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THE WOMEN'S LEGAL RIGHTS INITIATIVE

**MOZAMBIQUE NGO POSITION PAPER ON ANTI-TRAFFICKING IN
PERSONS LEGISLATION**

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BILL AGAINST TRAFFICKING OF PERSONS

Introduction

Background and Context

The history of Mozambique in the second half of the twentieth century was characterized by violence and social insecurity. Mozambique gained its national independence after ten years of liberation armed struggle. Right after independence, the country suffered an aggression by the former Southern Rhodesia, and was victim of a destabilization war which ended in 1992 after sixteen years of armed struggle, with the signing of the Peace General Accord between the Government and Renamo.

As consequence, the impact of war allied to poverty and frequent natural disasters affected in the worse manner the social textile.

In the last years, political stability and the rapid economical growth of the country resulting in development strategies adopted by the Government have produced significant results in the country and consequently in the proportion of people living in absolute poverty having these reduced from 69% in 1997 and 54% per cent in 2003.

Remarkable progress has been done in view to achieve the MDG (Millennium Development Goals, with focus on access to basic education, to primary health care, amongst other basic social service towards the improvement of living conditions of the population and families.

Besides the achieved progress, food insecurity, increasing impact of HIV/AIDS and natural disasters still continue to be important challenges towards the development of the country threatening effectively revert the gains of the latest years following the viewpoint of social development.

The impoverishment of families allied to the degradation of socio-cultural values brings itself the phenomenon which attempts against human dignity as violence and in the latest years the emergence of cases related to trafficking/sale of human beings.

CHAPTER I

1. THE PHENOMENON OF TRAFFICKING OF PERSONS

In conformity with line a) of the clause 3 of the Additional Protocol to the Convention of the United Nations against Trans-national Organised Crime relative to Prevention,

Repression and Punishment on Trafficking of Persons, ratified by the country through Resolution no. 87/2002, dated of 11 December, approved by the Cabinet Council, it is understood as trafficking of human beings the 'recruitment, transport, transfer, accommodation or reception of persons, recurring to threat or use of force or any other forms of coercion, to kidnap, to fraud on cheating to authority abuse or on the situation of vulnerability or on delivery or acceptance of payment or benefits to obtain the consent of one person who has authority over the other, for object of exploitation. The exploitation will include in the minimal the exploitation for prostitution of others or other forms of sexual exploitation, forced work or service or practices similar to slavery, servitude or the removal of organs'.

The phenomenon of trafficking of persons is not a recent phenomenon. Many years ago the humanity has known cases of trafficking of persons for effects of forced labour, sexual labour, and infantile labour.

This is how in the beginning of century XX, there comes the first time in International law the concept of trafficking associated to trafficking of European women as result of wakening of consciousness of the western world.

Large number of developed countries involved themselves in the 'import' of persons who were used to build their cities and infrastructures.

Such import was always eased, on one hand by the then governments and, on the other hand, by the need to seek better conditions of life, by the victims.

In latter years, the trafficking of persons has been linked to criminal organisations, or with tendency to trans-national intermediaries.

One research on trafficking in the southern part of the country, says Mozambique is one of the countries in Africa where trafficking is more intensive¹.

In the context of Mozambique, persons, mainly juveniles, taken by the socio-economical hardships, see in other countries, principally of the region, as a solution to their problems and accept proposals of criminal agents.

The search for the 'dream' makes persons 'vulnerable' to trafficking and not least are taken by persons whom they pay to guide them abroad and offered to work in precarious conditions. In most cases involved women and girls are hauled abroad and sexually exploited.

A research carried out by a South African foundation called Molo Songololo indicates that Mozambican children and young ladies are introduced into South Africa with work promises in agricultural farms ending in prostitution.² Mafia.

¹ Serra, Carlos. *Tatá papá, tatá mamã*, Tráfico de pessoas em Moçambique, Imprensa Universitária, 2006

² SONGOLOLO, Molo. *The trafficking of Children for Purpose of Sexual Exploration - South Africa*, Cape Town, 2000, p.42.

The published results confirm that studies the testimony extracts by juveniles transported to South Africa.

In Mozambique the dimension of the problem even though not known, there is information on the existence of various cases of trafficking of persons, mainly women and children.

In the last years the media has been reporting with certain frequency the occurrence of women and children kidnap cases, similar to the above-mentioned including the removal of human organs happening all over the country³.

An article published in daily newspaper Noticias⁴ said 'Police detained 5 suspects, among them 2 women suspect of kidnapping 3 children aged between 9 and 12 years old, supposedly to be sold to an intermediary who was supposed to take them to an unknown dealer from South Africa. According to Maputo Province Police, the children were kidnapped at the Santos (Matola) market, by a certain individual who was driving a Mercedes Benz who is believed to be living in the neighbourhood. The children have been cheated with sweets to get into the vehicle. The kidnapper confessed of having stolen the car from his employer to carry the children, following what he was supposed to hand over to the intermediary believed to have been waiting for him.'

This phenomenon has been noticed at domestic level, thus, from one point of the country to another within the country, and at international level, or better, from one point of the country to any other foreign countries. Mozambique is one of the countries of origin of trafficking of persons.

Available information says that the victims of trafficking are enticed by people known to them, who take them to neighbouring countries mainly to South Africa. On arrival, they are sheltered in house where they are deprived of freedom and later on sold for exploitation of labour force in exchange of unreasonable salary or sexual exploitation.

In most cases, the victims are not aware that they are being victims of trafficking and they notice it only when they are without any rights to oppose, without freedom and living under physical and psychological abuse.

On the other hand, there are signals that the country has been used as a transit point of the route to South Africa. Facts are there that mention the detention of 21 Pakistanis in the Province of Nampula, who were found with false entry visas after violating the border between Mozambique and Malawi and more 10 Somali citizens have embarked on a bus in Xai-Xai without documentation. Therefore, these examples show the fact Mozambique is a country of transit of trafficked persons on their way to Republic of South Africa.

Other slope of the phenomenon to take into account is the trafficking of persons from foreign countries into the country, as well as the dislocation of minors from their original

³ News from different media compiled (in the period 2001 to 2005) inserted in book by Serra, Carlos.

⁴ In Jornal notícias of 2002 (5/03/02), Page 7

region to another within the country for domestic work purpose without any form of remuneration and subject to ill treatment including sexual abuse.

It is important to refer that the trafficking of persons brings along grave consequences on people and to the country. On personal viewpoint, studies are there which indicate that the victims of trafficking present many times serious psychological disturbance and post traumatic tension dysfunctions, depression, complex of guilty, loss of sense of pride, chronic fear, anxiety, difficulty to express on what happened to them, due to the stress situation and violence to which they were submitted.

The trafficking of human beings represents very high prejudices to the country. The State loses citizens who become incapacitated to be useful for them and to the country due to the traumatic state which consume them. The same citizens then become a burden to the society to whom it must provide financial means and other for protection, shelter and support.

The research done indicates that the cases of trafficking in Mozambique are reported very timidly by the population but, however, it is general sense that the practice exists and must be fought against.

The phenomenon constitutes also a concern to various countries in the world which ended up by the adoption of the Convention of the United Nations against Trans-national Organised Crime and the Additional Protocol relative to Prevention, Repression and against Punishment of Trafficking of Persons, in special Women and Children which was ratified by our country through the Resolution no. 87/2002 dated of 11 December.

From the signature and ratification of such instruments, the State is obliged to take legislative measures and other actions at domestic level in order to make effective the assumed compromises.

Therefore, there is a need for the State to take some concrete actions in the sense to reprimand kidnap acts and extraction of human organs.

For this effect one multi-disciplinary group of consultants was established to prepare and present a Proposal of the Bill against Trafficking of Persons.

2-WORKING PHASES

The work scheduled for a period of four (4) months was drafted containing four (4) stages:

1st Phase – gathering of material analysis that include a bibliographic research, interviews and consultations close to groups of communities and civil society organisations, information collection on social practices in different regions of the country, analysis of

legislation in power and comparative studies relative to regulation of matters in other juridical ordinance;

2nd Phase – Workshop with experts from the Republic of South Africa, Rede Came and representatives of the civil society;

3rd Phase – undertake regional workshops for the presentation of the first draft to communities and organisations of the civil society.

4th Phase – Presentation of the final document

The present work is composed of introduction and two parts. One contains the background, context and justification and the second contains the bill proposal.

The first part has four chapters besides the introduction. In the **first**, it presents the phenomenon of trafficking of persons – internal view and international level, in which it tackles the concrete situation of Mozambique including some punctual situations; the **second** chapter under the title Trafficking Gender and Prostitution, dedicates on the relationship of gender and socio-cultural aspects that concur to the phenomenon of trafficking of persons:

In the **third**, it presents the constitutional principles allusive to protection of human dignity and therefore relatively relevant to the problem of trafficking of persons. In the **fourth** chapter, it deals with the International Conventions with relevance to the matter of trafficking of persons, analyzing the obligations resulting from the ratification of these instruments, in the **fifth** chapter, it brings about the analysis of the criminal legislation tackling crimes against persons drafting the manner the matter is dealt with or under bill proposal, in the **sixth**, and in terms of compared right, a brief summary of how the thematic of trafficking of persons is dealt with in some countries of the region and lastly, in chapter **seventh**, one finds the conclusions and recommendations.

CHAPTER II

TRAFFICKING, GENDER AND PROSTITUTION

There is a strict linkage amongst trafficking, gender and prostitution, meaning that the problem of trafficking of persons must be analysed also in the gender perspective.

In this chapter, we would like to analyse the phenomenon of prostitution within the framework of trafficking of persons, although we do not present here bill proposals on fighting prostitution.

Gender

Data obtained from research and the majority of reported cases through media take to the conclusion of saying people's object of trafficking for sexual exploitation are in majority females. This fact is clearly acknowledged by the protocol against trafficking which gives special focus to women and children. The tradition, the customs and socio-cultural values predominant in the society which put woman in a subaltern position relatively to man are some of the causes of gender inequality. The cultural conception of man supremacy and authority makes many men to expect obedience and submission by a woman in all aspects of daily life including sexual life.

Another factor that eases abuse against woman is the socio-economical situation and cultural factors which increase the gender inequalities and discrimination that makes women and children to be even more vulnerable to trafficking. Indeed, women and children are 'in gross mood' more disfavoured socially and economically. The scarce job and education opportunities in the country contribute for them (women and children) to become objects of trafficking, mainly to be taken outside the country.

From the socio - cultural point of view, there is the conviction that says the integration of minors together with aged persons, parents or not, contributes for a better training in life. Virtue to power relations and with the argument of saying child labour integrates child education; minors are also object of ill-treatment which contributes to the trafficking victims in the expectancy of better living conditions.

From the socio-economical viewpoint, perceiving the levels of poverty of the majority of the population, minors represent a financial burden difficult to afford and the sale of children or other parent emerges as a means of survival.

Both prostitution and trafficking are part of the domination system founded in gender relationship and it has its source in the inequality of power between man and woman in the society.

In Mozambique, there are no big legislative developments referring to the phenomenon of prostitution. However, there will be always a need to distinguish isolated prostitution from prostitution based in trafficking, therefore the issue of criminally give liability to the trafficking for sexual exploitation.

CHAPTER II

THE LEGAL FRAMEWORK

1. THE CONSTITUTION OF THE REPUBLIC OF MOZAMBIQUE

The Mozambican juridical ordinance has on its top the Constitution of the Republic. The Constitution is the 'mother' Law which defines the master boundary and guide of the State. In consequence, the ordinary laws must always conform to the principles herein established.

From the general display of the Constitution, (Article 11) it says that “The Mozambican State has the following objectives:

(...)

c) the edification of a society of social justice and the creation of material welfare, spiritual and of quality of citizens live:

(...)

e) the defence and the promotion of human rights and of equal of citizens before the law;

Intimately linked to protection of human rights one finds protection to right to life.

The right to life is a right of elevated dignity. With the consecration of the right to life, one is protecting a juridical good situated on top of the rest of rights.

Thus, line a) of the Article 40 of the Constitution establishes that:

1. All citizens have the right to life and physical and moral integrity and must not be subject to torture or cruel or inhuman treatment.

The practice of trafficking of persons is with no doubt a degrading practice and attempts against the dignity of the human being, taking into account victims are subject to ill-treatment, forced labour, sexual abuse.

The right to life is particularly questioned taking into attention the pandemic of HIV/AIDS, in virtue of unprotected sexual relations and with different partners in which now and then women are subject to, in countries of destination.

On the other side, being labour a right that dignifies men, the Constitution establishes the principle of free choice of a profession, stipulating that the work is compulsory and prohibited.

Thus, forced labour and sexual labour are object as victims of trafficking, constitutes a frontal violation to the principles of Constitution.

Relatively to child in special, the Constitution stipulates that:

Article 47

1-Children have the right to protection and necessary care for their welfare;

2- (.....)

3- All acts relative to children, be they practiced by public entities or by private institutions must principally take into account the superior interest of child (principle of infancy protection)

As corollary to protection of children, the Constitution consecrates the principle of 'the family is responsible for the harmonious growth of child.....; the family and the State ensure the education of the child training them on national unity values, in love to the nation, equality between man and woman, respect and social solidarity; the parents and mother must provide assistance to sons in and out of marriage'. (Article 120)

Article 121 stipulates that:

1- "All children have the right to family protection, by the society and State, in view to their integral development.

2- Children, in particular orphans, bearers of disability and the abandoned, have protection by the family, society and the State against any form of discrimination, ill-treatment and against the abusive exercise of authority within the family and rest of other institutions.

3- The child must not be discriminated, namely in reason of their birth, nor even subject to ill-treatment;

4- Child labour is forbidden independently to their age of compulsory scholar or any other form'.

The principle of the right of the child to protection of the family, of the society and of State aiming at its integral development versed in the cited constitutional disposition, it must be materialized which means not only the creation of law that incriminate the acts that they attend against the rights and the child welfare.

On the other hand, the same Constitution occur some important guiding principles on criminal law. Since then, the principle of typification: the principle of which it only constitutes crime the act qualified as such by the penal code, which is translated into the Latin expression '*nullum crimen sine lege*'.

This is resulting to the displayed on Article 60 of the Constitution: 'Nobody can be condemned for a non qualified act as crime at the moment of practising it.'

From this principle results that, if someone practises an act not typified by law as crime, there will be no room for criminal responsibility.

In consequence, because the criminal law does not foresee specifically the trafficking of persons as crime, then the practising agent will not be hold responsible criminally.

Alias, the imprisonment or detention of an accused person or accused of the crime of trafficking persons, the act should be contrary to the established by law in the Constitution subject to sanction in the terms of the law, as established in article 38.

It is important to mention that Article 70 of the Constitution consecrates the right of the citizen to appeal to court against acts that violate their rights and interests acknowledge by law.

In face of a situation of trafficking of persons, the interested parties may appeal to courts claiming criminal responsibility of the person who has committed the act.

However, the actor punished for such doing diverse acts foreseen in the penal code which integrates the behaviour of the agent but not for the crime of trafficking of persons not typified in the Penal Code or in any separate law.

Yet by force of the Constitution and in the ambit of international relations, Article 18 stipulates that:

International law

1. The international agreements and treaties, approved and ratified, in power within the Mozambican juridical ordinance after the official publication in the gazette and whilst the Mozambican State linked internationally
2. The norms within the international law have in the internal juridical ordinance the same value which assumes the infra-constitutional normative acts emanated by the parliament and government, according to respective form of reception.

Article 43 – interpretation of fundamental rights

The constitutional ruling relative to fundamental rights are interpreted and integrated in harmony with the Universal Declaration of Human Rights and the African Charter of Human and People's Rights.

Of conjugated interpretation of constitutional dispositions and international conventions result the need of adoption of rules which penalises expressively and adequately the crime of trafficking of persons, in particular women and children.

CHAPTER IV

1. INTERNATIONAL CONVENTIONS

In this chapter, we deal with the phenomenon of trafficking of persons at international law level.

It is important to stress that the trafficking of human beings constitutes a concern of international community.

In this context and on matters of protection of fundamental rights of persons, it is important to mention the following conventions:

1. Convention of the United Nations on the Rights of the Child

The Mozambican State adhered to the Convention of the United Nations on Rights of the Child through the resolution no. 19/90 dated of 23 October, approved by the Cabinet Council. In the terms of no. 1 of article 11 of this Convention, the party States compromise themselves, amongst others, to take proper measures to fight the dislocation and the illicit retention of children abroad.

On the other hand, no. 2 stipulates that for the effect of the States can establish bilateral or multi-lateral agreements or adhesion to existing agreements, which reinforces the ratification by the States to the Convention of the United Nations against Trans-national Organised Crime relative to Prevention, Repression and to Punishment of Trafficking of Persons in special Women and Children.

In view to guarantee protection against the illicit dislocation and retention of children, the Convention of the United Nations on the Rights of the Child in its article 21, it determines that the State that acknowledges and or permits the adoption must ensure that the interest of the child should be taken into primordial consideration.

In the ambit of adoption, various are the recommended measures of which it has been highlighted line d) which determines that the State must adopt the proper measures to guarantee in case the adoption by foreign country, the placement should not be trafficking or in inadequate material benefit for those who partake.

Need to mention yet that in matters of child labour article 32 of the Convention stipulates that the Party States acknowledge to the child the right to be protected against economic exploitation and against the performance of any labour which can be dangerous or can prejudice their education or can be noxious to their health or to their physical, spiritual, moral or social development.

Yet by the power of the Convention on the Rights of the Child (article 34) the Party States compromise themselves to protect the child against all forms of sexual exploitation and abuse and must take measures at national, bilateral and multi-lateral plan to impede among other aspects, the exploitation of children in prostitution or other illicit sexual practice.

In reinforcement of the consecrated in that Convention, the Convention on the Minimum Age for Admission to Employment (no. 138) in the terms of which all the member-country compromise itself to follow a national policy which assure the effective abolition

of child labour and elevates progressively the minimum age of admission to employment or to labour at an adequate level or full physical and mental development of the youth⁵

The practice of trafficking of persons mainly children constitutes a confrontation to stipulated principles in these Conventions above-mentioned once the finality of that is, in majority of the cases, the child labour and sexual exploitation.

2. African Charter on Rights and Welfare of the Child

This Convention was ratified by the Mozambican State through the resolution no. 20/98 dated of 26 May, approved by the Cabinet Council. In the terms of no. 1 of Article 15 of this Convention, it is acknowledged to all child the right to remain protected against all forms of economic exploitation and against the performance of any labour which can endanger the life of the child or which can be noxious to their health or to their physical, mental, spiritual, moral or social development.

The no. 2 of the cited article adds that the Party States will adopt legislative and administrative measures aimed at ensuring the implementation of the article.

On its turn, article 16 obliges the Party States to adopt legislative, administrative, social and educative measures adequate to child protection against all forms of torture, or physical or mental abuse, of non-attendance or negligent treatment, of ill-treatment or exploitation, including sexual abuse.

Yet in view to protection of the child and in accordance with the principle of protection of minor interest consecrated in the Convention on Rights of the Child, article 24 of the African Charter on Rights and Child Welfare establishes that the Party States who acknowledge or admit the adoption system, will ensure that the superior interest of the child will be of primordial consideration.

Referring to child sexual exploitation the African Charter on Rights and Child Welfare (article 27) consecrates the principle that States must adopt necessary measures to protect victims of that type of infraction.

In matters of trafficking, article 29 of the African Charter of Rights and Child Welfare establishes that Part States must take appropriate measures to impede the “kidnap, sale or trafficking of children independently to their end, or its form, practised by any person including the parents or representative of the child.”

3. Facultative Protocol to the Convention of the United Nations on Rights of the Child relative to Sale of Children, Prostitution and Infantile Pornography.

⁵ In conformity with that obligation, the Mozambican constitutional legislator consecrated the principle of prohibition of child labour be at the compulsory school age or at any other, cfr. no. 4 of Article 121 of the Constitution of the Republic of Mozambique, of 2004.

The Facultative Protocol to the Convention of the United Nations on Rights of the Child relative to Sale of Children, Prostitution and Infantile Pornography was ratified by Mozambique through the Resolution 43/02 dated of 25 May by the Cabinet Council and is of relevant importance for the protection of the child. In terms of Article 1 it determines that the Party States must prohibit the sale of children, infantile prostitution and pornography according to the displayed in the Protocol.

By force of that Protocol, and in the terms of Article 3rd, the Party States must guarantee that in the context of sale of children the determined acts by the Convention be typified as crime in Member States.

The Convention includes the following acts:

- a) the sale of children;
- b) Offer, delivery, or acceptance of one child, by any means, destined for:
Sexual exploitation, transfer of organs of the child with the profitable intention or submission of the child to forced labour;
- c) The induction or consent by undue manner as an intermediary for the adoption of the violation of international tools applicable in matters of adoption;
- d) The offer, obtaining, seeking or delivery of one child with infantile prostitution finality (...);
- e) The production, distribution, diffusion, import, export, offer, sale or possession **for all acts** of infantile pornography (...)

Yet in conformity with no. 3 of that same Article, The Party States must penalise these infractions with adequate sentences taking into account the gravity and nature

4. The Convention on Prohibiting of Worse Forms of Infantile Labour

The Mozambican State ratified the Convention no. 182, the Convention on the Prohibition of Worse Forms of Infantile Labour and the immediate action towards its elimination which is in accordance with the Convention of International Labour Organisation (ILO) on minors protection, namely the **Convention on the Minimum Age for Admission to Employment** (no. 138), ratified through the resolution no. 5/2003, dated of 23 April and the **Facultative Protocol to the Convention of the United Nations on Rights of the Child relative to Child Sale, Prostitution and Infantile Pornography**.

The Conventions herewith cited and ratified but the Mozambican State impose the adoption of legislative and administrative measures and others in view to the materialisation of obligations emerging from them.

5. Additional Protocol to the Convention of the United Nations against the Transnational Organised Crime relative to Prevention, Repression and Punishment of Trafficking of Persons, in special Women and Children.

This Protocol is an international instrument which in a special form establishes dispositions directed towards prevention, repression and punishment of trafficking of persons, with particular attention to women and children. They also constitute yet

objectives of the Protocol the protection and help of trafficking victims respecting fully their human rights and promote the cooperation between the Party States in order to achieve these objectives.

Thus, the Party States are obliged to take measures towards the criminalization of acts of trafficking of human beings.

In this perspective, the States must review the legislation through their Juridical Orders (Bars Associations) in order to integrate the acts of trafficking of persons according to the defined by the Protocol, in the internal Criminal Law.

CHAPTER V

1. THE CRIMINAL LAW

In this chapter, we shall present the legal types of crimes foreseen in penal code in power and that may approach to the crime of trafficking of persons.

One fundamental principle of the criminal law in power is the principle of legality due in article 1 of the Penal Code which also can be translated in the principle of typification foreseen in article 5 of the Penal Code. “*Nullum crimen sine legen*” in the terms of which not any fact, or can be in action or omission should be taken as crime without any one of the previous law can qualify it as such.

Should be added another principle of relevant importance in the ambit of criminal law is the non-application of extensive interpretation and of non-integration by analogy of criminal law. (art 18 of the Penal Code) of these principles result, on one side, that a determined norm must not extensively be applied to behaviours not strictly foreseen in the penal law; On the other side, it says that in any of the cases should the criminal law be applied taking into account the similarities which exist between one determined behaviour and other qualified as crime by the penal law.

In accordance with the concept adopted by the United Nations, the trafficking of human beings, it is understood as “the recruitment, transport, transfer, accommodation or shelter of persons, recurring to threats or use of force or other forms of coercion, kidnap, fraud, cheating to abuse of authority or of vulnerability situation or delivery or acceptance of payment or benefits to obtain the consent of one person who has authority over the other, for exploitation purposes.

The exploitation includes at least the prostitution exploitation of one person to another or other forms of sexual exploitation, forced labour or service, slavery or similar practises to slavery, ill-treatment or extraction of organs;”

Of the definition adopted by the United Nations, it has been concluded that there are three constitutive elements of crime of trafficking of persons, as follows:

- a) The acts of recruiting, or transporting, transfer accommodate or lodging;
- b) the means of threat or use of power, or other forms of threatening, kidnap, fraud, seduction or abuse of authority, or situation of vulnerability, the delivery or

- acceptance of payment or benefits to obtain the consent from one person who has the authority over the other;
- c) For exploitation purposes.

The constitutive elements of crime identified above are covered of particular importance; hence it is from them that one can distinguish crime of trafficking of persons from other crimes.

From the reading of this concept, one can see that the trafficking of persons should fit in crimes against persons. From this large group highlights some legal types which can be taken incorrectly or approach to crime of trafficking of persons, which we come forward and analyze.

Of crimes against persons

Article 328

Of crimes against persons liberty

All who imprison any free man will be sentenced to major imprisonment from two to eight years and the maximum in fine.

The subject of any free man to imprisonment should not incorrectly be taken as crime of trafficking of persons, thus the same does not presume the recruitment or other action or means foreseen for the crime of trafficking of persons.

Article 330

Private Prison

Any particular individual who establishes a private prison, retaining by him/herself or through others, up to twenty-four hours, someone as a prisoner inside a house or other place as a prison, and keep in such manner, which can not be in all his/her liberty, a post that cannot have any prison, will be sentenced to imprisonment of one month to one year.

§ 1. A simple retention for at least time is considered as a corporal offense, and punished according to regulations of the law in such cases.

§ 2. If the retention takes more than twenty-four hours, the criminal will be sentenced to three to two years of imprisonment.

§ 3. If within three days the criminal frees the once detained person, without gaining any object which was aimed with the retention, and before the commencement of any procedure against him, the sentence will be mitigated.

§ 4. If the retention, however takes more than twenty days, the sentence will be major imprisonment of two to eight years maximum.

The crime of private imprisonment has constitutive elements the retention of someone as a prisoner, in closed house or any other place for a period over 24 hours. The means and purposes of the agent do not influence the existence of crime.

Such elements are completely different from those of crime of trafficking; at least the two types of crime should not be taken incorrectly.

Article 331

Special aggravation in crime of private imprisonment

In any of the cases in which there is private imprisonment, the sentence will be of major imprisonment from two to eight years and the maximum fine, in which the following issues are verified:

1st If the criminal commits a crime, simulating by any means of being a public authority.

2nd If the crime has included death threat, torture or any other corporal offense, which would not correspond to a graver sentence

This disposition can inspire a form of regulation of special aggravation cases in the crime of trafficking of persons.

Article 332

Non-liberation and occultation of the offended

If the one who has committed the crime of private imprisonment does not show that he/she gave liberty to the offended or where this exists, will be sentenced from sixteen to twenty years.

Article 342

Violent and fraudulent subtraction of minor aged seven

The one who by violence or through fraud remove or take, or make remove or take one minor aged seven years from house or place where with the authorization of the guardians or direction, to be found, will be condemned at major imprisonment from two to eight years.

The crime of subtraction and occultation of a minor has some affinities with the crime of trafficking of persons, particularly the minors. There is the element take the minor out of the house or where they live which propose movement: There are means, fraud or violence, with authorization by the guardians but there is no element end or purpose of the same removal of the minor, hence this is not taken as crime of trafficking of persons.

Article 343

Constraints of minor by abandoning their parents or tutors' house

The one who shelters through violence, or induce by fraud a minor aged twenty to abandon parents or tutors' house, or those who would be the guardian of their person, or abandon the place in which by their mandate there are there, or removal or take, will be condemned to prison, without prejudice of major sentence of private imprisonment, if they occur.

Unique. If the minor is under 17, the sentence will be the maximum of imprisonment.

The same can be said in respect of the foreseen crime in article 343 of the Penal Code. Once present the element removal and the means violence and fraud independently of the end or purpose is committed the crime of constraints of minor to abandon parents or tutors' house.

Article 344

Occultation, change and misleading of minors

That who occults or makes occult, or changes or makes change by another, or mislead or makes misleading a minor aged 7, will be condemned to major imprisonment from two to eight years.

§ 1. If they are under 7 and the minor eighteen, they will be condemned to major prison from two to eight years, save major sentencing of private imprisonment, if these happen.

§ 2. In all cases up to now announced in this section, the one who does not show where the minor is, he/she will be sentenced to major imprisonment from sixteen to twenty years.

§ 3. Seeing oneself as the guardian of the person of one minor, the one who cannot present to those with the right of claiming, neither justifies their disappearance, will be condemned to major imprisonment from two to eight years, salvo if in curse on disposal of the article.

The crime of occultation, change and mislead of minors is not likely with the trafficking of persons. Following are some constitutive elements of crime, occultation, or make occultation, a change, or make removal or mislead minor aged seven. The norm envisage to protect the minor, guarantee security of the minor against the danger of their disappearance, by not covering in integrally the juridical good which is pretended to protect with the incrimination of trafficking of persons.

Article 345

Exposition and infantile abandon

§ 1. If the exposition or abandon is in first place, he will be condemned to major prison major from two to eight years.

§ 2. If this crime has been committed by the legitimate father or mother or tutor or guardians or education charges of the minor, the sentence will be aggravated with the maximum fine.

§ 3. If with exposition or abandon puts in danger of life of the minor, or if it has resulted in lesion or death, the sentence will be eight years of imprisonment.

In the crime of exposition and abandon, these are the constitutive elements of the crime, the exposition or abandon of a minor aged 7 in the place that no public establishment for the reception of the exposed. It's no approach to the crime of trafficking of persons. In the exposition the abandon is already the end of criminal act while in the crime of trafficking the end is exploitation in its own form.

Illegitimate delivery of minor aged 7

The one who, having his function, the creation or education of a minor aged 7, the delivery to a public establishment, or the other person without consent of person who has confidence or of competent authority, will be sentenced to prison of one month and correspondent fine.

In the crime of illegitimate delivery of minor aged 7 and what the law penalizes is the act of delivery to the public establishment or to other person, of a minor aged 7, without the consent of who has been trusted or the competent authority. Do not take it incorrectly, thus, with the acts of recruitment, transport, or sheltering by means of power, cheating, etc for the purpose of exploitation, which constitute essential elements of the crime of the trafficking of persons.

Of the crimes against persons

Article 392

Indecent assault

That who by means of seduction, indecently assaults a virgin woman, over twelve and under eighteen years, will have a sentence of major prison of two to two years.

Article 393

Violation

The one who has illicit intercourse with any woman, against their will by means of Physical violence, of vehemently intimidation or any other fraud, which does not constitute seduction, or seeing the private woman of use of reason and senses, they commit the crime of violation and will be penalized in prison from two to eight years in jail.

Article 394

Violation of a minor aged twelve

That who violates under twelve, given that it can't be proved any of the circumstances narrated in previous declared in latter clauses, will be sentenced into major prison from eight to twelve years.

The crime of indecent assault in nothing you can take it for trafficking of persons. Can however the crime of indecent assault with the trafficking of persons.

The same can be talked in relation to the crime of violation.

Article 395

Violent or fraudulent kidnap

The kidnap of any woman with dishonest end, through physical violence, of vehemently intimidation or any fraud, that it does not constitute seduction, or seen as private woman of the use of reason or of the sense, will be punished as an attempt to assault with violence, if the indecent assault does not take place, it will be considered as an aggravating circumstance of the committed crime.

They are constitutive elements of crime: the detention and dislocation of woman from one place to another with the dishonest purpose, by means of physical violence, vehemently intimidation or any other fraud that does not constitute seduction.

The crime of violent or fraudulent kidnap presents some affinities with the crime of trafficking of persons but out of it distinguishes in at least two aspects: the crime of kidnap is only on women while the crime of trafficking of persons respects to generality of people. Men are object of trafficking of persons say for the purpose of forced labour or service and also for the effect of extraction of human organs.

Article 396th

Consented kidnapping

It will be considered as aggravating circumstance on indecent assault the kidnap of any virgin woman, over 12 years and under 18 years, of the house or place in which with due authorisation she lives in, that it happens with her consent; if the indecent assault, however, does not take place will be punished for the kidnap by seduction with imprisonment up to one year.

The crime of consented kidnap reveals itself of particular interest on distinction between crime of trafficking of persons and other crimes in virtue of bringing consent as an element to consider in the qualification of the crime. In case the crime of trafficking of persons the consent of the victim is irrelevant, whatever the age is, according to what results from article 3, line b) of the Definition of the United Nations.

Article 398th

Special aggravation

In the crimes where this issue is dealt, the penalties will be substituted by immediate superior, if the criminal is:

1st Ascendant or a brother of the offended;

2nd if it is a tutor, caretaker or master of that particular person, or by any title that has over them, or the person responsible of their education, directorate or guardian; of if it an ecclesiastic or a ministry of any cult, or a public worker whose functions depend on the business or pretences of the offended.

3rd if it is created or a domestic of the offended person or its family, or, in reasons of profession that demand title, has influences over them.

4th If it has communicated to the offended person syphilis or venereal disease

The special aggravation could constitute an inspiration for the definition of the aggravating circumstances in case of crime of trafficking of persons.

Article 399th

Prior denunciation

The crimes due in antecedent articles have no place of criminal proceedings without denunciation of the offended, or from its parents, grand parents, husband, brothers, tutors or curers, unless in the following cases:

1st - If the offender is a minor of 12 years of age;

2nd - if it is committed any qualified violence by law as crime, whose accusations do not depend on the denouncement or of the accusation of the part;

3rd – being a miserable person or finding it in charge of establishment of beneficence.

§ unique - after the denunciation and instauration of criminal proceeding, the forgiveness or desistance from the part does not stop the criminal proceeding.

Contrary from the crimes dealt with above, the crime of trafficking of persons should revert to the public mature, taking into account the dimension of the rights and protected interests. The law should allow that the Public Prosecutor or any one from the people who has knowledge of facts, could denounce and proceed with an action against the authors of the crime.

3. LEGISLATION ON THE FOREIGNERS

The entrance, permanence and exit from the country of a foreign citizen is regulated by law 5/93 of 28th December. Nr.1 of article 5 of the cited Law establishes that the entrance in the country must be done through border points officially established for that purpose.

Article 6th defines the required documents for the entrance of a foreign citizen to the country among others it is highlighted the passport an equivalent valid document and the entry visa.

It is considered a clandestine migrant, and for that matter illegal, all those who leave the national territory or come into it from any habilitated point, without passport or equivalent document, false, incomplete or outdated, as well as those who do not use the habilitated points even with the necessary documentation⁶.

⁶ According to the definition encompassed in the Law 5/93 of 28th December.

It is to conclude that the trafficking of persons should not be confused with “smuggling” of persons, that is, the case of illegal migration or situations where someone facilitates the entrance of a foreigner in a certain country without the required documentation for that effect.

The trafficking involves a continuous exploitation of the victim while smuggling or misleading aims at facilitating an illegal introduction or exit of a person who is not national of a certain country or who has not permanent residence.

The person who facilitates the illegal entrance is normally paid at moment of the agreement between the smuggler and the smuggled and via some rules, their involvement ends as soon as the illegal entrance in the country of destiny is concretized. The intention of the smuggler is not to exploit his client. He can, however, once in the country of destiny, the smuggler to force his or her client to forced labour or sexual work

CHAPTER VI COMPARED LAW

Some countries have already taken some measures of prevention and combat to the trafficking of persons. In terms of comparative studies, and for the reasons of its existing deep affinity between their respective judicial ordinances of the countries, we brought the experience of Portugal and Brazil in terms of legislation of trafficking human beings. We also researched in some countries of the region as a way of understanding how this phenomenon is legally treated in those countries namely, our neighbour South Africa and Malawi

Although it is considered that Portugal does not punish adequately the crime, it has a Law which combats the trafficking of persons. It also refers that it only gives provision of trafficking for prostitution and it ignores the trafficking for labour exploitation.

Facing these observations, there are publications and the involvement of institutions in debates for the revision of the Law in force.

In Brazil, the trafficking of persons is punished by Law however, it is questioned the fact of this only limiting its penalties for international trafficking. There are also some criticisms that according to the law it only provides for trafficking for prostitution, not typifying the trafficking for other purposes. In the last years, the trafficking of human being has constituted the object for big debates which led to the proposal of the revision of the Bill. In this context, it was introduced an amendment in terms of criminalizing internal trafficking of persons subject to the applicable rules of the trafficking of persons and there were added some aggravating circumstances to the crime⁷

Apart from the existence of the law that penalize specifically the trafficking of human beings, Portugal and Brazil both have projects of prevention and combat of trafficking of persons as well as programmes for protecting the victims.

⁷ in http://www.planalto.gov.br/ccivil_Ato2004-2006/2005/Lei/L11106.htm

South Africa is in a very advanced stage of the elaboration of the Bill for Prevention and combat of trafficking of people.

Malawi, dedicates a section for trafficking of minors, in the Bill of the Protection of the Child still in the process of elaboration.

To have sound results in the combat of trafficking of persons, it is necessary to have concerted measures among different countries.

CHAPTER VII

CONCLUSIONS AND RECOMMENDATIONS

The studies indicate that in many parts of the country, there is practice of trafficking persons for work purposes or for forced labour, sexual work, child labour and for the extraction of human organs for magic purposes.

These practices are very seldom reported to the authorities, most of the times because those who know fear reprisals.

There is lack of legislation that criminalizes the practice of trafficking persons, and the authors of this practice can only be liable for different legal types of crimes, attending different actions practiced by the agent. In this way, most of the collaborators namely those who transport, accommodate and employ the victim of trafficking of persons are left unpunished.

The practice of trafficking persons, has a tendency of involving an organization of criminals in the interior and outside the country, particularly for international trafficking, there is a need for the countries to take concerted measures in a way of reprehend and avoid these practices.

Considering the obligations assumed of Mozambican State on ratifying the international convention already mentioned, with a particular emphasis to the United Nations Convention against Trans-national Organized Crime and the Additional Protocol Related to Prevention, to Reprehension and to the Punishment of Trafficking of Persons, in special Women and Children.

Therefore, there is a need of adopting a bill that regulates expressly the crime of trafficking of persons.