

**LEGAL PROTECTIONS TO VICTIMS OF TRANSNATIONAL  
TRAFFICKING: THE CASE OF ETHIOPIA AND  
MOZAMBIQUE**

**Submitted in partial fulfilment of the requirements of the  
degree LLM (Human Rights and Democratisation in Africa)**

**By**

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## **DECLARATION**

I, ANCHINESH SHIFERAW MULU, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

**Signature:** \_\_\_\_\_

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**Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**DEDICATIONS**  
**to**  
**My beloved family**  
**and**  
**Victims of trafficking around the globe**

## **ACKNOWLEDGMENTS**

I am indebted to the almighty God for opening opportunities and making my dreams come true. My mom and dad and sisters you have been there for me from the beginning to the end. I am all I am because of you. Thank you very much for your priceless support and assistance. I cannot pay back what you did for me except by saying thank you.

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## **LIST OF ABBREVIATIONS**

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>AU</b>	African Union
<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination against Women
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CRC</b>	Convention on the Rights of the Child
<b>ECCAS</b>	Economic Community of Central African States
<b>ECOWAS</b>	Economic Community of West African States
<b>EU</b>	European Union
<b>FDRE</b>	Federal democratic Republic of Ethiopia
<b>ICCPR</b>	International Convention on Civil and Political Rights
<b>ICESCR</b>	International Convention on Economic, Social and Cultural Rights
<b>ICPRMWF</b>	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
<b>ILO</b>	International Labour Organisation
<b>IOM</b>	International Organisation of Migration
<b>NGOs</b>	Non-Governmental Organisations
<b>Palermo Protocol</b>	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
<b>SADC</b>	Southern Africa Development Community
<b>SANTAC</b>	Southern Africa Network against Trafficking and Abuse of Children

<b>SARPCCO</b>	Southern African Regional Police Chiefs Co-operation Organisation
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UN.GIFT</b>	United Nations Global Initiative to Fight Human Trafficking
<b>UNTOC</b>	United Nations Convention on Transnational Organised Crime
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNICEF</b>	United Nations Children’s Fund
<b>UNODC</b>	United Nations Office of Drugs and Crime
<b>US</b>	United States of America
<b>VoT</b>	victims of trafficking

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the Study

Human trafficking is a modern form of slavery. It involves exploitation of human beings in the most intolerable way by deceiving and taking them from their home and family. The potential monetary turnover from exploitation is enormous for traffickers. In most legal regimes, victims are left without any remedy upon the prosecution of the trafficker. They may be expatriated to their home country having nothing after being exploited.<sup>1</sup> Human trafficking mainly targets the vulnerable group of the society usually women and children.<sup>2</sup> Under international legal frameworks, protection has been put in place in order to oblige states to prosecute traffickers and rectify the damage on the victims. However, 'the principal emphasis of [international instruments] remains firmly on the interception of trafficking rather than the identification and protection of [VoT].'<sup>3</sup> In addition, there are still problems in the enforcement of these legal instruments which scarcely cover the protection of VoT. A paradigm shift is necessary from criminal justice approach to victim-oriented approach.

International human rights instruments can be used to protect VoT. Special protections should also be available that can help VoT recover from their past trauma and start to integrate with their new life. These protections might extend from saving them from deportation in the event that their repatriation will endanger their safety to facilitate reparation for the damage they suffer by their traffickers. The protection may also include witness protection since it is only them that can testify and facilitate the prosecution of the perpetrators.<sup>4</sup> Even if they have been engaged in illegal activities such as dealing with drugs,

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<sup>1</sup> E Pearson *Half-hearted protection: What does victim protection really mean for victims of trafficking in Europe?* in R Masika (ed.) *Gender, trafficking and slavery* (2002) 56.

<sup>2</sup> CJ Wennerholm *Crossing borders and building bridges: The Baltic region networking project* in R Masika (ed.) *Gender, trafficking and slavery* (2002) 10.

<sup>3</sup> MT Ladan *Migration, trafficking, human rights and refugees under international law: A case study of Africa* (2004) 116.

<sup>4</sup> AD Jordan *Human rights or wrongs? The struggle for a rights-based response to trafficking in human beings* in R Masika (ed.) *Gender, trafficking and slavery* (2002) 34.

prostitution etc, they should be exonerated from punishment for the fact that they engage in those activities without their consent.<sup>5</sup>

VoT and undocumented migrants are confused which undermined the protection that should be accorded to VoT. These two concepts need to be treated differently. Special protection should be accorded to VoT unlike undocumented migrants who might face detention and deportation based on migration laws.<sup>6</sup>

The stress given to the protection of VoT differs from country to country. For instance, under the Ethiopian legal system, trafficking is dealt from criminal justice aspect ignoring the protection aspect of it. Contrary to this, the Mozambique's legal system has provided a comprehensive law for protection of VoT.

## **1.2 Objectives of the Study**

The research will explore the international protection accorded to VoT under the Palermo Protocol and other instruments. The protections accorded to VoT at the African level will be duly dealt with under this research. It also looks into the challenges faced in enforcing those protections under the domestic forum. Furthermore, it will inquire into the adequacy of the legal protection granted to VoT under the Ethiopia legal framework in comparison to the international legal framework and to the Mozambique experience.

## **1.3 The Research Questions**

The study will address the following issues:

- a. How do we distinguish the case of trafficking from slavery, smuggling and asylum seeking and illegal immigration?
- b. What are the available remedies internationally to safeguard the rights of VoT?
- c. What are the legal obligations of destination countries in regard to the protection of VoT before they repatriate them to their home countries?
- d. What kind of protection should receiving states of VoT accord to victims in case of their repatriation?
- e. What measures have been taken at the Africa level to protect VoT?

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<sup>5</sup> as above.

<sup>6</sup> B Iselin & M Adams *Distinguishing between human trafficking and people smuggling* (2003) 8.

- f. What are the legal frameworks put in place in Ethiopia and Mozambique to protect VoT?

#### **1.4 Definition of Terms**

- a. 'Trafficking in persons' is defined as  
the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>7</sup>
- b. The 'smuggling of people' is defined as  
the procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a state Party of which the person is not a national or a permanent resident.<sup>8</sup>
- c. A 'refugee' is defined as a person who  
owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...<sup>9</sup>
- d. Forced labour defined as '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.'<sup>10</sup>

#### **1.5 Literature Survey**

A number of materials are produced on trafficking especially after the enactment of the Palermo Protocol which made the issue of trafficking gain momentum. Even if there are plenty of literatures on trafficking, most of them focus on the prosecution aspect of trafficking.<sup>11</sup> Recently, some materials appeared which look into the protections VoT

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<sup>7</sup> Art 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).

<sup>8</sup> Art 3(a) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air.

<sup>9</sup> Art 1 (a)(2) of the 1951 Convention Related to the Status of Refugees.

<sup>10</sup> Art 2(1) ILO Convention no. 29 (1930).

<sup>11</sup> For instance T Obokata 'Trafficking of human beings as a crime against humanity: Some implications for international legal system' 54 (2) *International and Comparative Law Quarterly* (2005) 445-457.

deserve. In 2006, Amiel, in his article looks, trafficking from human rights perspectives and argues that the issue of VoT has been downplayed by the priority accorded to criminal justice than restoration of victims' integrity and human rights. His article focuses on trafficking of women for sexual exploitation in the European context.<sup>12</sup> Obokata, in his book, emphasis on the human rights protections victims should be accorded in light of the cases in Thailand, Poland and the United Kingdom.<sup>13</sup>

Most of the literatures either deal with trafficking of children or women ignoring trafficking of men. Furthermore, they focus on trafficking from Eastern Europe and Asia. At the African level there are scant studies made on trafficking. From the LL.M dissertations at the Centre for Human Rights, Pretoria University, the dissertation done by Kamidi focuses on the issue of child trafficking in South Africa and Benin.<sup>14</sup>

However, this study looks at the problem of trafficking in a holistic way focusing trafficking of men, women, and children and also victims' protection in Africa using Ethiopia and Mozambique as a case in point.

## **1.6 Research Methodology**

The main methodology that is utilized in this research is literature review. Library based research on the available literatures and legal instruments are made. Interviews with appropriate authorities and organs in Mozambique are also conducted. The study mainly employs legal positivism approach.

## **1.7 Overview of Chapters**

This research has five chapters. The first chapter deals with introductory matters such as objective of the study, methodology and literature survey. Chapter two of the research mainly focuses on laying the ground by analyzing the definition of trafficking and the different approaches to trafficking. The distinction between human trafficking and smuggling, asylum seeking and illegal migration is drawn under this chapter. Chapter three

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<sup>12</sup> A Amiel 'Integrating a human rights perspective into the European Approach to combating the trafficking of women for sexual exploitation' 12 *Buffalo Human Rights Law Review* (2006) 16.

<sup>13</sup> T Obokata *Trafficking of human beings from a human rights perspective: Towards a holistic approach* (2006).

<sup>14</sup> R Kamidi 'A legal response to child trafficking in Africa: A case study of South Africa and Benin' unpublished master's thesis, Centre for Human Rights, Faculty of Law, University of Pretoria (2007).

deals with the protection of VoT under international and regional laws. Under this chapter, the kind of protections provided under the Palermo Protocol and its limitations is explored. In addition, the African response at the continental level and at the subregional level is discussed. The fourth chapter is devoted to making analysis of the legal and institutional frame work put in place under the Ethiopian and Mozambique legal systems to protect VoT. The final chapter provides the conclusion and recommendations that must be adopted for better protection of VoT.

## **1.8 Delineation**

This paper is limited only in dealing with the available legal protection to VoT. It does not deal with the legal framework for the prevention and prosecution of trafficking. It focuses only on transnational trafficking as oppose to internal trafficking.

## **1.9 Limitations of the study**

The writer of this paper has made meticulous effort to make 'email-interviews' with some governmental institutions and NGOs based on Ethiopia. However, this effort was not fruitful. As a result, information from internet and from different reports has been relied upon as the main source in discussing protection of VoT in Ethiopia.

## CHAPTER TWO

# CONCEPTUAL DISCOURSE ON TRAFFICKING

### 2.1 Introduction

Trafficking has 'become one of the fastest growing and most lucrative criminal activities occurring both worldwide and in individual countries.'<sup>15</sup> According to some estimation, between 600 000 and 800 000 people are trafficked across borders annually.<sup>16</sup> The turnover from trafficking is also estimated to be \$7 to \$10 billion a year.<sup>17</sup>

Different people become vulnerable for trafficking for different reasons. Poverty, gender inequality, economic transition and scarcity of jobs are some of the explanations for trafficking.<sup>18</sup> The strict migration laws put in place by destination countries (most of them developed nations) also led people to choose the illegal way and be more prone to trafficking.<sup>19</sup> In addition, people may be trafficked because of the demand for labour, sex work or body organs.<sup>20</sup> The US Department of State report of 2004 shows that approximately 70% of women and 50% of children trafficked are sexually exploited.<sup>21</sup> Most of the women trafficked for sexual exploitation become vulnerable for HIV, early pregnancy and then unsafe abortion.<sup>22</sup> Children are also being trafficked and given for adoption for the person who pays the highest amount of money (highest bidder).<sup>23</sup> Several individuals, including recruiters, trainers, purveyors, creators of false documentation, transporters, money collectors, enforcers, and parents are involved in child trafficking.<sup>24</sup> Men also become VoT especially for forced labour. However, men as being the VoT have been ignored. More focus has been geared towards trafficking in women and children.<sup>25</sup>

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<sup>15</sup> T Makarenko 'Organized crime or crimes organized? Isolating and identifying actors in the human trafficking chain' in A Johsson (ed.) *Human trafficking and human security* Routledge (2009) 28.

<sup>16</sup> US Department of State 'Trafficking in Persons Report 2005' available at <<http://www.state.gov/documents/organisation/47255.pdf>> quoted in Amiel (n 12 above) 5.

<sup>17</sup> C Gould & N Fick *Selling sex in Cape town: Sex work and human trafficking in a South African city* (2008) 94.

<sup>18</sup> Amiel (n 12 above) 7.

<sup>19</sup> H Fisher 'The sex slave trade: Biological imperatives, cultural trends, and the coming empowerment of women' 13 *Hastings Women's Law Journal* 21 (2002) 22.

<sup>20</sup> KA McCabe *The trafficking of persons: National and international responses* (2008) 4.

<sup>21</sup> as above, 28.

<sup>22</sup> McCabe (n 20 above) 29.

<sup>23</sup> McCabe (n 20 above) 80.

<sup>24</sup> McCabe (n 20 above) 82.

<sup>25</sup> McCabe (n 20 above) 45.

Trafficking business is taken as 'a low-risk, high-return' prospect for the traffickers because of the difficulty the law enforcement organs face to trace it.<sup>26</sup> One of the reasons is that victims are rotated from one place to another by the traffickers which make it difficult for the police to identify trafficking. The second reason is that of the secretive nature of the crime. 'The "code of silence" among the victims of sex trafficking (similar to that of domestic violence victims) often remains in place even when the victims are questioned by law enforcement about their victimization.'<sup>27</sup> VoT might be unwilling to testify against their traffickers since they have established a strong bond with their traffickers out of fear.<sup>28</sup> This situation is called Stockholm syndrome which is a case experienced in Stockholm, Sweden captives who had developed 'cognitive distortions of positive feelings....for their captors.'<sup>29</sup> In addition, trafficked persons are not considered to be victims. They are associated with smuggled persons. Because of these victims may not report to the police for fear of deportation.<sup>30</sup> In contrast to their traffickers, VoT are in weak position. Their trafficker may buy off officials. Furthermore, victims do not consider themselves as victims of human trafficking. They have a misconception that the exploitation they suffer is as a result of their own fault.<sup>31</sup> Thus, most of the time, they do not cooperate with law enforcement organs and may even resist any support from the government.<sup>32</sup>

## **2.2 Problems of the Definition of Trafficking**

In order to accord VoT protection there is a need for a comprehensive and clear definition of trafficking which will able us to pin point VoT. To this end the Palermo Protocol defines trafficking.<sup>33</sup> The definition contains three separate elements of trafficking:

1. An action, consisting of: Recruitment, transportation, transfer, harbouring or receipt of persons;

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<sup>26</sup> Weissbrodt & Anti-Slavery International, OHCHR *Abolition slavery and its contemporary forms* United Nations (2002) 19.

<sup>27</sup> McCabe (n 20 above) 29.

<sup>28</sup> McCabe (n 20 above) 47 & 46.

<sup>29</sup> McCabe (n 20 above) 48.

<sup>30</sup> McCabe (n 20 above) 13.

<sup>31</sup> as above.

<sup>32</sup> McCabe () 47.

<sup>33</sup> Weissbrodt & Anti-Slavery International (n 26 above) 18; The Trafficking Protocol, supplement the United Nations Convention against Transnational Organized Crime. The Protocol is the first international instrument to come up with the definition of 'trafficking in persons.'



2. By means of: Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another;

3. For the purpose of: Exploitation (including, at a minimum,<sup>34</sup> the exploitation of the prostitution of others, or other form of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs).

This definition is very broad. The rationale for setting a broad definition in the Protocol was on the one hand to be able states to formulate domestic legislation which incorporate their situation and on the other hand to encourage state to sign up the Protocol such as states which have already legalized sex work since it can give them broader discretion.<sup>35</sup> Furthermore, it is difficult to have an adequate definition of trafficking. The crime of trafficking lacks the unity of time, place, perpetrators and activity. The persons involved are different. There can be recruiter, exploiter and transporter. The recruitment takes in one country while the exploitation is undertaken in another country on another time. This makes it very difficult to have a narrow but all catching definition. Thus, the net is cast wide enough to capture all perpetrators in the chain of abuse which made the definition of trafficking to become broad to include almost any act through which an individual ends up in an exploitative situation.<sup>36</sup>

### **2.2.1 Actions**

The definition requires the action of 'recruitment, transportation, transfer, harbouring or receipt of persons' for trafficking to take place.

### **2.2.2 Means**

In the negotiation process of the definition of trafficking, it had become difficult to reach an agreement whether the means used to secure the consent of the victim for the transportation and harbouring should be a determinant factor in the definition of trafficking in persons. Some argued that it is difficult to have one workable definition of trafficking

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<sup>34</sup> The word 'at a minimum' is used in lieu of a listing of specific forms of exploitation and in order to ensure that unnamed or new forms of exploitation were not excluded by implication. (UN Doc. A/AC.254/4/Add.3./Rev.7 (2000)).

<sup>35</sup> Gould & Fick (n 17 above) 90.

<sup>36</sup> Gould & Fick (n 17 above) 91.

because '[t]he shared international agenda that is designed to combat forced labour and slavery may really include several agendas including countering organised crime and abolishing prostitution.<sup>37</sup> Two groups were debating on the issue. The abolitionist group viewed prostitution as

violation of human rights under any circumstances (even if the woman consented) and take every prostitute persons as [VoT]. On the other hand, Sex Workers Rights Movement proposed for legalization of sex work and legislations which will regulate the sex industry. They argued force or deception should be necessary element of the definition of trafficking to differentiate it from consented prostitution. These two groups pursue for different definition of trafficking.<sup>38</sup>

But the final definition puts 'coercion, abduction, abuse of power etc' as elements in the definition of trafficking. However, the Protocol also 'unwieldy note to the effect that consent to intended exploitation is to be irrelevant where any of the stated elements which actually define trafficking (coercion, fraud, abuse of power etc) have been used.<sup>39</sup> This is made so that traffickers will not use consent of the victim of trafficking as a defence.<sup>40</sup> Thus, if a victim of trafficking withdraws his/her consent later on, even if that he/she has given his/her consent initially, it will be a case of trafficking from the time of the withdrawal of consent.<sup>41</sup> The fact that the definitional on the one hand requires 'coercion, fraud, abuse of power etc' as an essential element for trafficking to exist and on the other hand it makes the existence of consent irrelevant was taken as a victory by both groups.<sup>42</sup>

The other issue was that the definition use very vague and subjective terms. For example, coercion is a very broad term which includes physical and psychological one. Whether deception is part of coercion is also controversial issue. The Interpretative Notes for the official records (*travaux preparatoires*) defined 'deception' to mean 'a person has been tricked into a vulnerable or abusive situation.<sup>43</sup> It has been pointed that the definition

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<sup>37</sup> Gould & Fick (n 17 above) 93.

<sup>38</sup> J Doezema *Who gets to choose? coercion, consent, and the UN trafficking Protocol* in R Masika (ed.) *Gender, trafficking and slavery* (2002) 20; It has been also argued that considering trafficked people as victims whenever they have given consent is paternalistic approach.

<sup>39</sup> Ladan (n 3 above) 109; (n 7 above) art 3(b).

<sup>40</sup> Weissbrodt & Anti-Slavery International (n 26 above) 23; Gould and Fick (n 17 above) 92.

<sup>41</sup> Obokata (n 13 above) 26.

<sup>42</sup> Doezema (n 38 above) 20.

<sup>43</sup> 'An abuse of power or position of vulnerability' also defined to occur when 'a person involved had no real and acceptable alternative but to submit to the abuse involved.' United Nations document A/55/383/Add.1, para. 63 quoted in Weissbrodt & Anti-Slavery International (n 26 above) 22.

'recognizes that trafficking can occur without any actual threat or use of force.<sup>44</sup> Issues as to whether economic hardship, fear of prosecution, armed conflict or terrorism will constitute coercion when the trafficker take advantage of such situation has been raised. It has been argued that the definition is broad enough to include these situations as a form of coercion.<sup>45</sup>

Furthermore, the issue of who has to proof the existence of coercion/force triggers controversy. it is difficult to proof coercion/force. It requires extensive investigation of the situation. The trafficking and Smuggling Protocols 'appear to place the burden of proof squarely on the individual seeking protection.<sup>46</sup>

### 2.2.3 Purposes

The definition provides the end result of trafficking should be for exploitation of the victim for one of the purposes stated therein.<sup>47</sup> However, the Protocol failed to include the worst forms of child labour as identified by ILO Convention 182 in its list of forms of exploitation.<sup>48</sup> This can be ratified by the fact that the provision is made open deliberately so that new forms of exploitation such as purchasing or trafficking of babies under the umbrella of adoption can be part of it in the future.<sup>49</sup>

The Protocol made 'the exploitation of the prostitution of others, or other form of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs' to be elements of the purpose of exploitation.<sup>50</sup> The definition of 'slavery, forced labour, practice similar to slavery, or servitude' can be inferred from various international instruments and from the earlier drafts.<sup>51</sup> However, exploitation of the

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<sup>44</sup> N Ollus 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A tool for criminal justice personnel' (Resource Material Series No 62) 22 available at <[www.unafei.or.jp/english/pdf/PDF\\_rms/no62/Finland\(1\).pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no62/Finland(1).pdf)> (accessed on 31 August 2009).

<sup>45</sup> LA Malone 'Economic hardships as coercion under the Protocol on international trafficking in persons by Organised Criminal elements,' 25 *Fordham International Law Journal* 54 (2001) 89-91 quoted in Obokata (n 13 above) 25.

<sup>46</sup> Ladan (n 3 above) 122.

<sup>47</sup> n 7 above, art 3(a).

<sup>48</sup> Ladan (n 3 above) 112.

<sup>49</sup> Ollus (n 44 above) 22: BD Mezmur 'From Angelina (to MADONNA) to Zoe's Ark: What are the 'A – Z' lessons for intercountry adoptions in Africa?' *International Journal of Law, Policy and the Family* (2008) 13.

<sup>50</sup> n 7 above, art 3(a).

<sup>51</sup> Art 1 of the UN Slavery Convention of 1926 for the definition of slavery; Art 2(1) of ILO Convention No. 29 (1930) for the definition of forced labour and art 1(b) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

prostitution of others or other forms of sexual exploitation is not defined under any international instruments. According to the Interpretative Notes (*Travaux préparatoires*), it is left to states to define under their domestic laws based on their position towards prostitution.<sup>52</sup> There was a debate whether 'use in prostitution' should be included as a form of exploitation. However, the final draft departed from such proposal and come up with 'exploitation of the prostitution of others' (pimping) to be one of the forms of exploitation. Generally, the Protocol tried to compromise the two extreme views which support prostitution on the one hand and the other one which was totally against it.<sup>53</sup> The *travaux préparatoires* indicates that 'the Protocol addresses the issue of prostitution only in the context of trafficking, and that these references are without prejudice as to how states address this issue in their respective domestic laws.'<sup>54</sup>

All the three elements of trafficking must exist except in case of children for whom the second requirement is waived. In addition, article 4 of the Trafficking Protocol provides that the Protocol is applicable where trafficking is perpetrated by an organised criminal group across international borders. In order to say a crime is organised crime, the crime must be committed by a structured group of three or more persons.<sup>55</sup> However, it is 'evidently irrelevant to an individual who has been trafficked and whose human rights have been abused whether one, two, three or more people were responsible.'<sup>56</sup> In addition, trafficking within the national borders (internal trafficking) is not covered by the Palermo Protocol.

### **2.3 Distinguishing Features of Trafficking**

Some authors question the need for the concept of trafficking. They argue that 'if the intention of counter trafficking is to combat forced labour and slavery, there is no moral or analytical reason to distinguish between forced labour involving "illegal immigrants", "smuggled persons" or "victims of trafficking".' They, further, point out that

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<sup>52</sup> Weissbrodt & Anti-Slavery International (n 26 above) 23; Jordan (n 4 above) 32.

<sup>53</sup> Ladan (n 3 above) 109.

<sup>54</sup> Ladan (n 3 above) 110.

<sup>55</sup> Art 2(a) of the Convention against transnational Organized Crime: The Convention against Transnational Organized Crime is referred to as the 'parent' agreement. Its principle provisions apply, mutates mutandis, to the three additional Protocols dealing respectively with Smuggling of Migrants, Trafficking in Persons, Especially Women and Children, Trafficking in firearms; MT Ladan *Migration, trafficking, human rights and refugees under international law: A case study of Africa* (2004).

<sup>56</sup> Weissbrodt & Anti-Slavery International (n 26 above) 21.

the distinction between trafficking and smuggling may be clear to those who attach political priority to issues of border control and national sovereignty, but it is far from obvious to those who are primarily concerned with the promotion and protection of the rights of migrant workers.<sup>57</sup>

However, trafficking needs a special treatment from 'illegal immigration', 'smuggling' and 'slavery' for the reason that the protection that is accorded to VoT is different from smuggled people or illegal migrants.<sup>58</sup> The existence of coercion and deception in trafficking portray those trafficked people as victims of human rights abuse unlike the case of smuggling and illegal immigration in which case smuggled people or the illegal migrant might be subjected to measures like arrest, detention and deportation.<sup>59</sup> However, VoT are provided a protection from charges and prosecution for the illegality of entry or residence in the country of destination or for illegal acts they committed as a consequence of their situation as trafficked persons.<sup>60</sup> Thus, trafficking should be considered separately from smuggling and illegal migration.

### **2.3.1 Trafficking Vs Smuggling**

Smuggling is voluntary. There is no coercion or deception. The job of the smuggler ends after the people reach their destination. Smuggling necessary involves crossing of borders.<sup>61</sup> However, trafficking does not necessarily require the crossing of border as long as the act of transportation exist which can be within the country or out of the country.<sup>62</sup> Smuggling always entails illegal entry while trafficking might involve legal entry of individuals.<sup>63</sup> Furthermore, trafficking involves unlike that of smuggling exploitation.<sup>64</sup>

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<sup>57</sup> Gould & Fick (n 17 above) 93.

<sup>58</sup> T Obokata 'Smuggling of human beings from human rights perspective: Obligations of non-State and State actors under international human rights law' 17 *International Journal of Refugee law* (2005) 397.

<sup>59</sup> A Gallagher 'Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis' (2001) 23 No 4 *Human Rights Quarterly* 1000 quoted in Obokata (n 13 above) 21.

<sup>60</sup> Office of the United Nations High Commissioner for Refugees Recommended principles and guidelines on human rights and human trafficking (2002) 4.

<sup>61</sup> Obokata (n 13 above) 21.

<sup>62</sup> McCabe (n 20 above) 5.

<sup>63</sup> *Travaux preparatoires* of the Smuggling Protocol, A/AC.254/4/Add.1/Rev.1-6, and A/55/383/Add.1 quoted in Obokata (n 13 above) 21.

<sup>64</sup> Obokata (n 58 above) 397.

In case of smuggling, the smuggled person will not maintain a relationship with the smuggler after crossing the border.<sup>65</sup> However, in case of trafficking, the relation between the trafficked person and the trafficker is a continuous one. Sometimes smuggling may change its face to trafficking if the smuggled person loses his freedom of movement after he reaches the destination place.<sup>66</sup>

### **2.3.2 Trafficking Vs Slavery**

Trafficking has been described as the contemporary form of slavery by different authors on the issue. Even if it is called a contemporary form of slavery, trafficking and slavery are not essentially the same. Article 1 of the 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised.' In the traditional form of slavery, slaves are owned by their holders legally. The slave owners have a legal right over his slaves. However, the contemporary form of slavery or trafficking is not supported by a legal authority and the right of ownership. The traditional form of slavery was permanent and racial based contrary to the contemporary form of slavery (trafficking) which is temporary and is not based on racial identity.<sup>67</sup> In trafficking, the traffickers exercise the full ownership of the victim in order to exploit him as much as they like. This makes it to be essentially similar with slavery. This view is supported by the opinion of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Kunarac case*.<sup>68</sup> The tribunal held that there is a need to show more than the ability to buy, sell or trade people in order to reach a conclusion that an enslavement had taken place. Thus, there is a need to show that exploitation took place in order to consider an act as slavery. This exploitation should also be continuous one as the tribunal provided 'the duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved.'<sup>69</sup> The traffickers must transport people and exploit them to take the trafficking simultaneously as the case of slavery. However, according to the Palermo Protocol the non-existence of exploitation because of early interception of the act by law

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<sup>65</sup> McCabe (n 20 above) 6.

<sup>66</sup> McCabe (n 20 above) 6.

<sup>67</sup> T Obokata (n 13 above) 18.

<sup>68</sup> Prosecutor v. Kunarac, IT-96-23, Trial Judgment, 22 February 2001 quoted in Obokata (n 13 above) 19.

<sup>69</sup> Prosecutor v. Kunarac, IT-96-23, Trial Judgment, 22 February 2001, para. 542 quoted in Obokata (n 13 above) 19.

enforcement authorities after the person is trafficked for that purpose does not preclude the case from being considered as trafficking. The *mens rea* at the time of trafficking to exploit the victim is enough to take it as a case of trafficking.<sup>70</sup> However, if there is no intention of exploitation at the time of transportation then the case will fall under smuggling.

### **2.3.3 Trafficking Vs Illegal Migrants or Asylum Seekers or Refugees**

Illegal migrants used to cover all of the foreigners who are in a particular country illegally.<sup>71</sup> Most of them migrate for the reason of economic hardship.<sup>72</sup> VoT might fall as illegal migrants. However, all illegal migrants are not VoT since illegal migrants have made autonomous decision to migrate seeking employment or new life elsewhere while VoT are deceived and coerced to make such a decision.<sup>73</sup>

When we see the distinctions between refugees or asylum seekers and trafficking, refugees are those who are outside their country for a well-founded fear of persecution.<sup>74</sup> They have the right to seek asylum.<sup>75</sup> Those who acquire refugee status will not be deported because of the risk of persecution. However, VoT can return back to their home country when it is found out to be safe. Refugees who seeks asylum enter into a country illegally while VoT might enter into a country either legally or illegally. There is no third party involvement in case of asylum seekers while in case of trafficking there are third party involvement such as recruiters, transporters and exploiters.

## **2.4 Indicators to Identify VoT**

The Palermo Protocol does not provide for the definition of VoT beyond giving the definition of 'trafficking in persons.' The UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines a victim as an individual who 'suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of

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<sup>70</sup> Obokata (n 13 above) 20.

<sup>71</sup> Iselin & Adams (n 6 above) 2.

<sup>72</sup> S Kneebone (ed.) 'Refugees, asylum seekers and the rule of law' available at <<http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=9780521889353&ss=exc>> (accessed on 5 October 2009).

<sup>73</sup> A Joshi 'The face of human trafficking' 13 *Hastings Women's Law Journal* (2002) 32.

<sup>74</sup> n 9 above, art 1A(2); Art 1(1) of the 1969 OAU Convention Governing Specific Aspects of the Refugee Problem in Africa.

<sup>75</sup> Art 14 of UDHR.

criminal laws operative within member states, including those laws proscribing criminal abuse of power.<sup>76</sup> Thus, VoT are those who suffered harm in the hands of their traffickers.

The other weakness of the Palermo Protocol is its failure to address the issue of how VoT can be identified.<sup>77</sup> This lacuna affects the proper implementation of the provisions which protect victims.<sup>78</sup> Identification of VoT among all sort of illegal migrants and smuggled people is a key for the effective implementation of the Palermo Protocol. In this regard, different groups expressed their concern during the negotiation process of the Palermo Protocol and they submitted that

The distinction that has been made between trafficked persons and smuggled migrants is evidently a useful one. However, the Office of the High Commissioner for Human Rights, UNICEF, UNHCR and IOM are aware that such distinctions are less clear on the ground, where there is considerable movement and overlapping between the two categories. [It has been] determined that trafficked persons are to be granted protections additional to those accorded to smuggled migrants. However, there is little guidance in either instruments regarding how the identification process is to be made and by whom. The (Ad-Hoc Committee) may wish to consider the implications of the fact that...identifying an individual as a trafficking person carries different responsibilities for the state party concerned that in the case when the same person is identified as a smuggled migrant. The Ad-Hoc Committee may also wish to consider the possible consequences of a state ratifying one but not both instruments.<sup>79</sup>

Landan puts the consequence of failure to provide for identification as follows:<sup>80</sup>

Under the terms of the Protocol, dealing with trafficking persons will be more costly and impose a greater administrative burden on states than dealing with smuggled migrants. States, therefore, have an incentive to ratify one but not both Protocols. For the same reasons, border authorities and immigration official responsible for identifying and categorizing irregular migrants also have an incentive to identify such persons as being smuggled rather than as trafficked.

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<sup>76</sup> G.A. Res. 40/34 (1985) quoted in Amiel (n 12 above) 27; This declaration seeks to protect victims of crime by ensuring that they receive access to justice and fair treatment during legal proceedings.

<sup>77</sup> Ladan (n 3 above) 116.

<sup>78</sup> Ladan (n 3 above) 117.

<sup>79</sup> UN Doc A/AC.254/27, Inter-Agency Submission quoted in Ladan (n 3 above) 121; Smuggling and trafficking in persons and the protection of their human rights, Note by Secretary General, United Nations document E/CN.4/Sub.2/2001/26, para 7 quoted in Weissbrodt & Anti-Slavery International (n 26 above) 25.

<sup>80</sup> Ladan (n 3 above) 122.



A person who has been at first smuggled may end up in exploitative situation which might be trafficking. However, this situation is not recognized by both the Smuggling and trafficking Protocols. This shows that there is unwillingness by destination countries to relinquish their control over migrant identification process and according protection to VoT based of their identifications.<sup>81</sup>

In this regard different organisations like IOM, UNODC and UN.GIFT developed different guidelines to identify VoT.<sup>82</sup> Immigration, border and law enforcement authorities should also set up their own systematic procedures to identify VoT. Health, education, social welfare agencies and NGOs should cooperate and report to the law enforcement agencies for the proper identification of victims whenever they come across victims being exploited.<sup>83</sup> Victims should not be expected to identify themselves. For the fear of deportation and arrest, victims may not come forward to law enforcement authorities.<sup>84</sup> The proactive identification process will help to avoid confusion of VoT who needs protection from those of illegal migrants.

Special identification procedure that takes into consideration the circumstance of Children VoT should be adopted. One should also look for a different kind of indicators for different kinds of VoT such as victims of sex trafficking, labour trafficking, domestic servitude etc. Although it is most difficult to identify cases of labour trafficking, there are signs of labour trafficking victimization that are apparent to most cases. Specifically the visible indicators of labour trafficking include

1. victims living within the same area in which they work or victims who are driven from home to work with the employer, supervisor or owner(s) of establishment;
2. victims under the constant surveillance of their employer or other employees; and
3. victims whose translator will be either their employer or another employee when they want to communicate with someone outside of the workplace.<sup>85</sup>

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<sup>81</sup> as above.

<sup>82</sup> See annexure one for an indicators developed by UNODC and UN.GIFT available at <[www.unodc.org/pdf/HT\\_indicators\\_E\\_LOWRES.pdf](http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf)> (access by 3 September 2009).

<sup>83</sup> 'UNICEF guidelines on the protection of child victims of trafficking : UNICEF technical notes' (2006) 14 available at <[http://www.unicef.at/fileadmin/medienn/pdf/UNICEF\\_Guidelines\\_on\\_the\\_Protection\\_of\\_Child\\_Victims\\_of\\_Trafficking.pdf](http://www.unicef.at/fileadmin/medienn/pdf/UNICEF_Guidelines_on_the_Protection_of_Child_Victims_of_Trafficking.pdf)> (accessed on 31 August 2009).

<sup>84</sup> US Department of State 'Trafficking in Persons Report, June 2009' 28 available at <[www.state.gov/g/tip/rls/tiprpt/2009/](http://www.state.gov/g/tip/rls/tiprpt/2009/)> (accessed on 31 August 2009)

<sup>85</sup> McCabe (n 20 above) 48.

Thus, such indicators should at least trigger an investigation on the part of the police. Different indicators also exist for sex trafficking, child trafficking, domestic servitude etc as provided under annexure one.

## **2.5 Approaches to Trafficking**

Human trafficking has not been given attention as one of human rights violation under international legal framework. Human rights violations have been taken to be made by state actors such as policies, soldiers and multilateral institutions. It is recently that violation of human rights in crimes such as trafficking by non-state actors recognised. However, this does not mean that states have no part to play in trafficking. States might be complicit of trafficking if its personnel are corrupted and if it denies justice to the victims. In such a case, the state will be responsible for its failure to protect its citizens or defend the rights of VoT.<sup>86</sup>

Based on the extent of focus on the human right issue involved in trafficking, two approaches have been identified on trafficking. These are criminal justice approach and victim-centered approach.

### **2.5.1 Criminal Justice Approach**

This approach towards human trafficking has been focusing on criminal justice. Its main focus is imposing punishments on offenders, strengthening police co-operation and improving the number of prosecutions and convictions of traffickers as the only way to combat trafficking.<sup>87</sup> It ignored the need for the protection and aid to victims.<sup>88</sup>

States based on this approach has been concentrating on the criminal and migration issues that arise with trafficking. They have not given emphasis to the human rights issues that arise with trafficking.<sup>89</sup> The inclusion of trafficking as a crime against humanity 'when committed as part of a widespread or systematic attack directed against a civilian population

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<sup>86</sup> L Shelley 'Human security and human trafficking' in A Johsson (ed.) *Human trafficking and human security* (2009) 13.

<sup>87</sup> Amiel (n 12 above) 27.

<sup>88</sup> Gallagher (n 59 above) 991.

<sup>89</sup> DF Haynes 'Used, abused, arrested and deported: Extending Immigration benefits to protect the victims of trafficking and to secure the prosecution of traffickers' (2004) 26 *Human Rights Quarterly* 244.

with knowledge of the attack' demonstrate the momentum trafficking has gained as criminal offense.<sup>90</sup>

Internationally also the focus was on the origin countries of trafficking rather than on the destination countries where the demand for trafficked persons is overwhelming. The human rights issue has not been addressed properly under this approach. Thus, there is a need to adopt a holistic approach to trafficking.<sup>91</sup>

## **2.5.2 Victim-centred Approach**

Victim-centred approach focus on the human rights violations victims suffered by their traffickers. It proposes for the protection of VoT in addition to the prosecution of traffickers.<sup>92</sup> Victim-centred approach empowers the victims and fosters victims' integration with the society. It also helps to have holistic approach to trafficking since it helps us to analyse not only the process of trafficking but also the causes and consequences of trafficking. Criminal justice approach cannot be responsive to the whole issues in trafficking. Thus, the causes of trafficking such as poverty, humanitarian crisis, repression of women etc and the consequence of trafficking such as torture, degrading treatment etc are better dealt by human rights or victim centred approach.<sup>93</sup> This does not mean that this approach totally ignore the need for criminal justice. It rather adds the human rights protection of victims as an important part in the solution to trafficking.

The Office of the UN High Commissioner for Human Rights has adopted the Recommended Principles and guidelines on Human Rights and Human Trafficking to change the paradigm from criminal justice approach to victim-centred approach.<sup>94</sup> However, it is not a binding instrument on states.<sup>95</sup>

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<sup>90</sup> Art 10 of Rome Statute of International Criminal Court (ICC).

<sup>91</sup> Obokata (n 13 above) 4.

<sup>92</sup> Haynes (n 89 above) 238.

<sup>93</sup> Obokata (n 13 above) 35.

<sup>94</sup> E/2002/68/Add.1. available at <[http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf)> (accessed on 8 September 2009); Amiel (n 12 above) 37.

<sup>95</sup> Obokata (n 13 above) 4.

## **2.6 Conclusion**

The alarming increasing in the number of VoT should be a wakeup call for states to take measures for the protections of VoT. Trafficking has issues which crosscut the right of migrants, workers rights, sex workers rights, right of children, right of women etc. This shows that trafficking is a crime which needs special attention from human rights perspective and from victims' protection perspective. We need to adopt holistic approach towards the issue of trafficking which will give due considerations to protection of VoT.

## CHAPTER THREE

# INTERNATIONAL AND REGIONAL PROTECTIONS ACCORDED TO VoT

### 3.1 Introduction

At the international level, the 1904 international agreement for the suppression of the 'White Slave Traffic' was the first instrument to deal with trafficking. This agreement provided for the states to refer victims to 'public or private charitable institutions, or to private individuals offering the necessary security' prior to their repatriation.<sup>96</sup> After that the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others adopted by the UN General Assembly in 1949.<sup>97</sup> Article 16 of the Convention calls on states to address the needs of victims of prostitution and trafficking. It provides for victims to be rehabilitated and get social welfares.<sup>98</sup> Recently in 2000 the Palermo Protocol was adopted which provides the protection of victims' of trafficking as its main aim.<sup>99</sup> Under article 6 - 8 of this Protocol, it provides for different obligations of states in regard to the protection of VoT.

Furthermore, VoT can benefit from human rights provisions incorporated under different international and regional instruments. Trafficking violates 'the right to be free from slavery, torture, cruel, inhumane or degrading treatment, and the right to be free from discrimination.' These rights are protected under various UN treaties and UDHR.<sup>100</sup>

### 3.2 International Protection Accorded to VoT

#### 3.2.1 Palermo Protocol

The Palermo Protocol was adopted by the UN General Assembly in November 2000 together with the UNCTOC. It entered into force on 25 December 2003.<sup>101</sup> It has been ratified by 132 states to date and has 117 signatories. States must ratify the UNCTOC before ratifying

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<sup>96</sup> Art 3 of the international Agreement for the Suppression of the 'White Slave Trafficking' May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 quoted in Amiel (n 12 above) 25.

<sup>97</sup> Amiel (n 12 above) 24-25.

<sup>98</sup> Amiel (n 12 above) 25; SF Toepfor & BS Wells 'The worldwide market for sex: A review of international and regional legal prohibition regarding the trafficking in women' 2 *Mich. J. Gender and L.* (1994) 83, 93 quoted in SC Inglis 'Expanding international and national protections against trafficking for forced labour using a human rights framework' 7 *Buffalo Human Rights Law Review* (2001) 57-58.

<sup>99</sup> n 7 above, art 2(b) & its Preamble.

<sup>100</sup> Amiel (n 12 above) 35.

<sup>101</sup> Weissbrodt (n 26 above) 18.

Palermo Protocol. However, states may become party to the Convention without having to ratify the Protocol.<sup>102</sup>

The Palermo Protocol deals with trafficking in persons which includes trafficking of men but giving a special attention to trafficking of women and children.<sup>103</sup> It provides for the prevention and combating of trafficking, prosecution of participants in trafficking, and protection of VoT particularly women and children as its main purpose.<sup>104</sup> It deals with protection of VoT under article 6 - 8 which should be read together with articles 24 and 25 of the UNCTOC.<sup>105</sup> This protection aspect of the Protocol is discussed below.

### ***Right of Victims to Participate in Investigation and Prosecution***

Palermo Protocol provides for states to prosecute perpetrators of trafficking in strong terms.<sup>106</sup> Effective prosecution of traffickers is also one form of redress for the victims. In addition, favourable conditions must be created for the victims to participate and their views and concerns to be presented and considered in the investigation and prosecution.<sup>107</sup> This can lead to restoration of victims' dignity and self-worth which might reduce their anger and trauma in a constructive way. This also prevents the victims' from taking the law in their own hands.<sup>108</sup>

Furthermore, the Palermo Protocol requires states to provide VoT with information on relevant court and administrative proceedings.<sup>109</sup>

### ***Confidentiality of Legal Proceedings***

Article 6(1) of the Palermo Protocol requires states to keep the confidentiality of legal proceedings to protect the victims. Furthermore, it requires states to protect privacy and identity of VoT. However, this provision is put in a soft term and with a qualifying phrase

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<sup>102</sup> Ladan (n 3 above) 103.

<sup>103</sup> Ladan (n 3 above) 107: The earliest drafts of the trafficking Protocol were meant only to deal with trafficking in women and children. However, States, intergovernmental organisations and NGOs argued that 'this approach was unnecessarily restrictive and failed to take into account the fact that men were also trafficked. In the subsequent negotiation the scope of the Protocol expanded to cover 'trafficking in persons-especially women and children.

<sup>104</sup> n 7 above, art 2.

<sup>105</sup> Art 1(2) of the Palermo Protocol makes the UNCTOC applicable to the Protocol.

<sup>106</sup> n 7 above, art 5.

<sup>107</sup> n 7 above, art 6(2)(b) & 25(3) of the UNCTOC.

<sup>108</sup> Obokata (n 13 above) 158; n 7 above, art 6(2)(b)).

<sup>109</sup> n 7 above, Art 6(2)(a).

that requires such protection of VoT to be done 'in appropriate cases and to the extent possible under domestic law.<sup>110</sup>

Furthermore, the Protocol requires states to provide protection to the physical safety of VoT while they are within their territory.<sup>111</sup> This can be done by providing witness protection scheme for victims who testify against their traffickers.<sup>112</sup>

However, states are not required under the Palermo Protocol to provide protection for the family of VoT who testify against their traffickers. Their families may face danger because of the testimony of the victim.<sup>113</sup> However, article 24(1) of the UNCTOC expressly requires for an extension of such protection to the relatives of victims of transnational crimes. This shows that 'for protection to be effective, whether in country of origin or destination, it needs to be longer lasting than the duration of a court case, and it needs to extend beyond the victims to include those close to her/him.<sup>114</sup>

### ***Right to the Provisions of Basic Services***

Governments at the negotiation of the Palermo Protocol refused to give essential services to foreign VoT despite their obligations to respect everyone rights (including non-citizens) under international human rights instruments. One of their reasons was financial setbacks.<sup>115</sup> Despite the arguments of states, the Palermo Protocol requires states (both country of origin and destination) to provide various services which will enable VoT to recover from physical, psychological and social traumas.<sup>116</sup> It requires states to provide basic medical and mental health care, shelter, legal advice in the language they can understand, material assistance and employment, educational and training opportunities. Access to consular assistance from the consular of their home countries should also be available.<sup>117</sup>

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<sup>110</sup> n 7 above, art 6(1).

<sup>111</sup> n 7 above, art 6(4).

<sup>112</sup> Jordan (n 4 above) 34; also n 7 above, art 10(2) & 24 of the UNCTOC.

<sup>113</sup> Shelley (n 86 above) 14.

<sup>114</sup> Pearson (n 1 above) 58.

<sup>115</sup> Jordan (n 4 above) 35.

<sup>116</sup> n 7 above, art 6(3).

<sup>117</sup> Art 36 of the Vienna Convention on consular Relations 1963.

## ***Right to Compensation***

The remedy for victims other than punishing the perpetrators of trafficking is compensation. Compensation serves to 'affirm public respect for the victim and give public recognition of the wrongdoer's fault in failing to respect basic rights.'<sup>118</sup>

The Palermo Protocol expresses the protection of victims in 'soft' terms.<sup>119</sup> However, states are obliged in hard terms to create the possibility for VoT to obtain compensation for the damages they suffered irrespective of their nationality.<sup>120</sup> This compensation to the VoT is primarily intended to be paid by the criminal wrongdoers (trafficker) unlike in case of services for the recovery of victims which is provided by the state in co-operation with NGOs.<sup>121</sup> Destination states should create opportunity and make their jurisdictions open for victims to access its courts for claims of compensation after victims return to their home country. Claims of compensation can also be made part of criminal proceedings as has been made in USA.<sup>122</sup> This will create convenience for victims to access evidence used in the criminal prosecution by the prosecutor.

The Protocol is silent what should be done to the asset of trafficker after they are prosecuted. Article 12 of the UNCTOC provides for governments to confiscate the asset of traffickers. However, it is also silent about what should be done with the confiscated assets. The proposed solutions in the earlier draft were to use the assets

first, to pay compensation and reintegration costs to trafficked persons; second, to pay for services to trafficked persons in origin and destination countries; and, third, to fund anti-trafficking programs in origin and destination countries.<sup>123</sup>

Thus, domestic legislations should settle what should be done with the proceeds of trafficking after it is confiscated by the state.

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<sup>118</sup> Obokata (n 13 above) 160.

<sup>119</sup> I Osterdahl 'International countermeasures against human trafficking' in A Johsson (ed.) *Human trafficking and human security* (2009) 72.

<sup>120</sup> n 7 above, art 6(6) & 25(2) of the UNCTOC.

<sup>121</sup> Osterdahl (n 119 above) 73.

<sup>122</sup> US Department of State & Bureau of Democracy, Human Rights and Labour '2008 Human Rights Reports: Ethiopia' (2009) available at <<http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm>> (accessed on 22 September 2009).

<sup>123</sup> Jordan (n 4 above) 34; also Ladan (n 3 above) 113.



### ***Right to Voluntary Repatriation***

According to article 8(2) of the Palermo Protocol, voluntary repatriation should be arranged when the victims are willing to repatriate to their home country and there is no fear of persecution. UN High Commissioner for Human Rights believes that 'safe and, as far as possible, voluntary return must be at the core of any credible protection strategy of trafficked persons.'<sup>124</sup> Upon the decision of the VoT to return to his country of origin, his country of origin should facilitate and accept him without undue or unreasonable delay.<sup>125</sup>

Article 7(1)(2) of the same Protocol provides that state parties should 'consider' adopting legislative or other measures permitting VoT to remain in their territories temporarily or permanently 'in appropriate cases' with 'appropriate consideration' being given to humanitarian and compassionate factors. It was noted that humanitarian factors, in this context, referred to 'the rights established in the human rights instruments' and, as such, applicable to all persons.<sup>126</sup> However, the law does not oblige states rather requires state to consider measures permitting victims to remain in their territories.<sup>127</sup>

VoT should not be subject to immigration laws and should be given a reasonable 'breathing space' or reflection time to contact lawyers and analyse legal options before they are returned home. The reflection time or 'breathing space' will facilitate for them to make informed decisions on the reporting of their traffickers. It should be given to all VoT without differentiating them on the basis of whether they are willing to testify or not. It should solely be based on victim's need for social protection rather than their willingness to testify as has been done in some countries such as Italy.<sup>128</sup> At a minimum, it would 'appear that the identification of an individual as a trafficked person should be sufficient to ensure that immediate expulsion which goes against the will of the victim does not occur and that necessary protection and assistance is provided.'<sup>129</sup> Belgium and Netherlands has given 'breathing space' to VoT under their laws. During this time VoT will have a chance to make informed decision whether to testify on their traffickers or not. This recovery period lasts for

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<sup>124</sup> Ladan (n 3 above) 114.

<sup>125</sup> n 7 above, art 8(1).

<sup>126</sup> Ladan (n 3 above) 114.

<sup>127</sup> Weissbrodt & Anti-Slavery International (n 26 above) 24.

<sup>128</sup> Law 40 of 1998 quoted in Pearson (n 1 above) 58.

<sup>129</sup> Smuggling and trafficking in persons and the protection of their human rights, Note by the Secretary-General, United Nations document E/CN.4/sub.2/2001/26, para. 12 quoted in Weissbrodt and Anti-Slavery international (n 26 above) 24.

45 days in Belgium and three months in Netherlands. Various services are made available for victims during their stay which includes housing, medical and legal services, counselling, language and integration courses, financial assistance, and in Belgium, the right to work.<sup>130</sup>

Awarding permanent residential permit should also be considered by states and should not be narrowly construed.<sup>131</sup> In case the law suits the victims bring on their traffickers (both criminal and civil) requires them to stay for a longer period of time, state should allow them to stay. Their repatriation should be decided after considering it will be safe for the victims to return home.<sup>132</sup>

### **3.2.2 Limitations of the Palermo Protocol**

One of the biggest gaps in the Palermo Protocol is its failure to provide victims identification mechanisms.<sup>133</sup> This will make the VoT to be assimilated with illegal migrants and to suffer different harassments. In addition, there is a developing trend by developed countries to take illegal migrants including VoT as threats to internal security because of their connection with criminal activities.<sup>134</sup> Because of this they face detention, arrest and finally deportation.

The Protocol failed to exempt from criminal liability VoT for status-related offenses such as illegal migration, working without proper documentation, and prostitution despite the effort of NGOs and Inter-Agency Group. The reason for taking this position was that offenders may use 'trafficking defence' which might weaken states effort to control illegal migration and prostitution.<sup>135</sup>

In addition, the Palermo Protocol does not expressly make legal persons or corporate liable. However, based on article 10 of the UNCTOC, they can be subjected to civil, criminal or administrative liabilities.

The lack of any kind of review or supervisory mechanism is also 'a substantives weakness which is likely to undermine political commitment to the Protocols and, thereby, their

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<sup>130</sup> Pearson (n 1 above) 57.

<sup>131</sup> as above.

<sup>132</sup> n 7 above, art 8(2).

<sup>133</sup> Weissbrodt & Anti-Slavery International (n 26 above) 25.

<sup>134</sup> Kneebone (ed.) (n 72 above).

<sup>135</sup> Ladan (n 3 above) 113.

eventual effectiveness.<sup>136</sup> Article 32 of the UNCTOC establishes a Conference of state parties to promote and review the implementation of the Convention and to improve the capacity of state parties to combat transnational organized crime. The implementation provision establishes two-tier form of review. As the case with many multilateral treaties negotiated under UN auspices, state parties will be required to provide regular reports on the progress made in implementation. In addition, the Conference of parties may itself establish additional review mechanisms.<sup>137</sup> It is relevant to note that 'the Conference of parties will be concerned solely with the Convention and will not have any authority in respect to the Protocols, except insofar as their respective subject matters can be brought within the provisions of the convention itself.'<sup>138</sup>

In addition to the above limitations, the Palermo Protocol failed to provide an obligation on states to protect human rights of victims in 'hard' terms.<sup>139</sup> It ended up being a tool for enforcement of criminalization of trafficking and extradition of traffickers not protection of victims despite the effort of different NGOs. Consequently, 'the focus now shifts to the national level, and the burden of advocating for rights-protective national legislation and policies shifts to domestic NGOs.'<sup>140</sup>

### **3.2.3 Other International Instruments**

Trafficking entails the worst kind of human rights abuse. From the beginning of their transportation to their exploitations, victims receive the worst treatment by their traffickers. During their transportation victim might be raped and abused.

The existing human rights norms can be expanded to protect VoT since they face various human rights abuses.<sup>141</sup> Thus, ICCPR (articles 2 & 8), ICESCR (article 10(3)), ICPRMWF (article 11), CEDAW (article 6), CRC (article 35), Optional Protocol on Sales of Children, Child Prostitution and Child Pornography of 2000, International Labour Organisation Forced Labour Convention (No. 29) and the 1957 Abolition of Forced labour Convention (No. 115) are some of the international instruments which can be utilized in order to protect the

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<sup>136</sup> Ladan (n 3 above) 126.

<sup>137</sup> Art 32(4)(5) of UNCTOC.

<sup>138</sup> Ladan (n 3 above) 106.

<sup>139</sup> Ladan (n 3 above) 112.

<sup>140</sup> Jordan (n 4 above) 33.

<sup>141</sup> Amiel (n 12 above) 35.

human rights of the VoT. Furthermore, Strategic Objective D.3. of the Beijing Declaration and Platform for Action calls for assistance to VoT.<sup>142</sup>

States' obligation to protect VoT should not be narrowly construed. States should be willing to apply the principle of non-*refoulement* to VoT. This principle works to protect refugees from being returned back to their home country in a case they are going to face persecution and torture.<sup>143</sup> It has been accepted that 'an obligation of states to respect this principle extends to cases where persecution is attributed to non-state actors when states are unwilling or unable to punish them.<sup>144</sup> Asylum has been granted in different cases for trafficked people who are going to face persecution.<sup>145</sup> In addition, the United Nation High Commissioner for Refugees (UNHCR) included gender-based persecution as one ground to get refugee status in case the states are unable or unwilling to protect them.<sup>146</sup>

At regional level, there are different instruments pertinent to the protection of VoT. The Convention on Action against Trafficking of Human Beings was adopted by Council of Europe in 2005.<sup>147</sup> In Americas, the Organisation of American States (OAS) adopted the Inter-American Convention on International Trafficking in Minors in 1994.<sup>148</sup> Furthermore, South Asian Association for Regional Co-operation (SAARC) adopted the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution in 2002.<sup>149</sup> At the African level, there are different measures taken at the continental and subregional level which will be discussed in the next section.

An obligation of states to protect VoT can be implied also from article 16 (2) of the ICPRMWF which provides that '[m]igrant workers and members of their families shall be

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<sup>142</sup> Inglis (n 98 above) 57.

<sup>143</sup> n 9 above, art 33.

<sup>144</sup> Obokata (n 13 above) 155.

<sup>145</sup> See recent cases decided by Immigration Appeals Tribunal; Secretary of State for Home Department v. Lyudmyla Dzhygun (2000); Secretary of State for Home Department v. Josephine Ogbeide (2002); Secretary of State for Home Department v. A.B (2003); Secretary of State for Home Department v. A (2003); Secretary of State for Home Department v. k (2003); Secretary of State for Home Department v. tam Thi Dao (2003); The Immigrant Appeal Tribunal recognised that the respondent belonged to a particular social group under the definition of refugee quoted in obokata (n 13 above) 155.

<sup>146</sup> UNHCR, guideline on international Protection: gender-related persecution in the context of Art 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the status of Refugees, HCR/GIP/02/01 (7/5/02), para. 18 quoted in obokata (n 13 above) 157.

<sup>147</sup> Art 10 - 17 of the Convention on Action against Trafficking of Human Beings available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>> (accessed on 12 September 2009).

<sup>148</sup> Art 8 - 10 Inter-American Convention on International Trafficking in Minors in 1994 available at <<http://www.oas.org/juridico/English/treaties/b-57.html>> (accessed on 12 September 2009).

<sup>149</sup> Obokata (n 13 above) 33.

entitled to effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.’ Migrant worker is defined as ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.’<sup>150</sup> This shows that the scope of this convention extends to include trafficked people who are either legal or illegal migrants.<sup>151</sup>

### **3.2.4 Obstacles for VoT to Access International Legal Protections**

One of the obstacles to effectively protect trafficked persons is the lack of communication and co-operation between the national authorities of the country of origin and that of the country of destination. The UNCTOC and the Palermo Protocol set out different measures that should be taken among nations to enhance effective law enforcement and judicial enforcement.<sup>152</sup> States need to co-operate and exchange information on investigations, evidences, service of judicial documents, execution of searches, identification of the proceeds of crime and production of information and documentations. State parties can also establish joint investigation bodies, come to formal agreement on the use of special investigative techniques, consider the transfer of criminal proceedings and sentenced persons, and facilitate extradition procedures for offenses.<sup>153</sup>

The traditional view that non-states actors do not have international legal responsibility under international law until recently have been another obstacle.<sup>154</sup> This has been made clear by the Human Rights Committee which held that ‘obligations are directed to states and do not, as such, have direct horizontal effect as a matter of international law.’<sup>155</sup> The international jurisprudence also demonstrates that claims involving non-state actors have been held inadmissible on several occasions.<sup>156</sup> Thus, at the international level, non-state actors have moral obligations then legal one.<sup>157</sup> In the current state of affairs, there is a growing trend to make non-state actors accountable under international human rights

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<sup>150</sup> Art 2 of ICPRMWF.

<sup>151</sup> Obokata (n 13 above) 153.

<sup>152</sup> n 7 above, art 10(2) & 27 of the UNCTOC.

<sup>153</sup> Arts 13, 14(2), 15, 16, 17, 18, 19, 20, 21 & 26 of the UNCTOC.

<sup>154</sup> Obokata (n 13 above) 127.

<sup>155</sup> General Comment No. 31 (Nature of the General Legal Obligation Imposed on State Parties to the Covenant) (2005), CCPR/C/21/Rev.1/Add.13, para.8 quoted in Obokata (n 13 above) 128.

<sup>156</sup> F.G.G v The Netherlands, Communication No. 209/1989, CCPR/C29/D/209/1986, G.R.B v Sweden, Communication No. 83/1997, CAT/C/20/D/83/1997 quoted in Obokata (n 13 above) 128.

<sup>157</sup> Obokata (n 13 above) 128.

law.<sup>158</sup> Thus, crimes like trafficking which is committed by non-state actors such as organised criminal groups or by individuals can be a subject of international law. Victims can also enforce their rights through domestic courts.<sup>159</sup> The international protections which are binding on states can be enforced by states when they create forum for individuals to bring civil actions and criminal actions.

The other obstacle for VoT to get protections as granted to them under international instruments is resource constraints in developing states. In order for the developing states and states in economic transition to cope up with lack of resources in the implementation of the UNCTOC, it provides for a range of international co-operation measures including the establishment of a dedicated UN funding mechanism.<sup>160</sup>

### **3.3 Initiatives Taken at the African Level to Protect VoT**

#### **3.3.1 Ouagadougou Action Plan**

Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (Ouagadougou Action Plan) was adopted by AU and EC Commissioners, Ministers for Foreign Affairs, Ministers Responsible for Migration and development in Africa gathered in Tripoli in 2006.<sup>161</sup> This action plan reaffirms and reinforces international instruments on human trafficking such the Palermo Protocol. It requires state to sign, ratify and fully implement the UNCTOC and the Palermo Protocol.<sup>162</sup> The action plan focus on Children and women since they are the vulnerable part of the society in Africa facing discrimination based on gender and the more affected ones in relation to sexual exploitation.<sup>163</sup> The Ouagadougou Action Plan provides for prevention, provision and prosecution of trafficking. Member states are supposed to allocate resources for the implementation of the Action Plan. The recommendations in Ouagadougou Action Plan are supported by the Africa-EU Strategy for Partnership and the Lisbon Action Plan.<sup>164</sup>

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<sup>158</sup> Obokata (n 13 above) 127.

<sup>159</sup> Obokata (n 13 above) 132.

<sup>160</sup> Art 30 of UNCTOC.

<sup>161</sup> 'Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children' available at <<http://www.africaunion.org/root/UA/Conferences/2009/juin/SA/16juin/sa/Ouagadougou%20Action%20Plan%20to%20Combat%20Trafficking%20In%20Human%20Beings.doc>> (accessed on 22 September 2009).

<sup>162</sup> n 161 above, recommendation III(1).

<sup>163</sup> n 161 above.

<sup>164</sup> n 161 above.

The Action Plan recognizes the need for a comprehensive approach involving countries of origin, transit, and destination in the fight against trafficking.<sup>165</sup> It recommends measures based on respect for human rights including protection of victims.<sup>166</sup> It provides that states' policies, programs and other measures should comply with the international human rights instruments which protect victims.<sup>167</sup> This indicates that the Action Plan is based on victim-centred approach and takes a holistic view of trafficking by providing that the root causes of trafficking should also be solved in addition to prosecution of traffickers.

Furthermore, it provides that states should establish rehabilitation centres to assist victims of human trafficking in their social reintegration, safety and recovery.<sup>168</sup> This should be supported by providing victims with short or long-term psychological, medical and social assistance in appropriate cases.<sup>169</sup> The identification of VoT which should take into account their special vulnerabilities, rights and need is provided as an obligation on states.<sup>170</sup> It requires the country of origin and country of destination to provide for VoT with information on their legal and other rights.<sup>171</sup> In case the VoT decide to testify against their trafficker, states are required to ensure their safety and security.<sup>172</sup>

It also closes the lacuna in the Palermo Protocol by requiring states to avoid punishment of VoT for the crimes they committed as a direct result of their being trafficked.<sup>173</sup> States are also required to consider adopting legislative or other appropriate measures that permit VoT to remain in their territory, temporarily or permanently, and give appropriate consideration to humanitarian and compassionate factors in the same way with Palermo Protocol.<sup>174</sup> It also requires states to promote HIV/AIDS sensitive approach toward VoT.<sup>175</sup>

Unlike Palermo Protocol, the Ouagadougou Action Plan requires states to 'consider legislation to provide for administrative, civil or criminal liability of legal persons or their

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<sup>165</sup> n 161 above, its Preamble.

<sup>166</sup> n 161 above, recommendation II(1) & General Principles.

<sup>167</sup> n 161 above, recommendation II(1).

<sup>168</sup> n 161 above, recommendation I(10).

<sup>169</sup> n 161 above, recommendation II(7).

<sup>170</sup> n 161 above, recommendation II(2).

<sup>171</sup> n 161 above, recommendation II(4).

<sup>172</sup> n 161 above, recommendation II(5).

<sup>173</sup> n 161 above, recommendation II(6).

<sup>174</sup> n 161 above, recommendation II(8) & art 7(1)(2) of Palermo Protocol.

<sup>175</sup> n 161 above, recommendation II(10).

representatives for trafficking offences in addition to the liability of natural persons.<sup>176</sup> States are required to legislate for victims to obtain compensation and for the state to confiscate the proceeds of trafficking.<sup>177</sup> It further requires states to consider developing National Action Plan with its own task force which can monitor and report on the implementation of the National Action Plan to regional and international bodies.<sup>178</sup>

States should 'consider the establishment of joint investigation units and enact laws for the extradition of traffickers.<sup>179</sup> Co-ordination and co-operation at the national and international level should also exist which will ensure integrated approach to VoT.<sup>180</sup> The Action Plan proposes for regional and subregional organisations to consider establishment of a special unit to co-ordinate efforts to combat trafficking in human beings.<sup>181</sup> It finally proposes for the establishment of mechanism at the regional level to follow-up on the implementation of the Action Plan.<sup>182</sup> At present, the implementation of the Ouagadougou Action Plan is monitored by the AU Commission which reports to AU summit and to other AU policy-making organs and to member states.<sup>183</sup>

In addition to this Action Plan, the Au formulated different policies on trafficking. It has also launched the AU Commission's Initiative against Trafficking (AU.COMMIT Campaign) on 16 June 2009 to advocate for the implementation of Ouagadougou Action Plan.<sup>184</sup> There is also Africa-EU Strategic Partnership (Lisbon Action Plan) and the Africa-EU partnership on Migration, Mobility and Employment which call for more action to combat human trafficking.<sup>185</sup>

### **3.3.2 Other Regional Instruments**

At the regional level, instruments which protect human rights such as ACHPR can be utilized to protect the rights of VoT to be free from any form of exploitation, inhuman and

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<sup>176</sup> n 161 above, recommendation III(7).

<sup>177</sup> n 161 above, recommendation III(9)(8).

<sup>178</sup> n 161 above, recommendation III(16)(17)(18).

<sup>179</sup> n 161 above, recommendation III(22).

<sup>180</sup> n 161 above, recommendation IV(1).

<sup>181</sup> n 161 above, recommendation VI(5).

<sup>182</sup> n 161 above, recommendation VI(9).

<sup>183</sup> n 161 above.

<sup>184</sup> Womensphere 'African Union launches initiatives against human trafficking in Ethiopia' (2009) available at <<http://womensphere.wordpress.com/2009/07/03/african-union-launches-initiative-against-human-trafficking-in-ethiopia/>> (accessed on 93 September 2009).

<sup>185</sup> as above.



degrading treatments.<sup>186</sup> Furthermore, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the African Women's Protocol) which is adopted in July 2003 and entered into force in November 2005 contains specific provision on trafficking. It provides that states should take appropriate and effective measures to protect those women who are at risk of trafficking.<sup>187</sup> The Protocol in general terms provides protection of women from any form of violence and for rehabilitation and reparation for victims of violence.<sup>188</sup> Its provisions on non discrimination and protection of women from the adverse effect of globalisation are very useful for protection of VoT.<sup>189</sup> States are required to take measures ranging from socio-economic measures to that of the reduction of poverty and inequalities of women in the regional instrument assist in the reduction of VoT.<sup>190</sup>

The other instrument at regional level dealing with trafficking is ACRWC which is adopted in July 1990 and entered into force in November 1999. Article 29(a) of ACRWC requires states to prevent trafficking in children. This provision recognises that trafficking for any purpose perpetrated by persons such as parents and legal guardians of the child need to be addressed by states unlike article 35 of the CRC which failed to recognize parents and legal guardians as participant in trafficking.<sup>191</sup>

### **3.3.3 Subregional Initiatives to Protect Victims**

At the subregional level, SADC and ECOWAS have come up with different initiatives on the protection of VoT. The SADC Declaration on Gender and Development of 1997 and its addendum (The Prevention and Eradication of Violence against Women and Children) recognize the need to provide services to assist VoT.<sup>192</sup> Furthermore, recently the SADC ministers responsible for combating human trafficking have adopted a ten-year Regional Strategic Plan of Action. This strategic plan will be implemented after the approval of the

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<sup>186</sup> Art 5 of the ACHPR: It is adopted on 27 June 1981 and entered into force on 21 October 1986.

<sup>187</sup> Art 4(2)(g) of African Women's Protocol.

<sup>188</sup> as above, art 4(2)(f).

<sup>189</sup> Art 2 & 19(f) of Africa Women's Protocol quoted in R Amollo *A critical reflection on the African Women's Protocol as a means to combat HIV/AIDS among women in Africa* Unpublished Masters Thesis, Centre for Human Rights, Faculty of Law, University of Pretoria (2006) 54.

<sup>190</sup> Osterdahl (n 119 above) 86.

<sup>191</sup> Kamidi (n 14 above) 25.

<sup>192</sup> paras H (viii) & (ix) of the SADC Declaration and paras 8, 11, 12, 13, 15, 16 & 18 of its addendum quoted in Kamidi (n 14 above) 26.

council of Ministers from 2009 up to 2019.<sup>193</sup> It provides for assistance that brings rehabilitation and integration of VoT to be provided by states.<sup>194</sup>

The other regional organ ECOWAS adopted the ECOWAS Declaration on the Fight against Trafficking in Persons in 2001. This Declaration requires member state to provide protection to VoT which will enable them to recover from their physical, psychological and social damage.<sup>195</sup> It further provides for repatriation of VoT to their home country in consultation with them.<sup>196</sup> In 2002-03, ECOWAS developed Plan of Action against trafficking for West Africa. Again in 2006 it came up with a joint plan of action with ECCAS.<sup>197</sup> Furthermore, ECOWAS adopted a Multilateral Co-operation Agreement with Central Africa Countries in 2006 which brought enactment of laws which protect VoT in 12 states out of the 16 member states.<sup>198</sup> It had launched an initiative to raise regional awareness of human trafficking, especially children focusing on protection of VoT and prosecutions of those who participate in trafficking in 2007.<sup>199</sup>

In April 2009, ECOWAS adopted a policy that protect and assist VoT. This 28-paged policy seeks 'to establish and maintain a supportive and friendly environment that will provide victims with equitable access to those facilities that would ease their integration and enable them become functional members of the society.'<sup>200</sup> The policy elaborates 12 core areas of intervention strategies for 'reception, identification, sheltering, health, counselling, family tracing, return/repatriation, integration, empowerment, follow-up, after care and disengagement of victims.'<sup>201</sup>

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<sup>193</sup> 'SADC implements plan on human trafficking' (2009) available at <<http://www.africagoodnews.com/poverty/sadc-implements-plan-on-human-trafficking.html>> (accessed on 12 September 2009).

<sup>194</sup> 'Human trafficking communiqué' (2009) available at <<http://www.sadc.int/index/browse/page/531>> (accessed on 12 September 2009).

<sup>195</sup> 'ECOWAS, Declaration on the Fight Against trafficking in Persons,2001' available at <[http://www.commit4africa.org/declarations/248//ECOWAS%20\(Economic%20Community%20of%20West%20African%20States\)/0](http://www.commit4africa.org/declarations/248//ECOWAS%20(Economic%20Community%20of%20West%20African%20States)/0)> (accessed on 5 October 2009).

<sup>196</sup> as above.

<sup>197</sup> 'Ministers adopt policy for assistance and protection to victims of trafficking' (2009) available at <[http://news.ecowas.int/presseshow.php?nb=036\(=en&annee=2009](http://news.ecowas.int/presseshow.php?nb=036(=en&annee=2009)> (accessed on 6 September 2009).

<sup>198</sup> 'A regional response to trafficking in West Africa' (2008) <<http://www.ungift.org/ungift/en/stories/a-regional-response-to-trafficking-in-west-africa-html>> (accessed on 6 September 2009).

<sup>199</sup> 'ECOWAS works to eradicate child trafficking' (2007) available at <<http://www.voanews.com/english/archive/2007-06/2007-06-13-voa43.cfm?moddate=2007-06-13>> (accessed on 6 September 2009).

<sup>200</sup> n 197 above.

<sup>201</sup> n 197 above.

### **3.4 Conclusion**

The international legal instruments such as Palermo Protocol failed to provide the protection of the human rights of VoT in 'hard' terms. The instrument available at the African level is also not a binding one as it is in the form of Action Plan. However, the existing 'hard' termed human rights norms under different international and regional instruments can be utilized to safeguard the human rights of VoT. In addition, we can look to the national legal framework to rectify the weaknesses in the international system.

## CHAPTER FOUR

### NATIONAL CASE STUDIES ON PROTECTIONS OF VoT IN ETHIOPIA AND MOÇAMBIQUE

#### 4.1 Introduction

Both in Ethiopia and Mozambique, human trafficking is a great concern. Thousands of people are trafficked annually from both countries. Both countries are put on 'tier two' under the US department of State report of 2009.<sup>202</sup> This indicate that the governments of both countries are making significant step to protect victims but do not fully comply with the minimum standards of victims protection.<sup>203</sup> Mozambique has been placed on 'Tier 2 Watch List' for the previous two consecutive reports before 2009 because of the lack of prosecutions and limited protections of victims.<sup>204</sup>

In these countries people become vulnerable to trafficking for various factors. One of the factors for trafficking is the polarization of world economy as a consequence of globalisation.<sup>205</sup> This created demand for cheap labour in developed countries. The existence of a high rate of unemployment, poverty and discriminations pushed people in developing countries to become VoT.<sup>206</sup> The pursue of better life and opportunity abroad has made young people an easy prey for traffickers both in Ethiopia and Mozambique.<sup>207</sup> Furthermore, the non-existence or flawed birth registration in both countries also has its own contribution for trafficking of children. When new born children are not register, they will not formally acquire nationality or it will be difficult to proof their nationality. This will make them more volunerable to trafficking.<sup>208</sup>

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<sup>202</sup> n 84 above, 50.

<sup>203</sup> n 85 above, 49.

<sup>204</sup> US Department of State 'Trafficking in Persons Report 2008 – Mozambique' 4 June 2008, available at <<http://www.unhcr.org/refworld/docid/484f9a2e37.html>> (accessed on 16 October 2009)

<sup>205</sup> Makarenko (n 15 above) 26

<sup>206</sup> 'Ethiopia' 1 available at <<http://humantraffickingsearch.net/search.aspx?pr=HumanTraffickingSearch&query=Ethiopia>> (accessed on 9 April 2009)

<sup>207</sup> n 122 above.

<sup>208</sup> n 206 above; UNESCO and Intersectoral Programme Poverty Eradication 'Human trafficking in Mozambique: Root causes and recommendations' Policy paper No 14.1 (E) (2006) available at <<http://unesdoc.unesco.org/images/0014/001478/147846E.pdf>> (accessed on 12 September 2009) 50.

The strict anti-immigration national laws which do not allow people to cross borders freely make people to look for illegal ways of travel which is offered by traffickers. It is pointed out that '[a]s long as the current economic globalization process privileges movement of finance capital while restricting the movement of labour or human capital across national borders, trafficking of people will continue.'<sup>209</sup> Thus, solving issues related with migration, economic development and equality is a key in the protections of VoT.

## **4.2 Victims Protection in Ethiopia**

### **4.2.1 Introduction**

An increasing number of Men, women, and children are trafficked from Ethiopia to the Middle East, particularly Lebanon, the United Arab Emirates, Saudi Arabia, Syria, Kuwait and Bahrain.<sup>210</sup> Djibouti, Egypt, Kenya, Tanzania and Somaliland are reportedly the main transit routes for trafficked Ethiopians.<sup>211</sup> Women are mainly trafficked for domestic labour and to lesser extent for commercial sexual exploitation. From the Middle East some of the women are shipped to Europe for sexual exploitation.<sup>212</sup> Men are also trafficked as low-skilled labourers.<sup>213</sup> Ethiopian Children falls in the ring of trafficking in the name of adoption.<sup>214</sup> NGOs estimated that annually 20 000 and 25 000 Ethiopians are trafficked.<sup>215</sup> The 2009 US Department of State report shows that 30 000 to 35 000 persons were trafficked in the period between March 2007 and March 2008 most of the victims being women.<sup>216</sup> Ethiopia also serves as a transit country for trafficked persons from Brundi to Lebanon.<sup>217</sup>

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<sup>209</sup> S Jana et al 'A tale of two cities: Shifting the paradigm of anti-trafficking programmes' in R Masika (ed.) *Gender, trafficking and slavery* (2002) 70.

<sup>210</sup> n 122 above.

<sup>211</sup> n 84 above, 131; US Department of State & Bureau of Democracy, Human Rights and Labour 'Ethiopia 2007' (2008) available at <<http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm>> (accessed on 22 September 2009)

<sup>212</sup> US Department of States 'Trafficking in persons report 2008-Ethiopia' 4 June 2008 available at <<http://www.unhcr.org/refworld/docid/484f9a158.html>> (accessed on 6 September 2009)

<sup>213</sup> US Department of State & Bureau of Democracy, Human Rights and Labour 'Report on human rights practices in 2006' (2007) available at <<http://www.state.gov/g/drl/rls/hrrpt/2006/78734.htm>> (accessed on 22 September 2009)

<sup>214</sup> 'The hand that rocks the broken cradle' (June 2008) available at <<http://www.ethiomeia.com/all/6144.html>> (accessed on 22 September 2009)

<sup>215</sup> n 213 above.

<sup>216</sup> n 122 above.

<sup>217</sup> International Organisation for Migration 'New IOM Figures on the Global Scale of Trafficking' *Trafficking in Migrants*, no. 23 (April 2001) 3 quoted in (n 206 above).

Most of the victims are trafficked by local brokers who operate in the community by approaching the victims through family and friends.<sup>218</sup> These traffickers target girls between the age of 18 and 25 from districts in towns and cities. From each victim they send overseas they earn around 800 US \$.<sup>219</sup> However, there has also been reports which indicate that a network of persons working in tourism and trade are also involved in trafficking young girls for overseas work.<sup>220</sup>

VoT face different violations of human rights upon arrival to their destination countries. Most of these victims face conditions of involuntary servitude such as unlawful withholding of passports, restrictions on movement, non-payment of wages, threats, and physical or sexual abuse.<sup>221</sup> Government made different efforts to fight trafficking. The law that regulates agencies which send Ethiopians to foreign countries has been tightened.<sup>222</sup> In relation to prosecution of traffickers also the government made positive efforts and the number of convictions increased from year to year. However, victims' protection has been weak.

#### **4.2.2 National Laws Dealing with Trafficking**

Ethiopia has not ratified the Palermo Protocol. However, this does not mean that it does not have an international legal obligation to protect VoT. Before the coming of Palermo Protocol there was a Convention for the Suppression of the Traffic in Persons and of Exploitation of Prostitution of Others in 1949. The Convention dealt with trafficking issue to the extent it is related to prostitution. Since the Palermo Protocol and the Convention of 1949 overlap to a certain extent, the latter is obsolete for all practical purposes except between those states

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<sup>218</sup> E Pearson 'Study on trafficking in women in East Africa: A situational analysis including current NGO and governmental activities, as well as future opportunities, to address trafficking in women and girls in Ethiopia, Kenya, Tanzania, Uganda and Nigeria' (2003) 18 available at <[http://www.gtz.de/traffickinginwomen/download/bib\\_east\\_africa.pdf](http://www.gtz.de/traffickinginwomen/download/bib_east_africa.pdf)> (accessed on 7 April 2009)

<sup>219</sup> Ethiopia: Centre for Helping Victims of Trafficking Opens in Addis Ababa' <<http://medilinkz.org/news/news2.asp?newsid=7033>> 29 June 2004 (accessed on 9 April 2009); Ethiopia: Focus on Trafficking in women' October 14, 2002 available at <[http://www.walnet.org/csis/news/world\\_2002/irin-021014.html](http://www.walnet.org/csis/news/world_2002/irin-021014.html)> (accessed on 6 September 2009)

<sup>220</sup> US Department of State, *Country Reports - 2003: Ethiopia*, Section 6f. quoted in Bureau of International Labour Affairs 'Ethiopia: Incidence and nature of child labour' (2009) available at <<http://www.dol.gov/ilab/media/reports/iclp/tda2004/ethiopia.htm>> (accessed on 23 November 2009)

<sup>221</sup> n 84 above, 72 & 182.

<sup>222</sup> US Department of State 'Trafficking in persons report 2009 – Ethiopia' 16 June 2009, available at <<http://www.unhcr.org/refworld/docid/4a4214bc28.html>> (accessed on 6 September 2009)

which may be parties to the Convention of 1949, but not to the Protocol.<sup>223</sup> Ethiopia is party to the convention of 1949 even if it is not party to Palermo Protocol.<sup>224</sup> Thus, Ethiopia is bound by the 1949 Convention which provides for the use of social welfare to rehabilitate VoT.

Furthermore, the various international human rights instrument ratified by Ethiopia such as ILO Convention 182 on Elimination of Worst Forms of Child Labour, ILO Convention 29 on Forced Labour, ILO Convention 105 on Abolition of forced labour, CRC, ACRWC, ACHPR and CEDAW can be used as legal tools to protect VoT.<sup>225</sup>

The constitution of Ethiopia prohibits trafficking in human beings for any purpose.<sup>226</sup> Slavery or servitude<sup>227</sup> and forced or compulsory labour<sup>228</sup> are likewise outlawed. The constitution provides for protection of human rights. It provides for the protection of citizens from torture, inhumane and cruel treatment, discrimination and above all the protection of the life of citizens. Furthermore, it provides for equal access of justice for everyone. This will enable victims to get access to justice not only interms of criminal justice which leads to conviction of perpetrators of trafficking but also interms of getting compensation for the damage they sustained. Restitution of Victims by making the traffickers pay for the monetary loss the VoT sustained should be made. This can be done by bringing a civil action against traffickers.<sup>229</sup> The civil action can be brought in the form of tortuous action based on the provisions of the Civil Code.

Ethiopia's Criminal Code prohibits trafficking in women and children through violence, threat, deceit, fraud, kidnapping or by the giving of money or other advantage to the person who have control over the woman or child for the purpose of forced labour.<sup>230</sup> The penalty for such trafficking is up to 20 years' imprisonment and a fine.<sup>231</sup> Trafficking of women and

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<sup>223</sup> Osterdahl (n 119 above) 71.

<sup>224</sup> <[http://wapedia.mobi/en/Convention\\_for\\_the\\_Suppression\\_of\\_the\\_Traffic\\_in\\_Persons\\_and\\_of\\_the\\_Exploitatio\\_n\\_of\\_the\\_Prostitution\\_of\\_others](http://wapedia.mobi/en/Convention_for_the_Suppression_of_the_Traffic_in_Persons_and_of_the_Exploitatio_n_of_the_Prostitution_of_others)> (accessed on 16 September 2009).

<sup>225</sup> International agreements ratified by Ethiopia are parts of the laws of the land according to article 9(4) of the FDRE Constitution.

<sup>226</sup> Art 18(2) of the FDRE Constitution.

<sup>227</sup> as above, art 18(2).

<sup>228</sup> n 226 above, art 18(3).

<sup>229</sup> n 84 above, 18.

<sup>230</sup> Art 597 of the Criminal Code. Art 598(3) the same Code also prohibit unlawfull sending of Ethiopian men for work abroad.

<sup>231</sup> as above, art 597.

children by seucing, inducing, enticing, procuring them or by keeping them in a brethel for prostitution is also penalised with an imprisonment upto 5 years and fine.<sup>232</sup>

Proclamation 104/98 regulates private employment agencies which send Ethiopian abroad for work. Its main aim is to protect the rights, safety and dignity of Ethiopians employed and sent abroad.<sup>233</sup> This proclamation can be utilized for the protection of workers that are sent abroad. The proclamation requires any private employment agency that is operating in Ethiopia to have a licence.<sup>234</sup> And they need to submit a report to the Ministry of Labour and Social Affairs annually on the situation of workers they sent abroad.<sup>235</sup> Furthermore, they are required to deposit money for each worker to guarantee protection and enforcement of the rights of the workers.<sup>236</sup> The guarantee fund deposited can be used to satisfy claims of workers whose rights have been violated.<sup>237</sup> Private employment agencies must make sure the minimum conditions of working provided under the Ethiopian labour are fulfilled in the country of employment.<sup>238</sup> In the event of the violations of these minimum conditions the private employment agency and the third party will be jointly and severally liable.<sup>239</sup> Thus, workers who end up being VoT through fraud and deception can bring claims based on the Proclamation against the private employment agency (trafficker) who sent them abroad.

The Ministry of Labour and Social Affairs (MOLSA), in collaboration with the police, is responsible for monitoring trafficking in persons, while the Ministry of Justice is responsible for enforcing laws related to trafficking.<sup>240</sup>

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<sup>232</sup> n 230 above, art 635.

<sup>233</sup> The Preamble of Proclamation No. 104/1998 'Private Employment Agency Proclamation' March 1998. 'Private Employment Agency' under the proclamation refers to 'any person, independent of government bodies, which performs one or two of the following employment services without directly or indirectly receiving payments from the worker;

- a. services of matching offers of and application for local employment without being a party to the employment contract
- b. services of making a worker available locally or abroad to a third party by concluding a contract of employment with such a worker.

<sup>234</sup> as above, Art 4.

<sup>235</sup> n 233 above, art 12(2)(d).

<sup>236</sup> n 233 above, art 14(1)(2).

<sup>237</sup> n 233 above, art 14(3).

<sup>238</sup> n 233 above, art 15(1).

<sup>239</sup> n 233 above, art 17.

<sup>240</sup> n 213 above.



### 4.2.3 Victims Protection Measures

The government and different NGOs took different measure for the protection of victims of traffic. The Ethiopian government has set up a consulate in Beirut and Dubai to provide assistance and support to its nationals in Lebanon and United Arab Emirates.<sup>241</sup> However, the embassies provide very limited assistance to VoT. They provide limited legal advice, infrequent temporary shelter, and no repatriation loans.<sup>242</sup> It has also faced a challenge to trace and make sure the well being of Ethiopians there since most of the migrants changed their Ethiopian name to Muslim name to facilitate their visa process.<sup>243</sup> Ethiopia still does not have consular representative in United Arab Emirate, Bahrain or Omar where many Ethiopians are trafficked as domestic workers.<sup>244</sup>

In May 2008, after a series of deaths of Ethiopian maids in Lebanon, the government officially banned its citizens from travelling to this country.<sup>245</sup> In regard to the criminal justice, the government showed improvement in the number of prosecution of traffickers from year to year.<sup>246</sup> It has also been able to crack down the illegal private employment agencies using the Proclamation 104/1998 which regulates these agencies and protects Ethiopian migrant workers from fraudulent recruitment or excessive debt situations that could contribute to forced labour.<sup>247</sup> In 2009, the Ministry of Labour and Social Affairs planned to propose an amendment to Proclamation 104/98 'outlawing extraneous commission fees and requiring employment agencies to open branch offices in countries to which they send migrant workers.'<sup>248</sup> However, trafficker has come up with a new system of operation as tour and travel agencies which will enable them to escape the requirement of the proclamation on private employment agencies.<sup>249</sup>

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<sup>241</sup> A Adepoju (2005) *Review of research and data on human trafficking in Sub-Saharan Africa*, International Migration Vol 43 (1/2) 94.

<sup>242</sup> n 122 above.

<sup>243</sup> B Dessalegn 'FMO country guide: Ethiopia' (2004) 22 available at <[www.forcedmigration.org/guides/fmo033/fmo033.pdf](http://www.forcedmigration.org/guides/fmo033/fmo033.pdf)> (accessed on 23 September 2009)

<sup>244</sup> Pearson (n 218 above) 17.

<sup>245</sup> n 84 above, 133.

<sup>246</sup> as above.

<sup>247</sup> The Daily Monitor (Ethiopia) 'Human trafficking rises at an alarming rate claims police' (2005) available at <[http://allafrica.com/publishers.html?passed\\_name=The%20Daily%20Monitor&passed\\_location=Addis%20Ababa](http://allafrica.com/publishers.html?passed_name=The%20Daily%20Monitor&passed_location=Addis%20Ababa)> (accessed on 6 September 2009)

<sup>248</sup> n 84 above, 133.

<sup>249</sup> n 247 above.

In relation to victims protection, the government provides limited assistance for returnees. One of the reasons being the lack of resources. Returned VoT rely heavily on the few NGOs that work with victims and psychological services provided by one governmental mental health hospital.<sup>250</sup> The Ethiopian Women Lawyers Association (EWLA) is one of the NGOs that has done a great service in combating trafficking by hearing complaints of trafficking victims and giving them advice on their legal options.<sup>251</sup> Few NGOs provide services to a limited extent. However, this might be disrupted by the new Charity Proclamation which limited human rights advocacy services to be done by Ethiopian NGOs which generate their own income or only receive not more than 10% of their funding from a foreign sources.<sup>252</sup>

Most of the VoT are deported. Others voluntarily return to Ethiopia after undergoing psychological, physical, social, and sexual abuse while working outside of their country.<sup>253</sup> One shelter called *Addis Hiwot* Centre has been established in Addis Ababa by the fund from USAID in 2004. The centre helps the victims to reintegrate in the society. It provides victims with counselling and skills training activities so that victims will not be re-trafficked. However, it can only give service to persons not more than 12 persons at a time.<sup>254</sup> It is only a small portion of victims that can get assistance from the centre.

Middle East countries deport Ethiopians without making any effort to identify whether they are VoT or illegal migrants. The government has not made bilateral or multilateral agreements with these countries in order to ensure the protection of Ethiopian VoT and on the way the victims get compensations.<sup>255</sup> Securing such an agreement might tend to be difficult due to the different national interest involved in the sending and the receiving countries.<sup>256</sup> However, such agreements are the best options to secure victims human rights protection.

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<sup>250</sup> n 212 above, 4.

<sup>251</sup> 'Ethiopia: Focus on Trafficking in Women' *Africa News*, 14 October 2002 quoted in Ethiopia 4 available at <<http://humantraffickingsearch.net/search.aspx?pr=HumanTraffickingSearch&query=Ethiopia>> (accessed on 9 April 2009).

<sup>252</sup> Arts 2(2) & 14(5) of proclamation 621/2009; n 84 above, 133.

<sup>253</sup> 'Ethiopia: Centre for Helping Victims of Trafficking Opens in Addis Ababa' <<http://medilinkz.org/news/news2.asp?newsid=7033>> 29 June 2004 (accessed on 9 April 2009).

<sup>254</sup> 'The rehabilitation of victims of trafficking in group residential facilities in foreign countries: A Study Conducted Pursuant to the Trafficking Victim Protection Reauthorization Act, 2005' (2007) 6, 15 available at <[http://pdf.usaid.gov/pdf\\_docs/PNADK471.pdf](http://pdf.usaid.gov/pdf_docs/PNADK471.pdf)> (accessed on 22 September 2009)

<sup>255</sup> n 214 above; n 84 above, 132.

<sup>256</sup> Dessalegn (n 243 above) 22.

## 4.3 Protection of VoT in Mozambique

### 4.3.1 Introduction

Mozambique is a place in the region for transit, origin and to a lesser extent destination of trafficked persons.<sup>257</sup> Mozambicans have been trafficked to such countries as South Africa, Portugal, Swaziland and Zambia.<sup>258</sup> The main destination among these countries is South Africa (the region powerhouse) where VoT are forced to work as domestic workers, labourers in mining, sugarcane and farming industries, drug couriers and prostitutes.<sup>259</sup> According to IOM's 2003 study, every year over 1000 Mozambicans are trafficked to South Africa.<sup>260</sup> Trafficking of Mozambicans for body parts or organ harvesting for purpose of traditional medicine practice called '*Muti*' has also become common phenomenon.<sup>261</sup> Furthermore, Mozambican children are trafficked through the unregulated and illegal international adoption.<sup>262</sup>

Most of the victims are recruited by Mozambican recruiters who have cross-border links.<sup>263</sup> Small networks of South African citizens are also involved in trafficking business. However, larger Chinese and Nigerian syndicates have been implicated in this business.<sup>264</sup> Before independence, Mozambican were offered works in the mining of South Africa based on the arrangements between the former apartheid government of South Africa and the Portuguese colonial government in Mozambique. Parents still assuming that there is abundant job opportunity in South Africa and are willing to send their children to South Africa for a 'better life'. Mozambican girls also get deceived by the promises of good life and well-paid jobs in South Africa.<sup>265</sup>

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<sup>257</sup> n 84 above, 214.

<sup>258</sup> as above.

<sup>259</sup> Situational assessment of human trafficking: A 2005 situational assessment of human trafficking in SADC region, a survey of South Africa, Zimbabwe and Mozambique published by UNODC (2007) 37 & 41 available at <<http://www.unodc.org/documents/human-trafficking/2005>> UNODC Situational Assessment.pdf> (accessed on 6 September 2009).

<sup>260</sup> RA Ayisi 'Rights-Mozambique: Law to stop human trafficking' (2008) available on <<http://ipsnews.net/news.asp?idnews=38717>> (accessed on 6 September 2009).

<sup>261</sup> Human Rights League, Mozambique *Trafficking body parts in Mozambique and South Africa* (2008) 46.

<sup>262</sup> 'Mozambique: Legislation reviewed to curb child trafficking' (2007) available at <<http://www.crin.org/violence/search/closeup.asp?infoID=12407>> (accessed on 6 September 2009).

<sup>263</sup> UNESCO and Intersectoral Programme Poverty Eradication 'Human trafficking in Mozambique: Root causes and recommendations' Policy paper No 14.1 (E) (2006) 20 & 21 available at <<http://unesdoc.unesco.org/images/0014/001478/147846E.pdf>> (accessed on 12 September 2009).

<sup>264</sup> n 84 above, 214.

<sup>265</sup> n 259 above, 43.

After the victims reach in South Africa, the unscrupulous traffickers keep the victims through intimidation and threats, confiscation of travel documents, demands to pay job debts (debt bondage), and forcing them to use drugs. Finally, they report the victims as illegal migrants to the police so that they will be arrested and deported.<sup>266</sup>

Mozambique also serves as a transit country to victims from Asian countries, including Bangkok, Hong Kong, Pakistan and Bangladesh who are trafficked to South Africa.<sup>267</sup> Other nationals such as Malawian and Zimbabwean adults and children and Swazi girls are trafficked to Mozambique for forced labour and sexual exploitation.<sup>268</sup>

### **4.3.2 National Laws Dealing with Trafficking**

Under article 18 of Mozambique's Constitution, it is provided that international laws ratified by Mozambique will have binding effect as of the legal norms established by Congress and the Executive, but do not take precedence over the Constitution.<sup>269</sup> Mozambique has ratified the Palermo Protocol on 20 September 2006. Furthermore, Mozambique is party to ILO Convention No. 182 on the Worst Forms of Child Labour, ILO Convention No. 105 on Abolition of forced labour, UNCTOC, CRC, Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, CEDAW, ACRWC, African Women's Protocol and ACHPR which can be used in order to protect VoT.<sup>270</sup>

At the national level, the National Assembly of Mozambique passed the comprehensive law on human trafficking in April 2008, which came into force in September after the approval of the president.<sup>271</sup> This made Mozambique to be the first SADC country to come up with a law dealing with trafficking and an example to be followed by other countries in the

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<sup>266</sup> n 84 above, 260.

<sup>267</sup> n 259 above, 44; ; See Adepoju (n 241 above) 80.

<sup>268</sup> n 84 above, 196 & 269.

<sup>269</sup> Osterdahl (n 119 above) 86.

<sup>270</sup> n 263 above, 44 & 45.

<sup>271</sup> n 84 above, 215; USAID 'Case study: New law targets trafficking' (2008) 1 available at <[http://www.usaid.gov/our\\_work/crosscutting\\_programs/wid/pubs/CS\\_TraffickingLawMozambique\\_4-30-08.pdf](http://www.usaid.gov/our_work/crosscutting_programs/wid/pubs/CS_TraffickingLawMozambique_4-30-08.pdf)> (accessed on 22 September 2009).

region.<sup>272</sup> Before this legislation was introduced trafficking cases were dealt based on laws on kidnapping, corruption of minors, child labour and immigration.<sup>273</sup>

The new law provides for the definition of trafficking in the same way with the Palermo Protocol.<sup>274</sup> It punishes those who recruit and facilitate the exploitation of a person for purposes of prostitution, forced labour, slavery, or involuntary debt servitude with an imprisonment of 16 to 20 years.<sup>275</sup> It made the crime of trafficking a public crime which can be initiated by anyone reporting to the police.<sup>276</sup> It also provides for the protection of Victims and witnesses of human trafficking in hard terms.<sup>277</sup> Witnesses are protected from their identity being disclose during trials.<sup>278</sup> Unlike the Palermo Protocol, the new law exempts VoT from criminal punishment for crimes they commit as a direct consequence of being trafficked.<sup>279</sup> It provides for the government to provide shelter, counselling, legal advice and medical services for Mozambican returnees and other nationals victims in Mozambique in order for victims to recover their traumas and reintegrate in the society.<sup>280</sup> It further provides that the proceedings from trafficking to be reverted to the state and used in the assistance and protections of VoT.<sup>281</sup> It also guarantees victims to get compensation for the damages they suffered.<sup>282</sup> There is a possibility for the judge to render decision on the payment of compensation upon deciding the criminal liability of the perpetrators of trafficking.<sup>283</sup>

The law requires a regulation to come out for its implementation as it is too general to implement it at this stage.<sup>284</sup> The issue of trafficking is a cross-cutting issue which needs the collaboration among Ministry of Justice, Health, Interior, Women and Social Action. The

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<sup>272</sup> 'Mozambique: SADC fights against human trafficking' (2009) <<http://allafrica.com/stories/200905270705.html>> (accessed on 26 September 2009)

<sup>273</sup> n 259 above, 38 & 44; Interview with Mr Albachir Macassam, head of the department of promotion and development of human rights, Ministry of Justice held in his office on 14 October 2009.

<sup>274</sup> Arts 10 & 12 of Trafficking in Persons law n." 6/2008.

<sup>275</sup> as above, art 10; n 84 above, 215.

<sup>276</sup> Interview with Mr Albachir Macassam, head of the department of promotion and development of human rights, Ministry of Justice held in his office on 14 October 2009.

<sup>277</sup> n 274 above, art 20(2).

<sup>278</sup> n 275 above, art 20(1).

<sup>279</sup> n 274 above, art 20(3).

<sup>280</sup> n 274 above, arts 21 & 23(2).

<sup>281</sup> n 274 above, art 19.

<sup>282</sup> n 274 above, art 19(f).

<sup>283</sup> n 276 above.

<sup>284</sup> n 274 above, art 30.

regulation is expected to establish the work divisions among these ministerial and different institutions.<sup>285</sup> The new law has some weaknesses. It failed to provide the procedure for identification of VoT. It further failed to guarantee a specific reflection time to other national VoT in Mozambique before their deportation even though it provides for their recovery of their trauma before deportation under article 23(2). Article 24 provides for victims in Mozambique to get permit of temporary residence based on their willingness to testify against their traffickers. However, the basis for such permit should be the need of VoT and his safety upon his return to his/her country of origin rather than his willingness to testify against his/her trafficker.

### **4.3.3 Victims Protection Measures**

As a response to violence against women and children, the government has created a nationwide police unit to counter such violence from 2000 onwards. The unit gives protection and counselling service to women and children victims who were subjected to violence including VoT.<sup>286</sup> The Ministry of Women and Social Action has also provided six hospitals with counsellors to help victims of violence, including trafficking. Women and children friendly police stations are also established by the Ministry of Home Affairs or Interior to protect VoT in several border towns.<sup>287</sup> However, the government does not run any shelter facilities from which it can make interviews, give medical and counselling service and rehabilitates victims.<sup>288</sup> The government rather rely on NGOs for the provisions of shelter service for VoT. It co-ordinates and assists the NGOs effort by providing them with necessary securities, referring to them victims and providing them with professionals such as counsellors.<sup>289</sup>

In 2006, shelter for VoT which is funded by *Terre des Hommes*, Germany opened in Moamba province of Maputo to rehabilitate and reintegrate unaccompanied minors, women with children and VoT who are repatriated from Lindela Repatriation Facility in South

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<sup>285</sup> Interview with Mr Joaquim D. Nhampoca, responsible for research analysis and diffusion at Department of Women and Children, Ministry of Interior, held on 13 October 2009; n 276 above.

<sup>286</sup> n 259 above, 38.

<sup>287</sup> US State Department (2005) Trafficking in Persons Report quoted in (n 263 above) 50.

<sup>288</sup> n 259 above, 38.

<sup>289</sup> n 276 above.

Africa.<sup>290</sup> The beneficiaries who are received in the Moamba Reception Centre gets food, clothing and training services while the Centre locates their home community. It can accommodate up to 30 women and 10 men at a time.<sup>291</sup> In the same year another shelter which has a capacity of accommodating 80 persons inaugurated by FECIV (*Forum de Educação Cívica* - Institute for Civic education) in Moamba district to assist victims of child trafficking and sexual abuse.<sup>292</sup> Furthermore, NGOs such as ADDC (*Associação dos Defensores da Criança* - Association of Defenders of Child Rights) offer legal assistance to children who are VoT in different police stations. UNICEF has also launched a campaign on registration of birth which helps to protect VoT.<sup>293</sup>

The government is not yet prepared to give transit accommodation and psychological support for identified VoT who transit through Mozambique.<sup>294</sup> The challenge for the government are financial and resource setbacks. There is a need for capacity building in the agents and departments of the government.<sup>295</sup>

There is also lack of co-ordination and exchange of information on the identification of VoT and the arrest and deportation of Mozambicans between the South African police and its Mozambican counterpart.<sup>296</sup> This has created a problem to the extent of non-Mozambicans national being deported to Mozambique by the South African police and Mozambican VoT being treated as illegal migrants and facing detention and arrest in the hands of the South African police.<sup>297</sup> There is no legal framework either administrative mechanism which mandates such co-ordination at present between the two countries. However, the SARPCCO constitution provides for the collaboration of Southern African countries in the prevention of cross border crimes.<sup>298</sup> This forum can be utilized to bring co-ordination on the crime of trafficking among the Southern African countries. Furthermore, an agreement between

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<sup>290</sup> *Terre des hommes* co-ordinating office Southern Africa *Project proposal by FECIV- Institute for Civic Education: Transit and reintegration assistance for Mozambican women and children repatriated from South Africa* (2005) 3.

<sup>291</sup> Interview with Mrs. Lea Boaventura, Deputy Regional Co-ordinator of Southern Africa Co-ordination Office of *terre des hommes* Germany held at her office on 27 October 2009.

<sup>292</sup> n 263 above, 50.

<sup>293</sup> as above.

<sup>294</sup> n 259 above, 41.

<sup>295</sup> n 259 above, 42.

<sup>296</sup> n 259 above, 38.

<sup>297</sup> n 259 above, 39 & 40.

<sup>298</sup> <<http://www.interpol.int/public/Region/Africa/Committees/SARPCCO.asp>> (accessed on 15 October 2009).

Mozambican Migration Office and the police of South Africa exists to strength the co-ordination of South Africa and Mozambique.<sup>299</sup> However, this can only be used to protect migrants not VoT.<sup>300</sup> The coming into force of the SADC Action Plan to combat trafficking will help to strength the co-ordination among Southern African countries in the future.

After the coming into force of the new law on trafficking, the government has allocated \$360 000 for its enforcement and the Mozambican police created a six-person anti-trafficking unit to apprehend traffickers and reintegrate victims by facilitating their transfer to organisations which give them shelter, medical and counselling services.<sup>301</sup> Police, different NGOs and SANTAC are closely working to protect VoT the number of whom might increase in relation to the 2010 World Cup in South Africa.<sup>302</sup>

#### **4.4 Conclusion**

The enactment of a law on human trafficking is very significant step taken in Mozambique which is exemplary to Ethiopia. In case of Ethiopia, the existing protections under international instruments Ethiopia ratified and national laws should be used to protect victims. In both countries the government is making significant efforts in regard to protection of victims. However, this effort should be more strengthen and need to be done to the best of the available resources at their disposals in both countries.

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<sup>299</sup> Interview with Mr Joaquim D. Nhampoca, responsible for research analysis and diffusion at Department of Women and Children, Ministry of Interior, held on 13 October 2009.

<sup>300</sup> n 276 above.

<sup>301</sup> n 84 above, 215.

<sup>302</sup> SANTAC 'Maputo Consensus on preventing and combating child trafficking before, during and beyond the 2010 World Cup' available at <[http://www.santac.org/eng/content/download/1255/6874/file/Maputo%20Consensu\\_08.pdf](http://www.santac.org/eng/content/download/1255/6874/file/Maputo%20Consensu_08.pdf)> (accessed on 26 September 2009).



## **CHAPTER FIVE**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Conclusion**

The 4Ps (Prevention, prosecution, protection and policy for co-operation) are very useful in the fight against trafficking in persons. Undue emphasis should not be placed on one over the others in the regard. Nevertheless, more emphasis has been placed on prosecution of traffickers than protection of VoT. The human rights of victims have been ignored. At the international level, the Palermo Protocol has made a step forward in recognizing the need for the protection of VoT. However, it failed to provide protective obligations on State in hard terms. At the African level, an Action Plan has come out which provides for a better protection of VoT. This instrument is not also binding on states to enforce their protective obligations.

The close relation between illegal migrants and VoT confuse governments and lead them to deny the protection VoT deserve unlike illegal migrants. VoT have been facing immediate expulsion and deportation by destination countries. Proper identification of VoT needs to be made before governments take any measures on illegal migrants. Those who have been VoT need to be given time to recover from their trauma and consider on the legal options they have in the country of destination. Furthermore, they need to get shelter, medical, and psychological assistances in the countries they are found.

Victims face a cycle of abuse. In their country because of discrimination, poverty, unemployment etc they end up being trafficked. After they face the worst forms of human rights abuse and exploitation, they are deported to their home country without accumulating anything. But since the root causes which made them vulnerable for trafficking still exist, they will continue to be vulnerable for further victimization. They need to recover from their trauma through medical and psychological help and need to get an opportunity for a new life through trainings to enable them for self employment and provide them with educational opportunities in order to curb this vicious cycle of victimization.

In Ethiopia, even if there is lack of comprehensive law on trafficking, human rights protections under different laws can be used to protect victims. In Mozambique, the enactment of the new law on trafficking has been a significant step forward to protect

victims. However, much work still needs to be done in order to bring progress in the protections of VoT in both countries.

## **5.2 Recommendations**

### **5.2.1 General Recommendations**

Trafficking should be looked as a human rights violation. Holistic approach should be adopted at every level to tackle the root causes of trafficking, to curb the demand for trafficking and to protect human rights of VoT.

Destination countries should fairly, timely and properly distinguish VoT from other illegal migrants and smuggled people and give them protection. It is beneficial if independent international organs, such as IOM, UNICEF etc and national NGOs participate in the identification process. Law enforcement agencies should in collaboration with these international organisations develop guidelines which contain indicators of VoT to identify VoT. Country of origin should also identify and differentiate VoT from other returnees upon the arrival of repatriated individuals.

The Palermo Protocol does not incorporate hard terms on the human rights protection of VoT. Furthermore, it failed to exempt VoT from punishment as to status related crimes. Countries which ratify the Protocol should rectify these problems by coming up with laws which protect the human rights of VoT in hard terms. They should expand and made obligatory the protective provisions of the Protocol. Its enforcement problem should also be addressed through requiring states to report on the Protocol.

### **5.2.2 Regional Level Recommendations for Africa**

There is a need for a binding instrument at the African level which focuses on victims' protection and strength the current efforts. Until then, much work needs to be done to popularize and make states comply with Ouagadougou Action Plan. A special organ should also be established to oversee the implementation of Ouagadougou Action Plan.

Co-operation among states to fight intercontinental trafficking through making their legal systems accessible for victims to benefit from compensation, and extradition of traffickers should be strengthened. Subregional's economic organisations must strength their efforts

emphasizing on the particular kind of trafficking in their region. In addition, there is a need for co-ordination of the efforts put in place at the subregional level with the regional one.

### **5.2.3 National Level Recommendations for Ethiopia**

For a better protection of VoT, Ethiopia needs to ratify the Palermo Protocol. Ethiopia should also enter into bilateral and multilateral memorandum of understandings on issues such as protections of Ethiopian VoT from summary deportation, the possibility of obtaining compensation for the damages VoT suffer, victims support with psychosocial, medical and temporary shelter services different from detention centres, exemption from punishment for criminal act as a direct result of trafficking of victims, proper identification of victims and establishment of information exchange channels.

A comprehensive law on trafficking based on victim-centred approach should be enacted providing for the protection of VoT such as exemption of criminal liability of victims for crimes they commit as a direct result of trafficking, compensation, temporary shelter, medical, legal and psychological service, training for self employment and for the proceeds of trafficking to be use for rehabilitation and integration of VoT. This law can be formulated based on the model law that is drafted by UNODC.<sup>303</sup>

The government should also strengthen the services it provides to returnee VoT. It should encourage NGOs participation in this area by lifting up the laws and bureaucracy that put barriers on their actions. One of the actions can be amending the Charity Law which limits the financial sources of such national NGOs.

The root causes of trafficking such as unemployment, poverty, discrimination etc should be solved to protect victims from being trafficked again. Birth registration should be strengthened to protect children. International adoption procedure should also be regulated by enacting laws and making a follow-up of the situation of children adopted so that children will not end up being trafficked in the guise of adoption.

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<sup>303</sup> 'Model Law against Trafficking in Persons' available at <<http://www.unodc.org/unodc/en/human-trafficking/publications.html>> (accessed on 6 September 2009).

#### **5.2.4 National Level Recommendations for Mozambique**

The regulations which are needed for the effective implementation of the Mozambican law on trafficking should come out for the implementation of the law. This regulation should settle issues such as divisions of responsibility among different government organs in regard to different services to victims, by whom and how identification of victims should be carried out and provision of reflective time for foreign national VoT before they are deported. The different services provided for rehabilitation and reintegration of VoT by the government and NGOs should be expanded and strengthened. International adoption should be regulated and birth registration should be carried out. Furthermore, bilateral agreement with South Africa should be concluded to protect Mozambican VoT in South Africa.

**Word Count: 17 992**

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## **Annex**

**Annexure one: Human Trafficking indicators by UNODC and UN.GIFT available at <[http://www.unodc.org/pdf/HT\\_indicators\\_E\\_LOWRES.pdf](http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf)> (accessed on 3 September 2009)**

Not all the indicators listed below are present in all situations involving trafficking in humans. Although the presence or absence of any of the indicators neither proves nor disproves that human trafficking is taking place, their presence should lead to investigation. Victims of trafficking in humans can be found in a variety of situations. You can play a role in identifying such victims.

### **General indicators**

People who have been trafficked may:

- Believe that they must work against their will
- Be unable to leave their work environment
- Show signs that their movements are being controlled
- Feel that they cannot leave
- Show fear or anxiety
- Be subjected to violence or threats of violence against themselves or against their family members and loved ones
- Suffer injuries that appear to be the result of an assault
- Suffer injuries or impairments typical of certain jobs or control measures
- Suffer injuries that appear to be the result of the application of control measures
- Be distrustful of the authorities
- Be threatened with being handed over to the authorities
- Be afraid of revealing their immigration status
- Not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else
- Have false identity or travel documents
- Be found in or connected to a type of location likely to be used for exploiting people
- Be unfamiliar with the local language
- Not know their home or work address

- Allow others to speak for them when addressed directly
- Act as if they were instructed by someone else
- Be forced to work under certain conditions
- Be disciplined through punishment
- Be unable to negotiate working conditions
- Receive little or no payment
- Have no access to their earnings
- Work excessively long hours over long periods
- Not have any days off
- Live in poor or substandard accommodations
- Have no access to medical care
- Have limited or no social interaction
- Have limited contact with their families or with people outside of their immediate environment
- Be unable to communicate freely with others
- Be under the perception that they are bonded by debt
- Be in a situation of dependence
- Come from a place known to be a source of human trafficking
- Have had the fees for their transport to the country of destination paid for by facilitators, whom they must payback by working or providing services in the destination
- Have acted on the basis of false promises

### **Children**

Children who have been trafficked may:

- Have no access to their parents or guardians
- Look intimidated and behaves in a way that does not correspond with behaviour typical of children their age
- Have no friends of their own age outside of work
- Have no access to education
- Have no time for playing
- Live apart from other children and in substandard accommodations
- Eat apart from other members of the "family"

- Be given only leftovers to eat
- Be engaged in work that is not suitable for children
- Travel unaccompanied by adults
- Travel in groups with persons who are not relatives

The following might also indicate that children have been trafficked:

- The presence of child-sized clothing typically worn for doing manual or sex work
- The presence of toys, beds and children's clothing in inappropriate places such as brothels and factories
- The claim made by an adult that he or she has "found" an unaccompanied child
- The finding of unaccompanied children carrying telephone numbers for calling taxis
- The discovery of cases involving illegal adoption

### **Domestic servitude**

People who have been trafficked for the purpose of domestic servitude may:

- Live with a family
- Not eat with the rest of the family
- Have no private space
- Sleep in a shared or inappropriate space
- Be reported missing by their employer even though they are still living in their employer's house
- Never or rarely leave the house for social reasons
- Never leave the house without their employer
- Be given only leftovers to eat
- Be subjected to insults, abuse, threats or violence

### **Sexual exploitation**

People who have been trafficked for the purpose of sexual exploitation may:

- Be of any age, although the age may vary according to the location and the market
- Move from one brothel to the next or work in various locations
- Be escorted whenever they go to and return from work and other outside activities
- Have tattoos or other marks indicating "ownership" by their exploiters
- Work long hours or have few if any days off

- Sleep where they work
- Live or travel in a group, sometimes with other women who do not speak the same language
- Have very few items of clothing
- Have clothes that are mostly the kind typically worn for doing sex work
- Only know how to say sex-related words in the local language or in the language of the client group
- Have no cash of their own
- Be unable to show an identity document

The following might also indicate that children have been trafficked:

- There is evidence that suspected victims have had unprotected and/or violent sex.
- There is evidence that suspected victims cannot refuse unprotected and/or violent sex.
- There is evidence that a person has been bought and sold.
- There is evidence that groups of women are under the control of others.
- Advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality.
- It is reported that sex workers provide services to a clientele of a particular ethnicity or nationality.
- It is reported by clients that sex workers do not smile.

### **Labour exploitation**

People who have been trafficked for the purpose of labour exploitation are typically made to work in sectors such as the following: agriculture, construction, entertainment, service industry and manufacturing (in sweatshops).

People who have been trafficked for labour exploitation may:

- Live in groups in the same place where they work and leave those premises infrequently, if at all
- Live in degraded, unsuitable places, such as in agricultural or industrial buildings
- Not be dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing
- Be given only leftovers to eat
- Have no access to their earnings



- Have no labour contract
- Work excessively long hours
- Depend on their employer for a number of services, including work, transportation and accommodation
- Have no choice of accommodation
- Never leave the work premises without their employer
- Be unable to move freely
- Be subject to security measures designed to keep them on the work premises
- Be disciplined through fines
- Be subjected to insults, abuse, threats or violence
- Lack basic training and professional licences

The following might also indicate that people have been trafficked for labour exploitation:

- Notices have been posted in languages other than the local language.
- There are no health and safety notices.
- The employer or manager is unable to show the documents required for employing workers from other countries.
- The employer or manager is unable to show records of wages paid to workers.
- The health and safety equipment is of poor quality or is missing.
- Equipment is designed or has been modified so that it can be operated by children.
- There is evidence that labour laws are being breached.
- There is evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages.

### **Begging and petty crime**

People who have been trafficked for the purpose of begging or committing petty crimes may:

- Be children, elderly persons or disabled migrants who tend to beg in public places and on public transport
- Be children carrying and/or selling illicit drugs
- Have physical impairments that appear to be the result of mutilation
- Be children of the same nationality or ethnicity who move in large groups with only a few adults

- Be unaccompanied minors who have been “found” by an adult of the same nationality or ethnicity
- Move in groups while travelling on public transport: for example, they may walk up and down the length of trains
- Participate in the activities of organized criminal gangs
- Be part of large groups of children who have the same adult guardian
- Be punished if they do not collect or steal enough
- Live with members of their gang
- Travel with members of their gang to the country of destination
- Live, as gang members, with adults who are not their parents
- Move daily in large groups and over considerable distances

The following might also indicate that people have been trafficked for begging or for committing petty crimes:

- New forms of gang-related crime appear.
- There is evidence that the group of suspected victims has moved, over a period of time, through a number of countries.
- There is evidence that suspected victims have been involved in begging or in committing petty crimes in another country.