

CHAPTER TWO

INTERNATIONAL FRAMEWORK

INTRODUCTION

2.1 At the international level, several instruments relating to trafficking in persons were introduced as far back as 1904 when the International Agreement for Suppression of the White Slave Trade was adopted. South Africa has signed and/or ratified various international instruments which recognise trafficking in persons as a world-wide problem. This has placed an obligation on South Africa to bring its domestic laws and policies in line with the standards set by these international instruments. Although these instruments have highlighted the problem of trafficking in persons, their enforcement remains a challenge to the authorities. The following is an overview of some of the main international instruments addressing the problem of trafficking in persons.⁷

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Recommended Principles and Guidelines on Human Rights and Human Trafficking

2.2 The recommended Principles and Guidelines on Human Rights and Human Trafficking have been developed in order to provide practical rights-based policy guidance on the prevention of trafficking, as well as the protection of victims of trafficking. The purpose of these guidelines and principles is to promote and facilitate

⁷ Other international instruments also dealing with the issue of trafficking in persons include the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 1984; the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956; the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1949, the Convention for the Suppression of the Traffic in Women of Full Age of 1933; the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications of 1923 as amended by the Protocol of 12 November 1947; the Convention for the Suppression of Traffic in Women and Children of 1921; Convention for the Suppression of the White Slave Traffic of 1910; the International Agreement for the Suppression of the White Slave Traffic of 1904.

the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions.⁸

2.3 The following is a summary of the recommended principles:

Principle 1: The primacy of human rights

The human rights of victims of trafficking must be respected in all efforts aimed at preventing and combating trafficking, and at protecting, assisting and providing redress to victims. Furthermore, anti-trafficking measures should not adversely affect the human rights and dignity of victims of trafficking.

Principle 2: Preventing trafficking

Preventative measures must address demand as a root cause of trafficking in persons, as well as factors that make persons vulnerable to being trafficked such as poverty, inequality and all forms of discrimination. Furthermore, public officials who are involved in the crime of trafficking must be identified, investigated and, if convicted, punished appropriately.

Principle 3: Protection and assistance

Victims of trafficking should be provided with protection and assistance, including (a) immunity from prosecution for offences committed as a direct consequence of their situation as victims of trafficking, (b) protection from further exploitation, (c) access to adequate physical and psychological care, (d) legal and other assistance for the duration of any criminal or civil proceedings against traffickers, and (e) safe repatriation to their countries of origin, as well as legal alternatives to repatriation if their return would pose a serious risk to their safety and/or that of their families.

Principle 4: Criminalisation, punishment and redress

⁸ Office of the United Nations High Commissioner for Human Rights **Recommended Principles and Guidelines on Human Rights and Human Trafficking** 2002.

The act of trafficking in persons should be criminalised, investigated and prosecuted. Appropriate sanctions must be imposed on traffickers, and the assets of traffickers must be frozen and confiscated in appropriate cases. Furthermore, the crime of trafficking in persons should be made an extraditable offence and victims of trafficking should be given access to effective and appropriate legal remedies.

2.4 The following is a summary of the recommended guidelines:

Guideline 1: Promotion and protection of human rights

Human rights should be promoted and protected in all efforts to prevent and combat trafficking in persons.

Guideline 2: Identification of victims of trafficking and traffickers

Victims of trafficking should be identified and distinguished from illegal migrants. Traffickers should be identified, including those who are involved in controlling and exploiting victims of trafficking.

Guideline 3: Research, analysis, evaluation and dissemination

Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis.

Guideline 4: Ensuring an adequate legal framework

An appropriate legal framework that is consistent with relevant international instruments and standards should be developed. In developing such a legal framework, consideration should be given to the following: (a) the confiscation of the proceeds of trafficking, (b) the provision of compensation to victims of trafficking, (c) the provision of immunity from prosecution for victims of trafficking for crimes committed as a direct consequence of their situation as victims of trafficking, (d) protection from summary deportation of victims of trafficking, (e) the provision of legal information and assistance to victims of trafficking in a language they understand, (f) witness protection, and (g) the involvement of public officials in the crime of trafficking in persons.

Guideline 5: Ensuring an adequate law enforcement response

An effective law enforcement response should be ensured by securing the co-operation of victims of trafficking and other witnesses. This should be done by inter alia (a) ensuring the safety and immediate well-being of victims of trafficking, (b) training law enforcement officials in the investigation and prosecution of trafficking cases, (c) providing law enforcement authorities with adequate investigative power and techniques to enable effective investigation and prosecution of suspected traffickers, (d) protecting victims of trafficking during the investigation and trial processes and any subsequent period when the safety of the victims so requires, and (e) encouraging law enforcement authorities to work in partnership with non-governmental organisations in order to ensure that victims of trafficking receive the necessary support and assistance.

Guideline 6: Protection and support for victims of trafficking

Victims of trafficking should be provided with protection and support without discrimination. Special focus should be placed on the needs of victims of trafficking, including the provision of appropriate shelter, health care services and counselling, information on their right of access to diplomatic and consular representatives from their States of nationality, legal and other assistance in relation to any criminal, civil or other proceedings against traffickers, protection from harm, threats or intimidation from traffickers and associated persons.

Guideline 7: Prevention of trafficking

Trafficking in persons should be prevented as well as factors which increase persons' vulnerability to being trafficked. Preventative measures should include the development of programmes which offer (a) livelihood options, (b) the improvement of children's access to educational opportunities, (c) the provision of information to potential migrants on the risk of migration and options available for legal non-exploitative migration, (d) public awareness campaigns on the dangers associated with trafficking, and (e) opportunities for legal, gainful and non-exploitative labour migration.

Guideline 8: Special measures for the protection and support of child victims of trafficking

Child victims of trafficking should be provided with appropriate protection and support, taking into account their best interests and paying special attention to their views in all matters affecting them. Special protective measures for children must include (a) the rapid identification of child victims of trafficking, (b) the tracing of family members of unaccompanied children, (c) the reunification of children with family members where appropriate, and (d) the protection of the rights and interests of children at all stages of criminal proceedings against traffickers and during procedures for obtaining compensation.

Guideline 9: Access to remedies

Victims of trafficking' right to obtain adequate and appropriate remedies, including compensation, should be realised. Furthermore, victims of trafficking should be provided with information on such remedies and should be enabled to remain in the country for the duration of proceedings to obtain such remedies.

Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel

States should take effective measures to prevent peacekeepers, civilian police, and humanitarian and diplomatic personnel from engaging in the crime of trafficking and related forms of exploitation.

Guideline 11: Co-operation and co-ordination between States and regions

Co-operation on an international, multilateral and bilateral level should be established between States and regions, particularly those involved in different stages of the trafficking cycle.

UNITED NATIONS CONVENTIONS AND PROTOCOLS

United Nations Convention Against Transnational Organised Crime

2.5 The Convention⁹ gives a wide meaning to organised crime, as it covers all structured groups that commit serious crime. A structured group is not necessarily a formal organisation, membership or structure, but is more than merely a group which is randomly formed for the immediate commission of an offence.¹⁰ The Convention calls on State Parties to establish the liability of legal persons for participation in serious crimes involving an organised criminal group.¹¹ This is an important provision as not all traffickers are natural persons. Some traffickers operate within a company or partnership and have assets that could be confiscated.¹² The Convention provides for the protection of witnesses in criminal proceedings and, as appropriate, for their relatives and other persons close to them from potential retaliation or intimidation.¹³ Such measures may include:¹⁴

- (a) Establishing procedures for the physical protection of such persons, including relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning their identity and whereabouts.
- (b) Ensuring that a witness's testimony is given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

⁹ South Africa signed the Convention on 14 December 2000 and ratified it on 20 February 2004.

¹⁰ Kramer K "United Nations Convention against Transnational Organised Crime and its Protocols", Paper presented at the Seminar for SADC Countries on the ratification and implementation of the United Nations Convention against Transnational Organised Crime, Mauritius, 23 – 25 September 2003.

¹¹ Article 10.

¹² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.14.

¹³ Article 24(1).

¹⁴ Article 24(2).

2.6 The latter provisions on witness protection are formulated in stronger terms than those in article 6(1) of the Trafficking Protocol¹⁵ and, unlike the Trafficking Protocol, provide protection to all witnesses and not just witnesses who are victims of trafficking.

2.7 With regard to victim protection, the Convention obliges State Parties to take appropriate measures, within available means, to provide assistance and protection to victims of offences covered by the Convention.¹⁶ This is in contrast with article 6(3) of the Trafficking Protocol which requires States only to consider providing certain protective measures to victims of trafficking.¹⁷

2.8 The Convention further calls for the criminalisation of participation in an organised criminal group,¹⁸ the criminalisation of the laundering of the proceeds of crime,¹⁹ measures against corruption,²⁰ measures to enable the confiscation and seizure of assets gained through crime,²¹ mutual legal assistance,²² and special investigative techniques.²³

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (hereafter referred to as “the Trafficking Protocol”)²⁴

2.9 The Trafficking Protocol²⁵ is the first international instrument which deals comprehensively with the issue of trafficking in persons. Although the Trafficking Protocol is the principle instrument on trafficking in persons, it must be read with the

¹⁵ See paragraph 2.21 below.

¹⁶ Article 25(1).

¹⁷ See paragraph 2.22 below.

¹⁸ Article 5.

¹⁹ Article 6.

²⁰ Article 9.

²¹ Article 12.

²² Article 18.

²³ Article 20.

²⁴ The Protocol was open for signature in Palermo, Italy in December 2000.

²⁵ South Africa signed the Protocol on 14 December 2000 and ratified it on 20 February 2004.

Convention Against Transnational Organised Crime, as the Convention requires State Parties to legislate on various matters relevant to the issue of trafficking in persons.²⁶

Purposes of the Protocol

2.10 The purposes of the Protocol are to –

- (a) Prevent and combat trafficking in persons, paying particular attention to women and children.
- (b) Protect and assist victims of trafficking, with full respect for their human rights.
- (c) Promote co-operation amongst State Parties in order to meet these objectives.

2.11 Although one of the purposes of the Trafficking Protocol is to protect and assist victims of trafficking, the protection provisions in the Protocol are formulated in weak terms such as the following: Each State Party “shall consider” the provision of appropriate housing to victims of trafficking.²⁷ Despite this, States are still obliged to provide certain protection measures and assistance to victims of trafficking in accordance with other human rights instruments to which they are parties such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

Scope of application of the Protocol

2.12 The Trafficking Protocol applies to the prevention, investigation and prosecution of offences established in accordance with article 5 of the Protocol, where those offences are transnational in nature and involve an organised criminal group.²⁸ However, article 34(2) of the Convention Against Transnational Organised Crime makes it clear that the crime of trafficking in persons can be established in the

²⁶ Article 1 of the Trafficking Protocol stipulates that the Protocol must be interpreted together with the Convention Against Transnational Organised Crime. Article 37(4) of the Convention Against Transnational Organised Crime provides that any protocol to the Convention must be interpreted together with the Convention, taking into account the purpose of that protocol.

²⁷ Article 6(3) of the Protocol.

²⁸ Article 4.

domestic laws of a country irrespective of the transnational nature of the crime or the involvement of an organised criminal group. This is an important provision as the crime of trafficking in persons is not limited to cross-border trafficking, but also occurs within the borders of a country. Furthermore, the crime of trafficking in persons is also committed by individuals, other than organised criminal groups.

Definition of trafficking in persons

2.13 The Trafficking Protocol defines trafficking in persons as follows:

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.²⁹

2.14 The above definition might complicate the prosecution of trafficking cases because it contains too many elements that would have to be proved by the prosecution.³⁰ With regard to adults,³¹ prosecutors would have to prove that one or more of the means set out in the definition have been used in order to establish a case of trafficking in persons.

²⁹ Article 3(a).

³⁰ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.7.

³¹ Article 3(c) of the Protocol provides special protection to children in that it stipulates that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation must be considered "trafficking in persons" even if this does not involve any of the means set forth in the definition.

2.15 The words “abuse of a position of vulnerability” make it clear that trafficking can occur without any use of force and that victims of trafficking, especially children, may be told what to do by someone close to them, such as a parent or spouse.³²

2.16 The Trafficking Protocol does not define the terms “exploitation of the prostitution of others” and “sexual exploitation” as countries have different laws and policies on prostitution.

2.17 It is important to note that the removal of human organs for legitimate medical reasons should not be considered exploitation. Furthermore, the Trafficking Protocol does not apply to the transportation of organs alone. A case of trafficking in persons can be established only if a person is transported for the purpose of removing his or her organs.³³ Unfortunately, the Trafficking Protocol does not cover the removal of body parts, other than organs. This is clearly an oversight by the drafters of the Protocol as trafficking in persons for purposes of removing their body parts, including organs, to be used in the muti³⁴ of witch doctors is quite prevalent in Africa.

2.18 The crime of trafficking in persons consists of the following main elements: (a) **the action** i.e. the recruitment, transportation, transfer, harbouring or receipt of persons, (b) **the means** i.e. , threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, and (c) **the purpose** i.e. 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. It is important to keep in mind that all three elements do not necessarily have to take place in order to establish the crime of trafficking in persons. For example, if the victims were rescued before reaching the place of exploitation, the offender may still be prosecuted for the crime of trafficking in persons if the intention to exploit the victims can be proved. The crime of trafficking in persons can be established even though the actions that make

³² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.8.

³³ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.10.

³⁴ Muti is defined as African medicines, spells and herbs, parts of animals or human bodies, used in traditional therapy or in witchcraft or magic. See in this regard Branford J and Branford W **A Dictionary of South African English** Cape Town Oxford University Press 1991, p.209.

up the elements of the crime took place in different countries. Victims of trafficking may also be exploited during the trafficking process before they reach the place of exploitation. Traffickers often subject their victims to physical or sexual abuse during the trafficking process in order to break their spirit and to prepare them for the abuse to which they will be subjected.

Consent of a victim of trafficking

2.19 The Trafficking Protocol states that the consent of a victim of trafficking is irrelevant where any of the actions contemplated in the Protocol's definition of trafficking have been employed.³⁵ Hence, it cannot be said that a victim, who has consented to be brought into a country illegally to work in the sex industry for payment, has consented to be subjected to the exploitation if the intention of the other party was to hold her in forced prostitution where she has limited freedom of movement and no say as to the kind and number of clients she would be serving.

Criminalising the crime of trafficking in persons

2.20 The Trafficking Protocol obliges State Parties to criminalise the crime of trafficking in persons when committed intentionally.³⁶ State Parties are further compelled to criminalise the following acts: (a) an attempt to commit the crime of trafficking, (b) the participation as an accomplice in the crime of trafficking, and (c) organising and directing other persons to commit the crime of trafficking.³⁷ It is important to note that victims of trafficking who, for instance, agree to work illegally or to travel with false or without any documentation, should not be punished for their participation in the crime.³⁸

Protection of victims of trafficking in persons

2.21 The Trafficking Protocol addresses the human rights dimensions necessary for the protection of victims of trafficking. The Protocol provides that, in appropriate

³⁵ Article 3(b).

³⁶ Article 5(1).

³⁷ Article 5(2).

³⁸ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.15.

cases and to the extent possible, State Parties must protect the privacy and identity of victims of trafficking, including making legal proceedings relating to such trafficking confidential.³⁹ This is an important provision as the safety of victims of trafficking and their families may be at risk should the identity of the victims be disclosed. However, traffickers could infer, from the nature of the complaint, the identity of a specific victim. State Parties must ensure that victims of trafficking are provided, in appropriate cases, with information on relevant court and administrative proceedings, and with assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders.⁴⁰ This provision requires that victims of trafficking be provided with information through a translator or in writing in a language that they understand. Victims of trafficking should also be provided with interpreters during court proceedings.

2.22 The Protocol stipulates that State Parties shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking, including, in appropriate cases, the provision of (a) appropriate housing, (b) counselling and information in a language victims understand, and (c) employment, educational and training opportunities.⁴¹ This provision addresses the most important and urgent needs of victims of trafficking. Although the words “shall consider” and “in appropriate cases” do not place a positive obligation on State Parties to provide the mentioned services to victims, State Parties cannot neglect their responsibility in this regard as one of the purposes of the Protocol is to assist and protect victims of trafficking. It should also be kept in mind that the provision of protective measures and assistance to victims of trafficking stands independently from any efforts aimed at prosecuting traffickers.

2.23 State Parties must ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.⁴² This provision does not place an obligation on State Parties to establish a compensation fund for victims of trafficking. State Parties are only obliged to enable victims to claim compensation from offenders.

³⁹ Article 6(1).

⁴⁰ Article 6(2).

⁴¹ Article 6(3).

⁴² Article 6(6).

Immigration status of victims of trafficking

2.24 State Parties must consider whether to allow victims of trafficking to remain in their territories, temporarily or permanently, in appropriate cases.⁴³ Although this provision does not place a positive obligation on governments to grant an immigration status to victims of trafficking, it is important for governments to realise that the summary deportation of victims could lead to the unsuccessful prosecution of traffickers. This is because, in most cases, the testimony of a victim is needed to secure a conviction. When considering whether victims of trafficking should be allowed to remain in the territory of a State, appropriate consideration must be given to humanitarian and compassionate factors.⁴⁴

Repatriation of victims of trafficking

2.25 A State Party must facilitate and accept the return of a victim of trafficking who is its national or permanent resident, with due regard for the safety of that person.⁴⁵ Likewise, the State Party returning the victim of trafficking must ensure that such return is with due regard for the safety of that person.⁴⁶ This imposes a positive obligation upon governments to ensure that there is no danger of retaliation or other forms of harm (such as arrest for leaving the country or working in prostitution abroad) awaiting victims of trafficking upon returning home.⁴⁷ The Trafficking Protocol further provides for the issuing of travel documents or other authorisation necessary for victims to travel to and re-enter their countries of origin.⁴⁸

Prevention of trafficking in persons

2.26 The Trafficking Protocol emphasises the need for the prevention of trafficking in persons, including the protection of victims from revictimisation, the alleviation of

⁴³ Article 7(1).

⁴⁴ Article 7(2).

⁴⁵ Article 8(1).

⁴⁶ Article 8(2).

⁴⁷ International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.27.

⁴⁸ Article 8(4).

factors that make persons vulnerable to being trafficked and the discouragement of the demand that fosters exploitation of persons.⁴⁹

Information exchange and training

2.27 The Trafficking Protocol calls on State Parties to exchange information in order to determine:⁵⁰

- (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking.
- (b) The type of travel documents that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons.
- (c) The means and methods used by organised criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and amongst individuals and groups engaged in such trafficking, and possible measures for detecting them.

2.28 Training on prevention of trafficking in persons must be provided to law enforcement, immigration and other relevant officials. The training should focus on methods used in preventing trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from traffickers.⁵¹ It is important to ensure that efforts aimed at preventing trafficking in persons do not violate the rights of individuals to enter and leave a country freely.⁵²

Border measures

2.29 The Trafficking Protocol calls on State Parties to strengthen border controls as may be necessary to prevent and detect trafficking in persons. State Parties must

⁴⁹ Article 9.

⁵⁰ Article 10(1).

⁵¹ Article 10(2).

⁵² International Human Rights Law Group **The Annotated Guide to the complete UN Trafficking Protocol** 2002, p.31.

further adopt measures to prevent any means of transport operated by commercial carriers from being used in the commission of the crime of trafficking in persons or any attempt to commit such a crime. Measures taken by State Parties in this regard must include establishing the obligation of commercial carriers to ascertain that all passengers are in possession of the travel documents required for entry into a country. Furthermore, consideration must be given to the denial of entry or revocation of visas of persons implicated in the commission of the crime of trafficking in persons or any attempt to commit such a crime.⁵³

Security and control of documents

2.30 The Trafficking Protocol obliges each State Party to take such measures as may be necessary, within available means:⁵⁴

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, or readily falsified, replicated, issued or unlawfully altered.
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State and to prevent their unlawful creation, issuance and use.

Convention on the Rights of the Child of 1989

2.31 Certain provisions of the Convention on the Rights of the Child⁵⁵ are relevant to the issue of trafficking in children. The Convention calls for the implementation of measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.⁵⁶ Although this provision specifically refers to the trafficking of children, it fails to stipulate what constitute trafficking of children. State Parties are obliged to protect children from all forms of physical or mental violence, including sexual abuse.⁵⁷ The Convention provides for the right of every child to a standard of

⁵³ Article 11.

⁵⁴ Article 12.

⁵⁵ South Africa has ratified the Convention on the Rights of the Child (CRC) on 16 June 1995.

⁵⁶ Article 35.

⁵⁷ Article 19.

living adequate for the child's physical, mental, spiritual, moral and social development.⁵⁸ As a party to the Convention, South Africa is obliged to address the socio-economic conditions which force children into situations such as illegal employment and the sex trade. The Convention recognises the right of a child to be protected from performing any work that is likely to be hazardous or to interfere with the child's education, or which are harmful to the child's health or physical, mental, spiritual, moral or social development.⁵⁹ This provision is of particular relevance in instances of trafficking in children for purposes of sexual exploitation or exploitative labour practices. State Parties are required to protect children from all forms of sexual exploitation and sexual abuse.⁶⁰ Furthermore, State Parties must take appropriate measures to promote the physical and psychological recovery and social reintegration of a child who is a victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.⁶¹

Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000

2.32 The Protocol⁶² calls on State Parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.⁶³ Although the Protocol does not specifically mention child trafficking, it does define the "sale of children". In terms of the Protocol, the "sale of children" means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.⁶⁴ The Protocol promotes international law enforcement co-operation with provisions covering diverse issues such as jurisdiction,⁶⁵ extradition,⁶⁶ mutual assistance in investigations, criminal or extradition proceedings,⁶⁷ and seizure

⁵⁸ Article 27.

⁵⁹ Article 32.

⁶⁰ Article 34.

⁶¹ Article 39.

⁶² This Protocol supplements the Convention on the Rights of the Child of 1989. The Protocol came into force on 18 January 2002 and was ratified by South Africa on 1 July 2003.

⁶³ Article 8.

⁶⁴ Article 2(a).

⁶⁵ Article 4.

⁶⁶ Article 5.

⁶⁷ Article 6.

and confiscation of assets.⁶⁸ Unlike the Convention on the Rights of the Child in terms of which State Parties commit themselves to take only “appropriate measures” to prevent certain practices, the Protocol places an explicit obligation on State Parties to make certain activities relating to the sale of children a criminal offence. The Protocol provides that each State Party should ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law whether such offences are committed domestically or transnationally or on an individual or organised basis.⁶⁹

- (a) The offering, delivering or accepting, by whatever means, of a child for the purpose of –
 - (i) sexual exploitation of the child;
 - (ii) transfer of organs of the child for profit; and
 - (iii) engagement of the child in forced labour.
- (b) Improperly inducing consent, as an intermediary, for the adoption of a child internally or transnationally.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979

2.33 CEDAW⁷⁰ obliges States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women.⁷¹

Rome Statute of the International Criminal Court

2.34 The Rome Statute of the International Court⁷² includes “enslavement” in its list of crimes against humanity.⁷³ It further defines “enslavement” as the exercise of

⁶⁸ Article 7.

⁶⁹ Article 3(1).

⁷⁰ Acceded to by South Africa on 18 October 2005 and entered into force on 3 September 1981.

⁷¹ Article 6.

⁷² Adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Ratified by South Africa on 27 November 2000.

⁷³ Article 7(1)(c).

any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children.⁷⁴

INTERNATIONAL LABOUR ORGANISATION INSTRUMENTS

Convention concerning Forced Labour 29 of 1930

2.35 The Convention⁷⁵ commits all State Parties to suppress the use of forced or compulsory labour.⁷⁶ The Convention defines “forced or compulsory labour” as work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.⁷⁷

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 182

2.36 The Convention⁷⁸ obliges State Parties to take immediate and effective measures to prohibit and eliminate the worst forms of child labour.⁷⁹ These include (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, forced or compulsory labour, (b) the use, procuring or offering of a child for prostitution or the production of pornography, (c) the use of children in illicit activities, particularly for the production and trafficking of drugs and (d) work which is likely to harm the health, safety or morals of the child.⁸⁰ Unlike the Convention concerning Forced Labour, this Convention considers prostitution as a worst form of child labour. It further calls on State Parties to take effective measure (a) to prevent the engagement of children into these forms of labour, (b) to provide assistance for the removal of children from these forms of labour and for their

⁷⁴ Article 7(2)(c).

⁷⁵ This Convention came into force on 1 May 1932 and was ratified by South Africa on 5 March 1997.

⁷⁶ Article 1.

⁷⁷ Article 2.

⁷⁸ This Convention was ratified by South Africa on 7 June 2000 and came into force on 19 November 2000.

⁷⁹ Article 1.

⁸⁰ Article 3.

rehabilitation and social re-integration, (c) to identify and reach out to children at risk and (d) to take account of the special situation of girls.⁸¹ State Parties are also required to assist each other through enhanced international co-operation, including support for social and economic development, poverty eradication programmes and universal education.⁸²

REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights of 1981

2.37 The Charter⁸³ stipulates that every person is entitled to respect for his or her life and the integrity of his or her person.⁸⁴ The Charter recognises an individual's right to human dignity and prohibits all forms of exploitation and degradation of persons, particularly slavery; slave trading; torture; cruel, inhuman or degrading punishment and treatment.⁸⁵ The Charter stipulates that every individual has the right to liberty and security of the person.⁸⁶ Furthermore, State Parties must eliminate all discrimination against women and should ensure the protection of the rights of women and children as stipulated in international declarations and conventions.⁸⁷

African Charter on the Rights and Welfare of the Child of 1990

2.38 The Charter⁸⁸ commits State Parties to take appropriate measures to prevent the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child.⁸⁹ State Parties must take appropriate measures to prevent the use of children in all forms of begging.⁹⁰ The Charter emphasises the protection of children from all forms of economic exploitation

⁸¹ Article 7.

⁸² Article 8.

⁸³ Adopted on 27 June 1981 and entered into force on 21 October 1986.

⁸⁴ Article 4.

⁸⁵ Article 5.

⁸⁶ Article 6.

⁸⁷ Article 18(3).

⁸⁸ Entered into force on 29 November 1999.

⁸⁹ Article 29(a).

⁹⁰ Article 29(b).

and from performing any work that is likely to be hazardous or that may interfere with their physical, mental, spiritual, moral or social development.⁹¹ The Charter obliges State Parties to take specific legislative, administrative, social and educational measures to protect children from all forms of torture, inhuman or degrading treatment, especially physical or mental injury or abuse, neglect or maltreatment.⁹² Furthermore, State Parties must protect children from all forms of sexual exploitation and should take measures to prevent (a) the inducement, coercion or encouragement of a child to engage in any sexual activity, (b) the use of children in prostitution or other sexual practices, and (c) the use of children in pornographic activities, performances and material.⁹³

Protocol on the Rights of Women in Africa

2.39 The Protocol⁹⁴ supplements the African Charter on Human and Peoples' Rights. It obliges State Parties to adopt appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.⁹⁵ The Protocol further gives recognition to a woman's right to dignity⁹⁶ and prohibits all forms of exploitation, cruel, inhuman or degrading punishment and treatment against women.⁹⁷

⁹¹ Article 15(1).

⁹² Article 16(1).

⁹³ Article 27.

⁹⁴ Adopted on 11 July 2003.

⁹⁵ Article 4(2)(a).

⁹⁶ Article 3.

⁹⁷ Article 4(1).