

SOUTH AFRICAN LAW REFORM COMMISSION

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TRAFFICKING IN PERSONS

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INTRODUCTION

The South African Law Reform Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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Preface

This Issue Paper was prepared to serve as a basis for the Commission's deliberations, to elicit comment and suggestions from relevant stakeholders and to disseminate information on the issue of trafficking in persons to the public at large. For this reason, this paper does not contain clearly defined recommendations for law reform.

Submissions on this Issue Paper coupled with further intensive research will form the basis for a Discussion Paper which is to follow. The Discussion Paper will contain the Commission's preliminary proposals for law reform, comparative studies and draft legislation. The Discussion Paper will be circulated for general comment whereafter extensive consultation with relevant role-players and members of the public will follow. The purpose of the consultation process will be to test public opinion on solutions identified by the Commission. Submissions on the Discussion Paper will form the basis for the preparation of a Report. The Report will contain the Commission's final recommendations and will also include the Commission's final proposed draft legislation, which will be submitted to the Minister for Justice and Constitutional Development for consideration. Should the Minister deem it fit, he or she may then implement the Commission's recommendations by introducing the draft legislation in Parliament.

Respondents are not restricted to the questions posed and issues raised in this Issue Paper and are welcome to draw other relevant matters to the Commission's attention. In making submissions, it is important that respondents consider what would be realistic to achieve as regards reform of the law in the area under investigation. The Commission assumes that respondents will agree to the Commission's quoting from or referring to comments it receives, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations in terms of the Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996) and the Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comments or suggestions to the Commission by **31 March 2004** at the address appearing on the previous page.

Ms L A Stuurman may be contacted for further information on this Issue Paper.

The page numbers refer to the hard copy and may differ in electronic versions

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CHAPTER 1: INTRODUCTION

INTRODUCTION

1.1 Trafficking in persons is an age-old practice and continues to grow across all continents and cultures.¹ In Africa, trafficking in persons goes back to the time of the slave trade when persons were trafficked from Africa westwards through the Trans-Atlantic route and eastwards through the Indian Ocean.² Today, trafficking in persons, especially in relation to women and children, seems to be a growing illegal industry, often connected to organised crime, prostitution and modern-day slavery. Although trafficking in persons takes place mainly for purposes of sexual exploitation, persons may also be trafficked for other purposes.³ A recent U.S Government estimate indicates that approximately 800,000 – 900,000 people are trafficked annually across international borders worldwide. This estimate includes men, women and children.⁴

1.2 This Issue Paper is essentially divided into four parts, namely, (1) the introduction, (2) the international framework, (3) the substantive law, and (4) process and procedure. Issues for law reform have been addressed under the latter two parts which include questions posed to interested parties.

ORIGIN OF THE INVESTIGATION

1.3 The Commission's investigations into the review of the Child Care Act and sexual offences respectively considered the issue of trafficking in children. In its investigation into the review of the Child Care Act, the Commission found that relatives, including parents, are involved in the trafficking of their children by allowing others to exploit their

¹ See 2.4 below for the definition of trafficking in persons.

² Teriba Y 'Problems of Trafficking in Human Beings: An African Regional Response' Paper presented at the First Pan-African Conference on Human Trafficking held in Abuja, Nigeria on 18 – 23 February 2001.

³ See 3.7 – 3.32 below for an overview of some of the purposes for which persons may be trafficked.

⁴ US Department of State **Trafficking in Persons Report: Trafficking Victims Protection Act of 2000** June 2003, p 7.

children sexually for financial reward or to pay off a debt.⁵ The issue of parents who traffic their children has been addressed in the draft Children's Bill. The Bill provides that if a court finds that the parent or care-giver of a child or a person who has parental rights in respect of a child has trafficked the child, the court may (a) suspend all parental rights of that parent, care-giver or person pending a children's court inquiry, and (b) put the child in temporary safe care pending the placement of the child in alternative care. Furthermore, clause 11 of the Criminal Law (Sexual Offences) Amendment Bill 50 of 2003⁶ provides that a person is guilty of the offence of being involved in child prostitution if he or she intentionally (a) makes available, offers or engages a child for purposes of the commission of indecent acts or acts which cause penetration with such child by any person, (b) supplies, recruits, transports, transfers, harbours or receives such child, within or across the borders of the Republic, for purposes of the commission of indecent acts or acts which cause penetration with such child by any person, (c) allows or knowingly permits the commission of indecent acts or acts which cause penetration by any person with a child while being a primary care-giver, parent or guardian of that child, (d) detains a child, whether under threat, coercion, deception, abuse of power or force for purposes of the commission indecent acts or acts which cause penetration with the child by any person, (e) participates in, is involved in, promotes, encourages or facilitates the commission of indecent acts or acts which cause penetration with the child by any person.

1.4 However, given the magnitude of the problem and time constraints to finalise both the investigations referred to, the Commission realised that it would not be able to conduct detailed research in order to address the problem of trafficking in children adequately. The Commission subsequently decided to place on its programme a separate investigation into trafficking in persons, including children. It also decided that this investigation should not be limited to trafficking in persons for purposes of sexual exploitation, but should consider trafficking in persons broadly. Consequently, a request for the inclusion of an investigation into trafficking in persons in the Commission's research programme was submitted to the Minister for Justice and Constitutional

⁵ For example, 9-and10-year old brothers were recently sold for sex by their elder brother. See in this regard Maphumulo S 'We were sold for sex by our brother' **The Star** 18 August 2003.

⁶ The Bill has recently been tabled in the Parliamentary Portfolio Committee on Justice and Constitutional Development.

Development. The Minister approved the inclusion of the investigation on 21 January 2003.

LIMITATIONS OF THE INVESTIGATION

1.5 Limited research on the issue of trafficking in persons within South Africa and across its borders makes it difficult to give an accurate overview of the extent of the problem. This is aggravated by the fact that the act of trafficking in persons often takes place clandestinely. Moreover, there are no official statistics on the number of persons trafficked to and from South Africa, particularly into the sex industry. The Commission will therefore greatly rely on the inputs of relevant stakeholders such as the police services, immigration services, the prosecuting authority, social services, non-governmental organisations, the media and the public in general.

CHAPTER 2: INTERNATIONAL FRAMEWORK

INTRODUCTION

2.1 At the international level, several instruments relating to trafficking in persons were introduced as far back as 1904 when the International Agreement for Suppression of the White Slave Trade was adopted. South Africa has signed and/or ratified various international instruments which recognise trafficking in persons as a world-wide problem. This places an obligation on South Africa to bring its domestic laws and policies in line with the standards set by these international instruments. Although these instruments have highlighted the problem of trafficking in persons, their enforcement remains a challenge to the authorities. The following is an overview of some of the international instruments addressing the problem of trafficking in persons.⁷

UNITED NATIONS CONVENTIONS AND PROTOCOLS

United Nations Convention Against Transnational Organised Crime

2.2 In December 2000, 148 countries gathered in Palermo, Italy to attend a high-level conference opening UN Convention Against Transnational Organised Crime for signature. Of the 148 countries present, 121 signed the Convention, whilst over 80 countries signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (hereafter referred to as 'the Palermo Protocol').⁸ South Africa signed both the Convention and the Palermo Protocol on 14 December 2000.

⁷ Other international instruments also dealing with the issue of trafficking in persons include the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others of 1949, the Convention on the Elimination of All Forms of Discrimination against Women, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, 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, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 1984. On a regional level, instruments include the African Charter on Human and People Rights, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples Right on the Rights of Women in Africa.

⁸ Raymond Janice G **A Guide to the new UN Trafficking Protocol – Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention Against Transnational Organised Crime** 2001 1. As of 15 September 2003, 146 States and the European Community have signed the Convention and 41 have ratified it. Whilst 116 States and the European Community have signed the Palermo Protocol and 32 have ratified it. See 2.4 – 2.7 below for a discussion on the Palermo Protocol.

Parliament has approved the ratification of both the Convention and the Palermo Protocol.

2.3 The Convention gives a wide meaning to organised crime as it covers all structured groups which commit serious crime. A structured group is not necessarily a formal organisation, membership or structure, but is more than merely a group which is randomly formed for the immediate commission of an offence.⁹ The Convention applies to offences that are transnational in nature and involve organised criminal groups.¹⁰ However, the offence of trafficking in persons can be established in the domestic law of each State Party, irrespective of the transnational nature of the offence or the involvement of organised criminal groups.¹¹ The Convention further calls for the criminalisation of participation in an organised criminal group,¹² the criminalisation of the laundering of the proceeds of crime,¹³ measures against corruption,¹⁴ measures to enable the confiscation and seizure of assets gained through crime,¹⁵ mutual legal assistance,¹⁶ special investigative techniques,¹⁷ protection of witnesses¹⁸ and assistance to and protection of victims.¹⁹

Palermo Protocol

⁹ Kramer K 'United Nations Convention against Transnational Organised Crime and its Protocols', Paper presented at the Seminar for SADC Countries on the ratification and implementation of the United Nations Convention against Transnational Organised Crime, Mauritius, 23 – 25 September 2003.

¹⁰ Article 3.

¹¹ Article 34(2).

¹² Article 5.

¹³ Article 6.

¹⁴ Article 9.

¹⁵ Article 12.

¹⁶ Article 18.

¹⁷ Article 20.

¹⁸ Article 24.

¹⁹ Article 25.

2.4 The Palermo Protocol is the first international instrument which deals comprehensively with the issue of trafficking in persons. The Protocol addresses the crime of trafficking in persons on a transnational level and defines trafficking in persons as follows:

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.²⁰

2.5 The Protocol states that the consent of a victim of trafficking is irrelevant where any of the actions contemplated in the definition have been employed.²¹ The Protocol provides special protection to children in that it stipulates that the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation is considered 'trafficking in persons' even if this does not involve any of the actions contemplated in the above definition.²²

2.6 The Protocol further addresses the human rights dimensions necessary for the protection of victims of trafficking.²³ With regard to the repatriation of victims of trafficking, the Protocol provides for the safe return of victims to their countries of origin, and the issuing of travel documents or other authorisation necessary for victims to travel to and re-enter their countries of origin.²⁴ The Protocol also emphasises the need for prevention of trafficking in persons,²⁵ information exchange and training of officials,²⁶

²⁰ Article 3(a).

²¹ Article 3(b).

²² Article 3(c).

²³ Article 6.

²⁴ Article 8.

²⁵ Article 9.

²⁶ Article 10.

strengthening of border control measures,²⁷ and security and control of travel documents.²⁸

2.7 The full text of the Protocol is included in Annexure 'A' to facilitate reference to any particular provision of the protocol.

Convention on the Rights of the Child of 1989

2.8 South Africa has ratified the Convention on the Rights of the Child (CRC) on 16 June 1995. Certain provisions of the CRC are relevant to the issue of trafficking in children. Article 35 calls for the implementation of measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form. Article 19 commits State Parties to protect children from all forms of physical or mental violence, including sexual abuse. Article 27 provides for the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. As a party to the CRC, South Africa is obliged to address the socio-economic conditions which force children into situations such as illegal employment and the sex trade. Article 32 recognises the right of a child to be protected from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. This article is of particular relevance in instances of trafficking in children for purposes of sexual exploitation or exploitative labour practices. Article 34 requires State Parties to protect children from all forms of sexual exploitation and sexual abuse. Furthermore, article 39 commits State Parties to take appropriate measures to promote physical and psychological recovery and social reintegration of a child who is a victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000

²⁷ Article 11.

²⁸ Article 12.

2.9 This Protocol supplements the Convention on the Rights of the Child of 1989. The Protocol came into force on 18 January 2002 and was ratified by South Africa on 1 July 2003. The Protocol calls on State Parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography.²⁹ It promotes international law enforcement co-operation with provisions covering diverse issues such as jurisdiction;³⁰ extradition;³¹ mutual assistance in investigations, criminal or extradition proceedings³² and seizure and confiscation of assets.³³ Unlike the Convention on the Rights of the Child in terms of which State Parties commit themselves to take only 'appropriate measures' to prevent certain practices, the Protocol places an explicit obligation on State Parties to make certain activities relating to the sale of children a criminal offence.³⁴

INTERNATIONAL LABOUR ORGANISATION INSTRUMENTS

Convention concerning Forced Labour 29 of 1930

2.10 This Convention came into force on 1 May 1932 and was ratified by South Africa on 5 March 1997. The Convention commits all State Parties to suppress the use of

²⁹ Article 8.

³⁰ Article 4.

³¹ Article 5.

³² Article 6.

³³ Article 7.

³⁴ Article 3 of the Protocol provides that each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law whether such offences are committed domestically or transnationally or on an individual or organised basis:

- a. Sexual exploitation of the child;
- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour.

forced or compulsory labour.³⁵ The Convention defines ‘forced or compulsory labour’ as ‘work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.³⁶

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 182

2.11 This Convention was ratified by South Africa on 7 June 2000 and came into force on 19 November 2000. The Convention commits State Parties to take immediate and effective measures to prohibit and eliminate the worst forms of child labour.³⁷ These include (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, forced or compulsory labour, (b) the use, procuring or offering of a child for prostitution or the production of pornography, (c) the use of children in illicit activities, particularly for the production and trafficking of drugs and (d) work which is likely to harm the health, safety or morals of the child.³⁸ Unlike the Convention concerning Forced Labour, this Convention considers prostitution as a worst form of child labour. It further calls on State Parties to take effective measure to prevent the engagement of children into these forms of labour, to provide assistance for the removal of children from these forms of labour and for their rehabilitation and social re-integration, to identify and reach out to children at risk and to take account of the special situation of girls.³⁹ State Parties are also required to assist each other through enhanced international co-operation, including support for social and economic development, poverty eradication programmes and universal education.⁴⁰

³⁵ Article 1.

³⁶ Article 2.

³⁷ Article 1.

³⁸ Article 3.

³⁹ Article 7.

⁴⁰ Article 8.

CHAPTER 3: THE SUBSTANTIVE LAW

INTRODUCTION

3.1 This chapter highlights the growing problem of trafficking in persons, with particular focus on the abuse that victims of trafficking are subjected to.

THE EXTENT OF THE PROBLEM

South Africa as a country of destination, transit and origin

3.2 South Africa is considered mainly as a country of destination for victims of trafficking. It is also a transit point for trafficking operations between developing countries and Europe, the United States and Canada⁴¹ because it has direct flight and shipping routes to most countries in the developed world. Compounded with this is the fact that South Africa is regarded as one of the countries in the developing world whose citizens do not attempt to enter other countries illegally in significant numbers. This enables syndicates to evade suspicion at ports of entry in destination countries.⁴² Several instances have been reported about the use of South Africa as a transit country for purposes of trafficking in persons. For example, in 2001 the French Consulate informed the police that a group of women and children were trafficked from the Democratic Republic of the Congo and that the traffickers intended to use South Africa as a transit point to France.⁴³

3.3 There appears to be no published research on the trafficking of persons from South Africa to other parts of the world. A news paper report, however, mentions the trafficking of children from African countries, including South Africa, to Britain. The majority of these children are subjected to slave-like practices and a small number of them are forced into the sex industry.⁴⁴ There are also several unconfirmed reports of the trafficking of South African children to other parts of the world.⁴⁵

Methods used to ensnare persons for purposes of trafficking

3.4 Various means, including deception, threats and coercion, are used to ensnare persons for purposes of trafficking.⁴⁶ For example, a group of Chinese women recently

⁴¹ US Department of State **Victims of Trafficking and Violence Protection Act 2000: Trafficking in Persons Report** June 2002, p 94; US Department of State **Trafficking in Persons Report: Trafficking Victims Protection Act of 2000** June 2003, p 137.

⁴² Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p.43, compiled for the Institute for Child and Family Development, University of the Western Cape.

⁴³ Telephonic discussion with Superintendent Frans Kloppers, Gauteng Provincial Commander of Border Police, on 3 July 2003.

⁴⁴ 'S A kinders dalk in smokkelnet' **Rapport** 3 August 2003, p.11.

⁴⁵ Discussion with inspector Ferdi Ungerer, South African Police Service: Family Violence, Child Protection and Sexual Offences Investigation Unit on 12 August 2003.

⁴⁶ See also the definition of trafficking in persons' in article 3 of the Palermo Protocol for the various means being used to trafficked persons.

trafficked to South Africa were reportedly offered employment in an up-market hotel. These women were unaware of the fact that they would be forced into commercial sex work.⁴⁷ Women in South Africa often fall prey to the schemes used by traffickers to ensnare their victims. Traffickers usually make use of advertisements in which they offer work at, e.g. a health club or restaurant (usually in another province). These women's traveling expenses and accommodation costs are provided and on arrival at the place of destination, they are informed that they will also be required to work in the sex industry. Upon refusal, they are threatened and prevented from leaving until the expenditure has been repaid to the agency. Not being able to meet these demands, these women often do what is expected from them.⁴⁸ The group of Chinese women trafficked to South Africa were beaten into submission when they refused to comply with the demands of their traffickers.⁴⁹

Confiscating of travel documents

3.5 The passports and other travel documents of victims trafficked to South Africa are usually confiscated on their arrival in the country. Separated from their families, country and culture, usually not able to speak any language of the destination country and illegally resident in the country, deprived of identity documents and closely monitored by the traffickers, victims of trafficking are at the mercy of their exploiters. A similar scenario prevails in other countries.

Arrest and prosecution of victims

3.6 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. South Africa is no exception when it comes to the arrest and prosecution of these victims. This is clearly illustrated by the recent arrest of six Chinese women trafficked to

⁴⁷ Oelofse L 'Sex slaves discovered in posh city suburb: Duped Chinese women stage daring escape' **Pretoria News** 8 April 2003, p. 1.

⁴⁸ Molo Songololo **The trafficking of Women into the South African Sex Industry** 2000, p. 25 – 29.

⁴⁹ Oelofse L 'Sex slaves discovered in posh city suburb: Duped Chinese women stage daring escape' **Pretoria News** 8 April 2003, p. 1.

South Africa who allegedly traveled with false passports.⁵⁰ In South Africa, victims of trafficking may also be prosecuted for prostitution, even though they were forced into prostitution by their traffickers.⁵¹ Arresting and prosecuting victims of trafficking for such offences may discourage them from reaching out to the authorities for aid thereby making the combating of the crime of trafficking in persons extremely difficult.

PURPOSES FOR WHICH PERSONS MAY BE TRAFFICKED

3.7 Persons may be trafficked for various purposes. These include, but are not limited to, trafficking for purposes of sexual exploitation, forced labour or slavery or practices similar to slavery, servitude, forced marriages, adoption or the removal of organs or other body parts. No rigid distinction can be drawn between these as persons may be trafficked for purposes of subjecting them to more than one of the various practices. The following is a brief discussion of the most common purposes for which persons may be trafficked.

Trafficking for purposes of sexual exploitation

Introduction

3.8 The distinction between adults and children in the context of sex trafficking is blurred as recruitment by traffickers, and the subsequent abuse of the victims in the industry, often begins while the victim is still a child, but continues through and beyond attainment of the age of majority.⁵² Research⁵³ indicates that the trafficking of persons

⁵⁰ Oelofse L 'Sex slaves discovered in posh city suburb: Duped Chinese women stage daring escape' **Pretoria News** 8 April 2003, p. 1.

⁵¹ Sweden, for example, has adopted a unique strategy that explicitly penalises 'customers' of prostitution, and not the prostitutes themselves. See in this regard Shifman P and Franzblau K 2001, p.16. In Egypt, in terms of the Suppression of Prostitution Act 10 of 1961, it is the man seeking to buy sexual favours that is considered the criminal whatever the age of the prostitute. See in this regard ECPAT (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) International **The Fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996** 2000, p.13.

⁵² Shifman P and Franzblau K 'Trafficking: Legislative responses' in **Profiting from abuse: An investigation into the sexual exploitation of our children** 2001 UNICEF p.16.

⁵³ Molo Songololo **The trafficking of women** 2000, p.25 – 26; Johns Hopkins University Protection Project **Annual Human Rights Report on the Trafficking of Persons, Especially women and**

into the South African sex industry takes two forms, i.e. foreigners trafficked to South Africa are re-trafficked from one agency or brothel to another, or locals are trafficked from city to city and from rural areas to urban areas.

Cross-border trafficking of women and children

3.9 A survey of research on cross-border trafficking for purposes of sexual exploitation reveals that children are being trafficked to South Africa from the following African countries: Mozambique, Angola, Zambia, Senegal, Kenya, Tanzania, Uganda, Ethiopia, Swaziland, Namibia, Botswana, Nigeria, Lesotho and Malawi.⁵⁴ Research also shows that the trafficking of women to South Africa takes place from the following African countries: Angola, Zimbabwe, Lesotho, Swaziland, Zambia, Cameroon, Malawi, Sudan and Mozambique.⁵⁵ The research conducted by the International Organisation for Migration⁵⁶ reveals that male refugees in South Africa recruit female relatives from their countries of origin to South Africa for purposes of sexual exploitation. These women are usually 25 years of age and older, often married and have children. Individual refugee traffickers are also assisted by ethnically-based refugee syndicates. The research further indicates that African women who have been trafficked and who managed to escape are tracked down almost immediately by their trafficker through his extensive networks of contacts. These women therefore require not only support services such as safe havens, but also security and protection against being recaptured by their traffickers.

3.10 Transportation of African women trafficked to South Africa takes place through a variety of modes, including cars, long distance trucks, taxis, boats and on foot.⁵⁷

Children March 2002, p. 491; ECPAT International **The Commercial Sexual Exploitation of Children in Southern Africa** 2001, p. 42.

⁵⁴ Molo Songololo **The trafficking of children** 2000, p 44 - 49; ECPAT International **The Commercial Sexual Exploitation of Children in Southern Africa** 2001, p. 43; Johns Hopkins University Protection Project **Annual Human Rights Report** 2002, p. 490; International Organisation for Migration **Trafficking in Women and Children for Sexual Exploitation in Southern Africa** 2003, p. 21 - 29, prepared by Martens J, Pieczkowski M and Van Vuuren-Smyth B.

⁵⁵ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40; Molo Songololo **The trafficking of women** 2000, p. 20.

⁵⁶ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 13 - 20.

⁵⁷ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 16.

3.11 Women and children are also being trafficked to South Africa from Eastern Europe and South East Asia, especially from Thailand and Taiwan.⁵⁸ They are trafficked primarily to escort agencies in Gauteng, Cape Town and Durban. Recent media reports of the trafficking of persons to South Africa have again highlighted the problem of trafficking. For example, two SABC3 Special Assignment programmes highlighted the trafficking of Thai women to South Africa.⁵⁹

Cross-border trafficking of men, including young boys

3.12 There appear to be very little trafficking of men for purposes of sexual exploitation. There are, however, a few reported instances of men and young boys who were trafficked to South Africa. For instance, a man who was trafficked with a group of Chinese women to South Africa was forced to do household chores and garden work, whilst the women were forced into prostitution.⁶⁰ The report of the International Organisation for Migration mentions the trafficking of two boys from Lesotho to South Africa. The following quotes from the report illustrate the exploitation to which these boys were subjected:

The boy (18) met a white man in Maseru who promised to help him find his lost parents ... The boy crossed the border with the man and was taken to a private house. There he was beaten and forced to smoke dagga. The man forced him to have anal sex. He was kept captive for two days, given no food and had his hands and legs bound. On the third day he was thrown out of the house. Because of an 'aching anus' and an empty stomach he was unable to move and stayed close to the house. That night, the same man came and punched and kicked the boy who eventually lost consciousness.

⁵⁸ Molo Songololo **The trafficking of children** 2000, p 46; Molo Songololo **The trafficking of women** 2000, p. 30 – 32; ECPAT International **The Commercial Sexual Exploitation of Children in Southern Africa** 2001, p. 43; Johns Hopkins University Protection Project **Annual Human Rights Report** 2002, p. 491; International Organisation for Migration **Trafficking in Women and Children** 2003, p. 60 - 78.

⁵⁹ These programs were televised on 13 and 20 May 2003 respectively.

⁶⁰ Oelofse L 'Sex slaves discovered in posh city suburb: Duped Chinese women stage daring escape' **Pretoria News** 8 April 2003, p. 1.

A boy (15) was offered a job by a white man in Fouriesburg. When he arrived at the house he was forced to have sex with a group of men. They then forced the boy to masturbate them.⁶¹

Voluntary involvement in commercial sex work

3.13 Some individuals may sometimes be involved in commercial sex work through own choice before being trafficked. Their involvement in commercial sex work often brings them in contact with traffickers who may deceive or force them into the sex industry. Although these individuals are sometimes aware that they will be working in the sex industry, they usually do not foresee the brutality to which they will be subjected or that they are going to become slaves of the traffickers.

Trafficking in persons for non commercial reasons

3.14 Trafficking in persons for purposes of sexual exploitation does not always take place for commercial reasons. Victims may also be exploited for personal gratification. This is illustrated by a case currently being dealt with by the Pretoria Child and Family Care Society.⁶² It involves a 15-year old orphaned girl who was given to an affluent family in her country of origin at the age of 10 years, whereafter she was given to a relative of this family without her consent. She was then forced to do unpaid domestic work and was subjected to severe physical abuse. In June 2002 she was brought to South Africa by the same family. Her circumstances did not improve and she was continually subjected to physical and sexual abuse by various members of the family to whom she has been given to. She was also forced to have sexual intercourse with the security guard and friends of the family. The girl's circumstances became intolerable and she managed to escape in September 2002.

Working conditions

⁶¹ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 27.

⁶² As the case is still under investigation, information which may identify the persons involved or their whereabouts is not revealed.

3.15 The conditions under which victims are expected to work do not comply with the Basic Conditions of Employment Act⁶³ and the Occupational Health and Safety Act.⁶⁴ The conditions of work include (1) limited access to health care services, (2) working with active pelvic and vaginal infections, (3) limited time off, (4) subjection to violence and threats of violence from clients and management.⁶⁵

Trafficking for purposes of forced labour, slavery, practices similar to slavery or servitude

Definitions

3.16 The US Model Law to Combat Trafficking in Persons defines forced labour, slavery, practices similar to slavery and servitude as follows:

'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 servile 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.

3.17 There appear to be no statistics available on the trafficking of persons for the above purposes to and from South Africa. The following is a brief discussion of some of the labour practices for which persons may be trafficked.

⁶³ 95 of 1997.

⁶⁴ 85 of 1993.

⁶⁵ Molo Songololo **The trafficking of women** 2000, p. 26.

Domestic work

3.18 Research conducted by the International Labour Organisation highlight the trafficking of South African children for purposes of domestic work within the country.⁶⁶ The report states that emerging domestic labour agencies in Cape Town lure farm girls by advertising Cape Town as 'the place' for employment and by offering a higher salary than what these girls might have earned on a farm. These girls often lose contact with their relatives, are paid poorly by their employers and live and work in appalling conditions.

3.19 Another report titled *Children in Domestic Service in the Western Cape*⁶⁷ reveals the recruitment of both women and children by employment agencies. These agencies are linked with agents such as individuals, taxi drivers and syndicates who usually operate in rural areas. Agents usually promise their victims work as shop assistants, office workers or domestic workers. On arrival in Cape Town, the prospective job seeker finds herself in a situation which is very different from the one she was expecting or promised. She is taken to an agency where she is held until a prospective employer arrives. She is also told that the cost of her travel to Cape Town plus an agent's fee will be deducted from her first month's salary. She is also required to pay an additional fee for accommodation while waiting for employment.

3.20 A further report titled *Child Domestic Workers in Gauteng* indicates that children are also being trafficked for purposes of domestic work by individuals linked to organised child labour.⁶⁸

⁶⁶ International Labour Organisation **South Africa – Child Domestic Workers: A National Report** May 2002, compiled by Debbie Budlender and Dawie Bosch.

⁶⁷ Terre des homes schweiz **Children in domestic service: The case of the Western Cape** March 2002, compiled by K Koen and B Van Vuuren.

⁶⁸ Sithabile Child and Youth Centre **Child Domestic Workers in the Gauteng Province of South Africa** July 2002, p.9.

3.21 The following are some of the conditions that are experienced at the place of employment: physical, verbal and sexual abuse; poor sleeping arrangements; and no free time.⁶⁹

Drug couriers

3.22 There have been reports that trafficked victims are sometimes used as drug couriers. These couriers may be required to swallow small bags of drugs or may be forced to transport the drugs by some other means. Although it cannot be established with certainty, there is a suspicion that persons are being trafficked to South Africa to act as couriers of drugs.⁷⁰

Other economic activities

3.23 Around the world, children are bought and sold as commercial commodities and exposed to hazardous working conditions. The global demand for cheap labour contributes to the trafficking in children into various economic sectors, particularly into the agriculture and manufacturing business. In South Africa, children as young as six work on farms in slave-like conditions as some farmers allegedly prefer to use the cheapest and most docile workers available.⁷¹

Trafficking for purposes of forced marriages

3.24 Trafficking in women and girls for purposes of forced marriages is a world-wide phenomena and South Africa is no exception. The International Organisation for

⁶⁹ Terre des homes schweiz **Children in domestic service: The case of the Western Cape** March 2002.

⁷⁰ Discussion with Director Zirk Gous, Border Police: S A Police Service on 8 July 2003.

⁷¹ 'Child labour uncovered in South Africa'
Internet: http://www.afrol.com/News2001/sa026_childlabour_raid.htm Date accessed: 21/08/03.

Migration's Report⁷² reveals the trafficking of Mozambican women to South Africa to be sold as wives on the mines of Johannesburg West Rand. Young Mozambican women usually approach taxi drivers at Maputo's taxi ranks for transportation to South Africa where they hope to find work or to visit relatives. Many Mozambicans rely on these taxis to gain undocumented entry into South Africa as these taxis not only transport them directly to Johannesburg, but the taxi drivers also assist their passengers to gain illegal entry into South Africa. Women are also approached by traffickers at taxi ranks in Maputo who then persuade their intended victims to travel in one of the trafficker's taxis.

3.25 Young Mozambican women are also recruited through job offers in South Africa. Attractive job offers are made to young women working at markets in Maputo where many of them make a living by selling basic commodities. The traffickers also use other women to lure young women in their homes with attractive job offers.⁷³

3.26 Prior to crossing the border, these women do not suspect that they will be sold in Johannesburg. Until their arrival in Johannesburg, their transportation has the appearance of a smuggling operation.⁷⁴ During the journey, they are rarely separated from the other undocumented (mostly male) migrants traveling with them. The young women and other migrants are taken to transit houses in Soweto and Lenasia. Many of the migrants are free to leave the transit houses and thus simply remain clients who have been smuggled. However, some of the young women are kept captive at the houses and are later taken to the mines on the West Rand where they are sold as wives to mineworkers. These women then become the sex slaves of their so-called husbands as well as unpaid domestic servants. They often live under difficult conditions and very rarely are able to escape.⁷⁵

⁷² International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40.

⁷³ Ibid.

⁷⁴ See 3.47 below for a distinction between trafficking in persons and smuggling in persons.

⁷⁵ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 30 – 40.

3.27 The South African Police Service has encountered a number of cases of children being trafficked from neighbouring countries to South Africa to be sold as wives to men in the townships.⁷⁶

Trafficking for purposes of adoption

3.28 Trafficking in children for purposes of adoption is an issue of concern. There is a lack of research on the issue of the trafficking of children to and from South Africa for this purpose. However, the Department of Social Development: International Social Services have noticed an increase in the number of South African children going abroad unaccompanied, especially to England. It is not clear how these children have ended up unaccompanied in the destination countries.⁷⁷ The trafficking of children for purposes of adoption in other parts of the world is quite prevalent. For example, the rapid increase in the rate of foreign adoptions in Russia has given rise to the suspicion that not all of these adoptions are genuine.⁷⁸

Trafficking for purposes of organ removal or other body parts

3.29 Despite great advances in medical science, the reproduction of human body parts has thus far been unsuccessful. While the search for compatible artificial organs and other human body parts continues, transplant surgery has become the most popular alternative choice. The limited number of available organs can no longer meet the high demand for organ transplants. The scarcity of organs has led to the trade of human organs on the black market. Due to its clandestine nature, no documented research could be found on the trafficking of South Africans for purposes of organ removal to be

⁷⁶ Discussion with inspector Ferdi Ungerer, South African Police Service: Family Violence Child Protection Sexual Offences Investigating Unit, on 12 August 2003.

⁷⁷ Discussion with Ms Francis Viviers, Affiliated Bureau of International Social Services, on 11 July 2003.

⁷⁸ ECPAT International **The Fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996** 2000, p.133.

used in transplantations. There is also suspicion that some hospital personnel are involved in this illegal trade of human organs.⁷⁹

3.30 Instances of the removal of organs or other body parts from dead bodies (not persons who have been trafficked and then killed) without the permission or knowledge of the families of the deceased also occur. These organs or other body parts are harvested by state pathologists and mortuary staff for distribution to surgical and medical units.⁸⁰ These instances will not be discussed in this paper.

3.31 Another matter of concern is the trafficking of persons for purposes of removing their organs or other body parts to be used in muti.⁸¹ According to traditional African beliefs, the use of human organs or other body parts increases the power of muti. An important distinction needs to be made between those who only use plants and herbs for purposes of healing, i.e. traditional healers, and those who also use human organs and other body parts, i.e. witch doctors.⁸² This paper deals with the latter category. Several instances have been reported about the trafficking of persons within South Africa or from

⁷⁹ For example, a Somalian woman was shot through her shoulder and admitted to a hospital in Johannesburg. However, a few hours later her family was informed that she has died. The family took the body home and washed it for burial within 24 hours as is Muslim custom. They then discovered that her kidneys and brain have been removed from her body. This raises the question whether this woman was deliberately left to die. See in this regard <http://theothervoices.org.za/refugees/ssomalia.htm>. Also, an international syndicate that trade in human organs has recently been exposed when an Israeli man who allegedly bought a kidney from them was arrested moments after his release from a private hospital in Durban. According to the police, the syndicate has possible South African inks. See in this regard Ekron Z and Brits E 'Twee in arres oor gesmous met organe' **Beeld** 4 December 2003, p.4. Furthermore, the KwaZulu-Natal Department of Health has laid a formal charge against two doctors who allegedly have links with the syndicate. See in this regard Brits E 'Mense in mediese beroep glo ook orgaansmouse' **Beeld** 9 December 2003, p.2.

⁸⁰ 'Activity related to the organ trade around the world: South Africa' Internet <http://sunsite.berkeley.edu/biotech/organswatch/pages/southafrica.html> Date accessed 03/07/2003.

⁸¹ Muti is defined as African medicines, spells and herbs, parts of animals or human bodies, used in traditional therapy or in witchcraft or magic. See in this regard Branford J and Branford W **A Dictionary of South African English** Cape Town: Oxford University Press 1991, p.209.

⁸² This distinction was made by Superintendent Everton during a presentation on Muti Killings made to the Networking Forum on Commercial Sexual Exploitation of Children on 21 November 2002.

neighbouring countries to South Africa whose organs or other body parts ended up in the muti of witch doctors. The SABC3 Special Assignment programme exposed the illegal trade in body parts which appears to be flourishing in Southern Africa.⁸³ What appeared to be body parts of people, including blood, eyes and brains, could allegedly be bought under a bridge in Eloff Street in downtown Johannesburg.⁸⁴ Even though this programme has not reported that persons have been trafficked and killed for their organs or other body parts, this possibility cannot be excluded. Although it could not be established with certainty, there appear to be certain organised gangs which provide human organs or other body parts to witch doctors.⁸⁵ Mozambican groups involved in the trafficking of human organs also serve as a source of supply for South African witch doctors involved in this dubious trade. These groups usually kill specifically for the purpose of extracting organs.⁸⁶

3.32 Authorities generally prosecute only the perpetrators of the murder and not the witch doctor who has ordered the organs or other body parts. Unless the organs or other body parts are found in the possession of the witch doctor, the police have no evidence to link the killing to the witch doctor often denies knowing the perpetrators.⁸⁷ Given the belief that witch doctors possess supernatural powers, it is found that members of the community are often scared to testify against them.⁸⁸

Defining trafficking in persons

Questions

1. With reference to the definition of trafficking in persons

⁸³ The program was televised on 7 May 2002.

⁸⁴ 'Body parts sold as muti trade thrives' **The Herald News** Internet http://www.Epherald.co.za/herald/2002/05/08/news/n05_08052002.htm Date accessed: 02/07/2003.

⁸⁵ Dispatch Online 'Muti murders suspected in 5 deaths' 20 April 1999 Internet <http://www.dispatch.co.za/1999/04/20/southafrica/MUTI.HTM> Date accessed 02/07/2003. See also 'Lock your doors – muti killers on loose' **Daily Sun** 9 December 2003, p.2.

⁸⁶ Gastrow P and Mosse M 'Mozambique: Threats posed by the penetration of criminal networks' Paper delivered at the Institute for Security Studies Regional Seminar held on 18 and 19 April 2002.

⁸⁷ Information obtained from a presentation on Muti Killings made by Superintendent Everton to the Networking Forum on Commercial Sexual Exploitation of Children on 21 November 2002.

⁸⁸ Ibid.

as set out in article 3(a) of the Palermo Protocol, how should the crime of trafficking in persons be defined for purposes of South African legislation on trafficking in persons?

2. Should certain forms of trafficking in persons be categorised as 'severe forms of trafficking in persons'?⁸⁹ If yes, what would constitute severe forms of trafficking in persons? Should higher sentences be imposed on those who are found guilty of a severe form of trafficking in persons? If yes, what would be an appropriate sentence?

Consent to exploitation

Question

3. With reference to article 3(b) of the Palermo Protocol, should the consent of a victim of trafficking be irrelevant only where any of the actions contemplated in the definition of 'trafficking in persons' have been employed? If not, in what other instances should the consent of a victim of trafficking be irrelevant? Please motivate your answer.

Criminalisation of certain acts and sentencing

Questions

⁸⁹ In the USA, in terms of Public Law 106-386, October 28, 2000 (Victims of Trafficking and Violence Protection Act of 2000), severe forms of trafficking in persons means –

- 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, harboring, 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.

4. Should a minimum sentence be set for persons found guilty of the crime of trafficking in persons? If yes, what would be an appropriate minimum sentence?

5. As deception is the most common means used by traffickers to ensnare their victims, should the act of offering a person an employment or educational opportunity, knowing that that person will be trafficked for purposes of exploitation, be made a criminal offence? If yes, what would be an appropriate sentence for such an offence?

6. Should it be a criminal offence to intentionally destroy, confiscate or possess any passport, immigration document or other identification document belonging to a victim of trafficking?⁹⁰ If yes, what would be an appropriate sentence for such an offence?

7. Women and children are increasingly being trafficked for purposes of sexual exploitation given the high demand set by clients (who are mainly male). Section 20(1)(aA) of the Sexual Offences Act 23 of 1957 criminalises the buying of sexual services by clients by providing that any person who commits an act of indecency with any other person for reward is guilty of an offence. Should knowledge of the fact that the person rendering the sexual service has been trafficked result in a higher sentence? If yes, what would

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Macedonia adopted a new law in 2002 that criminalises trafficking in persons and actions associated with trafficking such as the destruction of identification documents. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 72.

be an appropriate sentence?

8. Trafficking in persons is mostly, if not always, profit driven. In view of this, should the act of profiteering from the crime of trafficking in persons be criminalised? What would be an appropriate sentence for such an offence?

9. Should a higher sentence be imposed on a person found guilty of the crime of trafficking in persons if the trafficking was part of the activity of an organised criminal group? If yes, what would be an appropriate sentence?

Denial of entry to South Africa

Question

10. With reference to article 11(5) of the Palermo Protocol, should persons found guilty of the crime of trafficking in persons or associated offences, whether convicted in South Africa or any other country, be denied entry to South Africa or have their visas revoked? If yes, should the convicted person's family members be denied entry to South Africa if they have benefited from the unlawful activity for which that person was convicted and knew or reasonably should have known that the benefit was the product of such unlawful activity? If yes, should such a provision also apply to the children (who were under the age of 18 years when the benefit was received) of the convicted person? Please motivate your answer.

Victim protection

Questions

11. Should a person who has been trafficked to South Africa be exempted from prosecution for any offences committed as a direct result of being trafficked?⁹¹

12. What measures can be taken to reduce the trafficking of persons to South Africa?

CAUSES LEADING TO TRAFFICKING IN PERSONS

3.33 Various factors contribute to the trafficking of persons, particularly into the sex industry. These include, but are not limited to the following:

Primary causes

Poverty

3.34 Poverty, coupled with high unemployment rates, is the main factor underlying persons' vulnerability to being trafficked. Because of chronic unemployment, widespread poverty or a lack of economic opportunities, traffickers use promises of higher wages and good working conditions in foreign countries to lure individuals into their schemes.⁹² Families seeing no economic opportunities within their communities will sometimes place their children with families and friends in areas where they believe the prospects for gainful employment may be greater. Children in these communities become easy

⁹¹ The Commission in its investigation into sexual offences has recommended that child prostitutes should be seen as victims and not as perpetrators. See in this regard South African Law Reform Commission **Discussion Paper 85: Sexual Offences, the Substantive Law** (Project 107) August 1999, par. 3.7.10.2.

⁹² US Department of State **Trafficking in Persons Report** 2003, p 7.

prey for traffickers who promise them trade and work opportunities.⁹³ Poverty-stricken parents have also sold their children to traffickers to get out of debt and the poverty they face.⁹⁴ In poor communities, there is generally a high rate of illiteracy and a lack of marketable skills. Young people are also attracted to the bright lights of the city where they know they can earn more money without fully appreciating the hardship they may suffer in the process of trying to escape from their circumstances. Poverty and hunger may place women and children in situations in which they are forced to exchange sex for food, shelter and survival.⁹⁵ Parents are known to even sell their children in order to survive. Poverty is also worsened by the lack of an effective welfare support system for those who are unable to provide for their families' financial needs.

Family breakdown

3.35 Parents sometimes find it difficult to cope with the stress in their lives and may become physically, emotionally or sexually abusive. Divorce and remarriage can also place a strain on family relationships. When families become homeless, or are forced to move from place to place, parents' abilities to care for and protect their children are often severely limited.⁹⁶ Abuse of children within the family is one of the reasons why children leave their home to survive on the streets, thereby becoming vulnerable to being trafficked.

Gender discrimination

3.36 In some societies men are held in higher esteem than women. Women and girls are often treated as property and denied a voice and a right to protection against violence. Families who do not value female children may deny them education or give

⁹³ Salah R 'Child trafficking in West and Central Africa: An overview' Paper presented at the First Pan African Conference on Human Trafficking held in Abudja, Nigeria on 19 – 23, February 2001.

⁹⁴ Fitzgibbon K 'Modern-day Slavery? The scope of trafficking in persons in Africa' **African Security Review** (2003)12(1) Internet: <http://www.iss.co.za/Pubs/ASR/12No1/E2.pdf> Date accessed: 15/8/03.

⁹⁵ Shifman P and Franzblau K 2001, p.17.

⁹⁶ Pamela Shifman and Ken Franzblau 'Trafficking: Legislative responses' in **Profiting from abuse: An investigation into the sexual exploitation of our children** 2001 UNICEF p.17.

them off into marriage at a young age. This dramatically limits their life opportunities and increases their vulnerability to exploitation and abuse.⁹⁷

Culture

3.37 In some societies cultural values produce the attitude that children should work outside the family to help parents and other siblings. There is also the attitude that a child is obligated to supplement the family income. Attractive job offers are made to the parents of children and in this way children are lured by traffickers. It is also not uncommon for parents and guardians to be witting or unwitting accomplices of the traffickers.⁹⁸

HIV/AIDS

3.38 HIV/AIDS has resulted in a massive rise in the number of orphans and child-headed households in which children are compelled to become wage earners. This vulnerability, along with the social stigma associated with HIV/AIDS in many parts of the world, leave these children with few defences against exploitation.⁹⁹

War, natural disasters and political instability

3.39 Sudden political change, economic collapse, civil unrest, internal armed conflict and natural disasters greatly increase the likelihood of people being displaced who then become vulnerable to exploitation by traffickers.¹⁰⁰ Exploitation of women and children flourishes in situations where norms break down.

Ignorance

⁹⁷ Shifman P and Franzblau K 2001, p.17. See also US Department of State **Trafficking in Persons Report** 2003, p 8.

⁹⁸ Information obtained at Internet: <http://www.stopchildtrafficking.info/causes.htm>

⁹⁹ Shifman P and Franzblau K 2001, p.17. See also US Department of State **Trafficking in Persons Report** 2003, p 10.

¹⁰⁰ US Department of State **Trafficking in Persons Report** 2003, p 8; See also Fitzgibbon K Modern-day Slavery? **African Security Review** (2003) 12(1) Date accessed: 15/8/03.

3.40 As most persons are ignorant of the risks involved in trafficking such as torture, rape and exposure to HIV/AIDS, they easily accept offers of employment opportunities for themselves or their children made by traffickers.

Demand

3.41 The supply of victims of trafficking is supported by a high demand for the exploitation of these victims in various sectors, especially the sex industry. Men form the biggest proportion of those creating the demand within the sex industry. There is also a high demand for the exploitation of children within the informal economic sector as children provide cheap labour and are vulnerable to abusive situations.¹⁰¹ Children are often unaware of their rights or are powerless to seek assistance.¹⁰²

Secondary causes

Weak laws and corruption

3.42 Efforts to fight trafficking in persons are usually hampered by inadequate laws which allow traffickers to continue their activities with relative impunity. Trafficking in persons is also facilitated by corrupt law enforcement officials who turn a blind eye to trafficking operations in return for payment.

Migration

3.43 As job opportunities are scarce, people are often forced to migrate in order to survive. Many women consider migration as the only opportunity for improving their standard of living and that of their families.¹⁰³ However, the expectations of migrants are generally shattered by the realities and the experiences they face at their place of destination. Migrant labourers are usually viewed as cheap economic tools and little

¹⁰¹ See also par. 3.23 above.

¹⁰² Salah R 'Child trafficking in West and Central Africa: An overview' Paper presented at the First Pan African Conference on Human Trafficking held in Abudja, Nigeria on 19 – 23 February 2001.

¹⁰³ Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p. 43.

regard is given to the conditions in which they live and work, their health and safety conditions. This creates conditions in which women migrant workers become particularly vulnerable to sexual exploitation and abuse from employers. Although migration does not necessarily lead to trafficking, it can create conditions which make migrating women and children more vulnerable to being trafficked into different kinds of bonded labour, including sex work.¹⁰⁴ The Southern African region became popular for migrants because of the political transformation that took place in South Africa during the 1990's and the opening up of international trade and regional cross-border activities which led to expansion of economic activities and relative prosperity in the region.¹⁰⁵ The increased movement of people and goods has also made it easier for traffickers to transport women and children across borders.

Question

13. What can be done to eliminate or reduce the causes making persons vulnerable to being trafficked? How can your suggestions best be incorporated in legislation?

THE TRAFFICKING NETWORK

3.44 Various role-players are involved in the trafficking of persons, all of whom profit in some way or other. The chain can be quite extensive. A victim might be linked to an abuser, sometimes across borders, through intermediaries which include recruiters, transporters, pimps, brothel owners, sex tourists and agents. Organised criminal networks thrive on this trade in persons and, to a lesser or greater extent, so do many others such as taxi drivers, and relatives, including parents. Agents do not always work for organised criminal networks. For example, an agent may buy and marry a Thai woman who has been trafficked to South Africa. The agent and his wife will then recruit one or more women from Thailand to work for them in the sex industry in South Africa. Individuals within organised criminal networks usually form the link between the network

¹⁰⁴ United Nations HIV and Development Program South and South-West Asia **The nexus of vulnerability: Prevention and trafficking of women and girls and HIV/AIDS in South Asia** 2001, p. 14 - 15.

¹⁰⁵ Umar A 'Organised crime links between Southern Africa and West Africa' Paper presented at the Seminar for SADC Countries on the ratification and implementation of the United Nations Convention against Transnational Organised Crime, Mauritius, 23 – 25 September 2003.

recruiting the persons to be trafficked and the network to which the persons are being trafficked. Trafficking of foreigners into South Africa for purposes of commercial sexual exploitation from Africa, Europe and Southeast Asia appears to be controlled by organised criminal gangs from Bulgaria, Russia, Thailand, China and Nigeria.¹⁰⁶ Traffickers are often highly successful because of their links with other transnational criminal networks, such as those dealing in arms and drugs that provide them with safe and tested routes, access to cash and known corrupt officials to bribe.¹⁰⁷

3.45 The Palermo Protocol does not make a distinction between those who recruit persons for purposes of exploitation (the traffickers) and those who merely facilitate the trafficking of persons such as the taxi driver who is not part of the trafficking network, but who transports the victims to the place of exploitation on a single occasion. Although the taxi driver plays an important role in the whole act of trafficking, he or she, unlike the trafficker, is not responsible for providing the supply of victims of trafficking.

Question

14. Should a distinction be made in sentencing between those who provide the supply of victims (the traffickers) and those who merely facilitate the act of trafficking in persons? If yes, what would be an appropriate sentence for those who merely facilitate trafficking in persons and who are not part of the trafficking network?

TRAFFICKING VERSUS EXPLOITATION

3.46 The Palermo Protocol makes it clear that the act of trafficking in persons for purposes of exploitation should be distinguished from the actual exploitation itself. However, the distinction between the two is not always clear. As can be seen from the International Organisation for Migration's Report, traffickers often subject their victims to physical or sexual abuse even before their victims reach the place of exploitation.¹⁰⁸ The USA Model Law to Combat Trafficking in Persons gives some guidance as to the

¹⁰⁶ Fitzgibbon K Modern-day Slavery? *African Security Review* (2003) 12(1).

¹⁰⁷ Ibid.

¹⁰⁸ International Organisation for Migration *Trafficking in Women and Children* 2003, p. 36 – 37.

manner in which traffickers who, in the process of trafficking their victims also, exploit them, should be dealt with. It proposes the following adjustments to the sentence of a person convicted of the crime of trafficking in persons:

- (a) If a trafficked person suffers a serious bodily injury, or if the convicted person commits a sexual assault against a trafficked person, 5 years shall be added to the minimum sentence.
- (b) If, in the course of trafficking or subsequent exploitation, the convicted person recklessly caused a trafficked person to be exposed to a life threatening illness, or if the convicted person intentionally caused a trafficked person to become addicted to any drug or medication, 5 years shall be added to the minimum sentence.
- (c) If a trafficked person suffers a permanent or life threatening injury, 10 years shall be added to the minimum sentence.
- (d) If a trafficked person dies as a result of the trafficking, the sentence shall be between 20 years and life imprisonment.

Questions

15. How should legislation on trafficking in persons address instances where traffickers also subject their victims to exploitation in the process of trafficking them?

16. The definition of trafficking in persons as set out in article 3 of the Palermo Protocol states that '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'. Should the latter forms of exploitation be defined? If yes, how?

17. Are there any other forms of exploitation which in your

view should be defined? If yes, how?

TRAFFICKING VERSUS SMUGGLING

3.47 The distinction between trafficking in persons and the smuggling of persons is not always clear. Trafficking involves the continued exploitation of the victim, whilst smuggling of persons is the procurement of illegal entry of a person into a state of which that person is not a national or a permanent resident.¹⁰⁹ The smuggler is usually paid a fee or other reward and his or her involvement with the smuggled person ends once illegal entry into the country has been secured. The smuggler therefore does not exploit or otherwise subject the smuggled person to abuse of any kind. However, a case may start off as smuggling, but once the person has been smuggled into the country of destination, he or she may be forced to work in the sex industry or be subjected to other forms of exploitative practices.

SOUTH AFRICAN SUPPORT SYSTEM FOR VICTIMS OF TRAFFICKING

3.48 South Africa lacks a proper system in terms of which assistance can be provided to victims of trafficking. Many shelters for battered women in South Africa, for example, require that an applicant produce a South African identification document before she is allowed access.¹¹⁰ Legislation is also not 'victim friendly'. For instance, the Immigration Act¹¹¹ states that an illegal foreigner shall be deported¹¹² and that an immigration officer may, without a warrant, arrest an illegal foreigner and deport him or her or cause him or her to be deported.¹¹³ A victim of trafficking who has entered the country without the necessary documentation is considered an illegal foreigner. Thus, victims are victimised twice. They are deceived and trafficked and then later discriminated against by the police and immigration officials who see them as illegal immigrants.

¹⁰⁹ See also article 3 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organised Crime 2000.

¹¹⁰ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 11.

¹¹¹ 13 of 2002.

¹¹² Section 32(2).

¹¹³ Section 34(1).

3.49 The Immigration Act¹¹⁴ further provides that no person may in any manner help an illegal foreigner.¹¹⁵ The Act also provides that it would not be a defence for any person that he or she did not know the status of the foreigner concerned, or whether he or she was an illegal foreigner, if the person ought reasonably to have known the status of the foreigner or whether the foreigner was illegal in South Africa.¹¹⁶ These provisions will certainly deter any person from assisting a victim of trafficking who is illegally in South Africa.

3.50 In terms of section 32 of the Refugees Act,¹¹⁷ a child who appears to qualify for refugee status and who is found in circumstances which clearly indicate that he or she is a child in need of care, must be brought before the Children's Court. Despite this provision, children are often deported without being brought before the Children's Court.¹¹⁸ The summary deportation of child victims may have serious consequences since children may be returned to the very parents who sold them or to a home where they were abused.¹¹⁹ There is also no policy within the police service in terms of which unaccompanied minors are referred to social services.¹²⁰ Although the police usually refer such children to social services, some of these children are taken to the Lindela Detention Centre from where they are deported.

3.51 Victims of trafficking are also deported to their countries of origin without a prior investigation into their circumstances in order to establish whether protective systems are in place in their countries of origin so as to ensure that victims are not returned to the same circumstances that made them vulnerable to being trafficked in the first instance. As international social services are the responsibility of the Department of Social Development, this Department is responsible for investigating the circumstances of victims of trafficking. However, the Department does not have an international social

¹¹⁴ 13 of 2002.

¹¹⁵ Section 42(1)(a).

¹¹⁶ Section 42(2).

¹¹⁷ 130 of 1998.

¹¹⁸ In Germany, the police are required to inform an NGO if they encounter a trafficking victim. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 52; US Department of State **Trafficking in Persons Report** 2003, p. 69.

¹¹⁹ Shifman P and Franzblau K 2001 p.13.

¹²⁰ Discussion with Director Zirk Gous, Border Police: S A Police Service on 8 July 2003.

services unit. Currently, the Department may contact International Social Services to assist in investigating the circumstances of victims trafficked to South Africa.¹²¹ The South African Red Cross Society is also available to assist in the tracing of and investigating of the circumstances of victims trafficked to South Africa.¹²² However, both institutions do not have the capacity to deal with a large volume of such cases.

3.52 A substantial number of victims trafficked to South Africa do not have the necessary documentation entitling them to be in South Africa. These victims may have to be provided with temporary resident permits whilst their circumstances are being investigated.

3.53 Victims of trafficking, especially those trafficked for purposes of sexual exploitation, face various problems. These include serious physical abuse, emotional trauma, health problems such as HIV/AIDS, the effects of forced and unsafe abortions, social isolation, drug and alcohol abuse, injuries from assault and post-traumatic stress disorders. They also experience intense feelings such as guilt, fear, anger, shame, betrayal, depression, low self-esteem, disorientation and lack of trust in others, including those offering assistance.¹²³ Victims of trafficking therefore need to be treated sensitively and with the necessary understanding in order to help them pick up the threads of their lives when they return home. Various services therefore need to be provided to victims of trafficking which, at a minimum, should include the following:¹²⁴ health care services, shelter, counseling, education and vocational training.

3.54 Research conducted by the International Organisation for Migration found that approximately 85% of victims trafficked to South Africa spoke Portuguese, Swahili, French or an East Asian or Eastern European language and very few could converse in a South African language. Providing assistance to victims may therefore be hampered by the fact that service providers may not be able to communicate with the victim in a

¹²¹ Discussion with Ms Frances Viviers, International Social Services Affiliated Bureau: SA, on 31 July 2003.

¹²² Discussion with Ms Henrietta Nthathu, International Committee of the Red Cross, on 31 July 2003.

¹²³ See also Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, p. 51.

¹²⁴ In Cyprus, Article 7(1) of the Combating of Trafficking in Persons and Sexual Exploitation of Children Law of 2000 provides for the protection and support of victims of trafficking, including providing arrangements for maintenance, temporary shelter, medical care and psychiatric support.

language understood by the victim. The Department of Social Development: International Social Services has submitted that it is almost impossible to make a comprehensive assessment of the circumstances and needs of children trafficked to South Africa as most of these children do not understand any of the South African official languages.¹²⁵

Questions

18. What services should be provided to persons who have been trafficked to South Africa? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

19. What services should be provided to South African citizens or persons holding permanent residency in South Africa who have been trafficked to other parts of the world (including those still abroad)? What Department(s) or institution(s) should be responsible for the provision of such services? Please motivate your answer.

20. How can interaction and co-operation between the government and non-governmental organisations be fostered in order to ensure effective provision of services to victims of trafficking?

21. What can be done to overcome the problem of language with regard to persons trafficked to South Africa?

22. Should guidelines be drawn up for the police on how

¹²⁵ Submission submitted to the Commission on 31 July 2003.

to deal with unaccompanied children who have no documents allowing them to be in South Africa? If yes, what should be the content of these guidelines?

23. Should an international social services unit be established within the Department of Social Development? With regard to victims of trafficking, what should be the functions of this unit?

24. Should persons who assist victims of trafficking, especially children, who are illegal in South Africa, be exempted from prosecution in certain circumstances? If yes, in what circumstances?

25. Child care facilities have been known to refuse admission to children who have been involved in commercial sex work because they may be uncontrollable and may have a bad influence on the other children.¹²⁶ Should children who have been trafficked for purposes of sexual exploitation, especially those who were voluntary involved in commercial sex work before being trafficked, be placed in residential care facilities with other children in care? Please motivate your answer. If no, how should these children be reintegrated with other children in care in instances where family reunification is not possible?

26. How can the process of providing victims of trafficking with temporary resident permits be facilitated?

¹²⁶

ECPAT International **The Psychosocial Rehabilitation of Children who have been Commercially Sexually Exploited** compiled by Cotterill C and Delaney Stephanie 2001, p 20.

27. Reintegration of child victims of trafficking, especially those who have been trafficked by their families, will not be successful unless their families are equipped to receive them back. How can the family be empowered to receive and parent the child?

REGISTER FOR VICTIMS OF TRAFFICKING

3.55 South Africa does not have a specific register for victims of trafficking. However, with regard to children, the National Child Protection Register established in terms of Regulation 39B to the Child Care Act¹²⁷ makes provision for the recording of reported cases of child abuse. The provincial Departments of Social Development also receive data on child abuse. In addition, the Child Protection Units of the South African Police Service have an internal reporting system for incidences of child abuse.

3.56 Reporting of cases of child abuse in terms of the Child Care Act will not necessarily cover all instances of trafficking in children. In some instances, such as children trafficked for purposes of adoption, no signs of abuse may be visible. This raises the question as to whether specific provision should be made for the reporting of cases of trafficking in persons, including children.

3.57 Another issue to consider is whether the reporting of cases of trafficking in persons should be made mandatory. Making the reporting of trafficking in persons mandatory needs to be balanced with adequate resources to investigate each reported case. Currently, limited resources do not allow for the proper investigation of each reported case. The investigation of unsubstantiated cases generated by such a mandatory reporting provision can also have massive cost implications at the expense of preventative and protective services. Thus, mandatory reporting is only useful to the extent that it gives rise to effective services.

¹²⁷ 74 of 1983.

3.58 Legislative provisions on the reporting of cases of trafficking in persons could be supported by a register for victims of trafficking. The purpose of such a register could be to provide statistical data on trafficking in persons, or can be used to provide services to those listed, or can be used to provide preventative services to persons, especially children, deemed to be at risk.

Questions

28. Should provision be made for the reporting of cases of trafficking in persons? If yes, should reporting be mandatory or voluntary? Please motivate your answer. Should the current Child Protection Register be used to record cases of trafficking in children? Please motivate your answer.

29. Should a register for victims of trafficking be established? If yes, what should be the purpose of such register? Which Department or institution should be responsible for the administration of such register? Who should have access to such register?

PREVENTION OF TRAFFICKING IN PERSONS

3.59 Although the rescuing and re-integration of victims of trafficking is important, a preventative approach is also needed. Prevention should be aimed at both interrupting supply and discouraging demand. Preventative efforts must therefore also target those who create the demand for the trafficking of persons. Since men are largely responsible for the great demand for the sexual exploitation of women and children, they need to be engaged in preventative approaches.

3.60 From the foregoing discussions, it is clear that women and children are lured by traffickers mostly by means of false promises. A central part of any anti-trafficking strategy should therefore be to alert families and communities to the various ploys being used by traffickers in ensnaring persons, especially women and children. Families should also be made aware of the fact that someone in a position of trust could lure their children into a trap. Schools can also play an active role in educating children to recognise high-risk situations. Given the fact that traffickers usually prey on the vulnerable, information campaigns could be structured to target vulnerable regions and

communities.¹²⁸ Apart from being profit driven, trafficking in persons has a lot to do with a lack of respect for human dignity. Schools and other institutions such as churches can play a significant role in teaching persons, especially children, the value of respecting fellow human beings.

Questions

30. With reference to article 9 of the Palermo Protocol, what policies, programmes or other measures should be established in order to educate potential victims of trafficking about the risks of becoming a victim, and to prevent trafficking in persons? What should be the content of such policies, programmes or other measures? Which Department(s) or institution(s) should be responsible for establishing such policies, programmes or other measures?

31. Given the fact that persons are also being trafficked from rural areas where little, if any, use is being made of television or radio, what is the most effective method to reach these persons through information campaigns?

32. What measures can be taken to ensure that victims of trafficking in South Africa are provided with information on,

¹²⁸

In Albania a program run by the international NGO Terre des Hommes are aimed at preventing at risk children from being trafficked. Social workers identify families with unemployed parents or that have other relatives who have emigrated. Their children are then integrated into the regular school system, and a prevention team work with both the school and family to inform them of the harsh realities of trafficking. The prevention team also produces leaflets, a video and posters that are distributed in the communities to raise awareness about the difficulties children are face with. See in this regard 'Albania's trafficked children' in **Profiting from abuse: An investigation into the sexual exploitation of our children** 2001 UNICEF p.22. In Colombia, the government has sent officials to the airport to identify and talk with likely trafficking victims while they are waiting to leave the country. In many cases, they have succeeded in educating women about the dangers of trafficking and many potential victims elected not to leave.

inter alia, their rights, measures in place to ensure their safety, and how to contact appropriate law enforcement authorities?

THE POLICE INVESTIGATION

4.1 The South African Police Service plays an important role in combating the crime of trafficking in persons. The police are responsible for investigating the case, collecting the evidence, recording the statements of victims and witnesses and arresting the suspects. The successful prosecution of traffickers therefore largely depends on the thoroughness of the police investigation. As the crime of trafficking in persons is often committed by organised criminal networks, the investigation will usually be conducted by the organised crime unit. However, intelligence services, as well as the murder and robbery section within the police service also investigate cases of trafficking in persons.

4.2 In terms of section 16 of the South African Police Service Act,¹²⁹ the following circumstances amounting to criminal conduct or an endeavour thereto are regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof:

Criminal conduct or endeavour thereto -

- by any enterprise or group of persons who have a common goal in committing crimes in an organised manner;
- in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention or investigation at national level would be in the national interest; and
- in respect of which the prevention or investigation requires the application of specialised skills and where expedience requires that it be prevented or investigated at national level.

4.3 Investigating the crime of trafficking in persons is not without problems. The police often find it difficult to communicate with victims trafficked to South Africa as most victims do not speak any of the South African official languages.¹³⁰

¹²⁹ 68 of 1995.

¹³⁰ For instance, in a case where a group of Chinese women were trafficked to South Africa, the police had to contact the Chinese Embassy to help with translations.¹³⁰ See also paragraph 3.54 above.

4.4 The growing use of the Internet for trafficking operations makes the uncovering of such activities even more difficult. Forums on the Internet have also become meeting places for pimps selling women.¹³¹ The Internet as the fastest growing and most unregulated communication network in the world is contributing to the escalation of the global sex trade.¹³² In view of the increasing use of the Internet for trafficking operations, consideration needs to be given to the gathering of computer-related evidence to be used in criminal proceedings against traffickers. The admissibility and evidential value of computer-related evidence are being regulated by the Electronic Communications and Transactions Act.¹³³ The Act defines a 'data message' as data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction and a stored record. Section 15 of the Act provides as follows:

- (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 data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor
- (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such a person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in

¹³¹ Shifman P and Franzblau K 2001, p.17.

¹³² Barnes-September et al **Child victims of prostitution in the Western Cape** 2000, 40.

¹³³ 25 of 2002.

evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

4.5 The Act further establishes cyber inspectors employed by the Department of Communications who have wide-ranging and invasive search and seizure rights in so far as computer-related matters are concerned.¹³⁴ The South African Police Service will have to apply for assistance from a cyber inspector with regard to computer-related investigations.¹³⁵ In order to ensure that a high evidential value is attached to a data message, the police need to ensure that the authenticity of such evidence is preserved.

Questions

33. Should guidelines be established for the police regarding the manner of identification and interviewing of victims of trafficking? If yes, what should be the content of these guidelines?

34. Given the nature of the crime of trafficking in persons and the fact that different sectors within the police deal with cases of trafficking in persons, should special police units be established to deal with cases of trafficking in persons?¹³⁶ Please motivate your answer. If yes, what should be the duties of these units? If no, how can the current police service be improved to deal with the crime of trafficking in persons effectively and to ensure the protection of victims during the police investigation?

¹³⁴ Sections 80 – 84. See also Schwikkard PJ et al **Principles of evidence** (second edition) Landsdowne: Juta 2002, p. 386.

¹³⁵ Section 81(2).

¹³⁶ In Britain, the police have dedicated contact officers in national and international law enforcement agencies who deal specifically with trafficking in persons cases. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 107.

35. Should guidelines be drawn up for the police regarding the manner of ensuring that the authenticity of a data message to be used as evidence in criminal proceedings against traffickers is preserved? Please motivate your answer. If yes, what should be the content of these guidelines?

BORDER CONTROL

Border control authorities

4.6 The Department of Home Affairs is responsible for controlling the entry and exit of people through the borders of South Africa and may do so with the assistance of other organs of State.¹³⁷ Co-operation amongst the departments responsible for border control is established through a national Border Control Operational Co-ordination Committee (BCOCC).¹³⁸ Similar committees have been established on a provincial level and at ports of entry.

4.7 Border police play a significant role in controlling the illegal movement of people or goods across the borders of South Africa. In terms of section 13(6) of the South African Police Service Act,¹³⁹ any member of the South African Police Service may, for purposes of border control, without a warrant search any person, premises, other place, vehicle, vessel or aircraft or any receptacle at any place within 10 kilometers or any reasonable distance from any border between South Africa and any foreign state. Such a search may also be conducted in the territorial waters of South Africa, or inside South Africa within 10 kilometers or any reasonable distance from such territorial waters, or at any airport or within any reasonable distance from such airport. A member is authorised to seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle which may lawfully be seized. The Gauteng Border Police have recently established a Task Team on

¹³⁷ Section 36(1) of the Immigration Act 13 of 2002.

¹³⁸ This Committee has replaced the National Inter-Departmental Structure on Border Control which was created in 1980 through a Cabinet decision and resolved in 2001 through a Cabinet decision.

¹³⁹ 68 of 1995.

Trafficking in Persons. This Task Team is mainly responsible for operational issues and works closely with the Organised Crime Unit.¹⁴⁰

Corruption

4.8 The South African borders are relatively easy to cross, with the most common points of entry being Beitbridge and Komatipoort.¹⁴¹ It is believed that trafficking of persons across borders is sometimes facilitated by certain corrupt officials.¹⁴²

4.9 It is difficult to obtain evidence against border officials suspected of being involved in acts of corruption. This is also made difficult by the fact that some officials are unwilling to expose colleagues who are involved in acts of corruption. However, several officials at ports of entry have been arrested for their involvement in acts of corruption. Government has taken initiative to stamp out corruption by introducing structured projects which are directed at obtaining the evidence required in order to take action against corrupt officials. As a measure to reduce corruption amongst officials, education is provided to officials through 'Project Beyond Reproach' which is directed at strengthening the Code of Ethics.¹⁴³ Furthermore, in order to stamp out corruption, the Corruption Act¹⁴⁴ makes it a criminal offence for any person to corruptly offer or receive any benefit to commit or omit to do any act in relation to a power or duty.¹⁴⁵ The issue of corruption has been dealt with in more detail in the proposed Prevention and Combating of Corrupt Activities Bill which was introduced in Parliament in 2002. The Bill has been approved by the National Assembly.¹⁴⁶

¹⁴⁰ Telephonic discussion with Superintendent Frans Kloppers, Gauteng Provincial Commander of Border Police, on 3 July 2003.

¹⁴¹ International Organisation for Migration **Trafficking in Women and Children** 2003, p. 16.

¹⁴² The following statement from a Lesotho victim who was trafficked to South Africa illustrates the situation: '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.' This quote is taken from the International Organisation for Migration's Report on **Trafficking in Women and Children** 2003, p. 24.

¹⁴³ Discussion with Director Zirk Gous, Border Police: S A Police Service on 8 July 2003.

¹⁴⁴ 94 of 1992.

¹⁴⁵ Section 1.

¹⁴⁶ Legalbrief News Diary, 28 November 2003.

Abuse of the asylum process

4.10 In the light of several international instruments recognising the rights of refugees, the Refugees Act¹⁴⁷ provides an illegal foreigner with the right to apply for asylum.¹⁴⁸ The Immigration Act¹⁴⁹ also states as one of its objectives the promotion of a human-rights based culture in both government and civil society in respect of immigration control.¹⁵⁰ This also includes the protection of asylum-seekers. However, although such a human-rights approach is needed, the asylum process is sometimes being abused by criminal syndicates. This is done by taking persons brought illegally into the country to apply for asylum in order to avoid arrest, whereafter these persons disappear. This has led to a suspicion that the asylum-seekers could be victims of trafficking.¹⁵¹

4.11 Furthermore, there have been instances where persons who have entered the country illegally, will immediately contact an attorney who is based in South Africa. The police are then hampered from arresting these persons as their attorney usually insists on their right to apply for asylum. This has also led to a suspicion that certain attorneys may be involved in the activities of criminal syndicates.¹⁵²

Question

36. How can border control be strengthened in order to prevent and detect trafficking in persons effectively?

37. What measures could be put in place to detect whether children traveling unattended are victims of trafficking?

38. Are the current measures aimed at reducing corruption amongst border officials

¹⁴⁷ 130 of 1998.

¹⁴⁸ Section 21.

¹⁴⁹ 13 of 2002.

¹⁵⁰ Section 2.

¹⁵¹ Discussion with Director Zirk Gous, Border Police: S A Police Service on 8 July 2003.

¹⁵² Ibid.

sufficient? Please motivate your answer. If no, what measures should be taken to eliminate, or at least reduce, corruption amongst border officials?

39. What measures can be taken in order to ensure that the asylum process is not abused by traffickers?

CO-OPERATION AMONGST STATES IN MATTERS RELATING TO TRAFFICKING IN PERSONS

4.12 As trafficking in persons often occurs across borders, the identification of workable solutions amongst countries may be problematic. Co-operation amongst countries and the continuous exchange of information, experience and expertise are therefore essential in order to combat the crime of trafficking in persons successfully. Bilateral or regional agreements on issues such as the protection of victims of trafficking, extradition and the prosecution of offenders may need to be developed.

4.13 As mentioned earlier, South Africa is currently in the process of ratifying the Palermo Protocol. Once it does so, it will assume the obligation to adopt legislative or other measures to ensure the protection of victims of trafficking and the prosecution of traffickers, including assisting other State Parties in this regard. However, the protection and repatriation of victims to their countries of origin may be problematic if those countries are not State Parties to the Palermo Protocol.

4.14 With regard to the extradition of traffickers, South Africa acceded, by ratification on 12 February 2003, to the European Convention on Extradition and the two protocols amending it. In respect of countries to which the Convention applies, it supersedes the provisions of any bilateral treaties, conventions and agreements governing extradition. Parties to the Convention may conclude other bilateral or multilateral agreements between themselves only to supplement the provisions of the Convention or facilitate the application of the principles contained therein. However, where States Parties to the Convention have laws in force providing for extradition, they are free to regulate their mutual relations in respect thereof exclusively in accordance with such system, notwithstanding the provisions of the Convention. The parties to the Convention must surrender to each other, (a) all persons against whom the competent authorities of the

requesting party are proceeding against for an offence or, (b) who are wanted by the said authorities for the carrying out of a sentence or detention order. Furthermore, the requested party must, in so far as its law permits and at the request of the requesting party, seize and hand over property which may be required as evidence or which has been acquired as a result of the offence and which, at the time of the arrest, is found in the possession of the person claimed or is discovered subsequently.¹⁵³

4.15 In South Africa, the Extradition Act¹⁵⁴ provides for the extradition of persons accused or convicted of certain offences. In terms of this Act, an extraditable offence is an offence which in terms of the law of South Africa and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.¹⁵⁵ The Act provides for the designation of foreign States. A person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State is liable to be surrendered to such designated State.¹⁵⁶ The President may also enter into an agreement with any foreign State, other than a designated State, providing for the surrender of persons accused or convicted of extraditable offences specified in such agreement.¹⁵⁷ The Act contains no exemption for South African nationals from being extradited for offences committed abroad.

4.16 South Africa's ratification of the Convention is a positive step in ensuring that those involved in the trafficking of persons are punished. Extradition agreements with countries, other than those which are party to the Convention, would be of particular use in instances where nationals of countries, in which trafficking in persons is not a crime, commit the crime of trafficking in persons in South Africa. South Africa would then be able to request that such persons be extradited to South Africa for prosecution.

Questions

¹⁵³ 'Extradition' 2003 **De Rebus** p.56 – 58.

¹⁵⁴ 67 of 1962.

¹⁵⁵ Section 1. In Cyprus, Trafficking in persons and the exploitation of children are deemed extraditable offences under the Extraction of Fugitives Law No. 97 of 1970.

¹⁵⁶ Section 3(3).

¹⁵⁷ Section 2(1)(a).

40. Given the trans-national nature of the crime of trafficking in persons, should bilateral and/or multilateral agreements relating to the protection of victims of trafficking and the prosecution of traffickers be concluded between South Africa and countries that are not Parties to the Palermo Protocol whose citizens are being trafficked to South Africa and to which South African citizens are being trafficked? If yes, what should be the content of such agreements?

41. Are the legal provisions regarding extradition as set out above sufficient to ensure the effective extradition of traffickers for purposes of prosecuting them? If no, how should the problem be addressed?

IMMIGRATION STATUS OF VICTIMS OF TRAFFICKING

Resident permits

4.17 The successful prosecution of traffickers is most likely through the testimony of victims. This requires that victims should stay in South Africa for the duration of the criminal proceedings against the traffickers and may require that victims be granted temporary resident permits.¹⁵⁸

¹⁵⁸ There, however, is a reported instance where a Thai woman who has been trafficked to South Africa was granted a permit to stay in the country in exchange for testifying against the traffickers. See in this regard SABC3 Special Assignment program broadcasted on 20 May 2003. In the Netherlands, Italy, Belgium and Austria, if the victim agrees to co-operate with law enforcement and judicial authorities, her residence permit and services are extended for the length of the criminal proceedings. The victim is also entitled to shelter, legal, financial and medical assistance. See in this regard ECPAT International **The Fourth Report on the Implementation of the Agenda for Action adopted at the First World Congress against Commercial Exploitation of Children in Stockholm, Sweden, 28 August 1996** 2000, p.119. See also USA Department of State **Trafficking in Persons Report 2002**; US Department of State **Trafficking in Persons Report 2003**. In Canada, victims of trafficking are eligible to apply for permanent residency status. See in this regard USA Department of State **Trafficking in Persons Report 2002**, p.38.

4.18 Allowing victims to stay in South Africa for the duration of criminal proceedings against traffickers may also require that the victim's family be allowed to join him or her. This will help to strengthen the support provided to victims, especially child victims.

4.19 However, concern has been expressed that the provisions of the Palermo Protocol regarding the provision of resident permits to victims of trafficking are open to abuse and that South Africa cannot construe the language of the Protocol as requiring the extension of permanent residence or a stable immigration status to victims of trafficking merely on that account.¹⁵⁹ It has also been pointed out that a person who is subject to a deportation procedure may falsely claim that he or she is a victim of trafficking. In this instance, the deportation will not be proceeded with as the claim will first have to be investigated. Furthermore, if a claim of being a victim of trafficking may lead to a temporary or permanent immigration status, such claim is likely to be abused.¹⁶⁰

Refugee status

4.20 Another option to explore is the possibility of applying for refugee status. In terms of section 3 of the Refugees Act,¹⁶¹ a person qualifies for refugee status if that person 'owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it'. Although it is not clear from the wording of the Act whether a person who has been trafficked to South Africa can apply for refugee status, it can be argued that a person may be trafficked because of his or her membership of a particular social group

¹⁵⁹ Ministry of Home Affairs **Remarks by Mangosuthu Buthelezi, MP, Minister of Home Affairs at the Second Bali Conference on people smuggling and trafficking in persons and related transnational organised crimes** 30 April 2003.

¹⁶⁰ Ibid.

¹⁶¹ 130 of 1998.

and may, owing to a well-founded fear of being trafficked again, be unwilling to return to his or her country of origin.¹⁶²

4.21 In terms of section 32 of the Refugees Act, a child who appears to be in need of care in terms of the Child Care Act¹⁶³ and who appears to qualify for refugee status, must be referred to the Children's Court. The Children's Court may order that such child be assisted in applying for asylum. However, it is a very long and tedious process to acquire refugee status and the procedure is not 'child-friendly'.¹⁶⁴ The Commission, in its Discussion Paper on the Review of the Child Care Act, made recommendations for the improvement of the asylum process in so far as it relates to children.¹⁶⁵ The Commission recommended that proper guidelines on the manner of interviewing asylum-seeker children should be established which should include the following:

- (a) what the nature of the interview should be (formal/informal);
- (b) how questions should be asked;
- (c) that the child should be allowed to express his or her views freely and that due weight should be given to such views;
- (d) where a child asylum-seeker cannot express him or herself in English, a competent interpreter must be made available to the child;
- (e) that interviews must be sensitive to cultural and gender factors;
- (f) that allowance must be made for the fact that children are not able to present evidence with the same degree of precision as adults and do manifest their fears differently from adults;
- (g) that children seeking asylum usually suffer from post traumatic stress disorder which can have an effect on their testimony.

¹⁶² See also Molo Songololo **The trafficking of women** 2000, p. 48.

¹⁶³ 74 of 1983.

¹⁶⁴ Submission made to the Commission by the Pretoria Child and Family Care Society, 30 June 2003.

¹⁶⁵ South African Law Reform Commission **Discussion Paper 103: Review of the Child Care Act** (Project 110) December 2001, p 1121 - 1122.

Questions

42. Should temporary resident permits be issued to victims of trafficking?¹⁶⁶ If yes, should the issuing of such permit be dependent on the victim's willingness to testify against traffickers in criminal proceedings?

43. Should permanent residence permits be provided to victims of trafficking if there is a real risk that the victim may be trafficked again, harmed or killed when returned to his or her country of origin?

44. Should a victim's immediate family be able to join him or her in South Africa for the duration of criminal proceedings against traffickers? Please motivate your answer.

45. Should a victim who has been trafficked to South Africa have a right to apply for refugee status?

LEGAL REPRESENTATION

4.22 In South Africa, the state acts on behalf of the victim of a criminal offence. The function of the prosecutor in a criminal case is to prove the guilt of the defendant beyond reasonable doubt. The victim is therefore not entitled to separate legal representation. However, a child is in certain circumstances entitled to legal representation in proceedings before the Children's Court. In terms of section 8A(1) of the Child Care

¹⁶⁶ In the Czech Republic, the government may provide temporary residence to victims who agree to testify against traffickers. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 43.

Act,¹⁶⁷ a child may have legal representation at any stage of a proceeding under the said Act. Regulation 4A(1) of the Child Care Act provides, *inter alia*, that legal representation, at state expense, must be provided for a child in the following circumstances:

- (a) where it is requested by the child who is capable of understanding;
- (b) where it is recommended in a report by a social worker or an accredited social worker;
- (c) where any party besides the child will be legally represented in the proceedings;
- (d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused; or
- (e) where the child is capable of understanding the proceedings, but cannot communicate directly with the court because of language differences – a legal representative who speaks both languages must be provided. Where such a legal representative cannot be provided, an alternative arrangement must be made including the provision of an interpreter for the child.

Question

46. Should victims of trafficking be provided with separate legal representation in criminal proceedings against traffickers, taking into account the role of the prosecutor? If yes, on what grounds should such separate legal representation be provided?

THE COURT PROCESS

The children's court process

4.23 The children's court process has extensively been dealt with in the Commission's investigation into the review of the Child Care Act. Issues addressed in that investigation are therefore not considered in this Issue Paper.

4.24 However, a few problems which have not been addressed in the Children's Bill¹⁶⁸ are being experienced with regard to foreign children who are in the country illegally,

¹⁶⁷ 74 of 1983.

including those trafficked to South Africa. Children trafficked to South Africa usually enter the country without the necessary documentation such as birth certificates. Although a children's court enquiry may be opened in the absence of a child's birth certificate, the children's court proceedings cannot be finalised without such certificate. This is because of the 13-digit identification document requirement which will allow the court to place the child within the child care system.

Question

47. What can be done to address the problems being experienced with placing foreign children, who are in the country illegally, in the child care system?

The criminal court process

Problems in prosecuting traffickers

4.25 Since trafficking in persons is not a crime in South Africa at present, traffickers are being charged with common law offences such as kidnapping¹⁶⁹ or abduction.¹⁷⁰ They may also be charged in terms of the Immigration Act¹⁷¹ for bringing persons into the country without the necessary documentation and in terms of the Sexual Offences Act if they have subjected their victims to sexual abuse.¹⁷² Although trafficking in persons is an age-old practice, it made headlines in South Africa only recently. Prosecutors are therefore not sufficiently trained to prosecute traffickers effectively. As organised criminal networks are usually involved in the trafficking of persons, the prosecution of traffickers may require special skills. Furthermore, traffickers usually have the advantage of being able to afford the best legal representation. In other jurisdictions,

¹⁶⁸ The Bill has recently been tabled in the Parliamentary Portfolio Committee on Social Development.

¹⁶⁹ Kidnapping is the wrongful and intentional deprivation of the liberty of another. See in this regard *S v Levy* 1967 (1) SA 353 (W). This definition makes it clear that it applies to man, woman and child.

¹⁷⁰ Abduction consists in unlawfully taking 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. See in this regard Burchell J and Milton J **Principals of criminal law** (second edition) Landsdowne: Juta 1997, p. 523.

¹⁷¹ 13 of 2002.

¹⁷² 23 of 1957.

prosecutors specialise in prosecuting cases of trafficking in persons. For example, a national public prosecutor for trafficking in persons was appointed in the Netherlands in 2001 and each district court has an anti-trafficking co-ordinator.¹⁷³

4.26 Prosecutors carry a heavy workload. It often happens that a prosecutor receives a case docket which does not contain sufficient evidence in order to secure a conviction. In such a case the prosecutor may request the police to conduct a further investigation in order to obtain the required evidence. Due to limited time, this may not be possible where the case has been placed on the court roll for hearing. In this instance the prosecutor has to approach the court to request for a postponement in order to conduct a further investigation, which may cause a delay in finalising the case. This raises the question as to whether prosecutors should be involved in guiding the collection of evidence during the police investigation.¹⁷⁴

Obtaining of testimony of victims or other witnesses

4.27 Victims of trafficking often refuse to testify against traffickers due to fear for their safety and the safety of their families. This hampers the effective prosecution of traffickers. It is therefore essential that victims or other witnesses should feel safe when testifying against traffickers.¹⁷⁵ Given the fact that the crime of trafficking in persons is such a clandestine operation, it is not always possible to catch traffickers in the act. The most likely means of prosecution is therefore through the testimony of victims or other witnesses.

4.28 The current system provides for the following protective measures for a victim or other witness who are scared to testify in criminal proceedings or to face the trafficker in court:

¹⁷³ See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 79; US Department of State **Trafficking in Persons Report** 2003, p. 112.

¹⁷⁴ A specific recommendation made at the Seminar for SADC countries on the ratification and implementation of the UN Convention Against Transnational Organised Crime held in Mauritius on 23 – 25 September 2003 was that prosecutors should play a greater role in guiding the collection of evidence in organised crime cases.

¹⁷⁵ In Lithuania, the Criminal Code and Criminal Process Code allows for separate testimony of a victim of trafficking to a judge in order to provide an alternative for victims who are fearful of testifying in an open court. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 71.

Witness protection

4.29 Section 7(1) of the Witness Protection Act¹⁷⁶ provides that any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by reason of his or her being a witness, may apply to be placed under protection. The Act defines a 'related person' as any member of the family or household of a witness, or any other person in a close relationship to, or in association with, such witness.¹⁷⁷

4.30 The effectiveness of the witness protection programme has, however, been questioned. For example, several witnesses have complained about being treated badly and that they have not received any counseling for the stress and trauma they have suffered.¹⁷⁸ The ineffectiveness of the witness protection programme may serve as yet another reason why victims of trafficking may refuse to testify against traffickers.

4.31 In terms of section 21 of the Act, the Minister for Justice and Constitutional Development may enter into an agreement with any international body, institution, organisation or foreign country to admit a protected person to a witness protection programme in terms of any law applicable to that body, institution or organisation or in that country. This provision can be applied to protect the family of a victim of trafficking in instances where the victim is to testify in criminal proceedings against traffickers in South Africa whilst his or her family is in another country.

Closed-circuit television

4.32 The Criminal Procedure Act¹⁷⁹ provides that a court may on its own initiative or on application by the public prosecutor order that a witness or accused, if the witness or accused consents thereto, give evidence by means of closed-circuit television or similar

¹⁷⁶ 112 of 1998.

¹⁷⁷ Section 1.

¹⁷⁸ Gill Moodie 'Its misery, says protected witness' Sunday Times News 24 February 2002 Internet: <http://www.suntimes.co.za/2002/02/24/news/cape/nct10.asp>; Mnet Carte Blanche program broadcasted on 28 January 2001.

¹⁷⁹ 51 of 1977.

electronic media.¹⁸⁰ A court may make a similar order on the application of an accused or a witness.¹⁸¹

Intermediary

4.33 Section 170A of the Criminal Procedure Act¹⁸² provides that whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if that witness testifies at such proceedings, the court may appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary. When an intermediary is appointed, no examination in chief, cross-examination or re-examination of the witness can take place in any manner other than through that intermediary. It is only the court that may question the witness without intervention by the intermediary. The witness concerned is also in another room and does not hear the original questions as put by the prosecutor or the defence counsel.¹⁸³

In camera hearings

4.34 If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings, the court may, in terms of section 153(2) of the Criminal procedure Act,¹⁸⁴ direct –

(a) that the person testifies behind closed doors and that no person should be present when such evidence is given unless his or her presence is necessary in connection with such proceedings or is authorised by the court;

(b) that the identity of such person should not be revealed or that it should not be revealed for a period specified by the court.

¹⁸⁰ Section 158(2)(a).

¹⁸¹ Section 158(2)(b).

¹⁸² 51 of 1977.

¹⁸³ Schwikkard PJ et al **Principles of Evidence** (second edition) Landsdowne: Juta 2002, p351.

¹⁸⁴ 51 of 1977.

4.35 The issue of withholding the identity of a witness has been discussed in **S v Ntoae** and Others.¹⁸⁵ In this case the court held that if it is in the interests of justice that the identity of a witness for the state should be withheld from the accused and their representatives, it is entitled and empowered, in terms of section 153(2), to grant such an order to that effect. However, the court should give due consideration to the accused's right to a fair trial and whether the withholding of the identity of the complainant or witness may render the accused unable to conduct a proper defence. Section 153(2) can therefore be used as a tool to protect victims of trafficking who fear for their safety and/or the safety of their families should their identity be revealed when testifying against traffickers. However, the court in the Ntoae case stated that it may become necessary, in order to ensure that the accused has a fair trial, to reveal the true identity of a witness, even after an initial ruling to the contrary. The defence may also at any time renew a request on substantiated grounds to have an initial order authorising non-disclosure of the identity of a witness reversed. Non-disclosure of the identity of victims of trafficking or any other witness can therefore not be guaranteed. This may indeed affect the willingness of victims to testify against traffickers.

4.36 The Prevention of Organised Crime Act¹⁸⁶ also makes it an offence to threaten any specific person or persons in general, with retaliation in any manner or by any means whatsoever.¹⁸⁷

Obtaining of testimony from victims or other witnesses outside South Africa

4.37 Another issue to consider is the obtaining of the testimony of a victim of trafficking or other witness who are outside South Africa to be used in criminal proceedings in South Africa. The necessary expenses to travel to South Africa could be paid to such a witness. This option is undoubtedly expensive. The issue of videotaping the testimony of a witness has been discussed extensively in the Commission's

¹⁸⁵ 2000 (1) SACR 17.

¹⁸⁶ 121 of 1998.

¹⁸⁷ Section 9.

Discussion Paper on Sexual Offences.¹⁸⁸ The Discussion Paper highlights various problems regarding the use of video-taped testimony and states that the current circumstances do not allow for the introduction of pre-recorded video-taped testimony as evidence during the trial. A specific disadvantage of video-taped evidence is the fact that the defence is not able to cross-examine the witness. This Issue Paper consequently does not pose the use of video-taped testimony as an option.

4.38 Besides permitting a witness to give evidence by means of closed-circuit television, the court may also allow the use of similar electronic media which may include the giving of evidence by audiovisual link.¹⁸⁹ The court may make an order to this effect only if facilities are readily available or obtainable and if it appears to the court that to do so would –¹⁹⁰

- (a) prevent unreasonable delay;
- (b) save cost;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interest of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

4.39 Allowing the giving of testimony through audiovisual link will require the installation of audiovisual equipment at the courts. The use of this option will also depend on whether the victim or other witness has access to audiovisual equipment. Giving evidence through audiovisual link allows for the cross-examination of witnesses. It is worth mentioning that the Commission has in its investigation into the Use of Electronic Equipment in Court Proceedings recommended that criminal cases against

¹⁸⁸ South African Law Reform Commission **Discussion Paper 102: Sexual Offences, Process and Procedure** (Project 107) December 2001, p. 389 – 401.

¹⁸⁹ Section 158(2) of the Criminal Procedure Act, 51 of 1977.

¹⁹⁰ Section 158(3) of the Criminal Procedure Act, 51 of 1977.

accused persons who are in custody awaiting trial should be postponed via audiovisual link.¹⁹¹

4.40 The International Co-operation in Criminal Matters Act¹⁹² is currently being used to obtain the testimony of a victim or witness who are outside South Africa. The Act provides for the issuing of a letter of request to a foreign State requesting such a State to obtain evidence as stated in the letter for use at proceedings before a court or an investigation related to an alleged offence. Where a letter of request relates to proceedings before a court, any party to such proceedings may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the court issuing the letter of request may attach to the letter of request, or (b) appear at the examination of a witness in person and may examine, cross-examine and re-examine the witness. Where the letter of request relates to an investigation, the person in charge of the investigation may, provided that it is permitted by the law of the requested State – (a) submit interrogatories which the judge or magistrate issuing the letter of request may attach to the letter of request, or (b) appear at the examination and question the person concerned.¹⁹³

Questions

48. Should prosecutors play an advisory role (guide the collection of evidence) in the investigation of trafficking in persons cases in order to ensure that the necessary evidence is obtained to ensure a conviction? If yes, how should such a provision be formulated in order to ensure that the prosecutor's involvement in the case does not place him or her in the same position as a witness for the state?

¹⁹¹ South African Law Reform Commission **Report on the use of Electronic Equipment in Court Proceedings** (Project 113) June 2003.

¹⁹² 75 of 1996.

¹⁹³ Sections 7 and 8.

49. Given the risks that victims of trafficking face when testifying against traffickers and taking into account that the current protective measures are not sufficient to ensure the safety of victims or other witnesses, how can the privacy and safety of victims or other witnesses be ensured in order to encourage them to testify against traffickers?

50. How should the criminal justice system deal with children who are to testify in criminal proceedings against traffickers?

51. Victims trafficked to South Africa often do not speak or understand any of the official languages of South Africa. Given this reality, how can victims be provided with the opportunity to express their views during criminal proceedings against traffickers, taking into account that an interpreter who speaks a language a victim understand may not be available?

52. Should future legislation on trafficking in persons include provisions on the use of audiovisual link in instances where a victim or other witness is outside South Africa and whose testimony is needed in criminal proceedings against traffickers taking place in South Africa? If yes, by what means should such testimony be obtained in instances where the victim does not have access to audiovisual link equipment?

COMPENSATION FOR DAMAGES

4.41 Several foreign jurisdictions permit victims of trafficking to institute legal proceedings against traffickers for damages suffered by them. For example, in Cyprus the Combating of Trafficking in Persons and Sexual Exploitation of Children Law of 2000 permits victims of trafficking to sue for civil damages. Victims also have an additional right to claim damages against any person who is responsible for the exploitation, and the person responsible is liable for both general and special damages.¹⁹⁴ In assessing general damages, the court may take into consideration the extent of the exploitation and the benefit that the offender derived from the exploitation,¹⁹⁵ the future prospects of the victim and the extent to which such prospects were adversely affected by the exploitation,¹⁹⁶ the culpability of the offender,¹⁹⁷ and the relationship or the dominating position or influence of the offender with regard to the victim.¹⁹⁸ Special damages refer to all expenses incurred as a result of the exploitation, including cost for repatriation in cases involving foreigners.¹⁹⁹ The court may also award punitive damages in appropriate cases, depending on the degree of exploitation or the nature of the relationship between the offender and the victim.²⁰⁰

4.42 In the USA, the Victims of Trafficking and Violence Protection Act of 2000 provides for the payment of restitution to a victim of trafficking for the full amount of the victim's losses.²⁰¹

4.43 In South Africa, section 300 of the Criminal Procedure Act²⁰² provides that where a person is convicted of an offence which has caused damage to or loss of property, including money, belonging to another person, the court in question may on application of the injured person award such person compensation for such damage or loss. This

¹⁹⁴ Article 8(1).

¹⁹⁵ Article 8(2)(a).

¹⁹⁶ Article 8(2)(b).

¹⁹⁷ Article 8(2)(c).

¹⁹⁸ Article 8(2)(d).

¹⁹⁹ Article 8(4).

²⁰⁰ Article 8(3).

²⁰¹ Section 1593 of Public Law 106 – 386 – OCT. 28, 2000.

²⁰² 51 of 1977.

provision, however, is limited as it refers only to property and not to physical or psychological injury suffered.

4.44 Section 30 of the Prevention of Organised Crime Act²⁰³ also provides for a mechanism in terms of which persons who have suffered damage to or loss of property or injury as a result of an offence or related activity may approach the High Court for an order directing that they be compensated out of property confiscated in terms of the Act. If the court is satisfied that the person has suffered damage to or loss of property or injury, it may allow that person to make representations in connection with the realisation of that property.²⁰⁴ If the person has already instituted civil proceedings or intends to institute such proceedings or has obtained a judgment against the defendant in respect of that damage, loss or injury, the court may order that the realisation of the whole or part of the property be suspended for a specified period in order to satisfy such claim or judgment and related legal expenses.

4.45 The Act further provides for the forfeiture of criminal assets that have either been used to commit an offence or are the proceeds of such an offence.²⁰⁵ The Act also provides for the rendering of financial assistance to law enforcement agencies out of funds derived from the confiscation and forfeiture of property.²⁰⁶

Questions

53. Are the legal remedies provided for in section 300 of the Criminal Procedure Act and section 30 of the Prevention of Organised Crime Act adequate to enable victims of trafficking to claim for damage suffered by them?²⁰⁷ If not, how should these provisions be amended

²⁰³ 121 of 1998.

²⁰⁴ Section 30(4).

²⁰⁵ Part 3 of the Act.

²⁰⁶ Section 69A.

²⁰⁷ In the USA, section 1593 of Public Law 106-386, Oct. 28, 2000 (Victims of Trafficking and Violence Protection Act of 2000) makes it mandatory for a court to order that restitution be paid to a victim of trafficking for any losses suffered.

in order to ensure that victims of trafficking are able to claim for damages suffered by them? What kind of damages should victims of trafficking be able to claim from their perpetrators?

INFORMATION TO BE PROVIDED TO VICTIMS OF TRAFFICKING

4.46 Victims of crime are often inadequately informed regarding matters relating to their case. This contributes to a sense of powerlessness and uncertainty. There is currently no system in terms of which victims of crime are provided with information regarding matters relating to their respective cases. In an attempt to provide victims with the necessary information, the National Prosecuting Authority has established four pilot victim assistance offices. The functions of these offices are to keep victims informed on developments regarding their cases, to arrange trauma counseling for victims and to devise safety plans for victims.²⁰⁸

4.47 The issue of the provision of information to victims of crime has been addressed in the draft South African Victim's Charter of Rights. The Charter is a government initiative giving recognition to the rights of victims of crime. The Charter states that victims of crime have the right to be informed of their rights and all available services, to be informed of their role in the case and of the duration of the case, to request information regarding court dates, witness fees and witness protection programmes, to be informed of the status of the case, whether or not the offender has been arrested, charged, granted bail, convicted and sentenced. Moreover, in order to strengthen their right to receive information, victims may request that any uncertainties be explained to them.

Question

54. With reference to article 6(2)(a) of the Palermo Protocol, what information should victims of trafficking be provided with and which authority should be responsible for

²⁰⁸ Discussion with adv. Thoko Majokweni, National Prosecuting Authority, on 17 July 2003.

providing such information to them?

JURISDICTIONAL ISSUES IN MATTERS RELATING TO TRAFFICKING IN PERSONS

4.48 Those charged with committing the crime of trafficking in persons can, depending on the circumstances of each case, also be charged with committing other offences such as rape, indecent assault, forced labour and child abuse. Several courts have concurrent jurisdiction to hear these matters. Rape cases are being heard by both the Magistrates' Courts and Sexual Offences Courts. Matters relating to forced labour are being heard by both the Labour Courts and Magistrates' Courts. Cases of child abuse are being heard by both the Magistrates' Courts and Children's Courts. Given the multiplicity of forums dealing with various aspects, a victim of trafficking may have to appear in more than one court. This may result in delays leaving the victim with uncertainty about his or her future. Victims of trafficking may already have been severely traumatised upon their rescue and requiring them to repeat painful details of their ordeal in various forums, may subject them to secondary systemic abuse.

Questions

55. Should all offences relating to the crime of trafficking in persons be heard in one court? If no, why not? If yes, which court? Please motivate your answer.

56. If proceedings relating to the crime of trafficking in persons are instituted in a court, other than the one suggested by you, how and on what grounds should the matter be referred from that court to the court suggested by you?

57. Should the court suggested by you be able to refer an issue in a matter before it to another court for hearing if it is of the opinion that justice would be served by such referral? If yes, what can be done to ensure that the victim is not subjected to secondary abuse by having to repeat his or her ordeal in the court the issue is being referred to?

SECURITY AND CONTROL OF TRAVEL DOCUMENTS

4.49 The crime of trafficking in persons is often facilitated by the production and supply of forged or fraudulently acquired documentation. In terms of the Immigration Act,²⁰⁹ the Department of Home Affairs is required to set up an internal anti-corruption unit charged with the task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power and dereliction of duty by a person employed in the Department.²¹⁰ The Act further makes it an offence for any civil servant to (a) provide false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, (b) facilitate such illegal foreigner to disguise his or her identity or status, or (c) accept any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of the Act. Any person, other than a civil servant, who produces a document purporting to be a document issued or administered by the Department of Home Affairs, is guilty of an offence.²¹¹ Also, any person who through offers of financial or other consideration or threats, compels or induces an officer to contravene the Act or to breach such officer's duty, is guilty of an offence.²¹²

4.50 South Africa is in possession of advanced equipment to determine whether travel documents have been forged. However, given the high cost of this equipment, it is not available at all ports of entry. Training is also provided to immigration officials to facilitate the detection of forged documents. Immigration officials have less than 30 seconds to scan travel documentation at ports of entry such as airports where large number of persons arrive simultaneously. It is therefore possible that some persons succeed in entering the country with forged travel documentation without being detected.²¹³

Question

58. What can be done to improve the detection of forged travel documents at ports of entry?

²⁰⁹ 13 of 2002.

²¹⁰ Section 47(1).

²¹¹ Section 49(9).

²¹² Section 49(10).

²¹³ Discussion with Director Zirk Gous, Border Police: S A Police Service on 8 July 2003.

59. With reference to article 12 of the Palermo Protocol, how can the Department of Home Affairs ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, readily falsified, unlawfully altered, replicated or issued?

REPATRIATION OF VICTIMS OF TRAFFICKING

4.51 Victims of trafficking who are found in South Africa without legal documentation are taken to the Lindela Detention Centre from where they are deported.²¹⁴ The living conditions in this centre are not 'victim friendly'. Research conducted by Human Rights Watch and the South African Human Rights Commission indicates that detention conditions at the Lindela Detention Center do not meet minimum requirements in a number of areas.²¹⁵ As already mentioned, victims of trafficking are being sent back to their countries of origin without any investigation being done into the circumstances victims are likely to face on their return. Child victims may also have been severely abused and neglected prior to being trafficked.²¹⁶ The lack of investigation into the circumstances victims are likely to face when returned to their countries of origin may have serious consequences.

Question

60. What measures should be put in place to ensure the safety of victims of trafficking when repatriated to their countries of origin or returned to the place from where they have been trafficked?

61. What measures should be taken in instances where there is no protective system in place in the victim's country of origin?

TRAINING OF LAW ENFORCEMENT OFFICIALS

²¹⁴ The SABC3 Special Assignment program which was broadcasted on 20 May 2003 exposed a network of syndicates that traffic Thai women into the country for purposes of sexual exploitation. When found by the police, these women were taken to the Lindela Detention Centre from where they were deported.

²¹⁵ **Lindela: At the crossroads for detention and repatriation**, December 2000.

²¹⁶ Save the Children 'From Acknowledgement to Action: A call for worldwide long-term commitments to free children from Sexual Exploitation and Abuse' Position paper for the Second World Congress against Commercial Sexual Exploitation of Children, Yokahama – Japan, 2001 p.6

4.52 In order to ensure the effective implementation of legislation on trafficking in persons, the training of those tasked with the implementation thereof is crucial.²¹⁷ Training could focus on the identification of victims of trafficking, the protection of the rights of victims of trafficking, the prosecution of traffickers, means and methods used by traffickers, including the recruitment and transportation of victims, routes and links between and amongst individuals and groups engaged in trafficking operations, and possible measures for detecting them.²¹⁸ It is worth mentioning that ECPAT International has started a pilot training project for South African law enforcement officials dealing with trafficked children. These include the police, immigration officials, social workers and the judiciary. Similar pilot projects have been conducted in Malawi and Mozambique. The International Organisation for Migration is also in the process of developing a curriculum for the training of border police on the issue of trafficking in persons.

Questions

62. Should provisions on training for law enforcement officials on the issue of trafficking in persons be included in the envisaged legislation on trafficking in persons? If yes, what should be the content of the training programme for the police, immigration officers, social workers and the judiciary respectively?

63. Are there any other categories of persons which in your view should be provided with training on the issue of trafficking in persons? If yes, who, and what should be the content of such training programmes?

EXTRA-TERRITORIAL OPERATION OF ENVISAGED LEGISLATION ON TRAFFICKING IN PERSONS

²¹⁷ Several countries provide special training to law enforcement officials on how to deal with trafficking in persons. For example, in Italy the Ministry of Interior conducts special training programs to sensitise the police to the problem of trafficking and many police officers specialise in handling trafficking cases. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 64. In Switzerland, the government trains its consular officials to educate visa applicants on the risks of falling victim to traffickers and common ploys used by traffickers to lure women into vulnerable situations. See in this regard USA Department of State **Trafficking in Persons Report** 2002, p. 98; US Department of State **Trafficking in Persons Report** 2003, p. 144.

²¹⁸ See also article 10 of the Palermo Protocol.

4.53 Given the global nature of the crime of trafficking in persons, it is important to ensure that it is possible to prosecute South African citizens as well as those with only temporary or permanent residency if they commit the crime of trafficking in persons in another country, especially in a country where trafficking in persons is not a criminal offence. Where foreign nationals commit the crime of trafficking in persons in South Africa, they will be prosecuted in terms of the relevant South African law based on the doctrine of national sovereignty.

Question

64. Should extra-territorial operation be given to the envisaged legislation on trafficking in persons to make it possible to prosecute South African citizens as well as temporary or permanent residents in South Africa for the crime of trafficking in persons committed abroad?

5. CONCLUSION

5.1 This Issue Paper has attempted to draw attention to issues for law reform with regard to matters relating to trafficking in persons. Respondents are once again invited to raise any issues that have not been addressed in this paper.

Annexure 'A'

**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS,
ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS
CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME**

**UNITED NATIONS
2000**

Advance copy of the authentic text. The copy certified
by the Secretary-General will be issued at a later time.

**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS,
ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS
CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME**

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

*Relation with the United Nations Convention
against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purposes of this Protocol are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights;
- and
- (c) To promote cooperation among States Parties in order to meet those objectives.

Article 3
Use of terms

For the purposes of this Protocol:

(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.

Article 4
Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5
Criminalization

1. Each State Party 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.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6
Assistance to and protection of victims of
trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7
Status of victims of trafficking in persons
in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8
Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national

or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9

Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10

Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

- (a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

- (b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14 *Saving clause*

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15 *Settlement of disputes*

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16 *Signature, ratification, acceptance, approval and accession*

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence

with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.
2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.
2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.