



UNIVERSITY OF NAIROBI

FACULTY OF LAW

**STATE RESPONSIBILITY IN COMBATING TRANSNATIONAL CRIME:
A CASE STUDY OF KENYA'S RESPONSE TO HUMAN TRAFFICKING**

BY

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
DECLARATION	vii
ACKNOWLEDGEMENTS.....	viii
DEDICATION.....	ix
ABBREVIATIONS AND ACRONYMS.....	x
LIST OF TREATIES, CONVENTIONS AND STATUTES.....	xi
LIST OF CASES.....	xiv
LIST OF FIGURES.....	xv
LIST OF TABLES	xvi
ABSTRACT.....	xvii
CHAPTER ONE: OVERVIEW OF THE STUDY	1
1.1. Background of the Study	1
1.2. Statement of the Problem	4
1.3. Justification of the Study	5
1.4. Research Objectives	5
1.5. Research Questions	6
1.6. Hypotheses.....	6
1.7. Literature Review.....	7
1.7.1. Position on Human Trafficking.....	7
1.7.2. The State and Human Trafficking.....	10
1.8. Theoretical Framework	12
1.8.1. Maslow’s Theory of Needs:.....	12
1.8.2. Fault and Objective Responsibility Theories on State Responsibility:	13
1.9. Research Methodology.....	15
1.9.1. Research Design:.....	15
1.9.2. Study Site:.....	16
1.9.3. Study Population:.....	16
1.9.4. Sample Size:	16
1.9.5. Sampling Methods:	17
1.9.6. Data Collection Methods:.....	18
1.9.6.1. Interviews:	18

1.9.6.2.	Questionnaires:	19
1.9.7.	Data Analysis:.....	20
1.9.8.	Ethical Considerations:.....	20
1.9.9.	Limitations of the Study:.....	21
1.10.	Chapter Breakdown.....	22
CHAPTER TWO: CONCEPTUAL AND REGULATORY FRAMEWORK ON HUMAN TRAFFICKING		24
2.1.	Introduction.....	24
2.2.	Doctrine of State Responsibility:	25
2.2.1.	Primary Rules:	26
2.2.1.1.	Attributable to the State:.....	26
2.2.1.2.	Breach of an International Obligation:.....	27
2.2.2.	Secondary Rules:.....	27
2.3.	State Obligations in the Regulatory Framework on Human Trafficking	29
2.4.	International Conventions.....	30
2.4.1.	Anti-Slavery Conventions	30
2.4.1.1.	International Agreement for the Suppression of the White Slave Traffic, 1904:	31
2.4.1.2.	International Agreement for the Suppression of the White Slave Traffic, 1910:	32
2.4.1.3.	International Convention for the Suppression of the Traffic in Women and Children, 1921:	33
2.4.1.4.	Convention to Suppress the Slave Trade and Slavery, 1926 (The Slavery Convention):	33
2.4.1.5.	Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956:.....	34
2.4.2.	Anti-Prostitution And Gender Discrimination Conventions	35
2.4.2.1.	Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1949:	35
2.4.2.2.	Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1979:.....	36
2.4.3.	Conventions Against Forced Labour.....	37
2.4.3.1.	Convention Concerning Forced or Compulsory Labour 1930 (No. 29):	37
2.4.3.2.	Convention Concerning the Abolition of Forced Labour 1957 (No. 105):	38
2.4.3.3.	Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (No. 182):.....	38
2.4.3.4.	Worst Forms of Child Labour Recommendation 1999 (No. 190):	39

2.4.3.5.	Protocol to the Forced Labour Convention of 2014:.....	40
2.4.4.	Human Rights Conventions	41
2.4.4.1.	Universal Declaration of Human Rights (UDHR) 1948:	41
2.4.4.2.	International Convention on the Elimination of All Forms of Racial Discrimination 1965:	42
2.4.4.3.	International Covenant on Civil and Political Rights (ICCPR) 1966:	43
2.4.4.4.	International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966:	43
2.4.4.5.	The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984:	44
2.4.4.6.	Convention on the Rights of Persons with Disabilities 2006:	45
2.4.5.	Children’s Rights Conventions:	45
2.4.5.1.	Convention on the Rights of the Child (CRC) 1989:	46
2.4.5.2.	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000:	46
2.4.6.	Protocol To Prevent, Suppress And Punish Trafficking In Persons Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime (The Palermo Protocol) 2000:.....	47
2.5.	Regional Conventions	51
2.5.1.	African Charter on Human and People’s Rights 1981:	51
2.5.2.	African Charter on the Rights and Welfare of the Child 1990:	51
2.5.3.	Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa 2005:	52
2.5.4.	Council of Europe Convention on Action against Trafficking in Human Beings 2005	52
2.5.5.	South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002:.....	53
2.6.	National Legislation	54
2.6.1.	The Sexual Offences Act 2006:	54
2.6.2.	The Employment Act of 2007:	55
2.6.3.	Constitution of Kenya 2010:.....	55
2.6.4.	Counter Trafficking in Persons Act 2010:.....	56
2.6.5.	The Kenya Citizenship and Immigration Act (KICA) 2011:	58
2.6.6.	The Mutual Legal Assistance Act 2011:	58
2.6.7.	The Labour Institutions (Private Employment Agencies) Regulations 2016:	59
2.6.8.	The Children Act of 2022:	60
2.7.	Conclusion	62

CHAPTER THREE: STATE OF HUMAN TRAFFICKING IN KENYA.....	64
3.1. Introduction.....	64
3.2. Historical Background.....	65
3.2.1. Slavery and Slave Trade at the Swahili Coast	65
3.2.2. Abolitionist Movement and Trafficking under Colonialism	67
3.3. Present Day Human Trafficking: Causal Factors.....	69
3.4. Economic Factors.....	72
3.4.1. Poverty and Unemployment:	72
3.4.2. Demand for Commercial Sex and Cheap Labour:	73
3.5. Social and Cultural Factors.....	75
3.5.1. Dissolution of families:	76
3.5.2. Child Fostering Arrangements:.....	76
3.5.3. Gender inequality:.....	77
3.5.4. Vulnerabilities of persons with disabilities:.....	79
3.5.5. Ignorance on human trafficking:.....	79
3.5.6. Belief in Witchcraft:.....	81
3.5.7. Cultures supporting slavery-like practices:	82
3.6. Political Factors:	84
3.6.1. Conflict resulting in refugees, stateless persons and internally displaced persons:	84
3.6.2. Permeability of Borders:.....	86
3.6.3. Corruption:.....	87
3.7. Environmental Factors:	88
3.8. Forms of Exploitation:.....	89
3.8.1. Forced Labour:.....	89
3.8.2. Forced Begging:.....	91
3.8.3. Forced Marriage:.....	92
3.8.4. Forced Criminality:	93
3.8.5. Trafficking in Children; the Abduction and Sale of Children:	94
3.8.6. Organ Removal:	94
3.8.7. Sex Exploitation:.....	96
3.8.8. Child Sex Tourism:	97
3.9. Conclusion.....	98
CHAPTER FOUR: KENYA’S COMPLIANCE WITH THE REGULATORY FRAMEWORK ON HUMAN TRAFFICKING.....	100

4.1.	Introduction.....	100
4.2.	Respondents’ Demographic Characteristics:	100
4.2.1.	Gender:	100
4.2.2.	Age:	101
4.2.3.	Highest Level of Education:	102
4.2.4.	Occupation:	102
4.3.	Paradigm 1- Respondent’s Awareness on Human Trafficking:.....	103
4.3.1.	Knowledge on human trafficking in Kenya.....	103
4.3.2.	Prevalence of Human Trafficking:.....	107
4.3.3.	Identity of Victims and Perpetrators of Human Trafficking:.....	114
4.3.4.	Vulnerable Groups:	117
4.3.5.	Factors Contributing to Human Trafficking	119
4.3.6.	Forms of Exploitation:.....	121
4.4.	Paradigm 2- Investigation and Prosecution of Human Trafficking Cases	125
4.4.1.	Reporting of Suspected Human Trafficking Cases	125
4.4.3.	Prosecution of Suspected Traffickers:.....	132
4.5.	Paradigm 3- Measures to Be Taken to Prevent Human Trafficking:	138
4.6.	Conclusion:	141
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.....		143
5.1.	CONCLUSIONS:.....	143
5.2.	RECOMMENDATIONS:	149
BIBLIOGRAPHY		154
APPENDICES		173
APPENDIX 1: QUESTIONNAIRE ON HUMAN TRAFFICKING FOR GENERAL RESPONDENTS.....		173
APPENDIX 2: INTERVIEW GUIDES FOR KEY INFORMANTS.....		181
APPENDIX 3: NACOSTI LICENCES		199

DECLARATION

I declare that the work presented in this research proposal is my original work and has not been presented for a degree in any other university. References and acknowledgements have been duly availed where other works were used.

Signature:  _____

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This research project has been submitted for examination with my approval as the University Supervisor.

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DEDICATION

I dedicate this research paper to the survivors and victims of human trafficking. I would also like to dedicate the paper to the state and non-state actors who are taking active (and often selfless) measures to create awareness on human trafficking, to rescue trafficking victims and to provide the necessary assistance.

ABBREVIATIONS AND ACRONYMS

ANPCCAN	African Network for the Prevention and Protection against Child Abuse and Neglect
ATCPU	Anti-Human Trafficking & Child Protection Unit
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CHTTEA	Counter Human Trafficking Trust East Africa
COVID-19	Coronavirus Disease of 2019
CTIP	Counter Trafficking in Persons Advisory Committee
DCI	Directorate of Criminal Investigations
ECHR	European Court of Human Rights
ICT	Information and Communication Technology
IDP	Internally Displaced Person
ICJ	International Court of Justice
IOM	International Organisation for Migration
KLR/eKLR	Kenya Law Reports
KNCHR	Kenya National Commission on Human Rights
NACOSTI	National Commission for Science Technology and Innovation
NEA	National Employment Agency
NGOs	Non-Government Organisations
NITA	National Industrial Training Authority
PCIJ	Permanent Court of International Justice
TIP	Trafficking in Persons Report
TOC	Transnational Organized Crime Unit
UN	United Nations
UNTOC	United Nations Convention against Transnational Organized Crime
US	United States of America

LIST OF TREATIES, CONVENTIONS AND STATUTES

International Conventions and Treaties

Convention Concerning Forced or Compulsory Labour 1930 (No. 29)

Convention Concerning the Abolition of Forced Labour 1957 (No. 105)

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (No. 182)

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1979

Convention on the Rights of Persons with Disabilities 2006

Convention on the Rights of the Child (CRC) 1989

Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1949

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International Covenant on Civil and Political Rights (ICCPR) 1966

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Protocol to Prevent, Suppress and Punish Trafficking In Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (The Palermo Protocol) 2000

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Council of Europe Convention on Action against Trafficking in Human Beings 2005

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2005

South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002:

National Legislation

Children Act 2022

Constitution of Kenya 2010

Counter Trafficking in Persons Act 2010

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Geoffrey Mutemi Manzi v Republic [2021] eKLR

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Rantsev v Cyprus and Russian Federation, App no 25965/04, IHRL 3632 (ECHR 2010)

Sigilani –vs- Republic [2004] 2 KLR, 480

US Diplomatic v Consular Staff in Tehran (1980 ICJ Report 1993)

LIST OF FIGURES

Figure 1: Distribution of Respondents by Age	101
Figure 2: Distribution of respondents based on their occupation	103
Figure 3: Prevalence of Human Trafficking in Kenya.....	108
Figure 4: Public perception on internal, international and transnational human trafficking	108
Figure 5: Identity of victims of human trafficking.	115
Figure 6: Vulnerable Groups	117
Figure 7: Factors contributing to human trafficking.....	121
Figure 8: Forms of Human Trafficking in Kenya.....	122
Figure 9: Investigation Challenges	131
Figure 10: Knowledge on the Prosecution and Conviction of Human Traffickers	136
Figure 11: Proposed measures to address human trafficking in Kenya.....	139

LIST OF TABLES

Table 1: Distribution of Respondents by Gender	101
Table 2: Distribution by Highest Level of Education	102
Table 3: Knowledge on Human Trafficking	104
Table 4: Public Perception on Reporting Stations for Suspected Human Trafficking Cases	126

ABSTRACT

Human trafficking, also referred to as '*Trafficking in Persons*', is a vice that has presented itself in many forms over the years and continues to plague societies. In spite of public awareness and efforts undertaken by states, the trafficking numbers appear to be on the rise. States have unfortunately contributed to human trafficking through their actions and omissions, for instance through their failure to enact requisite laws and lack of well-trained enforcement mechanisms. Further, as human trafficking has a transnational character, the lack of inter-state cooperation through the formation of unitary laws and specialised enforcement teams has created easier trafficking channels. Kenya is not immune to the vice and a number of trafficking incidences have been brought to the limelight through the media. This paper therefore intends to interrogate the country's perceived failure to meet its obligations to address human trafficking. The research findings provide possible recommendations geared towards measures that should be employed to address identified weaknesses, ensuring that Kenya fully meets its obligations in controlling human trafficking.

CHAPTER ONE: OVERVIEW

1.1. Background of the Study

Transnational crime is not a new concept. Even though they were not originally categorised as such, elements of transnational crime were identified from some cross-border activities, like the trafficking of stolen artwork and antiquities that were looted from wars as early as 21 BCE, piracy in the sixteenth century, the nineteenth-century peak of human smuggling and slavery, and the trafficking of weapons both during and after the Cold War. The sale of illicit products (drug trafficking, counterfeiting, weapons trafficking), the infiltration of companies (fraud, money laundering), and the sale of unlawful services (human trafficking) are examples of contemporary transnational criminal activities.¹

The term ‘transnational crime’ was coined by the United Nations Crime Prevention and Criminal Justice Branch in 1975 to identify crimes ‘*transcending international borders and transgressing the laws of several states.*’² In 1976, the said Branch further espoused transnational crime to include ‘*offences whose inception, preparation and/ or direct or indirect effects involved more than one country.*’³ In 2000, a broader definition was provided under the United Nations Convention against Transnational Organized Crime (UNTOC), which term remains as a reference tool to date. Under UNTOC, transnational crime relates to an offence committed in one country whereas a substantial part of its constitutive elements takes place in other countries.⁴ The

¹ Jay S Albanese, ‘Deciphering the Linkages between Organized Crime and Transnational Crime’ (2021) 66 Journal of International Affairs Editorial Board 17 <<https://www.jstor.org/stable/24388248>> accessed 29 December 2021.

² Neil Boister, *An Introduction to Transnational Criminal Law* (1st ed, Oxford University Press 2012).

³ *ibid.*

⁴ United Nations Convention against Transnational Organized Crime and the Protocols Thereto 2000. Article 3(2)

perpetrators of transnational crime are, in most cases, organized criminal groups with operations across several countries.⁵

This paper focuses on the transnational crime of human trafficking, which continues to be on a significant rise.⁶ Human trafficking pertains to ‘human- trade’ for exploitation. Human trafficking is widespread and highly profitable, generating about \$150 billion annually.⁷ Though men are also trafficked, women and children comprise of a higher ratio of victims.⁸ Traffickers target victims due to their vulnerability, spawned by situations such as poverty, gender discrimination, culture, family breakdown, weak laws and political instability. Global warming and severe natural disasters have also left many homeless and impoverished, which has created desperate people easily exploited by traffickers.⁹

According to the United States Trafficking in Persons Report (TIP Report) of 2022, victims in Kenya are exploited sexually and pushed into servitude.¹⁰ The TIP Report also noted that the closure of schools during the initial stages of the pandemic made children vulnerable to online sexual exploitation, forced domestic work and forced begging.¹¹ Other Coronavirus Disease (COVID-19) related restrictions (mainly travel restrictions and curfews) confined some victims to the same places as their traffickers, which further advanced their exploitation.¹² It was also noted that some victims were also recruited by employment agencies to work in the Middle East, where

⁵ *ibid.*

⁶ Eds Alexander Lautensach and Sabina Lautensach, *Human Security in World Affairs: Problems and Opportunities (2nd Edition)* (BCcampus & University of Northern British Columbia 2020) <<https://opentextbc.ca/humansecurity/>> accessed 29 January 2022.

⁷ United States of America Department of State, ‘Trafficking in Persons Report’ (2022).

⁸ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons* (2020).

⁹ Louise I Shelley, *Human Trafficking: A Global Perspective* (Cambridge University Press 2010).

¹⁰ United States of America Department of State (n 8).

¹¹ *ibid.*

¹² *ibid.*

they were exploited by traffickers in domestic servitude, brothels, manual labour and massage parlours.¹³

Kenya's neighbouring countries face challenges that exacerbate the trafficking situation in the East African region. For instance, acute food shortage and guerrilla wars in Tigray- Ethiopia,¹⁴ periodic civil wars in South Sudan,¹⁵ insecurity and humanitarian crises in Somalia¹⁶ have resulted in the smuggling of migrants through Kenya.¹⁷ This, according to the TIP, is enabled by the permeability of Kenya's borders, lack of screening of migrants and manifest levels of corruption.¹⁸ This has in turn exposed migrants to trafficking while en route to destination countries.¹⁹

Kenya has ratified international treaties²⁰ and enacted national laws to address human trafficking.²¹ Enforcement agencies have also been established to facilitate the implementation of these laws.²² Kenya remains a lucrative regional hub for people trafficking in spite of these precautions.²³ This calls for an investigation into whether Kenya's persistently high rate of human trafficking is due to deficiencies in the nation's legal or enforcement systems. If identified, the next issue to be

¹³ *ibid.*

¹⁴ The Guardian, 'Ethiopia Is Fighting "difficult and Tiresome" Guerrilla War in Tigray, Says PM | Ethiopia | The Guardian' <<https://www.theguardian.com/world/2021/apr/04/ethiopias-pm-says-military-fighting-difficult-and-tiresome-guerrilla-war>> accessed 29 January 2022.

¹⁵ Council on Foreign Relations, 'Civil War in South Sudan | Global Conflict Tracker' <<https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan>> accessed 29 January 2022.

¹⁶ Human Rights Watch, 'Somalia: Events of 2019', *World Report 2020* (2020) <<https://www.hrw.org/world-report/2020/country-chapters/somalia>> accessed 29 January 2022.

¹⁷ Countries such as South Sudan, Somalia and Uganda are not parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also known as the Palermo Protocol). This makes it difficult to ensure regional cooperation where members of the same regional block do not have anti-trafficking laws.

¹⁸ US Department of State, 'Trafficking in Persons Report' (2020) 293.

¹⁹ US Department of State (n 6).

²⁰ The United Nations Convention against Transnational Organized Crime, the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Palermo Protocol.

²¹ The Prevention of Organized Crimes Act 2010 and the Counter Trafficking in Persons Act No. 8 of 2010.

²² The Directorate of Criminal Investigation's Anti-Human Trafficking and Child Protection Unit.

²³ US Department of State (n 6) 322. According to estimates, between 35,000 and 40,000 victims were trafficked in 2020.

addressed is whether the said weaknesses are attributable to the state and whether they amount to a breach of its international obligations, for the doctrine of state responsibility to apply to Kenya.

1.2. Statement of the Problem

Having ratified the Palermo Protocol, Kenya is obliged to take legal measures to bring into effect the ‘3 paradigm concept’ of addressing human trafficking as espoused under the said Protocol, i.e. the protection of victims, prevention of human trafficking and prosecution of traffickers. However, as was identified by the TIP Report of 2022, Kenya continues to rank as a tier-two state²⁴ on account of its alleged failure to fully comply with the above paradigm.²⁵

For instance, on the protection of victims, it is noted that Kenya has failed to implement measures to provide housing for victims or to provide sufficient legal safeguards for Kenyan migrants.²⁶ On prosecution, it is noted that the prevailing anti-trafficking legislation creates an avenue for traffickers to avoid imprisonment sentences by paying fines.²⁷ It is also noted that there has been a decline in the prosecution of alleged traffickers, and in particular, suspected government officials.²⁸ Further, on prevention, it is noted that the country failed to effectively regulate labour migration and that subsisting laws on foreign recruitment failed to provide adequate safeguards for migrant workers.²⁹

There is a need to understand whether the country’s perceived non-compliance is attributable to its actions or omissions, or whether there are other extrinsic factors beyond the country’s control that continue to exacerbate efforts made. This paper, therefore, interrogates the country’s perceived

²⁴ US Department of State (n 21). The report defines a tier two state, as a country whose government does not fully meet the minimum standards to address human trafficking, but is making significant efforts to bring itself into compliance with those standards.

²⁵ US Department of State (n 7).

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

failure by examining its obligations as set out in international and regional conventions, as well as national statutes. Further, as the legislative framework does not subsist in a vacuum, the paper also examines the intricacies of human trafficking that are unique to Kenya and whether the legislative framework is aligned with present realities. The study equally interrogates Kenya's compliance with the regulatory framework and assesses the institutional framework in place to address human trafficking.

1.3. Justification of the Study

The study aims to contribute to the existing knowledge on human trafficking in Kenya, with respect to state responsibility. The information available concerning human trafficking is victim-centred, with due focus on the plight faced by victims in transit and destination countries. The paper, however, sought to highlight the role of the state and its obligations on human trafficking.

The study first assesses the effectiveness of Kenya's legal and institutional frameworks in dealing with human trafficking. The paper also highlights shortfalls in the laws and institutions, which act as encumbrances in its response measures. From the findings, the paper provides possible recommendations geared towards measures that should be employed by the country to address identified weaknesses, ensuring that it fully meets its obligations in controlling human trafficking.

1.4. Research Objectives

The general objective is to determine whether Kenya has failed to meet its obligations to address human trafficking, the extent of its non-compliance and the implications of such actions. More specifically, however, the study aims to:

- a) Examine the international, regional and national regulatory framework on human trafficking.
- b) Analyse the state of human trafficking in Kenya.

- c) Interrogate Kenya's legislative compliance with the regulatory framework on human trafficking.
- d) Assess the potential loopholes in Kenya's institutional framework in addressing human trafficking.

1.5. Research Questions

The primary question addressed by the paper is whether Kenya is non-compliant in its response measures. More specifically, the paper is guided by the following research questions:

- a) What are the international, regional and national regulatory frameworks on human trafficking?
- b) What is the current state of human trafficking in Kenya?
- c) What is the level of Kenya's legislative compliance with the regulatory framework on human trafficking?
- d) Are there loopholes in Kenya's institutional framework in addressing human trafficking?

1.6. Hypotheses

It is the general assumption that Kenya has not fully met its obligations to prevent, protect against and prosecute human trafficking offences. It is from this notion that the following hypotheses were tested in the course of the research:

- a) There are weaknesses in Kenya's legislative and institutional framework that facilitate human trafficking.
- b) Legal reforms and good governance practices will ensure Kenya's compliance with international and regional laws on human trafficking.

1.7. Literature Review

The study focused on literature that sheds light primarily on the position on human trafficking and state responsibility. Knowledge of the former provides an understanding of the concept of human trafficking whereas provides the basis for assigning responsibility to states.

1.7.1. Position on Human Trafficking

To comprehend the main characteristics of human trafficking, one must first conceptualise the phrase. *Gallagher* notes that the term was first coined in 1904 with the enactment of the Convention Against White Slavery,³⁰ which sought to suppress the trafficking of women for immoral purposes.³¹ She highlights that subsequent laws developed over the years continued to focus mainly on the trafficking of women and girls into prostitution. With the progression of time, it became apparent that the nature of trafficking was metamorphosing. Other racial groups of women were named as victims, especially those from developing nations. Sexual exploitation was no longer the only end goal of trafficking.³² Men and boys were also identified as victims.³³ It was only until the year 2000 that states were able to agree on an ‘all-inclusive’ definition of the term under the Palermo Protocol.³⁴

However, there is still no consensus on what constitutes human trafficking. It is generally agreed that sexual exploitation and forced labour are the main types of human trafficking. Nonetheless, there is much debate on whether forced labour should be dealt with as a trafficking issue or a

³⁰ International Agreement for the suppression of the ‘White Slave Traffic’ 1904.

³¹ Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 13-15.

³² *ibid.* Emerging reasons for trafficking included trafficking for marriage, forced labour and adoption.

³³ *ibid.*

³⁴ Article 3 of the Palermo Protocol defines human trafficking as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation*”.

labour law issue. *Gallagher*, for instance, states that whereas most victims of human trafficking engage in some form of forced labour, not all forced labourers find themselves in their statuses because of human trafficking.³⁵

Broad and *Turnbull* contend that the inclusion of forced labour into the definition of human trafficking makes all forced labour trafficking, irrespective of the lack of movement and that it creates confusion for its regulators.³⁶ *Weitzer* explains that some are of the view that human trafficking ought to include all acts of illegal migration for labour, whereas others conflate the term with concepts such as slavery and smuggling.³⁷ *Mackinnon* contends that pornography, being one of the ends of sex trafficking, should be considered as trafficking.³⁸ *Koops et al* consider child sex tourism as a special facet of human trafficking.³⁹ *Gallagher*, however, explains that no legal document can fully address all aspects of human trafficking.⁴⁰

This paper resonates that the lack of a concise legal definition covering all aspects of human trafficking has culminated in difficulty in enforcement. This, according to *Friesendorf*, has resulted in the handling of trafficking cases as immigration issues, leading to the classification of trafficking victims as illegal immigrants.⁴¹ Guided by *Friesendorf*'s analysis, this study highlighted further problems that arise from having a broad definition, particularly in the prosecution of traffickers.

³⁵ Gallagher (n 33).

³⁶ Rose Broad and Nick Turnbull, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' [2018] *Eur J Crim Policy* <<https://doi.org/10.1007/s10610-018-9375-4>> accessed 29 December 2021.

³⁷ Ronald Weitzer, 'Human Trafficking and Contemporary Slavery' (2015) 41 *Annual Review of Sociology* 223 <<https://www.annualreviews.org/doi/10.1146/annurev-soc-073014-112506>> accessed 30 January 2022.

³⁸ Catharine A MacKinnon, 'Pornography as Trafficking' (2005) 26 *Michigan Journal of International Law* 21.

³⁹ Thula Koops and others, 'Child Sex Tourism – Prevalence of and Risk Factors for Its Use in a German Community Sample' (2017) 17 *BMC Public Health* 344 <<https://doi.org/10.1186/s12889-017-4270-3>> accessed 30 January 2022.

⁴⁰ Gallagher (n 33).

⁴¹ Cornelius Friesendorf and Landesverteidigungsakademie (eds), *Strategies against Human Trafficking: The Role of the Security Sector* (Reprocenter Vienna 2009).

There are also different perspectives on the causal factors for human trafficking. *Aronowitz* explains that trafficking arises from supply and demand, migration and smuggling, development and globalization, among others.⁴² On supply and demand, he explains that the readily available supply of cheap labour and commercial sex services influences demand, contrary to traditional economic theories.⁴³

Shelley counters this view by stating that it is demand that fuels supply; the former being generated by the fact that people can be sold repeatedly.⁴⁴ *Liv* looks into the impact of the ‘dark net’ and the aspect of anonymity as a driving tool for human trafficking.⁴⁵ She highlights how easy it has become to ‘buy people’ online through certain unregulated sites, creating a wider market base for traffickers.⁴⁶ *Resisen* and others expound on vulnerabilities of the African people, and in particular, the lack of information and appeal of jobs abroad. They state that new forms of trafficking (athlete and ransom trafficking) have arisen with information and communication technology (ICT) that exploits the information ‘black hole’ in Africa.⁴⁷

Babatunde, on the other hand, invites us to consider the patriarchal gender arrangements of societies as an instrument for trafficking.⁴⁸ She explains that the devaluation of women and girls as economic burdens, their cultural subordination and the limited availability of legitimate employment opportunities for women have made them primary targets for exploitation through

⁴² Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Praeger 2009).

⁴³ *ibid.*

⁴⁴ Shelley (n 8).

⁴⁵ Nadine Liv, ‘An Examination of a Potential Connection between the Trafficking of Women on the Darknet and the Financing of Terrorism’ [2019] International Institute for Counter-Terrorism (ICT).

⁴⁶ *ibid.*

⁴⁷ Mirjam van Reisen and others (eds), *Mobile Africa: Human Trafficking and the Digital Divide* (Langaa Research & Publishing CIG 2019).

⁴⁸ Abosede Omowumi Babatunde, ‘Human Trafficking and Transnational Organized Crime: Implications for Security in Nigeria’ 46 (2021) 25, 63.

trafficking.⁴⁹ The different views of the cited authors are relevant to this study as they provide a background for understanding the causal factors of human trafficking. The paper expounds on the areas raised in the research, while trying to discover other causal factors that may have arisen, particularly during the COVID-19 pandemic.

1.7.2. The State and Human Trafficking

It has been argued that some laws and institutional mechanisms facilitate human trafficking. For instance, *Qadri* highlights that the *kafala*⁵⁰ system practised in some Middle Eastern countries sanctions employers' exploitation of their workers.⁵¹ He explains that the absolute power granted by the system has resulted in workers being subjected to inhumane treatment, long working hours and withheld wages, which have increased demand for trafficked migrants.⁵² *Daghar* supports *Qadri's* views and sheds light on the number of Kenyan migrant workers who ended up as trafficking victims in Saudi Arabia and Qatar because of the *kafala* system.⁵³ *Daghar* explains that unlicensed foreign employment agencies in Kenya and cartels that bypass immigration regulations abet the system.⁵⁴ However, the paper opines that the problem does not principally lie with the *kafala* system, but the legal and institutional frameworks in the origin countries. Failure to adequately regulate local and foreign recruitment agencies, to provide information on varying employment customs in destination countries, and to enter into bilateral agreements to ensure standard provisions in migrant employment contracts point to weaknesses of the state of origin.

⁴⁹ *ibid.*

⁵⁰ The Kafala System allows employers to confiscate passports and other travel documents of their employees during their entire duration of work.

⁵¹ Mustafa Qadri, 'The UAE's Kafala System: Harmless or Human Trafficking?' [2020] Carnegie Endowment for International Peace 7, 82.

⁵² *ibid.*

⁵³ Mohamed Daghar, 'Kenyan Workers in the Middle East' [2020] ENACT 16.

⁵⁴ *ibid.*

Corruption is another significant challenge that continues to cripple efforts made to control human trafficking. *Friesendorf* highlights that little has been written on the nexus between corruption and human trafficking.⁵⁵ He explains that this may be due to fear of self-incrimination by corrupt officials and the fear of reprisal by trafficked victims.⁵⁶

However, some authors have attempted to highlight how corruption takes place. *Campbell and Lord*, while acknowledging that there is limited research on the matter, enumerate that corruption in government, particularly in destination countries, facilitates human trafficking activities.⁵⁷ This, they explain, is demonstrated through the porosity of borders of the destination states and the collusion between organized criminal groups and corrupt officials. They further explain that corrupt practices can be seen through active involvement by accepting bribes or passive involvement by failing to take action on reported or suspected cases of human trafficking.⁵⁸

Trajano states that corruption occurs at all stages of trafficking.⁵⁹ The key parties in the trafficking chain who are often involved include immigration and law enforcement officials.⁶⁰ *Peksen et al* state that corruption is prevalent in the trafficking business as it culminates in low chances of prosecution of traffickers and is a low cost in comparison to the profits earned.⁶¹ From these writings, it is clear that more research ought to be done on the nexus between human trafficking

⁵⁵ Friesendorf and Landesverteidigungsakademie (n 43).

⁵⁶ *ibid.*

⁵⁷ Liz Campbell and Nicholas Lord (eds), *Corruption in Commercial Enterprise: Law, Theory and Practice* (1st edn, Routledge 2018) <<https://www.taylorfrancis.com/books/9781351602228>> accessed 31 January 2022.

⁵⁸ *ibid.*

⁵⁹ Julius Cesar Trajano, 'Combating Human Trafficking in East Asia: Mind the Gaps' [2018] S. Rajaratnam School of International Studies 14.

⁶⁰ ENACTAfrica.org, 'Corruption as a Facilitator for Organised Crime in the Eastern African Region' (*ENACT Africa*, 15 October 2019) <<https://enactafrica.org/research/interpol-reports/corruption-as-a-facilitator-for-organised-crime-in-the-eastern-african-region>> accessed 29 January 2022.

⁶¹ Dursun Peksen, Shannon Lindsey Blanton and Robert G Blanton, 'Neoliberal Policies and Human Trafficking for Labor: Free Markets, Unfree Workers?' (2017) 70 *Political Research Quarterly* 673 <<http://journals.sagepub.com/doi/10.1177/1065912917710339>> accessed 31 January 2022.

and corruption. As Kenya is infamous for corruption which cuts across several sectors,⁶² there is a high likelihood of this being a key contributor to Kenya's viability as a trafficking hub. The paper analyses the veracity of the alleged nexus in the study.

1.8. Theoretical Framework

The study sought to shed light on the mechanisms of human trafficking and the aspect of state responsibility through the lens of two renowned theories, i.e. Maslow's Theory of Needs and the Fault and Risk Theories on State Responsibility.

1.8.1. Maslow's Theory of Needs:

Maslow's theory is key to understanding the psychology behind the grooming process of victims and trauma bonding. The theory posits a hierarchy of five basic needs that all human beings require to attain a sense of fulfilment. At the bottom of the pyramid are psychological needs,⁶³ followed by security, affection and belonging, self-worth and self-actualisation at the apex.⁶⁴ It is closely related to Finnis' seven objective goods⁶⁵ that make human life worthwhile.⁶⁶ *Taormina* and *Gao* explain that the satisfaction of a lower-end need results in the satisfaction of the next need in the hierarchy.⁶⁷ Thus, when people are in environments that deprive them of some of these needs, for instance, where there is civil strife, high unemployment rates or inequalities, they are likely to experience dissatisfaction with all needs and may look elsewhere for fulfilment.

⁶² The Borgen Project, '10 Facts About Corruption in Kenya -' <<https://borgenproject.org/10-facts-about-corruption-in-kenya/>> accessed 31 January 2022.

⁶³ These include basic needs such as food, clothes and shelter.

⁶⁴ Robert J Taormina and Jennifer H Gao, 'Maslow and the Motivation Hierarchy: Measuring Satisfaction of the Needs' (2013) 126 *The American Journal of Psychology* 155, 156.

⁶⁵ Life, knowledge, religion, friendship, play, aesthetic experience and practical reasonableness.

⁶⁶ Denise Meyerson, *Understanding Jurisprudence* (Routledge-Cavendish 2007) 39.

⁶⁷ Taormina and Gao (n 71) 157-161.

Traffickers assess the needs of potential victims and provide an illusion being able to satisfy their desires. In the case of commercial sex trafficking, traffickers lure their victims with the promise of romantic relationships or filial affection.⁶⁸ They may also entice their victims with the promise of financial security and friendship.⁶⁹ Once lured, traffickers perpetuate the ideology that they are fulfilling the victims' needs, despite subjecting them to threats, exploitation and torture.⁷⁰ This ultimately results in trauma-bonding, where the repeated exposure to abuse culminates in a familiarity bond between the trafficker and the victim.⁷¹ This distorted relationship thus makes it difficult to identify trafficking victims as they become psychologically attached to their captures and are unlikely to expose them.⁷²

This theory is relevant to the study as it sheds light on the weaknesses that perpetuate the cycle of trafficking. Understanding how victims are lured and kept in captivity also aids in the development of strategies necessary to end the cycle.

1.8.2. Fault and Objective Responsibility Theories on State Responsibility:

The theories on state responsibility provide guiding principles in determining whether a state can be held liable for a breach of an international obligation.

Initial views on state responsibility drew from the fault theory posited by *Hugo Grotius*.⁷³ The fault theory places liability on the state only where its acts cause harm; fault is an essential

⁶⁸ Jacquelyn CA Meshelemiah and Raven E Lynch, *The Cause and Consequence of Human Trafficking: Human Rights Violations* (The Ohio State University Pressbook 2019), 86-87.

⁶⁹ *ibid.*

⁷⁰ Sophia Palmacci, 'Education for Liberation: Community Workshops to Recognize Human Trafficking' [2021] Merrimack College Merrimack ScholarWorks, 19-20.

⁷¹ US Department of State (n 6) 21.

⁷² *ibid.*

⁷³ IRALR, 'State Responsibility in International Law' (*Indian Review of Adv*, 28 May 2021) <<https://www.iralr.in/post/state-responsibility-in-international-law>> accessed 31 January 2022.

requirement for international wrong.⁷⁴ The victim under this theory must prove the wrongful act of the offending state.⁷⁵ The fault theory also posits that there has to be an international legal wrong for a state to be found culpable in respect thereof. A proponent of this view was *Riccardo Luzzato* who opined that state responsibility can only arise where there is both an act attributable to the state (the psychological element) and a breach of a specific international norm (the normative element).⁷⁶

Luzzato's 'psychological-normative' fault based theory may have inspired the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 ("the Draft Articles"), which focuses on attribution to the state and breach of an international obligation as the bases for state responsibility. These are also referred to as the primary rules of state responsibility, which are addressed in detail at Chapter 2 of this paper.

One of the earliest critics of the fault based theory, espousing the objective responsibility theory, was *Dionisio Anziloti*. He posited that if a causal link is established between a state's lack of due diligence and the violation of an international right, it ought to be held responsible without proof of actual fault on its part.⁷⁷ Thus, a state would not only have an obligation to punish wrongful acts (both by state actors and private individuals), it would also have a duty to *maintain* international norms.⁷⁸ It is therefore the wrongfulness of the act that attributes liability, not intent or fault.

Anzioloti's approach may have influenced the inclusion of due diligence of states as a second consideration in the Commentaries on the Draft Articles. This is also referred to as the secondary rule of state responsibility, which is equally elucidated in Chapter 2 of this paper.

⁷⁴ René Provost (ed), *State Responsibility in International Law* (Ashgate/Dartmouth 2002).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

In assessing the above theories, *Riccardo Pisilo-Mazzeschi* advocated for the inclusion of due diligence in the primary rules of state responsibility. He contended that due diligence should not be given a secondary character but ought to be treated as an integral international obligation to ensure compliance.⁷⁹

The objective responsibility theory, forms the basis of this study. The paper opines that, though acts directly imputed to a state that result in international wrongful acts attract state responsibility, the said state would similarly be accountable for neglecting to maintain international obligations under its jurisdiction with due diligence.

1.9. Research Methodology

1.9.1. Research Design:

The paper employs the use of different research approaches. Firstly, the paper incorporated the use of the descriptive research.⁸⁰ The rationale for this approach was to enable the researcher to investigate the background and scope of trafficking practices, and to identify current trends and patterns of human trafficking in today's society. This enabled the researcher to gain an in-depth understanding of human trafficking in Kenya.

The study design also employed the use of qualitative and quantitative research methods.⁸¹ The use of qualitative research was necessitated by the need to understand the social phenomena of trafficking to determine its prevalence. It also helped to highlight the perceptions on existing

⁷⁹ *ibid.*

⁸⁰ 'The Four Types of Research Design — Everything You Need to Know' <<https://blog.hubspot.com/marketing/types-of-research-design>> accessed 14 September 2023. Descriptive research is a systematic study design that enables a researcher to gain an in-depth understanding of the research through observation and description of the subject date. Descriptive research helps to address the 'what/how/where' of a study.

⁸¹ Ranjit Kumar, *Research Methodology: A Step-by-Step Guide for Beginners* (3. ed., reprinted, Sage Publ 2012). Qualitative research aims to "understand, explain, explore, discover and clarify situations, feelings, perceptions, attitudes, values, beliefs and experiences of a group of people." Conversely, quantitative research is more rigid and focuses on the quantification and measurement of a phenomena.

challenges and the experiences of key personnel in the study. On the other hand, the use of quantitative research enabled the researcher to obtain numerical data on factors such as awareness level, successful convictions, among others.

1.9.2. Study Site:

The study was conducted in Nairobi County and its environs. Nairobi is Kenya's capital and is highly populous.⁸² It is a transit point for local and foreign nationals travelling both within and outside Kenya. The National Crime Research Centre identifies Nairobi as a renowned transit and destination area for trafficking, thus making it a significant study site for the research.⁸³

1.9.3. Study Population:

The target population for the study were male and female adults in Nairobi. This included persons who were either employed, unemployed or self-employed working in the public and private sectors.

1.9.4. Sample Size:

A sample size of 117 respondents was pooled from the target population, with 100 respondents being general members of the public (general respondents) and 17 respondents being key informants.

The key informants included representatives from Non-Government Organizations (NGOs) dealing with human trafficking, i.e. the Counter Human Trafficking Trust East Africa (CHTTEA), Trace Kenya and the African Network for the Prevention and Protection against Child Abuse and

⁸² '2019 Kenya Population and Housing Census' (Kenya National Bureau of Statistics 2019).

⁸³ Stephen Masango Muteti, 'The Problem of Human Trafficking in Kenya' (National Crime Research Centre 2022) <chrome-extension://efaidnbmninnibpcapjpcglclefindmkaj/https://www.crimeresearch.go.ke/wp-content/uploads/2022/11/Report-on-the-Problem-of-Human-Trafficking-in-Kenya.pdf>.

Neglect (ANPCCAN). A survivor of human trafficking running a survivor-led NGO and also serving as an official of the Global Fund to End Modern Slavery was also included in the study.

Other key informants in the study included an official from the Kenya National Commission on Human Rights (KNCHR), a director of a recruitment agency, an official from the Ministry of Labour & Social Protection, an official from the Directorate of Immigration Services, an official from Counter Trafficking in Persons Advisory Committee (CTIP Advisory Committee), 2 detectives Directorate of Criminal Investigations (DCI) Anti-Human Trafficking & Child Protection Unit (ATCPU) and the Transnational Organized Crime Unit (TOC), 3 Public Prosecutors, and 3 Magistrates from Kahawa Law Courts and Jomo Kenyatta International Airport (JKIA) Law Courts.

1.9.5. Sampling Methods:

Simple random sampling⁸⁴ was employed in the selection of general respondents, giving each member of the target population an equal opportunity to be selected for the study. However, purposive sampling⁸⁵ was used in the selection of key informants working in human trafficking-related fields. The researcher undertook these sampling methods to ensure that the research findings captured both public perceptions on human trafficking from members of the public and insight from persons with specialized knowledge on the area of study.

Snowball sampling⁸⁶ was also utilised as some key informants were referred to the researcher by other key informants. For instance, the official from KNCHR introduced the researcher to the

⁸⁴ Shona McCombes, 'Sampling Methods | Types, Techniques & Examples' (*Scribbr*, 19 September 2019) <<https://www.scribbr.com/methodology/sampling-methods/>> accessed 14 September 2023. Simple Random Sampling refers to the random selection of people to take part in a study.

⁸⁵ *ibid.* Purposive Sampling pertains to the use of a researcher's expertise to determine and specific individuals with background knowledge of the study.

⁸⁶ *ibid.* Snowball Sampling refers to the recruitment of other participants to the study by original participants selected in the research.

officials from the CTIP Advisory Committee and from the Ministry of Labour. Similarly, a Magistrate from the JKIA Law Courts referred the researcher to a fellow Magistrate in the same station who had vast expertise on human trafficking cases.

1.9.6. Data Collection Methods:

The information for the study was garnered from both empirical and secondary data. The empirical data was collected through interviews and questionnaires. Empirical data collection was necessitated by the need to obtain real-time data on trafficking in persons. On the other hand, secondary data was obtained from reading and analysing books, reports, journal articles, public statistical records, newspaper articles, websites and case law on human trafficking. Secondary data was resourceful as it provided a broader array of information on human trafficking from the views of a number of experts and professionals in the field.

1.9.6.1. Interviews:

Interviews were conducted with key informants for the researcher to obtain more information on human trafficking from the experts. In doing so, the researcher employed the use of semi-structured interviews.⁸⁷ This enabled the researcher to pose a series of questions while having the opportunity to further explore certain responses. Interview guides were prepared beforehand and were structured to address certain themes.

Requests and appointments for interviews were done through email and telephone calls. However, some key informants targeted for the study failed to respond to interview requests. The interviews were conducted from July 2022 to September 2023. The lengthy period was occasioned by the

⁸⁷ Tegan George, 'Semi-Structured Interview | Definition, Guide & Examples' (*Scribbr*, 27 January 2022) <<https://www.scribbr.com/methodology/semi-structured-interview/>> accessed 14 September 2023. Semi-structured interviews are a blend of structured and unstructured interviews. It allows a researcher to use a set of pre-determined questions that can be modified based on the responses received.

rescheduling of interviews (due to the researcher and the informants' busy schedules), the transfer of some informants to other duty stations and the length of time it took to obtain approvals to interview certain informants. For instance, obtaining approval from the judiciary to interview Magistrates proved to be an arduous task and was only successful upon the intervention of the researcher's supervisor.

Most interviews were conducted through virtual platforms such as Microsoft Teams and Zoom, which proved to be both cost-effective and time-saving. However, some interviewees preferred face-to-face interviews. As such, the researcher had to travel to Kahawa Law Courts, Kiambu County to have a face-to-face interview with a Magistrate. Similar meetings were also held with DCI detectives at the DCI headquarters along Kiambu Road and the DCI Academy at South C, Nairobi.

The interviews were intended to last between thirty minutes to one hour. However, most interviews exceeded the one-hour limit, with one interview extending for over 2 hours. This was because the key informants had much information to share on the topic. In an interview with the Magistrate from Kahawa Law Courts, the interview had to be paused at certain intervals to allow for the calling of court files demonstrating the procedure of handling human trafficking cases.

1.9.6.2. Questionnaires:

A questionnaire was issued to general respondents. It included a blend of open-ended, close-ended and multiple-answer questions. The open-ended questions allowed the respondents to provide detailed information whereas the close-ended questions restricted the respondents to provide 'yes', 'no' or 'I do not know' responses. Multiple-answer questions allowed the respondents to select all answers that were applicable to the questions posed.

The questionnaire was drafted using Google Forms.⁸⁸ The researcher preferred this method as it was free and easy to use. It also enabled the researcher to obtain real-time responses as the questionnaires were copulated by general respondents. The questionnaire created in this format was also easy to share online. The researcher forwarded them to general respondents via email and WhatsApp. The researcher also created a link to the questionnaire and shared the link on social platforms. The respondents were also encouraged to share the questionnaire broadly with third parties.

1.9.7. Data Analysis:

The qualitative data obtained from the study was assessed through content analysis.⁸⁹ This entailed the transcription of interview recordings by a transcriber hired by the research assistant. Recording interviews made it easier to engage in an interactive session. In addition, the transcriptions eased the data analysis process and ensured that the researcher did not misquote the interviewees. The transcribed recordings were subsequently reviewed by the researcher and the responses were coded to reflect topics and themes discussed in the paper. On the other hand, quantitative data obtained from the questionnaire was automatically integrated by Google Forms into a detailed Excel spreadsheet, and correlating figures (tables and charts) were created.

1.9.8. Ethical Considerations:

A primary consideration in the study was the ability of the respondents to participate voluntarily and to give information without inhibitions. The researcher thus had to ensure the anonymity of the general respondents and key informants. For instance, prior to the commencement of the

⁸⁸ ‘Google Forms: Online Form Builder for Business | Google Workspace’ <<https://workspace.google.com/lp/forms/>> accessed 14 September 2023.

⁸⁹ ‘Content Analysis’ (*Columbia University Mailman School of Public Health*, 3 August 2016) <<https://www.publichealth.columbia.edu/research/population-health-methods/content-analysis>> accessed 14 September 2023. Content analysis is a research tool that is used to identify certain patterns or themes in a study.

interviews, the researcher assured the interviewees of their anonymity. Further, the questionnaire shared allowed the general respondents to provide anonymous responses. As such, the identities of the general respondents and key informants have not been disclosed in the research paper.

Informed consent was also taken into account by the researcher. The background of the research and the manner in which the information would be used was communicated on the first page of the questionnaire. Interviewees were also informed of the nature of the research and notified that the information they provided would be used solely for the purpose of the study. The interviews were subsequently recorded with the consent of the interviewees.

The researcher also endeavoured to procure a research license from the National Commission for Science and Technology (NACOSTI). The license was issued for an initial period from June 2022 to June 2023. However, considering the lengthy data collection process, the research renewed the license for a further period that runs up to June 2024.

1.9.9. Limitations:

The study was limited to respondents in Nairobi County and may not be an accurate record of trafficking in persons in the entire state. Additionally, with the exception of one survivor interviewed, the researcher was unable to get first-hand information from victims. This, the researcher believes, is on account of the sensitive nature and intricacies of human trafficking that prevent victim identification or their willingness to speak out.

It was noted from the study that there existed some level of perceived bias among some general respondents and key informants. This was particularly noted as regards topics such as corruption. The researcher also got the impression that some key informants were not completely forthcoming to avoid implicating themselves.

Time constraints also significantly impacted the research process as some key informants failed to honour the scheduled times. In some cases, the cancellations and rescheduling were recurrent, calling on the researcher to exercise tremendous patience.

1.10. Chapter Breakdown

The study is discussed in five chapters. These are outlined below.

Chapter One: Overview of the Study. The chapter introduces the subject matter of the research. This includes stating the research problem, the aim of the study, outlining the questions and objectives of the research and the hypothesis to be investigated. It also highlights the literature reviewed by the researcher and the theoretical framework on which the research will be premised. The research methodology employed in the study, ethical considerations and limitations encountered have also been shared.

Chapter Two: Conceptual and Regulatory Framework on Human Trafficking. This chapter conceptualizes state responsibility and further expounds on the obligations of states by analysing the regulatory framework on human trafficking. The regulatory framework has been analysed (as best as possible) in a chronological sequence, commencing with those relating to slavery, forced labour, human rights and finally highlighting those specific to human trafficking.

Chapter Three: Status of Human Trafficking in Kenya. A thorough analysis of secondary data on human trafficking is presented in this chapter. By comparing the known root causes of human trafficking to the current state of affairs in Kenya, it draws attention to the problem of human trafficking in the nation. It also lists the forms that have been found in Kenya and discusses its underlying causes.

Chapter Four: Kenya's Compliance with the Regulatory Framework on Human Trafficking. This chapter examines the state of Kenya's response measures. It analyses empirical

data collected from the fieldwork conducted by the researcher, focusing on three paradigms of human trafficking namely protection, prevention and prosecution.

Chapter Five: Conclusions and Recommendations. This chapter draws conclusions on the extent of Kenya's responsibility for human trafficking in its jurisdiction. The chapter subsequently sums up the study by providing recommendations that may alleviate the current status.

CHAPTER TWO: CONCEPTUAL AND REGULATORY FRAMEWORK ON HUMAN TRAFFICKING

2.1. Introduction

The previous chapter laid down the road map of the study by, among others, identifying the literary works and theories that explain the notion of state responsibility and the position on human trafficking. The conceptualization of the doctrine of state responsibility is necessary to determine when a state's accountability for a wrongful act arises. On the other hand, the conceptualization of human trafficking from its initial indices as slavery to the practices witnessed in today's society helps to appreciate the development of the various legal instruments formulated over time to address the vice. It sheds light on the various scopes and definitions of human trafficking through time and draws us to the well accepted classification and elements as set out under the Palermo Protocol. It also provides a comparative analysis of measures employed by states through the years to address human trafficking and lays a basis as to why the 3Paradigm principle espoused by the Palermo Protocol has proven to be the most effective.

In conceptualizing the doctrine of state responsibility, this chapter discusses its primary and secondary rules (also referred to as the constitutive elements of state responsibility), as influenced by the fault and objective theories. From this, the chapter subsequently sheds light on one constitutive element, i.e. the normative framework on human trafficking, analysing its metamorphosis from historical times to the Palermo Protocol of today. It also highlights further obligations placed on states from regional conventions and finally sheds light on Kenya's national normative framework on human trafficking and related practices.

2.2. Doctrine of State Responsibility:

The doctrine of state responsibility was a concept developed in international law to protect the rights of aliens, and arises when a state commits an international wrong against another state.⁹⁰

State responsibility hinges upon the establishment of certain factors including the existence of an international legal obligation, the occurrence of acts attributable to the state and the occurrence of loss on account of the conduct of a state.⁹¹

The doctrine is now considered a general principle of international law, as was noted in the *Chorzow Factory (Germany v Poland) (Merits)*.⁹² In the said case, the PCIJ observed that it was ‘*not only a principle of international law but a great conception of law*’ whose breach would result in an obligation to make reparations. The apportionment of responsibility on states to prevent international law violations thus makes them liable to remedy wrongs arising from the breach of international laws.

The road map for determining the state responsibility is set by the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (“the Draft Articles”). The Draft Articles stipulate that “*every internationally wrongful act of a state entails the international responsibility of that state.*”⁹³ The Commentaries on the Draft Articles highlight that there are two rules for consideration, i.e. basic or primary rules and secondary rules.⁹⁴

⁹⁰ Danwood Mzikenge Chirwa, ‘The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable For Human Rights’ (2004) 5 Melbourne Journal of International Law.

⁹¹ Malcolm N Shaw, *International Law* (5. ed., 5. print, Cambridge Univ Press 2006).

⁹² Factory at Chorzow (Germany v. Poland), Merits, 1928 PCIJ (Ser.A) No.17

⁹³ International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, Article 1.

⁹⁴ International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (with Commentaries), General commentary (1).

2.2.1. Primary Rules:

The primary elements considered for a state to be said to have committed an international wrong are that the act or omission must be attributable to the state and it should constitute a breach of an international obligation of that state.⁹⁵

2.2.1.1. Attributable to the State:

Considering that states are abstract ideas, the actions or inactions of state agencies, including the legislative, judicial, and executive branches, are equivalent to the actions or inactions of the state itself.⁹⁶ It does not matter that the alleged breach may not amount to a contravention of the said state's internal laws.

In addition, a state is responsible under the Draft Articles for the acts or omissions of state agents and representatives, whether these acts or omissions are done in their official or private capacity,⁹⁷ are unauthorized, or are in excess of the authority granted.⁹⁸ This was seen in the case of *Estate of Jean-Baptiste Caire (France) v. United Mexican States*⁹⁹ where it was found that the government of Mexico was liable for the unauthorized torture and killing of a French national by a Mexican soldier (who demanded to be paid 5,000 Mexican dollars). The Commission held that, even though the soldier acted without orders and against the wishes of his commanding officer, the soldier acted in his capacity as a state officer and his actions were therefore attributable to the state of Mexico.

⁹⁵ Draft Articles (n1) Article 2.

⁹⁶ Ibid, Article 4(1).

⁹⁷ Draft Articles (n1) Article 4(2).

⁹⁸ Ibid Article 7.

⁹⁹ *Estate of Jean-Baptiste Caire (France) v. United Mexican States* 5 RIAA, p. 516 (1929); 5 AD, p. 146.

A state is equally responsible for the acts or omissions of non-state agents with apparent state authority who breach international law provisions.¹⁰⁰ Similarly, a state is responsible for the acts of private persons under their control.¹⁰¹ The notion behind these forms of attribution is that the breach could only have been actuated because of the person's official or apparent authority.¹⁰²

2.2.1.2. Breach of an International Obligation:

It is not enough for an act or omission to be attributable to a state. The act or omission also has to amount to a breach of an international obligation of the said state. A country's obligations under international law are determined by treaties or conventions it has ratified, international customary law, general principles of law recognized by civil nations, or other accepted sources of international law.¹⁰³ As such, any conduct that is attributed to a state but does not amount to a breach of an international obligation arising from the above sources of international law, will not attain the character of an international wrong.¹⁰⁴ Furthermore, there is no application of retrospective responsibility; that is, a state would not be held accountable for an act or omission that is attributed to it and that occurred prior to the state being bound by the obligation.

2.2.2. Secondary Rules:

The primary rules elucidated above demonstrate that a state can only be responsible for acts of its organs, officials, or persons acting under apparent state authority. However, private persons with no state authority primarily commit acts that facilitate human trafficking. A strict reliance on the primary rules would dictate the states ought not to be held liable for these unauthorized acts by private persons, as is the general rule. The implication of such an interpretation would be that

¹⁰⁰ Ibid, Article 5.

¹⁰¹ Ibid, Article 8.

¹⁰² Anne Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

¹⁰³ Statute of the International Court of Justice, Article 36(2).

¹⁰⁴ Gallagher (n 102).

where states are not directly involved in human trafficking (or where such involvement cannot be demonstrated) they would bear no obligation to remedy the harm arising from the international wrongs committed.¹⁰⁵

In recognition of this potential loophole, the Draft Articles place liability on states for their failure to prevent conduct of private persons that amount to an international wrong.¹⁰⁶ A state's failure to intervene in such circumstances is akin to its ratification of the wrongful acts of private persons. This was best demonstrated in the Tehran Hostages case; *US Diplomatic v Consular Staff in Tehran*.¹⁰⁷ The US Embassy in Tehran, Iran was attacked and eventually overrun by students. They proceeded to hold the occupants hostage and to appropriate property and archives belonging to the US. Though their actions were initially not sanctioned by the state of Iran, the ICJ observed that Iran's failure to intervene in the circumstances amounted to the state's ratification of the acts committed against the US. As such, the Court held that Iran had to make reparations for the harm suffered by the US.

Inference on responsibility for private actors may also be drawn from international human rights laws, which create positive obligations on states to not only refrain from certain violations but to also set up measures to prevent such violations.¹⁰⁸ The basis for this is that only the state can ensure the respect for human rights provided under the various treaties by imposing duties on individuals.¹⁰⁹ The above notion finds support in Kenyan law. In 2016, the Constitutional Court in the case of *Florence Amunga Omukanda & another v Attorney General & 2 others*¹¹⁰ held that Kenya had a positive obligation to prevent the violation of its citizen's rights during the 2007-2008

¹⁰⁵ *ibid.*

¹⁰⁶ Draft Articles (n1) Article 11.

¹⁰⁷ *US Diplomatic v Consular Staff in Tehran* (1980 ICJ Report 1993)

¹⁰⁸ Gallagher (n 102).

¹⁰⁹ *ibid.*

¹¹⁰ *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR

post-election violence. The Court noted that the state had the duty to *'take appropriate steps to safeguard the lives of those within its jurisdiction'*

The Palermo Protocol creates positive obligations on states to prevent, protect against, and prosecute human trafficking cases. It is only the positive action of a state of enacting supporting legislation and ensuring the enforcement thereof that will culminate in the ultimate curbing of human trafficking. This position is supported by the case of *Rantsev v Cyprus and Russian Federation*.¹¹¹ The state of Cyprus, despite being aware of *'artiste'* visas being used for purposes of sex trafficking, took no action to prevent it. Further, following the suspicious death of a Russian woman who had been sexually exploited in Cyprus, the said state failed to conduct adequate investigations. The ECHR held that both Russia and Cyprus, by virtue of their inaction to address the known irregular recruitment and their failure to carry out proper investigations, were responsible to the subsequent violations of the deceased's rights.

The secondary rules call for states to exercise some form of due diligence to prevent the commission of international wrongs by private actors within their territories and to address breaches appropriately when they arise.

2.3. The Normative Framework on Human Trafficking

Human trafficking is a cross-border phenomenon rather than just a domestic problem. To address the causes, mechanisms, and effects of human trafficking, efficient international and regional legal framework and coordinated worldwide strategies are needed. Since human trafficking is a uniquely transnational phenomenon, conceptions of and reactions to it are greatly influenced by

¹¹¹ *Rantsev v Cyprus and Russian Federation*, App no 25965/04, IHRL 3632 (ECHR 2010)

international law. The obligations of states to address human trafficking have thus been laid down in a number of international and regional treaties and conventions, as well as national statutes.

The character and scope of the regulatory framework on human trafficking has changed over the years, influenced primarily by globalization and changing worldviews on the inclusivity of human rights. An in-depth grasp of the state of international law on human trafficking today is made possible by an examination of the international treaties that impacted the creation and ratification of the Palermo Protocol. In order to examine existing methods with more knowledge and awareness, we must first understand how and why the anti-trafficking objective came to be. This is discussed in detail below.

2.4. International Conventions

2.4.1. Anti-Slavery Conventions

Slavery was an accepted feature in most societies for a long time.¹¹² A slave was considered a legal chattel over whom all rights of ownership could be exercised.¹¹³ Slavery often subsisted for the life tenure of the slave, with few instances where the slave was liberated after serving a given period of time.¹¹⁴ The tide began to change in the early 19th century with the abolitionist movements in Western Europe and the Americas.¹¹⁵ The abolitionists viewed slavery as a violation of inherent rights that accrued to all men and advocated for its abolition.¹¹⁶ This resulted measures

¹¹² Emily Iddings, 'The History of Slavery' (*Restavek Freedom*, 11 September 2018) <<https://restavekfreedom.org/2018/09/11/the-history-of-slavery/>> accessed 10 July 2022. The first recorded entries of slavery were in the Code of Hammurabi in Mesopotamia. The prominence of slavery however arose in the Middle Ages with conquered citizens transported as slaves to work in their captors' states. This continued in procession until the 'boom' in the 16th -19th Century that saw to the enslavement of Africans to work in the Americas and Europe (The Trans-Atlantic Slave Trade).

¹¹³ Britannica, 'Slavery | Definition, History, & Facts |' <<https://www.britannica.com/topic/slavery-sociology>> accessed 11 July 2022.

¹¹⁴ *ibid.*

¹¹⁵ Iddings (n 112).

¹¹⁶ Britannica (n 113).

by stated to criminalize slavery. Below are some of the laws enacted to address slavery and slavery-like practices.

2.4.1.1. International Agreement for the Suppression of the White Slave Traffic, 1904:

By the late 19th and early 20th centuries, most European countries had already established or were in the process of establishing colonies. This resulted in increased migration from Europe to respective colonies and the demand for prostitution to *'meet the needs of colonial troops.'*¹¹⁷ Though some went willingly, it was noted with concern that in a number of cases, women were procured through kidnapping, deceit or the use of force. This culminated in widespread moral condemnation by European states, pushing for the enactment of laws to address the problem.¹¹⁸

The legal instrument that was enacted to address the collective abhorrence to white slavery was the International Agreement for the Suppression of the White Slave Traffic of 1904. This Agreement was entered into by 12 European states for the criminalization of white slavery and the punishment of offenders. Signatory states could however denounce the Agreement by giving 12 months' notice of their intention to do so.¹¹⁹ Non-signatory states could also rely on the Agreement upon notifying the signatory states.¹²⁰

Emphasis was placed on the monitoring of means of transportation and the supervision of employment agencies to identify victims and potential victims.¹²¹ Identified victims were to be placed in public or private charitable institutions as they awaited repatriation to their countries of

¹¹⁷ Jean Allain, 'White Slave Traffic in International Law' (2017) 1 Journal of Trafficking and Human Exploitation 1 <<http://www.ingentaconnect.com/content/10.7590/24522775111>> accessed 12 June 2022.

¹¹⁸ *ibid.*

¹¹⁹ International Agreement for the Suppression of the White Slave Traffic, 1904, Article 8.

¹²⁰ *Ibid*, Article 7.

¹²¹ *Ibid*, Articles 2 and 6.

origin.¹²² Reparation costs were to be incurred by the victim or her family and, where this was not feasible, would be borne by her country of residence or nationality.¹²³

The Agreement, though a first step towards providing a regulatory framework for combatting human trafficking, failed to comprehensively address human trafficking. It was influenced by the racialized thinking of the era by failing to address trafficking of persons from other races. It also failed to address male trafficking, possibly as women were presumed to be more vulnerable to abuse. Additionally, acts of trafficking were limited to prostitution and other immoral purposes, which were not defined. Moreover, there were no obligations placed on member states to enact local laws that would facilitate enforcement action against traffickers.

This Convention has since been superseded by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others of 1949.¹²⁴

2.4.1.2. International Agreement for the Suppression of the White Slave Traffic, 1910:

To buttress the 1904 Agreement, the contracting states met in Paris in 1910 and enacted the 1910 Agreement.¹²⁵ Trafficking under the 1910 Agreement pertained to the procurement or enticement of white women and underage girls by fraud, violence or threat of violence, abuse of authority or by other compulsive means for immoral purposes or to gratify the passions of other people.¹²⁶ The Agreement further required its signatories to *inter alia* enact or amend existing national laws on trafficking offences, extradite persons accused of engaging in trafficking offences and

¹²² Ibid, Article 3.

¹²³ Ibid, Article 4.

¹²⁴ 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=ind&mtdsg_no=XVIII-12-a&chapter=18&clang=_en> accessed 3 September 2023.

¹²⁵ Allain (n 117).

¹²⁶ International Agreement for the Suppression of the "White Slave Traffic," 1904, Articles 1 and 2.

communicate with each other on convictions made on the said offences. The 1910 Agreement however had similar weaknesses to its predecessor as it is also singled out white female slavery.

This Convention has since been superseded by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others of 1949.¹²⁷

2.4.1.3. International Convention for the Suppression of the Traffic in Women and

Children, 1921:

The Convention identified both male and female children as victims of trafficking.¹²⁸ It also required states to enact legislation regulating employment agencies and to adopt measures regulating immigration.¹²⁹ The Convention also made it a requirement to warn women and children on various modes of transit on the risk of trafficking and indicating where they can seek assistance.¹³⁰

The Convention provided small gains with respect to the measures set in place to protect women and children, but once again failed to address the inclusion of men as possible trafficking victims and was similarly not coined to cater to the interest of non-Caucasian races. Similarly, this Convention has since been superseded in 1949.¹³¹

2.4.1.4. Convention to Suppress the Slave Trade and Slavery, 1926 (The Slavery Convention):

This was the first attempt by the international community to provide an all-inclusive law against slavery. The Convention was inspired by international abolitionist movements that sought to end

¹²⁷ 'United Nations Treaty Collection' (n 125).

¹²⁸ International Convention for the Suppression of the Traffic in Women and Children, 1921, Article 2.

¹²⁹ Ibid, Articles 6 and 7.

¹³⁰ Ibid, Article 7.

¹³¹ 'United Nations Treaty Collection' (n 125).

the enslavement and trade of Africans.¹³² The Convention provided significant measures that influenced subsequent conventions on the prevention of human trafficking. For instance, it defined slavery to include the exercising ownership of a person and slave trade to include acts related to the acquisition and enslavement of a person.¹³³ Its contracting parties were required to take up measures to suppress slavery by enacting laws and the providing mutual assistance.¹³⁴ It also recognized forced labour as an additional element of slave trade.¹³⁵

The Convention however failed to address slavery-like practices for which people are trafficked such as debt bondage. Further, state parties could opt not to apply its provisions in their territories/colonies and could also exercise the liberty to denounce the Convention,¹³⁶ thereby defeating its aim of ending slavery.

2.4.1.5. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956:

This instrument highlighted debt bondage as a slave-like practise. It defined debt bondage as the pledge of a debtor to indentured work for himself or others under his control (usually family members) as security for non-payment of a debt.¹³⁷ Practices such as serfdom,¹³⁸ servile marriage,¹³⁹ and child servitude were also prohibited.¹⁴⁰ With particular regard to servile marriage, member states were called upon to establish appropriate minimum ages for marriage and the

¹³² Jean Allain, 'Slavery Convention' United Nations Audiovisual Library of International Law 8.

¹³³ The Slavery Convention, Article 1.

¹³⁴ Ibid, Articles 2 and 4.

¹³⁵ Ibid, Article 5.

¹³⁶ Ibid, Articles 9 and 10.

¹³⁷ Supplementary Convention on the Abolition of Slavery 1956, Article 1(a).

¹³⁸ Ibid, Article 1(b) defines serfdom as the status given to a person who renders services on another's land and is unable to or is prohibited from changing such status.

¹³⁹ Ibid, Article 1(c) defines servile marriage to include the forceful marriage of a woman by her family, clan or husband for monetary compensation or wife inheritance.

¹⁴⁰ Ibid, Article 1(d) prohibits the delivery of a child by his parents or guardians to a person for his exploitation.

requirement of consent.¹⁴¹ The Convention also criminalised the practice of slave marking, e.g. through branding and mutilation,¹⁴² and contracting parties were prohibited from making reservations to the Convention.¹⁴³

2.4.2. Anti-Prostitution and Gender Discrimination Conventions

The precursor to the ban of slave trade was the international community's disapproval of the use of women for '*immoral purposes*', mainly prostitution. Despite the enacted provisions that ended white slave trade for such purposes and all forms of slavery, there was still need to address this issue as women and young girls remained vulnerable to exploitation for sexual purposes. This was facilitated by factors such as cultural practices and gender discrimination that made women and young girls susceptible to being trafficked. Consequently, the following conventions were set up:

2.4.2.1. Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1949:

This Convention sought to bolster the 1904 and 1910 Conventions. It prohibited all forms of prostitution and further outlawed the exploitation of women for prostitution even with their consent.¹⁴⁴ Voluntary prostitution was therefore not acceptable. The Convention further criminalized the maintenance and financing of brothels and required contracting states to enact laws prohibiting prostitution.¹⁴⁵

However, unlike its predecessors, this Convention did not gain much support from a number of European states such as the Netherlands, Switzerland, Austria, Belgium and Germany where

¹⁴¹ Ibid, Article 2.

¹⁴² Ibid, Article 5.

¹⁴³ Ibid, Article 9.

¹⁴⁴ Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others, 1949, Article 1.

¹⁴⁵ Ibid, Articles 2 and 4.

voluntary prostitution is legalized.¹⁴⁶ The Convention raises a question that has sparked much debate to this day: has the legalisation of prostitution for those who voluntarily choose to work in the commercial sex industry increased demand for sex trafficking, or has criminalization of prostitution led to unscrupulous methods to provide commercial sex services through trafficking?

2.4.2.2. Convention on the Elimination of all forms of Discrimination Against Women

(CEDAW) 1979:

Trafficking in persons is a crime that preys on women and girls as they are often side-lined by their communities in political, economic, social and cultural fields. Practices such as preference of enrolment of boys to school, child marriage, gender violence, unequal employment opportunities, discriminative employment, unequal pay for equal work, stereotypical roles for women and girls, among others, expose women and girls to trafficking. Therefore, the purpose of this Convention was to safeguard women against any kind of sex-based discrimination, distinction, exclusion, or limitation. .¹⁴⁷

CEDAW *inter alia* obliges state parties to enact legislation to eliminate prejudices, customs and other practices that perpetuate the inferiority of one sex over the other and those that place stereotypical roles for men and women.¹⁴⁸ Additionally, it stipulates that state parties must take all necessary actions, such as passing laws, to stop prostitution and other forms of trafficking in women.¹⁴⁹ State parties are also required to enact legislation to eliminate discrimination against women with respect to education,¹⁵⁰ to eliminate discrimination in employment,¹⁵¹ to remunerate

¹⁴⁶ ‘Countries and Their Prostitution Policies - Prostitution - ProCon.Org’ (*Prostitution*) <<https://prostitution.procon.org/countries-and-their-prostitution-policies/>> accessed 12 June 2022.

¹⁴⁷ CEDAW, Articles 2 and 3.

¹⁴⁸ Ibid, Article 5 (a).

¹⁴⁹ Ibid, Article 6.

¹⁵⁰ Ibid, Article 10.

¹⁵¹ Ibid, Article 11 (1) (b).

men and women equally based on the type and value of their work,¹⁵² to eliminate discrimination against women on marriage and family matters e.g. by ensuring that they have equal right to enter into and dissolve marriages and that such marriages have be with free consent, among other provisions.¹⁵³

Understandably, the Convention's key focus was on the amelioration of the status of women in their respective states, but it failed to proffer substantive provisions on measures to be taken by states to deal with the trafficking of women.

2.4.3. Conventions Against Forced Labour

Human trafficking is not only restricted to the trafficking of women and girls for sexual exploitation but also for the provision of forced labour. In fact, more men and young boys identify as victims of this form of trafficking.¹⁵⁴ There was therefore need to enter into suppression conventions that would address trafficking in persons for purposes of forced labour. The international community, through the International Labour Organisation (hereinafter "ILO"), paved the way for the following conventions that strive to suppress and end all forms of forced labour.

2.4.3.1. Convention Concerning Forced or Compulsory Labour 1930 (No. 29):

The Convention was the first international instrument that sought to address the issue of forced labour. Most of its provisions were deleted pursuant to the establishment of the Protocol to the Forced Labour Convention of 2014. However, a key provision of the Convention is the definition of the term 'forced labour'. Any form of work to which a person did not offer himself voluntarily

¹⁵² Ibid, Article 11 (1) (d).

¹⁵³ Ibid, Article 16.

¹⁵⁴ 'Trafficking in Persons For The Purpose of Forced Labour' [2020] The Inter-Agency Coordination Group against Trafficking in Persons 8 <https://icat.un.org/sites/g/files/tmzbd1461/files/publications/20-02107_icat_brief_9_ebook.pdf> accessed 11 July 2022. 82% of men and 50% of boys are trafficked for forced labour.

and for which a penalty is imposed amounts to forced labour.¹⁵⁵ This however does not include work done under compulsory military service, normal civil obligations, prison conviction and cases of emergencies (war and natural disasters).¹⁵⁶ The Convention also requires member states who ratify it to enact laws to punish acts of forced labour.¹⁵⁷

2.4.3.2. Convention Concerning the Abolition of Forced Labour 1957 (No. 105):

This Convention solely seeks to highlight forms of forced labour that were not addressed by the Forced Labour Convention of 1930. These include employing forced labour for economic development, labour discipline, punishing strike participants, and utilising forced labour as a tool for social, racial, religious, or national discrimination.¹⁵⁸ Ratifying states are similarly required to enact local laws prohibiting the aforementioned acts.¹⁵⁹

2.4.3.3. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (No. 182):

The establishment of this Convention was the first step by the international community in recognizing that children fell victim to compulsory labour, most of which is harmful to their development, and reflected the universal condemnation of such acts.

The Convention defines the worst forms of child labour to include slavery and slavery-like practices, child trafficking, debt bondage, serfdom, forced labour, forced recruitment in armed conflict, child prostitution and pornography, use of children for the production and trafficking of drugs, and any work that is likely to harm the health, safety and morals of a child.¹⁶⁰ In addition to

¹⁵⁵ Convention Concerning Forced or Compulsory Labour 1930 (No. 29), Article 2 (1).

¹⁵⁶ Ibid, Article 2(2).

¹⁵⁷ Ibid, Article 25.

¹⁵⁸ Convention concerning the Abolition of Forced Labour (No. 105), Article 1.

¹⁵⁹ Ibid, Article 2.

¹⁶⁰ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (No. 182), Article 3.

the enactment of national laws to prohibit such acts, member states to the Convention are required to work with employers' and workers' organisations to monitor the implementation of the provisions of the Convention.¹⁶¹

2.4.3.4. Worst Forms of Child Labour Recommendation 1999 (No. 190):

The Recommendation supplements and is applied in conjunction with Convention No. 182.¹⁶² It sets out the aims of the programs referred to under Article 6 of Convention No. 182 to include the identification and denunciation of certain forms of child labour, the rehabilitation of children, among others.¹⁶³ The Recommendation also provides an extensive definition of hazardous work that may affect children These include work that exposes children to psychological, sexual or physical abuse, working in dangerous environments such as underground, at dangerous heights, with dangerous machinery among others.¹⁶⁴

The Recommendation encourages ratifying states to compile detailed information and statistical data on child labour,¹⁶⁵ to create national mechanisms that monitor the implementation of laws on the prohibition of worst forms of child labour,¹⁶⁶ and to enhance international cooperation and assistance for the elimination of worst forms of child labour, among other provisions.¹⁶⁷

¹⁶¹ Ibid, Articles 4 and 5.

¹⁶² Worst Forms of Child Labour Recommendation 1999 (No. 190), Article 1.

¹⁶³ Ibid, Article 2.

¹⁶⁴ Ibid, Article 3.

¹⁶⁵ Ibid, Articles 5(1), 6 and 7.

¹⁶⁶ Ibid, Article 8.

¹⁶⁷ Ibid, Article 16.

2.4.3.5. Protocol to the Forced Labour Convention of 2014:

This instrument seeks to address the shortcomings of the 1930 Convention. It denotes the need to review the measures in place on forced labour in light of the changes brought on by globalization that have broadened the forms of abuse that victims endure.¹⁶⁸

On the prevention of forced and compulsory labour, the Protocol provides that ratifying states should *inter alia* educate people (particularly vulnerable groups) and employers, develop national laws and policies on forced and compulsory labour, ensure that legislation on forced labour covers all workers in all economic sectors, strengthen labour inspection services responsible for the implementation of legislation on forced labour, and address the causal factors that heighten the risk of forced labour.¹⁶⁹ Further, in recognition of the transnational nature of labour trafficking, member states are required to cooperate with each other to prevent and eliminate forced and compulsory labour practices.¹⁷⁰

Member states are also encouraged to protect victims from exploitative practices.¹⁷¹ They are also obliged to ensure that victims of labour trafficking have access to appropriate remedies and compensation.¹⁷² The Protocol further prohibits countries from punishing victims of through prosecution or imposition of penalties for unlawful acts they may have been compelled to carry out.¹⁷³

¹⁶⁸ Protocol to the Forced Labour Convention of 2014, Preamble.

¹⁶⁹ Ibid, Articles 1 and 2.

¹⁷⁰ Ibid, Article 5.

¹⁷¹ Ibid, Article 2(d)

¹⁷² Ibid, Article 4(1).

¹⁷³ Ibid, Article 4(2).

2.4.4. Human Rights Conventions

Human trafficking's exploitative nature typically reflects a flagrant violation of a plethora of fundamental freedoms and rights. These include, among other things, the freedom from torture and cruel treatment, the freedom from slavery and acts that resemble slavery, the right to privacy, and the freedom of movement. A number of conventions and declarations were made to address the vice from a human rights perspective in recognition of the universality of such rights. Among them are the following:

2.4.4.1. Universal Declaration of Human Rights (UDHR) 1948:

The UDHR was drafted after World War II and represents the first global expression of rights to which all human beings are inherently entitled. It provides *inter alia* that all human beings “*are born free and equal in dignity and rights*”,¹⁷⁴ and that “*everyone has the right to life, liberty and security of person.*”¹⁷⁵ Victims of trafficking are denied of these rights as they are exploited in a manner that deprives them of these basic liberties. The UDHR thus seeks to protect them from any form of exploitation that will deprive them of their innate rights. Torture, cruel and inhumane or degrading treatment, often faced by victims of trafficking on route or in the countries of destination, are prohibited by this declaration.¹⁷⁶ Acts of compulsory labour without equal pay for equal work are equally prohibited.¹⁷⁷

Certain rights outlined in the UDHR can also be considered with regard to the treatment of trafficking victims by states. These include the right to seek and enjoy asylum from persecution,¹⁷⁸

¹⁷⁴UDHR, Article 1.

¹⁷⁵ Ibid, Article 3.

¹⁷⁶ Ibid, Article 5.

¹⁷⁷ Ibid, Article 23{2}.

¹⁷⁸ Ibid, Article 14(1).

right to non-discrimination,¹⁷⁹ right of recognition as persons and equal treatment before the law,¹⁸⁰ right to protection from arbitrary arrest, detention or exile,¹⁸¹ and the right to effective remedies before competent national tribunals and to a fair hearing.¹⁸²

The only drawback of the UDHR is that it does not establish legal obligations for states to observe it because it is not a legally binding document.

2.4.4.2. International Convention on the Elimination of All Forms of Racial Discrimination 1965:

Racism has been (and continues to be) a thorn in the moral fabric of human society. Systemic racism has impacted the measures taken by states in their actions in the fight against human trafficking. As noted by *Siobhán Mullally*, the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children: *“Instead of being identified as victims of a serious human rights violation, victims are being arrested, detained, denied assistance and protection and even forcibly returned to countries of origin because of racial profiling and discrimination at border crossings and in criminal justice systems.”*¹⁸³ Thus, the purpose of the Convention is to address the issue of racial discrimination, which directly contributes to the facilitation of human trafficking.

Racial discrimination is defined under the Convention to include ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

¹⁷⁹ Ibid, Article 2.

¹⁸⁰ Ibid, Articles 6 and 7.

¹⁸¹ Ibid, Article 9.

¹⁸² Ibid, Articles 8 and 10.

¹⁸³ ‘Racism and Xenophobia Put Human Rights of Human Trafficking Victims at Risk – UN Expert’ (*OHCHR*) <<https://www.ohchr.org/en/press-releases/2021/07/racism-and-xenophobia-put-human-rights-human-trafficking-victims-risk-un>> accessed 25 September 2022.

footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁸⁴ The Convention places a number of obligations on member states in the prohibition of racial discrimination as outlined. These include the requirement that member states enact laws that condemn all forms racial discrimination, and that they ensure that all persons within their jurisdictions are treated equally.¹⁸⁵

2.4.4.3. International Covenant on Civil and Political Rights (ICCPR) 1966:

The ICCPR's key operative is the recognition of civil and political rights and freedoms of all persons.¹⁸⁶ Civil and political rights are considered first-generation human rights as they are reflective of the basic foundations that enable the enjoyment of all other rights.¹⁸⁷ The ICCPR *inter alia* provides for the right to life, the protection of all persons from inhuman and degrading treatment or punishment and slavery and servitude, the prohibition of forced or compulsory labour, the right to consensual marriage, equal treatment and equal protection of the law, among others.¹⁸⁸

2.4.4.4. International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966:

The ICESCR primarily addresses second-generation human rights, i.e. those promoting equality of persons at the socio-cultural and economic levels.¹⁸⁹ The Convention advocates for the “*right to favourable and just conditions of work which includes the right to fair wages and safe working conditions, the protection of children and the youth from economic exploitation, the right to the highest attainable standard of physical and mental health, the right to take part in cultural life.*”¹⁹⁰

Victims of human trafficking are often placed in such dangerous and exploitative circumstances

¹⁸⁴ International Convention on the Elimination of All Forms of Racial Discrimination 1965, Article 1(1).

¹⁸⁵ Ibid, Articles 2-4, 5 (a) and 6.

¹⁸⁶ ICCPR, Preamble.

¹⁸⁷ ‘The Generations of Human Rights – UAB Institute for Human Rights Blog’ <<https://sites.uab.edu/humanrights/2019/01/14/the-generations-of-human-rights/>> accessed 25 September 2022.

¹⁸⁸ Ibid, Articles 6(1), 7, 8, 23 (3) and 26,

¹⁸⁹ ‘The Generations of Human Rights – UAB Institute for Human Rights Blog’ (n 190).

¹⁹⁰ ICESCR, Articles 7, 10(3), 12 (1) and 15 (1) (a).

as to deprive them of these rights. By the said provisions, it can be construed that the ICCPR seeks to target the commercial exploitation of trafficked persons as they do not get to enjoy the benefits of their labour and suffer detrimental consequences that hinder the full realization of their socio-cultural rights.

2.4.4.5. The Convention against Torture and other Cruel, Inhuman or Degrading

Treatment or Punishment 1984:

The Convention is key as it outlines acts that amount to torture, thereby bringing into perspective the forms of subjugation that trafficked victims usually endure. Torture is defined to include intentional acts inflicted on a person either physically or mentally that occasions severe pain or suffering.¹⁹¹ Such an act is done with the intention of obtaining a confession, coercing or intimidating a person, punishing a person for something done or for which he is suspected to have done.¹⁹² An obligation is placed on member states to the Convention to criminalize all acts of torture and to give appropriate penalties with respect to the gravity of the offence.¹⁹³

The Convention provides that the state where the act of torture has taken place has jurisdiction to prosecute the alleged offender.¹⁹⁴ Further, acts of torture are also considered as extraditable offences, thereby giving member states liberty to extradite persons alleged to have engaged in such acts to any requesting state.¹⁹⁵ These provisions are instrumental as they enable the prosecution of traffickers by either the state where they tortured their victims (transit or destination states) or by

¹⁹¹ The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 1(1).

¹⁹² Ibid.

¹⁹³ Ibid, Article 4.

¹⁹⁴ Ibid, Article 7.

¹⁹⁵ Ibid, Article 8.

the states seeking to have the traffickers extradited for prosecution or service of sentences (origin states).

2.4.4.6. Convention on the Rights of Persons with Disabilities 2006:

Vulnerable persons that fall victim to human trafficking include those with physical or mental disabilities. They are often exposed to trafficking in the form of forced begging and sexual exploitation.¹⁹⁶ This Convention highlights the need to protect the human rights and fundamental freedoms of persons with disabilities, which extends to their protection from the end purposes of trafficking.

The Convention defines discrimination on the basis of disability as the distinction, exclusion or restriction of persons with disabilities intended to prevent them from enjoying or exercising their basic rights in political, socio-cultural and economic fields.¹⁹⁷ The Convention entails similar provisions to the ICCPR and ICESCR by outlining the rights to be protected by states, including the right to life, freedom from exploitation, equality and non-discrimination, among others.¹⁹⁸

2.4.5. Children's Rights Conventions:

Children fall prey to a number of crimes on account of their vulnerability. In recognition of this, and in a bid to protect them, the international community entered into the conventions outlined below.

¹⁹⁶ The European Disability Forum, 'Position Paper on Combatting Trafficking in Persons with Disabilities' (2022) Directive 2011/36/EU <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.edf-feph.org/content/uploads/2022/03/EDF-position-on-combatting-human-trafficking-%E2%80%93-review-of-EU-rules-1.pdf> accessed 25 September 2022.

¹⁹⁷ Convention on the Rights of Persons with Disabilities 2006, Article 2.

¹⁹⁸ Ibid, Articles 10, 12, 15 and 17.

2.4.5.1. Convention on the Rights of the Child (CRC) 1989:

The CRC advocates for state parties to protect children from exploitative or hazardous work, or work that may interfere with the child's education or cause psycho-social problems.¹⁹⁹ The CRC also provides that states should take all appropriate measures to protect children from sexual exploitation and abuse. In addition, the CRC stipulates that state parties must support the social and physical reintegration of children who have experienced any of the following: neglect, exploitation, abuse, torture, or any other kind of cruel, inhuman, or degrading treatment or punishment, as well as armed conflict.²⁰⁰

2.4.5.2. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000:

The Optional Protocol was necessitated by the increased international traffic of children for sale, prostitution and pornography.²⁰¹ It explains each of these practices in more detail and adds that selling children also entails offering them up for forced labour, sexual exploitation, or organ harvesting.²⁰² The Optional Protocol's member states are required to enact laws that prohibit these practices.²⁰³ They are also mandated to take appropriate measures to ensure that the adoption of children is done in conformity with applicable international laws to protect children from such unlawful acts.²⁰⁴ The best interest of the child is also to be considered at all times.²⁰⁵

¹⁹⁹ CRC, Article 32.

²⁰⁰ Ibid, Article 39.

²⁰¹ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000, Preamble.

²⁰² Ibid, Article 3(1) (a) (i).

²⁰³ Ibid, Articles 1 and 3.

²⁰⁴ Ibid, Article 3(5).

²⁰⁵ Article 8 (3).

2.4.6. The Palermo Protocol of 2000:

The Palermo Protocol addresses human trafficking, which involves the trafficking of men as well, with a special focus on women and children. The main purpose of the Protocol is to prevent human trafficking, protect and assist victims of human trafficking and to prosecute persons for the offences pertaining to human trafficking.²⁰⁶ The protocol deals with human trafficking at a transnational level.²⁰⁷

The Palermo Protocol is distinct from previous conventions and treaties as it has provided an expansive definition for the term human trafficking. Three key elements are presented as features of the crime; i.e. **the acts, means and purpose of trafficking**. The acts include *'recruitment, transportation, transfer, harbouring or receipt of persons.'* The means include the use of *'threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.'* The purpose is the *'exploitation of people for prostitution or other forms of sexual exploitation, forced labour or services, slavery or similar practices to slavery, servitude or removal of organs.'*

It is also noteworthy that the consent of the victim is irrelevant in trafficking cases. This is because consent is more often than not, procured by the means outlined above. Therefore, even where a victim has consented to a particular activity such as prostitution, they cannot be deemed to have consented to sexual exploitation. There can be no consent to exploitation.

The Palermo Protocol further provides that the recruitment, transportation, harbouring or receipt of children for the purpose of exploitation shall be considered trafficking in persons, even if the

²⁰⁶Palermo Protocol, Articles 2 and 4.

²⁰⁷ Ibid, Article 4.

means used are not set out in Article 3(a). This highlights the special vulnerabilities of children, as a variety of means can be employed to exploit children for trafficking purposes.

The Palermo Protocol is also distinct as it introduces the **3 Paradigm** approach in addressing human trafficking, i.e. *protection, prosecution and prevention*,

a) Protection:

State parties to the Palermo Protocol are required to pass domestic legislation protecting the identity and privacy of trafficking victims while they are being sued. In addition, they are mandated to take steps to support the victims of human trafficking in terms of their physical, psychological, and social rehabilitation. These measures include the cooperation of state organs with NGOs and other elements of civil society to provide victims of trafficking in persons with appropriate housing, counselling and information, medical, psychological and material assistance, employment, educational and training opportunities.²⁰⁸ It encourages state parties to give victims information on the relevant court and administrative proceedings and should be provided with a legal counsel.²⁰⁹ The state parties are also required to set up measures that will see to the compensation of victims.²¹⁰

States are additionally required to take measures to allow victims of trafficking to remain in the state, either temporarily or permanently.²¹¹ They are obligated to ensure the physical safety of trafficking victims while they are on their soil.²¹² States are also encouraged to repatriate victims to their home states,²¹³ save that their deportation would not be advisable where there are

²⁰⁸ *ibid*, Article 6 (1), (3) and (4).

²⁰⁹ *ibid*, Article 6 (2) (b).

²¹⁰ *ibid*, Article 6 (6).

²¹¹ *ibid*, Article 7.

²¹² *ibid*, Article 6 (5).

²¹³ *ibid*, Article 8.

reasonable grounds to suspect that such return would present a risk to the trafficked person or his/her family.

b) Prosecution:

Signatory states to the Palermo Protocol are required to set up legislative measures, extensive policies, initiatives, and other safeguards against human trafficking.²¹⁴ It encourages the criminalization of human trafficking in national laws, requiring state parties to make human trafficking illegal, punish offenders, and encouraging cooperation between States Parties in order to achieve those goals. For instance, this is achieved by promoting regional and national projects and facilitating collaboration in the fight against crime.

c) Prevention:

The Palermo Protocol states that countries are required to undertake social and economic initiatives to prevent and combat trafficking in persons, strengthen measures to alleviate the factors that make people vulnerable to trafficking, and to enact laws to prohibit human trafficking and thereby discouraging the practice.²¹⁵ Furthermore, the Protocol advocates for inter-agency cooperation among states through the exchange of information. This should be done so as to determine whether people attempting to cross international borders are victims or perpetrators of trafficking, to determine the nature of their travel documents and also to identify the means and methods employed by organised criminal organisations to traffic people.²¹⁶

Countries are also required to strengthen their institutional frameworks in the prevention of trafficking in persons through initiatives such as training. This training should focus on methods

²¹⁴ *ibid*, Preamble and Article 5.

²¹⁵ *Ibid*, Article 9.

²¹⁶ *Ibid*, Article 10 (1).

used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers.²¹⁷

Loopholes in the Palermo Protocol

Though the Palermo Protocol has proven instrumental in the unification of all previous trafficking instruments on human trafficking, it is not without some glaring loopholes. Firstly, the Protocol applies only to offences that are transnational/transboundary and fails to address internal trafficking. Traffickers and other offenders may thus rely on this as a defence for trafficking acts committed within a country's borders, relying on the maxim "*nullum crimen sine lege/ nulla poena sine lege.*"²¹⁸ The Protocol also fails to provide a clear method of identification of victims.²¹⁹ This has led to the treatment of victims of trafficking as illegal migrants thus failing to provide them with the necessary protection. Victims of trafficking thus, more often than not, face detention, arrest/prosecution as illegal migrants and deportation to their home countries. Moreover, the Protocol does not make juristic persons liable for acts of human trafficking.

Additionally, even though the Palermo Protocol requires state parties to protect victims of trafficking, the same protection is not extended to their families.²²⁰

²¹⁷ Ibid, Article 10 (2).

²¹⁸ 'No crime without law/ no punishment without a law'; no one can be prosecuted or sanctioned for an act not proscribed by the law applicable at the moment of the infringement.

²¹⁹ E. Pearson, *Half-hearted protection: What does victim protection really mean for victims of trafficking in Europe?*, Oxfam Great Britain, 2002, 56.

²²⁰ Louise Shelley., 'Human Security and Human trafficking', *Human Trafficking and Human Security*, edited by A. Jonsson, Routledge: New York and London, 2008, 14.

2.5. Regional Conventions

2.5.1. African Charter on Human and People’s Rights 1981:

The African Charter on Human and People’s Rights provides that every individual shall have the right to respect the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.²²¹ The Charter also provides that human beings are inviolable and, as such, every human being is entitled to respect for his life and integrity. No one may be arbitrarily deprived of this right.²²²

It is noteworthy that the Charter merely enumerates general international provisions on human rights as denoted by international instruments but fails to specifically address human trafficking.

2.5.2. African Charter on the Rights and Welfare of the Child 1990:

The Charter strives to offer better protection for the African child. It obligates member states to protect the African child from all forms of economic exploitation.²²³ It also provides for the protection of the African child from sexual exploitation and sexual abuse.²²⁴ Similarly, this instrument fails to address human trafficking in the context of children, which would have been necessary noting that children comprise the highest ratio of trafficked persons.²²⁵

²²¹ African Charter on Human and People’s Rights, Article 5.

²²² Ibid, Article 4.

²²³ African Charter on the Rights and Welfare of the Child, Article 15.

²²⁴ Ibid, Article 27.

²²⁵ UNICEF and Inter-Agency Coordination Group against Trafficking, ‘Children Account for Nearly One-Third of Identified Trafficking Victims Globally’ <<https://www.unicef.org/turkiye/en/press-releases/children-account-nearly-one-third-identified-trafficking-victims-globally>> accessed 7 November 2023.

2.5.3. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2005:

According to the Protocol, state parties must take appropriate and effective action to stop and denounce women's trafficking, bring legal action against those who engage in it, and safeguard the most vulnerable women.²²⁶ In addition, it offers victims of violence rehabilitation as well as protection against all forms of violence.²²⁷ The Protocol appears to be the first instrument in Africa that places positive obligations on states to address the trafficking of women in their respective jurisdictions. It is noteworthy that the Convention followed the enactment of the Palermo Protocol and may thus have drawn inspiration from the said instrument.

2.5.4. Council of Europe Convention on Action against Trafficking in Human Beings 2005:

The parties to this Convention are the member states of the Council of Europe. The Convention strives to prevent and combat human trafficking while advancing gender equality.²²⁸ Unlike the Palermo Protocol, the Convention prohibits both internal and transnational trafficking in persons.²²⁹

Member states to the Convention are required to work together by providing mutual assistance to prevent human trafficking, which includes the development of effective policies and programs, gender mainstreaming, working with civil societies and non-government organizations, among others.²³⁰ They must also implement awareness-raising and educational initiatives to deter the market for trafficked individuals.²³¹

²²⁶ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, Article 4(2) (g).

²²⁷ Ibid, Article 4(2) (f).

²²⁸ Council of Europe Convention on Action against Trafficking in Human Beings 2005, Article 1(1) (a).

²²⁹ Ibid, Article 2

²³⁰ Ibid, Article 5

²³¹ Ibid, Article 6

In further discouraging demand, the Convention requires state parties to consider the criminalization of the use of services derived from the exploitation of trafficked persons.²³² Furthermore, member states must pass national legislation outlawing human trafficking while making sure that victims are not prosecuted for their involvement in illegal activity.²³³ Additionally, victims of trafficking are not to be expelled from the states where they are found until the completion of the victim identification process and the provision of assistance.²³⁴

2.5.5. South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002:

The Convention aims to promote cooperation among its member states to effectively curb human trafficking in the South Asian Region.²³⁵ Member states are required to penalize trafficking offences, including the financing or abetting of such offences, within their national jurisdictions and to provide appropriate penalties taking into account the gravity of the offences.²³⁶ National courts are also required to consider aggravating circumstances when convicting traffickers, e.g. their participation in an organized criminal group, use of violence, trafficking of children, whether the trafficker holds public office, among others.²³⁷

The Convention also advocates for mutual legal assistance among states with respect to *inter alia* information sharing, search and seizure, and assistance in investigations.²³⁸ It also encourages member states to enter into extradition treaties for traffickers.²³⁹ Member states are also required

²³² Ibid, Article 19

²³³ Ibid, Articles 18-26.

²³⁴ Ibid, Article 10.

²³⁵ South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Article II.

²³⁶ Ibid, Article III.

²³⁷ Ibid, Article IV.

²³⁸ Ibid, Article VI

²³⁹ Ibid, Article VII

to provide mutual assistance in victim repatriation while ensuring that their rights are safeguarded.

240

2.6. National Legislation

Prior to the year 2010, Kenya lacked comprehensive anti-human trafficking laws. Nonetheless, forms of exploitation were (indirectly) addressed by separate legislation such as the Sexual Offences Act of 2006 and the Employment Act of 2007. In 2010, the promulgation of the Constitution of Kenya culminated in the codification of basic human rights and subsequently paved the way for the Counter Trafficking in Persons Act of 2010 and related statutes discussed at length below.

2.6.1. The Sexual Offences Act 2006:

The Act was enacted to address numerous forms of sexual abuse and related violations. The Act prohibits crimes that form the end purposes of trafficking for sexual exploitation. These include rape, defilement, compulsion or inducement of persons to perform indecent acts, child sex tourism, child prostitution, child pornography, sexual communication with children, promotion of sexual offences against children, exploitation of prostitution, and prostitution of persons with mental disabilities²⁴¹

While the Act paved the way for addressing sexual offences, it has a number of loopholes that would have resulted in ineffective prosecution of traffickers. For instance, the Act defines rape as the act of penetration with genital organs.²⁴² Guided by this definition, it would prove difficult to prove the rape of male victims by female perpetrators. The Act also imposed a penalty for the

²⁴⁰ *Bid*, Article VIII

²⁴¹ The Sexual Offences Act, Sections 3, 6, 8, 12, 14-16, 16 A and 17.

²⁴² *ibid*, Section 3(1)(a).

making of false accusations,²⁴³ which had the effect of preventing victims from reporting sexual abuse or sexual exploitation. The provision was, however, repealed in June 2012.²⁴⁴

2.6.2. The Employment Act of 2007:

This legislation deals with general employment requirements. In line with the ILO Conventions, it strives to safeguard against child labour comprising of acts of slavery or slavery-like practices, the sale and trafficking of children, debt bondage, serfdom, forced recruitment of child soldiers, use of children for trafficking drugs, among others.²⁴⁵ The Act also prohibits forced labour, including the act of recruiting or assisting another person to recruit others for purposes of forced or compulsory labour.²⁴⁶ However, the Act fails to draw a distinction between forced labour and labour trafficking nor does it. The paper expounds on the distinction in Chapter 3.

2.6.3. Constitution of Kenya 2010:

The Constitution provides a bill of rights which highlights some of the basic human rights as envisaged in the UNDHR. It states that every person has a right to life and the right of inherent dignity.²⁴⁷ All persons also have the right to freedom and security; neither should they be subjected to torture in any manner, whether physical or psychological nor should they be treated or punished in a cruel, inhuman or degrading manner.²⁴⁸ The Constitution also provides that “*no person shall be held in slavery or servitude and that no person shall be required to perform forced labour.*”²⁴⁹

²⁴³ *ibid*, Section 38.

²⁴⁴ Office of the United Nations High Commissioner for Human Rights, ‘Concluding Observations on the Seventh Periodic Report of Kenya’ <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsglff%2FiazrVw%2BcyfdY9GxZ70QnmEqyQ7kRAkS9RaeGiZQhb18bUyxzNiqpG7ftEaA2O3nms7OapXuBm01F50UKj%2FF0sZ6X8jWKbxad7cIhGMI6u%2F%2F9jf%2BnSyoF8gVAgM8g%3D%3D>> accessed 7 November 2023.

²⁴⁵ The Employment Act 2007, Section 2.

²⁴⁶ *ibid*, Article 4.

²⁴⁷ The Constitution of Kenya 2010, Articles 26 and 28.

²⁴⁸ *ibid*, Article 29.

²⁴⁹ *ibid*, Article 30.

2.6.4. Counter Trafficking in Persons Act 2010:

The principal object of the Act is to implement Kenya's obligations under the Palermo Protocol. The Act adopts similar definitions on the elements of human trafficking as the Palermo Protocol. However, unlike the Protocol, the Act identifies human trafficking to include trafficking within Kenya's borders.²⁵⁰

Various trafficking offences are identified and penalized under the Counter Trafficking in Persons Act. For instance, trafficking in persons (including the acts of aiding, abetting or financing) attracts a fine of thirty million shillings, an imprisonment term of thirty years or both.²⁵¹ Further, to curb repeated offences, it provides for the life imprisonment of persons with the same prior convictions.²⁵² Life sentences are also imposed for human trafficking linked to organized crime and exploitation that occasions permanent/ life-threatening harm or the death of a victim.²⁵³

The Act also criminalizes the promotion of trafficking in persons through the publishing of materials, running or financing recruitment agencies for the purpose of human trafficking or through other forms of promotion, by imposing a fine of twenty million shillings, an imprisonment term of twenty years or both.²⁵⁴

The Act equally addresses the means of trafficking by prohibiting the acquisition of travel documents through fraud or misrepresentation, or the interfering with documents and travel effects with the intent to facilitate human trafficking. Persons convicted for this offence are to receive a fine of ten million, a sentence of ten years or both.²⁵⁵

²⁵⁰ Counter Trafficking in Persons Act, Section 3(4).

²⁵¹ *ibid*, Sections 5 and 6.

²⁵² *ibid*.

²⁵³ *ibid*, Sections 9 and 10.

²⁵⁴ *ibid*, Section 5

²⁵⁵ *ibid*, Sections 6 and 8.

Victim protection is also a key feature in the Counter Trafficking Act. It provides for the confidential handling of trafficking cases and prohibits the publication of confidential information. It also exempts victims from prosecution for any criminal acts resulting from trafficking.²⁵⁶ Victims also enjoy certain rights including the right to repatriation, the right to stay in Kenya until the conclusion of their legal proceedings, the right to work during their stay in Kenya and the right to have information communicated to them in a language they understand.²⁵⁷ Victims of trafficking are also to be given the necessary medical care and psychological care.²⁵⁸ The Act also establishes the Counter Trafficking in Persons Committee to handle all matters pertaining to human trafficking.²⁵⁹ A National Assistance Trust Fund is also created for the financial assistance of victims.²⁶⁰

The Counter Trafficking Act is quite comprehensive and aligns itself with the 3P paradigm dealing with human trafficking as outlined in the Palermo Protocol, i.e. prevention, protection and prosecution. What is distinct about the statute are the hefty fines and significant sentences imposed therein, unlike statutes prior statutes. For instance, a person convicted of sexual exploitation under the Counter Trafficking Act would face a thirty-year minimum sentence as opposed to a ten-year sentence for rape under the Sexual Offences Act.²⁶¹ This could be seen as a positive step in curbing the vice.

Conversely, the imposition of fines in lieu of prison sentences may not serve to deter human trafficking, which is ideally a lucrative crime. Persons convicted of human trafficking or

²⁵⁶ *ibid*, Section 14.

²⁵⁷ *ibid*, Sections 16 and 18.

²⁵⁸ *ibid*, Section 15.

²⁵⁹ *ibid*, Part IV.

²⁶⁰ *ibid*, Part V.

²⁶¹ Sexual Offences Act (n253).

trafficking-related offences with significant financial resources are able to ‘escape justice’. Moreover, the said provisions juxtapose victim protection measures provided under the Act.

2.6.5. The Kenya Citizenship and Immigration Act (KICA) 2011:

This Act addresses matters relating to citizenship, the issuance of travel documents and matters touching on immigration. KICA plays a significant role with respect to the fight against human trafficking, given the transnational aspect of human trafficking. The Act provides for the confiscation of travel documents or passports where the holders of such documents are convicted of trafficking in persons.²⁶² The Act also declares persons who are engaged in human trafficking, those who attempt to do so or those reasonably suspected of engaging in human trafficking as ‘prohibited migrants’.²⁶³ This is a positive step toward hindering traffic routes to or through Kenya.

2.6.6. The Mutual Legal Assistance Act 2011:

The Mutual Legal Assistance Act enables mutual legal assistance between Kenya and other states in the investigation and prosecution of criminal matters arising in their respective jurisdictions. This legislation falls in line with the provisions of the Palermo Protocol that require mutual cooperation among states in dealing with human trafficking.

The Act provides for the establishment of a Central Authority whose functions include transmitting and receiving requests for legal assistance, provision of legal assistance in conformity with Kenyan laws and international legal standards, locating persons of interest, witness examination, and conducting electronic surveillance, among others.²⁶⁴ It also provides for mutual assistance in

²⁶² The Kenya Citizenship and Immigration Act (KICA) 2011, Section 31 (1) (c).

²⁶³ Ibid, Sections 33 (1) (b-d).

²⁶⁴ The Mutual Legal Assistance Act 2011, Section 6.

dealing with assets procured from criminal activities through measures such as identification, tracing, freezing, seizure and confiscation.²⁶⁵

2.6.7. The Labour Institutions (Private Employment Agencies) Regulations 2016:

Private employment agencies play a significant role in today's society in adding job seekers to obtain employment opportunities. To regulate the industry, the country enacted the Labour Institutions (Private Employment Agencies) Regulations in 2016 in conformity with Section 60(1) of the Labour Institutions Act of 2007.

The Regulations focus primarily on the registration of private employment agencies in Kenya, setting out the eligibility criteria for registration and the procedure for the application of a certificate of registration.²⁶⁶ They also provide that foreign employment contracts should provide details on the party responsible for payment of the visa fee, air fare and medical examination.²⁶⁷

The Regulations also specify the information that must be included in job advertisements, such as the hiring entity's registration details, employment terms, and the agency's name and address.²⁶⁸

Regrettably, the Regulations fail to waylay concerns on the regulation of employment agencies. For instance, the requirements for the renewal of a certificates only entail financial considerations and notification of the agency's physical address. No conditions have been set with respect to the production or review of the records on persons recruited by the said agencies. In fact, the Regulations are silent on the nature of records to be kept by a recruitment agency, contrary to Section 60(2) (e) of the Labour Institutions Act.

²⁶⁵ Ibid, Article 23.

²⁶⁶ The Labour Institutions (Private Employment Agencies) Regulations 2016, Regulations 3-7.

²⁶⁷ Ibid, Regulation 8.

²⁶⁸ Ibid, Regulation 9(2).

The Regulations also seem to solely focus on the inclusion of payment details in foreign employment contracts as opposed to the material employment considerations. It would have been prudent to stipulate in the Regulations for the provision of basic employment terms in the contracts themselves as opposed to having them outlined in advertisements, which have no legal binding force.

2.6.8. The Children Act of 2022:

The Children Act of 2022 came in force to give effect to Article 53 of the Constitution of Kenya 2010 that provides for the rights of children. It primarily makes provisions for the care and protection of children and regulates the administration of child services, among others.²⁶⁹

There are significant changes introduced by the Act which provide better safeguards, unlike the repealed Children Act of 2001. For instance, the Act expounds the definition of child abuse to include child trafficking, pornography and sex tourism.²⁷⁰ It further defines child trafficking in line with Section 3 of the Counter Trafficking Act 2010 and notes that the means of trafficking set out in the Act are not exhaustive.²⁷¹ It also prohibits all forms of child abuse, as well as slavery, forced child labour, child begging, debt bondage, servitude, among others.²⁷² The Act further recognises children who are victims of human trafficking, street children and those who are at risk of radicalization as children in need of care and requires the state to facilitate their immediate safe custody.²⁷³

It is also notable that the Act recognizes harmful practices brought on by technological advancements which facilitate the exploitation of children. This includes online sex grooming,

²⁶⁹ Children Act 2022, Preamble.

²⁷⁰ *ibid*, Section 2.

²⁷¹ *ibid*

²⁷² *ibid*, Sections 18, 19 and 22(1).

²⁷³ *ibid*, Sections 144 and 145.

solicitation and cyber bullying on social networks, online games, among other platforms, which acts are prohibited.²⁷⁴

Another key feature in the Act is the advancement of the “best interest of the child,” which cuts across several provisions. For example, the Act provides that children have the right to social security where their parents or guardians are unable to take care of them and that their interest should be considered when placing them in alternative care.²⁷⁵ It advocates for participatory decision making in alternative care placement that considers the views of the child.²⁷⁶ This ensures that children are not placed in the care of relatives or persons who they believe would cause them harm.

While it is notable that the changes introduced by the Act significant aid in the protection of children in Kenya, it is also apparent that its sentencing provisions contradict those in the Counter Trafficking in Persons Act. For instance, whereas the latter provides for a thirty year imprisonment term or a thirty million shillings fine for human trafficking, the Children Act provides for five to ten year imprisonment terms (as a minimum) or a two million shillings fine.²⁷⁷ As such, child traffickers charged and convicted under the Children Act are likely to face more favourable terms. Further, the payment of fines in lieu of imprisonment sentences for grievous crimes such as child trafficking may not serve as a deterrence as traffickers are likely pay the said fines that are notably much cheaper than those in the Counter Trafficking in Persons Act.

²⁷⁴ *ibid*, Sections 2 and 22 (3) and (4).

²⁷⁵ *ibid*, Sections 12(1) and (4)(b).

²⁷⁶ *ibid*

²⁷⁷ *ibid*, Sections 22(2) to (6)

2.7. Conclusion

The chapter has demonstrated that state responsibility attaches where an act or omission is attributable to the state, where the act or omission culminates in the breach of an international obligation and where the state fails to exercise due diligence in its prevention measures. It has also been demonstrated, supporting the objective responsibility theory, that states have a duty to not only refrain from causing harm but to also take adequate measures to protect the lives of individuals within its jurisdiction. This has equally found support from the positive obligations placed on states by human rights instruments.

With respect to the international obligations of states, the position of various legal systems have been enumerated above to examine the extent to which they have contributed to the effective elimination of human trafficking. The examination of past advancements in international law has aided in the clarification of the intricacies surrounding modern definitions of human trafficking and the boundaries of such conceptualizations.

This journey into the development of an expansive definition has also culminated in the formulation of the 3Paradigm strategy under the Palermo Protocol as a means of effectively dealing with human trafficking. The 3Paradigm, to a great extent, incorporates the primary and secondary rules of state responsibility. It calls on states to not only refrain from engaging in acts that promote human trafficking and to punish offenders (*the prosecution limb*), but also requires state parties to take up measures to prevent and protect against human trafficking through alleviation of factors creating vulnerabilities, enactment of laws, sharing of information, among other measures.

Thus, in assessing the country's perceived failure in its response measures, we are called upon to interrogate the steps it has taken to protect, prosecute and prevent human trafficking. This cannot

solely be ascertained by a strict review of its ratified instruments and local legislation as discussed above. It also calls for an appreciation of the unique circumstances of human trafficking in Kenya to better appreciate (and scrutinize) the legislative measures in place. Laws do not exist in a vacuum thus the contextualization of human trafficking in Kenya as discussed in Chapter 3 is imperative. It is only upon the appreciation of the special circumstances of Kenya that an elaborate assessment of the extent of its compliance with the regulatory framework, and whether state responsibility would arise, can be analysed as brought out in Chapter 4.

CHAPTER THREE: STATE OF HUMAN TRAFFICKING IN KENYA

3.1. Introduction

We note from the above Chapter that there is a plethora of legislation addressing human trafficking and its related exploitative practices. We also note that Kenya has a number of national statutes addressing these issues. Further, following the promulgation of the Constitution of Kenya in 2010, the country became a monist state²⁷⁸ thereby making general rules of international law and ratified treaties on human trafficking part of the laws of Kenya.²⁷⁹ To date, the country boasts of nearly 13 years of legal knowledge and expertise on human trafficking.

In an idealistic society, logic would dictate that the presence of laws would culminate in the deterrence of the vices addressed therein. According to the “*Bad Man Theory*” as propounded by Justice Oliver Wendell Holmes, the law sets out rules and consequences which will instruct the actions of the ‘*bad man*’.²⁸⁰ A fellow realist, Alex Hagerstrom, posited that the psychological effects of legal rules play a role in the regulation of society, i.e. that obedience of the law by society depends not only on the knowledge of existing sanctions, but primarily on the psychological pressure for compliance that the law exerts.²⁸¹ One would therefore not be faulted for concluding that there are few or no incidences of human trafficking in Kenya, noting the limits set for the ‘*bad men*’ and psychological pressure for the obedience of anti-trafficking laws. However, that is not the case as human trafficking is still prevalent in Kenya.

²⁷⁸ David Sloss, ‘Domestic Application of Treaties’ [2011] Faculty Publications <<https://digitalcommons.law.scu.edu/facpubs/635>>. Accessed 14 July 2023

²⁷⁹ The Constitution of Kenya 2010, Articles 2(5) and (6).

²⁸⁰ Joan I Schwarz, ‘Oliver Wendell Holmes’s “The Path of the Law”: Conflicting Views of the Legal World’ (1985) 29 The American Journal of Legal History 235 <<https://academic.oup.com/ajlh/article-lookup/doi/10.2307/844757>> accessed 14 July 2023.

²⁸¹ ‘The Realism of Axel Hagerstrom: Positivism and Psychology’ [1982] Holdsworth Law Review, 59.

To appreciate the present anti-trafficking legislation and determine their effectiveness (or otherwise) in addressing the prevalence of human trafficking in Kenya, we would need to interrogate the incidences of human trafficking that are specific to the country. This entails the contextualization of human trafficking in Kenya from its historical underpinnings, its metamorphosis during colonial times and the traits that carried on into present day Kenya. Additionally, the context in which human trafficking manifests in the advent of globalization calls for an in-depth analysis of the causal factors and forms of human trafficking in Kenya. It is against this background that the efficacy of the implementation of the 3P paradigm under the Palermo Protocol (and the Counter Trafficking in Persons Act of 2010) can be tested. This chapter, therefore, sheds light on the state of human trafficking in Kenya to pave way for the subsequent interrogation of the extent of Kenya's compliance with the regulatory framework.

3.2. Historical Background

3.2.1. Slavery and Slave Trade at the Swahili Coast

Modern-day human trafficking draws its roots from slavery and slavery-like practices. Notable documented accounts on slavery in pre-colonial Kenya propound that the practice was exacerbated by its 'invaders', i.e. the Portuguese and Arab nations.

The settlement of the Omani Arabs along the Swahili Coast²⁸² from around 695 AD culminated in the formation of coastal towns where slave trade thrived.²⁸³ The Arabs, as the aristocrats of the time, owned plantations that were cultivated by slaves mainly captured from the local coastal population.²⁸⁴ These slaves were also sold to countries across the Indian Ocean such as Oman and

²⁸²Kemezis, K., 2010. East African City States (1000-1500). Blackpast.org. <<https://www.blackpast.org/global-african-history/east-african-city-states/>> accessed 23 July 2023. The Swahili Coast extended from Lamu, Kenya to Sofala, Mozambique and included the islands of Zanzibar and Comoros.

²⁸³ Elspeth Huxley, 'The Book of the Quarter: The Invaders of East Africa' (1939) XXXVIII African Affairs 347 <<https://academic.oup.com/afraf/article-lookup/doi/10.1093/oxfordjournals.afraf.a101216>> accessed 23 July 2023.

²⁸⁴ *ibid.*

India.²⁸⁵ Following Vasco Da Gama's exploration of the Swahili Coast in the late 14th Century, the Portuguese took control of the Indian Ocean trade, including slave trade.²⁸⁶ However, the Portuguese suffered defeat at the hands of the Omani Arabs in 1650, which paved the way for large-scale slave trade.²⁸⁷ The Omani Arabs organized extensive slave raiding and slave trading in the region, resulting in the capture and enslavement of significant numbers of indigenous peoples.²⁸⁸

By the 18th Century, there were between 43,000 to 47,000 slaves on the Kenyan Coast alone, representing 44% of the population at the time.²⁸⁹ These slaves were mainly concentrated in Malindi, Mambui, Lamu, Pate and Mombasa.²⁹⁰ Slaves were also procured from internal regions of the country, with slave trade caravans travelling through Mariakani, Kibwezi, Kitui, Machakos, Mtito Andei and Msongaleni, and subsequently settling at the coastal towns.²⁹¹ In fact, Mtito Andei translates from the Kamba language to '*place of vultures*' in recognition of the town's role in the slave trade.²⁹² It is also notable that slaves were also sourced from outside Kenya (as it then was) and were sold at slave markets along the Kenyan Coast. These included captives from the Democratic Republic of Congo and Madagascar, who were sold at slave markets such as Mtsanganyiko in Kilifi.²⁹³

²⁸⁵ *ibid.*

²⁸⁶ *ibid.*

²⁸⁷ Herman O Kiriamu, 'The Landscapes of Slavery in Kenya' (2018) 7 *Journal of African Diaspora Archaeology and Heritage* 192 <<https://www.tandfonline.com/doi/full/10.1080/21619441.2019.1589711>> accessed 23 July 2023.

²⁸⁸ Richard D Wolff, 'British Imperialism and the East African Slave Trade' (1972) 36 *Science & Society* 443.

²⁸⁹ Kiriamu (n 291).

²⁹⁰ *ibid.*

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ *ibid.*

While men were captured as slaves, Arab slavers had a preference for young women, who were viewed as malleable to the wills of their masters.²⁹⁴ These women would be subjected to forced sexual exploitation and were often turned into concubines living in harems.²⁹⁵ Male slaves and young boys would be castrated, with about only 10% surviving the ordeal, and were assigned the role of eunuchs to watch over the harems.²⁹⁶

3.2.2. Abolitionist Movement and Trafficking under Colonialism

Towards the mid to late 18th century, European abolitionist movements extended their anti-slavery campaign to the African continent. Though considered by some as an intervention for humanitarian reasons, the efforts made in this regard were primarily geared to preserve their commercial and political interests.²⁹⁷ Thus, with the Berlin Declaration of 1885 and the Brussels Act of 1890, European nations with colonial interests agreed to ban slave trade.²⁹⁸

In East Africa, the British used both diplomatic and military force against the Omani Arabs to eradicate slavery.²⁹⁹ The Sultan of Zanzibar, Said bin Sultan, was thus coerced into ratifying two treaties, i.e. the Moresby Treaty of 1822 and the Hammerton Treaty of 1845. The former allowed the British Navy to seize slaving vessels plying the waters of the Indian Ocean near the East African Coast whereas the latter prohibited the exportation and importation of slaves along the Swahili Coast.³⁰⁰ The pressure exerted by the British forces saw to the relative decline in slave trade in East Africa.

²⁹⁴ News African, 'Recalling Africa's harrowing tale of its first slavers – The Arabs – as UK Slave Trade Abolition is commemorated' <<https://newafricanmagazine.com/16616/>> accessed 24 July 2023.

²⁹⁵ *ibid.*

²⁹⁶ *ibid.*

²⁹⁷ Huxley (n 287).

²⁹⁸ 'Trafficking in Slavery's Wake: Law and the Experience of Women and Children' (2013) 50 Choice Reviews Online 50 <<http://choicereviews.org/review/10.5860/CHOICE.50-6263>> accessed 23 July 2023.

²⁹⁹ Wolff (n 292).

³⁰⁰ Kiriama (n 291).

Colonial East Africa was, however, not free from slavery or slavery-like practices. Raidings and kidnappings continued, though at a relatively smaller scale.³⁰¹ Women and children were trafficked for domestic work, agricultural labour and sexual exploitation, among others.³⁰² Pawning/ debt bondage also increased to raise money to pay taxes imposed by colonial masters.³⁰³ Further, communities previously dependent on slave labour resorted to the use of child labour and child bondage.³⁰⁴

Human trafficking was also intensified by colonial economic development in East Africa. A constant labour force was required for various projects including transportation, mining, plantations and other infrastructure.³⁰⁵ Though voluntary labour was initially sought, the pool of such labour was minimal on account of the low pay offered to Africans as incentives and as Africans owned land(s) as means of production.³⁰⁶ As such, the British compelled the local communities to work against their will. Further, as the projects were often situated at various parts of the protectorate, the local communities would be relocated against their will.³⁰⁷ It is also noteworthy that though labour was offered voluntarily in some cases, in other cases workers were recruited through deceit or other forms of manipulation.³⁰⁸ In addition, though wages were paid in most cases, the amounts offered were quite low premised on the misguided notion that Africans were lazy and did not have ‘wants’.³⁰⁹

³⁰¹ ‘Trafficking in Slavery’s Wake: Law and the Experience of Women and Children’ (n 302).

³⁰² *ibid.*

³⁰³ *ibid.*

³⁰⁴ *ibid.*

³⁰⁵ Ambe J Njoh and Elizabeth NM Ayuk-Etang, ‘Combating Forced Labour and Human Trafficking in Africa: The Role of Endogenous and Exogenous Forces’ (2012) 4 *African Review of Economics and Finance*.

³⁰⁶ Opolot Okia, ‘The Northey Forced Labor Crisis, 1920-1921: A Symptomatic Reading’ (2008) 41 *The International Journal of African Historical Studies* 263.

³⁰⁷ Njoh and Ayuk-Etang (n 309).

³⁰⁸ *ibid.*

³⁰⁹ Okia (n 310).

Laws were also enacted to sanction human trafficking practices. For instance, the Native Authority Ordinance of 1912 provided for forced unpaid labour for ‘communal purposes’ whereas the Native Authority Ordinance of 1920 provided for forced unpaid labour for state purposes.³¹⁰ The Master and Servant (Amendment) Ordinance of 1924, which outlined the colony’s labour policies, failed to address child labour.³¹¹ This, coupled with the failure to set a minimal age for wage work and increased colonial infrastructure development projects, paved the way for African children to work, especially in plantations and as domestic servants.³¹²

Though these laws and state-sanctioned practices became ineffectual following Kenya’s independence, they have influenced human trafficking in modern-day Kenya, e.g. labour migration through coercion or deception or the relative acceptance of child labour. Additionally, rural areas or ‘hinterland countries’ continue to serve as sources of trafficking victims whereas urban areas and coastal regions continue to serve as destination sites.³¹³

3.3. Present Day Human Trafficking: Causal Factors

Human trafficking in present-day Kenya can be understood by analyzing the conditions that are conducive to the supply of victims to the trade, otherwise known as ‘push factors’ and the situations that have created the demand for the same ‘pull factors’.

The social-economic, political and cultural dynamics of modern-day Kenya have changed significantly since the country’s independence in 1963. Increased international trade, free labour markets, ease of travel, tourism, technological advancements, developed international relations,

³¹⁰ *ibid.*

³¹¹ Samson K Ndanyi, “‘God Was With Us:’ Child Labor in Colonial Kenya, 1922 - 1950s’ (2016) 3 *Journal of Retracing Africa*:

³¹² *ibid.*

³¹³ Njoh and Ayuk-Etang (n 309).

among other factors have placed Kenya in the centre of today's global society. These factors are otherwise referred to as indices of globalization.

Globalization refers to the 21st century activity of creating and developing a massive worldwide economy, which is made possible by modern communications, enhanced shipping methods, free flow of capital and free competition among labour markets.³¹⁴ It entails the integration and interdependence of people beyond geographical barriers, international trade, foreign investment and technological advancement.³¹⁵

Globalization is regarded as a prevalent factor in increased cross-border and international migration. It has created the need for cash incomes to obtain the most basic needs and, noting the skewed development patterns among states, has resulted in a demand for those needs that cannot be satisfied by the state and local labour markets.³¹⁶ The widening wealth disparities created by the globalized economy have resulted in the unprecedented mobilization of unskilled and low-skilled labour from poor or less developed countries (the global south) to developed countries with labour deficit markets (the global north).³¹⁷ This is notable from the migration trends in Kenya.

According to the International Organization for Migration-Kenya, there has been a notable increase in the migration of Kenyans between 2016 and 2020. Over 535,000 Kenyans have emigrated from the country, compared to 481,000 in the period between 2010 and 2015.³¹⁸ It was noted that their destination states comprised primarily of global north states, namely the US, the

³¹⁴ Bryan A. Garner, *Blacks Law Dictionary*, 10th Edition, 805-806.

³¹⁵ Mary R Gilbertson, 'Globalization and the Sex Trafficking Industry: Examination of Effects on Regional Value Chain Operations' (College of Saint Benedict and Saint John's University 2015) <https://digitalcommons.csbsju.edu/honors_theses/78>.

³¹⁶ Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Praeger 2009).

³¹⁷ Nina Mollema, 'Combatting Human Trafficking in South Africa: A Comparative Legal Study' (University of South Africa 2013) <<http://hdl.handle.net/10500/10189>>.

³¹⁸ IOM Kenya, 'International Migration Snapshot (2016-2020)' <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kenya.iom.int/sites/g/files/tmzbdl926/files/documents/international-migration-from-kenya-undesa-2021dec01.pdf>>.

United Kingdom, Canada and Australia.³¹⁹ It was also noted that around 53% of these migrants were female whereas 47% were male.³²⁰ Similarly, there was an influx of migrants from Kenya's neighbouring countries with less developed economies in the country. International migrants from Uganda, Tanzania, Somalia, South Sudan, the Democratic Republic of Congo, Ethiopia and Burundi (comprising 2% of Kenya's total population) were identified in the country during the said period.³²¹

Globalization also goes hand in hand with the ideology of limited state intervention. It is perceived that limited or no state interference liberalizes trade and investment.³²² Conversely, the limited or lack of intervention in the global market has resulted in the growth of crime, with criminal groups exploiting the lessened border controls and the resultant greater freedom for the extension of their activities across borders and even to newer world regions.³²³ Human trafficking carries the connotation of the commercialization of humanity; the utilization of people as resources in the global economic process.³²⁴ It therefore comes as no surprise that human trafficking has been exacerbated by this conducive environment that promotes the proliferation of movement and the utilization of the 'human commodity'.

The push and pull factors of human trafficking in Kenya in the context of globalization are discussed in the groupings set out below.

³¹⁹ *ibid.*

³²⁰ *ibid.*

³²¹ *ibid.*

³²² Aronowitz (n 320).

³²³ *ibid.*

³²⁴ Kevin Bales, 'Expendable People: Slavery in the Age of Globalization' (2023) 53 *Journal of International Affairs*.

3.4. Economic Factors

Economic factors relate to the availability of resources to meet the financial needs of individuals. They also relate to considerations such as operational costs and demand and supply of resources. The economic factors that influence human trafficking are discussed below.

3.4.1. Poverty and Unemployment:

Poverty refers to the economic condition of lacking the means of sustenance; it pertains to the level of income that falls well below the threshold considered necessary for the attainment of a sufficient standard of living.³²⁵ Poverty remains a pressing concern in Africa well after colonization. Its stronghold in the continent is perpetuated by factors such as political instability, corruption, incessant borrowing and debt repayment, tax evasion, among others.³²⁶ Poverty may also be attributed to natural disasters such as drought and famine, or by personal attributes such as lack of individual responsibility.³²⁷ As at 2022, the number of people living in extreme poverty³²⁸ in Kenya was 8.9 million, representing 18% of the country's population.³²⁹ Of these, 7.8 million live in the rural areas.³³⁰

Conversely, unemployment refers to the lack jobs for individuals who are capable of working.³³¹ Factors contributing to unemployment include high population growth, lack of education, global

³²⁵ Bryan A. Garner, *Black's Law Dictionary*, 10th Edition, 1358.

³²⁶ Mirjam van Reisen and others (eds), *Mobile Africa: Human Trafficking and the Digital Divide* (Langaa Research & Publishing CIG 2019). 67.

³²⁷ Mollema (n 321).

³²⁸ 'Principles and Practice in Measuring Global Poverty' (*World Bank*) <<https://www.worldbank.org/en/news/feature/2016/01/13/principles-and-practice-in-measuring-global-poverty>> accessed 25 August 2023. According to the World Bank, extreme poverty refers to poverty below the international poverty line of 1.90 US Dollars per day.

³²⁹ 'Kenya: Extreme Poverty Rate 2016-2030' (*Statista*) <<https://www.statista.com/statistics/1227076/extreme-poverty-rate-in-kenya/>> accessed 25 August 2023.

³³⁰ *ibid.*

³³¹ 'Unemployment' (*Corporate Finance Institute*, 2019)

<<https://corporatefinanceinstitute.com/resources/economics/unemployment/>> accessed 25 August 2023.

economic recession, corruption and nepotism.³³² Political instability and weak economic policies have also been attributed as causal factors of unemployment.³³³ In 2022, 4.9% of Kenya's total workforce was unemployed.³³⁴

Poverty and unemployment influence the migration of human capital within and out of Africa in search of employment and better livelihoods. Deepening rural poverty forces poor families to migrate to urban areas and foreign countries.³³⁵ It also forces poor families to surrender their children to relatives and other persons living in urban areas or foreign countries under the hope, or pretext, of providing them with the opportunity to secure better lives.³³⁶ People who migrate because of vulnerability run the risk of becoming victims of human trafficking, who entice victims with false promises of better jobs and living conditions. For instance, women and young girls from Kenya have been lured to Gulf States by traffickers with the promise of better-paying jobs only for them to be subjected to domestic servitude or sexual exploitation.³³⁷

3.4.2. Demand for Commercial Sex and Cheap Labour:

The ultimate goal of human trafficking is profit generation from the exploitation of victims. For this to be realized, a market system (albeit illegal) that supports the commodification of human beings for trade and exploitation is required.³³⁸ The ability to purchase a commodity implies a sense of entitlement over the said item. As such, victims purchased in this market system are

³³² Salah Abdirahman Farah and Hussein Abdi Ali, 'A Study on the Causes of Unemployment among University Graduates in Kenya: A Case of Garissa County, Kenya' (2018) 1 *Open Journal of Economics and Commerce* 55.

³³³ Gacinya John, 'Human Trafficking Prevalence in Rwanda: The Role Played by Unemployment' (2019) 4 *American Journal of Social Sciences and Humanities* 163 <<https://onlinesciencepublishing.com/index.php/ajssh/article/view/130>> accessed 25 August 2023.

³³⁴ Kenya National Bureau of Statistics, 'Quarterly Labour Force Report- Quarter 4, October-December 2022' (2023) <<https://www.knbs.or.ke/publications/>>.

³³⁵ Reisen and others (n 330). 69.

³³⁶ *ibid.*

³³⁷ John (n 337).

³³⁸ Gergana Danailova-Trainor and Patrick Belser, 'Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand' [2006] Policy Integration Department International Labour Office Geneva.

deemed to have no say over their basic human rights.³³⁹ The market for trafficked persons is fostered by 3 underlying factors which include the seemingly endless supply of human commodities, the endless demand for services they provide and the presence of organized criminal networks that facilitate the process.³⁴⁰

Brothel owners and pimps in destination states purchase women and girls for the provision of sexual services in the form of prostitution.³⁴¹ Additionally, individuals who purchase sex fuel the supply of ‘sex workers.’³⁴² The migration of women and girls into destination states for prostitution is dependent on the availability of vulnerable local women and girls to be exploited in the destination states.³⁴³ Thus, if the local population vulnerable to sexual exploitation is low, pimps will engage in the use of traffickers to secure more numbers from other regions or states. For instance, the legalization of prostitution in the Netherlands coupled with the limited number of victims in the said state, has resulted in the increased trafficking of women and girls for sexual exploitation from other regions of the world.³⁴⁴ The demand is also influenced by other factors including the preference of sex with persons from a particular race or age –group. For instance, ‘thrill-seeking’ by paedophiles or the desire for new sexual experiences with younger victims has generated the demand for child sex tourism.³⁴⁵ Child sex tourists in Kenya are both domestic and

³³⁹ *ibid.*

³⁴⁰ Alexis A Aronowitz and Anneke Koning, ‘Understanding Human Trafficking as a Market System: Addressing the Demand Side of Trafficking for Sexual Exploitation’: (2015) Vol. 85 *Revue internationale de droit pénal* 669 <<https://www.cairn.info/revue-internationale-de-droit-penal-2014-3-page-669.htm?ref=doi>> accessed 26 August 2023.

³⁴¹ Danailova-Trainor and Belser (n 342).

³⁴² Swanee Hunt, ‘Deconstructing Demand: The Driving Force of Sex Trafficking’ (2013) 19 *The Brown Journal of World Affairs* 225.

³⁴³ Donna M Hughes, ‘The Demand: The Driving Force of Sex Trafficking’ [2002] Globalization Research Center, University of Hawaii at Manoa.

³⁴⁴ *ibid.*

³⁴⁵ Hunt (n 346).

international, who travel to destinations such as Mombasa, Old town Lamu and Malindi to have sex with underage boys and girls.³⁴⁶

Increased competition from foreign markets has placed pressure on employers to reduce operational costs, thereby creating the demand for cheap or low-cost labour.³⁴⁷ Additionally, disadvantaged and marginalized members of society who lack equal opportunities in the labour market are likely to opt for unregulated work opportunities in destination areas.³⁴⁸ These factors have fuelled the demand for migrant workers who have limited bargaining power, which is especially true for illegal immigrants.³⁴⁹ Human traffickers are aware of this vulnerability and act as intermediaries to facilitate the supply of a cheap labour force to employers.³⁵⁰ Trafficked workers are seen as more cost-effective as they work for extensive hours with little or no pay.³⁵¹ Further, trafficked workers are deemed to be malleable to the whims of their employers or captors as their conformity can be achieved through violent means.³⁵²

3.5. Social and Cultural Factors

These pertain to the social and cultural characteristics of given societies that instruct how they interact with each other and those around them. The socio-cultural factors that play a role in the prevalence of human trafficking in Kenya are discussed below.

³⁴⁶ Kempe Ronald Hope, Sr., 'Sex Tourism in Kenya: An Analytical Review' (2013) 18 *Tourism Analysis* 533 <<https://www.ingentaconnect.com/content/10.3727/108354213X13782245307759>> accessed 26 August 2023.

³⁴⁷ Aronowitz and Koning (n 344).

³⁴⁸ Aronowitz (n 320).

³⁴⁹ 'Why Migrant Workers Are More Likely to Be Underpaid' (*Grattan Institute*) <<https://grattan.edu.au/news/why-migrant-workers-are-more-likely-to-be-underpaid/>> accessed 26 August 2023.

³⁵⁰ Aronowitz and Koning (n 344).

³⁵¹ Cathy Zimmerman and Marc B Schenker, 'Human Trafficking for Forced Labour and Occupational Health' (2014) 71 *Occupational and Environmental Medicine* 807 <<https://oem.bmj.com/lookup/doi/10.1136/oemed-2014-102452>> accessed 26 August 2023.

³⁵² *ibid.*

3.5.1. Dissolution of families:

Dissolution of families pertains to the breakdown of traditional family relationships, whether nuclear or extended. This can take place in a number of forms including the death of a parent or both parents, divorce, breakdown of traditional family roles, homelessness, neglect or abandonment of children, among others.³⁵³ The destabilization of families in some of these instances creates desperate situations that may result in exposure to trafficking situations. For instance, orphaned children and homeless mothers sometimes end up on the streets where they are deprived of basic needs, endure brutal physical abuse and sexual violence, and face constant harassment by local authorities.³⁵⁴ In a bid to escape these inhumane circumstances, they may unknowingly consent to exploitative practices. Further, due to the lack of family safeguards, they are at risk of being abducted or forced into trafficking situations as their absence would not be noted.³⁵⁵

3.5.2. Child Fostering Arrangements:

In the African setting, it is not uncommon for children from rural areas or poor families to be placed in the care of well-to-do relatives and friends in urban areas. This is usually done as a means of ensuring that they get an opportunity to go to school or to attain better standards of living.³⁵⁶ These children would often be incorporated as part of the family unit in the placement or fostering

³⁵³ 'Family Breakdown | The Encyclopedia of World Problems' <<http://encyclopedia.uia.org/en/problem/family-breakdown>> accessed 27 August 2023.

³⁵⁴ 'Homeless Mothers In Kenya Have Become Easy Targets For Child Traffickers' (*Human Rights Pulse*, 15 January 2021) <<https://www.humanrightspulse.com/mastercontentblog/homeless-mothers-in-kenya-have-become-easy-targets-for-child-traffickers>> accessed 27 August 2023.

³⁵⁵ Mollema (n 321).

³⁵⁶ Neil Howard, 'Is "Child Placement" Trafficking?: Questioning the Validity of an Accepted Discourse' (2011) 27 *Anthropology Today* 3 <<https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8322.2011.00835.x>> accessed 27 August 2023.

family and would enjoy the same treatment as other children in the family.³⁵⁷ It was also accepted in some cases that these children would assist with household chores as a form of giving back to the said relatives or friends for their benevolence. However, this unassuming practice has exposed children to human trafficking, where they end up being exploited for domestic servitude or sexual exploitation by the said relatives or friends.³⁵⁸ In other instances, these relatives and friends hand over the children placed in their care to human traffickers.³⁵⁹

3.5.3. Gender inequality:

Gender equality is recognized as one of the UN Sustainable Development Goals of 2030.³⁶⁰ The term gender has often been misconstrued with sex and, subsequently, related to issues dealing with women. However, gender pertains to the socio-cultural and economic attributes and opportunities that are resultant of being either male or female.³⁶¹ Gender equality, then, is the equal treatment of men and women in the political, social, and cultural domains. It is, however, notable that gender inequality is often manifested in the exclusion or disadvantageous placement of women by society.³⁶²

While Kenya has laws that promote gender equality and gender mainstreaming,³⁶³ the country still ranks poorly on the international scale with respect to its handling of gender issues. The Global

³⁵⁷ Ifeyinwa Mbakogu, 'Child Fostering or Child Trafficking: Questioning Justifications for Children's Departure from Home' (2021) 2 Indonesian Journal of Social and Environmental Issues (IJSEI) 22 <<https://ojs.literacyinstitute.org/index.php/ijsei/article/view/101>> accessed 27 August 2023.

³⁵⁸ Howard (n 360).

³⁵⁹ Mbakogu (n 361).

³⁶⁰ 'Sustainable Development Goals' (*Practical Action*) <<https://practicalaction.org/sustainable-development-goals/>> accessed 26 August 2023. The UN Sustainable Development Goals were acceded to by 193 states in 2015, acting as a blueprint of interlinked goals necessary for the attainment of a better and sustainable future. Gender Equality is identified as Goal No. 5 of the 17 goals listed therein.

³⁶¹ 'Frequently Asked Questions about Gender Equality' (*United Nations Population Fund*) <<https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality>> accessed 26 August 2023.

³⁶² *ibid.*

³⁶³ 'What Is Gender Mainstreaming' (*European Institute for Gender Equality*, 5 July 2023) <https://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming?language_content_entity=en> accessed 26 August 2023.

Gender Gap Report of 2023 ranks Kenya as number 77 out of 146 countries in the world in relation to gender equality.³⁶⁴ The country also scored 0.708 (0.00 being no equality and 1.00 being full equality), falling 20 positions from its previous ranking in 2022.³⁶⁵ Customary norms and practices have influenced societal views on the role of women and girls in spite of existing laws. These practices include customs that prevent women from inheriting land,³⁶⁶ ignorance and negative attitudes towards the education of girls,³⁶⁷ promotion of early child marriage of girls,³⁶⁸ physical and sexual violence,³⁶⁹ and female genital mutilation practices,³⁷⁰ among others.

The need to escape gender discriminative environments, as described above, is a consideration held by potential victims of human trafficking before making the conscious decision to migrate to other regions or states perceived as more liberal to women's rights.³⁷¹ Regrettably, these women and girls are targeted by human traffickers who offer them the promise of better lives, only to end up in dire inescapable situations.³⁷²

³⁶⁴ World Economic Forum, 'Global Gender Gap Report 2023' (2023) <<http://reports.weforum.org/globalgender-gap-report-2023>>.

³⁶⁵ *ibid*.

³⁶⁶ Kenya Land Alliance, 'Kenya Land Issuance: Disaggregated Data Analysis' (2018) <https://kenyalandalliance.or.ke/login/publications/images/Kenya_Land_Issuance_Disaggregated_Data_Analysis.pdf>. It was noted in the data that only 10.3% of women in Kenya hold title deeds to property, representing 103,043 women.

³⁶⁷ Mike Dottridge, 'Trafficking in Children in West and Central Africa' (2002) 10 *Gender & Development* 38 <<https://www.tandfonline.com/doi/full/10.1080/13552070215890>> accessed 25 August 2023. Girls are presumed to be best suited to domestic chores and, noting their likelihood to be married off, ought to be acclimated to the same. Additionally, as women (and girls) leave the household upon marriage, no benefit is gained from investing in their education.

³⁶⁸ Nora Msuya, 'Tradition and Culture Misconceptions and Abuses Fuel Trafficking of Women and Children in Africa' *Tuma Law Review* 189.

³⁶⁹ Kenya National Bureau of Statistics, 'Demographics and Health Survey- Key Indicators Report' (2023). 34% of women were reported to have experienced physical violence in 2022, whereas 13% reported to have experience sexual violence in the same period.

³⁷⁰ Tasneem Kakal and others, 'What Makes a Woman? Understanding the Reasons for and Circumstances of Female Genital Mutilation/Cutting in Indonesia, Ethiopia and Kenya' [2022] *Culture, Health & Sexuality* <<https://www.tandfonline.com/doi/abs/10.1080/13691058.2022.2106584>> accessed 26 August 2023. Communities such as the Maasai in Kajiado Kenya still carry out female genital mutilation of girls between 8 to 18 years of age. Once circumcised, these girls are deemed ready to engage in sexual intercourse and are married off.

³⁷¹ Annette Lansink, 'Human Rights Focus on Trafficked Women: An International Law and Feminist Perspective' (2006) 1.2 *Agenda: Empowering Women for Gender Equity* 45.

³⁷² Mollema (n 321).

3.5.4. Vulnerabilities of persons with disabilities:

Disability refers to physical or mental impairments that impede a person's participation in society on an equal footing as other members of the same society.³⁷³ Persons with disabilities often lack of access to education or job and may equally face challenges such as health problems, reduced participation in community life, discrimination and neglect, among others.³⁷⁴ On account of their marginalization by society and poor socio-economic circumstances, persons with disabilities may be driven to seek better opportunities in situations that end up being exploitative.³⁷⁵ In addition, their lack of independence in most instances makes them vulnerable to exploitation by their caregivers.³⁷⁶ Human traffickers play on public sympathies to exploit persons with visible disabilities through forced begging whereas those with mental or psychosocial disabilities are manipulated into sexual exploitation or organ trafficking.³⁷⁷ Human traffickers also target persons with disabilities as they are less likely to be believed by local authorities, particularly those with intellectual challenges.³⁷⁸

3.5.5. Ignorance on human trafficking:

"My people are destroyed for lack of knowledge".³⁷⁹ This Bible verse resonates with the repercussions of society's lack of awareness of human trafficking. The lack of dissemination of information on human trafficking to high-risk areas or communities has exposed potential victims

³⁷³ Caroline Jagoe, Pei Ying Natalie Toh and Gillian Wylie, 'Disability and the Risk of Vulnerability to Human Trafficking: An Analysis of Case Law' (2022) 0 Journal of Human Trafficking 1 <<https://doi.org/10.1080/23322705.2022.2111507>> accessed 27 August 2023.

³⁷⁴ *ibid.*

³⁷⁵ *ibid.*

³⁷⁶ *ibid.*

³⁷⁷ The European Disability Forum (n 201).

³⁷⁸ *ibid.*

³⁷⁹ 'Bible Gateway Passage: Hosea 4:6 - New King James Version' (*Bible Gateway*) <<https://www.biblegateway.com/passage/?search=Hosea%204%3A6&version=NKJV>> accessed 27 August 2023.

in these areas to traffickers who lure them with false promises.³⁸⁰ There is also a level of bias on the information made available to the general public, with more salacious types of human trafficking such as sexual exploitation gaining media attention whereas limited information is shared on other forms.³⁸¹

Additionally, there exists a lack of knowledge of employment opportunities in destination areas, which is exploited by fraudulent recruitment agencies and traffickers to entice potential victims.³⁸²

What is also alarming is the lack of awareness among members of the public on the veracity of content shared on social media platforms, which are generally perceived as reality.³⁸³ In 2022, a number of distress calls were received from Kenyans stranded in Southeast Asian countries, who were deceived on social media on the availability of jobs in countries such as Thailand, Myanmar and Malaysia.³⁸⁴ They were promised jobs in teaching and customer care industries only to be exploited in sweatshops, brothels and cyber cafes.³⁸⁵ Similarly, some potential employers are at times unaware that they employ trafficked workers.³⁸⁶

³⁸⁰ Kiril Sharapov, Suzanne Hoff and Borislav Gerasimov, 'Editorial: Knowledge Is Power, Ignorance Is Bliss: Public Perceptions and Responses to Human Trafficking' [2019] *Anti-Trafficking Review* 1 <<https://antitraffickingreview.org/index.php/atrjournal/article/view/403>> accessed 27 August 2023.

³⁸¹ *ibid.*

³⁸² United Nations Office on Drugs and Crime, 'The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons' (2015) <chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://www.unodc.org/documents/human-trafficking/2015/15-05035_ebook_-_Recruitment_Fees.Agencies.pdf>.

³⁸³ Reisen and others (n 330).

³⁸⁴ 'Kenya "Overwhelmed" by Job Scam Victims in Myanmar' (*The East African*, 23 August 2022) <<https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-overwhelmed-by-job-scam-victims-in-myanmar-3923668>> accessed 27 August 2023.

³⁸⁵ 'Gov't Rescues More Kenyans Tricked into Fake Jobs in Myanmar' (*Citizen Digital*, 7 September 2022) <<https://www.citizen.digital/news/govt-rescues-more-kenyans-tricked-into-fake-jobs-in-myanmar-n305191>> accessed 27 August 2023.

³⁸⁶ United Nations Office on Drugs and Crime (n 386).

Lack of awareness is also noted among key stakeholders such as the police and immigration officials, which prevents the detection and arrest of potential traffickers and the rescue of trafficking victims.³⁸⁷

3.5.6. Belief in Witchcraft:

The belief in witchcraft is both a causal factor for human trafficking and an instrument of psychological coercion used by human traffickers.

The belief in the existence of witchcraft, sorcery and such like practices is prevalent in many parts of the world. Many Africans believe witchcraft to be a reality, not superstition.³⁸⁸ The belief can also be deemed as predominant in Kenya, noting that the country has a statute criminalizing witchcraft, i.e. the Witchcraft Act Cap 67 of the Laws of Kenya. However, there appears to be no consensus on the definition of the term witchcraft.³⁸⁹ The Witchcraft Act reflects this lack of consensus as it fails to define the practice of witchcraft while, paradoxically, criminalizing the same.

These so-called acts of witchcraft are not popular and persons accused of engaging in the practice are often ostracized or killed.³⁹⁰ The lynching of elderly women accused of witchcraft among the Gusii community is quite prevalent in Kenya.³⁹¹ These accusations are often perpetuated by greed and as a means of disinheriting women in the said region, especially widows.³⁹² When this occurs,

³⁸⁷ Kenya National Commission on Human Rights, 'Response To The Call By The Un Special Rapporteur On Trafficking In Persons, Especially Women And Children On Non- Punishment Principle' <<https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/submissions-HRC47/NHRIs/KenyaNationalCommissionforHR.docx>>.

³⁸⁸ Elizabeth Willmott Harrop, 'Ties That Bind: African Witchcraft and Contemporary Slavery' <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documentation.lastradainternational.org/Isidocs/Witchcraft%20and%20Trafficking%20in%20Africa.pdf>>.

³⁸⁹ Onesimus K Mutungi, 'Witchcraft and the Criminal Law in East Africa' (1971) 5 Valparaiso University Law Review.

³⁹⁰ *ibid.*

³⁹¹ 'Kenya Human Rights Commission - Lynching of Elderly Women in Gusiiland' <<https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/755-lynching-of-elderly-women-in-gusiiland.html>> accessed 1 September 2023.

³⁹² *ibid.*

the children of the murdered victims are often neglected by the community making them vulnerable to human trafficking.³⁹³

The belief in witchcraft has also resulted in the targeting of persons with albinism for organ trafficking. The body parts of persons with albinism are believed to possess magical powers with the ability to grant riches when used in certain rituals.³⁹⁴ It is also believed that the extraction of such parts from a live victim makes the magic more potent.³⁹⁵ These unfortunate misconceptions have resulted in the abduction and commission of barbaric acts against persons with albinism, whose body parts are trafficked across East Africa for rituals.³⁹⁶

Human traffickers, on the other hand, sometimes use the belief in witchcraft to ensure the continued subjugation of victims. ‘Oath-binding’ rituals are used to blackmail victims thus preventing them from leaving their captors for fear of spiritual attacks.³⁹⁷ Rescued victims are also apprehensive of giving evidence to law enforcement authorities or before courts for fear of reprisal action from sorcerers.³⁹⁸

3.5.7. Cultures supporting slavery-like practices:

Employer-sponsorship or guardianship programs such as the ‘*kafala*’ system practiced in Gulf States have prompted the influx of human trafficking. This has had a resultant ripple effect in destination states where migrants are sourced.

³⁹³ *ibid.*

³⁹⁴ ‘Market for Their Body Parts Forces Africans With Albinism to Live Amid Constant Danger of Attack’ (*Global Press Journal*, 8 November 2015) <<https://globalpressjournal.com/africa/kenya/market-for-their-body-parts-forces-africans-with-albinism-to-live-amid-constant-danger-of-attack/>> accessed 1 September 2023.

³⁹⁵ *ibid.*

³⁹⁶ *ibid.*

³⁹⁷ Luz E Nagle and Bolaji Owasanoye, ‘Fearing the Dark: The Use of Witchcraft to Control Human Trafficking Victims and Sustain Vulnerability’ 45 <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.swlaw.edu/sites/default/files/2017-04/5%20Fearing%20the%20Dar.pdf>>.

³⁹⁸ Harrop (n 392).

The *kafala* system is a visa-sponsorship scheme where an employer facilitates the presence of the migrant worker in a given country and exercises control over the said person.³⁹⁹ The legal status of the migrant worker is tied to the employer, in that the employer can determine whether the migrant worker can leave the country or whether he can be transferred to another employer.⁴⁰⁰ The employer has the right to take possession of the migrant worker's identification and travel documents, and determines the nature of work and length of stay of the migrant worker. Some employers exploit this system by forcing migrant workers to work for longer hours with no pay or by subjecting them to sexual exploitation. These employers also view the guardianship as a right of ownership that allows them to sell migrant workers to other employers on online platforms such as Facebook, Instagram and Twitter.⁴⁰¹

Kenyan migrant workers have fallen victim to human trafficking through the *kafala* system. This is because of the lack of knowledge of such practices pre-departure and their inability to negotiate the terms of contracts they execute.⁴⁰² Some recruitment agencies are also aware of such practices, particularly in Saudi Arabia, but fail to disclose the same to potential job seekers.⁴⁰³

³⁹⁹ Anne Josephine Wanjiru Mwaniki, 'Migrant Rights in International Relations: A Case Study of Kenyan Workers in Saudi Arabia 2015-2019' (United States International University-Africa 2020) <<https://erepo.usiu.ac.ke/handle/11732/7086#:~:text=The%20study%20revealed%20the%20forms,labour%20migration%20has%20had%20on>>.

⁴⁰⁰ *ibid.*

⁴⁰¹ 'En Arabie Saoudite, Des Employées de Maison Sont Vendues Sur Internet' (*Les Observateurs - France 24*, 13 March 2018) <<https://observers.france24.com/fr/20180313-arabie-saoudite-employees-maison-sont-mises-encheres-internet>> accessed 1 September 2023.

⁴⁰² Shadrack Omuka, 'Kenyan Women Speak Out About Kafala Exploitation in Gulf States' (*Toward Freedom*, 1 December 2022) <<https://towardfreedom.org/story/archives/africa-archives/kenyan-women-speak-out-about-kafala-exploitation-in-gulf-states/>> accessed 1 September 2023.

⁴⁰³ 'Gulf: Kenyan Domestic Workers Speak of Hardships under the Kafala System & the Role of Recruitment Agencies in Their Ordeal' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/latest-news/gulf-kenyan-domestic-workers-speak-of-hardships-under-the-kafala-system-the-role-of-recruitment-agencies-in-their-ordeal/>> accessed 1 September 2023.

3.6. Political Factors:

These refer to factors by the state and its organs that make people vulnerable to human trafficking situations. They are discussed below.

3.6.1. Conflict resulting in refugees, stateless persons and internally displaced persons:

Most of Kenya's immediate neighbours have been engaged in internal conflicts, wars and ethnic clashes over a span of several years. Kenya has also experienced its fair share of ethnic clashes, particularly during election years. These have resulted in the increased numbers of refugees, stateless persons and internally displaced persons, who are all at risk of being trafficked.

A refugee is a person outside his country of nationality who is unable or unwilling to return or to avail himself to the protection of his country of nationality because of persecution or well-founded fear of persecution.⁴⁰⁴ Stateless persons, on the other hand, are people who are not considered the nationals of any state.⁴⁰⁵ Kenya is host to over 500,000 refugees and stateless persons who are primarily located in Daadab Refugee Complex, Kakuma Refugee Camp and Kalobeyei Integrated Settlement.⁴⁰⁶ Most refugees in the country originate the immediate neighbouring states and cite political instability as a primary factor for their migration.⁴⁰⁷

Women and children comprise over 50% of refugees, having been left behind by their male counterparts who became combatants or were killed in conflict situations. Without the protection or assistance of male members of their families (who are often the primary income earners), women and children become predisposed to harsh economic environments, discrimination and

⁴⁰⁴ United Nations Convention Relating to the Status of Refugees (1951), Article 1(A).

⁴⁰⁵ United Nations Convention Relating to the Status of Stateless Persons (1954), Article 1.

⁴⁰⁶ United States of America Department of State (n 8). 324.

⁴⁰⁷ 'Key Figures in Kenya' (*UNHCR Kenya*) <<https://www.unhcr.org/ke/figures-at-a-glance>> accessed 27 August 2023.

sexual violence at refugee camps.⁴⁰⁸ The vulnerability of refugees and stateless persons in Kenya is also enunciated by the fact that they are required to reside in enclosed camps with limited movement and are further restrained from seeking employment opportunities outside.⁴⁰⁹ Their access to education and other livelihood opportunities is equally limited.⁴¹⁰ Human traffickers target these vulnerable groups more easily on account of their desperate situations. Further, the lack of proper identification records for refugees and stateless persons makes them easy targets as it is difficult for local authorities to trace them once trafficked.⁴¹¹

Internally displaced persons are equally susceptible to trafficking situations. An internally displaced person (IDP) refers to an individual who has been forced to flee from his place of habitual residence due to persecution, natural or man-made disasters, large-scale development projects, among other reasons, but has not crossed an internationally recognized border.⁴¹² As at 2022, Kenya had 318,000 of its citizens living as IDPs in various parts of the country.⁴¹³ The common causes for their displacement included political and ethnic violence witnessed in 1992, 1997 and 2007-2008, flash floods in areas such as Budalangi, Kano plains and the Tana River Basin, cattle rustling and banditry in North Rift and Eastern Kenya.⁴¹⁴

IDPs face a unique form of vulnerability due to the principles of state sovereignty and non-state interference.⁴¹⁵ States are solely responsible to IDPs in their jurisdictions and may not be willing to address their needs. Thus, unlike refugees who may receive financial and other assistance from

⁴⁰⁸ Smita Gupta and Saloni Kedia, 'Human Trafficking and Refugees Protection' [2018] *Supremo Amicus* 566.

⁴⁰⁹ United States of America Department of State (n 8).

⁴¹⁰ *ibid.*

⁴¹¹ Gupta and Kedia (n 412).

⁴¹² Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012, Section 2(1).

⁴¹³ 'World Bank Open Data' (*World Bank Open Data*) <<https://data.worldbank.org>> accessed 27 August 2023.

⁴¹⁴ 'Kenya National Commission on Human Rights > Our Work > Displacement and Forced Evictions > Internal Displacement' <<https://www.knchr.org/Our-Work/Displacement-and-Forced-Evictions/Internal-Displacement>> accessed 27 August 2023.

⁴¹⁵ Charter of the United Nations (1945) Articles 2 (1) and (7).

the United Nations, IDPs are wholly dependent on their nation-states. Most IDPs lack shelter, food, clothes, medical services and security, thereby exposing them to human traffickers who exploit their vulnerabilities.⁴¹⁶

3.6.2. Permeability of Borders:

A country's border regime plays a significant role in the prevalence of human trafficking. Borders checkpoints that are well-policed raise expenses for human traffickers as they incur higher costs in the procurement of travelling documents and the bribing of complacent border officials.⁴¹⁷ They also face a higher risk of detection and thus avoid tightly controlled checkpoints.⁴¹⁸ Conversely, less controlled and fewer checkpoints facilitate ease of movement for traffickers and enable them to obtain first-hand information on the country's terrain, its demand for trafficked persons, policing, among others.⁴¹⁹ Such information lowers costs incurred by traffickers and also reduces the chances of their apprehension.⁴²⁰ The permeability of Kenya's borders is well known by human smugglers and traffickers in the region. Official checkpoints are few and far between, thereby facilitating the utilization of various alternate illegal routes.⁴²¹ These alternate routes are unknown to local authorities and, as such, can be accessed with ease without any identification documents.⁴²²

⁴¹⁶ 'Displacement: The Challenges Of IDPs & Refugees (SOURCE: Modern Diplomacy) – Refugee Consortium of Kenya' <<https://www.rckkenya.org/displacement-the-challenges-of-idps-refugees-source-modern-diplomacy/>> accessed 27 August 2023.

⁴¹⁷ Cassandra E DiRienzo and Jayoti Das, 'Human Trafficking and Country Borders' (2017) 27(4) *International Criminal Justice Review* 278.

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

⁴²⁰ *ibid.*

⁴²¹ Nima Elbagir, 'The "back Door" to Kenya: Security Threat from Porous Somali Border' (*CNN*, 24 July 2015) <<https://www.cnn.com/2015/07/24/africa/kenya-back-door-porous-border-security-threat/index.html>> accessed 28 August 2023.

⁴²² *ibid.*

3.6.3. Corruption:

Human trafficking is a crime that often involves multiple facets. For traffickers, there are numerous factors to take into account, such as the requirement for travel documents, transportation issues, lodging requirements, and money transfer issues, among others. To meet these needs, therefore, a multitude of state and non-state actors would be needed. Officers from the police, immigration and border patrol, employment agencies, banks, and recruitment firms are a few of these actors. Thus, corruption plays a role in enabling these actors to participate.

Corruption refers to the abuse of power for personal or other gain. It entails acts such as bribery, fraud, embezzlement, abuse of office or breach of trust.⁴²³ Corruption has a symbiotic relationship with human trafficking as it is witnessed in various avenues.⁴²⁴ Traffickers may bribe immigration officials to obtain travel documents for victims. They may also liaise with police officers to obstruct investigations and avoid arrests.⁴²⁵ Employers of trafficked workers may liaise with unscrupulous law enforcement officials to intimidate victims who make reports and to obtain information on potential raids.⁴²⁶ Judicial officers may equally be compromised by traffickers to prevent their conviction or to ensure that they get light sentences.⁴²⁷

Corruption in Kenya is quite high. According to Transparency International's Corruption Perceptions Index of 2022, Kenya ranked position 32 out of 100 (with 0 representing highly corrupt and 100 representing least corrupt).⁴²⁸ The Ethics and Anti-Corruption Commission Survey of

⁴²³ Anti-Corruption and Economic Crimes Act, Section 2.

⁴²⁴ Lorenzo Pasculli and Nicholas Ryder (eds), *Corruption in the Global Era: Causes, Sources and Forms of Manifestation* (1st edn, Routledge 2019) <<https://www.taylorfrancis.com/books/9780429591181>> accessed 30 August 2023.

⁴²⁵ *ibid.*

⁴²⁶ *ibid.*

⁴²⁷ *ibid.*

⁴²⁸ '2022 Corruption Perceptions Index - Explore Kenya's Results' (*Transparency.org*, 31 January 2023) <<https://www.transparency.org/en/cpi/2022>> accessed 30 August 2023.

2021-2022 identified bribery as the most common form of corruption in Kenya.⁴²⁹ In addition, bribery was noted to be most prevalent with the Ministry of Immigration and Registration of Persons, the National Police Service, Country Government Offices, the Judiciary, among others.⁴³⁰

3.7. Environmental Factors:

These include both natural and man-made disasters that have aided in the furtherance of human trafficking activities. The most recent environmental disaster is the unprecedented COVID-19 pandemic that resulted in significant loss of lives globally and restrictive prevention measures such as the imposition of state-wide lockdowns.

The novelty of COVID-19 coupled with the rapid rates of infection pressured most countries to take necessary measures to prevent its spread. These included the closure of state borders, imposition of curfews and lockdowns, travel restrictions, quarantine of entire counties, restrictions on a number of people in public places and workstations, among others. These measures culminated in the loss of income and livelihoods for most people. As a result, some people, out of sheer desperation, sold themselves or became victims of debt bondage.⁴³¹

The restrictions imposed also meant that people were confined to their homes for longer hours, thereby leading to their increased online presence. During this period, some children were exposed to online grooming by sexual predators, with some being exploited on sex trafficking sites.⁴³² This also culminated in a greater demand for sexually abusive online content.⁴³³ There was also a

⁴²⁹ Ethics and Anti-Corruption Commission, 'National Ethics and Corruption Survey 2021' (2022).

⁴³⁰ *ibid.*

⁴³¹ Aseema Memoni, 'Rise of Human Trafficking During Covid-19' (2021) 4 International Journal of Law Management & Humanities 1348.

⁴³² United Nations Office on Drugs and Crime, 'Impact of the COVID-19 Pandemic on Trafficking in Persons: Preliminary Findings and Messaging Based on Rapid Stocktaking' <[chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.unodc.org/documents/Advocacy-Section/HTMSS_Thematic_Brief_on_COVID-19.pdf](https://www.unodc.org/documents/Advocacy-Section/HTMSS_Thematic_Brief_on_COVID-19.pdf)>.

⁴³³ *ibid.*

notable increase in domestic violence, with some victims being sexually exploited by family members or forced into prostitution for remuneration.⁴³⁴

The focus on preventing the spread of the virus also diverted most state resources, with limited resources being used to address human trafficking.⁴³⁵ In some instances, victims harboured by human traffickers were abandoned in their places of captivity due to the difficulties faced by traffickers in moving them. This was witnessed in Dandora, Nairobi where the DCI rescued 29 women who were to be trafficked to the Gulf States but were abandoned by their traffickers in two small rooms and in squalid conditions following the government-imposed travel restrictions.⁴³⁶

3.8. Forms of Exploitation:

The end goal of human trafficking is profit generation through the exploitation of people. The forms of exploitation are usually classified into two broad categories, trafficking for forced labour and sexual exploitation. However, various other forms exist, either within these clusters or as stand-alone forms such as organ trafficking. These are discussed at length below.

3.8.1. Forced Labour:

Forced labour has been outlined in Chapter 2 above as any form of non-voluntary work done by a person and for which a sanction is imposed. It is estimated that about 20.1 million people are in forced labour situations worldwide.⁴³⁷ However, it is noteworthy that not all forced labour is as a result of human trafficking. Forced labour may be reflective of unfavourable or substandard work

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ 'Kenya: Police Rescue 29 Suspected Victims of Human Trafficking Abandoned by Recruitment Agents after Covid-19-Related Travel Restrictions' (*Business & Human Rights Resource Centre*) <<https://www.business-humanrights.org/en/latest-news/kenya-police-rescue-29-suspected-victims-of-human-trafficking-abandoned-by-recruitment-agents-after-covid-19-related-travel-restrictions/>> accessed 1 September 2023.

⁴³⁷ 'Breaking Down Global Estimates of Human Trafficking: Human Trafficking Awareness Month 2022 | Human Trafficking Institute' <<https://traffickinginstitute.org/breaking-down-global-estimates-of-human-trafficking-human-trafficking-awareness-month-2022/>> accessed 3 September 2023.

conditions to which a person may be subjected.⁴³⁸ However, almost all forms of human trafficking constitute forced labour where a recruiter or employer takes advantage of the position of vulnerability of victims and derives financial gain from their labour exploitation.⁴³⁹

Human trafficking for forced labour or labour exploitation is the most predominant form in Kenya, with trafficking for domestic servitude being quite prevalent.⁴⁴⁰ There are also reported cases of girls sourced from outside Kenya to perform exploitative domestic services in the country. These girls are mainly recruited from Uganda, Tanzania, Burundi and Zimbabwe.⁴⁴¹ Girls from marginalized regions such as Karamoja-Uganda form the largest reported number of trafficked victims in Kenya, with many being sold to employers in border towns such as Busia or transported as far as Majengo Slums and Eastleigh in Nairobi and Garissa town.⁴⁴² Many Kenyans have also been trafficked outside the country to Gulf States to provide domestic labour. In some cases, women and girls were duped with promises of employment in the hotel industry only to end up working as domestic servants. Practices such as the *kafala* system have created grossly exploitative environments for these migrants, where they were overworked, underpaid or not paid, denied food, traded off to other employers and, in some instances, ended up dead under suspicious circumstances.

Agriculture, fishing, mining, cattle herding, and street vending are also common forms of forced labour exploitation of victims in Kenya, with men and young boys being identified as victims.⁴⁴³

⁴³⁸ ‘Forced Labour and Human Trafficking’ (Special Action Programme to Combat Forced Labour, International Labour Office 2008).

⁴³⁹ *ibid.*

⁴⁴⁰ United States of America Department of State (n 8).

⁴⁴¹ *ibid.*

⁴⁴² ENACTAfrica.org, ‘Girls from Karamoja Sold for US\$5 and Trafficked to Nairobi’ (*ENACT Africa*, 21 July 2021) <<https://enactafrica.org/enact-observer/girls-from-karamoja-sold-for-us5-and-trafficked-to-nairobi>> accessed 2 September 2023.

⁴⁴³ United States of America Department of State (n 8).

New forms of labour trafficking have also emerged. For instance, women from Nepal⁴⁴⁴ and Pakistan⁴⁴⁵ are being trafficked to Nairobi and Mombasa to work as *mujra* dancers (cultural dancers). In addition, the totalitarian government of Cuba, accused of state-run human trafficking,⁴⁴⁶ entered into an agreement with Kenya in 2019 that resulted in the forced labour of 100 Cuban medical professionals in the country.⁴⁴⁷

3.8.2. Forced Begging:

This has also become a prime form of trafficking in Kenya targeting persons with disabilities, children and the elderly. These victims are either abducted from street families, rented out by family members or lured from their homes with false promises of better livelihood or employment opportunities.⁴⁴⁸ The victims are forced to beg for money in specific areas in major towns and are under constant watch by their traffickers. They work for long hours with no remuneration and are forced to surrender their earning to traffickers.⁴⁴⁹ As persons with physical disabilities evoke more sympathy from society, victims may be given props such as wheelchairs or crutches to attract more attention. In extreme cases, traffickers are also known to purposefully disfigure or maim their

⁴⁴⁴ ‘60-Year Sentence – Kenyan Court Sets Precedent on Trafficking for Sexual Exploitation’ (*Equality Now*, 12 January 2022) <https://www.equalitynow.org/news_and_insights/60-year-sentence-kenyan-court-sets-precedent-on-trafficking-for-sexual-exploitation/> accessed 2 September 2023.

⁴⁴⁵ ‘Human Trafficking Probe: CS Echesa on Spot over Pakistani Girls’ (*Nation Media Group*, 29 June 2020) <<https://nation.africa/kenya/counties/nairobi/human-trafficking-probe-cs-echesa-on-spot-over-pakistani-girls-124518>> accessed 2 September 2023.

⁴⁴⁶ Vaitiari Rodriguez, ‘Human Trafficking in Cuba’s Medical Missions’ (Human Rights Foundation-Center for Law and Democracy 2022) <https://hrf.org/wp-content/uploads/2022/08/HUMAN-TRAFFICKING-IN-CUBA-MEDICAL-MISSIONS-REPORT_FINAL.pdf>. Cuba has led state-run human trafficking of its medical professionals for over 59 years. These medical professionals are sent on medical missions in third world or conflict countries worldwide without their consent. They are separated from their families and forced to work in unfamiliar territories where their pay is also withheld. They are also subjected to deplorable working conditions with little to no intervention by their home state. The medical services provided by these trafficked professionals serve as a source of foreign income for the Cuban government.

⁴⁴⁷ ‘US Bans Cuban Officials for Trafficking Doctors’ (*Nation Media Group*, 28 June 2020) <<https://nation.africa/kenya/news/us-bans-cuban-officials-for-trafficking-doctors--208992>> accessed 2 September 2023.

⁴⁴⁸ ‘Child Trafficking in Nairobi, Mombasa & Kisumu’ (*Stop the Traffik - Intelligence Report: Kenya*, 20 February 2019) <<https://www.stopthetraffik.org/intelligence/kenya/>> accessed 2 September 2023.

⁴⁴⁹ ‘Human Trafficking for Forced Begging’ (*IOM X*, 11 January 2017) <<https://iomx.iom.int/resources/forced-begging/factsheets/human-trafficking-forced-begging>> accessed 2 September 2023.

victims to earn more money.⁴⁵⁰ These victims are often subjugated through the use of physical violence and may at times also experience sexual abuse.⁴⁵¹

Kenya is notably home to several trafficked disabled children from Tanzania. A documentary by the British Broadcasting Corporation (BBC Africa Eye- Forced to Beg: Tanzania's Trafficked Kids) highlighted the existence of a trafficking syndicate in Kenya, which trafficked several disabled children from impoverished families in Tanzania who were forced to beg in Nairobi and other towns.⁴⁵²

3.8.3. Forced Marriage:

This relates to non-consensual marriage. An estimate of about 22 million individuals worldwide recognised as being in forced marriage situations, with a significant number representing women and girls.⁴⁵³ The prevalence of forced and early marriages in Kenya varies depending on the region. Most victims of forced and early marriages hail from communities from Tana River, Turkana, Wajir, Isiolo, Samburu, Migori and Narok.⁴⁵⁴

Patriarchal views and cultural practices are primary factors influencing the forced and early marriage of women and girls.⁴⁵⁵ In addition, financial challenges faced by impoverished families have resulted in the 'trade' of female family members to forced marriage situations.⁴⁵⁶ Victims of

⁴⁵⁰ *ibid.*

⁴⁵¹ *ibid.*

⁴⁵² *Forced to Beg: Tanzania's Trafficked Kids - BBC Africa Eye Documentary* (Directed by BBC News Africa, 2022) <<https://www.youtube.com/watch?v=sz8ZyCmV0N8>> accessed 2 September 2023.

⁴⁵³ 'Global Estimates of Modern Slavery Forced Labour and Forced Marriage' (International Labour Organization and the International Organization for Migration 2022) <chrome-extension://efaidnbmnnnibpajpcglclefindmkaj/https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_854733.pdf>.

⁴⁵⁴ 'Kenyan Advocacy on Child and Forced Marriage: A Guide for Faith Leaders' (Inter-Religious Council of Kenya, Walk Free, and the Global Freedom Network 2023) <<chrome-extension://efaidnbmnnnibpajpcglclefindmkaj/https://cdn.walkfree.org/content/uploads/2023/06/12153750/WF-Forced-and-Child-Marriage-Report.pdf>>.

⁴⁵⁵ 'Global Estimates of Modern Slavery Forced Labour and Forced Marriage' (n 458).

⁴⁵⁶ *ibid.*

trafficking for forced marriage are often face sexual and physical abuse.⁴⁵⁷ In some cases, victims and their family members are deceived with promises of lucrative marriage prospects only for the said victims to be exploited by their ‘husbands’ in commercial sex work or to be sold off to other husbands.⁴⁵⁸

3.8.4. Forced Criminality:

This form of trafficking is rampant with organized criminal groups who desire to continue engaging in criminal practices while avoiding detection and apprehension.

Victims in transit to other states are sometimes used as drug mules, with pellets of harmful drugs being forcefully inserted into their bodies.⁴⁵⁹ Unfortunately, with strict regulations on drug trafficking in several countries, it becomes difficult for them to seek help when apprehended by law enforcement.⁴⁶⁰

Victims are also trafficked to engage in cybercrime activities. In 2022, it was reported that a number of Kenyans had been trafficked to Southeast Asian countries such as Thailand, Myanmar, Cambodia and Laos to engage in crimes such as online identity theft and blackmailing of vulnerable people on dating sites.⁴⁶¹

Trafficking for violent extremism or radicalization is also prevalent in Kenya. The Al-Shabaab are renowned for using deceptive means such as the promise of employment and education

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*

⁴⁵⁹ ‘Drug Mules: Swallowed by the Illicit Drug Trade’ <https://www.unodc.org/southasia/frontpage/2012/october/drug-mules_-swallowed-by-the-illicit-drug-trade.html> accessed 2 September 2023.

⁴⁶⁰ ‘Criminal or Victim? Female Drug Mules Trapped as “legal Zombies” in Brazil’ *Reuters* (19 December 2019) <<https://www.reuters.com/article/us-brazil-trafficking-drugs-idUSKBN1YN00X>> accessed 2 September 2023.

⁴⁶¹ *The Asia Crime Trap: Kenyans Trafficked to Thailand to Engage in Cybercrime* (Directed by Citizen TV Kenya, 2022) <<https://www.youtube.com/watch?v=s5DbMftQqCQ>> accessed 2 September 2023.

opportunities to lure their victims.⁴⁶² Women have also been involuntarily recruited by the Al-Shabaab through blackmail, intimidation or pressure from indoctrinated spouses or through kidnap.⁴⁶³

3.8.5. Trafficking in Children; the Abduction and Sale of Children:

The abduction and sale of children in Kenya has become commonplace. Babies are often abducted from maternity hospitals or homeless mothers and sold to third parties.⁴⁶⁴ In some instances, women and girls who fall victim to sexual abuse sell their babies to traffickers to avoid societal stigma.⁴⁶⁵ Lack of financial resources has also led some families to sell their children to human traffickers.⁴⁶⁶ The primary purpose of this form of trafficking is to facilitate illegal adoption, where children are sold to individuals or placed in orphanages and subsequently passed on for adoption.⁴⁶⁷ Some of these ‘adoptive parents’ place children in brothels, whereas in other cases, the adopted children are used for ritual practices.⁴⁶⁸

3.8.6. Organ Removal:

This entails the movement of potential victims to destinations where their organs are to be harvested. The organs harvested are primarily vital organs such as the heart, liver, kidneys, and bone marrow, among others.⁴⁶⁹ Organ trafficking is fuelled by the scarcity of organ transplants in

⁴⁶² Fathima A Badurdeen, ‘Women and Recruitment in the Al-Shabaab Network: Stories of Women Being Recruited by Women Recruiters in the Coastal Region of Kenya’ (2018) 45 *The African Review: A Journal of African Politics, Development and International Affairs* 19.

⁴⁶³ *ibid.*

⁴⁶⁴ *The Baby Stealers - BBC Africa Eye Documentary* (Directed by BBC News Africa, 2020) <<https://www.youtube.com/watch?v=7ix5jbCmiDU>> accessed 2 September 2023.

⁴⁶⁵ Jennifer Philipp, ‘What to Know About Child Trafficking in Kenya’ (*The Borgen Project*, 27 February 2021) <<https://borgenproject.org/child-trafficking-in-kenya/>> accessed 2 September 2023.

⁴⁶⁶ ‘Trafficking in Children for Adoption | World Problems & Global Issues | The Encyclopedia of World Problems’ (*Union of International Associations*) <<http://encyclopedia.uia.org/en/problem/138882>> accessed 2 September 2023.

⁴⁶⁷ *ibid.*

⁴⁶⁸ *The Baby Stealers - BBC Africa Eye Documentary* (n 469).

⁴⁶⁹ Elizade University, Ilara-Mokin, Ondo State, Nigeria and others, ‘Reappraising Effective Regulation in Preventing Human Organs Trafficking in Africa: Kenya and Nigeria in Perspective’ (2022) 10 *ABUAD Law Journal* 59 <<https://journals.abuad.edu.ng/index.php/alj/article/view/199>> accessed 2 September 2023.

the proper donation channels, which culminate in long waiting periods for potential recipients who sometimes are not fortunate enough to receive a donor.⁴⁷⁰ Victims of organ trafficking are procured either through promises of lucrative job opportunities or payment of incentives.⁴⁷¹ In either case, the financial gain of their traffickers remains a top priority and there is little or no regard to the organ removal process or the post-surgery/ removal care of the victims.⁴⁷²

Cases of organ trafficking have been reported in Kenya. Following the exposure of the activities of a religious cult in Shakahola, Kilifi County, bodies of scores of victims discovered in Shakahola Forest were found to be missing vital organs leading to suspicions of organ trafficking within the said cult.⁴⁷³ Similarly, Kenyan victims trafficked to Laos and Thailand for forced labour and sexual exploitation were repeatedly threatened with the removal of their organs for failure to meet performance targets.⁴⁷⁴

Trafficking for organ removal also involves the sale of non-vital organs for ritualistic practices. Persons with albinism have been the unfortunate victims of this practice in East Africa as they are targeted for their skin and bones, which are believed to possess magical properties when used in rituals.⁴⁷⁵

⁴⁷⁰ *ibid.*

⁴⁷¹ *ibid.*

⁴⁷² *ibid.*

⁴⁷³ Agence France-Presse, 'Autopsies Reveal Missing Organs in Kenya Cult Deaths, Say Police' *The Guardian* (9 May 2023) <<https://www.theguardian.com/world/2023/may/09/autopsies-missing-organs-kenya-cult-deaths-police>> accessed 2 September 2023.

⁴⁷⁴ 'Prostitution, Organ Theft and Cyber Crime: Tales of Kenyans Trafficked to Asia' (*Citizen Digital*, 6 November 2022) <<https://www.citizen.digital/news/prostitution-organ-theft-and-cyber-crime-tales-of-kenyans-trafficked-to-asia-n308911>> accessed 2 September 2023.

⁴⁷⁵ ISSAfrica.org, 'Tanzanians Hard Hit by Trafficking in People with Albinism' (*ISS Africa*, 19 April 2022) <<https://issafrica.org/iss-today/tanzanians-hard-hit-by-trafficking-in-people-with-albinism>> accessed 2 September 2023.

3.8.7. Sex Exploitation:

Sexual exploitation refers to the “*actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, including but not limited to profiting monetarily, socially or politically from the sexual exploitation of another.*”⁴⁷⁶ It is estimated that there are about 4.8 million sex trafficking victims who are sexually exploited worldwide.⁴⁷⁷

Gender inequalities and disproportionate disadvantages in society place women at a higher risk of trafficking than men.⁴⁷⁸ However, women can be both victims and perpetrators of sex trafficking. Sometimes former female victims are forced by their traffickers to lure other women and girls into the industry as a means of ending the said victims’ exploitation.⁴⁷⁹ In other instances, former trafficked women willingly become part of the trafficking syndicates as madams and exploit other women for their personal gain.⁴⁸⁰

A number of factors may trigger trafficking for sexual exploitation. War and armed conflict often lead to the abduction of women and girls for sexual exploitation or sex slavery.⁴⁸¹ Technological advancements promote online sexual trafficking through forced pornography and forced sexual acts in online chat rooms.⁴⁸² Financial instability has resulted in the migration of victims to destinations where they were exploited to satisfy the demands of the sex industry.⁴⁸³

⁴⁷⁶ Alys McAlpine, Mazedra Hossain and Cathy Zimmerman, ‘Sex Trafficking and Sexual Exploitation in Settings Affected by Armed Conflicts in Africa, Asia and the Middle East: Systematic Review’ (2016) 16 BMC International Health and Human Rights 34 <<http://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-016-0107-x>> accessed 2 September 2023.

⁴⁷⁷ ‘Breaking Down Global Estimates of Human Trafficking: Human Trafficking Awareness Month 2022 | Human Trafficking Institute’ (n 442).

⁴⁷⁸ McAlpine, Hossain and Zimmerman (n 481).

⁴⁷⁹ Miriam Wijkman and Edward Kleemans, ‘Female Offenders of Human Trafficking and Sexual Exploitation’ (2019) 72 Crime, Law and Social Change 53 <<http://link.springer.com/10.1007/s10611-019-09840-x>> accessed 2 September 2023.

⁴⁸⁰ *ibid.*

⁴⁸¹ Danailova-Trainor and Belser (n 342).

⁴⁸² *ibid.*

⁴⁸³ *ibid.*

Victims of sex trafficking are lured by traffickers either through ‘*finesse pimping*’ or ‘*guerrilla pimping*’.⁴⁸⁴ The former pertains to the psychological deception of potential victims through acts of kindness and affection whereas the latter relates to the use of coercion or physical violence.⁴⁸⁵ Kenya is estimated to have “between 35,000 and 40,000 victims of sex trafficking”.⁴⁸⁶ Sex trafficking in the country is predominant in urban cities and coastal towns, where trafficked victims are forced to engage in sexual acts in brothels, bars and nightclubs.⁴⁸⁷ Kenyan migrants have also been subjected to sexual exploitation in foreign states. Some victims who were subjected to domestic servitude in Gulf States were also sexually exploited or assaulted by their employers.⁴⁸⁸ Victims trafficked to Laos and Thailand under the guise of obtaining lucrative jobs were instead forced to work in brothels.⁴⁸⁹ Victims lured with the promise of marriage and lavish lifestyles by foreign tourists ended up in sexually exploitative environments in countries such as Italy.⁴⁹⁰

3.8.8. Child Sex Tourism:

Child sex tourists are, ideally, persons visiting countries under the guise of tourism to defile or commit sexual acts with children.⁴⁹¹ Some countries have gained notoriety for their complacency with child sex trafficking due to its economic benefits.⁴⁹²

Child sex tourism is a relatively accepted practice in the Coastal Region of Kenya. Most communities in the said region live in absolute poverty and are therefore not averse to the

⁴⁸⁴ Neha A Deshpande and Nawal M Nour, ‘Sex Trafficking of Women and Girls’ (2013) 6 *Reviews in Obstetrics and Gynecology* e22 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3651545/>> accessed 3 September 2023.

⁴⁸⁵ *ibid.*

⁴⁸⁶ United States of America Department of State (n 8).

⁴⁸⁷ *ibid.*

⁴⁸⁸ Omuka (n 406).

⁴⁸⁹ ‘Prostitution, Organ Theft and Cyber Crime: Tales of Kenyans Trafficked to Asia’ (n 479).

⁴⁹⁰ ‘How Young Men in Kenya’s Coastal Region Fall Victim to Sex Trafficking.’ <<https://riskbulletins.globalinitiative.net/esa-obs-021/02-how-young-men-in-kenyas-coastal-region-fall-victim-to-sex-trafficking.html>> accessed 3 September 2023.

⁴⁹¹ Alan Davenport, ‘Child Sex Tourism: The New Law’ [1996] *Travel Law Journal* 110.

⁴⁹² *ibid.*

exploitation of their children in the sex industry.⁴⁹³ In some instances, more than one child from the same family will be engaged in child sex tourism.⁴⁹⁴ The children engaged in this practice may also not consider themselves victims of sexual exploitation, viewing it as their means of contributing to the financial stability of their families.⁴⁹⁵ Social media applications are used to advertise these children for sexual exploitation.⁴⁹⁶ Some unscrupulous tourism agencies also advertise child sex tourism on their websites using coded phrases.⁴⁹⁷

Though there appears to be common knowledge of this practice, the identification of perpetrators is not as easy. Police patrols are limited to public beaches and hotels whereas, knowing this, perpetrators exploit their victims in private villas and boats.⁴⁹⁸ In addition, reported cases are difficult to follow through to conviction as the perpetrators often escape accountability on account of their temporary presence within the state's jurisdiction.⁴⁹⁹

3.9. Conclusion

The presence of laws in a state does not equate to the eradication of the ills referenced therein. The Bill of Rights as outlined in Chapter 4 of the Constitution of Kenya has not deterred the exploitation of Kenyans locally or abroad. The Counter-Trafficking in Persons Act of 2010, though comprehensive, has not seen a reduction in the forms of trafficking referenced herein. Moreover,

⁴⁹³ 'Parents Sell Children as Kenya's Sex Tourism Normalizes Exploitation' (*Global Sisters Report*) <<https://www.globalsistersreport.org/news/ministry/parents-sell-children-kenyas-sex-tourism-normalizes-exploitation-52246>> accessed 2 September 2023.

⁴⁹⁴ *ibid.*

⁴⁹⁵ ENACTAfrica.org, 'New Efforts Needed to Stop Child Sex Tourism' (*ENACT Africa*, 5 April 2019) <<https://enactafrica.org/research/trend-reports/new-efforts-needed-to-stop-child-sex-tourism>> accessed 2 September 2023.

⁴⁹⁶ *ibid.*

⁴⁹⁷ Thomas R Panko and Babu P George, 'Child Sex Tourism: Exploring the Issues' (2012) 25 *Criminal Justice Studies* 67 <<https://www.tandfonline.com/doi/full/10.1080/1478601X.2012.657904>> accessed 2 September 2023.

⁴⁹⁸ ENACTAfrica.org (n 500).

⁴⁹⁹ 'Parents Sell Children as Kenya's Sex Tourism Normalizes Exploitation' (n 498).

the numerous laws on women's and children's rights have not impacted their continued predominance in trafficking statistics in the country.

The historical analysis of human trafficking in Kenya illuminates that its prevalence is wholly on account of what may be deemed as 'accepted practices' by the Kenyan society. It has become an accepted practice for children to engage in manual labour following both traditional norms and colonial administrates as discussed above. It is also the norm for children sent to live with relatives in urban areas to 'give back' as a form of appreciation, which exposes them to potential exploitation. Further, discrimination against women and girls as elucidated above continues to be common place, thereby instructing societal attitudes on whether such accepted practices actually amount to exploitation. This has had a resultant impact on Kenya's responsive measures in the implementation of the 3P Paradigm as espoused by the anti-trafficking legislation, which is analysed in detail in the next chapter.

CHAPTER FOUR: KENYA'S COMPLIANCE WITH THE REGULATORY FRAMEWORK ON HUMAN TRAFFICKING

4.1. Introduction

The state of human trafficking in Kenya can be discerned 'at a glance' from a review of the various literary works of numerous authors. However, the researcher sought to attain a greater understanding of the situation on the ground to obtain objective data, necessitating the conduct of quantitative research. This chapter, therefore, discusses the findings emanating from the primary data collected in the research.

The data collected has been set out in sub-themes demonstrating the demographics of the respondents and emulating the '3P-Paradigm'⁵⁰⁰ in addressing human trafficking, i.e. *protection*; focusing on the level of awareness of human trafficking among members of society, *prosecution*; shedding light on investigation and prosecution processes and challenges, and *prevention*; highlighting areas to be addressed to curb the vice in Kenya.

4.2. Respondents' Demographic Characteristics:

4.2.1. Gender:

The research demonstrates limited disparity in representation from both genders, with 61 of the total respondents being female whereas 56 of the total respondents were male. The distribution of the gender of the respondents is demonstrated in Table 1 below:

⁵⁰⁰ U.S. Department of State-Office to Monitor & Combat Trafficking in Persons, '3Ps: Prosecution, Protection, and Prevention' (*3Ps: Prosecution, Protection, and Prevention*) <<https://www.state.gov/3ps-prosecution-protection-and-prevention/>> accessed 16 August 2023.

Table 1: Distribution of Respondents by Gender

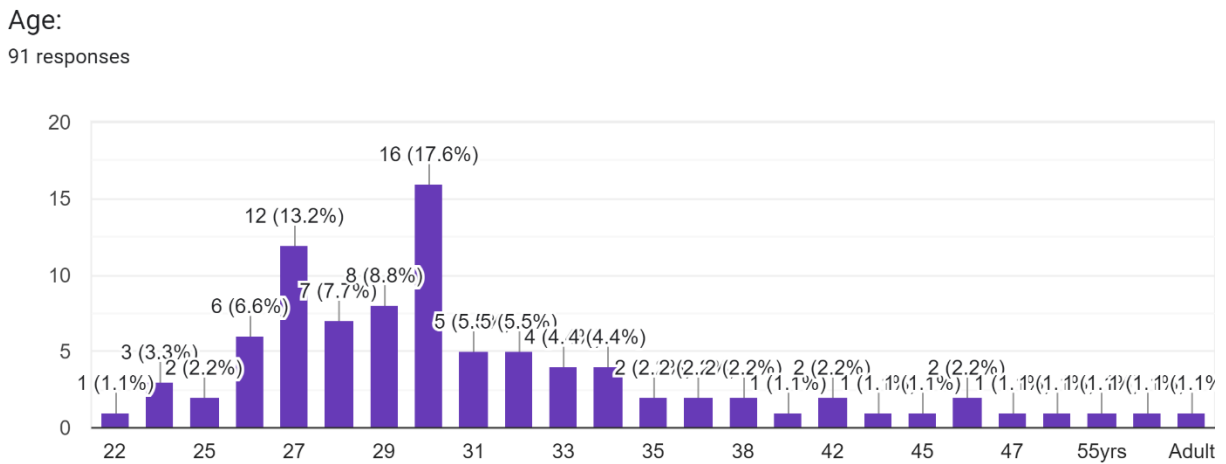
Gender	Number	Percentage (%)
Female	61	52.14
Male	56	47.86
Total	117	100

The relative level of representation between the genders demonstrates the willingness of either gender to share information freely.

4.2.2. Age:

Only 91 of the 117 respondents disclosed their age in the research. Most of these respondents ranged between 22-57 years of age. A majority of the respondents, representing 17.6%, were 30 years old. This is demonstrated in Figure 1 below:

Figure 1: Distribution of Respondents by Age



4.2.3. Highest Level of Education:

A majority of the respondents had attained secondary education. In addition, a significant number of the respondents had also obtained tertiary or university level education. This is demonstrated in Table 2 below:

Table 2: Distribution by Highest Level of Education

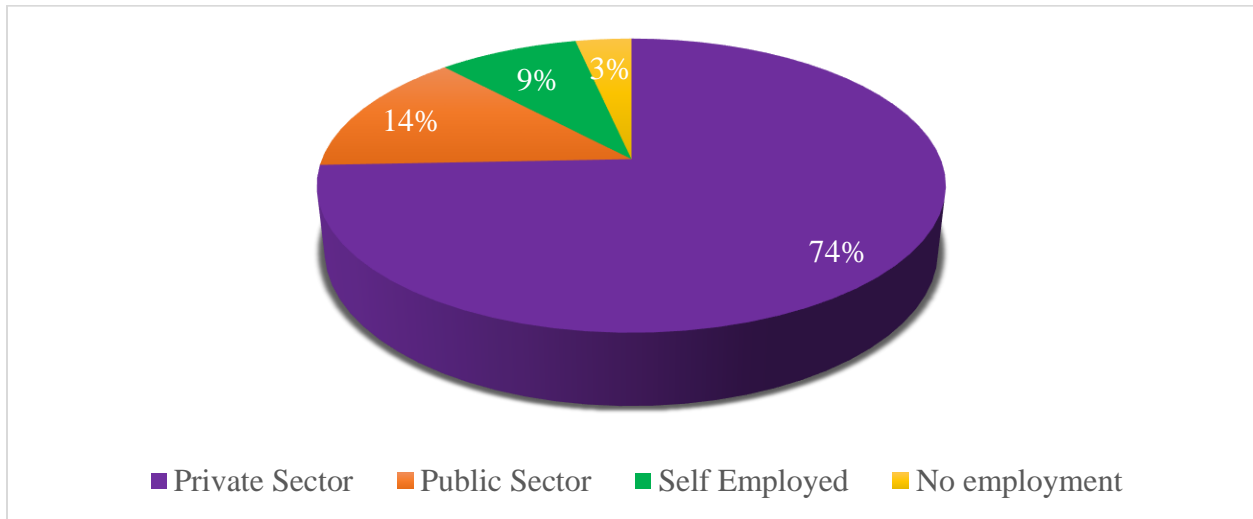
Highest Education Level	Number	Percentage (%)
Secondary	12	10.26
College or Vocational Education	20	17.09
University	85	72.65
Total	117	100

Premised on the above, many of the respondents had a good understanding of the subject matter of the research.

4.2.4. Occupation:

Most respondents in the study were employed, with 87 respondents working in the private sector and 16 respondents working in the public sector. On the other hand, 10 respondents were self-employed whereas 4 respondents had no form of employment. The data on the same is depicted in Figure 2 below:

Figure 2: Distribution of respondents based on their occupation



4.3. Paradigm 1- Respondent’s Awareness on Human Trafficking:

The prevention of human trafficking and slavery-like practices can only be effective upon understanding why the vice takes place. This entails the assessment of the level of awareness of human trafficking by members of society, which includes understanding the vulnerabilities exposing people to human trafficking, the modes of exploitation, among others. The researcher engaged the respondents in the study on these areas and has captured their responses below.

4.3.1. Knowledge on human trafficking in Kenya

It was noted that all respondents appeared to have heard of human trafficking. On how they became aware of human trafficking, 51 respondents stated that they heard of human trafficking incidences reported in the news and local newspapers. 34 respondents stated that they heard stories of trafficking victims from social media outlets or through personal research online. 8 respondents heard from family and friends whereas 2 respondents were informed in community group forums. 10 respondents were informed of human trafficking through formal training programs conducted

by NGOs and international organizations whereas 11 respondents stated that they gained knowledge on the same as part of their employment roles (conduct of trainings). Only 1 respondent became aware of human trafficking because of personal experience. The data in this regard has been shared in Table 3.

Table 3: Knowledge on Human Trafficking

Source of Information	Number	Percentage (%)
News and Local Newspapers	51	43.59
Online/Social Media	34	29.06
Family/Friends	8	6.84
Community Group Forums	2	1.71
Formal Trainings	10	8.55
Work	11	9.40
Personal Experience	1	0.85
Total	117	100

On awareness on human trafficking by members of the public, a key informant from CHTTEA stated that “...the level of awareness currently as we speak is at its highest level, it is the peak of the process.” The informant, however, further observed as follows:

“...a lot needs to be done because you realize getting the majority of the population to be in the know is not easy so the programs for awareness and creating interventions which provide prevention are more needed with the growth of the portfolio of knowledge... knowledge is not just knowledge, there should be information that goes to

the public but again there should also be information that goes specific to duty bearers like the police, like the judiciary, like the ODPP and other duty bearers who should part and parcel of the knowledge base.”

A key respondent from the CTIP Advisory Committee also affirmed that there was awareness of human trafficking in Kenya, but equally pointed to the limited knowledge among key stakeholders tasked with the enforcement of counter-trafficking laws. The informant had this to say:

“ ...there is limited awareness of what human trafficking offense constitutes, as such, when it comes to even referring charges or recording statements and undertaking further investigations, the investigations then are limited because they don't understand the key elements that they must have in the investigations of human trafficking cases...they are not aware of the crime itself, and even when police are investigating, a majority focus on the exploitation mode, they end up missing out on the whole investigation of unearthing the cartels of human trafficking.”

It was noted NGOs and civil society organisations, among other organisations, are working to raise public awareness of human trafficking. A key informant from Trace Kenya stated that they carry out information-sharing campaigns in schools, on social media, and through ‘nyumba kumi’ barazas. Another informant from the KNCHR stated that they have an online program touching on immigration and human rights wherein they discuss the inter-relation between smuggling and human trafficking, and outline the characteristics of human trafficking. A key informant from ANPPCAN stated that they sensitize the public through outlets with country-wide reach, e.g. through television stations and radio. The said informant also stated that they had also contributed to knowledge sharing with police officers and local community representatives to aid in the investigation and prosecution processes. The informant stated that:

“In the training that we did in our targeted areas, we also included the police officers and the chiefs...in some rural places they don’t go to report cases to police stations, they go to the chiefs. We have been training these policemen...previously, human trafficking was a bit new area and they weren’t aware about it so they wouldn’t even know the legislation to use to charge them with.”

A detective from the DCI-ATCPU Unit and two public prosecutors also confirmed that they had received regular training from NGOs and international organizations. One public prosecutor highlighted as follows:

“They (United Nations Organisation on Drugs and Crime) have been partners with the Office of the Director of Public Prosecutions (ODPP) when it comes to smuggling of migrants and trafficking in persons and they have organised awareness sessions, training sessions and taken keen interest in the cases that are handled. So they come in very handy when it comes to dealing with issues of trafficking.”

The state has also taken steps to create awareness among members of the public. A key informant from a recruitment agency also highlighted that information on human trafficking is also shared by the NEA. The informant further explained that job seekers planning to emigrate to foreign countries are also made aware of the dangers of human trafficking through emigrant training programs conducted by NITA. A prosecutor highlighted that training is also done by the ODPP through a forum on YouTube known as the ODPP Café. The prosecutor explained that:

“It is a YouTube channel where there is a media section in the ODPP and they have discussions on various topics to create awareness, so the public can log in and just listen to the segments that are held. Different prosecutors from different departments

get to discuss any issue that may arise. If decide on trafficking, the next time it will be on election offences and this varies.”

However, the respondent from the CTIP Advisory Committee pointed out that funding has not been availed by the state for the creation of awareness on human trafficking. The official stated that:

“One of the biggest challenges you will see is the government has really not invested anything on efforts to bar trafficking and in particular awareness creation, sensitization, capacity building and creation of mass campaigns on what human trafficking is all about and how to prevent and the reporting mechanisms.”

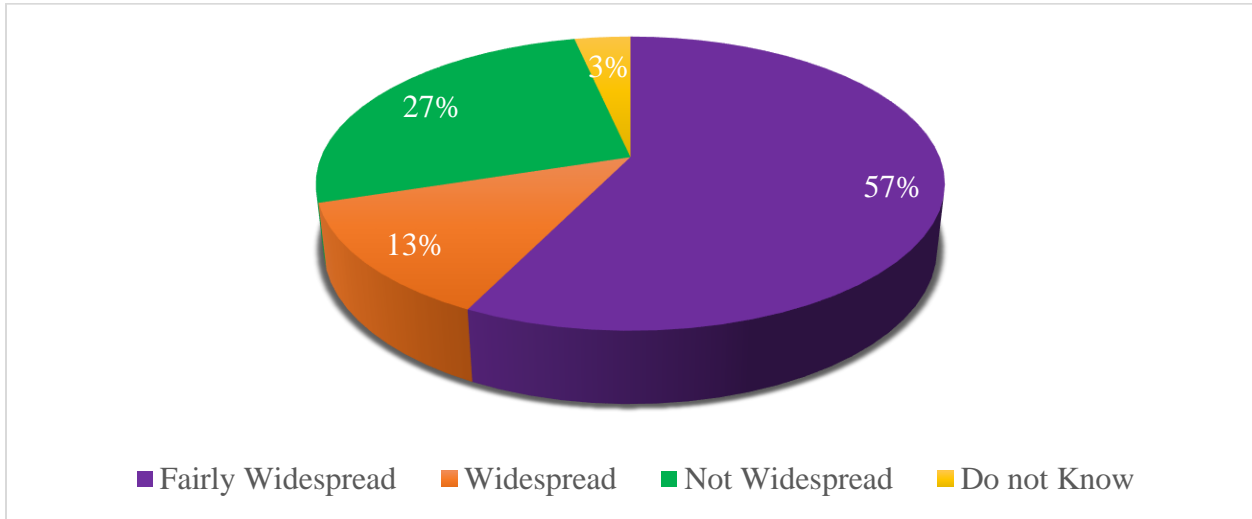
4.3.2. Prevalence of Human Trafficking:

The researcher, under this head, sought to not only understand public perception of the frequency of human trafficking in Kenya but also to gain an understanding of the country’s role as a source, transit and destination state.

Frequency:

Most respondents were of the view that human trafficking was fairly widespread in Kenya, representing 57% of the study population, while 13% of the respondents thought that it was widespread. On the other hand, 27% of the respondents posited that it was not widespread whereas 3% stated that they did not know the prevalence of human trafficking in Kenya. This is shown in Figure 3.

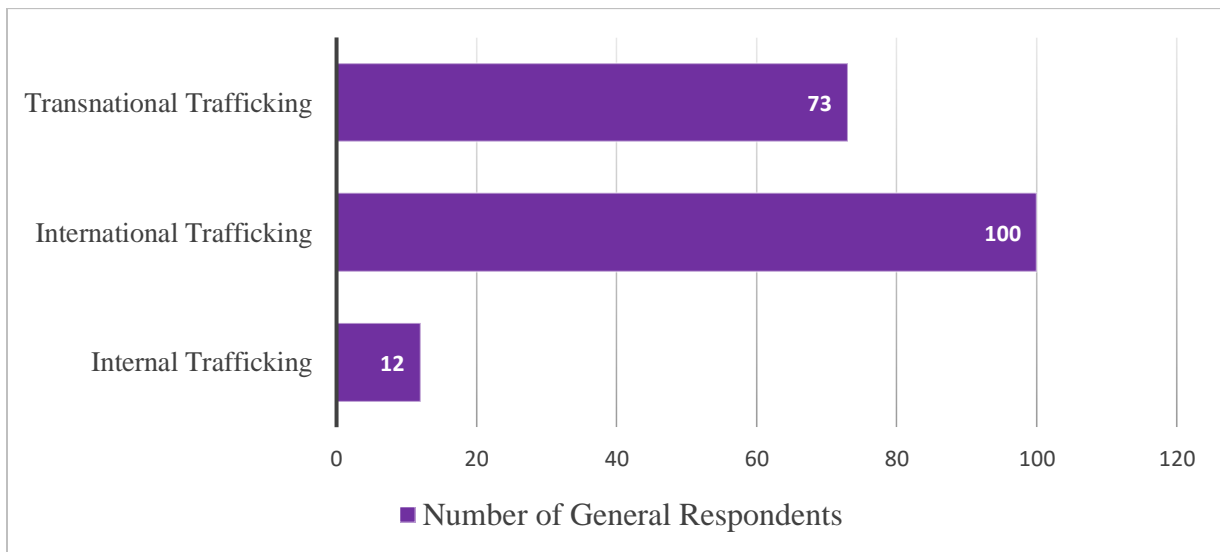
Figure 3: Prevalence of Human Trafficking in Kenya



Internal, International and Transnational Human Trafficking:

The feedback received from general respondents showed that members of the public are more acquainted with transnational and international human trafficking as opposed to domestic or internal trafficking. The statistics noted from the general respondents are displayed in Figure below.

Figure 4: Public perception on internal, international and transnational human trafficking



The researcher sought to understand why there was seemingly limited awareness on internal trafficking from the responses of general respondents. The informant from KNCHR confirmed this by stating that:

“...members of the public, you ask them, because they know human trafficking as external trafficking or even international trafficking. They don’t imagine internally there is so much happening...”

A public prosecutor elucidated that incidences of internal human trafficking may take place due to ignorance. The prosecutor explained as follows:

“Human trafficking in Kenya is highly prevalent both in reported and unreported instances and its prevalence is mostly out of ignorance. I think the general public do not know that their actions are actually trafficking. People are doing things without knowing that whatever that action is it is called human trafficking or trafficking in persons. That is where the trouble lies...victims also do not know that they have been trafficked.”

The study, however, made observations on internal human trafficking premised on responses from key informants. The informant from ANPPCAN highlighted that there were more cases of internal trafficking in Kenya, explaining that:

“In our case internal trafficking was more...the trafficking happens internally like inside the counties. So, it was either within this county to the next county but it was just within it was not across the borders.”

This was supported by a statement from a detective from the DCI ATCPU who noted as follows:

“We have encountered several of them... they are usually many cases of domestic labour in that somebody is coming to be a house help. Mainly girls.”

In addition, the survivor of human trafficking also noted that the survivor-led NGO encountered a majority of Kenyan victims trafficked locally. The said survivor had been trafficked and exploited within Nairobi when the survivor was 13 years old.

The study also showed that internal trafficking took the form of both rural to urban migration and vice versa. On rural to urban migration, the detective from the DCI- TOC Division highlighted that, *“ Most of them (victims) are being lured of being employed, being paid a lot of money or they are being cheated that they will be brought to Nairobi for work or to advance their education but once they land here in Nairobi, this does not happen. Most of them end up being used as domestic workers.”* On urban to rural migration, the CTIP Advisory Committee official explained that this was influenced by cultural practices or radicalization. The official stated as follows:

“This is common with cultures supporting female genital mutilation. Though some people live in the cities, they still believe in traditions which are already offence. So, what they do at some point is that they would move their children from the urban centres into the rural areas to undergo the process. Some of these young girls would then end up in forced marriages.

Similarly, when we are looking at trafficking for purposes of radicalisation, you get people moving from the cities because of the devotion. They are then moved to the rural areas in search of something...an ideology, only for them to be trafficked and be violated. A good example is what you are seeing with Shakahola, for instance. You have children who were trafficked for purposes of exploitation, whether they were being exploited religiously or in any other way.”

It was also observed from the study that certain incidences of internal human trafficking did not require the migration of victims. A key informant from the Global Fund to End Modern Slavery explained that globalization has expanded the reach of traffickers, stating as follows:

“What is interesting about human trafficking is its ability to evolve faster than we can respond. There is online child exploitation which is happening right now and it is not just poor children who are affected. It is not children from poor backgrounds like Kibera as would ordinarily be expected; it is your child in Karen who is targeted too and exploited online. You don’t need to leave your house, you will be trafficked while you are in your house.”

The key informants interviewed identified Kenya as a hub for human trafficking. A key informant from the Global Fund to End Modern Slavery highlighted the country’s feasibility in this regard in the following words:

“I think still when you look at Kenya geopolitics and the context of Kenya, it is one of the biggest economy in East Africa...when you think about the role that we play it means that, even just by that position, it places us where people can be trafficked compared to the others. Basically, there are three hubs in Africa and we have Nigeria in the West, we have Kenya in the East and then of course we have South Africa...Kenya is definitely the hub for East Africa.

This is because we have a strong economy compared to our neighbours. Also, if you think about our experience as far as economic stability and political stability, we have been way more stable than the rest of our neighbours which means that when there is war and all this, there is a lot of migration as a result of work or as a result of crisis. So yes, Kenya is a source, transit and destination for reasons of trafficking.”

As a source country, it was noted from the interviews with key informants from NGOs, the DCI and Immigration that most Kenyan nationals were trafficked to the Gulf States, with Saudi Arabia, Qatar, and Oman being identified as key states. However, the informant from the Ministry of Labour and Social Protection highlighted that new destination countries have been identified in recent years. The official stated that:

“We have now Thailand, Myanmar, Laos, India, those are the new routes, the new destinations. What is happening in those areas is about cybercrime; our young people are being trafficked to be used in cybercrime. So when you look at the job adverts they are promising them jobs in Thailand and they want graduates with either diploma or degree and competency in IT and fluency in English. That is the average young person in Kenya.

...everybody goes to India for medical treatment. So for those who want to get jobs there they assume or they are cheated there are jobs there, you just take a medical visa that you are either going there for treatment, as a caregiver or you are a patient and once you get there, the person who has organised puts you in a brothel.”

The immigration official currently based in Nairobi highlighted Kenya’s viability as a transit point in East Africa. The said official had this to say:

“I worked in North Eastern, Kisumu, Mombasa and then I was in Namanga...I was in charge of Namanga, for about three years. There was a lot of human trafficking coming from Ethiopia to South Africa and we could arrest them when they were travelling, some could even die, kwa ile magari kubwa wamejaa wamebebewa (they are overloaded on large trucks) ... the trucks would be left in the game reserves...”

However, the informant from the CTIP Advisory Committee provided a different account, noting that persons in transit through Kenya were mainly smuggled migrants who did not display characteristics of exploitation. The informant stated that:

“Normally the ones we get are those who are on transit as smuggled migrants. When you get smuggled migrants you are to screen them for trafficking so that you can ascertain that they knew that they were only getting a service or moving to the other country and they were not victims of trafficking. Among the Ethiopians that we have found so far we have not had instances of trafficking in persons. They are normally migrants who are being smuggled to the Southern part of Africa.”

It was also noted from the study that a case of human smuggling could easily transform into one of human trafficking. One of the prosecutors interviewed stated that:

“There are instances where migrants are in control from the borders towns up until they get to Nairobi. Once here, they are locked somewhere and told that the agreed transportation fees has doubled or tripled. They are told they have to do this and that in exchange to pay up the debt. They end up being exploited in the process of being smuggled.”

The country was identified as a destination country for nationalities predominantly from East Africa. It was noted from information shared by key informants that Ugandans, Tanzanians, Ethiopians, Burundi and Rwandese nationals comprised the majority of persons trafficked to be exploited in Kenya. The immigration official had this to say:

“I know about trafficked beggars from Tanzania and I remember very well we dealt with them. We returned so many and, unfortunately, it is our Kenyans who are doing that. There are some Kenyans who are doing such business (at Namanga), so whatever

business they are doing, ni matoke wanaleta, ni nini, all from Tanzania wanajuana na hao officers on the road every day. They reach a point wherehuyu ni ndizi anabeba, huyu analeta nyanya, huyu analeta machungwa, but today he is carrying something else but they (border police) don't bother to ask him to know what he is carrying..."

Key informants from the CTIP Advisory Committee and APPCAN also identified cases of Nepalese, Indian and Pakistani women being trafficked to be exploited in Nairobi and Mombasa regions. A Magistrate from the Kahawa Law Courts also identified reported cases of Thai women exploited in massage parlours in Nairobi.

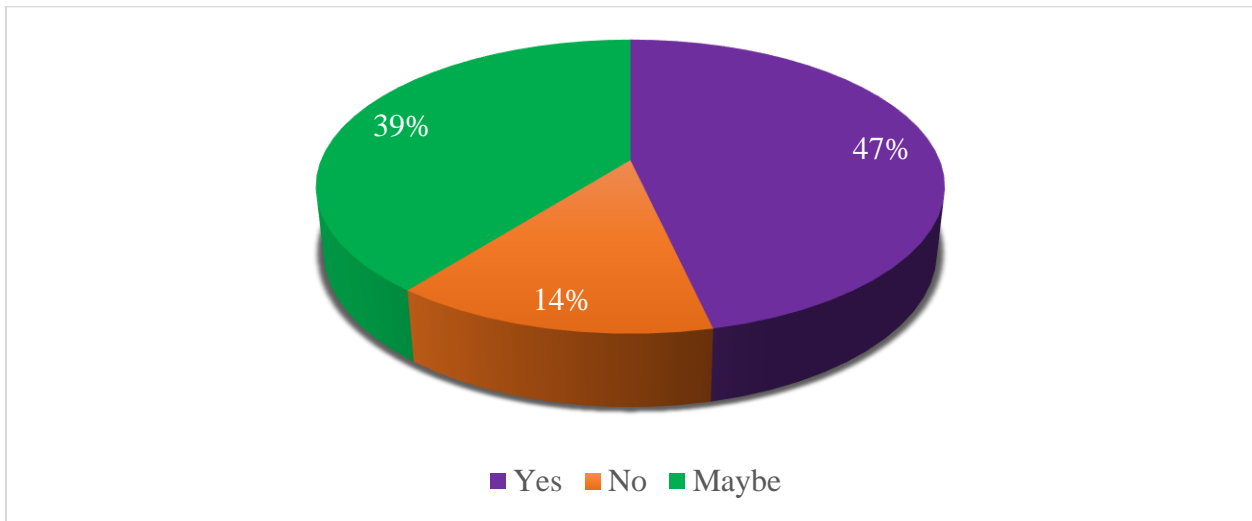
Based on the findings above, it is evident that the trafficking indices in Kenya remain prevalent despite the laws in place.

4.3.3. Identity of Victims and Perpetrators of Human Trafficking:

The researcher sought to understand whether members of the public are able to identify victims of human trafficking and perpetrators.

On victim identification, 46 general respondents answered in the affirmative, 15 stated that they probably would whereas 39 stated that they could not identify victims of human trafficking. The responses received from the survey of general respondents is noted in Figure 5 below:

Figure 5: Identity of victims of human trafficking.



Only 18 out of the general respondents provided further particulars on how they would identify victims of human trafficking. The indices of a trafficked victim according to these respondents included the lack of identification documents, low or no pay, restricted movements or lack of freedom, presence of bruises or other physical markings, anti-social behavior, frail or malnourished appearance, undignified working conditions, excessively long hours of work and a perpetual state of apprehension.

On identification of perpetrators, 89% of the general respondents indicated that they could not identify human traffickers. In addition, those who stated that they could identify the perpetrators did not provide further particulars.

The detective from the DCI-TOC Unit shed some light on the identification of victims and traffickers, explaining that they employ the use of an identification checklist to determine whether a person is a victim or trafficker. The checklist is premised on the three main elements of human trafficking, i.e. the act, means, and purpose.

A Magistrate from JKIA also confirmed the use of a ‘trafficking indicators checklist’ as provided under the Kenya Judicial Bench Book on Labour Trafficking that was launched on 8th July 2022.⁵⁰¹ The Bench Book sets out several key identifiers for instance, where the person (child) has no access to parents or guardians, has no labour contract, shows signs of physical or sexual violence, exhibits fear or hyper-vigilance, among others.⁵⁰² The Bench book also helps judicial officers to identify victims who may be wrongly classified as accused persons. These indicators include instances where coercion is identified as a factor resulting in the commission of a crime by the arraigned person, where a much older male is seeking the release of a young female at a bail hearing, where the accused person responds to questions in a manner that indicates coaching or coercion, among others.⁵⁰³

The detective from the DCI-TOC Unit stated that human traffickers identified were both men and women. The detective from the DCI-ATCPU Unit further stated that, in the case of children, women were the main perpetrators as they tend to appear trustworthy to children. He also explained that the traffickers they encountered were mainly the victims’ relatives, fraudulent employment agents, and members of organized criminal groups. The immigration official also provided further details on the identification of human traffickers. The official stated as follows:

“Sometimes the victims (on transit) will not tell you the names of the traffickers. This is either because of fear or language barrier...because the victims would not speak, the first thing we would do is to remove their belts. If you check their belts, na ndani (on the inside), you will see that they have written the names of the people they have to meet at each destination point. If you remove 3 or 4 belts, you will find a common name or

⁵⁰¹ International Association of Women Judges, *Kenya Judicial Bench Book on Labour Trafficking In Persons* (2022) <https://drive.google.com/file/d/1M9ZDM_Gotpsm8P2VKEwBTSMdW1RA3dWt/view>.

⁵⁰² *ibid.* p. 87-91.

⁵⁰³ *ibid.*

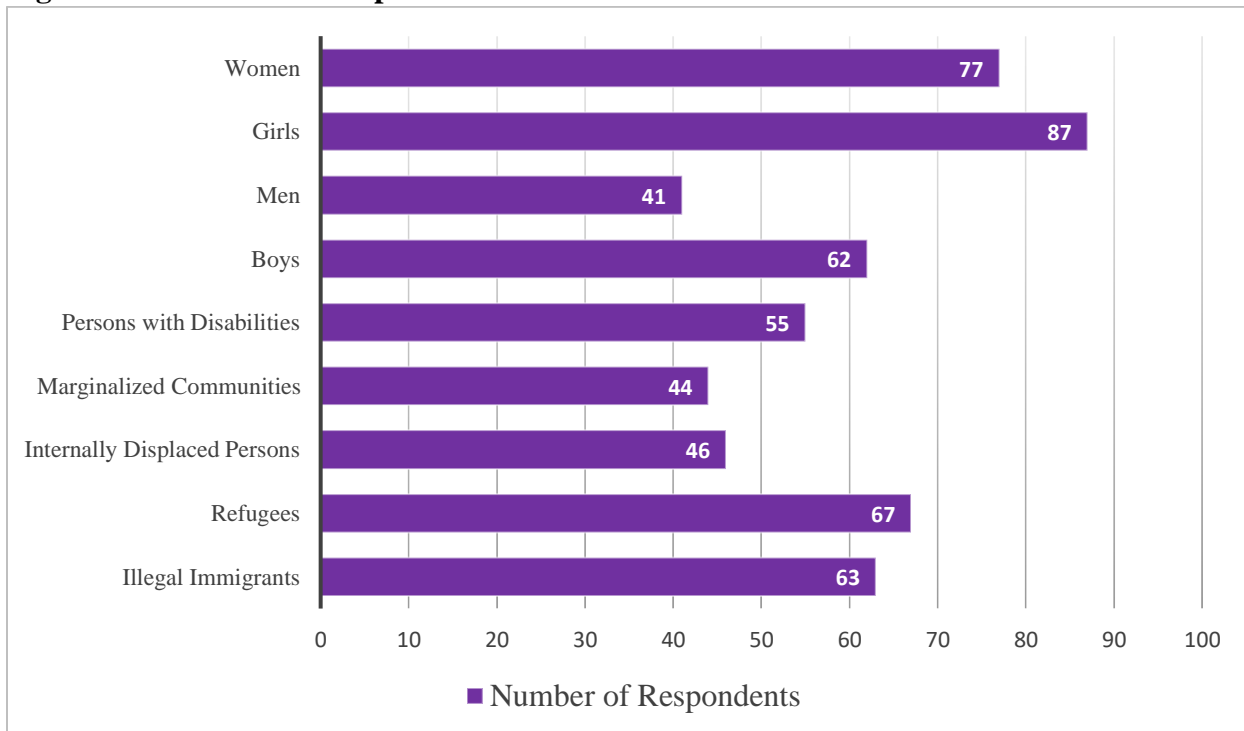
mobile number then you know that this is their trafficker. The minute you call these numbers and they find out who you are, they switch off.”

4.3.4. Vulnerable Groups:

The study also sought to identify the categories of persons who may be susceptible to being trafficked. It was noted from the research that women and young girls were more prone to being trafficked as opposed to their male counterparts. 77% of the respondents thought that women while 87% thought that girls were more predisposed. 41% held the view that men are also victims of human trafficking whereas 62% perceived boys to be more predisposed.

The respondents also shared their views on further vulnerabilities, besides gender as outlined above. The predisposition of persons with mental and physical disabilities was placed at 55%, marginalized communities at 44%, internally displaced persons at 46%, refugees at 67% and illegal immigrants at 63%. Figure 6 highlights the data captured in this regard.

Figure 6: Vulnerable Groups



The data collected supports the position that people perceived to be weaker or dependent members of society are much more susceptible to being targeted by traffickers. Women and young girls continue to remain the largest affected group to date. The key informant/ survivor of human trafficking sought to explain why this remains the case by elucidating the following:

“...we need to look at the people. If we look at the people who are being trafficked, what stories do they tell us? Most of the survivors are women and girls. If you think about it, what would make women and girls more vulnerable than other categories? We can't talk about trafficking and not talk about gender inequality.

In Kenya, care work is 'women's work' and because of this, most women and girls end up being trafficked as domestic workers. When you look at the poor, who do you think takes up the majority? It's women. Women and girls are still being denied access to education and the means to be independent...what happens to young girls when they fall pregnant? They are dropped out of school and things like that. If nothing changes in how we view women, nothing will change when it comes to them being trafficked.”

An informant from Trace Kenya, though in agreement on the issue of gender inequality, also identified the desire for affluent lifestyles as a reason for trafficking of young women and girls, particularly at the coastal region. The informant stated that:

“There is also a trend with young girls and women, especially in Mombasa, who see it as prestigious to date or to be seen in the company of a mzungu (white man). It may be driven by poverty at times but in other cases, it's a new-age thing with the young generation. They engage in sex for financial gain with the aspiration of eventually getting married to their mzungus and leaving for better pastures abroad. We have

encountered cases where these girls have been lied to and end up being exploited as prostitutes by those supposed partners in foreign countries.”

4.3.5. Factors Contributing to Human Trafficking:

A number of socio-economic factors were cited as the root causes of human trafficking in Kenya. The primary factors were poverty and lack of employment opportunities, which were ranked at 100% by the respondents. The key informant from the Global Fund to End Modern Slavery provided an interesting perspective on this, stating as follows:

“So poverty, of course, is a huge thing. I always find that when we talk about poverty it becomes this ambiguous thing that we cannot resolve; why are people poor? You find people are poor because they don’t have access to education, people are poor because of weak social protection systems...in general as human beings we hate poor people and if poor people are missing or dying or anything, no one cares. So, generally, people who are trafficked are people who if anything happened to them there would be no uproar.

...now when you start talking about poverty, sometimes really it is unemployment. It could be that you are not quite poor, but that there are no jobs or no suitable jobs- at least not the jobs that people want. People are seeking a better life and, if someone offers something they desire, they can be deceived.”

This was supported by the views of the director of an employment recruitment agency which specializes in job recruitments for Saudi Arabia. The informant had this to say:

“Most of them, those who want to go and work outside, they will tell you that they have struggled to get jobs in Kenya. They will say that they have not been successful in getting

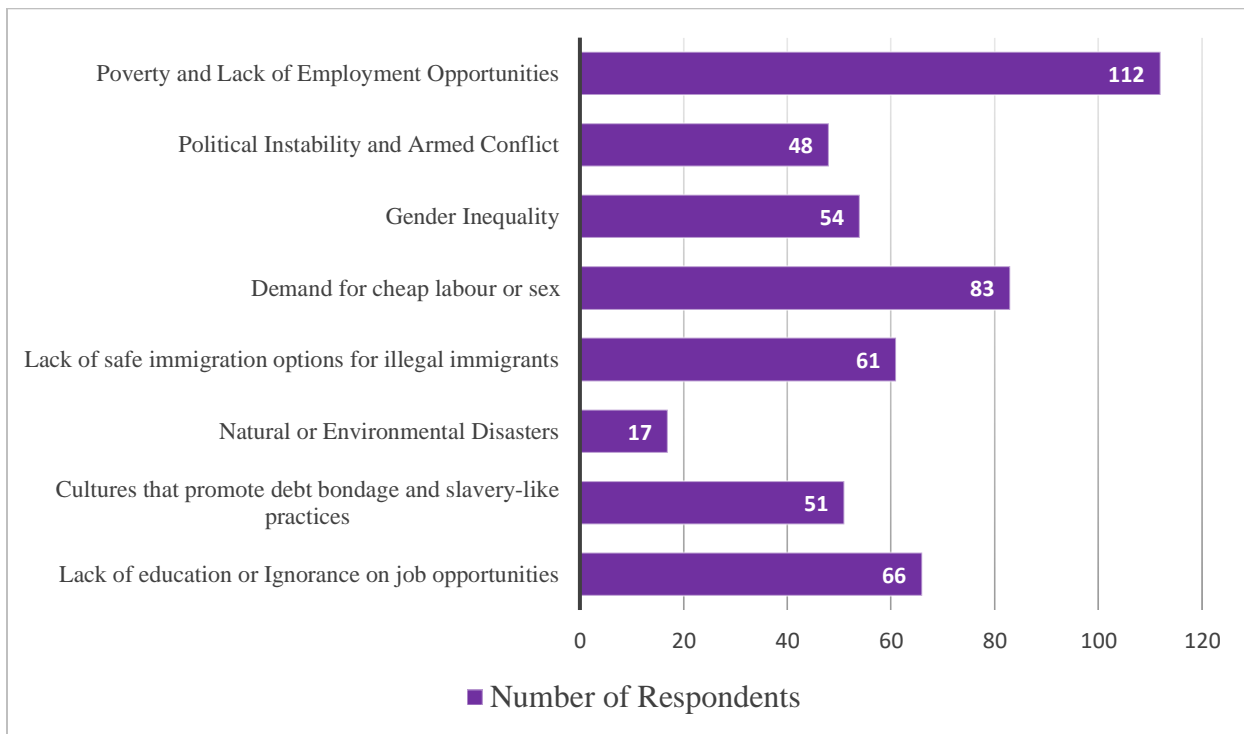
jobs or that they are underpaid in their current jobs. The jobs in Saudi Arabia offer better pay; that's why they come here."

Additional contributing factors noted in the study include demand for sex and cheap labour, gender inequality (as discussed above), political instability and armed conflict, lack of safe immigration options (for illegal immigrants), cultures that promote debt bondage and slavery-like practices, natural disasters, lack of education and ignorance on job opportunities. On the latter, an informant from the Ministry of Labour and Social Protection had this to say:

"...now with this route of South Asia we are getting people are who learned, people who had jobs, though they were not permanent jobs, who were cheated on the opportunities abroad. They were told that they were going for work and, on arrival, that work is either not there or it is another thing altogether."

The findings on the socio-economic factors resulting in the trafficking of persons are illustrated in Figure 7 below.

Figure 7: Factors contributing to human trafficking



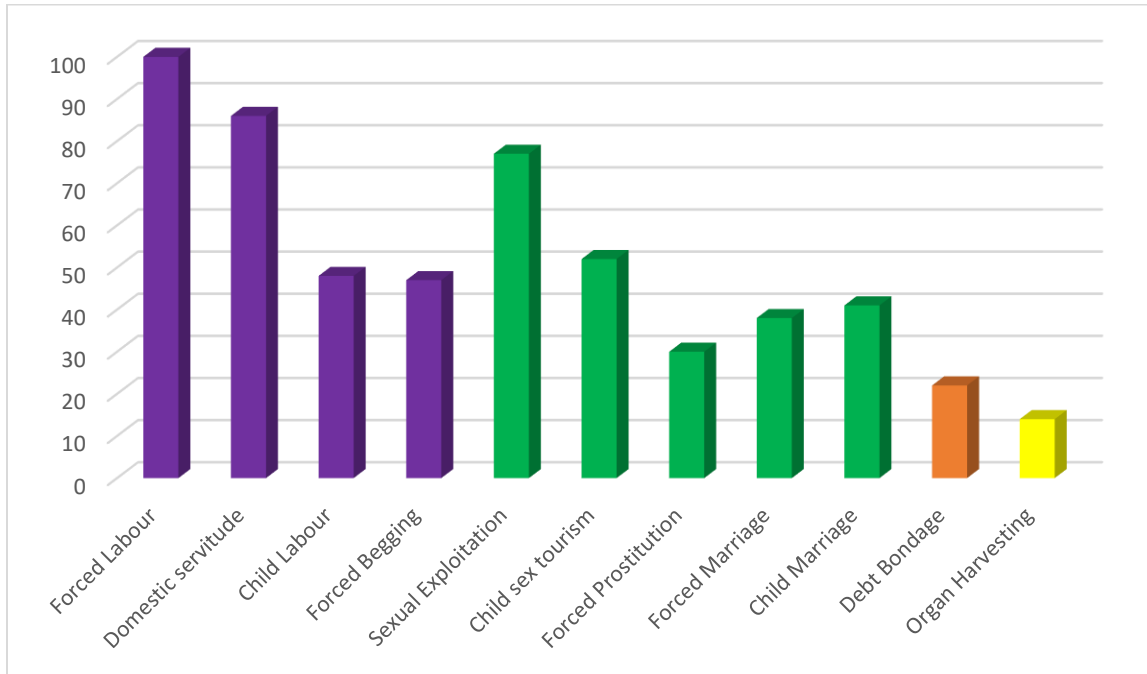
4.3.6. Forms of Exploitation:

Two main forms of exploitation identified by respondents interviewed were forced labour followed closely by sexual exploitation. 100 general respondents ranked forced labour as the predominant form whereas 77 of the same respondents ranked sexual exploitation as either being the main form or the second most common form of human trafficking in the country.

The prevailing types of forced labour identified from the study were domestic servitude as noted by 86 general respondents, child labour as noted by 48 general respondents, forced begging as noted by 47 general respondents. The most common forms of sexual exploitation included child sex tourism as noted by 52 general respondents, forced prostitution as noted by 30 general respondents, child marriage as noted by 41 general respondents and forced marriage as noted by 38 general respondents. Other forms of exploitation identified from the responses included debt

bondage at noted by 22 general respondents and organ harvesting as noted by 14 general respondents. These are outlined in Figure 8 below:

Figure 8: Forms of Human Trafficking in Kenya



Other forms of human trafficking identified from the interviews with the key informants include forced cattle herding and labour on farms, trafficking for cultural practices, and trafficking for religious purposes or radicalization. Additionally, another form of trafficking was brought to light by an informant from ANPPCAN, i.e. trafficking for purposes of illegal surrogacy. The informant had this to say on a case dealt with by the organization:

“...Another form that we got was one case of surrogacy. This child had been trafficked and then she was taken to stay with a relative in Nairobi. She was about 16 or 17 years. It turned out that the woman was she was to stay with was not her relative and that she had been brought so that the couple could have a baby. The husband of this apparent aunt defiled the child and the child got pregnant. They went to hospital, the child

delivered and then these people claimed the baby as their own. The girl made a report at the hospital then the hospital informed us... this case that went forward but not was not registered as child trafficking. Maybe the police officers didn't have an understanding what entails child trafficking. The police charged the man for defilement as there are no laws on surrogacy in Kenya; it is a new area."

The findings also demonstrated that the detection of victims of human trafficking for sexual exploitation was relatively less difficult than the identification of victims of forced labour. One of the prosecutors interviewed elaborated as follows:

"There are two types that are prevalent, there is trafficking in persons for purposes of sexual exploitation and trafficking in persons for purposes of forced labour. The one for sexual exploitation could be obvious but the one for labour is hardly noticeable and that is where the problem lies.

For sexual, it is more pronounced because it can easily be seen, especially if there are children involved... the society is ready to speak about it and say that so and so has a child in their house and they have been doing this to them. For purposes of forced labour, it mostly exists in domestic households, whereby a child is moved from their hometowns with promises of getting greener pastures or going to live with an aunty or an uncle or a particular female, only to be converted into a house girl, then they get overworked and their childhood is denied. We have cases of children as young as 13 who have been trafficked especially from up-country to Nairobi or from Uganda to Nairobi."

This was also supported by a detective from the DCI-TOC Unit, who pointed out to the difficulty in identifying persons trafficked for radicalization purposes. The said detective explained as follows:

“You see, these things are done with a lot of secrecy and because it involves a lot of people, even getting information is not easy. Like, for the Al Shabaab cases, they pick their victims from Madrasa classes. It is hard to know what is going on in Madrasas, whether they are being radicalized and so on. You cannot tell because whatever they are told there is in the Quran, but the message is brought out in a way that whatever they are taught a different thing. So they are just being radicalised without anybody knowing. We have to be careful when we investigate such cases because, if you don’t, the Muslims will complain.”

However, it was noted that other forms of forced labour were easily identifiable, particularly where the victims worked in the public sphere. The informant from ANPPCAN gave a narration on how the organization identified Ethiopian children in Kiamaiko during a particular operation, where they found that the said children were forced to slaughter goats for sale. A detective from the DCI-ATCPU Unit stated that it was also easy to identify children trafficked for forced begging. The detective stated:

“We have got so many trafficked children begging along the roads. In fact, most of the children who are used for begging money in town are from Tanzania. We did an operation after that (BBC Eye on Africa Documentary of Child Beggars). In fact, even before that, we rescued about ten kids. The problem that we have is we don’t have where we can accommodate them, they are so many.”

The above findings also demonstrate that the detection of adults in forced labour is far more difficult than the detection of children.

The overall findings under paradigm 1 show that the respondents in the study were reasonably aware of human trafficking and its existing forms in the country. However, the study also points to the lack of awareness on some forms of human trafficking and the lack of training of police officers on the elements of human trafficking.

4.4. Paradigm 2- Investigation and Prosecution of Human Trafficking Cases

The researcher, under this category, sought to gain perspective on the investigative methods undertaken by the relevant stakeholders, whether these investigations resulted in successful arrests of traffickers, and whether subsequent prosecution of human traffickers was successful. The findings under this head have been shared below:

4.4.1. Reporting of Suspected Human Trafficking Cases

The study sought to understand whether members of the public knew where to report suspected cases of human trafficking and the frequency of such reports from victims. 70% of the general respondents stated that they knew where to report suspected cases of human trafficking whereas 30% stated that they did not know. From the general respondents who answered in the affirmative, 61 stated that they would file a report at a police station, 5 to an NGO, 2 to the DCI, 1 to Immigration Offices and 1 to an activist online. These results are captured in Table 4 below.

Table 4: Public Perception on Reporting Stations for Suspected Human Trafficking Cases

Knowledge of where to Report	Number of General Respondents	Percentage (%)
Yes	70	70
No	30	30
Total	100	100

Reporting station	Number of General Respondents	Percentage (%)
Police Station	61	87.14
NGO	5	7.14
DCI	2	2.86
Immigration	1	1.43
Online	1	1.43
Total	70	100

It was noted from the study that it was more likely for members of the public to report matters the police or other stakeholders as outlined above than it was for victims. The detective from the DCI-TOC Unit highlighted that is usually attributed to the nature of human trafficking itself and ignorance by police while handling victims. The detective stated as follows on the issue:

“Victims don’t report...these victims are never left alone at any given time. Once they leave the streets or other places where they work, they are taken back to the trafficker’s

house. When they are in that house, they don't come outside that compound. So they don't have the time to mingle with Kenyans to advise them on what they are supposed to do.

Victims are also not be comfortable because of how they are handled...in fact, as we speak now, we have officers who don't know whether we have a charge called human trafficking. We have officers who instead of treating a victim as a victim, the police officers start harassing the victim not knowing exactly what trafficking is."

With respect to the manner in which victims are handled by the police as described above, one of the prosecutors interviewed made reference to a police program known as Police Care or 'Policare' and explained as follows on their role in addressing human trafficking cases:

"The Policare centre is where they have police customer service, but it is custom made to deal with issues of sexual and gender based violence. This also extends to dealing with trafficking in persons, especially where women and children are involved. The police officers who are placed at the Policare centre are people who are specially trained to deal with human emotions, or what is it called, 'to deal with the psychology of someone in pain.' So even the taking down of evidence is done in a particular manner to ensure that the victim is being given an opportunity to narrate his own story...the Policare system is in such a way that they are transforming police stations to be a safe space."

The study also pointed to trauma-bonding⁵⁰⁴ as a reason for the failure of victims to report cases.

The former victim had this to say:

⁵⁰⁴ 'Trauma Bonding: Definition, Examples, Signs, and Recovery' (27 November 2020) <<https://www.medicalnewstoday.com/articles/trauma-bonding>> accessed 20 August 2023. Trauma-bonding relates to the formation of a bond or a relationship between an abuser and an abused. It occurs where the abused party develops

“I think this is just really a common response to trauma. I feel like, in some cases, it is a logical response. I have encountered such situations...where, when you look at where you are coming from, the trafficking situation is way better than leaving. I feel like sometimes we try to explain these situations in such a complex psychological way when in reality, it is just people making logical decisions.

If you think the kind of support that survivors get all over the world, not just in Kenya, for someone to want to leave you will have to be giving them a better option. Most of the time we don't want to discuss our ability to give people a better option; we want to judge survivors for making the decisions they made in order to survive just because those decisions don't align with what we think is right or wrong. I think, whether you want to call it Stockholm Syndrome or victim bonding, I think it is very normal reaction, if you think about it.”

The key informants from KNCHR, CHTTEA and the CTIP Advisory Committee made reference to a reporting structure which they referred to as the referral partner organizations or complaints handling referral partners. They highlighted that the said partners include state entities and international organizations,⁵⁰⁵ the police, NGOs and other civil society organisations, which share information on possible cases of human trafficking. The said team not only handles circumstances pertaining to human trafficking, but also reported migrant smuggling cases.

some form of sympathy, attachment or dependence towards the abuser as a physiological response to deal with the abuse meted out upon them.

⁵⁰⁵ The state entities referred to by the KNCHR official include the United Nations Organization on Drugs and Crime, the Ministry of Labour and Social Protection and the Ministry of Foreign Affairs- Diaspora Unit.

4.4.2. Investigation and Arrests:

The researcher sought to understand how human trafficking cases are investigated in Kenya and public perception on the effectiveness of such investigations.

The detective from the DCI-TOC Unit explained that once reports are received, they carry out inspections and raid of places where suspected victims are harboured. Once identified as victims, children are placed in children's homes whereas adults are placed in shelters. It was noted, however, that there are no government shelters and much reliance is placed on support from NGOs.

This position was also confirmed by a Magistrate from the Kahawa Law Courts who had this to say:

“They (prosecutors) usually request to take them (trafficking victims) to safe houses. In most cases, because of lack of safe houses, they are taken to police stations. Safe houses are mainly run by charitable institutions and non-government organizations. They have no security; they are just places where the victims receive accommodation and a good environment... We have had cases where victims have run away from these safe houses, so the police are not keen on placing them there... It is difficult for victims, especially foreign ones, who do not understand the language or the systems...”

In addressing the issue of lack of government shelters, the official from the CTIP Advisory Committee stated as follows:

“The Advisory Committee and the Trust Fund already commenced the operationalization of a government shelter for the victims. So efforts are already underway; the shelter has been identified, it has been refurbished, so it is likely to be operationalized before the end of this year (2023). So yes, for the first time in Kenya, you are going to have a first government-operationalized shelter.”

It was noted from the study that information sharing between stakeholders was imperative to facilitate the investigation process. For instance, the DCI-ATCPU detective informed the researcher that they receive information on potential traffickers who enter the country from the INTERPOL National Central Bureau and are able to act upon such information.

The detectives from the DCI TOC and ATCPU units both identified inadequate funding as a primary challenge to their investigation efforts. The DCI-ATCPU detective stated that no specialized funds have been set aside for the investigation of trafficking cases and that officers would at times use their own finances in emergency cases. The detective had this to say:

“...I wish, you see the bureaucracy of applying for this money; it is a process. At least we should have some kitty for emergency problems. At times, you can have an emergency case which has to wait because there is no funding. Sometimes our officers just go and suffer there or they use their own money. When you hear victims are about to be moved to another place, you have to act fast. You just go, do the work, and claim later. You cannot wait for the money.”

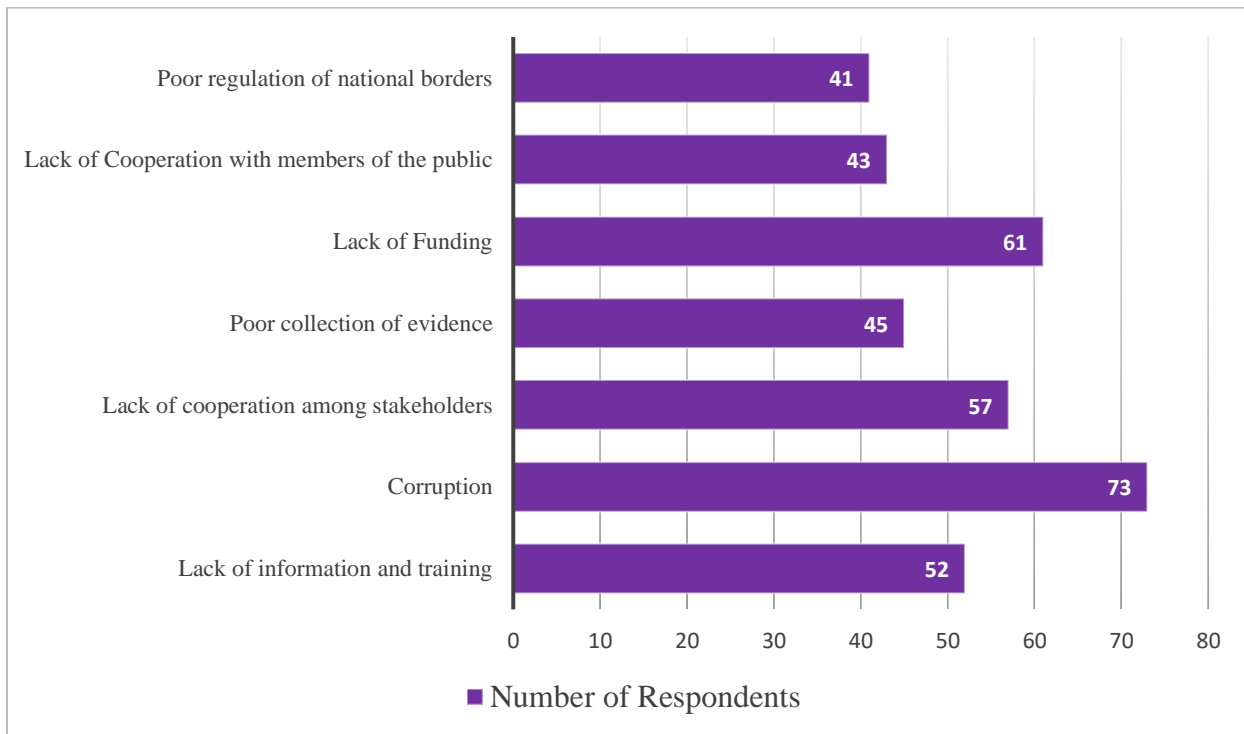
This position was also echoed by the immigration official, who noted that border patrol cannot be effecting without proper financing. The official stated as follows:

“The government has all the financial resources in this country; serekali iko na pesa mingi, ni kupeana hapeani lakini serekali iko na pesa (the government has money does not want to disburse it) ...they have resources but this is not seen along the border areas. We are dealing with human trafficking so they should buy patrol vehicles to patrol on our borders. Like in Namanga we had only one car. So if it is only one and you are going to the East, these people (traffickers) will see you and will go to the West.”

Another challenge pointed out by the detective from the DCI-ATCPU Unit is corruption among the stakeholders involved. The detective explained that corruption is manifest everywhere, particularly at border control areas where immigration officials and police officers are likely to be aware of the trafficking but fail to do anything about it. On the other hand, the immigration official intimated that the blame for corrupt practices at the borders would not ideally lie with one department. The official stated that “...there is the Customs, NIS (National Intelligence Service) KRA (Kenya Revenue Authority)...there are so many departments there. These departments, I am not talking of a department but a person, can have his own interest.”

The members of the public also shared their views on what they perceived as possible investigation challenges. Their views are presented in Figure 9 below.

Figure 9: Investigation Challenges



The study also noted that the arrest traffickers was a challenge for police officers. The DCI-TOC detective stated that, despite having an identification checklist, some traffickers would disguise themselves as victims and would eventually escape. Victims were also hesitant to name the traffickers for fear of reprisal. Further, the detective also pointed to the criminal organizations involved in the process, which make it difficult to detain arrested traffickers. The detective stated:

“It is not easy. These people (traffickers) raise bonds easily because of their networks; there are people who take care of that. They do the offence but they have security. When bond is given by the courts, they are taken to another country and are protected there by the criminal networks.”

In spite of the challenges outlined above, it is noteworthy that the specialized units of the DCI received high praise from the key informants interviewed, particularly those from NGO backgrounds. An informant from the Global Fund to End Modern Slavery stated that the DCI TOC and ATCPU Units had some of the most committed officers and were only limited from doing more due to funding restrictions.

4.4.3. Prosecution of Suspected Traffickers:

The researcher sought to gain an understanding of the process of prosecution of suspected human traffickers and the challenges faced by prosecutors.

The findings showed that there were precursory steps undertaken through joint cooperation between the police or DCI and the ODPP before the prosecution of perpetrators in court. One prosecutor stated that the two departments engage in consultation on the drafting of search and arrest warrants, prior to the presentation of such requests in court. This, the prosecutor stated, was essential to ensure that the evidence submitted by the police for such applications was admissible.

The prosecutor also stated that joint cooperation is required in the drafting of charge sheets.⁵⁰⁶ The prosecutor likened the correlation between the investigation process and the drafting of charges to a ‘domino-effect’, in that, if the investigation carried out does not reveal the presence of all three ingredients of human trafficking, then the charges in the charge sheet would not be brought under the Section 3 of the Counter-Trafficking in Persons Act 2010. The prosecutor explained that, the investigation process is sometimes impeded by police officers who have no training. The prosecutor has this to say:

“The anti-trafficking units are only in Nairobi and Mombasa. Officers in other regions do not have this training. If you have a case from Mandera, it will take some time before the officers from the unit travel from Nairobi to Mandera. By that time, the crime scene will have been tampered with or crucial evidence will have already been lost. Reconstituting the case becomes difficult. By the time you are prosecuting the case, you are simply fulfilling a role while trying to ensure that justice is meted out.”

The limited knowledge on human trafficking was not only noted in the case of police officers but also among prosecutors. One of the prosecutors with reasonable expertise in the area of human trafficking stated as follows:

“I think maybe they (prosecutors) are more open to be invited to trainings and some have attended trainings, but these crimes are generally tried in other courts like Kahawa Courts. Prosecutors do not become specialized because of the trainings if they do not often encounter such cases in their stations. It is only once you have prosecuted a matter

⁵⁰⁶ In the case of **Sigilani –vs- Republic (2004) 2 KLR, 480** the court, in appreciating charge sheets as official documents drawn by the police and detailing the allegations against an accused person, held that they should contain offences known in law. The particulars of the offence should contain the specific ingredients of the offence and should be set out clearly for the accused to understand.

in a specialized court that you become informed on the issues...it is the same case with magistrates.”

Defective charge sheets were also cited by the Magistrates interviewed as an impediment to the prosecution and conviction of suspected traffickers under Section 3 of the Counter Trafficking in Persons Act. A Magistrate from the Kahawa Law Courts observed that a key ingredient that does not often come out from the charge sheets is the aspect of exploitation. A prosecutor pointed to the complexity of the definition of human trafficking under the above Act, which also presents a problem when charging accused persons. The prosecutor stated as follows:

“...the threshold in all criminal cases is beyond reasonable doubt but it feels that under the Human Trafficking Act, there are a lot of details and nitty gritty which you might not meet as opposed to if you charge under the other acts.”

On the length of time taken to hear human trafficking cases, a Magistrate from the JKIA Law Courts stated that this could take between 6 months and one year. A Magistrate from the Kahawa Law Courts stated, in addition, that the hearing process itself takes about a week’s time. The said Magistrate explained that human trafficking cases are flagged as priority cases and hence much effort is placed by the courts to ensure that they are determined in record time. The Magistrate also referred to a case progression system employed by the Kahawa Law Courts, which entails the issuance of a notice from the court to the parties requiring them to provide details of the assistance they may require prior to the hearing.

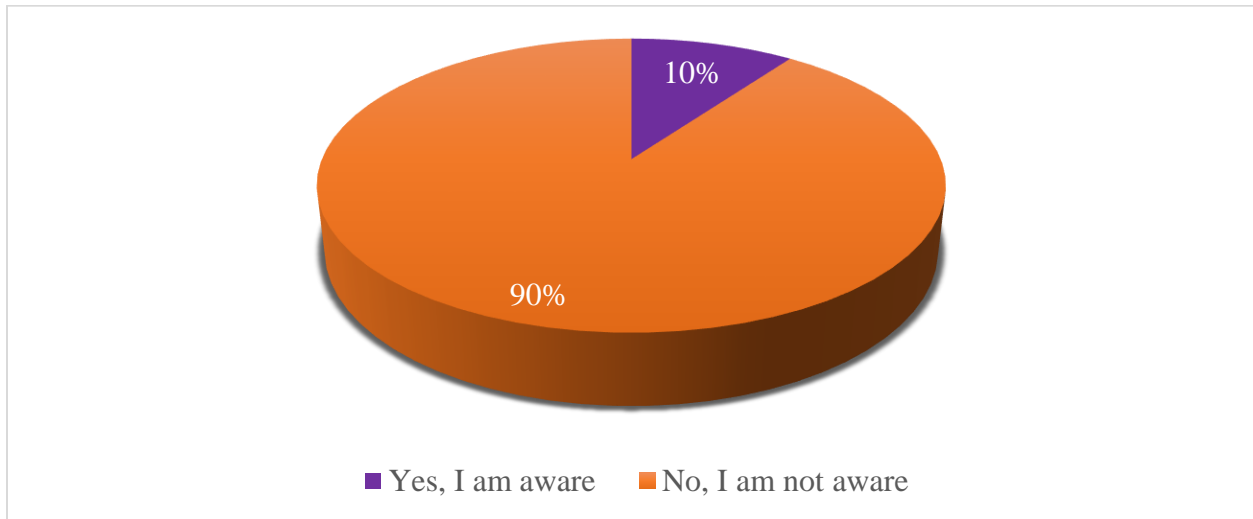
A Magistrate from the JKIA Law Courts explained that some of the measures placed to ensure the progression of cases included the provision of witness boxes, video conference facilities, hiring of interpreters, ensuring that documents are served on accused persons in time, among other measures.

It was also noted that the hearing process may at times be prolonged or delayed due to a number of factors. A Magistrate from the JKIA Law Courts stated that the factors that usually occasion delay include the change of prosecutors and defence counsels, transfer of Magistrates, the unpreparedness of defence counsels, and most recently COVID-19. It was noted from the research that the prosecution faced an additional setback with respect to the reluctance of witnesses to testify. On the efficacy of the witness protection programs, one prosecutor had this to say:

“Witness protection comes in handy when the witness feels threatened and they need to be protected for the duration of the case and even after. The problem with the witness protection system is that the conditions are stringent. We have had witnesses declining the protection because of the measures that would be required. As a witness, you have to be detached from your family, to be given a new identity in certain cases and you are also prevented from calling or contacting anyone for the duration of the protection. This is very hard for victims and some decline to be placed under this program, which is also risky. We have tried to look for alternative means of protection such as allowing witnesses to testify behind screens or through the boxes in court. This does not guarantee safety outside the courtroom.”

The researcher also undertook to find out whether the members of the public were aware of any prosecutions or convictions of human traffickers. Their responses are captured in Figure 10 below.

Figure 10: Knowledge on the Prosecution and Conviction of Human Traffickers



The prosecutors interviewed expressed that there have been a number of successful convictions of human traffickers. This position also received support from two of the Magistrates interviewed, with one Magistrate from the JKIA Law Courts positing that the rate of convictions is currently at 60%. However, a contradictory view was held by a Magistrate from the Kahawa Law Courts who stated the conviction rates were relatively low due to lack of sufficient evidence. The Magistrate explained as follows:

“Human trafficking is very difficult to prove. The evidence must show that all elements are present. The accused need not participate in all three for him to be convicted. The prosecution must prove that the accused person was part of the chain. The evidence must be there that the entire game was for human trafficking...so that even if you are participating in just one, maybe you are transporting, there must be evidence that it is leading to the ultimate purpose being exploitation...”

What they (prosecutors) miss out on, which is critical, is the knowledge part. They do not appreciate that they have to prove that the accused knew that his action was for the purpose of exploitation or facilitating the exploitation of the victim...

Cases are won on evidence, not simply by general perception. They must prove these elements for a conviction.”

The account given by the Magistrate from Kahawa Law Courts is supported by a number of convictions that have since been overturned on appeal to the High Court due to lack of sufficient evidence. For instance, in the sensationalized case of *Alibhai v Republic*, where a Canadian businessman residing in Kenya had been convicted for the exploitation of 12 Nepalese women in nightclubs, the High Court dismissed all charges of human trafficking for lack of sufficient evidence.⁵⁰⁷ Procedural failures have also led to the overturning of convictions as was demonstrated in the case of *Muhammad Asif v Republic* where the charges against the suspect had not been read out to him.⁵⁰⁸

The researcher also noted from the study that the Counter Trafficking Act provided for the payment of fines in lieu of sentencing, which also serves as an impediment to conviction rates. This was noted in the case of *Geoffrey Mutemi Manzi v Republic* where both the trial and appellate courts awarded fines for the harbouring of victims of human trafficking instead of sentencing the accused to serve an imprisonment term.⁵⁰⁹ The Magistrates interviewed observed that they were guided by the provisions of the Counter Trafficking in Persons Act that provided for either fines or imprisonment, or both. A Magistrate from JKIA Law Courts also added that the courts are guided by a number of factors in determining the proper sentence to be meted out including the nature of

⁵⁰⁷ *Alibhai v Republic* (Criminal Appeal E103 of 2021) [2022] KEHC 15411 (KLR) (21 October 2022) (Judgment).

⁵⁰⁸ *Muhammad Asif v Republic* [2017] eKLR.

⁵⁰⁹ *Geoffrey Mutemi Manzi v Republic* [2021] eKLR.

the offence, pre-sentence reports, victim impact statements, remorsefulness of the accused and the Sentencing Policy Guidelines.⁵¹⁰

The overall findings under paradigm 2 show that reasonable efforts are being made to investigate and prosecute cases of human trafficking in Kenya. There is however need to address the challenges highlighted to ensure the effective implementation of counter-human trafficking legislation.

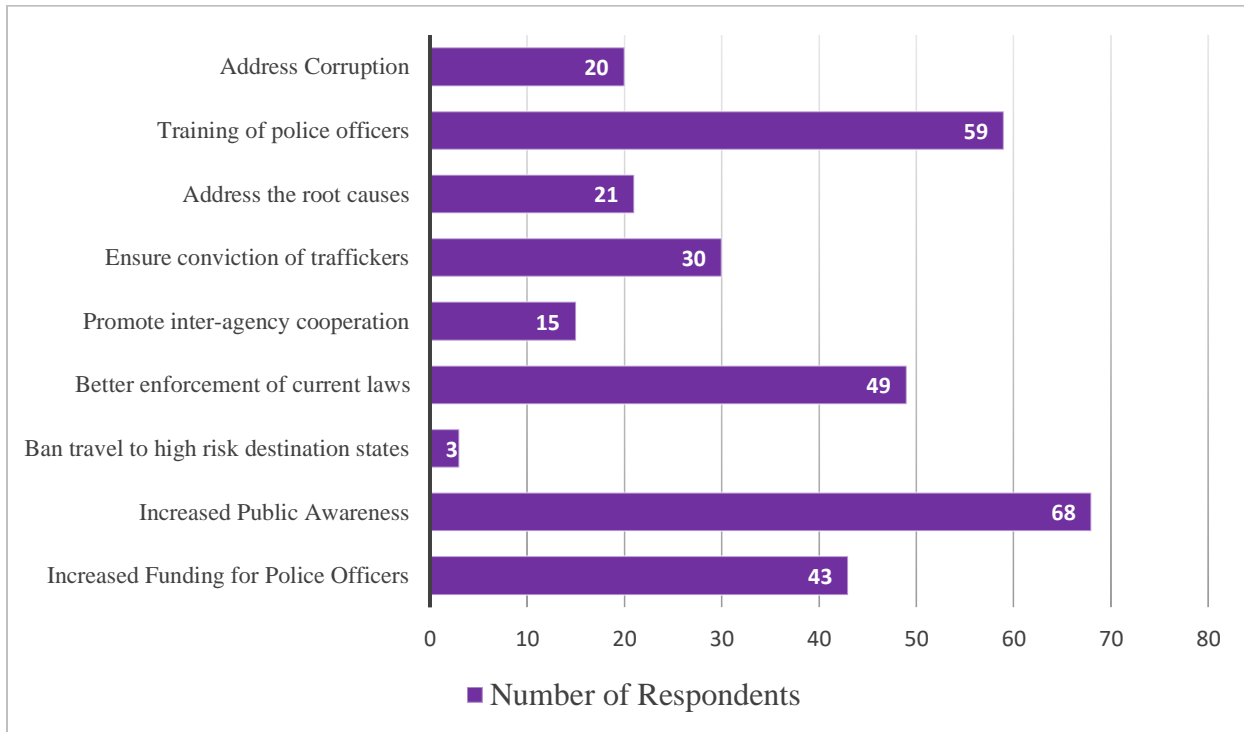
4.5. Paradigm 3- Counter-Trafficking Measures:

The study sought to understand the public perception on the measures put in place by the state to prevent human trafficking and to obtain their views on additional strategies to be employed.

The findings of the study showed that 73.4% of the general respondents had no knowledge of the existing measures to address human trafficking whereas 26.6% stated that they were aware. When asked whether the state needs to do more in its response measures, 99% of the general respondents stated that more should be done while 1% stated that no additional measures should be taken. 82 respondents provided particulars on the additional measures they felt should be employed. The solutions provided have been shared in Figure 11 below:

⁵¹⁰ Judicial Taskforce on Sentencing, 'Sentencing Policy Guidelines' (The Judiciary- Republic of Kenya) <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf>.

Figure 11: Proposed measures to address human trafficking in Kenya



A number of the views as represented above were shared by the key informants interviewed in the study.

The informant from the Ministry of Labour and Social Protection highlighted the need to address the socio-economic factors that create avenues for human trafficking. The informant explained that funds from the National Assistant Fund for Victims were utilized by the state in its reintegration efforts. The informant cited examples of female victims brought back to Kenya from Saudi Arabia who have since gone back to school, received vocational training or set up small scale businesses from the funds availed by the state. However, the informant from Global Fund to End Modern Slavery highlighted that there was need for the state to issue guidelines on the provision of funds for assistance of victims of human trafficking from the National Assistant Fund for Victims. The informant stated as follows:

“Did they tell you that the guidelines are in place to receive the funds? There are no guidelines to receive those funds. They have been creating guidelines from 2010! ...there is no step by step procedure for an NGO to get access to the funds; there is nothing in the public sphere. The funds exist on paper! There are a few organizations that get the money because they have figured out who to speak to in government but the procedure to access the money is not out in the public.”

The DCI-TOC detective pointed out that the training of police officers countrywide, increased funding and the provision of government shelters to house adult victims were crucial factors in the investigation process and that they ought to be taken into consideration by the state.

The director of the recruitment agency stated that better checks should be undertaken by the Ministry of Labour and Social Protection in its review of employment contracts and other documents from Saudi Arabia, noting that the agencies themselves do not negotiate the terms of these contracts. The informant also pointed to the need for assessment of recruitment agencies that are not registered with the National Employment Authority. Adding to this, the representative from Trace Kenya expressed the view that the Ministry of Diaspora and Foreign Affairs should encourage Kenyan nationals travelling for opportunities abroad to ensure that they are registered with them as a safeguard. The said representative also advocated for the entry of bilateral agreements between Kenya and its neighbours to ensure information and resource sharing.

The representative from CHTTEA called for more cooperation between the state and non-state actors. The said representative had this to say:

“I think we should have joint programs that can exploit the resources that both sides have without working like there is competition because much of the work we do is the same work. The government would like to do things on their own while we do things on

our own, but we can actually do that without feeling that our resources are ours and the government's is theirs. A win for us is a win for them.”

The need for a uniform data collection system and a shared database system was highlighted by the officials from the Global Fund to End Modern Slavery and the CTIP Advisory Committee. The former pointed to the fact that each stakeholder is currently undertaking its own data collection process and that there is lack of uniformity in the data collection methods. The said informant highlighted that the lack of uniformity would result in disproportionate data, thereby inhibiting data fed to any database system that may be subsequently created.

The immigration official interviewed in the study advocated for better utilization of the One-Border-Stop-Post⁵¹¹ in Namanga and the creation of similar stops all around the country's borders so as to deal with the issue trafficking through porous borders. He explained that, though the One-Border-Stop-Post was established for purposes of easing trade by reducing the clearance period at the check-points, having one centralized checkpoint will dissuade traffickers from using other routes as such routes would end up being closed off.

4.6. Conclusion:

The quantitative data collected in the study demonstrates that human trafficking continues to be a pervasive problem, in spite of the counter-trafficking laws in place and despite the institutional mechanisms available. The socio-economic factors which influence human trafficking continue to affect the vulnerable persons identified in the study. In addition, globalization has led to the emergence of new categories persons to be exploited and a plethora of new forms of exploitation. Though the country is making considerable steps to implement the laws in place, the rate of

⁵¹¹ 'One-Stop-Boarder-Posts (OSBP)' (*Virtual PIDA Information Centre - vPIC*, 2 May 2017) <<https://www.aupida.org/one-stop-boarder-posts-osbp/>> accessed 21 August 2023. The One-Stop-Border-Posts system promotes the use of a single post for the processing of all people and goods moving through adjoining states.

transformation of trafficking methods coupled with the ingenuity of traffickers continues to be one step ahead of the country's efforts. Enhanced funding of key stakeholders, awareness creation, trainings and addressing the socio-economic effects are noted as some of the primary measures that should be integrated by the country to reduce the rate of human trafficking.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The study sought to address whether Kenya has failed to comply with its obligations under international law with respect to the prevention, protection and prosecution of human trafficking and the extent of such non-compliance (if any). The assessment of Kenya's responsibility for human trafficking has to be done by analyzing not only whether the incidences of human trafficking discussed above are attributable to the state, but also whether the country has exercised reasonable diligence to hinder the furtherance of human trafficking by private actors. This analysis has been done at length in the conclusions below.

5.1. CONCLUSIONS:

The study first outlined the international, regional and national laws that form the basis of Kenya's obligations. The commonality among these legal instruments is that human trafficking is viewed as both a human rights concern and a criminal act. They impose positive obligations on Kenya to uphold fundamental rights and freedoms, whose non-observance creates vulnerabilities culminating in the susceptibility of persons to human trafficking. They also place an obligation on the country to address further vulnerabilities occasioned by socio-economic and political circumstances in its territory.

The special circumstances of women and children are also highlighted in these instruments, calling for Kenya to ensure better protection of these groups as they comprise the bulk of trafficked victims. They also call on the country to prevent human trafficking by creating awareness, enacting laws and imposing severe penalties on traffickers, among other measures. Kenya has an obligation to take action to stop human trafficking in its territory as a signatory to various regional and international instruments addressing human rights and human trafficking (as well as having passed

local laws on the subject). This obligation applies regardless of whether the trafficking was caused by the actions of state officials, private citizens, or state organs.

The study proceeded to evaluate the state of human trafficking in Kenya, tracing its origins from pre-colonialism to modern-day Kenya. It is understood from the research that human trafficking is not a novel practice in the country, having initially manifested itself as slavery during the Indian Ocean Slave Trade, progressing into 'state-sanctioned' trafficking during colonisation and metamorphosing into the exploitative practice witnessed in modern-day Kenya.

It was also noted from the study that there have been gradual changes in the acts, means and purpose of human trafficking in Kenya. There has been a transition from violent and coercive recruitment methods such as abduction to deceptive approaches designed to facilitate the voluntary migration of victims. Online recruitment of victims through social media platforms seems to be a growing trend in today's society. The means of transport have also changed significantly due to technological advancements, thereby influencing more rapid movement and continuous flow of victims.

The manner of exploitation of victims has also advanced, with victims being exploited from the comfort of their homes in cases such as online sex trafficking. Organ trafficking and cyber-crime trafficking are also newer forms of exploitation that have manifested with medical and technological advancements. It can thus be concluded from the study that the state or pattern of trafficking trends in Kenya transforms in tandem with economic and technological changes.

The study also examined the extent of Kenya's compliance with its international obligations to curb human trafficking by collecting empirical data from both members of the public and state officials. Global inequality and capitalistic systems have exacerbated individual vulnerabilities, thus making more people predisposed to being trafficked than before. Thus, despite efforts thus

far, Kenya continues to struggle to address the vulnerabilities that facilitate human trafficking. Poverty and unemployment remain key contributing factors for human trafficking in the country. The country has, however, made reasonable efforts to address other contributing factors such as gender inequality through gender mainstreaming efforts.⁵¹² For instance, the country has engaged in gender-responsive budgeting by making special provisions in its expenditure to promote gender equality and to focus on the needs of marginalized groups.⁵¹³ Additionally, significant efforts are also being made to ensure equal access to education opportunities such as the provision for free primary school education under the Basic Education Act of 2013.⁵¹⁴

It was appreciated from the study that there is a level of general awareness of human trafficking among members of the public, this form of awareness appears to be what the researcher calls ‘post-fact’ awareness. Knowledge of human trafficking for a majority of respondents in the study was garnered from reported accounts of experiences by victims. There were few recorded instances where respondents were informed of the incidences of human trafficking through some form of education system. It was also noted from the study that awareness-creation was done chiefly by civil society organisations and not state organs. The lack of budgetary allocation for awareness programs was cited as the primary reason for the limited state intervention in this regard.

It also came out from the study that there was limited information sharing and training on human trafficking among key stakeholders. It was noted from interviews conducted with key informants that a significant number of law enforcement agents were still not trained on human trafficking

⁵¹² ‘What Is Gender Mainstreaming | European Institute for Gender Equality’ <<https://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming>> accessed 4 September 2023. Gender mainstreaming is a strategy geared towards realizing gender equality. It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programs, with a view to promoting equality between women and men, and combating discrimination.

⁵¹³ Constitution of Kenya 2010, Article 201 (b) and 203.

⁵¹⁴ Basic Education Act 2013, Part IV.

and were thus not well versed on how to collect evidence for such cases. However, it was also noted that tremendous efforts were being made by the state to liaise with NGOs to facilitate more training. It was also noted that information sharing among key stakeholders was also gradually improving, particularly with the active use of the complaints referral system.

The study also identified the lack of a uniform data collection system. Current data collection methods are determined by the individual practices of the many civil society organizations and state organs, which results in varying data. There is equally no database retention system available in the country that can be utilized for the assessment of data collected on human trafficking.

Investigative efforts by specialized law enforcement units have received significant praise in the study. Reasonable efforts are being made by the said units to conduct raids and rescues of victims and potential victims. Information sharing with these specialized units has also resulted in quick action when addressing human trafficking cases. It should be noted, however, that their efforts have been gravely impacted due to lack of financing. It study showed that there was no special budget set aside to deal with this aspect.

The arrest of traffickers, recruiters and perpetrators of human trafficking remains a challenge. On one hand, this is understandable due to the nature of the crime. Key forms of trafficking such as domestic servitude take place in the confines of people's homes thus making it difficult to identify victims. Victims are also afraid to make reports thereby making it difficult for the apprehension of their traffickers. On the other hand, factors pointing to degrading societal standards such as corruption were cited as hindrances to the arrest and detention of perpetrators of human trafficking. There was, however, no empirical evidence obtained from the study to demonstrate corruption among key stakeholders.

The research also pointed to significant challenges in the prosecution and conviction of suspected traffickers. It was noted that the problem in the prosecution process commenced from the nature of the investigations carried out. Poor investigations carried out by non-trained officers culminated in the presentation of evidence that did not satisfy the elements of human trafficking as set out under Section 3 of the Counter Trafficking in Persons Act 2010. The lack of training among prosecutors also impacted the process, particularly as regards their influence on the drafting of charge sheets which, based on the evidence, would support the framing of lesser charges under other criminal statutes with lighter penalties. These factors culminated in few prosecutions of suspected perpetrators of human trafficking. It was also alleged in the research that some judicial officers were compromised and complicit in the acquittal of suspected human traffickers. However, the information obtained in this regard was not supported by factual data.

With respect to Kenya's victim assistance, it was noted from the study that a fund had been established in compliance with Section 22 of the Counter Trafficking in Persons Act. Money required for the rehabilitation and reintegration of victims is sourced from this fund. However, the study shows that there are no established guidelines in place to facilitate the distribution of these funds to civil society groups. It was also noted from the study that there is no state shelter for the placement of adult victims and that they were left in the care of NGOs.

Premised on the findings above, the researcher concluded that human trafficking in Kenya is attributable to the state. Factors such as the failure to create awareness among all members of the public, lack of training and information, corruption, prosecution failures and the provision for the payment of fines in lieu of sentencing are all acts and omissions connected to Kenya's organs and officials. These primary factors demonstrate that the country's waning diligence practices have paved the way for unscrupulous private persons to engage in human trafficking in and through the

state. It is appreciated that efforts are being made by the state to address these problems, which will take considerable time, goodwill and finances. However, it is disconcerting that it has now been about 13 years since the enactment of the Counter Trafficking in Persons Act and the country continues to struggle in its efforts to provide the necessary measures.

The findings above support the study's hypothesis that there are weaknesses in Kenya's legislative and institutional framework on human trafficking. The payment of fines in lieu of imprisonment terms is a primary weakness of the Counter Trafficking Act. Further, as outlined in Chapter 2, the Labour Institutions (Private Employment Agencies) Regulations are lacking in outlining the responsibilities of recruitment agencies. They also fail to address measures that ought to be set to protect job seekers such as the inclusion of all material terms in foreign contracts as opposed to having them set out in job advertisements. The second hypothesis alluding to the need for legal reforms and good governance practices is also demonstrated in the study which shows that, save for the legal reforms identified above, enforcement is where the major challenge lies.

As such, premised on the above findings, the paper concludes that Kenya has failed to fully meet its international obligations to address human trafficking in its borders. It has been demonstrated that these failures are both attributable to the state and as a result of its failure to honour positive obligations to prevent human trafficking.

5.2. RECOMMENDATIONS:

The paper has established that Kenya has failed to fully meet its international obligations in its response to human trafficking. Though laws have been enacted to curb the vice, they are relatively weak as they provide avenues for traffickers to avoid imprisonment by paying fines. Further, laws regulating foreign recruitment do not provide adequate safeguards to address the mushrooming of unregistered agencies or to prevent the exploitation of job seekers in destination states. The country has also failed to exercise reasonable diligence its enforcement efforts. Lack of training and unavailability of financial resources are noted as key hindrances and inadequate measures are in place to address these challenges.

Having identified the weaknesses in Kenya's regulatory and enforcement mechanisms, the study makes the following recommendations:

- a) **Review of the Counter Trafficking in Persons Act and the Children Act:** As highlighted in Chapter 2 above, the provision of fines in lieu of imprisonment fails to satisfy the 3P paradigm in addressing human trafficking. The crime is a lucrative business with many actors and cross-cutting criminal organizations. A human trafficking ring may involve human smugglers, drug traffickers and money launderers thus creating a wide capital pool. The imposition of a fine, irrespective of the amount, is not a sufficient deterrent as perpetrators with links to organized criminal groups may not have challenges in raising the said fines.
- b) **Review of the Labour Institutions (Private Employment Agencies) Regulations:** There is need to review these Regulations to address the monitoring of employment agencies in the country. The Regulations should require employment agencies to keep certain records with respect to their clients and make it compulsory for such records to be availed as a

condition for renewal of their certificates. The Regulations should also provide for regular annual inspections of agencies and for the revocation of certificates where breaches are established. In addition, the Regulations should require the inclusion of employment terms in the foreign contracts and not advertisements as is currently the case. This will provide necessary safeguards for employees who seek to enforce the terms of the said contracts.

- c) **Review Bilateral Labour Agreements:** The country needs to review bilateral labour agreements with destination states, particularly Gulf States, to ensure compliance with international human rights and labour law standards. Moreover, the establishment of joint implementation committees will facilitate the routine review of the conditions of migrant workers in destination states and provide safeguards against their exploitation.
- d) **Improve Border Management:** There is need for coordinated efforts among the various government agencies situated along Kenya's borders. This entails the development of harmonized standard operating procedures on monitoring of border points, routine consultations and timely information sharing. Improving capabilities through trainings also results increased awareness and better identification of potential trafficking victims. Enhances cooperation with neighbouring states may also aid in effective monitoring and securing of illegal migration routes. This can be done through joint trainings and the establishment of joint taskforces.
- e) **Addressing the root causes:** Poverty and unemployment are the principal factors that make people susceptible to human trafficking in the country. Improving access to education, including the provision of free secondary and tertiary/ vocational education, will serve to open up more work opportunities for people and increase economic growth for the country. The establishment of development projects in rural areas in Kenya may also

culminate in job creation and economic growth in the said areas, thereby limiting rural to urban migration in search of employment. There should also be improved construction and infrastructure among the counties to improve living standards and facilitate the establishment of businesses that will result in job creation.

Further, as poverty seems to be endemic to women, there is need to improve on the gender equality measures employed. This can be done through the use of community training initiatives, using local administrative officers to ensure that girls are taken to school, and taking stringent action on parents who marry off children, among other measures.

- f) **Creation of Awareness:** The creation of awareness on human trafficking needs to be done not only for people migrating to destination countries but for the greater public. People entering the job market are primarily found in schools, and as such, the inclusion of information on human trafficking in education curriculums will result in their enlightenment. Sensitization of communities where human trafficking is prone is also necessary to shift the regional focus on human traffickers. Sharing of information on human trafficking through the media, and social media in particular, will also increase the level of awareness. The creation of awareness also extends to the training of all key stakeholders. Police officers, prosecutors and judicial officers across the country require specialized training on the elements of human trafficking and victim identification. Training in this regard will improve the quality of investigations carried out by non-specialized units and aid in the prosecution process.
- g) **Improved monitoring measures:** There are still a number of unregistered recruitment agencies that operate in the country which continue to facilitate the trafficking of victims to destination states. Regular and random physical inspection may curb the mushrooming

of these unregistered agencies. There is also need to monitor their online presence, flagging suspicious websites and holding social media companies such as Facebook (Meta) and TikTok accountable for misleading content shared on their platforms. In addition, further safeguards can be placed in reviewing employment contracts prepared by destination states, especially Gulf States, to ensure that they do not infringe on basic fundamental rights and freedoms.

- h) **Increased Budgetary Allocation:** There is also need for budgetary allocation for purposes of facilitating awareness creation, monitoring and investigation processes. Increased funding in these areas will exceedingly ameliorate the efforts made by key stakeholders who are currently constrained from doing much due to lack of sufficient funding.
- i) **Establishment of state-run shelters:** Victim protection measures can be improved by providing state-run shelters. NGOs depend heavily on donor funding and their ability to provide for victims of human trafficking is limited by available resources. Further, NGOs lack the capacity to provide security for victims of human trafficking. Conversely, the placement of victims in police stations where NGOs lack capacity or where security concerns are raised may serve to further perpetuate the reluctance of victims to present themselves for fear of confinement for prolonged periods in police cells. A state-run facility utilizing funds from the National Assistance Trust Fund would be better placed to meet the needs of victims of human trafficking and would also serve to address their reluctance to report to law enforcement or testify in court.
- j) **Adequate Witness Protection Measures:** due regard for the well-being of victims should be considered when victims are required to testify in court. Whereas witness protection in shelters is commendable, the circumstances of each case ought to be considered.

Confinement of victims to specific shelters may not be necessary for purposes of securing their testimonies in court. With the advent of online courts, victims who wish to return to their origin homes or states should be allowed to do so and be given the option of testifying online.

- k) **Standardization of data collection and a centralized national database:** The standardization of data collection methods and the creation of a centralized national database system will also significantly aid protection and prevention measures. This would also require the conduct of further research on the ever-changing trends in human trafficking. In addition, information sharing with regional and international agencies can lead to the creation of a human traffickers register, allowing Kenya and its neighbours to identify and flag traffickers within their respective jurisdictions.

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September 2023

APPENDICES

APPENDIX 1: QUESTIONNAIRE ON HUMAN TRAFFICKING FOR GENERAL RESPONDENTS

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

Gender: _____

Age: _____

Occupation: _____

Awareness on Human Trafficking

1. Have you heard of human trafficking?

Mark only one oval.

Yes

No

2. Have you heard of instances of human trafficking in Kenya?

Mark only one oval.

Yes

No

3. If yes to number 2, where did you hear about human trafficking?

Mark only one oval.

Personal Encounter

Family/Friends

Training in School

News/Newspaper

Online/Social Media

Community Group

Other (Specify): _____

4. To what extent do you think human trafficking is present in Kenya?

Mark only one oval.

Widespread

Fairly widespread

Not widespread

None existent

I don't know

5. Which forms of human trafficking are prevalent in Kenya?

Check all that apply.

- Transnational/ Cross-border trafficking
- International trafficking
- Internal trafficking

6. How do you believe human trafficking victims are exploited?

Check all that apply.

- Sexual Exploitation
- Forced Labour
- Forced Begging
- Debt Bondage
- Organ harvesting
- Forced Marriage
- Child Marriage
- Child Labour

Other (Specify): _____

7. Who do you think could become a victim of human trafficking?

Check all that apply.

- Men
- Women
- Girls
- Boys
- Persons with physical disabilities
- Marginalized communities
- Internally Displaced Persons (IDPs)
- Refugees
- Illegal Migrants

Other (specify): _____

8. What external factors make people vulnerable to human trafficking? (Please tick all that apply)

Check all that apply.

- Poverty/ Lack of economic opportunities
- Political Instability/ War/ Armed Conflict
- Gender Inequality
- Lack of education/ Ignorance
- Demand for cheap labour/sex
- Natural/ Environmental Disasters
- Lack of safe immigration options/ Migrant Smuggling
- Cultures that promote slavery or slavery-like practices

Other (Specify): _____

Investigation and Prosecution

9. Would you be able to identify a victim of human trafficking?

Mark only one oval.

Yes

No

10. If (yes) on question 9 above, please explain how you would be able to identify a victim of human trafficking.

11. Would you be able to identify a human trafficker?

Mark only one oval.

Yes

No

12. If (yes) on question 11 above, please explain how you would be able to identify a human trafficker.

13. Do you know where to report a suspected case of human trafficking?

Mark only one oval.

Yes

No

14. If (yes) on question 13 above, please state where you would report a suspected case of human trafficking.

15. Are you aware of any arrests that have been made of suspected human traffickers?

Mark only one oval.

Yes

No

16. What challenges, in your opinion, prevent effective investigations of human trafficking cases?

Check all that apply.

Lack of information and training

- Corruption
- Lack of cooperation from members of the public
- Lack of inter-agency cooperation (police, civil society, non-government organisations [NGOs])
- Poor regulation of national borders
- Poor implementation of laws
- Poor collection of evidence

Other (Specify): _____

17. Are you aware of any human trafficking cases that have been presented in court?

Mark only one oval.

- Yes
- No

18. Do you think there have been many convictions of human traffickers by the courts?

Mark only one oval.

- Yes
- No
- I don't know

Prevention:

19. Are you aware of measures put in place by the country to prevent human trafficking?

Mark only one oval.

Yes

No

20. If (yes) on question 19 above, please state the measures that have been put in place to prevent human trafficking in Kenya.

21. Does the Government of Kenya need to do more to prevent human trafficking?

Mark only one oval.

Yes

No

22. If (yes) on question 21 above, please explain what more should be done by the Government of Kenya to prevent human trafficking.

**APPENDIX 2: INTERVIEW GUIDES FOR KEY INFORMANTS
(GENERAL)**

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

General Information

Organization/ Institution: _____

Role/ Position: _____

1. Incidences of Trafficking in Kenya:

- 1.1. Would you say that human trafficking is prevalent in Kenya?
- 1.2. Which is more prevalent; internal, international or transnational human trafficking?
- 1.3. What are the nationalities of the victims of human trafficking that you have encountered?
- 1.4. What are the common forms of human trafficking in Kenya?
- 1.5. From which background(s) do most victims of human trafficking come from?

- 1.6. What would you say are some of the factors that have resulted in human trafficking in Kenya?

2. Awareness on Human Trafficking:

- 2.1. Do you think there is much awareness on human trafficking among members of the public?
- 2.2. What steps have you taken to create awareness on human trafficking?
- 2.3. Do you share information on human trafficking with NGOs, government agencies or other stakeholders? Is information sharing done on a regular basis?
- 2.4. How would you rank the level of cooperation between NGOs, government agencies and other stakeholders on information sharing?
- 2.5. Do you receive any financial support from the state to create awareness on human trafficking?

3. Prevention and Protection Measures:

- 3.1. Do victims or members of the public often report incidences of human trafficking?
 - 3.2. How do you deal with human trafficking cases reported to you?
 - 3.3. What forms of aid do you provide to victims of human trafficking?
 - 3.4. Do you receive financial or other forms of assistance from the state when dealing with victims of human trafficking?
 - 3.5. Are you aware of any prosecutions of suspected human traffickers?
-

4. Conclusion:

- 4.1. How would you rank the state's efforts thus far in addressing human trafficking?
- 4.2. What additional measures do you think should be put in place to address human trafficking in Kenya?

THANK YOU FOR YOUR TIME

(EMPLOYMENT AGENCIES)

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

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General Information

Position Held: _____

Registration with the National Employment Authority: _____

1. Recruitment Process:

- 1.1. How does the Agency get potential clients?
- 1.2. From what economic background do your clients come from?
- 1.3. Do you recruit employees for local or foreign employers (destination states)?
- 1.4. Are there preferred employment destination states?
- 1.5. What type of employment opportunities are mainly offered in destination states (skilled or unskilled)?

- 1.6. How do you identify the prospective employers in the destination states?
- 1.7. Do you get in touch with the employers directly or through other agencies/brokers?
- 1.8. Are you provided with employment contracts by these employers/agencies/brokers?
- 1.9. Are the contracts usually in English or Kiswahili? If not, are they translated into English or Kiswahili?
- 1.10. Do you provide a copy of the employment contracts to the Ministry of Labour for authentication?
- 1.11. Do you explain the terms of the contracts to your clients?
- 1.12. Do you negotiate the employment terms on behalf of your clients?
- 1.13. Do you conduct pre-departure training (training on the laws, sensitization on cultural and social norms, etc) for clients going to work in destination states?
- 1.14. Do you advice your clients to register with Diplomatic Offices in destination states?

2. Awareness on Human Trafficking:

- 2.1. Have you received any training from the Ministry of Labour, Ministry of Immigration, NEA or any state agency on human trafficking?
- 2.2. Do you sensitize your clients on human trafficking?
- 2.3. Have your clients encountered incidences of human trafficking (forced labour, sexual exploitation, etc) while working at a given place of employment?
- 2.4. Which type (s) of human trafficking have been frequently reported to you? Have there been fatalities reported?
- 2.5. What assistance do you provide for a client who becomes a victim of human trafficking?

- 2.6. Do you coordinate with the Ministry of Labour to facilitate the protection and/ or safe return of victim of human trafficking?
- 2.7. What challenges do you face when dealing with reported cases of human trafficking?

3. Conclusion:

- 3.1. What additional measures need to be put in place to deal with human trafficking of people seeking employment opportunities?

THANK YOU FOR YOUR TIME

(IMMIGRATION OFFICIALS)

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

General Information

Position: _____

Duty Station: _____

Awareness on Human Trafficking:

-
- 1.1. Have you received any training on human trafficking? Do you offer any training on human trafficking?
 - 1.2. Do you share information inter/ intra-agencies or with Non-Government Organizations (NGOs) on human trafficking?
 - 1.3. Do you have resources (financial) to deal with incidences of human trafficking?
 - 1.4. Are there international collaboration efforts to deal with incidences of human trafficking?
-

2. Immigration & Human Trafficking:

- 2.1. Do you have immigration officials stationed at the state borders/ at the airports?
 - 2.2. Do they check the travel documents of foreign nationals?
 - 2.3. Does you encounter cases of illegal immigration? If so, how frequent is it? From which countries do the illegal immigrants come from?
 - 2.4. What challenges do you face in controlling the borders/ entry points that result in illegal immigration?
 - 2.5. Have there been reported cases of trafficked immigrants?
 - 2.6. What sort of screening process is done to determine whether a foreigner is an illegal immigrant or a victim of human trafficking?
 - 2.7. What measures do you take once a foreign national is identified as a victim of human trafficking (e.g. deportation, repatriation, etc)?
 - 2.8. How do you address claims of victims seeking asylum in the country? How does an asylum seeker make an application with the Department of Refugee Services while in custody or at a witness protection centre from the?
-

3. Emigration & Human Trafficking:

- 3.1. Do you review the employment contracts of workers travelling to destination states before issuing work permits?
- 3.2. Which are the common destination countries where complaints were received on actual or potential human trafficking of Kenyan nationals?

- 3.3. What measures do you take when you receive information of reported incidences of human trafficking in destination states?
- 3.4. Do you liaise with Diplomatic Offices in destination states to provide protection and/ or to take up the necessary action on behalf of victims of trafficking?
- 3.5. Do you arrange for the repatriation of victims of human trafficking? Are travel documents provided where the victim does not have any in their possession?
- 3.6. Are interviews conducted with returned victims to gain further insight for prevention purposes?
- 3.7. Do you provide re-integration plans (temporary housing, medical treatment, psychological care, etc.) to aid victims of human trafficking?

4. Conclusion:

- 4.1. How would you rank your enforcement mechanisms in addressing human trafficking cases thus far?
- 4.2. What additional measures do you think need to be set in place to deal with human trafficking both into and out of the country?

THANK YOU FOR YOUR TIME

(DCI)

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

General Information

Position: _____

Duty Station: _____

Status of Human Trafficking in Kenya:

1. What is your understanding of human trafficking?
2. How many cases of human trafficking are reported to the DCI or the police on average?
3. What is the common age-range of the victims/ complainants?
4. What is the ratio of male to female victims/ complainants?
5. Have you encountered cases of internal trafficking? If so:
 - From which regions/ areas do the victims originate?

- In which regions/ areas are the victims exploited?
 - What forms of exploitation do these victim encounter?
6. Have you encountered cases of transnational or international trafficking? If so:
- From which regions/ areas do the victims originate?
 - Which are the common transit routes used by traffickers?
 - In which regions/ areas are the victims exploited?
 - What forms of exploitation do these victim encounter?
7. What factors or circumstances have resulted in the trafficking of victims?
8. What are the commonly reported recruitment methods by human traffickers?

Reporting and Investigation:

9. Is there a hotline or a distinct contact number for members of the public to report human trafficking cases?
10. How often are cases of human trafficking reported to the police and/ or the DCI?
11. What means do traffickers use to dissuade victims from reporting to the police?
12. Have you encountered cases of trauma-bonding between traffickers and their victims?
13. Does the DCI have specialized units to receive and investigate complaints of human trafficking? If so:
- Are they located in each region of the country?
 - Do they train the police on incidences of human trafficking?
 - Is there a standardized database for victim identification and processing?

➤ Do they receive financial, technical or other assistance from the state?

14. How is information on human trafficking disseminated/ shared between the DCI and other stakeholders, e.g. civil society groups, Ministry of Immigration, etc.?
15. How does the DCI investigate reported cases of human trafficking? Is there a multi-agency approach in conducting investigations?
16. How do you deal with cases of victims who require protection during the investigation process?
17. What challenges do you encounter when investigating reported human trafficking cases?
18. Have you encountered cases of compromised or corrupt police officers? If so, how do you address this?

Arrests and Charging of Suspected Traffickers:

19. How often are human traffickers arrested?
 20. From which regions/ nationalities do the traffickers come from?
 21. What is the ratio of male to female traffickers?
 22. What challenges do you face in identifying and arresting human traffickers?
 23. Have you encountered cases where the alleged trafficker is the actual victim of human trafficking? If so, how did you approach it?
 24. Have you encountered cases of repeated offenders?
 25. What instructs your decision to draft charges under the Counter Trafficking in Persons Act as opposed to other offences, e.g. sexual offences under the Sexual Offences Act?
-

Conclusion:

26. How would you rank the DCI in its efforts to address human trafficking cases thus far?

27. What additional measures ought to be taken up by the DCI to facilitate more human trafficking convictions?

(PUBLIC PROSECUTORS)

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

General Information

Duty Station: _____

Incidences of Trafficking in Kenya:

From the cases you have handled:

1. Would you say that human trafficking is prevalent in Kenya?
 2. What are the common forms of human trafficking in Kenya?
 3. What are some of the factors that have resulted in human trafficking in Kenya?
 4. What are the nationalities of the victims of human trafficking that you have encountered?
-

Awareness:

5. Do you think there is much awareness on human trafficking among members of the public?
6. Is there much awareness by public prosecutors in general on human trafficking?
7. What steps has your institution taken to create awareness on human trafficking in Kenya?

Prosecution:

8. Do you think the country has taken reasonable steps in the prosecution of human traffickers since the enactment of the Counter Trafficking in Persons Act, 2010?
9. What is the prosecution rate for human trafficking cases as compared to other crimes?
10. What are the nationalities of the traffickers convicted thus far?
11. What key elements do you consider in determining whether to prosecute under the Counter Trafficking in Persons Act, 2010 or under another Act? (e. g. Sexual Offences Act 2006?)
12. What, in your opinion, are some of the challenges you encounter in the prosecution of human trafficking cases?
13. Is there any form of inter-agency assistance in the prosecution of human trafficking cases?
14. What, in your opinion, are some of the best practices that can be employed by your institution to increase the conviction rates of traffickers?

THANK YOU FOR YOUR TIME

(JUDICIAL OFFICERS-CRIMINAL DIVISION)

My name is Sheila Onyango, a Master of Laws (LLM) student at the University of Nairobi. I am carrying out a survey in Nairobi, Kenya to collate data for my thesis, “*State Responsibility in Combatting Transnational Crime: A Case Study of Kenya’s Response to Human Trafficking.*”

The research aims to highlight the public perception on human trafficking and the efforts made by the country to prevent human trafficking, protect potential victims and prosecute trafficking offenders.

I am grateful that you have agreed to give a few minutes of your time to share your views on the issues discussed above.

The information collected from this survey will be used solely for research purposes and will only be disseminated through my final thesis paper that shall be presented to the University of Nairobi.

General Information

Duty Station: _____

Rank: _____

Awareness:

1. Have you encountered many cases of human trafficking? How many on average are filed/ brought to court?
2. What is the common age-range of the victims/ complainants?
3. What is the ratio of male versus female victims/ complainants?
4. What are the common forms of human trafficking identified?

5. Have you encountered cases of foreign victims/ complainants? If so, which are the common nationalities?
6. What directions does the court give in such circumstances, e.g. with respect to where the foreign nationals are detained?
7. Have you encountered cases where the accused is the actual victim of human trafficking (“victim defendants”)? If so, how did you approach it?
8. Does the court take an inquisitive role to establish whether a foreign national is a victim of human trafficking once presented before the court?

Trial process:

9. Are the elements of human trafficking as set out under the Counter Trafficking in Persons Act 2010 often brought out clearly in Charge Sheets?
10. Do you often encounter cases of defective Charge Sheets (e.g. where there is a variance between the charge and the evidence)? If so, are requests for amendments raised by the prosecution? Do you often exercise your power under the Criminal Procedure Code to amend the Charge Sheets?
11. Do the amendments often alter the nature of the criminal charge (e.g. from a human trafficking offence to a sexual offence)? If so, how often does this happen?
12. Do you receive requests for Witness Protection? If so, what factors do you consider before granting such orders?
13. Are statements provided on the status of victims/ potential witnesses while at witness protection centres?

14. Do complainants attend court to testify against traffickers or other accused persons? If so, are they offered any protection while in court (e.g. testifying in camera)?
15. How long, on average, do you take to hear and determine a human trafficking case?
16. What, in your opinion, occasions delay in the determination of human trafficking cases?
17. What challenges do you encounter when determining whether sufficient evidence has been presented to sustain a human trafficking charge?
18. How often are perpetrators of human trafficking found guilty as charged?
19. What sentences do you met out for human trafficking offences? What is the maximum prison sentence you have issued?
20. What factors do you factors do you take into account when sentencing accused person? Do you consider mitigating circumstances as well?
21. Have you encountered cases of repeated offenders? If so, how have you dealt with them?

-
22. How would you rank the court in its efforts to address human trafficking cases thus far?
 23. What additional measures ought to be taken up by the courts and/ or court practitioners to facilitate more human trafficking convictions?

THANK YOU FOR YOUR TIME

APPENDIX 3: NACOSTI LICENCES


REPUBLIC OF KENYA


**NATIONAL COMMISSION FOR
SCIENCE, TECHNOLOGY & INNOVATION**

Ref No: **148732** Date of Issue: **06/June/2022**

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REPUBLIC OF KENYA



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY & INNOVATION

Ref No: 592555

Date of Issue: 22/June/2023

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THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013 (Rev. 2014)

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The National Commission for Science, Technology and Innovation, hereafter referred to as the Commission, was established under the Science, Technology and Innovation Act 2013 (Revised 2014) herein after referred to as the Act. The objective of the Commission shall be to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.

CONDITIONS OF THE RESEARCH LICENSE

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2. The research and its related activities as well as outcomes shall be beneficial to the country and shall not in any way;
 - i. Endanger national security
 - ii. Adversely affect the lives of Kenyans
 - iii. Be in contravention of Kenya's international obligations including Biological Weapons Convention (BWC), Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), Chemical, Biological, Radiological and Nuclear (CBRN).
 - iv. Result in exploitation of intellectual property rights of communities in Kenya
 - v. Adversely affect the environment
 - vi. Adversely affect the rights of communities
 - vii. Endanger public safety and national cohesion
 - viii. Plagiarize someone else's work
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10. The Licensee shall submit one hard copy, and upload a soft copy of their final report (thesis) onto a platform designated by the Commission within one year of completion of the research.
11. The Commission reserves the right to modify the conditions of the License including cancellation without prior notice.
12. Research, findings and information regarding research systems shall be stored or disseminated, utilized or applied in such a manner as may be prescribed by the Commission from time to time.
13. The Licensee shall disclose to the Commission, the relevant Institutional Scientific and Ethical Review Committee, and the relevant national agencies any inventions and discoveries that are of National strategic importance.
14. The Commission shall have powers to acquire from any person the right in, or to, any scientific innovation, invention or patent of strategic importance to the country.
15. Relevant Institutional Scientific and Ethical Review Committee shall monitor and evaluate the research periodically, and make a report of its findings to the Commission for necessary action.

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