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South Africa's Approach to the Global Human Trafficking Crisis: An Analysis of the Proposed Legislation and the Prospects of Implementation

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SOUTH AFRICA'S APPROACH TO THE GLOBAL HUMAN TRAFFICKING CRISIS: AN ANALYSIS OF THE PROPOSED LEGISLATION AND THE PROSPECTS OF IMPLEMENTATION

I. INTRODUCTION

The worldwide epidemic of trafficking in persons continues to be a global problem each year,¹ despite the creation and ratification in 2000 of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime* ("Protocol" or "U.N. Protocol").² Even with 117 signatories,³ the Protocol alone is ineffective in curbing the increasing crisis. The responsibility to remedy the problem still lies in the hands of individual countries,⁴ which must enact legislation to deal with intrastate issues and work with each other to deal with interstate issues. South Africa is not only a signatory to the Protocol; it ratified the Protocol on February 20, 2004.⁵ Despite the

1. See Hillary Rodham Clinton, Secretary of State, Summary of Remarks at the Release of the Ninth Annual Trafficking in Persons Report Alongside Leaders in Congress (June 16, 2009), <http://www.state.gov/g/tip/rls/tiprpt/2009/index.htm> ("The ninth annual Trafficking in Persons Report sheds light on the faces of modern-day slavery and on new facets of this global problem. The human trafficking phenomenon affects virtually every country, including the United States.").

2. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II (Nov. 15, 2000) [hereinafter Protocol], available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

3. United Nations Office on Drugs & Crime [UNODC], Signatories to the CTOC [Convention Against Transnational Organized Crime] Trafficking Protocol, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last visited Aug. 28, 2009).

4. See, e.g., Protocol, *supra* note 2, art. 5 ("Each State Party shall adopt such legislation and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."). Language requiring state legislative implementation is also used in articles six through thirteen. *Id.* arts. 6–13 (employing the words, e.g., "each State Party shall").

5. South Africa ratified the Protocol, but stated:
[P]ending a decision by the Government of the Republic of South Africa on the compulsory jurisdiction of the International Court of Justice, the Government of the Republic does not consider itself bound by the terms of Article 15 (2) of the Protocol which provides for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Protocol. The Republic will adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case.

Signatories to the CTOC Trafficking Protocol, *supra* note 3.

country's commitment to eliminating the illegal trafficking of persons, it took the South African Law Reform Commission over four years to draft legislation combating human trafficking.

On November 25, 2008, the South African Law Reform Commission released the final version of the *Prevention and Combating of Trafficking in Persons Bill*.⁶ This proposed legislation was created to

[G]ive effect to the [Protocol]; to address the trafficking of persons within or across the border of the Republic; to prevent trafficking in persons; to provide for an offence of trafficking in persons and other offences associated with trafficking in persons; to provide for measures to protect and assist victims of trafficking in persons; and to provide for matters connected therewith.⁷

The proposed bill was submitted to the Minister of Justice and was later published for public comment after March 31, 2009.⁸ The period for public commentary closed on June 15, 2009, and the bill was expected to be presented to Parliament for a year-end vote.⁹

Since the inception of the United States' Victims of Trafficking and Violence Protection Act of 2000,¹⁰ the United States annually issues the *Trafficking in Persons Report* in an attempt to gather and disseminate information about the growing worldwide problem of human trafficking.¹¹

6. South African Law Reform Comm'n, Reports Index, <http://www.doj.gov.za/salrc/reports.htm> (last visited Aug. 28, 2009).

7. SOUTH AFRICAN LAW REFORM COMM'N, PROJECT 131: REPORT ON TRAFFICKING IN PERSONS, Annexure D, 2 (2008), http://www.doj.gov.za/salrc/reports/r_pr131_trafficking_2008.pdf [hereinafter SA LAW REFORM COMM'N REPORT].

8. Nthambeleni Gabara, *Human Trafficking Legislation to Be Gazetted for Public Comment*, BUA NEWS ONLINE, Mar. 31, 2009, <http://www.buanews.gov.za/news/09/09033111151002>.

9. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 261 (2009), <http://www.state.gov/documents/organization/123357.pdf> [hereinafter 2009 TIP REPORT]. As of January 18, 2010 the draft bill does not yet appear to have been presented to Parliament. See Parliament of the Republic of South Africa, Bills Before Parliament, http://www.parliament.gov.za/live/content.php?Category_ID=72 (last visited Jan. 18, 2010).

10. Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7101 (2000) (amended 2003, 2005).

11. *The Trafficking in Persons Report*

is intended to raise global awareness and spur foreign governments to take effective actions to counter all forms of trafficking in persons—a form of modern-day slavery. The Report has increasingly focused the efforts of a growing community of nations to share information and to partner in new and important ways to fight human trafficking. A country that fails to take significant actions to bring itself into compliance with the minimum standards for the elimination of trafficking in persons receives a negative “Tier 3” assessment in this Report. Such an assessment could trigger the withholding of non-humanitarian, non-trade-related assistance from the United States to that country.

The United States monitors and evaluates other governments' efforts to combat trafficking using a tier system that determines a state's level of compliance with minimum standards for eliminating the trafficking of persons. First, the Department of State "evaluates whether the government[s] fully compl[y] with the TVPRA's [Trafficking Victims Protection Reauthorization Act] minimum standards for the elimination of trafficking."¹² Next, the Department "considers whether governments [have] made significant efforts to bring themselves into compliance."¹³ There are four possible tier placements, ranging from full compliance to little or no compliance: Tier 1, Tier 2, Tier 2 Watch List, and Tier 3; Tier 1 represents full compliance.¹⁴

In the 2005 report, South Africa was removed from Tier 2 and placed on the Tier 2 Watch List.¹⁵ It remained on the Tier 2 Special Watch List from 2005 until 2009.¹⁶ According to the 2008 Report, "[t]he Government of South Africa [did] not fully comply with the minimum standards for the

U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2005), <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 TIP REPORT].

12. Office to Monitor & Combat Trafficking in Persons, *Trafficking in Persons Interim Assessment*, U.S. DEP'T OF STATE, Feb. 1, 2006, <http://www.state.gov/g/tip/rls/rpt/60487.htm> [hereinafter *Trafficking in Persons Interim Assessment*]. See *infra* notes 98 and 100 and accompanying text.

13. *Trafficking in Persons Interim Assessment*, *supra* note 12.

14. The tier classification system is defined as follows:

Tier 1: Countries whose governments fully comply with the Act's minimum standards.

Tier 2: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards.

Tier 2 Special Watch List: Countries whose governments do not fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards, and:

(a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or

(b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or

(c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

Tier 3: Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.

2005 TIP REPORT, *supra* note 11, at 28.

15. *Id.* at 198–99.

16. *Id.*; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 46 (2006), <http://www.state.gov/documents/organization/66086.pdf> [hereinafter 2006 TIP REPORT]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 42 (2007), <http://www.state.gov/documents/organization/82902.pdf> [hereinafter 2007 TIP REPORT]; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 44 (2008), <http://www.state.gov/documents/organization/105501.pdf> [hereinafter 2008 TIP REPORT]; 2009 TIP REPORT, *supra* note 9, at 50.

elimination of trafficking; however, it [was] making significant efforts to do so.”¹⁷ Throughout the remainder of 2008 and into 2009, South Africa demonstrated its commitment to the elimination of trafficking in persons, warranting its removal from the Tier 2 Watch List and its return to the Tier 2 List in the 2009 Report.¹⁸

The enactment of the *Prevention and Combating of Trafficking in Persons Bill*, combined with proper implementation devices, should be enough to remove South Africa from its current placement on the Tier 2 List, ideally bringing the country up to full compliance with U.S. and international standards for human trafficking. The proposed legislation includes provisions that give full effect to the U.N. Protocol, as well as those that provide for the creation of inter-sectoral task teams throughout the country in order to facilitate its effective implementation.¹⁹ The scope of the proposed legislation, combined with the support of these task teams, should enable South Africa to competently fight human trafficking within and across its borders. The country has numerous reasons²⁰ to work toward the end goals of eliminating human trafficking and aligning with U.S. and international standards, and it must begin by enacting the proposed legislation.

This Note will first discuss the historical background of trafficking in persons in South Africa. It will then review the legislative measures currently in place in South Africa to prosecute and prevent human trafficking. Next, it will analyze the proposed legislation and assess the likelihood of its effectiveness with regard to the U.N. Protocol and the standards set forth in the United States’ TVPRA. Finally, from international methods of implementing the U.N. Protocol, it will draw suggestions for South Africa to most effectively prevent human trafficking within and across its borders, prosecute those who engage in human trafficking, and protect victims.²¹

17. 2008 TIP REPORT, *supra* note 16, at 228.

18. 2009 TIP REPORT, *supra* note 9, at 50.

19. *See generally* SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D.

20. These reasons include: the fast-approaching Fédération Internationale de Football Association (“FIFA”) World Cup that is sure to spark an influx of tourism of all kinds; South Africa’s constitutional commitment to protect its citizens from slavery; South Africa’s signing and ratification of the U.N. Protocol; and South Africa’s demotion to Tier 2 Watch List status in 2005 by the United States in the annual *Trafficking in Persons Reports*, though this particular issues has been partially remedied already by South Africa’s significant efforts in the past year, which warranted its removal from the watch list and its placement on the Tier 2 list in the 2009 TIP Report.

21.

The United Nations Office on Drugs and Crime (UNODC) describes victims as “young girls sold by their families; children drugged and forced to fight as soldiers; men bonded/chained in labor on mines and farms; women enslaved in quarries and households; women and girls

II. BACKGROUND: HUMAN TRAFFICKING IN SOUTH AFRICA

While trafficking in human beings in South Africa is not new, there has been a rapid increase over the past two decades in the prevalence and documentation of cases.²² With the growth of globalization, human trafficking worldwide has become “a complex, multi-faceted phenomenon involving multiple stakeholders at the institutional and commercial level.”²³ In a country where demand for cheap labor and commercial sex is high, it is no wonder that the black-market business of trafficking in persons has flourished in South Africa. A combination of extreme poverty, poor education, and a lack of employment opportunities “propel[s] vulnerable people into the hands of traffickers.”²⁴

In the aftermath of apartheid, South Africa has become a “source, transit, and destination country for trafficked men, women, and children.”²⁵ This modern-day form of slavery has become increasingly problematic for South Africans as “[a]rmed conflict and associated dislocation, political and economic upheaval, food insecurity, lack of education and employment opportunities and the blight of the AIDS epidemic make South Africa a magnet that attracts migration from across

trapped in the sex trade; boys forced to fish in dangerous waters—all of them people, human beings, coerced to do what others would never freely do, paid virtually nothing for their pains.”

International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery: Hearing Before the H. Comm. on Foreign Affairs, 110th Cong. 39 (2007) (statement of Rev. Monsignor Franklyn M. Casale, President, St. Thomas University, Miami, Florida) (footnote omitted).

22. This increase in the perceived prevalence and documentation may come from the heightened interest of the human interest group Molo Songololo in South Africa and the International Organization for Migration (“IOM”). A 2008 article published by the Integrated Regional Information Networks stated, “Official statistics are not available and ‘reports on the trade in South Africa draw almost entirely on three pieces of primary research’: two reports compiled in 2000 by the children’s advocacy group, Molo Songololo, and a 2003 study by the IOM, but only the IOM study attempted to ascertain the numbers involved.” Integrated Regional Information Networks (IRIN), *South Africa: How Heavy Is Human Trafficking?*, Sept. 8, 2008, <http://www.unhcr.org/refworld/docid/48ce1d5e1e.html>. However, the article further recognized that human trafficking has become a prevalent and lucrative economic threat:

The IOM contends that global human trafficking is worth between US \$7 billion and \$12 billion dollars annually, making it the third most lucrative criminal activity after the narcotics and weapons trades, although “in contrast to these other criminal activities, however, the penalties for human trafficking in most countries are much less severe, or non-existent.”

Id.

23. U.N. Educ., Scientific & Cultural Org. [UNESCO], *Policy Paper No. 14.5(E): Human Trafficking in South Africa: Root Causes and Recommendations*, at 7, SHS/CCT/2007/P1/H/6 (2007), available at <http://unesdoc.unesco.org/images/0015/001528/152823e.pdf> [hereinafter *Root Causes and Recommendations*].

24. *Id.*

25. 2008 TIP REPORT, *supra* note 16, at 227.

the continent.”²⁶ As these immigrants are vulnerable and easily susceptible to traffickers, the increase in migration across South Africa’s borders correlates with the rise in trafficking.²⁷ In 2003, the International Organization for Migration (“IOM”) published a report on human trafficking in southern Africa.²⁸ The report notes that male refugees, who make up the vast majority of the growing population of refugees in the region,²⁹ may turn to conducting human trafficking as a way of easily earning money.³⁰ The report suggests that “[t]he struggle to survive in South Africa in the face of unemployment and xenophobia pushes some refugee men to pursue opportunities from within the relative security of the clan, which may entail engaging in illegal activities. The trafficking of female family members for sexual exploitation is one such activity.”³¹ Additionally, criminal syndicates have been implicated as an alternative driving force behind the increase in human trafficking in South Africa.³²

According to the Southern Africa Counter-Trafficking Assistance Program (“SACTAP”), “South Africa is commonly regarded as the main country of destination for trafficked persons in the region.”³³ It further explains that, “[i]n many cases, women and children are lured to South Africa with promises of jobs, education or marriage, only to be sold and sexually exploited in the country’s major urban centres, or small towns

26. *Root Causes and Recommendations*, *supra* note 23, at 7.

27. “Traditional migration patterns of labour to South Africa from surrounding states, the practice of children being loaned/sent to better-situated family members to be raised; and casual border procedures contribute to acceptance and expectations of unregulated cross-border movement.” *Id.* at 11. *See also* JONATHAN MARTENS, MACIEJ PIECZKOWSKI & BERNADETTE VAN VUUREN-SMYTH, INT’L ORG. FOR MIGRATION (IOM), SEDUCTION, SALE AND SLAVERY: TRAFFICKING IN WOMEN & CHILDREN FOR SEXUAL EXPLOITATION IN SOUTHERN AFRICA 21 (May 2003) (suggesting that “[m]obile populations are always more vulnerable to exploitation than stable populations”).

28. MARTENS, *supra* note 27, at 133.

29. At the time the IOM report was published, the population of refugees stood at 23,000. *Id.* at 21. Ninety-five percent of the refugee population was male. *Id.* at 23.

30. “The sexual exploitation of women, as a means of earning an income, soon becomes an attractive and viable option for some refugee men, particularly those living in cities where there is an obviously profitable sex industry.” *Id.* at 24.

31. *Id.* at 33.

32. “Traffickers operating in South Africa include Nigerian networks, Chinese triads, Russian and Bulgarian mafia and various groups of organised criminal syndicates.” Yazeed Kamaldien, *International Women’s Day: South Africa Linked in the Global Human Trafficking*, INTER PRESS SERVICE NEWS AGENCY, Mar. 8, 2005, <http://ipsnews.net/africa/nota.asp?idnews=27772>.

In the past, victims had typically been runaways who fell prey to city pimps, but now crime syndicates recruit victims from rural towns. South African women are trafficked to Europe and the Middle East for domestic servitude and sexual exploitation. Nigerian syndicates have reportedly begun moving trafficked women from South Africa to the U.S. as well for African migrant clients there.

See 2009 TIP REPORT, *supra* note 9, at 260.

33. IRIN, *supra* note 22.

and more rural environments.”³⁴ According to a 2004 report by South Africa’s Independent Newspapers, “every year nearly 900,000 people are smuggled across borders as sex slaves, child labourers and illegal organ donors, with 75 percent of them going through South Africa.”³⁵ Other research suggests that the number of women and children trafficked annually into South Africa for the purpose of sexual exploitation is between 850 and 1,100.³⁶ Most researchers, however, seem to believe that cases of human trafficking are underreported, and thus feel that the current statistics do not accurately reflect the immensity of the problem.³⁷ Many factors may play a role in the projected high percentage of incidents of trafficking in persons that go unreported or undiscovered. For instance, under the current legislative regime in South Africa, there are disincentives for victims of human trafficking to turn themselves in, as they may be prosecuted for prostitution or other crimes.³⁸ Additionally, South Africa’s current witness protection program fails to provide complete support and protection for victims and, thus, may also deter human trafficking victims from stepping forward.³⁹ Researchers also contend that access to victims is difficult as they are hard to identify, “may

34. *Id.*

In most cases, women and children are lured with promises of employment or educational opportunities abroad; offers made appealing and credible within the context of historical migration patterns in the region which flow southwards to the relative prosperity of South Africa, or northwards to Europe. Only sometimes are their situations absolutely desperate. . . . Their sexual exploitation is facilitated largely by their relocation from a place with which they are familiar to one with which they are not.

MARTENS, *supra* note 27, at 123–24.

35. IRIN, *supra* note 22.

36. *Id.*

37. According to Karen Blackman, a spokesperson for the IOM’s Southern Africa Counter-Trafficking Assistance Program (“SACTAP”), “[t]he clandestine nature of human trafficking makes the scale of the illicit industry difficult to assess and there are few reliable statistics on the number of persons trafficked in the southern African region.” *Id.*

38. MARTENS, *supra* note 27, at 133.

When identified by police in South Africa, victims of trafficking are deported as illegal immigrants without being questioned about their experiences. Victims are afraid of law enforcement, and do not trust police to assist them. [In addition,] South Africa has no public services specifically designed to assist victims of trafficking.

Id. at 125.

39. South Africa passed the Witness Protection Act of 1998, which created the Office of Witness Protection and established protocol to be followed with respect to the protection of witnesses. Witness Protection Act 112 of 1998. There are a number of holes in this piece of legislation, including a failure to place a limit on how long the witness protection program may run, a failure to discuss what happens after testimony is given by a witness, and any explanation of whether there is a structure in place to take care of witnesses for the long term. *See id.*

speaking a language that is not native to the country in which they end up, and may be involved in hidden criminal activity.”⁴⁰

According to a policy paper published by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), the root causes of human trafficking in South Africa can be broken down into supply and demand factors.⁴¹ Factors that contribute to the supply of victims of human trafficking include “unequal access to education . . . lack of legitimate and fulfilling employment opportunities . . . sex-selective migration policies and restrictive emigration policies/laws . . . less access to information on migration/job opportunities . . . disruption of support systems due to natural and human created catastrophes; and traditional community attitudes and practices.”⁴²

Many factors augment demand, including the increased use of foreign workers in household roles, the growth of the sex and entertainment industries, and the low-risk, high-profit nature of trafficking.⁴³ Because the business of human trafficking feeds on poverty and despair, it is commonly found in countries, such as South Africa, that lack the general stability and economic resources to combat it.

III. SOUTH AFRICA’S CURRENT LEGISLATIVE SYSTEM FOR HUMAN TRAFFICKING

With the 2010 World Cup—set to be held in South Africa—rapidly approaching, researchers and legislators are growing more concerned about implementing effective legislation to combat the problem of

40. IRIN, *supra* note 22. The language problem may be particularly enhanced in South Africa as it has eleven official languages. S. AFR. CONST. 1996 s. 6(1).

41. *Root Causes and Recommendations*, *supra* note 23, at 32.

42. *Id.* at 32–33. Additional supply factors are categorized as poverty, HIV and AIDS, gender and age imbalances, discriminatory cultural practices and beliefs, lack of knowledge and information, and absence of effective laws. *Id.* at 34–38.

43.

[T]he increasing demand for foreign workers for domestic and care-giving roles, and lack of adequate regulatory frameworks to support this; the growth of the billion-dollar sex and entertainment industry, tolerated as a “necessary evil” while women in prostitution are criminalized and discriminated against; the low risk-high profit nature of trafficking encouraged by a lack of will on the part of enforcement agencies to prosecute traffickers (which includes owners/managers of institutions into which persons are trafficked); the ease in controlling and manipulating vulnerable women; lack of access to legal redress or remedies, for victims of traffickers; and devaluation of women and children’s human rights.

Id. at 32. Additional demand factors are categorized as “[n]eed for low-skilled and cheap labor, [c]ultural beliefs, [s]ex tourism and industry, [a]doption trade, [d]emand for organs and body-parts, [and] [n]eed for children-soldiers in armed conflict.” *Id.* at 38.

trafficking in persons in South Africa.⁴⁴ According to Amanda Ledwaba, Director of Investigations in the Department of Home Affairs, “[t]he pressure is now on the government to pass this legislation as soon as possible.”⁴⁵ She further stated that “it would also be ‘a disaster’ if the Act were not introduced before 2010, as sex workers from all over the world would be coming in ahead of 2010 to ply their trade. And the human-traffickers who brought them in would manipulate the women.”⁴⁶ Pre-World Cup tensions may be one of the driving forces behind the current push for legislation. Additional factors may include: South Africa’s constitutional commitment to freedom from slavery; its need to follow through on its international obligations under the U.N. Protocol; and its interest in raising its status on the United States’ tier list.

While South Africa has not yet enacted legislation dealing solely with the issue of human trafficking, it has taken a number of steps in that direction. Prior to the release of the proposed *Prevention and Combating of Trafficking in Persons Bill*, South Africa signed and ratified the *United Nations Convention Against Transnational Organized Crime* (“Convention”)⁴⁷ and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.⁴⁸ South Africa has also signed and ratified a number of international instruments related to trafficking in persons.⁴⁹ Despite its commitment to fighting human

44. Frederico Links, *Human Trafficking and Prostitution to Surge Ahead of 2010 World Cup*, NAMIBIAN, Sept. 2, 2008, [http://www.namibian.com.na/index.php?id=28&tx_ttnews\[tt_news\]=51243&no_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=51243&no_cache=1).

45. Barbara Cole, *Human Trafficking Must Be Addressed Now*, DAILY NEWS (Durban), Sept. 12, 2008, at 5, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080912113400769C601405 (quoting Amanda Ledwaba at a workshop on human trafficking in Durban, South Africa in September 2008).

46. *Id.* See also Katherine L. Morrow, Comment, *Soccer, Sex and Slavery: Human Trafficking in the World Cup*, 17 TUL. J. INT’L & COMP. L. 243 (2008) (analyzing the estimate that 40,000 women would have been trafficked into Germany prior to its hosting of the 2006 World Cup but for the implementation of preventive and protective measures).

47. U.N. Convention Against Transnational Organized Crime [UNCTOC], G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

48. The Protocol was created in 2000 to supplement the Convention. Protocol, *supra* note 2. The Convention came into operation on September 29, 2003 and the Protocol came into operation on December 25, 2003. See South African Government Information, Human Trafficking Strategy, <http://www.info.gov.za/issues/humantrafficking/strategy.htm> (last visited on Jan. 11, 2010) [hereinafter Human Trafficking Strategy].

49. These include: the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949, signed in 1950, ratified in 1951); the Convention on the Elimination of All Forms of Discrimination Against Women (1979, signed in 1993, ratified in 1996); and the Rome Statute of the International Criminal Court (2002, signed in 1998, ratified in 2000). South Africa has ratified other legal instruments including: the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women (1999, ratified in 2005); the Hague Convention no.33 on Protection of Children and Cooperation in Respect of Inter-

trafficking, evidenced by the signing and ratification of these agreements, the South African government cannot utilize these international agreements to prosecute human traffickers without first enacting implementing legislation.⁵⁰ Without explicit legislation addressing human trafficking, South Africa's National Prosecuting Authority is forced to prosecute human trafficking under various other statutes.⁵¹ In addition to employing criminal statutes, the legislators have amended a number of acts in order to provide minimal coverage of human trafficking issues.⁵² While these measures can be used to address some forms of human trafficking, full compliance under the Protocol mandates that each ratifying country implement national legislation that is modeled on the Protocol.⁵³

The Children's Act of 2005⁵⁴ is one of the most important acts currently at the disposal of South African prosecutors. Chapter 18 of the Children's Act deals with trafficking in children and was enacted to give effect to the U.N. Protocol as well as to "generally combat trafficking in

country Adoption (1993, ratified in 2003); the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000, ratified in 2003); the 1989 U.N. Convention on the Rights of the Child (ratified in 1995); the ILO Convention No.182 on the Worst Forms of Child Labour (1999, ratified in 2000). *Root Causes and Recommendations*, *supra* note 23, at 41–42.

50. Section 231(2) of South Africa's Constitution states that an international agreement binds the republic when it is enacted into law through national legislation. S. AFR. CONST. 1996 s. 231(2).

51. The available legislative means include

the Sexual Offences Act 23 of 1957, the Child Care Act 74 of 1983, as amended, the Prevention of Organised Crime Act 121 of 1998, the Prevention of and Combatting of Corrupt Activities Act 12 of 2004, the Immigration Act 13 of 2002, as amended, the Films and Publications Act 65 of 1996, as amended, the Corruption Act 94 of 1992, the Intimidation Act 72 of 1982 and the Riotous Assemblies Act 17 of 1956.

Human Trafficking Strategy, *supra* note 48. "The absence of legislation specific to human trafficking limits prosecutors to dealing only with the perpetrator directly linked to the offences resulting from the trafficking of the victim, to the exclusion of the perpetrators behind the scenes, as this is often an organized crime activity." *Id.*

52. These additions include: Chapter 18 of the Children's Act [Children's Act 38 of 2005 ss. 281–291]; Section 50(A) of the Child Care Act [Child Care Act 74 of 1983 s. 50(A)], and Chapter 5 of the Criminal Law (Sexual Offences) Amendment Bill [Criminal Law (Sexual Offences) Amendment Bill, 2003, Bill 50-2003]. *Root Causes and Recommendations*, *supra* note 23, at 45–48.

53.

[The Protocol] mandates that States Parties take the necessary measures not only to criminalize the offense of trafficking, but also to prevent trafficking, protect and assist victims of trafficking, and promote international cooperation to combat the problem of trafficking. Thus, the Protocol provides a "comprehensive international approach" to combating trafficking, which surpasses the earlier international trafficking prohibitions . . .

Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *FORDHAM INT'L L.J.* 721, 722 (2003) (internal citations omitted).

54. Children's Act 38 of 2005.

children.”⁵⁵ It sets forth a comprehensive definition of trafficking, which broadens the one found in the U.N. Protocol with respect to child trafficking victims.⁵⁶ The Act is divided into sections outlining target areas for the increased prevention of human trafficking, prosecution of traffickers, and protection of victims.⁵⁷ The proposed legislation for combating trafficking in persons is much more comprehensive in scope than the current text of the Children’s Act.⁵⁸ While Chapter 18 of the 2005 Children’s Act is a solid start to remedying the problem of trafficking in minors, it cannot sufficiently and effectively address all aspects of the growing international crisis in just three pages.⁵⁹

In addition to Chapter 18 of the Children’s Act, South Africa’s strategy to combat trafficking in persons includes a Sexual Offences Bill.⁶⁰ This bill provides another provisional definition of trafficking⁶¹ and was put in

55. Children’s Act 38 of 2005 s. 281(b). The Act further states: “The UN Protocol to Prevent Trafficking in Persons is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.” *Id.* s. 282.

56.

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

Children’s Act 38 of 2005 s. 1 at “trafficking.”

57. These target areas include: international co-operation, prohibition of trafficking in children, prohibition of behavior facilitating trafficking in children, providing assistance to children who are victims of trafficking, parental trafficking of children, protocols for reporting instances of child victimization, and treatment and repatriation of victims of human trafficking. *See* Children’s Act 38 of 2005 ss. 281–291.

58. The draft version of the Prevention and Combating of Trafficking in Persons Bill, as submitted to the Minister of Justice on November 25, 2008, is forty-five pages long and is divided into eleven chapters that attempt to create lasting definitions of the various offenses that may be prosecuted via this legislation. SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D.

59. Chapter 18 of the Children’s Act of 2005 dealing with trafficking in children spans pages numbered 144 through 148, which is only three pages of actual text in the Act, as compared to the much more comprehensive proposed human trafficking legislation, which is forty-five pages. *Compare* Children’s Act 38 of 2005 ss. 281–291, *with* SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D.

60. Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2003, Bill 50-2003 [hereinafter Sexual Offenses Amendment Bill].

61. Trafficking is defined to include

the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of—(a) threat of harm; (b) the threat or use of force, intimidation or other forms of coercion; (c) abduction; (d) fraud; (e) deception or false pretenses; (f) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an

place “[p]ending the adoption of legislation in compliance with” the U.N. Protocol.⁶²

While the National Prosecuting Authority is currently able to prosecute offenders under only common law⁶³ or statutory law,⁶⁴ South African legislators’ recognition of the compelling need to enact comprehensive and all-inclusive legislation addressing the prevention, prohibition, and prosecution of human trafficking demonstrates their continued commitment to combating the problem.

IV. IMPLEMENTING THE U.N. PROTOCOL: THE PREVENTION AND COMBATING OF TRAFFICKING IN PERSONS BILL

In assessing the implementation of South Africa’s proposed legislation, it is important to consider the framework upon which it is based—the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*. The Protocol, as discussed below, sets forth an international standard, which its signatories are requested to meet by enacting domestic legislation that provides individualized interstate and intrastate solutions to the global problem of human trafficking.

act; or (g) the giving or receiving of payments or benefits, for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic.

Sexual Offences Amendment Bill, *supra* note 60, s. 70(2)(b).

62. *Id.* at 40. See SA LAW REFORM COMM’N REPORT, *supra* note 7, at 14 (concluding that “[p]ending the promulgation of comprehensive legislation on trafficking in persons, the Criminal Law (Sexual Offences and Related Matters) Amendment Act is the most appropriate legislation to charge those who traffick persons for purposes of sexual exploitation”).

63. “[D]epending on the circumstances of each case, such persons could be charged with kidnapping, common assault, assault with intent to cause grievous bodily harm, extortion, slavery, attempted murder and murder.” SA LAW REFORM COMM’N REPORT, *supra* note 7, at 14.

64.

Statutory offences are provided for in the Sexual Offences Act [23 of 1957], the Riotous Assemblies Act [17 of 1956], the Immigration Act [13 of 2002], the Basic Conditions of Employment Act [75 of 1997], the Intimidation Act [72 of 1982], the Domestic Violence Act [116 of 1998] and the Prevention of Organised Crime Act [121 of 1998].

Id.

A. *The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*

In 2000, the United Nations enacted the Protocol, which recognizes that

effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights⁶⁵

It first sets forth a statement of purpose⁶⁶ and defines the terms of art that are utilized throughout the document.⁶⁷ The majority of sections begin with the mandate, “each State Party shall,” and prescribes the measures that states should implement to best combat trafficking.⁶⁸

While the Protocol proposes a comprehensive international approach to combat human trafficking, it cannot be enforced globally unless the signatories enact domestic legislation. Thus, it functions more as a starting point for those countries that have signed and ratified it, mandating domestic legislation modeled after the Protocol.⁶⁹ It is clear from the

65. Protocol, *supra* note 2, pmb1.

66.

The purposes of this Protocol are: (a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.

Protocol, *supra* note 2, art. 2.

67.

“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

Protocol, *supra* note 2, art. 3.

68. See, e.g., Protocol, *supra* note 2, arts. 5–6.

69. See Mattar, *supra* note 53. Additionally, “[a]ny anti-trafficking legislation must comply with the international mandate of the Protocol.” *Id.* at 758.

language of the Protocol that the United Nations views some measures as necessary to combat trafficking, and others as useful, but not essential.⁷⁰ Therefore, those nations that enact legislation in compliance with the required sections of the Protocol will have fulfilled their obligations as signatories of the document.⁷¹

B. South Africa's Prevention and Combating of Trafficking in Persons Bill

On November 25, 2008, the South African Law Reform Commission ("SALRC") submitted the *Prevention and Combating of Trafficking in Persons Bill* to the then Minister of Justice and Constitutional Development, Mohamed Enver Surty.⁷² South Africa's proposed legislation appears to be in full compliance with the standards set forth in the U.N. Protocol. The SALRC's investigation process⁷³ was accompanied by other responses of the South African government to the increasing

70. Compare Protocol, *supra* note 2, art. 5 ("[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally"), with Protocol, *supra* note 2, art. 7 ("each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases"). This difference in language suggests that the Protocol drafters believe that defining a criminal offense is necessary to combat trafficking in persons, but do not believe that countries must allow victims to remain in the country into which they have been trafficked.

71. South Africa has both signed and ratified the Protocol. According to section 231 of the South African Constitution:

An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless . . . [it is] [a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive.

S. AFR. CONST. 1996 s. 231(2)-(3). South Africa's signature and ratification of the Protocol "has placed an obligation on the government to bring its domestic laws and policies in line with the standards set by these instruments." SA LAW REFORM COMM'N REPORT, *supra* note 7, at 4.

72. SALRC Submits Reports on Trafficking and Stalking Amongst Others, JUSTICE TODAY (Dep't of Justice & Constitutional Dev., Republic of South Africa), Nov./Dec. 2008, at 6, available at http://www.doj.gov.za/newsletter/JT/JT2008_Vol%206.pdf.

73. See *infra* note 115. The SALRC first created an Issue Paper with a closing deadline for comment of April 30, 2004 to "serve as a basis for the Commission's deliberations, to elicit comment and suggestions from relevant stakeholders and to disseminate information on the issue of trafficking in persons to the public at large." SOUTH AFRICAN LAW REVIEW COMM'N, ISSUE PAPER 25, PROJECT 131: TRAFFICKING IN PERSONS, at iii (2004), http://www.doj.gov.za/salrc/ipapers/ip25_prj131_2004.pdf. Following up on the Issue Paper, the SALRC published a Discussion Paper with a comment submission deadline of June 30, 2006. SOUTH AFRICAN LAW REFORM COMM'N, DISCUSSION PAPER 111, PROJECT 131: TRAFFICKING IN PERSONS, at iii (2004), <http://www.doj.gov.za/salrc/dp111.pdf>. Finally, the SALRC published its official Report, which included the *Prevention and Combating of Trafficking in Persons Bill*, on November 25, 2008. South African Law Reform Comm'n, Reports Index, *supra* note 6.

prevalence of human trafficking.⁷⁴ The Bill was “gazetted,” or published, for public comment by the new Minister of Justice and Constitutional Development, Jeffrey Thamsanqa Radebe, in early 2009.⁷⁵ The proposed bill contains eleven chapters in which the SALRC sets out legislation for the prevention of trafficking, newly formulated offenses and penalties for traffickers, procedures for identification, protection and compensation of victims, general administrative measures, and a renewed commitment to international cooperation.⁷⁶ Additionally, it provides comprehensive definitions of the elements of human trafficking that incorporate and exceed the scope of the definitions set forth in the U.N. Protocol.⁷⁷

74. According to the South African government website, the government has created a “human trafficking strategy” in order to coordinate South Africa’s response to trafficking in persons. Aside from the SALRC’s investigation, the government established a “Human Trafficking Desk within the Organised Crime Unit at the South African Police Service (SAPS).” Human Trafficking Strategy, *supra* note 48.

Additionally, “[t]he presidential mandate of the SOCA [Sexual Offences and Community Affairs] Unit is to deal efficiently and effectively with sexual offences,” and as such, SOCA has been tasked with the “[e]stablishment of an inter-sectoral Task Team to commence a process of coordination and refinement of activities towards the development of a multi-sectoral and comprehensive strategy.” *Id.*

In the interest of inclusiveness, the following organizations and respective internal departments were elected to the Task Team: SAPS (the Human Trafficking Desk, Organised Crime Unit; Ports of Entry Policing); Department of Justice & Constitutional Development (Legislative Directorate); Department of Home Affairs (International Affairs); International Organisation for Migration; Department of Social Development; Department of Labour; Molo Songololo; United Nations Office on Drugs and Crime. “The Task Team identified six pillars of a national strategy to effectively address trafficking in persons, as an instance of organised crime: Information, Capacity-Building & Development, Victim Assistance & Integration, Policy & Legislation Development, Liaison & Consultation as well as Monitoring & Evaluation.” *Id.* See also Malebo Kotu-Rammopo, National Prosecuting Authority, South Africa’s Strategy to Counter Human Trafficking: Media Briefing Session (Aug. 13, 2008), <http://www.npa.gov.za/UploadedFiles/HUMAN%20TRAFFICKING%20PROGRAMME%20%20Media%2013%20Aug%202008.ppt>.

75. See General Notice, Dep’t of Justice & Constitutional Dev., Publication of Prevention and Combating of Trafficking in Persons Bill (2009), available at http://www.justice.gov.za/legislation/invitations/20090508_EnglishTIP.pdf.

76. SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D. The first chapter of the Bill includes a definitional section as well as an outline of the proposed legislation’s objectives. *Id.*

77. The Bill defines trafficking as

the recruitment, sale, supply, procurement, transportation, transfer, harbouring, receipt of persons or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic—

(a) by means of the use of threat, force, intimidation or other forms of coercion, abduction, kidnapping, fraud, deception, debt bondage, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control or authority over another person; or

(b) by abusing vulnerability.

Id. at 11. The Bill further defines exploitation in much greater detail than does the U.N. Protocol.

“[E]xploitation” includes, but is not limited to—(a) all forms of slavery or practices similar to slavery; (b) forced marriage; (c) sexual exploitation; (d) servitude; (e) forced labour; (f) child labour as defined in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005); (g) the

The proposed bill complies with the U.N. Protocol by suggesting legislative measures that would establish criminal offenses for trafficking in persons.⁷⁸ Once adopted, this legislation will provide the National Prosecuting Authority with a new arsenal of tools with which to prosecute traffickers and almost anyone who has even minimal involvement with the movement of trafficking victims into, out of, and through the Republic.⁷⁹

In compliance with article 6 of the Protocol, the Bill provides for programs to increase public awareness in order to lay a foundation for the prevention of human trafficking.⁸⁰ It is important to note that Chapter 6 of

removal of body parts; and (h) the impregnation of a female person against her will for the purpose of selling her child when born.

Id. at 9.

78. Chapter 3 of the Bill introduces offenses and penalties, making it a crime to intentionally traffic another human being. *Id.* at 13. In a footnote to the Bill, the SALRC explains:

Schedule 1 to this Bill amends the Criminal Law Amendment Act 105 of 1997 by including the offence of trafficking in persons in Schedule 2, Part 1 of that Act. This means that a regional court or a High Court may sentence a person it has convicted of the offence of trafficking in persons to imprisonment for life.

Id. at 13.

79. The Bill establishes penalties for trafficking in persons; engaging in conduct that causes another person to enter into debt bondage; destroying, confiscating, possessing or concealing documents; using the services of, or intentionally benefitting from, a victim of trafficking; any conduct that facilitates trafficking in persons; and carrying victims of trafficking into or out of the Republic—with some restrictions. *Id.* at 13–17. The Bill further provides that a court of the Republic may exert jurisdiction outside of the Republic if the person to be charged

(a) is a citizen of the Republic; (b) is ordinarily resident in the Republic; (c) has committed the offence against a citizen of the Republic or a person who is ordinarily resident in the Republic; (d) is, after the commission of the offence, present in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic; (e) is, for any reason, not extradited by the Republic or if there is no application to extradite that person; or (f) is a juristic person or a partnership in terms of any law in the Republic.

Id. at 17.

80.

Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases: (a) Information on relevant court and administrative proceedings; (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

Protocol, *supra* note 2, art. 6, § 2.

Chapter 4 of the Bill deals with the identification and protection of victims of trafficking, including how to report and refer both child and adult victims of trafficking to the correct authorities to ensure their safety. The chapter further provides specific measures to be taken to aid a child trafficking victim and provide health care to victims. *See* SA LAW REFORM COMM'N REPORT, *supra* note 7, Annexure D, at 18–21.

Additionally, Chapter 5 of the Bill addresses the status of foreign victims of trafficking by providing a recovery and reflection period, temporary residency, and possible permanent residency. *Id.* at 21–24. Chapter 6 further elaborates on the available services for adult victims of trafficking. It includes a list of the minimum norms and standards that must be provided to such victims and a

the Bill calls on “an accredited organisation” to draw up plans to provide access to such programs and additional assistance.⁸¹ The Bill places a positive obligation on other functioning members of the State to be more involved, and establishes a more cohesive approach to South Africa’s fight against trafficking.⁸²

Additionally, in accordance with article 9 of the Protocol, the Bill includes statutory measures for the identification and protection of victims of trafficking.⁸³ It further protects victims of trafficking by specifically prohibiting criminal prosecution of victims in certain circumstances, i.e., if a victim’s violation of another statutory or common law provision was a direct result of being trafficked.⁸⁴ The Bill also addresses the

description of programs that must be offered by accredited organizations in the Republic for accommodations, counseling, rehabilitation, and reintegration for adult victims. *Id.* at 24–27.

81. Chapter 6 of the Bill places an obligation on “an accredited organisation” to offer specified programs, draw up plans “to address the immediate and long term needs of a person who has been certified as a victim of trafficking,” and manage and collect information on victims of trafficking. *Id.* at 25–26. Whether this will be effective will depend on the organization tasked with these obligations. Because the SALRC did not name a specific organization in this draft, the choice is likely to be left to the Minister of Justice or to Parliament.

82. For example, in Chapter 10 Section 40 the proposed bill calls for the establishment of an Inter-sectoral Committee, which it calls on in Chapter 2 Section 3 to “establish public awareness programmes or other measures for the prevention of trafficking in persons.” *See id.* at 12, 39–40. The proposed legislation also calls on the help of immigration officials, labour inspectors, social workers, social service professionals, doctors, nurses and healers to report all instances where they have “reasonable grounds” to conclude that an adult person is a victim of trafficking. *See id.* at 19.

83. “States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization.” Protocol, *supra* note 2, art. 9.

Chapter 2 of the Bill is aimed at preventing trafficking in persons and sets forth measures to increase public awareness. It mandates that the Inter-sectoral Committee:

[E]stablish public awareness programmes or other measures for the prevention of trafficking in persons designed to—(a) inform and educate members of the public, especially those who are vulnerable or at risk of becoming victims of trafficking, foreigners who apply for South African visas who may be victims of trafficking, and South African citizens or permanent residents who depart for work abroad, on issues relating to trafficking in persons . . . (b) inform and educate victims of trafficking on—(i) their rights as victims; (ii) legal or other measures in place to ensure their safety, recovery and repatriation; and (iii) organisations, institutions or law enforcement agencies that may be approached for assistance or information; (c) discourage the demand for and the supply of victims of trafficking that fosters the exploitation of such victims, especially women and children.

SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D, at 12.

84.

No criminal prosecution shall be instituted against a child who was found to be a victim of trafficking after an investigation in terms of section 110(5)(c) of the Children’s Amendment Act, 2007 (Act No. 41 of 2007), or an adult person who has been certified as a victim of trafficking in terms of section 12(6)(a) for—

(a) entering or remaining in the Republic in contravention of the Immigration Act, 2002 (Act No. 13 of 2002);

compensation of victims and the State,⁸⁵ deportation and repatriation of victims,⁸⁶ and general implementation provisions.⁸⁷

As the period for public comment on the *Prevention and Combating of Trafficking in Persons Bill* closed on June 15, 2009, the Department of Justice's next step will be to introduce the Bill to the Cabinet for approval and from there, it will be introduced into Parliament.⁸⁸ At the press briefing on November 25, 2008, the Minister of Justice projected that the proposed legislation would become law by the end of 2009.⁸⁹ While the accuracy of this estimate is dependent on the parliamentary process, the Department of Justice and Constitutional Development is committed to finalizing the process as soon as possible.⁹⁰ As of January 2010, the draft bill had not yet been introduced into Parliament for a vote, however, such action is expected in the near future.⁹¹ Further, inter-sectoral task teams on

(b) assisting another person to enter or remain in the Republic in contravention of the Immigration Act, 2002 (Act No. 13 of 2002);

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

(d) being involved in an illegal activity to the extent that he or she has been compelled to do so, as a direct result of his or her situation as a victim of trafficking.

Id., Annexure D, at 21.

85. *Id.*, Annexure D, at 27–30.

86. *Id.*, Annexure D, at 30–33.

87. These provisions include measures for dealing with trafficking by a parent, guardian, or other person who has parental responsibilities and rights for international co-operation, general directions for implementation and procedures that must be followed. *Id.*, Annexure D, at 33–39. The Bill further provides for the establishment of an Inter-Sectoral Committee, sets forth who will comprise this committee, and what its functions will be with respect to solving the crisis of human trafficking. *Id.*, Annexure D, at 39–42.

88. South Africa's legislative process involves a number of steps. The preparation of draft legislation requires the "investigation and evaluation of the legislative proposals . . . and consultation with interested parties." Dep't of Justice & Constitutional Dev., *The Legislative Process*, <http://www.doj.gov.za/legislation/legprocess.htm> (last visited Aug. 29, 2009). The majority of South Africa's bills are prepared by a government organization under the direction of a Minister or Deputy Minister. Once the Minister signs off on the proposed legislation, it is submitted to the Cabinet along with a Cabinet memorandum for approval. After such approval has been granted, the Minister "must submit a copy of the draft Bill to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces. However, before a Bill can be formally submitted to Parliament the State Law Advisers must be approached to certify the draft Bill." *Id.* This step ensures that the bill is in line with current South African law. Once approved, the bill is formally introduced into Parliament and, if passed, referred to the President to be signed into law. *Id.*; see also S. AFR. CONST. 1996 ss. 73, 82.

89. E-mail from Lowesa Stuurman, Researcher, SA Law Reform Comm'n, to Laura Najemy, J.D. Candidate, Washington University in St. Louis School of Law (Dec. 5, 2008, 05:35 CST) (on file with author).

90. *Id.*

91. E-mail from Gaile Moosmann, Executive Director, Parliamentary Monitoring Group, to Laura Najemy, J.D. Candidate, Washington University in St. Louis School of Law (Jan. 12, 2010, 03:38 CST) (on file with author).

human trafficking are already being set up throughout the country, demonstrating that South Africa is committed to fighting the problem on all fronts.⁹²

V. SOUTH AFRICA'S COMPLIANCE WITH U.S. AND INTERNATIONAL STANDARDS

In 2000, the United States enacted the Victims of Trafficking and Violence Protection Act ("VTVP Act").⁹³ This Act has since been reauthorized and amended in 2003⁹⁴ and 2005.⁹⁵ The United States' VTVP Act created minimum standards for the elimination of trafficking globally.⁹⁶ In order to assess each country's compliance with these

92. The National Prosecuting Authority spearheaded an inter-sectoral task team on human trafficking in the Kwa-Zulu Natal province that has already proved successful. The Kwa-Zulu Natal province has seen a decrease in the number of brothels in Durban Central because of an increase in police activity in the area according to Police Superintendent Anton Booysen of the Kwa-Zulu Natal Human Trafficking, Prostitution, Pornography and Brothels Task Team. Kamin Padayachee, *Battle to Control Brothels in Suburbs*, MERCURY, Aug. 28, 2009, http://www.iol.co.za/index.php?set_id=1&click_id=2937&art_id=vn20090828042540710C294076. Additionally, international organizations have been influential in creating task teams to combat human trafficking in South Africa. The International Organization for Migration launched the Western Cape Provincial Task Team, South Africa's "first provincial civil society initiative against human trafficking," in 2008. *SA: Western Cape Provincial Task Team on Human Trafficking Launched*, EYE ON HUMAN TRAFFICKING: A BULLETIN OF NEWS, INFORMATION AND ANALYSIS ON TRAFFICKING IN PERSONS IN SOUTHERN AFRICA (International Organization for Migration, Pretoria, South Africa), Issue 17, 2008, at 6, available at http://iom.org.za/site/index.php?option=com_docman&task=doc_view&gid=101.

93. Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7101 (2000) (amended 2003, 2005). The VTVP Act was originally intended for three main purposes: "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." § 7101(a).

94. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (2003).

95. Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (2005).

96.

Minimum Standards—For purposes of this chapter, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following:

(1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.

(2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.

(3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

minimum standards, the VTVP Act established seven criteria for consideration.⁹⁷ According to the process laid out in the VTVP Act, if a country does not meet the minimum standards, the United States then assesses what efforts the country is making to do so. This determines whether the country is placed in Tier 2 or Tier 3.⁹⁸

In 2001, in response to the passage of the Victims of Trafficking and Violence Protection Act of 2000,⁹⁹ the President of the United States created the Office to Monitor and Combat Trafficking in Persons,¹⁰⁰ which

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

VTVP Act § 7106(a).

97. The Act also sets out seven criteria that “should be considered” as indicia of the fourth point above, “serious and sustained efforts to eliminate trafficking.” VTVP Act § 7106(a)(4), (b). Summarized, they are:

1. Whether the government vigorously investigates and prosecutes acts of trafficking within its territory.
2. Whether the government protects victims of trafficking, encourages victims’ assistance in investigation and prosecution, provides victims with legal alternatives to their removal to countries where they would face retribution or hardship, and ensures that victims are not inappropriately penalized solely for unlawful acts as a direct result of being trafficked.
3. Whether the government has adopted measures, such as public education, to prevent trafficking.
4. Whether the government cooperates with other governments in investigating and prosecuting trafficking.
5. Whether the government extradites persons charged with trafficking as it does with other serious crimes.
6. Whether the government monitors immigration and emigration patterns for evidence of trafficking, and whether law enforcement agencies respond appropriately to such evidence.
7. Whether the government vigorously investigates and prosecutes public officials who participate in or facilitate trafficking, and takes all appropriate measures against officials who condone trafficking.

§ 7106(b). *See also* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 15 (2003), <http://www.state.gov/documents/organization/21555.pdf> [hereinafter 2003 TIP REPORT].

98.

If a government is not in compliance with the minimum standards, the Department’s determination of whether that government is making significant efforts to bring itself into compliance with these minimum standards dictates its placement in Tier 2 or 3. The Act sets out three mitigating factors which the Department is to consider in making such determinations. Summarized, they are as follows:

1. the extent of trafficking in the country;
2. the extent of governmental noncompliance with the minimum standards, particularly the extent to which government officials have participated in, facilitated, condoned, or are otherwise complicit in trafficking; and
3. what measures are reasonable to bring the government into compliance with the minimum standards in light of the government’s resources and capabilities.

Id. at 15–16.

99. VTVP Act, § 7101.

100. Office to Monitor and Combat Trafficking in Persons, <http://www.state.gov/g/tip/> (last

publishes the *Trafficking in Persons* (“TIP”) Report, an annual report on trafficking in persons worldwide. These reports recognize the major forms of human trafficking¹⁰¹ throughout the world and categorize countries in tiers that reflect each country’s efforts to combat trafficking.¹⁰² The reports also provide country narratives for each country reviewed, which discuss the current problems, measures being taken, and recommendations for future action in prosecution, protection, and prevention.¹⁰³ The *TIP Reports* suggest a three-pronged approach to ending global human trafficking, focusing on prosecution, protection, and prevention.¹⁰⁴ The reports further provide a succinct definition of human trafficking, which is extrapolated from the U.N. Protocol.¹⁰⁵ The annual *TIP Reports* are an important part of the global effort to prevent, protect, and prosecute instances of human trafficking because they target non-compliant countries putting pressure on them to focus on domestic problems and solutions for human trafficking.

South Africa remained on the Tier 2 Watch List from 2005 until 2009, and the country report published in the *2009 TIP Report* concluded that, while the government does not fully comply with the minimum standards,

visited Sept. 15, 2009). The office “provides the tools to combat trafficking in persons and assists in the coordination of anti-trafficking efforts both worldwide and domestically.” *Id.*

101. Major forms of trafficking include: forced labor, bonded labor, debt bondage and involuntary servitude among migrant laborers, involuntary domestic servitude, forced child labor, child soldiers, sex trafficking and prostitution, children exploited for commercial sex, and child sex tourism. 2008 TIP REPORT, *supra* note 16, at 19–25.

102. See 2008 TIP REPORT, *supra* note 16.

103. In the *2008 TIP Report*, the recommendations for South Africa were:

Fully implement the trafficking provisions of the Sexual Offenses and Children’s Acts and raise awareness among all levels of relevant government officials as to their responsibilities under these provisions; develop and employ national procedures for victim protection, including the identification of trafficking victims among undocumented immigrants; and regularly compile national statistics on the number of trafficking cases prosecuted and victims assisted, as is done for other crimes.

2008 TIP REPORT, *supra* note 16, at 228.

104. See Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357 (2006) (suggesting that the U.S. approach of the “Three Ps” should be expanded to a “Five P’s” approach that would focus on protection, participation, prevention, provision, and prosecution).

105.

Human Trafficking is: Process ([r]ecruitment or [t]ransportation or [t]ransferring or [h]arboring or [r]eceiving) and Way/Mean ([t]hreat or [c]oercion or [a]bduction or [f]raud or [d]eceiveit or [d]eception or [a]buse of [p]ower) and Goal ([p]rostitution or [p]ornography or [v]iolence/[s]exual [e]xploitation or [f]orced [l]abor or [i]nvoluntary [s]ervitude or [d]ebt [b]ondage with unfair wages or [s]lavery/[s]imilar practices).

2008 TIP REPORT, *supra* note 16, at 290.

“it is making significant efforts to do so.”¹⁰⁶ South Africa’s proposed Bill demonstrates the country’s commitment to all three prongs suggested in the *TIP Reports*. It addresses issues of criminalization and prohibition of trafficking,¹⁰⁷ protection and assistance for trafficking victims,¹⁰⁸ and prevention of trafficking through awareness programs.¹⁰⁹ While these measures were not implemented nor fully functioning by the release of the *2009 TIP Report* on June 16, 2009, the report recognized that South Africa had made great strides over the past year toward compliance with international standards for the elimination of trafficking in persons.¹¹⁰ South Africa’s commitment toward implementing successful legislation proved to the United States that it was taking human trafficking seriously. Recognizing this, the United States removed South Africa from the Tier 2 Watch List and placed it back on the Tier 2 list,¹¹¹ where it had been prior to 2005.¹¹² Once the proposed legislation is signed into law and proven effective, South Africa will likely be classified as a Tier 1 country, indicating that its government “fully complies with the Trafficking Victims Protection Act’s minimum standards.”¹¹³

106. 2009 TIP REPORT, *supra* note 9, at 260.

107. See SA LAW REFORM COMM’N REPORT, *supra* note 7, Annexure D, at 13–18 (Chapter 3 is titled “Offences and Penalties.”).

108. See *id.*, Annexure D, at 18–33 (Chapter 4 is titled “Identification and Protection of Victim of Trafficking.” Chapter 5 is titled “Status of Foreign Victim of Trafficking.” Chapter 6 is titled “Services to Adult Victims of Trafficking.” Chapter 7 is titled “Compensation.” Chapter 8 is titled “Deportation and Repatriation of Victim of Trafficking.”).

109. See *id.*, Annexure D, at 12–13, 33–45 (Chapter 2 is titled “Prevention of Trafficking in Persons.” Chapter 9 is titled “General Provisions.” Chapter 10 is titled “Administration of Act.”).

110.

The Government of South Africa does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. The government opened prosecutions against 16 suspected trafficking offenders during the year and is continuing to prepare for late 2009 passage and subsequent implementation of its comprehensive anti-trafficking law by developing inter-agency operating procedures and training officials on the law, victim identification, and agency roles.

2009 TIP REPORT, *supra* note 9, at 260.

111. See *id.* at 50.

112. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 39 (2004), <http://www.state.gov/documents/organization/34158.pdf> [hereinafter 2004 TIP REPORT].

113. *Id.* at 30. Both downward and upward movement of classification within the tiers is very possible. For example, in 2003, Canada was demoted from Tier 1 to Tier 2. 2003 TIP REPORT, *supra* note 97; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2002), <http://www.state.gov/documents/organization/10815.pdf> [hereinafter 2002 TIP REPORT]. Yet, according to the *2004 TIP Report*,

[t]he Government of Canada fully complies with the minimum standards for the elimination of trafficking. The government’s Interdepartmental Working Group coordinates and reports on the effectiveness of the national anti-trafficking policy. Senior government officials are speaking out more often, and more resources are being devoted to border control; a new

VI. THE FUTURE OF HUMAN TRAFFICKING IN SOUTH AFRICA

With the 2010 World Cup on the horizon, it is more important than ever that South Africa stays committed to fighting the phenomenon of trafficking in persons within and across its borders.¹¹⁴ If the South African government implements the suggestions made by the SALRC in its Report on Trafficking in Persons¹¹⁵ and codifies the Bill into law, not only will it have aligned itself domestically with U.N. and U.S. schemata, but it will also have made great strides to protect its people against the very real and dangerous threat of human trafficking.

RCMP anti-trafficking taskforce is also being created. For these reasons, Canada has been reclassified from Tier 2 to Tier 1.

2004 TIP REPORT, *supra* note 112, at 228.

114. Some anecdotal evidence already exists suggesting that there will be a surge in trafficking in persons in anticipation of the 2010 World Cup. "IOM in Ethiopia, for example, is increasingly aware of stories of men who are promised lucrative contracts in the construction industry in South Africa as the country prepares for the football World Cup in 2010." Press Briefing, Int'l Org. for Migration, Research on Trafficking of Men for Labour Exploitation (Dec. 18, 2007), <http://www.iom.int/jahia/Jahia/pbnAF/cache/offonce?entryId=16263>.

115. The SALRC's report is comprehensive, and it outlines and explains the rationale behind the proposed legislation. It is important to note that the SALRC's Report takes into consideration not only the views of the SALRC and the Department of Justice, but also those of South African society as a whole. The SALRC investigation process involves three main steps, and after each, various governmental and nongovernmental agencies and organizations are allotted a substantial amount of time to comment on the document to allow for the most complete investigation possible.

The first step is publication of an issue paper. The SALRC website explains:

In order to actively involve the community at an earlier stage, the Commission has decided to publish issue papers for appropriate investigations as the first step in the consultation process. The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues by way of including specific questions on relevant issues.

South African Law Reform Comm'n, Issue Papers Index, <http://www.doj.gov.za/salrc/ipapers.htm> (last visited Aug. 5, 2009). The SALRC's Issue Paper on Trafficking in Persons was published in early 2004 and was open for commentary until April 30, 2004. *Id.*

The second step is publication of a discussion paper. The SALRC website explains:

Discussion papers, previously referred to as working papers, are documents in which the Commission's preliminary research results are contained. In most cases discussion papers also contain draft legislation which gives effect to the Commission's tentative recommendations and proposals. The main purpose of these documents is to test public opinion on solutions identified by the Commission.

South African Law Reform Comm'n, Discussion Papers Index, <http://www.doj.gov.za/salrc/dpapers.htm> (last visited Aug. 5, 2009). The Discussion Paper on Trafficking in Persons was published on May 5, 2006, and was open for commentary until June 30, 2006. *Id.*

The third step is publication of a final report. The SALRC published the final report on Project 131, Trafficking in Persons, on November 25, 2008, and subsequently submitted it to the Minister of Justice and Constitutional Development. South African Law Reform Comm'n, Reports Index, *supra* note 6.

To suggest that South Africa has not been committed to solving this problem prior to the submission of the Bill to the Minister of Justice would be far from accurate. The SALRC has been investigating trafficking in persons since South Africa ratified the U.N. Protocol. South Africa's well-formulated plan of attack addresses each of the three P's of U.S. policy—prevention, prosecution, and protection—and is likely to be effective in all three areas, assuming that all departments called upon in the proposed legislation contribute to the inter-sectoral task team and work together to solve the human trafficking crisis. Particularly in the wake of apartheid, South Africa's commitment to eliminating trafficking in persons into, out of, and through the Republic is essential to the current regime's continued legitimacy. A failure to prosecute and prevent trafficking in persons would be too closely linked to a failure to prevent South Africans from being subject to "slavery, servitude or forced labour," which is specifically prohibited by the Constitution of the Republic.¹¹⁶ Thus, the only avenue for South Africa is to comply with its international obligations and enact the proposed legislation so that it is binding throughout the Republic.

*Laura Brooks Najemy**

116.

The Bill of Rights contained in Chapter 2 of the Constitution is the cornerstone of the South African democracy. The Bill of Rights provides that no one may be subjected to slavery, servitude or forced labour. It states that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, the right to be free from all forms of violence from either public or private sources, the right not to be tortured in any way and the right not to be treated or punished in a cruel, inhuman or degrading way. It further affirms the democratic values of human dignity and freedom of movement. Children also have the right to be protected from maltreatment, neglect, abuse or degradation and the right to be protected from exploitative labour practices.

SA LAW REFORM COMM'N REPORT, *supra* note 7, at 3 (citing S. AFR. CONST. 1996 ss. 10, 12, 13, 21, 28) (internal footnotes omitted).

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