

**GOLD BETWEEN THEIR LEGS? TRAFFICKING IN WOMEN FOR
SEXUAL EXPLOITATION: AN ANALYSIS OF THE SADC RESPONSE AT
NATIONAL AND REGIONAL LEVEL**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF
THE DEGREE LLM (HUMAN RIGHTS AND DEMOCRATISATION IN
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DECLARATION

I, **Chongo Vanessa Chitupila** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Dr Christopher Mbazira

Signed.....

Date.....

DEDICATION

To my sister, two brothers and *ba mbuya* for allowing me to chase my dreams. To **Mom**, for allowing me to dream.

To all trafficked women and girls; may justice find you and serve you well.

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I thank my God and Father without whose guidance and blessings I would not have come this far.

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Claudio *obrigada* for translating the Portuguese text into English that enabled me to complete chapter three.

To the LLM (Human Rights and Democratisation in Africa) 2009 class, you were an interesting lot.

LIST OF ABBREVIATIONS

ACHPR – African Charter on Human and People’s Rights

CAT – Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

CESCR – International Covenant on Economic, Social and Cultural Rights

CERD – International Convention on the Elimination of All forms of Racial Discrimination

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

EU – European Union

FIFA - Fédération Internationale de Football Association

GRETA – Group of Experts against Trafficking in Human Beings

ICCPR – International Covenant on Civil and Political Rights

ICTY – International Criminal Tribunal for the former Yugoslavia

ILO – International Labour Organisation

IOM – International Organisation for Migration

PDSAU – Politics, Defence and Security Affairs Unit

SADC – Southern African Development Community

SARPCCO – Southern African Regional Police Chiefs Organisation

UN – United Nations

UNPF – United Nations Population Fund

UNTOC – United Nations Convention against Transnational Organised Crime

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CHAPTER ONE

TRAFFICKING IN PERSONS: A SOUTHERN AFRICAN PERSPECTIVE

1.1 Background to the research question

Trafficking in persons (also known as human trafficking) is one of the most lucrative businesses in the world today with profits second only to drug trafficking and illegal arms profits.¹ Human trafficking occurs in all parts of the world and is almost always connected to organised crime.²

Human trafficking in which persons are treated in a manner akin to commodities and bought, sold or exchanged in various ways is defined as;³

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 abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Human trafficking occurs almost everywhere in the world and involves cross border trafficking, which is the trafficking of persons across national borders as well as internal trafficking, which is the trafficking of persons within the borders of a country.⁴ Trafficking occurs for various reasons; most prominent being trafficking for purposes of sexual exploitation with 79% of women trafficked for this purpose, while 18% of people are trafficked for purposes of forced labour.⁵ Trafficking also occurs for purposes of buying and selling human body organs and for purposes of (illegal) foreign or domestic adoption.⁶

With its history of southward migration flows, political instability, porous borders and weak institutions and structures, Southern Africa is fertile ground for human trafficking.⁷ Children and women in Africa and Southern Africa are especially vulnerable due to economic

¹ B Olateru-Olagbegi 'State response to trafficking in women and children - the Nigerian experience' in Centre for Human Rights *Gender based Violence in Africa: Perspectives from the Continent* 154.

² South Africa Law Reform Commission 'Trafficking in Persons' Issue Paper 25 2004 1.

³ The Palermo Protocol, article 3.

⁴ Bermudez, L. 'No experience necessary: The internal trafficking of persons in South Africa' 2008 IOM.

⁵ UNODC 'Global Report on Trafficking in Persons' 2009 6.

⁶ UNODC (n 5 above).

⁷ IOM 'Breaking the cycle of vulnerability: Responding to the health needs of trafficked women in East and Southern Africa' 2006 22.

disparities in which they have lower socio-economic status.⁸ Mozambique, South Africa, Zambia and Zimbabwe are all countries in which human trafficking activities occur. Each of these countries is a source, transit and sometimes destination country while South Africa is a source, transit and destination country.⁹

Human trafficking involves the violation of the rights of trafficked persons, for example, the right to dignity, the right to integrity and security of the person, the right to health and reproductive rights, freedom from cruel, inhuman and degrading treatment, freedom from slavery, freedom of movement and sometimes the right to life. Some of the available literature addresses human trafficking as a human rights concern particularly in relation to women; most literature however, concentrates on the rights of the victims after trafficking has occurred. Nonetheless, there is a need to address the factors that make women and children vulnerable and discuss the rights that are violated during trafficking in order for governments within the SADC region to establish meaningful preventive measures as well as address human rights violations that occur during and after trafficking.

In May 2009, the Southern Africa Development Community (SADC) ministers responsible for combating trafficking in persons together with other regional and international partners met in Maputo, Mozambique. They discussed the phenomenon of trafficking in persons, especially women and children in the SADC Region. They adopted a ten year regional plan of action aimed at increased cooperation and adoption of national policies to curb the practice.

The regional plan of action has priority areas, such as the development of national policies and enactment of anti-trafficking legislation, regional training and capacity building for national law enforcement, customs and immigration officials, social workers and judges, research and information sharing and most importantly, coordination and regional cooperation, which covers enhancing cooperation and collaboration between Member States and all other regional, continental and international stakeholders in combating trafficking in persons.¹⁰

In 2010 South Africa will host the Fédération Internationale de Football Association (FIFA) Soccer World Cup and the International Organisation for Migration (IOM) has on a number of occasions in its magazine Eye on Human Trafficking featured articles that suggest that there may be an increase in human trafficking to South Africa due to the FIFA Soccer World

⁸ Bermudez (n 4 above).

⁹ IOM (n 7 above).

¹⁰ SADC Human Trafficking Communique 2009. <<http://www.sadc.int/index/browse/page/531>> (accessed on 8 July 2009).

Cup,¹¹ this anticipated increase in trafficking is expected to be for purposes of sexual exploitation.¹²

Although a number of countries in the SADC region have signed the Palermo Protocol, only two countries in the region, Mozambique and Zambia have enacted domestic legislation to address the issue of human trafficking, South Africa which is the country grappling the most with trafficking has been in the process of drafting legislation for many years without any concrete results and at present does not have comprehensive anti-trafficking legislation, although it does have existing legislation that incorporates trafficking.¹³

The meeting of the SADC ministers marks an attempt at regional cooperation on the issue, however, there is a sense of urgency that surrounds human trafficking within the SADC region especially as a result of the upcoming World Cup and there is a need for immediate but effective action.

In light of the problem of human trafficking that seems to be endemic to most countries in Southern Africa and reports that suggest that there is likely to be an increase in human trafficking due to the 2010 World Cup, there is a need to analyse the approaches to human trafficking, the efforts made in the past to address human trafficking in the region and the measures currently in place and whether these are effective.

ILO estimates that of the 12.3 million people (adults and children) in forced and bonded labour and commercial sexual servitude, most of whom are victims of trafficking, at least 1.39 million are victims of commercial sexual servitude at transnational and national level.¹⁴ Of these victims, 56% are women and girls.¹⁵ IOM estimates between one and two million women are trafficked around the world each year. IOM is cautious with its figures and states that such figures are never truly correct.¹⁶ Whereas people are trafficked for various purposes, the traffic in women and children for purposes of sexual exploitation is the most prevalent manifestation of human trafficking and accounts for the majority of all trafficking victims.¹⁷

¹¹ 'Warning on legal sex work for 2010' *Eye on Human Trafficking* Issue 19/2008 & 'Alert on 2010 child trafficking' *Eye on Human Trafficking* Issue 20/2009.

¹² 'Warning on legal sex work for 2010' *Eye on Human Trafficking* Issue 19/2008.

¹³ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Part 6 section 70-71.

¹⁴ US Department of State 'Trafficking in Persons Report 2009' (2009) 8.

¹⁵ US Department of State (n 14 above).

¹⁶ L Hauber 'The Trafficking of Women for Prostitution: A growing problem with the European Union' (1998) 21 *Boston College International and Comparative Law Review*.

¹⁷ A Dorevitch & M Foster 'Obstacles on the road to protection: Assessing the treatment of sex-trafficking victims under Australia's migration and refugee law' (2008) *Melbourne Journal of International Law* 1.

In the process of trafficking, women are subjected to physical, psychological and sexual violence.¹⁸ Such violations coupled with the crime of trafficking infringes a large scope of the rights of trafficked women, rights which are contained in international instruments such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of women, as well as national laws of various countries.

Human trafficking is a problem that needs to be addressed urgently, however, isolated measures undertaken by individual countries will not be effective. This is because trafficking syndicates are funded, organised and work across borders in various countries, regions and continents.¹⁹ Furthermore, there is a host of factors that renders people vulnerable to trafficking and these need to be addressed.

In addressing human trafficking, most measures and policies appear to overlook the reasons why women are vulnerable to trafficking, the human rights violations women suffer during the process of trafficking and how to address these issues. There is a need for a holistic approach to addressing human trafficking, especially any attempts to prevent and suppress trafficking, this is because the sex industry that fuels demand for women is large and spread across the continents of the world and it is unrealistic to believe that the demand for sex and women to supply it will cease. Any measures to combat trafficking need to address the issue of demand and supply in the trafficking and sex industry.

1.2 Statement of the problem

Human trafficking has existed for centuries, originally as slavery, between Southern Africa and Europe and throughout Southern Africa.²⁰ Early in the 19th century young women were trafficked into South Africa from Europe to serve as prostitutes or wives for mine workers. Simultaneously, many African girls were trafficked to Europe where a number of them were sex slaves in French ports.²¹ Within Southern Africa, women and girls are trafficked from the Democratic Republic of Congo, Mozambique and Zambia to South Africa for various purposes but prominently for sexual exploitation.²²

¹⁸ Report of the Special Rapporteur on violence against women Ms. Radhika Coomaraswamy. E/CN.4/2000/68 29 February 2000.

¹⁹ Bermudez, (n 4 above).

²⁰ J Martens et al 'Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa' 2003 7.

²¹ Martens et al (n 20 above).

²² US Department of State (n 14 above).

Women and girls are also trafficked within their various countries and forced into prostitution or domestic labour where they are often forced to provide sexual services to their employers or others with or without the knowledge of their employers.²³ In forced prostitution or forced work in the sex industry, women are subjected to rape, violence or threats of violence against themselves or their families, their documents are confiscated or destroyed and they are forced to pay off insurmountable debts.²⁴ While men, women and children are all victims of trafficking, this study will focus on trafficking of women and girls for purposes of sexual exploitation.

There has been a tendency for states and various agencies to approach human trafficking from a criminal law and post – trafficking protection point of view. With the advent of the Palermo Protocol signed, ratified or acceded by twelve of the fourteen member states of SADC, countries such as Mozambique and Zambia have developed anti-human trafficking legislation principally based on criminal law. South Africa and Tanzania have existing criminal legislation in which they have incorporated provisions on human trafficking. The remaining member states lack trafficking legislation and SADC as a region does not have a regional framework on human trafficking.

Prior to May 2009, there were no concrete actions to create a regional instrument on human trafficking. The SADC region remains without a regional framework such as legislation tackling the various aspects of human trafficking and addressing the needs of victims. However, the existence of regional legislation on human trafficking does not guarantee cooperation among states, the elimination of trafficking nor successful efforts to address it. As already stated, in the region, only Mozambique and Zambia have enacted anti-human trafficking legislation. Notably without anti-human trafficking legislation is South Africa, this is all the more poignant because of all the countries in the SADC region as well as throughout Africa, South Africa is a source, transit and destination country (whereas most countries are usually only source and transit countries) because it is one of the most developed countries in Africa. South Africa attracts people seeking to earn more money and improve their standard of living. The problem with some countries having anti-trafficking legislation and South Africa lacking it, is the adverse effect it has on attempts to address trafficking. This arises in areas such as extradition, where Zambia for instance, provides for cooperation with foreign states for the extradition from or to Zambia for the prosecution of someone accused of

²³ S Tiefenbrun 'Sex sells but drugs don't talk: Trafficking of Women Sex Workers' 23 (2000-2001) *Thomas Jefferson Law Review*.

²⁴ 'Control mechanisms in human trafficking' *Eye on Human Trafficking* Issue 20/2009.

trafficking,²⁵ South Africa does not address extradition in cases of trafficking. Therefore, South Africa may not be willing to extradite its citizens to stand trial in Zambia for trafficking.

Furthermore, while Zambia and Mozambique provide for the protection and rehabilitation of victims (regardless of nationality) in their laws,²⁶ South Africa does not do so, therefore while a South African victim may receive counselling and rehabilitation in Mozambique upon return to South Africa this ceases as there is no obligation on South Africa to provide such services, making a victim vulnerable to re-trafficking. Immigration and border control issues also arise, whereas Zambia has provided for port and border control;²⁷ Zimbabwe, Malawi and South Africa have no specific anti-trafficking controls at their borders which renders them trouble free passageways for traffickers and their victims. Consequently, traffickers may avoid Zambian borders but will simply devise routes through other countries in the region to get to South Africa, where they can also easily traffic girls to other regions of the world.

The existence of anti-trafficking legislation in South Africa would contribute to effectively addressing trafficking in terms of increased human and financial resources and technology available. Furthermore, South Africa's cooperation with Mozambique and Zambia as well as other countries in the region would lead to coordinated efforts at information exchange, identifying individual traffickers or trafficking syndicates, trafficking routes, potential victims and trafficked victims.²⁸ This would provide a template for developing effective strategies to deal with trafficking within the region and the various nations as well as solutions to causes of trafficking.

Essentially, lack of legislation in most SADC countries creates disparities in addressing trafficking at both the regional and national level, with disorganised and ineffective strategies to tackle trafficking. This is an advantage for traffickers as the risks to their business remain minimal, they are organised and operate efficiently nationally and trans-nationally, bribing corrupt officials at unmonitored borders and making it difficult to stop them.

The countries of SADC need to find solutions to the problem of human trafficking. The ministerial conference of 2009 and the adopted Plan of Action was a pathway to solutions. Other solutions consist of the enactment of regional legislation and non-legal programmes to address human trafficking. Furthermore, member states should enact national anti-trafficking

²⁵ Article 95, Act No. 11 of 2008.

²⁶ Articles 25 - 47, Act No. 11 of 2008 (Zambia), Articles 20 & 21 Lei n°6/2008 (Mozambique).

²⁷ Articles 69 – 83, Act No. 11 of 2008.

²⁸ E Delpont *et al* 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.5 (E) 2007.

legislation which should be based on the regional framework and the entire region should harmonise its anti-trafficking legislation and non-legal programmes. However, questions arise as to whether countries would abide by a regional instrument, implement regional programmes or harmonise their legislation. Furthermore, the relationship between the various domestic jurisdictions may prove problematic with regard to harmonisation, for instance Namibia and South Africa apply Roman Dutch law, Mozambique has a Civil jurisdiction while Malawi, Zimbabwe and Zambia as well as a number of other countries have a Common Law system.

In consideration of the national and regional lack of anti-trafficking laws and programmes as well as some of the inherent difficulties of putting such legislation and programmes in place, this study will be conducted based on the following questions:

1. Are the current efforts (both regional and national) by member states of SADC at addressing human trafficking effective?
2. Does the SADC region require regional anti-trafficking legislation?
3. Does the SADC region require non-legal measures against human trafficking?
4. How can the member states of SADC sufficiently address human trafficking at both the national and regional level?

1.3 Objectives

Regional and national efforts at comprehensively addressing human trafficking can only be effective if human trafficking is adequately understood; its context, causes, patterns, trends, actors, victims, national peculiarities and consequences must be understood and addressed. Consequently, the objectives of this study are as follows:

- a. To examine the history of human trafficking and the various international legal instruments adopted to address it.
- b. To examine the trafficking of women and girls for sexual purposes and sexual exploitation as well as examine the various human rights (of female victims) violated during and after the process of human trafficking.
- c. To examine the context of trafficking within Mozambique, Zambia and South Africa and explore how these three countries are addressing human trafficking through legislation.
- d. To examine Europe's measures against trafficking and whether there are lessons for the SADC region.

1.4 Significance of the study

While human trafficking has been prevalent in the region for many years, it is only recently that it has been receiving attention.²⁹ Furthermore, while there is an abundance of literature on trafficking within Europe, there is very scarce literature on human trafficking within Africa in general and Southern Africa in particular. More information on trafficking within the region is required.

Furthermore, as SADC Ministers tasked with addressing human trafficking only met and adopted a Plan of Action in 2009, there is an absence of examination of the Plan of Action. However, an examination is necessary especially at such an early stage in the adoption of the Plan as it allows for the Plan to be improved, consequently ensuring better legislation and programmes for the region and member states in addressing human trafficking.

The goal of this dissertation is to discuss the need for a comprehensive approach to human trafficking, beginning with preventive measures, addressing the issues of demand for sex and supply for that demand as well as attached factors such as social, cultural and economic issues that affect people particularly women. The dissertation will also discuss the human rights negatively impacted by human trafficking whether during or after trafficking, this all contributes to the significance of the study.

1.5 Literature Review

There is an abundance of literature on human trafficking,³⁰ particularly women and children, most of it focusing on trafficking for sexual exploitation. However, many authors while concentrating on trafficking for sexual exploitation and blaming the sex industry for trafficking,³¹ neglect to address the link between trafficking, globalisation and the sex industry, in light of which this paper will attempt to underscore the relationship between the three and highlight the consequences such as slavery like conditions and forced labour.

Swing, Director General of the International Organisation for Migration (IOM) says, 'trafficking in persons is perhaps modern day's most widespread form of slavery and is one of

²⁹ E Delpont et al (n 28 above).

³⁰ See A Jonsson (ed) (2008) *Human Trafficking and Human Security* which is a collection of articles on human trafficking in Europe.

³¹ H Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007) and E Kelly 'Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe' (2002).

the most heinous international crimes of the globalisation era.³² Watson, Hathaway and Esquibel discuss slavery and human trafficking,³³ making comparisons and highlighting applicable international instruments old and new,³⁴ however they fail to explain the exercise of powers attaching to right of ownership in slavery and thereby fail to express the relationship between slavery and human trafficking. However, using a key case of the International Criminal Tribunal of the former Yugoslavia, this study draws out that relationship between the two.

Human trafficking is defined in the Palermo Protocol, a criminal legal instrument intended to facilitate the prosecution of traffickers. Jordan contends the definition has too many elements which have to be proved by prosecutors and laments the lack of definition of significant terms such as sexual exploitation.³⁵ Additionally, Bruch indicates the Protocol's criminal law emphasis³⁶ and Coontz and Griebel while agreeing add that such a focus neglects the root causes of trafficking.³⁷ Gender inequality is one such root cause that renders women vulnerable to trafficking, women are trafficked for work in commercial sex activities where they are sexually exploited by traffickers, buyers or end users.³⁸ However, these authors while suggesting the incorporation of a human rights framework alongside the criminal approach, fail to highlight the specific human rights violated. Authors such as Askola cite relevant human rights instruments³⁹ but do not address specific rights therein and this study will address this deficiency by identifying certain human rights instruments and the specific rights violated.

There is a surplus of literature addressing factors that render women vulnerable to trafficking, such as; poverty, gender inequality and sex industries.⁴⁰ However, most of these writings emphasise factors that although common to all parts of the world are peculiar to Europe. Southern Africa grapples with these factors but has factors peculiar to the region for instance,

³² Speech delivered at the EU Ministerial Conference; 'Towards Global EU Action Against Trafficking in Human Beings' 2009 Belgium.

³³ N Watson & International Helsinki Federation for Human Rights 'A Form of Slavery: Trafficking in Women in OSCE Member States' 2000 i. <<http://www.unhcr.org/refworld/docid/46963afd.html>> (accessed 20 October 2009).

³⁴ Unpublished: M Esquibel 'Human Trafficking: a violation of human rights, a universal issue' unpublished Honors in the Major thesis, Florida State University, 2005 & J Hathaway 'The Human Rights Quagmire of Human Trafficking' (2008-2009) 49 *Virginia Journal of International Law* 5-6.

³⁵ AD Jordan *The Annotated Guide to the Complete UN Trafficking Protocol* (2002) 7.

³⁶ EM Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law*.

³⁷ Coontz & Griebel 'International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law' <<http://www.awid.org/eng/Issues-and-Analysis/Library/>> (accessed 25 January 2009).

³⁸ 'Report of the Special Rapporteur on Violence against Women, its causes and consequences Ms R Coomaraswamy' E/CN.4/1997/47 <<http://www.unhcr.org/refworld/docid/3b00f4104.html>> (accessed on 20 August 2009).

³⁹ H Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007).

⁴⁰ C James & S Adler 'Trafficking of Young Women' in J Arvanitakis (ed) *Highly Affected Rarely Considered: The International Youth Parliament Commission Report on the Impacts of Globalisation on Young People* (2003).

globalisation and HIV and AIDS. This paper will highlight factors peculiar to Southern Africa and show why they are peculiar to the region.

The plethora of literature on trafficking in women and children, includes writings on the legislative measures employed by various regions of the world to address trafficking. Many authors discuss European measures. Askola argues that Europe has incorporated a comprehensive approach combat trafficking in recognition of the fact that trafficking requires national and international cooperation.⁴¹ Österdahl in considering the Council of Europe Convention on Action against Trafficking in Human Beings and the EU Council Framework Decision on Combating Trafficking in Human Beings, asserts that relative political homogeneity reigning in Europe should render the procedure of implementation of the instruments easier as compared to the implementation of the Palermo Protocol with its heterogeneous state parties.⁴² Further, Österdahl contends that international cooperation is an effective means of combating trafficking and despite their reluctance, the countries of Europe acknowledge this and work together.⁴³ However, there is inadequate literature on the anti-trafficking measures of the Southern African region. Therefore, this study seeks to discuss any such measures.

Additionally, Europe has employed non legal measures supplementary to its legislation and Obokata discusses these non legal measures which include social projects and awareness raising campaigns.⁴⁴ Based on such a comprehensive approach, this study will draw lessons from Europe for the SADC region which has only recently addressed trafficking as a region. Most countries in Southern Africa do not have national legislation on human trafficking, this paper will discuss two countries with anti-trafficking legislation so as to contribute to the minimum literature on counter trafficking measures within individual countries.⁴⁵

Building on this existing body of knowledge, this study examines the phenomenon of trafficking in women for sexual exploitation, the phenomenon within three specified countries in Southern Africa and the SADC Plan of Action. The study critiques the Plan of Action and

⁴¹ Askola (n 39 above) 5.

⁴² I Österdahl 'International countermeasures against human trafficking' in A Jonsson (ed) *Human Trafficking and Human Security* 76.

⁴³ Österdahl (n 42 above) 87.

⁴⁴ T Obokata 'Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights or States' Interests? (2001) 5 Web Journal of Current Legal Issues. <<http://webjcli.nl.au.uk/2001/issue5/obok5.html>> (accessed on 10 September 2009)

⁴⁵ E Delpont *et al* 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.5 (E) 2007 32 and L Boaventura *et al* 'Human Trafficking in Mozambique: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.1 (E) 2006.

bridges the gaps in literature by providing recommendations to improve the Plan of Action and thereby effectively address trafficking in Southern Africa.

1.6 Methodology

The questions raised by this study will be answered through examination of primary sources such as treaties, protocols and national legislation as well as reports of regional and other organisations. Text book based literature on human trafficking forms part of the research literature. Human trafficking is a specialised field on which there is substantial literature, but most of it is not contained in text books as human trafficking has only recently been defined and international instruments recently enacted, therefore a large amount of research will be internet based. The research will be largely based on desktop research and literature surveys.

1.7 Delineation and limitations of study

While the study recognises collective and individual measures to address human trafficking, this paper will examine mainly individual measures of countries with Southern Africa, to address human trafficking. The study will also discuss collective European measures addressing trafficking. The study will analyse the legal and non legal measures of European countries as a region and will highlight lessons from Europe for SADC.

Of the various regions in Africa, the SADC region is the latest to cooperate and initiate measures to address human trafficking, this paper will analyse the Plan of Action. However, most of the countries in the region do not have national anti-trafficking legislation or policies on human trafficking. This paper will examine how a region whose countries have disparate legal systems and most lack anti-trafficking legislation can address human trafficking jointly and independently. Mozambique and Zambia will be discussed in this paper because they have anti-trafficking legislation and South Africa will be discussed because it is the country that is most affected by trafficking in the region but appears to have made the least efforts to address trafficking.

As human trafficking is a specialised field, there is a lack of access to experts on the matter which largely rules out conducting interviews. Furthermore, due to the sensitive nature of the consequences on victims of human trafficking, it is very difficult to obtain interviews with perpetrators and victims of human trafficking. Additionally, efforts to address human trafficking within the SADC region are recent and literature on these efforts is scant.

1.8 Overview of chapters

Chapter one provides a preamble to human trafficking and contextualises the phenomenon within the SADC region; it underscores regional attempts to address human trafficking and some of the attendant obstacles thereto. It also highlights the scope of study of this paper.

Chapter two outlines the history of human trafficking, from its conceptualisation as slavery through to its evolution as human trafficking; underlining the legal instruments formulated over time to address human trafficking. The chapter also discusses the human rights framework, highlighting the various human rights violated when human trafficking occurs.

Chapter three discusses the root causes of human trafficking and its context within Mozambique, South Africa and Zambia. The chapter presents a case study of Mozambique, South Africa and Zambia, analysing the legal measures taken to address human trafficking.

Chapter four analyses the Ten Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children, highlighting its weaknesses. The chapter also analyses the measures European countries as a region have taken to address human trafficking and emphasises some lessons for SADC countries.

Chapter five presents conclusions and recommendations on how SADC countries can effectively address human trafficking within the region.

CHAPTER TWO

FROM OWNERSHIP TO CONTROL, SLAVERY TO HUMAN TRAFFICKING

2.0 Introduction

Human trafficking is an aeon-old practice that shows no sign of abating but is instead thriving and has become one of three of the most lucrative international crimes in the world together with trafficking in drugs and illegal arms.⁴⁶ Human trafficking affects men, women and children, although the sad reality is that women and children are the most vulnerable and obvious victims.⁴⁷ It occurs in different forms, for various reasons, on every continent and in almost every country.⁴⁸ In particular, African states have been identified as source, transit and destination countries of trafficked victims.⁴⁹

The trafficking of women for purposes of commercial sexual exploitation dates back to the late 19th century with Jewish women being transported to Buenos Aires for prostitution. Equally, in the 1920s in order to escape poverty and famine in post revolutionary Russia, Russian women were trafficked into China.⁵⁰ In the 21st century the trend continues, exacerbated by various factors some old and associated to such issues as poverty, patriarchal societies and gender inequality.⁵¹ New factors include globalisation and technology which have facilitated trafficking and sexual exploitation because they enable people to easily buy, sell and exchange images and videos of sexual exploitation of women and children. Furthermore, technologies allow sexual predators and traffickers to access women and girls and harm them anonymously.⁵² This combination has given the sex industry various means of exploiting women and children, fuelling demand and utilising supply.⁵³

⁴⁶ B Olateru-Olagbegi 'State response to trafficking in women and children in Africa – the Nigerian experience' in Centre for Human Rights *Gender-based violence in Africa: Perspectives from the Continent* 153.

⁴⁷ J Chuang 'Redirecting the debate over trafficking in women: Definitions, paradigms and contexts' (1998) 11 *Harvard Human Rights Journal* 65.

⁴⁸ South Africa Law Reform Commission (n 2 above).

⁴⁹ US Department of State (n 22 above).

⁵⁰ S Jeffreys 'Trafficking in women versus prostitution: A false distinction' July 2002.

⁵¹ United Nations Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking 2002 principle 5.

⁵² D Hughes 'The use of New Communications and Information Technologies for Sexual Exploitation of Women and Children' (2002) 13 *Hastings Women's Law Journal* 129.

⁵³ D Hughes 'Globalization, Information Technology and Sexual Exploitation of Women and Children' (2001) *Rain and Thunder – A Radical Feminist Journal of Discussion and Activism*, Issue 1.

This chapter discusses the concept of human trafficking, highlighting its association with slavery, discussing the international definition of trafficking and its elements, the various forms of human trafficking and underscoring the link between human trafficking and the sex industry. The chapter also examines the human rights framework and human rights that are violated during the process of trafficking.

2.1 The Relationship between Human Trafficking and Slavery

Many authors and organisations have referred to human trafficking as slavery. For example, the United Nations Population Fund has equated trafficking to slavery,⁵⁴ the United States Department of State refers to trafficking as modern day slavery⁵⁵ and various authors refer to trafficking as either slavery or a new slavery.⁵⁶ However, authors such as Hathaway while recognising human trafficking as slavery, seek to distinguish it as a small subset of a weightier problem – the problem of slavery. Hathaway argues that the concept of human trafficking promotes a very partial perspective of the problem of modern slavery, as only a small percentage of modern slaves meet the definition of a trafficked person under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (Palermo Protocol). He further argues that such a partial scope ignores the predominant manifestations of slavery and allows the governments of the world to avoid addressing the endemic slavery that persists everywhere.⁵⁷ This is usually to the detriment of people enslaved the world over but who do not fall under the definition of trafficking.

The general consensus among authors who write about and organisations that address human trafficking is that it amounts to slavery. Although they attempt to differentiate it from the transatlantic slavery, stating that in contemporary time's slavery is illegal. Furthermore, unlike the old slavery that consisted of owning a person, modern slavery (human trafficking) entails the control of a person for purposes of exploiting them.⁵⁸

While human trafficking affects, men, women and children, it has been feminised since time immemorial. As Chuang points out, international trafficking in women has been recognised

⁵⁴ UNPF 'Trafficking in human misery' available at <<http://www.unfpa.org/gender/trafficking.htm>> (accessed on 12 September 2009).

⁵⁵ US Department of State (14 above).

⁵⁶ Unpublished: M Esquibel 'Human Trafficking: a violation of human rights, a universal issue' unpublished Honors in the Major thesis, Florida State University, 2005. K Bales *Disposable People: New slavery in the global economy* (1999).

⁵⁷ J Hathaway 'The Human Rights Quagmire of Human Trafficking' (2008-2009) 49 *Virginia Journal of International Law* 5-6.

⁵⁸ Unpublished: M Esquibel 'Human Trafficking: a violation of human rights, a universal issue' unpublished Honors in the Major thesis, Florida State University, 2005.

since the late 19th century.⁵⁹ One of the earliest international agreements signed with regard to trafficking within the scope of slavery was the International Agreement for the Suppression of White Slave Traffic (White Slave Traffic Agreement) in 1904 drafted by the League of Nations. This Agreement defined trafficking for prostitution as a moral problem related to slavery and was intended to address the export of European women into brothels in various parts of colonial empires.⁶⁰ Although the intent of the White Slave Traffic Agreement was to suppress “white slavery,” which was the code word for prostitution, this agreement merely required states party to it, to collect information on the procurement of women abroad.⁶¹

The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention 1926 (1926 Slavery Convention) was an international instrument adopted to address slavery but also encompassed trafficking. It defined slavery and slave trade as;⁶²

the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. Slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The 1926 Slavery Convention addressed trafficking because of its definition which focused on coercion and loss of liberty, which has similarities to the trafficking definition in the Palermo Protocol.⁶³

The 1926 Slavery Convention was supplemented by the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery (1956 Supplementary Convention) which widened the understanding of slavery-like practices by prohibiting debt-bondage, serfdom, servile marriage and child labour.⁶⁴ All of which occur in trafficking. The 1926 Slavery Convention and its supplementary convention were mainly focused on tackling slavery which constitutes elements of trafficking although they were not referred to as trafficking in that era but solely considered slavery. The problem with these two instruments is that they do not define what ‘right of ownership’ entails in order for the comparison between human trafficking and slavery to be justified. In *Prosecutor v Kunarac*,

⁵⁹ Chuang (n 47 above) 75.

⁶⁰ P Coontz & C Griebel ‘International Approaches to Human Trafficking: The Call for a Gender – Sensitive Perspective in International Law’ <<http://www.awid.org/eng/Issues-and-Analysis/Library/>> (accessed 25 January 2009).

⁶¹ Coontz & Griebel (n 60 above) 74.

⁶² Article 1(1), (2) 1926 Slavery Convention.

⁶³ J Morrison & B Crosland ‘The Trafficking and Smuggling of Refugees; the End Game in European Asylum Policy’ 2000 61.

⁶⁴ Article 1 of the 1956 Supplementary Convention.

*Kovac & Vukovic*⁶⁵ the trial Chamber of the (International Criminal Tribunal for the former Yugoslavia) ICTY stated that slavery consists of the exercise of powers attaching to the right of ownership over a person and the exercise of such powers includes (among others) control of someone's movement, control of sexuality, force or threat of force, subjection to cruel treatment, prevention of escape and forced labour.

Early 19th century, trafficking was incorporated in slavery but has evolved over time to take centre stage, even in 1998 the Working Group on Contemporary Forms of Slavery in its recommendation declared that cross border trafficking of women for sexual exploitation is a contemporary form of slavery.⁶⁶ Conclusively, as the *Kunarac* case shows, trafficking contains elements of the exercise of powers of right of ownership and is contemporary slavery. It is a new terminology for the age old practice of slavery.⁶⁷

2.2 Defining Human Trafficking

The International Convention for the Suppression of Traffic in Women and Children of 1921 (1921 Convention) and the International Convention on the Suppression of the Traffic in Women of Full Age of 1933 (1933 Convention) address the issue of trafficking in a manner somewhat distinct from slavery. Both conventions address trafficking, but consider its end purposes such as prostitution as a matter of domestic jurisdiction thereby limiting the scope of the conventions to recruitment and transportation. However, the 1921 Convention expanded the scope of protective measures provided by previous instruments such as the White Slave Traffic Agreement to include non-white women and children of either sex.⁶⁸ The 1933 Convention on the other hand, provides that consent by a trafficked woman does not constitute a defence to the crime of international trafficking.⁶⁹ Neither convention defines trafficking.

The Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others of 1949 (1949 Convention), is said to have consolidated previous treaties regarding trafficking and exploitation of prostitution.⁷⁰ Nonetheless, this convention does not define trafficking; it solely addresses cross-border trafficking for purposes of prostitution - ignoring internal trafficking (that is trafficking within a country's own borders),

⁶⁵(*Appeal Judgment*), IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002.

⁶⁶ Morrison & Crosland (n 63 above).

⁶⁷ N Watson & International Helsinki Federation for Human Rights 'A Form of Slavery: Trafficking in Women in OSCE Member States' 2000 i.

⁶⁸ J Chuang 'Redirecting the debate over trafficking in women: Definitions, paradigms and contexts' (1998) 11 *Harvard Human Rights Journal* 75.

⁶⁹ Chuang (n 68 above).

⁷⁰ E Pearson 'Human Traffic, Human Rights: redefining victim protection' 2002 14.

criminalises prostitution (even prostitution with the consent of all parties concerned) and lacks enforcement mechanisms. It does not have a compulsory reporting requirement nor a committee to supervise its implementation⁷¹ and was not widely ratified.⁷²

Prior to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), an internationally agreed definition of trafficking was lacking. Previous instruments lacked a definition and as the scale of human trafficking increased and more attention was drawn to the problem, various governmental and non-governmental organisations adopted individual definitions.⁷³ For instance, the International Organisation for Migration (IOM) adopted its definition in 1999, defining trafficking as a situation in which:

A migrant is illicitly engaged (recruited, kidnapped, sold, etc) and/or moved, either within national or across international borders; [and] intermediaries (traffickers) during any part of this process obtain economic or other profit by means of deception, coercion, and/or other forms of exploitation under conditions that violate the fundamental rights of migrants.⁷⁴

As the dynamics and complexities of human trafficking began to change, it was agreed by all parties involved in addressing human trafficking that previous treaties contained out dated notions of the constitutive elements of trafficking. Historical characterisations of trafficking were ill defined and non responsive to the prevailing realities of the trafficking phenomenon.⁷⁵ For instance, most treaties dealing with trafficking were framed in a manner that considered trafficking as undertaken for the purpose of either prostitution or the sexual exploitation of women. However, the international community has since realised that trafficking is undertaken for other purposes such as illegal adoptions, forced marriages, forced labour, human body organ removal⁷⁶ and more recently for ritual purposes and making traditional medicines in Africa (traditional medicine is referred to as *muti* in South Africa). The making of traditional medicines entails the forced removal of body organs which are then used to make potions to cure common illness.⁷⁷ Additionally, the international community has

⁷¹ 'Report of the Special *Rapporteur* on Violence against Women, its causes and consequences Ms R Coomaraswamy ; Report on the Mission of the Special *Rapporteur* to Poland on the issue of Trafficking and Forced Prostitution of Women' E/CN.4/1997/47/Add. 1 17.

⁷² Only 72 countries have ratified the 1949 Convention. E Pearson *Human Rights and Trafficking in Persons: A handbook* (2000).

⁷³ Pearson (n 70 above) 15.

⁷⁴ Pearson (n 70 above) 15, 16.

⁷⁵ E Pearson *Human Rights and Trafficking in Persons: A handbook* (2000) 21.

⁷⁶ Pearson (n 70 above).

⁷⁷ L Bermudez 'No experience necessary. The internal trafficking of persons in South Africa' Report prepared for the IOM 26 August 2008 60.

realised that human trafficking has various dimensions aside from the criminal aspect, dimensions such as migration, labour and human rights.⁷⁸

In November 2000, the UN General Assembly adopted the Palermo Protocol as a supplement to the UN Convention against Transnational Organised Crime (UNTOC). Various views are propounded explaining the basis of the Palermo Protocol. Abramson argues that the Palermo Protocol was the consequence of concerns over security issues and the human rights dimensions of the movement of people across and within national borders,⁷⁹ emphasising the human rights aspect. In contrast, Hathaway contends that the Palermo Protocol focuses on the punishment of traffickers and allows developed countries to pursue a border control agenda, making their borders less porous and curtailing international migration.⁸⁰

The Palermo Protocol provides the first world wide accepted definition of trafficking. It also offers guidelines for formulating domestic legislation that enables states party to comply with the Protocol. Article 3 of the Palermo Protocol states:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Whereas the Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others of 1949 focused on prostitution which it considered trafficking, whether the prostitution was forced or voluntary, the Palermo Protocol recognises the existence of voluntary and forced prostitution.⁸¹ Occasionally trafficking occurs without the use of force, something taken into account by the Palermo Protocol in its use of the term ‘abuse of a position of vulnerability,’ referring to people who are vulnerable to the extent that they are trafficked due to their circumstances for example poverty. The issue of consent was dealt with during the drafting of the Palermo Protocol and is reflected in paragraph (b) article 3:

⁷⁸ Pearson (n 75 above) 23. The United Nations Children’s Fund (UNICEF), United Nations Office of the High Commissioner for Human Rights (UNHCHR), the United Nations Special *Rapporteur* on Violence against women and International Organisation for Migration (IOM) all adopted definitions that recognised trafficking as a human rights problem.

⁷⁹ K Abramson ‘Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol’ (2003) 44 *Harvard International Law Journal* 473.

⁸⁰ J Hathaway ‘The Human Rights Quagmire of Human Trafficking’ (2008-2009) 49 *Virginia Journal of International Law* 58.

⁸¹ Pearson (n 75 above) 25.

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) are established.

The means of subparagraph (a) referred to above are those set out in the definition:⁸²

the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

This reinforces the position that trafficking is a forced act, however, if the act is not carried out in the manner set forth in article 3 subparagraph (a), then even if such an act is carried out with an intent to exploit it does not amount to trafficking.⁸³ Jordan asserts that article 3 has too many elements that have to be proven by prosecutors in courts, making prosecutions difficult and the definition inappropriate for domestic criminal procedures.⁸⁴

The terms sexual exploitation and exploitation of the prostitution of others are not defined in the Palermo Protocol. This was intentional taking into account the fact that countries have diverse positions in their domestic laws and policies towards the legalisation or criminalisation of prostitution or adult sex work.⁸⁵

It is evident from the definition in the Palermo Protocol that it has three constitutive elements;⁸⁶

- the act of trafficking: refers to what is done and entails recruitment, transportation, transfer, harbouring or receipt of persons;
- the means: refers to how the trafficking is done and entails the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim; and
- the purpose: refers to why trafficking is done and refers to the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

These elements when read in conjunction with the trafficking definition in the Palermo Protocol are used to ascertain whether a particular circumstance amounts to human trafficking.

⁸² Article 3 (a) Palermo Protocol.

⁸³ Abramson (n 79 above) 477.

⁸⁴ AD Jordan *The Annotated Guide to the Complete UN Trafficking Protocol* (2002) 7.

⁸⁵ Jordan (n 84 above) 8.

⁸⁶ A Gallagher 'Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly* 986-987.

While the definition of trafficking in the Palermo Protocol is broad, it possesses some complexities, such as the fact that a number of the terms are either vague or undefined, for instance, the terms forced labour or services, slavery or practices similar to slavery, servitude and removal of organs, sexual exploitation and the exploitation of the prostitution of others.⁸⁷ Although some of these terms are undefined in the Palermo Protocol, they are defined in other international instruments that contain definitions of terms that characterize aspects of trafficking, whether or not the international instrument makes reference to trafficking. For example, trafficked persons are often held in slavery or slavery like conditions or trafficked for purposes of engaging in forced labour.

Examples of international instruments that contain definitions of terms undefined in the Palermo Protocol are; the International Labour Organisation (ILO) Convention No. 29 Concerning Forced Labour, which defines forced labour, the 1926 Slavery Convention defines slavery and the 1956 Supplementary Convention defines practices similar to slavery. The lack of definition of pertinent terms in the Palermo Protocol in addition to definitions of such terms being contained in other instruments sometimes proves difficult for an effective reconciliation of the terms and definitions.

Furthermore, the definition of trafficking in the Palermo Protocol follows a traditional law enforcement approach which not only marginalises human rights and labour concerns but has human rights implications.⁸⁸ The Law enforcement approach also tends to isolate and punish individual perpetrators, excluding the organised crime syndicates behind these individuals as well as state and government officials that either tolerate or engage in trafficking. Much trafficking occurs with involvement of government officials such as police officers and immigration officials⁸⁹ Nevertheless; the role played by government or state officials in trafficking appears to be addressed by article 5 of the Palermo Protocol which criminalises their participation in trafficking.

Hathaway contends that overemphasis of the Palermo Protocol on criminalisation ignores the root causes of trafficking and meaningful attempts to protect victims.⁹⁰ Principally, the Palermo Protocol is a supplement to the UNTOC and therefore addresses human trafficking within the context of organised transnational criminal activities such as money laundering,

⁸⁷ A Gallagher 'Human Rights and the new UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 *Human Rights Quarterly*.

⁸⁸ EM Bruch 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 21.

⁸⁹ Bruch (n 88 above).

⁹⁰ J Hathaway 'The Human Rights Quagmire of Human Trafficking' (2008-2009) 49 *Virginia Journal of International Law* 42.

smuggling of migrants and corruption.⁹¹ In support of Hathaway, it can be argued that the Palermo Protocol is primarily a law enforcement instrument developed by a law enforcement body - the UN Crime Commission and arising from the desire of governments to create a tool to combat the growth of transnational organised crime.⁹² Coontz and Griebel assert that the Palermo Protocols focus on criminalisation, deportation and border control strategies results in a supply side approach that places primary responsibility on law enforcement, paying scant attention to factors such as economic inequality between developing and developed nations, economic, social and cultural rights and non discriminatory treatment of women.⁹³

The Palermo Protocol is vague with regard to addressing the root causes of trafficking⁹⁴ and thereby fails to bolster preventive measures. It provides that states shall undertake social and economic initiatives to prevent and combat trafficking in persons, that states shall take or strengthen measures to alleviate the factors that make persons especially women and children vulnerable to trafficking, that states shall adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.⁹⁵ However, it does not specify the initiatives and measures to be undertaken by states. This allows states to determine what measures to undertake, in accordance with each states domestic legislation and policies and according to each states financial and human resource capabilities. Conversely, this negates the sense of urgency surrounding human trafficking and proffers states with reasons for delays in implementing anti-trafficking legislation and policies.

Increasing global economic disparities, poverty, lack of education prospects, lack of adequate employment opportunities and the disruption of traditional livelihoods are some of the factors that make people vulnerable to trafficking.⁹⁶ Apart from article 9 of the Palermo Protocol, no other articles therein specifically address the root causes of trafficking which are significant because they facilitate an understanding of trafficking and enable the development of policies and responses towards trafficking.⁹⁷

Countering Hathaway's views, authors like Jordan argue that although the Palermo Protocol is not a human rights instrument, it contains human rights protections and victims assistance,

⁹¹ N Ollus 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A tool for Criminal Justice Personnel.'

⁹² Jordan (n 84 above) 2.

⁹³ Coontz & Griebel 'International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law' <<http://www.awid.org/eng/Issues-and-Analysis/Library/>>.

⁹⁴ Gallagher (n 87 above) 21.

⁹⁵ Article 9 (2), (4), (5) of the Palermo Protocol.

⁹⁶ Ollus (n 91 above) 16.

⁹⁷ AD Jordan *The Annotated Guide to the Complete UN Trafficking Protocol* (2002).

albeit couched in weak language.⁹⁸ Part II of the Palermo Protocol contains human rights protections.⁹⁹ The weak language in the Protocol includes language such as ‘States shall undertake these measures merely *in appropriate cases* and *to the extent possible*.¹⁰⁰

Finally, despite an expanded list including forced labour, slavery like practices and servitude the definition like historical instruments appears to focus primarily on sexual exploitation, a concept under which prostitution or sex work can be categorised.¹⁰¹

2.3 Sexual Exploitation, Forced Labour and other forms of trafficking

*That is pimp speak as in “hey girl this is a dog-eat-dog world and you got gold between your legs”*¹⁰²

As previously stated human trafficking is a multi billion dollar industry. Essentially it occurs because there are profits to be made, the question arises in what industries are these profits being made? Where do trafficked people end up? People are trafficked for various reasons and end up in various industries, trafficking in women often serves the purpose of servicing the sex industry and usually entails the sexual exploitation of women.

2.3.1 Sexual Exploitation

The United Nations Office on Drugs and Crime (UNODC) has reported that sexual exploitation is the most common form of human trafficking in the world.¹⁰³ Sexual exploitation is not defined in the Palermo Protocol or in international law. However, Jordan has defined it as:

the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, coercion, abduction, force, abuse of authority, debt bondage or fraud.¹⁰⁴

Sexual exploitation usually entails the trafficked person providing sexual services for reimbursement or material gain.¹⁰⁵ Others define sexual exploitation as;¹⁰⁶

⁹⁸ n 97 above 2-3.

⁹⁹ Articles 6 – 8.

¹⁰⁰ Article 9 (3) and 11 (2) are examples of some articles in the Palermo Protocol that use the weak language referred to.

¹⁰¹ Bruch (n 88 above)20.

¹⁰² M Fairely ‘Unequal’ 2005 <<http://action.web/home/catw/readingroom.shtml>> (accessed on 26 September 2009).

¹⁰³ UNODC ‘Global Report on Trafficking in Persons’ February 2009.

¹⁰⁴ n 97 above 9.

¹⁰⁵ R Surtees ‘Commercial sex work’ in R Rosenberg (ed) *Trafficking of Women and Children in Indonesia* 63.

all practices by which a person achieves sexual gratification or financial gain through the abuse or exploitation of a woman or child by abrogating her human right to dignity, equality, autonomy, and physical and mental well-being.

This definition is all encompassing because it includes both, those benefiting financially from the sexual exploitation of women such as the traffickers or anyone else that controls a trafficked woman and it also includes end users, the clients who buy the services of trafficked women. Jordan's definition to the contrary focuses solely on the sexually exploited person, describing his or her experiences. Furthermore, Jordan's definition states the practices that amount to sexual exploitation and reflects the fact that both men and women are sexually exploited, whereas the latter definition merely refers to sexual exploitation as all practices and is biased towards women and children, ignoring the fact that men too are sexually exploited.

Trafficking in persons for the purpose of sexual exploitation has also been defined as: a crime that involves the recruitment, transport and exploitation of an individual which can take the form of forced prostitution, pornography or any other forced sexual practices.¹⁰⁷ ILO states that 43 per cent of trafficked persons are trapped in commercial sexual exploitation.¹⁰⁸

Trafficking for purposes of sexual exploitation appears to be strongly linked to organised crime syndicates, although some operations appear to be individually run. Their purpose is supplying women to meet the demands of the sex industry. For instance in South Africa trafficking for the purpose of sexual exploitation is dominated by Nigerian, Chinese, Moroccan and Eastern European crime syndicates which operate in Johannesburg, Pretoria, Cape Town, Durban, Port Elizabeth and Bloemfontein.¹⁰⁹ UNODC states that sexual exploitation makes up 79 per cent of the various forms of trafficking.¹¹⁰

I. The link between the Sex Industry and Human Trafficking

The exploitation of female labour and of the female body has led to an international industry of trafficking in women and girls, each year women and girls are trafficked throughout the world to work as domestic workers, sweatshop labourers, wives and prostitutes.¹¹¹ Historically, trafficking in women has often meant the trade of women for the purpose of

¹⁰⁶ D Hughes 'The Internet and Sex Industries: Partners in Global Sexual Exploitation' 2000 *Technology and Society Magazine*.

¹⁰⁷ L Bermudez 'No experience necessary. The internal trafficking of persons in South Africa' Report prepared for IOM 26 August 2008 34.

¹⁰⁸ 'Fighting Human Trafficking: the Forced Labour Dimensions' Background Paper prepared for the Vienna Forum on Human Trafficking 13-15 February 2008.

¹⁰⁹ Bermudez (n 107 above) 36.

¹¹⁰ UNODC (n 103 above) 50.

¹¹¹ H Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007).

prostitution.¹¹² Where trafficking involves women and girls it is commonly for sexual purposes, servicing a sex industry that has expanded throughout the latter part of the 20th century into the 21st century.

Steadily, over time, women have become a trade in themselves, commodities to be bought and sold by organised crime syndicates, individuals, tourists, military personnel, men seeking sexual entertainment or non-threatening marriage partners,¹¹³ largely aided by globalisation as will be discussed in chapter three. The sexual exploitation of women has become alarmingly industrialised, creating a sex industry. The sex industry is defined as the collection of legal and illegal, single and multi-party operations that profit from the selling of women and children through trafficking, organized prostitution and/or pornography.¹¹⁴ It consists of various sectors such as street and indoor prostitution, brothels, escort agencies, massage parlours, strip bars, revue bars, pornography (both published and on the internet) and adult shops among others.¹¹⁵

The modern sex industry is said to have its origins in the 1950s and 1960s particularly in the United States of America, subsequent to which it has expanded. This expansion of the sex industry has been attributed to a liberalisation of laws regulating prostitution and pornography and wide scale tolerance of men's sexual abuse and sexual exploitation of women.¹¹⁶ However, the sex industry has also expanded due to technology. Technology has provided novel methods of advertising, exploiting and delivering women packaged as commodities to buyers, often men.¹¹⁷ Women due to their vulnerability arising from an array of factors such as poverty, gender inequality, racism and violence are forced into the sex industry - they become commodities to be bought, sold and used just as any other consumer item.

Moreover, the sex industry is sustained by a global culture in which women's bodies are used to market consumer products,¹¹⁸ for instance television commercials advertising drinks show skimpily dressed women, perfume and clothes advertisements in magazines that depict semi-

¹¹² 'Report of the Special *Rapporteur* on Violence against Women, its causes and consequences Ms R Coomaraswamy' E/CN.4/1997/47.

¹¹³ Hughes (n 106 above).

¹¹⁴ Hughes (n 106 above) 1.

¹¹⁵ 'Human Trafficking in Southern Africa: Training for Law Enforcement' Microsoft Power Point Presentation by Marcellino Ramkishun.

¹¹⁶ Hughes (n 106 above).

¹¹⁷ Hughes (n 106 above).

¹¹⁸ D Hughes 'Men create the demand; women are the supply' Lecture on Sexual Exploitation at the Queen Sofia Centre, Valencia, Spain, November 2000.

nude or nude women.¹¹⁹ Usually there is no correlation between the product and the scantily dressed or naked women but we live in a society where “sex sells” and this phrase usually entails the use of women’s bodies or sexuality to sell products.

As of 2000, it was estimated that the global sex industry makes US\$52 billion dollars a year and to keep the sex industry in business; women are trafficked to, from and through every region in the world.¹²⁰ The value of the global trade in women as commodities for sex industries is estimated to be between seven and twelve billion dollars annually, creating a situation in which the sex industry targets and consumes young women, usually under age 25 and each year they get younger and younger.¹²¹ The global sexual exploitation of women and girls is a supply and demand market. Men create the demand and women are the supply.¹²²

2.3.2 Forced Labour

According to the Global Report on Trafficking in Persons, trafficking for purposes of forced labour is the second most common form of human trafficking making up 18 per cent of the various forms of trafficking.¹²³ Human trafficking almost always has as its end product forced labour.¹²⁴

The ILO Convention defines forced labour as follows:

For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.¹²⁵

The term forced labour encompasses all work that any woman, man or child is compelled to do under threat of a punishment and for which they have not voluntarily offered themselves.¹²⁶

¹¹⁹ DKNY ‘Under DKNY Wear’ Esther Canadas advert <http://www.bwgreyscale.com/adimg01/adv_0107.JPG> (accessed on 18 September 2009), Tom Ford ‘Tom Ford for Men’ advert available at <<http://www.advertolog.com/tom-ford-for-men/print-outdoor/tom-ford-for-men-191683/>> (accessed on 18 September 2009).

¹²⁰ Hughes (n 118 above).

¹²¹ Hughes (n 118 above).

¹²² Casella *et al* ‘Critique of Focus on the Demand in the Context of Trafficking in Persons’ A position paper of the Sex Workers Project at the Urban Justice Center 2007.

¹²³ UNODC (n 103 above) 50.

¹²⁴ ‘Fighting Human Trafficking: the Forced Labour Dimensions’ Background Paper prepared for the Vienna Forum on Human Trafficking 13-15 February 2008.

¹²⁵ Article 2 (1) ILO Convention concerning Forced or Compulsory Labour No 29.

¹²⁶ (n 124 above) 2.

Coercion is used to ensure a trafficked person works, for instance, threats of or actual physical violence against the victim or family members, debt bondage (debt incurred by the victim during trafficking and at destination in some cases, accumulate to such large amounts that the victim is unable to pay off and they are bound to the trafficker or employer for an unascertained period of time), withholding of wages, confiscation of identification documents and threats of reporting them to immigration officials.¹²⁷

There are various forms of forced labour such as; domestic labour in which usually, but not exclusively, women are engaged as household domestic workers,¹²⁸ agricultural labour usually but not exclusively, boys and men are trafficked for the purpose of forced labour in the agriculture sector¹²⁹ and trafficking of boys for street vending, forced begging and to commit crimes.¹³⁰

ILO estimates that at least 12.3 million people are victims of forced labour world wide, 9.8 million are victims exploited by private agents with 2.4 million exploited victims as a result of human trafficking.¹³¹

2.3.3 Other forms of trafficking

The public's attention has recently been drawn to trafficking in children for purposes of illegal adoption,¹³² previously, it had been operating at a clandestine level. Whereas in some cases babies are kidnapped, there are instances in which poor pregnant and single women are targeted by baby selling syndicates or individuals, forcibly held captive until birth, whereupon the child is taken away and sold - this amounts to trafficking.¹³³

Illegal adoptions exploit children, exploitation occurs because children are removed and placed outside the protections afforded to them by legal adoption systems, placing them on the black market and in danger with many of their rights violated, for instance the right to non-separation from the family.¹³⁴

¹²⁷ 'Fighting Human Trafficking: the Forced Labour Dimensions' Background Paper prepared for the Vienna Forum on Human Trafficking 13-15 February 2008.

¹²⁸ L Bermudez 'No experience necessary. The internal trafficking of persons in South Africa' Report prepared for the IOM 26 August 2008 46.

¹²⁹ Bermudez (n 128 above) 54.

¹³⁰ Bermudez (n 128 above) 56.

¹³¹ n 127 above 2.

¹³² N Misra 'Adoption' in R Rosenberg (ed) *Trafficking of Women and Children in Indonesia* 114.

¹³³ n 132 above.

¹³⁴ J Pascoe 'Trafficking in Unborn Children' Paper presented at the International Conference on Child Labour and Child Exploitation: Trafficking in Unborn Children 4 August 2008 available at <<http://www.fmc.gov.au/pubs/docs/trafficking2008.pdf>> (accessed on 28 August 2009).

A shortage of transplantable organs all over the world has led to illegal methods of procuring organs in attempts to fulfil organ donation requests. Often these illegal methods entail human rights abuses.¹³⁵ In this form of trafficking, a person is exploited for the purpose of a trafficker obtaining profit on the organ black market and also covers instances in which a person is trafficked for the purpose of the removal of their organs for the purpose of witchcraft and traditional medicine.¹³⁶

2.4 Human Rights Framework

UNODC provides that in human trafficking for the purposes of sexual exploitation, the victims are largely women.¹³⁷ Human rights violations occur before, during and after the process of trafficking. Abuses of civil, political, economic and social rights render women and young girls vulnerable to trafficking. This study of the human rights framework will focus on the violations that occur during the process of trafficking.

Trafficking victims endure violations of the worst possible kind, to their bodies, their psyche, their families and their livelihoods.¹³⁸ The violated rights are contained in an array of human rights treaties.

As the purpose of this paper is to analyse human trafficking for purposes of sexual exploitation of women and girls, this analysis of human rights and human rights instruments focuses on instruments that enable an emphasis on the promotion and protection of women's rights.

2.4.1 Human Rights and Human Rights Instruments

Although the Universal Declaration of Human Rights (Universal Declaration) is not an internationally binding instrument, it is the foundation of human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant

¹³⁵ S Statz 'Finding the Winning Combination: How Blending Organ Procurement Systems Used Internationally Can Reduce the Organ Shortage' (2006) 39 *Vanderbilt Journal of Transnational Law* 1679.

¹³⁶ 'Human Trafficking for the removal of organs and body parts' Background Paper prepared for the Vienna Forum on Human Trafficking 13-15 February 2008 2.

¹³⁷ UNODC (n 103 above) 11.

¹³⁸ R Coomaraswamy 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences' 1997 E/CN.4/1997/47.

on Economic Social and Cultural Rights (CESCR).¹³⁹ Two principles in the Universal Declaration need to be emphasised. Article 1 unequivocally states that *all* human beings are born free and equal in dignity and rights. This article's effect is; all women, men and children are equal and all fundamental rights apply to them equally. Article 2 is the non discrimination clause which provides that everyone is entitled to all the rights and freedoms in the Universal Declaration without regard to race, colour, sex, language, religion, political opinion, national or social origin, property, birth or status.

The harms suffered by women trafficked for purposes of sexual exploitation arise from violations of rights contained in various human rights instruments intended to protect women from violence and other forms of abuse.¹⁴⁰ These instruments include the ICCPR, CESCR, African Charter on Human and People's Rights (ACHPR), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Convention), the Protocol to the ACHPR on the Rights of Women in Africa (Protocol on the Rights of Women), the Convention on the Elimination of All forms of Racial Discrimination (CERD), International Labour Organisation Convention on Forced or Compulsory Labour No 29 (ILO Convention) and the Convention against Torture and other Cruel, Inhuman and Degrading Treatment (CAT).

These instruments bind states, however, trafficking is often committed by third parties (non state actors). Nonetheless, this does not justify state inaction towards rights violations in trafficking.¹⁴¹ This is because instruments such as the ICCPR and CESCR, oblige states to respect and ensure the rights of all people within their territories.¹⁴² This includes a duty on states to protect human rights and requires states to prevent violations of rights by third parties.¹⁴³

The aforementioned instruments enshrine similar rights;

The ICCPR, the ACHPR, the Protocol on the Rights of Women and the Migrant Convention specify; all humans have the right to life, which is protected by law and no one shall be arbitrarily deprived of this right.¹⁴⁴ Despite these provisions, trafficked women and girls are often murdered with impunity in various circumstances, for instance when they are uncooperative with traffickers or end users such as clients or buyers, when they attempt to

¹³⁹ MC Bassiouni 'Enslavement as an International Crime' (1990-1991) 23 *New York University Journal of International Law and Politics*.

¹⁴⁰ Askola (n 111 above).

¹⁴¹ Askola (n 111 above) 136.

¹⁴² Articles 2(1) of both instruments.

¹⁴³ EU Petersman 'Bridging Foundations Human Rights and International Trade Law: Defining and Connecting the Two Fields' in T Cottier & J Pauwelyn (eds) *International Trade and Human Rights* (2004) 64.

¹⁴⁴ Article 6(1), article 4, article 4(1), article 9 respectively.

escape, are sick, when the traffickers have no use for them and when police are active in the area.¹⁴⁵ According to Europol which is a joint police service in Europe, hundreds of corpses of trafficked women beaten to death, shot or strangled are found each year.¹⁴⁶ This amounts to arbitrary deprivation of life from which victims should be protected.

Trafficked women and girls are held captive often against their will and in perpetual fear of their lives, subjected to violence or threats of violence if they leave or attempt to do so.¹⁴⁷ This is contrary to the right to liberty; their right to move around freely, not subject to detention of any kind. Nonetheless this right contained in the ICCPR, the Migrant Convention and the ACHPR, the Protocol on the Rights of Women and CERD (where it is phrased as right to security of the Person) is often violated.¹⁴⁸

Violence is intrinsic to trafficking especially for sexual exploitation, which often entails violent degrading and abusive actions and sexual acts against the victims. Victims are raped, beaten, kicked in the head, strangled, slammed against objects, lashed until they bleed, burned, verbally abused, urinated or defecated upon, starved and receive threats against their families.¹⁴⁹ This amounts to torture whose definition is;¹⁵⁰

any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...

This definition indicates that the term torture can only be invoked where the pain or suffering is instigated at the hands of public officials or persons acting in official capacity, meaning state sponsored or acquiesced acts. However, it is usually non state actors that torture victims and states have an obligation to protect people from human rights violations by third parties. For instance, the body of girl who had been trafficked to Singapore from Indonesia was discovered by police bearing scars of 200 separate injuries. Her employer admitted to among other things, beating her with his fists, canes and a hammer; she eventually died from being kicked so severely that her stomach ruptured.¹⁵¹

¹⁴⁵ E Kelly 'Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe' (2000) No. 11 IOM Migration Research Series 34.

¹⁴⁶ M O'Connor & G Healy *The Links between Prostitution and Sex Trafficking: A Briefing Handbook* (2006) 14.

¹⁴⁷ O' Connor & Healy (n 146 above).

¹⁴⁸ Articles 9, 16, 6, 4(1) & 5 respectively.

¹⁴⁹ O' Connor & Healy (n 146 above).

¹⁵⁰ Article 1 of CAT.

¹⁵¹ N Misra & R Rosenberg 'Forms of Trafficking in Indonesia' in R Rosenberg (ed) *Trafficking of Women and Children in Indonesia* 49.

Consequently, the situations that many women and girls are forced into in the sex industry for instance, prostitution, mail order brides and contract wives,¹⁵² expose them to violence and abuse which when combined with the acts in the torture definition also constitutes cruel, inhuman and degrading treatment or punishment, inflicted on the victims and is contrary to the ICCPR, CAT, Migrant Convention, Protocol on the rights of Women and the ACHPR which reiterates that human beings are inviolable and entitled to respect of the integrity of the person.¹⁵³

In connection thereto, women and girls trafficked for purposes of sexual exploitation are treated like slaves and exposed to slavery like conditions where they are subjected to forced or compulsory labour contrary to provisions that prohibit slavery, and servitude or forced labour. These prohibitions are espoused in the ICCPR, Migrant Convention, ACHPR and the Protocol on the Rights of Women which refers to all forms of exploitation.¹⁵⁴ The Working Group on Contemporary Forms of Slavery in 1998 adopted a recommendation that declared transnational trafficking of women and girls for sexual exploitation as a contemporary form of slavery,¹⁵⁵ the women and girls are 'owned' by the traffickers or the buyers and forced to work under whatever conditions are provided.¹⁵⁶

Trafficked victims are often women and girls who are part of familial structures and end up being trafficked as a consequence of their need to earn money and improve the standard of living of their families as well as themselves. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state,¹⁵⁷ when women and girls are forcibly trafficked and taken away from their families; this affects the family as a group unit and removes women and girls from its structure and protection, rendering them vulnerable to violations. Furthermore, as a consequence of trafficking, victims are deprived of their right to decide whether to marry or not, they are treated as commodities providing a service to consumers in the sex industry. This also applies to victims forced to marry men, for example Mozambican women sold as wives to mineworkers in South Africa¹⁵⁸ or mail order

¹⁵² R Surtees 'Commercial sex work' in R Rosenberg (ed) *Trafficking of Women and Children in Indonesia*.

¹⁵³ Articles 7, 10, 4(1), 5 & 4 respectively and I Emke-Poulopoulos 'Trafficking in Women and Children: Greece, a country of Destination and Transit' (2001) Mediterranean Migration Observatory Paper 16.

¹⁵⁴ Articles 8, 11, 5 & 4(1) respectively.

¹⁵⁵ Recommendation of the 1998 Session of the Working Group on Contemporary Forms of Slavery, United Nations Human Rights Committee.

¹⁵⁶ L Fergus 'Trafficking in Women for Sexual Exploitation' (2005) 5 *Briefing* 23.

¹⁵⁷ Articles 23(1) of the ICCPR, 10(1) of the ICESCR & 18(1) of the ACHPR.

¹⁵⁸ E Delpont *et al* 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.5 (E) 2007.

bride victims.¹⁵⁹ Forced marriage abrogates the full and free consent of victims as well as the requirement of attaining the age of majority as many girls are sold into marriage.¹⁶⁰

Trafficking places women and girls beyond the protection of the law and reach of law enforcement officers and others who can help them or enable them access the protection and assistance they require. It violates their right to recognition as a person before the law and right to equal protection before the law.¹⁶¹ Other rights protected by the law but often violated by traffickers are;¹⁶²

- (a) right to access justice, legal aid and legal representation;
- (b) right to privacy;
- (c) right to bodily integrity;
- (d) freedom of association; and
- (e) right to information and freedom of expression.

Although economic and social rights are non-justiciable in most countries, many countries are party to the CDESCR and have an obligation to ensure the protection of these rights, also applicable to trafficked women and girls. Trafficked women and girls work undocumented, in an industry that is largely unregulated. Under the CDESCR, article 6 recognises the right to work and provides that everyone has the right to gain a living by work one freely chooses or accepts. However, trafficked women and girls often do not freely choose the work that they perform or the conditions of work.¹⁶³ Article 7 provides that everyone has the right to just and favourable conditions of work, the provision further provides for remuneration, fair wages, safe and healthy work conditions, rest and decent living, all of which trafficked women in the sex industry do not enjoy or even have the opportunity to negotiate.¹⁶⁴

Everyone has the right to an adequate standard of living of every person.¹⁶⁵ This means people have the right to a standard of living that is adequate for the health and well being of themselves and their families. It includes basic needs such as food, housing, clothing and

¹⁵⁹ N Misra and R Rosenberg 'Servile marriage and mail order brides' in R Rosenberg (ed) *Trafficking of Women and Children in Indonesia* 106,107.

¹⁶⁰ Articles 23(2), (3) ICCPR, 10(1) CDESCR, 6(a), (b) Protocol on the Rights of Women & 16(b) CEDAW.

¹⁶¹ Articles 3 of ICCPR, 15(1) CEDAW, 3 of ACHPR & 8 of Protocol on the Rights of Women.

¹⁶² JN Ezeilo 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to Development' Report submitted by the Special *Rapporteur* on Trafficking in Persons especially Women and Children A/HRC/10/16 20 February 2009 16.

¹⁶³ Fergus (n 156 above).

¹⁶⁴ Askola (n 111 above).

¹⁶⁵ Article 11 CDESCR.

medical care, this is what people need to survive.¹⁶⁶ Trafficked women and girls do not have the opportunity to achieve such a standard of living, they rarely fulfil their basic needs such as adequate food, clothing or access to medical care because they are often unpaid and cannot afford basics.¹⁶⁷ Additionally, everyone has the right to attain the highest attainable standard of health,¹⁶⁸ however trafficked women and girls are usually at high risk health wise while working in the sex industry serving a large number of client's everyday, often without protection, working long hours and everyday of the week.¹⁶⁹ They are neither provided medication nor allowed access to health care despite their risky conditions.¹⁷⁰

Additionally, trafficked women and girls are denied their right to reproductive self determination which includes the right to choose any method of contraception, the right to self protection and to be protected against sexually transmitted infections including HIV and AIDS.¹⁷¹

The UNODC states in its 2009 Global Report that following trafficking for purposes of sexual exploitation, trafficking for purposes of forced labour is the next biggest form of trafficking. However, many of the conditions of work and activities women are compelled to perform in the sex industry fall under the category of forced labour because the women and girls do not always volunteer for such work and usually perform the work under threat of punishment.¹⁷² The ILO Convention on Forced or Compulsory Labour No 29 defines forced or compulsory labour which definition has been set out previously.

Trafficking in women and girls is by nature a clandestine and illegal activity, traffickers take trafficked women and girls and place them beyond the protection of their governments as well as the protection of foreign governments leaving them entirely at the mercy of traffickers or organised crime syndicates. The human rights instruments set out do provide the protections necessary for victims but requires identification of and access to victims in order to enforce the human rights provisions.

¹⁶⁶ UN 'Right to Adequate Standard of Living' <<http://www.un.org/cyberschoolbus/humanrights/declaration/25>> (accessed on 10 October 2009).

¹⁶⁷ Article 11.

¹⁶⁸ Article 12.

¹⁶⁹ A Jonsson 'Human Trafficking and Human Security in the Baltic Sea Region' in A Jonsson (ed) *Human Trafficking and Human Security* (2008).

¹⁷⁰ J Busza 'Sex Work and Migration: The Dangers of Oversimplification – A Case Study of Vietnamese Women in Cambodia.' (2004) *Health and Human Rights*.

¹⁷¹ Article 14(1) (c),(d)

¹⁷² E Kelly 'Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe' (2000).

2.5 Conclusion

Trafficking is often simultaneously referred to as slavery or forced labour, it is contended that it is a sub set of slavery and contains elements of forced labour. The elements of trafficking relate to slavery, diverging only on ownership in slavery and control in trafficking.

Trafficking remained undefined at international level until 2000 when a definition was provided in the Palermo Protocol. The Palermo Protocol has not repealed previous protocols addressing trafficking, especially those addressing slavery, it principally, recognises the existence of trafficking and provides methods to prevent and combat the problem as well as protect and assist victims. It is a guide for states on how they should address trafficking.

It is acknowledged that there are various forms of trafficking but the most notorious is trafficking for purposes of sexual exploitation with the targets and victims usually comprising women and girls. It entails violations of fundamental human rights enshrined in major international instruments. Many women and girls have some or all their fundamental rights violated during the process of trafficking and because it is such a clandestine activity it usually places the trafficked victims beyond the reach of authorities and protection of the law. There is a need to address these human rights violations so as to protect victims and enable their recovery and return to society, while ensuring the prevention of similar violations to others. This requires the involvement and cooperation of not only governments but international and national NGOs and citizens alike – everyone should be involved but governments need to play a central role. They cannot afford to be reluctant or hesitant as trafficking is occurring throughout the world.

Organised crime syndicates and individual traffickers are thriving in areas where there is least effort to curb the problem, one such area is Southern Africa. While almost all the governments of this region have signed, ratified or acceded to the Palermo Protocol, only two countries have enacted anti-trafficking legislation and the region does not have any regional legislation or policies on human trafficking. The following chapter will discuss how three countries within Southern Africa are affected by trafficking and what measures they are taking.

CHAPTER THREE

ADDRESSING HUMAN TRAFFICKING IN SOUTHERN AFRICA: THE CASE OF MOZAMBIQUE, ZAMBIA AND SOUTH AFRICA

3.0 Introduction

Southern Africa as a region is addressing human trafficking through the Southern Africa Development Community (SADC), a regional organisation that is largely based on economic cooperation among member states, although it is also a political organisation.¹⁷³ SADC is made up of 14 countries; however, this chapter examines three of those 14 countries and highlights their human trafficking experiences. These countries are Mozambique, South Africa and Zambia. These countries have been selected as case studies because Mozambique and Zambia are mainly source and transit countries. It is from these two countries that women and girls are recruited and transported to other countries. Furthermore, these countries enacted anti - trafficking legislation in 2008, the only two out of 14 countries in the region to do so. On the other hand, South Africa is a source, transit and destination country. While recruitment and transportation occurs in this country, women and girls from countries in the region, other parts of Africa as well as the world are trafficked to South Africa.¹⁷⁴ Yet in spite of this South Africa lacks specific anti trafficking legislation.

This chapter will restrict its analysis to the legislative measures in place in the aforementioned countries. This is mainly because at present the countries' legislations are more prominent than their non legal measures which are officially non existent. Further, word limit constraints confine analysis to legislation. However, the chapter begins with a discussion of root causes of trafficking that peculiarly affect Southern Africa.

3.1 Root Causes of Human Trafficking

Southern Africa like many parts of Sub Saharan Africa has experienced adverse social, economic and environmental changes with serious implications for the institutional and cultural structures that have shaped the security of people's livelihoods for centuries.¹⁷⁵ These changes also known as factors that enhance human trafficking are numerous and various

¹⁷³ M Madakufamba 'SADC in the Twenty First Century' <http://www.osisa.org/resources/docs/.../2_1_p090-094_munetsi_madakufamba.pdf> (accessed on 19 September 2009).

¹⁷⁴ E Delpont *et al* 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.5 (E) 2007 32.

¹⁷⁵ T-D Truong & M Angeles 'Poverty, Gender and Human Trafficking in Sub-Saharan Africa: Rethinking Best Practices in Migration Management' 2006 28.

authors have been dissimilar in their views and methods in which they have addressed these factors. Truong and Angeles have identified three key clusters of factors;¹⁷⁶

- (i) Socio-cultural factors such as the social acceptability of putting children to work, illiteracy, low education levels and preparation for marriage;
- (ii) Economic factors such as the imbalance between rural and urban wealth levels and a desire to escape poverty;
- (iii) Juridical and political factors such as absence of legislation and the ignorance of parents and trafficked persons of their rights under the law and open borders.

Bermudez on the other hand, refers to ‘vulnerabilities’, stating that human trafficking is a multi-dimensional social phenomenon perpetuated by socio economic challenges facing the population and demand for the exploitative use of individuals, both of which make the people in society vulnerable to recruitment.¹⁷⁷ Delpont *et al* address the root causes of human trafficking in terms of push and pull factors.¹⁷⁸ Push factors refer to root causes of human trafficking that include poverty, unequal development, conflicts, natural disasters, dysfunctional families and social and gender discrimination. Pull factors are root causes that include globalisation, global demand for cheap labour, improved communications systems, improved transport networks by air, land and sea and expanding global tourism.¹⁷⁹ Push factors intensify the vulnerability of disadvantaged or marginalised social groups to trafficking, whereas pull factors create the demand for women in particular forms of labour.¹⁸⁰

Regardless of the various terms used by the authors, they all refer to the root causes of human trafficking, these being the reasons underlying the recruitment of women and girls who thereafter become trafficking victims provided the criteria of the trafficking definition are met. The root causes of trafficking although similar for all regions and countries, also contain differences that are peculiar to particular regions, for instance the effect of HIV and AIDS within the Southern African region that renders women and girls vulnerable to trafficking, does not have the same effect in Western Europe. For example, Kelly in discussing the principal root causes of trafficking in women and children in Europe does not allude to the disease.¹⁸¹

¹⁷⁶ Truong & Angeles (n 175 above) 11.

¹⁷⁷ L Bermudez ‘No experience necessary. The internal trafficking of persons in South Africa’ 2008 12.

¹⁷⁸ Delpont *et al* (n 174 above).

¹⁷⁹ Asian Development Bank ‘Human Trafficking in Asia and ADB’s Roles’ < <http://www.adb.org/Human-Trafficking/adb-ht-asia.asp>> (accessed on 1 October 2009).

¹⁸⁰ C James & S Adler ‘Trafficking of Young Women’ in J Arvanitakis (ed) *Highly Affected Rarely Considered: The International Youth Parliament Commission Report on the Impacts of Globalisation on Young People* (2003) 74.

¹⁸¹ E Kelly ‘Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe’ (2008) 23-24.

The following are the principal root causes of trafficking within Southern Africa;

3.1.1 Globalisation

Globalisation¹⁸² has created market demand for cheap, low skilled labour in sectors such as domestic service, home health care, sex work, labour intensive manufacturing and agriculture. This demand is present in both industrialised and developing nations. The aforementioned sectors are areas in which it is easy to maintain highly exploitative working conditions that violate human rights, in locations authorities find difficult to monitor,¹⁸³ and in which the labour of trafficked persons is most used. The global reach and scale of human trafficking is the disadvantage of globalisation,¹⁸⁴ because women's economic inequality in power, status and access to resources renders them vulnerable to the disadvantages of globalisation.¹⁸⁵

3.1.2 Poverty

Poverty has been identified as one of the main factors of human trafficking with those who are disproportionately of lower socio-economic status more prone to being trafficked. People living in impoverished situations are usually anxious to gain employment and in so doing travel beyond their communities in search of employment opportunities and the chance to improve their standard of living as well as that of their family.¹⁸⁶ Reduced economic opportunities in rural areas, loss of traditional livelihoods, reduction of subsidies and other protective means and the introduction of Structural Adjustment Programmes (SAPs)¹⁸⁷ have all aggravated the lives of the poor in Southern Africa.¹⁸⁸

High levels of unemployment, predominantly among women, high earning inequalities, low wages for low skilled workers in comparison with the cost of living are all factors that compel women to seek employment or better wages and consequently makes them susceptible to

¹⁸² Globalisation or the increased interconnectedness and interdependence of people and countries, is generally understood to include two interrelated elements: the opening of borders to increasingly fast flows of goods, services, finance, people and ideas across international borders; and the changes in institutional and policy regimes at the international and national levels that facilitate or promote such flows. WHO 'Globalisation' <<http://www.who.int/trade/glossary/story043/en/index.html>> (accessed on 24 October 2009).

¹⁸³ L Boaventura *et al* 'Human Trafficking in Mozambique: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.1 (E) 2006 33.

¹⁸⁴ Stopping Forced Labour: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 89th session 2001, ILO Geneva.

¹⁸⁵ James & Adler (n 180 above).

¹⁸⁶ Bermudez (n 177 above).

¹⁸⁷ SAPs imposed by international financial institutions have compelled states to reduce spending on social welfare, education and health care and consequent subsidies to impoverished citizens. The burden of providing these basic needs has fallen to the families and most often women who usually do not have the means. James & Adler (n 180 above).

¹⁸⁸ Delpont *et al* (n 174 above) 34.

trafficking.¹⁸⁹

3.1.3 Gender Inequality

Gender inequality is another root cause of human trafficking, societies in Africa are pervaded by a patriarchal ethos which contains social constructions of masculinity and femininity and women are given little recognition as human beings with rights in their own right.¹⁹⁰ Men, women, boys and girls are allocated different positions in society consequentially this affects their entitlements and command over resources,¹⁹¹ for instance women and girls are confined to the home setting particularly in rural areas whereas men and boys go out to work and school, this is referred to as gender relations and determines how males and females old and young relate to each other.¹⁹²

Gender inequality and cultural factors often mean that girls are denied the right to education, this decreases their chances of employment in the formal sector, resigning them to employment in the informal sector where no skills are required and where chances of exploitation are high.¹⁹³

3.1.4 HIV and AIDS

HIV and AIDS is endemic to Sub Saharan Africa and Southern Africa has been particularly hard hit.¹⁹⁴ South Africa, for instance has one of the highest rates of infection in the world and this has affected its social structure, the disease has also affected other countries in the region.¹⁹⁵ Consequently, there has been a loss of the professional generation and millions of children have lost their parents. The situation is such that ailing parents are unable to support their children financially or emotionally and family poverty is heightened by lack of income, high cost of medical care and eventually funerals. Such children become socially isolated and vulnerable to trafficking especially girls who, in many instances are forced to leave school prematurely and assume the role of care giver to ailing parents – lacking education and skills they are easy prey for traffickers.¹⁹⁶ Some women and girls occasionally decide to migrate in search of work which renders them vulnerable to trafficking. Additionally the prevalence of

¹⁸⁹ Bermudez (n 177 above) 13.

¹⁹⁰ Delpont *et al* (n 174 above) 37.

¹⁹¹ Truong & Angeles (n above 175) 42.

¹⁹² Delpont *et al* (n above 174).

¹⁹³ James & Atler (n 180 above).

¹⁹⁴ S Kreston 'Trafficking in Children in South Africa: An Analysis of Pending Legislation' (2007) 8 (1) *Child Abuse Research in South Africa*.

¹⁹⁵ Bermudez (n 189 above).

¹⁹⁶ Delpont *et al* (n 174 above).

HIV and AIDS has led to an increased demand for younger women based on the perception that they are disease free. Traffickers are therefore targeting younger girls.¹⁹⁷

3.1.5 The Growth of the Sex Industry

The demands of the sex industry are increasing and so is the trafficking of women and girls to fulfil this demand. Delpont *et al* point out that development projects within the region bring with them an increase in demand for commercial sex. This is attributed to the increase in unaccompanied male workers seeking sexual experiences in areas where few recreation and entertainment facilities exist.¹⁹⁸

While the listed causes are not exhaustive, they represent the principal factors that leave women and girls exposed and vulnerable to traffickers. These are the factors that governments need to address in order to curb human trafficking, within the region some governments have made commitments to fight trafficking and others are following through on these commitments.

3.2 A SURVEY OF SELECTED COUNTRIES

3.2.1 Mozambique

I. The Context of Trafficking in Mozambique

Mozambique is largely affected by the aforementioned root causes of trafficking. IOM in 2003 reported that sexual exploitation and forced labour are the principle purpose of trafficking in Mozambique.¹⁹⁹ Situated next to South Africa, Mozambique is a transit and destination country, with women trafficked from Mozambique to South Africa. Additionally, there is a high prevalence of internal trafficking in Mozambique. The country's history of civil war between two political groups Mozambique Liberation Front (FRELIMO) and Mozambique National Resistance (RENAMO) and that subsequent dislocation of people, loss, reconstruction, political upheaval and deep social scars are factors that have fuelled trafficking. This is in addition to the country's geographical location and the AIDS pandemic

¹⁹⁷ James & Atler (n 180 above) 76.

¹⁹⁸ Delpont et al (n 174 above) 39.

¹⁹⁹ J Martens *et al* 'Seduction, sale and slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa' 2003.

when coupled with gender discrimination are factors which expose women to human trafficking.²⁰⁰

In the past, Mozambique was considered a source of labour for South Africa, South African mines and farms used to recruit labour officially from Mozambique and people still believe that work is abundant in South Africa. This renders them easy prey for traffickers.²⁰¹

Women from rural areas are often lured with promises of employment or education and thereafter trafficked to the urban areas of Mozambique and South Africa. Most Mozambican traffickers are based in Maputo, the capital city and actively recruit women working in the informal sector, in local markets and trading. Moreover the traffickers recruit both sex and non sex workers, with some sex workers specifically recruited for sale to brothels in the Gauteng and KwaZulu-Natal provinces in South Africa.²⁰² Their trafficking methods entail the assistance of a female accomplice, sometimes known to the victim, offering employment as waitresses or domestic helps.²⁰³ Maputo, Nampula, Gaza, and Inhambane are the main recruitment sites for women for the sex industry.²⁰⁴

Mozambican women are trafficked to Portugal and South Africa for commercial sexual exploitation, whilst women are trafficked from Zimbabwe and Malawi for commercial sexual exploitation in Mozambique.²⁰⁵ From the north of the country women are trafficked to South Africa through Zimbabwe,²⁰⁶ According to an African map that has appeared in the IOM Southern African publication, power point presentations by experts on trafficking and human trafficking reports; victims from as far as Rwanda and Burundi are trafficked through Tanzania to Mozambique and from Burundi, Rwanda and DRC through Zambia, Malawi and finally to Mozambique which is sometimes the destination but most times is *en route* to South Africa.²⁰⁷ Although the map is significant it has been used since 2003 making it outdated to some extent in light of the fact that the data collated therein dates back to or before 2003, wherein routes may have changed. However it lays a foundation from which more routes may be ascertained and data collected.

²⁰⁰ L Boaventura *et al* 'Human Trafficking in Mozambique: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.1 (E) 2006 9.

²⁰¹ UNODC 'Situational Assessment of Human Trafficking. A 2005 Situational Assessment of Human Trafficking in the SADC Region 2007 37.

²⁰² Boaventura (n 200 above) 20.

²⁰³ Boaventura (n 200 above).

²⁰⁴ Boaventura (n 200 above) 21.

²⁰⁵ US Department of State 'Trafficking in Persons Report 2009' (2009) 214.

²⁰⁶ UNICEF 'Trafficking in Human Beings, Especially Women and Children, in Africa' Innocenti Research Centre.

²⁰⁷ A copy of the map appears in Delpont *et al* (n 174 above) 25.

II. Legislative Responses in Mozambique

On 20 September 2006 Mozambique ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). The Palermo Protocol obliges states that have ratified or acceded to it, to pass specific and comprehensive domestic legislation criminalising human trafficking. According to Article 18 of the Mozambican constitution, the ratification of an international Protocol makes it legally binding in the country. Subsequently, on 19 April 2008, Mozambique passed laws criminalising human trafficking, becoming the first country within the SADC region to do so. Mozambique enacted Lei no. 6/2008 which is the general law against human trafficking that applies to both women and children. The Act applies to the prevention and combating of trafficking in persons in Mozambique and elsewhere. It stipulates the responsibility of corporations for trafficking; corporations refers to any legal entity including the state. The provision provides that the officers of corporations that are guilty of trafficking, such as presidents or directors will be required to pay indemnity, fines and court costs.²⁰⁸

The Act provides for aggravated circumstances which have the effect of an increased sanction for the offence of trafficking, some of the aggravated circumstances include, women or children unable to protect themselves, where the person involved in trafficking is a public authority, where the trafficker is someone that has a special duty to protect the victim, when trafficking is perpetuated by a union, crime syndicate, where there is a large number of victims or where as a result of trafficking the victim contracts HIV and AID, has psychological problems or other health problems.²⁰⁹

It defines human trafficking as the recruitment, transportation, harbour or receipt for any means including the pretence of employment for domestic services in Mozambique or any foreign country for training or studying purposes when it is actually for prostitution, forced labour, slavery, involuntary servitude, servitude for debt. The Act provides a prison sentence of between 16 and 20 years.²¹⁰ The Act further criminalises trafficking for purposes of pornography and sexual exploitation among other things and criminalises illegal adoption for purposes such as prostitution, sex exploitation among others.²¹¹ Furthermore, the Act provides a sentence of 16 to 20 years for transporting and kidnapping and a sentence of 8 to 12 years for leasing and subleasing property for trafficking purposes.²¹²

²⁰⁸ Article 4(1), (2).

²⁰⁹ Article 5.

²¹⁰ Article 10.

²¹¹ Article 11 & 12.

²¹² Article 13 & 14.

The Act however, states that criminal investigations can only be instigated if the victim files a complaint or a third party denounces or reports the traffickers.²¹³ It appears that competent authorities cannot proceed with criminal investigations unless and until a complaint has been filed by either the victim or a third party. This is problematic because due to trafficking, victims are often undocumented or illegal foreigners in the country, afraid of deportation or imprisonment as they possess no migration or requisite papers to prove their status or they may possess falsified papers which is an offence.²¹⁴ Victims may be afraid of approaching authorities. Furthermore, this provision exposes victims to threats and intimidation by traffickers that deters them from making complaints. Where the traffickers are capable of corrupting officials, the result is that complaints will never be made or investigations carried out.

Perhaps to remedy this fault, the Act places a duty on all citizens to report to the competent authorities any information or facts on human trafficking. Immigration service officers, customs, border security, police or public servants have a specific duty to report to competent authorities pursuant to which the police have a duty to investigate trafficking.²¹⁵

The Act also criminalises advertising, publishing, printing or broadcasting information that promotes human trafficking whether by the use of information technology or the internet. The destruction, concealment or confiscation of a travel documents or personal property of the trafficked victim is an offence.²¹⁶ The Act also stipulates that the victims consent does not amount to a defence against the crime of trafficking.²¹⁷ Further, the Act provides that courts can order the payment of compensation to victims for damage that occurred during trafficking.²¹⁸

With regard to the protection of trafficked victims, the Act provides witness protection, stipulating that the identities of witnesses be protected during and after criminal proceedings. The Act further assures special protection in certain cases, for instance, pregnancy, disability, victims who contracted HIV or AIDS or any sexually transmitted infection as a consequence of trafficking, minors, or witnesses who enter Mozambique illegally or without requisite

²¹³ Article 7.

²¹⁴ P Twomey 'Europe's other Market; Trafficking in People' (2000) 2 *European Journal of Migration and Law*.

²¹⁵ Article 9(1)(2).

²¹⁶ Article 15 & 16.

²¹⁷ Article 18.

²¹⁸ Article 19.

documents.²¹⁹ The Act further stipulates that victims are not criminally responsible for any acts committed as a result of trafficking.²²⁰

The Act provides protection measures for victims, it stipulates that victims have a right to emergency accommodation, medical assistance, counselling, legal assistance or legal aid, educational and professional training. Victims also have a right to state implemented supervision, monitoring and follow up to ensure their recuperation, rehabilitation and reintegration.²²¹ Victims further have the right to be informed about their rights, protection measures, institutions that can assist them, assistance programmes and the criminal proceedings.²²²

The Act encourages international cooperation to facilitate repatriation of Mozambican victims abroad as well foreign victims in Mozambique and the establishment of centre for victims with access to medical assistance and adequate food as they await repatriation.²²³ The Act prohibits repatriation of foreign victims if there is no guarantee of the security of the victim in the country she will be repatriated to during the repatriation process and victims have the right to be informed about the conditions in the country to which they will be repatriated.²²⁴ The Act also requires that authorities facilitate the receipt of Mozambican victims or foreigners resident in Mozambique trafficked abroad, that they be assisted and their security ensured.²²⁵ The Act requires that victims in Mozambique and victims who agree to cooperate with authorities are granted temporary visas.²²⁶ This provision does have the effect of compelling victims to provide information to the authorities. The Act further protects anyone who reports trafficking activities to the authorities by providing that they cannot be prejudiced, persecuted or face disciplinary measures as a consequence of reporting trafficking activities to the authorities, anyone who prejudices, persecutes or disciplines them is liable to imprisonment or a fine.²²⁷

Principally, the Act is criminal legislation along the lines of the Palermo Protocol, it criminalises trafficking and provides penal sanctions. It also emphasises the protection of the identities of victims of and witnesses to trafficking and attempts to ensure the rehabilitation and care of victims, thereby attempting to address the human rights violations suffered by the

²¹⁹ Article 20(1).

²²⁰ Article 20(3).

²²¹ Article 21(1),(2).

²²² Article 22.

²²³ Article 23(1)

²²⁴ Article 23(2)

²²⁵ Article 23.

²²⁶ Article 24.

²²⁷ Article 26(1),(2).

victims during the trafficking process. However, it provides no civil or other recourse to the victims against their traffickers and makes compensation to victims a remedy at the discretion of the court. The Act also seeks to hold corporations accountable for trafficking, in spite of this, the Act does not address the root causes of trafficking.

3.2.2 Zambia

I. The Context of Trafficking in Zambia

The aforementioned root causes of trafficking are prevalent in Zambia rendering many women and young girls vulnerable to human trafficking. Southern Africa has been particularly affected by the AIDS pandemic;²²⁸ with Zambia struggling to address the pandemic. The AIDS pandemic has left many women and children headed households, this is particularly precarious in a two fold manner. Firstly, it creates a breakdown in the family unit leading to a lack of supervision and care that places children especially girls, at risk of trafficking. Secondly, it compels women and children to migrate in search of work, making them vulnerable to trafficking.²²⁹

Zambia is source and transit country but has also been declared a destination country (women and children are occasionally trafficked from Malawi and Mozambique to Zambia), women and girls are trafficked from, within and through Zambia specifically for sexual exploitation and forced labour and child victims trafficked within the country are trafficked for sexual exploitation and are often female, adolescent and orphaned.²³⁰ Trafficking mainly occurs through networks of relatives, business people, religious leaders, cross-border traders and most often truck drivers.²³¹ Zambian women and young girls are offered false marriage proposals or false employment pursuant to which they are trafficked to South Africa through Zimbabwe²³² or to Europe through Malawi in all cases for purposes of sexual exploitation.²³³ Zambia facilitates transnational trafficking from the Great Lakes region and the Democratic Republic of Congo (DRC) due to its geographic location; it is centred between East and Southern Africa, lax immigration enforcement and porous borders.²³⁴

²²⁸ Truong & Angeles (n 175 above) 49.

²²⁹ Bermudez (n 189 above).

²³⁰ US Department of State (n 205 above) 303.

²³¹ US Department of State (n 230 above).

²³² IOM *Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa* (2006).

²³³ US Department of State (n 205 above).

²³⁴ US Department of State (n 205 above).

II. Legislative Response in Zambia

Prior to 2008 there was no anti-human trafficking legislation in Zambia. However there were references to trafficking of children; for instance, the Constitution specifically prohibits trafficking in children, defining children for this purpose as any young person below the age of 15.²³⁵ However, the Constitution does not define trafficking nor is any punishment imposed on those who engage in trafficking. The Employment of Young Persons and Children's Amendment Act of 2004 also prohibits the sale and trafficking of children and young persons and imposes a fine and/or imprisonment for a period of between five to 25 years.²³⁶ The Penal Code which is the criminal law code of the country does not refer to human trafficking.

To highlight the problem with this state of affairs, a few years ago, a woman from DRC was intercepted at Chirundu, Zambia's border with Zimbabwe, accompanied by several children in unexplained circumstances, one of the children revealed that they were in transit through Zambia and headed for another country. The woman was detained by immigration authorities and prosecuted under immigration related offences which solely involved a fine as there was no law on human trafficking under which she could be prosecuted.²³⁷

III. The Anti-Human Trafficking Act

Zambia acceded to the Palermo Protocol in April 2005. In November 2008, The Anti-Human Trafficking Act No. 11 of 2008 (the Act) was passed, the first law that comprehensively addresses human trafficking in the country.²³⁸ The Act domesticates the Palermo Protocol and provides for the prohibition, prevention and prosecution of human trafficking. It provides for the establishment of a Committee on Human Trafficking as well as a Human Trafficking Fund.

The Act is divided into 14 parts. As stated in Chapter two of this paper, the Palermo Protocol is a criminal law instrument and states party to it are obliged to ensure that human trafficking is criminalised. The Act in Zambia's case criminalises human trafficking according to article 5 of the Palermo Protocol. This provision requires the criminalisation of trafficking as defined in article 3 of the Protocol. Part one of the Act which is the interpretation section contains definitions of various terms used throughout the Act such as, Traffic which reproduces the definition of the Palermo Protocol although it goes further and includes illegal adoption of

²³⁵ Article 24(3),(4).

²³⁶ Section 2(a), 4B(2) of Chapter 274 of the Laws of Zambia.

²³⁷ 'Curbing Human Trafficking in Zambia' *Times of Zambia* 2005.

²³⁸ 'Zambia passes legislation' *Eye on Human Trafficking* Issue 20/2009 1.

children and control mechanisms in human trafficking such as the destruction, concealment or confiscation of a passport or identification document.²³⁹ The Act also defines sexual exploitation which is undefined in the Palermo Protocol and international law.²⁴⁰

Part two of the Act is the prohibition section; which prohibits trafficking in persons providing specifically for intentional and unlawful trafficking with varying periods of imprisonment for trafficking in person's dependant on the exploitative purpose of the crime, the condition of the victim, the relationship of the trafficker to the victim or the position of the trafficker in society. For instance if the trafficking is for the purpose of engaging the victim in the worst forms of labour or child labour the term of imprisonment is between 25 and 35 years.²⁴¹ Generally prescribed imprisonment ranges from between 25 to 35 years however instances where the victim is trafficked for sexual exploitation purposes or where the victim is grievously harmed or dies as a result of the trafficking, the term is imprisonment for life.²⁴²

Part two of the Act also makes control mechanisms in human trafficking criminal offences, mechanisms such as debt bondage and confiscation, destruction or concealment of documents such as passports attract a prison term of between 15 and 25 years.²⁴³ Clients or end users of the services of victims of trafficking and anyone benefiting from the services of a victim commit an offence and are liable to imprisonment with the prison term being slightly higher where the victim was sexually exploited.²⁴⁴ The Act further criminalises advertisements, publications or broadcasts that allude to trafficking and the transportation and harbouring of victims of trafficking.²⁴⁵

The Act provides that institutions such as companies, partnerships or other businesses that engage in trafficking commit an offence and the institution and officers of the institution will be held liable.²⁴⁶

With regard to criminalisation of human trafficking, the Act is quite comprehensive in part two and complies with article 5 of the Palermo Protocol that discusses criminalisation of trafficking, the Act addresses accomplices as well as any other legal or natural persons that engage in trafficking as per the Palermo Protocol. It criminalises the control mechanisms utilised in trafficking and the various means through which trafficking attracts women and

²³⁹ Section 2(1).

²⁴⁰ Section 2(1).

²⁴¹ Section 3(4).

²⁴² Section 3(3),(6).

²⁴³ Sections 4 & 5 respectively.

²⁴⁴ Section 6(1), (2)(a).

²⁴⁵ Section 7(1), (a),(b),(c).

²⁴⁶ Section 13(1), (2).

girls, that is, advertisements whether on radio, television, in magazines, newspapers or posters. The Act states that internet service providers are required to report to the police any sites that advertise information that alludes to trafficking, failure to do so amounts to an offence that carries the penalty of a fine or imprisonment.²⁴⁷

The fact that the Act provides stiffer terms of imprisonment such as life imprisonment where the trafficking is for the purpose of sexual exploitation of the victim or where a trafficker benefits financially from the sexual exploitation of a victim or where an end users utilisation of the services of a victim amount to sexual exploitation, reflects the gravity of the problem of trafficking for sexual exploitation and the violation of the human rights of victims.

Although it is an anti-human trafficking Act it criminalises smuggling of persons. Troubling however, is the fact that consenting to being smuggled is an offence with a penalty of imprisonment of up to fifteen years,²⁴⁸ this provision does not take into consideration cases in which peoples situations maybe so desperate due to human rights violations, conflict or environmental disaster that they engage the services of smugglers to enable them leave. For instance during 2008, the economic and political situation coupled with a health crisis upon the outbreak of cholera in Zimbabwe was so severe that many Zimbabweans fled to neighbouring countries, Zambia included.²⁴⁹ Commendably, the Act addresses the issue of trafficking by public officials and institutions such as companies and other businesses, making it an offence.²⁵⁰

Part three of the Act provides for the identification and protection of victims of trafficking, it contains detailed guidelines for determination of whether a person is a victim of trafficking.²⁵¹ This is a comprehensive list that considers a wide range of possible circumstances of the victim, for example, it considers the victim being in an exploitative situation, suffers from health conditions such as rape, destruction of victims passport or subjection to debt bondage.²⁵²

The Act provides that the Director of Public Prosecutions can decide whether a victim of trafficking should be prosecuted for an offence committed as a direct result of the victims situation,²⁵³ this provision is detrimental because it ignores the dynamics of the relationship

²⁴⁷ Section 8(1), (2).

²⁴⁸ Section 9(1).

²⁴⁹ 'Zambia turns Zimbabweans back at border' *The Zimbabwe Times* 5 December 2008.

²⁵⁰ Section 3(8), section 13(1), (2) and section 14.

²⁵¹ Section 22.

²⁵² Section 22(a), (c)(i), (d), (g).

²⁵³ Section 24(1)

between a trafficker and a victim in which the victim is completely controlled by the trafficker and her survival depends on doing exactly what the trafficker commands. Principle seven of the UN Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002) provides; trafficked persons should not be prosecuted for involvement in unlawful activities where it is a direct consequence of their situation as trafficked persons, this provision in the Act contravenes this principle. Although the principles are not legally binding on states they provide guidelines that enable the protection of the human rights of trafficked victims while addressing human trafficking.

The Act notably obliges police officers to assist victims and provide them with protection; however, the type of protection to be provided is neither stated nor defined.²⁵⁴

The Act while it does not expressly refer to the protection of specific fundamental human rights of victims, does offer protection of a number of human rights through the establishment of Centres for victims. It provides that separate centres be established for children and adult victims. The centres are expected to provide security for all victims, offer counselling, rehabilitation and education or skills development services, victims are also entitled to public health care services. While there appears to be adequate protection in the Act proffered to victims, the Act lacks a witness protection programme for victims whose lives are in danger as the centres maybe known to traffickers and may not be sufficiently secure.

The summary deportation of victims is prohibited.²⁵⁵ Even as the Act provides that victims may be granted a temporary permit that enables them to remain in the country, this is nonetheless contingent on victims cooperating with law enforcement agencies in the investigation and prosecution of cases of trafficking. However, victims should be encouraged to voluntarily cooperate with law enforcement agencies and not be forced to cooperate especially as the Act does not provide for the protection of the identity of the victim throughout the investigative and prosecutorial processes.

Regarding compensation, the Act provides that victims may be paid compensation but payment is framed as an order of and at the discretion of the Court and not a remedy available to victims.²⁵⁶ In fact, the Act does not provide criminal, civil or other action against traffickers by victims. The Act further specifies the establishment of a human trafficking fund, however,

²⁵⁴ Section 27(1).

²⁵⁵ Section 32.

²⁵⁶ Section 58(1).

it does not state that such funds will be applied to compensation. The funds are intended for basic material support of victims, skills training, family tracing and rehabilitation or reintegration.²⁵⁷

Regarding international cooperation, the Act provides for cooperation with foreign states in the exchange of information, assistance in investigations and prosecutions and extradition.²⁵⁸ The Act also provides for public awareness and advocacy aimed at educating the public of the risks, techniques, tactics, abuses suffered in human trafficking and organisations and institutions from which help can be sought.²⁵⁹ There is an emphasis in the Act on discouraging the demand that cultivates the exploitation of women and children, additionally; there is an emphasis on ensuring public awareness in the rural areas and the effectiveness of such measures is subject to review biennially.²⁶⁰ The Act also provides for the information and education of victims as to their rights.²⁶¹

There are organisations that deal with trafficking victims in the country providing material and tertiary support, for instance IOM and Tasintha Drop in Centre.²⁶²

The Anti-human trafficking Act is a comprehensive piece of legislation that effectively criminalises human trafficking and a number of procedures and processes that are part of trafficking, this aligns it with the intent of the Palermo Protocol. The Act goes further than the Protocol in a number of areas, for instance, it defines some of the terms that remain undefined in the Protocol such as servitude, sexual exploitation and victim. It also incorporates more elements into the definition of trafficking beyond that espoused in the Protocol; for example it has criminalised a number of control mechanisms often used by traffickers, thereby expanding the definition. This is advantageous because it reflects the fact that while the Protocol was used as a guide, the drafters did not limit themselves to its provisions.

The Anti-trafficking Act reflects the gravity of the problem of human trafficking by stipulating long prison terms for perpetrators, notably longer than those provided by Mozambique in its anti-trafficking law. The Act recognises aggravated circumstances and stipulates sentences, although it does not set them out as aggravated circumstances.

Perhaps as recognition of the adverse role that demand plays in trafficking, the Act criminalises the use of the services of victims. It also attempts to regulate technology by

²⁵⁷ Section 102(1)(3).

²⁵⁸ Section 91.

²⁵⁹ Section 96(1)(a).

²⁶⁰ Section 96(1)(c), (2).

²⁶¹ Section 96(1)(b).

²⁶² US Department of State (n 205 above).

criminalising advertisements, broadcasts or distribution of information on trafficking and obliging internet service providers to report trafficking sites to the police. Commendably the Act addresses trafficking by public officials and companies. In the criminalisation of trafficking and its various aspects the Act is quite commendable as it has expanded on the provisions of the Palermo Protocol.

However, there are many gaps with regard to its protection provisions. Whereas it prohibits the deportation of victims and provides for the issuance of temporary residency permits, the Act provides very little by way of protection of victims rights. For instance, temporary residence is subject to cooperation with competent authorities and there are no victim or witness protection measures in place, provision of security at victim centres is also not guaranteed. Further, the Act places compensation of victims at the discretion of courts and not as an entitlement of victims. Prevention of trafficking is addressed in the Act, although the focus is on information campaigns. Perhaps the Act's greatest failing is that it does not address the root causes of human trafficking.

3.2.3 South Africa

I. The Context of Trafficking in South Africa

South Africa is the regional powerhouse with a GDP four times greater than its Southern African neighbours.²⁶³ It is also a source, transit and destination country for men women and children, especially women and girls who are trafficked for commercial sexual exploitation.²⁶⁴ Although South Africa has one of the strongest economies in Africa, there is great economic disparity between many of the white minority and most of the black majority.²⁶⁵ Many people live in impoverished situations and are anxious to find employment, yet there are high unemployment levels, high earning inequalities and low skilled workers are paid low wages despite high living costs.²⁶⁶ These factors make people vulnerable to human trafficking as they attempt to improve their lives by seeking employment elsewhere and using any means to do so.

South African society struggles with gender based violence, women endure physical and sexual abuse from partners, family and community members. Such histories of sexual and

²⁶³ E Delpont *et al* 'Human Trafficking in South Africa: Root Causes and Recommendations' Policy Paper Poverty Series No. 14.5 (E) 2007 10.

²⁶⁴ US Department of State (n 205 above) 260.

²⁶⁵ L Bermudez 'No experience necessary. The internal trafficking of persons in South Africa' 2008.

²⁶⁶ Bermudez (n 265 above) 13.

physical violence render women and girls vulnerable to trafficking particularly for purposes of sexual exploitation as they seek means to escape the violence.²⁶⁷

Additionally, South Africa has a growing sex tourism industry where travellers to the country seek and engage in commercial sex as part of a travel experience; therefore traffickers are servicing the demand of this lucrative and expanding industry.²⁶⁸ In connection with sex tourism there have been concerns that there will be an increase in human trafficking to service the sex industry during the period of the soccer world cup that South Africa will be hosting in 2010, IOM guardedly downplays these concerns. It reports that there is no research data that sustains such concerns which are mainly speculation. IOM concedes that due to the nature of an event such as the soccer world cup, traffickers may take advantage and attempt to consolidate their activities; however, IOM is cautious in expressly stating that human trafficking activities will increase during the 2010 FIFA World Cup.²⁶⁹

South Africa has porous borders marked by a tradition of movement and migration to South Africa for trade and work as well as illegal smuggling of goods and people, trafficked people are indistinguishable among these flows.²⁷⁰

Trafficking in South Africa is complex as it consists of trafficking to, from and within South Africa. Women from refugee producing countries such as the Democratic Republic of Congo are trafficked to South Africa,²⁷¹ sex workers and non-sex workers are trafficked from Mozambique to Gauteng and KwaZulu-Natal in South Africa and placed in prostitution.²⁷² Young girls from Swaziland are trafficked to South Africa and forced into prostitution, while Lesotho, Botswana along with Swaziland are used as transit routes for trafficked Chinese women that are imported to South Africa.²⁷³ Women and girls from Malawi are trafficked to South Africa for prostitution and others are trafficked through South Africa to Northern Europe for purposes of sexual exploitation.²⁷⁴

Women from Asia and the Middle East are trafficked into the Western Cape province of South Africa en route to North America while women and girls from Thailand and China are trafficked into the commercial sex industry for instance clubs and restaurants in South

²⁶⁷ S Kreston 'Trafficking in Children in South Africa: An Analysis of Pending Legislation' (2007) 8 (1) *Child Abuse Research in South Africa*.

²⁶⁸ Bermudez (n 265 above) 17.

²⁶⁹ 'Human Trafficking and the 2010 Soccer World Cup' *Eye on Human Trafficking* Issue 21/2009.

²⁷⁰ Delpont *et al* (n 263 above) 34.

²⁷¹ US Department of State (n 205 above).

²⁷² Delpont *et al* (n 263 above) 21.

²⁷³ Delpont *et al* (n 270 above).

²⁷⁴ Delpont *et al* (n 263 above) 20.

Africa.²⁷⁵ Women from Eastern Europe are also trafficked to work in the sex industry in private clubs and brothels.²⁷⁶ South Africa is also a source country; women and girls are trafficked from South Africa into the commercial sex industry in countries in Europe, the Middle East and the United States of America.²⁷⁷

Internal trafficking is also prevalent in South Africa, victims are often from rural areas, recruited through false offers of employment or genuine offers of employment but with the realities of the conditions omitted. The victims are then provided with travel allowances or offered transportation by the recruiter and taken to urban centres. Victims of internal trafficking are recruited from areas such as Beauford West, Graaff-Reinet and Orange Farm and trafficked to places such as Cape Town, Johannesburg, Pretoria and Durban.²⁷⁸

Trafficking in South Africa is largely linked to organised crime although not exclusively so. Refugees who have established themselves in South Africa have been known to traffic family and other asylum seekers to South Africa especially for sexual exploitation.²⁷⁹ Organised crime networks conduct trafficking operations trans-nationally and internally in South Africa, these trafficking rings are dominated by Nigerian, Moroccan, Chinese and Eastern European syndicates, with the Nigerian syndicate widely credited for operating internal trafficking for sexual exploitation.²⁸⁰

II. Legislative response in South Africa

South Africa signed the Palermo Protocol in December 2000 and ratified it in February 2004 and has been working towards drafting legislation since 2005 and still lacks specific anti-human trafficking legislation.²⁸¹ Nevertheless, it has a number of laws that prohibit human trafficking.

III. The Children's Act 38 of 2005

The Children's Act reproduces the definition of trafficking found in the Palermo Protocol although it includes the sale and supply of children and illegal adoption in its definition. It

²⁷⁵ Delpont *et al* (n 263 above) 22.

²⁷⁶ US Department of State (n 205 above) 260.

²⁷⁷ US Department of State (n 205 above).

²⁷⁸ Bermudez (n 265 above) 31-32.

²⁷⁹ Delpont *et al* (n 263 above).

²⁸⁰ Bermudez (n 265 above) 36.

²⁸¹ Kreston (n 267 above).

also defines the terms commercial sexual exploitation and exploitation.²⁸² The Children's Act gives effect to the Palermo Protocol and prohibits the trafficking of children by natural and juristic persons and partnerships. The Children's Act further stipulates that the consent of a child or her or his parents or guardians to the trafficking or exploitation consequent thereon is not a defence to the crime of trafficking.²⁸³ The Children's Act also prohibits the harbouring of trafficked children and prohibits the advertisement, publication or broadcasting of information that alludes to trafficking including the internet. Internet service providers are required to report sites that advertise or broadcast information on trafficking to the police,²⁸⁴ although the Act prescribes no punishment for the contravention of the offences.

The Children's Act also provides for the return from foreign states to South Africa of trafficked children that are citizens or permanent residents of South Africa which includes the provision of travel documents and adult escort if required, at state expense in certain circumstances, for instance where the child is too young to travel alone.²⁸⁵ Where a court has reason to believe that the parents, guardian or any person with parental responsibilities in respect of a child, has trafficked or allowed the traffic of the child, the court may suspend such person's parental responsibilities and rights and place the child in temporary care.²⁸⁶

The Children's Act requires immigration and police officials, social workers, medical practitioners or nurses to refer trafficked children to designated social workers for investigations.²⁸⁷ The Children's Act goes on to provide procedures for foreign trafficked children found in South Africa; they are to be referred to a designated social worker, placed in temporary safe care after which they may be presented before a Children's Court that may order that the child be assisted in applying for asylum.²⁸⁸ An order by a Children's Court that a foreign trafficked child is in need of care and protection, serves as an authorisation for the child to remain in South Africa for the duration of the courts order.²⁸⁹

Further, the Children's Act provides that a foreign trafficked child cannot be repatriated to her or his country of origin unless care and safety arrangements for the child have been made and are confirmed.²⁹⁰ The Children's Act can be used to protect and provide assistance to young girls that are trafficking victims. The Act is vague as to what amounts to temporary safe care

²⁸² Section 1.

²⁸³ Section 281(a) & 284(1), (2)(a).

²⁸⁴ Section 285(1)(a), (b), (2).

²⁸⁵ Section 286.

²⁸⁶ Section 287(a)(b).

²⁸⁷ Section 288.

²⁸⁸ Section 289(1),(2).

²⁸⁹ Section 289(3).

²⁹⁰ Section 290.

and does not provide penalties for trafficking or those guilty of harbouring trafficked children despite proscribing the two. It also does not address a number of the human rights concerns of trafficking victims such as psychological and medical care, redress for trafficking victims against traffickers and does not provide for compensation. Positively, it employs the principle of *non-refoulement* providing that foreign trafficked children cannot be returned to the country of origin unless care arrangements and the safety are assured.

IV. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

The Sexual Offences Act (the Act) refers to trafficking in persons specifically for sexual purposes. The definition of trafficking replicates the definition in the Palermo Protocol although it adds the terms supply, sale, disposal or receiving of a person and threat of harm. In explaining the purpose of trafficking the Act provides;²⁹¹

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.

The Act criminalises trafficking in persons for sexual purposes where the trafficked person does not consent to the trafficking.²⁹² The Act stipulates acts that amount to trafficking and states that any person who executes those actions is guilty of the offence of involvement in trafficking in persons for sexual purposes. The Act also defines consent and sets out circumstances in which a trafficked person is coerced or forced onto trafficking for sexual purposes.²⁹³ Further, it provides that a trafficked person cannot stand trial for any criminal offence or migration related offence if it was a consequence of being trafficked.²⁹⁴

Companies, owners or operators of any means of conveying goods or people for commercial gain, commit an offence if they bring into or remove a person from South Africa with that person having the requisite travel documents and are liable to pay the trafficked persons care, safekeeping and return costs which will be ordered by the court upon conviction.²⁹⁵

The Act stipulates trafficking for sexual exploitation as a criminal offence but does not prescribe penalties for it. Furthermore, it states that the provisions relating to human trafficking for sexual exploitation are transitional, ensuring partial compliance with South

²⁹¹ Section 70(2)(b)(i)(vi).

²⁹² Section 71(1).

²⁹³ Section 71(3), (4)

²⁹⁴ Section 71(5)

²⁹⁵ Section 71(6)(a) (b)(c)(d).

Africa's international obligations under the Palermo Protocol and pending the enactment of comprehensive legislation on human trafficking, this perhaps accounts for the lack of sanctions for established offences. However, the problem with the Act is; it is criminal in nature and has no human rights friendly provisions, neither does it offer any protection, assistance or remedies to trafficking victims and does not address preventive measures against human trafficking.

The transitional nature of the provisions of the Act enable South African authorities to remain inactive with regard to implementing comprehensive legislation on human trafficking as they can argue that the Sexual Offences Act fulfils the criminal aspects of the Palermo Protocol even if it excludes human rights protections..

There are a number of organisations that deal with victims of trafficking, for instance IOM and Molo Songololo.

3.3 Conclusion

Within the SADC region, there many factors that cause people to leave their homes in search of a better life for themselves and their families, this rings true especially for women and girls, it also means that are particularly vulnerable to trafficking. Within the SADC region, a number of countries have signed the Palermo Protocol, only two countries have domesticated it and one has temporarily domesticated the criminal provisions of the Palermo Protocol.

Zambia has comprehensive legislation that addresses a broad range of issues, however, the Act is criminally focused. Mozambique's legislation although not as comprehensive as Zambia's; addresses trafficking ensuring not only the protection of victims but their identities as well. It makes the reporting of trafficking activities a duty on citizens and investigation subsequent to reports a duty on competent authorities, this law too is principally criminal focused.

South Africa has made a half hearted attempt to address the issue of trafficking focusing on sexual exploitation, commendably it recognises some of the factors of trafficking such as the commercial sex industry and the vulnerability of women. However, it is criminal legislation that makes trafficking for sexual purposes a crime but offers no legal sanctions. Furthermore the law is transitory in nature pending comprehensive legislation; it does not incorporate any human rights principles or remedies for victims against their traffickers.

The greatest failings of the various laws analysed is; they do not address the root causes of trafficking nor do they provide reference to any other domestic laws that address root causes of trafficking. Furthermore, these individual country attempts to tackle trafficking will only be effective if they are supported by other countries with similar efforts. This requires regional cooperation in order to successively prevent, suppress and punish trafficking in persons as no country can succeed on its own.

The following chapter will discuss the collective efforts of the SADC region in addressing trafficking. The chapter will also analyse the efforts of the European region to combat trafficking and conclude by drawing lessons from the European experience for SADC.

CHAPTER FOUR

SADC's STRATEGY AND EUROPE'S BEST PRACTICES

4.0 Introduction

In order to address human trafficking, many countries have banded together in their regional groupings and sought solutions which require coordinated efforts at the regional and national levels. The Southern Africa Development Community (SADC) is the latest regional group to tackle human trafficking, drafting a Ten Year Strategic Plan of Action (Plan of Action) as its blue print. This chapter analyses the Strategic Plan. Additionally, the chapter analyses European measures against trafficking and draws lessons from Europe for SADC. The European region is being used as the standard bearer because member states of the European Union and the Council of Europe are accustomed to cooperating closely in general and harmonising their legislation in particular, more than other regions.²⁹⁶

4.1 The Strategic Plan

On 28 May 2009, SADC ministers responsible for combating trafficking in persons, together with the AU and various international cooperating partners, attended a ministerial conference on human trafficking in Mozambique. At this conference the Ministers adopted a Plan of Action (the Plan) which was supposed to be submitted to the SADC Council of Ministers at their meeting in August 2009.²⁹⁷ The Plan is subject to the approval of the SADC Council of Ministers that was scheduled to meet in August 2009; at the conclusion of this study, there were no indications that the meeting occurred and no information was available to that effect.

The Plan is not a legally binding instrument. Rather it is a programme that aims to fulfil SADC objectives²⁹⁸ including a commitment to the protection of women's and children's human rights.²⁹⁹ The Plan has been incorporated into a broader regional strategic plan referred to as the Regional Indicative Strategic Development Plan, which is a regional development plan designed to deal with development and poverty reduction.³⁰⁰

²⁹⁶ I Österdahl 'International countermeasures against human trafficking' in A Jonsson (ed) *Human Trafficking and Human Security* 71.

²⁹⁷ SADC Human Trafficking *Communique* available at <<http://www.sadc.int>> (accessed on 18 June 2009).

²⁹⁸ Treaty of the Southern African Development Community, article 5.

²⁹⁹ Article H (vii),(ix) SADC Declaration on Gender and Development 1997

³⁰⁰ Southern Africa Trust 'The SADC Regional Indicative Strategic Development Plan: Towards a Regional Vision to End Poverty?' <<http://www.southernafricatrust.org/news6.html>> (accessed on 19 October 2009).

The Plan will be implemented in two phases of five years each, the first phase 2009 – 2014 is already developed, while the second phase will be elaborated in 2014.

The Plan sets out goals, purposes and objectives. These consist of the provision of support for cooperation among member states in the elimination of human trafficking within the region and provision of assistance to member states for the adoption and implementation of legislative and other mechanisms on trafficking.³⁰¹ Further, the objectives of the Plan include establishment of legislation and policies on human trafficking and strengthening regional coordination.³⁰² These objectives are broad and general and do not specify whether the legislation should be established at a regional or national level, the policies also lack specificity.

The Plan sets out a framework for combating trafficking in persons and establishes principles to guide member states; these principles require a human rights approach to trafficking and the adoption of policies; programmes and strategies that incorporate gender sensitivity, child rights focus, inter-state cooperation, criminalisation of trafficking and participation of communities and victims.³⁰³

I. Analysis of the Plan of Action

The Plan is realistic in setting out a two phase stage for implementation as it makes planning, budgeting and fund raising easier and sets realistic goals for member states.

The framework for combating trafficking in persons contains principles, such as human rights and gender sensitivity,³⁰⁴ intended to guide states in the implementation of the Plan, however, instead of explaining the guiding principles suggested in the framework, the Plan repeatedly states that the policies, strategies and programmes of member states should incorporate the guiding principles.

The Plan establishes minimum requirements for a comprehensive approach to trafficking. This is a valid strategy as it requires member states to ensure that the standards are ones without which member states cannot promulgate laws or create policies and programmes.

³⁰¹ Section 4.

³⁰² Section 4.3.

³⁰³ 10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children (2009 – 2014) 8.

³⁰⁴ Section 3.1.

These are;³⁰⁵ prevention, advocacy and awareness raising, protection, rehabilitation, integration, repatriation and investigation and prosecution

While these minimum standards are encouraging, they are too broad, which creates a situation whereby different countries may interpret them differently and create disparate national policies. The effect of this would be member states having largely varied national policies and programmes contrary to the Plan's objective of creating a harmonised regional framework in which member states' national policies and programmes are similar. The Plan should have been more specific regarding policies and programmes that incorporate these standards in order to ensure that states generate specific and uniform laws and policies. Additionally, the Plan should have recommended the creation of uniform regional policies to ensure that all member states apply the same set of standards.

In the Strategic Priorities for Action section,³⁰⁶ the Plan systematically outlines activities and expected outputs on legislation and policy measures and finally suggests the development of regional legislation on human trafficking.³⁰⁷ Nevertheless, it is not apparent whether the regional legislation is meant to bind member states or simply provide a model for states without human trafficking legislation. Other strategic priorities refer to policies on training, public awareness raising, victim and witness protection, regional cooperation, information sharing, monitoring and evaluation and resource mobilisation.³⁰⁸

The Plan includes a five year implementation matrix of the Plan of Action; this matrix is more detailed than the Strategic Priorities section and specifies the strategic priorities expansively, including indicators, time frames, responsible partners and the allocated budget.³⁰⁹ This section and the implementation matrix are elaborative where much of the Plan is vague and broad.

Furthermore, the Plan highlights national, regional and international partners and ascribes their roles.³¹⁰ Main partners include the SADC Secretariat, African Union and undefined international cooperating partners.³¹¹

³⁰⁵ Section 3.2.

³⁰⁶ Section 5.

³⁰⁷ Section 5.

³⁰⁸ Subsections 5.2, 5.3, 5.4, 5.5, 5.6, 5.7 & 5.8.

³⁰⁹ Section 10.

³¹⁰ Section 7.

³¹¹ Section 7.2.

The Plan establishes the various organs within SADC and departments in member states that are responsible for monitoring the Plan.³¹² The organ on Politics, Defence and Security Affairs Unit (PDSAU) will monitor the implementation of the Plan. Mandating the PDSAU to monitor implementation risks a security based response to the problem, however, this risk is counteracted by the involvement of other sectors such as gender, child and youth ministries in member states and the engagement of ad hoc consultants.³¹³

Additionally, the Plan provides for the establishment of a regional Ministerial Task Force to oversee implementation of the Plan at regional and national levels.³¹⁴ Its functions are a duplication of those of the PDSAU and it should be decided which of the two bodies should be mandated to monitor implementation.

The Plan is affirmative because it signifies action to address human trafficking at a regional level and demands cooperation among states. The Plan encourages individualistic country approaches to trafficking by emphasising national policies, programmes and strategies. While this is important, it should be recognised that human trafficking is a transnational problem as much as it is national and organised crime syndicates are often behind trafficking, well funded and operating across borders.³¹⁵ Consequently, a regional response is required and member states cannot afford to be disorganised with haphazard policies and standards.

Additionally, the Plan calls for harmonisation of laws, policies and programmes to address trafficking,³¹⁶ this should be done against the background of the different legal systems within SADC. Some countries have the Civil jurisdiction, others have the Common Law system and yet others Roman Dutch Law,³¹⁷ any harmonisation of legislation needs to consider these disparities and make the necessary adaptations, for instance if countries cannot agree on criminal provisions due to different legal procedures, the prosecution of traffickers can be assigned to a regional court, in which case the SADC Tribunal's mandate should be extended to include the prosecution of trafficking cases.

Furthermore, the Plan should be supported by a legally binding instrument such as a Protocol that compels the compliance of member states. Europe for instance, has policies addressing human trafficking at a regional level via the European Union and the Council of Europe, and they are supported by legally binding instruments as discussed subsequently.

³¹² Section 8.

³¹³ Section 8.

³¹⁴ Section 8.

³¹⁵ H Askola *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007).

³¹⁶ Objectives subsection 4.3.

³¹⁷ J Dugard *International Law: A South African Perspective* (2007).

4.2 The European Union (EU) Framework decision on Combating Trafficking in Human Beings

Europe is also affected by human trafficking, perhaps more than other regions. This has resulted from comparably better economies and standards of living.³¹⁸ Europe is a source, transit and destination continent.³¹⁹ As a region, Europe has addressed human trafficking using various means, most prominent being through a treaty and a framework decision.

In 2002, the European Union Council adopted the EU Framework Decision on Trafficking in Persons. Framework decisions may be adopted under the third pillar of the EU Treaty, which contains provisions on police and judicial cooperation in criminal matters.³²⁰ Framework decisions are binding on EU member states to the extent of the results to be achieved but allow national authorities to determine the form and methods of achieving the results.³²¹ The EU Framework decision on trafficking is a brief document with exclusive focus on criminalisation of human trafficking.

The Framework decision defines trafficking in its first article which describes the constitutive elements of trafficking and creates an obligation on states to criminalise the acts. The definition of trafficking is the same as that contained in the Palermo Protocol, except the Framework decision does not include trafficking for the removal of organs. The Framework decision provides that member states are obliged to take necessary measures to ensure that trafficking and aiding, abetting or attempting offences categorised as trafficking, are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.³²² It also provides the penalty of imprisonment for a period not less than eight years for trafficking where there are aggravating circumstances.³²³

Each member state undertakes to establish its jurisdiction over human trafficking where the offence is committed wholly or partly in its territory, where the offender is one of its nationals or the offence is committed for the benefit of a legal person established in the territory of the

³¹⁸ A Di Pascale 'The New Regulations on Immigration and the Status of Foreigners in Italy' (2002) 4 *European Journal of Migration and Law*.

³¹⁹ US Department of State 'Trafficking in Persons Report 2009' (2009).

³²⁰ Treaty on the European Union, Official Journal, C 325/5 24/12/2002, Article 34 (2)(b).

³²¹ I Österdahl 'International countermeasures against human trafficking' in A Jonsson (ed) *Human Trafficking and Human Security* 81.

³²² Article 3(1).

³²³ Article 3(2).

member state.³²⁴ A member state that does not extradite its nationals is obliged to prosecute such nationals for offences under the Framework decision committed outside its territory.³²⁵

The Framework decision provides for liability and sanctions of legal persons which include criminal or non-criminal fines as well as other sanctions such as, temporary or permanent disqualification from the practice of commercial activities or a judicial winding up order.³²⁶ The specification of the applicable sanctions clearly provides what member states must do while correspondingly offering them ideas on effective measures to fight human trafficking. The sanctions may have a semi-compulsory nature in that states which fail to implement the measures may have to explain themselves at some point.³²⁷

The Framework decision contains an article on protection and assistance to victims which merely refers to the fact that investigations or prosecutions of trafficking offences therein must not be dependent on reports of victims especially if the offence is committed within the territory of a member state.³²⁸ Additionally, this article recognises the vulnerability of children as trafficking victims and requires states to assist them and their families.³²⁹ Notably, the Framework decision does not contain a clause requiring member states to grant temporary or permanent residence to trafficking victims. However, there is a 2004 EU Council Directive on residence permits issued to third country nationals that are trafficking victims, if they cooperate with the competent authorities.³³⁰ Essentially, the Directive makes temporary residence for victims conditional on cooperation with authorities.

Österdahl contends that the Council Directive is aimed at the victim's cooperation with authorities and the victim staying in the receiving country for the duration of investigations and proceedings.³³¹ The implication of the Directive is; it is not concerned with the protection of the rights of victims. The lack of concern for victim's rights reflected in the Directive is supported by the fact that the Framework decision contains no human rights protections despite the title of article of seven³³² additionally, the Council Directive reflects the fact that the EU is more concerned with advancing its criminal agenda and successfully prosecuting perpetrators than it is with the protection and human rights of the victims.³³³

³²⁴ Article 6(1).

³²⁵ Article 6(3).

³²⁶ Article 5 (a) – (e).

³²⁷ Österdahl (n 321 above) 83.

³²⁸ Article 7(1).

³²⁹ Article 7(2),(3).

³³⁰ Council Directive 2004/81/EC, Article 1.

³³¹ Österdahl (n 321 above) 84.

³³² The title is *Protection and Assistance to Victims*.

³³³ Österdahl (n 321 above).

The Framework decision is influential in ensuring maximum uniformity between member states with regard to their criminal law approaches to human trafficking.³³⁴ This is because framework decisions are subject to the jurisdiction of the European Court of Justice;³³⁵ therefore, where a member state is not implementing the Framework decision, the matter may be taken before the European Court of Justice.³³⁶ This may compel states to implement the provisions of the Framework decision, thereby ensuring a minimum standard.

4.3 The Council of Europe Convention on Action Against Trafficking in Human Beings

In 2005, the Council of Europe made up of 47 member states including the 27 member states of the EU, adopted a regional Convention on Action against Trafficking in Human Beings (the Convention).³³⁷ The definition of human trafficking contained in the Convention is the same as that contained in the Palermo Protocol, although the Convention explicitly states that it applies to national and transnational human trafficking whether connected to organised crime or not.³³⁸ The Convention is similar to the Palermo Protocol but its point of departure is that whereas the Palermo Protocol emphasises the criminal aspect of human trafficking and its prevention, the Convention emphasises human rights and victim protection and guaranteeing gender equality.³³⁹

The Convention deals with prevention, cooperation and other measures in trafficking. In prevention it requires states to establish and strengthen national coordination between various bodies in the prevention and combating of trafficking, it requires the establishment of policies and programmes to prevent trafficking and a human rights approach to policies.³⁴⁰

Österdahl argues that, from the provision on prevention it is unclear what states are actually supposed to do and that creates difficulties when determining whether a state has fulfilled its commitments under the convention.³⁴¹ The provisions that require states to establish or strengthen effective policies to prevent trafficking are too general and give states leeway especially in applying the barest minimum standards. The Convention also requires states to

³³⁴ A Gallagher 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *European Journal of Migration and Law* 167.

³³⁵ EU Treaty, Article 34, 35 and 46(b).

³³⁶ Österdahl (n 321 above).

³³⁷ Österdahl (n 321 above).

³³⁸ Article 2.

³³⁹ Article 1(1).

³⁴⁰ Convention on Action Against Trafficking in Human Beings, Chapter II & article 5 (1).

³⁴¹ Österdahl (n 321 above) 76.

adopt measures that discourage the demand for people,³⁴² for instance demand for prostitutes in the sex industry. It is argued that such demand fosters all forms of exploitation.³⁴³ However, the problem with this provision and the other measures on prevention is that they are phrased in the form of information and education campaigns, which Österdahl argues renders them ‘soft’ measures without any force when compared to legal measures.³⁴⁴ However, the explanatory note of the Convention provides that prevention measures may be legislative, administrative, educational, social or cultural.³⁴⁵

The third chapter of the Convention addresses protection of the rights of victims; this chapter is quite elaborate on the protection of victim’s rights. It begins with the identification of victims requiring that legislation be adopted to ensure identification of victims. The Convention provides that correct identification of victims is crucial for the provision of protection and assistance.³⁴⁶ The Convention also applies the principle of *non-refoulement*, as victims once identified as such cannot be removed from the member state until the identification process is completed,³⁴⁷ even though this may be a temporary measure, it ensures the safety of victims while their matter is investigated.

Member states are obliged to adopt legislative measures that ensure the provision of basic assistance to all trafficking victims.³⁴⁸ Victims are to be assisted in their physical, psychological and social recovery, with access to accommodation, medical treatment, counselling, labour markets and education. Furthermore, member states are required to adopt legislation that ensures that assistance to victims is not conditional on a victim’s willingness to cooperate with authorities.³⁴⁹ This removes the coercive element of forcing victims to cooperate with authorities in exchange for temporary protection or residence. The Convention requires states to provide for a recovery and reflection period for victims in their domestic laws, this allows victims to escape the influence of traffickers and recover while taking an informed decision on cooperating with authorities.³⁵⁰

The Convention provides for compensation of victims either by the perpetrators or other means. It requires member states to ensure their domestic laws provide access to legal assistance and aid for trafficking victims and the right to compensation from perpetrators.

³⁴² n 338 above article 6.

³⁴³ US Department of State (n 319 above).

³⁴⁴ Österdahl (n 321 above)77.

³⁴⁵ Explanatory Report - Convention on Action Against Trafficking in Human Beings, article 6.

³⁴⁶ Gallagher (n 334 above) 176.

³⁴⁷ Article 10(2).

³⁴⁸ Gallagher (n 346 above).

³⁴⁹ Article 12(6).

³⁵⁰ Article 13.

Member states should also have legislation that guarantees compensation of victims. The Convention goes on to provide the example of the establishment of a victim's fund.³⁵¹ This recognises the fact that if perpetrators are unable to compensate their victims, victims should still have the right to compensation. The Convention requires states to promote gender equality and mainstreaming in the application of measures to promote and protect human right of victims.³⁵² This is in recognition of the marginalisation of women in the societies of member states and is perhaps aimed at countering gender equality as a root cause of trafficking.

The Convention criminalises human trafficking much like the EU Framework decision and many of the provisions are similar. However, unlike the EU Framework decision, the Convention encourages member states to criminalise the use of services of a trafficking victim. This is aimed at discouraging the demand for exploitable people that fuels human trafficking.³⁵³ The wording of this article provides that member states shall 'consider' adopting legislation, reflecting the fact that member states have varying domestic laws on domestic labour, prostitution and other forms of labour such as agriculture.

The Convention provides a monitoring mechanism made up of two monitoring groups, the Group of Experts against trafficking in human beings (GRETA) and Committee of the Parties. GRETA does the bulk of the monitoring of the implementation of the Convention while the Committee of the Parties adds political weight to GRETA and can request states to implement GRETA conclusions with regard to implementation.³⁵⁴

The Convention is pro-human rights in that it has incorporated human rights within the protection of victims rights while at the same time ensuring the criminalisation of trafficking and establishing provisions that ensure that when effectively implemented Europe will not be a safe haven for traffickers.³⁵⁵

One of the problems of having a regional instrument is that even though it is intended as a guide for member states, states tend to guard their sovereignty jealously and resent interference with their domestic legislation and policies. However, in the case of Europe, states often manage to agree at least in principle on significant points on which they should

³⁵¹ Article 15(4).

³⁵² Article 17.

³⁵³ Explanatory Report – Action against Trafficking in Human Beings, Article 19.

³⁵⁴ Gallagher (n 334 above) 186.

³⁵⁵ Gallagher (n 334 above).

cooperate strongly; human trafficking is one of those points.³⁵⁶ European states have agreed to allow legal instruments to prescribe broadly and in some cases specifically the legislation, programmes and policies member states should introduce.

However, the vague nature of many of the provisions in both the Framework decision and the Convention makes it difficult for states to ensure that they have taken the right measures or done enough to implement the agreement. Furthermore, even where the instruments are clear and precise other factors are pivotal, such as the degree of prioritisation states attach and the available resources.³⁵⁷

4.3.1 Non legal Measures

Part of the reason why Europe appears to be addressing human trafficking better than other regions is that it combines legal instruments with non legal programmes. For instance the European Union launched programmes to address trafficking such as the STOP programme and the DAPHNE Initiative to combat violence against children, young people and women which in 2000 incorporated trafficking issues and is referred to as the DAPHNE programme.³⁵⁸ The DAPHNE programme is a complementary programme that funds transnational projects to combat all types of violence against children and women, including sexual exploitation and human trafficking. Activities include, but are not limited to; exchanges of good practice and work experience, creation of sustainable multidisciplinary networks and studies and research.³⁵⁹

The defunct STOP programme intended to prevent and combat human trafficking and all forms of sexual exploitation. It created a framework for training, information, study and exchange programmes for persons responsible for combating human trafficking and the sexual exploitation of children.³⁶⁰ The two programmes entail cooperation between non governmental organisations and governments.³⁶¹

³⁵⁶ Österdahl (n 321 above) 85.

³⁵⁷ Österdahl (n 319 above) 86.

³⁵⁸ T Obokata 'Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights or States' Interests?' (2001) *Web Journal of Current Legal Issues* <<http://webjcli.ncl.au.uk/2001/issue5/obok5.html>> (accessed on 10 September 2009).

³⁵⁹ DAPHNE II Programme available at <http://ec.europa.eu/justice_home> (accessed on 2 October 2009).

³⁶⁰ STOP II Programme available at <http://ec.europa.eu/justice_home> (accessed on 2 October 2009).

³⁶¹ Obokata (n 357 above).

Europe also utilises its coordination in law enforcement through the European police (Europol), which is the European Law enforcement organisation that handles criminal intelligence, its mandate includes human trafficking.³⁶²

Europe also coordinates its prosecutions through Eurojust, a judicial cooperation body created to help improve the fight against serious crime. It facilitates coordination of investigations and prosecutions in the territories of member states. It is an important tool for fighting human trafficking.³⁶³

4.4 Europe's practices, SADC's lessons

The SADC Plan of Action as a regional strategy is a flawed but good initiative. Primarily, it lacks a legally binding instrument to give it force and ensure the implementation of its provisions. The enactment of such an instrument is proposed in the Plan.³⁶⁴ The Plan contains broad and often imprecise provisions requiring states to establish policies and programmes without making any specifications or drawing examples. Furthermore, it appears to focus on encouraging states to enact national legislation and policies, largely ignoring regional coordination in addressing human trafficking, this defeats its objective which is regional harmonisation and coordination in trafficking.³⁶⁵ The Plan especially recognises the vulnerability to trafficking of women but does not specifically address trafficking for sexual exploitation and it does not address the root causes of trafficking. Furthermore, the Plan has not been publicised and is not readily accessible to the general public.

The Plan of should be more comprehensive and it can achieve this by drawing lessons from the European region.

4.4.1 Lessons from Europe

The European region applies a two prong approach to trafficking using legal and non-legal measures.

Firstly, the region enacted legislation that creates minimum standards which states are required to incorporate in their laws but is also binding at regional level. The legislation consists of the Convention and Framework decision previously discussed.³⁶⁶ While the

³⁶² EU 'Trafficking in Human Beings; A European Response' <<http://www.europol.europa.eu>> (accessed on 10 October 2009).

³⁶³ EUROJUST <<http://www.eurojust.europa.eu>> (accessed on 10 October 2009).

³⁶⁴ Legislation and Policy Measures section 5 subsection 5.1.

³⁶⁵ Objectives subsection 4.3 section 4.

³⁶⁶ Askola (n 315 above).

Framework concentrates on criminal aspects of human trafficking, the Convention incorporates a human rights approach. Therefore, SADC could draw from the instruments and generate a single instrument that balances criminal law; investigating and prosecuting the perpetrators and human rights; prevention of trafficking and protection of rights.

The Convention provides a monitoring mechanism in the form of a group of experts to monitor the implementation of the Convention³⁶⁷ and the group is assisted by the Committee of Parties.³⁶⁸ This is meant to ensure state compliance with the provisions of the Convention individually and in its entirety. The SADC Plan provides similarly although, it appears that the two bodies intended to oversee implementation will be duplicating each others functions. Further, SADC should consider establishing a panel of experts in human trafficking and related fields to oversee implementation of the Plan instead of two different bodies.

Secondly, using the existing institutions within the regional bodies, the European region has coordinated country efforts at tackling human trafficking and has ensured collaboration on various aspects of trafficking. For instance, Europol; the regional law enforcement organ has been mandated to deal with trafficking, this facilitates the exchange of information and investigation into traffickers, trafficking syndicates and victims across national boundaries as well as the arrest of perpetrators anywhere in the region.³⁶⁹ The region also utilises Eurojust a judicial organ to regionally coordinate efforts at prosecuting perpetrators regardless of territoriality.³⁷⁰ SADC can extend the mandates of existing organs to suit the requisite coordination, for instance the SADC Tribunal's mandate should include prosecution of traffickers or facilitate victim's claims for compensation against state or non state actors while Southern Africa Regional Police Chiefs Organisation (SARPCCO) should include investigation of human trafficking.

SADC should additionally utilise its various protocols such as the Protocol on Mutual Legal Assistance in Criminal Matters,³⁷¹ to encourage cooperation and coordination among states in trafficking matters.

The European region also adopted regional programmes such as STOP and DAPHNE III which incorporate multiple non governmental organisations and draw from their expertise and experiences in the implementation of policies and programmes aimed at prevention of

³⁶⁷ Article 36.

³⁶⁸ Article 37.

³⁶⁹ EUROPOL 'Trafficking in Human Beings; A European Response' <<http://www.europol.europa.eu>> (accessed on 10 October 2009).

³⁷⁰ 'Trafficking in Human Beings; A European Response' <<http://www.europol.europa.eu>> (accessed on 10 October 2009).

³⁷¹ SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002.

trafficking and protection of victims.³⁷² Through such non legal measures the root causes of trafficking can be comprehensively addressed. The use of non governmental organisations also facilitates the implementation of policies at the grass roots level.

The Plan emphasises non legal measures such as programmes to address trafficking, while it proposes these at the national level, it should also adopt programmes at the regional level and collaborate with civil society organisations as well as the private sector. This may ensure that programmes are implemented especially at the grass roots level; it also draws on the experiences of civil society organisations. The use of non legal measures complemented by legal measures provides a holistic approach to trafficking that may prove effective.

To its disadvantage, Europe has too many pieces of legislation under various organs which leads to overlapping and duplication of functions, SADC should avoid such duplicity. The drafters of the Plan should consider these lessons from Europe and adapt them to Southern African peculiarities for a regionally coordinated and comprehensive approach to trafficking.

4.5 Conclusion

It has been shown in this chapter that the SADC Plan of Action is the regions response to the problem of trafficking. The Plan is not a legal instrument with force of law; it is simply a guideline for member states, advising them to adopt policies, programmes and laws that address human trafficking. Much of the Plan is imprecise and set out in broad terms, this is perhaps in recognition of the principle of sovereignty of states and the fact that the policies and programmes member states are encouraged to adopt address issues of national concern. However, by virtue of membership of SADC states have agreed to cooperate and address various issues in unison.

The Plan needs to be developed further and should be more specific in the minimum standards that it sets out, such as specifying the types of policies that states should adopt so as to ensure uniformity in the Plans' implementation and coordination, which is the objective of the Plan. The Plan also requires the harmonisation of SADC member states laws and policies; to this effect, the differences in legal systems should be acknowledged and appropriate adaptations made, the differences in legal systems should not hamper harmonisation efforts.

³⁷² European Commission 'Daphne II Programme'
<http://ec.europa.eu/justice_home/funding/daphne3/funding_daphne-en.htm> (accessed on 10 October 2009).

This chapter has also discussed the Convention and the Framework decision, Europe's approach to trafficking. These instruments although similar are different. The former is human rights focused while the latter concentrates on criminal law, each modelled on the Palermo Protocol but also going beyond the provisions of the Protocol. They provide examples of how a region can cooperate in order to address a problem. Nonetheless, the region does not solely depend on legislation; Europe also incorporated non-legal measures to support its legislative efforts. There is some insight that SADC can garner from Europe's human trafficking policies – the good and the bad.

Although it is common to read about best practices such as analysing how a particular region is addressing a problem, the processes and solutions involved and the application of those solutions to another region. The reality is that the unadulterated application of best practices is inappropriate. Although the processes and solutions may be utilised, it should be acknowledged that each country is different and has its own peculiarities and the use of any best practices must be done with caution, requiring modification; an adaptation of a particular regions standards to suit those of another – this is especially true when the two regions are as disparate as Europe and Africa.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This study set out to investigate the measures taken within the SADC region to address human trafficking both at the national and regional levels. This study was undertaken in view of the increased reports of human trafficking in individual countries and the region and in view of the absence of human trafficking legislation and programmes in many Southern African countries.

In light of the information reflected in this study, this chapter sets out a number of recommendations to help SADC and the institutions and organs tasked in the Plan of Action with its implementation.

5.1 Summary and Conclusion

This study discussed the phenomenon of human trafficking, tracing its history, defining it and establishing the numerous human rights violations that victims suffer. The study further discussed some significant root causes of trafficking within the SADC region and analysed the legislative frameworks of three countries in SADC, setting out the strengths and weaknesses of the legislation.

The study then proceeded to review the SADC regional Plan of Action, highlighting its significant provisions. This was followed by an analysis of two European instruments whose advantages and disadvantages were emphasised, additionally, non legal measures utilised in Europe were set out and lessons from Europe were drawn out for SADC efforts.

There are no quick fix solutions to addressing human trafficking, it requires a comprehensive and coordinated approach that incorporates all available players such as NGOs, social authorities, law enforcement, judicial and migration authorities at the national and international level.³⁷³ Trafficking will not cease overnight or simply because governments and organisations declare war on it. But it requires a long term commitment, dedication of financial and human resources and most importantly coordination and cooperation at the international, regional and national level.

³⁷³ Askola (n 315 above) 5.

5.2 Recommendations

In light of the foregoing, for the SADC region to effectively prevent and tackle human trafficking and protect the citizens of member states through the Plan of Action, the subsequent recommendations are proposed;

1. The Plan should be re-modelled; the process should involve thorough consultations with civil society organisations, legislative, judicial and national human rights institutions for the review, adoption and operation of the Plan.
2. For purposes of knowledge sharing and capacity building, existing and novel NGOs within the SADC region should network with international and regional NGOs as well as UN specialised agencies that have been active in campaigning for government recognition of human trafficking as a problem. For example, Anti – Slavery International, Coalition Against Trafficking in Women, Global Alliance Against Trafficking in Women and Human Rights Watch. Furthermore, there must be interaction between government, NGOs and the private sector in addressing human trafficking.
3. SADC governments must address the prostitution and sex industries in their countries, establishing specific laws whether these criminalise, abolish or regulate prostitution and the sex industry. Moreover, member states must effectively address the demand aspect of trafficking for sexual exploitation and the root causes of trafficking through policies and programmes.
4. The Ministries of Education in member states must include in their curriculum, information on human trafficking, its causes, forms, processes, consequences and solutions. This curriculum must be adapted for primary, secondary, tertiary, college and university institutions.
5. Regular training seminars should be conducted for professionals such as lawyers, judges, doctors, social workers and counsellors through the professional associations that regulate and monitor professionals in the respective countries. Advocacy should also occur at the community level in rural and urban areas targeting adults, adolescents and children.
6. Member states should each establish resource centres and at least one secure centre that shelters victims, provides counselling and information, legal assistance, protection, rehabilitation and reintegration.
7. Member states should adopt a Protocol that criminalises human trafficking within the SADC region. It should incorporate human rights, migration, human development and criminal approaches. Furthermore, member states should enact and enforce national legislation based on the regional legislation. Additionally, a

single monitoring body made up of a panel of experts on human trafficking and related matters should be established. This body should be solely mandated with monitoring the implementation of regional and national legislation and policies and programmes.

8. SADC should utilise the Southern African Regional Police Chiefs Organisation (SARPCCO) for regional cooperation in managing trafficking and enhance regional cooperation according to the SADC Protocol on Mutual Legal Assistance in Criminal Matters.
9. The SADC tribunal's jurisdiction should be extended to include the prosecution of traffickers across territoriality. There should also be cooperation between judicial institutions of member states and the SADC tribunal.
10. Regionally and nationally, member states should establish long term income generating schemes and poverty reduction strategies to prevent trafficking. Furthermore, SADC member states should adopt specific programmes that protect citizens from the adverse effects of globalisation, address gender inequality and the HIV and AIDS pandemic.
11. In view of the upcoming 2010 FIFA World Cup; member states should establish effective temporary programmes that facilitate monitoring of possible trafficking cases and cooperation of police and immigration officials within the region. These programmes must balance human rights, migration and crime concerns.

Ultimately, this study has sought to answer the questions established in Chapter one.

Human trafficking will not be eradicated in five or ten years; it requires long term commitment and the investment of human and financial resources. The process of preventing it, protecting citizens and victims and prosecuting perpetrators is lengthy; in the mean time, SADC countries need to coordinate and cooperate in order to effectively address this vice and they can do so by implementing regional legislation and non legal programmes while simultaneously enacting national laws and programmes based on the regional framework.

27,846 (excluding table of contents and bibliography)

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The EU Framework Decision on Combating Trafficking in Human Beings

SADC Protocol on Mutual Legal Assistance in Criminal Matters

SADC Declaration on Gender and Development

Treaty of the Southern African Development Community

International Instruments

Convention against Torture and other Cruel, Inhuman and Degrading Treatment

Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others

Convention on the Elimination of All Forms of Racial Discrimination

International Agreement for the Suppression of White Slave Traffic

International Convention for the Suppression of Traffic in Women and Children

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

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