

THE INVESTIGATION OF HUMAN TRAFFICKING: AN IMPOSSIBLE MISSION WITHOUT ELEMENTAL IDENTIFICATION OF THE CRIMEJuanida Horne¹**ABSTRACT**

Human trafficking has not only awakened a great deal of interest within the academic world, but its inhumanness has also been seriously questioned within local communities. This concern of communities is placing increasing pressure on law enforcement agencies to act swiftly in their attempts to prevent and combat this daunting crime. Although research on human trafficking in South Africa is still in its infancy, it has become apparent that one of the unique challenges of combating human trafficking is the ability of investigating officers to understand and deal with the complexities of identifying and investigating this crime. The aim of this study was to provide more clarification on the general elements of this so-called hidden crime to aid investigating officers to gain a better understanding and thus be able to identify it. In-depth, individual interviews were conducted with six police investigators, currently investigating trafficking cases, with a total of 90 years' investigation experience. Content analysis was applied that provided some clarity on the difficulty experienced in identifying and understanding the crime of trafficking. Three main themes emerged, namely the elements of the crime, its prevalence and the identification of the crime. The results of the research provide practical guidelines and recommendations to assist police officials to more successfully investigate these cases.

INTRODUCTION

Human trafficking is viewed as a rising crime and has become an increasingly important human rights concern worldwide as it poses a serious challenge to law enforcement in the 21st century (Farrell, McDevitt & Fahy, 2008: 13). There is increasing recognition and acceptance of the most essential role that the criminal justice system and, more specifically, police officials must fulfil in the investigation and prevention of human trafficking, both nationally and internationally.

Moreover, this crime trend is heightened by the high demand for low-cost labour by global economies, the inadequacy of law enforcement and insufficient legislation on human trafficking (Shelley, 2003). The trafficking of humans is further commonly exacerbated by the economic pressures on individuals to flee from their home countries in search of opportunities for a better life. The actual movement of these individuals in itself does not constitute trafficking; rather, it is the force, fraud or coercion exerted on these individuals by another to perform services or remain in services that constitute this crime (US Department of State, 2005).

With this global increase in the trafficking of humans, the already high expectations placed by Government on law enforcement agencies and relevant role players, particularly investigators to combat and investigate these crimes successfully are raised even more. The challenges experienced by investigators are surpassed by the fact that labour and sex trafficking incidents are erroneously labelled and viewed as gloomy immoral social occurrences, and are therefore not necessarily seen as crimes that qualify for law enforcement involvement. Moreover, the trafficking of persons currently presents a unique challenge to police officials due to the complexity of investigating these cases. Intense political pressure is

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continuously placed on all governments to secure convictions as an indicator of national efforts to address this crime (Segrave, Milivojevic & Pickering, 2009: 65).

The limited research in this field contributes to the misconceptions of how trafficking issues should be dealt with in the criminal justice system. Pharoah (2006: 66) found that almost no research has yet been conducted in South Africa on the challenges that will be experienced within the criminal justice system when trafficking cases are investigated and offenders prosecuted. The dilemma is that the successful investigation of human trafficking, as a hidden crime in South Africa, will not be possible if the difficulties in understanding, identifying, investigating and proving the elements of this crime are not effectively addressed.

A previous study by Van Zyl and Horne (2009: 10) focused on the various challenges and difficulties that investigators face when investigating child trafficking cases. These challenges include the lack of sufficient guidelines on the structuring of investigation units, as well as dealing with specific trafficking investigations. These authors also found that the investigating officers experienced difficulty in identifying the crime of trafficking during an investigation as South Africa does not have legislation yet and therefore have to rely on related crimes such as kidnapping and sexual offences.

AIMS AND OBJECTIVES OF THE STUDY

The aim of the study on which this article is based was to clarify and identify the general characteristics and specific elements of human trafficking in order to gain a better understanding of this crime and to provide practical guidelines and recommendations to police officials to combat and investigate these cases more successfully. Three main themes will be discussed, namely the elements and characterisation of the crime, the prevalence of the crime and, lastly, the identification of the crime. The results of the study will be presented within these three themes and the article will conclude with practical guidelines and recommendations to assist police officials in investigating this crime more successfully.

RESEARCH METHODS

An empirical research design was used in this study following a qualitative research approach, as explained by Mouton (2001: 144) in order to gain information on the elements of human trafficking that will assist investigators in identifying this crime. In-depth, individual interviews were conducted with the six police investigators who investigate trafficking cases to obtain primary data as well as their perspectives of and views on the difficulties experienced with the identification and investigation of this crime.

In the light of the exploratory nature of this research and because there are few police investigators with significant experience in the investigation of this crime, the non-probability snowball sampling method as recommended by Huysamen (1993: 46) was used to select the six participants investigating trafficking cases in South Africa. The ranks of the six participants who were interviewed varied from constable to senior superintendent and they had 4, 8, 11, 12, 25 and 30 years' experience in the investigation of crime, respectively, in other words a total of 90 years' investigation experience.

In order to gain a better understanding of the research problem, the following question was formulated and posed to the participants:

In your opinion, how difficult do you think it will be to identify the crime of human trafficking during the investigation of these crimes?

A literature study was conducted on both national and international literature on human trafficking. This literature study provided the researcher with different perspectives as well as new ideas on what elements constitute the crime of human trafficking and how this crime can be identified and investigated, as indicated by Leedy and Ormrod (2005: 81).

The researcher used content analysis in order to gain a clear understanding of the relationship between the constructs that make up the crime of human trafficking in this research. This was done to determine whether there were any patterns or trends that could be identified to establish the main themes that emerged from the data collected (Mouton, 2001: 108).

The three themes identified were firstly the elements and characterisation of the crime, secondly the prevalence of the crime and lastly the identification of the crime. The researcher then specifically followed this sequence of identified themes in order to obtain a practical understanding and to reflect on the difficulties experienced with the identification of this crime under investigation.

FINDINGS

The results of this study are discussed firstly by reporting on the participants' responses, then by underpinning the responses theoretically and lastly by providing the researcher's own interpretation of and insight into the implications for the relevant role players within this specific field.

Elements of the crime

Without any promulgated legislation that addresses a specific crime, it is virtually impossible to identify and investigate the specific crime and literally impossible to prosecute the perpetrators of the specific crime successfully. The successful identification of any criminal phenomenon is therefore dependent on the clear identification of the elements that constitute the unlawful act and/or omission that results in a specific crime.

The elements of the crime of human trafficking, as contained in the internationally recognised definition that is currently used as a concept definition within the legal fraternity, as well as the participants' responses will form the foundation of the discussion of the elements of this crime.

The following response from two of the participants clearly indicates the importance of the recognition of the elements of this crime:

"Every police official and more specifically, investigators, needs to know the elements of this crime – human trafficking." (Participant 2).

"Investigators need to be knowledgeable of the elements of this crime in order to identify and investigate this crime successfully." (Participant 4).

Although the terminology of the trafficking in persons has been in existence for a long time, it is only since the new millennium that a more descriptive and comprehensive legal definition was introduced that clearly represents "trafficking in persons" (Koen, Mobilyn & Solomons, 2007: 11).

In order to gain an understanding of this crime and the actual elements that constitute it, the definition of trafficking in persons as defined in the South African Law Reform Commission

(2004) Issue Paper 25 according to the United Nations Palermo Protocol will form the basis of the discussion of this theme.

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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.

From this definition it is apparent that human trafficking constitutes three elements, namely action, means and purpose. All these elements need to be present for any situation to be considered human trafficking (Association of Southeast Asian Nations (ASEAN), 2006: IX). David (2007: 2) argues that the internationally recognised legal definition of human trafficking is not only complex but also includes a number of concepts such as coercion, exercise of control over another and exploitation, which need to be clearly defined. Throughout the world, countries are still coming to terms with how best to interpret and translate these concepts into national law and it is this fissure in legal frameworks that has a direct impact on the successful investigation of this phenomenon (David, 2007: 2).

The following response from two of the participants further confirms the importance of the recognition of the elements of this crime during an investigation of a related crime:

The investigator should keep in contact with non-governmental organisations that work with trafficked victims on a daily basis to keep abreast with the methods used by traffickers to traffic their victims in order to identify the elements of this crime (Participant 3).

“The investigator should always keep the three elements of trafficking in mind and build a case with evidence proving the presence of each element, namely:

- *Recruitment: Any proof of communication between the victim and the recruiter/trafficker prior to being mobilised and exploited: diary entries, witnesses aware of the circumstances under which the victim left his or her place of residence or employment, the manner in which the victim was recruited, for example, force, full deceit or partial deceit, etc.*
- *Transportation: How was the victim mobilised? Are there any witnesses who saw the victim in the presence of his/her recruiter/trafficker? Is there any proof of means of transport, petrol slips, bus tickets and the like?*
- *Exploitation: This includes the medical examination, witness statements, evidence of forced drug inducement or torture, cell phone records (text communication between victim and trafficker) and so on. The list is endless (Participant 5).*

The above response emphasises the “what?”, the “how?” and the “why?” of identifying a human trafficking case. The action regarding the person (what), the means by which the action was undertaken (how) and lastly the purpose of the action, namely the means to the end (why), as noted during the participants’ interviews as well as the findings discussed in the

ASEAN study, will be presented in Table 1 below for ease of distinguishing between the specific elements.

Table 1: Human trafficking elements

HUMAN TRAFFICKING ELEMENTS		
ACTION (WHAT)	MEANS (HOW)	PURPOSE (WHY)
<p>The actual deed must include the</p> <ul style="list-style-type: none"> • recruitment; • transportation; • transfer; • harbouring; or • receipt of persons. 	<p>In order to recruit or procure the person, the action must be undertaken by one or more of the following means:</p> <ul style="list-style-type: none"> • force or the threat of force • other forms of coercion • abduction • fraud • deception • abuse of power • abuse of a position of vulnerability • giving or receiving of payments or benefits to achieve the consent of a person having control over another person 	<p>The action must be for the purpose of exploitation. Exploitation includes, at a minimum,</p> <ul style="list-style-type: none"> • 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.

(Source: Adapted from ASEAN, 2006: IX)

It is clear from the definition and clarification above, both from the participants and literature, that human trafficking entails much more than the organised movement of individuals in order to gain a profit. The presence of force, coercion or deception for the purpose of exploitation throughout or during any stage in the movement process is the critical factor that distinguishes human trafficking from immigrant smuggling (ASEAN, 2006: 74).

According to Farrell et al. (2008: 12), the key component that distinguishes human trafficking from immigrant smuggling is the element of fraud, force or coercion. In order to make this distinction between trafficking and smuggling, consideration of the victim's final destination is required. Smuggling usually involves the transport of a consenting person for illegal entry into a country, for a profit, whereas trafficking victims do not consent to their movement.

In some instances where victims initially consented, this agreement may be annulled by the coercive, deceptive and abusive actions of the traffickers. Therefore, these elements of the crime, namely fraud, force or coercion, are often very difficult to detect by law enforcement at an early stage of an investigation and are also one of the difficult factors to prove during prosecution (Farrell et al., 2008: 12). The lack of clarity on the meaning of certain terms used within the definition of human trafficking, such as coercion, deception and exploitation, further complicates research on this already risky and hidden terrain (Pharoah, 2006: 23). Van Zyl and Horne (2009: 11) confirm that human trafficking is not an easy topic to research, as the current definition is very broad and entails various kinds of offences such as forced labour, the drawing of children into prostitution, the trading in and of body parts and organs and child pornography.

It is of the utmost importance that countries worldwide have a thorough understanding of their own human trafficking profile, bearing in mind that these specific profiles will change continuously. Having an understanding and a clear picture of this phenomenon will assist governments in making informed decisions regarding the allocation of resources in order to address and respond to this crime effectively (ASEAN, 2006: 74).

If the definition of human trafficking is unpacked from an investigative point of view, the criminal justice system and, more specifically, investigators are faced with a huge challenge. Investigators will have to prove that a case of trafficking was indeed committed, taking into consideration the vague and wide description of the elements of this crime.

The fact that human trafficking has been defined from a juridical point of view does not imply that investigating officers necessarily have an easier task in understanding the complexity of the crime. It has been clarified that coercion, exercise of control over another and exploitation are the three key elements that emerge when considering human trafficking from a theoretical or legal perspective. From a more practical and investigative perspective, on the other hand, for any situation to be considered trafficking, the elements of human trafficking should entail a thorough three-pronged understanding of the crime, namely the action (what), the means (how) and the purpose (why) of the perpetrator regarding the victim.

Prevalence of the crime

The issue of the lack of promulgating legislation and insufficient record keeping, not only hampers the identification of this crime, but also causes additional problems, as can be seen from the following response:

Due to the fact that South Africa has no promulgated legislation human trafficking cases are not captured and registered as trafficking cases and therefore no accurate information relating to this crime is available (Participant 1).

“Approximately 10/15 of former cases that I investigated were registered and treated as kidnapping and/or abduction cases” (Participant 6).

The ASEAN study found that the scope of human trafficking can be recorded more easily when countries have specific legislation that criminalises this crime. It is further noted in this study that in the same sense, statistics also further assist law enforcement in better understanding the prevalence and extent of this problem (ASEAN, 2006: 7). Human trafficking can easily be confused with other forms of movement of people, such as migrant smuggling, which often results in this phenomenon not always being recognised as a specific form of crime. The aim of migrant smuggling is the illegal crossing of borders whereas the aim of trafficking is the exploitation of an individual's labour. Although smuggling and trafficking both entail the moving of individuals for profit, two additional elements must be present in the case of trafficking namely, firstly there must be some form of recruitment by means of coercion, deception or any abuse of power and secondly the movement must have been undertaken for an exploitive purpose. This misidentification not only contributes to the complexity to disrupt trafficking networks, but also to the difficulty in obtaining accurate information regarding the actual scope of trafficking as a problem (Farrell et al., 2008: 12).

While no empirically valid information and analyses of the occurrence of human trafficking are available, the US Department of Justice (2004) estimates that between 600 000 and 800

000 people are trafficked worldwide annually. With no empirical validation of this data it is very difficult to determine the actual prevalence of human trafficking currently viewed worldwide as a rising epidemic. This limitation of our knowledge regarding the actual scale of trafficking, the dynamics of this crime and the most effective means to investigate and prevent it is further negatively affected by the large gaps in the actual statistics estimated and presented as well as the capturing of this phenomenon as a crime.

As reported by the US Department of State (2005), “the nature of this crime – underground, often under-acknowledged – contributes to an inability to determine the precise number of people who are victimized by traffickers each year”. This is further supported by Tyldum and Brunovskis (2005), who state that irrespective of the severe physical and mental abuse that trafficking victims undergo, they are mostly reluctant to seek help and do everything possible to avoid any contact with law enforcement. Trafficking victims are also often reluctant to report their victimisation to the police, not only because they fear retaliation, but also because they have been made to believe that if they report the crime they will be put in jail or deported (Aron, Zweig & Newmark, 2006).

Trafficked victims are normally under extreme surveillance and supervision of their captors, working and living in exclusively private environments and homes. This results in very little exposure to the outside world. The hidden nature and circumstances of human trafficking make it even more difficult to establish the parameters upon which representative and reliable samples should be drawn to develop an accurate estimate of the extent of this crime (Laczko & Gozdzik, 2005). This, as expected, contributes directly to the hidden world in which these crimes are committed.

The collection of reliable data and the overlapping of the crime with other forms of abusive crimes, based on the confusing terminology and generic characteristics, are even more problematic in South Africa where no legislation on human trafficking has been promulgated and where no collection or capturing of reliable data has been reported. In addition to the current lack of reliable data and statistics worldwide, there is no single central organisation that centralises the collection, collation, analysis and harmonisation of trafficking statistics (Farrell et al., 2008: 14).

This not only has a negative impact on the identification and detection of the crime, but also contributes to the confusion of the South African government, which is expected to promulgate laws and address this serious concern based on conflicting data. The fact that human trafficking is viewed as a hidden crime that is committed in an unknown world means that an understanding of the actual extent of this crime is also lacking. This contributes directly to a lack of official recording of statistics relating to this crime.

Specific promulgation of legislation and criminalisation of the act of trafficking human beings will most certainly contribute to the successful investigation of these cases in South Africa. The promulgation of formal legislation will allow law enforcement agencies to establish and implement sound structures, systems and procedures to combat and investigate this crime. Once these formal countermeasures and structures are put in place, police officials that deal with these investigations will have adequate and sufficient guidelines to formally pursue the perpetrators of this crime.

Identification of the crime

The following response was obtained from one of the participants on the difficulty of identifying the crime of trafficking:

Currently, the identification of trafficking will be a challenge for two reasons. The first is the lack of training of key personnel such as police officials, border police, officials working at various ports of entry, Home Affairs officials working with the issuing of identification and travel documents, and so on. Training should be provided which focuses on the identification of possible victims of trafficking. The second challenge is the preconceived ideas we as people so often hold when labelling prostitutes or children begging on street corners. By showing some interest and by asking the right questions, you just might establish that 'Tracy' is now being coerced into prostitution after having been deceitfully persuaded to leave her job as a secretary in Cape Town to come to Gauteng because she was promised a huge salary as a sales representative selling 'beauty products'. These types of preconceived ideas should be discarded as a matter of urgency as they are counterproductive to the successful identification of a possible trafficking case (Participant 5).

According to Farrell et al. (2008: 16), the identification of the hidden crime, human trafficking, still remains one of the most testing factors in the investigation of this crime today. Law enforcement now plays, more than ever before, an indispensable role in the identification and rescue of these victims as well as in the arrest and prosecution of the offenders of this crime.

Identification is vital for an investigator during a trafficking investigation. According to Marais (1992: 2), the first step in the investigation process is identifying the crime that was committed, known as 'situation identification'. The second step is identifying the victim, referred to as 'victim identification', and the last step is positively identifying the offender, referred to as 'offender identification'.

Apart from the difficulties in identifying the crime, it is problematic to obtain physical evidence from the victims due to their fear of retribution from the traffickers and their associates (Piotrowicz, 2002: 263). Farrell et al. (2008: 8) support this view by stating that the most regularly experienced challenge faced by law enforcement agencies in investigating cases of human trafficking, is the lack of victim cooperation. This hesitance of victims, due to fear and retribution, is in many cases a potential indicator and possible early warning sign for identifying the act of human trafficking in its initial stage.

The complexity of the identification and gathering of evidence during an investigation was furthermore supported by another participant:

It is difficult to identify trafficking. The act of trafficking is complex. Information to expose and gather evidence is unfortunately dependent on victims and associates; such cooperation could be influenced by the circumstances of the victim that led to the entrapment and the strength/power of the network" (Participant 6).

In their study "Understanding and improving law enforcement responses to human trafficking", Farrell et al. (2008: 7) report that law enforcement officials most frequently

learn about incidents of human trafficking (52%) during the course of other investigations, for example drug raids and cases of domestic violence. Some 81% of their responding agencies stated that the most significant indicators of human trafficking are the victims' appearance, more specifically, victims appearing fearful and non-cooperative.

Almost 92% of law enforcement agencies further reported in their study that there is a connection between trafficking and other existing criminal networks, for example drug distribution or prostitution. They stated that collaboration with other law enforcement agencies and the use of extensive surveillance are some of the most general investigative strategies used by law enforcement to build human trafficking cases against offenders (Farrell et al., 2008: 7).

In the ASEAN study it was reported that law enforcement agencies who established and participated in multi-agency human trafficking task forces, were more likely to perceive human trafficking as a problem within their midst and were furthermore likely to have training, protocols and standard operating procedures and personnel devoted to human trafficking investigations (ASEAN, 2006: 118). Human trafficking incidents regularly entail factual situations where members of the same group, for example a multi-agency human trafficking task force, disagree about whether or not a specific individual is indeed a victim of force, fraud or coercion (Farrell et al., 2008: 16).

It is therefore clear that a trafficking investigation can be complicated and demanding and that only experienced and well-trained investigators will achieve success in the investigation of these complex cases. It would probably be much easier for an investigator to determine and identify if a crime of rape or kidnapping was committed in comparison to a trafficking crime. In a trafficking investigation, the investigator will have to search for evidence to prove the already unclear elements of this crime. For investigators to be successful in the identification of this crime, they will have to be trained, self-motivated and committed in order to prove all its elements. It is clear that training is a burning issue and that it is important for all role players, including state prosecutors, to be trained regarding this relatively new crime.

It is of the utmost importance that investigators know exactly what they are looking for, how to correctly identify and collect evidence as well as how to identify both victims and perpetrators in these cases. In recognition of these complexities, several countries have created specialist investigation units within their law enforcement agencies to respond to these crimes both strategically and tactically (ASEAN, 2006: 76).

The success of establishing specialist units to investigate trafficking provides an added advantage of expertise, experience and resources that bring about a coherent and cohesive capability between key agencies, both nationally and internationally (David, 2007: 4). This also contributes to a cohesive and collaborative force with effective standard guidelines and operational procedures to combat and investigate this crime effectively.

RECOMMENDATIONS

The following recommendations are made, based on the results of this research:

The necessity of adequate legislation criminalising human trafficking in South Africa cannot be overemphasised. It is therefore strongly recommended that adequate legislation complying with international standards be promulgated to criminalise trafficking in all of its forms. This

legislation should also include the criminalisation of trafficking-related offences such as debt bondage, forced labour, forced marriage and exploitative and child labour. Furthermore, trafficking should also be included in all other legislation relating to this crime, for example kidnapping, abduction, prostitution, organised crime and money laundering, to name but a few.

It is further recommended that formal written guidelines and procedures such as standing operating procedures be developed for all officials such as the police, immigration officials, non-governmental organisations and all other individuals involved in dealing with possible and actual human trafficking incidents. These guidelines should contain not only all definitions, procedures and processes relating to the identification and investigation of human trafficking, but also clear procedures on the cooperation between all relevant authorities to ensure the effective identification, investigation and prevention of this crime.

The establishment of a central database, both nationally and internationally, is strongly recommended to ensure the continuous exchange of information among organisations involved in dealing with human trafficking cases. This will ensure that the sharing of critical information such as the identities of perpetrators, the modus operandi of perpetrators and movements and activities of identified criminal organisations are coordinated within a centralised system.

It is of the utmost importance that all police officials receive training and be informed of how to identify and respond to human trafficking cases in general. Every police official, preferably during basic training, should be able to accurately identify human trafficking victims as well as perpetrators of this crime. They should also be trained in the identification, collection and preservation of all related evidence in these cases to ensure the successful investigation of this crime.

Furthermore, it is recommended that a specialist human trafficking investigation unit be established in South Africa. This unit needs to be equipped with well-trained, self-motivated and committed personnel that can function with specific expertise to combat and investigate this crime successfully. These specialists must gain all the necessary competencies and skills to correctly identify not only possible evidence of trafficking cases, but also possible victims of this horrendous crime.

CONCLUSION

The crime of human trafficking is now more prevalent than ever before. This crime in itself has proven to be very complex in nature and as a result poses a major challenge and places a huge burden on investigators to combat and investigate it successfully.

To assist investigators in understanding the complexities and realities of this crime, this research focused specifically on creating a better understanding and clarification of the elements, nature and extent of the crime.

The research established that it is critical that investigators familiarise themselves with the complexities of this crime by gaining a clear understanding of its elements and characteristics. However, this knowledge is only one step closer to addressing this crime. In addition, this research further found that the lack of the promulgation of legislation, unclear definitions and guidelines to role players in this sphere are even more problematic. This

further contributes to the difficulty which investigators are currently experiencing to effectively identify, investigate, prove and present evidence in these cases.

It is important that South Africa follow the world trend of specialisation in order to deal with the complex crime of human trafficking with its own unique elements and intricacies.

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