UNIVERSITY OF NAIROBI

CHILD TRAFFICKING IN KENYA: EXAMINING THE COOPERATION MECHANISMS UNDER THE EXISTING LEGAL FRAMEWORK

 $\mathbf{B}\mathbf{y}$

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Declaration

I, MAMBO SYLVIA WAIRIMU, do hereby declare that the work presented is my original work and the same has not been submitted and is not being submitted for a for a degree in any other University.
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This thesis has been submitted for examination with my approval as the University Supervisor
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515/2017
Date

Dedication

To my Father in Heaven, for His boundless support.

To my late mother, Mary Mambo whose love for children greatly inspired me.

And to my daughters Emma and Evie for being the hope that keeps me going.

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It is with immense gratitude that I acknowledge the help of tremendously giving people, who stood with me as I researched, compiled, amended and completed this research study.

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Problem

Human trafficking is a universal phenomenon that has received global attention over the past decade or so.¹ The act of trafficking humans over borders is a worldwide problem that can be traced back to slavery. Governments around the world have committed themselves to enacting legislation to combat the trade in humans.² This has resulted in the adoption of international legal standards and obligations of governments to address human trafficking and especially child trafficking.³

According to International Labour Organization (ILO) child trafficking is among the gravest forms of child abuse.⁴ Trafficking of children involves movement of victims across borders while others are trafficked within their home countries, mostly from rural to urban areas.⁵ Mostly, children are trafficked for sexual exploitation including pornography and sex tourism, forced labour including domestic service, armed conflict including being sex slaves for combatants, adoption and marriage.⁶

Kenya has been identified as a country of origin, destination, and transit for trafficking in persons. Within the country, children are mostly trafficked from rural areas to urban area

¹ United Nations Global Initiave to Fight Human Trafficking, 'Research on Trafficking in Persons: Gaps and Limitations in Crime and Criminal Justice Data' (*United Nations Global Initiative to Fight Human Trafficking*, 2008) 20 https://www.unodc.org/documents/human-trafficking/2008/BP024QuantifyingHumanTrafficking.pdf accessed 6 August 2015.

² Pharaoh Robin, *Getting to Grips with Trafficking Research in South Africa* (Institute for Security Studies 2006).ibid.

³ ibid.

⁴ Convention on the Worst Forms of Child Labour no. 182 (adopted 17 June 1999).

⁵ UNICEF, 'Combating Child Trafficking' (2005)

http://www.unicef.org/ceecis/IPU combattingchildtrafficking GB.pdf> accessed 5 August 2015

⁶ Barbara Ruck, 'Child Trafficking' (2005) 1 https://www.worldvision.org.nz/media/72256/child_trafficking.pdf accessed 4 June 2015.

⁷ Government of Kenya, *National Plan of Action for Combating Human Trafficking* (Government of Kenya 2015).

with labour, sexual exploitation and early marriage are the three most common form of child trafficking in Kenya.⁸ Children from East Africa are trafficked into the country and subjected to forced labour and sex trafficking.⁹ Trucks transporting goods to Somalia return back into the country with young girls who are placed in brothels in Nairobi and Mombasa and are forced to endure sexual exploitation.¹⁰ According to the National Crime and Research Center, victims from Kenya are mostly trafficked out of the country into Europe, Middle East and North America.¹¹ The report stated that Kenya remains a source, transit and destination country due to the socio-economic challenges and opportunities for both traffickers and victims.¹²

Adoption, fostering and guardianship have been identified under the Counter-Trafficking in Person Act, 2010 as some of the factors that contribute to the trafficking of children. In 2014, the Principal Secretary, Ministry of Labour, Social Security and Services declared an indefinite moratorium on inter-country adoptions of Kenyan children to foreigners. ¹³ Many childless couples in developed countries are turning to adoption agencies in developing societies to fill that void. ¹⁴ Interestingly most of these couples feel the need to adopt babies from developing nations who have been identified as children 'in need' thus creating a market demand for babies. ¹⁵

⁸ HAART, Kenya's Child Market: Lure, Sell and Dispose (HAART Kenya 2015).

⁹ United States Department of State, 'Trafficking in Persons Report', (2015)

http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243466.htm accessed 12 November 2016 10 Ibid.

¹¹ National Crime Research Centre, 'Human Trafficking in Kenya' (2014)

http://www.crimeresearch.go.ke/index.php?option=com_phocadownload&view=category&download=4:human-trafficking-in-kenya&id=4:preliminary-reports&Itemid=496 accessed 25 October 2016.

12 Ibid.

¹³ Thiong'o Mathenge and Rawlings Otieno, 'Kenyan Government Bans Adoption of Children by Foreigners' Standard Digital Media (2014) http://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners accessed 28 September 2016.

¹⁴ Brian (n 20).

¹⁵ ibid.

Kenya has enacted laws aimed at combating child trafficking. Most notably, these include, The Constitution 2010 and the Counter-Trafficking in Persons Act. Additionally, it has also ratified international legal instruments with the Convention on the Rights of the Child (CRC) together with its Optional Protocol on the Sale of Children being at the fore. However, despite the existence these laws, trafficking of children still persists. The cross-border nature of trafficking of children means it's a transnational offence that would require transnational judicial and law enforcement cooperation. Additionally, due to the complex nature of child trafficking, there is need for cooperation between relevant agencies, civil society and private sector both within the country and at the international level to effectively curb the crime.

Sound laws are a key foundation of good governance in every country. Yet, formulating the law is half the puzzle, ensuring proper and effective implementation is crucial. Kenya has enacted various anti-trafficking laws to combat child trafficking, however, it appears that lack of prompt implementation has led to the prevalence of the crime.

The Counter Trafficking in Persons Act was enacted in 2010 yet in 2014 child trafficking was reported to be the most prevalent form of human trafficking in the country. ¹⁶ According to the study conducted by the National Crime and Research Centre, children trafficked, for various reasons were, at 39% of all trafficking cases studied in 2014. ¹⁷ It can be argued that without proper implementation of the existing legal framework, there is no real effect on the lives of children who should benefit from these laws.

¹⁶ National Crime Research Centre (n 47).

¹⁷ Ibid.

1.2 Problem Statement

Whereas Kenya has an adequate legal framework to curb child trafficking, there is still little progress in protecting children from trafficking. Ensuring proper and effective implementation is crucial to confronting the crime of trafficking.

The transnational nature of child trafficking means that Kenya needs to arm itself with a comprehensive national and international strategy to respond to the crime. Legislation that promotes cooperation and coordination at both national and international levels will ensure that shortcomings of working alone are avoided. Thus, there is need to analyze the legal frame work and the mechanisms therein that facilitate cooperation in order to advance effective ways to protect children from being trafficked.

1.3 Theoretical Framework

1.3.1 Natural Law Theory

Theorists of natural law propose that there is a connection between the law and human morality. For Thomas Aquinas, natural law is comprised of eternal law that govern the behavior of human beings simply for possessing reason and free will. ¹⁸ That human beings can make decisions to do good and avoid evil since God instilled in us a sense of rationality. ¹⁹ Therefore, human beings are capable of making good laws. Thomas Aquinas also advances that a human law, that is promulgated by human beings is valid insofar as its content conforms to the content of natural law. ²⁰ In his book Aristotle's Politics, he reminds us of the evident evils of anarchy, a condition where no person or body is widely

¹⁸ John Finnis, 'Aquinas, Moral, Political and Legal Philosophy' (Edward Zalta ed, Summer, *The Stanford Encyclopedia of Philosophy*, 2014) http://plato.stanford.edu/archives/sum2014/entries/aquinas-moral-political accessed 23 October 2016.

¹⁹ ibid.

²⁰ ibid.

accepted as having authority to restrict use of violence.²¹ Arguably there's need for persons who will promote the common good among people. In his discussion on natural law, Thomas Aquinas notes that, 'other matters of law are ordained to the moral common good".²² Relying on Aquinas's work, Professor John Finnis advances that "the good that is common between friends is not simply the good of successful collaboration or coordination, nor is it simply the good of two successfully achieved coinciding projects or objectives; it is the common good of mutual self-constitution, self-fulfillment and self-realization".²³

Finnis also notes the importance of community to the common good.²⁴ Aristotle noted, "every state is a community of some kind and every community is established with a view of some good".²⁵ In advancing this idea, Aristotle also noted that just governments are those "which have regard to the common interest".²⁶ Thus, the study argues that the concept of collaboration to help solve mutual problems such as child trafficking is derived from human consciousness about living a life that is interdependent, for the common good, rather than purely autonomous.

From the development of the modern state centuries ago, Countries have engaged with each other for various reasons. Over the centuries Interdependence among states has

²¹ Aristotle, *Introduction to Aristotle* (Richard Mceon ed, Benjamin Jowett trans, Modern Library 1992).

²² John Finnis (n 58).

²³ John Finnis, 'Natural Law and Natural Rights' (1980) 141

²⁴ ibid.

²⁵ Aristotle (n 61).

²⁶ ibid.

increased.²⁷ Countries have created networks in form of treaties/agreements or even formation of inter-governmental organizations to cooperate on issues of international security, ecological sustainability, global finance, terrorism and human rights. Over the years, States have successfully been able to cooperate on matters of finance and trade with positive results. For example, according to the African Union, since the formation of the Southern African Development Community (SADC), member States have been able to benefit from various infrastructural projects and consequently improved the lives of its citizens.²⁸

1.3.2 Natural law theory on International Cooperation

Natural law theories base human rights on a "natural" moral, religious or even biological order that is independent of transitory human laws or traditions.²⁹ Human rights are inalienable and fundamental rights to all persons are inherently entitled simply by virtue of being human.

For these rights to be enjoyed on an international scale states must exist in societies and international systems must be developed for states to thrive.

International cooperation can be argued to be a Western social thought that envisions harmony as a natural outgrowth of interactions of autonomous actors, in this case nation states. Cooperation is thus argued to be the normal condition of human affairs.³⁰ This would seem to be the safe explanation but it's sadly not the reality. The cooperation

²⁷ Kal Rauistala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law Association 1, 2.

²⁸ Southern Africa Development Community, 'Regional Economic Communities' (*Southern Africa Development Community*) http://www.africa-union.org/root/au/recs/sadc.htm#achievements accessed 14 May 2013.

²⁹ 'Natural Law' (*Collins English Dictionary - Complete & Unabridged 10th Edition*) > accessed 17 June 2014.

³⁰ Johannes Gutenberg Universitat, 'The Nature of International Law and the International System' (*Johannes Gutenberg Universitat*) 23 http://www.jgu.edu.in/joss/PDF/internationallegalsystem.pdf> accessed 17 June 2014.

required to solve collective action problems such as child trafficking is intense. This type of cooperation must be governed by international law. It has been argued by that for international law to stay relevant, it has to be effective in controlling states and other international actors in 'real life' situations. Natural law theory presupposes an ideal system of law founded on the nature of man as a reasonable being. Max Dixon argues that natural law finds little support in international law.³¹ The law created under international law is heavily dependent on consent or practice.³² Thus, it is difficult to maintain that there is some guiding set of principles that states defer when creating law.³³ The proponent however, argues that natural law theory doesn't explain why international law is binding especially because nations of the world are so diverse.

The principle cooperation in this research study is anchored on the basic premise that since there has been an increased mutual dependence of matters ranging from trade to terrorism, the same process can be replicated to combat international child trafficking. The concept rests on a particular notion of 'International collective responsibility'. It seems reasonable to assume that in this era of globalization and information technology that eradication of international child trafficking can be achieved.

1.3.3 Economic theory on Crime

Economic theory can be used to explain crimes, actions and behaviors which calculate the gains and benefits accrued from participating in a certain criminal activity. Economic theory of crime as postulated by Ann Witte and Robert Witt, suggests that people make decisions to commit crime the same way they make decisions about other non-criminal

³¹ Ibid.

³² Ibid

³³ Ibid.

activities.³⁴ The criminal might commit a based on the real gains from the activity as opposed to the punishment prescribed.³⁵

It is pointed out by Witte & Witt that individuals participate in criminal activities as the expected gains outweigh the legal consequences thereby accentuating trafficking in persons. The theory presupposes that where punishment is viewed as less, then trafficking in persons persists. Perpetrators weigh the probability of being apprehended and going through the justice system against the profits gained in engaging in the criminal activity. In summary, perpetrators become extremely knowledgeable on the legal response to human trafficking and make rational decisions to carry out trafficking activities.

1.4 Literature Review

Child trafficking in Kenya has been defined as a crime under various legal instruments. Kenyan children are trafficked both locally and internationally. A Terre Des Hommes conducted a preliminary rapid assessment on child trafficking in Mathare and Mukuru slums located in Nairobi County. Its main objective was to determine how child trafficking occurs in these settlement areas. The report found that of all the children being trafficked, girls were more vulnerable than boys. It established that children from low income households were most vulnerable to traffickers. Though it was well known that trafficking of children was occurring within the settlements there existed no official government mechanism to track this crime. It established that children are mostly trafficked for domestic labour and sex work. With relatives of the victims being cited as

³⁴ Ann Witte and Robert Witt, 'Crime Causation: Economic Theories' (*Encyclopedia of Crime and Justice*, 2001) 17 https://www.surrey.ac.uk/economics/files/apaperspdf/ECON 03-00.pdf accessed 12 June 2015.

Joshua Eagle and David Betters, 'The Endangered Species Act and Economic Values: A Comparison of Fines and Contingent Valuation Studies' (1998) 26 Ecological Economics 165, 171.

³⁶ HAART, Kenya's Child Market: Lure, Sell and Dispose (HAART Kenya 2015).

³⁷ Hommes (n 76) p 6.

³⁸ Hommes (n 76) p 6.

³⁹ Hommes (n 76) p 16.

⁴⁰ Hommes (n 76) p 16.

the main instigators of the crime. ⁴¹ Further, the research conducted found that poverty and lack of awareness about child trafficking as a crime among the factors facilitating child trafficking within the settlements. The report also established that the police in the area did not perceive child trafficking as a notable problem, contrary to its findings and attributed this perception by the police to being complacent in the crime, unwillingness to investigate instances of trafficking, and little capacity to do so. ⁴² It recommends training of law enforcement officials on how to handle child trafficking in the area as a means of curbing the crime. ⁴³ Although, the report does provide valuable information on child trafficking in urban Kenya, it however, makes no mention of the existing legal framework on child trafficking. It is important to establish the factors that facilitate child trafficking both within and outside Kenyan borders.

Similarly, a report published in 2015 by Child Trafficking by Awareness Against Human Trafficking (HAART) offers the same findings as that by Terre Des Hommes. The study's objective was to map out the state of child trafficking in Kenya with the aim of raising awareness about the crime. Like the study cited above, it found that children victims of trafficking come from low-income homes and are mostly trafficked to urban areas and the coastal region. 44 It establishes child labour and sexual exploitation as some of the major forms of exploitation and offers a profile of a recruiter. The study concludes that trafficking is indeed a multi-dimensional crime and recommends cooperation and information sharing between government officials, NGO's and all relevant stakeholders. 45

⁴¹ Hommes (n 76) p 6.

⁴² Hommes (n 76) p 22.

⁴³ Hommes (n 76) p26.

⁴⁴ HAART (n 75) p 21.

⁴⁵ HAART (n 75) 22.

Likewise, the National Crime Research Centre (Human Trafficking in Kenya)- published in 2014 offers detailed information on the state of human trafficking in Kenya. 46 The report examines the prevalence of human trafficking in the country including that of child victims. It establishes the forms of trafficking and correlates the prevalence to the factors that contribute to human trafficking. 47 Additionally, it studies the socio-economic profiles of victims as well as the factors facilitating the recruitment of victims. 48. Further, child victims of trafficking come from low- income homes and are mostly illiterate. 49 Its findings also indicated that recruiters of trafficking victims are mostly relatives or well known to the victims. 50 High levels of poverty and unemployment in the country make up the main facilitators of trafficking, with children being lured from hospitals, children homes and schools. 51

Corruption is cited as one of the major hindrances in combating trafficking in Kenya.⁵² The report recommends the strengthening of detection and proper investigation of these crimes through collaboration of all stakeholders.⁵³ Though it does not examine the legal framework on trafficking, the report does find that poor implementation of existing laws on trafficking as a major reason why trafficking still persists in the country. In the trafficking cycle a high number of players are involved. From the recruiter, one who transports the child to the person who harbors or receives the child for purposes of exploitation. It is vital that the legal framework on trafficking of children be well integrated and anchored on the principles of cooperation between national agencies, non-

⁴⁶ National Crime Research Centre (n 47).

⁴⁷ National Crime Research Centre (n 47) 24, 27.

⁴⁸ National Crime Research Centre (n 47) 40.

⁴⁹ National Crime Research Centre (n 47) 26.

⁵⁰ National Crime Research Centre (n 47) 27.

⁵¹ National Crime Research Centre (n 47) xv.

⁵² National Crime Research Centre (n 47) XVI, 42, 45 and 47.

⁵³ National Crime Research Centre (n 47) 74.

governmental organizations, local communities and international agencies in order to effectively fight the crime.

The United Nations Office on Drugs and Crime in its discussion paper, *Organized Crime* and *Trafficking in Eastern Africa*, suggests organized crime and corruption have greatly contributed to the exacerbation of crimes such as trafficking of persons. ⁵⁴ Eastern Africa has currently three conflict zones: in Southern Sudan, the East of the Democratic Republic of Congo and Somalia. These conflicts have seen a spillover of refugees into neighboring countries especially Kenya, thereby undermining the stability of the whole region. These conditions facilitate the emergence of organized crime and are a fertile ground for criminal networks. Similarly, the Trafficking in Persons 2015 report published by the United States Department of State highlighted the fact that some children in Kenya's largest refugee camp -Dadaab are exposed to sexual exploitation, while some are trafficked into forced labour. ⁵⁵ It is imperative that Kenya effectively implements the existing legal framework to protect all children within our borders from trafficking.

A research study conducted by Sylvain Dessy, Caroline Orset and Legrand Yemele Kama⁵⁶ whereby they developed a two State model to determine how international cooperation can fight child trafficking finds that child trafficking involves two separate upstream and downstream operations with the latter taking a trans-boundary scope. Cooperation by State parties raises an important issue of agreeable pillars for it to be a successful tool against child trafficking⁵⁷. They show that when State economies are

⁵⁴ United Nations Office on Drugs and Crime, 2009, Organized Crime and Trafficking in Eastern Africa, discussion paper, Nairobi: Kenya, available at https://www.unodc.org/documents/easternafrica/regional-ministerial-meeting/organized crime and trafficking in eastern Africa discission Paper.pdf

⁵⁵ United States Department of State, 'Trafficking in Persons Report', (2015)

http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243466.htm accessed 12 November 2016

⁵⁶ Sylvain D., Caroline O., Legrand Y. K., *International Coordination of National Action Plans Against Child Trafficking: Are There Gains from Specialization*, Institut D'Économie Publique - French Institute for Public economics, http://www.vcharite.univ-mrs.fr/ocs/index.php/index/index/index/accessed 10 November 2010

⁵⁷ Ibid

significantly different, specialization is paramount. Poorer/ countries of origin can concentrate on fighting the flow of children –upstream- and richer/destination countries can concentrate on curbing the purchasing and eventual exploitation of trafficked children.⁵⁸

Similarly, in a study titled *Cross-National Collaboration to Combat Human Trafficking* ⁵⁹, it was suggested that for cross national cooperation to be effective among countries, there needs to be a pre-existing intra-country cooperation supported by the government of the day. The study observed that in many countries where human trafficking occurs (and especially countries of origin) there was insufficient intra-country cooperation, thus hampering any genuine efforts to effectively implement cross national collaboration mechanisms. ⁶⁰ As child trafficking affects almost every country around the world, no one country can successfully fight the crime on its own. It is therefore important for Kenya to bolster its national mechanisms to facilitate cooperation in order to cement a good foundation for international cooperation.

This study is timely as the Kenyan government only recently launched its National Plan of Action on Combating Human Trafficking which has prioritized development of multi sectoral cooperation mechanisms as well as international cooperation mechanisms including joint legal assistance as well as reciprocal arrangements such as extradition to enhance cooperation on human trafficking.

The literature related to the study established that there have been some studies conducted on child trafficking in Kenya. Whereas, all the studies above have been able to shed light on the current study it was noted that due to the different objectives these studies and reports were out to address no one study has been carried out on the possibility of poor

⁵⁸ Ibid

⁵⁹ Philip L.R, 'Cross-National Collaboration to Combat Human Trafficking Learning from the Experiences of Others', (2008) < www.ncjrs.gov/pdffiles1/nij/grants/223286.pdf. > accessed August 19 2012
⁶⁰ Ibid

implementation of the cooperation mechanisms under the legal framework on child trafficking. Thus, creating a knowledge gap. This study is timely as a strong case is established for the need to establish whether cooperation at various national and international levels is prioritized under the existing legal framework and advanced as a potent tool to combat child trafficking in Kenya.

1.5 Research Objectives

The study will be guided by the following research objectives:

The overall Objective of the study is to examine the legal framework on child trafficking in order to establish the national and international mechanisms that facilitate cooperation in combating the crime.

Whereas specific Objectives include;

- 1. To establish the challenges faced in combating child trafficking in Kenya
- To recommend strategies that enhance cooperation between countries in combating child trafficking.

1.6 Justification for the Study

The information generated by the study will contribute to additional knowledge for academic, research and institutions working to improving the rights of children. It will also influence the making of policy in Kenya. The study objectives are in line with Kenya's national planning strategy officially known as Kenya Vision 2030.⁶¹ Aligning the legal framework and national policy to meet the needs of its citizens is one of its goals.

⁶¹ Government of Kenya, Kenya Vision 2030 (Government Printer 2007).

By identifying the gaps in how Kenya implements its laws and what collaboration strategies are employed in implementing the laws, the study will contribute to the information and knowledge gap. Knowledge and information are crucial in fighting child trafficking because it'll enhance the functions of administrative, judicial and law enforcement institutions.

The study provides useful information that if implemented may reduce the number of children trafficked from Kenya to other countries, consequently better protect our children. It is opined that with proper implementation of the existing legal framework, the will be a real effect on the lives of children who should benefit from particular laws.

1.7 Hypothesis

The study proceeds on the hypothesis that the lack of proper implementation of the existing legal framework and especially the cooperation mechanism there under negatively impacts on the fight against child trafficking in Kenya.

1.8 Research Questions

The research study aims to answer the following questions;

- 1. What challenges does Kenya face in the fight against child trafficking?
- 2. What cooperation mechanisms can be utilized in order to effectively combat child trafficking in Kenya?
- 3. What strategies can be taken to enhance cooperation nationally and among countries in the fight against child trafficking?

1.9 Research Methodology

This study utilized desk/library based research method. Reference was made to primary and secondary data. Primary data reviewed included NGO and government reports, papers, journals and case law on child trafficking in Kenya. Secondary data included conventions, treaties, statutes, and internet sources.

1.10 Scope of the Study

Child trafficking involves both international and domestic trafficking, where children are trafficked within their countries borders. The study will focus only on children trafficked out of Kenya. Kenya has been identified as a country of origin, transit and destination, thus the scope of the study will be limited to collaboration efforts employed to fight the crime.

There are other topics relevant to the study like trafficking for purposes of exploitation of labour, and sex trade, however, the study focuses on the implementation of the laws and specifically the role of cooperation to curb child trafficking. It argues that where cooperation mechanisms anchored on these laws, the overall exploitation of children will cease.

1.11 Chapter Breakdown

Chapter One: Introduces child trafficking and background information, problem statement, research objectives, research questions, justification of the study and hypothesis. Also, theoretical framework is discussed, research methodology, assumptions, scope and limitations of the study.

Chapter Two: Discusses the challenges that Kenya faces in combating child trafficking. It also establishes the factors that exacerbate the problem such as poverty and corruption. The impact of trafficking on victims is also examined with the aim of highlighting the effects of trafficking on child victims.

Chapter Three: Analyzes the existing legal framework on fighting child trafficking with the aim of establishing its efficiency and whether it provides for of cooperation at national and international levels as a tool to combat child trafficking.

Chapter Four: Discusses and examines the role of multi-sectoral cooperation as well as collaboration among in combating child trafficking. The current National Plan of Action on Human Trafficking is examined. A model bilateral agreement on child trafficking developed by the United Nations Children's Fund is also examined as well as examples of countries that have entered into such agreements with the aim of establishing whether a bilateral approach is effective in combating child trafficking.

Chapter Five: Draws conclusions and advances recommendations makes recommendations on how to effectively curb child trafficking through cooperation mechanisms anchored in the existing legal framework

CHAPTER TWO

CHALLENGES IN COMBATING CHILD TRAFFICKING IN KENYA

2.0 Introduction

The trafficking cycle involves the recruitment, transportation and eventual harbor and exploitation of children. This chapter will examine the trafficking cycle with the aim of establishing the various stages of trafficking as well as the challenges faced in preventing children from becoming victims of trafficking. Victims of trafficking often endure exploitation and experience trauma that is detrimental to their wellbeing. Thus, it is important to examine the effects that trafficking has on children victims.

2.1 The Trafficking Process

Given the definition of Trafficking in persons under the Palermo Protocol, elements of human trafficking would constitute three stages. Firstly, the act of recruitment, transportation, receipt and habouring of potential victims of trafficking. It must be shown that the person or an organized group that carries out the recruitment is doing so for purposes of exploiting the child or children. Secondly, the means by which victims are recruited either by force or threat of force, coercion, abduction, fraud (deception), abuse of power or giving payments to a person in control of a child. Thirdly, trafficking must be for the sole purpose of the victim's exploitation either for sexual exploitation, domestic servitude, child labor and removal of organs.

2.1.1 Stage 1: Recruitment

At the stage of recruitment, a child may be abducted but often they or their guardians may be tricked into releasing their children for an opportunity at a better life. For example, if the child goes to stay with a relative they are forced to endure hard work is hard and they have to work long hours sometimes for meager pay which does is not paid directly to the child.⁶² Some of the children are exposed to sexual predation and if the child has been placed with a relative who turns out to be a trafficker, most of the time he/she undergoes horrendous exploitation and may never be heard from again.⁶³

The saddest reality about the recruitment process is that even though women are especially vulnerable to trafficking, more often than not women are actively engaged in recruitment of children.⁶⁴ One crucial aspect of recruitment is that there is always an element of trust present. It is easier for a recruiter to win over the trust of the parents or guardians and thus for this first stage to be successful, it is paramount that would be victims and their guardians believe whatever story that the recruiter has told them and win the confidence of the victim.⁶⁵ Furthermore, even where a successful recruitment has taken place, the recruiter most likely does not fully understand the level of exploitation that the victim will undergo.⁶⁶

In some reported cases, young girls are commonly lured with false promises of employment abroad, but they end up in the sex industry instead. There was a reported case of a teenage girl who had been orphaned and living on the streets of Nairobi when a

⁶² Smith Delaney, Guide to Trafficking in Children & Young People Especially for Sexual Purposes (ECPAT International 2008).

⁶³Brian (n 20) 9.

⁶⁴ ibid.

⁶⁵ ibid.

⁶⁶ ibid.

man approached her and promised her work as a domestic helper in the United Kingdom. However, on arrival into the U.K. she was taken to a brothel, where she endured rape and forced prostitution. Even after becoming pregnant three months later she was still forced to work as a prostitute. She was later rescued by police after her captors dumped her in the streets of Sheffield as she was heavily pregnant.⁶⁷

Adoption, fostering and guardianship have been identified under the Counter-Trafficking in Person Act, 2010 as some of the factors that contribute to the trafficking of children. Going by the Gilbert Deya 'miracle babies' saga there exists a market for babies' worldwide. Many childless couples in developed State-Nations are turning to adoption agencies in developing societies to fill that void. ⁶⁸ Interestingly most of these couples feel the need to adopt babies from developing nations who have been identified as children 'in need' thus creating a market demand for babies. ⁶⁹ Ultimately, like in Gilbert Deya story, most traffickers end up abducting and stealing babies to meet the demand.

2.1.2 Stage 2: Transport

When a child who is a victim of trafficking is being moved, the safety of a child is not put into account. The child may travel in the back of a lorry or in trucks transporting goods. The journey can sometimes be very long during which time the child is hidden or told to lie about why they are travelling. Commendably, national and international legal instruments maintain that children do not have the right to choose to consent for the purposes of trafficking is not required to prove a case against a trafficker. ⁷⁰

Musiyiwa Ambrose, 'Child Trafficking in the U.K: A Slave Trade in the Heart of Britain' (2006) <<english.ohmynews.com/articleview/article_view.asp?article_class=5&no=293231&rel_no=6> accessed 8 August 2011.

⁶⁸ Brian (n 20).

⁶⁹ibid.

⁷⁰ ibid.

Transport of would be victims of trafficking is a key element of the offence of trafficking and thus law enforcement authorities must be able to detect whether or not the children are travelling willingly or even though willingly, they are doing so under false pretenses. At this stage, key allies of the trafficker come into play and the child is completely alienated from all things familiar. More often than not the trafficker will stop communicating with the child's parents or guardians. Total dependability on the trafficker then begins and unfortunately total control by the trafficker over the child means that exploitation (often sexual or physical abuse) of the child begins at this stage.

2.1.3 Stage 3: Destination

At this stage, a child arrives at his or her final place where they are exploited as in the above-mentioned case of the teenage girl in the United Kingdom. The purpose for recruitment all along was for the trafficker to be able to exploit the child either through, domestic work, sexual abuse, debt bondage, street begging or sale of organs. Often times it is at this stage that the child will fully realize or comprehend what is happening to them.⁷²

Not surprisingly, a child may be abused throughout the three phases (recruitment, transportation and destination). They are often mistreated, such as being beaten or denied food. It is also at this stage that a child, like in the above-mentioned case of the Kenyan girl trafficked to the U.K, is taken to the place of exploitation like a brothel instead of the place of work that had been promised. It is also the stage that the recruiter and receiver establish total control over the child in the most violent of ways. The child may undergo serious threats to their life including psychological coercion that their families may be

⁷¹ ibid.

⁷² ibid.

harmed or killed if the child does not agree to the terms/rules set by the receiver/trafficker.⁷³

In most trafficking cases, the recruiter has already established control over the victim. For a successful operation where people are trafficked from one country to another through international airports, the victim must be compliant.⁷⁴ Ultimately, the child becomes fearful and learns to follow the rules in order to survive. Unfortunately, even though the child or his/her guardian may have consented, it is only upon arrival that they become aware of the full extent of the deception.⁷⁵

The single most apparent distinction between smuggling and trafficking is that in the latter case the sole purpose is exploitation. ⁷⁶ Exploitation of children ranges from involuntary servitude, debt bondage, sexual exploitation, street begging, Child labour, removal of organs. Unfortunately, child victims of trafficking are also at risk of engaging in illegal activities such as drug running or insurgency as child soldiers in militia groups as was the case in Rwanda and Uganda and also form part of the chain of those recruiting others.

Exploitation and abuse is repeated and sometimes becomes a vicious cycle and may continue for an extended period of time. The worst kind of abuse and damage is usually done during this phase.⁷⁷

2.2 Factors that influence child trafficking in Kenya

Human trafficking and indeed trafficking of children occurs in almost every country on this planet; however, it is mostly successful in environments with a tourism industry, or a

74 ibid.

⁷³ ibid.

⁷⁵ ibid.

⁷⁶ ibid.

⁷⁷ ibid.

crippling economy or one that lacks good governance. What fuels child trafficking? The simple truth is that there is demand for it. Trafficking of persons is the second-most lucrative business for international crime syndicates, after trafficking in weapons.⁷⁸ Individuals around the world profit in pleasure and exploitation at the expense of thousands of women and children.

This study stresses that despite the globalization of the crime of trafficking in children and the realization by the international community of the importance of co-operation and collaboration to combat the same, very little progress has been achieved by way of international inter- dependence to stop child trafficking.

2.2.1 Weak Implementation of Legal and Institutional Framework

Kenya has made significant efforts to dealing with certain issues relating to children. The most current being the enactment of the Counter-Trafficking in Persons Act 2010. The 2010 Act is a comprehensive Act that provides for the punishment of traffickers and offers mechanisms for victim support. Other legislation relating to trafficking includes, Sexual Offences Act, Children Act, and the Penal Code.

However, despite existence of these laws several factors hinder the protection of children's rights as contained therein. For instance, poor accountability and law enforcement, corruption, and lack of proper training in the implementation of these laws.

79 Policemen suspected of taking bribes in cases of child trafficking are not prosecuted

⁷⁸UNICEF, 'Child Protection from Exploitation, Violence and Abuse' (*UNICEF*, 2009) http://www.unicef.org/media/media/45451.html accessed 12 January 2012.

⁷⁹ Centre for Human Rights and Policy Studies, 'Local Policing Accountability in Kenya: Challenges and Opportunities for Action' (2014) 30 http://www.chrips.or.ke/docs/publications/local-policing-accountability-in-kenya.pdf accessed 15 April 2015.

due to the reluctance by the Police authorities to investigate their own; the courts are yet to prosecute any police officer or government official.⁸⁰

2.2.2 Corruption

Despite Kenya being among the first nations to ratify the United Nations Convention against Corruption, Kenya remains one of the most corrupt countries in the world. There has been reports of some police officers engaging in corrupt practices in some cases of child trafficking. For example, in 2005, Margaret Deya the wife of the now infamous Archbishop Gilbert Deya was arrested together with two mid wives at their home in Nairobi after a raid by Police. Following the raid, ten (10) children were taken into protective custody. Margaret and Gilbert Deya alleged to be the biological parents of those children but however, DNA results proved negative.

Police also recovered forged birth certificates from their house and subsequently Mrs. Deya was charged- together with others- with child abduction. During their investigations, the Police discovered that a high number of women from Pumwani Maternity hospital had reported been told that their children had died during child birth while in fact they had been sold to desperate British couples who worshipped at the Gilbert Deya Ministries.

Though officials at Pumwani Maternity hospital-a government run hospital- were never charged in the above case the Police believed that some of the hospital personnel were involved in a child abduction ring. The above case is a perfect example of the level of cooperation between the relevant authorities in both Kenya and the United Kingdom to unearth a child abduction ring ran by the Gilbert Deya Ministries. Mr Deya is yet to be extradited to Kenya to stand trial for his crimes.

⁸⁰ ibid.

Though the government, through the enactment of the Counter-Trafficking in Persons Act 2010, has made efforts to develop and implement legislation to turn the tide on child trafficking, corruption at all levels coupled with under resourced police forces has contributed to the rise in the numbers of children trafficked every year.

As earlier stated corrupt officials form a vital link in the trafficking process. They may not be directly involved in trafficking of victims but their behavior and actions contribute to the successes full operation of the trafficking process.

According to a report published by Transparency International, corruption has a disappropriate effect on groups of people exposed to particular risks. These include women, children, minority groups, refugees and those who are poor. 81 Those that commit corrupt acts are usually in positions of power - such as police or immigration officials and do all they can to avoid detection and thus remain in positions of influence. Women and children tend to be more exploited and thus corruption reinforces their exclusion and discrimination. 82

Children possess the same civil, political, social, economic, and cultural rights as adults.

Corrupt practices violate a child's rights to be protected during adoption procedures.⁸³

2.2.3 Poverty and socio-economic status

Poverty has been established as a contributing factor to trafficking but does not cause trafficking.⁸⁴ Poverty merely makes one vulnerable to being trafficked. Poverty, age, lack of citizenship rights, conflict, disease, and drought can push people out of familiar

⁸¹ Transparency International Kenya, 'Corruption and Human Rights: Making the Connection' (*Tranparency International*, 2009) www.ichrp.org/files/reports/40/131_web.pdf> accessed 24 February 2012.

⁸² ibid.

⁸³ ibid...

⁸⁴ Brian (n 20) 9.

environment right into the hands of a trafficker.⁸⁵ In Kenya, our economy mainly depends on agriculture and is dominated by seasonality and highly variable weather conditions making people vulnerable to different seasons during the year. There are several factors contributing to the ongoing problem of poverty in Kenya. Population total in Kenya is approximately forty (40) million people, and according to United Nations Development Programme's Human Development Index, which measures development in terms of life expectancy, educational attainment and standard of living, Kenya ranks 143rd among 187 countries.⁸⁶

With a majority of people dependent on agriculture as a source of living, extended periods of drought not only cripple the economy but also restrict the percentage of income streaming into most households. Poverty and deprivation as well as extended periods of unemployment make people more vulnerable. Thus, in searching for opportunities available in the low-skilled or ill-defined sectors abroad, women and children become subject to unscrupulous practices of recruiters and facilitators.

There are multiple causes of poverty affecting adults, such high levels of unemployment, natural disasters such as extended periods of drought, population growth, poor governance, failed economic strategies, and so on, to a certain degree also affect children.

Poverty does make people vulnerable to trafficking. Those who hope and dream of a better life are most at risk. Human Trafficking like any other business is very much a demand driven. Due to the socio-economic insecurity in the country some families may result to illegal immigration in a bid to seek economic benefits elsewhere and in turn may get exploited. The lucrative tourism industry at the coast, among a community that feels

⁸⁵ ibid.

⁸⁶ ibid.

disenfranchised, has exacerbated and increased the vulnerability of child to sexual exploitation.

According to a UNICEF report most sex workers at the coast are children whose basic needs cannot be met by their families and thus seek out tourists' to supplement the family income. These children come from families that have been affected by unemployment or the loss of one or both parents.

2.2.4 HIV/AIDS

HIV/AIDS is a pandemic that afflicts millions of people worldwide. According to UNAIDS, WHO, and UNICEF 2011 estimates, around 3.4 million children were living with HIV at the end of 2010.87 Further, Sub-Saharan Africa remains the most heavily affected by HIV.88

In Kenya, a possible 1200 children have lose both or one parent, on a daily basis, to the pandemic making this group of children vulnerable to trafficking. ⁸⁹ Most of these children either end up as street children or become the breadwinners of their homes and thus are exposed to the risks of possible trafficking. Ultimately, as a result of HIV/AIDS the number of orphaned children has increased.

HIV/AIDS and child trafficking share common impacts. On the one hand being orphaned due to HIV/AIDS increases the vulnerability of being trafficked while trafficking especially for sexual exploitation results to children being at risk of contracting HIV.

<www.unaids.org/documents/20101123_global report_em.pdf> accessed 13 February 2012.

⁸⁷ World Health Organisation, 'Progress Report 2011: Global HIV/AIDS Response' (*World Health Organization*, 2011) <www.who.int/hiv/pub/progress_report 2011> accessed 13 February 2012.

⁸⁸ UNAIDS, 'Report on the Global AIDS Endemic' (UNAIDS, 2010)

⁸⁹ CRADLE, Full Circle: Exploring the Nexus between Child Trafficking and HIV/AIDS (CRADLE 2011).

Further, there is an unfounded belief - in certain regions of the country- that young girls are pure and therefore less likely to carry the virus.

Children are routinely trafficked to the coastal region- as it is a tourist hotspot- for purposes of sexual exploitation and therefore at a greater risk of contracting HIV. Political instability that recently rocked the country contributed to the vulnerability of women and children exposing them to the risks of being trafficked. For instance, it was reported that 30 children had disappeared from Nakuru showground where some IDP's had sought refuge. Mostly between the ages of 13-17 years, both girls and boys had been lured by unknown persons on the promise of job placement only to be sexually exploited. 90

According to Tom Omwenga of Child Aid Organization Kenya, HIV/AIDS has exacerbated the vulnerability of orphaned children to trafficking. 91 Most children in Kenya are trafficked internally for domestic use, sexual exploitation, street begging and working in tea plantations. Children orphaned through HIV/AIDS makes them especially vulnerable to trafficking. In 2011 Child Aid Organization Kenya rescued and helped place a 12-year-old girl with the Children's Department after their investigations revealed that the girl had been trafficked to Nairobi from Mbooni for sexual exploitation. Angeline Mbithe* became the *de facto* breadwinner after both her parents succumbed to HIV/AIDS related complications. Being the first born in a family of nine, she was forced to cut short her education despite performing well in her Kenya Certificate of Primary Education exams in order to help her ageing grandmother feed her other siblings. In her quest for a better life for herself and her siblings Angeline was approached by a lady- from her village- about a possible job as a charcoal seller in Nairobi. Angeline agreed and traveled accompanied by the lady to Nairobi. However, on arrival she was instructed that she would

90 ibid.

⁹¹ Tom Omwenga, 'HIV/AIDS Fueling Child Trafficking in Kenya' (*Media Voices for Children*, 2011) <www. Mediavoices forchildren.org> accessed 13 February 2012.

work as a prostitute. When she protested, she was thrown out of the 'recruiter's' house and thereafter sought help from the Child Aid Organization offices.

Most orphaned children are not so lucky. In most instances, where a family is financially struggling to meet its daily needs, the girl child is always the first to be withdrawn from school. If she finds employment, she is at a high risk of being abused- physically or otherwise- due to her vulnerability. Furthermore, medical bills of ailing family member's raises the cost of living of the family thus priorities shift and children from affected households are forced to actively take part in breadwinning at the expense of their development.⁹²

2.3 Impact of Trafficking on Child Survivors

Trafficking of children undoubtedly negatively affects individual children and a community in general in various immediate and longtime ways. On the top of the list is the deteriorating development in education, health, physical and mental development. Most trafficked children are disempowered in many ways. Many of them find themselves in foreign countries, with a foreign language and a foreign way of doing things. It is found in this study that most trafficked children are from families with difficult economic backgrounds. More often than not these children had little opportunity for school or education.

Girls trafficked to the coastal region and eventually 'married' off to wealthy mzungu tourists, work in an environment that does not foster development of one's mind. It is highly unlikely that these girls will be afforded the opportunity to read or study or even develop other skills necessary for a career change.

⁹² CRADLE (n 206).

According to a report by the International Organization for Migration (IOM) child sexual exploitation remains the most common form of child trafficking. Unfortunately abuse and exploitation of children often goes unreported.⁹³

As earlier discussed in this study, traffickers usually use manipulation and coercive tactics to establish and maintain control over their victims. By instilling fear in these children, it disables their physical and psychological strengths making them defenseless and thus cannot escape. Children victims often endure, physical, sexual and psychological abuse, isolation, working in places/ locations unknown to the child, dependence on drugs and alcohol to maintain control over that child and limited access to food and water. ⁹⁴

In a report conducted by ECPAT, the level of severity of emotional and physical trauma that trafficked children undergo stunts their emotional development. 95 Further, according to findings by IOM, child sexual violence is physically and emotionally damaging to a victim especially if it persists for a long period of time. 96

2.3.1 Educational Deprivation

Children who are trafficked cannot access the few educational opportunities available to them and thus are unlikely to develop any other skills necessary for a career change that will uplift their future economic status.⁹⁷

Ultimately these children- if rescued- have developmental delays and problems in language, verbal and memory skills and perform poorly academically.

⁹³ Yvonne Rafferty, 'Impact of Trafficking on Children: Psychological and Social Policy Perspectives' (2008) 2 Child Development Perspectives, 13-18.

⁹⁴ ibid.

⁹⁵ ibid.

⁹⁶ibid.

⁹⁷ibid.

2.3.2 Physical Health Problems

More often than not victims of child trafficking live in deplorable and inhumane conditions. They most likely have inadequate diets and hygiene and due to the frequent beatings and abuse, the trauma takes a toll on their overall health sometimes resulting in lasting health problems.⁹⁸

Victims of child sexual exploitation are exposed to dangerous and unsafe sexual practices, heightening risks for unwanted pregnancies, contraction of HIV/AIDS and other sexually transmitted diseases.⁹⁹

2.3.4 Emotional Problems

Like any adult victim, the experience of trafficking and exploitation has grave and lasting psychological implications. Children are more vulnerable due to emotional development. Children experience anxiety and stress associated with being away from a support system –family or friends-. Ultimately children suffer from depression, hopelessness, anxiety and low self-esteem.¹⁰⁰

Even when reintegrated back into the society, children have problems making relationships and are socially and emotionally withdrawn. They may also suffer from Post-Traumatic Stress Disorder (PTSD) as well as having suicidal thoughts. Ultimately, children victims become very distrusting of adults and exhibit antisocial behavior such as violent tendencies. Those who are trafficked for sexual exploitation may sometimes feel worthless and continue to engage in prostitution as a result. ¹⁰¹ Children who have been

99 ibid.

⁹⁸ ibid.

¹⁰⁰ ibid.

¹⁰¹ ibid.

trafficked are at a higher risk of engaging in substance abuse and as adults may be violent due to the negligence experienced as children. 102

2.4 Conclusion

This chapter examined the trafficking process that victims undergo. It is evident that victims may face abuse and exploitation at any stage of the trafficking cycle. Intervention strategies to curb factors such as corruption, poverty and weak implementation of the legal framework need to be prioritized for there to be a significant change in prevention and combating of child trafficking. Trafficking is a traumatic experience and ensuring that victims receive the necessary assistance is crucial to their future wellbeing. Of notable importance, Kenya has launched its 2013-2017 National Plan of Action to Combat Human Trafficking has allocated funds to set up and operationalize the National Assistance Trust Fund for victims of trafficking.

¹⁰² ibid.

CHAPTER THREE

EXISTING LEGAL FRAMEWORK ON CHILD TRAFFICKING

3.0 Introduction

This chapter analyses the existing legal framework on the protection of children from trafficking. These include, at the international level, the CRC and its Optional Protocols, Palermo Protocol, and ILO C182 and its Recommendation 90. At the regional level, ACRWC and ACHPR (hereinafter referred as Banjul Charter) and at the national level, Constitution of Kenya, Penal Code, Evidence Act, Sexual Offences Act, Children's Act, Counter Trafficking in Persons Act, Victims Protection Act and Extradition (Contiguous and Foreign Countries) Act. It is important to establish the extent to which these laws facilitate cooperation among all relevant stakeholders to ascertain where the legislation has failed to be comprehensive in its approach to combating child trafficking.

3.1 International Legal Framework

3.1.1 United Nations Convention on the Rights of the Child (CRC)

United Nations member states first collectively recognized the rights of children in the Universal Declaration of Human Rights, a non-binding resolution adopted by the U.N. General Assembly in 1948.¹⁰³ The declaration highlighted that women and children are entitled to special social protection and care. U.N. member states, in 1959, further enunciated children's rights by unanimously adopting the Declaration on the Rights of the

¹⁰³ The Universal Declaration of Human Rights was not the first international document to address the rights of children.

On September 16, 1924, members of the League of Nations agreed to the Geneva Declaration on the Rights of the Child. The Declaration recognized that children must be: given material and spiritual means for normal development; fed or nursed, reclaimed when delinquent, and sheltered when orphaned; the first to receive relief in times of distress; and put in a position to earn a livelihood and be sheltered from exploitation. It was adopted by U.N. General Assembly resolution 217 A (III) on December 10, 1948, by a vote of 48 in favor, zero against, and eight abstentions.

Child. The Convention was adopted by the U.N. General Assembly after a decade of negotiations on November 20, 1989, and entered into force on September 2, 1990. 104

3.1.1.1 Article 32 of CRC

This article provides for what would constitute protection against child labour. It underscores the responsibility of State parties to protect children from performing any work that is hazardous and likely to interfere with the welfare and development of the child. The Article is geared to protect children from any form of work that would otherwise infringe their rights to education, mental and physical health. The nature of this Article is that children are protected from economic exploitation.

Governments are thus urged, through enactment of labour laws, that protect children from work that is dangerous or might harm their health or their education. Notably, the convention does not prohibit parents from allowing children to engage in age appropriate work or chores that would help build their character. Children's work should be structured in harmony with their other rights to education and the right to play and relaxation.

3.1.1.2 Article 34 of the CRC

State parties are obligated under this Article to protect children from all forms of sexual exploitation and abuse. This provision is augmented under the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Article 34 urges cooperation among State parties in meeting their obligations to protect children from sexual abuse.

Thus, from the wording of this Article it can be argued that the drafting committee was alive to the fact that child trafficking for purpose of sexual exploitation was on the rise

¹⁰⁴ UNGA Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990. As of 10December 2013, 140 States are signatories and 193 are parties to the Convention.

and State parties could work together by entering into bilateral and multilateral agreements.

3.1.1.3 Article 35 of the CRC

Article 35 deals specifically with child trafficking:

'States parties shall take appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or the traffic in children for any purpose or in any form.'

The wording of this Article reveals both the vagueness of the provision and the insufficiency of national measures to meet the requirements of the child's protection. The vagueness relates to the failure to define 'abduction', 'sale', and 'trafficking'; whereas the inadequacy of domestic measures calls for bilateral and multilateral co-operation.

Child trafficking was subsequently defined with the advent of the Palermo Protocol.

It is evident that nothing much could be expected from State parties to the CRC in their fight against child trafficking when the mother Convention on children's rights does not provide sufficient clarification of key concepts. It is expected that State parties will not make much progress to understanding legal principles enshrined in international instruments if no guidance is given.

Returning to national measures, the Committee on the Rights of the Child (hereafter referred to as the Committee) believes that effective national measures can be judged by the legislation put in place. Legislation that ensures protection of children, prosecution of perpetrators and effective public awareness of child trafficking and its attendant practices.

This approach offers state parties a range of actions but however, but does not address the reintegration of the victims, as compared to the Palermo Protocol. ¹⁰⁵

Also, the signing of co-operation agreements would be beneficial in the design of a clear prevention and prosecution road map by exchanging information regarding traffickers and to provide for legal policies to extradite and prosecute them. ¹⁰⁶

3.1.1.4 Article 39 of the CRC

Article 39 is about the physical and psychological recovery and social re-integration of the child victim. It is particularly significant as child trafficking is a traumatic experience and thus this trauma must be properly addressed to facilitate successful rehabilitation of a victim. State parties therefore have the obligation to promote measures and provide suitable environments to this end.¹⁰⁷

3.1.2 The Optional Protocol to the Convention on the Rights of the Child (OPRC)

With 121 signatories and 171 State parties, ¹⁰⁸this Protocol was adopted in order to help achieve the goals of the CRC and the implementation of Articles 32, 34, and 35 among others. ¹⁰⁹ Kenya is among the state parties that has signed the Protocol. The Optional Protocol offers various definitions of crimes associated with child trafficking and abuse

¹⁰⁵ Article 6 (3) Palermo Protocol.

¹⁰⁶ ibid.

¹⁰⁷ Peter Newell and Rachel Hodgkin, 'Implementation Handbook for the Convention on the Rights of the Child' (UNICEF, 2007) 475

http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the e Child Part 1 of 3.pdf> accessed 14 February 2012.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force 18 January 2002, UNGA RES 54/263).
109 Para (1) Preamble.

such as sale of children, child prostitution and child pornography. ¹¹⁰ This shows great strides for the international committee in protecting children's rights.

Article 5 goes a step further and encourages State parties to make extraditable all the acts referred to earlier. It advocates, with Articles 6 and 10, the strengthening of international cooperation in the prosecution of offenders, while article 8 focuses on the protection of victims. Due to its binding nature, Article 12, compels State parties to report to the Committee on the measures taken to implement those provisions.

The OPRC is logically among the best attempts to counter some manifestations of child trafficking. Yet, the plague goes beyond a simple matter of buying, selling and exploiting children. Child trafficking is more; it is about a whole cycle of exploitation, from the recruitment to the habouring and eventual exploitation activities that are prejudicial to the child. Consequently, this state of affairs dictated the adoption of the holistic approach offered by the Palermo Protocol.

3.1.3 Palermo Protocol

Over the years the impact of trafficking in persons on the victims' dignity and rights, and the consequences for their health has raised concern about this particular crime. ¹¹¹ Through its enactment, the United Nations Member States recognize the rise in the transnational crime of trafficking and that its rise can effectively be solved through close international cooperation. ¹¹²

¹¹² Op. cit 8.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force 18 January 2002, UNGA RES 54/263).

¹¹¹ International Organisation for Migration, 'Breaking the Cycle of Vulnerability: Responding to the Health Needs of Trafficked Women in East and Southern Africa' (2002).

The Convention is a binding document; States that ratify it must take develop measures and policies against transnational organized crime. 113

The Palermo Protocol came into force on 25 December 2003 and, to date, 117 countries have signed, and 124 have ratified it including Kenya¹¹⁴ Its fame derives from its features of 'establishing the first internationally agreed definition of the crime of trafficking in humans, for advancing national and regional initiatives and for facilitating crime-control cooperation'. ¹¹⁵

The Palermo Protocol was designed to prevent and combat TIP, protect and assist the victims, and promote co-operation among State parties in order to meet those objectives. ¹¹⁶ Unlike the CRC it gives a better definition of (child) trafficking ¹¹⁷ and 'child'. ¹¹⁸ making it easier to identify victims of trafficking. The Protocol provides for offences that are transnational in nature while encouraging State Parties to develop national legislation to deal with trafficking within their borders. ¹¹⁹

3.1.4 The ILO C182 Convention and its Recommendation 190

This convention was adopted on 19 November 2000 with the aim of addressing effective measures to prevent worst forms of child labour. ¹²⁰ The convention applies to children under the age of 18 years ¹²¹ and defines the worst form of child labour to include, the sale

¹¹³ Ibid.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially women and Children (adopted 15 November 2000, UNGA Res 55/25) https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html accessed 6 October 2105

¹¹⁵ Ibid.

¹¹⁶ Op. cit 8.

¹¹⁷ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially women and Children, Article 3(c).

¹¹⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially women and Children, Article 3 (d).

¹¹⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially women and Children, Article 4 and Article 5.

¹²⁰ C182, Worst Forms of Child Labour Convention (Convention concerning the Prohibition and Immediate Action for the Elimination of the worst Forms of Child labour, entered into force; 19 November 2000).
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182
Accessed 13 October 2015

¹²¹ C182, Article 2.

and trafficking of children.¹²² It promotes international cooperation as one of the tools to eliminate worst form of child labour by encouraging Members to assist each other in eradication programmes.¹²³ As of 13 October 2015, 180 states have ratified it including Kenya.¹²⁴

To facilitate its implementation, Recommendation 190¹²⁵ puts in place Programmes of Action as stipulated in Article 6 of the convention. ¹²⁶ It defines hazardous work as work that exposes children to physical, psychological and sexual abuse. ¹²⁷ Being a Recommendation, it is thus not legally binding. However, it offers an all rounded approach to the criminalization of worst forms of child labour. It upholds the importance of detailed information and statistical data compilation and international cooperation as a matter of priority. Thus, Recommendation 19 is important as it offers effective tools to assist the provisions of CRC and other instruments discussed above. There is need to address gaps that this convention and its Recommendation cannot fill and especially with regards to the prosecution of offenders.

3.2 Regional Law

Kenya has ratified various legal instruments dealing with child trafficking enacted under the auspices of the African Union. These include the African Charter on Human and Peoples Rights and the African Charter on the Rights and Welfare of the Child.

¹²² C182, Article 3 (a).

¹²³ C182, Article 8

¹²⁴ International Labour Organisation, 'Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)' (2012) 1.

¹²⁵ R190, Worst Forms of Child Labour Recommendation (Recommendation concerning Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) (87th ILC Session, Geneva, 15 June 1999)

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R190 Accessed 13 October 2015

¹²⁶ C182, Article 6

¹²⁷ R190, Recommendation 3

3.2.1 African Charter on Human and Peoples Rights (ACHPR)

Adopted in June 1981 and entered into force in 1986¹²⁸, ACHPR seeks to promote and protect human rights within the African continent. The Charter recognizes that every individual has a right to the enjoyment of rights and freedoms guaranteed therein. Article 5 prohibits all forms of exploitation against human beings. The article enumerates the forms of exploitation with slavery topping the list. Although, not explicitly stated, it can be argued that trafficking of children is covered under this Article.

Under article 18(3) the Charter provides that States ensure the protection of children as stipulated under international declarations and conventions. Thus, it provides under Article 1 that States must undertake to adopt legislative and other measures that give effect to the rights under the Charter. The Charter is relevant as it recognizes children as individuals in need of protection and emphasizes on the State to be protector of these rights. However, in practice, the State may act as both protector and violator of those rights. States have a duty to ensure counter trafficking measures are effective.

3.2.2 African Charter on the Rights and Welfare of the Child (ACRWC)

Adopted in 1990,¹³¹ the Charter has so far been ratified by 41 Countries including Kenya.¹³² The Charter recognizes a child as any human being below the age of 18 years.¹³³ This definition is more precise than that under the CRC. Member States recognize the

¹²⁸ African Charter on Human and Peoples Rights (adopted June 1981 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) http://www.achpr.org/instruments/achpr/>Accessed 10 June 2015

¹²⁹ Ibid, Article 5.

¹³⁰ Shewit Gebreegziabher, Modern Slavery in African Land: Situations of Trafficking Women from Ethiopia to Sudan (Anchor Academic Publishing 2013).

¹³¹ African Charter on the Rights and Welfare of the Child (adopted 1990 OAUDoc.CAB/LEG/24.9/49, entered into force 29 November 1999) http://www.achpr.org/instruments/child/>accessed 10 June 2015.

¹³² Africa Commission on People and Human Rights, 'Ratification Table: African Charter on the Rights and Welfare of the Child' (*Africa Commission on People and Human Rights*, 2015)
http://pages.au.int/acerwc/pages/acrwc-ratifications-table> accessed 27 October 2016.

¹³³ Article 2, ACRWC.

rights, freedoms and duties enshrined therein and urged to adopt laws that are consistent with them. 134 Consistent with Article 32 CRC, Article 15 stipulates that children should be protected from all forms of commercial exploitation and from performing any work that is likely to be hazardous or to interfere with their physical, mental, spiritual, moral, or social development. 135 This article includes the informal and formal sector of the economy. This is extremely important, considering that in Africa the informal sector is just as important as the formal sector and thus must be regulated to protect child from exploitation. In fact, read together with Article 11 which provides that a child has a right to education; it is evident that the Charter seeks to uphold the right of children to be children. It can be argued that the economic argument under both this articles would mean protection of children today can have a positive effect on the future economic growth and development of a country as these children grow up to be law abiding, patriotic citizens. 136

Article 27 develops from the CRC as it not only criminalizes all forms of sexual exploitation and sexual abuse against children but also the inducement to engage into any sexual activity. This is of great value as coercion is not the only way to recruit a child into trafficking. Further, to make Article 35 of the CRC more appropriate, the ACRWC includes parents and legal guardians as potential perpetrators in the sale, abduction and trafficking of children.¹³⁷ It goes further to include child begging as a form of trafficking.¹³⁸

¹³⁴ Article 1, ACRWC.

¹³⁵ Article 15, ACRWC.

¹³⁶Ramphal Sillah and Tawanda Chibanda, 'Assessing The African Charter on the Rights and Welfare of The Child (ACRWC) As a Blueprint Towards the Attainment of Children's Rights in Africa' (2013) 11 IOSR Journal Of Humanities And Social Science 50.

¹³⁷ Article 29 (a), ACRWC.

¹³⁸ Article 29 (b), ACRWC.

The ACRWC puts great emphasis on domestication of the law by its member states so as to be able to adhere to its provisions. Unlike the CRC and ILO Convention 182, the Charter does not specify cooperation mechanisms. It leaves the mechanism of collaboration up to member States. However, it can be argued that for any piece of legislation to be effective, it must provide for full interpretation of its terms. Leaving interpretation to state parties can create loopholes on its implementation making States parties unlikely to fully adhere to its provisions.

3.2.3 Ouagadougou Plan of Action on Trafficking in Human Beings Especially Women and Children

Since its inception, the African Union has continually emphasized the special focus of women and children and particularly with regard to trafficking. The AU, through the Department of Social Affairs (DSA) has developed several polices on migration. The Ouagadougou Plan of Action on Trafficking in Human Beings Especially Women and Children (the Ouagadougou Action Plan) is one of these policy documents.

The Ouagadougou Action Plan provides specific measures and recommendations to Member States on combating trafficking of women and children. It justifies the special focus on women and children due to their socio-economic status and objectionable cultural practices that afflict them. The Action plan also points out that in order to effectively combat trafficking in human beings and especially that of women and children, States must map out a comprehensive and clear approach between countries of origin, transit and destination. It is clear that with the development of The Ouagadougou Action Plan, the African Union intends to galvanize activities by international, regional and national bodies into a synergized approach to combating trafficking in persons and especially that of women and children.

The implementation of the Ouagadougou Action Plan as well as the activities carried out by the African Commission Initiatives against Trafficking Campaign to Combat Trafficking in Human Beings (AU. COMMIT), the African Union seeks to prevent trafficking of persons including and especially children by putting in place measures to prevent trafficking, protect victims of trafficking and most importantly prosecute those involved in trafficking and other related abuses. States are urged to provide education, training, to safeguard children's rights and create awareness through all relevant media channels against trafficking of children including mobilizing families and NGO's. States are also called to provide psychosocial and medical support to children who have been victims of trafficking through the establishment of rehabilitation centers that facilitate their recovery and reintegration back into the society.

Moreover, States are called to adopt effective measures for prosecution that allow victims to testify against offenders without putting their safety at risk and also without prejudicing the offender's case. States must strengthen the training of their government personnel at all levels to ensure that the Police are equipped with the necessary skills to detect the crime of trafficking and that successful prosecutions are carried out thereafter. To this end, the AU. COMMIT has set aside a total budget of 600,000 USD for those activities to be implanted over a period of four years, which is 2009-2012.

The AU. COMMIT also aims at consolidating the activities of the AU Commission, the Regional Economic Communities (RECs), Member States and partner organizations in order to encourage States to utilize the Ouagadougou Action Plan as a reference to develop and reform their national policies, laws and interventions on trafficking in persons especially women and children.

It has been argued that though commendable the initiative to combat trafficking of African children. However, the Ouagadougou Action Plan has been heavily influenced by the

European Union due to lack of financial commitment by most African States. ¹³⁹ The Joint Africa-EU Ouagadougou Action Plan to Combat Trafficking is one of these initiatives. Though it raises questions of accountability and ownership, it is obvious that the African Union recognizes the threat that Child trafficking poses to the African Continent and the Action Plan emphasizes on the need for cooperation among all relevant stakeholders.

3.2.4 Treaty establishing the East African Community

The Treaty establishing the East African Community summarizes the regional intergovernmental organization whose vision is promoting a prosperous, safe, and unified East Africa, through co-operation among Member States through political, social and economic fields. ¹⁴⁰ Currently there are no enacted laws or agreements with regards to the child trafficking by the EAC however, the Partner States have recognized the need for collaboration to combat trafficking of child within its region as a violation of human rights.

During its 3rd annual conference on good governance the EAC delegates were united in their recommendation that the East African Court of Justice (EACJ) be empowered to try cases of violation of human rights as well as crimes of an international nature within the region. The delegates further acknowledged that conflict in the Horn of Africa had increased the high levels of poverty and consequently increased the number of people, including children, being trafficked across the borders within the region.

Henrike Klavert, 'African Union Frameworks for Migrations: Current Issues and Questions for the Future' (2011) 108 http://ecdpm.org/publications/african-union-frameworks-migration-current-issues-questions-future/>accessed 10 October 2015.

¹⁴⁰East African Community, *About EAC* (East African Community 2012).

To this end, member states adopted the East African Community Protocol on Peace and Security to promote peace and security within the region. ¹⁴¹ Article 12 of the Protocol provides that states shall undertake joint operations in preventing cross border crimes such as human trafficking. ¹⁴² This is in line with Article 2 which underscores the importance of cooperation and collaboration among member states in order to effectively promote security in the region. ¹⁴³

Of notable importance, in October 2016, the East African Legislative Assembly passed the Anti-Trafficking in Persons Bill, 2016.¹⁴⁴ The law seeks to provide for a legal framework for the prevention of trafficking in persons within the region through prosecution of perpetrators, provision of victim protection services and development of cooperation mechanisms among member states. The Bill is currently awaiting the assent by all Heads of member States before becoming operational.

3.3 Kenyan Legislation

Protecting and realizing children's rights is a continuous process. The Government of Kenya is indeed making positive strides to meet the minimum requirements for elimination of human trafficking through the enactment of relevant laws. The following part of the chapter will analyze these laws.

¹⁴¹ East African Community, Protocol on Peace and Security, (adopted in 1999)

 $https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&sqi=2&ved=0\\ahUKEwjYoLvi-$

 $KXQAhXKOBQKHcWABtMQFggaMAA\&url=http\%3A\%2F\%2Feac.int\%2Flegal\%2Findex.php\%3Foption\%3Dcom_docman\%26task\%3Ddoc_download\%26gid\%3D203\%26Itemid\%3D47\&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47\&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%3D203\%26Itemid\%3D47&usg=AFQjCNFz-townload\%26gid\%26$

⁸pR5Kc7_ECMOVl3A8NZVmF43A&sig2=Pwxq_ovd5Lc7aWX7Ji9XZ> accessed 13 November 2016

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ East Africa community, Assembly enacts Anti Trafficking in Persons Bill, (2016) < http://www.eac.int/news-and-media/press-releases/20161018/assembly-enacts-anti-trafficking-persons-bill> accessed 19 November 2016

3.3.1 The Constitution of Kenya 2010

Promulgated in 2010 the Constitution is the supreme law of the land. It guarantees the protection of basic civil, political rights and freedoms of all Kenyan people. Chapter 4 enumerates the Bill of Rights, which rights and freedoms belong to everyone and must be protected as such. Article 20 (3) (a) provides that laws should be developed anchored on the provisions of the Constitution. Further, it stipulates that the State must employ resources to ensure enjoyment and protection of these rights. Protection of vulnerable groups in particular is important under the Constitution. Though the Constitution does not specifically provide for children's rights its provisions imply broadly protection of children's rights.

The Constitution makes provision of protection of the child under Article 53(Article 53 of the Constitution of Kenya). Moreover, Article 2 (5) and (6) (Article 2 of the Constitution of Kenya) provide that any treaty or convention ratified by Kenya shall form part of the Law of Kenya under the Constitution. Effectively, this means that the conventions are thus applicable by municipal courts. Though the Bill of Rights under Chapter 4 of the Constitution does not specifically provide for protection against child trafficking, it does provide for fundamental rights and freedoms some of which can be the basis for protecting children as victims of trafficking. These include, right to life, ¹⁴⁵ right to human dignity, ¹⁴⁶ protection against slavery, servitude and forced labor, ¹⁴⁷ freedom of movement and residence ¹⁴⁸ and protection of victim of offences. ¹⁴⁹

The Constitution establishes the Kenya National Human Rights and Equality Commission is under Article 59 (2) and whose mandate is to promote human rights in Kenya. One of

¹⁴⁵ Article 26, Constitution of Kenya, 2010.

¹⁴⁶ Article 28, Constitution of Kenya, 2010.

¹⁴⁷ Article 30, Constitution of Kenya, 2010.

¹⁴⁸ Article 39, Constitution of Kenya, 2010.

¹⁴⁹ Article 50(9), Constitution of Kenva, 2010.

its principal mandates is to ensure that Kenya complies with its obligations under all treaties and conventions concerning human rights.

The Constitution as a framework document sets out basic principles and is rarely litigated in ordinary courts on a daily basis, thus it's important to harmonize the Counter Trafficking in Persons Act to deal with all cases of trafficking.

3.3.2 Penal Code

The Penal code outlines criminal offences and outlines penalties. It classifies punishable offences against children into two categories namely; sexual and physical abuse. Sexual offences outlined are; rape, incest, defilement, unnatural offenses and assault. Physical abuse includes occasioning bodily harm and common assault. The Penal code read together with the Sexual Offences Act ensure that children are protected from sexual abuse and more importantly that these crimes are punishable. This is important because a study conducted by UNICEF and the Kenyan government reported that up to 24,000 children are exposed into sex tourism at the Kenyan coast. 150

In 2005, Mary Deya the wife of the now infamous Archbishop Gilbert Deya was arrested together and charged under the Section 174 (1) and Section 129 (a) with one count of the offence of child stealing and two counts of giving false information to a person employed in the public service. Mary Deya had alleged to have given birth to a baby outside the Nairobi hospital and reported the birth at Kenyatta National hospital. On further examination, a pregnancy test was performed on her which test should turn positive after delivery but it turned negative. She also presented a placenta which after further tests it was determined that she was not the mother of the baby. The trial court having determined that she had indeed stolen the child and convicted her to seven (7) year in prison.

¹⁵⁰ Pamella Sitoni, 'Sex Tourism in Kenya: One Girls Story' (2006).

¹⁵¹ Mary Juma Gilbert Deya vs. Republic [2014]eKLR

3.3.3 Sexual Offences Act, 2006

The Act enacted in 2006,¹⁵² criminalizes offences of a sexual nature. Section 13 defines child trafficking as the movement of a child within or outside the country with the intention of sexually exploiting him/her. This is in line with the provisions of the CRC. In addition, Sections 14, 15, and 17 of the Sexual Offenses Act prohibits the facilitation of child sex tourism, child prostitution and prescribes punishment of at least 10 years imprisonment, and forced prostitution with a prescribed punishment of at least five years' imprisonment.

3.3.4 The Children Act, 2001

The Children Act was enacted in 2001 in line with Kenya's obligations under the CRC. The overall theme of the Act is to safeguard the rights of the child. The Act upholds every childs inherent right to life and gives the government the responsibility to safeguard that right. This is important because under the Constitution, the government is mandated to employ resources to protect children's rights. It can be argued that full implementation of laws is one way of achieving that.

Section 13(1) of the Act provides for protection of a child from physical and psychological abuse and any other form of exploitation including trafficking. It is the only section that deals specifically with trafficking of children. Considering the harm caused to the exploited child and to give this section effect, it is necessary that it is read together with the provisions of the Penal Code, Sexual Offences Act and the Constitution. Further, it does provide for the punishment of child abuse and neglect which is widely accepted to be among the various reasons why children are trafficked.

¹⁵² Sexual Offences Act No 3 of 2006.

In September 2010, for example, a Tanzanian man and his Kenyan wife were jointly charged before a Nairobi Court, under the Children Act with exploiting children from Tanzania with unlawful child labor and illegal harboring. The couple would abduct children from Tanzania and force then to beg on the streets of Nairobi; both were convicted and sentenced to two years' imprisonment.¹⁵³

Section 132 provides for care orders issued by the Court with respect to children in foster care or in adoption proceedings. This section stipulates that it is the responsibility of the Court issuing the order to determine whether or not an adopted child can be emigrated from Kenya. This is important as it protects children against possible trafficking through international adoptions. Moreover, Kenya has been identified as a hot spot for trafficking of children through adoptions. ¹⁵⁴ In fact, the Counter-Trafficking in Persons Act has specifically stated adoption as act that promotes child trafficking. Focusing specifically on safeguarding children against trafficking, this Act could not guarantee protection. Another law was thus welcome.

3.3.5 Counter-Trafficking in Persons Act, 2010

This Act was developed in line with Kenya's obligations under the Palermo Protocols. It provides for offences relating to trafficking in persons. A person is guilty of the offence of trafficking when the person recruits, transports, transfers, harbours or receives another person for the purposes of exploitation. The Act goes further than the CRC as it also criminalizes the threat of movement of a child. 155

¹⁵³ United States Department of State, 'Trafficking in Persons Report' (2014).

¹⁵⁴ Venus Maroun and Cecie Grasso, Rights of the Child (World Organisation Against Torture 2006).

The Preamble notes that exploitation means the child labour and exposing a person to practices similar to slavery. ¹⁵⁶ In the earlier chapters of the study, trafficking has been likened to modern day slavery.

3.3.5.1 Acts that Promote Child Trafficking

The Act enumerates three acts that promote child trafficking as adoption, fostering and guardianship. ¹⁵⁷ A person found guilty of initiating these acts is liable to imprisonment for up to thirty years or a fine of not less than twenty million shillings. The penalty stipulated is envisaged to bring deterrence to the forefront. Further, Section 26(3) provides where an offender has already adopted, fostered or acted as a guardian to the victim of trafficking, the court shall rescind that adoption, fostering or guardianship.

In 2014, the Principal Secretary, Ministry of Labour, Social Security and Services declared an indefinite moratorium on inter-country adoptions of Kenyan children to foreigners. However, in cases where the court directed that the Director of Children Services file a report with regards to a case and the Director failed to do so, the court has allowed adoption proceedings to continue. ¹⁵⁹ Of great concern, the court has allowed those adoptions. ¹⁶⁰

Under Section 7, a person found guilty of facilitating the entry into and out of the country of anyone for purposes of exploitation is liable to not less than thirty years in prison or a fine of not less than thirty million shillings or both with a habitual offender being awarded life imprisonment.¹⁶¹ It is worth noting that this section directly seeks

¹⁵⁶ Preamble to the Counter-Trafficking in Persons Act 2010.

¹⁵⁷ Section 4 of the Counter-Trafficking in Persons Act 2010.

¹⁵⁸ Thiong'o Mathenge and Rawlings Otieno, 'Kenyan Government Bans Adoption of Children by Foreigners' Standard Digital Media (2014) http://www.standardmedia.co.ke/article/2000142876/kenyan-government-bans-adoption-of-children-by-foreigners accessed 28 September 2016.

¹⁵⁹ In re A M (Baby), Adoption Cause No 45 of 2015, [2015] eKLR

¹⁶⁰ In re Baby I J – (Minor), Adoption Cause No 115 of 2015, [2015] eKLR

¹⁶¹ Section 7 of the Counter-Trafficking in Persons Act 2010

to punish any corruption related activities that actually facilitate trafficking of persons. Additionally, the Act appropriately criminalizes any action by any employee or government official who knowingly issues travel documents with the intention of promoting trafficking. ¹⁶²

3.3.5.2 Prosecution of Offenders

Where an offender is found guilty under the Act, Section 13 provides for restitution to the victim by an offender. Restitution can be in form of medical costs, transportation or living expenses or any other costs the courts may deem appropriate. This is commendable as perpetrators do indeed profit from the exploitation of victims. Additionally, the Act provides for the National Assistance Trust Fund to help victims of trafficking and it allows that the proceeds of the crime fortified or confiscated from the perpetrator can be allocated to this fund. 164

Under Section 25 the Act provides for the prosecution of a person who commits an offence under the Act outside Kenya but is a permanent resident or a Kenyan citizen. Provided, however that the person has not already been charged with the offence in the jurisdiction where the offence occurred. The Act empowers the courts to try foreigners charged with offences under the Act and if convicted order for the perpetrators deportation from the country. A conviction under this section effectively means that the perpetrator is permanently barred from re-entry into the country. This is commendable especially as it ensures protection of the victim from the perpetrator.

¹⁶² Section 6 of the Counter-Trafficking in Persons Act 2010

¹⁶³ Section 13 of the Counter-Trafficking in Persons Act 2010

¹⁶⁴ Section 23 (1)(a) of the Counter-Trafficking in Persons Act 2010

¹⁶⁵ Section 25 of the Counter-Trafficking in Persons Act 2010

3.3.5.3 Support and Protection of Victims

The Act rightly provides for the protection of the identity of victims of trafficking especially during court proceedings. ¹⁶⁶ It provides under Section 15 that victims are entitled to protection services which may include repatriation back to Kenya, medical and legal services as well as re-integration and settlement. Multi sectoral cooperation; collaboration with non-state actors as well as other countries is thus vital for the government to actualize these services to victims.

Through the National Assistance Trust Fund victims can also receive much needed services in terms of medical or psychosocial support. The Trust Fund is established under Part V of the Act. To this end the Kenyan 2013-2017 National Plan of Action for Combating Human Trafficking launched by the government last year does indeed provide for resources to set up the victim assistance fund. Once operational, victims will be able to access medical or legal services that is vital to their reintegration.

Of notable importance, the NPA plans to develop a national referral system that will ensure victims are directed to the appropriate centers or organizations for assistance. In line with devolution, it is important that the government identifies and establishes agencies or organizations of assistance at the county level to facilitate access to support services. Also, the NPA plans to coordinate with non-governmental organizations that already offer assistance to victims of trafficking. Appropriate monitoring of these organizations will also be necessary to ensure the funds are actually being expended to helping victims of trafficking. These provisions for victim protection under the Act are

¹⁶⁶ Section 11 of the Counter-Trafficking in Persons Act 2010

commendable and if fully implemented will assist in mitigating the effects of trafficking on victims, including children.

3.3.5.4 Advisory Committee

Part IV¹⁶⁷ of the Act provides for the Counter-Trafficking Advisory committee. It is mandated to advise the government on coordinated inter agency activities to combat trafficking in the country. It is also tasked with developing and implementing prevention and protection policies. The Advisory Committee is mandated under the Act to galvanize all efforts to prevent human trafficking in the country. In line with its mandate to develop regulations and guidelines to implement the Act, it launched the 2013-2017 National Plan of Action for Combating Human Trafficking. This Action Plan discussed in the next chapter, provides a road map for the government in combating human trafficking.

It is notable that the Act recognizes the role of cooperation in curbing trafficking in persons. It mandates the Advisory Committee to put in place measures that promote cooperation between Kenya and other countries through bilateral and multi-lateral agreements. Public Awareness of the law can also be effective in prevention of trafficking in persons. To this end, the Advisory Committee is charged with coordinating dissemination of information about the law and issues relating to trafficking through relevant national agencies and relevant non-governmental organizations. ¹⁶⁸

¹⁶⁷ Section 19 of the Counter-Trafficking in Persons Act 2010.

¹⁶⁸ Section 20 (2) (c) of the Counter-Trafficking in Persons Act

3.4 Extradition (Contiguous and Foreign Countries) Act

These statutes deal with the procedure of extradition of criminals. Where it is determined

that a criminal has committed a crime within the jurisdiction of Kenya but is now residing in another country. The legislation provides at Part III that once an application for a warrant of arrest for a criminal is issued and the same has been issued and authenticated that the same can be served with the help of the country where the criminal is residing. 169 The Act is vital in combating trafficking as traffickers connected with crimes committed in Kenya can be prosecuted making collaboration an important tool for the successful arrest and extradition of a criminal. In 2007, the Kenyan government issued an extradition request for the now infamous Bishop Gilbert Deya in his role in the 'miracles babies' saga. 170 This came in the wake of the successful trial and conviction of his wife, Mary Deva on charges of child theft. It was later established after investigations by the Kenyan authorities that Mary and Gilbert Deya were part of a trafficking ring that saw children end up in London, housed at a children's home ran by Gilbert Deya Ministries. 171 However, despite the request being issued over a decade ago, Gilbert Deya is yet to be extradited back to the country. In an article by Irin News, it was reported that Mr. Deva had appealed his extradition on the grounds that it would breach his human rights. 172 It was further reported that the United Kingdom (UK) Home office had stated that his extradition would breach the European Convention on Human Rights. 173 With no decisive

¹⁶⁹ Part III Extradition (contiguous and Foreign Countries) Act

¹⁷⁰ Emma Supple, *Revealed: The 'miracle babies 'Preacher tying British Regulators in Knots*, Irinnews,2016 https://www.irinnews.org/special-report/2016/10/03/revealed-%E2%80%9Cmiracle-babies%E2%80%9D-preacher-tying-british-regulators-knots accessed 30 October 2016

¹⁷¹ Ibid.

¹⁷² Ibid

¹⁷³ Ibid

steps being taken by both countries, the tragic part about this story is that the children at the center of this saga remain in limbo and perhaps forever scarred.

3.5 Conclusion

This chapter has shown that Kenya has an abundance of legal instruments both national and international. However, an abundance of legal instruments does not necessarily guarantee full protection of children from trafficking; implementation of these instruments remains sluggish Promotion of cooperation measures, as provided under the various legal instruments, across multi sectors and also between Kenya and other countries may prove to be an effective tool against combating child trafficking.

CHAPTER FOUR

STRATEGIES AGAINST CHILD TRAFFICKING: THE ROLE OF COOPERATION IN COMBATING CHILD TRAFFICKING

4.0 Introduction

Combating Human Trafficking is not a simple task.¹⁷⁴ In this chapter the study will examine cooperation as a tool to combat child trafficking. National cooperation mechanisms are best anchored under National Plans of Actions which in turn forms the bases for international cooperation. Due to the transnational nature of the crime of trafficking, integrated Plans of Action discussed in this chapter demonstrate cooperation between countries as effective way to combat child trafficking. can be among different sectors within government agencies as well as between countries.

Further, the chapter will highlight bilateral agreements to combat human trafficking between China and Vietnam, Benin and the Republic of Congo as well as Benin and - Nigeria with the aim of establishing their effectiveness.

4.1 National Plans of Action

At a national level and especially for countries which have been categorized as being of origin, such as Kenya, a comprehensive National Plan of Action that emphasizes on cooperation between all sectors can help minimize children's vulnerability to trafficking.

For instance, having recognized the importance of cooperation in protecting children from

trafficking, the Economic Community of West African States (ECOWAS) in 2001

¹⁷⁴Department of Global Development, 'Poverty and Trafficking in Human Beings: A Strategy for Combating Trafficking in Human Beings through Swedish International Development Cooperation' (2003) (n 48).

adopted a Declaration and Plan of Action against Trafficking in persons (2002-2003). Member States pledged to, among other measures, promote awareness on Human Trafficking and also push for cooperation between border control agencies. The Member States also pledged to share information and data between ECOWAS countries and the UN.¹⁷⁵

Perceptions of Child Trafficking differ from Country to Country depending on whether a Country is a Country of origin, transit or destination. Thus, the resulting perception dominates domestic national policies. ¹⁷⁶ Countries of origin doubtless become more aware of child trafficking. In West Africa, for instance, Mali recognized that most of their children were being trafficked to Ivory Coast and promptly adopted a National Plan of Action to combat the flow of children into Ivory Coast. ¹⁷⁷ Destination countries may sometimes show an indifference as the children trafficked are not their own and thus may not be a national concern. Again, with the international media shining a spotlight on the plight of trafficked children in many destination countries as well as the exploitation they undergo, it has become virtually impossible to ignore children who have illegal immigration status. ¹⁷⁸

4.1.1 Kenyan 2013-2017 National Plan of Action for Combating Human Trafficking

In May of 2015, the Government of Kenya launched its strategic four (4) year plan to combat human trafficking by adopting the National Plan of Action Against Human

¹⁷⁵ UNICEF, 'Child Trafficking in West Africa: Policy Responses' (n 120).

¹⁷⁶ibid.

¹⁷⁷ ibid.

¹⁷⁸ ibid.

Trafficking.¹⁷⁹ This is a general strategy addressing victims of Human Trafficking for 2013-2017. The Action Plan states that special attention will be given to protecting and assisting children because of their special vulnerability. ¹⁸⁰ Notably, the Action Plan does not specifically provide for children but in turn categorizes them under vulnerable groups. Specific objectives with regard to child trafficking mentioned in the Action Plan are to develop policies, programmes and other measures that foster research, information collection and sharing and awareness creation to combat child trafficking. To strengthen these measures, the Action Plan has prioritized cooperation with non-governmental organizations and other relevant stakeholders. ¹⁸¹ To reduce the vulnerability of children to trafficking the Action Plan will endeavor to strengthen measures that alleviate factors that contribute to their trafficking such as poverty. ¹⁸²

The Action Plan also addresses raising the efficiency of prevention activities targeting trafficking of children. In particular, through training of law enforcement, immigration and other relevant officials in order to accurately detect a child being trafficked. ¹⁸³ The trainings will enhance, intelligence- led investigations thereby producing stronger cases for prosecution. ¹⁸⁴

4.1.1.1 Data Collection Mechanisms

In order to facilitate availability of data, the Action Pan will develop a standardized system for collection of data for potential victims and perpetrators of trafficking. Although, it

¹⁷⁹ Government of Kenya, 'National Plan of Action for Combating Human Trafficking' (n 78).

¹⁸⁰ ibid.

¹⁸¹ ibid.

¹⁸² ibid.

¹⁸³ ibid.

¹⁸⁴ ibid.

does not provide for a separate system of data collection specific for child trafficking, it is a step in the right direction.

Collection, storage and sharing of the data will lay a strong foundation to the development of cooperation mechanisms between different stakeholders within all sectors in Kenya as well as of international cooperation mechanisms such as legal assistance and joint investigations.¹⁸⁵

There is also a data collection mechanism for case law to be developed under the Action Plan through capacity building of judicial officials and prosecutors. ¹⁸⁶

4.1.1.2 Awareness Raising Campaigns

The Action Plan has prioritized conducting of public awareness on deception and means used by traffickers to conduct trafficking. ¹⁸⁷ Additionally, it will provide information on where and how to seek help for potential victims. To complement these activities, the Action Plan intends to mobilize resources for safe homes where children trafficked can be housed, separated by gender and age. ¹⁸⁸ However, the Action Plan does not set out activities to involve children in conducting awareness.

4.1.1.3 National Referral Mechanism

In order to combat human trafficking, the Action Plan has provided for the development, publication and dissemination of a National Referral Mechanism and guidelines. ¹⁸⁹ The Action Plan seeks to conduct a mapping exercise to identify all existing support services

¹⁸⁶ ibid.

¹⁸⁸ ibid.

¹⁸⁵ ibid.

¹⁸⁷ ibid.

¹⁸⁹ ibid.

available to trafficked persons.¹⁹⁰ It is not designed for children trafficked specifically but they will be beneficiaries of it. The document will aid in creation of a system of identification of victims of trafficking including children and referral to providers of assistance services.¹⁹¹

In summary, the 2013-2017 National Plan of Action for Combat Human Trafficking can be lauded for recognizing that human trafficking is an issue of concern in Kenya. However, the same was launched in 2015 while the strategic Plan is meant to run from 2013-2017, meaning for the last three (3) years there has been very little achieved in protecting Kenyans from trafficking. In its preamble, it states that it endeavors to raise the profile of human trafficking issues in both public and policy circles. A National Action Plan builds on national realities and may have an immediate impact. For the government, it can create the real 'picture' of trafficking and set a foundation for addressing the underlying issues causing trafficking and interventions needed. ¹⁹²

Where Countries opt to enter into bilateral or multilateral agreements, harmonizing National Plans of Action means having relevant ministries dealing with child trafficking developed in a similar manner. The Plan of Action would foster collaboration between security agencies, law enforcement and possibly establish special task force to combat the flow of children between the two countries.

4.2 Integrated Plans of Action

Child trafficking conceptually, it operates by creating two separate economic operations.

On the one hand, the recruiter/trafficker works at targeting vulnerable children through

¹⁹⁰ ibid.

¹⁹¹ ibid.

¹⁹² ibid.

abduction, coercion, fraud/false promises and getting a trafficked child through the various border points. The recruiter/trafficker is thus a resident of the country of origin and even the transit nation. On the other hand, there are those that 'sell' and facilitate the 'purchase' trafficked children for purposes of exploitation either through provision of cheap labour, sex trade, street begging and extraction of organs.¹⁹³

At a national level and especially for countries which have been categorized as being of origin, a comprehensive national plan of action such as the one Kenya launched, that emphasizes on creating a safety net over vulnerable children to minimize their vulnerability to trafficking is important.

For instance, having recognized the importance of cooperation in protecting children from trafficking, the Economic Community of West African States (ECOWAS) in 2001 adopted a Declaration and Plan of Action against Trafficking in persons (2002-2003). Member States pledged to, among other measures, promote awareness on Human Trafficking and also push for cooperation between border control agencies. The Member States also pledged to share information and data between ECOWAS countries and the UN. 194

Perceptions of Child Trafficking differ from country to country depending on whether a Country is a Country of origin, transit or destination. Thus, the resulting perception dominates domestic national policies. ¹⁹⁵ Countries of origin doubtless become more aware of child trafficking. In West Africa, for instance, Mali recognized that most of their children were being trafficked to Ivory Coast and promptly adopted a national plan of action to combat the flow of children into Ivory Coast. Transit countries are more likely

195 Ibid

¹⁹³ Ibid

¹⁹⁴ UNICEF, "Child Trafficking in West Africa: Policy Responses," 2002,< www.unicefirc.org/publications/pdf/insight7.pdf > (accessed on 14 February 2012)

to perceive child trafficking as a non-nation issue and thus may not be prioritized in terms of policy development (however, with increased accountability by the international media, countries can no longer ignore the problem). ¹⁹⁶Destination countries may sometimes show an indifference as the children trafficked are not their own and thus may not be a national concern. Again, with the international media shining a spotlight on the plight of trafficked children in many destination countries as well as the exploitation they undergo, it has become virtually impossible to ignore children who have illegal immigration status. ¹⁹⁷

Harmonizing National Plans of Action means having relevant government ministries developed in a similar manner. These Plans of Action need to be jointly drafted across a number of countries. ¹⁹⁸ The Plan of Action needs to foster an integrated response to the trafficking cycle between two countries. Ultimately, achieving institutional symmetry will require firm political will that is anchored on the importance of cooperation and collaboration mechanisms to combat child trafficking within the two countries. ¹⁹⁹

4.3 Inter-Country Cooperation Agreements

4.3.1 Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking

In recognizing that if countries agree to fight child trafficking by collaborating their efforts, it significantly minimizes the rise in the number of children trafficked across borders, the United Nations Children's Fund developed a model bilateral agreement

197 Ibid

¹⁹⁶ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Ibid

namely, Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking in 2004.²⁰⁰

The Agreement in its preamble states that child trafficking is a special nature crime that the contracting parties have recognized and want to take effective measures to combat. ²⁰¹It reaffirms the resolve to collaborate to combat child trafficking in order to adhere to the principle that the Best Interests of the Child are paramount. ²⁰²

The Agreements enumerates the areas of mutual assistance such as, protection, care and social welfare services of child victims, cooperation with all relevant stakeholders, sharing of information on victims of trafficking and effecting judicial documents among others.²⁰³ It is notable that the Kenyan National Plan of Action discussed earlier also prioritizes these mechanisms in combating child trafficking in Kenya.

The agreement provides that the contracting states must be proactive in developing identification measures of trafficked children and the categorization of children according to age so as to protect the most vulnerable of victims.²⁰⁴

Assistance to and protection of victims is also provided for and contracting countries are required to put in place measures of rehabilitation and social integration of victims.²⁰⁵ This is important in order to help the child victims have a decent opportunity to grow into well-adjusted adults. In signing the agreement, contracting countries also have to establish

²⁰⁰ UNICEF Regional Office West and Central Africa, 'Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans Border Trafficking' (UNICEF Regional Office West and Central Africa, 2004) http://www.unhcr.org/50aa01009.pdf accessed 27 October 2016.

²⁰¹ Preamble to the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking.

²⁰² Ibid.

²⁰³ Article 1(2) of the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking.

²⁰⁴ Article 6 of the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking.

²⁰⁵ Article 7 of the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking.

comprehensive policies and programmes that prevent, combat and protect child victims of trafficking.²⁰⁶ To complement the measures, Parties must adopt relevant legislative measures to criminalize trafficking of children.²⁰⁷

The Agreement also provides for mutual assistance in the form of technical expertise and conducting of joint investigations.²⁰⁸ This has also been highlighted under the Kenyan National Plan of Action to Combat Human Trafficking.

The benefit of this model is that contracting countries can customize it their legal systems as well as unique situations. It is a good foundation for countries that have identified that their children are trafficked in and out of their territories. It also provides an opportunity for the contracting countries to establish whether a bilateral approach to combating child trafficking is effective.

4.3.2 Benin-Republic of Congo and Benin-Nigeria Cooperation Agreement to Combat Trafficking Especially Women and Children

In 2011 Benin and the Republic of Congo signed an agreement to protect child trafficking in the region. According to the UNICEF many trafficked Benin children are trafficked into Pointe Noire, the Republic of the Congo. These children, who are as young as six years old, are forced to endure sexual exploitation.²⁰⁹

In 2005, Benin and the Federal Republic of Nigeria signed a cooperation agreement to Prevent, Suppress and Punish trafficking in Persons with an Emphasis on Women and Children with the aim of developing a concerting effort against trafficking and protecting,

²⁰⁶ Ibid.

²⁰⁷ Ibid

²⁰⁸ Articles 17 and 18 of the Model Bilateral Agreement on Cooperation and Mutual Legal Assistance in Protecting Children from Trans-Border Trafficking.

²⁰⁹ UNICEF, 'UNICEF Welcomes Agreement between Two African Countries against Child Trafficking'.

rehabilitating and integrating victims. According to the United Nations Office on Drugs and Crime (UNODC), one of the most notable features of the agreement is that it provides for interagency coordination between security officials in both countries to patrol their borders. ²¹⁰

4.3.3 China and Vietnam Cooperation Agreement to Combat Human Trafficking

As an example of a successful bilateral agreement to combat human trafficking, World Vision reported that China and Vietnam have made great strides in curbing the number of people being trafficked into China from Vietnam. World Vision was responsible in implementing End Trafficking in Persons Program in both countries in cooperation with other organizations in Vietnam. China with better economic opportunities is a country of destination for many victims of trafficking from Vietnam. The bilateral agreement was entered into in 2001. The governments of China and Vietnam evaluated their bilateral agreement in an annual meeting in October 2016. According to the report presented by Vietnam's Ministry of Public Security, police had identified over 700 cases of human trafficking, rescued over 1000 victims and arrested over 1000 traffickers. In evaluating its effectiveness of the agreement both countries agreed to deal with the challenges of victim identification and more cooperation.

²¹⁰ UNODC, 'Bilateral and Multilateral Cooperation Agreements or Arrangements' (*UNODC*) <www.unodc.org documents/human-trafficking/Toolkit-files/08-58296_tool_4-9.pdf> accessed 16 February 2012.

²¹¹ Nguyen Ngan, 'Vietnam-China Cooperation on Combatting Human Trafficking' (*World Vision*, 2015) http://www.wvi.org/vietnam/article/vietnam-china-cooperation-human-trafficking-combat accessed 27 October 2016.

²¹² Christina Le, 'The Exploitation of Women and Children: A Comparative Study of Human Trafficking Laws between the United States-Mexico and China-Vietnam' (*Hausa Global Law School Program*, 2016) http://www.nyulawglobal.org/globalex/Human Trafficking 1.html> accessed 27 October 2016.

²¹³ Ngan (n 256).

²¹⁴ Le (n 257).

²¹⁵ ibid.

4.4 Conclusion

Multi-sectoral cooperation as envisioned in the NPA 2013-2017, aims to focus on fostering partnerships and networks within the country. This collaboration aims to create channels of communication and develop standard operational procedures among law enforcement, judiciary and victim service providers. Ultimately, this cooperation will lay a good foundation for international cooperation. Where countries are already categorized as regional blocs as discussed earlier, bilateral agreements can be an effective in combating human trafficking. Countries have to be committed to ensuring that the objectives of the agreement are actualized. These agreements, such as the Model discussed in this study emphasize countries to have in place proper legislation to support it.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The objective of the study was to establish the cooperation mechanisms provided for under the existing legal framework legal framework on child trafficking. The aim was to determine if these cooperation mechanisms are indeed utilized in the fight against child trafficking in Kenya. It was thus important to discuss the challenges that Kenya faces in curbing the crime and consequently advance recommendations that facilitate cooperation between national agencies, non-governmental organizations and other States as an effective tool to protect children from being trafficked.

The analysis on the factors that facilitate child trafficking in Kenya has revealed the prevalence of the crime. Kenya has been identified as a country of origin, transit and destination. The most prevalent forms of child trafficking include forced labour mainly domestic servitude, sex exploitation and early marriage. The trafficking cycle examined showed that children are trafficked both within the country and externally. The trafficking process includes the recruitment, transport and eventual habouring or receipt of victims for purposes of exploitation. The study established a major gap in the statistics on the actual number of children being trafficked generally. The findings of organization's some non-governmental organizations and those published from the National Crime and Report Centre are significantly different. Notably, the 2013-2017 National Plan of Action for Combating Human Trafficking does provide for the establishment of a standardized system for collection, storage, and sharing of data on potential victims of trafficking as well as perpetrators.

It is important to note that exploitation and abuse not only takes place at the last stage of the trafficking process but may occur in the recruitment or transport stage of the trafficking cycle. Recruitment of children is often done by a relative or well-known person to the child. Most parents also consent to the movement of their children under the misguided notion of securing a better future for their children.

Further, factors such as poverty and HIV/AIDS tend to make victims vulnerable to both domestic and external trafficking. The study established that most children prone to trafficking come from low income households. Children orphaned due to the death of parents or guardians through HIV/AIDS are especially vulnerable to trafficking. Corruption was also discussed as one of the major factors that have greatly contributed to the exacerbation of the crime. Notably the Counter-Trafficking in Persons Act criminalizes any involvement of any government official who knowingly issues travel documents or assists in the movement of persons for purposes of trafficking. Corrupt officials form a link in the trafficking cycle and their actions directly contribute to the eventual abuse and exploitation of children.

The effects of trafficking on child victims are traumatic and adversely affect their future wellbeing. Children victims of trafficking cannot access educational opportunities due to the nature of exploitation. Ultimately these children, if rescued, exhibit developmental delays and may perform poorly academically. Victims of forced labour are exposed to deplorable working conditions. They also endure poor diets and hygiene which may take a toll on their overall health. Further, children who endure sexual exploitation are exposed to dangerous and unsafe sexual practices heightening the risks for unwanted pregnancies and contraction of sexually transmitted diseases.

Undoubtedly, trafficking is a traumatic experience that causes serious emotional problems with grave psychological implications. Children are especially vulnerable due their age

and under developed emotional status. The lack of a support system from caring parents or guardians means that children victims experience depression, anxiety and general hopelessness. Unfortunately, upon reintegration back to society, victims have problems forming relationships and may be socially or emotionally withdrawn. Of significant importance, the Counter-Trafficking in Persons Act does specifically establish a National Assistance Trust Fund to provide medical, legal and psychosocial assistance to victims of trafficking. Commendably, the Advisory Committee under the Act mandated with coordinating all anti-trafficking activities in the country, launched the 2013-2017 National Plan of Action for Combating Human Trafficking which specifically allocates money towards the operationalization of the Fund.

The analysis of the national and international legal instruments has demonstrated that there is an existence of a robust legal framework. Indeed, Kenya has made positive strides in the protection of children against trafficking. It has ratified the United Nations Convention on the Rights of the Child together with its Protocols. Further, it has ratified the Palermo Protocol that provides for the widely accepted definition of child trafficking. Our legal framework includes laws that not only criminalizes child trafficking but also provide for the protection and assistance of victims. Most notably, the Counter-Trafficking in Persons Act is a major piece of legislation that provides for all attendant offences and penalties of trafficking as well as establishing the Advisory Committee that is mandated in coordinating all anti-trafficking activities in the country. It is however important to note that though the Counter-Trafficking in Persons Act was enacted in 2010, the Advisory Committee was only set up in July 2014. This delay in establishing the Committee is not only inordinate but directly hampers the full and timely implementation of the Act.

Significantly, the Counter-Trafficking in Persons Act rightly highlights the transnational nature of trafficking and prioritizes cooperation and collaboration between relevant national agencies, civil society groups, private sector and other States. The crime of trafficking is such that it involves a contingency of perpetrators who play different roles in the trafficking cycle. The penalties set out under the Act are sufficiently high to actually deter potential perpetrators.

Commendably, the legal framework analyzed provides for prevention of child from trafficking through multi-lateral and bi-lateral agreements. Though Kenya is yet to enter into such agreements with regards to child trafficking, it is commendable that the law recognizes cooperation as a viable strategy to combat child trafficking.

The bilateral agreements such as the model bilateral agreement on cooperation and mutual assistance in protecting children from trans-border trafficking as drafted by UNICEF emphasizes the potency of cooperation between countries as a tool in curbing child trafficking. It emphasizes that due to the transnational nature of trafficking, countries cannot deal with the crime alone and that cooperation not only ensures that perpetrators are caught but that victims receive the necessary assistance. Regional blocs such as Economic Cooperation of West African States (ECOWAS) and the East African Community (EAC) too have used these established organizations to elaborate regional treaties on trafficking in persons. Ultimately, these agreements are specifically geared towards protecting the rights, dignity and welfare of all persons' victims of trafficking.

Recommendations

1. Effective implementation of the Counter-Trafficking in Persons Act

Kenya needs to allocate the necessary financial resources to the Counter-Trafficking in Persons Advisory Committee in order for it to effectively coordinate anti-trafficking efforts and oversee full implementation of the Counter-Trafficking in Persons Act 2010.

The Advisory Committee must ensure effective and proper implementation of the strategic framework on the National Plan of Action for Combating Human Trafficking. It is vital that the development of a standardized system for the collection, storage and sharing of data so as to map out a clear picture of trafficking of persons and especially children. This is important as the Committee will be able to prioritize allocation of resources for combating human trafficking.

The national and international cooperation mechanisms established under the Plan of Action must be fully utilized for there to be any significant reduction in the number of victims trafficked as well as prosecution of perpetrators.

2. Establishing of the National Assistance Trust Fund

The crime of trafficking has detrimental effects on its victims. Children especially are vulnerable due to their age. The Advisory Committee needs to expedite the establishment of the Assistance Fund in order for victims of trafficking to access legal, medical and psychosocial assistance vital to their reintegration into society. Helping children survivors cope and eventually overcome the effects of trafficking will ensure that they grow up to be fully functioning adults.

3. Enhanced multi sectoral and international cooperation

Establishing cooperation and collaboration mechanisms among government agencies will form a good foundation for international cooperation. These structures will encourage sharing of information among immigration officials and law enforcement agencies that is crucial in not only detecting victims of trafficking but also apprehending perpetrators. Development of international cooperation mechanisms such as cooperation agreements would help curb trafficking of children to other jurisdictions. Proper enforcement of reciprocal arrangements such as extradition requests would greatly help in the prosecution of traffickers. Notably the 2013-2017 National Plan of Action to Combat Human Trafficking has prioritized international cooperation as a strategy against human trafficking as well as development of human trafficking case law. Though Kenya is yet to enter into trans-border agreements on combating child trafficking, it would benefit from such agreements where it can be shown that Kenyan children are being trafficked to specific jurisdictions.

4. Awareness Creation on the crime of Trafficking in Persons

Creating public awareness about the law on counter trafficking can be an effective way of deterring potential perpetrators. Further, informing the public on what constitutes trafficking will greatly empower parents and guardians to make informed decisions about their children's wellbeing. Involving children in awareness campaigns would also enlighten them on the dangers of trafficking and ignite in them a sense of vigilance. Dissemination of information on child trafficking is important in protecting children from trafficking. Information on trafficking activities must be included in the education curriculum which in turn ensure that children are sensitized to the crime.

5. Taming Corruption

Taming corruption is a good solution to preventing and combating child trafficking in Kenya. However, a great deal of political will and boldness in needed to actually make sustainable change in reducing corruption.

6. Improving Socio-economic status of Parents and Guardians

Reducing poverty and creating sustainable income generating activities for parents will create hope among parents especially who will in turn be empowered to make decisions based on the best interest of their children.

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