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**HUMAN TRAFFICKING WITH SPECIFIC REFERENCE TO SOUTH AFRICAN  
AND MOZAMBIKAN COUNTER-TRAFFICKING LEGISLATION<sup>1</sup>****Richard Obinna Iroanya<sup>2</sup>**

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**ABSTRACT**

*The adverse impact of human trafficking on individuals, societies, countries and regions have necessitated legal and non-legal efforts being made at global, regional and national levels to combat the phenomenon. This article specifically compares South African and Mozambican approaches to countering human trafficking and provides a conceptual framework of trafficking. This does not entail a comprehensive evaluation of the effectiveness of South African and Mozambican measures in combating trafficking, but a content analysis of major provisions of their anti-trafficking legislation enacted in fulfilment of the obligations of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000 (Palermo Protocol). It is contended that the adoption of anti-trafficking legislation by these countries signifies a willingness to comprehensively address the problem. While similarities can be observed in provisions relating to prosecution, protection, prevention, national co-ordination and co-operation as well as international co-ordination and co-operation, certain differences still exist. These differences are observed in, for example, provisions relating to reporting and investigation of cases of trafficking. While fewer powers appear to be given to the Mozambican police to investigate trafficking cases, more powers are given to the South African police. Again, while the South African legislation makes provision for extra-territorial jurisdiction regarding cases of trafficking, the Mozambican legislation has not provided for this. Despite comprehensive provisions to address human trafficking, the anti-trafficking legislation of both countries contains certain weaknesses in areas such as the provision of guidelines for victim identification. These weaknesses, it is contended, will hinder effective implementation of the anti-trafficking laws. Against this background, suggestions are made for prioritisation of the campaign against trafficking through national co-operation and co-ordination, as well as bi-lateral and multi-lateral international co-operation.*

**Keywords:** *Countering human trafficking; Mozambique; South Africa; trafficking legislation and Palermo Protocol.*

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**INTRODUCTION**

Since the early 1990s, human trafficking in Southern Africa has been attracting significant attention. Various forms of the phenomenon in the sub-region are identified in several studies, reports and publications by international institutions, governments, and non-governmental organisations (NGOs). Domestic and international trafficking of men, women and children for sexual and labour exploitation are the most prevalent forms of trafficking in Southern Africa. However, human organ trafficking has also been identified as a growing form of the phenomenon (Fellows, 2008: 7).

Based on annual reports on human trafficking by the United States (US) State Department, regions and countries unintentionally play different roles in the human trafficking flow. While some countries and regions are classified as human trafficking destinations, others are considered as trafficking sources and transit routes. Although it appears that human trafficking mainly flows from relatively richer countries and regions to relatively poorer ones (United Nations Office on Drugs and Crime (UNODC), 2012: 40),

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empirical evidence tends to suggest that no country or region can uniquely be considered as a destination, transit, or source only country or region in the global and regional human trafficking business. The multi-faceted nature of the phenomenon implies that it does not constantly flow in one direction or route. Trafficking routes are varied and change as law enforcement improves (Aronowitz, 2009: 101) and new forms of trafficking are discovered. Therefore, the use of a region or country as a source, transit or destination place largely depends on exploitable opportunities identified by human traffickers. In this regard, Southern Africa is generally regarded as a source, transit and to a certain extent a destination for human trafficking. South Africa, for example, is largely considered as a human trafficking destination, while Mozambique is mainly regarded as a source country (US Department of States, 2013: 271)

Regardless of the classification of countries and regions as sources, transits or trafficking destinations, the phenomenon is caused by several factors and specifically has serious consequences for countries in Southern Africa. Among some of the factors identified as its main causes are poverty; ineffective laws; corruption, political and economic changes; internal conflict, linkage to organised crime and attractive conditions in destination countries (Adepoju, 2005: 75-98). The phenomenon is also associated with forced labour, sexual exploitation, human rights violations, and insecurity as some of its major consequences. Considering the adverse impact of human trafficking on societies, legal and non-legal efforts are being made at global, regional and national levels to combat it. This article specifically, compares the South African and Mozambican approaches to countering human trafficking. This does not entail a comprehensive evaluation of the effectiveness of South African and Mozambican measures in combating trafficking, but a content analysis of the provisions of their anti-trafficking legislation enacted in fulfilment of the obligations of the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* of 2000 (the so-called Palermo Protocol).

### CONCEPTUALISING HUMAN TRAFFICKING

Since the last century, several attempts have been made to provide a generally accepted definition of human trafficking. In this regard, Rijken, traces the origin of such attempts to 1904 with the adoption of the *International Agreement for the Suppression of White Slave Traffic of 1904* (Rijken, 2003: 54). While this international instrument did not address all forms of trafficking as presently understood, Rijken's assertion is correct to the extent that it addressed several issues relating to human trafficking. The difficulty encountered in attempting to define human trafficking has prompted scholars such as Gould to conclude that human trafficking is "a slippery concept, something that is hard to pin down and come to grips with" (Gould, 2006: 19-25). The "slippery" nature of human trafficking arguably stems from its constitution of different activities which are social, political, economic, and criminal in nature. Human trafficking involves different forms of exploitation such as sexual and labour exploitation as well as trafficking in body organs, adoption, begging, conscription and other criminal activities (Kruger, 2010: 40). In support of this assertion, Laczko and Gramegna conclude that:

Trafficking in persons is used as an umbrella term to cover a range of actions and outcomes. Viewed as a process, trafficking can be used to entail several phases – recruitment, transportation (which could cross several borders), and control in the place of destination. Different groups, agents or individuals may be involved in different phases of the process, and can organise recruitment, transportation and control in different ways. There is thus immense diversity between and within trafficking systems (Laczko & Gramegna, 2003: 179-194).

Prior to the Palermo Protocol, there was no generally accepted definition of human trafficking. From the literature, different definitions of the concept are noticeable as well as the employment of terms such as “trafficking in persons” (Human Sciences Research Council (HSRC), 2010: 6); “human trade” (Meese, Van Impe & Vanheste, 1998: 168); “human smuggling” (Aronowitz, 2001: 163-195), kidnapping and “modern day slavery” (Williams, 1999: 145-170), synonymously with human trafficking.

Bale, for example, equates human trafficking with slavery and defines it as “the complete control of a person for economic exploitation by violence or the threat of violence” (Bales, 2000: 461). He argues that as a new form of slavery, human trafficking is characterised by temporary ownership, low purchase cost, high profit, debt bondage and forced labour. Burgess on his part sees human trafficking as an act that, “involves moving men, women and children from one place to another and placing them in conditions of forced labour. Among current practices are domestic labour, agricultural labour, sweatshop, factory or restaurant work and forced prostitution” (Burgess, 2008: 60-66). To Hughes, human trafficking is the same as sexual exploitation. Accordingly, human trafficking involves “moving people within and across local or national borders for the explicit purpose of sexual exploitation. This movement may be as a result of force, coercion, manipulation, deception, abuse of authority, initial consent, family pressure, past and present family and community violence or economic deprivation” (Hughes, 2001: 9-15). In these three definitions of human trafficking, emphasis is placed on exploitation and control of victims as well as movement of people within and across national borders.

In the context of movement across national borders, some institutions describe human trafficking as part of the challenge of global migration process with specific reference to human rights violations. For example, the International Organisation for Migration (IOM) defines human trafficking thus (Pearson, 2002: 14):

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

This definition tends to acknowledge human trafficking as part of the problem of global migration. It also tends to confirm the national and international dimensions of human trafficking; the involvement of agents or traffickers in the process, and the exploitative and rights violation tendencies of the problem. Although not explicitly stated, the definition also appears to suggest that human trafficking is carried out through illegal means only. Nevertheless, empirical evidence supports the claim that legal means are also used to perpetrate human trafficking (Haynes, 2004: 221-272). Similarly, although human trafficking may have certain features of migration, it is different from migration. The difference lays in the fact that migration, whether legally or illegally embarked upon, is consciously and purposefully done whereas victims of trafficking, in most cases, are unaware of being trafficked.

The exploitative and violent nature of human trafficking appears to compel the United Nations Population Fund (UNPF) to view the phenomenon as “modern day slavery” (UNPF 2012: 1). The US government also equates human trafficking with slavery and sexual exploitation. Thus, in the US legislation, namely the *Victims of Trafficking and Violence Protection Act* of 2000 (the TVPA), human trafficking is defined as:

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or ...the recruitment, harbouring, transportation, provision, or

obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (*Victims of Trafficking and Violence Protection Act* (TVPA), Division A Section 103: 8-9).

The US definition of human trafficking captures different methods and phases involved in the trafficking process. Thus, the uses of force, fraud or coercion as means of recruitment and exploitation are important features of human trafficking. By highlighting commercial sex, the definition seems to acknowledge that children and women may be the most targeted group in human trafficking. Equally highlighted in the definition are different practices similar to slavery such as “involuntary servitude”, “debt bondage” and “peonage”.

The definition provided in the TVPA is similar to the one provided in the Palermo Protocol. In the protocol, human trafficking is elaborately defined as follows:

(a) Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age (The Palermo Protocol, 2000)

The definition provided in the Palermo Protocol is comprehensive in that it covers a wide range of issues involved in human trafficking. It also tends to agree with other definitions on certain aspects of trafficking such as child trafficking. For example, the Palermo Protocol agrees with the TVPA that a child is any person under the age of 18. The Palermo Protocol and the TVPA also agree that the term trafficking applies whether a child was voluntarily or involuntarily trafficked. Other aspects of the Palermo Protocol which are in agreement with the US legislation, include the phases of trafficking such as recruitment, transportation, harbouring and receiving of victims. There is also a general agreement that human trafficking is a criminal act, coercive and exploitative in nature and involves human rights violations. The lack of a precise definition of “the exploitation of the prostitution of others” leaves room for different interpretations. For example, it can be argued that though women are mostly the focus of discussions on prostitution; men could also be trafficked and sexually exploited, thus, the Palermo Protocol appears to protect both men and women.

Conceptually, human trafficking is a socio-economic, political and security phenomenon associated with the movement of people within and across national borders either legally or illegally and which has forced labour, sexual exploitation, human rights violations and insecurity as some of its consequences. Six approaches to its conceptualisation are noticeable. Firstly, it is equated with slavery. Secondly, human trafficking is described as

part of transnational organised crime. Thirdly, trafficking is seen as part of the global migration challenge. Fourthly, it is conceptualised as human rights violations. Fifthly, trafficking is synonymous with prostitution and sixthly, it is the negative aspect of globalisation (Lee, 2011: 20-35). Human trafficking, in its domestic and transnational forms, exhibits the same characteristics. These characteristics distinguish it from other cross border activities such as smuggling and illegal migration.

### **DISTINGUISHING FEATURES OF HUMAN TRAFFICKING**

Although empirically, human trafficking is hardly differentiated from other forms of crime such as slavery, migrant smuggling and illegal migration, it is however, conceptually distinguishable from these related crimes. Certain distinguishing features of human trafficking can be gleaned from the definition of the concept in the Palermo Protocol, as well as from other scholarly discourses on the subject. These features which are observable in both domestic and transnational trafficking relate mainly to the exercise of control over victims. Categorising an activity as human trafficking requires identifying the degree to which control over victims is exercised (Stuurman, 2004: 5). In this regard, Defeis posits that human trafficking involves “actions in which offenders gain control of victims by coercive or deceptive means or by exploiting relationships” (Defeis, 2003: 485-495). Louise reaches similar conclusion by sustaining that control over victims is central to their continued exploitation by traffickers even after arrival at destinations (Louise, 2007: 148).

The exercise of absolute control over victims distinguishes human trafficking from other related cross border crimes and is reinforced by the use of violence and coercion. Most human trafficking cases involve physical assault, intimidation and abuse, imprisonment in one place and threat of harm and violence to victims and their families (Rijken, 2003: 54; Louise 2007: 148). These coercive means are intended to instil fear in victims and their families and to compel obedience and submission to the whims and caprices of human traffickers. The confiscation of travel documents of victims, especially of those who have travelled legally to trafficking destinations is further used to gain, maintain and perpetuate control over victims. The confiscation of victims’ travel documents also renders them illegal in transit or destination countries and as such vulnerable to exploitation. Their illegal status further prevents victims from accessing state protection (Haynes, 2004: 221-272).

A complementary method to travel document confiscation is the separating of victims from the local population in transit and destination countries. Victims kept in secured locations have limited access to public places and interaction with the local population. Frequent relocation strategy prevents victims from becoming familiar with the local population, and therefore minimises the risk of escape (Kruger, 2010: 150). Traffickers thus maintain control over their victims by creating an atmosphere of fear and insecurity (Zimmerman, Hossain, Yun, Roche, Morison & Watts, 2006: 32). The essence of these strategies is to perpetuate control and the exploitation of victims.

Apart from physical restrictions, it has also been documented that human trafficking victims are often prevented from communicating with people, especially families, friends and close persons. Limited interaction with the outside world minimises the risk of exposure, arrest and prosecution by local law enforcement agents but increases the vulnerability of victims to all forms of exploitation. Furthermore, physical isolation may also be accompanied by what has been described as “cultural or social isolation” (Kruger, 2010: 150). This double sense of isolation is made possible by the confiscation of victims’ travel documents, lack of language skills, especially of their destination countries, and “loss of social networks and ignorance of the culture and laws of the destination countries” (Kruger, 2010: 150).

Control over trafficking victims is further ensured through debt bondage. This is common to both domestic and transnational human trafficking (Kruger, 2010: 151). This

important aspect of control of human trafficking is strongly emphasised in the Palermo Protocol as well as in the TVPA and other national anti-trafficking legislation. Traffickers impose debt on victims and force them to repay the debt through various working conditions similar to slavery. Thus, forced labour is an integral part of the control mechanism employed by traffickers to perpetuate exploitation of victims. Often, trafficking victims are reported to be physically abused, live and work in unhygienic conditions, and are consequently in poor health (Eleanor, Zimmerman, Louise, Howard and Oram, 2013: 473). Many have also been found to be addicted to hard drugs possibly as a means of coping with harsh conditions. Drug use could also be forced on victims by traffickers. On the basis of that, Kruger posits that traffickers administer drugs to their victims to form addiction and perpetually depend on traffickers who provide the drugs. In the long term, drug dependency becomes an effective means of control and perpetuation of exploitation of victims (Kruger, 2010: 153).

From the foregoing, it can be seen that though human trafficking can be domestic and international in nature, its main distinguishing feature is, arguably the exercise of absolute control over victims, which is achieved through threats of violence, isolation, debt bondage and drug addiction.

### COMBATING HUMAN TRAFFICKING

The high prevalence of human trafficking and its serious impact on communities in recent times, demands concerted efforts at global, regional and national levels to combat it. Intentions to combat the phenomenon can be ascertained from the adoption of several legal instruments and other counter measures by several countries. Concerted efforts in this regard indicate an acknowledgement of the negative impact of the phenomenon on the political, economic, and social structures of countries. However, sustainability of these efforts remains of serious concern. This is because efforts to combat human trafficking in its entirety are not new. What is new however, is the renewed interest and vigour with which countries are condemning the phenomenon. Thus, some have traced attempts to combat human trafficking to the beginning of the 20<sup>th</sup> Century with the adoption of the *International Agreement for the Suppression of White Slave Traffic* in 1904 (Rijken, 2003: 54). Besides, the 1904 *Agreement*, there were also the *Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications* of 1923 as amended by the *Protocol* of 12 November 1947 and the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* of 1949. The *Supplementary Convention on the Abolition of Slavery*; the *Slave Trade and Institutions and Practices Similar to Slavery* of 1956; and the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979, as well as the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment* of 1984, are other equally important previous international legal instruments designed to combat human trafficking and related crimes.

These previous international legal instruments provide strong historical support to the current Palermo Protocol of 2000. In this regard the United Nations Office on Drugs and Crime (UNODC) argued that international legal framework concerning human trafficking is not contained in a single document such as the Palermo Protocol. Rather, the protocol forms “part of a continuum of instruments that deal with trafficking and related activities, in particular slavery” (UNODC, 2004: 339-340). The Palermo Protocol deals broadly with human trafficking, regardless of age and gender and applies to all forms of trafficking such as labour, domestic servitude and human organ trafficking (UNODC, 2004: 339-340). The protocol has two main purposes. Firstly, it is aimed at preventing and combating human trafficking with particular attention to the protection of women and children (The Palermo Protocol, 2000: Article 2(a)). Women and children are specifically referred to in the protocol because they are considered as the most vulnerable to the crime, although men are also

trafficked. Second, the protocol aims to promote and facilitate co-operation among states parties in order to realise the objective of combating and eradicating human trafficking (The Palermo Protocol, 2000: Article 2(b)(c)). Thus, States Parties to the Palermo Protocol, are required to comply with certain obligations necessary for preventing, suppressing, punishing and combating of human trafficking. Among the wide range of measures required of States Parties to the protocol is the criminalisation of all forms of human trafficking in their national legislation and criminal prosecution of human traffickers (The Palermo Protocol, 2000: Article 5). It is believed that the absence of uniformity in criminal legislation makes communication and co-operation among countries difficult, especially with respect to combating human trafficking (Gallagher, 2001: 975-1004).

Although the Palermo Protocol remains the most important international legal instrument for combating human trafficking (Truong & Angeles 2005: 17), it has been subjected to criticism. The Protocol has, for example, been criticised for not committing to evaluating the effectiveness of its framework and the impact of policies introduced by member states in the fulfilment of its obligations (Milivojevic & Segrave, 2012: 233-257). This criticism has continued despite the establishment in 2006 of the Conference of the Parties to the UN Convention against Transnational Organised Crime and its Protocols (the Conference), as a body responsible for periodic assessment of the implementation of the convention. Milivojevic and Segrave (2012: 233-257) argue that the Conference is quite limited in its powers and scope. With respect to human trafficking, they argue that the Conference only assesses if member states have implemented “the basic criminalisation and international co-operation standards and requirements”. They, therefore, further argued that the lack of a formal mechanism for evaluation limits knowledge about human trafficking and efforts to combat it to criminal justice activity (Milivojevic & Segrave 2012: 233-257).

The protocol has also been criticised on the absence of guidance for identifying human trafficking victims. Gallagher describes the absence of guidance for identifying trafficking victims as a fundamental weakness of the protocol. The lack of identification guidelines makes it difficult to identify actual trafficking victims and accord them access to support and assistance provided in terms of the protocol. Similarly, absence of guidance tends to weaken rather than strengthen the trafficking legislation (Gallagher, 2001: 975-1004). Linked to the absence of identification guidelines for trafficking victims, is the tendency to classify victims as part of undocumented or illegal immigrants in destination countries (Milivojevic & Segrave 2012: 233-257). This, results in human trafficking victims being criminally prosecuted for offences such as illegal migration; working without proper documentation, and prostitution (Kruger, 2010: 261). Furthermore, although the protocol forbids discrimination against victims on grounds of gender, age, race, religion, nationality, and others described in existing international instruments, it has been observed that not all possible bases for discrimination are covered in the protocol. Thus, it is argued that governments could still discriminate against trafficking victims who are gay, lesbian or transgender on the ground of their sexual orientation (HSRC, 2010: 25).

By 2014, the Palermo Protocol had been ratified by 159 countries including South Africa and Mozambique. Both countries have also adopted national anti-trafficking legislation to combat trafficking in fulfilment of international obligations as signatories to the Palermo Protocol. National anti-trafficking legislation of countries is supposed to cover areas not adequately covered by the Palermo Protocol and possibly correct its identified shortcomings. South African and Mozambican national legislation are subsequently compared to the extent that they achieve these goals.

**SIMILARITIES BETWEEN SOUTH AFRICAN AND MOZAMBIKAN ANTI-TRAFFICKING LEGISLATION**

South Africa and Mozambique are listed as Tier 2 countries in the US annual *Trafficking in Persons Report* (TIP). In accordance with the US definition, Tier 2 countries are those countries that do not fully comply with the minimum standards for the elimination of human trafficking (US Department of State, 2013: 271, 336). Nevertheless, South Africa and Mozambique have been making attempts to combat human trafficking within the context of their limited resources. Based on the obligations in the Palermo Protocol, South Africa and Mozambique's efforts are based on the principles of prevention, protection, support, and prosecution. These efforts involve extensive collaboration with governments and international organisations such as UNICEF, as well as local NGOs. The efforts also include the creation of public awareness, which are non-legal means, as well as the prosecution of offenders under their national anti-human trafficking or related legislation (Delpont, Koen & Mackay, 2006: 48-53, Boaventura, Manjate & Mackay, 2006: 46-51).

The South African and Mozambican legislation (*Prevention and Combating of Trafficking in Persons Act No. 7 of 2013* and the *Publicação oficial da república de Moçambique. Lei no. 6/2008* respectively) to counter trafficking are similar in many respects. As previously mentioned, both are based on the Palermo Protocol. It is important however, to mention that the South African legislation is not yet operational. Nevertheless, both South African and Mozambican legislation proscribe human trafficking in all its ramifications and provide punishment for the offences (*Prevention and Combating of Trafficking in Persons Act (PCTPA)*, 2013: Section 4(1)(a to j); (2)(a-b) and Section 13(a-e); *Lei No. 6/2008*: Article 4(1)(2)). Both laws place strong emphasis on the protection of the identities of trafficking victims, as well as witnesses to the crime of trafficking (*Lei No. 6/2008*: Article 4(1)(2); *PCTPA* 2013: Section 41(1)(2)). Furthermore, under the laws, rehabilitation and care of victims are guaranteed (*Prevention and Combating of Trafficking in Persons Act*, 2013: Section 18; *Lei No. 6/2008*: Article 21(1)(2)). These provisions may be regarded as attempts to address the human rights violations suffered by victims during their victimisation. Most importantly, both the South African and Mozambican legislation hold both natural and legal persons accountable for trafficking offences.

The similarity of both laws also rest on criminalisation of all forms of advertising, publishing, printing or broadcasting of information encouraging human trafficking through media outlets such as the Internet (*Lei No. 6/2008*: Article 15 & 16; *PCTPA*, 2013: Section 8). Both also condemn the destruction, concealment or confiscation of travel documents or personal belongings of trafficking victims (*PCTPA*, 2013: Section 4(6); *Lei No. 6/2008*: Article 15 & 16). Similarly, in both the South African and Mozambican legislation, the victim's consent cannot be used as an excuse for the crime of trafficking (*Lei No. 6/2008*: Article 18; *PCTPA*, 2013: Section 4). The South African and Mozambican legislation also exempt victims of trafficking from criminal prosecution provided their crimes were committed as a result of their victimisation (*Lei No. 6/2008*: Article 20(3); *PCTPA*, 2013: Section 22 (1), (4)). The victims are also expected under both laws to co-operate with or assist the police in their investigation into these crimes (*PCTPA*, 2013: Section 15(2), *Lei No. 6/2008*: Article 24).

In accordance with the Palermo Protocol, both South African and Mozambican legislation encourage international co-operation with other countries to expedite the process of repatriation of their nationals trafficked to other countries, as well as the repatriation of nationals of other countries trafficked to Mozambique and South Africa (*Lei No. 6/2008*: Article 23(2); *PCTPA*, 2013: Section 31 & 32). The establishment of rehabilitation centres with medical facilities and sufficient food supply are also mandatory in the laws of both countries (*Lei No. 6/2008*: Article 21(1)(2); *PCTPA*, 2013: Section 21). The right to



information and legal assistance to victims of trafficking are also guaranteed by the legislation of both countries (Lei No. 6/2008: Article 22; PCTPA, 2013: Section 26). The granting of temporary visas to victims who agree to co-operate with the police in their investigation is also provided for in both cases (Lei No. 6/2008: Article 24; PCTPA, 2013: Section 17). Both laws also provide that victims, whose safety and security cannot be guaranteed in their home countries, would not be repatriated (PCTPA, 2013: Section 31, 32 & 33; Lei No. 6/2008: Article 23(2)).

## **DIFFERENCES BETWEEN THE SOUTH AFRICAN AND MOZAMBICAN LEGISLATION**

Although both the South African and Mozambican legislation give effect to the Palermo Protocol, and show similarity in many respects, there are still areas of observable differences. One major area of difference is in the reporting of human trafficking cases. Both the South African and Mozambican legislation provide that cases of human trafficking be reported to the police by victims, witnesses or interested third parties (PCTPA, 2013: Section 9; Lei No. 6/2008: Article 9(1)(2)). However, in Mozambique the police are not authorised to investigate suspected cases of trafficking without a prior reporting of such cases by victims or witnesses (Lei No. 6/2008: Article 7). The opposite is however the case in South Africa where the police are authorised to forcefully enter any premises without a warrant, if they reasonably suspect that those premises are being used for trafficking purposes (PCTPA, 2013: Section 4 (a) & Section 5 (a)(i)). The use of force which may include the breaking of doors and windows of such premises, may be carried out after the police had audibly demanded entry and informed the residents of the purpose of their operation (PCTPA, 2013: Section 4 (a) & Section 5 (a)(i)).

In terms of compensation, both the South African and Mozambican legislation provide for the payment of compensation to victims of human trafficking as well as the state (PCTPA, 2013: Section 29 & Section 30). However, the Mozambican legislation leaves the determination of the nature of compensation to be paid by convicted traffickers to victims entirely at the discretion of the courts (Lei No. 6/2008: Article 19). Similarly, with respect to terms of imprisonment, the Mozambican legislation also recommends a sentence of 16 to 20 years for trafficking acts such as transporting and kidnapping, and eight to twelve years for aiding trafficking through leasing out of premises to human traffickers (Lei No. 6/2008: Articles 10, 11 and 12). The South African legislation differs from the Mozambican legislation to the extent that it categorically states that convicted traffickers are to pay R100 million (US\$10 million) or risk life imprisonment or both, for trafficking through force, deception or coercion as well as by adoption and forced marriage (PCTPA, 2013: Section 13(a)). Similarly, trafficking for the purposes of debt bondage; tampering; destruction or concealment of travel documents belonging to trafficking victims; and leasing of premises to be used for trafficking, are to be fined or sentenced to 15 years imprisonment (PCTPA, 2013: Section 13 (a-e)). On this provision, it can be argued that while the Mozambican and South African legislation criminalise trafficking in all its ramifications, the South African legislation appears much stricter than the Mozambican legislation.

Differences between the legislation of both countries also exist in the identification of aggravating trafficking circumstances. The South African legislation identifies certain aggravating factors that must be taken into consideration when imposing a sentence on convicted traffickers. These factors include, but are not necessarily limited to, the role played by traffickers and previous convictions; addiction of the victim; condition of the victim; long captivity, and extent of abuse (PCTPA, 2013: Section 14(a-f)). Other factors include physical and psychological abuse; involvement of organised crime; involvement of children; mental state of the victim, and physical disability (PCTPA, 2013: Section 14 (g-h)). Although the

South African legislation makes provision for the addition of other factors during prosecution, the provisions of the law are only similar to those of the Mozambican legislation to the extent that they both identified involvement of organised crime; involvement of the guardian; physical and psychological abuse; children; mental state and disability of victims as aggravating circumstances. However, the Mozambican legislation goes further and also stipulates that aggravated circumstances exist when public officials take advantage of the vulnerability of persons to traffic them (Lei No. 6/2008: Article 5). This is a significant recognition because in countries such as the US, cases of human trafficking involving diplomats have been reported (Cockroft, 2014: 1, Keyes 2014: 1). In this regard the Mozambican legislation is broader than the South African legislation.

Differences can also be observed in the provisions of both laws relating to the reporting of trafficking cases to the police. The Mozambican legislation does not seem to oblige or compel victims and witnesses to provide information to the authorities regarding human trafficking (Lei No. 6/2008: Article 7). To this extent, it differs from the South African legislation. The South African legislation expressly states that, “despite any law, policy or code of conduct prohibiting the disclosure of personal information, any person who knows or ought reasonably to have known or suspected that a child is a victim of trafficking must immediately report that knowledge or suspicion to a police official for investigation” (PCTPA, 2013: Section 18 (1)(a)). This provision applies to both individuals and organisations and has a compelling force. The wording of the provision appears to indicate that witnesses who knowingly refuse to report cases of trafficking risk being prosecuted themselves.

Another major difference between the South African and Mozambican legislation is in the provision of extra-territorial jurisdiction. The South African legislation provides that a South African Court has jurisdiction in respect of acts of trafficking committed outside South Africa, which could have constituted an offence if it had been committed in the country (PCTPA, 2013: Section 12 (1) (a-f)). According to the law, the act remains an offence even though the laws of the country where it was committed do not criminalise it as such. For this provision to apply, the law states that the suspect must be a South African citizen or an ordinary resident, and the offence must have been committed against a South African citizen. Other conditions of the provision include the presence of the suspect in the country or its territorial waters; on board its ships; vessels; off-shore installations; fixed platforms; and aircraft registered or required to be registered in South Africa. There must also be no application for the suspect to be extradited to another country and the suspect must be a juridical person or a partnership registered in terms of any law in South Africa (PCTPA, 2013: Section 12 (1) (a-f) and (2-5)). The Mozambican legislation does not have a provision relating to extra-territorial jurisdiction. However, it does refer to other penal codes which may also be used to prosecute human trafficking.

From the foregoing, it can be seen that the South African and Mozambican national legislation are comprehensive legal instruments that holistically address the problem of human trafficking. They cover all aspects of the Palermo Protocol and go further to cover areas not adequately covered by the international legal instrument, such as the exemption of human trafficking victims from criminal prosecution for offences committed as a result of having been trafficked. Whereas only victims of international trafficking are protected under the Palermo Protocol, the South African and Mozambican legislation provide for both victims of international and domestic trafficking.

## **CONCLUSION**

From several indications, it does appear that human trafficking will remain an ongoing problem in South Africa and Mozambique, since the underlying causes of the phenomenon

tend to endure although more emphasis than before is being placed on combating it nationally. The adoption of anti-trafficking policies and legislation by South Africa and Mozambique indicate a willingness to combat human trafficking and acceptance of the obligations stipulated in international legal instruments. However, the national anti-trafficking legislation of both countries suffers similar weaknesses as the international protocol on which they are based. For example, the anti-trafficking acts direct institutions, public agencies, organisations and individuals to report suspected cases of human trafficking without providing guidelines or signs to look for so as to properly identify victims. The absence of identification guidelines in both national Acts, implies that individuals, organisations and institution will continue to rely on suspicion and intuition in searching for trafficking victims. Therefore, it is that argued the lack of identification guideline will impact on efforts to properly identify and separate human trafficking victims and accord them access to necessary support provided in these acts. Thus, the possibility of criminally prosecuting human trafficking victims for offences such as illegal migration and prostitution has not been eliminated by the Acts. Furthermore, these acts have also not eliminated possible bases for discrimination against victims as envisaged in national and international legal instruments. Thus, as has been observed with respect to the Palermo Protocol, the possibility of discrimination against trafficking victims who may be gay, lesbian or transgender on the ground of their sexual orientation still exists (HSRC, 2010: 25).

Considering the multi-faceted nature of the phenomenon and its enduring causes and global dimensions, it is recommended that, South Africa, Mozambique, and other Southern African countries reprioritise human trafficking on their scale of policy preferences. This will require effective implementation of national anti-trafficking legislation as well as the provision of adequate human and material resources to deal with the problem. Adequate allocation of resources and support to special units dealing with human trafficking will signal a willingness to combat the phenomenon. In addition to this, it is also necessary for South Africa and Mozambique to improve measures with respect to criminal prosecution, border protection, intelligence gathering, and the campaign against corruption.

Human trafficking affects all countries in Southern Africa and no country can effectively combat the phenomenon on its own. In this regard, it is also necessary that South Africa and Mozambique as well as other Southern African countries establish, maintain and strengthen international counter-trafficking co-operation among themselves and international partners, as recommended in the Palermo Protocol. International co-operation would lead to the enhancement of the anti-trafficking capabilities of Southern African countries, especially South Africa and Mozambique.

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