

## LEGAL PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS IN SOUTH SUDAN

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### **Abstract**

This article analyses the legal framework protecting victims of trafficking in South Sudan. It discusses the international framework from human rights law and anti-trafficking specific instruments on victims' protection. It then offers a critical study of the South Sudanese legal framework on trafficking. It establishes that South Sudan criminalises some forms of trafficking and protects victims. The article, however, notes that South Sudanese legal framework fails to criminalise trafficking comprehensively and does not protect victims sufficiently. Its provisions obfuscate protection aspects that international law establishes. Its poor and fragmented manner of criminalising trafficking equally contributes to ineffective protection. It is noted that lack of a sectoral legislation is largely responsible for the ensuing legal dilemma. The main recommendation is that South Sudan should ratify the Organized Crime Convention and its Anti-Trafficking Protocol and enact a specific legislation to protect victims of trafficking and remove the existing confusion.

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## 1.0. INTRODUCTION

The heinous crime of trafficking in persons or human trafficking is a transnational organized crime posing a major threat to both human and national security.<sup>1</sup> Trafficking in persons, unlike the smuggling of migrants, is also a national crime capable of being committed within the borders of the same country.<sup>2</sup> Trafficking is a criminal offence that violates the criminal and penal laws of most countries. Importantly, trafficking amounts to a human rights violation in certain circumstances of state involvement or in-action.<sup>3</sup> It affects populations across regional, ethnic and religious lines. It manifests itself in diverse forms of exploitative practices such as sexual exploitation, forced labour, organ removal,<sup>4</sup> and forcible recruitment into armed groups or military service.<sup>5</sup>

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the Anti-Trafficking Protocol) defines ‘trafficking in persons’ as

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<sup>1</sup> Piotrowicz R., “Human security and trafficking of human beings: the myth and the reality” in Edwards A., et al, *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge: Cambridge University Press, 2010, p. 404.

<sup>2</sup> *MS (Pakistan) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2020] UKSC 9, para.3.

<sup>3</sup> Gallagher, A.T., “The Right to An Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy.” (Paper submitted for the Expert Consultation Convened by the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Bratislava, Slovakia, 22-23 November 2010), pp. 3-4.

<sup>4</sup> *Rex v Obinna Obeta, Ike Ekwerehadu, Beatrice Ekwerehadu* before Central Criminal Court, Judiciary of England and Wales, 5 May 2023, where the accused were convicted of human trafficking for organ removal (kidney).

<sup>5</sup> Bigo, J., and Vogelstain, R., “The Security Implications of Human Trafficking” (Discussion paper 2019 at Council on Foreign Relations), p. 1.

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.<sup>6</sup> 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

The provision defines trafficking as consisting of three elements, namely, the action element which indicates what is done, the means element which explains how the action element is achieved, and the purpose element which provides the reason for the action and the means elements employed.<sup>7</sup> The law creates an irrebuttable presumption that consent of a victim of trafficking is immaterial where the means element has been employed.<sup>8</sup> The law sets the standard that the trafficking of children does not require the means element.<sup>9</sup> Only the action and purpose elements suffice. As such, the presence of the means element aggravates the offence.<sup>10</sup>

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<sup>6</sup> Anti-Trafficking Protocol, art. 3 (a).

<sup>7</sup> Lansiki, A., "Human Rights Focus on Trafficked Women: An International Law and Feminist Perspective." 1 (2) *Empowering Women for Gender Equity*, 2006, pp. 45-56 at p. 94.; Kranrattanasuit, N., *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam*, Leiden, Brill Nijhoff, 201, p. 1.

<sup>8</sup> Anti-Trafficking Protocol, art. 3 (b).

<sup>9</sup> Anti-Trafficking Protocol, art. 3(c).

<sup>10</sup> Human Rights Council: *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*: United Nations, 6 June 2012, UN. Doc. A/HRC/20/18, para. 67.

In South Sudan, the crime of trafficking in persons is endemic. It has been and is being perpetrated for purposes of child abduction, forced recruitment by armed forces and armed groups, forced marriage, domestic servitude, sexual exploitation and labour exploitation.<sup>11</sup> Protracted conflicts, Covid-19 pandemic, natural disasters such as floods, weak border control, the bleeding economy and its promising prospects to the neighbouring countries have been factors exacerbating the problem.<sup>12</sup> Men, women and children from South Sudan and neighbouring countries, including Eritrea, Ethiopia, Kenya, Somalia, and Uganda are often recruited by South Sudanese and foreign business owners on the basis of false employment opportunities in hotels, restaurants, and construction that result in trafficking for labour and sexual exploitation.<sup>13</sup> Internally Displaced Persons (IDPs) and refugees, especially unaccompanied minors who may be kidnapped for sex or labour trafficking are reported to be at high risk of being trafficked.<sup>14</sup> Children in South Sudan are the most vulnerable subjects of human trafficking who are subjected to all sorts of abuses such as recruitment into armies, abduction, forced labour, domestic servitude, forced marriage and sexual exploitation.<sup>15</sup>

According to the report by the U.S., South Sudan ranking remained on Tier 3 because it does not fully meet the minimum standards for the elimination of trafficking coupled with its complacency in making significant efforts to improve its capacity to combat trafficking in

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<sup>11</sup> U.S Department of State: *Trafficking in Persons Report*: Washington, D.C: Government Publisher, 2022, pp. 504-505.

<sup>12</sup> International Organisation for Migration: *Trafficking in persons in South Sudan Prevalence, Challenges and Responses IOM South Sudan*: Juba: IOM Publisher 2020, p. xi

<sup>13</sup> The U.S Department of State: *Trafficking in Persons Report*, 2022, pp. 504-505; ILO, An assessment of labour migration and mobility governance in the IGAD region: Country report for South Sudan, 2020, p 15.

<sup>14</sup> Id. P. ix

<sup>15</sup> U.S Department of State: *Trafficking in Persons Report*, Washington, D.C: Government Publisher, 2022, pp. 504-506.

persons. Through the Tier system, the United States rates countries and territories' legal and institutional frameworks according to their ability to meet the minimum standards to eliminate the severe forms of trafficking in persons occurring in their jurisdictions as defined in the United States' Trafficking Victims Protection Act (TVPA).<sup>16</sup> Tier one represents countries whose frameworks fully comply with those minimum standards. Tier 2 represents countries and territories not fully compliant but make significant efforts to comply. Tier 2 Watch List contains countries which, in addition to meeting the elements of Tier 2, have a significantly increasing number of victims of trafficking but take unproportional measures against it, without any serious evidence of efforts to improve compared to their previous reports. Tier 3 represents countries not meeting the minimum standards and not making any significant efforts to comply.<sup>17</sup> It is in Tier 3 where South Sudan falls. Several factors have contributed to South Sudan's position in this category. Corruption and official complicity in trafficking crimes rank significantly high.<sup>18</sup> Although there are some appreciable steps that the government has taken towards combating trafficking, the aspects of protection, prevention, prosecution, coordination and cooperation as envisaged in the international instruments are not prioritized.<sup>19</sup> This is compounded by the fact that South Sudan is not a party to the United Nations Convention against Transnational Organized Crime<sup>20</sup> and the Anti-Trafficking Protocol. Moreover, there is limited data on trafficking

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<sup>16</sup> Agape International Missions, *All You Need to Know about the TIP Report*, available at <<https://aimfree.org/trafficking-in-persons-report/#:~:text=Tier%201%3A%20fully%20compliant%20with,compliant%20with%20the%20minimum%20standards>>. Accessed 17 July 2023.

<sup>17</sup> Human Trafficking Institute, *Trafficking in Persons Report July 2022*, available at <<https://traffickinginstitute.org/what-is-the-trafficking-in-persons-report/>>. Accessed 17 July 2023.

<sup>18</sup> *Id.* pp. 504-5.

<sup>19</sup> *Id.* pp. 504-506.

<sup>20</sup> 2222 U.N.T.S 209 (2000).

in persons which causes the crime to remain unabated, thus jeopardising both human and national security of this fragile State.

Trafficking in persons inflicts superfluous suffering upon the victims by depriving them of their dignity and worth as humans which reduces them to commodities to be bought, sold and put to exploitation under close surveillance and whose movements must often be circumscribed.<sup>21</sup> Victims are mostly subjected to inhumane and degrading treatment such as exploitative labour, typical physical and sexual violence, psychological pressures, enforced drug taking and deprivation of liberty.<sup>22</sup> Therefore, victim protection must constitute an integral part of action against the crime of human trafficking.<sup>23</sup>

Although South Sudan is not a party to the Anti-Trafficking Protocol, and has no specific law concerning this matter, it is a party to other international human rights frameworks that provide general human rights protection.<sup>24</sup> So far, South Sudan has ratified the Universal Declaration of Human Rights (UDHR), the Convention on the Rights of the Child (CRC) and its two Optional Protocols, namely, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the UN Convention on the Rights

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<sup>21</sup> *Rantsev v. Cyprus and Russia* Application No. 25965/04, Judgment of 7 January 2010, para. 28.

<sup>22</sup> Piotrowicz R., “Human security and trafficking of human beings: the myth and the reality” in Edwards A., et al, *Human Security and Non-Citizens: Law, Policy and International Affairs*, Cambridge University Press, 2010, p.405.

<sup>23</sup> Obokata, T., “The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific” 7 *Asian Journal of International Law*, 2017, pp. 39–60.

<sup>24</sup> Advocates for Justice and Human Rights, South Sudan, *International Treaty Status*, available at <<https://www.icj.org/cijlcountryprofiles/south-sudan/south-sudan-introduction/south-sudan-international-treaty-status/#:~:text=The%20following%20have%20been%20ratified,Rights%20was%20adopted%20in%201981.>> Accessed 16 August 2022).

of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights, the Maputo Protocol to the African Charter on the Rights of Women.<sup>25</sup> These and other instruments are analysed in part 2 and partly in part 4 of this article. Therefore, this paper seeks to examine the existing legal framework on the protection of the victims of trafficking to draw conclusion whether it is adequate and proffer recommendations thereto. In order to realize this objective, the article is divided into three parts. Part 1 is the Introduction which covers the concept of trafficking in persons and its manifestations in South Sudan. Part 2 discusses the protection rights of the victims from the international law perspective while part 3 provides the status of the laws of South Sudan enacted before 2011. Part 4 provides a critical analysis of the domestic legal framework of South Sudan. Finally, Part 5 contains the conclusion and the recommendations.

## **2.0. PROTECTION OF THE VICTIMS OF TRAFFICKING**

The protection of victims of trafficking is one of the most important state obligations. Scholars have grouped what constitutes the obligation to protect victims of trafficking into: obligation to identify victims of trafficking; obligation not to prosecute the victims; protection from further harm and respect for privacy; provision of physical and psychological support and care; obligation relating to legal assistance and protection; obligation relating to repatriation; and obligation to provide effective and appropriate remedies.<sup>26</sup> Therefore, it is prudent to examine the measures and mechanisms provided in the Anti-Trafficking Protocol

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<sup>25</sup> United Nations Human Rights Treaty Bodies, *Ratification Status for South Sudan*, available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en) Accessed 17 July 2023.

<sup>26</sup> Filbert Kahimba, N., *Trafficking in Persons under International Law and Tanzania Law*, The Hague: TMC Asser Press/Springer, 2021, pp. 254-72.

and the international human rights legal framework so that South Sudan can draw inspiration to strengthen victim protection. Finally, the domestic legal framework will be analyzed to determine whether it aligns with the international standards for the protection of victims.

## 2.1. Anti-Trafficking Protocol

This is the main international instrument on trafficking in persons and many states have ratified.<sup>27</sup> Although the Anti-Trafficking Protocol was not intended to provide full protection of victim's rights, but rather the criminalisation of trafficking and cooperation between states to facilitate prosecution,<sup>28</sup> it has very important provisions that are generally relevant to the protection of victim's rights.<sup>29</sup>

These include, *inter alia*, protection of the privacy and identification of the victims during the legal proceedings which is to be confidential; access to information; fair hearing; provision of physical, psychological support and social recovery, medical assistance, material support through cooperation with Non-Governmental Organizations (NGOs), other relevant organizations including Civil Society;<sup>30</sup> and granting of temporary or permanent residence on humanitarian and compassionate basis;<sup>31</sup> and voluntary repatriation for those victims who had rights of residence.<sup>32</sup> This means that those victims with no right of permanent residence are less protected when it comes to repatriation, and may be repatriated at will. Also, there is no explicit right to immunity from

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<sup>27</sup>United Nations Treaty Collection, available at <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-12-a&chapter=18](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18)> Accessed 16 August 2022.

<sup>28</sup> Gallagher A. T., and Ezeilo J.N., "The UN Special Rapporteur on Trafficking: A Turbulent Decade in Review", 37*Human Rights Quarterly*, 2015, pp. 913-940.

<sup>29</sup> Anti-Trafficking Protocol, Part II.

<sup>30</sup> TIP Protocol, art. 6.

<sup>31</sup> Id, art. 7.

<sup>32</sup> Id, art. 6(6).



prosecution for victims of trafficking.<sup>33</sup> The Anti-Trafficking Protocol enjoins states parties to ensure that their domestic legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.<sup>34</sup>

Although the Anti-Trafficking Protocol provides for the protection of the rights of the victims, it suffers from weak phraseology couched in a discretionary language such as “within its means or subject to its domestic laws” as seen above.<sup>35</sup> This compromises the protection of victims as States are at liberty to decide whether to provide sufficient protection to the victims or not. This means that international law on human trafficking must be supplemented by international human rights legal framework which covers all victims of organized crime from the human rights dimension.<sup>36</sup> This aligns with the preamble to the Anti-Trafficking Protocol that calls for the protection of the internationally recognized human rights of the victims.

## **2.2. International Human Rights Law**

Having seen that the Anti-Trafficking Protocol does not ably provide for the protection of the human rights of the victims, it is imperative to turn to the international human rights framework.

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<sup>33</sup> Edwards, A., “Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor”, 36 (1) *Denver Journal of International Law & Policy*, 2008, pp. 9-20.

<sup>34</sup> TIP Protocol, art. 6(6).

<sup>35</sup> Gallagher, A., “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis,” 23 *Human Rights Quarterly*, 2001, pp. 975-990.

<sup>36</sup>Obokata, T., “The Value of International Law in Combating Transnational Organized Crime in the Asia-Pacific” 7 *Asian Journal of International Law*, 2017, pp. 39-52.

At the global level, the UDHR prohibits slavery and servitude of any forms.<sup>37</sup> This is echoed by the ICCPR with forced labour or compulsory labour being prohibited also.<sup>38</sup> Although these forms of exploitation are not trafficking in themselves, they are mostly the end result of trafficking in persons. The European Court of Human Rights confirms this position.<sup>39</sup> It also prohibits torture or cruel, inhuman or degrading treatment or punishment, and calls upon parties to grant victims of human rights violations access to justice and remedy.<sup>40</sup> While torture or cruel, inhuman or degrading treatment or punishment are not trafficking, official reports have explored the possibility of trafficking amounting to torture or cruel, inhuman or degrading treatment or punishment.<sup>41</sup> In such circumstances, victims of human trafficking deserve protection once subjected to torture or cruel, inhuman or degrading treatment or punishment. The ICESCR calls upon Parties to adopt special measures for the protection of children against economic and social exploitation.<sup>42</sup> These include all other forms of exploitation prejudicial to any aspects of the child's welfare.<sup>43</sup> The rationale is that these are harmful to the child's health or physical, mental, spiritual, moral or social development.<sup>44</sup> Trafficking in persons is both a social and economic exploitation that exposes children to the worst forms of child labour and sexual exploitation. Although the Convention on the Rights of the Child

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<sup>37</sup> Universal Declaration on Human Rights, G.A. Res. 217A(III), UN. Doc. A/810 at 71 (1948), art. 4.

<sup>38</sup> International Covenant Civil Political and Rights (ICCPR, 1969), art. 8.

<sup>39</sup> *Siladimi V. France*, European Court of Human Rights Second Section, Application No. 73316/01, Human Rights Judgment, 26 July 2005, para.

<sup>40</sup> ICCPR, arts. 7, 2.

<sup>41</sup> Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention*. UN Doc. A/HRC/13/39/Add/5, 5 February 2010, paras. 195, 200.

<sup>42</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 U.N.T.S 3 (1966), art.10 (3).

<sup>43</sup> Convention on the Rights of the Child, 1577 U.N.T.S. 3 (1989) art. 32.

<sup>44</sup> *Ibid.*

(CRC) will be discussed better in Part III, it is important to note that CRC mandates Parties to undertake measures that are aimed at protecting children from all forms of sexual exploitation and sexual abuse.<sup>45</sup> It also requires States to adopt measures that prevent children being recruited or engaged in armed conflict.<sup>46</sup> Specialised studies indicate clearly that sexual exploitation and engagement in armed activities are end results of trafficking in persons in a country with internal political and economic instabilities such as South Sudan.<sup>47</sup> The Convention further obliges States Parties to take measures to combat the illicit transfer and non-return of children abroad.<sup>48</sup>

The United Nations Convention on the Protection of Migrant Workers and Members of Their Families equally prohibits Member States from depriving migrant workers of their rights regardless of their irregular status.<sup>49</sup> This is important as irregularity in immigration status has been linked to trafficking in persons. Migrants in irregular situations are either victims of trafficking in persons for having their identity and travel documents taken from them or will be exposed to trafficking for fear of being reported to responsible authorities for violation of immigration laws of host countries.<sup>50</sup> Thus, this provision covers trafficked persons who might have entered illegally and engaged in the informal sector.

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<sup>45</sup> Convention on the Rights of the Child, art. 34.

<sup>46</sup> *Id.*, art. 38.

<sup>47</sup> United Nations Security Council, *Report of the Secretary General on Trafficking in Persons in Armed Conflict Pursuant to Security Council Resolution 2388 (2017)*. UN Doc. S/2018/1042, 21 November 2017; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons in the Context of Armed Conflict*. Vienna: United Nations Publications, 2018.

<sup>48</sup> Convention on the Rights of the Child, art. 11

<sup>49</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 U.N.T.S 3 (1990), art. 25 (3).

<sup>50</sup> Gallagher A.T & Skrivankova K., "Human Rights and Trafficking in Persons, (Background paper presented at 15<sup>th</sup> Inform ASEM Seminar on Human Rights, Montreux, 24-26 November, 2015), p. 8; Spapens T., "The Business of Trafficking in

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires States Parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.<sup>51</sup> This is premised on the understanding that poverty, unemployment, wars, armed conflicts and the occupation of territories increase or often lead to increased trafficking for prostitution.<sup>52</sup> Although CEDAW does not define the “trafficking in women” it requires states to suppress, a broader interpretation considers the Anti-Trafficking Protocol and all major frameworks criminalising the offence.

At the regional level, the African Charter prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment.<sup>53</sup> As already noted, these forms of exploitation have a bearing link to trafficking as they can amount into the purposes of trafficking. Again, degrading treatment or punishment can also be the means to maintain victims in exploitative circumstances. The African Charter on the Rights and Welfare of the Child calls on states parties to take appropriate measures to prevent the abduction, the sale of or trafficking of children for any purpose or in any form, by any person including parents or legal guardians of the child.<sup>54</sup> A broader consideration of these provisions clearly indicates that child victims of trafficking have a regional anti-trafficking framework that protects them from trafficking and its negative outcomes. Moreover, the Protocol to the African Charter on

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Human Beings” In Piotrowicz et al (eds), *Routledge Handbook of Human Trafficking*, London: Routledge Taylor & Francis Group, 2018, pp. 353-360.

<sup>51</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1975, art. 6.

<sup>52</sup> CEDAW General Recommendation No. 19, paras. 15, 14, 16.

<sup>53</sup> African (Banjul) Charter on Human and Peoples' Rights, 1981 (OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M.58), art. 35.

<sup>54</sup> The African Charter on the Rights and Welfare of Child (ACRWC) adopted 1 July 1990 and entered into force 29 November 1999, art. 29.

Human and Peoples' Rights on the Rights of Women in Africa urges States Parties to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.<sup>55</sup> The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children<sup>56</sup> provides important provisions on the protection of all persons, especially women and children, from trafficking.<sup>57</sup> The Ouagadougou Action Plan not only confirms the commitment and applicability in Africa of the Anti-Trafficking Protocol, it equally calls upon African states to take concerted measures nationally and regionally to protect victims of trafficking.<sup>58</sup> Although a soft policy framework, it has played an important persuasive role in shaping Africa's approach to suppressing trafficking and protecting its victims.

At the sub-regional level, the East African Community Protocol on Peace and Security 2007 merely provides commitment to fighting human trafficking without defining it or giving clear guidance on what amounts to human trafficking and the protection thereto.<sup>59</sup> Notwithstanding, an argument is in order that international and national legal frameworks form the basis of its understanding. It is from this premise that in 2016 the East African Community Legislative Assembly adopted the East African Community Counter-Trafficking Bill whose sections 25-27 offer protective provisions for victims of trafficking in persons. Nonetheless, the Bill is yet to become an Act of the Community for lack of assent from the Heads of the Partner States of the Community as the Treaty for

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<sup>55</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women

in Africa, adopted in 1 July 2003 and entered into force 25 November 2005, art.4 (2) (g).

<sup>56</sup> African Union and European Union, as adopted by the Ministerial Conference on Migration and Development, Tripoli 22-23 November 2006.

<sup>57</sup> Part II.

<sup>58</sup> Part IV.

<sup>59</sup> EAC Protocol on Peace and Security 2007, art. 12.

the Establishment of the East African Community requires.<sup>60</sup> The fragmented and non-binding nature of this framework destroys clarity on the concept and undermines the States roles in protecting victims of trafficking.

There is a need to specify in respect of each international instrument how South Sudan relates to it. Has the country ratified each? If not, does the instrument give rise to any binding obligations against the country?

It is clear that South Sudan is a new state. All these international instruments impose obligations on “states parties” or “contracting states” etc. The question is: is South Sudan covered? If it is not party to these or any of these conventions, how will this analysis in respect of each instrument be linked to the country?

### **3.0 STATUS OF SOUTH SUDANESE LAWS ENACTED BEFORE 2011**

Following the protracted civil wars in Sudan since August 1955, a Comprehensive Peace Agreement (CPA) was signed in 2005 between the Government of Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A). The CPA granted South Sudan semi-autonomous status during the interim period (2005 to 2011) when Southern Sudanese would exercise their right to self-determination through a referendum which was held on 9 January 2011. This meant that South Sudan was given leverage to govern affairs within its territorial jurisdiction, including enacting laws independent from the Government of Sudan in the North.<sup>61</sup> These laws according to the reception clause in the Transition Constitution of the Republic of South Sudan remain in

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<sup>60</sup> Art. 62.

<sup>61</sup> The Comprehensive Peace Agreement between the Government of Sudan and Sudan Peoples’ Liberation Movement/Army, 2005, Machakos Protocol, Art. 1,2

force in South Sudan after the independence from Sudan.<sup>62</sup> Therefore, part 4 contains the analysis of the laws applicable to the topic under study.

#### **4.0. DOMESTIC PROTECTION OF THE RIGHTS OF VICTIMS OF TRAFFICKING**

The Transitional Constitution of South Sudan recognizes that the international human rights instruments that the Republic of South Sudan has ratified or acceded to form an integral part of the Bill of Rights.<sup>63</sup> This presents South Sudan as a Monist State where ratified instruments acquire domestic justiciability in the absence of a domesticating Act of Parliament. Thus, victims of trafficking can invoke the provisions of the ratified international human rights instruments before the courts of South Sudan in situations of state's complicity from state actors or acquiescence and passivity from non-state actors. Further, the Constitution prohibits the subjection of South Sudanese persons to slavery, servitude or forced labour.<sup>64</sup> Since trafficking in persons is always perpetrated, among others, for the purpose of forced labour or services as well as slavery or servitude,<sup>65</sup> this provision becomes more relevant. Victims of trafficking can bring an action that their slavery or forced labour, which is against the Constitution, was the result of Government inaction or complicity.

The Constitution specifically provides for the protection of children against trafficking and abduction<sup>66</sup> and the Child Act further amplifies

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<sup>62</sup> Transitional Constitution of the Republic of South Sudan, 2011 as amended, art 200.

<sup>63</sup> Transitional Constitution of the Republic of South Sudan, 2011 as amended, art 9(3).

<sup>64</sup> *Id.*, art. 13.

<sup>65</sup> Anti-Trafficking Protocol, art. 3 (a).

<sup>66</sup> For its definition in the South Sudanese context, the Child Act, (No.10 of 2008), s.5. This law as enacted before SS became an independent state. What is the status of this law in SS? How does the constitution regard such laws??? (Answered in the Status on the Laws enacted before 2011)

these constitutional provisions.<sup>67</sup> The purpose of the Child Act is the protection of children’s rights as enshrined, among others, in the 1989 United Nations Convention on the Rights of the Child and other international instruments mentioned in part 1.<sup>68</sup> This provision requires the application and interpretation of the Child Act to consider the international framework in the protection of the South Sudanese children.<sup>69</sup> Article 35 of the CRC obligates South Sudan to take measures to prevent the abduction and trafficking of children “for any purpose or in any form.” Such purposes and any form include, in the words of paragraph 3 of the Preamble to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography “trafficking for the purposes of sale of children, child prostitution and child pornography.”

Further, the Child Act adopts the definition of “trafficking in persons” as contained in the Anti-Trafficking Protocol, save for the term “exploitation” which the Child Act does not define. This suggests that trafficking of children under the South Sudanese legal framework requires an acceptance or consideration of the purpose element contained in the Anti-Trafficking Protocol and the country’s peculiar national circumstances. Such national circumstances, according to the Child Act, could include trafficking for the purpose of recruitment in armed conflicts,<sup>70</sup> female forced circumcision, work in industrial undertakings, early marriage and for purposes of sacrifice.<sup>71</sup> This justifies South Sudan’s ratification of the two Optional Protocols to the CRC. Finally, the Child Act imposes a mandatory obligation on the

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<sup>67</sup> The Transitional Constitution of the Republic of South Sudan, 2011, art. 17 (h).

<sup>68</sup> The Child Act, (No.10 of 2008), s.3.

<sup>69</sup> Ratification Status by Country or by Treaty, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=215&Lang=en) (Accessed 10 August 2022).

<sup>70</sup> The Child Act, (No.10, 2008), ss. 31,32.

<sup>71</sup>Id, ss. 5, 23(1).



government and its institutions to protect children from abuse, abduction and trafficking whether perpetrated by parents or guardians.<sup>72</sup> The Child Act further obligates the government to take concrete measures to prevent sale, trafficking, slavery and servitude.<sup>73</sup> Considering that these are minimum end purposes of trafficking under international law, the Child Act makes a strong case for the protection of children's rights in South Sudan. It is the position of the Child Act that a trafficked child requires special protection and care due to specific vulnerabilities they experience.<sup>74</sup> This provision considers that children can be victims of armed conflicts, internal displacement, climate change, irregular migrants and family mismanagement, which all expose them to further risks such as trafficking in persons.

While this position appears clear, sections 119 and 120 of the Child Act complicate the matter. They define trafficking in three alternatives. In the first alternative, section 119(1) defines trafficking to mean taking part in a transaction whose object or objects is wholly or partly and permanently or temporarily to confer or transfer the possession, custody or control of a child for any valuable consideration. In the second alternative, trafficking means an act of a person who without lawful excuse or authority (the entrusted person) harbours or possesses, controls or has custody of a child (the entrusted child) who has been entrusted to him temporarily or permanently from another person (entrusting person) for a valuable consideration. It does not matter whether the entrusting person lives in South Sudan or without the jurisdiction.<sup>75</sup> Section 119(3) creates a rebuttable presumption that the entrusted child is always a child as long as he remains in the custody, control or harbouring of the entrusted person for a valuable consideration. In the last alternative,

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<sup>72</sup> The Child Act, (No.10, 2008), s.22(3)(b).

<sup>73</sup> *Id.*, s. 36(2)(l).

<sup>74</sup> *Id.*, s.126(k).

<sup>75</sup> *Id.*, s. 119(2).

trafficking is defined to mean an action of a person who brings or assists in bringing a child not his or hers into South Sudan by means of false pretence or representation or fraudulent or deceitful means, whether such means are acted within or without Southern Sudan.<sup>76</sup>

These provisions present several legal conundrums. The first alternative to defining trafficking of children contains a loose action element of taking part in a transaction and the purpose element of temporary or permanent conferring of possession, control or custody of a child to another person for a consideration. The purpose element is legally restrictive. It does not take a broader approach that sections 3 and 5 present which allow a consideration of international and national circumstances to the purpose element of trafficking. The purpose element does not define what amounts to “any valuable consideration.” It is not clear whether the consideration is valuable because it is sexual, financial, material or others. Certainly, one could argue that the openness of the provision captures in all forms of consideration. Notwithstanding the foregoing, one question lingers and may remain unanswered: what if the consideration lacks value, as for example, it is purely psychological? A strict interpretation would mean that trafficking has not been committed.

The first alternative does not inform us who gives “any valuable consideration.” Is it the entrusted person giving consideration to the entrusting person to traffick the entrusted child? Will this imply that the entrusted person is the actual perpetrator of trafficking? Or is it the entrusting person who gives any valuable consideration to the entrusted person as a means to obtain his or her consent to traffic the entrusted

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<sup>76</sup> The Child Act, (No.10, 2008), s. 120. This law was enacted in SUDAN (seems so) before SS became independent. We need to know the status in SS. How and under which authority did such laws become applicable in SS? (Answered under the Section on the Status of Laws Enacted before independence)

child? If this is the case, it somehow reflects the same approach the Anti-Trafficking Protocol envisages.<sup>77</sup> Notwithstanding this dilemma, the provision will be making the means element of “giving or receiving payments to achieve the consent of a person having control over another person” found both in the definition of trafficking in persons under the Child Act and international law the purpose element. While making an individual component of the means element the purpose element and *vice-versa* is not unheard of in international law,<sup>78</sup> this approach is legally confusing. The approach obfuscates the relationship between the definition of trafficking in persons in section 5 and its criminalisation in sections 119 and 120. Another question is whether the purpose of obtaining any valuable consideration is a mutual purpose of the entrusted and entrusting persons. In that case, does the provision admit the existence of an arrangement or organisation in the trafficking of the entrusted child? This provision also does not inform us when intention and knowledge is imputed to the entrusting person and entrusted person or whether this depends on the factual circumstances of a case.

Further, the first alternative takes a narrow understanding of the action element. It is only limited to taking part in a transaction. The action element, which explains what is done to traffic, must be express about the specific actions it targets. Otherwise, this violates the principle of legal certainty,<sup>79</sup> considering that under international law, the trafficking of children requires the establishment of the action and purpose elements only, with the additional presence of the means element playing the role of an aggravating factor. The first alternative is silent on the means element. This is understandable because this element is not a legal requirement under international law. While in terms of definitional

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<sup>77</sup> Anti-Trafficking Protocol, art. 3(a).

<sup>78</sup> Section of the Anti-Trafficking in Persons Act 2008 of Tanzania.

<sup>79</sup> Van Meerbeeck, J., “The Principle of Legal Certainty in the Case Law of the European Court of Justice: from Certainty to Trust”, 4(41) *European Law Review*. 2016, pp. 275-288.

emphasis and understanding the Anti-Trafficking Protocol's approach can be taken, the argument is unconvincing in the investigation and prosecution of this offence in South Sudan. The crime must be prosecuted in strict compliance with the criminal law principle of legal certainty. This makes it difficult to understand how many traffickers will South Sudan investigate and prosecute. Unfortunately, the confusing manner of criminalising trafficking equally confuses South Sudan's protection obligations for victim of trafficking.

The second alternative to the trafficking of children limits trafficking to the entrusted person abusing a position of trust against the entrusted child for a valuable consideration despite lacking legal authority or excuse. The provision impliedly indicates that should the entrusted person have lawful authority or excuse, for example as a legal guardian, he can traffick the entrusted child for any valuable consideration. This is legally a wrong trajectory because "abuse of power or position of vulnerability" in international law are part of the means element to trafficking a person.<sup>80</sup> They admit no excuse or colour of justification in trafficking. The premise for this legal understanding is simple and compelling: the means element always operates to vitiate consent of the victim, even when it was freely given at the beginning of a trafficking chain. Considering extensive possibilities of parents and family members' involvement in trafficking,<sup>81</sup> this provision sets a wrong precedent. This is because parents and guardians indeed do have authority over their children. Since section 119(2) talks about a person "without lawful authority or excuse" and not "without lawful authority and excuse", it leaves room open for a parent with lawful authority to traffic his or her own child. It also leaves the same room for a guardian with lawful authority. The provision takes a circumscribed approach to the action

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<sup>80</sup> Anti-Trafficking Protocol, Article 3(a).

<sup>81</sup> Raphael J., "Parents as Pimps: Survivor Accounts of Trafficking of Children in the United States," 4(4) *Dignity: Journal of Analysis of Exploitation and Violence*, 2020, pp. 1-34.

element. It only contemplates, harbouring, taking custody or control of the entrusted child. While harbouring or taking custody fits well in the action element, they are specific and inadequate to express the breadth of the action element as reflected from international law and best practices. Control of the entrusted child could make a legal credibility if understood as part of the means element. The purpose of the means element is always to achieve the action element and/or sustain the purpose element. In the absence of clear understanding of what is criminalised, victims remain unprotected for being unrecognised as victims.

The third alternative to defining trafficking is inherently problematic. It considers as trafficking the action of bringing or assisting in bringing deceitfully or fraudulently a child not one's into South Sudan. The provision does not inform the reader what is the purpose element of the means and action elements employed. The provision omits completely the second most important legal element in the trafficking of children, which is the purpose element. It makes mandatory the means element which is not supposed to be and belittles the purpose element which is key, in addition to the action element. The analysis of the Child Act makes it clear that child victims, although enjoying a level of protection from trafficking, the poor manner of criminalising acts of trafficking leaves room for many child victims going unrecognised or unprotected.

The Penal Code Act 2008, which imposes penalties for criminal acts and sentences upon conviction,<sup>82</sup> criminalises the offense of trafficking in persons. Section 282 criminalises trafficking in persons as the conduct of a person who “procures, entices or leads away any person, even with his or her consent, for the sale or immoral purposes to be carried outside South Sudan. Thus, the provision defines trafficking in persons to mean

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<sup>82</sup> The Penal Code Act, (No. 9 of 2008), s 3.

the procurement, enticing or leading away any person, even with his or her consent, for the sale or immoral purposes abroad. The criminalisation and definition present several legal flaws. First, its purpose element, which is sale or immoral purposes, is limited and undefined. The Penal Code does not define what sale or immoral purposes mean contrary to the principle of legal certainty. It leaves open whether the sale or immoral purposes are examined under the South Sudanese or “outside South Sudan” perspectives. Second, the provision takes a very restricted sphere for the means element. This entails that where traffickers lead victims for purposes other than sale or immoral purposes abroad, the offense of trafficking is not committed. Third, its action element, which is procuring, enticing or leading away, is also lacking. It allows the trafficker to plead a criminal defence that he transported or harboured but did not procure, entice or lead away any victim of trafficking in persons. This makes an act classified as trafficking under international law incapable of being trafficking in the South Sudanese law.

Fourth, Section 282 of the Penal Code Act also lacks the means element completely. While if a person trafficked is a child the provision is not problematic, this is not the case for an adult. What is the point of criminalising the action of an adult who freely consents going to another country for prostitution or pornographic acting through enticement without any form of coercion, force or undue influence? His or her consent was never vitiated. This evokes the old debates of consent versus victimhood which were hot and divisive before the states adopted the Anti-Trafficking Protocol.<sup>83</sup> Fifth, this provision takes the 1904-1906 international legal position and makes it applicable today in South Sudan. In 1904, even before the existence of the League of Nations, the states adopted the International Agreement for the Suppression of the “White

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<sup>83</sup> Filbert Kahimba, N., *Trafficking in Persons under International Law and Tanzania Law*, The Hague: TMC Asser Press/Springer, 2021, pp. 43-44.

Slave Traffic”<sup>84</sup> which criminalised the procuring of white women or girls for immoral purposes abroad, which is mostly forced prostitution.<sup>85</sup> The Penal Code Act also takes the same narrow approach of the International Convention for the Suppression of the White Slave Traffic<sup>86</sup> which criminalised the prostitution of minor girls even with their consent regardless of the means element, and of women of full age through unlawful means.<sup>87</sup> However, the international community discarded these instruments because they were racist, did not define the immoral purposes abroad or prostitution and were gender-specific.<sup>88</sup> They utterly failed to protect victims of trafficking who were largely unrecognised. Finally, the definition and offence of trafficking the Penal Code criminalises has material and mental requirements quite different from the Child Act. With such a chaotic legal milieu, many victims of trafficking will remain unprotected much as traffickers will go unpunished.

The Passports and Immigration Act 2012 allows competent authorities in South Sudan to deny the granting of visa to any person they “reasonably suspect” is entering South Sudan for the purpose of human trafficking.<sup>89</sup> The provision considers that immigration systems and borders can be used clandestinely or illegally to perpetrate trafficking in persons. International law confirms this approach. It therefore obligates states parties to take national and international efforts to ensure that their

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<sup>84</sup> Opened for Signature 18 May 1904, 1 LNTS 83 (1904), amended by a Protocol approved by the United Nations General Assembly on 3 December 1948, opened for signature on 4 May 1949, 30 UNTS 23, entered into force 21 June 1951.

<sup>85</sup> The Preamble to the Convention and art. 1.

<sup>86</sup> Opened for signature 4 May 1910, 3 LNTS 278 (1910), amended by a Protocol approved by the General Assembly on 4 May 1949, 30 UNTS 23, entered into force 14 August 1951.

<sup>87</sup> International Convention for the Suppression of the White Slave Traffic, arts.1, 2.

<sup>88</sup> Obokata, T., *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Leiden: Nijhoff Publishers, 2006, p. 14.

<sup>89</sup> The Passports and Immigration Act, 2012, s. 15(f).

borders and documents are not used for the purpose of trafficking in persons.<sup>90</sup> Notwithstanding, the provision presents several shortcomings. First, it does not tell us whether the person coming to South Sudan and whose visa or its application should be denied is a trafficker or a trafficked person. Second, where this person is a trafficked person, the law is silent on whether he will be treated as a victim of a crime as international law requires or a violator of the immigration laws of South Sudan. This might leave victims of trafficking vulnerable to deportation. Third, the law does not inform us what amounts to a ‘reasonable suspicion’. Is reasonable suspicion legally determined, a judicial process, a result of an informed fear, emanating from prior training given to immigration officers or simply relying on subjective views of the desk officer? Finally, the provision does not inform us the source of its inspiration for “human trafficking.” Does it refer to trafficking in persons under international legal framework to which South Sudan is not a Party? Does it refer to the Child Act, in which case only taking a narrow protection approach which leaves adult victims, especially women, unprotected? Does it consider other laws of South Sudan such as the Penal Code Act without mentioning it? Or does this law make a legal presumption that trafficking in persons is known by looks and smells as if it has body odour? Thus, the Passports and Immigration Act leaves the protection of the victims of trafficking hanging and unknown.

In terms of rescue, investigation and prosecution, the South Sudan Police Services Act 2009 obligates the Police Service and its personnel with the duty to combat terrorism, organised crime and human trafficking.<sup>91</sup> Notwithstanding, the law does not detail the extent the Police should combat trafficking to protect victims. The modalities on how to counteract the crimes are lacking and this adversely affects how South

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<sup>90</sup> Anti-Trafficking Protocol, Arts. 10-11.

<sup>91</sup> The South Sudan Police Act, 2009, s. 7 (i; k).



Sudan protects victims of human trafficking, considering the police are the first stakeholders to rescue and protect victims. Also, the law does not inform us the human trafficking parameter it considers, whether it is trafficking in persons under the Penal Code Act or Child Act.

Labour Act, which is the recent law here considered, provides its own peculiarities. It prohibits both forced and the worst forms of child labour.<sup>92</sup> Section 13(2)(a) defines the worst forms of child labour to mean, among others, “all forms of slavery or practices similar to slavery, such as sale and trafficking of children, debt bondage and serfdom, forced or compulsory labour, and forced or compulsory recruitment of children for use in armed conflict.” This provision indeed does protect children from the worst forms of child labour. However, what it defines as worst forms of child labour, especially in the context of trafficking, ends up leaving many child victims unprotected.

Slavery or practices similar to slavery are not the worst form of child labour under international law. Legally speaking, even slavery is different from practices similar to slavery. International law through the 1926 Convention to Suppress the Slave Trade and Slavery<sup>93</sup> as well as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery<sup>94</sup> treats slavery, practices similar to slavery and forced labour, of which worst forms of child labour is an extreme subset, to be completely dissimilar forms of exploitation.<sup>95</sup> International anti-trafficking law takes this approach, too.<sup>96</sup> It considers these forms to be the gravest from which states could consider other forms based on their national circumstances.

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<sup>92</sup> Labour Act, No. 64 of 2017, ss. 10,13.

<sup>93</sup> 60 L.N.T.S 254 (1926).

<sup>94</sup> 226 U.N.T.S 3 (1956).

<sup>95</sup> For a considered analysis, Kahimba, N. F., *Human Trafficking under International and Tanzanian Law*, the Hague: TMC Asser Press/Springer, 2021, pp. 61-70.

<sup>96</sup> Anti-Trafficking Protocol, art. 3(a).

The Labour Act does not stop here with the confusion. It considers sale and trafficking of children as “all forms of slavery and practices similar to slavery.” As already noted, this is legally wrong. Under international law, trafficking in persons, including that of children, can be perpetrated for the purposes of slavery and practices similar to slavery. This means slavery or practices similar to slavery are not trafficking, and neither is trafficking slavery or practices similar to slavery. It also means that slavery or practices similar to slavery are very specific and distinct forms of exploitation emanating from trafficking. This is also true of forced or compulsory labour. It is also not clear whether by trafficking of children, the law envisages the Child Act’s approach or the Penal Code Act’s. The legal implication of this confusion cannot be overemphasised. It is difficult to prosecute traffickers and protect victims when confusion abounds concerning legal requirements of specific elements. Only when these are clear can a conviction for trafficking stand.

This discussion reveals that while South Sudan has certain pieces of legislation which have some provisions prohibiting trafficking and protecting victims of trafficking, these laws do not comprehensively deal with trafficking as understood in international anti-trafficking law which provides for the prevention, protection and criminalisation of trafficking. The provisions discussed not only confuse clearly established positions of international law, they also lack harmony among themselves. The laws criminalise outdated practices of trafficking or ambiguously protect rights of victims of trafficking. Coupled with lack of implementation, these fewer provisions remain symbolic as far as the protection of the victims of trafficking in persons is concerned.

## **5.0. CONCLUDING REMARKS**

This article has revealed that trafficking in persons is real in South Sudan. It has provided a considered analysis of the international anti-trafficking obligation relating to protection of victims of trafficking as contained in

international human rights law and specific anti-trafficking frameworks. It has also provided a critical examination of the South Sudanese legal framework to establish the extent of protection of the rights of victims. It has indicated not only are there fewer protections but also that the manner in which trafficking is criminalised makes it harder to protect victims of trafficking. Thus, the existing laws fall short of the standards or benchmarks contained in the international instruments for the protection of the victims of trafficking. Even where it has taken appreciable steps, available literature show that they are compromised by Covid-19 pandemic, corruption, lack of political will, weak institutions and lack of human capacity to combat human trafficking. Finally, the article has poignantly shown how South Sudanese legal frameworks obfuscate general principles of law as they relate to trafficking and human rights. We opine that these problems are mostly due to lack of sector-specific legislation. Therefore, it is our recommendation that South Sudan should ratify the Organized Crime Convention and the Anti-Trafficking Protocol and enact a specific anti-trafficking legislation which harmonises the current fragmented legal framework.