Chapter 3

Human Mobility and Human Trafficking in Africa: Diversity in Practice and Tension in Regulatory Frameworks

The contemporary regulation of human mobility has two opposing aspects. One is prohibitive, addressing human trafficking; the other allows for the principle of free movement. Both aspects are strongly related to issues of identity, social membership and citizenship, and neither has been able to address the grey area between free and forced movement. This inability may result from some institutions not accepting that the trafficking of people – and its embedded violence – is part of a process of globalisation which contains a central contradiction: the standards guiding economic transformation are at odds with those guiding social protection. The liberalisation of economies to facilitate the mobility of capital, goods and services has not been matched by a corresponding degree of freedom of movement for people.

This contradiction has created three distinct classes of mobile persons, governed by differentiated rules: (a) highly-skilled professionals – associated with capital and technology, (b) low or semi-skilled contract labourers, and (c) undocumented workers, refugees and asylum seekers. Conflicting rules have created an enabling environment for the emergence of networks specialised in facilitating movement. In some instances such networks have created a new ethos by which the lack of security experienced by one person or group becomes a market opportunity for another. Thus, although the intersection between migration and human trafficking is context-specific, it is possible to discern particular corridors of movement beyond the purview of the state and where profit is derived from human vulnerability.

Control over human mobility through identity control is a fairly recent phenomenon in Sub-Saharan Africa (SSA), affiliated with colonialism and the creation of the modern state. In previous times borders – such as they existed at all – were fluid and permeable. Recent concern about human trafficking in the region and attempts to produce a precise definition of

human trafficking as an emerging form of human mobility – often labelled as the 'New Slavery' – have provoked much controversy owing to the diversity of perspectives from which the subject may be viewed (Save the Children-Sweden, 2003:14), and there is tension between two key sets of concerns: the sovereignty and interests of nation-states as discrete units in international relations; and the violations of the human rights of persons in a particular process of migration labelled 'human trafficking'. When there is insufficient grasp of the reasons for the phenomenon of human trafficking, policy tends to lurch inconsistently in different directions – often suppressing the voices of those affected.

There are currently six perspectives on sex trafficking and related actions:

- A moral problem that leads to intervention for the abolition or prohibition of prostitution or commercial sex;

- A problem of organised crime that leads to legislative reforms, policing and the penalising of criminal networks;

- A migration problem that leads to border controls (passport and identification papers);

- A public order problem that leads to awareness campaigns, publicity about risks, and changing cultural practices;

- A labour problem that leads to intervention such as improving working conditions and labour monitoring systems, and abolishing child labour;

- A human rights problem and a gender issue that lead to intervention to address violence against women and children (Wijers and Lap Chew, 1997).

This chapter illustrates how different concerns and priorities for combating human trafficking in SSA – particularly involving women and children – have yet to become harmonized.

3.1 Trends and Patterns of Human Trafficking in Sub-Saharan Africa

The manifestation of human trafficking became visible to policy makers in the 1990s. Its deeper roots are becoming apparent through the process of intervention to counter the problem. Intervention measures share the following objectives:

- To define the different forms of abuse faced by women and children in the process of trafficking for labour exploitation,

- To locate the corresponding perpetrators or complicit agents,

- To devise specific policy instruments to counteract the problem,
- To establish new forms of cooperation between different agencies involved in this area.

According to UNICEF (2003: 9-10) trafficking is recognized as a problem in the greater majority of West African countries and as a severe problem in a third of them. In Eastern and Southern Africa it is also identified as a problem in roughly one in three of the countries. The fact that trafficking is a very sensitive issue may contribute to public reluctance to acknowledge its prevalence and this itself can be an obstacle to research and data analysis. The body of literature extant does nonetheless contribute to an understanding of the scope and depth of the problem, and to some extent clarifies its dimensions. More research is required before firm conclusions can be drawn.

One analytical perspective on the intersection between migration and trafficking may be offered by combining insights derived from studies on migration which use the livelihood framework, with those gained from investigations into trafficking. De Haan *et al* (2003) offer a perspective on migration in the Sahelian region tracing the behaviour of two kinds of institutions which have a strong impact on migration and in turn are structured by the migration experience. These are (a) networks through which migrants obtain access to resources and (b) the structure of the household and its management. They point out that the decision-making process to enter migration networks in order to improve livelihood (or to prevent its erosion) is based on a careful assessment of household resources. Calculations are made of assets, gains and losses within a particular livelihood system and temporal frame. The growing body of literature on human trafficking singles out the lack of access to reliable information channels regarding labour markets and living conditions as an important factor which fosters a symbiotic relationship between the trafficker and the trafficked. Control over information – or the provision of false information – by third parties can render a (potential) migrant's careful assessment of gains totally unrealistic and enhance their susceptibility to dependency on crime networks. In addition to this, both the regulation of particular segments of the labour markets and the extant structure of opportunity in a recipient country can result in migrants being switched between a variety of occupations controlled by the same networks, and this may affect their coping strategies. This process of switching constitutes another junction where migration and trafficking intersect. At each junction in the migration process vulnerability is enhanced due to migrants being constantly on the move and thus less able to consolidate social ties.

3.1.1 West and Central Africa

In West and Central Africa the different perceptions of human trafficking combined with different socio-economic and political situations in the various countries have created a mixture of policy responses (UNICEF, 2002: 7). Guided by knowledge derived from action-oriented research initiated by a number of international governmental and non-governmental organisations,[43] responses have included a variety of measures. These are directed at: raising awareness among families, communities, local chiefs, government ministers and law enforcers; attempting legislative changes to protect trafficked persons and prosecute traffickers; providing training for border patrol police and social workers, and providing direct support to trafficked persons and their families. Direct support has covered interception, rescue and socio-economic reintegration often using micro-credit as the means for an alternative livelihood with economic self-sufficiency.

The implementing of anti-trafficking practices has brought to light the degree to which a given social and cultural setting is conducive to human trafficking and re-trafficking; and the subject of the latter requires analytical attention. Evidence gathered so far reveals that the links between migration and trafficking are visible at different junctions of some broader social process that either disrupts livelihood systems (such as militarized conflict) or gradually erodes their sustainability (such as unsuccessful institutional reforms). Gender and age appear significant in determining who participates in what type of regime of migration, or at what juncture migration gets involved with practices of trafficking and for which types of work.

Veil (1999 in Adepoju, 2005: 77) identifies six different processes that can be involved and may become trafficking. Poor parents sell their children for money –having also received promises that they will be treated well. There is 'placement' for a specified period in return for a token sum or gift items. 'Bonded placement' of children is the reimbursement for a debt the parents accrued. There is enrolment with an agent for domestic work – the parents paying the agent a fee. Fees are also paid agents who purport to enrol the children in some course of schooling or training in a trade but who put them out to domestic work. And there is straightforward abduction.

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43. International organisations such as UNICEF, ILO-IPEC, UNODC; inter-governmental organizations such as IOM; and non-governmental organizations such as Anti-Slavery International (ASI), Terre des Hommes (TDH), Save the Children.

The trafficking of adult women – involving the payment of a fee to an agent –from West Africa to Western Europe which became visible in the 1980s and continued through the 1990s was often explained as an outcome of pressures to provide additional income to support their families and the children's education (Truong, 1998). But that has been followed by a cross-continental trafficking flow of minors of both sexes, to Western Europe from other sub-regions of SSA (IOM, 2002). It appears that the trafficking of women and children is closely related to an erosion of social protection, which has pushed them to find other options elsewhere.

Where intra-regional regimes of trafficking in children are concerned, the specificities of their vulnerability deriving from local contexts (such as belonging to marginal ethnic groups, subservient castes, or dysfunctional families affected by war or disaster) have apparently contributed to the creation of a child-specific demand for wide-ranging types of work within the region (ILO-IPEC, 2002:29).[44] Children are trafficked into a variety of exploitative situations including commercial sex, domestic service, armed conflict, service industries like bars and restaurants; or into hazardous forms of work in factories, mines, construction, agriculture and fishing; also begging (ILO-IPEC, 2002). Exploitation of trafficked children can be progressive. Those trafficked to work in urban factories; domestic service or restaurants may subsequently be forced into prostitution. Those trafficked for prostitution may be subject to re-sale more than once.

Dottridge (2004:84) points out that the vulnerability of women and children to re-trafficking is due to factors such as the forms of intra-household decision-making and tacit 'tolerance' of trafficking mechanisms among the wider public, but also to an improper handling of trafficked persons, driven by social and cultural values that carry stigmatising effects.[45] Reports have revealed many cases where the children and women who have been intercepted and returned to their communities are soon being subject to re-trafficking.

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44. The Anti-Slavery International's (ASI) 1999 report suggests that trafficking routes reflect the routes used by the populations themselves. These have formed intricate regional intersections which are flexible, depending on border control activity and labour market demands (Anti-Slavery International, 1999).

45. Analysis indicates that existing protocol on handling victims of trafficking falls short in preventing re-victimization. Some anti-trafficking efforts can cause further damage by treating victims as criminals rather than identifying them as victims. The lack of effective protection mechanisms during reintegration can result in restricted freedom of movement, or in arbitrary detention and a disregard for the privacy of trafficked persons (Organisation for Security and Cooperation in Europe, 2004).

ILO-IPEC (2001) offers a detailed picture of the context, patterns and backgrounds of families and communities which have facilitated trafficking in West and Central Africa. It identifies three key clusters of factors, as follows[46]:

(1) *socio-cultural factors* such as the social acceptability of putting children to work, traditions of migrations that are centuries old in Africa, illiteracy or low education levels, and preparations for marriage (sometimes having to engage in domestic work to pay the dowry),

(2) *economic factors* such as the imbalance between rural and urban wealth levels and a desire to escape poverty,

(3) *juridical and political factors* such as absence of legislation and the ignorance of parents and trafficked persons of their rights under the law, or mistrust of the law; and open borders.

The traditional system of educating children to be independent and to initiate them to the world of work has been a recurring theme addressed by a variety of organisations. The tradition of 'placing', 'placement', 'confiding', or 'socialisation' has been variously portrayed as happening only during school holidays for a variety of purposes – such as to acquire social and life skills, to pay off debts, to prepare for marriage, or to prove that children can live independently.

That the social construct of 'placement' of children in work through migration is a tradition remains contested. National governments maintain a distinction between child placement and the traditional seasonal migration, which has linked West and Central Africa for generations. Anti-Slavery International (2003:1) notes that this traditional system of educating children by initiating them into work has been distorted into a commercial transaction which in turn has led to the trafficking of children from villages to the urban areas, and between countries within West and Central Africa. Recognising the placing of children to live and work with relatives in better-off households as a long-standing practice, some analysts have noted that cross-border trafficking increased significantly during the 1980's and that in the 1990's there was an increase in movement from impoverished areas to the relatively well-off areas of Gabon, Southwest Nigeria and southern Côte d'Ivoire, where there was a greater demand for child labour (Dottridge 2002: 39).

Dottridge (2002) records some gender-specific patterns of child trafficking with girls being placed in prostitution and other gender-based

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46. ILO-IPEC (2001).

forms of work such as domestic service and street vending, where only some get paid and most do not. He also notes some gender-specific traditional practices that contribute to the aggravation of the trafficking situation of young women. For instance norms of kinship instil a custom which requires young women to have a wedding trousseau and to leave their family and community when they get married. Gender-bias in investment in education tends to keep girls at home to help in the household chores, giving preference to the education of boys. Inheritance rules for land tend to exclude women and girls. Taken together, these gender-specific practices tend to marginalize women and girls in the community and render them vulnerable to risky 'work-placement' abroad.

Dottridge (2002) emphasises that in many parents' cognitive frame, 'placing' their children does not constitute the act of 'selling'; it is sending them away in the hope that they will be better off. In many cases the 'consent' of parents, and sometimes of the children, has been obtained before the designated child goes with the trafficker who may be a relative or a person who has gained the 'trust' of the parents and family. On some occasions there is no choice other than to *trust* this person to take care of the child.[47]

The findings of Riisoen *et al* (2004) shed new light on the intersection between child migration and trafficking. Their main observation regards the erosion of norms of accountability in traditional arrangements of child fostering and placement which can leave children vulnerable to exploitative conditions and to greater risks of being trafficked. Based on data collected in several countries in West Africa, Riisoen et al (2004) demonstrate some similarities and differences in the living and working conditions under a variety of placement systems.[48] A common feature noted in the study is the fact that children's vulnerability is often derived from the actual treatment by fosterers who command full authority over them. Economic difficulties can turn fostering within kinship systems into a burden for families leading to the withdrawal of responsibilities or the release of the fostered child to distant labour markets. Likewise, lack of means of livelihoods can shape given/traditional practices of fostering

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47. The Anti-Slavery International Report (2001) notes that poverty is central to why parents, acting as intermediaries, have to trust – and send their children to work. The reality of one less mouth to feed for a poor household makes a significant difference while the prospect of good wages in a wealthier country can lure desperate parents to trust that earnings will contribute to the child's dowry for instance; or parents take a part or even the whole of the child's salary for the household (ASI, 2001; ILO, 2001).

48. These include the fostering system based on extended kinship, and educational arrangements such as apprenticeship in workshops or under Muslim clerics.

– such as, for boys, under the framework of religious education (called 'talibes' in Burkina Faso and Mali) into the undertaking of a variety of tasks for their masters which can include begging. An intersection is emerging between traditional arrangements of child fostering and placement and new forms of trafficking, where children are more susceptible to multiple forms of vulnerability because in situations where traditional norms of accountability no longer hold there are no alternative protection networks. Children may be lured to these arrangements but release themselves – if able – to pursue the goals of getting education on their own account.[49]

Under these conditions of vulnerability children often find themselves allocated to work in sectors where employers offer the worst living and working conditions. According to the General Agricultural Workers' Union (GAWU) in Ghana the increased practice of flexible contractual work and casual treatment of norms of labour standards has allowed child labour gradually and indirectly into the formal agriculture sector.[50] A number of studies on coastal fisheries in Ghana also point to the link between changing dynamics in this sector and the shift towards in-land fishing.[51] Competition for scarce resources may have led to an intensified use of child labour to cut costs. A recent report commissioned by the Danish Agency for Development Assistance (DANIDA) in Ghana found that about two-thirds of the trafficked children (both girls and boys) are engaged in the fishing sector: the majority of the boys as fishers and fishing assistants; the girls in the smoking and selling of the fish (Tengey and Oguaah, 2002).

The International Organisation for Migration (IOM) claims that it has so far rescued more than a hundred children sold into bonded labour in one of the fishing communities – Yeji – on the Northern shores of Lake

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49. Referring to a UNICEF study, Riison et al (2004) note that in northern Ghana economic hardships can pressure foster families to encourage fostered girls to go to one of the major cities to find work; or can even result in the girls leaving on their own initiative. In a number of cases the girls left for a few months to work in market places to save money to go back to school.

50. 'In 1979 the General Agricultural Workers Union (GAWU) of Ghana used the 1972 ILO Convention on Rural Workers to expand its area of work to non-waged workers and subsistence farmers in the rural areas and to organise rural workers, including subsistence farmers. The constitution of the union was changed to cover a broader scope of "all employment in Agricultural Services or undertakings generally, including Rural Workers and self-employed Peasant Labour". Structural adjustment programmes in Ghana had had a devastating effect on wage labour in the rural areas, and the membership of GAWU had dropped from 130 000 to 30 000 as a result' (Horn, 2002).

51. Overa (2001) notes several factors causing a decline in small-scale coastal fisheries in Ghana and a relocation elsewhere. These include over fishing by foreign industrial ships which makes canoe-fishing unsustainable; rising fuel prices, and falling demands due to a decrease in purchasing power.

Volta.[52] As many studies have emphasised, child labour is cost-effective for employers in many ways. It is cheap or unpaid due to the provision of accommodation and food. It is easily arranged due to the condition of poverty and lack of options faced by the children and their families combined with weak legislation. Therefore, when addressing the demand side of trafficking, sector-specific analyses can be useful for revealing which structural changes – of production, and market outlets – do, or not, intensify the use of children (paid or unpaid, fostered or trafficked.) In a counteraction against traffickers in fishing communities, IOM Ghana set out to register child labourers and opened one-to-one negotiations with fishermen known to employ children. IOM agreed to provide training and modern fishing equipment in exchange for the children to be reunified with their families in a sustainable manner – thus circumventing the demand side of trafficking in the fishing sector.[53]

3.1.2 Southern and Eastern Africa

Less information is accessible about the incidence, trends and routes of trafficking of women and children in Southern Africa. Available information suggests that both internal and cross-border forms of trafficking are prevalent. Molo Songololo (2000) produced an in-depth report on the internal trafficking of children in South Africa for the purposes of commercial sexual exploitation. The findings show children are predominantly trafficked within their country of origin and traffickers are predominantly locals, but that where cross-border movement occurs the traffickers are foreign persons or crime organizations.

Both sexes are exploited although girl children are more likely to be channelled through cross-country migration and lured into the sex industry. Girl children are sold by their family as brides (to single men) or to brothels, syndicates and gangs. They can also be abducted, held captive and sexually assaulted in exchange for money. Boys tend to be voluntary migrants and engage in homosexual prostitution as a means to survive. The report provides examples of recruitment of girls into the sex industry through newspapers ads whence 'young women are then surreptitiously coerced through a form of debt bondage into doing strip-tease work,

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52. Africa Newswire Network, Children in Ghana rescued from forced labour, General News of Tuesday, 15th February 2005, http://www.ghanaweb.com.
53. Africa Newswire Network, Fishermen back fight against child labour, General News of January 9, 2003. http://www.ghanaweb.com, and Africa Newswire Network, Trafficked children registered, General News of Tuesday February 4, 2003. http://www.ghanaweb.com.

providing "sex" for patrons of certain establishments or performing in pornographic films' (Molo Songololo, 2000). A clear link between tourism and the sex trafficking of girls is revealed through interviews with sex tourists – men actively seeking girl children. One of them explains his motivation as follows:

'The little girls, 10 or 12 years old, I wouldn't describe them as innocent, they are not innocent, but they are fresh. They don't have the attitude of the older whores. The older whores have gone down hill. They use foul language. They drink. They're hardened. The little girls, they're not experienced. They're not hardened, they want to please you, they don't know what to expect, you get a better service from them'[54] (Molo Songololo, 2000:33).

Children who have experienced sexual exploitation and who are quoted in the report do express a deep sense of despair owing to the conditions of captivity in lodgings controlled by gangs. Molo Songololo's study emphasises the socio-economic structural conditions in South Africa as being a key problem. The poor economic situation among those trafficked, the breakdown in extended and nuclear families – often accompanied by changes in cultural attitudes and practices – and the high demand for sex with children are shown to be key factors behind the increase in internal sex trafficking.

Two reports on cross-border trafficking, prepared by Anti-Slavery International (ASI) in 1991 and 1992,[55] have documented trafficking from Mozambique to South Africa. An IOM report (2003) has documented the trafficking of refugees from Angola and the Great Lakes region – sometimes from further north – to South Africa, with some additional references to child trafficking from Lesotho, Mozambique and Malawi to South Africa. The reports also note incidences of inter-continental trafficking of young women to South Africa – from Russia, Eastern Europe, Thailand, China and Taiwan – involving crime syndicates based in Mozambique, Eastern Europe and Thailand. The IOM 2003 report states that although information is scarce, the evidence suggests that trafficking between Europe and Southern Africa – documented through the past century – is persistent and widening in scope. South Africa also emerges from these reports as

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54. Interview with independent researcher, Die Burger and J. O'Connell Davidson and J. Sanchez Taylor; *Child Prostitution and Sex Tourism: South Africa*, ECPAT International, 1996).

55. The two reports by Anti-Slavery International were cited in the IOM (2003) report on trafficking in South Africa and are as follows: the 1991 publication by Vines, A. *Mozambique: Slaves and the Snake of Fire* and the 1992 report by McKibbon, S. *Slavery of Mozambican Refugees in South Africa*.

a source and transit country as well as a major destination. Trafficking in South Africa appears to be closely linked with the highly sophisticated global sex industry. Further research is needed to provide more explanation on how cross-border links in sex trafficking emerge.

3.2 Political and Legal Framework

Since 1996 West and Central African governments, individually and collectively, have made significant efforts to reform the judiciary to address human trafficking. The Libreville Common Platform of Action of the Sub-regional Consultation of the Development of Strategies to Fight Child Trafficking for Exploitative Labour Purposes in West and Central Africa was signed in 2000 by 21 countries in West and Central Africa (supported by UNICEF and ILO with the cooperation of the government of Gabon). This was followed by the Declaration of Action Against Trafficking adopted by the Economic Community of West African States (ECOWAS)[56] and the endorsement of ECOWAS Plan of Action[57] in Dakar in 2001 by 15 member-states. This Common Platform of Action identifies the main characteristics and causes of child trafficking, and suggests government commitment in several areas: advocacy and sensitisation campaigns; setting up appropriate legal and institutional mechanisms to address child trafficking; improving care received by trafficked children; monitoring the incidence of trafficking by collating data from (new) research; improving inter-governmental and inter-ministerial cooperation.

The ECOWAS Plan of Action covered specified crucial areas: 1) legislation and ratification of the relevant international and regional covenants; 2) inter-state collaboration in collecting and exchanging information on trafficking incidence and trends, and in training personnel – including special police units, border police, judges and other law enforcers; 3) prevention of future trafficking through intensive awareness campaigns; 4) monitoring the implementation of the Plan.

In January 2002 high-level government ministers from West and Central African States met again in Yamoussoukro, Côte d'Ivoire during the

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56. Founded in 1975, ECOWAS is a regional group of 16 West African countries. It is also referred to in French as 'CEDEAO', for Communauté Economique des Etats de l'Afrique de l'Ouest.

57. The Declaration and the Plan of Action were both signed in 2001 during a ministerial meeting of 15 ECOWAS States in Dakar, Senegal. The meeting was organized by ECOWAS states and the United Nations Office for Drug Control and Crime Prevention. The 15 ECOWAS States were Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

'First Specialised Meeting on Child Trafficking and Exploitation in West and Central Africa' to exchange information and review national strategies.[58] In March 2002 representatives from West and Central African States met in Libreville, Gabon to discuss the feasibility of adopting a sub-regional convention on trafficking. At this meeting, organized by UNICEF and ILO, the representatives mapped out phases towards ratification by the end of 2004 which included continuing technical cooperation through 2003.[59] Whether this specific convention has been ratified is unclear at the time of writing this report, although several news briefs report that African governments intend to adopt the African Regional Plan of Action to Combat Trafficking in Human Beings.

Several countries have entered bilateral agreements. In 1996 an agreement was signed between Ghana, Togo, Benin and Nigeria to address trafficking. Mali has established a national commission focussing on child trafficking between Mali and Côte d'Ivoire. Togo and Benin have signed an agreement for cooperation in the rehabilitation of trafficked children (ILO-IPEC, 2001:39). There are variations in the way these international and regional agreements are being incorporated into domestic law. Active changes in legislation within West Africa have been observed in Togo, Mali, Cameroon, Benin (which enacted legislation in 1995 regulating travel of children under the age of 14) and Burkina Faso. In Burkina Faso, for instance, in May 2003 the national assembly adopted a law that defines child trafficking and punishes traffickers by imprisonment or a fine.[60] Togo does not have an anti-trafficking law but uses other parallel laws to prosecute traffickers.

Domestic laws and bilateral agreements do yet remain inadequate to respond to the complexities of trafficking. Lack of coordination and insufficient national or regional budgetary commitments can jeopardise implementation of these well-intended plans. As Fitzgibbon (2003:88) notes '[…] the bribes traffickers being able to pay also undermine a government's ability to combat corruption among law enforcement, immigration and judicial officials [..].' and tells how 'immigration officials attempting to capture child traffickers were attacked by well-armed traffickers and forced to retreat.'

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58. Organized by Interpol and the government of Côte d'Ivoire, as reported in 'irinnews. org', a website of the UN Office for the Coordination of Humanitarian Affairs.

59. As reported in Irin news: http://www.irinnews.org/report.asp?ReportID=26560&SelectRegion=West_Africa ("Central Africa and West Africa Region to establish child trafficking legislation in 2004").

60. Prior to this law apprehended traffickers were able to go unpunished because of inadequate legislation (according to a report by the Network Against Human Trafficking in West Africa.)

With the exception of South Africa, there is a noticeable absence of domestic anti-trafficking legislation in Southern Africa countries. Most countries in Southern Africa use the framework of illegal immigration – which tends to criminalize the trafficked person rather than the trafficker. In South Africa national legislation contains several articles which can be applied to the prosecution of traffickers, though they are not specific to human trafficking. Examples of these separate pieces of legislation are to be found in the Sexual Offences Bill, the Children's Bill, the Child Care Act and certain clauses in the Criminal Act. The prevalent unwillingness to draft legislation that deals specifically with trafficking is slowly changing.[61] A draft of the Human Trafficking Legislation has been tabled and is now being discussed.[62] South Africa is in the process of reforming national laws to bring the legal system in line with the United Nations Convention against Transnational Organised Crime (2000) and its Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.

Current discussion on the trafficking of women and children in Africa exhibits some tension at various levels. A key contention lies between human rights norms and the definition of 'tradition'. The failure to integrate human rights norms to protect trafficked persons is due to the absence of a definition of human trafficking in the juridical systems of many countries, combined with structural weakness in the judiciaries. This weakness is regarded as an outcome of 'missing ingredients' such as: political will, resources, and awareness among law enforcers (border police, magistrates, local chiefs and others). It is important to point out that the discussion on 'traditions' has not fully unearthed their dynamic nature. A tradition – such as the 'placement' of children – can be subject to alteration by exogenous forces which commercialise it, which in turn allows for trafficking. The issue at stake is not only what kind of legal label should be placed on this practice, but also adequate understanding of those forces that nullify the defining. Public and political debates on human mobility and trafficking should be about ways to connect cultural factors with other relevant structural issues.

Research findings from a study conducted by the Centre for Population Studies in London (Busza *et al*, 2005) on child migrants in Mali point to a shady area – in the legislative measures – between a trafficker with intent to exploit and an intermediary who facilitates a young migrant to search for

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61. Communication with Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) in South Africa (Author's files).
62. "Draft Interim Human Trafficking Legislation", a discussion paper containing the draft legislation submitted to the authors by RAPCAN in South Africa.

work and housing. A number of girls and boys, who have described their migrating experience, perceive such experience as a *rite of passage* with cultural and financial significance, not as one in which they were deceived or exploited. The study found that children who left home on their own, and who reported being returned against their will by non-governmental organizations and placed in rehabilitation centres, would take off again. Intermediaries *can* be perceived by the children to be 'active agents' who protect them during their journey. In Mali however, because local anti-trafficking surveillance committees view all migration as negative and no credence is accorded to the relationship between migrants and intermediaries. Migration is mostly clandestine and this hinders potential development of legislative measures that acknowledge protective networks of intermediaries and community members.

Identifying the tradition of migration and its cultural import as the cause of a higher incidence of autonomous child migration can tend to obliterate labour market dynamics in an era of global competition. Driven as it is by both supply and demand, human trafficking has gradually acquired a combination of local and global characteristics which resemble commodity chains having different nodal points involving different actors with varying degrees of power and authority (Truong, 2003c). Cross-cultural and historical comparisons are required to sharpen analytical tools and interpretation. Identifying root causes such as poverty requires rigorous analysis of social change through a given period. Analysing processes of migration and their intersection with trafficking requires a combination of methods from different disciplines to explain the mechanisms to show the relevance of similarities and differences between economic sectors and regions. Pronouncements on what constitutes the root causes which are too previous or have limited validation may well reduce complex dynamics to factors in a static system and thereby misguide consequent action.

3.3 The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children

The strong call for the adoption of an internationally recognised definition of human trafficking in the late 1990's sought to consolidate the diverse ways of understanding it. Since the adoption of a definition of trafficking in the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organised Crime in 2000, the discussion on human trafficking has been made easier, but not less controversial.

The definition is contained in Article 3 of the Protocol:

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

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

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

(d) "Child" shall mean any person less than eighteen years of age.

The Protocol provides an internationally binding definition. It aims to eliminate differences between national legal systems and to set standards for domestic law to address organised crime. Bound as it is by social and cultural contexts, the interpretation of crime and penalty has been subject to many queries. Particular concern has been raised about the interpretation of crime in the context of those who give non-commercial help – because of their own ideological commitment, friendship or compassion – to would-be migrants crossing national borders to reach political safety. To bring such acts under the general category of 'human smuggling' as a crime may destroy ethical norms of human solidarity – deterring human action evoked by empathetic sentiments. As Nadig (2002) pointed out, only in the context of undocumented or falsely documented entry being offered against payment should human smuggling be liable to penalty.[63]

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63. 'The smuggling of people' meaning the procurement – in order to obtain, directly or indirectly, a financial or material benefit – of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (Art. 3(a) UN Protocol against the Smuggling of Migrants by Land, Sea, Air, Supplementing the UN Convention Against Transnational Organized Crime, 2000). In contrast to trafficking the act of human smuggling does not require an element of exploitation, coercion, or violation of human rights to be subject to penalty (IOM, 2004).

Practices of human trafficking are embedded in social relations and therefore diverse. It is difficult to generalise interpretations based on fragmented evidence. As illustrated in section 3.2 a number of international non-governmental organisations have noted the peculiarities of human trafficking in Africa that do not entirely fit the international definition.[64] The definition bases itself on the model of transnational trafficking, often attributed to the presence of large networks of organised crime. Trafficking in Africa is through small, family-related networks and does not always take place across national borders. Terms such as 'trafficking', 'abduction' and 'sale of children' all have different meanings, depending on the particularity of contexts. Even the term consenting party is controversial with regard to the involvement of the parents and sometimes the children in the decision-making process.[65] A criminalisation approach could have to impose penalty on entire communities.

Another perspective is the broad definition adopted by ILO-IPEC that allows for its application in a wider variety of situations. In a 2001 report ILO-IPEC states the following:

'[I]n some respects, the variations found in the definition of trafficking in international instruments and frameworks are both inevitable and legitimate, and in no way represent confusion or disagreement. Each international instrument relates to the place the organisation of reference occupies in the international multilateral structure — be it a crime-focussed or rights-focussed body. As a result, what might at first seem an uneven handling of trafficking issues across organisations is actually more a question of approach and context than a difference of intent.' (Boonpala and Kane, 2001:5)

ILO-IPEC sees the merit in maintaining some flexibility in the use of the concept of 'trafficking' to accommodate institutional objectives and contextual requirements. A wide definition permits the practical accommodation of the specific objectives of the various, yet complementary, international instruments.

3.4 Other International Conventions

Other international organisations have formed an understanding of 'trafficking' and its related situations by combining the definition in the

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64. Examples of those NGOs are Anti-Slavery International, Terre des Hommes, and Human Rights Watch.

65. There are also concerns about the lack of definition of the terms 'exploitation of the prostitution of others' and 'coercion', see reports cited at the end by Save the Children-Sweden (2004) and UNICEF (2003).

Trafficking Protocol with other related agreements and conventions. Among these are the UN Convention on the Rights of the Child of 1989 (UN CRC), the ILO Worst Forms of Child Labour Convention of 1999 (No. 182), the ILO Forced Labour Convention of 1930 (No. 29) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979. Additional international frameworks that can be used to supplement the Trafficking Protocol include the General Agreement on Trade in Services (GATS) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (also called the UN Migrant Rights Convention). Using ILO Convention 182 as a reference point, Article 3 of the convention clearly indicates the inclusion of trafficking of children in the areas of concern.[66]

'For the purposes of this Convention, the term *the worst forms of child labour* comprises:

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.'

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – adopted in 1979 by the UN General Assembly and often described as an international bill of rights for women – defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. By 18 March 2005, 180 countries had ratified or acceded to the convention (with 98 signatures). Discrimination against women is defined in Article 1 of the Convention as:[67]

'...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment

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66. http://www.ilo.org/public/english/standards/ipec/ratification/convention/text. htm#top.
67. http://www.un.org/womenwatch/daw/cedaw/.

or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

Pertinent to trafficking of women and children, the convention calls on states to take appropriate measures against all forms of trafficking in women. It also affirms the reproductive rights of women as well as their rights to acquire and change or retain their nationality and the nationality of their children.

The UN Convention on the Right of the Child (UN CRC) is the most universally accepted human rights convention with the highest number of ratifications by member states. This convention recognises the human rights of children and the standards to which all governments must aspire in realising these rights. It elaborates the basic human rights which all children everywhere are *entitled* to, which are: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to full participation in family, cultural and social life. It includes the child's human right not to be trafficked or exploited.

There are two Optional Protocols to the convention that have been adopted to strengthen the provisions of the Convention in specific areas, being: the involvement of children in armed conflict and the sale of children (entered into force in February 2002), child prostitution and child pornography (entered into force in January 2002).

3.5 Governance Frameworks for the Movement of People

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and Mode 4 of the General Agreement on Trade in Services are frameworks governing the movement of people. The issues they individually cover, and the relative strength and status they enjoy as international legal instruments, reflect the current patterns of polarisation in international political economy.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families manifests the belief in the principle of indivisibility of rights (civil political, socio-economic and cultural). It took more than 12 years for the convention to come into force on July 2003 after reaching the minimum required ratification of 20 countries in addition to the ten countries which had signed the convention. By September 2005 there was a total of 33 ratifications and 15 signatures by UN member states. Of these, 12 ratifications and 8 signatures are

by African countries.[68] The countries ratifying this Convention belong to the low-income group and are home to some 4.5 million migrants (2.6 per cent of the world total migrant population). Major migrant-receiving countries located in high-income regions – such as Western Europe and North America – have not ratified the Convention, even though they host the majority of migrant workers (nearly 100 million out of a total of 175).[69] Other important receiving countries – India, Japan, Singapore, Malaysia, Australia, and the Gulf States – have not ratified the Convention either.

Irrespective of the form of migration – whether 'regular' or 'irregular' – the Convention recognises that migrants are entitled to a minimum set of rights which includes human living and working conditions, education and health services, legal equality including correct procedures, and the freedom from sexual abuse. The Convention also specifies that migrants have the right to return to their country of origin and participate in the political procedures there. The Convention accepts that even undocumented migrants are entitled to basic protection and recognition of their rights as human beings. Although countries that have ratified and signed the Convention are primarily sending countries, some are also transit and receiving countries. Signatories must treat migrants according to the principles of the Convention, irrespective of their documented or undocumented status. Articles 10 and 11 make provision for the prevention of, and the imposition of penalties on, human trafficking.[70]

As Taran points out (2000: 30) 'the fundamental challenge for the extension of human rights to migrants is the sharpening contention between basing an overall international approach to migration on a framework of control versus establishing a migration management framework in which human rights is a fundamental basis'. As he notes (2000: 36) the tension

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68. http://www.december18.net/web/general/page.
69. Statistics are from the UNESCO Information Kit on the UN Convention on Migrants Rights. See also the websites of December 18 and Migrants Rights International for more information on the convention.
70. Mr. Bertrand Ramcharan, the then Acting High Commissioner for Human Rights, noted in his speech marking its entry into force: 'the Convention will assist in securing a protective international mechanism of the human rights of migrants, including those in irregular situations. If States manage migratory flows in a manner that is respectful of human rights of migrants, a climate of non-confrontation and a feeling of security will grow in society. By defining migrant workers and their basic rights, the Convention seeks to play a role in preventing and eliminating the exploitation of all migrant workers and members of their families throughout the entire migration process. In particular, it seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage their employment in an irregular or undocumented situation.' (http://www.migrantsrights.org).

between global competition and the protection of migrants is tending to shift migration issues into a framework of migration management. States may still use their discrete sovereign power to refuse to extend human rights provisions to undocumented migrants – especially socio-economic rights.

Less *ad hoc* preferences – with discriminatory consequences – may be found in the other regulatory framework that touches on the 'free movement of natural persons', notably Mode 4 of the WTO's General Agreement on Trade in Services (GATS).[71] Mode 4 defines the supplier in technical terms as a 'natural person' – as opposed to a 'juridical person' such as a business firm. In principle, although Mode 4 covers all skill levels, the commitments of labour-importing countries have largely been restricted to the highly skilled corporate sector (e.g. intra-corporate transferees, business visitors, consultants, or contract-suppliers) (Young and Hoppe, 2003).[72]

Mode 4 has raised considerable debate among high-income and lower-income countries about the implications for labour migration, immigration policy and border controls. High-income countries are concerned that full liberalisation of Mode 4 will facilitate permanent migration and unauthorised migration or open the borders to a 'flood' of unskilled and semi-skilled migrants.[73] Lower-income countries are concerned that Mode 4 will facilitate 'brain drain' or, in reverse, a flood of highly paid consultants into their countries.[74] The application of Mode 4 so far fails to address the hierarchy of labour relations in the service sector, leaving migrant workers in the lower-skill strata more vulnerable to the risks of irregular forms of mobility where they are subject to the unruly practices of those who organise it.

A segment of the service sector that is increasingly being subject to scrutiny is the care sector in industrialised countries. The care sector is undergoing dramatic changes due to a plethora of factors which include the restructuring of the welfare state, aging population and a rising

71. 39 African countries are members of the WTO; many of which have 'Least Developed Country' status.

72. Mode 4 was initially conceived by the experts as an instrument for trade liberalisation, primarily concerned with service provision linked to foreign direct investment (FDI). Negotiations have eventually covered other sectors not necessarily dominated by FDI – such as education, health, tourism, and information technology.

73. For example, as Young and Hoppe (2003) point out, the German position stresses that labour is not a commodity like any others and thus not negotiable under similar terms; labour has to be negotiated in the context of social rights and social protection.

74. Sands, Oonagh (2004) taken from Migration Policy Institute, Migration Information Source, at http://www.migrationinformation.org/Feature/display.cfm?id=231.

participation of women in the labour market without a corresponding share of men in care tasks (in paid or unpaid form). For the managed care sector, negotiations are ongoing to find replacement by migrant labour; for private care the labour situation remains unruly. 'Houses of pleasures' and sex work constitute another domain concerning migration that has met with considerable resistance to an open dialogue on policy – owing to unresolved conflicts over moral values. Workers in these sectors will remain without protection until a resolution can be found.

3.6 Concluding Remarks

Recent judicial reforms in West and Central Africa have secured new legal measures to enhance human rights protection for trafficked persons, but the emphasis given to problems caused by the supply side could back fire. Overemphasis of the supply side can obliterate the dynamics of demand – which dynamics have been brought to light by a number of grassroots organisations.

Current defining of human trafficking – for policy-making particularly – has tended to fragment the entire constellation of institutions governing human mobility as a process. This fragmentation has led to much tension around the issues of public order, economic competition, efficiency and human vulnerability. Those concerned for public order purport that cross-border human trafficking reflects the weakening of states and local systems of governance. Those more concerned with human vulnerability see the state as a key actor driven by plural interests and, in this era of global competition, now stranded between three regimes: crime control, human rights protection, and economic efficiency. To avoid human rights being overridden by other interests it is important that these three regulatory regimes concerning human mobility are treated as three dimensions of an interconnected whole. A migration management framework is indeed now emerging which both protects the interests of states and ensures that the protection of the human rights of migrants is included in policy-making. The fate of those yet excluded from such a framework will remain with the Palermo Convention and its Trafficking Protocol.