

# Towards a sharp prosecution sword to combat human trafficking: comparing the new South African counter-trafficking law with international prosecution standards\*

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## *Abstract*

Combating human trafficking and, in particular, the successful prosecution of this crime remains a daunting challenge worldwide. To address the global trade in human beings, the Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, established international minimum standards for combating and effectively prosecuting human trafficking. States party to these treaties – including South Africa – must comply with these standards in their domestic law. On 9 August 2015 South Africa's first comprehensive counter-trafficking law, the Prevention and Combating of Trafficking in Persons Act 7 of 2013, came into operation. This article seeks to contribute to the existing body of knowledge by assessing whether or not the new South African law complies with five key international standards on the prosecution of human trafficking. Although the study reveals some minor shortcomings, it is submitted that the new South African legislation fundamentally complies with the main international prosecutorial standards. Apart from complying with minimum standards, the legislation further includes a number of additional provisions which significantly extend the prosecution's arsenal in respect of various trafficking offences.

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## INTRODUCTION

Efforts to combat human trafficking have increased significantly during the past decade. The successful prosecution of this crime, however, continues to be a daunting task worldwide. The total global number of successful prosecutions of trafficking offenders remains negligible.<sup>1</sup> For this reason, Kangaspunta<sup>2</sup> has sounded a stern warning that human trafficking is still a crime of vast impunity. This disturbing reality is confirmed in the United States' Department of State's Trafficking-in-Persons Report of 2015 ('the Trafficking-in-Persons Report'). This report states that while 44 462 victims were identified globally in 2014, only 10 051 prosecutions were instituted, and a mere 4 443 convictions were secured.<sup>3</sup> More alarming is the fact that while 500 more prosecutions were instituted globally in 2014 than in 2013, the number of convictions has decreased by more than 1 300.<sup>4</sup>

Trafficking in persons, or human trafficking,<sup>5</sup> which in essence encompasses the 'wheeling and dealing' in human beings, is a reality also facing South Africa. South Africa has been identified as a source, transit and destination country.<sup>6</sup> For the seventh consecutive year, the Trafficking-in-Persons Report ranked South Africa as a 'tier 2' country. A 'tier 1' ranking was not achieved because the government did not comply with the minimum standards for the elimination of human trafficking set out in the United States' Trafficking Victims Protection Act.<sup>7</sup> Despite increasing counter-trafficking efforts, minimal trafficking convictions have been reported on the

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<sup>1</sup> Farrell, Owens & McDewitt 'New laws but few cases: understanding the challenges to the investigation and prosecution of human trafficking cases, (2014) 61/2 *Crime, Law and Social Change* 139 141; Farrell *et al Identifying challenges to improve the investigation and prosecution of state and local human trafficking cases* (2012) 4–5 8 16; United Nations Office on Drugs and Crime 'Global report on trafficking in persons' (2014) (hereafter 'UNODC Global report') 17 available at:

[http://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP\\_2014\\_full\\_report.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf) (last accessed 12 October 2015).

<sup>2</sup> Kangaspunta 'Was trafficking in persons really criminalised' (2015) 4 *Anti-trafficking Review* 84 86.

<sup>3</sup> United States Department of State 'Trafficking in persons report' (2015) (hereafter 'US Trafficking report (2015)') 48 available at:

<http://www.state.gov/documents/organization/245363.pdf> (last accessed 27 July 2015).

<sup>4</sup> US Trafficking report (2015) n 3 above at 48.

<sup>5</sup> The terms 'trafficking in persons' and 'human trafficking' are commonly used as synonyms in international and domestic literature. Therefore, these terms are used interchangeably in this article.

<sup>6</sup> US Trafficking report (2015) n 3 above at 309; Segrave 'Human trafficking with a focus on Africa' in: Peacock (ed) *Victimology in South Africa* (2013) 232–3.

<sup>7</sup> US Trafficking report (2015) n 3 above at 309.

African continent, including South Africa. There are no official national statistics on successful human trafficking prosecutions in South Africa.<sup>8</sup> However, the Trafficking-in-Persons Report states that in South Africa only three convictions on a charge of human trafficking were secured annually in both 2013 and 2014.<sup>9</sup> Failure to stop human trafficking in South Africa in past years may in large measure be attributed to a lack of comprehensive legal measures designed to prosecute perpetrators effectively.

To address this shortcoming, and to comply with international standards, a law-reform process was undertaken in order to develop counter-trafficking legislation for South Africa. In 2004 the South African Law Reform Commission initiated this process and finalised its report and proposals for a counter-trafficking law four years later.<sup>10</sup> During the subsequent parliamentary review process, the 2010 Prevention and Combating of Trafficking in Persons Bill was amended after in-depth deliberations. Finally, on 9 August 2015, South Africa's first comprehensive counter-trafficking law – the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the 'Trafficking Act') – came into operation.

The finalisation of the new South African Trafficking Act has been widely lauded. Some aspects of the Act have already been evaluated.<sup>11</sup> However, a critical assessment focusing specifically on its compliance with international prosecutorial standards has to date not been undertaken. This article aims to

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<sup>8</sup> *Id* at 309; Mofokeng & Olutola 'Expert reflections on challenges experienced to address human trafficking in South Africa prior to the implementation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013' (2014) 1 *Acta Criminologica* 132; Segrave n 6 above 232–3.

<sup>9</sup> US Trafficking report (2015) n 3 above at 309; Hepburn & Simon *Human trafficking around the world – hidden in plain sight* (2013) 286.

<sup>10</sup> Human Sciences Research Council (HSRC) 'Tsireledzani: understanding the dimensions of human trafficking in South Africa' (2010) 44 available at: <http://www.hsrc.ac.za/Document-3562.phtml> (last accessed 3 March 2010); Najemy 'South Africa's approach to the global human trafficking crisis: an analysis of the proposed legislation and the prospects of implementation' (2010) 9/1 *Washington University Global Studies Law Review* 172.

<sup>11</sup> Mollema 'Combating human trafficking in South Africa: a critical evaluation of the Prevention and Combating of Trafficking in Persons Act 7 of 2013' (2014) 77 *Journal of Contemporary Roman-Dutch Law*; Mollema 'Follow the leader: best practices to combat human trafficking in the United States' (2015) 48/1 *CILSA* 1; Kreston 'Human trafficking legislation in South Africa: consent, coercion and consequences' (2014) 1 *South African Journal of Criminal Justice*; Mofokeng & Olutola n 8 above; Iroanya 'Human trafficking with specific reference to South African and Mozambican counter-trafficking legislation' (2014) 27/2 *Acta Criminologica* 102.

fill this gap. Such an assessment of compliance with international standards has been carried out in other jurisdictions and is critical in ensuring effective counter-trafficking laws.<sup>12</sup> It is against this background that this article strives to contribute to the existing body of knowledge by assessing whether or not the new South African Trafficking Act complies with key international standards governing the prosecution of human trafficking.

A critical element of the holistic approach to combating human trafficking is the successful prosecution of offenders. With a view to the effective prosecution of this crime, the Convention against Transnational Organised Crime ('the Organised Crime Convention'/'the Convention') and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('the Palermo Protocol'/'the Protocol') set international minimum standards for combating human trafficking. Najemy<sup>13</sup> strongly emphasises that the signatories to these treaties, including South Africa, must meet these international standards by 'enacting domestic legislation that provides individualised inter-state and intra-state solutions to the global problem of human trafficking'.

It is widely accepted that each state party needs a domestic legal response aligned with international standards as a first step in successfully addressing the trade in human beings.<sup>14</sup> This article therefore seeks to determine whether the South African Trafficking Act complies with international standards designed to provide the prosecution with a sharp sword to end the impunity with which traffickers ply their trade. Firstly, five key international prosecutorial standards on human trafficking, as set out in the Convention and its Protocol, are identified and clarified. Thereafter, those provisions in the new South African Trafficking Act which focus on prosecutorial aspects of human trafficking are analysed and measured against the identified international standards. Finally, submissions are made as to whether and to what extent the South African counter-trafficking law complies with international standards on the prosecution of human trafficking.

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<sup>12</sup> Thomas 'Responses to human trafficking in Bangladesh, India, Nepal and Sri Lanka' (2011) available at: [http://www.unodc.org/documents/human-trafficking/2011/Responses\\_to\\_HumanTrafficking\\_in\\_Bangladesh\\_India\\_Nepal\\_and\\_Sri\\_Lanka](http://www.unodc.org/documents/human-trafficking/2011/Responses_to_HumanTrafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka) (last accessed 3 March 2014) 1–6 71–4.

<sup>13</sup> Najemy n 10 above at 182.

<sup>14</sup> Farrell *et al* n 1 above at 141; Thomas n 12 above at 4.

## INTERNATIONAL STANDARDS FOR PROSECUTING HUMAN TRAFFICKING

### Introduction

International instruments have established minimum standards with which domestic legal responses must comply in order to combat human trafficking effectively.<sup>15</sup> Jordan<sup>16</sup> points out that the Organised Crime Convention,<sup>17</sup> the Palermo Protocol,<sup>18</sup> and the Official Interpretative Notes (*Travaux préparatoires*)<sup>19</sup> to the Protocol encompass the international obligations and standards relevant to human trafficking. The Palermo Protocol, which is one of the three supplementary protocols to the Convention, comprises the international community's response designed to introduce a truly global approach to the combating of human trafficking. The United Nations adopted the Palermo Protocol in 2000 and it came into force on 25 December 2003.<sup>20</sup> Numerous states have since adopted legislation to incorporate the identified international standards in their domestic law.

The Organised Crime Convention and its three protocols effectively supplement each other.<sup>21</sup> For this reason, the Palermo Protocol must be interpreted together with the parent Convention unless the purpose of the

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<sup>15</sup> Jansson *Modern slavery – a comparative study of the definition of trafficking in persons* (2015) 73.

<sup>16</sup> Jordan 'The annotated guide to the complete UN trafficking protocol' (2002) 2 available at <http://www.walnet.org/csis/papers/UN-TRAFFICK.PDF> (last accessed 13 November 2008).

<sup>17</sup> United Nations Convention against Transnational Organized Crime (2000) (hereafter 'UN Convention') available at: [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf) (last accessed 3 March 2008).

<sup>18</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereafter 'UN Protocol') available at: [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) (last accessed 11 March 2008).

<sup>19</sup> United Nations Office on Drugs and Crime 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the protocols thereto (2006) (hereafter 'UNODC Travaux Préparatoires') available at: [http://www.unodc.org/pdf/ctoccop\\_2006/04-60074\\_ebook-e.pdf](http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf) (last accessed 18 November 2008).

<sup>20</sup> United Nations Office on Drugs and Crime 'Toolkit to combat trafficking in persons – global programme against trafficking in human beings' (2008) (hereafter 'UNODC Toolkit') 1–2; Segrave n 6 above at 228.

<sup>21</sup> Jansson n 15 above at 69; Gallagher *The international law of human trafficking* (2010) (hereafter 'Gallagher *International law*') 73–4.

Protocol requires otherwise.<sup>22</sup> The relationship between the two treaties further implies that the Palermo-Protocol offences are to be regarded as offences established in accordance with the Organised Crime Convention.<sup>23</sup> As indicated above, it is important to note that the mandatory requirements in the Convention and the Protocol constitute minimum standards with which the domestic law of state parties must comply.<sup>24</sup> However, domestic responses may be more stringent.<sup>25</sup> In addition, the Organised Crime Convention requires state parties to broaden the scope of domestic responses by including domestic offences ‘independently of the transnational nature or the involvement of an organized criminal group’.<sup>26</sup> Jordan<sup>27</sup> rightly concludes that

domestic laws should go further than the Trafficking [or Palermo] Protocol and include all domestic and cross-border trafficking and should punish individual traffickers as well as organised criminal groups.

The Palermo Protocol deals comprehensively with trafficking in persons, irrespective of the age or gender of victims, and covers all forms of trafficking.<sup>28</sup>

The Protocol has two main purposes. Firstly, it underpins the well-known international three-part or ‘3P’ approach to combating human trafficking holistically by encompassing the prevention of human trafficking, the prosecution and punishment of traffickers, as well as the protection of

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<sup>22</sup> Article 37.4 of the Convention and article 1 of the Palermo Protocol; UNODC Toolkit n 20 above at 12.

<sup>23</sup> Article 1.3 of the Palermo Protocol; Gallagher n 21 above at 74.

<sup>24</sup> United Nations Office on Drugs and Crime ‘Legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the protocols thereto (hereafter ‘UNODC Legislative guides’)(2004) 255; HSRC n 10 above at 20.

<sup>25</sup> Jansson n 15 above at 73; HSRC n 10 above at 20; UNODC Legislative guides n 24 above at 255. The Convention provides, in article 34.3, that domestic measures may be stricter or more severe than Convention provisions.

<sup>26</sup> Article 34.2; Jansson n 15 above at 79. Article 34(2): ‘The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention...’.

<sup>27</sup> Jordan n 16 above at 13.

<sup>28</sup> Iroanya n 11 above at 107; UNODC Legislative guides n 24 above at 257.

victims.<sup>29</sup> Secondly, the Protocol aims to promote cooperation among states parties in meeting these aims.<sup>30</sup>

As indicated above, the Organised Crime Convention and the Palermo Protocol establish numerous standards pertaining to the combating of human trafficking with which state parties' domestic laws must comply.<sup>31</sup> This article focuses only on those standards which deal primarily with the prosecution of the crime of human-trafficking.

### **Key minimum standards for prosecuting human trafficking**

National legal frameworks worldwide must comply with the following key international standards for the prosecution of human trafficking:

#### *Criminalisation of human trafficking and associated conduct*

The first core standard is that states must enact domestic pieces of legislation which criminalise human trafficking and other offences associated with the principal offence.<sup>32</sup> Marks and Clapham<sup>33</sup> summarise article 5 of the Protocol as the requirement to criminalise the following behaviour in domestic law:

- (a) the intentional trafficking in persons;
- (b) attempting to commit trafficking in persons;
- (c) participating as an accomplice in trafficking in persons; and
- (d) organising or directing other persons to commit trafficking in persons.

The Protocol adds a further criminalisation obligation for commercial carriers aimed at stemming the use of transport services in the commission of human trafficking.<sup>34</sup> State parties are required to introduce sanctions for

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<sup>29</sup> Gallagher n 21 above at 79; United States Department of State 'Trafficking in persons report' 2010 (hereafter 'US Trafficking report (2010)') 5. The increasing need for different role players to form partnerships to combat human trafficking effectively led to the recommendation that a fourth P, namely 'partnerships, be included – United Nations Global Initiative to Fight Human Trafficking 'The Vienna Forum report: a way forward to combat human trafficking' (2008) (hereafter 'UN GIFT') 59; US Trafficking report (2010) at 15.

<sup>30</sup> Article 2; Gallagher 'Human rights and the new UN protocols on trafficking and migrant smuggling: a preliminary analysis' (hereafter 'Gallagher Human rights') (2001) 23 *Human Rights Quarterly* 983; UNODC Legislative guides n 24 above at 257.

<sup>31</sup> Iroanya n 11 above at 108.

<sup>32</sup> Kangaspunta n 2 above at 82.

<sup>33</sup> Marks & Clapham *International human rights lexicon* (2005) 424.

<sup>34</sup> Article 11(2) & (3).

a commercial carrier, ‘including any transportation company or the owner or operator of any means of transport’, which fails to ascertain that its passengers have the necessary travel documents to enter receiving [receiving as is specifically provided for in art 11(3)]/destination states.<sup>35</sup>

#### *Liability of natural and legal persons*

The Palermo Protocol does not expressly oblige states parties to prosecute both natural and juristic persons for conduct which constitutes an offence in terms of the Protocol. However, as highlighted above, the Protocol must be read and applied together with the provisions of the Organized Crime Convention. This Convention clearly obliges state parties to establish the liability of both natural and legal persons involved in Convention crimes.<sup>36</sup> Compliance with this standard is important in that human trafficking and related offences are often committed not only by natural persons, but also through legal entities such as a travel or employment agency trafficking human beings.<sup>37</sup>

#### *Definitional elements of the crime of human trafficking*

A further key minimum standard relevant to the prosecution of human trafficking is the requirement that the essence of the Protocol’s definition of ‘trafficking in persons’ be included in domestic law.<sup>38</sup> Compliance with this definition is essential for the prosecution to clarify what conduct constitutes the crime of human trafficking.

#### *Elements of the crime: adult trafficking*

The elements of the offence of human trafficking are found in the Palermo Protocol’s internationally agreed-upon definition. The definition provides that ‘trafficking in persons’ means:

- (a) the recruitment, transportation, transfer, harbouring or receipt of persons;
- (b) 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

<sup>35</sup> Article 11(2)–(4); Jordan n 16 above at 31–2; HSRC n 10 above at 22; Thomas n 12 above at ix.

<sup>36</sup> Article 10(1); Gallagher *International law* n 21 above at 80.

<sup>37</sup> South African Law Reform Commission ‘Trafficking in persons Project 131’ (2006) (hereafter ‘SALRC’) 11 available at: <http://www.doj.gov.za/salrc/dpapers.htm> (last accessed 11 March 2008).

<sup>38</sup> Gallagher ‘Two cheers for the trafficking protocol’ (2015) (hereafter ‘Gallagher Trafficking protocol’) 4 *Anti-trafficking Review* 16.



of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and (c) for the purpose of exploitation.<sup>39</sup>

The definition contains three basic components: the prohibited act or trade measure of the trafficker; the means used by the trafficker to commit the act; and the exploitative purpose of the trafficker.<sup>40</sup> Stated differently, the definition describes the crime by stipulating what is done (the conduct), how it is done (the method used), and why it is done (the purpose).<sup>41</sup> The definition encompasses the usual human trafficking processes which typically involve the use of illegal methods to recruit or capture victims, followed by moving them, and then harbouring them at the destination location in order to exploit them for the benefit of the trafficker. The required exploitative purpose includes any type of exploitation, such as sexual exploitation, forced labour, slavery, servitude, or the removal of body parts.<sup>42</sup> All three of the components of the definition must be proven to constitute the trafficking of an adult person.<sup>43</sup>

*Elements of the crime: child trafficking*

The elements of the trafficking crime differ when a child, as opposed to an adult, is trafficked. In cases where a child, who is defined as a person under the age of eighteen years,<sup>44</sup> is trafficked, the Palermo Protocol provides as follows

[t]he 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.<sup>45</sup>

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<sup>39</sup> Article 3(a); Agarwal *Combating child trafficking* (2008) 31; Bien-Aimé & Rutman ‘International law and human trafficking’ in: Goodman & Leidholt (eds) *Lawyers’ manual on human trafficking: pursuing justice for victims* (2011) 65–7; Thomas n 12 above at ix.

<sup>40</sup> Jansson n 15 above at 81; Gallagher *International law* n 21 above at 29–42; UNODC Legislative guides n 24 above at 268; Bien-Aimé & Rutman n 39 above at 66.

<sup>41</sup> UNODC Toolkit n 20 above at 2, 96.

<sup>42</sup> Article 3(a); Segrave n 6 above at 228.

<sup>43</sup> Jansson n 15 above at 81–5; Horne ‘The investigation of human trafficking: an impossible mission without elemental identification of the crime’ (2011) 24/3 *Acta Criminologica* 23.

<sup>44</sup> Article 3(d).

<sup>45</sup> Article 3(c).

The Protocol therefore waives the means-element in cases where children are trafficked. Consequently, the prosecution needs to prove only two definitional elements: the prohibited action; and exploitative purpose to secure a conviction for the trafficking of children.<sup>46</sup>

*Validity of a consent-based defence*

In the prosecution of human trafficking, the trafficker could conceivably endeavour to raise the defence that the victim consented to the intended exploitation. Jordan, however, points out that valid consent is only possible and legally recognisable when ‘all the relevant facts are known and the person is free to consent or not’.<sup>47</sup> In line with this international legal norm,<sup>48</sup> the Palermo Protocol unambiguously provides that consent to the intended exploitation is irrelevant where such consent was obtained by any of the prohibited means listed in the Protocol.<sup>49</sup> The ‘means’ component which the prosecution must prove in adult trafficking includes non-consensual, coercive, abusive, and deceptive methods used by the perpetrators. Accordingly, the presence of the means component in such cases will automatically exclude consent.<sup>50</sup> Gallagher concisely summarises the issue of consent-based defences as follows

[t]he ‘means’ of trafficking in adults – an inherent part of the trafficking definition – will operate to nullify consent. As such means are not required to be established in relation to trafficking in children, consensual trafficking of either adults or children is a legal impossibility.<sup>51</sup>

Another situation in which consent may be nullified arises where adult victims initially consent, but the subsequent deceptive, abusive or coercive behaviour of their traffickers nullifies the agreement.<sup>52</sup> For example, a person may agree to be employed by the trafficker without the latter using any improper means. However, the person may later realise that he or she has

<sup>46</sup> Gallagher *Human rights* n 30 above at 987; Agarwal n 39 above at 31.

<sup>47</sup> Jordan n 16 above at 11.

<sup>48</sup> United Nations Office on Drugs and Crime ‘Model law for trafficking in persons’ (2009) (hereafter ‘UNODC Model law’) 34 available at: [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf) (last accessed 14 July 2010).

<sup>49</sup> Article 3(b); Gallagher *International law* n 21 above at 28; Bien-Aimé & Rutman n 39 above at 67.

<sup>50</sup> Jansson n 15 above at 86.

<sup>51</sup> Gallagher n 21 above at 47; Bien-Aimé & Rutman n 39 above at 68.

<sup>52</sup> Horne n 43 above at 24.

been misled about the nature or conditions of the work. In such cases, the consent is not legally binding, because

consent of the victim at one stage of the process cannot be taken as consent at all stages of the process and without consent at every stage of the process, trafficking has taken place.<sup>53</sup>

From the preceding discussion it is clear that domestic law of state parties must comply with the Protocol provision providing that is no defence to a charge of human trafficking.

#### *Appropriate punishment*

A further international standard relevant in the last phase of the prosecution process deals with the punishment of convicted offenders. On this issue, Kangaspunta<sup>54</sup> posits that

the real intolerance against human trafficking should be demonstrated by holding criminals liable to sanctions that take into account the gravity of the human trafficking offences combined with proper compensation to victims of trafficking.

The Organised Crime Convention explicitly requires state parties to ensure that appropriate and stringent sanctions are imposed.<sup>55</sup> Punishment that fails to take the seriousness of the crime of human-trafficking into consideration does not deter perpetrators.<sup>56</sup> While the Palermo Protocol lacks direction on the severity of sentences to be imposed, a provision in the Convention does make it compulsory to impose sanctions ‘that take into account the gravity of that offence’.<sup>57</sup> In addition, the Convention enjoins state parties to impose ‘effective, proportionate and dissuasive criminal or non-criminal sanctions,

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<sup>53</sup> UN GIFT n 29 above at 5; UNODC Toolkit n 20 above at 5–6.

<sup>54</sup> Kangaspunta n 2 above at 86.

<sup>55</sup> Article 11.1; Gallagher *Human rights* n 30 above at 979; Gallagher *International law* n 21 above at 80.

<sup>56</sup> Jansson n 15 at 9; UN GIFT n 29 at 27.

<sup>57</sup> Article 11.1; David ‘Law enforcement responses to trafficking in persons: challenges and emerging good practice’ (2007) 347 *Trends and Issues in Crime and Criminal Justice* 1; UN GIFT n 29 at 27; UNODC Toolkit n 20 at 112; UNODC Legislative guides n 24 at 273; Gallagher & Holmes ‘Developing an effective criminal justice response to human trafficking – lessons from the front line’ (2008) 18/3 *International Criminal Justice Review* 322.

including monetary sanctions’ in respect of legal persons committing crimes in terms of the Convention.<sup>58</sup>

In essence, international law mandates that national penal codes must provide for sanctions that specifically ‘take account of, and are proportionate to, the gravity of the offence’.<sup>59</sup> Accordingly, a proper criminal-justice response must not only provide for the securing of a conviction, but must also mete out appropriate criminal punishment in line with international law.

## **THE SOUTH AFRICAN LEGISLATIVE RESPONSE WITH REGARD TO THE PROSECUTION OF HUMAN TRAFFICKING**

### **Introduction**

In 2004 South Africa ratified both the Organised Crime Convention and the supplementing Palermo Protocol.<sup>60</sup> Consequently, South Africa incurred an obligation to adopt domestic counter-trafficking legislation to give effect to the obligations set out in these treaties.<sup>61</sup> Farrel and others emphasise that ‘legislation enabling and supporting the prosecution of specific offenses is a necessary first step to [a] criminal justice system response’.<sup>62</sup>

South Africa initiated the process of complying with international counter-trafficking obligations by introducing interim provisions in existing legislation pending the finalisation of comprehensive legislation. This interim counter-trafficking legislative framework was, however, fragmented and non-compliant with international standards in that it did not capture all forms of human trafficking.<sup>63</sup> On the one hand, the Children’s Act 38 of 2005 criminalised trafficking, but only if committed against children.<sup>64</sup> On the other hand, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, criminalised the trafficking of adults and children, but only for purposes of sexual exploitation.<sup>65</sup> These interim

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<sup>58</sup> Article 10.4.

<sup>59</sup> Gallagher & Holmes n 57 above at 322.

<sup>60</sup> SALRC n 37 above at 11–12; Minnie ‘Sexual offences against children’ in: Boezaart (ed) *Child law in South Africa* (2009) 200.

<sup>61</sup> Minnie n 60 above at 200.

<sup>62</sup> Farrell *et al* n 1 above at 9.

<sup>63</sup> Mollema n 11 above at 247; Hepburn & Simon n 9 above at 288.

<sup>64</sup> Section 284, read with the definition of ‘trafficking’ in section 1. Najemy n 10 above at 180–1.

<sup>65</sup> Section 71, read with the definition of ‘trafficking’ in s 70(2)(b); Soobramanien ‘“Bought at a price”: trafficking in human beings – a brief study of the law in South Africa and the United States’ (2011) 3 *South African Journal of Criminal Justice* 252.

legislative responses offered no comprehensive solution to the human-trafficking problem and were therefore an ineffective tool to prosecute all forms of trafficking.<sup>66</sup>

On 9 August 2015, however, a long-awaited milestone was reached in the battle against human trafficking in South Africa. The Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the 'Trafficking Act'), which had been promulgated more than two years earlier, finally came into operation.<sup>67</sup> Regrettably, three sections on protection and assistance measures concerning foreign victims of trafficking have not yet come into force.<sup>68</sup> Notwithstanding this concern, that the previous fragmented interim provisions on trafficking have been repealed and replaced by a single, stand-alone statute to combat human trafficking comprehensively is a positive step. The new Act is indeed a welcome advance in the fight against human trafficking in that it addresses human trafficking holistically and comprehensively by covering all forms of trafficking and by protecting all trafficked persons irrespective of age or gender.

### **Outline of the Prevention and Combating of Trafficking in Persons Act 7 of 2013**

Although the focus of this article is on the prosecutorial provisions in the South African Trafficking Act, a brief overview of the entire Act is provided as background. The Act, consisting of ten chapters and a schedule on repealed and amended laws, may be divided into four main parts. The first and introductory part includes definitions and interpretations of concepts so as to promote legal certainty. Of importance is that this part also sets out the objects of the Act that underpin the holistic approach to combating this crime. This holistic approach is characterised by an acceptance of the '3P-approach' focusing on prosecution, protection and prevention issues.<sup>69</sup> Consequently, the Act provides for the prosecution of perpetrators, appropriate punishment of perpetrators, protection of and assistance for trafficked victims, and, to a lesser extent, the prevention of human trafficking.

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<sup>66</sup> Kruger 'In the firing line: the South African legislative response designed to combat human trafficking' (2012) 2 *South African Journal of Criminal Justice* 258–68.

<sup>67</sup> Republic of South Africa 'Commencement of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013)' Proclamation R 32 *Government Gazette* 39078, 7 August 2015 (hereafter 'RSA') 4.

<sup>68</sup> *Ibid.*

<sup>69</sup> Sections 1–3 of Act 7 of 2013.

The second part of the Act, comprising Chapter 2, deals with prosecution-related matters, including offences and penalties, and falls squarely within the framework of our current discussion. The third part – Chapters 3 to 7 – deals primarily with victim-related matters. This voluminous part of the Act provides for the identification and protection of victims, the accreditation of organisations that provide services for victims, and also for the repatriation of victims. In addition, it makes provision for courts to order that convicted perpetrators pay compensation to their victims. With regard to foreign victims who are required to assist in the investigation and prosecution of criminal cases against perpetrators, the Act provides for protective measures and a visitor's visa for a recovery and reflection period. The fourth and last part of the Act covers measures addressing the administration and implementation of the Act, and general and miscellaneous matters. This outline of the Trafficking Act therefore illustrates that, for the first time, South Africa's counter-trafficking response is brought together in a single, comprehensive statute – an essential instrument for combating this present-day form of slavery.

### **The South African Trafficking Act: Compliance assessment with regard to international standards for prosecuting human trafficking**

The new Trafficking Act has been widely lauded for closing loopholes in the interim legislative provisions. However, this article seeks to assess critically whether or not the Trafficking Act fully complies with key international standards governing the prosecution of human trafficking.

#### *Criminalisation of human trafficking and associated conduct*

A principal standard established in the Palermo Protocol relating to the prosecution of human trafficking is the requirement that the intentional trafficking of all persons be criminalised in domestic law.<sup>70</sup> The Trafficking Act creates the principal offence of trafficking in persons in compliance with this standard. For the first time South African law criminalises, comprehensively, all types of human trafficking, irrespective of the age or gender of the victim.<sup>71</sup> Furthermore, the Act does not require transnationality or the involvement of organised criminal groups in any of the trafficking offences, thereby complying with the requirements of the Organised Crime Convention.<sup>72</sup> Section 4(1) of the Act prohibits human

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<sup>70</sup> Article 5.1.

<sup>71</sup> Section 4(1).

<sup>72</sup> Article 34.2.

trafficking committed within or across the borders of the Republic of South Africa by ‘any person’, and not only organised criminal groups.

However, unlike the Protocol, the Trafficking Act does not specifically state that intention is the required form of fault for human trafficking. In contrast, for most of the other established offences associated with human trafficking – such as debt bondage, tampering with documents, and using the services of trafficked victims – intention is the form of fault expressly required by the Act. Arguably, the legislature has waived the requirement of intention as the only form of fault, and has thereby provided for the possibility of a conviction in circumstances where the state can only prove negligence and not intention. In this regard, Jansson<sup>73</sup> points out that both the Palermo Protocol and its parent Convention require that only intentional conduct must be criminalised. In sum, although state parties need not criminalise negligent conduct, they are not prohibited from doing so.<sup>74</sup>

As alluded to above, the Protocol requires that state parties criminalise not only the principal crime of human trafficking, but also conduct that constitutes ‘involvement in human trafficking’.<sup>75</sup> The Trafficking Act explicitly criminalises involvement in human trafficking, namely attempts to commit human trafficking and any related offence created in Chapter 2, as well as participation therein.<sup>76</sup> Furthermore, conduct inciting or directing others to commit such crimes and conduct amounting to conspiring with others to commit these crimes are also criminalised.<sup>77</sup> It must be noted that the inclusion of these offences relating to involvement in human-trafficking crimes is unnecessary, as South African law prohibits not only completed crimes, but also ‘certain preceding forms of conduct directed at the commission of a crime, namely attempt, conspiracy and incitement to commit a crime’.<sup>78</sup>

These inchoate crimes are recognised as substantive crimes in South African law, and, in terms of the Riotous Assemblies Act 17 of 1956, attempt, conspiracy and incitement apply to all statutory offences.<sup>79</sup> Accordingly, the Trafficking Act’s criminalisation of involvement in Chapter 2 offences is

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<sup>73</sup> Jansson n 15 above at 85–6.

<sup>74</sup> *Id* at 86.

<sup>75</sup> Article 5.2.

<sup>76</sup> Section 10(1)(a).

<sup>77</sup> Section 10(1)(b).

<sup>78</sup> Snyman *Criminal law* (2014) 275; Burchell *Principles of criminal law* (2013) 463–535.

<sup>79</sup> Section 18.

largely a duplication of the provision in the Riotous Assemblies Act.<sup>80</sup> However, the Trafficking Act does broaden the offence of incitement somewhat by including not only the conduct listed in the Riotous Assemblies Act, but also other conduct, namely directing, aiding, promoting, advising and encouraging others to commit human-trafficking offences. This broadening of the incitement offence may be helpful in prosecuting more persons who form part of the trafficking ring.

A point of concern was raised that the Protocol's requirement that the 'organising' of others to commit human trafficking be specifically criminalised was not met in either the Riotous Assemblies Act or in section 10 of the Trafficking Act. This is a serious omission as without such inclusion key trafficking agents who organise and supervise others to commit this 'high profit-low risk' crime cannot be prosecuted. Such organisers, while by and large remaining safely out of reach of law enforcement, continue to profit from the illegal trafficking activities of others.<sup>81</sup> Although the Trafficking Act criminalises various forms of conduct that may be associated with 'organising' – for example, inciting, instigating, commanding, aiding, promoting, advising, encouraging, or procuring – none of these terms is entirely synonymous with 'organising'. Mollema<sup>82</sup> criticises the Trafficking Act for not criminalising the 'organising' of others to commit human trafficking as is required by the Palermo Protocol. However, it is important to note that the legislature in fact addressed this concern. The Act specifically criminalises the 'organising' of Chapter 2 offences under criminal conduct that facilitates the crime.<sup>83</sup> It is, therefore, clear that the Trafficking Act fully complies with the Protocol's minimum standard of criminalising all conduct that constitutes involvement in human trafficking.

Although not in strictly mandatory terms, the Palermo Protocol requires that commercial carriers that cross international borders establish whether their passengers are in possession of the required travel documents in order to curb collusion between carriers and traffickers.<sup>84</sup> This duty is to be enforced by instituting sanctions for its violation. The Trafficking Act does not place such a duty on carriers. However, a similar duty is already incorporated in section 35(9) of the amended Immigration Act 13 of 2002. This provision

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<sup>80</sup> Section 18(2)(a); Mollema n 11 above at 252–3.

<sup>81</sup> Gallagher *Human rights* n 30 above at 977.

<sup>82</sup> Mollema n 11 above at 253 fn 32.

<sup>83</sup> Section 8(1)(d).

<sup>84</sup> Section 11(2)–(3).



requires that a person in charge of a ‘conveyance’ – which includes any means of transport – must ensure that any ‘foreigner’ conveyed to a port of entry holds a valid passport and, if so required, a visa. The shortcoming seems to be that the duty is restricted to foreigners and is not enforceable when a South African citizen is transported across an international border without valid travel documents. Therefore, the provision in the Immigration Act is not fully compliant with the Protocol. The maximum penalty for negligently contravening section 35(9) of the Immigration Act is an administrative fine, which may not be an effective deterrent to trafficking rings that transport trafficked persons illegally across borders.

The South African Trafficking Act does, however, include another provision on carriers with a more direct link to human trafficking. The Act provides that a ‘carrier’ that transports a passenger within or across the borders of South Africa commits an offence if, at the time of transportation, such carrier knows, or ought reasonably to know, that the passenger is a victim of trafficking.<sup>85</sup> It is significant that the Trafficking Act has opted to use the term ‘carrier’, instead of ‘commercial carrier’ as the Protocol does. The term ‘carrier’ has a broader meaning than its counterpart in the Protocol as it is not limited to carriers that transport people for commercial gain.<sup>86</sup> The expanded meaning of the term ‘carrier’ is to be welcomed in that it brings both commercial and private carriers that provide transportation so as to promote human trafficking within the scope of the provision.

Apart from efforts to comply with the minimum standard to establish certain trafficking offences, the Trafficking Act goes further by creating numerous additional offences related to human trafficking.

Firstly, besides the principal trafficking offence, the Act also criminalises the legal or illegal adoption of a child or the conclusion of a forced marriage with another person if the purpose is to exploit such adopted child or person forced into marriage.<sup>87</sup>

Secondly, offences are created relating to the unlawful control of victims. It is well-known that traffickers take various measures to keep victims under

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<sup>85</sup> Section 9(1).

<sup>86</sup> Section 1.

<sup>87</sup> Section 4(2); Jansson n 15 above at 83–4; see also Gallagher *Trafficking protocol* n 38 above at 29–30 for a critical view on including these offences as trafficking-related offences.

their control in order to ensure ongoing illegal profit from their victims' exploitation.<sup>88</sup> Some of the methods of control include confiscating victims' passports, identification, or other travel documents. Perpetrators also coerce victims to enter into debt bondage, in terms of which they are required to pay off alleged debts through their labour. The criminalisation of debt bondage carries a stringent sentence of up to fifteen years' imprisonment, while a sentence of up to ten years' imprisonment may be imposed for the confiscation of or tampering with victims' documents.

Of importance is that a further very broad offence is instituted which criminalises all conduct that finances, controls, or organises the commission of offences established under the Trafficking Act.<sup>89</sup> This offence is vitally important, because, as David rightly points out, human trafficking is not a single, static incident but usually a process involving 'multiple offenders and crime sites across several jurisdictions'.<sup>90</sup> This comprehensive offence introduced by the Act will enable the prosecution of numerous offenders who play a part in financing, planning, or controlling the crime – especially the kingpins who do not commit the trafficking actions themselves but organise and finance others to do so. These trafficking agents, who are often part of an organised criminal syndicate, typically profit significantly and with impunity from trafficking offences.<sup>91</sup>

Finally, the inclusion of new offences to combat the demand for the services of victims of trafficking from three angles is to be welcomed. Firstly, the Trafficking Act provides that end users who create the market for the services of trafficked persons can be prosecuted. A person who knowingly uses or benefits, financially or otherwise, from the services of trafficked persons commits an offence and may be imprisoned for up to fifteen years.<sup>92</sup> Therefore, apart from enabling the prosecution to take action against perpetrators on the supply side of human trafficking, the Trafficking Act also brings the demand side within the reach of the prosecution by criminalising the use of the services of trafficked persons and by providing proportionate and deterrent sanctions.<sup>93</sup>

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<sup>88</sup> Goodman 'What we know about human trafficking: research and resources' in: Goodman & Leidholt (eds) *Lawyers' manual on human trafficking: pursuing justice for victims* (2011) 10.

<sup>89</sup> Section 8(1)(d).

<sup>90</sup> David n 57 above at 2.

<sup>91</sup> Gallagher *Human rights* n 30 above at 977; UN GIFT n 29 above at 15.

<sup>92</sup> Section 7.

<sup>93</sup> Mollema n 11 above at 253.

Secondly, the Trafficking Act also targets the demand for trafficking victims by criminalising conduct that facilitates human trafficking.<sup>94</sup> For example, a person who does not exploit a trafficked person, but who intentionally leases or subleases any building for the purpose of harbouring trafficked persons, commits an offence.

The Act further deals with the demand for trafficked persons by criminalising conduct related to advertising, publishing, broadcasting and distributing information designed to promote human trafficking. This offence covers, for example, the recruitment of trafficked victims through the print and online media, by means of radio and television broadcasts, and by e-mail or cell phone communication (texting). Yu<sup>95</sup> rightly points out that internet marketing provides ‘convenience, cost efficiency, and anonymity’, and, in addition, reaches a far bigger audience.<sup>96</sup> In fact, billions of internet users worldwide have access to online advertising. For this reason, the South African intervention in this regard is critical and indeed welcomed.

New technology, combined with the internet, has given rise to new opportunities for human trafficking.<sup>97</sup> In 2013 Terre des Hommes published a study on a new form of online commercial child exploitation: webcam child sex tourism. This type of tourism amounts to adult tourists ‘travelling’ to another destination via the internet and, in return for payment or other rewards, being allowed to view and even live-stream video footage of children performing sexual acts in front of the webcam.<sup>98</sup> This type of sexual exploitation of the child – which is essentially a combination of child pornography and child prostitution – involves no physical contact between the child victim and the perpetrator.<sup>99</sup> In order to illustrate the demand for webcam sex, researchers from Terre des Hommes, Netherlands, created a computer-generated image of a ten-year-old Filipino girl, Sweetie. After the researchers had logged into public chat rooms on the internet under the alias ‘Sweetie’, more than 20 000 people contacted the ‘girl’ within a period of

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<sup>94</sup> Section 8.

<sup>95</sup> Yu ‘Human trafficking and the Internet’ in: Palmiotto (ed) *Combating human trafficking – a multidisciplinary approach* (2015) 66.

<sup>96</sup> Aronowitz *Human trafficking, human misery – the global trade in human beings* (2009) 129; Goodman n 88 above at 8.

<sup>97</sup> Yu n 95 above at 66–9.

<sup>98</sup> Terre des Hommes ‘Fullscreen on view – an exploratory study on the background and psychosocial consequences of webcam child sex tourism in the Philippines’ (2013) 5, 20 available at: [http://www.terredeshommes.nl/upload/dossier/download/TdH-Fullscreen\\_on\\_View-Webversie\\_def.pdf](http://www.terredeshommes.nl/upload/dossier/download/TdH-Fullscreen_on_View-Webversie_def.pdf) (last accessed 6 November 2013).

<sup>99</sup> Yu n 95 above at 68.

two months, each willing to pay to watch her perform sexual acts live online.<sup>100</sup> Webcam child-sex tourism offers new opportunities for traffickers to exploit children to garner illegal profits. It is reported that traffickers keep hired or trafficked children, often against their will, in so-called cyber-sex dens to exploit them for webcam sex shows at the request of online ‘tourists’.<sup>101</sup> Against this background, it is laudable that section 8 of the South African Trafficking Act empowers the prosecutorial authority to act against trafficking agents who use online advertising and communication to facilitate human trafficking and related trafficking activities such as child-sex tourism and webcam sex shows.<sup>102</sup> The Act goes further by introducing innovative offences relating to the providers of electronic communication services. Although these service providers do not have a general obligation to monitor the data they transmit and store, the Trafficking Act provides that they must take reasonable steps to prevent the use of their service for hosting information that promotes trafficking.<sup>103</sup> These service providers, when aware of customers’ online trafficking activities, can also be prosecuted if they do not report such activities to the police and do not take reasonable steps to preserve evidence in this regard.<sup>104</sup>

In conclusion, Gallagher and Holmes<sup>105</sup> argue that an important criterion in assessing a domestic legal framework’s effectiveness in terms of international standards is ‘whether such national penal code criminalises all aspects of trafficking as this crime has been defined by the international community’. Measured against this criterion, the Trafficking Act fundamentally complies in that human trafficking as set out in the Palermo Protocol is fully criminalised. In addition, as pointed out above, the Act establishes various additional offences related to the principal offence, ranging from debt bondage and the confiscation of victims’ passports, to online advertising in order to promote trafficking. Gallagher<sup>106</sup> and

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<sup>100</sup> Withnall ‘Activists use CGI 10-year-old Filipino girl “Sweetie” to snare thousands of paedophiles’ (2013) 1 available at: <http://www.independent.co.uk/news/world/europe/activists-use-cgi-10yearold-filipino-girl-sweetie-to-snare-thousands-of-paedophiles-8921964.html?origin=internalSearch> (last accessed 11 November 2013).

<sup>101</sup> Terre des Hommes n 98 above at 30.

<sup>102</sup> Hepburn & Simon n 9 above at 282–3.

<sup>103</sup> Section 8(2)(a).

<sup>104</sup> Section 8(2)(b) & (3); Mollema n 11 above at 253.

<sup>105</sup> Gallagher & Holmes n 57 above at 5.

<sup>106</sup> Gallagher *Trafficking protocol* n 38 above at 31.

Chuang<sup>107</sup> justly question the limitless broadening of the parameters of trafficking. Such unrestricted widening of the counter-trafficking net tends to capture almost all exploitation as trafficking. This so-called ‘exploitation creep’ may thwart a deep and nuanced understanding of trafficking and risks diluting efforts to combat the worst forms of trafficking exploitation.<sup>108</sup> Still, as has been indicated in the above discussion, expanding the criminalisation of trafficking to include key offences related to trafficking is indeed meaningful. Therefore, it is to be welcomed that the Trafficking Act creates more offences than the minimum required in the Protocol, because such enhancement empowers the prosecution to bring diverse trafficking offenders to book.

*Liability of natural and legal persons*

The second key prosecutorial standard stipulates that both natural and legal persons are to be held liable for committing trafficking offences.<sup>109</sup> The Trafficking Act fully complies with this standard, in that the ‘person’ committing a trafficking offence includes ‘a natural person, a juristic person and a partnership, unless the context indicates otherwise’.<sup>110</sup> Iroanya<sup>111</sup> welcomes the fact that both natural and legal persons are held accountable for trafficking offences.

*Definitional elements of human trafficking*

The third international standard requires the inclusion of the essence of the Protocol’s definition of ‘trafficking in persons’ in domestic legal frameworks.<sup>112</sup> This standard is crucial for the prosecution, because the core components of the trafficking definition clarify what elements the state must prove to secure a conviction.

New laws create challenges for prosecutors because their elements are often unclear until tested in court. This seems to be particularly true in human-trafficking cases.<sup>113</sup>

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<sup>107</sup> Chuang ‘Exploitation creep and the unmaking of human trafficking law’ (2014) 108 *American Journal of International Law* 609–11.

<sup>108</sup> Gallagher n 38 above at 31.

<sup>109</sup> Article 10 Organized Crime Convention.

<sup>110</sup> Section 1.

<sup>111</sup> Iroanya n 11 above at 109.

<sup>112</sup> Article 3(a); Soobramanien n 65 above at 263; UNODC Legislative guides n 24 above at 268.

<sup>113</sup> Farrell, Owens & McDevitt n 1 above at 142; Farrell *et al* n 1 above at 10.

Section 1 of the Trafficking Act provides definitions of numerous concepts, but does not include a definition of the key concept ‘trafficking in persons’. However, the definitional components of human trafficking are included in section 4 which establishes the human trafficking offence. Table 1 provides a comparison between the three main components of the definition of human trafficking – the prohibited action, the means used to commit the crime, and the exploitative purpose – in the Palermo Protocol and the South African Trafficking Act.

As indicated in Table 1 below, the elements of the principal human-trafficking offence in South African law fully incorporate the formulation of its counterpart in the Palermo Protocol. In fact, the trafficking definition in the Trafficking Act is broader than the core definition in the Protocol. However, it must be accepted that ‘no legal definition of trafficking, no matter how carefully crafted, can ever be expected to respond fully to the shades and complexities of the real world’.<sup>114</sup>

A point to be considered is the relevance and meaningfulness of the additions made by the Trafficking Act to the core definition in the Palermo Protocol. Firstly, the action component of the ‘trafficking in persons’ offence in the Trafficking Act includes forms of conduct in addition to those found in the Protocol.<sup>115</sup> Adding the concept of ‘delivery’ appears useful. Conduct such as merely handing over a victim to another person, even when the victim is not transported by means of a vehicle, boat, aircraft or any other vessel, will be covered by this concept. Therefore, trafficking agents who do not recruit, transport or harbour victims, but who play some role in delivering them to where they are required in order to fulfil the exploitative purpose, will now also fall within those who may be prosecuted. Concomitantly, the other three additional concepts are key to ensuring the prosecution of those agents who though not committing the acts prohibited in the Protocol definition, negotiate the illegal selling, exchange or lease of the trafficked person. To conclude, it is submitted that these additional concepts which have been added to the list of prohibited actions provide a meaningful expansion of the prosecution’s arsenal so as to reach the various agents who are often part of the trafficking ring.

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<sup>114</sup> Gallagher n 21 above at 52.

<sup>115</sup> Mollema n 11 above at 248.

Table 1: Human trafficking definition: comparison between the Palermo Protocol and the South African Trafficking Act

DEFINITION: 'TRAFFICKING'	PALERMO PROTOCOL: Article 3(a)	SOUTH AFRICAN TRAFFICKING ACT: section 4
<b>Prohibited actions</b>	recruitment, transportation, transfer, harbouring or receipt of persons	recruitment, transportation, transfer, harbouring, receipt, <i>delivery, sale, exchange or lease of another person within or across the borders of the Republic</i>
<b>Means</b>		<i>(a) threat of harm</i>
	threat or use of force or other forms of coercion	(b) threat or use of force or other forms of coercion
	the abuse of <i>a position</i> of vulnerability	(c) the abuse of vulnerability
	Fraud	(d) fraud
	Deception	(e) deception
	Abduction	(f) abduction
		<i>(g) kidnapping</i>
	the abuse of power	(h) the abuse of power
	giving or receiving of payments or benefits to achieve the consent of a person having control over another person	(i) the <i>direct or indirect</i> giving or receiving of payments or benefits to obtain the consent of a person having control <i>or authority</i> over another person, or
	<i>(j) 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</i>	
<b>Exploitative purpose</b>	for the purpose of exploitation	for the purpose of <i>any form or manner</i> of exploitation

Key to table:

~Normal text: identical in both the Palermo Protocol and the Trafficking Act

~**Text in bold italics**: only in the Trafficking Act

~*Text in italics*: only in the Palermo Protocol

Secondly, the means component of the offence is also formulated more broadly than in the Palermo Protocol. The addition of the phrase ‘threat of harm’ to the list of illegal means may indeed be helpful, because it does not necessarily overlap with the phrase ‘threat of force’, in that the term ‘harm’ can include non-violent threats, such as an employer’s threat to dismiss the victim or to spread indecent photographs. The Trafficking Act further adds the concept ‘kidnapping’ which in essence is the unlawful deprivation of a person’s freedom of movement, to the list of means. It can be argued that ‘kidnapping’ is usually effected by force and that it can therefore be incorporated under the ‘use of force’ means. However, a person may be deceived or tricked into non-violent removal. Such cases will not be covered by ‘use of force’. For this reason, adding the concept ‘kidnapping’ is a meaningful expansion of the means component. The last expansion of the means element is by way of section 4(1)(j), which refers to the giving or receiving of payments, compensation, rewards, benefits, or any other advantage. With reference to the types of means listed under (I) and (j) of the Trafficking Act,<sup>116</sup> it should be noted that section 4(1)(i) – which follows the wording of the Protocol and provides for the giving or receiving of payments or benefits to obtain the consent of certain persons – is superfluous. The addition of section 4(1)(j) includes the ‘giving or receiving of payments ... or benefits or any other advantage’, which need not be made to a specific person or for a specific purpose. Mollema<sup>117</sup> argues that the prohibited giving or receiving of ‘any other advantage’ serves as a catch-all phrase that broadens the scope of the means component significantly. It is therefore submitted that the means listed in (j) are broad enough to incorporate (I), and that the latter is therefore redundant.

After the illegal actions and means listed in section 4(1), the Trafficking Act has added an innovative phrase relating to the person at whom the prohibited conduct is aimed. In the Protocol’s definition, the victim is targeted, but the Trafficking Act provides that the trafficking conduct may be aimed either at the trafficked person or ‘an immediate family member’ or ‘a person in [a] close relationship’ to the victim.<sup>118</sup> The Act defines an ‘immediate family member’ broadly to include a spouse, civil partner or life partner, as well as dependant family members of a trafficked person.<sup>119</sup> This addition was apparently introduced to address the reality that the family and loved-ones

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<sup>116</sup> Section 4(1); Table 1.

<sup>117</sup> Mollema n 11 above at 249.

<sup>118</sup> Section 4(1).

<sup>119</sup> Section 1.



of trafficked persons are often threatened in order to compel victims to submit to the demands of their traffickers.<sup>120</sup>

It should be clear from this discussion that the core of the international definition of human trafficking is fully incorporated into the new South African law. However, as David<sup>121</sup> indicates, domestic law should not merely copy the formulation of the international definition, but should reflect the realities of a particular domestic criminal-justice system and be as clear and precise as possible.<sup>122</sup> For example, the concepts in the international definition as well as other relevant concepts need to be clearly defined in domestic law to avoid confusion.<sup>123</sup> Although defining core concepts is a difficult task, the definition of numerous concepts, including ‘abuse of vulnerability’, ‘servitude’, and ‘debt bondage’ in section 1 of the Act is to be welcomed. In addressing the clarification of concepts, the legislation has also adopted some definitions that are specific to the South African context and thus depart from the generic formulations. For example, both the definitions of ‘sexual exploitation’ and ‘removal of body parts’ are defined within the context of applicable South African legislation. This enhances the understanding and practical implementation of these concepts locally. Britton and Dean<sup>124</sup> describe such domestication as ‘norm diffusion and norm localization’ in that the legislation not only reflects the language and norms of relevant international treaties, but also embodies the local context. According to them ‘nation-specific language and laws demonstrate that countries are moving toward ownership of the problem, rather than merely rubber-stamping the policies provided by the Palermo Protocol’.

It remains of concern that the Trafficking Act does not clarify certain key concepts. Concepts, such as ‘coercion’, ‘transportation’, and ‘exploitation’ are not yet conceptualised within the trafficking setting and are so still open to differing interpretations.<sup>125</sup> The legal uncertainty regarding their meaning may seriously hamper successful prosecutions.

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<sup>120</sup> Mollema n 11 above at 248–9 fn 10.

<sup>121</sup> David n 57 above at 2.

<sup>122</sup> Gallagher & Holmes n 57 above at 6.

<sup>123</sup> Horne n 43 above at 23.

<sup>124</sup> Britton & Dean ‘Policy responses to human trafficking in southern Africa: domesticating international norms’ (2014) 15 *Human Rights Review* 311.

<sup>125</sup> Jansson n 15 above at 243; Kreston n 11 above at 29–30; Allain *Slavery in international law* (2013) 350–1, 356; Allain ‘Trafficking and human exploitation in international law, with special reference to women and children in Africa’ in: Lawrence & Roberts (eds) *Trafficking in slavery’s wake – law and the experience of women and children* (2012) 151–3; Horne n 43 above at 23; Gallagher *International law* n 21 above at 49.

The three core definitional components of human trafficking discussed so far apply only to adult trafficking. In cases where children are trafficked, the international definitional components are not identical. The Palermo Protocol expressly waives the ‘means’ definitional component in child trafficking and requires only the other two components – the prohibited action and the exploitative purpose – to be present to constitute ‘trafficking in persons’.<sup>126</sup> Gallagher<sup>127</sup> emphasises that the prosecution therefore has a lighter evidential burden in proving child trafficking when compared with the situation involving an adult victim.<sup>128</sup> The Trafficking Act, however, does not explicitly distinguish between trafficking in adults and trafficking in children, as is required by the Palermo Protocol.<sup>129</sup> The formulation of the main human-trafficking offence in section 4 requires that all three definitional components must be proven concerning the trafficking of a ‘person’. No specific mention is made of what elements must be proven when the trafficked person is a child. It seems that the state will therefore have to prove all three definitional components, and not only the two required by the Protocol, to ensure a conviction when children are trafficked. Non-compliance with the Protocol as regards this aspect is open to criticism as the state incurs a greater evidentiary burden than is required in the Protocol. Regrettably, this is a missed opportunity to clearly align domestic law with the Palermo Protocol by expressly providing that the ‘means’ definitional component is not an element of child trafficking and need not be proven by the state.

It should further be noted that section 11(1) of the Act refers to some child-trafficking issues where the ‘means’ component need not be proven. This section provides that it is no defence if a child consents to the exploitation or the conduct element of any of the Chapter 2 offences, even if none of the listed means were used by the perpetrator. In other words, this provision clearly complies with article 3(b) of the Palermo Protocol in that it waives the ‘means’ component when a consent-based defence is raised in child-trafficking cases. The question is whether the intention of the legislature was to waive the ‘means’ component regarding consent based-defences only, or also as a compulsory element of the child-trafficking crime in general. The Trafficking Act could have avoided any uncertainty by using the wording of article 3(c) of the Protocol which clearly states that only the action and

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<sup>126</sup> Article 3(c); Minnie n 60 above at 202–3.

<sup>127</sup> Gallagher *International law* n 21 above at 29.

<sup>128</sup> Grona-Robb ‘Prosecuting human traffickers’ (2010) 40 *The Prosecutor* 6.

<sup>129</sup> Kreston n 11 above at 25.

exploitative purpose elements are required to secure a conviction when children are trafficked. Arguably, the means element may be rendered redundant if child trafficking cases are prosecuted as the ‘abuse of vulnerability’, as the definition of this concept includes ‘being a child’.<sup>130</sup> Instead of speculating, the elements of child trafficking should be clearly identified to ensure legal certainty regarding the evidence that the prosecution must present to secure a conviction.<sup>131</sup> It remains to be seen how the courts will interpret the matter. It is to be hoped that the courts will choose an interpretation that is consistent with the Protocol, namely that the ‘means’ component is not a definitional element of the crime where children are trafficked.

#### *Validity of a consent-based defence*

The Trafficking Act is at one with the Protocol regarding the validity of consent-based defences in adult and child trafficking. The Act clearly provides that it is no defence to a charge of any of the Chapter 2 offences that consent was obtained from an adult person by any of the prohibited means.<sup>132</sup> As stated above, once any of the means is proven valid consent is excluded. Furthermore, the Trafficking Act explicitly provides that the consent of a trafficked child, or of the person having control or authority over such child, does not provide a defence even if none of the means was used.<sup>133</sup>

Whether or not consent by a trafficked child or of a person having authority over such child constitutes a defence on a charge of human trafficking was recently addressed in *S v Jezile*.<sup>134</sup> An unwilling fourteen-year-old girl was forced to marry an unknown and much older man. Despite the complainant’s unwillingness, her family consented to the marriage and forced her to leave her home and enter into the purported marriage.<sup>135</sup> Jezile paid the girl’s family ZAR8 000 as *lobola* (a customary law dowry).<sup>136</sup> When the unhappy

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<sup>130</sup> Section 4(1) read with the definition of ‘abuse of vulnerability’ in s 1; see also Kreston n 11 above at 25.

<sup>131</sup> Home n 43 above at 23.

<sup>132</sup> Section 11(1).

<sup>133</sup> Section 11(1)(a).

<sup>134</sup> 2015 JDR 0566 WCC.

<sup>135</sup> *S v Jezile* par 7-10.

<sup>136</sup> *S v Jezile* par 9; Otto ‘Man jailed for marrying, raping girl, 14 *Cape Argus* 13 February 2013 at 1 available from: <http://www.iol.co.za/news/crime-courts/man-jailed-for-marrying-raping-girl-14-.1646973#.Uv3UQPmSyVM> (last accessed 14 February 2014); Ntabazalila ‘16 Days of activism – Western Cape reflection’ *Khasho – National Prosecuting Authority* (2013) 15; Hepburn & Simon n 9 above at 277.

girl ran away from her ‘husband’ on more than one occasion, her male family members returned her. The offender held the girl captive and raped her repeatedly. Jezile raised as a defence to the charge of human trafficking that the girl was in a customary, arranged marriage to which the complainant had tacitly, and her family explicitly, consented.<sup>137</sup> On this issue, it is significant to note that section 21(e) of the *Zambian Anti-Human Trafficking Act of 2008* unambiguously provides that it is no defence that the act constituting the trafficking offence is a customary practice. A similar provision against harmful cultural practices may be considered in the South African context. Despite the defence based on customary practices, the court in *S v Jezile* unequivocally rejected the purported consent of the family, or of persons having authority over the teenage girl, and convicted the accused of, among others, human trafficking in terms of the transitional anti-trafficking provision in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*. In this ground-breaking case, a sentence of an effective twenty-two years’ imprisonment on charges of human trafficking and rape was confirmed on appeal.<sup>138</sup> This case sets a clear precedent to the effect that a person having authority over a child cannot validly consent to the child being trafficked into a forced marriage. Once the state proves the elements of the human-trafficking offence, the offender will be convicted despite cultural practices which may be acceptable in some communities.<sup>139</sup> As regards this issue, it is noteworthy that section 4(2)(b) of the *Trafficking Act* contains a new provision that will expand the prosecution’s reach in cases of forced marriage. This section criminalises the conclusion of a forced marriage with the purpose of exploiting the unwilling party. A stringent penalty of a maximum fine of ZAR100 million or imprisonment for life, or both, may be imposed in terms of this provision on conviction.

#### *Appropriate sanctions*

While upholding the primacy of national law, the *Organised Crime Convention* obliges state parties to take into account the gravity of the offences covered by the *Convention* and impose appropriate and stringent sanctions.<sup>140</sup> As alluded to above, the *Organised Crime Convention* further requires that ‘effective, proportionate and dissuasive criminal or non-

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<sup>137</sup> *S v Jezile* par 51–2.

<sup>138</sup> *S v Jezile* pars 1, 2 & 106.

<sup>139</sup> *S v Jezile* par 51.

<sup>140</sup> Article 11.1 & 11.6; David n57 above at 1; UN GIFT n 29 at 27; UNODC Toolkit n 20 at 112; UNODC Legislative guides n 24 at 273.

criminal sanctions' be imposed on liable legal persons.<sup>141</sup> The Legislative Guides for the Implementation of the Convention against Transnational Organised Crime and the Protocols thereto emphasise that state parties have a duty to ensure that 'the grave nature of the offence and the need to deter its commission [are] taken into account in prosecution, adjudication and correctional practices and decisions'.<sup>142</sup>

In accordance with the international standard requiring the imposition of deterrent sanctions, the Trafficking Act acknowledges the seriousness of human-trafficking offences by providing for severe penalties.<sup>143</sup> The main trafficking offence carries a maximum fine of ZAR100 million or imprisonment for life, or both.<sup>144</sup> Other crimes related to human trafficking also carry lengthy terms of imprisonment. For example, a convicted offender risks fifteen years' imprisonment for debt bondage or using the services of trafficked victims.<sup>145</sup> A maximum of ten years' imprisonment may be imposed for unlawful conduct pertaining to travel documents and for conduct facilitating human trafficking.<sup>146</sup> The Act further makes provision for the cancellation of a licence to conduct business on conviction of certain offences under the Act. Accordingly, it is submitted that the sanctions provided for in respect of trafficking offences in terms of the Trafficking Act comply with the international standard regarding appropriate and deterrent sanctions.

The Trafficking Act takes things a step further by properly sanctioning the commission of trafficking offences. The Act emphasises the gravity of the offence by requiring the courts to consider a list of aggravating factors before sentencing the perpetrator.<sup>147</sup> These factors include: the effect of the offence on the victim; the significance of the convicted person's role in the trafficking process; whether organised crime was involved; and whether the victim was a child, had a physical disability or was mentally ill. In human-trafficking cases, where the impact of the crime on victims is often severe and enduring, the judgment of the Supreme Court of Appeal in *State v*

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<sup>141</sup> Article 10.4; UNODC Legislative guides n 24 at 133.

<sup>142</sup> UNODC Legislative guides n 24 at 20.

<sup>143</sup> Mollema n 11 above at 252.

<sup>144</sup> Section 13(a). The Supreme Court of Appeal emphasised that sentences imposed for violent crimes must be appropriate and not 'so disturbingly lenient that [they have] the effect of trivialising violence' – *Director of Public Prosecutions v Mngoma* 2010 1 SACR 427 (SCA) 432G.

<sup>145</sup> Sections 5 & 7.

<sup>146</sup> Sections 6 & 8.

<sup>147</sup> Section 14.

*Matyityi*<sup>148</sup> is significant. In this case the court emphasised that an appropriate sentence ‘also needs to be victim-centred’. To conclude, the stringent penalty provisions bring the Trafficking Act clearly in line with the required international standards pertaining to the imposing of appropriate deterrent sentences.

### **Overview: Compliance of the Trafficking Act with international prosecutorial standards**

In the debate over whether the South African Trafficking Act complies with the country’s international obligations under the Convention and the Protocol, it is argued that the Act is indeed fully compliant.<sup>149</sup> In contrast, the discussion above clarifies that the Trafficking Act does not fully comply with all five international prosecutorial standards drawn from the major international instruments on human trafficking. However, many provisions in the Act are broader or more stringent than the minimum standards required by international law. It has also been indicated that certain sections in the Act, namely the criminalisation of conduct that constitutes involvement in human trafficking and the means listed in section 4(1)(I), are superfluous.

The assessment of the Trafficking Act’s compliance with international standards can therefore be divided into three categories: aspects where the Act is compliant; where it is partly compliant; and where it is non-compliant. This is illustrated in Table 2 below.

### **CONCLUSION**

The successful prosecution of offenders is a vital component of the holistic approach to the combating of human trafficking. However, it is a matter of grave concern that the number of convictions on a charge of human trafficking remains negligible worldwide. To address this challenge, international law has established international prosecutorial standards with which state parties must comply in their domestic legal responses. A comprehensive domestic legal response aligned with international standards is an essential part of an effective national criminal-justice system, and is crucial for facilitating the successful prosecution of this complex crime with its unique elements and intricacies.

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<sup>148</sup> 2011 1 (SACR) 40 SCA par 16.

<sup>149</sup> Mollema n 11 above at 260.

*Table 2: Assessment of the Trafficking Act’s compliance with international prosecutorial standards*

International prosecutorial standards	Trafficking Act 7 of 2013		
	Compliant	Partly compliant	Not compliant
1. Criminalisation: human trafficking and related conduct			
1.1 Human trafficking	X		
1.2 Involvement in human trafficking	X		
1.3 Carrier duties		X	
2. Liability of natural and legal persons	X		
3. Definitional elements			
3.1 Adult trafficking	X		
3.2 Child trafficking		X	
4. Consent-based defences	X		
5. Appropriate punishment	X		

It is therefore of utmost importance that all states, South Africa included, bring their counter-trafficking legal frameworks in line with these international minimum standards. These standards provide a yardstick against which domestic counter-trafficking responses can be measured. This article contributes to the existing body of knowledge by assessing the compliance of the new South African Prevention and Combating of Trafficking in Persons Act with the identified international prosecutorial standards. While a similar study undertaken in a number of countries in southern Asia has found that compliance with international standards has not yet been realised,<sup>150</sup> this study reveals that the South African Trafficking Act is virtually in full compliance with the five identified international standards. There are, however, two areas of concern. Firstly, the Act does not clearly waive the ‘means’ definitional component as an element of child trafficking

<sup>150</sup> Thomas n 12 above at 71–4.

as is required by the Palermo Protocol. Secondly, while the Act establishes an additional useful offence related to the curbing of collusion between carriers and traffickers, the existing provision in the amended Immigration Act 13 of 2002 is not fully compliant with the Protocol's requirement that commercial carriers need to establish that all their passengers are in possession of the required travel documents when crossing international borders.

Apart from these relatively minor shortcomings, it is submitted that the South African Trafficking Act fundamentally complies with the main international prosecutorial standards. Moreover, it is to be welcomed that, apart from complying with the minimum standards, the Prevention and Combating of Trafficking in Persons Act is more comprehensive in that many additional provisions are included which significantly extend the prosecution arsenal in respect of both the principal trafficking offender and all other trafficking agents who play a role in committing the offence. These additional provisions may be considered by other states that are developing or reviewing their counter-trafficking response.

To conclude, the new South African Trafficking Act indeed provides the prosecuting authority with an innovative and invaluable tool – a sharp prosecution sword to end impunity for the multiple trafficking agents who still thrive by exploiting human beings for profit.