

Contemporary Slavery: Sex trafficking in South Africa and suggested solutions¹

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Introduction

Human trafficking for the purposes of sexual exploitation is now a global phenomenon. The following quote from Marcello Ramkishun, who works for the International Organisation of Migration's counter-trafficking unit based in Cape Town, illustrates this fact:

...you got now Russian or former communist members...you got Italians in Cape Town involved with ministers, you got Lebanese groups in Johannesburg, triads in Cape Town and Johannesburg and in Durban, you got local groups, you got Nigerians...what you're getting is this big pool of talents...this is like a globalisation...the globalisation of crime has already happened...it's just fine tuning itself now.²

There is strong support for the view of trafficking in persons resulting in a globalisation of crime. The United Nations estimate that trafficking in persons manages to generate an annual profit of some seven to ten billion dollars worldwide.³ The focus of this research paper is on sex trafficking in South Africa. There are numerous problems that arise when attempting to combat sex traffickers. If trafficking is to be made a crime, the task of laying out precisely what must be outlawed is difficult and putting the accused on trial is costly and slow. In addition, democratically elected governments, who respond to the desires of the public that elects them, will, when confronted with a xenophobic and jobs-hungry citizenship, pass protectionist immigration legislation. These factors have a negative impact on the victims of sex trafficking, particularly foreign sex workers who are within our borders.

The structure of this paper will be as follows: first, the definition of human trafficking will be scrutinised; second, the international provisions regarding sex trafficking will be analysed; third, the current position in South African law on sex trafficking will be viewed critically from a human rights perspective, and it will be shown that South Africa has not complied with international standards; next, the plight of the victims of sex trafficking will be described; and finally, I will attempt to suggest solutions to the problem of sex trafficking both from a South African and an international perspective. Potential solutions would include the passing of anti-trafficking legislation and the strengthening of the witness protection programme, which would help to ensure that vital victim testimony would be given in court.

(1) What is human trafficking?

The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention Against Transnational Organised Crime of 2000, provides a definition of human trafficking in article 3:

- 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 a position of vulnerability or of the giving or receiving of payment 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) are 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.

For explanatory purposes it is important to provide a clear distinction between smuggling and trafficking. The former does not involve exploitation or abuse. The smuggler is paid to transport people from one place to another and his or her involvement in the matter terminates once the unlawful entry into the country of destination occurs. The latter involves a continued exploitation of the victim.⁴ In smuggling the migrant is acting voluntarily; in trafficking the persons are moved against their will.⁵

The advantages of article 3 are twofold: (a) it gives effect to the rights of victims; and (b) it establishes a common definition for trafficking. Regarding (a), the trafficked persons are seen as victims and not as perpetrators of the crime.⁶ In addition, the consent of the victim is irrelevant. This provision is a response to the fact that sex traffickers often lure their victims, most of whom are suffering in poverty, with false promises of a better life elsewhere.⁷ The crux of the trafficking process is recognised by the article as the exploitation of the victims and not their physical passage from one place to another.⁸ Regarding (b), there is now an accepted definition of trafficking. The article casts a very wide and comprehensive definition of trafficking. This will make it easier to harmonise anti-trafficking legislation.

There are two main criticisms of the definition article of the Protocol. First, the definition of trafficking in persons is enumerative. This means that the Protocol gives a broad list of the various activities that are considered to constitute human trafficking. It may be technically possible for a trafficker to find a loophole in the article by arguing that what he is doing falls outside this list. Admittedly there is very little scope for any trafficker to find such a loophole as the definition is drafted quite widely. Second, it becomes very difficult to design assistance mechanisms for victims of trafficking if you include too many related criminal activities into the definition of trafficking; as one source has noted,

...an overly broad reading, or an attempt to cluster an assortment of other crimes within the trafficking definition may ultimately result in distracting assistance designed uniquely for victims of a more narrowly defined trafficking.⁹

(2) International Responses to the Trafficking in Persons

The Palermo Protocol has appeared on the international scene as a continuation of the international instruments dedicated to the abolition of all forms of slavery. The lofty idealism of the UN Declaration on Human Rights 1948 is a powerful statement by the international community against the abhorrence of slavery of any kind. The Declaration provides: “no one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms”.¹⁰ This is not the only categorical rejection of slavery. The 1926 Slavery Convention and the 1957 Supplementary Convention on Slavery are two examples. This principled position taken by the international community has set the platform for the struggle against sex trafficking.

The Palermo Protocol seeks to build on this international anti-slavery regime. The context in which this Protocol must be seen is an attempt to further concretise a global consensus regarding the abolition of slavery. This attempt will encompass three main efforts: first, making trafficking a crime; second, providing protection for the victims of trafficking; and, third, ensuring greater solidarity amongst nations in the battle against sex trafficking.

The language of the article, which provides for the criminalisation of trafficking, is mandatory: “Each state *shall* adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”¹¹ This article also mandates that a state must adopt legislative and other measures to provide for attempt and accomplice liability¹² concerning the crime of trafficking. It also deals with the organised criminal aspect of trafficking.¹³

The Protocol further improves on the existing anti-slavery agenda by providing for the victims of trafficking. The language used by the Protocol, regarding protection of victim’s rights, is less stringent than the language used concerning the criminalisation of trafficking. The Palermo Protocol says that states must *consider* implementing measures to support victims.¹⁴ The Protocol is cognisant of the constrained resources of some states. It provides that, in cooperation with NGOs, states should make provision for housing, counseling and information, medical assistance, and job provision for victims of trafficking.¹⁵ The repatriation of victims is also provided for in the Protocol. The receiving state can only return the victims to their home country if it is safe enough to do so.¹⁶

The final way in which the Palermo Protocol attempts to progress the international anti-slavery cause is by creating a global language consciousness regarding trafficking in persons.¹⁷ As a consequence of the globalisation of labour and information trafficking is transnational in nature. This requires state cooperation.¹⁸ This is provided for in the Protocol where it deals with information exchange between states¹⁹ and the strengthening

border control.²⁰ The Protocol further attempts to address the global nature of the crime of trafficking through its aims to harmonise national laws in the tackling of trafficking in persons.²¹ This objective is particularly important because of the transnational nature of trafficking. Such an objective is remarkably difficult to achieve considering the Protocol must also respect the sovereignty of states by not dictating the content of the anti-trafficking measure that must be adopted.

It is useful, for clarification, to mention Article 1 of the US Model Law to Combat Trafficking in Persons 2003, which both codifies and expands on the provisions of the Palermo Protocol.²²

- ‘Forced labor’ shall mean labor or services obtained or maintained through force, threat of force, or other means of coercion or physical restraint.
- ‘Slavery’ shall mean the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised.
- ‘Practices similar to slavery’ include, in general, debt bondage, serfdom, forced or servite marriages and delivery of children for exploitation.
- ‘Servitude’ shall mean a condition of dependency in which the labor or services of a person are provided or obtained by threats of serious harm to that person or another person, or through any scheme, plan, or pattern, intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm.

These definitions would be useful as a model for potential anti-trafficking legislation in South Africa. The US Model Law will be referred to in section 5 of this paper as it provides some solutions to the problem of human trafficking.

(3) The South African Context

The following court testimony of a foreign national sex worker in South Africa clearly illustrates contemporary slavery in the form of debt bondage:

There were many girls working at the Ranch as sex workers on the same basis as myself (Ilieva). I would estimate that there were in the vicinity of 50 girls working there like that plus about 30 strippers. The girls were of various nationalities including local girls...I made varying amounts per night at the Ranch. Some nights I would make a loss when I had no clients and I had to carry the levy over to the following shift. After paying my levies and the money to Itzo (pimp) I would end up with about R500 to R1000 for myself each week...

As far as I am aware I was legally entitled to work in the RSA due to my refugee status...I would think that in the RSA the job I was doing as a prostitute is illegal, but I am not sure.²³

South Africa is a country of destination, transit, and origin of trafficked persons.²⁴ This places a great responsibility on South Africa to introduce measures to counter the growing trend of sex trafficking. It is imperative that the state gives effect to its

constitutional obligation to protect the rights of its citizens; the sexual exploitation of women must be defeated.

On 14 December 2000 South Africa signed, and on 20 February 2004 ratified the Palermo Protocol. Despite this fact, South Africa still has not promulgated any legislation dealing directly with trafficking in persons. Currently we follow what can only be described as a 'piecemeal' approach to trafficking.²⁵ There are three main pieces of legislation: the Sexual Offences Act,²⁶ the Prevention of Organised Crime Act,²⁷ and the Immigration Act.²⁸ In addition to this there are the common law offences of abduction²⁹ and kidnapping.³⁰

The SOA: (i) outlaws the owning of a brothel,³¹ (ii) criminalises the procurement (by coercive means or by drugs) of a woman for the purpose of unlawful carnal intercourse,³² and (iii) makes it an offence to live off the earnings from the prostitution business.³³ Regarding (ii), the Act has recognised that prostitutes are often trapped in a cycle of addiction. Sex workers end up working just to pay off their drug habit. This creates situations akin to slavery. The problem with (iii) is that it makes the victims of trafficking guilty along with their traffickers.³⁴

Trafficking in persons is a very profitable business for organised crime.³⁵ It is for this reason that Prevention of Organised Crime Act (POCA) is currently the strongest weapon against sex traffickers. POCA³⁶ criminalises racketeering activities;³⁷ offences that relate to the proceeds of unlawful activities, which includes the assistance of another in benefiting from the proceeds of unlawful activities.³⁸ The Act provides for criminal confiscation and civil forfeiture of the proceeds of unlawful activities.³⁹ POCA introduces a two-pronged system for recovering these proceeds: first, confiscation after a conviction by a court of law,⁴⁰ and, second, civil forfeiture without the need of a conviction.⁴¹ The legislature has conferred an extensive power on the courts by allowing the issuing of a restraint order⁴² without a legal conviction of the defendant, provided there is at least a reasonable prospect of getting a conviction.⁴³

There is a possibility of constitutional challenge against POCA on the grounds of (a) property rights⁴⁴ and (b) the right to a fair trial.⁴⁵ Regarding (a), the constitutional right to property protects everyone from being arbitrarily deprived of his or her property except by law of general application.⁴⁶ If any such person is so deprived, just compensation must be given. Thus, it may be possible to challenge the provision in POCA, allowing for civil forfeiture without a conviction, as the lack of a court order may render the forfeiture arbitrary. Regarding (b), the constitutional right to a fair trial includes the right to be presumed innocent until proven guilty.⁴⁷ The power of the courts, granted by POCA, to issue a restraint order, without legal conviction of the defendant, might offend this right to presumption of innocence. However, this paper will not pursue in any greater detail these possible constitutional challenges to POCA.

The focus of the Immigration Act⁴⁸ is on arresting and repatriating illegal foreigners residing within South African borders. This means that a trafficker would only be prosecuted for breaking immigration laws by employing an illegal foreigner in South

Africa.⁴⁹ In practice, the main targets of this Act seem to be the victims of sex trafficking. This is because sex workers have most likely been brought in from other countries and do not have the necessary valid documentation. This leads to secondary victimisation.⁵⁰ The case of *National Director of Public Prosecutions v Phillips and Others*⁵¹ is instructive on how South African prosecution services would approach charging a suspected trafficker. Andrew Phillips was the owner of an upmarket brothel in Johannesburg called the ‘Ranch Executive Entertainment Centre’. The police raided this brothel and arrested forty women of foreign nationalities. The case essentially concerned a restraint order in terms of POCA. In addition, there were eight counts leveled against Phillips:⁵² the first four involved contravention of various sections of the SOA, and the last four concerned contraventions of the Aliens Control Act.⁵³ On appeal, Howie P upheld the decision of the court *a quo* to award a confiscation order against Phillips.⁵⁴ The reason was that Phillips had profited considerably from his conduct at the Ranch. Therefore there were reasonable grounds for believing he would be convicted of unlawfully owning a brothel and living off the earnings of prostitution.⁵⁵

The issue of how legislation (e.g. Aliens Control Act, Immigration Act) has the effect of secondary victimisation of the victims of trafficking, will be discussed in greater detail in section 4 of this paper.

(3.1) The Problems Facing South Africa in tackling Trafficking

In a recent interview with *The Mercury* newspaper, Jonathan Martens of the International Organisation of Migration in Pretoria, broadly outlined the problems facing South Africa regarding human trafficking:

Human trafficking is a serious problem in South Africa because of the country’s organized crime gangs and large, porous borders. The problem is compounded because there are no laws in South Africa outlawing human trafficking.⁵⁶

There are three areas of concern for South African authorities in combating sex trafficking: corruption,⁵⁷ implications of limited state resources⁵⁸ and logistical difficulties.⁵⁹ A special area of concern is the tendency for legitimate refugees, facing South African xenophobia, turning into traffickers of their own family members.⁶⁰

Corruption detrimentally impacts on effective law enforcement in two ways. First, it undercuts strong border control measures. South Africa has porous borders. Corrupt officials allow traffickers to gain easy access into the country, especially through Komatipoort.⁶¹ Consider the following words by a victim who was trafficked from Lesotho to South Africa: “So we just crossed the border, without a passport, without anything...through the border post. They just passed, nobody asked them about any passport or anything.”⁶² Second, traffickers benefit from corruption by paying lawyers to abuse the asylum process.⁶³ The Refugee Act⁶⁴ allows an illegal foreigner the right to apply for refugee status in South Africa.⁶⁵ Whilst this application procedure is being carried out the police cannot arrest the illegal foreigner.⁶⁶ Some traffickers take advantage of this by bribing their lawyers to submit false asylum applications. This abuse of the asylum process is another way that traffickers bypass the law.

When providing for measures to combat sex trafficking it would be prudent for the state to take account of the resource implications of such measures. The lack of both human and financial resources acts as an obstacle to evidence-based policy-making by the executive.⁶⁷ Strained resources adversely impact upon the fight against trafficking in three main ways. First, an investigation carried out by an under equipped police force will lower the chances of a successful prosecution.⁶⁸ Second, South African port authorities cannot afford to have advanced anti-forgery equipment at every port. This means it is possible for traffickers to slip by at the ports where there is no such equipment and gain illegal access into the country.⁶⁹ Third, a vital part of establishing a case against a trafficker is the testimony of the victim(s). South Africa has a weak witness protection programme, which means that victims are less likely to come forward and testify against their sexual exploiters.⁷⁰ This state of affairs has prompted the media to tell of the dangers involved in being a state witness. The headline of a Sunday Times article captures their plight: 'It's misery, says protected witness.'⁷¹

There are four main logistical difficulties in combating sex trafficking. In the first instance, there is a communication barrier between the predominantly foreign victims of trafficking and the South African law enforcement officials.⁷² About 85% of victims trafficked to our shores speak Portuguese, Swahili, French or Asian or East European languages.⁷³ Very few victims know any of the official languages recognised in our constitution.⁷⁴ This point links up with the second logistical difficulty, which is the lack of research on the issue of trafficking in South Africa.⁷⁵ The reason for this is that one of the main ways of compiling in-depth research is the first-hand account of victims of trafficking. Comprehensive research on the matter would allow for a more knowledge-based response to sex trafficking. The more you know about something, the better you are able to anticipate the problems and react to them. Thirdly, state prosecutors are not sufficiently trained in the field of trafficking which requires special skills.⁷⁶ A possible reason for this lack of training is the paucity of research on trafficking mentioned above. Finally, the Internet is a massive and largely unregulated entity. This is ideal for traffickers who can use the Internet as a forum to meet and recruit potential sex workers.⁷⁷ Laws of nations are territorial while the Internet is not located in any one territory.⁷⁸ The major task concerning computer related evidence is how to collect it and *preserve* it in a way that it will be useful at trial.⁷⁹ The main piece of current legislation in this regard is the Electronic Communications and Transactions Act.⁸⁰ Section 15 provides:

1. In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence –
 - a. on the mere grounds that it is constituted by a data message; or
 - b. if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
2. Information in the form of a data message must be given due evidential weight.
3. In accessing the evidential weight of a data message, regard must be had to –

- a. the reliability of the manner in which the integrity of the data message was maintained;
 - b. the manner in which its originator was identified; and
 - c. any other relevant factor.
4. A data message made by a person in the ordinary course of business, or a copy or print out of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative, or disciplinary proceedings under any law, the rules of a self regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such a record, copy, printout or extract.

This section reflects an attempt to secure, in an increasingly electronic age, computer generated evidence. The Act responds to the challenge posed by the Internet in two ways: it does not allow courts a discretion regarding admissibility of such data messages, but it does afford them a discretion concerning the weight to be attached to such message evidence;⁸¹ and, the Act endeavours to bolster the strength of the state in combating internet crime by creating ‘cyber inspectors’ who have extensive search and seizure rights.⁸²

People with legitimate claims to refugee status in South Africa are often the ones who turn into sex traffickers.⁸³ Unemployment in South Africa has meant that our labour market provides for our citizens first before it can accommodate unskilled foreigners. As a result they feel alienated from South African society.⁸⁴ The IOM paper states:

Harsh living conditions among refugee men in South Africa, high unemployment, and the clan system, often coalesce to facilitate extra-legal survival strategies and tactics, such as the trafficking of women for commercial sexual exploitation.⁸⁵

These refugees-turned-traffickers often exploit their own family relatives for the purposes of sex work.⁸⁶

(4) Victims of Sex Trafficking

It is vital to understand how the sex trafficking industry operates in order to learn what impact it has on its victims. A disturbing article in *The Mercury* on July 12, entitled ‘Job offer ended up being a trap’, clearly illustrates how traffickers lure their victims into sex work:

Lured by the promise of a brighter future in South Africa, Win and Pin [not their real names] accepted an offer from a friend to travel halfway around the world from their homes in Thailand...they were promised work at an upmarket Thai restaurant in Durban, and that their travel expenses were to be paid. But, unbeknown to them, their ‘friend’ was a recruiter for a human trafficking syndicate, which supplies Thai women to brothels in South Africa. And, instead of a restaurant, the two found themselves at a nightclub in Durban, where they were forced into prostitution. Their passports were confiscated and they were threatened with harm if they did not

do what they were told. They were denied contact with family. The money they earned from sex with the club's clients went to their captors to pay off their travel expenses. The two women worked until a 'client' informed police that something was amiss at the club.⁸⁷

In various ways, South Africa has failed to create a victim-friendly environment for women who have been trafficked for the purposes of sexual exploitation. These victims suffer from both a lack of support mechanisms and systematic abuse at the hands of traffickers. Furthermore, anti-immigration legislation results in forced deportations of these victims. While the keystone to a successful prosecution of a trafficker is victim testimony, often victims do not feel safe enough to testify against their abusers. There is also a need for better compensation for victims of sex trafficking.

Victims of sex trafficking face many problems. These problems can broadly be delineated into three main areas: first (as mentioned above), there is a lack of support mechanisms for victims of sex trafficking⁸⁸ – where such facilities do exist, there is a lack of access to them (it is mandatory to produce an identity document before being allowed into any shelter;⁸⁹ the illegal status of many victims means that they shy away from trying to seek such shelters in the first place).⁹⁰ Secondly, victims of sex trafficking suffer abuse. Traffickers demand that their sex workers must earn a prescribed minimum sum of money; if this amount is not raised these sex workers will suffer violent repercussions.⁹¹ Refugee victims are forced to work long hours and they face abuse from clients refusing to pay for their sexual services.⁹² Third, when the prosecuting authority is actually pursuing a case, the victims receive very little information regarding the legal proceedings.⁹³ This lack of information creates feelings of uncertainty and anxiety for the victim in question.

Legislation can aggravate the secondary victimisation of sex workers. The Immigration Act and the Aliens Control Act are focused on getting illegal foreigners out of the country and are unconcerned with the plight of victims of sex trafficking. Moreover, they are more interested in punishing the trafficked person, rather than the trafficker. The case of *NDPP v Phillips*⁹⁴ is a classic example of how such legislation operates. Of the forty women arrested in the police raid, fifteen were charged and convicted of breaking the provisions of the Aliens Control Act (eleven for possessing invalid temporary residence permits and the other four for possessing expired permits). These fifteen women, plus another three, were summarily removed from the country.⁹⁵ The Immigration Act states that an illegal foreigner must be deported,⁹⁶ and facilitates such deportation by conferring powers on an immigration officer to, without a warrant, arrest an illegal foreigner and deport him or her.⁹⁷ In sum, sex workers are first victimised by their traffickers, and then also suffer the brunt of protectionist legislation.⁹⁸

Victims of sex trafficking have a legitimate interest in bringing abusive traffickers to justice. The testimony from such victims often proves to be vital evidence in the prosecution of such traffickers. Lamentably, many victims are deterred from agreeing to give oral evidence for fear of reprisals from their masters.⁹⁹ This fear stems from the constant abuse suffered at the hands of sex traffickers and from the rather weak witness

protection programme in South Africa. Victims have submitted complaints regarding their maltreatment at the hands of those meant to be protecting them, and the fact that there are inadequate trauma counselling facilities available.¹⁰⁰ There are, however, various avenues through which victim testimony can be secured. Under the Criminal Procedure Act¹⁰¹ witnesses can give evidence by closed circuit television,¹⁰² or by way of *in camera* proceedings, if it is in the interests of justice to do so.¹⁰³

The victim of sex trafficking should be, and is, entitled to some form of compensation. The Criminal Procedure Act provides compensation for loss of property or money. It does not include relief for psychological or physical suffering.¹⁰⁴ POCA provides for compensation for loss of property but also for injury to the victim concerned.¹⁰⁵

In summary, victims suffer through lack of support mechanisms, anti-immigration legislation, and a lack of sufficient police protection to safely tell their stories to a court.

(5) Suggested Solutions in tackling sex trafficking

Marcello Ramkishun: "...you need legislation to contextualise this problem...you're going to have to have cops with a balance of victim assistance knowledge, they must know how to handle women. And I'm also extremely in favour of female cops doing that part...you're going to also have to have communication between units and it has to be provincially or even nationally that has to extend regionally on agreements between governments and then also internationally because we have this issue of trafficking being a transnational crime...my greatest fear about having a trafficking law is that once we get the law trafficking just becomes a regular crime...legislation has to be concise legislation, it has to be specific, but more importantly it has to be applied specifically by specific people."¹⁰⁶

There are a number of challenges facing South Africa in tackling sex trafficking. However, there are also many solutions to the problems, which, if implemented correctly, could have a very positive impact on the fight against sexual exploitation and abuse. There is much to be done: firstly, there is a responsibility on the government to introduce anti-trafficking legislation; secondly, the police must reform the way they enforce the law in order to effectively counter sex trafficking; thirdly, there is a need to develop a common understanding of the plight of those who suffer from coercion and exploitation; finally, the international or transnational dimension of the crime of trafficking must be addressed. The UK police research series has been extremely helpful in developing this list of solutions as has the US Model Law to Combat Trafficking in Persons 2003.

Section 13 of our constitution resolutely states that no one shall be subject to any form of slavery, servitude, or forced labour in South Africa. The South Africa government has a constitutional duty to protect the rights of its citizens.¹⁰⁷ One of the ways in which these rights, such as human dignity and freedom, can be protected is through the implementation of legislation.¹⁰⁸ There are two important factors to consider when deciding to introduce legislation: (1) should we criminalise certain conduct in the proposed legislation, and, (2) what should such potential legislation entail? Regarding

(1), the Palermo Protocol states that the proposed legislation should make the trafficking in persons for the purposes of sexual exploitation a criminal offence.¹⁰⁹ There has been much debate over the merits of criminalisation of certain conduct.¹¹⁰ The arguments against legislative criminalisation of certain conduct include cost implications in the implementation and enforcement of the legislation¹¹¹ as well as the problem of over-criminalisation, which would result in trafficking becoming a regular crime.¹¹² However, in South Africa there seems little option but to introduce legislation dealing specifically with sex trafficking. We need to contextualise the problem before us. Regarding (2), such proposed legislation should: set up a special unit trained specifically for apprehending traffickers as ordinary policing methods are insufficient in dealing with the unique nature of the trafficking process;¹¹³ make provision for heavy penalties for those charged and convicted of trafficking – this will help act as a deterrent;¹¹⁴ create a crime of sexual exploitation where it is necessary to prove a sexual act took place and someone benefited from that act either monetarily or otherwise;¹¹⁵ confer powers on the relevant Minister to set up guidelines for better policing – this will enable efficient collection of evidence against an alleged trafficker;¹¹⁶ make sure trafficked persons are not punished for related offences such as prostitution or transgressions of immigration laws, which is a vital step in eradicating the effects of secondary victimisation;¹¹⁷ and allow for temporary or permanent residence for victims provided they testify at trial, which will secure important oral evidence and enhance the State's pursuit of justice against alleged traffickers.¹¹⁸ In short, a broad and comprehensive legal framework must be created in order to effectively dismantle the trafficking network.

The proposed anti-trafficking legislation would require the police to reform their methods of law enforcement. In the first instance, police must dedicate more time to simple intelligence-gathering on off-street prostitution. They must pay particular attention to the presence of foreign women in South Africa.¹¹⁹ In this regard there is a need to train police to properly identify victims of trafficking.¹²⁰ Furthermore, there should be an increase in attendance by police forces at conferences that are designed to increase awareness of the trappings of the sex industry and how it operates in South Africa.¹²¹ This applies especially to those of the force who are unfamiliar with such an industry. A strengthening of the witness protection programme is also required; law enforcement must ensure that victims of sex trafficking feel secure enough to give vital testimony at the trial of an alleged trafficker.¹²² Lastly, as Marcel Ramkishun has suggested above, it would be advisable to get female police officers to deal with and interact with the victims of sexual exploitation.

There is a need to develop a common understanding of the nature of the crime of trafficking in persons as well as the effect such trafficking has on its victims. The focus in this regard should be on education. It is essential to promote an increased awareness of what trafficking is and the endemic abuse that results from it. There must also be a heightened awareness of coerced prostitution.¹²³ It is important to spread information about: the common recruitment techniques that traffickers use, exactly what debt bondage is, the risk of rape or abuse at the hands of traffickers, and the psychological harm caused by both primary and secondary victimisation.¹²⁴ There should be detailed research on women's experiences of sexual exploitation.¹²⁵ The United States has taken the lead in

developing an understanding of the plight facing trafficked women. The US Model Law suggests that data collection should be carried out on a large scale in order to ascertain (a) the number of arrests, prosecutions, and convictions of traffickers has occurred (this will obviously only apply when South Africa finally adopts anti-trafficking legislation); (b) the number of victims there are, including the age of the victims and how they were recruited; and (c) establishing the various trafficking routes and patterns used by traffickers.¹²⁶ Any kind of research needs to be given high profile coverage in the media. The prostitution of trafficked women must be put back on the policy agenda for government.¹²⁷ It is also useful to bring NGOs on board to assist with the provision of basic necessities to victims of trafficking.¹²⁸ It is necessary for government to work with NGOs and civil society to cope with the problem of trafficking.¹²⁹ The needs of victims include: the provision of adequate health care services, counselling for trauma suffered, and basic education.¹³⁰ In addition, NGOs can play a vital role in expertly monitoring the process of the government's implementation of its anti-trafficking measures.¹³¹

Trafficking in persons is a transnational crime. The main way of combating trafficking on an international level is the intensification of cooperation amongst states.¹³² The US Model Law 2003 stresses the need to work on securing relations with countries, especially those who are the source, destination, or place of transit for victims of trafficking.¹³³ South Africa is such a country. Ideally states should cooperate to ensure a free exchange of vital information¹³⁴ and expertise needed to track the whereabouts of traffickers. This may well involve the establishment of bilateral or multilateral agreements ranging from extradition to strong border control.¹³⁵ South Africa has already acceded to the European Convention on Extradition.¹³⁶ While efforts are being made to secure closer working relations with other states more still needs to be done.

Conclusion

In summary, this paper has aimed to do a number of things. Firstly, to define human trafficking for the purposes of sexual exploitation; secondly to reveal the situation in South Africa regarding prosecution of sex trafficking. Subsequently the paper went on to explain and highlight the plight of victims – almost all women – of such trafficking. Finally, and perhaps most importantly, this paper has attempted to provide solutions to the growing problem of sex trafficking.

It seems fitting to conclude with reference to a quote on a 2005 Canadian film entitled 'Sex Slaves':

Sex Slaves is a gripping documentary exposé into the shadowy, multi-billion dollar world of sex trafficking. The film takes us to the villages of Moldova and Ukraine, where girls are lured and then sold and forced into prostitution all over Europe. Often forced to service up to 20 customers a day, these girls are beaten, tortured, threatened and sold from one pimp to another. Hidden cameras follow Viorel, a Ukrainian man searching for his pregnant wife who has been sold for \$1000 and trafficked to Turkey. After days of desperate efforts, Viorel poses as a trafficker and sets out to buy her back. Bienstock [director] interviews traffickers, cops and victims and takes us deeper into the world of modern sex slavery than ever before.

Part cinema verite, part investigation, *Sex Slaves* puts a human face on this most inhumane of contemporary issues.¹³⁷

As *Sex Slaves* aimed to create an awareness of the heinous crime of sex trafficking, so too has this paper aimed to add to this growing knowledge – about a rampant industry that needs to be dealt with immediately.

¹ Unpublished Essay on International Human Rights and the Constitution 2003. The topic of this essay dealt with human trafficking. The essay was helpful in developing ideas and assessing legal issues in the research paper.

Thanks to Cathy Powell for her insightful comments on my first two drafts. Thanks also to Salim Nakhjavani who gave some very useful comments.

² Interview with the author, May 2006.

³ Kathleen Fitzgibbon 'Modern day slavery? The scope of trafficking in persons in Africa.' (2003), African Security Review, vol. 12(1), p. 85. Article from the internet <http://www.iss.co.za/Pubs/ASR/12No1/E2.pdf> ; date accessed: 21 April 2006. See also the US Attorney-General's report to Congress on human trafficking: "an estimated 600,000 to 800,000 persons are trafficked across international borders each year. More than 80% of these victims are women and girls and 70% of them are forced into sexual servitude." <http://justice.gov/ag/annualreports/tr2005/agreporhumantrafficking2005.pdf>. Accessed on 3 August 2006.

⁴ SALC Issue Paper 25 Project 131 'Trafficking in Persons' (2004), p. 33.

⁵ ECRE Background Paper, 'An Overview of Proposals Addressing Migrant Smuggling and Trafficking in Persons', 2001, p. 1.

⁶ Raymond, J.G. 'A Guide to the new UN Trafficking Protocol – Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime, 2001, p. 4.

⁷ SALC Paper (n. 2), p. 27 & 39. See further under section 4 dealing with victims of sex trafficking.

⁸ Article 3(b) of the Protocol. See also Raymond (n. 4), p. 4.

⁹ IOM Paper, 'Seduction, Sale and Slavery: Trafficking of Women and Children for Sexual Exploitation in Southern Africa.' 3rd Edition, 2003, p. 14.

¹⁰ Article 4 of the UN Declaration on Human Rights 1948.

¹¹ Article 5 of the Protocol.

¹² Article 5(2)(a) & (b) of the Protocol.

¹³ Article 5(2)(c) of the Protocol.

¹⁴ Article 6(3)(c) of the Protocol.

¹⁵ Article 6(a), (b), (c), and (d) respectively of the Protocol.

¹⁶ Article 8(1) of the Protocol.

¹⁷ Raymond (n. 4), p. 1.

¹⁸ Ibid.

¹⁹ Article 10 of the Protocol.

²⁰ Article 11 of the Protocol.

²¹ Graeme Hosken 'Children sold for sexual exploitation' *The Mercury*, July 12 2006, p. 3. Jonathon Lucas, of the UN Office on Drugs and Crime representative, was quoted as saying the following: "We are trying to get Southern African countries, including South Africa, to adopt common legislation on trafficked persons in line with the UN protocol on trafficking in persons."

²² See also SALC Paper (n. 2), p. 17. See also a very useful website commenting on the US Model Law http://www.stopvaw.org/U_S_State_Department_Model_Law_to_Combat_Trafficking.html. Accessed on 29 August 2006. The US Model Law is basically a codification of the Palermo Protocol. The Model Law provides many supplementary definitions for explain concepts in the Palermo Protocol. The provisions of the Model Law dealing with support of victims expands on the Palermo Protocol by also providing for the victims' family.

²³ *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 92A – C. See also the appeal court judgment *Phillips v National Director of Public Prosecution* 2003 (6) SA 447 (SCA) at 449F: "In addition, the customers pay the women for sexual services rendered but first appellant receives

no part of these payments. The current amount each of the women has to pay is R450 per shift and a customer's entry fee is R250."

²⁴ SALC Paper (n. 2), p. 11.

²⁵ *Phillips* (n. 19) at 79B-81C. See also SALC Paper (n. 2), p. 54.

²⁶ 23 of 1957. Hereinafter referred to as SOA.

²⁷ 121 of 1998. Hereinafter referred to as POCA.

²⁸ 13 of 2002.

²⁹ Abduction is the unlawful taking of a minor out of the control of his or her custodian with the intention of enabling someone to marry or have sexual intercourse with that minor. Burchell J. 'Principles of Criminal Law' (2005), 3rd Edition, p. 762.

³⁰ Kidnapping is the unlawful and intentional deprivation of a persons liberty of movement and/or his or her custodians of control. Burchell (n. 27), p. 758.

³¹ S1 of SOA defines brothel: any house or place used for unlawful carnal intercourse. "Unlawful carnal intercourse" is any intercourse other than between husband and wife. S2 outlaws the owning of such a brothel.

³² S10 (a) – (e) of the SOA.

³³ S20 (a) – (c) of SOA.

³⁴ S20 of the SOA says: "Any person who...shall be guilty of an offence". It does not differentiate between the trafficker and the trafficked person(s).

³⁵ Fitzgibbon (n. 1), p. 86. A trafficker of women to Europe can earn between \$20, 000 and \$50, 000 per victim.

³⁶ See (n. 24). POCA came into operation on 21 January 1999.

³⁷ Ch2 of POCA: s2 criminalises; s3 prescribes the penalties.

³⁸ Ch 3 of POCA. S5 of POCA outlaws the assistance of another to benefit from proceeds of unlawful activities.

³⁹ Ch 5 and 6 respectively.

⁴⁰ S18 of POCA.

⁴¹ Ch 6 part 3 of POCA.

⁴² S25 of POCA.

⁴³ S25(1)(b)(ii) of POCA. See also *Phillips* (n. 21) at para 12.

⁴⁴ S25 of the Constitution of the Republic of South Africa no. 108 of 1996, hereinafter referred to as the Constitution.

⁴⁵ S35(3) of the Constitution. See *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA), which dealt with the issue of retrospectivity of ch 6 preservation order in POCA.

⁴⁶ S25(1) of the Constitution.

⁴⁷ S35(3)(h) of the Constitution. S2(2) of POCA allows for admission of hearsay and similar fact evidence in racketeering cases provided it does not render the trial unfair. See Burchell (n. 27), p. 982.

⁴⁸ 13 of 2002.

⁴⁹ S38 of the Act.

⁵⁰ SALC Paper (n. 2), p. 12: "Apart from dealing with the trauma of being trafficked, victims are also faced with arrest and prosecution for offences committed as a direct result of them being trafficked."

⁵¹ 2002 (4) SA 60 (W).

⁵² At 79C – 81D.

⁵³ 91 of 1996.

⁵⁴ *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 458H.

⁵⁵ *Phillips* (n. 52) at 457H – J. It is interesting to read what the appellant stated in court papers on appeal at 457D- E of the judgment: "He aims to attract 'executive patrons' who want 'personal stress relief' in a 'private, clean and secure environment'. There are women sex workers there at any time. He 'assumes' that the service they render is sex in some form. They are paid for the favours they provide...Appellant claims the Ranch has a reputation for being the best establishment of its kind 'probably in the southern hemisphere'."

⁵⁶ Jonathan Martens as quoted by Graeme Hosken (n. 19), p. 3.

⁵⁷ SALC Paper (n. 2), p. 45.

⁵⁸ Benjamin Roberts 'Public Matters' *Mail & Guardian* 30 June to 6 July 2006, p. 22.

⁵⁹ SALC Paper (n. 2), p. 42.

- ⁶⁰ IOM Paper (n. 7), p. 23.
- ⁶¹ SALC Paper (n. 2), p. 45.
- ⁶² IOM Paper (n. 7), p. 40.
- ⁶³ SALC Paper (n. 2), p. 46.
- ⁶⁴ 130 of 1998.
- ⁶⁵ S21(1) of the Act.
- ⁶⁶ S21(4) of the Act states: “Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if – (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal...”
- ⁶⁷ Roberts (n. 48), p. 22.
- ⁶⁸ SALC Paper (n. 2), p. 41.
- ⁶⁹ SALC Paper (n. 2), p. 65. See Hosken (n. 19), p. 3 who refers to Jonathon Lucas, of the UNDC, who says South Africa is being targeted as a location for trafficking because of our well-established port system.
- ⁷⁰ SALC Paper (n. 2), p. 55 & 56.
- ⁷¹ Gill Moodie ‘It’s misery, says protected witness’ Sunday Times News 24 February 2002 Internet <http://www.suntimes.co.za/2002/02/24/news/cape/nct10.asp>.
- ⁷² SALC Paper (n. 2), p. 42.
- ⁷³ SALC Paper (n. 2), p. 35.
- ⁷⁴ IOM Paper (n. 7), p. 90.
- ⁷⁵ SALC Paper (n. 2), p. 3.
- ⁷⁶ SALC Paper (n. 2), p. 54.
- ⁷⁷ SALC Paper (n. 2), p. 42.
- ⁷⁸ Schwikkard PJ et al ‘Principles of Evidence’ (2002), 2nd Edition, Landsdowne, Juta, p. 386.
- ⁷⁹ US Attorney General Janet Reno, delivered at the meeting of the P8 Senior Experts’ Group on Transnational Organised Crime, 12 August 2002 at <http://www.usdoj.gov/criminal/cybercrime/agfranc.htm>.
- ⁸⁰ 25 of 2002.
- ⁸¹ S15(1)(a) – (b) of the Act; Schwikkard (n. 76), p. 385.
- ⁸² S80 – 84 of the Act.
- ⁸³ IOM Paper (n. 7), p. 23.
- ⁸⁴ Ibid.
- ⁸⁵ Ibid.
- ⁸⁶ IOM Paper (n. 7), p. 24.
- ⁸⁷ Graeme Hosken ‘Job offer ended up being a trap’ *The Mercury*, Wednesday July 12 2006, p. 3.
- ⁸⁸ SALC Paper (n. 2), p. 33.
- ⁸⁹ IOM Paper (n. 7), p. 17.
- ⁹⁰ Ibid.
- ⁹¹ IOM Paper (n. 7), p. 30. See also Fitzgibbon (n. 1), p. 86, for a detailed excursus on the effects of trafficking: namely the violations of human rights, social exclusion, and crime.
- ⁹² Ibid.
- ⁹³ SALC Paper (n. 2), p. 63.
- ⁹⁴ *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W).
- ⁹⁵ At 87C – 88D.
- ⁹⁶ S32(2) of the Act.
- ⁹⁷ S34(1) of the Act.
- ⁹⁸ SALC Paper (n. 2), p. 33. See also Raymond (n. 4), p. 9, who warns against treating trafficked women as migration criminals.
- ⁹⁹ SALC Paper (n. 2), p. 55.
- ¹⁰⁰ SALC Paper (n. 2), p. 56.
- ¹⁰¹ 51 of 1977.
- ¹⁰² S158 of the Act.
- ¹⁰³ S153 of the Act.
- ¹⁰⁴ S300 of the Act.
- ¹⁰⁵ S30 of POCA.

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- ¹⁰⁶ Interview with the author, May 2007.
- ¹⁰⁷ S7(2) of the Constitution.
- ¹⁰⁸ S85(2)(b) & (d) of the Constitution.
- ¹⁰⁹ Op cit (n. 9). The dire need for legislation is expressed in the IOM Paper (n. 7), p. 125.
- ¹¹⁰ Burchell (n. 27), p. 58; N Norris 'The Over-reach of Criminal Law' (1975) *Acta Juridica* 40 at 43: "prohibitory laws...must match the seriousness of the threat to the individual, to his property, or to those who depend on him and must take into account the costs and collateral consequences of official intervention."
- ¹¹¹ Burchell (n. 27), p. 58.
- ¹¹² Burchell (n. 27), p. 59: Over-criminalisation lessens the authority of the criminal law. The Legislature has recognised the problem of creating too many crimes. It has passed the Decriminalisation Act 107 of 1991, which has been amended by the Justice Laws Rationalisation Act 18 of 1996.
- ¹¹³ Article V of US Model Law suggests the establishment of an inter-agency task force. Such a force would: develop a national plan for the prevention of trafficking in persons, coordinate the implementation of such a plan, and be responsible to collecting and sharing data between the various government agencies.
- ¹¹⁴ IOM Paper (n. 7), p. 133. See also SALC Paper (n. 2), p. 43; Raymond (n. 4), p. 9.
- ¹¹⁵ United Kingdom Police Research Series, Paper 125, 'Stopping Traffic: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the UK' (2004).
- ¹¹⁶ SALC Paper (n. 2), p. 43. According to Fitzgibbon (n. 1), p. 88, there is a strong need for political will to effectively tackle sex trafficking.
- ¹¹⁷ IOM Paper (n. 7), p. 133.
- ¹¹⁸ Ibid.
- ¹¹⁹ UK Police Research Series (n. 112).
- ¹²⁰ Article V of the US Model Law.
- ¹²¹ UK Police Research Series (n. 112)
- ¹²² SALC Paper (n. 2), p. 55. See also IOM Paper (n. 7), p. 125.
- ¹²³ UK Police Research Series (n. 112)
- ¹²⁴ Article V of the US Model Law.
- ¹²⁵ UK Police Research Series (n. 112)
- ¹²⁶ Article V of US Model Law.
- ¹²⁷ Raymond (n. 4), p. 8.
- ¹²⁸ UK Police Research Series (n. 112)
- ¹²⁹ Article V US Model Law.
- ¹³⁰ SALC Paper (n. 2), p. 35.
- ¹³¹ Jean-Jacques Cornish 'Public Matters' *Mail & Guardian* 30 June to 6 July 2006, p. 22.
- ¹³² See Part 3 of Palermo Protocol. See also SALC Paper (n. 2), p. 47; Raymond (n. 4), p. 2.
- ¹³³ Article V of the US Model Law.
- ¹³⁴ Article 10 of the Protocol.
- ¹³⁵ Article 11 of the Protocol. See also SALC Paper (n. 2), p. 47; See also Article V of US Model Law.
- ¹³⁶ Extradition Act 67 of 1962. See Government Notice no. 24872 on 13 May 2003.
- ¹³⁷ Bienstock 'Sex Slaves' in Continental Film Festival 2006.