

COMBATING TRAFFICKING IN PERSONS

A 2005 Assessment of the Laws and Measures Relevant
to Human Trafficking in selected SADC countries

Malawi, Mozambique, South Africa and Zambia



November 2007

Table of Contents

Acknowledgements	vii
Acronyms	viii
Executive Summary	x
Chapter 1: Introduction	1
The assessment's focus	1
An overview	1
Outline of the assessment	1
Chapter 2: The UN Organized Crime Convention, its protocols & other relevant international instruments	6
The relationship between the Convention and Protocols and the domestic incorporation of their principles	6
The Organized Crime Convention	6
The Protocol on Human Trafficking	10
The Smuggling Protocol	11
UN Convention on the Rights of the Child	14
ILO Conventions Prohibiting Forced Labour and Child Labour	15
Matrix elements for trafficking, organised crime, smuggling and exploitation	16
Chapter 3: Trafficking Issues and Patterns	17
Overview of trafficking in the assessment countries	17
<i>Malawi</i>	17
<i>Mozambique</i>	18
<i>South Africa</i>	19
<i>Zambia</i>	20
Law enforcement cooperation and training	20
Corruption and money laundering	21
Witness/victim security and protection	22
Adoption laws and organisational liability	23

© 2007, The United Nations Office on Drugs and Crime (UNODC)
and the Southern African Development Community (SADC)

Copyright in the assessment as a whole or in part is vested in the SADC and UNODC
and no part may be reproduced without express permission in writing.

Published by

The United Nations Office on Drugs and Crime
Regional Office for Southern Africa
P O Box 12673
Hatfield
0028
Pretoria
South Africa

Tel: (+27-12) 342- 2424

Fax: (+27-12) 342- 2356

www.unodc.org

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

This publication has been made possible thanks to contributions
from the Government of the United States of America.

Design and layout: Marketing Support Services (+27-12) 346-2168

Editing: Tyrus Text (+27-82) 416-2918

Chapter 4: Key Laws and Measures – Malawi	24
Trafficking in persons	24
Protection of basic rights and prevention of the exploitation of labour and children	25
Offences under criminal law	26
<i>Law Commission on criminal justice reform</i>	26
<i>Trafficking in body parts</i>	27
<i>Rape, indecent assault and defilement</i>	28
<i>Prostitution</i>	28
<i>Child pornography and sexual abuse</i>	30
<i>Assault and murder</i>	30
<i>Kidnapping, abduction and slavery</i>	31
Organised crime and related offences	31
<i>Participation in an organised crime group</i>	31
<i>Money laundering</i>	32
<i>Corruption</i>	35
Obstruction of justice	37
Immigration matters	37
<i>Liability of commercial carriers and border checks</i>	37
<i>Prohibited and undesirable immigrants</i>	38
<i>Forging documents, assisting unlawful entry, forfeit and seizure</i>	38
<i>Entry and work permits</i>	39
Victim and witness assistance	40
Chapter 5: Key laws and measures – Mozambique	42
Trafficking in persons	43
Protection of basic rights and prevention of the exploitation of labour and children – <i>Direitos e proteções</i>	44
<i>Offences under criminal law – Infrações do código penal</i>	45
<i>Trafficking in body parts – Tráfico de Órgãos</i>	45
<i>Prostitution, corruption of minors and related offences – Prostituição e medidas de segurança</i>	46
<i>Private imprisonment, abduction and unlawful enticements of children – Cativoiro, subtracção, constrangimento e ocultação de menores</i>	47
<i>Assault and murder – Ofensas corporais e homicídio</i>	47
<i>Indecent assault, defilement and rape – Atentado ao pudor, estupro e violação</i>	48
<i>Kidnapping and corruption of minors – Rapto, lenocínio e corrupção de menores</i>	49
<i>Minimum drinking and night-clubbing law</i>	49
Organised crime and related offences – <i>Associações criminosas</i>	49
<i>Participation in an organised crime group</i>	49
<i>Money laundering – Branqueamento</i>	50

<i>Corruption – Corrupção</i>	51
<i>Obstruction of justice</i>	52
Immigration matters	52
<i>Liability of commercial carriers and border checks</i>	52
<i>Prohibited immigrants: Grounds for exclusion</i>	52
<i>Forging documents and assisting unlawful entry</i>	53
<i>Entry and work permits</i>	53
Victim and witness assistance	54
Chapter 6: Key Laws and Measures – South Africa	55
Trafficking in persons	55
Protection of basic rights and prevention of the exploitation of labour and children	56
Offences under criminal law	56
<i>Trafficking in body parts</i>	57
<i>Murder and assault</i>	57
<i>Intimidation</i>	58
<i>Sexual offences</i>	58
<i>Kidnapping</i>	61
Organised crime and related offences	61
<i>Participation in an organised crime group</i>	61
<i>Money laundering legislation – POCA and FICA</i>	63
<i>Corruption</i>	64
<i>Obstruction of justice</i>	65
Immigration matters	65
<i>Liability of commercial carriers and border checks</i>	66
<i>Prohibited and undesirable immigrants</i>	66
<i>Forging documents and assisting unlawful entry</i>	67
<i>Entry and work permits</i>	68
Victim and witness assistance	69
Chapter 7: Key Laws and Measures – Zambia	72
Trafficking in persons	72
Protection of basic rights and prevention of the exploitation of labour and children	73
Offences under criminal law	74
<i>Trafficking in body parts</i>	74
<i>Prostitution</i>	75
<i>Assault and murder</i>	76
<i>Kidnapping and abduction</i>	76
<i>Rape, indecent assault and defilement</i>	76

Organised crime and related offences	77
<i>Participation in an organised crime group</i>	77
<i>The Money Laundering Act</i>	78
<i>Corruption</i>	80
<i>Obstruction of justice</i>	81
Immigration matters	81
<i>Liability of commercial carriers and border checks</i>	82
<i>Prohibited immigrants</i>	82
<i>Forging documents, assisting unlawful entry, forfeit and seizure</i>	83
<i>Entry and work permits</i>	83
Victim and witnesses assistance	84
Chapter 8: Findings and Recommendations	85
Findings	85
Recommendations	87
Endnotes	95
Appendix: Matrix for Human Trafficking, Organised Crime and Related Offences for Malawi, Mozambique, South Africa and Zambia	103

Acknowledgements

Thanks go to all those who provided help in arranging visits, gathering lengthy and difficult to find documents, and answering a nearly endless list of questions. In Zambia they include the Task Force on Human Trafficking, most particularly Nason Banda of the Drug Enforcement Commission and Monty Mulikita of the Ministry of Home Affairs, as well as Hon. Judge Philip Musonda and the staff of the International Labour Organization's International Programme on the Elimination of Child Labour. In Mozambique they include the United Nations Development Programme staff, most particularly Mirza Antunes and Attorney General Dr. Joaquim Luis Madeira for making so much time available to be interviewed. In Malawi special thanks go to Louis Loti of the Ministry of Home Affairs and Pacharo Kayira of the State Advocate's office. In South Africa they include the staff of the National Prosecuting Authority, particularly George Hardaker and Nolwandle Qaba. Finally, special thanks go to the many people who were interviewed for this assessment; their ideas, expertise and energy give hope for positive change.

This report was compiled by Jeffrey Wheeler on behalf of the United Nations Office on Drugs and Crime, Regional Office for Southern Africa and the Southern African Development Community.

Acronyms

TVPA	Trafficking Victims Protection Act of 2000
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations Refugee Agency
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
US	United States
VSU	Victim Support Unit
YWCA	Young Women's Christian Association

ACCA	Anti-Corruption Commission Act
ACP	Anglican Children's Project
ADDC	Association for Defence of Child Rights
BCEA	Basic Conditions of Employment Act
CP	Penal Code (Mozambique)
CRC	UN Convention on the Rights of the Child
DFID	Department for International Development
DRC	Democratic Republic of the Congo
ESAAMLG	Eastern and Southern African Money Laundering Group
FIC	Financial Intelligence Centre
FICA	Financial Intelligence Centre Act
Frelimo	Mozambique Liberation Front
HTA	Human Tissues Act
IDA	Immigration and Deportation Act
ILO	International Labour Organization
IMF	International Monetary Fund
IOM	International Organization for Migration
IPEC	International Programme on the Elimination of Child Labour
LDC	League for Child Rights
LDH	League of Human Rights
MCPA	Malawi Corrupt Practices Act
MLA	Money Laundering Act
NACF	National Anti-Corruption Forum
NGO	Non-governmental organisation
NPA	National Prosecuting Authority
PC	Penal Code
POCA	Prevention of Organised Crime Act
Renamo	Mozambique National Resistance
SADC	Southern African Development Community
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SARPCCO	Southern African Regional Police Chiefs Cooperation Organisation
TIPS Report	Trafficking in Persons Report

Executive Summary

The assessment analyses laws and measures related to human trafficking as defined and addressed in the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in a sample of Southern African Development Community (SADC) countries, namely Malawi, Mozambique, South Africa and Zambia. It also analyses laws and measures concerning organised crime, money laundering, corruption and related areas, as defined and addressed in the UN Convention against Transnational Organized Crime, due to their integral relationship with human trafficking. The assessment provides information on the ratification and implementation status of the Convention and Protocol in all SADC countries. It further provides some anecdotal information on human trafficking in the assessment countries and gives a brief overview of studies on its extent and nature.

Although the precise extent of human trafficking will continue to be debated, it is clear that a substantial amount of human trafficking is occurring in SADC, that the offences are serious enough to be criminalised, and that the offences are important enough to warrant clear and comprehensive legislation even if there may be some overlap with existing legislation. Details on the findings and recommendations are set forth in Chapter 8 of the assessment.

In sum, the findings are as follows:

- A substantial amount of human trafficking is occurring in the SADC countries under review but the problem has only been partly assessed, understood and evaluated. Data has largely been gathered through the collection of anecdotal cases but not through broad and systematic data collection involving law enforcement.
- In all four countries, a large gap exists between the common complaints of human trafficking in the field and the low conviction rate of traffickers.
- While trafficking in body parts and child abductions are relatively common in the region, the domestic responses are weak and cooperation in cross-border investigations and prosecutions are virtually non-existent.
- None of the assessed countries have comprehensive laws criminalising trafficking, although the issue is partly addressed in Zambia in its constitutional prohibition of trafficking in children and its 2004 Employment of Young Persons and Children's Act Amendment. However, this law's

scope and depth are limited and the Zambian government does not provide sufficient resources and training to enforce it. In South Africa, the law reform process has generated proposals and draft laws to prohibit human trafficking, though the timeframe for passage of most of them is uncertain.

- No laws effectively address trafficking in body parts.
- Other international instruments and their related domestic laws may help in the fight against human trafficking or may provide additional support to new laws and measures to fight trafficking.
- In general, laws exist in the four countries that criminalise or otherwise prohibit offences commonly found in human trafficking such as abduction, defilement, child labour, forced labour and the forging of documents. In general, most prosecutors are conservative in their approaches to law enforcement and do not aggressively seek to punish human trafficking with laws that have not been previously used for that purpose.
- South African laws are more precise yet still quite broad in scope, but have not been commonly used to investigate, apprehend and convict human traffickers.
- South Africa is the only assessment country with a comprehensive law on organised crime.
- Mozambique, South Africa and Zambia have laws criminalising money laundering. Malawi has a bill on money laundering pending.
- Mozambique law enforcement officials and courts still rely on the old Portuguese Penal Code, which in some key ways is out of date or not culturally appropriate or realistic. Difficult issues exist concerning whether a law on human trafficking may or should be adopted prior to broad reform of the Penal Code.
- Gaps in the relevant laws and measures exist, and are addressed in this assessment.
- When traffickers are apprehended, criminal convictions are rare. It is more common that they are simply deported, often without officials coordinating their return with officials in the receiving country.
- As a general matter, enforcement of the relevant laws and measures is hampered by a lack of training, resources and personnel as well as by corruption.
- The coordination of efforts to fight human trafficking, organised crime and money laundering is largely ad hoc, inconsistently done and generally reactive to specific problem cases.
- Aid organisations and a few government offices have been active in the four countries providing assistance to women and children in need, including a limited number of trafficking victims. In practice, however, the assistance provided has been very limited in terms of numbers, extent of assistance and geographical coverage within the countries.
- Regarding witness and victim protection laws and practices, Mozambique has almost nothing in place, Malawi is marginally better, Zambia has limited

systems that have shown some successes, and South Africa has by far the most developed law and procedures, though there have been few trafficking cases to test their use. Also, Mozambique has no effective system to obtain evidence and testimony from child victims that would lead to the conviction of perpetrators.

Regarding recommended actions, it is important to stress that the requirements and recommendations in the Organized Crime Convention and the Human Trafficking Protocol can be implemented through laws, regulations, policies and/or practices. In developing a plan to fully implement them, it is important to take a practical approach. If it appears that the legislative process will be long and delayed, then consideration should be given to making changes through statutory instruments or policies in the meantime. Moreover, law enforcement and the judiciary should apply criminal provisions for trafficking-related crimes (such as kidnapping, slavery, sexual exploitation, etc.) for the investigation and prosecution of trafficking cases, until new specific legislation is adopted.

The following recommendations apply to all the assessment countries, with more detail set forth in Chapter 8:

- Each government should promote cooperation between its ministries and other relevant stakeholders to investigate trafficking cases and apply the existing laws discussed in the assessment to prosecute and convict persons involved in human trafficking. Although the existing laws may not be sufficient to fully address all aspects of related offences with appropriately severe penalties, each of the assessment countries does in fact have laws that can and should be more aggressively applied in trafficking cases.
- Each government should establish a comprehensive plan in law and/or policy that identifies the specific role to be played by each key ministry, agency or department, and should ensure that they receive sufficient resources to fulfil their roles. Pending the government's development of such a plan, each ministry, agency or department should develop their own policies and procedures as soon as possible, in accordance with their mandates.
- Each government should adopt a comprehensive law or laws on human trafficking consistent with the Human Trafficking Protocol and internally consistent with its own existing laws on immigration, crime and victim assistance. Such laws should provide a better focus and mandate for law enforcement officials.
- Law enforcement should engage in broad data collection on human trafficking derived from their criminal investigations.
- Each government should ensure that trafficking in body parts is criminalised, whether as part of comprehensive anti-human trafficking law or separately, and should promote international cooperation to investigate and prosecute such offences.

- Stakeholders, particularly governments, should promote stronger regional coordination and cooperation to fight human trafficking, organised crime and money laundering. They should establish a better network to facilitate a more comprehensive proactive approach in these areas.
- Each government should develop or expand its witness security/protection efforts in a manner that provides a meaningful and sustainable level of security for witnesses without creating unsupportable expectations.
- Each government should expand, improve and formalise its relationships with non-governmental organisations (NGOs) and other aid organisations to ensure that better support is provided to trafficking victims.
- Governments should establish/reinforce immigration rules that expressly prohibit the entry of and provide for the deportation of perpetrators involved in trafficking, organised crime and related offences, including through statutory instruments and policies.
- Similarly they should clarify immigration rules by expressly allowing the granting of temporary or longer-term residency permits to trafficking victims, and where appropriate temporary work permits.

In **Malawi**, the following actions are recommended in addition to those discussed above:

- At best, the government should adopt broad anti-trafficking legislation as defined and addressed in the Human Trafficking Protocol. If this is not reasonably possible to achieve in the near future, then the Law Commission's recommended amendments in the Penal Code criminalising trafficking in children should be substantially expanded, both in its coverage of issues related to children and in its scope of offences to broadly cover trafficking as addressed in the Protocol.
- Amend the law to criminalise trafficking in body parts, preferably along with broad provisions criminalising trafficking, or if necessary as a stopgap measure through a focused amendment in the Penal Code.
- Adopt amendments in the Penal Code, as identified in the assessment.
- Criminalise participation in an 'organised crime group' and implement related key aspects of the Organized Crime Convention.
- Adopt the Money Laundering and Proceeds of Serious Crime Bill and ensure that the appropriate authorities have the capacity to enforce it.
- Implement stronger and more comprehensive methods to prevent corruption in law enforcement and immigration, consistent with the Corrupt Practices Act.
- Develop a formal programme for assisting trafficking victims involving the relevant aid organisations and ministries.
- Amend the Employment Act to expressly prohibit the worst forms of child labour, consistent with International Labour Organization Convention No. 182, thus expanding that law's protection.

In **Mozambique**, the following actions are recommended in addition to those discussed above:

- Draft and adopt separate comprehensive legislation on human trafficking preferably before comprehensive criminal law reform is finalised, which may take a long time.
- Until specific legislation is established, police and prosecutors should aggressively use existing Penal Code provisions to prosecute traffickers.
- Law enforcement and the judiciary should create a legal plan of action. As a start in implementing the plan, they should investigate and prosecute at least one significant human trafficking case for which wide media coverage should be sought. The purpose of the coverage would be to build public confidence in the police, educate the public on human trafficking, provide a warning to persons who may engage in trafficking, and encourage witnesses to provide information to the police. Momentum can be built on one or a few successful high-profile cases. Police enforcement operations would have to continue to improve to meet the public's increased expectations.
- Expand and formalise the relationship between aid organisations and NGOs on the one hand, and the police and the appropriate government ministries on the other to assist trafficking victims and gather evidence to prosecute traffickers.
- Provide the police with more resources and training in general, and specifically on human trafficking and organised crime.
- Consider the creation of a new police enforcement unit with specialised skills, appropriate resources, enforceable high integrity standards and jurisdiction over matters pertaining to the Organized Crime Convention and its Protocols, perhaps similar to the South African Scorpions.
- Prosecutors should apply the law prohibiting the harvesting and use of human tissue and, with police assistance, find a test case.
- Draft and adopt a law that prohibits participation in an organised crime group, consistent with the Organized Crime Convention.
- Create a financial intelligence unit, with the appropriate resources and skilled staff to implement the new Money Laundering Act.
- Aggressively implement the Anti-Corruption Act to prevent and prosecute misconduct by police and immigration officials that facilitates human trafficking and organised crime.
- Prosecutors and police must develop, at the very least, a rudimentary witness protection or security programme supported by a law, regulations and/or a policy that operates effectively.
- The police, prosecutors and NGOs should expand victim protections in part by establishing a regular committee to develop a formal plan to receive, refer, assist, and protect trafficking victims in all parts of the country.

In **South Africa**, the following actions are recommended in addition to those discussed above:

- Law enforcement should increase efforts to use existing laws to fight human trafficking.
- The Law Reform Commission should fast-track the process for discussing, revising, seeking comments on and adopting a comprehensive law on human trafficking. The greatest challenge may be for the Inter-Sectoral Task Team on Human Trafficking to ensure that all of its member organisations stay fully informed on the relevant issues, maintain a high level of support for adopting the law, and define their organisations' roles in the effort to fight trafficking.
- Part of the purpose of change in the law will be to ensure that the law enforcement authorities and key ministries have clearly defined responsibilities for assessing the extent of human trafficking and prosecuting offenders.
- Adopt the Sexual Offences Bill (with any necessary modifications), because it addresses offences related to human trafficking.
- Include a comprehensive prohibition on trafficking in body parts in the draft Human Trafficking Bill and/or in a separate law or amendment, with appropriate means to investigate and prosecute such cases.
- Expand the training of judges, prosecutors, immigration, police, and other law enforcement and judicial officers on human trafficking; this should be done together with greater public education.
- A stronger link between law enforcement and NGOs working with women, children and other potential groups of trafficking victims should improve the providing of useful leads to the police and identifying and assisting trafficking victims.
- Expand communication and cooperation with neighbouring countries to assist them in fighting human trafficking, organised crime and money laundering.
- The South African government should enter into witness protection agreements with other SADC nations, as per the minister's authority under the Witness Protection Act.

In **Zambia**, the following actions are recommended in addition to those discussed above:

- Produce and adopt comprehensive legislation on human trafficking. (Before law reform begins, it would be best first to determine in writing that the cabinet will support law reform without a policy, or if a policy is required what the policy should address.)
- As in Malawi, amend the law to criminalise trafficking in body parts, preferably along with broad provisions criminalising human trafficking.
- Adopt amendments in the Penal Code, as identified in the assessment.

- Consider adopting an amendment to the Employment Act to prohibit forced labour, thereby giving more direct enforcement power to the constitution's prohibition.
- Criminalise participation in an 'organised crime group' and implement related key aspects of the Organized Crime Convention.
- Provide sufficient resources and training to the Ministry of Labour and Social Security to ensure that it enforces the 2004 Employment of Young Persons and Children's Act Amendment.
- Aggressively enforce anti-corruption laws, which in many respects have been unsuccessfully applied.
- Expand training in human trafficking for police and immigration officials.
- Encourage and expand the creative approach taken by law enforcement officials to apprehend and convict traffickers, until sustainable solutions are found.
- Expand and improve the victim and witness support network because it has worked well in limited cases.

CHAPTER 1

Introduction

THE ASSESSMENT'S FOCUS

The United Nations Office on Drugs and Crime (UNODC) sponsored this assessment on laws and other measures related to trafficking in persons in the Southern African Development Community (SADC) region to further implement its Project FS/RAF/04/R49 – 'Assistance in the Formulation and Implementation of the SADC Declaration and Plan of Action against Trafficking in Persons'. The project objectives include providing support to SADC member states in:

- ratifying and implementing the key United Nations (UN) instruments;
- developing specialised anti-trafficking legislation;
- developing and adopting a Declaration and Plan of Action against Trafficking in Persons; and
- strengthening capacity to prevent, suppress and punish trafficking in persons.

The guiding instruments for the project and the assessment include the UN Convention against Transnational Organized Crime (Organized Crime Convention) and, most particularly, its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Human Trafficking Protocol). Where relevant the assessment also refers to the Organized Crime Convention's Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol).¹

The assessment analyses laws and measures related to human trafficking as defined and addressed in the Human Trafficking Protocol in four selected SADC countries, namely Malawi, Mozambique, South Africa and Zambia. It also analyses laws and measures related to organised crime, money laundering, corruption and related areas as defined and addressed in the Organized Crime Convention, due to their integral relationship with human trafficking. The assessment provides information on the ratification and implementation status of the Convention and Protocol in all SADC countries. It further provides some anecdotal information on human trafficking in the four countries under review and provides a brief overview of studies on the extent and nature of human trafficking.

The assessment addresses the following fundamental questions:

- Do the states under review have laws and measures to prohibit trafficking in persons consistent with the Human Trafficking Protocol?
- If not, do they have laws and measures that implement key components identified in the Protocol that have been or could be used to fight human trafficking?
- Do they have laws that criminalise exploitative conduct that commonly serves as a motivation for human trafficking?
- Do the states have laws and measures against organised crime, money laundering, corruption in the public sector, and obstruction of justice that are consistent with the Organized Crime Convention?
- What are the gaps in these laws and measures, and how should they be improved?

The assessment addresses the Human Trafficking Protocol's key components, which are broadly grouped as follows:

- The criminalisation of human trafficking and related conduct.
- The protection of and assistance to victims of human trafficking, and provisions relating to receiving their testimony and evidence to support prosecution of traffickers.
- Efforts to prevent human trafficking and to cooperate in the fight against it within and between states.

Following the structure of the Organized Crime Convention, the assessment addresses these key areas:

- The criminalisation of participation in organised crime groups.
- The criminalisation of the laundering of proceeds acquired through predicate ('serious') offences.
- The criminalisation of money laundering.
- The criminalisation of public corruption.
- The protection of witnesses.
- Assistance to and protection of victims.
- Cooperation within and between states to address these matters.

The assessment focuses on four SADC countries that have different legal systems and cultures. South Africa has the most complex legal system in the region. It is rooted in the Roman-Dutch civil law tradition, with strong British common law influences and with important modifications in the laws and structures made after the first free elections in 1994. Mozambique's legal system, which is rooted in the Portuguese civil law tradition, has experienced extensive disruptions due to war and other causes. The Zambian and Malawi legal systems are similar

in important ways because they are both rooted in British common law and the countries have related cultures and languages. However, each country has applied and changed its laws and legal systems in different ways.

Regarding the assessment's methodology, interviews were conducted in April and May 2005 with representatives from relevant key stakeholders in Malawi, Mozambique, South Africa and Zambia. Relevant laws, statutory instruments, regulations, policies, reports, and other documents were collected from March to June 2005. Owing to the short time period available for the assessment, some relevant information was not obtainable. Also, despite the assessor's best efforts to make the arrangements, officials from some key stakeholders were not available for interviews. Moreover it was not possible to research extensively all relevant case law to determine how and to what extent courts have interpreted and applied all the various laws and regulations discussed herein. Nonetheless, thousands of pages of key laws, regulations, policies, reports and other documents were reviewed and dozens of interviews were conducted. The information gleaned from these documents and interviews serves as the foundation for the assessment's findings and recommendations.

AN OVERVIEW

As discussed in more detail later, the Human Trafficking Protocol defines human trafficking as an *act of* recruitment, transportation, transfer, harbouring or receipt of persons *by means of* threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability, giving or receiving payments or benefits *for the purpose of* exploitation through achieving the consent of a person having control over another person.

The extent of human trafficking in the region and in the world has been and continues to be widely debated. By its nature, human trafficking is difficult to measure because the traffickers' methods and means are complex, covert and frequently changing. In the SADC region, non-governmental organisations (NGOs) for women and children commonly report widespread cases of trafficking, but law enforcement officials often assert that they rarely receive trafficking complaints that support criminal charges under current laws or, at times, even under proposed anti-trafficking laws. It is hoped and expected that future surveys and law enforcement investigations will further clarify the extent of trafficking in Southern Africa.

Nevertheless, there is ample evidence that a substantial amount of human trafficking is occurring and that it takes a terrible toll on lives, economies, cultures and families. According to estimates made in the United States (US) State Department's June 2005 'Trafficking in Persons Report' (TIPS Report), 600,000 to 800,000 people are trafficked across international borders annually, of which 80% are female and 50% children. The State Department does not include cases of trafficking in body parts.

As per the Trafficking Victims Protection Act of 2000 (TVPA), the US State Department uses a tier system for evaluating countries' efforts to fight trafficking:

- Tier 1 includes those countries complying with the TVPA's minimum standards.
- Tier 2 countries include those that do not comply fully but are making significant efforts to reach compliance.
- Tier 2 Watch List countries including Tier 2 countries with increasing trafficking problems or little continued efforts towards compliance.
- Tier 3 countries include those that do not comply and are not making efforts to be in compliance with the TVPA's minimum standards.

Regarding SADC, in 2005 the Tier 2 countries included Angola, the Democratic Republic of the Congo (DRC), Mozambique, Tanzania, Zambia and Malawi, and the Tier 2 Watch List countries included Mauritius, South Africa and Zimbabwe. South Africa's placement worsened from Tier 2 in 2004 to Tier 2 Watch List in 2005. Malawi and Zambia, as well as Tanzania and the DRC, improved from Tier 2 Watch List in 2004 to Tier 2 in 2005. Botswana, Lesotho, Namibia and Swaziland were not evaluated in either year. The TIPS Report notes that there were only 134 prosecutions and 29 convictions in the African countries covered in 2004, although this was an improvement from 50 prosecutions and 10 convictions in 2003.

A number of other studies have been conducted on human trafficking in Southern Africa. The International Organization for Migration (IOM) conducted a research assessment in 2002-2003 on the trafficking of women and children for exploitation in Southern Africa, the results of which it published in *Trafficking in Women and Children for Sexual Exploitation in Southern Africa* (3rd edition, May 2003). It found, among other things, that:

- South Africa is a main destination for trafficked women and children, and male refugees are often recruited to lure in victims from their home countries;
- Mozambican victims include girls and women who are promised jobs as waitresses or sex workers in South Africa and are then sold in Johannesburg to brothels or to individuals as private slaves or to mineworkers as wives;
- Malawi has three different trafficking patterns: first, Malawian businesswomen recruit women for prostitution usually by falsely promising them business or educational opportunities; second, European tourists around Lake Malawi lure children away from their parents on promises of educational opportunities but then traffic them in paedophile rings and use them in pornographic videos; and third, long-distance truck drivers promise jobs, marriage or schooling to women and girls but force them into prostitution in South Africa; and

- Thai, Chinese, Russian and Bulgarian mafia groups traffic women into South Africa who are often forced into bonded servitude for prostitution.

Molo Songololo, a children's rights organisation based in Cape Town, has also produced some useful reports, including 'The Trafficking of Children for Purposes of Sexual Exploitation – South Africa' (2000) and 'The Trafficking of Women into the South African Sex Industry' (2000). A draft rapid assessment on trafficking in Zambia has recently been produced by the Anglican Church Project (ACP), funded by the International Labour Organization's (ILO) International Programme on the Elimination of Child Labour (IPEC).

It should be noted that human trafficking is often linked to other international criminal activities. For example, organised crime groups involved in trafficking are often involved in trading in illegal drugs and arms. A money laundering network used in human trafficking can also be used to fund terrorist activities. As the UN formally recognised in Security Resolution 1373 (2001), there is a

close connection between international terrorism and transnational organized crime, illicit drugs, money laundering, illegal arms trafficking, and illegal movements of nuclear, chemical, biological and other potentially deadly materials.

Thus, legislative drafters have to ensure that the legislation in these areas is consistent, comprehensive and mutually reinforcing.

OUTLINE OF THE ASSESSMENT

Chapter 2 of the assessment discusses the UN Organized Crime Convention and its Protocols as well as other relevant international instruments such as the Convention on the Rights of the Child and the ILO conventions on Forced Labour and the Worst Forms of Child Labour. Chapter 3 provides a brief overview of trafficking issues and patterns in the four countries under review, as well as law enforcement cooperation and training, corruption and money laundering, adoption laws and organisational liability.

Chapters 4 to 7 address key laws and measures in Malawi, Mozambique, South Africa and Zambia, broken down by each country. The chapters cover: trafficking in persons; the protection of basic rights and prevention of the exploitation of labour and children; relevant offences under the criminal laws; and organised crime and related offences such as money laundering, corruption and obstruction of justice. The chapters also analyse immigration matters such as: the liability of commercial carriers and border checks; prohibited and undesirable immigrants; the forging of documents and assisting unlawful entry; entry and work permits; and victim and witness assistance. Where relevant for each country, there are some variations and additions in the sections. Chapter 8 presents findings and recommendations.

CHAPTER 2

The UN Organized Crime Convention, its Protocols & other Relevant International Instruments

THE RELATIONSHIP BETWEEN THE CONVENTION AND PROTOCOLS AND THE DOMESTIC INCORPORATION OF THEIR PRINCIPLES

The Convention and Protocols were drafted as a group, with the Convention containing general provisions against transnational organised crime applicable to all of the Protocols. While the Organized Crime Convention focuses primarily on offences that facilitate the profit-making activities of organised crime groups, the Protocols target particular serious types of organised criminal activity that require specialised provisions. Accordingly, as provided for in Article 37 of the Convention, a state or regional economic integration organisation must be a party to the Convention in order to be a party to any of the Protocols.

As provided for in Article 1 of each of the Protocols, the Protocols must be interpreted together with the Convention. Thus, any offence addressed in the Protocols will automatically be included within the scope of the Convention's basic provisions (Art. 1, para. 3), and the Convention's provisions on mutual legal assistance and extradition apply to the Human Trafficking Protocol's criminalisation of human trafficking. Equally, the Convention's mandatory provisions on general matters such as protection of witnesses and assistance to and protection of victims, are applicable to the offences addressed in the Protocols. The Convention's provisions apply *mutatis mutandis* (with such modifications as circumstances may require) to the Protocols, meaning that in applying the Convention's provisions to the Protocols, minor modifications of interpretation or application may be made to take account of circumstances that arise under the Protocols, but modifications should not be made unless they are necessary (Art. 1, para. 1 of the Protocols).

Also, the Protocols present a minimum standard: domestic measures may be broader in scope or more severe than those required by the Protocols, as long as all of the Protocols' obligations have been fulfilled (Art. 34, para. 3 of the Convention). Similarly the Protocols do not narrow or diminish the rights, obligations or responsibilities set forth in other international instruments; rather, they only add to them. For example, the Human Trafficking Protocol should not be read to narrow the application of a state's ratification of the Convention on the Rights of the Child.

The UNODC's 2004 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (Legislative Guide) provides useful advice for the drafting of domestic legislation. For example, it recommends that drafters check for consistency with other offences, definitions and other legislative uses before relying on the Convention and Protocols' formulations and terminology, which were drafted for general purposes and addressed to governments. It notes that their 'level of abstraction is higher than necessary for domestic legislation' and therefore drafters should ensure that provisions in domestic law reflect the 'spirit and meaning' of the Convention and Protocols rather than copy their provisions verbatim.²

In establishing priorities, drafters should bear in mind that provisions in the Convention and Protocols have different levels of priorities as stated in the texts, namely:

- measures that are mandatory (states are 'required to');
- measures that states must consider applying and/or endeavour to apply (states are 'required to consider'); and
- measures that are optional but may be helpful in application (states 'may wish to consider').

Other useful tools are available for legislative drafters. An official one is the 'Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto'. An informal guide that may prove very useful is the UNODC's 'Anti-Trafficking Assessment Tool'. It also has a helpful checklist.³

In the drafting process, drafters should be aware that prosecutors and law enforcement officials are often less inclined to charge defendants with crimes that contain many elements and prefer to charge defendants with crimes that have fewer elements. For example, in some cases prosecutors may charge defendants with simple fraud rather than money laundering because they may believe it to be easier to prove. Similarly a prosecutor may charge a defendant with a lesser offence (such as solicitation for prostitution) than a greater offence (such as a newly created human trafficking offence) where the trafficking offence is complex and confusing with multiple layers of burdens of proof.

THE ORGANIZED CRIME CONVENTION

The UN General Assembly adopted the UN Convention against Transnational Organized Crime (the Organized Crime Convention), which is commonly referred to as the Palermo Convention (referring to the place of the signing conference) at its Millennium Meeting in November 2000. As stated by Ambassador Luigi Lauriola, chairman of the Ad Hoc Committee on the

Convention, the Convention signifies that the UN member states recognise that organised crime with its related offences ‘is a serious and growing problem that can only be solved through close international cooperation’. Lauriola added that through the Convention,

State Parties will be able to rely on one another in investigating, prosecuting and punishing crimes committed by organized criminal groups [by making] it much more difficult for offenders and organized criminal groups to take advantage of gaps in international laws, jurisdictional problems or a lack of accurate information about the full scope of their activities.

The Convention entered into force on 29 September 2003 after ratification by the 40th state signatory. All of the SADC states have signed it. A state’s signature represents a commitment to ratify or otherwise adopt it; however, Madagascar, the DRC, Tanzania, Mozambique and Zimbabwe have not ratified or adopted the Convention.⁴ With regard to those countries addressed in detail in this assessment: Malawi signed the Convention on 13 December 2000 and ratified it on 17 March 2005; Mozambique signed the Convention on 15 December 2000 but has not yet deposited its signed ratification with the UN; South Africa signed the Convention on 14 December 2000 and ratified it on 20 February 2004; and Zambia’s accession to the Convention was on 24 April 2005.

In sum, the Convention requires states to do the following in these areas:

- *Organised crime*: Criminalise participation in an organised crime group (Art. 5).
- *Money laundering*: Criminalise and institute measures to prevent and prosecute the knowing conversion and transfer of the proceeds of crime to conceal the source (Arts. 6-7).
- *Corruption*: Criminalise and institute measures to prevent and prosecute corruption by public officials and employees (Arts. 8-9).
- *Liability for legal persons*: Adopt measures to ensure that ‘legal persons’ (i.e. legal entities such as companies and charitable organisations) are held legally liable, civilly or criminally, for offences covered by the Convention (Art. 10).
- *Prosecution*: Provide for the prosecution, adjudication and application of sanctions for these offences (Art. 11).
- *Confiscation and seizure*: Adopt measures to allow for identifying, tracing, freezing or confiscating the proceeds derived from offences covered by the Convention and other property and instruments used or to be used to commit them (Arts. 12-14).
- *Obstruction of justice*: Criminalise the obstruction of justice (Art. 23).
- *Protect and assist witnesses and victims*: Take measures to protect witnesses from potential retaliation and intimidation, and provide means for them to

testify in a manner that ensures their safety. Provide victims with access to any appropriate compensation and restitution (Arts. 24-25).

- *Jurisdiction*: Establish jurisdiction over the covered offences (Art. 15).
- *Extradition*: Include the covered offences in extradition agreements (Art. 16) and consider transnational transfer of prisoners (Art. 17).
- *Cooperation*: Promote international cooperation, for example through information sharing, joint investigations, extradition and legal assistance (Arts. 18-22, 26-27).
- *Training and data collection*: Provide training, research and information-sharing measures (Arts. 28-29).
- *Prevention*: Encourage preventive policies and measures (Arts. 30-31).

All of the articles, except Article 17, have mandatory provisions and most include measures that the state parties must consider or are optional.

As stated in the General Assembly’s resolution adopting the Organized Crime Convention, the state parties are ‘determined to deny safe havens to those who engage in transnational organized crime by prosecuting their crimes wherever they occur and by cooperating at the international level’. The Convention applies to offences that are ‘transnational’ in nature and involve an ‘organised criminal group’.

Article 3(2) of the Convention provides that an offence is transnational in nature where it is:

- Committed in more than one State;
- Committed in one State but:
 - a substantial part of its preparation, planning, direction or control takes place in another State;
 - it involves an organized criminal group that engages in criminal activities in more than one State; or
 - it has substantial effects in another State.

For example, a criminal network may recruit child labourers in one country, bribe immigrations officials in a transit country to pass through it unlawfully, and use a commercial enterprise operating in the destination country and a fourth country in order to launder proceeds of the trafficking. Accordingly, as recognised by the Convention, the transnational nature of the offences requires a transnational response. For example, officials from the source country may need assistance from officials in the destination country in order to obtain sufficient evidence to secure a conviction and repatriate the victims; and the destination country should cooperate with the fourth country to ensure that the transfer of funds through seemingly lawful enterprises is traced and seized.

The Convention defines an ‘organised criminal group’ as:

A structured group⁵ of three or more persons, existing for a period of time and acting in concert with the aim of committing one or

more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The term ‘material benefit’ is to be interpreted broadly to include personal ‘benefits’, such as sexual gratification gained through child pornography or forced sex.⁶

THE PROTOCOL ON HUMAN TRAFFICKING

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Human Trafficking Protocol) supplements the Organized Crime Convention. Its preamble declares that:

effective action to prevent and combat trafficking in persons ... 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 ...

It acknowledges that although a variety of international instruments contain rules and measures to combat the exploitation of persons, especially women and children, there has been no universal instrument that addresses all aspects of trafficking in persons. Thus the Protocol promotes a move away from addressing the problems of human trafficking piecemeal to one that comprehensively addresses the full range of its supporting activities and its transnational nature and effects.

All of the SADC states have signed the Protocol, except for Angola and Zimbabwe: Malawi’s accession to the Protocol was on 17 March 2005; Mozambique signed it on 15 December 2000 and ratified it on 20 September 2006; South Africa signed it on 14 December 2000 and ratified it on 20 February 2004; and Zambia’s accession to the Protocol was on 24 April 2005.

Article 2(a) requires that ‘particular attention’ be paid to combating and preventing trafficking in women and children, with the recognition that specific provisions in national legislation may be needed to take into consideration the problems of women and children who are victimised. Although the original mandate from the General Assembly’s resolution referred only to trafficking in women and children, the General Assembly resolved after discussions to expand the Protocol’s scope to ensure that it maintains the basic principle that any human being, regardless of age or gender, could become a victim and that all forms of trafficking should be covered by the Protocol.⁷

The Human Trafficking Protocol has three basic purposes, namely: combating and preventing human trafficking (Part I, Art. 5); protecting and supporting trafficking victims (Part II); and promoting cooperation within and between states parties (Part III). Part I also provides common definitions of key terms.

The Protocol provides a definition of ‘trafficking in persons’ – referred to hereafter as human trafficking – with three components focusing on the acts, the means and the purpose:

- The acts of –
 - recruitment;
 - transportation, transfer, harbouring; or
 - receipt of persons.
- By means of –
 - the threat or use of force or other forms of coercion;
 - abduction;
 - fraud;
 - deception;
 - the abuse of power or of a position of vulnerability;⁸ or
 - giving or receiving payments or benefits.
- For the purpose of exploitation.

A victim’s ‘consent’ is irrelevant where any of these means are used (Art. 3(b)). Moreover, the Protocol provides that the means are irrelevant if the trafficking involves children (Art. 3(c)). States are also obligated to criminalise participation as an accomplice and organising and directing others to commit the offence. Attempts to commit the offence must also be criminalised but only ‘subject to the basic concepts’ of each state’s legal system (Art. 5).

Exploitation includes, but is not limited to, sexual exploitation, forced labour or services, slavery or practices similar to slavery. References to slavery and similar practices may include illegal adoption in some circumstances.⁹

In sum, the Human Trafficking Protocol requires states to do the following in these areas:

- *Criminalise human trafficking* (Art. 5).
- *Provide assistance to and protection for victims of trafficking* (Art. 6). For example, states shall:
 - protect the privacy and identity of the victims, in part by making the legal proceedings confidential;
 - ensure that the victims receive information on the relevant proceedings and assistance to ensure that their views and concerns are considered without prejudicing the defendants’ rights;
 - consider implementing measures to provide for the physical, psychological and social recovery of the victims, including in appropriate cases cooperation with NGOs and organisations in civil society on matters such as housing, counselling, medical assistance and employment;
 - endeavour to provide for the victims’ physical safety; and
 - ensure that legal measures exist allowing victims to recover damages.
- *On the victims’ immigration status* (Art. 7):

- The state in which victims are found (and are not nationals or permanent residents) shall consider adopting measures to permit victims to remain temporarily or permanently in the state.
- On *repatriation* (Art. 8):
 - The victims' home state (where they are nationals or permanent residents) shall facilitate and accept their return without undue delay and with due regard for the victims' safety.
 - The state of destination shall return them with due regard for their safety.
 - On request from the state of destination, the home state shall verify whether a victim is its national or permanent resident and shall agree to issue any travel document necessary for the victim to return.
- On *prevention of trafficking* (Art. 9), the states shall:
 - establish comprehensive policies, programmes and other measures to prevent and combat trafficking and protect victims from revictimisation;
 - endeavour to conduct research and mass media campaigns on trafficking as well as implement social and economic initiatives to prevent and combat trafficking;
 - cooperate with NGOs and civil society to fight trafficking;
 - take measures to alleviate the factors that make persons vulnerable to trafficking, such as poverty; and
 - adopt measures to discourage the demand for persons for exploitation that leads to trafficking.
- On *information exchange and training* (Art. 10):
 - Law enforcement and other authorities within states shall cooperate with one another to determine whether: persons crossing borders are traffickers or trafficking victims; what types of travel documents are used in trafficking cases; and the means and methods used by criminal groups for trafficking, including routes and links, for the purpose of detecting them.
 - The states shall provide training to law enforcement, immigration and other relevant officials in the prevention of trafficking, prosecution of traffickers and the protection of victims.
 - A state receiving information about trafficking cases shall comply with any request by the transmitting state that places restrictions on its use (confidentiality).
- On *border measures* (Art. 11), the states shall:
 - strengthen border controls to prevent and detect trafficking;
 - adopt measures, with sanctions available, to prevent commercial carriers from being used for trafficking and require them to ascertain that their passengers have the necessary documents for entry into a state;
 - take measures to deny entry or revoke visas of persons implicated in the commission of trafficking-related offences; and
 - consider strengthening cooperation among border control agencies by establishing and maintaining direct channels of communication.

- On *security and control of documents* (Art. 12):
 - A state shall take measures to ensure that the travel and identity documents it issues cannot easily be misused, falsified, altered or copied and prevent their unlawful creation, issuance and use.
- On *legitimacy and validity of documents* (Art. 13):
 - On request from another state, a state shall verify the legitimacy and validity of travel or identity documents issued or purported to have been issued and suspected of being used in trafficking.

THE SMUGGLING PROTOCOL

The Protocol against the Smuggling of Migrants by Land, Sea and Air (the Smuggling Protocol) also supplements the Organized Crime Convention. The Smuggling Protocol's purpose is to prevent and combat the smuggling of migrants and protect the rights of smuggled migrants (Art. 2). Similar to the Human Trafficking Protocol, it declares in the preamble that effective action to prevent and combat the smuggling of migrants requires 'a comprehensive international approach', including cooperation, the exchange of information and other appropriate measures at the national, regional and international levels.¹⁰

All of the SADC states have signed the Protocol, except for Angola and Zimbabwe: Malawi's accession to the Protocol was on 17 March 2005; Mozambique signed it on 15 December 2000 but has not yet ratified it; South Africa signed it on 14 December 2000 and ratified it on 20 February 2004; and Zambia's accession to the Protocol was on 24 April 2005.

The Smuggling Protocol in Article 3(a) defines 'smuggling' as the 'procurement in order to obtain, directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or permanent resident'. The core of the Smuggling Protocol is its requirement that state parties adopt legislative and other measures to:

- criminalise the smuggling of migrants when done so intentionally and in order to obtain, directly or indirectly, a financial or other material benefit; and
- criminalise producing a fraudulent travel or identity document and the procuring, providing and possessing of such a document when done for the purpose of enabling the smuggling of migrants.

It contains the same or very similar provisions as the Human Trafficking Protocol on:

- collecting and sharing information to better understand the manner, means and methods of the offences;
- maintaining appropriate border control measures;
- providing for the security and control of travel and identity documents;
- ensuring the legitimacy and validity of those documents;

- providing training and technical assistance to immigration and other relevant officials;
- promoting public awareness of smuggling;
- providing protection and assistance to migrants; and
- providing appropriate measures for the return of migrants.

It is very important to understand the differing definitions for the smuggling of persons and human trafficking. Smuggling necessarily involves the crossing of a national border while trafficking may or may not. Trafficking always involves the purpose of exploiting the persons on arrival while smuggling does not. In practice, this last distinction is often hard for law enforcement officials to make. Where officials have caught the offenders and their victims/clients in transit, it may be difficult for them to determine the purpose of the movement. For example, traffickers may have the intention of forcing women into prostitution but the women may believe they are being smuggled to engage in domestic work. Similarly, children may be told that they will receive scholarships while the traffickers intend to force them into work.

UN CONVENTION ON THE RIGHTS OF THE CHILD

Legislative drafters may find additional support for their efforts in the UN Convention on the Rights of the Child (CRC) and its protocol. The CRC was unanimously adopted by the UN General Assembly in 1989 and entered into force in 1990. The CRC has four basic principles:

- States are obliged to protect children from discrimination and actively protect their rights.
- Every child has the right to life and the state has an obligation to ensure a child's survival and development.
- All actions concerning the child shall take full account of his or her best interests.
- The child has a right to express his or her opinion freely and have it taken into account in any matter or procedure affecting that child.

The CRC defines a child as a person less than 18 years of age. It has some provisions relevant to the exploitation of children for trafficking. For example:

- children have the right to be protected from work that threatens their health, education or development (Art. 32);
- children must be protected from sexual exploitation and abuse (Art. 34); and
- children who are victims of exploitation must receive appropriate treatment for recovery and social reintegration (Art. 37).

All of the SADC countries have ratified the CRC; however, only the following have signed and/or adopted the CRC's Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography: Botswana, accession 2003; the DRC, ratified 2001; Lesotho, ratified 2003; Malawi, signed 2000; Mauritius, signed 2000; Mozambique, 2003; Namibia, ratified 2002; Seychelles, signed 2001; South Africa, accession 2003; and Tanzania, accession 2003.

ILO CONVENTIONS PROHIBITING FORCED LABOUR AND CHILD LABOUR

The ILO estimates that there are at least 12.3 million victims of forced labour worldwide, with 9.8 million of them exploited by private agents and more than 2.4 million in forced labour as a result of human trafficking.¹¹ The ILO's Forced Labour Convention (No. 29, 1930) requires ratifying states to 'suppress the use of forced or compulsory labour in all its forms within the shortest possible period'. This convention defines 'forced or compulsory labour' as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Human trafficking is often conducted for purposes of forced labour. Work lacking voluntary consent includes:

- physical abduction or kidnapping;
- sale of a person into the ownership of another;
- deception or false promises about types and terms of work;
- withholding and non-payment of wages; and
- retention of identity documents or other valuable possessions.

Similarly, the menace of a penalty includes:

- physical violence against the person, a co-worker or family or friends;
- sexual violence;
- threat of supernatural retaliation; and
- imprisonment or confinement.

These offences may be included in labour laws or in criminal codes or both. The broad concept of 'exploitation' addressed in this Convention as well as in the Human Trafficking Protocol 'require States parties, several of which have hitherto adopted anti-trafficking laws which cover only the sexual exploitation of woman and children, to adopt or amend their laws in order to have a broader concept of trafficking and exploitation'.¹²

The Worst Forms of Child Labour Convention (No. 182, 1999) requires ratifying states to 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of

urgency'.¹³ Specifically, it prohibits employing a child (defined as under 18 years old) in the worst forms of labour, which include:

- all forms of slavery and all practices similar to slavery, such as the sale and trafficking of children and young persons, debt bondage, serfdom and forced and compulsory labour;
- the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- the use, procuring or offering of a child for illicit activities (e.g. drug trade); and
- work that by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children or young persons.

All of the SADC countries have ratified ILO Conventions No. 29 and No. 182.

MATRIX ELEMENTS FOR TRAFFICKING, ORGANISED CRIME, SMUGGLING AND EXPLOITATION

The matrix illustrated in the appendix to the assessment reflects which components of laws and measures related to trafficking have been adopted in Malawi, Mozambique, South Africa and Zambia. The matrix includes key elements from the Human Trafficking Protocol and the Organized Crime Convention,¹⁴ as well as the Smuggling Protocol where it overlaps with the Human Trafficking Protocol on certain immigration-related matters (such as penalties for forging passports). It also includes types of exploitation commonly found in trafficking, including forced labour and slavery/servitude, child labour, removal of body parts, sexual exploitation, prostitution, crimes against life (e.g. murder), and kidnapping and abduction. It should be noted that the coverage of penal code provisions in the country-specific sections below largely track the order and grouping of offences that is on average reflected in each country's penal code. The order and groupings may therefore vary from country to country.

The matrix also summarises immigration laws and measures related to the liability of commercial carriers, the authority to exclude and deport traffickers, the authority to permit trafficking victims to stay and work in the country, the penalties for forging identity documents and facilitating unlawful entry, measures for the well-being and recovery of victims, data collection, and communication and coordination between countries. The discussions in the chapters that follow cover a wider range of issues than does the matrix.

CHAPTER 3

Trafficking Issues and Patterns

'Where there is so much smoke, there must be some fire.'

A Mozambican judge on human trafficking

OVERVIEW OF TRAFFICKING IN THE ASSESSMENT COUNTRIES

During the assessment process, interviews were held with dozens of persons from different key organisations to obtain information on trafficking in each of the countries under study. A brief review of the information and views gathered may provide a better focus for efforts in law review and enforcement. They may also better convey the sense of alarm that was expressed by interviewees over the vicious and gruesome trafficking crimes occurring in their countries than would, by itself, a clinical review of the legal provisions. However, it should be noted that the assessment was not conducted for the purposes of collecting and evaluating quantitative information on the numbers and types of trafficking cases.

Malawi

In Malawi, several types of trafficking and potential trafficking cases were raised. A surprisingly large number of body part removal cases were reported during the assessor's short visit in Malawi. Probably all or nearly all of the reported body part removal cases were for the purpose of witchcraft or *muti*.¹⁵ In one example during the past year, the police department's criminal investigation unit reported that a Mozambican man was picked up in Blantyre with a young boy cousin. The man admitted that he came to sell the boy to a South African man who would cut out his heart and other organs.

Many cases have been reported of women who have been murdered and have had their body parts removed, and boys who have been abducted and have had their penises and testicles cut off. For example, in April 2005 *The Nation* newspaper reported that an eight-year-old boy in Lilongwe was 'battling for his life' in an intensive care unit after 'thugs dragged the boy to a nearby bush and cut off his private parts'.¹⁶ The treating doctor reported that it was the fourth such case he had handled in six months.

A number of murder and body part removal cases have been reported in the Chiradzulu area in Southern Malawi, including the infamous *Bokhobokho and*

Jonathan v. The Republic case. During the same week as *The Nation* story, it was also reported that a woman was found dead in her bed in Chiradzulu with her intestines and other organs removed. The news stories noted that many other such cases had been reported in the area over the past year. It is unclear whether the organs were used for witchcraft locally or transported out of the country, or whether these crimes could be considered as organ trafficking. However, given the substantial number of similar cases reported in Mozambique and Zimbabwe – with alleged links to South Africa, other African countries and Europe – there is evidence indicating a regional network of organ trafficking.

The Ministry of Labour reports that a substantial number of children and young persons have been recruited in the south, in Mulanje, for work on tobacco and other plantations in the north in places such as Kazungulu. In some cases employers have been fined under the labour laws. In a number of cases the children's 'employment' has been terminated but they have not been transported back to their homes. It is unclear whether all such cases involve 'trafficking' or whether they are limited to child labour law violations. Other cases involve the transport of children across the border from Mozambique to Malawi.

Cases were also reported of women and girls recruited in Malawi for prostitution in Europe, lured with the promise of scholarships or jobs. Fewer such cases were reported to the assessor than those involving organ trafficking and farm labour; however, it may be that such trafficking victims are more often found in Europe, as reflected in the IOM report.

Other issues raised in Malawi include a long-standing concern that Malawi passports and documents have been too easy to forge and that officials, particularly those in immigration, have been frequently bribed to facilitate illegal border crossings and accept fraudulent documents.

Mozambique

In Mozambique there is a remarkable disconnect between the substantial number of trafficking and child abduction cases reported by NGOs and the media on the one hand, and the near absence of any convictions for trafficking or abductions on the other. Considerable attention has been focused on a large number of child abductions and disappearances in Nampula Province. The League of Human Rights (LDH) reported that 52 children were reported missing from Nampula and that some were killed for organ trafficking, including for witchcraft. The LDH has reported more than 450 such cases across the country. Other estimates have run into the thousands.

There are many complex and troubling allegations related to these and other disappearances, with repeated allegations of involvement by South Africans, other Africans and Europeans. The attorney general oversaw an investigation that led to a report on the disappearances in Nampula, which has not been released to the public. The LDH has asserted that foreign witchdoctors, mainly from West Africa, are running a human organ trafficking network in Nampula. However, the assistant attorney general responded that, with regard to some

of the cases, a preliminary investigation found no evidence that human body parts had been removed and sold, nor did it find an organ trafficking network. The government has requested some support from Portugal. The LDH has questioned the government's capacity to probe 'such a complex issue' without more international assistance.¹⁷

The problem of missing and abducted children became so widely known that these cases were commonly called *adeus mama, adeus papa* (goodbye mother, goodbye father) cases. Some of the cases have been reported on extensively in the media. For example, a boy named Raphael explained on television how he and his little sister had been abducted, how he had run away when the car stopped for him to go to the bathroom and how he had made it to a police station, whereupon the police permitted him to be taken by a woman who forced him to work for her for several years until he could escape. He tearfully explained that he regretted that he could not save his sister.

In an interview for this assessment, a police official reported that the police had been asked to investigate a number of alleged abductions of children but discovered that the leads were false or the police were unable to obtain any useful evidence from any witnesses.

The destructive dynamic in Mozambique appears to be that the police are widely reported to make serious mistakes in police work, as in Raphael's case, which increases the public's mistrust of them. As a result, when the police conduct subsequent investigations members of the public and potential witnesses are less willing to step forward and provide them with information, which makes the police work less effective, and again increases public distrust of the police. The police are also hampered by a lack of resources and sophisticated investigative techniques. For example, the police will simply arrest individual drug couriers because they lack the ability to track the couriers covertly to their suppliers or major distributors and have never been successful in turning such couriers into informants.¹⁸

NGOs and other aid organisations have reported other types of trafficking cases in Mozambique, particularly trafficking in women for prostitution in South Africa and trafficking in children in the region for labour. A Mozambican official complained about the lack of cooperation from South African officials on trafficking cases.¹⁹

South Africa

As in other countries in the region, a host of aid organisations reported a large number of trafficking cases, but law enforcement officials assert that they see very few of them. South Africa has been reported to be a destination country for trafficked women and children. Victims are also recruited or abducted within the country. The issue of trafficking has been widely covered in the media. For example, in May 2005 Radio 702 conducted interviews on trafficking that included some specific cases, including those in which South Africans have sold their own children into prostitution. Also, on 10 June 2005 the *Sandton Chronicle*

reported an interview with a Zimbabwean woman who was abducted near the Beitbridge border and forced into prostitution near Johannesburg.²⁰ A member of the local Community Policing Forum noted that this woman was the fourth such victim who had come to them in a few weeks. In terms of law enforcement it appears that the greatest focus has been on breaking up prostitution rings, many of which involve trafficking by highly organised syndicates.²¹

Zambia

The largest number of documented cases of trafficking was reported in Zambia by the national Task Force on Trafficking and the ACP. Some cases involved smuggling of persons, many involved trafficking, and some involved the abduction of children for unknown reasons. In one recent case a man claiming to be a bishop promised Tanzanian children scholarships in South Africa but was caught in Zambia trying to traffic them to the DRC. Zambian officials arranged the children's return through the Tanzanian High Commission and deported the 'bishop' back to Tanzania. However, they did not coordinate the bishop's return with the Tanzanian authorities who may have been able to charge him with an offence, nor did they charge him with a criminal offence in Zambia.

In another case a man was apprehended near the border when attempting to take Zambian girls into Angola. The eldest of them, in her teens, refused to give the police information on the trafficker, asserting that officers were simply jealous of the man because he had more money than them. The officers spoke to the younger children, who said that the older girl had been spending nights in the same room as the man, and the girl's family pressured her into admitting that she had been sleeping with him. As a result, the police had sufficient evidence to charge the man with defilement.

The Zambian 2004 Amendment to the Children and Young Persons Act is the most direct piece of legislation on human trafficking in the assessment countries. However, in addition to its limitations in scope even for children, the primary ministry responsible for its enforcement – the Ministry of Labour and Social Security – has very limited resources or trained personnel to ensure compliance.

LAW ENFORCEMENT COOPERATION AND TRAINING

Law enforcement officials from the different countries cooperate on an ad hoc basis. At times when it is obvious that a crime involves conduct or a person in or from a neighbouring country, a police or immigration official will directly contact his or her counterpart in that country. At other times an official may make a more formal request for information through Interpol and the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO). The Interpol Subregional Bureau for Southern Africa began its operations in 1997 with the objectives of studying and evaluating crime trends and coordinating

training and acts as the secretariat to SARPCCO, which coordinates the flow of crime-related information between the countries.

The problem appears to be that little work is being done to improve regional systems of information sharing or to develop a coordinated regional plan to proactively fight crime in general or human trafficking specifically. This reactive, ad hoc approach is poorly suited to fighting organised crime, and in many cases it appears that even ad hoc communication or coordination does not take place.

The IOM has recently begun training on human trafficking for immigration and police officers in Zambia and is planning to begin such training in Malawi. No organisation appears to be planning similar training in Mozambique. The South African Police Service (SAPS) is considering new approaches to training officers in that country.

CORRUPTION AND MONEY LAUNDERING

A detailed discussion of corruption is beyond the scope of this assessment;²² however, persons interviewed for the assessment confirmed the common view that corruption is a serious problem in the region, particularly in law enforcement. It is clear that the governments in the four countries under review have sincerely dedicated themselves to the fight against corruption but that they are having great difficulty in substantially reducing corruption. There have been allegations in Zambia and Mozambique that government officials themselves have been actively involved in human trafficking, and examples of corruption throughout the police force are rife in both countries. There have been long-standing concerns in Malawi that immigration and other government officials have been bribed to forge passports and other documents in order to facilitate human trafficking.

Corruption remains a complex and serious problem in South Africa, highlighted by the recent conviction of businessman Schabir Shaik and the related removal of Jacob Zuma from the office of deputy president. In 2003, the South African government and the UNODC published the 'Country Corruption Assessment Report', which provides a detailed qualitative picture concerning corruption. In March 2005 Transparency International issued its 'Country Study Report for South Africa' on corruption. Allegations also have been made in South Africa that immigration officials are frequently bribed to allow immigrants to enter the country unlawfully.

However, at times it is difficult to separate the problems of loose border controls from problems of corruption. For example, traffickers may transport victims directly through the Ressaano Garcia-Komatipoort border posts because immigration officials do not have a rigorous process for ensuring that each traveller's passport is checked upon entry or departure, as exists with airport immigration procedures.

A detailed discussion of money laundering is also beyond the scope of this assessment, although it is a very important issue that is relevant to human

trafficking.²³ A number of organisations have provided regional support in this area, including the Eastern and Southern African Money Laundering Group. As the assessment's interviews made clear, Malawi, Mozambique and Zambia lack the ability to conduct sophisticated financial investigations to trace the sources and movements of money.

A key official in Mozambique commented that they were uncertain of the gaps that exist in the 2002 Money Laundering Act because it has not yet been used in a prosecution and the country lacks the resources necessary for its systematic implementation. As a result, efforts are under way to create a financial intelligence unit to implement the law.

WITNESS/VICTIM SECURITY AND PROTECTION

A fundamental problem that exists throughout the region is that traffickers are not being charged and convicted because unprotected witnesses and victims will not provide evidence against the trafficker. In all of the assessment countries, some assistance is provided to victims of domestic violence; however, this assistance is inadequate where organised criminal groups and traffickers may threaten the victims and witnesses. In some cases government corruption compounds the problem. The reality, therefore, is that passing new laws will be insufficient unless prosecutors can obtain the necessary evidence – and witnesses will cooperate only if they feel secure. Obtaining accurate evidence and protecting the victim is particularly challenging when the victim is a child.

Each government, with input from the social partners, must carefully consider the kind of protection it may reasonably provide to witnesses. Generally the approaches may include protection afforded at pre-trial, trial and post-trial stages. Courthouse protection is usually limited to protection provided just before, during and immediately after the legal proceedings. By contrast, a witness protection programme is generally understood to entail permanently changing the witness's identity and ending all association with his or her previous life.²⁴ This kind of protection requires a sophisticated system and considerable funding that would be very difficult for most countries to set up and sustain.

Yet if a government is unable to operate such a complex system it should determine which witnesses and victims need protection the most, what kinds of protection they need, and what kinds of protection the government has the ability and resources to provide, possibly with the assistance of aid organisations. In communicating with witnesses and victims, government officials must be very careful to not make promises they cannot keep: they should not give witnesses assurances of protection if they are actually unable to provide it. Doing so can lead to the killing of witnesses and the chilling of testimony given by future witnesses. Government officials must therefore develop meaningful and sustainable protection systems without creating false expectations.

ADOPTION LAWS AND ORGANISATIONAL LIABILITY

In all the assessment countries, the laws on adoption require the completion of an extensive process demanding a court order and possibly also interviews by social workers. The Malawi Adoption of Children Act, Cap. 26:01 (1949, amended 1967), for example, establishes such a procedure which a person seeking an adoption has to adhere to and that requires a court order to be finalised. The law prohibits an adoption order to an applicant who is not a resident in Malawi. It also prohibits adoption where the applicant is a male and the child a female unless there are special circumstances warranting it. Similarly, Mozambique's Family Law (*Projecto de Lei da Família, Título V, da Adopção*) and related adoption processes require review by social workers, compliance with certain conditions and a court order; non-residents may adopt in some circumstances.

Most of the adoption laws have explicit limitations on foreign adoptions. For example, the Zambian Adoption Act, Cap. 54 (1956, amended as recently as 1994) provides in a 1994 amendment that it is unlawful for a Zambian resident to allow an infant to be transferred to a non-resident abroad unless the Community Development and Social Services minister has given approval (s. 32). In South Africa, the pending draft Children's Bill has detailed provisions on inter-country and domestic adoption, as well as child abduction and trafficking in children.

However, children aid organisations have expressed concern that the adoption processes in Zambia, Malawi and Mozambique at times have been manipulated, either by fraudulent applications or through the bribery of government officials. In such cases, attention should perhaps be focused on improving the integrity of the systems rather than changing the law.

Regarding the issue of organisational liability, organisations or 'legal persons' in all the assessment countries can generally be held financially accountable under corporate law for offences committed through them. Additional grounds for liability may be found in money laundering or drug trafficking legislation.

CHAPTER 4

Key Laws and Measures – Malawi

Malawi's formal legal system is rooted in its British colonial past. Although Malawi (formerly known as Nyasaland) gained independence in 1964, the Penal Code dates back to 1930, with numerous amendments made during the colonial period. Over the period 1965–1995, the Malawi government also made amendments in the Penal Code; however, the legislation and regulations still reflect the basic logic of British jurisprudence and much of the current Penal Code remains rooted in British law.

The Malawi government appointed a special Law Commission on Criminal Justice Reform in 1998 that, with support from the United Kingdom's Department for International Development (DFID), produced the 'Law Commission Report on the Review of the Penal Code', published in the *Malawi Gazette* in 2000. The Commission Report includes the Penal Code (Amendment) Bill, 2000, which was not adopted but is again under consideration by the National Assembly in 2005. Thus, some important incongruities, inconsistencies and gaps in the Penal Code remain. Where relevant the report's recommendations are discussed in this chapter.

TRAFFICKING IN PERSONS

In Malawi, the Ministry of Gender, Child Welfare and Community Services has taken the lead in developing approaches to human trafficking. In April 2005, with United Nations Children's Fund (UNICEF) assistance, the ministry held a workshop that developed an action plan to help prevent trafficking (primarily of children), protect victims and develop practices to recover, remove and reintegrate victims. A consultant is to be engaged to conduct a survey to better identify the problems and needs. The ministry is training and deploying child protection officers who are to detect all forms of child abuse, including trafficking.

The ministry asserts that many serious impediments exist, including lack of cross-border cooperation to track down traffickers, lack of linkages between key laws and ministries, and insufficient funds and processes to assist victims.

The Malawi Law Commission, which participated in the ministry's workshop, has recently launched its Law Reform Programme on Trafficking in Persons. It has been evaluating laws that may be used to fight trafficking with the aim of developing comprehensive new legislation on human trafficking.²⁵ It has also

focused on the Law Commission Report's (2000) recommended provisions, which were intended as a limited stopgap measure.

The Law Commission Report recommended adding a new section to the Penal Code's prohibition on the management of a brothel (s. 147) to address trafficking in persons for the purpose of prostitution.²⁶ The report notes that the Law Commission 'was made aware of the illicit trafficking of women and girls as well as boys, to destinations abroad for the purposes of commercial sex'. The proposed section 147A provides that any person who:

- (a) Owns, controls, manages, supervises or otherwise keeps, alone or in association with another person, a house or business for prostitution;
 - (b) Procures, encourages, induces, or otherwise purposely causes another person to become or remain a common prostitute;
 - (c) Solicits another person to patronise a prostitute;
 - (d) Transfers or transports any person into or out of or within Malawi with the purpose to engage that other person in prostitution;
 - (e) Rents or permits any place to be regularly used for prostitution or promotion of prostitution; or
 - (f) Fails to disclose or notify the relevant authorities by any available means, of the existence of any house or business for prostitution,
- Shall be guilty of an offence and shall be liable to imprisonment for fourteen years.

This provision overlaps with some current offences like the 'keeping' of a brothel (s. 147) and the procurement of females for prostitution (s. 140) as discussed below, but expands that offence to include implicitly the procurement of males as well as the prohibition on transporting persons for prostitution. However, the proposed amendments miss many key aspects of the Human Trafficking Protocol, including a broader prohibition of human trafficking for other forms of exploitation, e.g. labour, removal of body parts, etc. and provisions on the protection of victims.

PROTECTION OF BASIC RIGHTS AND PREVENTION OF THE EXPLOITATION OF LABOUR AND CHILDREN

The Malawi constitution protects every person's right to personal liberty (s. 18) and provides that 'no person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment' (s. 18(3)). It also protects the rights of children and women, and prohibits slavery, servitude and forced labour.

Section 23 provides that children (defined as under 16 years of age) are entitled to be protected 'from economic exploitation or any treatment, work or punishment that is, or is likely to –

- (a) be hazardous;
- (b) interfere with their education; or

- (c) be harmful to their health or their physical, mental or spiritual or social development.’

Section 24 directs lawmakers to eliminate practices that discriminate against women, particularly sexual abuse, harassment and violence. Section 27 prohibits slavery, servitude and forced labour.

The Employment Act (2000) also prohibits forced labour and provides that any person who ‘exacts or imposes forced labour or causes or permits forced labour shall be guilty of an offence and liable to a fine of K10,000 and to imprisonment for two years’ (s. 4). In Part IV on Employment of Young Persons, the Employment Act prohibits child labour and hazardous work for young persons. Section 21 provides that ‘no person under the age of 14 shall be employed or work in any public or private agricultural, industrial or non-industrial undertaking’, unless the work is done in a vocational school or other approved training institution or programme. Section 22 provides that no person between the age of 14 and 18 shall work or be employed in any activity that is likely to be:

- (a) harmful to the health, safety, education, morals or development of such a person; or
(b) prejudicial to his attendance at school or any other vocational or training programme.

The Employment Act requires all employers to keep a register of any person under the age of 18 working for them (s. 23).

The Penal Code also prohibits unlawfully compelling a person ‘to labour against the will of that person’, punishable as a misdemeanour (s. 269). (See the next section for other offences under the Penal Code.)

OFFENCES UNDER CRIMINAL LAW

Law Commission on criminal justice reform

The foreword of the Law Commission Report notes that some of the current Penal Code provisions ‘are inadequate to cope with developments in the administration of the criminal justice system and to deal effectively with new and diverse forms in which criminal activities are committed’. The report recommends substantive changes and new criminal offences, such as adding a section on trafficking in prostitution (s. 147A), the prohibition of money laundering (s. 331A) and a new Chapter XVA on Offences against Morality Relating to Children (ss. 160A-160G).

The report also recommends expanding judicial discretion by removing mandatory minimum sentences and changing some penalties. For example, it recommends deleting corporal punishment because it is inconsistent with the constitution and increasing the punishment for some offences, such as keeping

a brothel (s. 147). It also uses the term ‘offence’ for all types of offences and removes the terms ‘misdemeanour’ (most notably for offences punished with long prison sentences) and ‘felony’. This approach is consistent with the abolishment of the terms ‘treasons’, ‘felonies’ and ‘misdemeanours’ in English law in 1967.²⁷ However, the terms felony and misdemeanour apparently would remain for Criminal Code provisions not addressed in the report’s draft amendments. The Criminal Code currently provides that where no punishment is specifically provided for any misdemeanour, the punishment is a fine and/or a prison term not exceeding two years (s. 34).

It remains unclear whether, to what extent and when the amendments will be adopted. Some amendments may require substantial changes or deletion. For example, the provisions on trafficking should be expanded, perhaps with some provisions added outside of the Penal Code, and the section on money laundering should be deleted or substantially modified if the draft Money Laundering Act is adopted.

Trafficking in body parts

Malawi has no law that criminalises trafficking in body parts. The closest, yet still distant, provisions appear to be in Chapter XIV of the Penal Code, on Offences Relating to Religion. Section 130 provides that a person who, with the knowledge that any person’s religious feelings are likely to be wounded or that any religion is likely to be insulted, trespasses in any ‘place of sepulture’ or place serving as a ‘depository for the remains of the dead, or offers any indignity to any human corpse’ is guilty of a misdemeanour (emphasis added). Similarly, the Penal Code provides that the hindering of a burial of a dead body or the disinterring, dissecting or ‘harming’ of a dead body without lawful authority constitutes a misdemeanour (s. 131).

The Malawi police report that obtaining a conviction under these provisions is difficult and rare. They report that courts have ruled that the finding of a body part, like a hand or foot, alone is insufficient to support a conviction under section 131. And, indeed, none of these provisions appear to address a situation in which a person is found in possession of human body parts but no facts can be ascertained concerning how the body parts came into his or her possession. In such cases, the facts may not support a murder charge. Showing theft (ss. 270-271, 278) may also be very difficult both conceptually (whether a body part may be stolen)²⁸ and in practice (showing that it was in fact stolen).

A case commonly referred to in Malawi is the Chiradzulu case of *Bokhobokho and Jonathan v. The Republic*, MSCA Criminal Appeal No. 10 of 2000,²⁹ which involved trafficking in body parts. In the case, six women were strangled or stabbed to death and dismembered, with their private parts, breasts and intestines removed and eyes gouged out. However, the case turned on murder charges and the court upheld the conviction of one appellant because he had confessed to murder. The court overturned the murder conviction of the second appellant, who allegedly requested and purchased the organs (and thus also was

allegedly part of the murder) because the only evidence in support of the charges against him were a confession by the first appellant, which was retracted during the trial. Thus the Chiradzulu case does not clarify the law's application to cases involving trafficking in human body parts alone.

Rape, indecent assault and defilement

The Penal Code in Chapter XV on Offences against Morality addresses rape, defilement and related abductions. The code defines rape as when a person has 'unlawful carnal knowledge of a female without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act' (s. 132). Thus in addition to force a wide range of means can be used in rape. Notably, at least in theory, a man or woman can be guilty of rape but this provision only addresses rape of a female. The punishment for rape is death or life imprisonment (s. 133) and for attempted rape, life imprisonment (s. 134).

This chapter also criminalises an 'abduction' in which a person takes away or detains a woman against her will with the intent to marry or 'carnally know' her, or to cause her to be married or carnally known by any person, punishable with seven years' imprisonment (s. 135). A person who abducts an unmarried girl under the age of 16 for such a purpose is guilty of a misdemeanour (s. 136).

Under section 137, a person who unlawfully or indecently assaults any female is guilty of a felony and is liable to 14 years' imprisonment, with the proviso that with regards to a girl under the age of 13 it is no defence that she consented to the act.

The defilement of girls is criminalised in section 138, which provides that any person who unlawfully and carnally knows or attempts to know any girl under the age of 13 is guilty of a felony and liable to 14 years' imprisonment, unless the charged person had reasonable cause to believe and did believe that she was 13 years old or older. The Law Commission Report recommends increasing the age to 16 and narrowing this defence to an accused male under the age of 22 where the female consented and the male had reasonable cause to believe, and did believe, that the girl was at least 16 years old. It notes that judges had similarly narrowed the application of the current proviso.³⁰ The penalty for violating this provision is life imprisonment.

A number of persons interviewed for the assessment complained that Malawian judges often give relatively short sentences for men guilty of defilement. In contrast, Zambian judges often give long sentences for defilement offences, largely because of the danger of spreading HIV/Aids.

The only provision that comes close to criminalising the rape of males is section 155, which provides that any person who 'indecently assaults' a boy under the age of 14 is guilty of a felony and is liable to seven years' imprisonment.

Prostitution

The Penal Code in Chapter XV also criminalises many offences related to prostitution, including procuring prostitutes, running a brothel and living

on the proceeds of prostitution, though it does not directly criminalise prostitution itself. The provisions contain some archaic anomalies. Section 140(a) criminalises procuring and attempting to procure any female under the age of 21 to have carnal knowledge with anyone in Malawi or elsewhere. It also criminalises procuring and attempting to procure any female:

- to become a prostitute anywhere, whether in or out of Malawi (s. 140(b));
- to leave Malawi with the intent for her to become an inmate of or frequent a brothel (s. 140(c)); and
- to leave her abode in Malawi with intent 'that she may, for the purpose of prostitution, become an inmate of or frequent a brothel either in the Republic or elsewhere' (s. 140(d)).

Proof of violation requires more than one witness's testimony and a violation is only a misdemeanour. Similarly a person's use of threats or intimidation or giving drugs to stupefy or overpower a female to procure her or attempt to procure her to have any unlawful carnal knowledge either in Malawi or elsewhere is unlawful (s. 141). Also, it is unlawful to use false pretences or false representations to procure or attempt to procure a woman to have any unlawful carnal connection (s. 141). A violation is only a misdemeanour. The Law Commission Report recommends increasing the punishment for violating sections 140 and 141 to 14 years' imprisonment.³¹

The courts have clarified at least one limitation in section 140's application. In *Republic v. Lourenço*, Crim. Case No. 150 of 1999 (unrep.), the court held that Ms Lourenço, who procured Malawian females for prostitution in Europe, could not be convicted under section 140(d) because the victims had been common prostitutes in Malawi, were not forcibly detained and chose to go to Europe to work as prostitutes, and therefore they could not be 'procured'. It is speculative whether the same offence could have been successfully convicted under section 140(a) or (b). Most likely a conviction would not have followed because the term 'procure' is common to all three subparagraphs.

In contrast, as in Zambia, the Penal Code criminalises a male procuring or even committing 'any act of gross indecency' with another male as a felony liable to five years' imprisonment (s. 156). In short, it appears that consensual sex between men is a felony while threatening, intimidating and drugging a woman into having sex with another person is still only a misdemeanour in Malawi.

The work of pimps and 'queen mothers' is also largely prohibited. A male who knowingly lives on the proceeds of prostitution, including situations in which he aids, abets or compels a female's prostitution is guilty of a misdemeanour (s. 145). Similarly a woman who knowingly lives on the earnings of the prostitution of another for the purpose of gain through aiding, abetting or compelling the prostitution is guilty of a misdemeanour (s. 146). However, it has been reported that charges under these provisions have not been brought against any traffickers.³²

The Penal Code currently provides that ‘keeping’ a brothel is a misdemeanour (s. 147). The Commission Report recommends substantial revisions in this section, recognising the importance of expressing society’s concern regarding the spread of HIV/Aids through prostitution, including a penalty of seven years’ imprisonment.³³ As discussed above in the part on trafficking, the Commission Report also recommends adding a new section 147A to address trafficking in persons for the purpose of prostitution.³⁴

Although keeping a brothel is currently only a misdemeanour, greater penalties are available for related offences. For example, a person owning or occupying a brothel that permits the defilement (‘carnal knowledge’) of girls under the age of 13 is guilty of a felony and is liable to five years’ imprisonment (s. 142). Furthermore, any person who detains any female against her will in any premises operating as a brothel is guilty of a misdemeanour (s. 143). It is ‘constructive detention’, and therefore unlawful, when the person withholds the female’s clothing in such an establishment. However, as may happen in a trafficking case, constructive detention does not include withholding an identity or travel document such as a passport.

Child pornography and sexual abuse

The Malawi Law Commission Report recommends adding in the Penal Code a new Chapter XVA on Offences against Morality Relating to Children. The new provisions would punish:

- sexual activity with a child (under 16), with 14 years’ imprisonment or for 21 years under aggravating circumstances (such as wounding or degrading) (s. 160B);
- committing with a child or procuring a child to commit any act of gross indecency, with 14 years’ imprisonment (s. 160C);
- filming or photographing a child in sexual acts or simulated acts, with 14 years’ imprisonment (s. 160E); and
- causing or procuring a child to take part in any ‘public entertainment’ of ‘an immoral nature’ or that is ‘dangerous to life or prejudicial to the health, physical fitness and kind treatment of the child’, with a K10,000 fine and three years’ imprisonment (s. 160F).

Contrary to the current defilement provisions discussed above, section 160G would provide that the accused may not rely on the defence that he believed that the child was over 15 years old.

Assault and murder

The Penal Code’s Chapter XIX on Murder and Manslaughter punishes murder with a death sentence³⁵ (ss. 209-210) and manslaughter with imprisonment for life (ss. 208-211). Chapter XXI on Offences Connected with Murder and Suicide punishes attempted murder (s. 223), accessory to murder after the fact

(s. 225), and conspiracy to commit murder (s. 227), with life imprisonment. Chapter XXIV criminalises common assault as a misdemeanour liable to a years’ imprisonment (s. 253) and assault with bodily harm as a misdemeanour liable to five years’ imprisonment (s. 254). As with many other offences, the Commission Report recommends deleting the term ‘misdemeanour’ from section 254 due to the length of the prison term.³⁶

In Chapter XXII on Offences Endangering Life or Health, the code also criminalises stupefying with the intent to commit a felony or misdemeanour, punishable as a felony with life imprisonment (s. 224), which could include the drugging of a trafficking victim.

Kidnapping, abduction and slavery

In Chapter XXV on Offences against Liberty, the Penal Code has a range of provisions that criminalise kidnapping, abduction, slavery and related offences. Section 257 defines kidnapping as when a person ‘conveys any person beyond the limits of the Republic without the consent of that person, or of some person legally authorised to consent on behalf of that person’. However, ‘kidnapping’ also includes a situation in which someone takes or entices any ‘minor’ (under age 14 males or under age 16 females) or a person of ‘unsound mind’ from a lawful guardian without the guardian’s permission (s. 258). The Commission Report recommends that the age be 16 for both males and females and that ‘minor’ be changed to ‘child’, in accordance with the constitution.³⁷ The basic penalty for kidnapping is seven years’ imprisonment (s. 260) but increases to 10 years if the purpose was to murder the person (s. 261), seven years if done for the purpose of secret confinement (s. 262), and 10 years if done to subject the person to grievous harm, slavery or ‘unnatural lust’ (s. 263).

As in Zambia the definition of abduction is very broad but, unlike kidnapping, must be linked to a specified purpose to violate the law. The Penal Code defines abduction as when someone ‘by force compels, or by any deceitful means induces, any person to go from any place’ (s. 259). Thus, a national border need not be crossed and the use of deceit is sufficient. As with the offence of kidnapping, the penalty is 10 years for abduction with the purpose of murder (s. 261), seven years if done for the purpose of secret confinement (s. 262) and 10 years for subjecting the person to grievous harm, slavery or ‘unnatural lust’ (s. 263).

Any person who wrongfully conceals or confines another person, knowing that he or she has been kidnapped or abducted, is guilty of a felony and shall receive the same punishment to which the kidnapper or abductor is subject (s. 264).

ORGANISED CRIME AND RELATED OFFENCES

Participation in an organised crime group

Malawi does not have a law criminalising participation in an ‘organised crime group’, as required in the UN Transnational Organized Crime Convention. As a

result there are no specific penalties or sanctions for such conduct. As in Zambian law, the closest ones appear to be the Penal Code's broad provisions criminalising conspiracy to a commit a felony or misdemeanour and accessories after the fact.

Chapter XLIII of the Penal Code addresses conspiracies. Section 404 provides:

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Malawi would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and shall be liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment.

Thus, for example, if a person conspires in South Africa to 'abduct' a child in Zambia for prostitution or 'defilement' in Malawi, that person is guilty of a felony. Similarly, it appears that if a person conspires in Malawi to abduct a child in Zambia for forced labour by another person in Mozambique, he or she is also guilty of violating this provision.

The Penal Code also criminalises conspiracy to commit a misdemeanour 'or to do any act in any part of the world which if done in Malawi would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done', which is also punishable as a misdemeanour (s. 405).

The Penal Code further contains a provision on 'other conspiracies' (s. 406), which includes conspiracy to:

- prevent or defeat the execution or enforcement of any Act;
- cause any injury to a person;
- effect any unlawful purpose; or
- effect any lawful purpose by any unlawful means.

This catchall provision could be useful in trafficking cases. For example, it could be used against a person for conspiring to: use a child in a prohibited worst form of labour; forge a passport used to move a trafficking victim; and move a woman for the purpose of prostitution or 'defilement'.

In Chapter XLIV, on Accessories After the Fact, the Penal Code provides that any person who receives or assists another who is to his or her knowledge guilty of an offence in order to enable that person to escape punishment, is guilty of a felony when covering up a felony and shall be liable for three years' imprisonment if no other punishment is provided (ss. 407, 408) and guilty of a misdemeanour when covering up a misdemeanour (ss. 407, 409).

Money laundering

The Malawi government has several legal and regulatory instruments relevant to money laundering, namely: the Banking Act (1989); the Reserve Bank of Malawi's

Directive on Customer Due Diligence for Banks and Financial Institutions (2005); the Money Laundering and Proceeds of Serious Crime Bill (debate on adoption pending); and the draft national Anti-Money Laundering and Combating the Financing of Terrorism Strategy. It also has a National Task Force on Anti-Money Laundering with members from the Reserve Bank, the ministries of Finance, Justice, Home Affairs and Internal Security, the Anti-Corruption Bureau and the Malawi Police. The Reserve Bank has requested technical assistance from the International Monetary Fund (IMF) to implement the Bill, once passed into law.

The Banking Act broadly provides for the regulation of banks and financial institutions. It requires licensing for any institution to operate as a bank or financial institution in Malawi and provides that no person other than a company may receive such a licence, except with the approval of the minister on the recommendation of the Reserve Bank (ss. 3). The Banking Act requires that certain specified conditions be met for a licence to be authorised (ss. 6-8).

The Banking Act also empowers the Reserve Bank to supervise all banks and financial institutions which are required to report on specified matters related to their solvency, liquidity and profitability (ss. 14-19). The banks and financial institutions are required to file independent audits every year (s. 20). The Banking Act prohibits banking and financial managers from permitting any transaction, including the opening of an account, to occur:

- without taking all reasonable steps to establish the true identity of the person concerned in the transaction;
- when he or she doubts or has reason to doubt the authenticity of documents and the truth of written or oral statements material to the transaction; or
- when he or she knows or has reason to suspect that any of the funds involved in the transaction have been obtained by any party as the direct or indirect result of an activity that is illegal inside or outside Malawi.

The penalty for violating this provision is a fine of K10,000 and imprisonment for two years (s. 49).

The Reserve Bank issued the Directive on Customer Due Diligence for Banks and Financial Institutions (NO.DO1-2005/CDD) partly as a stopgap measure pending adoption of the Money Laundering Bill. The directive's objectives include:

- ensuring that banks and financial institutions maintain practices to determine the true identity of their customers and their source of funds as well as follow the formal 'know your customer' principles;
- protecting them from becoming vehicles for or victims of illegal activities, including money laundering; and
- ensuring that the financial sector complies with the international conventions and initiatives by international bodies in preventing criminal use of the financial system (Part II s. 1).

The directive provides detailed guidance on customer acceptance policies, custom identification monitoring, reporting and record-keeping requirements (Part IV ss. 1-6). For example, it requires banks and financial institutions to report promptly a transaction or attempted transaction to the Reserve Bank when they have reasonable grounds to suspect that the transaction ‘either stems from a criminal activity or is linked or related to, or is to be used to finance terrorism’ (s. 4). It further requires banks and financial institutions to cooperate by exchanging information about customers (Part V s. 1), and authorises the Reserve Bank to conduct inspections to determine compliance (Part VI) and to impose civil monetary penalties and administrative sanctions for non-compliance (Part VII).

The Money Laundering and Proceeds of Serious Crime Bill was published in the *Malawi Gazette* on 10 September 2004. Consideration of the Bill was deferred to the parliamentary session scheduled to begin in May 2005. As the *Gazette* memorandum explains, the Bill seeks to operationalise Malawi’s treaty obligations under the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the SADC Protocol on Combating Illicit Drugs (1996), as well as other international instruments. The memorandum also explains that its provisions incorporate the spirit of the 40 recommendations on money laundering made by the Financial Action Task Force (1990, revised 1996), as approved by the Commonwealth Heads of Government in 1997 and adopted by the Eastern and Southern Africa Anti-Money Laundering Group, of which Malawi is a member.

The Money Laundering Bill provides detailed rules governing the verification of customers’ identities, maintaining customer records and reporting requirements for suspicious transactions (ss. 14-18). It also criminalises money-laundering offences (s. 19) in very similar terms as the *Zambian Money Laundering Act* (discussed below) and related offences (s. 20) (e.g. operating an account under a false name). The Bill also authorises the seizure of imported or exported currency if the amount is more than the prescribed sum and he or she has reasonable grounds to suspect that it is property derived from a serious offence or intended for use in the commission of a serious offence (s. 21).³⁸ It also provides for the seizure of tainted property (ss. 35-42 and 51-57) including realisable property (s. 68), and empowers investigators to obtain relevant information (ss. 73-81).

The IMF produced a preliminary report highlighting potential problems in the Bill; however, the government may proceed to seek its adoption and later make amendments as appropriate rather than subject the Bill to further and potentially longer delays in adoption.

Finally, the draft national Anti-Money Laundering and Combating the Financing of Terrorism Strategy (July 2004) has yet to be reviewed by the relevant stakeholders who are to submit comments on it before it is finalised. The strategy includes a statement of vision and a statement of purposes to guide action, goals and specific strategies. It links goals to specific measurable performance indicators.

Corruption

The Corrupt Practices Act

The Malawi Corrupt Practices Act, Cap. 7:04 (1996, amended in 2004) (MCPA) establishes an Anti-Corruption Bureau and criminalises public and private corruption. The president appoints the commissioner and deputy commissioner subject to the confirmation of the Public Appointments Committee (ss. 5-8) and other officers for whom the committee’s confirmation is not required (s. 9). The Anti-Corruption Bureau’s functions include:

- taking measures to prevent corruption in public and private bodies by:
 - examining them to discover corrupt practices and helping revise work methods and procedures to prevent corruption;
 - advising them on ways and means of fighting corruption; and
 - disseminating information on the evil and dangerous effects of corruption on society and enlisting public support in the fight;
- receiving and investigating complaints of corruption and subject to the directions of the Director of Public Prosecutions, prosecute MCPA offences and other related offences; and
- investigating any public officer suspected of corruption (s. 10).

The Director of Public Prosecutions and the Anti-Corruption Bureau have very broad authority to:

- require any public officer or other person to answer questions about his or her duties and may inspect any relevant standing orders, directives or office instructions (s. 11(1));
- require the person in charge of any government or private body to produce any documents ‘which the Bureau considers necessary’ for investigating any alleged or suspected offences (s. 11(2));
- by warrant, have access to all records relating to the work of any public or private body and access at any time to any public or private premises, including any vessel or vehicle, where the bureau ‘has reason to suspect that any property corruptly acquired has been placed, deposited or concealed therein’ (s. 12);
- require any suspected person to furnish a sworn statement listing all his or her property and explaining how it was obtained, including money or other property sent out of Malawi, provided that the bureau ‘has reasonable grounds to believe that such information can assist in the investigation or proceedings’ (s. 12A); and
- arrest, if authorised by warrant, any person that the bureau ‘reasonably suspects has committed or is about to commit an offence under this Act’ (s. 15).

The Director of Public Prosecutions may, by written notice, require that a person not dispose of any property without the director’s consent where the Anti-

Corruption Bureau has instituted an investigation or a prosecution involving that property (s. 23). The bureau's officers have immunity for work done in good faith in the exercise of official duties (s. 22). The Director of Public Prosecutions must institute or consent to any prosecution under the MCPA (s. 42).

The MCPA criminalises the following conduct:

- A public officer, whether acting alone or with others, corruptly soliciting, accepting or obtaining or agreeing to accept or attempting to receive or obtain, from any person for himself or anyone else any advantage as an inducement or reward for doing or not doing any action with which any public body is or may be concerned (ss. 24-25), including the voting by a public body (s. 28).
- A public officer's corrupt performance of any duty or function (s. 25A(1)).
- A person's act of corruptly influencing or attempting to corrupt a public officer with regard to any relevant matter or transaction within that officer's jurisdiction (s. 25A(2)).
- A public officer's misuse or abuse of public office for person gain (s. 25B).
- A person's act in inducing or persuading a public officer to misuse or abuse his or her office (s. 25B(2)).³⁹
- A person's corrupt actions (whether offering or soliciting/receiving) regarding any matter or transaction, actual or proposed, with which any private body is or may be concerned (s. 26-27).
- A person acting as an agent regarding the commission of a corrupt act (s. 27).
- A person's corrupt actions (whether offering or soliciting/receiving) regarding the promotion, execution or procurement of any contract with a public or private body (ss. 29-31).
- A person who attempts to commit, or who aids, abets, counsels, or conspires to commit, any MCPA offence is guilty of committing that offence (s. 35).

The MCPA provides that a person guilty of violating one of these offences is liable to 12 years' imprisonment (s. 34) and may be required to return and forfeit any money or pecuniary resources, wealth, property, profit, asset, business interest or other advantage or its value where a court ascertains that it has been acquired through or tainted with or otherwise connected with the offence (s. 37).

The Penal Code's provisions on public corruption

A 1995 amendment in Chapter X of the Penal Code revised provisions on Corruption and the Abuse of Office (ss. 90-100), although it is unclear what the relationship of these provisions is to the MCPA. In language very similar to the MCPA, it criminalises official corruption by public officials and by individuals attempting to corrupt them (ss. 90-92). Violators are guilty of a felony and liable to imprisonment for a term not less than five years but not more than

12 years. However, the Commission Report proposes removing all mandatory minimum sentences and leaving the length of terms to judicial discretion.⁴⁰ This approach is taken in the MCPA. The National Assembly is again considering the commission's recommendations. Since the MCPA's provisions are more extensive than those of the Criminal Code, it is unclear what form any amendment in Chapter X would take.

The Criminal Code also addresses public officers receiving property to show favour (s. 92), engaging in a conflict of interest between the officer's public responsibility and private interest in the sale of property (s. 93), false claims by officials (s. 94), and abuse of office (s. 95). It appears, however, that the MCPA is the principle legislation applied in corruption cases.

OBSTRUCTION OF JUSTICE

In Chapter XI on Offences Relating to the Administration of Justice, the Penal Code criminalises perjury (s. 101(1)), suborning perjury (s. 101(2)), deceiving witnesses (s. 107) and destroying evidence (s. 108), among other offences. In section 109 it further criminalises conspiracy to defeat justice and interfere with witnesses, providing that any person who conspires with another to do anything to obstruct, prevent or defeat the course of justice or interferes with the execution of any legal process is guilty of a felony. It further criminalises conduct committed in order to obstruct the due course of justice, or which dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness, or endeavours to do so, from so appearing and giving evidence.

These provisions originated in the British colonial period and therefore are largely identical to those in the Zambian Penal Code.

IMMIGRATION MATTERS

Liability of commercial carriers and border checks

The Malawi Immigration Act, Cap. 15:03 (1991) regulates the entry of persons into Malawi, prohibits the entry of undesirable persons and makes provisions for their deportation. The Act defines the roles and authority of the chief immigration officer and other immigration officers. It also empowers the minister to make regulations regarding, among other things, steps to be taken to prevent the entry of prohibited immigrants and applicable conditions and fees for permits (s. 40).

The Malawi Immigration Act provides that where a prohibited immigrant has been ordered to leave Malawi he or she is required to pay the costs of removal. If a person is refused entry on arrival, then the carrier that transported him or her into the country shall, on the direction of an immigration officer (using Form No. 9), convey that person out of the country at the carrier's expense (s. 10(2)). The carrier may be required to ensure that the person does not disembark from the vehicle prior to leaving the country (Regs s. 33(2)).

Prohibited and undesirable immigrants

The Immigration Act's Part I addresses 'Immigration Generally'. This part prohibits the entry of a 'prohibited immigrant', defined as any person who:

- the minister deems to be an undesirable inhabitant on economic grounds or on account of 'standard or habits of life';
- the minister deems to be an 'undesirable', based on information received through any official or diplomatic channels;
- any person who is unable to read and write in a prescribed language (in the uncommon case where an immigration official requests proof);
- who is likely to become a public charge;
- is an 'idiot', epileptic or physically afflicted;
- is infected, afflicted with or suffering from a prescribed disease, unless he or she has a permit authorised by the minister;
- has been convicted of a proscribed offence;
- is a prostitute, homosexual, lives or has lived on the earnings of prostitution or homosexuality, or has procured others for 'immoral purposes'; or
- has been deported from or ordered to leave Malawi.

Thus, particularly under the first two grounds listed above, the minister has a high degree of discretion in classifying persons as 'prohibited immigrants'. As set forth in the Third Schedule of the Immigration Regulations (attached to the Act as subsidiary legislation), the proscribed offences include 'procuring, or trafficking in, women or young persons for immoral purposes', as well as murder, manslaughter, a breach of company law, conspiracy to defeat justice, bribery, indecent assault and rape, among other things. An immigration officer may issue a temporary permit to any prohibited immigrant, except those declared by the minister to be undesirable, where so directed by the minister to do so (s. 17).

Forging documents, assisting unlawful entry, and forfeit and seizure

Part III of the Immigration Act defines offences. For example, it is an offence for:

- a prohibited immigrant to re-enter the country, punishable with arrest and imprisonment with hard labour for three months and removal from Malawi (s. 33);
- a person to misuse a permit or identity document or allow another person to use it, punishable with a fine of K500 or 12 months' imprisonment (s. 34);
- a person to forge a permit or identity document, punishable with five years' imprisonment (s. 35);
- a person to aid or abet any person to enter or remain in the country or evade an order to leave, punishable with a fine of K500 or 12 months' imprisonment (s. 36(1));

- a person to make any false representations or commit any fraud to help oneself or another to unlawfully enter the country, punishable with a fine of K500 or 12 months' imprisonment (s. 36(2)); or
- a person to forge a permit, identity document or other key document, or knowingly use a forged permit or document, or fail to comply with permit conditions, punishable with a fine of K500 or 12 months' imprisonment (s. 37).

Entry and work permits

Part II addresses restrictions on immigration, permanent residence permits, temporary residence and employment permits, visitors' permits and other related matters. Section 21 provides that a foreigner must possess an appropriate permit, and if he or she lacks one may be considered a 'prohibited immigrant' and therefore must leave the country within 14 days of conviction for contravening the Immigration Act. Many of the permit conditions are detailed on the required forms rather than in the Act.

The minister may, in his discretion, issue a permanent residence permit to any person who 'is in the opinion of the Minister a desirable immigrant' (s. 22). The Immigration Regulations require an applicant for permanent residency to file Form No. 14, which requires him or her to submit a birth certificate, medical certificate, a police or character certificate, 'proof of financial circumstances', and information related to qualifications and proposed employment (to last at least six months) (Reg. s. 23).

An immigration officer may issue a visitor's permit for a period not exceeding three months to a person who wishes to enter Malawi as a 'bona fide tourist or visitor' (s. 26). An immigration officer may issue a person who has properly completed Form No. 11 a temporary residency permit subject to any conditions set by the minister and valid for not longer than six months, and may be required to post a monetary bond (s. 24). Form No. 11 provides that the holder 'shall not engage in any work, occupation or activity which is not necessary for or incidental to the purpose for which he was permitted to enter Malawi unless he has first obtained the permission of the Chief Immigration Officer'.

Where so authorised generally or specifically by the minister, the chief immigration officer may issue a temporary work permit to a person to reside in a particular area and work for a period not less than six months or more than two years (s. 25 and Form No. 20). The statutory requirements for such applicants are very limited and Immigrations appears to have discretion to grant such a work permit to a trafficking victim provided, apparently, that he or she has been offered a job.

The Fourth Schedule of the Immigration Regulations sets forth relatively low fees for some of the permits: permanent residency, K75; temporary employment, K250; and temporary residency, K25. There is no fee for a visitor's permit, but visitors travelling through an airport are required to pay an exit fee.

VICTIM AND WITNESS ASSISTANCE

The Malawi government does not have a formal system for the protection of trafficking victims or safe houses for them, though it does have a support network for refugees as well as for abused and exploited women and children. The Refugees Act, Cap 15:04 (1989, amended 1992) provides protection to persons who qualify as refugees. The Department of Disaster and Poverty Management in the Office of the President of the Cabinet oversees the Refugee Technical Committee, which reviews asylum applications and makes recommendations to the Refugee Committee. The Refugee Committee, which comprises representatives from key ministries, then makes a final determination on whether to grant refugee status. Refugees and applicants for refugee status receive assistance in refugee camps near some of the borders. Organisations such as the Red Cross, the World Food Programme and the UN Refugee Agency (UNHCR) provide assistance at these locations. The question as to whether these camps could also assist trafficking victims apparently has not been addressed. On at least one occasion an aid organisation repatriated children to the DRC, although apparently a determination was not made about whether they were being trafficked.

Regarding the Refugee Act, however, a person must request refugee asylum in to order to receive assistance under that Act pending a final determination on refugee status. Many foreign victims of trafficking are, however, unlikely to qualify as 'refugees' who have a well-founded fear of persecution for reasons of race, religion, nationality or political affiliation or have been displaced due to disruptions of public order, such as war in the home country. Perhaps at best a trafficking victim could request asylum and remain in the country for a number of weeks before the Refugee Committee makes a final decision on the application. Such an approach, of course, would be inadequate and would not comply with the requirements of the Human Trafficking Protocol.

The Ministry of Gender, Child Welfare and Community Services provides assistance to women and children who are abused, and this may include some who are victims of trafficking or labour exploitation. In February 2003 the Ministry of Gender, Child Welfare and Community Services issued its 'National Policy on Orphans and Other Vulnerable Children' which was announced by the president in June 2005, and recently it conducted a rapid assessment on orphans. With the assistance of UNICEF, the ministry has been training child protection volunteers and has established 37 victim support units throughout the country to assist exploited children, including trafficking victims. However, the ministry reports that it does not have the resources to repatriate trafficking victims, as has been necessary for child labourers from Mozambique or those who have been moved within the country to work on farms.

Malawi has no witness protection law or programme. The Corrupt Practices Act appears to be the only law that provides protection for witnesses who are whistle-blowers. With regard to the giving of testimony, under the Criminal and Evidence Procedure Code a child victim or witness generally gives evidence

in court in the same manner as adults. It has been reported that girls who are victims of defilement have been asked to testify in open court. However, under a common law practice a court may conduct *in camera* proceedings to hear a child's testimony where circumstances warrant it. Such proceedings appear to be more commonly conducted where a child is charged with an offence.⁴¹ A Child Right's Bill is currently being drafted that should address protection for child victims and witnesses; however, it is not currently law and in any event would cover only one group of trafficking victims. It must be emphasised that organised criminal groups can pose a serious threat to any witness, whether man, woman or child.

CHAPTER 5

Key Laws and Measures – Mozambique

It is necessary to have a basic knowledge of Mozambique's history in order to understand how its legal system operates. By the end of the 17th century the Portuguese had established control over many parts of what is now Mozambique. During the colonial period, including the 20th century, the 'formal justice system had been limited to urban areas, serving mainly colonial settlers and a tiny minority of black Africans – *assimilados*'.⁴² Most Mozambicans lived in rural areas which were governed by African customary law, enforced by Portuguese officials to whom traditional leaders often turned.

Resistance to colonial administration began with the formation of the Mozambique Liberation Front (Frelimo) in 1962 and which gained strength in the 1960s.⁴³ Frelimo suffered some military set backs in the early 1970s, but when the Portuguese leadership was overthrown in Lisbon the Portuguese grip on Mozambique quickly weakened. The Frelimo party adopted the first national constitution on 20 June 1975 and Mozambique gained its independence a few days later on 25 June 1975. The Portuguese pulled out immediately and left the country in serious disorder.

Through the new constitution the new Mozambique government adopted Portuguese law, except for legislation 'contrary to the constitution' which was automatically repealed. In effect, however, most of the Portuguese penal law as set forth in the *Código Penal Português* became Mozambican law. Frelimo established the People's Supreme Court, which was unable to operate for some time due to a lack of resources. The new government substantially reduced the power of traditional leaders and introduced a popular justice system, with 'people's courts' operating in rural communities.

The justice system suffered new disruptions in 1976 when the Mozambique National Resistance (Renamo), established by Rhodesia and later supported by South Africa, began a new war that spread destruction throughout Mozambique, particularly in the north and rural areas. Thus in many parts of the country the old Portuguese system of enforcing African customary law had disappeared, the role of traditional leaders in resolving disputes had largely been broken, and the new people's courts were not able to operate effectively or at all. Meanwhile, Frelimo's attempts at promoting economic growth were unsuccessful and its newly created Revolutionary Military Court abrogated some basic rights and judicial principles until it was abolished in 1989.

By the early 1990s Frelimo disavowed its Marxist ideology, switched to a market economy and signed a ceasefire with Renamo. In 1990 the government adopted a new constitution, which detailed a reformed democratic system and included an extensive bill of human rights. Multiparty elections were held in 1994, with Frelimo winning a substantial majority of seats and the presidency, and Renamo winning a minority. The 2004 elections saw Frelimo retain a majority of seats and the presidency. The most recent constitution was adopted in 2004.

Quite remarkably the Portuguese Penal Code which dates back to the 1880s, with amendments as recent as 1972, has not simply served as a model for the Mozambican law; rather, it *is* officially the Mozambique penal code. Notably, the Portuguese Penal Code in Portugal was amended after 1975, but those changes are not in effect in Mozambique, though many aspects of the Penal Code are out of date or inappropriate for Mozambique too. Perhaps more importantly many Mozambicans do not perceive their country's legal legacy to be fully legitimate. As Mozambican Judge Mondlane asserts:

Portuguese law was imposed on the peoples and cultures of Mozambique. This alien legal system was sustained by domination and the force of arms. For the majority of the population, this was, and still is, viewed as an imposition. The perception has always been that it falls short of the requirements that will grant it cultural legitimacy.⁴⁴

At the same time, as interviews for this assessment made apparent, many Mozambicans are quite unfamiliar with the Penal Code's provisions. Indeed, some interviewees incorrectly asserted that the law does not prohibit some important offences that are in fact included in the code. Regardless of the dislike of the imposition of the Portuguese law, and due to the common ignorance of its provisions, many of the provisions can and should be applied in trafficking cases. Although the penal law in some respects is archaic, it retains a functional logic and defines many key offences. In short, the Penal Code may be a useful if imperfect tool until comprehensive reform can be implemented.

The original Portuguese terminology is used in some cases below for the ease of Portuguese-speaking readers and because some terms, especially the oldest of them, have particular technical meanings that may not directly translate into English. Proper application would require judges to follow the spirit of the provisions where the terms are ambiguous or refer to matters of specific relevance to Portugal.

TRAFFICKING IN PERSONS

In the past few years, high-profile campaigns against human trafficking, in particular trafficking in children, have been held in Mozambique. President

Chissano, Archbishop Desmond Tutu and UNICEF goodwill ambassador Graça Machel have publicly promoted the campaigns. The Association for Defence of Child Rights (ADDC) was formed as the umbrella organisation for the National Campaign against Sexual Abuse and Child Trafficking, which includes a substantial number of NGOs. The Anti-Child Trafficking Forum was formed as part of this effort. Organisations addressing trafficking in children have included *Terre des Hommes* (a German NGO that has funded many of the activities), the League for Child Rights (LDC), Save the Children Norway, DFID, UNICEF, Save the Children Alliance, the Children's Network (*Rede de Criança*), the Council of Christian Churches, the Women's Forum (*Fórum Mulher*) and many others.

Despite these efforts, and the media's reporting of numerous trafficking and child abduction cases, Mozambique does not have a law prohibiting human trafficking.

The national campaign has, through the University in Maputo, engaged the Centre for Legal and Judicial Training (*Centro de Formação Jurídica e Judiciária*) to conduct an assessment of the laws of Mozambique to determine which ones could best be used to fight trafficking in persons. This effort was borne out of frustration at the lack of public prosecution of trafficking offenders.⁴⁵

Mozambican officials and legislators have been discussing how to develop and adopt an entirely new penal code. A very important question is whether matters related to the Organized Crime Convention and Human Trafficking Protocol can be incorporated into a separate piece of legislation that may be adopted soon, or whether they must wait for a comprehensive rewrite of the criminal code which may take a considerable amount of time and effort to conclude.

PROTECTION OF BASIC RIGHTS AND PREVENTION OF THE EXPLOITATION OF LABOUR AND CHILDREN – DIREITOS E PROTEÇÕES

The current constitution protects enumerated human rights and prohibits certain types of exploitation. Article 40 on the Right to Life provides that every citizen has the right to life and physical and moral integrity and to not be subject to torture or cruel and inhuman treatment. Article 47 on the Rights of Children provides that children have the right to be protected and receive the care that is necessary for their welfare. Article 84 prohibits compulsory and forced labour.

The Labour Act (Lei. No. 8/1998, July 20) regulates employment matters and provides certain protections to workers. It provides that the minimum age for work is 15 years old (except in limited circumstances) (Art. 79) and that minors aged 15 to 18 may not engage in unhealthy or dangerous work (Art. 80). The Labour Act also expressly protects the dignity of women at work (Art. 76).

OFFENCES UNDER CRIMINAL LAW – INFRACÇÕES DO CÓDIGO PENAL

Trafficking in body parts – Tráfico de Órgãos

Although Mozambique does not have a law that fully criminalises trafficking in human body parts, it appears that a Portuguese law regulating the use of human tissue has been incorporated into Mozambique law through the Penal Code (CP). The law (Lei No. 1/1970, February 12, CP p. 562) provides that it is unlawful to harvest or use biological human products in a manner that is immoral or contrary to good practices (Art. 3):

É proibida a colheita e utilização de productos biológicos human quando forem contrários à moral ou ofensivas dos bons costumes.

The supply and distribution of human biological products in a prohibited manner may be punished with a fine and up to two years' imprisonment (Art. 8(3)). The Ministry of Health is responsible for regulating the lawful use of human tissue (Art. 2-7). It appears that a proper death certificate is required before human tissue may be removed, the lack of which may be an additional offence.⁴⁶

The law against castration may be applicable in trafficking cases where an attacker cuts off a boy's penis and testicles, as has been reported in Mozambique (as well as in Malawi and Zimbabwe). Article 366 (*Castração*) provides that anyone who commits the crime of castration by amputating an 'organ necessary for procreation' is to be punished with two to eight years' imprisonment. If the victim subsequently dies then the punishment is 16 to 20 years' imprisonment. A note to this article explains that the victim could be male or female (n. 3).

Another provision that may be relevant is in Chapter VII, s. 1, on the violation of inhumation laws and graves (*Da violação das leis sobre inumações e violação dos túmulos*). Article 246 on violating tombs and disrespecting the dead (*Violação de túmulos e quebra do respeito devido aos mortos*) provides in ambiguous terms that it is unlawful, before or after burial, to show disrespect for the memory of the dead, which is punishable with a fine and up to one year's imprisonment:

Aquele que cometer violação de túmulos ou sepulturas, praticando antes ou depois da inumação quaisquer factos tendentes directamente a quebrantar o respeito devido à memória dos mortos, sera condenado à pena de prisão até um ano e multa correspondente.

It may be argued that mutilating a corpse and removing body parts would be an offence. However, this provision appears to be aimed more at the violation of the tomb rather than the removal of body parts. It may be that Article 389's

offence for failing to disclose information about or hiding a corpse (*Sonegação ou ocultação de cadáveres*) could be used. Yet prosecutors appear more likely to continue charging organ traffickers with assault, attempted murder and murder, which are discussed below.

Prostitution, corruption of minors and related offences – *Prostituição e medidas de segurança*

The offences related to prostitution are addressed in Title II, ambiguously titled as ‘The Sentences and Their Effects and Safety Measures’ (*Das penas e seus efeitos e das medidas de segurança*), which appears to treat most of the covered offences as relatively minor, recognising ‘delinquents’ for these offences as being more amenable to reform than other types of offenders.⁴⁷ Article 71 (*Subjeição a medidas de segurança*) addresses some disparate offences together, including beggary, living off the proceeds of prostitution (pimping), the practice of ‘unnatural vices’, prostitution in some cases, keeping brothels, corrupting minors, fencing stolen objects and even organised criminal activities.

This article provides that it is an offence for ‘ruffians’⁴⁸ to live off the proceeds of prostitution (para. 3). In an implicit acknowledgement that prostitution is not always a prohibited offence, it further provides that prostitutes who ‘cause a public scandal or continually disobey police orders’ are guilty of an offence (para. 5). It also provides that a person who maintains or directs a house of prostitution and repeatedly disobeys regulatory or police orders is guilty of an offence (para. 6). However, a note to the article explains that the law was revised in 1962 to provide a general prohibition on prostitution and to punish those who facilitate or exercise prostitution with up to a year in prison with a corresponding fine (CP p. 234 n. 3). Article 71 also provides that it is unlawful for a person to corrupt minors or entice them into prostitution (para. 7).

Notably, Art. 71 (para. 9) also applies to persons committing offences with groups, gangs or bands of criminals:

São aplicáveis medidas de segurança ... A todos os que tiverem sido condenados por crimes de associação de maleitores ou por crime cometido por associação de malfeitores, quadrilha ou bando organizado.

It is also unlawful for a person to fence (serve as an intermediary for) stolen goods (para. 8).

Except where changed by the 1962 amendment, the penalties are relatively minor, ranging from posting a bond to ensure good conduct (*a caução de boa conduta*) or serving a type of parole (*liberdade vigiada*) for the first offence, to parole with a double bond (*liberdade vigiada com caução elevada ao dobro*) or detention (*internamento*) for a second offence.⁴⁹ Foreigners who engage in these activities may be deported.

Private imprisonment, abduction and unlawful enticements of children – *Cativeiro, subtração, constrangimento e ocultação de menores*

The Penal Code’s Title IV on the Crimes against Persons details offences related to denying persons their liberty of movement. For example, in terms from another era, Art. 328 (*Cativeiro*) prohibits holding a free man captive, punishable with two to eight years in prison and a fine. Article 330 (*Carcere privado*) prohibits the private detainment or imprisonment of a person, with punishment ranging from three months to two years in prison for holding a person more than 24 hours; and two to eight years and a fine for holding a person more than 20 days. Detention for less than 24 hours constitutes a corporal offence, which is addressed under another provision. As a note to the article explains, private detainment also differs from a corporal offence because it involves holding a person on a privately controlled property or moving the person to a different place (n. 1(a)). The crime is an ‘aggravated’ one, punishable with a two- to eight-year prison sentence when the offender uses death threats or torture (Art. 331).

Article 342 (*subtração violenta ou fraudulenta de menor de sete anos*) criminalises the violent or fraudulent removal of children less than seven years old without the approval of a parent or guardian, which is punishable with two to eight years’ imprisonment.⁵⁰ Article 343 (*Constrangimento de menor a abandonar a casa dos pais ou tutores*) criminalises forcing by violence or inducing by fraud a minor (under 21 years old) to leave home or a place where he or she is supposed to be, without approval of a parent or guardian, punishable with a prison term. The article’s note states this offence is separate from that of *estupro* (deflowering a female) (discussed below). Article 344 (*Ocultação, troca e descaminho de menores*) criminalises the hiding, exchanging or waylaying of children under the age of seven, punishable with two to eight years’ imprisonment.

Assault and murder – *Ofensas corporais e homicídio*

Chapter III addresses crimes against personal safety (*Dos crimes contra a segurança das pessoas*). Article 349 criminalises simple homicide (*homicídio voluntário simples*) with imprisonment for 16 to 20 years. Article 350 criminalises attempted murder (*Tentativa de homicídio e homicídio frustrado*) and Article 351 punishes ‘qualified’ or aggravated homicide, which includes premeditated murder and the use of torture or other acts of cruelty to increase the victim’s suffering (*homicídio qualificado*) with 20 to 25 years’ imprisonment.

Section IV addresses corporal offences (*ofensas corporais*), which generally means assault. Article 359 criminalises simple assault, punishable with prison up to three months. Subsequent articles provide for more severe punishment under certain circumstances. For example, Art. 360 provides for substantially longer prison sentences and fines for assaults that prevent the victim from working, with increasing penalties for increasing periods. Assault that leads to permanent

physical or mental disability or to death (where not intentional) is punishable with two to eight years' imprisonment (Art. 361). Threatening with a firearm is punishable with three to six months' imprisonment (Art. 363). Manslaughter (*homicídio involuntário*) is punishable with one month to two years' imprisonment and an appropriate fine (Art. 368). A verbal or written threat to commit an act that constitutes a crime is an offence, punishable with up to three months' imprisonment and a fine (Art. 379).

Indecent assault, defilement and rape – *Atentado ao pudor, estupro e violação*

The Penal Code contains several offences for sex-related crimes, often in indirect and outdated terminology. In some cases, the elements of the offences are not entirely clear nor are the distinctions between the offences.

Article 391 criminalises 'attempts on modesty' (*Atentado ao pudor*), which means that anyone who makes a 'violent' attempt on the honour of a person of the opposite sex to satisfy his or her 'lascivious passions' is guilty of an offence, punishable with imprisonment. 'Violence', which appears to mean that the aggressor lacks permission, is presumed when the victim is less than 16 years old. A note explains that copulation with a minor under 16, whether consensual or not, violates this provision where the act does not constitute an *estupro* crime. The 'attempt' usually contemplates some physical action, though the notes explain that courts in Spain, Italy, France and Portugal have expressed different views on this issue. One court found that showing pornographic photos to an eight-year-old girl and telling her how nice they are, violates this provision. Another court found that the use of offensive words alone violate this provision while another found that 'kisses and hugs done to satisfy the sexual appetite' are sufficient (n. 2(b)).

Article 392 criminalises *estupro*, which perhaps is best translated as the deflowering of a young lady.⁵¹ This article criminalises the seduction and deflowering of (intercourse with) a female virgin between 12 and 18 years old, punishable with two to eight years in prison:

Aquele que, por meio de sedução, estuprar mulher virgem, maior de doze e menor de dezoito anos, terá a pena de prisão maior de dois a oito anos.

Article 393 criminalises rape (*Violação*), which is defined as illicit copulation with a woman against her will by means of violence, intimidation or fraud, where it does not constitute seduction, or on finding her deprived of her sense of reason. The penalty is two to eight years' imprisonment. Portuguese courts noted that attempted rape differs from attempts on modesty in that the perpetrator of rape necessarily intends to have intercourse with the woman against her will. In contrast, an attempt on modesty may not entail an attempt at intercourse (CP p. 627). Article 394 (*Violação de menor de doze anos*) punishes rape of children under 12 with eight to 12 years' imprisonment.

Kidnapping and corruption of minors – *Rapto, lenocínio e corrupção de menores*

The Penal Code criminalises two types of kidnapping: kidnapping through violence or fraud; or 'consensual' kidnapping. Article 395 (*Rapto violento ou fraudulento*) punishes the kidnapping of a woman with a dishonest intent by means of violence, intimidation or fraud, where it does not constitute seduction, or taking advantage of her deprivation of reason, with the same punishment as that for attempts on modesty with violence. The Article notes that an un rebuttable presumption of violence applies if the victim is a child under 12 years old. It adds that the kidnapping of a minor under 13 and the commission of the crime of private imprisonment is aggravating circumstances, warranting longer imprisonment.

Article 396 (*Rapto consentido*) criminalises 'consensual' kidnapping, which is narrowly defined to include the circumstances of kidnapping in which a virgin woman between 12 and 18 years old is enticed from her home without her parent or guardian's approval. In essence it criminalises attempted *estupro* when the female is taken from the home even where there may be no physical contact. The penalty is up to one year in prison.

Article 405 (*Lenocínio*) criminalises a person's facilitation of a minor's corruption, including becoming a prostitute, where the person is an elder relative or guardian of the minor, punishable with imprisonment for one to two years and a fine. Article 406 (*Corrupção de menores*) criminalises the 'corruption of minors' (under the age of 21), punishable with imprisonment of three months to one year and a fine.⁵²

Minimum drinking and night-clubbing law

Mozambique adopted a law (Lei No. 6/1999, February 2) that sets a minimum drinking age and prevents young persons from entering nightclubs. For example, it prohibits persons under 18 from visiting cabarets and nightclubs and regulates the times that persons aged 14 to 18 may attend dances and discotheques. The intent of the law is largely to prevent young persons from serving as prostitutes in these businesses.

ORGANISED CRIME AND RELATED OFFENCES – ASSOCIAÇÕES CRIMINOSAS

Participation in an organised crime group

Mozambique does not have a law that generally criminalises participation in an organised crime group, although organised crime activities are covered with regard to some specific criminal offences. The Narcotics Act (Lei No. 3/1997, March 13) criminalises the use of criminal associations in the drug trade. Under this Act, a person who heads or directs such a criminal association may be punished with 24 to 30 years in prison (Art. 42). As noted above, Article 71

prohibits committing offences through a gang, though the Article has only a minor punishment for it.

Money laundering – *Branqueamento*

The Money Laundering Act (Lei No. 7/2002, Feb. 5) establishes a legal regimen for the prevention and suppression of the use of the financial system to launder money, goods and products resulting from criminal activity. Article 4 provides that it is an offence for anyone, relative to the capital, goods, products or other proceeds of crimes – such as those set forth in the Narcotics Act, theft, robbery, fraud, illegal arms dealing, terrorism, extortion, corruption, embezzlement, smuggling contraband in or out of the country – to:

- convert, transfer, assist or facilitate the conversion or transfer of property or products, directly or indirectly, for the purpose of hiding the unlawful source or the person implicated in the related unlawful acts, punishable with eight to 10 years' imprisonment;
- hide the true nature or origins of the goods or products or their related proceeds, punishable with two to eight years' imprisonment; or
- acquire or receive title, use, detain, preserve or guard of such goods, products or proceeds, punishable with imprisonment.

The Act authorises the government to seize the laundered objects or their monetary value (Arts. 5-9). The Act also places certain obligations on financial entities to: identify clients and keep records (Arts. 10-15); report transactions suspected to be linked to criminal activities identified in the Narcotics Act or the Money Laundering Act; cooperate with government authorities in investigations (Arts. 16-18); and refrain from processing suspected transactions (Art. 19). The Act has very limited provisions on the supervisory mechanism (Arts. 22-24) and an extraterritorial clause (Art. 26).

The Money Laundering Act provides penalties for responsible individuals (Art. 29), the failure to perform a required duty (Art. 30), obstruction of justice (Art. 31), and the negligent failure to perform a required duty (Art. 32). Violations of the Act may be penalised with fines (Arts. 34-37).

The 2004 regulations provide more details for implementing the Money Laundering Act (Decree No. 37/2004, Sept. 8). Article 2 provides that the regulations widely cover banks, microbanks, leasing societies, credit cooperatives, money exchanges, casinos and many other organisations and businesses in financing, banking, insurance and money changing. The supervisory entities include the Bank of Mozambique, the Inspector General for Insurance, the Inspector General for Gaming, and the Ministry Overseeing Finance (Arts. 4 and 6).

The regulated institutions are required to implement systems to prevent and fight money laundering (Art. 7). They have the duty to determine the identity of their clients by the specified means (Art. 8) relating to a wide range

of transactions (Art. 9). The Act details the information that must be retained for individuals (name, nationality, date of birth, identity number, etc.) and for organisations and other groups of persons (registration numbers, address of headquarters, their economic activity code, objectives, representatives, etc.) (Art. 10). The identity information must be verified and if necessary corrected (Arts. 11 and 12).

The regulations also provide more details on the adjudicatory process (Arts. 20-24) and the distribution of seized goods to government ministries (Art. 27).

Corruption – *Corrupção*

Mozambique recently adopted the Anti-Corruption Act (Lei No. 6/2004, June 17), which applies to directors, functionaries and employees of the national government, local authorities, public enterprises and private enterprises that perform state functions or are implementing public contracts (Art 2).⁵³ The covered entities and individuals are required to perform their functions consistent with principles of legality, equality, non-discrimination, impartiality, ethics, openness and justice (Art. 3). The covered entities are required to declare all their property (Art. 4) and to operate fairly in their administrative acts (Art. 5). All government contracts are required to have anti-corruption clauses (Art. 6).

Consistent with the Penal Code, the Anti-Corruption Act makes a distinction between 'passive corruption', which for example refers to the act of receiving a bribe, while 'active corruption' refers to the offering to pay a bribe. Article 7 criminalises passive corruption for an illicit purpose (*Corrupção passiva para acto ilícito*), which includes the consent, ratification, solicitation or receipt of money or a promise of money or any other advantage that is not within the entity's or person's scope of duty, to commit or not commit an act, punishable with two to eight years' imprisonment. Showing favouritism in a public contract bidding process or prejudicing the fair competition is punishable with up to a year in prison and a fine. Article 8 criminalises passive corruption for a licit purpose (*Corrupção passiva para acto lícito*), when the entity or person receives some benefit for performing an act that is not contrary to official duty, punishable with imprisonment for up to one year and a fine. 'Active' corruption is addressed in Article 9, which prohibits the offering or giving of money or an advantage for a corrupt purpose (*Corrupção activa*). An act of corruption to further a business economic activity is punishable with two to eight years' imprisonment (Art. 10).

The sanctions include an order to confiscate the property gained through corrupt activities or its value, require the offender to indemnify for any loss, subject the offender to professional expulsion, and prohibit the offender from bidding on government contracts or receiving fiscal benefits or credit (Art. 11).

The Anti-Corruption Act defines the role of the Public Ministry in receiving information about and investigating suspected incidents of corruption and proposing measures to fight corruption (Art. 17). It also creates the Central Cabinet to Fight Corruption under the attorney general, and defines its goals,

which include investigating complaints and starting prosecutions (Art. 19). Public and private auditors are required to report any evidence of corruption they receive, subject to fines and a suspension of their professional licences for failing to do so (Art. 21).

The Penal Code also contains provisions criminalising public corruption. For example, a public employee's embezzlement or theft of government property is punishable with suspension, fines and, for theft, possibly imprisonment (Art. 313). A public employee's extortion is punishable with 16 to 20 years' imprisonment (Art. 314), while abusing one's position to gain a personal benefit is punishable with one to two years' imprisonment and a fine. A public official who receives a bribe (*corrupção passiva*) is punishable with suspension for one to three years and a fine (Art. 318), while a person offering the bribe (*corrupção activa*) is subject to similar penalties (Art. 321).

Obstruction of justice

The Money Laundering Act criminalises the obstruction of justice for offences covered by that law. It provides that it is an offence for a person to use force, intimidation or promises to induce another person to provide false testimony or the production of evidence in the investigation of any offence in the Act, punishable with two to eight years in prison (Art. 31). It further provides that it is an offence to interfere with the authorities' investigations, punishable with two to eight years in prison.

The Criminal Code has some provision indirectly related to the obstruction of justice. For example, it criminalises the hiding or destruction of evidence for the purpose of concealing a crime or otherwise hiding facts to protect a criminal (*Encobridores* Art. 23).

IMMIGRATION MATTERS

The Immigration Act (Lei No. 5/1993, Dec. 28) establishes the law regarding citizenship, the conditions of entry of foreigners, and their rights, duties and guarantees. It is a relatively short and basic piece of legislation.

Liability of commercial carriers and border checks

The transporter or organisation or agent responsible for an unlawful immigrant is responsible for the immigrant's return and is liable to a fine (Art. 46). The immigration officials are authorised to conduct inspections and review documents (Art. 58) and commercial carriers are required to cooperate (Arts. 59-60).

Prohibited immigrants: Grounds for exclusion

Unlike the immigration laws in the other three countries covered in the assessment, the Mozambique Immigration Act does not have a category of 'prohibited immigrants'. However, it has some requirements regarding entry into the country, conditions for entry and detailed conditions for expulsion. Entry is

only allowed through official entry points (Art. 5) and a valid passport or other travel documents must be presented (Art. 6). As per Article 29, reasons for expulsion *by administrative action* include:

- conduct against national security, public order or good practices;
- activities in the country that threaten the interests and dignity of the state or its citizens;
- disrespecting the constitution and applicable laws;
- interfering in politics; and
- practicing acts that impeded their entry into the country on other occasions.

Reasons for expulsion *by courts* include:

- a non-resident foreigner who has been convicted of a crime in Mozambique with at least a six-month prison sentence; and
- a foreigner who has been a resident for less than five years and has been convicted of a crime with at least a one-year sentence (with longer residency periods requiring longer prison terms).

The grounds for expulsion may also be used as grounds for exclusion from entry (Art. 16(e)).

Forging documents and assisting unlawful entry

The Immigration Act provides for a series of fines for unlawful entry and remaining in the country with an expired permit (Arts. 42-43). However, it does not appear to include punishment for forging documents (beyond exclusion or expulsion of the immigrants using them). It appears that forgery, assisting unlawful entry and bribing immigration officials would be addressed by the Penal Code or the Anti-Corruption Act, discussed above.

Entry and work permits

Permits include tourist permits, available for up to 90 days (Art. 11), transit permits for up to seven days (Art. 12), a visitor's permit from 15 to 90 days (Art. 13) and a business permit for up to 90 days (Art. 14). Criteria for determining whether a permit will be granted include: purpose of the visit; means to sustain oneself in the country; and possession of sufficient money (Art. 9). Among other reasons a person may be excluded is if he or she is subject to a prior expulsion or has been declared a *persona non grata* in Mozambique (Art. 16(d)) or has engaged in activities for which he or she could be subject to expulsion (Art. 16(e)). The immigration authorities are authorised to grant a residency permit. The Act provides for very few conditions and it appears that the authorities have relatively wide discretion that could be set forth in regulations and policies (Art. 10). Refugees, as recognised under the 1951 Geneva Convention, are given special consideration (Arts. 53-54).

VICTIM AND WITNESS ASSISTANCE

A police officer stated in an interview for this assessment that the police have never addressed witness protection because 'no one has ever asked for it'. Mozambique has no law or formal practice for witness protection. The police have not received any training for protecting witnesses and they do not have any safe houses to keep witnesses secure. In fact as a general matter it has been widely observed that persons with potentially useful information about criminal conduct do not share that information with the police. The public commonly distrusts police officers.

In recent years the police established the Office for Victims of Domestic Violence, which provides support to children and women who have been abused and exploited. The unit may refer children to a hospital for care, return them to their families, or when necessary refer them to the Ministry of Women and Social Welfare which may place them in orphanages. The unit has officers in nearly 60 police stations around the country. As reported by NGOs these unit officers have been very helpful, although they assert that the unit needs considerably more support. Moreover, neither the government nor the unit has safe houses for victims of trafficking.

The unit separates the victims from the offenders and makes child victims available to lawyers, usually from Defenders of Children's Rights in the Human Rights League, which may interview and defend them. However, it rarely or never happens that a child gives testimony against a trafficker or a sexual offender, and thus it appears that the legal system has not developed any process, rules or procedures to facilitate and protect the children in providing testimony. Yet, apparently, the criminal procedure allows for testimony to be given *in camera* where warranted.

The ADDC, the National Campaign against Sexual Abuse and Child Trafficking, the Anti-Child Trafficking Forum, and their member organisations have provided assistance to some trafficking victims. Member organisations started a facility for trafficking victims near Ressano Garcia but closed it after six months due to problems of being too close to the border (it was thus not felt to be a safe location) and because of a lack of resources to assist in feeding and providing medical services to those who needed it. A new centre is, however, being planned. There is a home (Amazing Grace) in Malelane for street children and children who have been trafficked. Informally, police and immigration officials have called NGOs and requested their assistance with trafficking victims. No formal referral system exists.

CHAPTER 6

Key Laws and Measures – South Africa

The 1994 elections in South Africa, with its introduction of a new democratic system, led to a substantial expansion of protections of human rights in the constitution and the law. Since 1994 South Africa has introduced many new laws to address matters such as corruption, money laundering and organised crime. Of all the countries covered in this assessment, South Africa has the most complex and extensive set of laws. At the same time the structure of the legal system has remained essentially the same, although new enforcement bodies have been created.

TRAFFICKING IN PERSONS

South Africa does not have a law prohibiting human trafficking, although efforts have been under way for some time to finalise one. In early 2004 the South African Law Reform Commission (SALRC) published Issue Paper 25 on 'Trafficking in Persons' to serve as a basis for the commission's deliberations and to seek public input on key issues. This was followed in May 2006 by the release of Discussion Paper 111,54 also on trafficking in persons, for general information and comment. This discussion paper sets out the SALRC's preliminary recommendations for law reform, including the criminalisation and prevention of trafficking, the protection of victims, etc. A draft Sexual Offences Bill is currently pending.

A consultant produced the 'Draft Interim Human Trafficking Legislation: Seeking Justice for Victims of Human Trafficking in South Africa', which closely follows the UN Trafficking Protocol. The draft has served as a starting point for discussion, although a concern has been expressed that further study is necessary to ensure that the draft legislation submitted to parliament does not conflict with existing legislation (e.g. laws on immigration, witness protection, sexual offences, etc.). Moreover, the pending draft Children's Bill would prohibit trafficking in children and require that assistance is given to child trafficking victims. It also expressly provides that the Human Trafficking Protocol 'is in force' in South Africa (ss. 280-284).

South Africa also has an Inter-Sectoral Task Team on Trafficking in Persons that, after a lapse, has recently become active again. The team's members are from the National Prosecuting Authority, the Department of Justice and Constitutional Development, the Border Police/SAPS, the Human Trafficking

Desk from the Organised Crime Unit (SAPS), the departments of Labour, Home Affairs and Social Development, the UNODC, the IOM and Molo Songololo (a children's rights organisation).

PROTECTION OF BASIC RIGHTS AND PREVENTION OF THE EXPLOITATION OF LABOUR AND CHILDREN

The South African constitution (1996) protects a wide range of human rights, including the rights to:

- be treated with dignity (s. 10);
- not be subject to torture, cruel, inhuman or degrading treatment or punishment, or public or private violence (s. 12); and
- not be subject to servitude or forced labour (s. 13).

Children (under the age of 18) have the right to not be subjected to neglect or abuse, exploitative labour practices or work that puts at risk their well-being, education, health, or spiritual, moral or social development (s. 28).

Consistent with the constitution, the Basic Conditions of Employment Act, No. 75 of 1997, as amended (BCEA), regulates the employment of children and adults and prohibits forced labour. The BCEA's preamble provides that its aim is to comply with the country's obligations as a member state in the ILO.

The BCEA defines a child as a person under the age of 18 (s. 1) and prohibits employing a child in employment that is 'inappropriate for a person that age' or that 'places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development' (s. 43(2)).

It also prohibits the employment of a child under 15 or under the minimum school leaving age in terms of any law if the age is over 15 years (s. 43). For example, the South African Schools Act (No. 84 of 1996) requires parents to keep their children in school until the last school day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is first. It further provides that the Labour minister may, on the advice of the Employment Conditions Commission, make regulations to prohibit or place conditions on the employment of children who are at least 15 years old and no longer subject to compulsory schooling (s. 44).

Section 48 of the BCEA provides that, subject to the constitution, all forced labour is prohibited and that no person may for his or her own benefit or for the benefit of someone else cause, demand or impose forced labour. The penalty for violations of these provisions is a fine or imprisonment not exceeding three years (s. 93).

OFFENCES UNDER CRIMINAL LAW

The three main sources of South African criminal law include legislation, common law and case law (court decisions). In South Africa the term 'common law' refers

to binding substantive rules of law not found in South African legislation that are derived from Roman-Dutch law. Some of the basic criminal offences, such as murder, kidnapping and assault, are common law offences. Where legislation has been adopted in an area, it generally replaces any conflicting approaches under common law. Although English law did not replace Roman-Dutch law when the Cape became an English colony, it had considerable influence on the definitions and elements of particular crimes.⁵⁵

Trafficking in body parts

South Africa has no law on the trafficking of human body parts. The closest relevant legislation may be the Human Tissues Act, No. 65 of 1983 (HTA), which primarily aims at regulating the medical field. The HTA provides that tissue, blood and gametes removed from a living donor may only be used for medical and dental purposes. It also has provisions concerning the treatment of dead bodies. Section 34(a) provides that any person who without legal authorisation 'acquires, uses or supplies a body of a deceased person or any tissue, blood or gamete of a living or deceased person' is guilty of an offence. Thus this provision covers the behaviour of individuals down the chain of custody, including those who provide, supply and receive the tissue. However, the penalty is only a R2,000 fine and/or imprisonment not exceeding one year.

With regard to the offence of 'violating a corpse', Prof. Snyman asserts that 'although there is little authority in our case law on this crime, there can be no doubt that there is such a crime in our law'.⁵⁶ Thus he asserts that a person who kicks, burns or stabs a corpse (and, one assumes, cuts off body parts) could be convicted of this crime. Intentionally disturbing, destroying or damaging a grave is also an offence. Theft of a corpse is not legally possible because a corpse is considered a 'non-commercial object'.⁵⁷

In 2001 South Africa set up a Commission of Inquiry into Witchcraft Violence and Ritual Murders to investigate 140 killings that year alone in Northern Province and for killings in Soweto. The KwaZulu-Natal police have operated an occult crimes unit that specialises in investigating human sacrifices by *muti* witchdoctors.

Murder and assault

As a general matter, murder remains a common law offence. Assault is defined under common law as the act of unlawfully and intentionally applying force, directly or indirectly, to the person of another, or inspiring another person to believe that force is immediately to be applied against him or her. Thus a threat of immediate violence constitutes assault. Assault with the intent to do grievous bodily harm is a more serious offence.⁵⁸

Indecent assault is defined as the act of unlawfully and intentionally assaulting, touching or handling another in circumstances in which the act or the intention is indecent. 'Indecent' appears to mean that the accused has the aim of sexual gratification or stimulation. Both the perpetrator and the victim

may be either male or female. Sodomy, by itself, is no longer a crime. Consent may be a defence to an assault charge, except when the victim is a girl under the age of 12 years, in which case the girl is irrebuttably presumed to not give consent.⁵⁹

Intimidation

The Intimidation Act, No. 72 of 1982, as amended, criminalises acts of intimidation that may be used in a very wide variety of circumstances, including but not limited to intimidating a person into not supporting a political organisation. Section 1(1)(a) of the Act provides that any person who without lawful reason and with intent to compel or induce any person to do or abstain from doing any act ‘assaults, injures or causes damage to any person; or in any manner threatens to kill, assault, injure or cause damage to any person’ is guilty of an offence and liable to a fine not exceeding R200,000⁶⁰ and/or to 10 years’ imprisonment.

Section 1(1)(b) provides the same punishment for the very broadly defined offence where a person ‘acts or conducts himself in a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be that a person ... fears for his own safety or the safety of any other person or the safety of the property of any other person or the security of the livelihood of any person’. Thus section 1(1)(a) criminalises the commission of a certain act while section 1(1)(b) criminalises the causing of a certain condition in which the victim may not have been in fact intimidated.

Since the Intimidation Act overlaps with other criminal offences, courts have expressed the view that in some cases other laws should be applied. For example, in cases of private quarrels, such as where a husband assaults his wife, the prosecution should charge the husband with common law assault or violation of the Domestic Violence Act. Notably this reasoning would likely not apply to a trafficking case because it is not such a ‘private’ matter nor is it likely to be appropriately covered by any other law.

Sexual offences

Under common law, the crime of rape is defined as an act by a male having unlawful and intentional sexual intercourse with a female without her consent.⁶¹ Common law abduction is defined as the act of unlawfully and intentionally removing an unmarried minor from the control of his or her parents or guardian without consent, intending that he or she or somebody else may marry or have sexual intercourse with the minor. Both offenders and victims may be either male or female. Statutory abduction in section 13 of the Sexual Offences Act is very similar to, but has not replaced, common law abduction.

The Films and Publications Act, No. 65 of 1996, as amended, criminalises the possession, creation, production, importation or exportation of child pornography (s. 27), punishable with a fine and/or imprisonment for a

period not exceeding 10 years (s. 30(1A)). This Act also has extra-territorial jurisdiction in that it applies to South Africans who commit the offence outside of the country (s. 30A).

Most other sex-related offences are contained in the Sexual Offences Act, No. 23 of 1957, as amended, which addresses a wide range of matters including keeping a brothel, procuring prostitution, abduction, sexual offences with young people and other related offences. With regard to brothels, the Act provides that any person who ‘keeps’ a brothel is guilty of an offence (s. 2). Section 3 provides that such persons include those who:

- reside in a brothel unless he or she proves that he or she was ignorant of the character of the premises;
- manage or assist in managing a brothel;
- knowingly receive any money taken in a brothel;
- occupy the premises and knowingly permit it to be used as a brothel;
- refuse to disclose the name and identity of the brothel keeper;
- are an owner of the premises with the knowledge that it is used as a brothel; and
- are married to the brothel keeper, unless that person proves he or she was ignorant of the activities or lives apart from the spouse and does not live off the proceeds or the brothel business.

The penalty is imprisonment not exceeding three years with or without a fine not exceeding R6,000 (s. 22(a)).

The Act also provides that it is unlawful for any parent or guardian to procure the defilement of his or her child or ward, which includes both males and females. Specifically it provides that any person who is a parent or guardian of a child under the age of 18 who:

permits, procures or attempts to procure such child to have unlawful carnal intercourse, or to commit any immoral or indecent act, with any person other than the procurer or to reside in or frequent a brothel; or orders, permits, or in any way assists in bringing about, or receives any consideration for, the defilement, seduction or prostitution of such child shall be guilty of an offence (s. 9).

The penalty is imprisonment for a period up to five years or life imprisonment if the victim is a boy under 14 years of age or a girl under 12 (s. 22(b)).

The Act further prohibits procuring or attempting to procure any female to have unlawful intercourse with any other person, including ‘inveigling or enticing’ any female to a brothel for prostitution or using drugs or alcohol to stupefy or overpower her (s. 10). Conspiracy to defile a female (s. 11) and detention of a female against her will for the purpose of unlawful carnal intercourse (s. 12) are also unlawful. Detention is deemed ‘against her will’ where the female is under

16 years old, where there is no parent or guardian's consent for 16 to 18 year olds, or where her 'wearing apparel or other property' is withheld (s. 12(2)-(3)). It is also unlawful for a person to help for reward another person to procure or solicit a prostitute (s. 12A). The penalty for procurement (s. 10) and detention (s. 12) is imprisonment not exceeding seven years (s. 22(e)), while the penalty for conspiracy to defile (s. 11) and soliciting (s. 12A) is a fine or imprisonment not exceeding five years (s. 22(d)).

In section 13 on Abduction, the Act provides that 'any person who takes or detains or causes to be taken or detained any unmarried male or female' under the age of 21 against the parent or guardian's will with the intent of having sex with him or her is guilty of an offence. The penalty is a fine or imprisonment not exceeding five years (s. 22(d)).

The provisions on sexual offences with youth present a complex web of varying offences depending on whether the perpetrator and victim are males or females. For example, it is unlawful for a male to have or attempt to have intercourse with a girl under the age of 16 or commit an immoral or indecent act with a girl or boy under 19 (s. 14(1)(a)-(b)), while it is unlawful for a female to have or attempt to have intercourse with a boy under the age of 16 or commit an immoral or indecent act with a girl or boy under 19 (s. 14(3)(a)-(b)). It is also unlawful for a male or female to 'solicit or entice such a girl or boy to the commission of an indecent act' (ss. 14(1)(c) and 14(3)(c)). The penalty is imprisonment not exceeding six years with or without a R12,000 fine (s. 22(d)).

The Sexual Offences Act also criminalises both living on the earnings of prostitution and, unlike in Malawi, Zambia and Mozambique, the act of prostitution by the prostitute (s. 20). The penalty is a fine not exceeding R4,000 and/or imprisonment not exceeding two years (s. 22(g)).

South Africa has a draft Sexual Offences Bill that codifies rape, modifies some existing offences and adds new ones. In sum, it would:

- detail, clarify and codify the elements of the crime of rape, making some changes in relevant common law concepts;
- define the crime of compelling or inducing indecent acts;
- introduce detailed offences relating to sexual exploitation of children (including prostitution) and mentally impaired persons;
- require prosecutors to inform a witness, particularly a child, that he or she may be declared a 'vulnerable witness', which would result in certain protections such as allowing the witness to give testimony by closed circuit TV, through an intermediary, or in a closed courtroom hearing (*in camera*), protecting his or her name, and any other appropriate measures;
- allow for special supervision of dangerous sexual offenders; and
- provide extra-territorial jurisdiction for South Africans committing the offences in other countries.

A more recent version of the Bill recommends the crime of sexual assault.

Most importantly the draft Bill contains provisions that prohibit trafficking in persons and provides that it is an offence for a common carrier to transport a person into the country without valid travel documents. The definition of trafficking would be based, in whole or in part, on the definition of trafficking in the UN Trafficking Protocol. These provisions are viewed primarily as a stopgap measure, pending adoption of a more comprehensive human trafficking law.

Kidnapping

The common law offence of kidnapping is defined as the act of unlawfully and intentionally depriving a person of his or her freedom of movement and/or, if that person is a child, the custodians of their control over the child.⁶² The concept of kidnapping includes older crimes that were referred to as child stealing, man stealing and woman stealing, although it is generally viewed in South Africa that a person cannot be 'stolen'.

ORGANISED CRIME AND RELATED OFFENCES

Participation in an organised crime group

The Prevention of Organised Crime Act, No. 121 of 1998, as amended (POCA),⁶³ introduces measures to fight organised crime, criminal gang activities and money laundering. The preamble notes that South African common law and statutory law has failed to incorporate the necessary international measures and to work effectively in these areas. It further notes that because prosecutors usually find it very difficult to prove that organised crime leaders are directly involved in particular cases, it is necessary to criminalise the management of and conduct related to the running of enterprises that are involved in 'a pattern of racketeering activity'.⁶⁴

Chapter 2 of the Act criminalises racketeering, which is generally defined as operating an illegal business for personal profit or carrying on a dishonest or illegal scheme in order to make money.⁶⁵ POCA covers a range of forms of wealth, including: monetary instruments; (e.g. cash); goods (e.g. houses, cars and boats); and investments (e.g. securities).

Specifically, POCA provides that any person who, directly or indirectly:

- (1) (a) Receives or retains any property derived from a pattern of racketeering activity; and knows or ought reasonably to have known that such property is so derived; and uses or invests, any part of such property in acquisition of any interest in, or the establishment of, any enterprise; or
- (b) Receives or retains any property on behalf of any enterprise; and knows or ought to have known that such property derived or is derived from or through a pattern of racketeering activities; or
- (c) Uses or invests any property on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation

- or activities of any enterprise; and knows or ought to have known that such property derived or is derived from or through a pattern of racketeering activities;
- (d) Acquires or maintains any interest in or control of any enterprise through a pattern of racketeering activity;
 - (e) While associated with any such enterprise, participates in the conduct of the enterprise's affairs through a pattern of racketeering activity;
 - (f) Manages the operation or activities of an enterprise and knows or ought reasonably to have known that someone else participates in the conduct in the enterprise's affairs through a pattern of racketeering activity; or
 - (g) Conspires or attempts to violate any of the above provisions within South Africa or elsewhere;
- shall be guilty of an offence (s. 2(1)).

It defines a 'pattern of racketeering activity' as 'the planned, ongoing, continuous or repeated participation or involvement in' any listed offence and includes at least two of the listed offences, of which the last act occurred within 10 years after the commission of the prior offence (s. 1). The 34 listed offences are set forth in Schedule 1 and include murder, rape, kidnapping, assault with intent to commit grievous bodily harm, indecent assault, sex and indecent acts with children, 'childstealing' (which may be subsumed into the kidnapping offence), the types of intimidation proscribed in sections 1(1) and 1A(1) of the Intimidation Act (discussed above) and obstruction of justice, among others. The penalties for racketeering range from a fine not exceeding R1,000 million to life imprisonment (s. 3).

POCA applies special exceptions for certain evidentiary rules and court sentencing procedures. For example, it provides that a court 'may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, and provided that such evidence would not render a trial unfair' (s. 2(2)). It also expands the power of regional courts to impose penalties in excess of their penal jurisdiction (s. 3).

In Chapter 4, POCA criminalises gang activities, including threatening and performing violence as well as instigating others to commit crimes and join gangs (s. 9). This chapter appears to be aimed at street gangs, although the definitions broadly cover organised crime activity. For example, it defines a criminal gang as:

Any formal or informal ongoing organisation, associate, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in a pattern of criminal gang activity (s. 1).

It defines 'a pattern of criminal gang activity' as the commission of two or more Schedule 1 criminal offences, the last of which occurred within three years of a prior offence, where the offences were committed on separate occasions and by two or more persons who are members of the same gang on the same occasion. The penalties for offences relating to criminal activity range from a fine to imprisonment not exceeding eight years.

Money laundering legislation – POCA and FICA

The two most important laws on money laundering include POCA and the Financial Intelligence Centre Act, No. 38 of 2001 (FICA). Chapter 3 of POCA addresses Offences Relating to Proceeds of Unlawful Activities. Section 4 provides that 'any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities' and:

- enters into an agreement or engages in any arrangement or transaction with anyone in connection to that property; or
- performs any other act in connection with that property that has or is likely to have the effect of:
 - concealing or disguising the nature, source, location, disposition or movement of the property or any interest in it; or
 - enabling or assisting any person who has committed or commits an offence, whether in South Africa or elsewhere to avoid prosecution or remove or diminish any property acquired as a result of an offence

shall be guilty of an offence. POCA also makes it unlawful for a person to assist another to benefit from the proceeds of unlawful activities (s. 5) or to acquire, possess or use the proceeds of unlawful activities that he or she knows or ought to know forms part of the proceeds of someone else's unlawful activities (s. 6). A 2001 amendment provides that, if charged under POCA, a person employed by an accounting institution as defined by FICA may use the defence that he or she had complied with the applicable reporting obligations (s. 7A). The penalties for violating the anti-money laundering provisions under POCA range from a fine not exceeding R100 million to imprisonment not exceeding 30 years (s. 8).

Chapter 5 addresses the Proceeds of Unlawful Activities. Section 13 provides that proceedings are civil, rather than criminal, for confiscation and restraint orders, which means that the government's burden of proof is lower (a 'balance of probabilities' rather than 'beyond a reasonable doubt'). When a defendant is convicted of an offence covered by POCA the court may issue a confiscation order for any benefit derived from the crime or related crimes or their value (ss. 18-24). POCA also authorises the issuance of restraining orders to prevent the dissolution of the proceeds of a crime when a prosecution has been instituted although the defendant has not yet been convicted (ss. 24A-29A). POCA authorises the recovery of property through civil proceedings (ss. 37-62).

Finally POCA establishes a Criminal Assets Recovery Account for all property derived from confiscation and forfeiture orders, which is overseen by a committee chaired by the Justice minister (ss. 63-70).

FICA combats money laundering by imposing record keeping and reporting requirements on institutions and creating new institutions to provide better direction in the fight against money laundering. Unlike POCA, which identifies money-laundering conduct by specifying offences, FICA provides a definition in s. 1(1) for 'money laundering':

An activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in section 64 of this Act⁶⁶ or section 4, 5 or 6 of [POCA].

FICA creates the Financial Intelligence Centre (FIC) to: coordinate policy and measures to fight money laundering; collect, process and interpret relevant information; advise investigating authorities; and provide guidance to institutions (Chap 1). It also establishes the Money Laundering Advisory Council, which provides advice to the Ministry of Finance and FIC regarding its operations and promotes dialogue with the private sector (Chap. 2).

FICA defines certain institutions as 'accountable institutions' (set forth in an annex) and imposes obligations on them to implement internal administrative systems to identify customers, keep records of transactions for at least five years, report certain 'suspicious or unusual transactions', and train their employees to recognise and deal with suspected money laundering (Chap. 3). It also identifies 'supervisory bodies' such as the Financial Services Board and the Law Society of South Africa, and requires them to report any suspicious transactions in institutions they regulate (ss. 44-45). It further limits access to FIC's information (s. 40) and protects confidential information (s. 41) and prohibits its misuse (s. 60). FICA's requirements have frequently been described as 'burdensome' and the cost of compliance 'substantial'.⁶⁷

Corruption

In South Africa, different bodies exercise different powers to fight corruption. The constitutional and oversight bodies include the auditor general (appointed by the National Assembly), the public protector, the Public Service Commission, and the Independent Complaints Directorate. The criminal justice agencies include the police service (SAPS), the National Prosecuting Authority (NPA), the Directorate of Special Operations (also known as the Scorpions), the Asset Forfeiture Unit and the Special Investigations Unit. In 2001 the National Anti-Corruption Forum (NACF) was established as a cross-sectoral body representing business, civil society and government. The NACF became largely inactive but has been recently revived.

The Prevention and Combating of Corrupt Activities Act, No. 12 of 2004, is the most important legislation on corruption. It defines and prohibits corruption

in many forms and provides for investigative measures to fight it. In broad terms, section 3 provides that the general offence of corruption is committed when any person directly or indirectly:

- accepts, gives, or offers to accept or give any gratification from any other person to benefit himself or herself or another person in order to act or influence another to act in a manner that amounts to –
 - the abuse of a position of authority, a breach of trust or the violation of a legal duty or a set of rules –
 - designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not do anything.

Provisions with specific offences relate to public officers (s. 2), foreign public officials (to be in line with the Organisation for Economic Cooperation and Development convention on bribery of foreign officials) (s. 5), agents (s. 6), members of the legislature (s. 7), judicial officers (s. 8), members of the prosecuting authority (s. 9), witnesses (s. 11), employees (s. 10), public and private contracts (s. 12), and procuring and withdrawing tenders (s. 13), among others. Accessories to or after an offence (s. 20) and those who attempt, conspire or induce others to commit a corrupt act have also committed an offence (s. 21).

Chapter 3 provides rules and guidance on investigations and prosecutions. For example, a judge may issue an investigative direction where there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, and he or she maintains such a high standard of living through the commission of corrupt activities (s. 23(3)).

On penalties: a high court may order payment of a fine or life imprisonment for most of the offences; a regional court can order a fine or imprisonment not exceeding 18 years; and a magistrate's court can order a fine or imprisonment not exceeding five years (s. 26).

Obstruction of justice

Regarding obstruction of justice, prosecutors pursue contempt of court and revocation of bail proceedings where a defendant threatens a potential witness. Otherwise, particularly in cases where a non-defendant makes threats, it appears that the Intimidation Act may be used, which broadly prohibits intimidation though it is not specifically directed at the obstruction of justice (discussed below under victim and witness assistance).

IMMIGRATION MATTERS

The Immigration Act, No. 13 of 2002, regulates the admission of persons, their residence in, and their departure from South Africa. In section 2 the Act details the objectives and functions of immigration control, including, but not limited to:

- promoting a human rights-based culture;
- facilitating the issuance of permanent and temporary residence permits to those qualified to receive them;
- concentrating resources and efforts in enforcing the Act at community level and cooperating with civil society;
- discouraging, detecting and deporting illegal foreigners;
- facilitating compliance with South Africa's international obligations;
- liaising with the South African police to ensure they check the identities and immigration status of persons' arrested, and educating law enforcement agencies on the detection of illegal foreigners and report them;
- promoting cooperative programmes with other states to prevent illegal migration, in cooperation with the Ministry of Foreign Affairs; and
- assisting in the public prosecution of any offence under the Act (s. 3(i)).

It has been reported that the Ministry of Home Affairs was preparing a policy on human trafficking that was to be issued in July 2005.⁶⁸

Liability of commercial carriers and border checks

The Immigration Act authorises the Home Affairs minister to establish an inspectorate through regulations (s. 33(1)), and authorises immigration officers to investigate any matter within the scope of the Act, conduct inspections, obtain warrants to gather relevant information and inspect goods, conduct searches without a warrant when justifiable and necessary (s. 33(4) – (14)), and arrest illegal foreigners (s. 34(1)). Similar to the Service Charter for Victims of Crime in South Africa (discussed below), the Immigration Act requires warranted searches to be conducted with strict regard for a person's right to dignity, privacy, freedom and security (s. 33(7)).

The Immigration Act does not provide for the liability of commercial carriers for bringing illegal foreigners into South Africa, although it makes it unlawful for an employer to employ an illegal foreigner (s. 38). It also requires businesses providing accommodation to make a good faith effort to identify their customers as citizens or lawful permit holders (s. 40).

The South African Police Service Act, No. 68 of 1995, authorises the police, for the purpose of border control, to search without a warrant any person, premises or other place, vehicle, vessel or aircraft at any place within 10 km or any reasonable distance from any South African border (s. 13(6)). The police may also seize anything that may be lawfully seized.

The Gauteng Border Police have recently established a task team on Trafficking in Persons, which works closely with the Organised Crime Unit.

Prohibited and undesirable immigrants

The Immigration Act provides that 'prohibited persons' who do not qualify for a temporary or permanent residence permit include anyone who has been convicted of or for whom a warrant has been issued for money laundering,

kidnapping, murder, drug trafficking, terrorism or genocide (s. 29). It also includes, among others, anyone who is or has been a member of or an adherent to an organisation or association using crime or terrorism to pursue its ends, and anyone who is infected with a prescribed infectious disease.

In short, persons engaging in human trafficking are not necessarily 'prohibited persons', unless they have been convicted of or have a warrant against them for offences such as money laundering, kidnapping or murder. Conversely, trafficking victims who have a prescribed infectious disease are 'prohibited persons' and therefore are subject to exclusion or deportation. However, the Act provides that the minister may for good cause and after consultation with the Department of Home Affairs' director general, declare a person covered by this section to not be a prohibited person.

The Department of Home Affairs has the discretion to declare a person to be 'undesirable' and therefore unable to receive a temporary residence permit (see s. 10(4)) for anyone who is likely to become a public charge, is a fugitive from justice or has previous criminal convictions without the option of a fine for conduct which would be an offence in South Africa, with the exclusion of certain proscribed offences (s. 30(1)). On the affected person's application, the Department of Home Affairs may waive any of the grounds of undesirability provided that it reports that decision to the minister (s. 30(2)).

Thus, it appears that the minister has the discretion to ensure that trafficking victims are not declared prohibited or undesirable persons. Similarly while some but not all types of traffickers would be 'prohibited persons', the Department of Home Affairs appears to have wider latitude to declare additional traffickers to be 'undesirable persons' and thus subject them to exclusion or deportation, mindful of due process requirements.

Forging documents and assisting unlawful entry

The Immigration Act provides in section 49 that it is an offence for anyone to:

- enter or remain in the country in contravention of the Act, liable to a fine or imprisonment not exceeding three months;
- assist another to unlawfully enter the country, liable to a fine or imprisonment not exceeding nine months;
- employ a foreigner in violation of the Act, liable to a fine or imprisonment not exceeding one year for the first offence and longer for additional offences;
- produce, wilfully or through gross negligence, a false certification contemplated by the Act, liable to a fine or imprisonment not exceeding one year, with suspension from the relevant professional association; or
- compel or induce an officer to contravene the Act through offers of financial or other consideration or threats to breach the officer's duties, liable to a fine or imprisonment not exceeding 18 months.

The Immigration Act also provides that it is an offence for:

- a civil servant to provide false, intentionally inaccurate or unauthorised documentation to an illegal foreigner or help him or her disguise his or her identity or status or accept any undue financial or other consideration to perform an act, liable to a fine or imprisonment not exceeding two years, unless the civil servant is employed by the Department of Home Affairs, in which case he or she is liable to imprisonment not exceeding three years without the option of a fine; or
- anyone other than a civil servant to produce a document purporting to be a document issued by the Department of Home Affairs, liable to a fine or imprisonment not exceeding two years.

Entry and work permits

The Immigration Act provides for a wide range of entry permits, including temporary resident permits in the form of visitors' permits, work permits, medical treatment permits, other permits, asylum, and cross-border and transit passes. Section 10 provides that a foreigner may enter and sojourn in South Africa if he or she possesses a 'temporary permit', which is issued on the condition that the holder is not or does not become a 'prohibited or an undesirable person'. The Department of Home Affairs may attach reasonable individual terms and conditions to a temporary residence, for good cause as proscribed in the Act. As discussed above, it appears that the minister and Department of Home Affairs have the discretion to ensure that most foreign trafficking victims are not declared prohibited or undesirable persons.

A visitor's permit may be issued to a foreigner who holds a visa or is a citizen of a prescribed state and provides financial and other proscribed guarantees, provided that the permit does not exceed three months (which can be renewed on application). The holder of a visitor's permit may not conduct 'work' in the country, as defined in the Act (s. 11(1)). A foreigner may change his or her status while in the country, subject to the Act's terms (s. 6).

Work permits are limited to quota work permits which are available to foreigners working within the annually prescribed categories of jobs, and a general work permit which is available where, among other things, the prospective employers shows that they have been able to employ a person with the foreigners' qualifications after a diligent search (s. 19). It appears, therefore, that foreign trafficking victims do not qualify for work permits unless perhaps they qualify on other grounds, such as being a spouse of a South African (s. 26(b)), or in the unlikely event that quota permits include a category for trafficking victims, which would appear to run contrary to the focus of section 19 on categories of employment.

With regard to the adjudication of claims and review procedures, it appears that there are substantial grounds for delaying a deportation. For example, for due process reasons, before issuing an adverse decision the Department of Home Affairs must provide 10 days' notice to a person of its intent to issue the decision and the reasons for it. Within 20 calendar days, the aggrieved person may appeal

it to the director-general, who has 10 days to make a decision with an additional 20-day period to appeal to the minister. The minister may extend the deadline and may also require the aggrieved person to post a bond to defray deportation costs (s. 8).

VICTIM AND WITNESS ASSISTANCE

The Witness Protection Act, No. 112 of 1998, which creates the Office for the Protection of Witnesses, provides a process for the protection and placement of witnesses and expands witness services in courts. The Justice minister appoints a director and has the discretion to establish and abolish Office branches in any defined area to administer the Act, after consulting the minister of Safety and Security (ss. 2-3). Witness protection officers head the branches and security officers report to them (ss. 5-6).

Under this Act 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 anyone else because he or she is a witness may apply for protection with any appropriate law enforcement officer, public prosecutor or Office member (s. 7). If a witness is unable to report or apply for protection then any 'interested person' or the investigating officer may do so (s. 7(2)). The officer may provide temporary protection to an applicant pending a final decision (s. 8). A witness protection officer must make a recommendation to the director within 14 days of the application, along with recommendations regarding the nature of protection, the expected duration and particular circumstances that should be taken into account (s. 9).

The director must, before placing any witness or related person under protection, enter into a written agreement with the person to be protected, specifying the director's and that person's obligations (s. 11). If a director denies protection, the applicant may apply to the minister for review (s. 14).

An application may be made by or on behalf of a child without the consent of the parent or guardian (s. 7(2)(b)) provided that the child will testify in proceedings where his or her parent or guardian is a suspect or cannot be identified or found, the child has no parent or guardian, or the parent or guardian unreasonably withholds or is unable to give consent (s. 12(1)). If the director decides to protect a child, he or she must submit a report with the stated reasons to the judge president of the High Court within seven days (s. 12(2)). A judge may suspend the right of access to a child if appropriate for protecting the child's identity or achieving the Act's objectives (s. 16).

The minister has wide discretion in issuing regulations regarding the type and manner of protections (s. 23) and is authorised to enter into agreements with any international body, institution, organisation or foreign country to provide witnesses with protection (s. 21).

The Criminal Procedure Act, No. 51 of 1977, as amended, details circumstances in which criminal proceedings shall not take place in open court. Section 153 provides that if it appears to any court that it would be

in the interests of the security of the State or of good order or of public morals or the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

In criminal proceedings, if it appears that there is a likelihood that harm might result to any person other than the accused if he or she testifies, then the court may direct that the person shall testify behind closed doors with only authorised persons present and/or that the witness's identity be protected for some period.

Section 153 further provides that where the accused is charged with committing an 'indecent act' towards a person or any other offence in which using fear to gain advantage is an element, then the court may order the accused to not be present during that person's testimony. As courts have found, the interests of justice rather than the protection of witnesses is the primary objective of this provision and that in cases where witnesses gave testimony *in camera*, it may be necessary in the interest of justice to disclose to the public the substance of the testimony.⁶⁹

POCA also authorises courts to hold closed proceedings for POCA prosecutions where it is in the interest of justice to do so or there is a likelihood that harm may come to any person as a result of the proceedings being open (s. 74).

South Africa also has the Service Charter for Victims of Crime in South Africa, which was developed by the Gender Directorate in the Department of Justice and Constitutional Development. The charter is designed to comply with the constitution's protection of basic rights and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985). It provides that the victim of a crime has the rights to:

- be treated with fairness and with respect for dignity and privacy;
- offer information during the investigation and trial;
- receive information on his or her rights and the status of the case;
- protection from intimidation, harassment, fear, tampering, bribery, corruption and abuse;
- assistance and, where relevant, access to available social, health and counselling services as well as legal assistance, and with special measures in sexual offence cases;
- compensation for loss or damage to property as a result of crime; and
- restitution where he or she has been unlawfully dispossessed of goods or property or where they have been damaged.

Although the charter makes no specific reference to victims of trafficking (particularly those who are not South African) these rights are very relevant to victim and witness protections addressed in the Organized Crime Convention and the UN Trafficking Protocol.

A number of NGOs in South Africa, including Molo Songololo, have been assessing human trafficking in the region and have provided some assistance to trafficking victims.

CHAPTER 7

Key Laws and Measures – Zambia

Many of the sections and provisions in the *Zambian Penal Code* are largely identical to those found in the *Malawi Penal Code*, because both legal systems are rooted in their British colonial past. However, over the years many amendments have been made in their penal codes, with some amendments making very limited specific changes. Thus the codes of each country must be read very closely without assuming that corresponding provisions have remained identical in all respects. Like Malawi, much of the *Zambian Penal Code* dates back to 1930, prior to Zambia's independence (formerly Northern Rhodesia) in 1964.

TRAFFICKING IN PERSONS

Zambian law provides no general prohibition against human trafficking nor does it provide a definition of human trafficking. However, the *Zambian constitution* provides a specific, though very brief, prohibition against trafficking in children. In section 24(3) it provides that a 'young person shall not be the subject of traffic in any form'. It defines a 'young person' as under the age of 15 but it does not provide a definition of 'traffic' nor apparently does any *Zambian law*. However, as discussed below, a recently adopted amendment on child labour explicitly prohibits 'trafficking' in children. The closest provision in the *Penal Code* addresses 'child stealing', which provides that any person who 'forcibly or fraudulently takes or entices away, or detains' a child under the age of 16 from a parent or guardian, or knowingly receives or harbours such a child, is guilty of a felony and is liable to 14 years' imprisonment (s. 171).

Zambia has a newly formed Task Force on Human Trafficking, chaired by the Ministry of Home Affairs with members from the Ministry of Home Affairs' Department of Immigration, the Drug Enforcement Commission, the Police Service's Victim Support Unit, the Ministry of Information and Broadcasting, and the Ministry of Youth and Sport. It appears that Zambia's task force, which has been meeting without donor support, is the most active one in the region. It is in the process of finalising its terms of reference and a plan of action. Members of the task force have expressed their alarm at trafficking cases in Zambia about which they have been collecting information.

PROTECTION OF BASIC RIGHTS AND PREVENTION OF THE EXPLOITATION OF LABOUR AND CHILDREN

In Zambia, the constitution and other legal instruments provide protection for children, with differing ages for the definitions of a 'child' and 'young person'.⁷⁰ As stated above, the constitution prohibits trafficking in young persons (under age 15), which was only recently incorporated into a key employment law. The constitution also prohibits forced labour. A Violence against Women Bill is also currently under consideration in Zambia.

On 8 September 2004 the *Zambian National Assembly* adopted the *Employment of Young Persons and Children's Act Amendment*, which explicitly adopts the ILO's Worst Forms of Child Labour Convention (C. 182) and the Minimum Age Convention (C. 138).⁷¹ Specifically, it prohibits employing any person under the age of 18 in any of the worst forms of labour, which include:

- all forms of slavery and all practices similar to slavery, such as the sale and trafficking of children and young persons, debt bondage, serfdom and forced and compulsory labour;
- the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- the use, procuring or offering of a child for illicit activities (e.g. drug trade); and
- work that by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children or young persons.

The penalty for contravening this provision is a fine of not less than 200,000 penalty units⁷² or exceeding 1,000,000 penalty units, or an imprisonment for a term of not less than five years but not exceeding 25 years, or both.

The amendment also prohibits the employment of children, except that a child aged between 13 and 15 may lawfully engage in 'light work' that does not harm his or her health or interfere with that child's education. The penalty for contravening this provision is a fine not exceeding 200,000 penalty units or imprisonment for a term not exceeding three years, or both.

Since the constitution and the amendment do not provide a definition of trafficking, a prosecutor could argue in a legal case that the court should adopt the definition set forth in the *UN Trafficking Protocol* because of Zambia's accession to it. This argument would likely be more persuasive in a case involving the amendment, which was adopted after the accession.

The *Juveniles Act* (1956, last amended in 1994) may be relevant to some types of trafficking cases involving children, with an emphasis on those from Zambia. Under that Act a police officer or juveniles' inspector may bring before a juvenile court any juvenile in need of care (ss. 10(1) and 9)). In such cases the court may order the parents or guardians to: provide proper care; commit the juvenile to the care of any 'fit person, whether a relative or not, who is willing to undertake the care of him'; place the juvenile under

the supervision of a probation officer; or order him or her to be sent to an approved school (s. 10(2)).

The Juveniles Act also has provisions on offences against juveniles. For example, it criminalises cruelty to a juvenile committed by a person who has 'the custody, charge or care' of the juvenile, which may include assault, ill-treatment, neglect, abandonment or exposes him or her to any cruel treatment, with punishment including a fine not exceeding 6,000 penalty units or two years' imprisonment or both (s. 46). Perhaps this provision is applicable where a parent agrees to turn a child over to a trafficker, in which case both the parent and trafficker would be guilty of this offence. Additional offences include causing or encouraging the prostitution of a girl under 16 years old (s. 47), allowing persons under the age of 16 into brothels (s. 48) and causing or allowing children to be used for begging (s. 50).

OFFENCES UNDER CRIMINAL LAW

It is useful to first review common offences that may form part of activities committed to further both organised crime and human trafficking. Since Zambia does not have a law prohibiting either participation in an organised crime group or human trafficking in general, the provisions reviewed below may be the only ones currently available to fight those crimes. Penal Code provisions on conspiracies are discussed below in the section on organised crime. The Penal Code provides that the general punishment for a misdemeanour is a term not exceeding two years, with a fine or both, unless another punishment is specified in the provision (s. 38).

Trafficking in body parts

Zambian law does not criminalise trafficking in body parts. The police have reported that at least one organ possession charge in Zambia was dismissed for lack of an appropriate charge. The closest provisions appear to be in Chapter XIV of the Penal Code on Offences Relating to Religion. Section 130 provides that a person who, with the knowledge that any person's religious feelings are likely to be wounded or that any religion is likely to be insulted, trespasses in any 'place of sepulture' or place serving as a 'depository for the remains of the dead, *or offers any indignity to any human corpse*' is guilty of a misdemeanour (emphasis added). Similarly, the Penal Code provides that the hindering of a burial of a dead body or the disinterring, dissecting or 'harming' of a dead body without lawful authority constitutes a misdemeanour (s. 131). These provisions are identical to those in the Malawi Criminal Code.

According to one report, a Zambian magistrate in 1996 convicted a 70-year-old man for professing knowledge of witchcraft and tampering with a dead body, with two years' imprisonment for each offence. A 60-year-old woman was also convicted for eating human flesh that the man gave to her on condition that she kills somebody else.⁷³

A potential charge could be theft (ss. 264-265 and 272) and perhaps, if the facts permit, the offence of trespassing on a burial place. However, none of these Criminal Code provisions appear to address a situation in which a person is found with human body parts but no evidence is found concerning how the body parts were obtained. Similarly, the facts may not necessarily support a murder charge.

Prostitution

In Chapter XV, the Penal Code criminalises many offences related to prostitution including procuring (or soliciting), running a brothel and living on the proceeds of prostitution, although it does not directly criminalise prostitution itself. The provisions contain some archaic anomalies. Section 140 criminalises procuring and attempting to procure any female under 21 to have carnal knowledge with anyone in Zambia or elsewhere. It also criminalises procuring and attempting to procure any female from anywhere for prostitution anywhere, whether in or outside of Zambia. Proof of violation requires more than one witness's testimony and a violation is only a misdemeanour. Similarly, a person's use of threats or intimidation or giving drugs to stupefy or overpower a female to procure her or attempt to procure her to have any unlawful carnal knowledge either in Zambia or elsewhere is unlawful (s. 141). Also it is unlawful to use false pretences or false representations to procure or attempt to procure a woman to have any unlawful carnal connection. A violation is only a misdemeanour.

In contrast, section 158 criminalises a male procuring or even committing 'any act of gross indecency' with another male as a felony liable to five years' imprisonment. In short it appears that consensual sex between men is a felony while threatening, intimidating and drugging a woman into sex with another person is only a misdemeanour.

Various aspects of running a brothel violate the Penal Code. As a general matter, running a brothel is a misdemeanour (s. 149). However, a person running a brothel that permits the defilement ('carnal knowledge') of girls under the age of 12 is guilty of a felony and is liable to five years' imprisonment (s. 142). For girls aged 13 to 15, the offence is a misdemeanour (s. 143). Yet conspiracy to defile any female is a felony liable to three years' imprisonment (s. 150).

Furthermore, any person who detains any female against her will in any premises operating as a brothel is guilty of a misdemeanour (s. 144). It is 'constructive detention', and therefore is unlawful, when the person withholds the female's clothing in such an establishment. However, as may happen in a trafficking case, constructive detention does not include withholding an identity or travel document, such as a passport.

The work of pimps and 'queen mothers' is also largely prohibited. A male who knowingly lives on the proceeds of prostitution, including situations in which he aids, abets or compels a female's prostitution, is guilty of a misdemeanour (s. 146). Similarly a woman who knowingly lives on the earnings of the prostitution of another for the purpose of gain through aiding, abetting or compelling the prostitution is guilty of a misdemeanour (s. 147).

Assault and murder

The Penal Code's Chapter XXIV criminalises common assault (s. 247) and assault with bodily harm (s. 248) as misdemeanours. A person who causes grievous harm to another is guilty of a felony and is liable to seven years' imprisonment (s. 229). The Penal Code also criminalises stupefying with the intent to commit a felony or misdemeanour (s. 224), which could include the drugging of a trafficking victim. In chapters XIX and XXI it also criminalises murder which may be punishable with death (ss. 200-201), and manslaughter which may be punishable with a life sentence (ss. 199-202). It further criminalises attempt of and conspiracy for murder (s. 216-217) and accessory after the fact to murder (s. 217).

Kidnapping and abduction

In Chapter XXV on Offences against Liberty, the Penal Code has a range of provisions that criminalise kidnapping, abduction, slavery and related offences. Section 251 defines kidnapping as when a person 'conveys any person beyond the limits of Zambia without the consent of that person, or of some person legally authorised to consent on behalf of that person'. However, 'kidnapping' also includes a situation in which someone takes or entices any 'minor' (under age 14 for males or under age 16 for females) or a person of 'unsound mind' from a lawful guardian without the guardian's permission (s. 252). The basic penalty for kidnapping is seven years' imprisonment (s. 254) but 10 years if the purpose was to murder the person (s. 255) or to subject the person to grievous harm, slavery or 'unnatural lust' (s. 257); and also seven years if done for the purpose of secret confinement (s. 256).

As in Malawi, the definition of abduction is very broad but, unlike kidnapping, must be linked to a specified purpose to violate the law. The Penal Code defines abduction as when someone 'by force compels, or by any deceitful means induces, any person to go from any place' (s. 253). Thus a national border need not be crossed and the use of deceit is sufficient. As with the offence of kidnapping, the penalty is 10 years for abduction with the purpose of murder (s. 255), 10 years for subjecting the person to grievous harm, slavery or 'unnatural lust' (s. 257), and seven years if done for the purpose of secret confinement (s. 256).

Any person who wrongfully conceals or confines another person, knowing that he or she has been kidnapped or abducted, is guilty of a felony and shall receive the same punishment to which the kidnapper or abductor is subject (s. 258).

Rape, indecent assault and defilement

In Chapter XV on Offences against Morality, the Penal Code addresses rape, defilement and related abductions. The code defines rape as when a person has:

Unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by

means of false representations as to the nature of the act, or, in the case of a married woman, by personating her husband (s. 132).

Thus in addition to force, a wide range of means can be used in rape. Notably, at least in theory, a man or woman can be guilty of rape but this provision only addresses rape of a female. The punishment for rape and attempted rape is life imprisonment (ss. 132-134).

This chapter also criminalises an 'abduction' in which a person takes away or detains a woman against her will with the intent to marry or 'carnally know' her, or to cause her to be married or carnally known by any person, punishable with seven years' imprisonment (s. 135). A person who abducts an unmarried girl under the age of 16 is guilty of a misdemeanour (s. 136).

Under section 137, a person who unlawfully or indecently assaults any female is guilty of a felony and is liable to 14 years' imprisonment, with the proviso that with regard to a girl under the age of 12, it is no defence that she consented unless the charged person had reasonable cause to believe and did believe that she was 12 years or older.

The defilement of girls is criminalised in section 138, which provides that any person who unlawfully and carnally knows or attempts to know any girl under the age of 16 is guilty of a felony and liable to 14 years' imprisonment, unless the charged person had reasonable cause to believe and did believe that she was 16 years or older. The penalty for violating this provision is life imprisonment.

The only provision that specifically appears to criminalise the rape of males is section 157, which provides that any person who indecently assaults a boy under the age of 14 is guilty of a felony and is liable to seven years' imprisonment.

ORGANISED CRIME AND RELATED OFFENCES

Participation in an organised crime group

Zambian law does not criminalise participation in an 'organised crime group' as required by the UN Convention against Transnational Organized Crime. As a result there are no specific penalties or sanctions for such conduct. The closest appear to be the Penal Code's broad provisions criminalising conspiracy to commit a felony or misdemeanour and accessories after the fact.

Chapter XLIII of the Penal Code addresses conspiracies. Section 394 provides that:

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Zambia would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony.

Thus, for example, if a person conspires in South Africa to ‘abduct’ a child in Malawi for prostitution or ‘defilement’ in Zambia, that person is guilty of a felony in Zambia. Similarly it appears that if a person conspires in Zambia to abduct a child in Malawi for forced labour by another person in Mozambique, he or she is also guilty of violating this provision.

Section 394 further provides that a person violating this provision is liable to seven years’ imprisonment if no other punishment is provided, or to a lesser punishment if the greatest punishment to which that person is convicted is imprisonment for less than seven years.

The Penal Code also criminalises conspiracy to commit a misdemeanour ‘or to do any act in any part of the world which if done in Zambia would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done’, which is also punishable as a misdemeanour (s. 395).

The code further contains a provision on ‘other conspiracies’, which includes a conspiracy to:

- prevent or defeat the execution or enforcement of any Act, statute or order;
- cause any injury to a person;
- effect any unlawful purpose; or
- effect any lawful purpose by any unlawful means.

This catchall provision could be useful in trafficking cases. For example, it could be used against a person for conspiring to: use a child in a prohibited worst form of labour; forge a passport used to move a trafficking victim; or move a woman for the purpose of prostitution or ‘defilement’.

In Chapter XLIV on Accessories After the Fact, the Penal Code provides that any person who receives or assists another who is to his or her knowledge guilty of an offence in order to enable that person to escape punishment, is guilty of a felony when covering up a felony (s. 398) and guilty of a misdemeanour when covering up a misdemeanour (s. 399).

The Money Laundering Act

The Prohibition and Prevention of Money Laundering Act of 2001 (the Money Laundering Act or MLA) creates new bodies to help prevent and prosecute money laundering, criminalises money laundering offences, and authorises the seizure and forfeiture of assets gained through them.⁷⁴ It creates the Anti-Money Laundering Authority, composed of the attorney general (who is chair), the inspector general of the police, the commissioner (appointed under the Narcotic Drugs and Psychotropic Substances Act), the director general of the Anti-Corruption Commission, the governor of the Bank of Zambia, the commissioner general of the Zambia Revenue Authority and two other unnamed persons. The Anti-Money Laundering Authority is charged with providing policy direction and advice on measures to prevent and detect money laundering. The MLA

also creates an Investigations Unit under the commissioner’s direction which investigates and prosecutes, liaises with other law enforcement agencies and supervises the reporting requirements.

The MLA defines money laundering as the act of:

- engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime;⁷⁵
- receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realised directly or indirectly from illegal activity; or
- retaining or acquiring of property knowing that the property is derived or realised, directly or indirectly, from illegal activity.

A person guilty of money laundering is liable to a fine not exceeding 170,000 penalty units or a term of imprisonment not exceeding 10 years, or both (s. 7). If a ‘body of persons’, whether corporate or unincorporated, commits an offence it is liable on conviction to a fine not exceeding 400,000 penalty units. Moreover, every person who acted or purported to act in an official capacity for the body and was involved in the commission of the offence is also guilty and subject to the fine and prison sentence for a person who commits money laundering (s. 8).

The MLA also criminalises attempting, aiding, abetting counselling or procuring the commission of money laundering subject to a fine not exceeding 139,000 penalty units or imprisonment not exceeding 10 years, or both (s. 9(1)). The same penalty is available for a person guilty of conspiring to launder money (s. 9(2)).

Actively hiding or concealing evidence of money laundering is also an offence. The MLA provides that any person ‘who knows or suspects that an investigation has been, is being or is about to be conducted, falsifies, conceals, destroys, or otherwise disposes of, causes or permits the falsification of material which is or is likely to be relevant to the investigation’ is guilty of an offence subject to the same penalty as for attempts (s. 10). Finally, the MLA criminalises the divulging of information about a money laundering investigation (s. 11).

As a prevention measure, the MLA provides a Supervisory Authority. It includes a wide range of institutions such as the Bank of Zambia, the Registrar of Banks and Financial Institutions, the Securities and Exchange commissioner and the casino licensing authority, which must report potential money laundering cases to the Investigations Unit (s. 12). Institutions regulated by a supervisory authority are required to:

- keep identification and business transaction records for 10 years after the transactions occurred;
- where a transaction gives the institution ‘reasonable grounds to believe’ that it involves money laundering, report the involved persons’ identities and details of the transaction to the Investigations Unit; and

- permit any authorised officer (who is given the power of arrest, entry, search and seizure in ss. 22-23) with a warrant to inspect and copy any relevant records.

If a regulated institution contravenes any of these provisions or obstructs an investigation, it is guilty of an offence and liable to a fine not exceeding 200,000 penalty units (s. 13 and ss. 25-27).

The MLA also provides that an authorised officer shall seize property that he or she has reasonable grounds to believe is derived or acquired from money laundering (ss. 15-16). It further provides that such seized property, when in the possession of a person convicted of money laundering and where it has been shown to have derived or acquired from the proceeds of the crime shall be liable to forfeiture by a court (s. 17). An offence under the MLA is an extraditable offence under the Extradition Act (s. 25). Finally, the MLA has a jurisdictional clause providing that it applies to acts committed by Zambians anywhere (s. 29).

In addition, the Penal Code has general provisions on the receipt of stolen goods (ss. 318-320). For example, a person who knows or has reason to believe that goods were stolen outside Zambia is guilty of an offence and liable to seven years' imprisonment (s. 320).

The Financial and Banking Services Act regulates financial transactions and reporting requirements for financial institutions in Zambia.

Corruption

Zambia adopted the Anti-Corruption Commission Act (ACCA) in 1996 (replacing the 1980 Corrupt Practices Act), which accordingly established the Anti-Corruption Commission and charged it with the duty to:

- prevent corruption in public and private bodies by:
 - examining them to discover corrupt practices and helping to revise work methods and procedures to prevent it;
 - advising them on ways and means of fighting corruption; and
 - disseminating information on the evil and dangerous effects of corruption on society and enlist public support in the fight;
- receive and investigate complaints of corruption and, subject to the directions of the Director of Public Prosecutions, prosecute ACCA offences and other related offences; and
- investigate any public officer suspected of corruption.

To promote the Anti-Corruption Commission's autonomy, the ACCA provides that it shall not, in the performance of its duties, be subject to the direction or control of any person or authority (s. 5). The commission is composed of a chair and four other commissioners appointed for three-year terms (ss. 7-8). A director general, appointed by the president and ratified by the National Assembly, is responsible for the Anti-Corruption Commission's management

and administration (ss. 16-17). The commission may appoint a deputy director general and investigating officers and staff (ss. 18-19).

The ACCA provides a series of rules to promote confidentiality and prohibit the disclosure of sensitive information to 'unauthorised persons'. The commission's written permission is required to disclose such information (s. 14). With regard to offences, the ACCA broadly provides that any public officer who:

Corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for himself or for any person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, shall be guilty of an offence (s. 29(1)).

The ACCA has a similarly broad provision criminalising a person's conduct in corruptly promising, offering and/or giving any 'gratification' to any public officer as an inducement or reward for taking or not taking any action (s. 29(2)). This prohibition also applies to legal organisations/persons (s. 31) and agents (s. 32). A public official who maintains an unexplainably high standard of living may also be guilty of an offence (s. 37). Those who attempt to commit, aid, abet or counsel, or conspire with another to commit an offence are also guilty of an offence (s. 39). The general penalty for an offence is imprisonment for a term not exceeding 12 years and forfeiture to the state of any related pecuniary gain (s. 41).⁷⁶

Obstruction of justice

In Chapter XI on Offences Relating to the Administration of Justice, the Penal Code criminalises perjury (s. 104), suborning perjury (s. 104(7)), deceiving witnesses (s. 110) and destroying evidence (s. 111). Section 112 further criminalises conspiracy to defeat justice and interfere with witnesses, providing that any person who conspires with another to do anything to obstruct, prevent or defeat the course of justice or interferes with the execution of any legal process is guilty of a felony. It further criminalises conduct committed:

In order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so.

IMMIGRATION MATTERS

The Immigration and Deportation Act (1994) and its 1997 Amendment (IDA) regulate the entry of immigrants into Zambia and the granting and use of

immigrant permits, and defines the roles and authority of the chief immigration officer and other immigration officers.

Liability of commercial carriers and border checks

With regard to the liability of commercial carriers, the IDA does not directly require commercial carriers to check the travel documents of each passenger. However, it provides that carriers are responsible for removing from Zambia any prohibited immigrants travelling on their transport, and if they fail to do so they are liable to the government for any costs incurred in removing the prohibited immigrants (s. 8). With regard to the immigration officials' authority, they are empowered to stop and search any vehicle entering Zambia and require the carrier to furnish a list of passengers (s. 7). An immigration assistant may without warrant arrest any person whom he or she reasonably suspects to be a prohibited immigrant (s. 6).

Prohibited immigrants

An immigration officer is required to exclude any 'prohibited immigrant' as defined in the IDA's Second Schedule. The schedule includes several classes of prohibited immigrants, including:

- prostitutes and persons who have lived on the earnings of prostitution or have procured prostitutes (Class B);
- any person previously deported or barred from entry (Class C);
- any person whose permit has been revoked or expired (Class D);
- any person who is likely to become a charge of the government, has contravened any part of the IDA or has made any false representation to or concealed any relevant information from an immigration officer (Class E);
- any person apparently 16 years old or older who does not have a valid passport (Class F); and
- any person who, prior to entering Zambia, has been sentenced to a term of imprisonment after conviction in another country and who in the opinion of the chief immigration officer is not 'of good character' (Class H).

Section 22(2) also grants the minister broad authority to include in the category of prohibited immigrants 'any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest'.

Class H immigrants may include persons convicted in other countries of trafficking or organised crime-related offences. Similarly Class B immigrants could include persons trafficking in women for prostitution. Also section 22(2)'s broad provision may be used to exclude potential traffickers, depending on its application and mindful of potential constitutional limitations put on it by courts. In contrast, the definition of prohibited immigrants in Class E, depending on its application, could include summary exclusion or deportation of

trafficking victims, which may be inconsistent with the obligations of the UN Trafficking Protocol.

Forging documents, assisting unlawful entry, forfeit and seizure

As per the 1997 Amendment in section 22, the IDA provides that any person who assists a person in unlawfully entering Zambia is guilty of an offence if he or she:

- harbours the prohibited immigrant;
- makes a 'false statement';
- forges or unlawfully alters any permit, travel document or certificate;
- uses any permit or certificate knowing it to be forged; or
- utters or uses any permit or travel document or certificate that he or she is not entitled to use.

It further adds that an immigration officer who knowingly facilitates the unlawful entry into or remaining in Zambia of a person is guilty of an offence.

Regarding forfeiture, the Amendment further provides that where a person is convicted of entering unlawfully or knowingly helping someone else to enter unlawfully, his or her vehicle used in the offence may be seized and subject to forfeiture (s. 30A).

Entry and work permits

As a general matter, the Home Affairs minister and the chief immigration officer have relatively wide latitude in granting conditional temporary permits. For example, section 14, which regulates the issuance of entry permits, provides that the chief immigration officer 'shall issue an entry permit to any person in respect of whom the Minister directs that such permit be issued'.

An immigration officer may issue a temporary permit to a prohibited immigrant and may require a deposit to secure compliance with the permit's conditions. Similarly, an immigration officer shall issue a temporary permit to a person when directed to do so by the minister (s. 17). A temporary permit is required to specify any prescribed conditions and the period of its validity (not longer than 30 days, unless the chief immigration officer approves, and then not in excess of two years) (s. 17). The immigration authorities currently charge a substantial fee for the issuance of a temporary permit; however, the Immigration and Deportation Regulations provide that the minister 'may, in respect of any person or class of persons, waive or reduce any fee payable under this regulation'. In other words it appears that the minister has the authority to waive the temporary permit fee for trafficking victims.

However, the Ministry of Home Affairs and immigration department have far less latitude regarding work permits. Section 18 provides that the chief immigration officer 'shall issue an employment permit to any person outside Zambia who he is satisfied is not a prohibited immigrant; and belongs to

Class A of the First Schedule', which according to the IDA includes: qualified trained persons who seek work for which there is not already a sufficient number of persons engaged in, and which is likely to benefit, Zambians; and any person with his or her own financial resources who will engage in work likely beneficial to Zambians; and identified relatives of Zambians. In short, it appears that immigration officials most likely do not have the authority to issue work permits to trafficking victims. It is unclear whether they would have more latitude regarding trafficking victims who enter the country with lawful, valid documents.

VICTIM AND WITNESSES ASSISTANCE

The Community Services Division of the Zambia Police Services operates the Victim Support Unit (VSU) primarily to provide counselling and support to certain types of crime victims. It has identified its core areas as child abuse, human trafficking, spouse abuse, victimisation of elders, rape and sexual harassment, and property grabbing (family of a deceased person grabbing property from the spouse). Its strongest focus is on providing assistance to children and women victims. The VSU has officers in provincial and field stations as well as in police headquarters in Lusaka. The VSU distributes pamphlets to the public to explain the services its officers provide. Zambia has no law on witness protection; a police standing order is reported to provide some protection.

An alliance of NGOs has worked with Zambian authorities to provide safe houses for trafficking victims. At times the police, immigration officials or social welfare officers have taken child trafficking victims and turned them over to the Young Women's Christian Association (YWCA), which maintains a hidden transitional home. In some cases the IOM pays a stipend to the YWCA for room and board for the victims.

The ILO's IPEC has been implementing the Child Trafficking Programme, which has been funding the ACP. The project has been providing support to child trafficking victims by finding them room and board. It has also provided sensitisation training to some members of parliament, and has recently completed a rapid assessment of a substantial number of identifiable trafficking cases in Zambia. Placement of children has at times been dangerous due to death threats.

The approach used with trafficking victims in Zambia may serve as a useful model for other SADC countries; however, it is endangered even in Zambia once IPEC's funding for its programme ends. And even under current circumstances, the resources, including safe houses, are inadequate to meet the demand.

CHAPTER 8

Findings and Recommendations

FINDINGS

The findings pertain to a broad set of facts about human trafficking as well as legislative, regulatory, enforcement and protection matters, with the caveat that the assessment does not include a quantitative evaluation of trafficking cases.

The findings are as follows:

- A significant amount of human trafficking is occurring in SADC countries but it has only been partly assessed, understood and evaluated. Data has largely been gathered through the collection of anecdotal cases but not through broad and systematic data collection involving law enforcement and the judiciary.
- In all four assessment countries, a large gap exists between the observance of human trafficking in the field and the conviction rate of traffickers. Aid organisations and the media report substantial numbers of cases that do or may involve human trafficking, such as those involving the unexplained abduction of children. However, (interviewed) police enforcement officials frequently assert that they receive few or no allegations of trafficking or are given insufficient or inaccurate information on which to base arrests. Thus, in some cases prosecutors may have insufficient evidence to pursue convictions. In some cases law enforcement officials have said that they have insufficient resources or an insufficient mandate to pursue trafficking cases.
- None of the assessment countries have comprehensive laws criminalising trafficking in persons. Zambia partly addresses trafficking through its constitutional prohibition of trafficking in children and its 2004 Employment of Young Persons and Children's Act Amendment, which prohibits the worst forms of child labour and prohibits trafficking of children and young persons. However, these provisions are very limited in scope and do not address many of the Convention's and Protocol's key aspects. Moreover, the Zambian government does not provide sufficient resources and training to enforce this law. In South Africa, the law reform process has generated proposals and draft laws to prohibit human trafficking, though the time frame for passage of most of them remains uncertain.
- Trafficking in body parts and child abductions are surprisingly common in the region; however, the domestic responses are very weak and cooperation

in cross-border investigations and prosecutions, particularly in organ removal cases, is nearly non-existent. The most gruesome reported cases include the mutilation and killing of children for their body parts. Police have on occasion detained villagers who have sought to sell children or body parts, but apparently they have never traced the trade across a border to the persons ultimately receiving the child or body parts, nor apparently have they broken any cross-border organ trafficking network.

- No laws effectively address trafficking in body parts. The strongest one is a Portuguese law that appears to be incorporated into Mozambican law through the Portuguese Penal Code, to the extent legally permissible.
- Other international instruments – in addition to the UN Convention against Organized Crime and its supplementing protocol against trafficking in persons – and their related domestic laws may help in the fight against human trafficking or provide additional support to new laws and measures to fight trafficking. The instruments include in part the UN Convention on the Rights of the Child, and the ILO’s conventions on Forced Labour (No. 29) and the Worst Forms of Child Labour (No. 182).
- In general, laws exist in the four countries that criminalise or otherwise prohibit offences commonly found in human trafficking such as abduction, defilement, child labour, forced labour and forging documents, among others. Some penal code provisions, particularly in Zambia and Malawi, are broad and ambiguous in scope though narrow in enforcement. In general, most prosecutors are conservative in their approaches to law enforcement and do not aggressively seek to punish human trafficking with laws that have not been previously used for that purpose. Zambian police and prosecutors at times have used the most creative and aggressive approaches.
- South African laws are more precise yet still quite broad in scope, but have not been commonly used to investigate, apprehend and convict human traffickers, except most notably in a few high-profile prostitution cases.
- South Africa is the only assessment country with a comprehensive law on organised crime and an extensive law enforcement and prosecution system to fight it.
- Mozambique, South Africa and Zambia have laws criminalising money laundering. Malawi has a bill on money laundering pending. South Africa is the only country with an extensive law enforcement and prosecution system to fight money laundering.
- Mozambique law enforcement officials and courts still rely on the old Portuguese Penal Code, which in some key ways is out of date or not culturally appropriate or realistic. Difficult issues exist concerning whether a law on human trafficking may or should be adopted prior to broad reform of the Penal Code.
- As a general matter, when traffickers are apprehended, criminal convictions are rare. It is more common that the traffickers are simply deported, often

without officials from the deporting country coordinating their return with officials in the receiving country.

- Enforcement of the relevant laws and measures is hampered by a lack of training, resources and personnel, as well as by corruption:
 - Regarding money laundering, particularly in Mozambique, Zambia and Malawi, the primary problem appears to be a lack of capacity to provide sophisticated financial oversight, skilled investigations and regional coordination necessary for enforcement.
 - Regarding immigration, the primary problem appears to be a lack of specificity and precision in laws, rules and regulations. Perhaps partly because of this lack of clarity, there are more opportunities for and examples of corruption.
 - Regarding the police, the primary problems are a lack of belief that human trafficking is a serious problem, a lack of training in how to address trafficking, a lack of adequate resources, and corruption.
- The coordination of efforts to fight human trafficking is largely ad hoc, inconsistent and generally reactive to specific problem cases.
- Aid organisations and a few government offices have been active in the four countries under review, providing assistance to women and children in need, including a limited number of trafficking victims. In practice, however, the assistance provided has been very limited in terms of numbers of victims, extent of assistance and geographical coverage.
- As Mozambique has no witness or victim protection laws, regulations, policies or practices, its law enforcement officials’ ability to investigate crimes and make arrests is severely hampered. The public generally does not have faith in the police. Also, Mozambique has no effective system to obtain evidence and testimony from child victims that leads to the perpetrators’ convictions. Malawi’s approach to witness and victim protection and assistance is only marginally better. Zambia has limited systems for victim and witness protection and support that have shown some successes. South Africa has by far the most developed laws and procedures related to witness and victim protection, though there have been few trafficking cases to test their use.

RECOMMENDATIONS

Although the extent of human trafficking will continue to be debated, it is clear that a significant amount of human trafficking is occurring in the SADC region, that the offences are serious enough to be criminalised, and that the offences are important enough to warrant clear and comprehensive legislation even if there may be some overlap with existing legislation.

It is important to stress that the different requirements and recommendations in the UN Organized Crime Convention and its Human Trafficking Protocol can be implemented through laws, regulations, policies and practices. In

developing a plan to fully implement them, it is important to take a practical approach: if it appears that the legislative process will be long and delayed, then consideration should be given to making changes through statutory instruments or policies in the meantime. In some cases (e.g. regarding offences that are committed in the course of the trafficking process) it may not be necessary to change the law, but rather to apply existing legislation to prosecute trafficking cases and trafficking-related crimes.

For example, on immigration matters, the minister (of home affairs) may have the authority to approve regulations setting forth the relevant criteria, standards and rules that, consistent with the country's laws, expressly exclude traffickers and allow the granting of temporary residency permits to victims. The minister may also have the authority to waive fees or change some conditions for permits. Similarly, ministries of justice, courts and the police may create regulations, procedures, standing orders and practices that provide greater protection to witnesses and facilitate the trafficking victims' giving of testimony under protected circumstances. However, it is clear that some specific changes should be made in the laws to enable some necessary activities.

It would be useful for legislative drafters to refer to the summary of the UN Organized Crime Convention and its Human Trafficking Protocol in Chapter 2 of this assessment, the UNODC's 'Anti-Trafficking Assessment Tool', the 'Legislative Guide to the UN Convention Against Transnational Organized Crime and the Protocols Thereto', and the official 'Interpretive Notes to the Convention and Protocols'.

The following recommendations apply to all the assessment countries:

- Each government should promote cooperation between its ministries and other relevant stakeholders, including law enforcement and the judiciary, to investigate trafficking cases and apply the existing laws discussed in the assessment to prosecute and convict persons involved in human trafficking. Although the existing laws may not be sufficient to fully address all aspects of related offences with appropriately severe penalties, each assessment country has laws that can and should be applied more aggressively in trafficking cases, until the more specific legislation is adopted.
- Each government should establish a comprehensive plan in law and/or policy that identifies the specific role to be played by each key ministry, agency or department, and to ensure that they receive sufficient resources to fulfil their roles. Pending the government's development of such a plan, each ministry, agency or department should develop their own policies and procedures as soon as possible, in accordance with their mandates.
- Each government should adopt a comprehensive law or laws on human trafficking consistent with the UN Human Trafficking Protocol and internally consistent with its own existing laws on immigration, crime and victim assistance. Such laws will, among other things, provide a better focus and mandate for law enforcement officials, ensure a harmonised

regional response to human trafficking, and allow systematic and broad data collection on human trafficking. If it is not feasible for governments to adopt comprehensive laws in the near future, then lawmakers should seek amendments in specific laws (partly identified below) to serve as stopgap measures.

- Each government should ensure that trafficking in body parts is criminalised, whether as part of comprehensive anti-human trafficking law or separately, and should promote international cooperation to investigate and prosecute such offences.
- Stakeholders, particularly governments, should promote stronger regional coordination and cooperation to fight human trafficking, organised crime and money laundering. They should establish a better network to facilitate a more comprehensive, proactive approach in these areas.
- Each government must develop or expand its witness security/protection efforts in a manner that provides a meaningful and sustainable level of security for witnesses, without creating unsupportable expectations.
- Each government should expand, improve and formalise its relationships with NGOs and other aid organisations to ensure that better support is provided to trafficking victims.
- Governments should establish/reinforce immigration rules by expressly prohibiting the entry of and providing for the deportation of persons involved in trafficking, organised crime and related offences through statutory instruments or, if necessary, through changes in the law, consistent with any relevant constitutional and due process requirements.
- Similarly they should clarify immigration rules by expressly allowing the granting of temporary or longer-term residency permits to trafficking victims and, where appropriate, temporary work permits under the appropriate conditions.

In **Malawi**, the following actions are recommended:

- At best, the government should adopt broad anti-trafficking legislation, as defined and addressed in the Human Trafficking Protocol. If this is not reasonably possible to achieve in the near future, then the Law Commission's recommended amendments in the Penal Code criminalising trafficking in children should be substantially expanded, both in its coverage of issues related to children and in its scope of offences to broadly cover trafficking as addressed in the Protocol. Comprehensive anti-trafficking legislation should be easier than piecemeal amendments through a series of amendments and could be reviewed by parliament during its consideration of the Law Commission's recommendations.
- Amend the law to criminalise trafficking in body parts, preferably along with broad provisions on trafficking. Alternatively, this amendment could be incorporated into the Penal Code's provisions on 'Offences Related to

Religion'. If circumstances permit, perhaps an additional separate piece of legislation could be drafted that comprehensively addresses the medical and non-medical use of human tissues.

- Adopt certain changes in the Penal Code, including adoption of the Law Commission's recommendations on a new chapter on 'Offences against Morality Relating to Children' (with appropriate modifications), and increasing the penalty for some offences, such as threatening or intimidating a woman into having sex; and adding new offences, such as criminalising the rape of males. Also, section 143's provision that holding a woman's clothing constitutes 'constructive detention' should be expanded to include the holding of passports and other identity documents. Alternatively, this provision could be included in a comprehensive law on human trafficking.
- Criminalise participation in an 'organised crime group' and implement related key aspects of the Organized Crime Convention.
- Adopt the Money Laundering and Proceeds of Serious Crime Bill (with any necessary modifications) and ensure that the regulatory mechanism is properly funded and staffed with qualified personnel who are assisted through a strong regional and national system of communication and coordination. The government should also finalise and adopt an anti-money laundering strategy.
- Implement stronger and more comprehensive methods to prevent corruption in law enforcement and immigration, consistent with the Corrupt Practices Act.
- Develop a formal programme for assisting trafficking victims that involves the relevant aid organisations and ministries, most likely coordinated by the Ministry of Gender, Child Welfare and Community Services or possibly the Office of the President of the Cabinet. Also, expand and implement the Ministry of Gender's action plan.
- The Employment Act could be amended to expressly prohibit the worst forms of child labour, consistent with ILO Convention No. 182.

In **Mozambique**, the following actions are recommended:

- Finalise the ratification process by depositing with the UN its ratification of the Organized Crime Convention, the Human Trafficking Protocol and the Smuggling Protocol.
- Police and prosecutors should aggressively use existing Penal Code provisions to prosecute traffickers. They should create a legal plan of action. As a start, they should investigate and prosecute at least one significant human trafficking case for which wide media coverage should be sought. The purpose of the coverage would be to build public confidence in the police, educate the public on human trafficking, provide a warning to persons who may engage in trafficking, and encourage witnesses to provide information to the police. Momentum can be built on one or a few successful high-profile

cases. Police enforcement operations would have to continue to improve to meet the public's increased expectations.

- Draft and adopt separate and comprehensive legislation on human trafficking. Comprehensive reform of criminal law in Mozambique is very important and should be pursued; however, because that is likely to be a long process, a law on human trafficking should be drafted and adopted sooner.
- Expand and formalise the relationship between aid organisations and NGOs on the one hand, and the police and appropriate government ministries on the other, to assist trafficking victims and gather evidence to prosecute traffickers. The aid organisations and NGOs have been working hard to assist trafficking victims, however close coordination with government and convictions are lacking.
- The government should provide the police with more resources and training in general, and specifically on human trafficking and organised crime. The police should be given more support and more should be expected of them.
- Consider the creation of a new police enforcement unit with specialised skills, appropriate resources, enforceable high integrity standards, and jurisdiction over matters pertaining to the Organized Crime Convention and its Protocols, perhaps similar to the South African Scorpians.
- Prosecutors should confirm the applicability of the law prohibiting the harvesting and use of human tissue and, with police assistance, find a test case to apply it.
- Draft and adopt a law that prohibits participation in an organised crime group, consistent with the Organized Crime Convention.
- Create a financial intelligence unit with the appropriate resources and skilled staff to implement the new Money Laundering Act. The Act may very well have gaps and limitations; however, it is best to first begin implementing its provisions and let experience guide any potential future efforts at amending it.
- Aggressively implement the Anti-Corruption Act to prevent police and immigration misconduct that facilitates human trafficking and organised crime.
- Prosecutors and police must develop, at the very least, a rudimentary witness and victim protection programme supported by a law, regulations and/or a policy. They should consult with the judiciary to ensure smooth court proceedings. Similarly, it is very important for prosecutors and police to develop a comprehensive approach to assisting child victims and taking statements from children in a non-threatening manner that yields evidence which may be used in court. Child psychologists could be helpful in this regard, with input from Defenders of Children's Rights organization. Similarly, courts should develop clear written rules and procedures for the taking of testimony from women, children and men who may suffer reprisals for giving testimony. The South African law and procedure may serve as a useful example.

- The police, prosecutors, NGOs and aid organisations should establish a committee to develop a formal plan to receive, refer, assist and protect trafficking victims in all parts of the country. The police child/victim unit and the National Campaign against Sexual Abuse should be involved. The approach taken by aid organisations and the government in Zambia may provide a useful example.

In South Africa, the following actions are recommended:

- The government should expand law enforcement efforts to use existing laws to fight human trafficking.
- The Law Reform Commission should continue the process for discussing, revising, seeking comments on and adopting a comprehensive law on human trafficking. The greatest challenge may be for the Inter-Sectoral Task Team on Human Trafficking to ensure that all of its member organisations stay fully informed on the relevant issues, maintain a high level of support for adopting the law and define their organisations' roles in the effort to fight trafficking. Continuous efforts should help ensure that adoption of the law is 'fast tracked' and that debate does not linger on for years.
- Part of the purpose of change in the law will be to ensure that the law enforcement organisations and key ministries have clearly defined responsibilities for assessing the extent of human trafficking and prosecuting offenders. Such activities are best led by law enforcement officials rather than exclusively by aid organisations that do not have experience in investigating criminal conduct.
- Expand the training of judges and immigration, police and judicial officers on human trafficking in conjunction with greater public education. The result should be a greater application of current laws to find and prosecute trafficking-related offences. As noted above, South Africa's current laws prohibit many activities that relate to and support human trafficking.
- A stronger link between law enforcement and NGOs and aid organisations working with women, children and other potential groups of trafficking victims should improve the providing of useful leads to the police and identifying and assisting trafficking victims.
- Adopt the Sexual Offences Bill (with any necessary modifications) in part because it addresses offences related to human trafficking.
- Include a comprehensive prohibition of trafficking in body parts in the draft human trafficking bill and/or in a separate law or amendment, with appropriate means to investigate and prosecute such cases.
- Expand communication and cooperation with neighbouring countries to assist them in fighting human trafficking, organised crime and money laundering. It is in South Africa's interest to do so because criminals are cloaking their conduct through businesses, banks, and transactions in other

SADC countries in a manner that will better enable them to expand their criminal activities in South Africa.

- The South African government should enter into witness protection agreements with other SADC nations, as per the minister's authority under the Witness Protection Act.

In **Zambia**, the following actions are recommended:

- Produce and adopt a comprehensive law on human trafficking. Most likely the Task Force on Human Trafficking should direct the effort. It should be noted that the president's cabinet commonly requires that a policy be adopted before it will support legislative reform. Before law reform begins it would be best first to determine in writing that the cabinet will support law reform without a policy, or if a policy is required what the policy should address. Generally such efforts must be supported and led by a key minister with a voice in the cabinet. A danger to avoid is spending considerable time and money to create a policy that neither provides a meaningful law enforcement tool nor implements other key provisions and, given time and resource limitations, neglects the adoption of legislation. Indeed it would be more effective for the government to first adopt legislation and then create a more detailed policy for its enforcement.
- As in Malawi, the law should be amended to criminalise trafficking in body parts, preferably along with broad provisions criminalising human trafficking. Alternatively, and as a stopgap measure, this amendment could be incorporated into the Penal Code with 'Offences Related to Religion'. If circumstances permit, additional legislation could perhaps be drafted that comprehensively addresses the medical and non-medical use of human tissues.
- Adopt changes in the Penal Code in part by increasing the penalty for some offences such as threatening or intimidating a woman into having sex; and adding new offences, such as criminalising the rape of males. Also, section 144's provision that holding a woman's clothing constitutes 'constructive detention' should be expanded to include passports and other identity document. Alternatively, this provision could be included in a comprehensive law on human trafficking.
- Criminalise participation in an 'organised crime group' and implement related key aspects of the Organized Crime Convention.
- Provide sufficient resources and training to the Ministry of Labour and Social Security to ensure that it enforces the 2004 Employment of Young Persons and Children's Act Amendment, and promote the ministry's cooperation with other law enforcement offices as well as with appropriate NGOs and aid organisations.
- Consider adopting an amendment in the Employment Act to prohibit forced labour, in order to give more direct enforcement power to the constitution's prohibition.

- Aggressively enforce anti-corruption laws, which in many respects have been unsuccessfully applied.
- The training in human trafficking for police and immigration officials is useful and should be expanded. In general the police should be given more, and more should be expected of them. Authorising law enforcement officials to form unions could allow them to establish better conditions, training and support in order for them to perform their jobs better.
- Encourage and expand the creative approach taken by law enforcement officials to apprehend and convict traffickers. The officials who have done so should be recognised and rewarded for their contribution.
- Expand and improve the victim and witness support network because it has worked well in limited cases.

Endnotes

- 1 The Organized Crime Convention is also supplemented by the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, which is not addressed in this assessment.
- 2 UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', 2004, p. 249.
- 3 See also *The Annotated Guide to The Complete UN Trafficking Protocol*, published by Global Rights (available at www.Globalrights.org), which provides a review of the Protocol's provisions and recommends that legislative drafters develop a 'human rights based response' (in addition to a law enforcement response) to human trafficking in part by providing for support and protection of victims and witnesses.
- 4 From the UNODC's website at www.unodc.org/unodc/en/trafficking_human_beings.html.
- 5 The Convention defines a 'structured group' as a group 'that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.
- 6 'Legislative Guide', op. cit., pp. 13, 259.
- 7 Ibid., p. 257.
- 8 The abuse of 'a position of vulnerability' refers to a situation in which the victim has no other real and acceptable alternative but to submit to abuse involved. 'Legislative Guide', op. cit., p. 269. See also 'Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto', United Nations General Assembly, Fifty-fifth session, Agenda item 105 Crime prevention and criminal justice, 2000, A1 para. 66.
- 9 See 'Legislative Guide', op. cit., p. 269 and 'Interpretive notes', ibid., A para. 66.
- 10 For a detailed discussion of immigration and refugee laws, see Klaaren J & Rutinwa B, *Towards the Harmonization of Immigration and Refugee Law in SADC*, MIDSAs Report No. 1 (SAMP), 2004.

- 11 ILO, *A Global Alliance Against Forced Labour: Global Report to the Follow Up to the Declaration on Fundamental Principles and Rights at Work*, 2005, p. 10.
- 12 'Legislative Guide', op. cit., p. 257. Also, The Abolition of Forced Labour Convention (No. 105, 1957) specifies that forced labour can never be used for the purpose of economic development or as a means of political education, discrimination, labour discipline or punishment for having participated in strikes.
- 13 The Minimum Age Convention (No. 138, 1973) requires each ratifying state to 'pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development'.
- 14 Given time limitations, the assessment does not address some aspects of the Convention and Protocol, including efforts aimed at the underlying causes of human trafficking such as poverty, as well as extradition and the transnational transfer of prisoners.
- 15 The term *muti* derives from the Zulu word *umutbi* (meaning tree and medicine), which is commonly used in Southern Africa to refer to traditional medicine in general or witchcraft specifically.
- 16 'Thugs remove boy's private parts', *The Nation*, 19 April 2005, pp. 1-2. One theory is that genitals are used for fertility, virility and good luck. A related concept is that each person is born with a certain amount of luck and children have not depleted theirs, and thus one may take their luck by taking their body parts. The prevalence of *muti* is often linked with HIV/Aids, with many people believing that it is both caused and cured by *muti*. See Ashforth A, *AIDS, Witchcraft, and the Problem of Power in Post-Apartheid South Africa*, Paper No. 10, May 2001. Available at www.sss.ias.edu.
- 17 'Mutilation is one crime, organ trafficking another', AFP France, 5 May 2004 (reported at ReligionNewsBlog.com).
- 18 The police further complain that they lack the ability to trace cell phone numbers, which would improve their investigations.
- 19 An assertion was made that trafficking of persons from or through Mozambique is done to South Africa for the purpose of illegal organ transplant operations. The assessor was unable to verify any such cases, however, an investigation was conducted in the past year or two about alleged illegal transplants operations being performed in Durban.
- 20 'Mapping the inhuman trade', *Sandton Chronicle*, 10 June 2005, p. 9.
- 21 For related news stories, see the Southern African Migration Project website at www.queensu.ca/samp/migrationnews/.

- 22 For more information see for example, Kututwa N, *African Anti-Corruption Commitments: A Review of Eight NEPAD Countries*. African Human Security Initiative, 2005.
- 23 For more information, see Goredema C (ed), *Tackling Money Laundering in East and Southern Africa*, volumes 1 and 2. Institute for Security Studies Monograph Series No. 107 and 108, Pretoria, 2004.
- 24 For example, the Canadian Witness Protection Program Act (1996) provides that 'protections' may include relocation, accommodation, change of identity, counselling and financial support for these purposes or any others to ensure the witness's security or to facilitate the witness's re-establishment or ability to become self-sufficient. Witnesses entering the witness protection programme are deemed to be in the programme for life (available at <http://laws.justice.gc.ca/en/W-11.2/110647.html>). See also Lacko G, *The Protection of Witnesses*, undated. Available at http://canada.justice.gc.ca/en/ps/inter/protect_witness/page4.html. The UN International Drug Control Programme's Model Witness Protection Bill 2000 provides basic selection criteria and outlines types of protection (available at www.unodc.org).
- 25 See, for example, Msowoya A, 'Trafficking in Persons, Especially Women and Children: An Overview of the Law in Malawi'. Unpublished manuscript, 10 April 2005.
- 26 Law Commission Report, 'Review of the Penal Code', 2000, p. 39.
- 27 Criminal Law Act 1967 (15 & 16 Eliz II c58) section 1. The concept of a 'felony' was introduced into English law in the 12th century under King Henry II. Felonies included crimes that were 'particularly base and degrading' and were considered to be crimes against the king because they broke the king's peace. Commission of a felony could lead to asset forfeiture such as the loss of property. Willson DH & Prall SE, *A History of England*, 3rd ed. CBS College Publishing, 1984 p. 66.
- 28 Perhaps an argument could be made that Malawi law recognises that a body can be stolen because it explicitly criminalises 'child stealing', which assumes that a child may be subject to theft. Compare Snyman CR, *Criminal Law*, 4th ed. LexisNexis Butterworths, 2002, pp. 462-463 (South African law no longer has a child-stealing offence because a human being cannot be the object of theft).
- 29 Available at www.judiciary.mw.
- 30 Law Commission Report, op. cit., pp. 36-37.
- 31 Ibid, pp. 37-38.
- 32 See Msowoya, op. cit., p. 5.
- 33 Law Commission Report, op. cit., p. 39.
- 34 Ibid.

- 35 The Law Commission Report recommends allowing the penalty of life imprisonment for murder. Law Commission Report, op. cit., p. 109.
- 36 Ibid., p. 112.
- 37 Ibid., p. 58.
- 38 A 'serious offence' is defined in the Money Laundering Bill as an offence under Malawi law for which the maximum penalty is death or imprisonment for at least 12 months.
- 39 The MCPA establishes a presumption of a violation where the prosecution shows that the defendant did or directed or was involved in an 'arbitrary act' (done contrary to law, rule or known arrangement) that resulted in the loss or damage of any government property or the diversion of property for an unauthorised purpose, which may be rebutted by the defendant's proof to the contrary (s. 25B(4)).
- 40 Law Commission Report, op. cit., pp. 31-32.
- 41 In a related area, the DFID has been providing assistance in Malawi on reforming the juvenile justice system and training magistrates and police officers on cases involving children, although these efforts appear to be primarily focused on child offenders.
- 42 Mondlane L, 'Mozambique: Nurturing justice from liberation zones to a stable democratic state', in An-Na'im AA (ed), *Human Rights Under The African Constitutions – Realising The Promise For Ourselves*. Philadelphia: University of Pennsylvania Press, 2003, p 186.
- 43 By 1966 Frelimo had liberated the two northernmost provinces while the Portuguese stationed a substantial number of troops in nearby Nampula Province. Some Mozambicans interviewed for this assessment asserted that during this period the Portuguese government's soldiers started child prostitution rings in Nampula that they speculate have continued and may be related to the many reported disappearances of children in that province. Similarly, the IOM reported in its report on 'Trafficking in Women and Children for Sexual Exploitation in Southern Africa' (discussed in the assessment's introduction) that prostitution is common in Nampula in part because the Portuguese army created a market for sex workers, thus laying a foundation for traffickers' networks later in the region.
- 44 Mondlane, op. cit., p. 193.
- 45 The Centre for Legal and Judicial Training also requested that they be given additional resources in order to collect crime statistics and provide detailed guidance in the efforts to fight crime.
- 46 See Article 246 (*Enterramento com violação das leis sobre inumacoes*) and Art. 247 (discussed below) and its note 1.

- 47 The notes to Title II in Art. 54 explain that the roots of penal theory for these offences lie in the 1852 Penal Code, which was modified in the 1884 law and, perhaps with a stronger focus on reforming the delinquent, a 1954 law that revised this title.
- 48 A *rufião* can also be understood as an *alcoviteiro* – *aquele que servir de intermediario em relações amorosas* (one who serves as an intermediary in amorous relations).
- 49 The Penal Code also contains some provisions that have been explicitly or, more confusing for judges, implicitly repealed through the 1975 constitution, the 1990 or 2004 constitutions and the Bill of Human Rights or perhaps other laws. A note to Article 71 states that as per a 1956 amendment, the internal security measures were expanded to criminalise membership in communist subversive groups. Given the Marxist revolutionary goals of Frelimo in the 1970s, this offence certainly could not have survived the 1975 constitution and independence.
- 50 A note to the article states that this crime includes an act of 'moral violence' (*violencia moral*) used with fraud, without further explanation (note 1).
- 51 The online dictionary Priberam.pt defines *estupro* in a manner that includes both the offences in articles 391 and 392: '*atentado contra o pudor de uma mulher; desfloramento de virgem.*' The crime of *estupro* has its roots in Roman law, similar to South African common law. In Roman law, rape was punished as *vis* (violence) or *stuprum*, which was defined under Roman-Dutch law as the defloration of a virtuous girl or widow without violence. Snyman, op. cit., pp. 445-446 n.60.
- 52 Both articles 405 and 406 state that the punishment may include a suspension of political rights for a number of years, though it is highly likely such a punishment is now unconstitutional.
- 53 For a comprehensive discussion of the issues before this law was passed, see UNDP, *Accountability and Transparency: Instruments and Strategies in Fighting Against Corruption*, UNDP's Forum on Transparency and Corruption, 8-9 October 2002.
- 54 Discussion papers 25 and 111 are available at www.doj.gov.za/salrc/index.htm.
- 55 Snyman, op. cit., pp. 8-10. The 'Roman -Dutch law' is founded in the 13th to 18th century Dutch interpretations and applications of the 6th century Justinian compilation of Roman law. In contrast, in the US the 'common law' generally refers to the role of court decisions in filling in the gaps in civil law. In the US the authority to find criminal culpability must derive from statutory authority.
- 56 Snyman, op. cit., p. 367.
- 57 Ibid., p. 363.
- 58 Ibid., pp. 430-436.
- 59 Ibid., pp. 436-439.

- 60 As modified by the Adjustment of Fines Act 101 of 1991.
- 61 Snyman, op. cit., p. 445. In contrast, Namibia has a gender-neutral crime of rape in which the victim may be male as well as female. Combating of Rape Act 8 of 2000.
- 62 Snyman, op. cit., p. 462.
- 63 POCA was modelled on the US Racketeer Influenced Corrupt Organizations Act (RICO), which was narrowed by the Civil Asset Forfeiture Reform Act (2000), which placed a greater burden on government to show that property is the proceeds of crime to justify seizure.
- 64 POCA also amended some provisions in the Drugs and Drugs Trafficking Act, No. 140 of 1992, and the International Co-operation in Criminal Matters Act, No. 75 of 1996, to standardise certain terminology used in those laws.
- 65 See, www.white-collar-crimes.com/criminal_terms.shtml, and www.indiaonline.com/bisc/jmer.html.
- 66 FICA section 64 criminalises conducting two or more transactions with the purpose of avoiding giving rise to a FICA reporting duty.
- 67 See for example, Van der Westhuizen W, 'The Financial Intelligence Centre Act 38 of 2001 - From paper to practice', *Deneys Reitz Case Law Update*, 27 February 2002. Available at www.deneysreitz.co.za/publications
- 68 Immigration officials were not available to provide any information during the assessment period. Thus the discussion of some matters in this section may be incomplete.
- 69 Du Toit E et al (ed.), *Commentary on the Criminal Procedure Act*. Cape Town: Juta, 2003.
- 70 For a detailed discussion, see Chanda A, 'Gaps in the law and policy in the implementation of the Convention on the Rights of the Child in Zambia', *Zambia Law Journal* 32, 2000, pp. 1-19 (discussing Zambia's treatment of children in law and policy and urging legislative reform to fully implement the Convention on the Rights of the Child).
- 71 The author of this assessment wrote the original draft of this amendment along with several other draft amendments on matters such as HIV/Aids in the workplace. However, the amendment in the Employment of Young Person's and Children's Act was the only one forwarded by the cabinet to the National Assembly and adopted into law. It appears that the US State Department's placing of Zambia on a watch list for human trafficking added some impetus to its passage.
- 72 By law one penalty unit currently equals K180, which is equal to about 3.5 cents on the US dollar. Hence 200,000 penalty units = K36,000,000 = about US\$7,200. The Zambian government infrequently adjusts the monetary value of a 'unit' to take into consideration the impact of inflation.

- 73 Kangende K, *Zambian Myths and Legends of the Wild*. Lusaka: Minta Publishers, 2001, p. 184.
- 74 Similarly the Narcotic Drugs and Psychotropic Substances Act (1993) contains provisions criminalising money laundering in the drug trade and authorises the seizure and forfeiture of property used by drug traffickers.
- 75 'Proceeds of crime' is defined as 'any property, benefit or advantage, within or outside Zambia realised or derived, directly or indirectly from illegal activity'.
- 76 The Penal Code also criminalises stealing by persons in public service. Section 277 provides that a public employee who steals government property or a thing that 'came into his possession by virtue of his employment' is liable to 15 years' imprisonment.

APPENDIX

Matrix for Human Trafficking, Organised Crime
and Related Offences for Malawi, Mozambique,
South Africa and Zambia



HUMAN TRAFFICKING MATRIX

PC = Penal Code

Elements	MALAWI	MOZAMBIQUE	SOUTH AFRICA	ZAMBIA
Trafficking: Defines and prohibits trafficking and provides penalties and sanctions	No. Law Commission Report recommends 'stopgap' amendments on commercial sex trafficking.	No.	No. Issue Paper to lead efforts to adopt anti-trafficking law. Also draft Children's Bill includes child trafficking.	Not in general, but: Constitution s. 24(3) and Young Persons and Children's Act (2004) prohibit child and young person trafficking.
Government efforts to fight trafficking	Ministry of Gender drafted action plan.	Must deposit its ratification of Convention and Protocols with the UN.	Multi-sector task force active.	Multi-sector task force active.
PROHIBITS EXPLOITATION IN THE FOLLOWING AREAS:				
■ Forced labour and slavery/servitude	Yes. Malawi Constitution s. 27. Employment Act No. 6 (2000), s. 4. Also PC s. 269. Slavery - Constitution s. 27.	Yes. Mozambique Constitution Art. 84.	Yes. Constitution s. 13 - no servitude or forced labour; Basic Conditions of Employment Act (1997), s. 48.	Yes. Constitution prohibits forced labour, but labour laws do not.
■ Child labour	Yes. Constitution s. 23; Employment Act No. 6 (2000), s. 21-24.	Yes. Labour Act prohibits child labour, Arts. 79-80.	Yes. Basic Conditions of Employment Act (1997), s. 43-47.	Yes. Employment of Children and Young Persons Amendment, No. 10, 2004 (prohibits worst forms).
■ Removal and trafficking of body parts	No. PC s. 131 on corpses is closet, but insufficient.	In part. PC amendment on human biological products. PC Art. 366 on castration.	No. Weak coverage by Human Tissues Act (1983). Perhaps also common law offence of violating a corpse.	No. Closet is PC ss. 130-131 on indignity and harming a corpse.
■ Sexual exploitation	Yes. Rape: PC ss.132-134; defilement ss.135-138; assaulting boys s.155.	Yes. <i>Atentado ao Pudor</i> - Art. 391; <i>Estupro</i> - Art. 392; <i>Violação</i> - Art.393-394.	Yes. Wide coverage in Sexual Offences Act (1957). Also, new draft bill pending.	Yes. Rape: PC ss. 132-134; defilement ss. 135-138; assaulting boys s. 157.
■ Prostitution	Yes for related offences, PC ss. 140-147.	Yes for prostitution and related offences, PC Art. 71 and Amendment.	Yes. Sexual Offences Act for prostitution and related offences.	Yes for related offences, PC ss. 140-150.

Elements	MALAWI	MOZAMBIQUE	SOUTH AFRICA	ZAMBIA
■ Crimes against life: Assault, murder, intimidation, etc.	Yes. PC ss. 208-224.	Yes. <i>Homicídio</i> - PC Arts. 349-351; <i>ofensas corporais</i> - Arts. 359-363.	Yes. Murder is a common law offence. Also see Intimidation Act (1982).	Yes. PC ss. 199-250.
■ Kidnapping and abduction	Yes. PC ss. 257-264.	Abduction of children - PC Arts. 342-344 <i>Rapto</i> - Arts. 395-396; <i>Lenocínio</i> - Art. 405; <i>Corrupção de Menores</i> - Art 406 and 1999 law.	Yes. Kidnapping a common law offence; some abduction in Sexual Offences Act.	Yes. PC ss. 251-258.
Immigration: Liability of commercial carriers	Yes. Immigration Act (IA) s. 10 - carrier must remove at own expense.	Yes. IA Art. 46 - carrier must return and pay fine.	Not in IA.	Yes. Immigration and Deportation Act (1994) (IDA) s. 8 - carrier must remove at own expense.
Traffickers may be excluded/ deported immigrants	Yes. IA s. 4 and Third Schedule - May be excluded/ deported if convicted of trafficking in women or young persons for 'immoral purposes' or offences such as rape, indecent assault, etc. 'Undesirables' and those in prostitution may also be excluded (s. 4).	Not specifically but within discretion. IA Arts. 26 and 16 - conduct against public order or dignity of the state, or declared <i>persona non grata</i> .	Not specifically , but if warrant has been issued for money laundering, kidnapping, murder, drug trafficking or association with crime group. Also discretion where person is a fugitive from justice or convicted of a proscribed offence. IA ss. 29-30.	Not specifically, but within discretion. IDA - may exclude if imprisoned for crimes or 'not of good character'.
Provision for traffic victims to remain in country and/or work	No explicit provision, but likely discretion to allow lawful stay (s. 24 and 26) and temporary work (s. 25).	No explicit provision, but likely discretion to allow lawful stay - Arts. 10-14; work unclear.	Under IA, appears to have discretion to grant temporary stays, though not work.	No explicit provision, but likely discretion to allow lawful stay but not work (ss. 14-18).
Criminal offences for forging identity documents and assisting unlawful entry (immigration laws)	Yes. IA ss. 33-37.	Not in IA, see Anti-Corruption Act (2004).	Yes. IA s. 49.	Yes. IDA s. 22.

Elements	MALAWI	MOZAMBIQUE	SOUTH AFRICA	ZAMBIA
Measures to protect victims and in hearings	No witness protection law or programme. Limited to whistleblowers. <i>In camera</i> testimony may be allowed, but no other protections.	No witness protection law or programme. No protected testimony in practice, though courts could direct <i>in camera</i> testimony.	Yes. Intimidation Act (1982); Witness Protection Act (1998); and s. 153 of the Criminal Procedure Act (1977).	Little assistance. Police standing order on witnesses and <i>in camera</i> testimony in some cases.
Measures for well being and recovery of victims	Little assistance for trafficking victims in general. More for exploited children, some for exploited women.	Very limited. Police Victim Unit and National Campaign help some.	See Charter for Victims of Crime. Social services exist, though unclear extent to which available to foreigners. Have active NGOs.	Some limited victim support through Police Victim Support Unit and NGOs and aid organisations.
Measures for safe and timely repatriation of victims	No. On ad hoc rare occasions done by aid organisation.	No. On rare occasion, on informal basis.	No formal system.	No formal system, although has happened through intra-government cooperation.
Government collects comprehensive statistics/ data on trafficking	No. Limited collection on general crime statistics.	No. Very poor to non-existent data collection.	No. Other crime statistics collected.	No. Other crime statistics collected.
Channels of communication and coordination in country and internationally	Limited reactive ad hoc basis between counterpart government officials or Interpol/SARPPCO.	(same)	(same) Also through Trafficking Desk within SAPS organised crime unit.	(same)

ORGANISED CRIME MATRIX

Elements	MALAWI	MOZAMBIQUE	SOUTH AFRICA	ZAMBIA
Defines organised crime and prohibits participation in organised crime group	No. Closest is conspiracy and accessory offences, PC ss. 404-409.	No. Only for criminal group under Narcotics Act and minor gang activity, PC Art. 71.	Yes. Prevention of Organised Crime Act (1998).	No. Closest is conspiracy and accessory offences, PC ss. 394-398.

Elements	MALAWI	MOZAMBIQUE	SOUTH AFRICA	ZAMBIA
Prohibits money laundering and penalties and sanctions	No. Draft Bill pending. Reserve Bank's Directive on Customer Due Diligence is stopgap measure.	Yes. Money Laundering Act (2002) and 2004 regulations.	Yes. The Prevention of Organised Crime Act and the Financial Intelligence Centre Act (2001).	Yes. Prohibition and Prevention of Money Laundering Act (2001).
Supervisory regime for banks and others to deter and detect laundering	In part, Yes. The Banking Act (1989) and the Directive on Customer Due Diligence.	Money Laundering Act (2002) and 2004 regulations.	Yes. The Financial Intelligence Centre Act.	Yes. The Financial and Banking Services Act and Prohibition and Prevention of Money Laundering Act.
Other measures to combat laundering	National Task Force on Anti-Money Laundering.	Seeks to create financial intelligence unit.	Money Laundering Advisory Council and Financial Intelligence Centre.	Anti-Money Laundering Authority.
Measures for confiscation and seizure	No. See Draft Bill.	Yes, some in Money Laundering Act, Arts. 5-9.	Yes. The Prevention of Organised Crime Act.	Some in the Prohibition and Prevention of Money Laundering Act.
Prohibit corruption of public officials	Yes. Corrupt Practices Act (1996); and PC ss. 90-95.	Yes. Anti-Corruption Act (2004).	Yes. The Prevention and Combating of Corrupt Activities Act (2004).	Yes. Anti-Corruption Commission Act (1996).
Liability for 'legal persons' (organisations)	Yes.	Yes. Commercial Code (2000), Art. 7	Yes.	Yes. Commercial Code.
Prohibits obstruction of justice	Yes. PC ss. 101 and 107-109.	Limited. In Money Laundering Act, Art. 31.	Yes.	Yes.

