

**TRAFFICKING IN WOMEN AND CHILDREN
IN KENYA: A CRITIQUE OF THE CURRENT
LEGAL AND INSTITUTIONAL FRAMEWORK**

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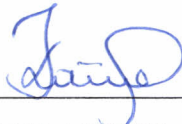
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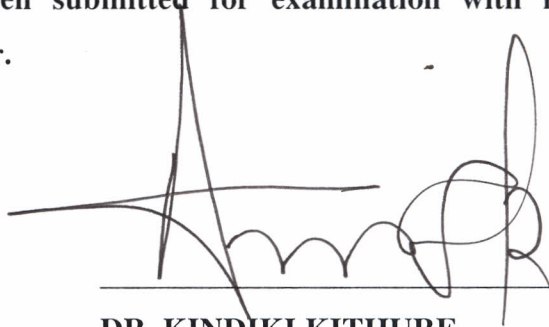
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This Thesis has been submitted for examination with my approval as university supervisor.



SIGNED

DR. KINDIKI KITHURE

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CHAPTER 1

1.0 INTRODUCTION

Trafficking in women and children is a crime that also constitutes a serious human rights violation. It is reported that approximately 800,000 to 900,000 persons annually fall prey to traffickers for sexual exploitation and forced labour¹. About 70 to 80 percent of these victims are women and children². Though there are no official credible data or figure to support claims of the existence of trafficking in women and children in Kenya, several studies have been conducted in Africa that indicate that trafficking in women and children in immeasurable numbers is real. A study by the Deutsche Gesellschaft Fur Technische Zusammenarbeit (GTZ) indicates that Kenya is a country of origin, transit and destination for domestically and internationally trafficked women and children³.

This phenomenon has however been severely neglected in Kenya and many women and children continue to suffer at the hands of their traffickers who derive profit from exploiting them as the country lacks a specific anti-trafficking statute. Trafficked persons are entitled to protection, assistance and redress in their own right, regardless of their willingness or capacity to press charges and / or give testimony against their traffickers. A response to this crime therefore necessitates a strong human rights based, victim-centered approach by the Kenyan government.

¹ United States Department of State, *Trafficking in Persons Report*, Kenya, June 2005.

² Ibid.

³ Elaine Pearson, *Study on Trafficking in Women in East Africa*, Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ) GmbH, Sector project against Trafficking in Women, December 2003.

Trafficking in persons has been defined in Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (also called the Palermo Protocol), which definition shall be the adopted for this study. In this Protocol, trafficking in persons has been defined as follows: -

- a) *Trafficking in persons refers to the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation for the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;*
- b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*
- c) *The recruitment, transportation, harboring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;*
- d) *“Child” shall mean any person less than 18 years of age.*

From the above definition, it is clear that in the case of trafficking in children, unlike that of adults, only the activity (recruitment, transportation, transfer and receipt) and the purpose (financial or other profit through exploitation) are relevant. The means of trafficking are not.

Trafficking in women and children occurs both domestically or internationally. Domestic trafficking occurs where a victim is recruited and moved within a

national border by land air or sea for the eventual purpose of exploitation. In domestic trafficking, it is not necessary that long distances be covered to the destination. International trafficking on the other hand occurs where victims are recruited and moved across international borders. This could be through one or more transit countries before the victims of trafficking finally end up in the destination country. Victims may cross borders legally using valid travel documents or illegally. They could travel by land air or sea and may or may not be accompanied by their traffickers.

Recruitment of trafficking victims is normally done through fully deceptive means, where victims are lured by promises of financial gain or by partially deceptive means where victims might be aware that they are being taken elsewhere to be employed in some activity but do not know or understand the conditions they would be working under. Traffickers control their victims using various means including the use of debt bondage, isolation and the use of violence or threat of reprisal against the victim or the victim's families.

Harboring of victims by their traffickers substantially facilitates human trafficking. Victims are forcefully harbored in secret shelters where they cannot be easily detected by the outside world and from where they cannot easily escape. On the other hand, traffickers shield themselves from detection by state authorities through the employment of different means geared towards obstruction of inspection by authorities such as by obtaining false documentation or even through corruption of immigration officials as well as the local police. Exploitation of trafficked victims can take several forms including labor or economic exploitation, sexual exploitation (which includes child pornography, child sex trade and prostitution), illegal adoptions and illegal organ harvesting and trade.

Trafficking in women and children must be distinguished from smuggling of women and children. Smuggled persons are moved illegally from one place to another for profit. Unlike the case of trafficking, smuggled persons are usually considered as partners, however unequal, in a commercial transaction. All going well, their relationship with the smuggler ends at the destination country⁴. Another difference between smuggling and trafficking is that smuggled persons must cross a transnational border, whereas trafficking can occur within a national boundary.

On the other hand, trafficked persons are moved from one place to another through the employment of force, coercion, abduction, fraud, deception or abuse of power for the sole purposes of exploitation. The profit in trafficking comes not from the movement of the person, but from their trade and continued exploitation through sale of sexual and other services such as labor in the country or place of destination. Trafficking victims either have never consented to being trafficked, or if the person initially consented, that consent is thereafter rendered meaningless by the coercive, deceptive or abusive actions of the traffickers. It is in this regard that human smuggling can often very easily turn into human trafficking.

Unlike human smuggling where the relationship with the smuggler ends on reaching the agreed destination, the relationship with the trafficker does not end at the destination. Trafficked persons may be moved through several places and traded over and over again as long as the trafficker continues to derive a profit.

Some of the causes of trafficking in women and children in Kenya include poverty, family disintegration, negative societal attitudes, inadequate birth

⁴ Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, Forced Migration Review No. 12, Refugee Studies Centre, University of Oxford.

registration or documentation, internal conflict, globalization and restrictive immigration policies. In Kenya, women generally do not occupy positions of power and authority. A high number of women are also uneducated and unskilled. To some women, migration whether through legal or illegal means is not just an economic decision, but offers the hope of personal freedom from restrictive cultural practices as well as the hope for better living conditions. These women are usually uninformed and uneducated about the conditions and risks that would accompany their decisions to leave their communities. They do not understand their legal rights or the available legal remedies to protect themselves in case they find themselves in exploitative relationships.

Trafficking in women and children may lead to severe negative consequences either within the communities in which the trafficked persons were recruited, or to the communities where the trafficked persons are finally taken to. Organized crime and trafficking in persons usually abide hand in hand. Trafficking in women and children may lead to a recurrent presence of criminal activities and organizations both within the recruiting and destination community. Traffickers often rely on underground criminal syndicates to obtain falsified documents and organize their traveling routes. These organized criminal syndicates may also aid in the corruption of state officials in order for their businesses to thrive and this will have a negative impact to the society.

Secondly, trafficking in persons leads to an increase of irregular migration within and across communities. Lack of documentation and the possibility of being considered as illegal before the law may lead to a situation of the repeated transportation or sale of victims from one place to another in order to avoid detection by state authorities.

Third, trafficking leads to the violation of other existing national legislation such as the immigration rules or labor laws as people move across the borders undetected and engage in illegal and uncontrolled trade of all sorts. Compounded together, these issues in turn affect the general public confidence in the system of government.

1.1 STATEMENT OF THE PROBLEM

Though accurate and official figures on the magnitude of the phenomenon of trafficking in women and children are lacking, there is positive indication that trafficking in women and children in Kenya takes place in colossal numbers yet the available legal and institutional response to the phenomenon is deplorable. Trafficking in women and children has not been recognized officially as a serious problem by the Kenyan government and has not been regarded as a priority issue in the country's legislative agenda. The available penal laws do not identify or define trafficking in persons as a criminal offence and therefore does not lay down means to identify and prosecute trafficking offences. Victims of trafficking continue to be exposed to massive and continued physical and psychological violence and abuse. They are denied labor rights and are in most cases considered illegal before the law. They are often found in forced and unwanted relationships of dependency with their traffickers and hence the urgent need to draw attention to their plight.

Kenyan must no longer ignore the severity of this serious human rights violation but arise and take action on trafficking in women and children within its borders. It is time for the country to come up with policy and legislation geared towards identification of this gross human rights violation within the society, curb the

practice and protect both of the victims of trafficking as well as the potential victims.

1.2 JUSTIFICATION OF THE STUDY

Though an island surrounded by a sea of countries embroiled in civil strife and prolonged war situations, Kenya's borders remain extremely porous and most migrant movements remain widely un-documented. There is continuous rural-urban migration within the country as people search for better employment opportunities elsewhere. Illegal as it may be, child labor is still rampant across the country. It is in such unchartered waters that that trafficking in women and children thrives.

A recent quantitative study done in Kenya revealed that trafficking in persons exists in all its forms and that most victims are deceived by the traffickers with promises of better lives. The study indicated that there is generally low awareness and understanding on what constitutes human trafficking. Human trafficking was mostly defined by the general public as, "the mistreatment of employees by their employers."⁵ It is in light of such serious misinformation that there is need to raise public awareness of the evidence and manifestations of human trafficking in Kenya and hence this study.

Kenya has been listed as a country of origin, transit and destination for domestically and internationally trafficked women and girls⁶. However, the country lacks a specific anti-trafficking statute. It has no comprehensive law

⁵ The Child Rights Advisory Documentation and Legal Centre (CRADLE), *Report on Status of Human Trafficking*, Strategic Public Relations and Research, 2006.

⁶ Ibid p.2.

enforcement programs specifically targeting trafficking in persons in general and women and children in particular. In a 1996 report for example, it was indicated that more than 200 Kenyans were stranded in Saudi Arabia after being tricked by traffickers operating bogus companies who promised them lucrative jobs. In the same report, it was indicated that Pakistani and Indian nationals were being lured into Kenya by trafficking syndicates in the hope of employment only to find a scarcity of jobs⁷. This indicates that trafficking in persons is not a new phenomenon in Kenya.

In 2003, the Kenyan Immigration Department arrested more than 70 illegal immigrants from India, Bangladesh, Pakistan and Somalia who were suspected to be either victims of trafficking or smuggling and had been housed in appalling conditions in a house in Mombasa. No investigations were done on the manner in which they came into the country, why they were being held in such squalor or where they were destined. They were promptly deported from the country. In the same year, more than 30 illegal migrants from Somalia without any documentation were arrested at the Taita Taveta and Lunga Lunga border points, and were suspected to be enroute to other destinations but they too were never investigated or charged⁸. These are serious indications of the lack in policy and legislation within the country. To many, the distinction between smuggling and trafficking is not clear especially as there is currently no definition of the crime of trafficking within the country's legislation.

Though there are several constitutional guarantees within the Kenyan Constitution such as the right to life; the right to liberty; protection against slavery, servitude,

⁷ International Organization for Migration (IOM), *Trafficking in Migrants*, Quarterly Bulletin, September 1996, Geneva Switzerland.

⁸ Africa News, Kenya: *Illegal Human Immigrants Pose Security Risk*, July 2003.

forced labour, torture or cruel, inhuman or degrading treatment or punishment; the freedom of movement and the right to be discriminated against⁹, the constitution is largely considered as a framework on which the basis principles of governance are contained. It does not contain detailed provisions that would be applicable in the successful prosecution of trafficking offences. The above Constitutional provisions are rarely contested in the Kenyan courts as the Constitutional provisions are usually only interpreted in the High Court when it is constituted as a Constitutional Court in peculiar circumstances such as where a litigant requests for a constitutional interpretation where there is alleged breach of one's constitutionally guaranteed human rights.

Some trafficking offenses could be prosecuted under the laws addressing child labor, abduction, forced detention for prostitution, and the commercial exploitation of children, such as under the Kenyan Penal Code¹⁰, the Children Act¹¹, The Domicil Act¹², The Kenyan Citizenship Act¹³, The Aliens Restriction Act¹⁴, The Extradition Acts¹⁵, The Witness Summonses (Reciprocal Enforcement) Act¹⁶, The Kenyan Sexual Offences Act No 3 of 2006 or under the Immigration Act¹⁷. To date however, though several arrest have been made of migrants suspected to have been moved illegally into the country, no human trafficking related offenses have been successfully prosecuted in Kenya.

⁹ Chapter 5 of the Constitution of Kenya.

¹⁰ Chapter 63 of the Laws of Kenya.

¹¹ Chapter 576 of the Laws of Kenya.

¹² Chapter 37 of the Laws of Kenya.

¹³ Chapter 170 of the Laws of Kenya.

¹⁴ Chapter 173 of the Laws of Kenya.

¹⁵ Chapter 76 and 77 of the Laws of Kenya.

¹⁶ Chapter 78 of the Laws of Kenya.

¹⁷ Chapter 172 of the Laws of Kenya.

Given the multitudinous nature of and the seriousness of the phenomenon of trafficking in persons around the globe, Kenya requires a specific anti trafficking legislation and policy guidelines to deal specifically with the problem of trafficking in persons in line with the precepts of human rights. This study critically analyzes the current Kenyan legal framework and its appropriateness in dealing with this phenomenon. It also postulates recommendations geared towards law reform that is appropriate in dealing with the limitations within the system. It is hoped that the recommendations given at the end of this study shall be a foothold towards the establishment of a legal framework on which the development of a comprehensive anti-trafficking statute can be developed. With this regard, the study is beneficial to Kenyan policymakers, legal scholars and legislators alike.

1.3 RESEARCH OBJECTIVES

This research hopes to achieve the following objectives:

1. To explore the nature of the problem of trafficking in women and children in Kenya, its prevalence and its manifestations.
2. To analyze the current legal framework and its ability to respond to the trafficking in women and children in Kenya.
3. To propose an effective legal framework to deal with the problem of trafficking in women and children in Kenya.
4. To make recommendations on implementation mechanisms to address the problem of trafficking of women and children in Kenya.

1.4 HYPOTHESIS

The study aims to establish the following hypothesis: -

That the phenomenon of trafficking in women and children in Kenya is prevalent and multitudinous yet the current international and domestic legal framework is inadequate in addressing the same hence the need for a comprehensive domestic legislation on which to identify and prosecute trafficking offences.

1.5 RESEARCH QUESTION

The study is guided by the following research questions: -

1. What is the nature of the phenomenon of trafficking in women and children in Kenya, how prevalent is it and what are its manifestations?
2. How does the current legal framework respond to the problem of trafficking in women and children in Kenya?
3. What would be an effective legal framework to deal with the phenomenon of trafficking in women and children in Kenya?

1.6 THEORETICAL FRAMEWORK

This research is based on the natural law theory. Trafficking in persons is elaborated as a serious violation of human rights that are inherent to human beings based on the precincts of natural law jurisprudence.

Natural law theory is one of the most important theories in the philosophy yet also one that is widely misunderstood by many who either have not taken time to study

it, or have heard of it and dismissed it as a medieval relic. The concept of natural law began with the ancient Greeks' conception of a universe governed in every sense by an eternal, immutable law.

Christian philosophers identified natural law with the law of God. For Thomas Aquinas, natural law was that part of the eternal law of God which was knowable by human beings by means of their power of reason. Human or positive law to Thomas Aquinas was the application of natural law to particular social circumstances. Aquinas believed that a positive law that violated natural law was not true law.

Natural law in its simplest definition is the concept of a body of moral principles that is common to all humankind and is recognizable by human reason alone. Natural law is therefore distinguished from, and provides a standard for positive law. Since law must always be some dictate of reason, natural law will be some dictate of reason. Our normal and natural grasp of the natural law is affected by reason i.e. by the thinking mind, and in this service, reason is sometimes called "conscience". We, in all our human acts, inevitably see them in their relation to the natural law, and we mentally pronounce upon their agreement or disagreement with the natural law. Such a pronouncement may be called a "judgment of conscience". The "norm" of morality is the natural law as applied by conscience. Lastly, we can state that the natural law is the disposition of things as known by our human reason and to which we must conform ourselves if we are to realize our proper end or "good" as human beings.

Natural law theory gave rise to the concept of "natural rights". John Locke, the 17th Century philosopher particularly argued that human beings in the state of nature are free and equal, yet insecure in their freedom. He outlined that when

they enter society, they surrender only such rights as are necessary for their security and for the common good. Each individual retains fundamental prerogatives drawn from natural law relating to the integrity of persons and property (natural rights). Locke argued that natural rights flowed from natural law. He founded the existence of such inalienable rights as the rights to life, liberty and property upon a social contract marking the end of the difficult conditions of the state of nature. This theory enabled recourse to be had to a superior type of law and thus was able to provide a powerful method of restraining arbitrary power¹⁸.

There are certain human rights that are considered as non-derogable, such as the right to life, the right to be free from slavery/servitude, the right to be free from torture and the right to be free from the retroactive application of penal laws. Under international law, unlike other human rights, these non-derogable human rights cannot be limited or pushed aside even during times of national emergency.

Based on John Locke's theory of inalienable rights, trafficking in women and children goes against the very precepts of natural law jurisprudence as the trafficked person is forced to surrender their inalienable rights such as right to life, liberty and freedom from servitude/ slavery and torture. These inalienable rights are theirs based on the fact that they are human beings and as such, no one has the right to lay any limitations on them. Trafficking in itself is an abusive and coercive phenomenon. Victims are powerless before their traffickers and users. They undergo massive violation of their human rights. Trafficking victims face the possibility of having illegal status in country/ place of destination and are therefore usually regarded and treated as criminals. They face the risk of death or the contraction of serious diseases while under different forms of exploitation

¹⁸ Malcolm N. Shaw, *International Law, Fourth Edition*, Cambridge University Press, 2000.

including sexual exploitation and employment in slavery-like situations. They face difficulty in reintegration and stigmatization upon return. This is especially so, for the children born out of sexual exploitation.

“Human Rights” refers to the concept of human beings having universal or natural rights and status regardless of legal jurisdiction or other localizing factors such as ethnicity or nationality¹⁹. The 1948 Universal Declaration of Human Rights²⁰ states at Article 1 that, “*All Human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*” This international guide on the requisite human rights standards also indicates that everyone has a right to life, liberty and security. Article 15 of the Declaration provides that everyone has the right to a nationality. It also forbids the practice of slavery and servitude, torture, inhuman and degrading treatment, arbitrary arrest and detention, freedom of movement, free choice of unemployment, working and living in healthy environment. These are the very rights that trafficking in women and children traverse.

Trafficking in women and children is both a cause and a consequence of human rights violations. It is a cause of human rights violations because it violates human rights such as such as the right to dignity and security, right to just and favorable conditions of work, the right to health, the right to equality and the right to be recognized as a person before the law. It is also a consequence of human rights violation because it is rooted in poverty, inequality and discrimination²¹.

¹⁹ Freeman Michael. *Human Rights: An Interdisciplinary Approach*, Cambridge Polity, 2002.

²⁰ United Nations General Assembly Resolution 217 A (III) of 10 December 1948.

²¹ Mary Robinson, Former UN High Commissioner for Human Rights (UNHCHR).

Essentially, a natural law theory based approach to the study of trafficking in women and children integrates within it the norms, standards and principles of the international human rights system into legislation, policies, programs and processes. Important elements are the recognition that human beings as subjects are holders of rights, equality and equity, standard setting and accountability, empowerment and participation.

As such, the human rights based approach to the problem of trafficking in women and children offers a conceptual and normative framework that will give direction for the development of policies in the area of human trafficking in Kenya. At the same time it offers a framework to monitor and evaluate any existing trafficking policies, practices and actions for their real and potential impact on trafficked persons.

1.7 RESEARCH METHODOLOGY

This is a desk / library-based research on the problem of trafficking in women and children in Kenya. The research revolves around detailed internet searches on anti-trafficking programs and projects by various UN and other reputable donor agencies.

Secondary data is widely used in the study. This is related to the fact that many trafficking cases remain undiscovered and victims/ survivors of trafficking are often hard to trace or may remain afraid to talk about their experiences. It is very difficult to obtain first hand information from those that have been exploited through trafficking. Earlier studies on trafficking in persons indicate that finding reliable statistics on the extent of trafficking in any part of the world is virtually impossible and this is attributed to two main things: The first is that there is a lack

of systematic research in the area of trafficking and secondly, there is a lack of precise, consistent and unambiguous definition of the phenomenon. As a result, there are practical as well as definitional or ideological reasons involved in the problem of quantifying trafficking²².

Secondary data is collected from various human rights reports from reputable human rights organizations, scholarly books, international conventions, government reports and case law. The sources of research material includes reports on trafficking from reputable local and international non governmental organizations such as the International Organization for Migration (IOM), Deutsche Gesellschaft Fur Technische Zusammenarbeit (GTZ), United Nations Children Fund (UNICEF), United Nations High Commissioner for Refugees (UNHCR), United Nations High Commissioner for Human Rights (UNHCHR), the Global Alliance Against Traffic in Women (GAATW), the Child Rights Advisory and Legal Services (CRADLE) and the Federation of Women Lawyers (FIDA-Kenya) as well as scholarly articles from the Forced Migration Review (FMR) reports by various professors of forced migration from the University of Oxford among others.

The current study focuses on women and children as the main trafficking victims both domestically and across the country's borders, an area that has so far received least attention in the global studies conducted on trafficking in persons in general. Causes of trafficking in women and children in Kenya, the methods of recruitment employed by traffickers, patterns of exploitation of trafficking victims and the law reform measures that are required are explored. The current

²² Wijers M., and L. Lap-Chew, *Trafficking in Women Forced Labour and Slavery-like Practices in Marriage Domestic Labour and Prostitution*, Foundation Against Trafficking in Women (STV), Utrecht, 2003.

international and domestic legal and institutional frameworks are critically analyzed and their efficacy queried with regard to trafficking in women and children. The study finally postulates recommendations and conclusions towards the establishment of a comprehensive domestic anti-trafficking statute.

1.8 LIMITATIONS

Several limitations were encountered during the study. First, there was a lack of detailed and current information and accurate statistics on the magnitude of trafficking in women and children in Kenya as it is a clandestine and uncontrolled trade. Kenya lacks a mechanism for the registration and data collection on trafficked persons. Secondly, there was virtually no case law reported on the area of trafficking in persons in general in Kenya as trafficking is not yet legislated in the country. Third, information on domestic trafficking was hard to obtain as it is done secretly between families and communities without any documentation. Fourth, quantifying the extent of trafficking was problematic largely because of inconsistent understandings on what constitutes trafficking and by the very nature of trafficking itself. Lastly, there was a shortage of time and funds to undertake a comprehensive and conclusive study on the extent of the phenomenon of trafficking in women and children in Kenya.

1.9 LITERATURE REVIEW

Although the origins of the trafficking debate date back to the end of the nineteenth century²³, the rapid rise in the number of publications on the subject of

²³ Derks A., *Combating Trafficking in South-East Asia: A Review of Policy and Programme Responses*, Migration Research Series, No. 2, IOM, Geneva, 2000.

trafficking reflects the mounting national and international concern with human trafficking and the available means to combat it.

The report titled, "Trafficking in Women in Africa: a Regional Report"²⁴ sensitizes African women's rights Non Governmental Organizations (NGO) to the magnitude of trafficking in women in Uganda, Kenya, Mali, Cameroon, Namibia, Tanzania, Zambia and Nigeria. It contains in-depth interview reports that were conducted in Kenya, Mali, Uganda and Nigeria, with women who have been involved in trafficking as recruiters, the victims, moneylenders, government officials and immigration officers, the police and journalists. The author highlights the difficulty of conceptualizing trafficking in women for prostitution, forced labour and slavery-like perspectives and provides a descriptive analysis of the challenges arising from trafficking in Africa.

Though the report does not give much detail on the methodology used during the study, it is important to this study as it gives a background of the trafficking problems in Kenya and therefore assists in the discussion on the national legislative provisions and international legal standards that should be applicable to trafficking in women in Kenya.

The report titled, "Trafficking in Human Beings Especially Women and Children, in Africa"²⁵ exposes the trafficking patterns in women and children in Africa in general. It gives a brief overview of the normative framework and policy framework that certain African countries have put in place to deal with the problem of trafficking in human beings, with special reference to women and

²⁴ Butegwa F., *Trafficking in Women in Africa: A Regional Report*, mimeographed, 1997.

²⁵ UNICEF, *Trafficking in Human Beings, Especially Women and Children in Africa*, Innocenti Research Center, September 2003.

children. It gives a broad conceptual study of the phenomenon of trafficking in selected African countries, including Kenya, but given that it is a report on trafficking in human beings in Africa in general, it does not get into a detailed exposition of the specific problems of trafficking in women and children in the Kenyan context. The report is however of much value in the current study as it is a basis on which to obtain a broad understanding of the phenomenon of trafficking in women and children.

The report titled, “*Data and Research on Human Trafficking: A Global Survey*”²⁶ Gives a broad overview of the different research initiatives in the area of human trafficking by various countries and organizations as well as the methodological challenges in research in this field. It gives a collection of research data in the area of trafficking in selected countries in the globe where the problem is deemed prevalent and gives a detailed bibliography on human trafficking by geographical region. It however does not deal specifically with women and children and also does not have much information on trafficking in women and children in Africa in general. It has some information on trafficking within the Sub-Sahara Africa but given that the study is broad based, it does not contain enough data on trafficking in Africa in general. It is however fundamental in this study as it provides a general understanding to the problem of human trafficking globally as well as assist in the observation of trafficking trends and patterns across the globe.

The Forced Migration review report entitled, “*People Trafficking: Upholding Rights and Understanding Vulnerabilities*”²⁷ provides a collection of short reports on trafficking written by various experts in the area of forced migration from the

²⁶ International Organization for Migration (IOM), *Data and Research on Human Trafficking: A Global Survey*, Vol. 43 (1/2) 2005.

²⁷ Refugee Studies Centre, *People Trafficking: Upholding Rights and Understanding Vulnerabilities*, Forced Migration Review No. 25, University of Oxford, May 2006.

University of Oxford. These reports are invaluable in this research on trafficking in women and children in Kenya, as they deal with different elements of trafficking in persons, such as the challenges of developing anti-trafficking legislation, safe return of trafficked persons, how to end trafficking in persons, the special case of trafficked children, responsibilities of destination countries, internal trafficking, locating victims of trafficking and country profiles of human trafficking and the responses taken by the same. These reports are helpful when formulating policies and legislative responses that Kenya should adopt in order to curb the trafficking in women and children.

The report titled “*Study on Trafficking in Women in East Africa*”²⁸ was the first attempt at looking at the special problems faced by trafficked women. It specifically deals with the problems of trafficked women in Kenya, Uganda, Ethiopia, Nigeria and Tanzania and thus is not only restricted to the East Africa region as the topic suggests. The report however only deals with trafficking of women solely for purposes of prostitution and provision of labor as housemaids. The report nevertheless enumerates a list of recommendations that each country should put in place to curb the trade. The current study on trafficking in women and children therefore picks on the issues already presented in the report and elaborate them as concerns Kenya today.

The “*Report on Status of Human Trafficking*”²⁹ constitutes a collaborative study effort coordinated by a technical team formed by a number of the civil society organizations in Kenya. The report provides conclusions based on individual

²⁸ Elaine Pearson, *Study on Trafficking in Women in East Africa*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Sector Project Against Trafficking in Women, December 2003.

²⁹ The Child Rights Advisory Documentation and Legal Centre (CRADLE), *Report on Status of Human Trafficking*, Strategic Public Relations and Research, 2006.

interviews, analysis of quantitative data collected from a human trafficking study collected in the month of December 2005 to inform on the status and presence of trafficking in persons within Kenyan border. The report indicates the various districts that have been implicated in trafficking of children in Kenya as well as a brief overview of the reasons for the existence of the trade.

This study however failed to present a clear profile of the victims of trafficking or those who are at risk of being trafficked and bases its conclusions arrived at based on probable assumptions on only one month of study that is, December 2005. The report also focuses primarily on the trafficking of the girl-child in Kenya for provision of labor services. It does not deal much with international trafficking but majors on internal trafficking of female children in Kenya for labor as domestic servants and to a limited extent, for prostitution. The report concludes that there is need for further research in the area of trafficking in persons in Kenya in order to assess and determine the magnitude of the phenomenon within the country. As it is not conclusive as to its findings, it is therefore imperative that the current study be conducted in order to tackle the issues that the above report on human trafficking in Kenya was not able to elaborate upon.

In his publication titled *Reconceiving International Refugee Law*³⁰, James C. Hathaway the intellectual architect of contemporary refugee law links refugee and human rights law and charts the way forward to a dynamic and purposeful study and interpretation of refugee law and the element of forced migration to which trafficking in persons is directly linked. The importance of refugee law and forced migration in this study cannot be overlooked as trafficked persons are potential refugees.

³⁰ James C. Hathaway (ed) Martinus Nijhoff, *Reconceiving International Refugee Law*, Lexis Publication, October 1997.

The book “*Human Rights and the Protection of Refugees under International Law*”³¹ by Alan E. Nash discusses the human rights that accrue to refugees under international law. Though this publication is not directed at human trafficking in particular, it is an excellent exposition of refugee rights under international refugee and human rights law. The above publication on refugee law provides the grounding on which to embark a proper exposition of the element of forced migration and its interrelation with trafficking in persons.

In “*The Uprooted: Improving Humanitarian Responses to Forced Migration*”³², there is a methodical examination of the progress and persistent shortcomings of the current humanitarian regime. The authors, who are all experts in the field of forced migration, describe the organizational, political and conceptual shortcomings that are created and the gaps and inefficiencies of international and national agencies to reach entire categories of forced migrants. The authors make policy-based recommendations to improve international regional, national and local responses in areas including organization, security, funding and durability of responses. Though it does not deal directly with trafficking in persons (to which this study is dedicated), *The Uprooted* serves as a wake-up call, emphasizing the urgent need to develop more comprehensive and cohesive strategies to address forced migration in its complexities and is useful in evaluating the current Kenyan legal frameworks as regards trafficked persons and assist in the final chapter that gives recommendations towards a comprehensive legal framework on trafficking in persons in the country.

³¹ Alan E. Nash, *Human Rights and the Protection of Refugees under International Law*, Institute for Research on Refugee studies, June 1998.

³² Susan F. Martin, Patricia Weiss Fagen, Kari M. Jorgensen, Andrew Schoenholtz & Lydia Mann-Bodat, *The Uprooted: Improving Humanitarian Responses to Forced Migration*, Lexington Publishers, July 2005.

In “*Catching Fire: Containing Forced Migration in a Volatile World*”³³, the authors provide for the first time an in-depth analysis of political and humanitarian catastrophes in which forced migration characterizes the complexity of both emergency and the response. It examines the issue of forced migration both within national borders and across international borders. Though it does not contain information on forced migration in Kenya, it analyzes forced migration in Burundi, Georgia, Colombia and East Timor. The author adds significantly to the ongoing debate between powerful states over the management of forced migration in the developing world. It discusses the varied circumstances that lead citizens to migrate or become refugees and evaluates the impact of relief programs on affected populations. It focuses on the causes of displacement that is helpful in this study in evaluating the reasons why trafficking in persons in war situations is a thriving trade worldwide as well as their patterns of flight and settlement.

The publication titled “*Dialogues on Migration Policy*”³⁴ brings together leading American and European scholars of immigration politics to address migration policy. The book addresses three main theoretical concerns in this field: the role of the national state in a globalizing world, the determinants of policy change and the role of collective interest in migration policy. The book adopts an unconventional format yet the novelty of it lies in the fact that it is structured around a series of debates among authors. These debates are crucial in the study of trafficking in persons as they enumerate possible causes of forced migration as well as the emergent stringent immigration policies in the western world.

³³ Nicholas Van Hear & Christopher McDowell (eds), *Catching Fire: Containing Forced Migration in a Volatile World*, Lexington Publishers, February 2006.

³⁴ Marco Giugni & Florence Passy (eds), *Dialogues on Migration Policy*, Lexington Publishers, April 2006.

The publication “*Refugee Women*”³⁵ that was originally published in 1992 turned awareness for the first time to the particular issues faced by women driven from their homes as a result of international conflict. In this second edition, Susan Forbes Martin draws on years of personal field experience and policy work to revisit the particular concerns of refugee women. The author provides a crucial background for understanding the legal issues and policies developed to protect women persecuted because of their gender. She discusses the recent genesis of the category of internally displaced persons, focusing on the unique hardships of women who flee their homes but remain within national borders of their own countries. Finally, she demonstrates how women can advance toward greater participation in legal and economic decision making, affirming the power women possess to affect their own destiny given the necessary support.

This book though directed at refugee women, is crucial in the study on trafficking in women as it enlightens us on the various and unique problems faced by women who are forced to leave their areas of habitual residence for one reason or another. Refugee women could potentially have been trafficked across international borders and therefore this book is fundamental in understanding the plight of trafficked women.

In “*Engendering Forced Migration*”³⁶ the authors offer a great deal to the global scenario of armed conflict, environmental stress, large scale displacements and the desperate search for security and better economic prospects. In this volume, eighteen scholars provide a wide-ranging, interdisciplinary look beyond the statistics at the experiences of women, men, girls and boys who comprise global

³⁵ Susan Forbes Martin, (Foreword by Rudd Lubbers, UN High Commissioner for Refugees) *Refugee Women 2nd Edition*, Lexington Publishers, December 2003.

³⁶ Doreen Indra (ed) *Engendering Forced Migration, Theory and Practice*, Berghan Publishers, 1998.

flow, and at the highly gendered forces that frame and affect them. In theorizing gender and forced migration, these authors present a set of descriptively rich, gendered case studies drawn from around the world on topics ranging from international human rights, to the culture aid, to the complex ways in which men and women differently perceive displacement and resettlement. This publication is useful in assessing why trafficking in women is of prime importance. Women experience forced migration differently from men as they are also trafficked differently from men specifically due to their gender and physical anatomy.

This literature review established that whereas not all publications in the area of trafficking in persons present new research, there is little doubt that research on the subject of trafficking in persons has become increasingly urgent and widespread, spanning historical, political, humanitarian, legal and socio-economic dimensions. Studies in trafficking in persons have been conducted in nearly all the major regions of the world. However, there is relatively little research that has been done on trafficking in persons in Africa and especially within the East Africa region and Kenya in particular.

Secondly, available research on the subject of trafficking in persons has been largely based on two main approaches, that of irregular migration and sexual exploitation. Most research has tended to focus a great deal on the trafficking of women and children for sexual exploitation, neglecting other forms of non-sexual exploitation. This research however looks at other possible forms of exploitation affecting women and children, their causes and how to combat them.

Most research on trafficking has been concerned primarily with international trafficking and less with internal trafficking. Internal and international trafficking tends to be studied as though they were mutually exclusive phenomena. Few

studies have tried to investigate the possible linkages between the two. It is for this reason that this study on trafficking in women and children in Kenya is necessary so as to compile together, add to and refine the ideas contained in the various publications to come up with one complete report on the phenomenon.

1.10 CHAPTER BREAKDOWN

Chapter one is the introduction into the study in the area of trafficking in women and children in Kenya. It presents a background into the phenomenon of trafficking in women and children in general and the justification for the current study.

Chapter two presents the available legal provisions applicable to trafficking in women and children. It lays down both the international and the domestic legislation applicable to trafficking and related offences that could be used to prosecute trafficking offences in Kenya.

Chapter three is a critical exposition of the lacunae in both the international and domestic legal and institutional framework in the area of trafficking in women and children. The efficacy of the current legal and institutional framework both internationally and domestically is queried. It also critiques the recent anti-trafficking bill as has been presented to the Attorney General.

Chapter four concludes the study on study trafficking in women and children in Kenya. In light of the shortcomings of the legal and institutional framework in the area of trafficking in women and children, chapter four postulates recommendations on the way forward towards the establishment of a comprehensive anti-trafficking statute in Kenya.

CHAPTER 2

THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

2.0 THE INTERNATIONAL LEGAL FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

Though trafficking in persons is not a new phenomenon and has probably been in existence since the development of state boundaries, a common and internationally acceptable definition of what trafficking constitutes only emerged fairly recently in November 2000 when the international community took steps towards the shaping of a strong international normative framework geared towards protection against human trafficking. This resulted to the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (hereinafter referred to as the Palermo Protocol).

Before this, at the centre of the international normative framework with regard to the trafficking in children were the Hague Convention Number 33 on Protection of Children and Cooperation in respect of Intercountry Adoption (1993); The Hague Convention Number 34 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for Protection of Children (1996); the ILO Convention Number 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) and the Convention on the Rights of the Child (1989) and its Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000).

Other international human rights instruments that are primarily geared towards the protection of the rights of women that have some elements of protection against trafficking include the Convention on the Elimination of All forms of Discrimination against Women (1979); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999); The Slavery Convention (1926) and Protocol amending the Slavery Convention (1953); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

There is yet no regional treaty or instrument that specifically deals with the prevention of and protection from trafficking of women or children in Africa. The principle relevant regional human rights instruments that deal with protection of women and children from human rights abuses that may be related to trafficking include the African Charter on Human and People's Rights (1981) and the African Charter on the Rights and Welfare of the Child (1990) both negotiated under the auspices of the Organization of African Unity (OAU). These regional human rights instruments are however not anti-trafficking instruments and therefore contain very limited provisions that would apply in the area of trafficking in women and children.

The existence of these copious international human rights instruments each geared towards the protection of specific human rights issues, translated into problems with regard to the consistency/ uniformity of definitions and applications of these conventions with regard to trafficking in persons. The adoption of the Palermo Protocol in 2000 was a breakthrough in the international arena as it is the first comprehensive internationally accepted anti-trafficking instrument that clearly

defines trafficking in persons as a crime. The Palermo Protocol is therefore the core international instrument analyzed in this study.

a) **The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Palermo Protocol)**

In November 2000 the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol) was finally opened for signature in Palermo, Italy. Prior to the drafting of this United Nations definition, trafficking in persons was often viewed as a form of human smuggling and a type of illegal migration³⁷. The Palermo Protocol was the result of two years of negotiation at the United Nations Centre for International Crime Prevention in Vienna in order to deal with the increase of transnational organized crime.

The parent instrument for the Palermo Protocol is the United Nations Convention against Transnational Organized Crime that had been earlier adopted by the United Nations General Assembly in November 2000. The Palermo Protocol, to which Kenya acceded in 2005, acknowledges in its preamble that despite the existence of a variety of international human rights instruments containing rules and practical measures to combat exploitation of persons, especially women and children, there was until November 2000, no universal instrument that addressed all the aspects of trafficking in persons. This Protocol lays special emphasis on the trafficking of women and children.

³⁷ Lackzo F., *Human Trafficking: The Need for Better Data*, Migration Information Source, Migration Policy Institute, Washington DC, 2000.

The problem of definition of what constitutes trafficking in persons was contested significantly and in the end, the signatories of the Palermo Protocol settled for the definition that,

“Trafficking in persons refers to the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation for the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs³⁸.”

The Palermo Protocol is divided into Parts I to III. Part I of the Protocol is made up of Articles 1-5. Articles 1, 2 and 4 set out the relationship between this Protocol and its parent instrument, the 2000 UN Convention against Transnational Organized Crime, the basic purpose of the Palermo Protocol and its scope of application. This Protocol is not a stand-alone instrument and must be read and applied together with its parent Convention³⁹. A country must therefore be a party to the United Nations Convention against Transnational Organized Crime in order to be a party to the Palermo Protocol.

The Protocol’s main emphasis is on strengthening cooperation between states through the criminalization of trafficking and imposition of appropriate penalties, facilitation and return of their trafficked nationals with due regard to their safety, exchanging of information aimed at identifying the perpetrators or victims of trafficking as well as the methods and means employed by traffickers, provision of and strengthening of law enforcement mechanisms and immigration procedure

³⁸ Article 3a

³⁹ Article 1.

and policies including trained personnel aimed at preventing and prosecuting trafficking offences, strengthening border controls and integrity of identity and travel documents against fraudulent use and taking legislative measures to prevent commercial transport from being used in trafficking.

Part II of the Palermo Protocol is made up of Articles 6-8. It deals with the protection of trafficked persons. The Protocol requires State Parties to ratify it and to take some steps to protect and assist victims of trafficking. These supplement the more general provisions of its parent Convention for the protection of victims and witnesses, recognizing that victims of trafficking are often in greater danger and in greater need of assistance and support, particularly if repatriated to their countries of origin.

Article 8 of the Palermo Protocol requires countries to, “*facilitate and accept*” the return of victims who are their nationals or who had legal residency rights when they were trafficked into the destination country, and then incorporates a series of safeguards to protect victims. Repatriation should be voluntary, if possible, and must take into consideration the safety of the victim and the status of any ongoing legal proceedings. This helps to ensure the viability of prosecutions by reducing the likelihood that witnesses would be repatriated before they can testify. A further safeguard provision is found in Article 14 that protects other fundamental interests, including those of trafficking victims who are asylum seekers, and the principle of non-discrimination.

Under the Palermo Protocol, trafficking victims would be entitled to some degree of confidentiality, information about legal proceedings involving traffickers and assistance in making representations in such proceedings at an appropriate stage. Under both the parent Convention and the Protocol, states must endeavor to

provide for the basic safety and security of victims. The Palermo Protocol requires that victims be afforded, “...*the possibility of obtaining compensation for damage suffered...*” The Protocol also calls for further social assistance to victims in areas such as counseling, housing, education and health care needs, although these are not obligatory.

Part III of the Palermo Protocol covers Articles 9-13. It deals with Prevention, cooperation and other measures that state Parties can put in place to combat trafficking in persons, including women and children. Under Part III, law enforcement agencies of State Parties are required to cooperate in the identification of offenders, identification of trafficked persons, share information about the methods of offenders, train investigators and law enforcement officials including victims support personnel⁴⁰. Countries are also required to implement security and border control mechanisms to detect and prevent trafficking⁴¹. These measures include strengthening their own border controls, imposing requirements on commercial carriers to check passports and visas, setting standards for the technical quality of passports and other travel documents, protecting the production and issuance of travel documents from fraud and corruption and ensuring the expeditious cooperation of security personnel in establishing the validity of their own documents on request.

Social methods of prevention such as research, advertising and social or economic support are also provided for in the Palermo Protocol. The specific provisions of the Palermo Protocol contained in Article 9 should be read in conjunction with the parallel provisions of the parent Convention contained in Article 31, which contains additional language dealing with the alleviation of social conditions and

⁴⁰ Article 10.

⁴¹ Articles 11-13.

the need for public information campaigns. These are particularly important with respect to trafficking, where the willingness, and in some cases desperation of potential victims to relocate and their ignorance of trafficking and the true conditions in the destinations to which they are trafficked have been identified as major contributing factors. In addition to the general social prevention measure, the Palermo Protocol also calls for measures to prevent re-victimization, where victims who are returned to their countries of origin are trafficked out again.

2.1 THE DOMESTIC LEGAL FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

a) The Penal Code Chapter 63 of the Laws of Kenya

The Penal Code establishes a code of criminal behavior in Kenya. It stipulates what acts or omissions amount to criminal behavior and specifies penalties for specific crimes. At present, trafficking in persons does not amount to a crime in Kenya as this has not yet been defined and spelt out in the Penal Code. However, this does not mean that persons engaged in trafficking in persons, especially women and children should go unpunished, or that the victims can not claim redress for these serious human rights abuses. There are several provisions within the Penal Code geared towards the protection of women and children that could be used to prosecute trafficking offences.

Chapter XV of the Penal Code deals with offences against morality. Sexual offences including rape, attempted rape, abduction and detention of a woman with the intention of marriage, abduction of girls under 16 years for marriage, indecent

assault of females and defilement of girls under 14 years are expressly prohibited⁴².

The Criminal Law (Amendment) Act No. 5 of 2003 amended the provisions contained in Section 143 of the Penal Code to prohibit the abduction of boys under 16 years of age. It also increased the age with regard to indecent assault of girls from 14 years to 16 years⁴³. The penalty for indecent assault of girls was also raised from 14 years imprisonment to 21 years imprisonment.

Sexual offences against girls under 16 years of age are defined as felonies and are punishable with life imprisonment⁴⁴. Indecent assault on a boy under 18 years is a felony punishable with up to 21 years imprisonment⁴⁵.

Crimes such as kidnapping and abduction of persons are denoted as felonies. A felony has been defined under Section 4 as, *“an offence which is declared by law to be a felony, or if not declared as a misdemeanor, is punishable without proof of previous conviction, with death, or with imprisonment for three years or more.”* A misdemeanor is defined as, *“an offence which is not a felony”*

The Kenyan Penal Code also criminalizes the procurement of any person for prostitution⁴⁶. More relevant to trafficking is the criminalization of the procuring of a person for unlawful sexual intercourse by using threats, intimidation and

⁴² Section 139 -145 of the Penal Code.

⁴³ Section 16 of the Criminal Law (Amendment) Act 2003.

⁴⁴ Section 19 of the Criminal Law (Amendment) Act 2003 replacing Section 145 of the Penal Code.

⁴⁵ Section 34 of the Criminal Law (Amendment) Act 2003 replacing Section 164 of the Penal Code.

⁴⁶ Section 147.

deception or by administering drugs⁴⁷. This is broader than the previous provision that only deals with procurement for prostitution.

Illegally detaining another person for immoral purposes or prostitution is a felony⁴⁸. The Penal Code however does not define what constitutes prostitution. It also does not expressly prohibit prostitution, but only prohibits living wholly or in part from the proceeds of prostitution as a felony.⁴⁹

Fraudulent pretence of marriage as well as marriage with dishonest or fraudulent intent is prohibited.⁵⁰ The Penal Code also prohibits slavery as a felony that attracts a penalty of seven years' imprisonment though the penalty could go up to 10 years imprisonment for those guilty of habitually dealing in slaves.⁵¹ Forced labour is also expressly prohibited as a misdemeanor. The Penal Code defines forced labour as, "*compelling any person to labour against the will of that person.*"⁵²

Section 238 of the Penal Code expressly prohibits intimidation or molestation of another person as a misdemeanor. This provision could be used to target the methods of intimidation that traffickers use to keep their victims in check.

Chapter XXVII of the Penal Code deals with criminal recklessness and negligence. Under the provisions in this Chapter, the endangerment of the safety of another traveling by railway as well as it the transportation of persons by water

⁴⁷ Section 148.

⁴⁸ Section 27 of the Criminal Law (Amendment) Act 2003 replacing Section 151 of the Penal Code.

⁴⁹ Section 154 & 155.

⁵⁰ Section 171 & 172.

⁵¹ Section 265.

⁵² Section 266.

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for hire in unsafe or overloaded vessel⁵³. This section could be used to target the transportation of trafficking victims that are many times transported in unhealthy, reckless and hazardous manner.

Offences against the liberty of others are listed and prohibited under Chapter XXV of the Penal Code. Section 254 provides against kidnapping of persons from within Kenya. It states that, *“Any person who conveys any person beyond the limits of Kenya without the consent of that person, or of some person legally authorized to consent on behalf of that person is said to kidnap that person from Kenya.”* Kidnapping is a felony and is punishable by an imprisonment term of up to 7 years. This can go up to 10 years if the kidnapping has been done for the purposes of inflicting grievous harm, slavery or immorality⁵⁴.

Stealing of children less than 14 years is prohibited under Section 174 as a felony and is punishable by imprisonment of 7 years. Abduction is also prohibited under the Penal Code. Abduction has been defined as, *“forcing or compelling, or by any deceitful means inducing any person to go from any place.”*⁵⁵ These sections could specifically apply in the case of international and domestic trafficking of women and children in Kenya.

The Kenyan Penal Code therefore has several provisions that could be used to prosecute trafficking offences, including the recruitment, harboring, transportation and exploitation of trafficked persons. Some of the previous limitations within the Code especially with regard to the penalties for certain criminal acts and the ages of the victims of some offences were rectified by the Criminal Law (Amendment)

⁵³ Section 248 & 249.

⁵⁴ Section 257 – 262.

⁵⁵ Section 256.

Act 2003 towards additional protection of women and children. Those crimes previously regarded as misdemeanors and therefore awarded minimum punishment are now regarded as felonies and therefore attract stricter punishments. The ages with regard to crimes against girls and boys were raised from 14 years to 16 years and in some cases to 18 years by the Criminal Law (Amendment) Act 2003. The protection of boys was reinforced as their protection had originally been outrightly omitted in the Penal Code.

b) The Children Act Chapter 586 of the Laws of Kenya

The Children Act was enacted with the aim of promoting the well being of children in Kenya. The Act defines a child as any person under the age of 18 years⁵⁶. This Act merged together and updated the provisions previously contained in the now repealed Guardianship of Infants Act Chapter 144, the Adoption Act Chapter 143 and the Children and Young Persons Act Chapter 141. The Children Act also consolidates those rights that are contained in the United Nations Convention on the Rights of the Child as well as the regional African Charter on the Rights and Welfare of the Child, both which been ratified by the Kenyan government. The Act sets out the general roles and responsibilities of parents in ensuring the wellbeing of the child. It also provides for the establishment of institutions dealing with children and gives guidelines on issues of children's welfare, legal aid, custody and care of children, foster care, guardianship and adoption.

The Act provides definitions that may be relevant to trafficking in children, including the definition that child abuse can be physical, sexual psychological and

⁵⁶ Section 2 of the Children Act.

mental⁵⁷. The Act has a special category of children called “child of tender years” that refers to a child under the age of 10 years and gives them special protection. It also defines foster placement as the placing of a child with a person who is not his parent relative or guardian and who is willing to care for and maintain him. Additionally, it defines the terms parent, guardian and relative. These definitions are important in trafficking as it lays the basis on which to identify children who are victims of trafficking and related crimes.

Though trafficking is not defined in the Children Act, the Act specifies that a child shall be protected from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person. Other provisions of significance in trafficking in children include the provisions that children are to be protected from abuse, neglect and slavery. They must also be protected from sexual exploitation, inducement or coercion to engage in any sexual activity, or exposure to obscene materials. They are also protected from torture, cruel punishment or unlawful arrest or jailing. Children are also protected from use of harmful drugs, including alcohol and tobacco products and being involved in their production, trafficking or distribution.

Part II of the Act has provisions protecting children from economic exploitation and any work that is harmful to their health, physical, mental, moral or social development, or which could interfere with their education. Child labour is expressly prohibited⁵⁸. The Act specifies that every child has a right to a name and identity and that the government is to protect and assist children who have lost their identities⁵⁹. Recruitment of children into war is expressly prohibited.

⁵⁷ Section 13 (1).

⁵⁸ Section 10.

⁵⁹ Section 11.

The government of Kenya has been given the responsibility of making sure that children affected by war or natural disasters are cared for and helped to lead a normal life. These provisions are important in the protection of children from recruitment and exploitation by traffickers.

Parents and guardians are also given the obligation of protecting their children from falling into the hands of traffickers. Part III of the Children Act deals with provisions on parental responsibility over their children. Parental responsibility is defined as, “*all duties, rights, powers, responsibilities and authority which by law the parent has in relation to the child or the child’s property.*”

Additionally, trafficked children could be protected under this Act under the provisions that define children in need of care and protection under Part X of the Act. This part lists several groups of children in need of care and protection including orphaned or abandoned children, girls who have been forced into early marriages, children who are forced into customs and practices that are harmful to their life, education and health, those being held in overcrowded, unhealthy and dangerous places, those engaged in the use of or trafficking of drugs or other substance that may be declared harmful by the health minister, of those who do work that could harm their health or affect their education and those who have been victims of sexual offences or live with another child who has undergone such experience or with a person who has been convicted of such an offence are all listed as children in need of care and protection.

Part XII deals with adoption of children and is therefore important in the protection of children who are trafficked for adoptions. The Act establishes an Adoption Committee and gives guidance on the modalities of adoption of a child.

c) The Immigration Act Chapter 172 of the Laws of Kenya

The Immigration Act is divided into 21 sections. It is an Act of Parliament that consolidates the laws relating to immigration into Kenya. Section 3 of the Act defines a prohibited immigrant and indicates the means of dealing with such persons. Section 4 deals with the entry or removal of immigrants from the Kenyan territory. It stipulates the conditions under which an immigrant may obtain an entry permit and the conditions under which such permits would be rendered invalid. It gives the Minister for Immigration powers to remove certain persons from Kenyan territory under specific conditions as stipulated in Section 8. It has provisions that could be used in the prosecution of cases of international trafficking, especially with regard to duties and liabilities of carriers including ships, aircraft and train captains who transport persons into the country illegally⁶⁰.

d) The Kenyan Sexual Offences Act No. 3 of 2006

Kenya recently passed the Sexual Offences Act into law in July 2006. It is divided into 49 sections and 2 schedules. This is an Act to make provisions about sexual offences, their definition, prevention and the protection of all persons from harm through unlawful sexual acts and connected purposes.

The Sexual Offences Act prohibits sexual offences such as rape, gang rape, attempted rape, sexual assault, sexual harassment, defilement and attempted defilement among many others. The Act made a breakthrough in the country's legislation, by specifically identifying crimes of child trafficking, child sexual tourism, child prostitution and child pornography both domestically and internationally. Section 14 of the Act prohibits child sex tourism both

⁶⁰ Section 9.

domestically or internationally, whereas Section 15 prohibits child prostitution and Section 16 prohibits child pornography.

The statute has specific provisions protecting against trafficking in children especially for sexual exploitation and acknowledges that this human rights abuse is real and rampant within the country. Section 13 of this Act provides that,

“A person including a juristic person who in relation to a child:

- a) knowingly or intentionally makes or organizes any travel arrangements for or on behalf of a child within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against the child, irrespective of whether the offence is committed;*
- b) supplies, recruits, transports, transfers, harbors or receives a child, within or across the borders of Kenya, for the purposes of the commission of any sexual offence under this Act with such child or any other person, is, in addition to any other offence for which he or she may be convicted, guilty of the offence of child trafficking and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings”.*

The statute provides for investigation and prosecution of sexual offences including the protection of vulnerable witnesses and provision of medical treatment. It is therefore a much needed addition towards the prosecution of trafficking offenders and prevention of the trafficking in women and children for sexual exploitation and prostitution.

e) The Witness Summonses (Reciprocal Enforcement) Act Chapter 78 of the Laws of Kenya

This is an Act of Parliament that provides for the enforcement of witness summonses issued by courts of certain countries including matters incidental thereto. It is divided into 9 sections. Section 2 of this Act is the interpretation

section and is defines a summons to include any subpoena or other process for requiring the attendance of any person to give evidence before a court or to produce any document before a court.

Sections 4 and 5 deal with the procedure for backing and service of witness summons whereas section 6 deals with the procedure where witnesses cannot be found. A witness may be excused from attending court via a summons by the Attorney General or by the court. Section 9 provides for the penalty for disobedience of a summons. This statute is vital in the study of trafficking in women and children in Kenya as it lays down the procedure through which witnesses that have information on trafficking can be summoned to give evidence in court during the prosecution of trafficking offences.

f) The Law of Domicil Act Chapter 37 of the Laws of Kenya

The Law of Domicil Act is a statute that declares and amends the law relating to the legal domicil of persons within the Kenyan territory. It is divided into 10 sections. Domicil can be obtained by birth or by choice. Section 3 deals with acquisition of the Kenyan domicil at birth whereas section 8 deals with acquisition of domicil by choice. Section 4 indicates that an infant who is a foundling is deemed to have the domicil of the country in which he/ she is found. This is important in the area of trafficking in children as it provides for the means of identification of the domicil of trafficked infants who may be within the Kenyan territory. Section 10 indicates that a person may not have more than one domicil at a time. It is also a protective statute as and stipulates that no person shall be deemed to be without a domicil.

g) The Kenyan Citizenship Act Chapter 170 of the Laws of Kenya

The Kenya Citizenship Act has provisions for the acquisition of citizenship of Kenya such as by registration in certain cases. It also regulates the manner and circumstances in which aliens may be naturalized as citizens of Kenya. The statute further stipulates the circumstances under which citizens of Kenya may renounce or be deprived of their citizenship. It is divided into 18 sections. Unlike other Kenyan statutes, section 2 of this statute which is the interpretations section defines a minor as one who has not yet attained the age of twenty one years.

This statute prohibits dual nationality. However, section 7(2) of this statute provides that a person who renounces the Kenyan nationality would still be liable for any offences committed by him/ her before the renunciation or deprivation of his citizenship. This statute is important in this study as it lays down the rules through which the citizenship of trafficking offenders and victims can be identified for prosecution purposes.

h) The Aliens Restriction Act Chapter 173 of the Laws of Kenya

This is an Act of Parliament that enables restrictions to be imposed on aliens. It also makes provisions necessary or expedient to carry out such restrictions. It is divided into 3 sections. An alien is defined at section 2 as a person who is not a citizen of Kenya. Section 3 provides for the means and methods of restricting the entrance and movement of aliens within the country as well as provisions with regard to their restrictions while within the Kenyan territory. It is important in this study as women and children who are trafficked through international borders into Kenya, who are not citizens of Kenya would find themselves in a situation where they would be considered as aliens within the Kenyan territory.

2.2 CONCLUSION

This Chapter laid down the international and domestic legal provisions that are currently available towards the protection of women and children from trafficking. The chapter does not deal with the analysis of the efficacy of these legal instruments but simply stipulates the available legislation as they are.

The analysis on this chapter indicates that though Kenya has no specific anti-trafficking statute, this should not be used as an excuse to let trafficking offenders go unpunished and trafficking offences uninvestigated and undocumented. The Chapter exposes that there are several provisions within the various existing domestic statutes and international conventions that could be invoked to counter trafficking offences as the country awaits the legislation of a more comprehensive anti-trafficking legislation.

CHAPTER 3

NORMATIVE AND INSTITUTIONAL GAPS IN THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

3.0 GAPS IN THE INTERNATIONAL FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

a) Gaps in the Nature of International Law

International law consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations interse, as well as with some of their relations with persons, whether natural or juridical. Traditionally, states were the sole subjects of international law. With the proliferation of international organisation over the last century, they have in some cases been recognized as relevant parties as well. Recent interpretations of international human rights law, international humanitarian law and international trade law have been inclusive of corporations, and even individuals.

Article 38 (1) of the Statute of the International Court of justice is widely recognized as the most authoritative statement as to the sources of international law. It provides that,

“the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as

law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

International law establishes the framework and the criteria for identifying states as the principal actors in the international legal system. It has long been argued whether international law is really law for various reasons. Whilst municipal law is hierarchical or vertical, with the legislature enacting binding legislation, international law is horizontal, with all states being sovereign and theoretically equal. Because of this, the value and authority of international law is dependent upon the voluntary participation of states in its formulation, observance, and enforcement. Although there may be exceptions, most states enter into legal commitments to other states out of enlightened self-interest rather than adherence to a body of law that is higher than their own. International law cannot therefore exist in isolation from the political factors operating in the sphere of international relations.

Where there are breaches of the law, international law has no established compulsory judicial system for the settlement of disputes or a coercive penal system. There are no institutional provisions for the investigation and enforcement of the provisions contained in international instruments against states.

Apart from a state's natural inclination to uphold certain norms, the force of international law has always come from the pressure that states put upon one another to behave consistently and to honor their obligations. As with any system of law, many violations of international law obligations are overlooked. If addressed, it is almost always purely through diplomacy and the consequences

upon an offending state's reputation. Though violations may be common in fact, states try to avoid the appearance of having disregarded international obligations. States may also unilaterally adopt sanctions against one another such as the severance of economic or diplomatic ties, or through reciprocal action.

In some cases, domestic courts may render judgment against a foreign state (the realm of private international law) for an injury, though this is a complicated area of law where international law intersects with domestic law. States have the right to employ force in self-defense against an offending state that has used force to attack its territory or political independence. States may also use force in collective self-defense, where force is used against another state. The state that force is used against must authorize the participation of third-states in its self-defense.

Two theories have been put forward regarding the applicability of international law rules to the domestic scene. These attempts to explain the precise nature of the relationship and provide a guide for courts faced with an international element in the case before it. One approach has been stated in the doctrine of transformation. This is based on the perception of the domestic and international law systems as being two quite distinct systems of law, operating separately. It maintains that before any rule or principle of international law can have any effect within the domestic jurisdiction, it must expressly and specifically "transformed" into municipal law by the use of the appropriate constitutional machinery, such as an Act of Parliament. This doctrine grew from the procedure whereby international agreements are rendered operative in municipal law by the device of ratification by the sovereign and the idea has developed from this that any rule of international law must be transformed, or specifically adopted, to be valid within the internal legal order.

The second approach, known as the doctrine of incorporation, holds that international law is part of municipal law automatically without the necessity for the interposition of a constitutional ratification procedure.

Kenya is a dualist state and as such does not recognize international law as applicable within the domestic scene until it is domesticated into the domestic statutes. This was further made clear in the case of Okunda vs Republic⁶¹ it was held that the laws of the East African Community were void to the extent of any inconsistency with the Kenyan constitution. The subsequent appeal to the Court of Appeal of East Africa was struck out as incompetent as the High Court of Kenya is the final reference to it in criminal proceedings. Nevertheless, the Court of Appeal expressed obiter, the view that,

“The Constitution of Kenya is Paramount and any law, whether it be of Kenya or of the Community or of any other country which has been applied in Kenya which is in conflict with the Constitution is void to the extent of the conflict.”

This is a major flaw as Kenya is a signatory and has ratified very many international instruments that have been rendered ineffective due to its dualist nature. International law provides an alternative to the use of force in settling disputes by relying on compromise, cooperation, mutual legal obligations, and common ends. In today’s world of increasingly interdependent nations and economies, the resolution of conflicts without violence is more essential than ever.

⁶¹ 1970 EALR p.453.

b) Gaps in The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Palermo Protocol)

Though it represents a breakthrough in the area of trafficking in persons, the Palermo Protocol is not without its limitations. First, it focuses excessively on the criminalization of traffickers to the detriment of making the protection of trafficked persons the priority. There is need for a more balanced approach in dealing with traffickers and victims of trafficking.

Secondly, for the comprehensive act of trafficking in persons to be established under the Trafficking Protocol, three elements that must be ascertained: These are the *activities* that constitute trafficking in persons, (these being the recruitment, transportation, harboring and receipt of victims); the *method* employed to recruit the victims (force, coercion, fraud, abduction, deception and abuse of power or of position of vulnerability) and the *intention or mens rea* which is exploitation (though prostitution of others, sexual exploitation, forced labour or services, slavery or practices similar to slavery). The purpose of the activities of the trafficker must therefore relate directly to the intention of the trafficker, and this must be for exploitation. *Mens rea* in trafficking as in many other crimes is however very subjective and might therefore be very difficult to prove in a court of law. Under the Protocol, it is only in the case of trafficking in children, unlike that of adults, that only the activity (recruitment, transportation, transfer and receipt) and the purpose (financial or other profit through exploitation) are relevant. The means of trafficking are not.

Thirdly, although the Trafficking Protocol includes measures to protect trafficking victims, parties to it are not mandated to include them at the top of their priority

list as the victim protection measures are only optional. The Trafficking Protocol operates in the hope that states would create domestic laws in response to the provisions within the Protocol. The protection weakness in the Protocol would thus be likely to undermine the law enforcement objective of the same by ensuring that those caught up in trafficking networks would have little incentive to cooperate with state authorities and without such cooperation it is likely that traffickers will continue to operate with impunity⁶².

Fourth, there are still several definitional gaps within the Protocol. Though the Palermo Protocol states that “*exploitation includes, at a minimum, the exploitation for the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs*”⁶³, there is however no standard or universal definition of what constitutes exploitation. The worldview of what the terms “prostitution of others”, “sexual exploitation”, “forced labour” and “slavery” entails is varied. The problem with the definition of prostitution was likewise experienced during the drafting of the Palermo Protocol where different stakeholders defined the same set of facts differently depending on their interests and ideologies. In some countries for example, prostitution is not regarded as a criminal offence whereas in others it is expressly prohibited. What constitutes forced labour is another controversial issue. The reality in many families especially in Africa and in Kenya in particular is that child labour is often employed in order to add to the family income in order to maintain a reasonable level of sustenance. Some forms of labour have also often been relegated to women and therefore they would be expected to perform

⁶² Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, Forced Migration Review No. 12, Refugee Studies Centre, University of Oxford.

⁶³ Article 3(a).

certain activities albeit against their personal choice. This may be viewed by some as forced labour.

The International Labour Organization (ILO) that is geared towards the protection of migrant workers defines forced labour as, “*all work or services that is exacted from any person under the menace of any penalty and for which the said person has offered himself voluntarily.*”⁶⁴ The two main elements that must be present according to this definition are the menace of penalty and the notion of consent. These elements however also pose serious challenges such as the nature of penalty that should qualify forced labour and how consent can be viewed when workers are actually not in a position to make an informed, consensual decision. The ILO supervisory bodies responded to these questions by stating that a penalty does not have to take the form of a penal sanction and that it might as well be linked to the loss of rights or privileges. On the issue of consent, these bodies stated that consent is rendered meaningless if a worker has been induced into employment by deceit, false promises and the retention of identity documents or force.⁶⁵ Regardless of these clarifications, the understanding of the element of forced labour continues to vary from community to community across the globe.

Fifthly, the Palermo Protocol does not stipulate how trafficked persons are to be identified as belonging to this category. On this point, the Canadian Refugee Council stated that, “If authorities have no means of determining among the intercepted or arrested that is being trafficked, how do they propose to grant them the measure of protection they are committing themselves to?”⁶⁶ Identification of trafficked persons is important in order to be able to protect them from immediate

⁶⁴ International Labour Organization Convention No. 29, Article 2.

⁶⁵ International Labour Organization (ILO), *Fundamental Rights and Work and International Labour Standards*, ILO, Geneva, 2003.

⁶⁶ Canadian Council for Refugees, *Migrant Smuggling and Trafficking in Persons*, February 2000.

expulsion or “*refoule*” where they may have valid reasons for remaining within a certain state for reasons of security including seeking of asylum. The Palermo Protocol however does not have this minimum standard. There is a great need to create a comprehensive legal definition of trafficking in persons that will establish it as an international crime and a human rights violation⁶⁷.

Lastly, this Protocol only applies to those states that are party to it. In some countries such as Kenya, international conventions only get the force of law after they have been domesticated into legislation. Whereas its final provisions may not be perfect, the Palermo Protocol has been a great achievement to the international community in the area of development of legislation regarding trafficking in persons. It is hoped that Kenya shall take active steps towards its codification into domestic legislation.

3.1 GAPS IN THE DOMESTIC FRAMEWORK ON TRAFFICKING IN WOMEN AND CHILDREN

a) Institutional Gaps in the Domestic Framework on Trafficking in Women and Children

Kenya does not have as any institutional framework for dealing with trafficking and related offences in persons in general, and those affecting trafficked women and children in particular. There is no institution or body charged with the systematic collection of data relating to trafficking or with research on the root causes and consequences of trafficking in the country. There is no institutional framework for international cooperation with other states and information sharing

⁶⁷ Hyland K. F., *The Impact of the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children*, Human Rights Brief, 2001.

on matters of cross border trafficking. Kenya does not have any institutional framework for the identification, investigation and prosecution of trafficking offences. There is no policy on the procedures to be followed reporting trafficking and related crimes to the local police stations or for instituting criminal proceedings relating to trafficking offences within the domestic courts. The police who are the first contact point between the trafficking victim and the legal process in the domestic courts are greatly uneducated on matters relating to trafficking in persons. The Police and other law enforcement agencies are not sensitive to the plight of the trafficked victims, often regarding them as criminals or illegal migrants. In Kenyan communities, talking about sexuality and related topics is taboo and the country does not have the infrastructure to address different forms of sexual violence that could be related to trafficking. It is therefore not surprising that when drawing parallels to undocumented migration and issues revolving around various forms of sexual violence in the country, accurate numbers on the magnitude of trafficking in persons in Kenya is elusive. This lack of institutional framework therefore means that trafficking cases are rarely reported or prosecuted successfully.

b) Gaps in the Domestic Legislative Framework on Trafficking in Women and Children

Though Kenya has constitutional guarantees from forced labour, slavery and servitude⁶⁸, Kenya has no specific criminal provision on trafficking in persons. Despite the constitutional guarantees that categorically addresses the problem of trafficking in women and children, the crime of “trafficking in persons” does not exist within the country’s statutes. Offences specified under various other statutes

⁶⁸ Article 73 of the Constitution of Kenya.

could however be used to prosecute trafficking offences as the country advances towards a specific anti-trafficking legislation.

i) The Penal Code Chapter 63 of the Laws of Kenya

Trafficking in persons does not amount to a crime in Kenya as this has not yet been defined and spelt out in the Penal Code. The Penal Code fails to provide important definitions such as “forced labour”, “prostitution” or “exploitation” that are important in the identification and prosecution of trafficking offences. It also designates some of the sexual offences that could target the trafficking of women and girls as mere misdemeanors with lenient punishments.

Section 36 of the Code specifies that, “*where no punishment is specially provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years with a fine or both*”. This may lead to situations where some serious sexual or other offences against trafficked victims might receive very lenient punishments and thus the statute may not be in this regard deterrent or punitive in nature. Though Section 238 of the Penal Code expressly prohibits intimidation or molestation of another person as a misdemeanor, the statute however does not define what constitutes molestation or intimidation and therefore this section could be interpreted in a myriad of ways.

The Penal Code contains many loopholes especially with regard to the protection of persons above the ages of 21. Whereas it is criminalized to procure a woman below the age of 21 for unlawful sexual intercourse, it is silent on the procurement of a woman above the age of 21 or of boys and men of any ages. Such loopholes allow for traffickers to make use of the silent areas of the laws to their advantage.

Being the principle statute that specifies and defines offences under the Kenyan law, The Penal Code is in urgent need of updating to include the offence of trafficking in persons. The Penal Code should specifically criminalize trafficking offences rather than cluster trafficking offences with other criminal activities such as smuggling and other forms of organized crime. It should also create and provide for the necessary institutions to combat trafficking offences, including the recruitment, harboring, transportation, transfer, receipt and final exploitation of trafficking victims. Additionally, in lieu of creating a new trafficking offence, the existing slavery provision under the Penal Code needs to be reinterpreted to be able to capture trafficking, the modern form of slavery. This means reinterpreting slavery to include cases where victims are threatened or psychologically coerced to remain in exploitative conditions, rather than being physically restrained and fettered by chains.

ii) The Children Act Chapter 586 of the Laws of Kenya

Though it contains numerous provisions that protect children from human rights abuses through different forms of exploitation and abuse, the Children Act does not define trafficking as a criminal offence. It is not a primary anti-trafficking statute and therefore does not contain detailed provisions regarding the prevention, identification, prosecution, rehabilitation or repatriation of trafficked children or specify penalties against child traffickers and users.

iii) The Immigration Act Chapter 172 of the Laws of Kenya

The Immigration Act is not a statute geared towards the prevention or prosecution of trafficking in persons. Most of the provisions contained in the Immigration Act are geared towards the prosecution of trafficking victims as opposed to protecting

them as victims of human rights abuses. This would be an indication of the country's lack of realization that trafficked victims have rights and should be protected regardless of their role in the trafficking scenario. It also indicates that the country is interested more in limiting the movement of certain persons into the country and of criminalizing trafficked victims without regard to how these persons find themselves in such abusive arrangements.

Section 3 of the statute states that a person who is not a citizen of Kenya and who is incapable of supporting himself in Kenya is a prohibited immigrant. Many trafficked victims, may find themselves within Kenya and unable to sustain themselves. The Immigration Act in this case would find them guilty of being illegal immigrants.

The Immigration Act also prohibits entry into the country without a valid entry permit or pass⁶⁹. Most trafficked victims on the other hand may have entered the country illegally and without such permits. They would in this case be considered as being in breach of the immigration laws and they may be considered as illegal immigrants as per Section 3 of the Act. The Immigration Act also gives the immigration officers the right to invalidate entry permits in certain circumstances and declaring the bearer an illegal immigrant⁷⁰. An entry document issued fraudulently is considered void under the Kenyan immigration law. The Immigration Act also empowers the Minister of Immigration to remove any person that is considered as being unlawfully within the country⁷¹.

⁶⁹ Section 4 of the Immigration Act.

⁷⁰ Section 6.

⁷¹ Section 8.

The Immigration Act therefore, does not have much to offer in the area of protection of trafficked women and children in Kenya. It is to the trafficked victim more vindictive rather than protective in nature.

iv) The Kenyan Sexual Offences Act No 3 of 2006

The Sexual Offences Act provides protection against, including, rape, sexual assault or defilement but it fails to present important and detailed definitions as to what constitutes the crimes that it protects women and children against. For example, Section 11 of this Act prohibits any indecent act with a child and prescribes a penalty of up to 10 years imprisonment for such offenders. It fails to define what an indecent act is. Similarly, though it prohibits offences related to trafficking in persons and especially children, it does not specifically define what constitutes trafficking or how to identify the victims of trafficking. Additionally, it does not define “exploitation” but protects persons from exploitation through prostitution and other forms of sexual exploitation⁷². It is not a primary anti-trafficking statute and therefore does not have much to offer with regard to the identification and prosecution of trafficking offences that are non sexual.

v) The Witness Summonses (Reciprocal Enforcement) Act Chapter 78 of the Laws of Kenya

This statute provides for the enforcement of Witness summons by foreign courts. It allows for the summoning of witnesses between the Kenyan courts and the courts of other countries to give evidence in criminal cases. Such provisions would be paramount especially in the area of international trafficking in women and children where interstate summons would be beneficial in the successful

⁷² Section 17 & 18.

prosecution of trafficking offences. This statute however was not targeted at trafficking offences and therefore does not have any procedural guidelines on how to deal with trafficking related offences.

vi) The Domicil Act Chapter 37 of the Laws of Kenya

This is not an anti-trafficking statute and therefore does not deal with the definition or identification of trafficking offences. The Domicil Act defines one's domicile as their fixed, permanent and principal home for legal purposes. Domicil can be acquired by birth of descent or by choice by demonstrating their intention to stay in a certain country (*animus manendi*). Though this provision was geared towards the protection of foundlings within the country, but could be subject to abuse by traffickers.

vii) The Kenyan Citizenship Act Chapter 170 of the Laws of Kenya

The Act is rather stringent with regard to obtaining of the Kenyan citizenship. Section 3(1) of this Act states that one may acquire Kenyan citizenship by birth / descent or by registration or naturalization. The preconditions for registration and naturalization are quite strict. Dual citizenship is expressly prohibited in this statute. This provision of restricting the acquisition of dual nationality on the other hand could be detrimental in the case of a person who loses his Kenyan nationality and is thereafter trafficked through the country as this person would fail to get the protection of Kenya once he acquired another nationality.

viii) The Aliens Restriction Act Chapter 173 of the Laws of Kenya

Section 2 of this Statute stipulates certain restrictions on Aliens, i.e. persons who are not Citizens of Kenya. Aliens must obtain entry permits or passes issued by the Immigration Department during their period of stay within the country. It stipulates the procedures of obtaining these permits/ passes. This statute is paramount towards the identification of illegal immigrants within the country's borders who are usually tied to the trafficking in human's trade. The statute is however overly concerned with the regulation of aliens within the country and fails to deal with issues that are connected with trafficking in persons.

ix) The Extradition Acts Chapter 76 and 77 of the Laws of Kenya

The two Extradition statutes have provisions regarding the surrender of a criminal through the operation of a treaty or other statute by one state to another that has jurisdiction over the matter. These Acts are important in the area of trafficking in women and children as they have provisions that could be used by the Kenyan government to obtain and prosecute traffickers for trafficking offences in Kenya wherever they are found. The shortcoming with the extradition legislation is with the fact that the rule of double criminality would require that for extradition to take place, the conduct for which one is to be extradited must be criminal in nature and must be an extraditable offence in both countries. Unfortunately, Trafficking in persons is not one of the extraditable offences within the domestic laws.

x) The Proposed Refugee Bill 2005

Asylum systems and immigration laws are often abused by situations of mixed movements, where persons escaping economic hardships or legal prosecutions arrive in the country along with genuine asylum seekers and refugees. As regular migration routes are increasingly closed and security on these routes is tightened, asylum seekers and refugees are forced to turn to smugglers and traffickers to reach safety despite the dangers and financial costs involved. For many such persons, the only way to cross international borders has been to take advantage of malfunctioning asylum system in certain countries.

Located in the midst of several African countries that have been torn by prolonged civil strife, war, hunger and poverty, Kenya's geographical location is central to the study of smuggling and trafficking of asylum seekers and refugees in East Africa, as it plays a key role in the migratory patterns of asylum seekers and refugees in the region.

The Kenya government abdicated its duty to undertake refugee status determination since 1991 with the large influx of asylum seekers from Ethiopia and Somalia. This is currently being done by the United Nations High Commissioner for refugees Offices (UNHCR). Women and children asylum seekers and refugees are especially vulnerable and often fall prey to traffickers.

Though not an anti-trafficking statute, the proposed Refugee Bill 2005 if promptly legislated and adopted would go along way towards the protection of asylum seekers and refugees who would fall prey to traffickers as they would be guaranteed basic human rights akin to that of aliens as enumerated in the international refugee conventions.

3.2 ANATOMY OF A PROPOSED ANTI-TRAFFICKING STATUTE

Trafficking in women and children is a complex problem and strategic interventions must therefore be put in place in Kenya in order to address research and advocacy, prevention, legal and policy measures, prosecution, rescue, repatriation and integration of victims of trafficking that are presently lacking.

Kenya must adopt a specific anti-trafficking statute in order to combat both domestic and international trafficking. Given their special vulnerabilities that make them target for traffickers, specific provisions must be put in place for the protection and prevention of trafficking in women and children. With this in mind, the proposed legislation must have provisions on significant definition of terms to avoid ambiguity. It must have provisions to prevent the practice of trafficking in persons, protect the victims of trafficking and punish the perpetrators of trafficking offences.

a) Provisions on Definition and the Identification of Trafficking Offences

The proposed Kenyan anti trafficking statute must contain specific and detailed provisions related to definitions of terms that are relevant to trafficking in persons. Trafficking in persons must be clearly defined in the penal laws as a criminal offence. Terms such as “trafficking in persons”, “women”, “children”, “adoption”, “recruitment”, “transportation”, “transfer”, “harboring”, “receipt of persons”, “threat”, “use of force”, “coercion”, “abduction”, “fraud”, “deception”, “abuse of power or of a position of vulnerability”, “giving or receiving of payments or benefits to achieve the consent of a person”, “having control over another person for the purpose of exploitation”, “exploitation” “prostitution”, “sexual exploitation”, “forced labor or services”, “slavery”, “practices similar to

slavery”, “servitude” and “removal of organs” must be clearly defined in the statute.

Clear definition of terms disposes ambiguities thereby leading to uniformity in understanding and application of provisions relating to trafficking offences and therefore aids in the identification, prosecution and prevention of trafficking offences.

b) Preventive Measures

The proposed anti-trafficking statute must have provisions that deter the practice of trafficking in persons in general and women and children in particular. Trafficking in persons and offences related to trafficking must be criminalized and stringent penalties put in place to deter the practice.

There must be legislative provisions to prevent the use of commercial and private transportation whether by road, air, rail or sea from being used in trafficking processes by criminalizing the same and stipulating strict penalties. Additionally, the statute on trafficking in persons must contain provisions that strengthen border controls in Kenya.

There must be regular and mandatory training for personnel involved in law enforcement such as policemen, immigration officials, judicial officers and other stakeholders. The training should be aimed at the identification of trafficking victims, preventing trafficking in persons and especially women and children, prosecuting trafficking offenses and protecting the rights of trafficked victims.

c) Protective Measures

The Trafficking Protocol makes provisions on victim protection that are optional in their application. On the other hand, the proposed Kenyan anti-trafficking statute must have measures that protect trafficking victims and these should not be optional in their wording to ensure compliance in their application.

The statute should have provisions allowing trafficking victims to remain in certain territories temporarily (and in some cases permanently depending on their eventual security and physical safety in their areas of origin) with consideration being given to humanitarian factors as their rehabilitation and repatriation to their places of origin is being undertaken.

The privacy of trafficked victims must be upheld and provided for in the legislation. There must be discreet help desks manned by properly trained personnel to which trafficking related offences can be properly addressed. Other than this, the anti-trafficking statute must have provisions that are geared toward the empowerment of trafficking victims by provision of information on legal proceedings and facilities that they can use to give their views and concerns especially in the prosecution of trafficking offenders.

d) Punitive Measures

Trafficking is a serious human rights abuse that affects the victims' right to life, dignity, liberty and security. Appropriate penalties for trafficking offences must be imposed in order to deter and punish trafficking offences. The means and methods employed by traffickers in identifying, recruiting, transporting, harboring and exploiting their victims must be legislated and strict penalties stipulated.

There must be clear institutional provisions such as help desks within the community through which Kenyan nationals can effectively report trafficking cases. The police, immigration officials, judiciary and other law enforcement officials and stakeholders that deal at all levels with the identification and prosecution of trafficking offences must be well trained and sensitized on the seriousness of the offence of trafficking in persons in general and women and children in particular and a follow-up mechanism be put in place to ensure that these institutional provisions are adhered to at all levels.

e) Rehabilitative Measures

Rehabilitation and treatment of trafficked victims is of paramount importance as in most cases victims have undergone both psychological and physical forms of abuse from their traffickers and users. This rehabilitation will ensure their recovery from the experience and facilitate in their eventual acceptance and return to their countries or former habitual places of residence. The return of trafficking victims must be done with due regard to their safety and the status of any relevant legal proceedings.

The domestic anti trafficking statute should have provisions that permit victims of trafficking to obtain compensation from their traffickers and users for the pain and suffering or loss caused through their exploitation. The principle of “do no harm” is essential in any trafficking initiative and human rights must be the centre of any well intentioned anti trafficking campaigns. They should not compound the already existing societal discrimination against women and children in Kenya.

3.3 A CRITIQUE OF THE PROPOSED KENYA TRAFFICKING IN PERSONS BILL, 2006

The Kenya Trafficking in Persons Bill 2006 is a proposed Act of Parliament geared towards the domestication of the UN Conventions and Protocols relating to Trafficking in Persons especially women and children, through the provision of preventive, protective and prosecutorial measures including the establishment of the necessary institutional mechanisms to deal with the phenomenon of trafficking. It was prepared principally under the auspices of the International Organization for Migration (IOM) and other stakeholders in the civil society and is currently in the office of the Attorney General⁷³. The Bill is yet to be introduced in Parliament.

The Bill is divided into 32 Articles that contain specific provisions on the prevention, identification and prosecution of trafficking offences as well as the First schedule which contains the guiding principles to be considered in the application of the Act, the Second Schedule which lays down provisions as to the conduct of business and affairs of the Board established under Section 5 of the Bill and a memorandum of the objects of the Bill. This is stated as the recognition and protection of the equal rights and inherent human dignity of women, men, boys and girls as enshrined in the various international human rights instruments and to establish the necessary institutional mechanisms for the protection and support of trafficked persons to ensure just and effective punishment of traffickers.

⁷³ Dr. K. Kithure, “*The Final Report of the Consultant on Legal and Policy Issues (Counter Trafficking)*”, The International Organization for Migration (IOM) Mission with Regional Functions, February 2006.

The choice of the name “Trafficking in Persons Bill” is however problematic as at first glance, it suggests that it is a document to encourage trafficking in persons, rather than to combat trafficking in persons. The nomenclature aside, this Bill is quite comprehensive as an anti-trafficking statute. It clearly defines its object and purpose as well as the principles that guide the Act⁷⁴ and contains clear and detailed definitions of the acts relating to the offence of trafficking in persons in Article 2 which is the interpretation Article. It also clearly spells out stringent penalties for trafficking offences.

The Bill embraces a responsibility and accountability mechanism that involves the establishment of an authority to monitor and review the progress in dealing with trafficking issues. Article 4 of the Bill establishes a Counter-Trafficking in Persons Board and enumerates detailed functions of the Board in Article 5 which among others include the coordination of inter-agency activities aimed at combating trafficking and promoting the implementation of preventive, protective and rehabilitative programs for trafficked persons.

The proposed Bill addresses the entire process of trafficking, including the identification and recruitment of victims, transportation and transfer of victims, harboring of victims receipt of victims and exploitation of victims. Article 6 enumerates a detailed list of acts that constitute trafficking in persons as criminal offences and stipulates strict penalties of imprisonment of not less than ten years or a fine of not less than ten million shillings or to both. Upon subsequent conviction for an act of trafficking, it recommends for imprisonment for a term not less than twenty years imprisonment without the option of a fine.

⁷⁴ Article 3(1) of the Proposed Trafficking in Persons Bill 2006.

Where there are aggravating factors such as death, insanity, permanent or life threatening bodily injury to a person being transported, transportation of a person as part of the activity of an organized criminal group, or when an adoption as effected under the Children Act, as an Inter-Country adoption and the said adoption is undertaken for the sole purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude and debt bondage, or where the offender is an ascendant, parent, sibling or guardian of the trafficked persons or a person who exercises authority and control over the trafficked person and when the offence is committed by a public officer, as stipulated in Article 8(1) of the proposed Bill, life imprisonment without the option of a fine is proposed. Article 7 specifically prohibits an act that promotes trafficking in persons.

The proposed anti-trafficking Bill provides for restitution to the trafficked person for any loss suffered including the cost of medical treatment and rehabilitation, necessary transportation and temporary housing and any other relief that the court may consider fit to be awarded to the victim⁷⁵. Trafficked persons are exempt from paying fees for civil suits for recovery of civil damages. It recognizes the importance of confidentiality in the investigation, prosecution and trial of trafficking cases to protect the victims and stipulated provisions for repatriation of trafficked persons to and from Kenya. The Trafficking in Persons Bill adopts the principle of non criminalization of the act of being trafficked. It encourages the state to protect the victims of trafficking as victims and not criminals at Article 14 including the protection of foreigners trafficked into Kenya in Article 22. It specifically stipulates that the legal age of consent to sex is not considered a

⁷⁵ Article 9(1).

defense in the trafficking⁷⁶. Witness protection is expressly provided for at Article 21.

The proposed anti-trafficking Bill recognizes the multiplicity of actors and the roles involved in combating trafficking in persons and the institutions that are required to deal with them. It deals with the transnational dimensions of trafficking in persons and the need for cooperation between states especially with regard to border control measures and information sharing. It also makes provisions for funding for counter trafficking measures.

Unlike the Palermo Protocol, the trafficking Bill clearly stipulates the activities and actions that constitute exploitation of trafficked persons. It has a wider definition than that provided for in the Palermo Protocol. Secondly, the proposed Trafficking in Persons Bill 2006 stipulate how trafficked persons are to be identified as belonging to this category. Thirdly, whereas the Palermo Protocol includes measures to protect trafficking victims, parties to it are not mandated to include them at the top of their priority list as the victim protection measures are only optional, issues of victim protection are not optional in the proposed Bill. Fourthly, whereas the Palermo Protocol focuses excessively on the criminalization of traffickers to the detriment of making the protection of trafficked persons the priority, the proposed anti-trafficking Bill specifically provides for the protection of victims of Trafficking in addition to criminalizing the traffickers. With this regard, the proposed anti-trafficking Bill is more detailed and would therefore have more force within the Kenyan scenario as an anti-trafficking tool.

⁷⁶ Article 13.

3.4 CONCLUSION

This chapter was dedicated to a discussion of the available international, regional and domestic legal framework in the area of trafficking in women and children. The provisions within these legal instruments and their implications and efficacy in preventing and prosecuting trafficking offences were discussed.

The chapter reveals that there is a gross lacuna in the country's statutes with regard to the protection of women and children from abuse of their human rights through trafficking. Incorporating a common understanding of trafficking into national laws and policies would enable states to cooperate and collaborate more effectively in the area of trafficking in persons.

The available statutes do not relate to trafficking specifically but mixes them up with other criminal offences. There is also poor enforcement of these statutes, especially with regard to trafficking in women and children. This is because of the lack of proper institutional framework for the identification, reporting, investigation and prosecution of trafficking offences. In addition to this, Kenya is a dualist state. This means that mere ratification of international treaties and conventions does not make the international conventions binding locally as law. The Kenyan parliament must enact legislation to domesticate the already ratified conventions as this is the only way in which they are beneficial to the country.

It is therefore posited that the above discussions have established the hypothesis of the study that the phenomenon of trafficking in women and children in Kenya is prevalent and multitudinous yet the current international and domestic legal framework is inadequate in addressing the same hence the need for a more

comprehensive domestic legislation on which to identify and prosecute trafficking offences.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.0 CONCLUSIONS

This thesis has addressed itself to the problem of trafficking in women and children in Kenya as a serious crime and a violation of the inalienable human rights of the individual. The root causes of trafficking in women and children in Kenya as well as the consequences of trafficking on both the trafficked individual and the community at large were addressed.

Efforts have been made to determine the role of the international community as well as the role of the regional and domestic framework in responding to the problem of trafficking in women and children.

Chapter one presents a background into the problem of trafficking in women and children in Kenya and the justification for the current study.

Chapter two laid down the current international and domestic legislation that applicable in trafficking cases. It further determined the relevance of the current study as it presented and discussed the available legal provisions that have a bearing on trafficking in women and children in bid to determine their efficacy and the need of a more comprehensive legal framework.

Chapter 3 critically analyses the lacunae in both the international and domestic legal and institutional framework in the area of trafficking in women and children in Kenya. It reveals that there is a serious gap within the country's statutes with

regard to the protection of women and children from abuse of their human rights through trafficking. It also reinforces the need for a more comprehensive and specific anti trafficking statute in the country as well as a need for a mechanism to make international conventions more relevant and applicable as law within the country.

4.1 RECOMMENDATIONS

1. The process of researching for data in relation to the topic of this thesis discovered a serious lack of documentation on migratory movements and trafficking data in Kenya. The available information was very scanty and tended to concern only with few individual cases. There is no systematic collection of data or keeping of coordinated records in response to the phenomenon of trafficking in persons. It is recommended that an institutional framework be established by the government to improve on data collection. This must include the training of relevant officials on methods of migration data collection and compilation of statistics in order to capture the main trends of trafficking in Kenya. It is hoped that this thesis would act as a basic guide to researchers and policy makers alike as a reference point or starting point in their research on trafficking especially in women and children in Kenya.
2. Information sharing is paramount especially between the countries of origin and destination of trafficked victims. It is recommended that there should be increased operational contact and sharing of information between law enforcement authorities of recipient countries on the numbers and nationalities of trafficked persons, smuggling routes and methods of

interdiction. Cooperation between governments is crucial to combat international trafficking, especially as stricter immigration policies in receiving countries of the west fuel markets for trafficking, smuggling and general irregular migration across the globe.

Regional cooperation towards curbing trafficking practices needs to be encouraged as national measures do not work in isolation. This is because the very nature of trafficking means that if one country cracks down on traffickers and makes the activity more difficult or more risky, traffickers will simply shift their activities to another country. Regional and international cooperation and harmonization of trafficking laws is imperative towards effectively combating the problems. As a member of both NEPAD and the East Africa Community, Kenya must champion regional cohesion through the use of these regional bodies in combating this serious human rights abuse.

Regional organizations within East African such as the East Africa Community (EAC) should be encouraged to take up initiatives and set up institutions towards combating trafficking in persons including women and children. A starting point could be in line with the initiatives undertaken in the western African region by the Economic Community of West African States (ECOWAS) towards combating trafficking in women and children. ECOWAS has been instrumental in putting particular emphasis on the ratification of the Trafficking Protocol in Western African states. Its initiatives to promote normative responses to trafficking may

also be identified within its broad actions to enhance more generally the criminal law provisions of and between its member states⁷⁷.

The New Partnership for Africa's Development (NEPAD) provides a historic opportunity to overcome obstacles to development in Africa⁷⁸. Its overall objective lies in providing African leaders with a basis upon which to consolidate democracy and sound economic management, to promote peace, security and people-centered development, good governance and human rights as necessary pre-conditions for Africa's recovery. NEPAD's system of "peer review" provides a platform for countries to share experiences with a view to fostering good governance. This could be an important tool if used properly to mutually monitor, plan for and come up with policies towards ending trafficking in persons in Africa.

3. The need for a specific anti-trafficking statute in Kenya cannot be overemphasized. The provisions contained in the Proposed Trafficking in Persons Bill 2006 and the Palermo Protocol must be legislated as they have covered all the salient issues that are paramount towards the prevention, protection from and prosecution of trafficking offences. It is recommended that the Attorney General should table the Proposed Trafficking Bill before the Kenyan parliament as soon as possible in order to have it legislated upon as this is the only way in which to guarantee the

⁷⁷ A Declaration and Plan of Action against Trafficking in Persons (2000-2003) was adopted during the annual ECOWAS Summit held in Dakar, Senegal in December 2001. The Plan of Action stipulates specific measures, including the criminalization of trafficking in persons, creating an ECOWAS Coordination Unit to liaise with National Task Forces, protection and support of victims, awareness raising, cooperation between border control agencies and data collection by ECOWAS countries and the United Nations.

⁷⁸ UNICEF, *Trafficking in Human Beings, Especially Women and Children in Africa*, Innocenti Research Center, September 2003.

rights of women and children who continue to suffer at the hands of traffickers.

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