice Review* 318.

² *Ibid* at 4-5.

³ A Jordan ‘UN Trafficking Protocol: An Imperfect Approach’ Issue Paper 1 Centre for Human Rights and Humanitarian Law Washington College of Law (2010) 1.

⁴ The Trafficking Act was signed into law on 29 July 2013 by the State President. “Human trafficking bill signed into law” *South African Government News Agency* 29 July 2013.

the prosecution of child trafficking from an organised crime perspective. In doing so, the above-mentioned statutes are examined. Where appropriate, brief discussions of other relevant laws that address key issues not covered in the Trafficking Act, but are nonetheless applicable to organised crime, are included. As the trafficking provisions in the Children's Act and the Sexual Offences Amendment Act will be repealed once the Trafficking Act becomes operative,⁵ they are examined jointly, followed by a discussion of the Trafficking Act.

The current child trafficking laws are assessed within the context of the international framework as discussed in chapter 3. It must be mentioned that South Africa's own Constitution (Constitution of the Republic of South Africa, 1996; hereafter referred to as the "Constitution"), contains several provisions applicable to child trafficking. For example, children are protected from *inter alia* abuse, degradation;⁶ exploitative labour practices⁷ and not to be used in armed conflict.⁸ Furthermore, children enjoy the right to freedom, to be free from violence and not to be treated in a cruel, inhuman or degrading way.⁹ Importantly, section 28(2) of the Constitution provides that "a child's best interests are of paramount importance in every matter concerning the child".¹⁰ The implementation of these constitutional rights requires a detailed legislative framework, and the international instruments presented in chapter 3 of this dissertation, provide guidance for the development and the evaluation of such a framework.

For ease of reference, the current trafficking laws are examined within a thematic context of the main legislative requirements of the international framework, as discussed in chapter 3, and which are relevant to organised crime.

⁵ Once the relevant national regulations of the various government departments involved in the implementation of this Act have been finalised, it is presumed that only then will the Trafficking Act become operational.

⁶ Section 28(1) (d) of Act 108 of 1996.

⁷ Section 28(1) (e) of Act 108 of 1996.

⁸ Section 28(1) (i) of Act 108 of 1996.

⁹ Section 12(1) of Act 108 of 1996.

¹⁰ While all other sections refer to "everyone" or "persons," section 28 of Act 108 of 1996 specifically refers to "every child" and deals exclusively with the rights of children, in addition to the rights they enjoy elsewhere in the Bill of Rights.

4.2 A comprehensive trafficking definition in compliance with the international framework

Gallagher and Holmes submit that an important criterion for judging a legal framework's effectiveness is if national legislation criminalises all aspects of trafficking, as defined by the international community.¹¹ Section 1 of the Children's Act defines trafficking in children as:

- “(a) the recruitment, sale, supply, transportation, transfer, harbouring, or receipt of children, within or across the borders of the Republic –
 - (i) by any means, including the use of threat, force, or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of the person having control over the child; or
 - (ii) due to a position of vulnerability, for the purpose of exploitation;¹² and
- (b) includes the adoption of a child facilitated or secured through illegal means”.

While this definition of trafficking is broader than the Palermo Protocol definition, and includes the sale, supply and adoption of a child secured through illegal means, it is a flawed definition. The problem with this definition is that it creates an additional evidentiary burden for the prosecution by requiring specific means (example force, threats, deception or coercion) to be proved in a child trafficking case.¹³ This means that prosecutors have the challenging task of proving an additional element of trafficking that is not required under international law. This is in conflict with the Palermo Protocol, which only requires the act and exploitation elements to be present for a case to qualify as child trafficking.¹⁴ The implication of this provision means that prosecutors have the challenging task of proving an additional element of trafficking, which is not required under international law.

¹¹ Gallagher and Holmes op cit note 1 at 5.

¹² Section 1 of Act 38 of 2005 provides a wide definition of exploitation.

¹³ D Kassan 'Trafficking in Children' in CJ Davel and AM Skelton (ed) *Commentary on the Children's Act* (2007) 18-11.

¹⁴ Article 3(c) of the Palermo Protocol: The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article. See also section 11(1) of Act 7 of 2013.

Section 70 of the Sexual Offences Amendment Act defines trafficking as the:

“...supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, (*the act, my insertion*) by means of—

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

for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and “trafficks” and “trafficked” have a corresponding meaning”.

Although the act and means elements are similar to those in the Palermo Protocol,¹⁵ “the problem with this definition is that it applies to trafficking of adults and children *only* for the purpose of sexual exploitation”.¹⁶ It excludes other forms of exploitation such as trafficking for forced labour, organ trafficking and child soldiers. As a result, prosecutors must use other laws to prosecute child traffickers, where the exploitation is not of a sexual nature.

In addition, the Act specifies that a person who cannot consent and is incapable in law of appreciating the nature of the act, as being a child below the age of 12 years,¹⁷ thus suggesting that children between 12 and 18 years of age can consent to exploitation.¹⁸ Organised crime traffickers can use this technicality in their defence, to assert that children between the ages of 12 and 18 are capable of

¹⁵ HB Kruger *Combating Human Trafficking: A South African Legal Perspective* (LLD thesis, University of the Free State, 2010) 491.

¹⁶ S Kreston ‘Trafficking in Children in South Africa: an analysis of pending legislation’ (2007) 8(1) *South African Professional Society on the Abuse of Children* 35 at 45.

¹⁷ Section 71(4) of Act 32 of 2007.

¹⁸ Kreston op cit note 16 at 46.

consenting. In addition, “this provision assigns different protection to children under the age of 12, leaving a gaping chasm for disparate treatment of exploitation victims between the ages of 12 and 18 years”.¹⁹ In agreement with Kreston, this definition of trafficking falls short of the requirements of the Palermo Protocol, and does not bring South Africa into compliance with its international obligations. “A law that criminalises only trafficking for sexual exploitation and requires the means element to be present for child trafficking, is insufficient and compromises the ability of national criminal justice agencies to deal effectively with trafficking”.²⁰

The Trafficking Act defines trafficking in persons as:

“Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, by means of a threat of harm; the threat or use of force or other forms of coercion; the abuse of vulnerability; fraud; deception; abduction; kidnapping; the abuse of power; the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, for the purpose of any form or manner of exploitation,²¹ is guilty of the offence of trafficking of persons”.²²

In examining this definition, it is first noted that the Trafficking Act covers any form or manner of exploitation, and closes the gap of the Sexual Offences Amendment Act, which only focussed on trafficking for sexual exploitation. Secondly, the Act removes from the Sexual Offences Amendment Act, the provision that only children under 12 years of age are incapable of consenting to exploitation and now includes all children under the age of 18 years.²³ Thirdly, the Trafficking Act eliminates the additional

¹⁹ Kreston op cit note 16 at 46.

²⁰ Gallagher and Holmes op cit note 1 at 5.

²¹ Section 1 of Act 7 of 2013 describes exploitation as including but not limited to all forms of slavery or slavery like practices, sexual exploitation, servitude, forced labour, child labour as defined in section 1 of the Children’s Act, the removal of body parts and impregnating a female person against her will, for the purpose of selling her child when the child is born.

²² Section 4(1) of Act 7 of 2013. When drafting criminal charges prosecutors should ensure that this definition is read with section 11(1) of the Act, which outlines liability of persons that can be charged under the Act.

²³ Section 11(1) of Act 7 of 2013.

evidentiary burden required by the Children's Act, by providing that a perpetrator cannot claim as a defence that the child or person having control of that child consented to the intended exploitation, or that the intended exploitation did not occur even if none of the *means* have been used.²⁴ This definition is in line with Article 3 of the Palermo Protocol, the OPCRC, and the ILO Convention 182, which provide broad definitions of the sale of children and worst forms of child labour, and covers most situations in which children are trafficked.²⁵

The Trafficking Act includes an important section on the knowledge or "*mens rea*" aspect of the crime of trafficking. The standard used for measuring knowledge is the "reasonable man test". Where the conclusions that ought to be reached, are those which a reasonably diligent and vigilant person would have reached, based on *inter alia* his general knowledge, skill, training and experience, and which are reasonably expected of a person in his or her position or that he or she in fact has.²⁶ Notably, omissions are included in the act.²⁷

This provision is particularly useful against persons such as property owners and landlords, who are "wilfully blind" to the illegal activities of their lessees, who lease and use such premises to exploit children. This provision assists prosecutors in rebutting the claim of lack of knowledge on their part. Importantly, the three counter trafficking statutes do not require that actual exploitation take place, but only that the person is removed "for the purpose of exploitation".²⁸ This is in line with Article 3 of the Palermo Protocol, the OPCRC and ILO Convention 182.

The definition of trafficking in all three Acts broadens the scope of liability of perpetrators. Organised crime involves the cooperation of several persons or groups in a concern, where the main activity is serious crime and implicates a range of actors that have different roles in the trafficking process. This includes the recruiter, transporter, harbourer and exploiter, who each benefit as the trafficked child passes through their hands. The comprehensive definition of trafficking in the Trafficking Act

²⁴ Ibid.

²⁵ See part 3.2 for a discussion of the OPCRC and ILO Convention 182 definitions sale of children and worst forms of child labour.

²⁶ Section 2(2) of Act 7 of 2013.

²⁷ Section 2(3) of Act 7 of 2013.

²⁸ See chapter 3 part 3.3 for a discussion of this aspect.

enables the prosecution of each individual person involved in the trafficking chain. In evaluating whether this definition is consistent with the international framework, it can be seen that the definition is in line with Article 5 of the Organised Crime Convention, Article 5 of the Palermo Protocol, Article 3(b) of the OPCRC, Article 29 of the ACRWC and Articles 19, 32, 34 and 36 of the CRC.

The inclusion of the words “within or across the borders of the Republic” appears in all three statutes and recognises the international nature of child trafficking. Significantly, the definition in the Trafficking Act covers the elements of the act, the means and the purpose as required by the Palermo Protocol (where children are involved only the act and the purpose are applicable). The Trafficking Act makes an important addition to the definition of trafficking in persons, by providing that the act, means and purpose elements are not only applicable to the trafficked person, but includes an immediate family member or any other person in close relationship to the trafficked person.²⁹ This means that persons such as parents and siblings of the victim, can be targeted by the means used by traffickers, such as threats, force and coercion.³⁰

Organised crime perpetrators “frequently use tactics that instil fear and threats of violence towards the victims and or members of their families in order to coerce victims to submit to the demands of their traffickers”.³¹ This provision assists prosecutors who wish to charge perpetrators for threatening the family or close acquaintance/s of the victim. It must be noted, that the international framework does not oblige State parties to criminalise trafficking where threats are aimed at immediate family members or persons in close relationship to the trafficked person. In this regard, the Trafficking Act goes beyond the minimum standards provided by the international trafficking framework and establishes a significant and innovative provision that ought to be included in the international trafficking framework. An advantage of the new trafficking definition means that prosecutors are able to use one statute and do not have look at other statutes to address the various form of exploitation.

²⁹ Section 4(1) of Act 7 of 2013.

³⁰ *Ibid.*

³¹ HSRC ‘Tsireledzani: Understanding the Dimensions of Human Trafficking in South Africa’ (2010) at 156.

4.3 The criminalisation of all aspects of trafficking

A strong legal framework must go beyond the crime of trafficking and ensure that related conduct is adequately criminalised. Such conduct must include the facilitation and involvement in trafficking, tampering with documents, involvement of organised crime, money laundering, and “the commission of more ‘traditional’ forms of harm that are characteristic of the *modus operandi* of traffickers, such as serious physical and sexual harm and deprivation of liberty”.³² The net of criminal responsibility needs to be extended to all involved in order for the response to be effective.

4.3.1 The criminalisation of the offence of trafficking in persons

The Children’s Act criminalises trafficking in children by a natural or juristic person, as well as partnerships, and carries a term of imprisonment not exceeding 20 years, a fine, or both.³³ The Sexual Offences Amendment Act only addresses “a person” and not juristic or legal persons. This shortcoming fails to address organised crime groups that hide and operate behind the façade of legitimate businesses and companies. The Trafficking Act specifically addresses this issue, by defining the term “person” as including “a natural person, a juristic person and a partnership, unless the context indicates otherwise”.³⁴ The criminalisation of legal and juristic persons is in line with Article 10 of the Organised Crime Convention and Article 3(4) of the OPCRC.

4.3.2 The criminalisation of the facilitation of trafficking in persons

Organised crime groups often lease property from other persons in order to conduct their criminal activities, for example, houses and accommodation establishments which are used to keep a brothel.³⁵ The Children’s Act criminalises behaviour facilitating child trafficking.³⁶ The Sexual Offences Amendment Act does not criminalise the facilitation of trafficking of persons, and ignores the fact that persons

³² Gallagher and Holmes op cit note 1 at 5.

³³ Sections 284(1) and 305(8) of Act 38 of 2005.

³⁴ See section 1 of Act 7 of 2013.

³⁵ In *S v Zweni and others* pending case no 41/362/2012, Durban Regional Court, accused 1 leased numerous rooms in an accommodation lodge where young girls were sexually exploited.

³⁶ Section 285 of Act 38 of 2005.

(such as property owners), facilitate child trafficking by receiving rent and income from criminal groups, who lease their property for the exploitation of a child.³⁷ The consequence is that this group of persons escapes the net of prosecution.

The facilitation of trafficking has increased through the introduction of the internet and mobile phone technology. The Children's Act prohibits the facilitating of child trafficking through *inter alia* the advertising, printing and broadcasting of information facilitating trafficking,³⁸ and places an onus on internet service providers to report any information alluding to trafficking of a child to the South African Police.³⁹ However, the Act fails to create any offence, if internet service providers fail to comply with this provision.

The Children's Act omits to stipulate any proactive steps, which the service provider must take in order to prevent the use of their services to facilitate trafficking. The Act merely creates a reporting obligation with no sanction and no positive obligations to assist law enforcement, address such crimes. This gap allows organised crime perpetrators to continue their criminal activities, as the anonymity of the internet presents significant challenges to the resources and skills of investigators. The Sexual Offences Amendment Act fails to address the advertising, printing and broadcasting of information alluding to trafficking, including the use of the internet.

The Trafficking Act has incorporated and expanded upon the offence of facilitating trafficking in persons. In line with Article 5(1) (b) of the Organised Crime Convention and Article 5 of the Palermo Protocol, the Act makes it an offence for any person who *inter alia* leases any premises, or advertises, prints, or broadcasts information that facilitates trafficking.⁴⁰ In addition, the Trafficking Act prohibits any person from financing, controlling or organising any offence under the Trafficking Act.⁴¹ This section targets persons such as the "boss or kingpin" of the criminal group, who do not commit the actual trafficking acts themselves, but are in a leadership position, and ultimately benefit from the spoils of the crime.

³⁷ *Zweni supra* note 35.

³⁸ Section 285(1) (b) of Act 38 of 2005.

³⁹ Section 285(2) of Act 38 of 2005.

⁴⁰ Section 8 of Act 7 of 2013.

⁴¹ Section 8(1) of Act 7 of 2013.

Furthermore, the Trafficking Act makes it mandatory for electronic communication service providers (hereafter referred to as “ECSP’s”) to report any suspicious trafficking related acts to the police, to preserve evidence, and to prevent continued access to the offending websites.⁴² Failure to do so is an offence punishable by a fine, 5 years imprisonment or both.⁴³ “Organised criminals have expanded their technological toolkits,”⁴⁴ and internet and cell phone networks have promoted speedy communication,⁴⁵ which aids their illegal activity.

This provision is to be welcomed as it holds ECSP’s accountable, and may deter traffickers, as there is a higher degree of detection. Moreover, it closes the gaps created by the Sexual Offences Act, which failed to criminalise this offence, and the Children’s Act which failed to create any offence for internet service providers. Although the OPCRC stresses the importance of closer cooperation and partnership between governments and the internet industry, it does not place any specific mandatory obligations on States to address internet service providers. In this regard, the Trafficking Act has gone beyond the minimum standards required by international law.

4.3.3 The criminalisation of a wide range of forms of participation in trafficking in persons

Organised crime groups involved in child trafficking implicate a number of actors with varying roles. The Sexual Offences Amendment Act criminalises the offences of committing, causing, bringing about, encouraging, promoting, contributing towards or participating in trafficking.⁴⁶ The Children’s Act does not criminalise the involvement or participation in trafficking.

It can be argued that the participation crimes are covered by existing legislation. However, the challenge is that prosecutors have to use the “fragmented trafficking provisions,” in addition to looking at other statutes such as the Riotous Assemblies

⁴² Section 8(2) of Act 7 of 2013.

⁴³ Section 13(e) of Act 7 of 2013.

⁴⁴ JP Bjelopera and KM Finklea *Organised Crime: An Evolving Challenge for US Law Enforcement* at 10.

⁴⁵ *Ibid* at 1.

⁴⁶ Section 71(2) of Act 32 of 2007.

Act 17 of 1956 on a charge of conspiracy, or POCA to charge the key perpetrators of child trafficking.

The Trafficking Act has incorporated the offence of “involvement in trafficking”.⁴⁷ The Act bridges the gap created by the Children’s Act, which omitted participation and/or involvement of persons in trafficking. In this regard, the Trafficking Act complies with Article 5 of the Palermo Protocol, and Article 5 of the Organised Crime Convention, which obliges State parties to criminalise attempts, participation as accomplices and organising or directing others to commit trafficking. This provision is broader than the Palermo Protocol, which only requires the criminalisation of participation as an accomplice, and is a useful tool in prosecuting the various role-players in the trafficking chain.

4.3.4 The criminalisation of the use of carriers in child trafficking

Organised crime groups involved in trafficking use commercial carriers to move people in and out of a country, and within a country. The Palermo Protocol calls for State parties to take measures to prevent the use of carriers in the commission of offences, established under Article 5.⁴⁸ The difficulty with this provision is that it applies only to offences that are transnational in nature.⁴⁹ The Sexual Offences Amendment Act’s prohibition on commercial carriers⁵⁰ is similar to the Palermo Protocol and addresses travel across international borders,⁵¹ only for the purpose of sexual exploitation. It fails to recognise that traffickers use commercial carriers to conduct domestic trafficking. The Children’s Act makes no provision for criminalising commercial carriers that transport trafficked children, and fails to recognise the use and abuse of commercial carriers by organised crime groups. As a result, prosecutors having to look at other laws to prosecute commercial carriers, which

⁴⁷ Section 10 of Act 7 of 2013.

⁴⁸ Article 11(2) of the Palermo Protocol.

⁴⁹ See Article 11 of the Palermo Protocol. See discussion in HB Kruger *Combatting Human Trafficking: A South African Legal Perspective* at 249 – 252.

⁵⁰ Section 70(2)(a) of Act 32 of 2007. “Commercial carrier” includes 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.

⁵¹ Section 71(6) (a) and (c) of Act 32 of 2007. On conviction, the carrier may be ordered to pay the costs of the trafficked person’s care, safekeeping and return from the Republic.

transport trafficked children for other forms of exploitation, such as forced labour or illegal marriages.

The Trafficking Act prohibits a carrier that transports a person within or across the borders of the Republic, knowing that the person is a victim of trafficking or ought reasonably to have known that the person is a victim of trafficking.⁵² A carrier who, on reasonable grounds, suspects that any of its passengers is a trafficked victim, must immediately report that suspicion to a police official for investigation.⁵³ Failure to report is an offence⁵⁴ and carries a sanction of a fine, five years imprisonment or both.⁵⁵ This provision recognises that trafficking takes place across borders as well as within a country, and goes beyond the minimum requirement of the Palermo Protocol. Proving knowledge on the part of the carrier may be challenging, as knowledge will be dependent on the perpetrators level of awareness of the offence of child trafficking, and its identifying signs.

4.3.5 Debt bondage

Debt bondage of a victim is part of the *modus operandi* of organised crime groups involved in child trafficking. Section 5 of the Trafficking Act criminalises the offence of debt bondage where any person who intentionally engages in conduct that causes another person to enter into debt bondage, is guilty of an offence.⁵⁶ The offence is punishable by up to 15 years imprisonment.⁵⁷ This provision recognises the gravity of the offence and the means used by organised crime groups to control victims, and is in line with Article 11(1) of the Organised Crime Convention.

⁵² Section 9(1) of Act 7 of 2013.

⁵³ Section 9(2) of Act 7 of 2013.

⁵⁴ Section 9(3) of Act 7 of 2013.

⁵⁵ Section 13(e) of Act 7 of 2013. Section 9(4) of Act 7 of 2013: On conviction, a carrier can be ordered to pay any expenses incurred or expected to be incurred in connection with the care, accommodation, transportation and repatriation or return of the victim to his or her country of origin or country or place from where he or she was trafficked, if the court finds, on a balance of probabilities, that the carrier knowingly transported a victim of trafficking or ought reasonably to have known or suspected that it was transporting a victim of trafficking.

⁵⁶ Section 5 of Act 7 of 2013.

⁵⁷ Section 13(c) of Act 7 of 2013.

4.3.6 The criminalisation of the laundering of the proceeds of crime

Organised crime groups are involved in trafficking due to its high profits and low risks. The Organised Crime Convention and by extension the Palermo Protocol, call for State parties to criminalise money laundering and related offences of dealing with property in order to conceal its source and acquisition, possession or use of proceeds of crime.⁵⁸ The Children's Act, Sexual Offences Amendment Act and the Trafficking Act do not contain any money laundering provisions, most probably due to there being existing legislation in the form of POCA, which addresses the crime of money laundering comprehensively.⁵⁹

POCA criminalises money laundering, assisting another to benefit from proceeds of unlawful activities, acquisition, possession and use of proceeds of unlawful activities⁶⁰ and is in line with Article 6 of the Organised Crime Convention. Such provisions were used in child trafficking cases to prosecute traffickers and to seize, recover, confiscate and forfeit criminal assets used to commit trafficking or that are the proceeds of the exploitation of a child.⁶¹ As POCA comprehensively addresses confiscation of the proceeds of crime, it becomes unnecessary to have a similar provision in the Trafficking Act.

4.3.7 The criminalisation of corruption

"Corruption is central to the success of traffickers and therefore organised crime groups consider it a necessary investment".⁶² Organised crime groups target dishonest public employees and seek out persons that have specific skills and access to information, or certain job responsibilities that lend themselves to specific schemes,⁶³ such as immigration officials and police officers. Trafficked victims have reported collusion of public officials with traffickers, demonstrating that bribery and

⁵⁸ Article 6 of the Organised Crime Convention.

⁵⁹ Sections 4, 5 and 6 of Act 121 of 1998.

⁶⁰ *Ibid.*

⁶¹ *Zweni supra* note 35. The Asset Forfeiture Unit is looking into obtaining a confiscation order for the premises that was used to harbour and exploit the victims of trafficking.

⁶² UNODC 2011 *The Role of Corruption in Trafficking in Persons* at 7.

⁶³ JP Bjelopera and KM Finklea *op cit* note 44 at 27.

abuse of power of public officials or people of influence people are frequently part of the trafficking process.⁶⁴

Mollema states that in almost all trafficking related cases involving corruption, the trafficker gives a gratification (such as money, a gift, any advantage or favour including non-patrimonial benefits such as sexual services) to the other party, who accepts it as inducement to act in a certain way.⁶⁵ “The authorities may use the prostitution services themselves, or the criminals try to bargain with the authorities and offer ‘compensation’ for their cooperation”.⁶⁶ The Organised Crime Convention requires State parties to criminalise certain corrupt activities involving public officials.⁶⁷ The Children’s Act, Sexual Offences Act and Trafficking Act do not address corruption offences as such offences already form part of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereafter the “Corruption Act”) which addresses corrupt activities comprehensively.⁶⁸

The Act complies with Article 8(1) of the Organised Crime Convention, which forbids corruption of public officials. The Corruption Act can be used in the prosecution of traffickers as it also considers the gravity of this offence and calls for harsh sanctions varying between 3 and 15 years imprisonment to life imprisonment.⁶⁹

4.3.8 The criminalisation of tampering with documents

As part of the *modus operandi* of organised crime groups involved in trafficking, they often take possession of the passports or identity documents of victims to ensure that they do not escape.⁷⁰ The Immigration Act 13 of 2002 (hereafter referred to as

⁶⁴ UNODC 2011 op cit note 62 at 10.

⁶⁵ N Mollema *Combatting Human Trafficking in South Africa: A Comparative Legal Study* (unpublished Doctor of Laws thesis, University of South Africa 2013) at 446.

⁶⁶ M Viuhko and A Jokinen 2009 European Institute for Crime Prevention and Control *Human Trafficking and Organised Crime Trafficking for sexual exploitation and organised procuring in Finland* at 84. In *Zweni’s case supra* note 35, the victims alleged that certain police officials used the prostitution services of the victims controlled by the organised crime group, in return for not arresting them for their criminal activities.⁶⁶

⁶⁷ Article 8 of the Organised Crime Convention.

⁶⁸ Section 3 of Act 12 of 2004 criminalises the general offence of corruption, which is the offering or giving of an undue benefit to any person, and the solicitation or acceptance of such an undue advantage by such a person.

⁶⁹ Section 26-28 of Act 12 of 2004.

⁷⁰ *Ibid.*

the “Immigration Act”), prohibits a person from being in possession of another person's travel, identity documents or passport.⁷¹ The Identification Act 68 of 1997 penalises a person who unlawfully possesses, imitates or alters identity cards,⁷² punishable with up to five years' imprisonment.⁷³ However, related issues such as the confiscation, or destruction, of their travel and identity documents needs to be addressed more comprehensively.⁷⁴ It must be noted that the penalties provided for in the Immigration Act are too lenient to deter potential traffickers, and do not reflect the seriousness of this offence.

There are no provisions addressing the tampering of documents pertaining to a trafficked child in the Children's Act or Sexual Offences Amendment Act. In line with Article 12 of the Palermo Protocol, the Trafficking Act introduces a new offence of the possession, destruction, confiscation, concealment of or tampering with the identity or travel documents or passport of a trafficked person.⁷⁵ The harsh penalty of a fine, 10 years imprisonment or both, reflects the seriousness of this offence⁷⁶ and is consistent with Article 11(1) of the Organised Crime Convention. This section provides prosecutors with the tools to prosecute conduct, which was previously considered, unrelated to trafficking, and was regarded more as a contravention of the Immigration Act and the Identification Act 68 of 1997.

4.4 Effective sanctions for trafficking and related offences

The Organised Crime Convention requires sanctions that take into consideration the gravity of the offence⁷⁷ and is “consistent with the harm caused and the benefits derived from trafficking”.⁷⁸ In addition, legal persons' such as companies and businesses are subject to effective, proportionate, and dissuasive criminal or non-criminal sanctions, including monetary sanctions.⁷⁹ The OPCRC requires offences

⁷¹ Section 49(15)(b) of Act 13 of 2002.

⁷² Section 18(1) of Act 68 of 1997.

⁷³ Section 18(2) of Act 68 of 1997.

⁷⁴ L Stuurman 'Anti-trafficking Legislation Can No Longer Be Delayed' in B Kruger op cit note 15 at 300.

⁷⁵ Section 6 of Act 7 of 2013.

⁷⁶ Section 13(d) of Act 7 of 2013.

⁷⁷ Article 11(1) of the Organised Crime Convention.

⁷⁸ AT Gallagher *The International Law of Human Trafficking* (2010) at 395.

⁷⁹ Ibid, Article 10(4) of the Organised Crime Convention.

to be punishable by appropriate penalties that take into account their grave nature.⁸⁰ The ILO Convention 182 makes it obligatory for the provision and application of penal sanctions or, as appropriate, other sanctions.⁸¹

In assessing whether the South African legal response to child trafficking complies with international law, the Children's Act specifies a 20-year sentence for the trafficking of a child, a fine or both.⁸² The Sexual Offences Amendment Act provides for life imprisonment for child trafficking for the purpose of sexual exploitation. Although the sanctions are lengthy, "this disparity in the term of imprisonment results in an imbalanced sentencing of perpetrators involved in organised child trafficking".⁸³ The Trafficking Act stipulates a fine of up to a R100 million or imprisonment up to life imprisonment or both.⁸⁴ As mentioned before, organised crime groups are attracted by the staggering profits made from human trafficking. The concern is that the payment of a fine on conviction may not be sufficient to deter them from similar conduct in the future.

Gallagher submits that other sanctions such as the closure of any establishment used to carry out child trafficking and the banning of a perpetrator from carrying out the activity in the course of which the offence was committed, must be considered.⁸⁵ In agreement with Gallagher, this innovative provision can be used to act against establishments that might be used as a facade for child trafficking, such as matrimonial and placement agencies, travel agencies, hotels, or escort services.⁸⁶

Furthermore, organised crime groups involved in trafficking implicate various role players. "Each benefits differently from the exploitation as will be their contribution to the harm caused to victims".⁸⁷ "Therefore sentences are required to be effective and proportionate".⁸⁸ It is submitted that the Trafficking Act meets this requirement.

⁸⁰ Article 3(3) of the OPCRC.

⁸¹ Article 7(1) of the ILO Convention 182.

⁸² Section 305(7) of Act 38 of 2005.

⁸³ Gallagher and Holmes op cit note 1.

⁸⁴ Sections 13(a) and (b) of Act 7 of 2013.

⁸⁵ Gallagher op cit note 78 at 393.

⁸⁶ Ibid.

⁸⁷ Ibid at 394.

⁸⁸ For a discussion on effective and proportionate sentences, see Gallagher 'International Law of Human Trafficking' at 395 to 396.

Facilitation of trafficking carries up to 5 to 10 years imprisonment; commercial carriers face up to 5 years imprisonment, persons who tamper with documents face up to 10 years imprisonment and debt bondage carries up to 15 years imprisonment. Persons involved in trafficking (depending on the role of the perpetrator) face the relevant sanction as specified in the Act for that particular offence.⁸⁹

Significantly, persons who use the services of victims of trafficking⁹⁰ face up to 5 years imprisonment.⁹¹ This provision addresses those persons who create the demand for trafficked children and is important in deterring child trafficking. The above-mentioned penalty provisions take into consideration the gravity of the crimes, and meet the required minimum standards of international law.

4.5 Aggravating factors and previous convictions

The crime of trafficking may be more serious under certain circumstances and should therefore attract a harsher sanction.⁹² “Although the Palermo Protocol does not refer to aggravated offences, subsequent interpretative materials make it clear that State parties are free to develop a system of sanctions that includes aggravated offenses”.⁹³ The specific stipulation of aggravating factors does not appear in the Children’s Act nor the Sexual Offences Act.

The Trafficking Act devotes an entire section to aggravating factors and considers *inter alia* previous convictions, whether the victim was a child, physical abuse of the victim, the role of the convicted person in the trafficking process and whether the offence formed part of organised crime.⁹⁴ This provision is noteworthy, in that the legislature recognises the concept of “aggravated factors” and in so doing acknowledges the special dangers associated with violent trafficking, organised trafficking and trafficking in children. This provision guides prosecutors in arguing for stronger sentences against organised crime traffickers. It is suggested that an

⁸⁹ Section 10(2) of Act 7 of 2013.

⁹⁰ Section 7 of Act 7 of 2013.

⁹¹ Section 13(d) of Act 7 of 2013.

⁹² Gallagher op cit note 78 at 396.

⁹³ Ibid.

⁹⁴ Section 14 of Act 7 of 2013.

addition to the list of aggravating factors should include an offence committed by a public official in the performance of his or her duties.

A key point raised by Gallagher is that criminal groups, whose members have convictions in more than one country, often conduct trafficking across national borders.⁹⁵ “Previous convictions in foreign jurisdictions are not usually considered for sentencing purposes by domestic courts”.⁹⁶ The European and South Asian Association for Regional Cooperation Trafficking Conventions, both recognise the principle of “international recidivism” by providing that relevant previous convictions in other countries can be taken into account when determining penalties.⁹⁷ South African law does not allow foreign previous convictions to be considered by the trial court. It is submitted that the inclusion of such a provision into the Trafficking Act should be considered, as it may have a deterrent effect against organised crime traffickers, who operate international trafficking syndicates, by making the crime of trafficking in persons, more “high risk”.

4.6 Compensation for victims

Organised crime traffickers’ use and reuse children, and benefit to the maximum extent possible from their exploitation. The Palermo Protocol obliges State parties to ensure that domestic legislation contains measures that offer trafficked victims the possibility to receive compensation for damage suffered.⁹⁸ The Children’s Act and the Sexual Offences Amendment Act do not address any issue of compensation to the trafficked victim. This omission fails to assist and secure justice for trafficked children.

The Trafficking Act closes this gap, by making specific provision for compensation to trafficked victims, in addition to any other sentence imposed. The Act provides for compensation for psychological, physical and other injury, damage to property of the victim and the infection of the victim with a life threatening disease.⁹⁹ Where the

⁹⁵ Gallagher op cit note 78 at 398.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Article 6(6) of the Palermo Protocol.

⁹⁹ Section 29 of Act 7 of 2013.

amount of damage exceeds the jurisdiction of the magistrate's court, the victim can claim the excess in a civil action.¹⁰⁰

The Trafficking Act goes further and provides for additional compensation to the State, where a court can order the convicted person to pay to the Criminal Assets Recovery Account established under POCA, compensation for present and future expenses incurred for the care, accommodation and return of the victim.¹⁰¹ These provisions are applauded, as the benefits received by organised crime groups from the exploitation of victims, can be used for victim compensation. "The linking of a criminal justice measure such as confiscation of proceeds to victim support is an important step forward in both ending impunity for traffickers and securing justice for victims".¹⁰² The Trafficking Act in this regard is in line with the Palermo Protocol.

4.7 Extraterritorial jurisdiction

Both the Children's Act and the Sexual Offences Amendment Act make provision for extra-territorial jurisdiction, where citizens, permanent residents, or a legal entity commits trafficking offences abroad.¹⁰³ The Trafficking Act has incorporated these provisions. A South African court has jurisdiction under certain conditions, where an act is committed outside the Republic.¹⁰⁴ This provision is important and in line with Article 15 of the Organised Crime Convention and Article 4 and 5 of the OPCRC, and "aims to reduce or eliminate 'safe havens' for traffickers and organised crime groups, by ensuring that all parts of the crime can be punished wherever they took

¹⁰⁰ See section 29(2) of Act 7 of 2013. Where a child is the victim, the parent or guardian of that child, has *locus standi* to institute a civil action for damages on behalf of that child. However, it should be taken into consideration that secondary trauma to the child may occur because of another court procedure. The counselling and therapeutic services to the child, in addition to congested court rolls may delay a civil action. In this regard, it is submitted that the best interests of the child should take priority over any court proceeding whether it is civil or criminal in nature and it may happen that the child may not testify at all, due to secondary trauma to that child.

¹⁰¹ Section 30 of Act 7 of 2013.

¹⁰² A Gallagher op cit note 78 at 403.

¹⁰³ Section 291 of Act 38 of 2005 and section 61 of Act 32 of 2007.

¹⁰⁴ The offences must be offences established under the Trafficking Act and it is irrelevant whether this act constitutes an offence at its place of commission or not. Section 12(1) (a-f) of Act 7 of 2013 sets out the circumstances under which a South African court has jurisdiction.

place”.¹⁰⁵ It prevents perpetrators from escaping the net of prosecution and facilitates the ease of prosecution for trafficking offences committed abroad.¹⁰⁶

4.8 Confiscation, seizure and asset forfeiture of proceeds of crime

Trafficking in persons is a highly profitable and low risk crime. The “kingpins or managers” involved in organising and financing child trafficking, often distance themselves from direct involvement in the trafficking activity, making it challenging for investigators to trace such proceeds and profits. “Even if arrested and punished, traffickers will often be able to enjoy their illegal gains for personal use and for maintaining the operation of their trafficking enterprises”.¹⁰⁷ “Proceeds of child trafficking include property and monies such as: profits from the services and exploitation of the victim; the profits from child pornography; transportation modes used to transport child victims; accommodation and entertainment establishments, brothels, farms where labour exploitation took place and profits from the sale or resale of a child from one trafficker to another”.¹⁰⁸

The Organised Crime Convention and by extension the Palermo Protocol provides for seizure and confiscation.¹⁰⁹ “Organised crime groups involved in trafficking may organise their affairs so that the proceeds derived from trafficking are located in a State other than the one in which they live or in which the crime takes place”.¹¹⁰ “The goal of ensuring that there are no safe havens for traffickers must be applied in respect of the assets accrued through the exploitation of their victims”.¹¹¹

¹⁰⁵ AT Gallagher and N Karlebach *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice* (Background Paper) (2011) at 8.

¹⁰⁶ Prosecuting traffickers using extraterritorial jurisdiction, is dependent on *inter alia* international cooperation between States. Although the author has not dealt with a trafficking case involving extraterritorial jurisdiction, nor aware of any cases prosecuted under the Children’s Act nor the Sexual Offences Amendment Act, such prosecutions are possible. Factors such as the perpetrator being a citizen of the Republic, being ordinarily resident in the Republic, committing the offence against a South African citizen or resident, after the commission of the offence is present on South African territory, where the perpetrator is not extradited to South Africa, or is a juristic or legal person, are factors to be considered when establishing extraterritorial jurisdiction. The prosecution must be authorised in writing by the National Director of Public Prosecutions. See section 12 of Act 7 of 2013.

¹⁰⁷ Gallagher op cit note 78 at 400.

¹⁰⁸ Ibid

¹⁰⁹ Article 12 of the Organised Crime Convention.

¹¹⁰ Gallagher op cit note 78 at 400.

¹¹¹ Ibid.

The three counter trafficking statutes in South Africa do not contain any provisions on confiscation matters as required by the Organised Crime Convention. However, POCA can be used to seize, recover and confiscate the proceeds of crime in child trafficking matters. Given the huge profits made from trafficking, it is important for States to remove the incentive from trafficking and to ensure that trafficking does not reward its role players. In this regard, the confiscation and forfeiture measures contained in POCA comprehensively addresses the proceeds and instrumentalities of crimes, generated by organised crime groups involved in trafficking and is compliant with the Organised Crime Convention.

4.9 Assistance and protection to victims

Victims have a critical role to play in the criminal prosecution of organised crime groups involved in trafficking. As discussed in chapter two part 2.8, child victims may be vulnerable to intimidation and reprisals from traffickers, and their involvement in legal proceedings can cause further trauma. Domestic legislation should recognise the importance of victim evidence and provide them with the necessary protections they require to participate in the prosecution of their exploiters. Neither the Children's Act, the Sexual Offences Amendment Act nor the Trafficking Act contain any specific provisions on witness protection, nor measures aimed at protecting the child's identity, privacy and dignity during the court process, such as video and closed hearings. In all probability these would have been omitted, as comprehensive legislation on witness protection already exists.¹¹² These measures are not discussed in this study.

The Trafficking Act however, includes some additional protective measures such as the issuing of a visitor's visa, for purposes of investigation and prosecution in respect of foreign victims of trafficking¹¹³ and the placement of the child in temporary safe care pending transfer to a designated child protection organisation.¹¹⁴ Furthermore, once the Trafficking Act becomes operational, it provides for an amendment to the Witness Protection Act, to provide a witness or related person to be placed under

¹¹² As contained in the Witness Protection Act 112 of 1998. See also section 153, 158 and 170 of the Criminal Procedure Act 51 of 1977.

¹¹³ Section 15 of Act 7 of 2013.

¹¹⁴ Section 18(4) (c) of Act 7 of 2013.

protection for any offence under Chapter 2 of the Trafficking Act.¹¹⁵ The concern that arises as regards the provision of the visitor's visa for a foreign victim is that the accused could argue that this factor influenced the victim to testify for the prosecution in order to remain in South Africa and could potentially "colour" a victim's testimony.¹¹⁶

4.10 International investigative and judicial cooperation in trafficking cases

A lack of communication and cooperation between national law enforcement authorities is one of the principal obstacles to effective action against transnational organised crime and trafficking. "The transnational nature of child trafficking necessitates cooperation among States".¹¹⁷ The Children's Act makes provision for the entering of agreements between South Africa and States that are not parties to the Palermo Protocol, in respect of any matter pertaining to trafficking in children.¹¹⁸ However, Kreston criticises this provision in that the Children's Act does not cater for international cooperation facilitating extradition and mutual legal assistance as set out in the Palermo Protocol.¹¹⁹ The Sexual Offences Act contains no such provisions.

The Trafficking Act establishes measures for international cooperation.¹²⁰ The State President may enter into, amend or revoke agreements with foreign States that are not a party to the Palermo Protocol, in respect of any matter pertaining to trafficking in persons.¹²¹ The broad wording of this provision encompasses cooperation *inter alia* on mutual legal assistance, extradition, issues of repatriation of trafficking victims, prevention of trafficking, information exchange, training, and legitimacy and

¹¹⁵ See Schedule to the Trafficking Act 7 of 2013.

¹¹⁶ In responding to such an assertion by an accused person, prosecutors can address this issue in their final arguments to the court on the merits of the matter. The maxim "*res ipsa loquitur*" is applicable.

¹¹⁷ Kassan op cit note 13 at 18-14.

¹¹⁸ Section 283(1) of Act 38 of 2005.

¹¹⁹ Kreston op cit note 16 at 43.

¹²⁰ Section 37 of Act 7 of 2013. Informal communication is possible between the different law enforcement agencies. However where a prosecution is to be instituted, it is advisable to follow the formal procedures as laid down in the relevant legislation on international cooperation.

¹²¹ Section 37 of Act 7 of 2013.

validity of documents.¹²² These aspects are important investigative and prosecutorial tools in the fight against organised crime.

South Africa has existing international cooperation laws in the form of the International Cooperation in Criminal Matters Act 75 of 1996. This Act addresses in detail important aspects *inter alia* the mutual provision of evidence¹²³ and the confiscation and transfer of the proceeds of crime between the Republic of South Africa and foreign states.¹²⁴ The provisions in the Trafficking Act and the Children's Act are in line with Article 9(4) and 10(1) of the Palermo Protocol and Articles 16, 18, 21 and 27 of the Organised Crime Convention. In addition, the Trafficking Act is consistent with the provisions of Article 35 of the CRC; Article 7(6) of the OPCRC; Article 7 of OPAC and Article 8 of the ILO Convention 182, and ensures that child traffickers do not evade prosecution by taking refuge in other countries.

4.11 A specialist law enforcement capacity to investigate human trafficking

Although the international framework does not specifically oblige State parties to establish a specialised and dedicated anti trafficking capacity, international law, policy, and practice is, beginning to confirm that specialisation is essential to an effective investigative response.¹²⁵ In agreement with Gallagher and Holmes, both the international and national framework ought to include such a provision in their laws. Personal experience and research has indicated that dedicated investigators and prosecutors are essential in addressing organised crime groups that commit child trafficking.

“Specialist personnel must be trained in reactive investigation including victim identification, management of trauma and cultural challenges, specialised video-recorded interview techniques for adult and child victims, collection of corroborative evidence, witness protection and witness management, and international cooperation”.¹²⁶ A significant absence in any of the counter-trafficking laws, including

¹²² Article 13 of the Palermo Protocol.

¹²³ Sections 2-12 of the International Cooperation in Criminal Matters Act 75 of 1996.

¹²⁴ Section 19 - 26 *ibid*.

¹²⁵ Gallagher and Holmes *op cit* note 1 at 6.

¹²⁶ *Ibid*.

the Trafficking Act, is the establishment of specialised trafficking units staffed with skilled and trained personnel. This is a crucial requirement necessary to investigate and prosecute organised child trafficking and should be included in the Trafficking Act. In agreement with Kreston, the value of such expertise cannot be overstated.¹²⁷

4.12 Prevention measures

Prevention measures are not discussed in depth, except in its relevance to organised crime. Organised crime groups prey on vulnerable persons. Literature and personal experience has revealed that the prevention of child trafficking requires a resourceful and coordinated response. In preventing trafficking, factors that cause children vulnerable to become vulnerable to trafficking and those, which contribute to individuals becoming traffickers, must be addressed.¹²⁸

Neither the Children's Act nor the Sexual Offences Amendment Act contains any prevention measures. The Trafficking Act contains provisions on prevention that involves public awareness, information and education to the public, with a specific focus on vulnerable persons.¹²⁹ In addition, it calls for action to discourage the demand and supply of victims, especially women and children.¹³⁰ If these provisions are implemented through proper education and awareness, it can contribute to reducing the vulnerability of children to being trafficked by organised crime groups. However, the Trafficking Act does not specifically address key factors such as poverty and gender discrimination, which contributes to children becoming vulnerable to being trafficked. Although the Trafficking Act provides for public awareness programs to discourage demand and supply of victims of trafficking, the Act does not specify a plan of action to discourage such demand supply.

4.13 Conclusion

This Chapter outlined the South African legal response for combating child trafficking and examined the three counter-trafficking statutes with a specific focus

¹²⁷ Kreston op cit note 16 at 46.

¹²⁸ UNODC 2008 *Prevention of trafficking in persons* at 449.

¹²⁹ Section 41(d) of Act 7 of 2013.

¹³⁰ Section 41(d)(iii) of Act 7 of 2013.

on the organised crime aspects of this offence. The Children's Act places a heavy evidentiary burden on the prosecution, by requiring specific means such as force, threats, deception or coercion to be proved in a child trafficking case, which is not required by international law. The Sexual Offences Act focusses only on trafficking for the purpose of sexual exploitation and excludes other forms of exploitation such as trafficking for forced labour, organ trafficking and child soldiers. The Trafficking Act addresses the problems in the above two statutes and provides a comprehensive definition of trafficking in persons that covers all forms of exploitation against all persons.

Although the Children's Act and the Sexual Offences Act broaden the scope of liability of perpetrators involved in trafficking, the Trafficking Act enables the prosecution of each individual person involved in the trafficking chain. Importantly the Trafficking Act establishes a significant and innovative provision that includes trafficking, where for example, force, threats or coercion are directed towards immediate family members or persons in close relationship to the trafficked person.

The net of criminal responsibility must be extended to all involved the trafficking chain, in order for the response to be effective. The Trafficking Act addresses this issue, by including natural and juristic persons that can be prosecuted for trafficking related offences. In addition, the Act criminalises the facilitation of and participation in trafficking, including the use of the internet, the use of carriers to traffic children, debt bondage, and tampering with documents. All the offences have sanctions that take into account the gravity of the offences and its aggravating factors.

The Trafficking Act makes provision for international cooperation. In addition, the Act specifically addresses the needs of foreign victims such as the issuing of a visitor's visa, for purposes of investigation and prosecution and protection and assistance to such victims. This allows foreign children who have been trafficked to enjoy the same benefits of protection and assistance as local children who have been trafficked.

While the Children's Act and the Sexual Offences Act are positive steps in the right direction, neither provide any prevention measures, specialised trafficking units with

trained investigators and prosecutors, and uniform sanctions for trafficking offences. Both neglect to offer victim services for the trafficked child. While the purpose of the Children's Act and Sexual Offences Act is to give effect to the Palermo Protocol and generally to combat trafficking in children, they have fallen short of being fully compliant with the Palermo Protocol.

The Trafficking Act is an all-inclusive law that addresses the prevention, protection and prosecution of traffickers. The Trafficking Act has adequately bridged the gaps identified above in the Children's Act and the Sexual Offences Act and provides a comprehensive definition of trafficking in persons, in line with the Palermo Protocol. The Act addresses issues such as the criminalisation of a broad category of persons involved in the trafficking chain, victim compensation and international cooperation, which are key in combatting child trafficking.

The Trafficking Act includes a new provision on victim compensation that allows victims to recover the profits the organised crime group received from his or her exploitation. Importantly, children can benefit from this provision. Strict enforcement of victim and State compensation can result in child trafficking going from a low risk, high profit crime, to one where the risk is high with low profits. This provision can deter traffickers from engaging in trafficking and prevents them enjoying the fruits of their crimes.

A significant absence in the Trafficking Act is the establishment of specialised trafficking units with skilled and trained personnel. Trafficking prosecutions can be complex and difficult, requiring skills that generalist prosecutors may not possess. The need for such a unit cannot be under-estimated and both the international framework and the national law ought to make provision for specialised anti-trafficking units. It must be noted that the Trafficking Act must not be applied in isolation in a trafficking prosecution, but should be complemented by various other statutes such as POCA, the Corruption Act and where applicable, even the common law.

In concluding, the lack of comprehensive trafficking legislation placed a heavy burden on prosecutors and other role-players that deal with trafficking cases and

victims. The Trafficking Act has alleviated this burden by establishing a comprehensive trafficking definition and punishes this crime and its related crimes under one statute.

CHAPTER 5

CONCLUSION

Child trafficking represents a serious threat to the lives of children and their families, and must be addressed through judicious policymaking. The development of an appropriate national trafficking framework, that is consistent with the relevant international instruments and standards, plays an important role in the prosecution of child trafficking and its related offences, protection of victims and prevention of this crime.

This study sought to provide a critical analysis of the Trafficking Act, as far as it relates to child trafficking from an organised crime perspective, to determine its potential impact on the prosecution of child trafficking cases in South Africa. In addressing this issue, a number of key research questions were posed. However, before attempting to examine the key research questions posed in this study, it was necessary to provide a background to the problem of child trafficking, examine its causes and extent of the problem, in addition to looking at the role of organised crime groups in child trafficking.

In this regard, chapter 2 addressed the second research question and provided an overview of child trafficking, and a background against which the challenges to prosecuting child trafficking from an organised crime perspective had to be understood. Importantly, the international definition of trafficking indicated that where children are concerned, it is only necessary that the elements of an act and exploitation of the child are present to qualify as a trafficking case. The consent and the presence or absence of improper means of trafficking is irrelevant if the victim is a child under 18 years of age.

Due to its clandestine nature, estimating the true extent of the problem of child trafficking is difficult. Research however indicates, that globally at least 50 percent of trafficked victims are minors. As regards South Africa, very little is known about the

actual extent and scope of child trafficking. Literature indicates that human trafficking is one of the largest profit sources for organised crime worldwide. Victims are mostly drawn from the most vulnerable populations of the world, where factors such as poverty, gender discrimination, war, violence, unemployment, natural disasters and globalisation “push” victims into the control of traffickers and organised crime groups who exploit this vulnerability. In striving towards a deeper understanding of the problem of child trafficking, its various exploitative purposes were examined. It was found that trafficking for sexual exploitation and forced labour are the two fastest growing areas of criminal activity.

The analysis in this study, reveals that organised crime syndicates have links to *inter alia* trafficking for sexual exploitation, forced labour and organ trafficking - where it involves three or more persons, existing for a period and acting in concert with the aim of committing one or more serious crimes in order to obtain a financial or material benefit. The examination also reveals the diversity of actors such as the recruiter, transporter, exploiter and kingpin involved in the trafficking process, each of whom has a specific function. Chapter 2 closed with identifying some of the key features that makes child trafficking challenging to prosecute, and provides suggestions in which such challenges can be addressed.

Providing prosecutors with the necessary skills and training will assist in effective prosecutions against perpetrators and ultimately more convictions. A proper understanding of the different legal processes involved in international cooperation such as mutual legal assistance, extradition and seizure and confiscation of assets, is necessary to address transnational child trafficking. Equipping prosecutors with the necessary training and skills will enable them to identify criminal organisations and target those persons who manage and profit the most from the trafficking of children. Prosecutors must be trained and equipped to deal with all aspects of protection and assistance, to child witnesses.

In answering the first research question, chapter 3 examined certain international and regional instruments namely the Organised Crime Convention, the Palermo Protocol, the CRC, the ACRWC, the OPCRC, OPAC and the ILO Convention 182. These instruments provided the theoretical framework of this study. In order to

address child trafficking from an organised crime perspective, it was established that there are certain key legal components contained in the international framework, which are required to be included in domestic trafficking legislation.

First, a comprehensive definition of trafficking in persons, which must be in line with the standard set by the Palermo Protocol, is required. Secondly, the international framework requires the criminalisation of all aspects and forms of trafficking in persons. Criminalisation must include the participation in, or involvement or facilitating, organising, directing or aiding and abetting a trafficking related offence and attempts to commit any of these crimes. The use or involvement of commercial carriers in child trafficking, must be prohibited. Such crimes must apply to both legal and natural persons. All trafficking offences require sanctions that take into account the gravity of the offences.

Thirdly, States must have measures in place to seize and confiscate the proceeds of trafficking and criminalise money laundering. Fourthly, States are required to criminalise corruption particularly involving public officials. Fifthly, States must promote international cooperation among States in preventing and combating child trafficking. Sixth is the establishment of provisions that protect and assist victims of trafficking, including compensation afforded to such victims. Finally, States are required to provide training and technical assistance to the relevant agencies and personnel in effectively addressing the organised crime aspects of child trafficking,

Having identified the key legal components for inclusion in the national trafficking legislation, chapter 4 addressed key research questions three, four and five by identifying the challenges to prosecuting child trafficking as an organised crime under the current legal framework and whether the Trafficking Act addressed such challenges and potential challenges. Finally, it was assessed whether the Trafficking Act brought South Africa in line with the country's international obligations in this regard.

A critical examination of the relevant provisions of the Children's Act, the Sexual Offences Amendment Act and the Trafficking Act, was conducted in relation to child trafficking. The Children's Act placed an extra evidentiary burden on the prosecution,

by requiring specific means to be proved in a child trafficking case, that is not required by international law. The Sexual Offences Amendment Act focussed only on trafficking for the purpose of sexual exploitation. The Trafficking Act addresses the problems in the above two statutes and provides a comprehensive definition of trafficking in persons that covers all forms of exploitation against all persons and eliminates the evidentiary burden created by the Children's Act.

While the Children's Act and the Sexual Offences Act extended the scope of liability of perpetrators in certain circumstances, the Trafficking Act enables the prosecution of each person involved in the trafficking chain, thus extending the net of criminal responsibility, in order for the response to be effective. The Trafficking Act specifically includes the prosecution of natural and juristic persons for trafficking related offences. The Trafficking Act criminalises the facilitation of and participation in trafficking in persons, including the use of the internet, the use of carriers to traffic children, debt bondage, and tampering with documents. All the offences include sanctions, which take into account the seriousness of the offences. Importantly the Trafficking Act includes provisions on compensation for victims.

The Trafficking Act makes provision for international cooperation. Although international cooperation can be a complicated and time-consuming procedure, it is indispensable for an effective prosecution against organised crime groups involved in transnational child trafficking. The analysis revealed further that the Children's Act and the Sexual Offences Amendment Act failed to provide any prevention measures, nor specialised trafficking units with trained investigators and prosecutors. Moreover, the sanctions in the abovementioned statutes were disparate.

Although the Trafficking Act addresses the prevention, protection and prosecution of trafficking comprehensively, it fails to provide for the establishment of specialised trafficking units with skilled and trained personnel. The international framework does not address the establishment of specialised trafficking units. It is submitted that both the international and national framework ought to include this requirement, as it is indispensable for an effective response to child trafficking.

The three counter-trafficking statutes in South Africa do not address money laundering, seizure and confiscation of proceeds of crime, corruption and specific provisions on witness protection before, during or after the court process. This is most probably due to existing legislation in the form of *inter alia* POCA, the Corruption Act and the Witness Protection Act, which comprehensively address such issues.

In summing up, the Trafficking Act has adequately bridged the gaps identified in the Children's Act and the Sexual Offences Act. It is a comprehensive law that is aligned with international standards. The Act addresses in detail key issues such as the criminalisation and penalisation of a broad category of persons involved in the trafficking chain, victim protection, compensation, international cooperation and seizure and confiscation of proceeds of crime. These provisions are fundamental in combatting organised child trafficking. A significant impact of the Act is that it establishes a comprehensive trafficking definition, which enables prosecutors to deal with all trafficking related crimes under one statute. It must be acknowledged that the Trafficking Act addresses most of the prosecution challenges outlined in this study.

In evaluating whether the key research questions have been addressed in this study, it can be said that the Trafficking Act comprehensively addresses all aspects of trafficking from an organised crime perspective and is compliant with international law in this regard. It is a major step towards ending impunity of traffickers, protects and assists children and provides a solid foundation for prosecutors to build strong cases against traffickers.

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17 March 2014

Adv. Valisha Dafel 200302858
School of Law
Howard College Campus

Dear Adv. Dafel

Protocol reference number: HSS/0855/013M

New Project title: The Prevention and Combating of Trafficking in Persons Act7 of 2013: A Critical Analysis of its Potential Impact on Child Trafficking Prosecutions in South Africa

Approval - Change of project title

I wish to confirm that your application dated 14 March 2014 in connection with the above mentioned project has been approved.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach/Methods must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the discipline/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully



.....
Dr Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Mrs M Couzens
cc Academic Leader Mrs Shannon Bosch
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

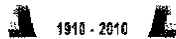
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