

International Law and the Regulation of Child Trafficking In Kenya

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ABSTRACT

Despite the protection of children through ratification of international legal instruments in Kenya, enacting the Counter-Trafficking Act, 2010 and Children's Act of 2001, the number of children victims of trafficking is soaring. The objectives of the study were to; examine the international legal framework applicable towards addressing child trafficking in Kenya, assess the extent of Kenya's compliance with its international obligation towards addressing child trafficking and analyze the challenges in efforts to address child trafficking in Kenya. Critical legal theory was used to examine the nature of child trafficking treaties in Kenya. The research used exploratory research design. This enabled the collecting of data on several variables which were then examined for recurring patterns. The population consisted of the officers working with the Department of Children services, National Council of Children Services, and National Police Service, organizations that address child trafficking, such as Trace Kenya, Counter Human Trafficking East Africa, Consolation East Africa, and the Salvation Army. The study used purposive sampling and snowballing techniques. The unit of analysis was the International law on child trafficking. The researcher obtained the list of registered child trafficking case reports from kenyalaw.org. Data was collected using questionnaires, structured interviews and phone interviews. A total of 30 key informant interviews was conducted and follow up interviews in some cases. The validity and reliability of questionnaires was determined through a pilot study in Kenyatta University main campus in the department of International Relations, Conflict and Strategic Studies. Document analysis were used to enhance thematic analyses. The data collected was analyzed and presented in tables, pie charts, and percentages. The qualitative findings were analyzed by content. The overall conclusion of this study was that Kenya's implementation of anti-child trafficking laws was lax. To this end, Kenya is a child-friendly nation; however, a lot needs to be done to implement child protection laws and awareness creation.

KEYWORDS: International law, child trafficking, state compliance, domestication

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I. INTRODUCTION

Background to the study

Worldwide, trafficking in people is cited as an exceedingly lucrative transnational organized crime competing with drugs and weapon trafficking (Bales, 2005). An observation made by the International Labour Organization report (2014), the proceeds from this illegal business are approximated to be US\$ 150 billion annually. Trafficking in persons is unique as the world's greatest somber transnational crimes, which hold very complex human rights challenges of our time globally, regionally, and nationally. According to the United Nations Office on Drugs and Crime (UNODC) Trafficking in Persons global report of 2016, the overall number of humans trafficked worldwide is an estimated 12.3 million. Notably, 25 percent of the trafficked persons are children. Girls are primarily trafficked for use in commercial sexual exploitation and domestic work, while boys are mainly trafficked for agriculture, mining, plantations, and armed conflict (UNODC TIP Report, 2016).

International law is an influential channel in Combating Trafficking in persons by setting up a defining, prevention, and protection framework. Trade in humans is a grave rights and dignity violation (Islam and Nicaise, 2017). The universal instrument which provides the definitive framework in the regulation of human trafficking is the United Nations Convention against Transnational Organized Crime (UN TOC). This instrument was agreed upon by the United Nations General Assembly (UNGA) on 15th November 2000, which entered into force on 23rd September 2003. It was adopted to confront the transnational nature of human trafficking. Supplementing the convention, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, also known as the "Palermo Protocol." It was agreed upon in the year 2000, which conceptualizes the notion of child trafficking (UN TOC, 2000).

Trade in humans' origin epochs back to the time in history where bond slaves' proprietorship was esteemed and viewed as a service. The bond slaves were being conveyed away from the brutalities of life in their own homes (Colson, 2007). This happened for centuries until such an inexcusable reality required the resilient and speedy action of the international community. This seemingly brought together several international legal instruments being adopted over the years, dating back to 1588 while Japan and Lithuania got into a pact to put an end to Slavery (Ngwe and Elechi, 2012).

The willingness of states to suppress trafficking in human beings is evident through ratification of Palermo Protocol. States made a declaration to enhance efforts through an all-inclusive international approach to address the Trafficking in persons in origin, transit, and destination states (Estourgie, 2016). The main focus of the protocol has been for states to detect and prosecute traffickers while identifying, protecting, and assisting those who have already been trafficked while at the same time initiating various actions to prevent people from being trafficked (Protocol, 2001). As of 2010, the UNODC is committed to producing annual reports under the name: "UN Global Plan of Action to Combat Trafficking in Persons." In 2019, 173 states had endorsed the Palermo protocol as of 31st March 2019, to which Kenya is a party. Among these states, 168 states have passed domestic legislation to curb Trafficking in human beings (UNODC TIP Report, 2019).

Compliance to International Law

Domestication of the international treaties is essential for states to address the particular elements in the treaties at the national level. Domestication of the Palermo protocol criminalizes trade in human beings as per the outline. In addition, domestication plays a momentous role in the adoption of new regulations to translate the protocol into action or amend the existing laws. At the same time, they establish institutions and procedures to implement the international law and protect victims towards a victim-centered approach (UNODC TIP Report, 2019).

Non-compliance with the Palermo Protocol has penalties. Recently United States Trafficking in Persons report evaluated states' compliance by using the three-tier classification system. Penalties follow according to the ranking of the state. The lowest rank a state can earn is tier three, where sanctions involve the withdrawing of non-humanitarian aid. In addition, the states involved may not obtain aid for the partaking of programs related to cultural exchange or education (US Department of State Report, 2014).

Exposure of children to organized transnational crime has been increasingly on top political agendas of the international community. The international laws addressing child trafficking in the world today include The Palermo protocol, the Convention on the Rights of the Child (CRC) (1989), and its additional protocol on the sale of children, child prostitution, and child pornography (CRC-OP-SC), the ILO Convention No. 182 on the Worst Forms of Child Labor of 1999 (Sigfridsson, 2013).

Regionally, the 2006 Ouagadougou plan of action towards fighting trafficking in humans, particularly women and children, endorses these international instruments to avert Trafficking, safeguard victims of Trafficking, and the trial of those involved in the crime of trading in persons (Thipanyane, 2015). At the East African level, the East African Community (EAC) Trafficking in Persons Bill, 2016 has been presented whose main aim is to counter the trade in human beings with particular attention to children and women (EAC Counter-Trafficking in Persons Bill, 2016).

Child trafficking statistics in Kenya

According to National Crime Research Center (NCRC) Report on Human Trafficking in Kenya 2015, international trafficking prevalence is relatively high, at 60.2%. Child trafficking is the second to Trafficking designed for labor. Poverty, unemployment, and corruption are the main factors contributing to child trafficking (NCRC, 2015).

African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) 2017 provides a baseline survey for child trafficking in Busia, Mandera, and Marsabit that observes that there is a absence of lucidity and consistency in comprehension of child trafficking because of being theoretically related to other crimes. An estimated 20,000 children are trafficked annually, with two key categories being targeted: girls less than 16 years of age and newborn babies who go missing at the hospitals. (ANPPCAN, 2017).

In November 2020, the BBC Africa Eye brought to light a baby stealing syndicate in Kenya after a yearlong investigation. The syndicate stole children from poor and homeless women, primarily single mothers who lived in informal settlements. The babies were then sold to the highest bidder. This racket constituted community leaders and government officials in public hospitals. This criminal enterprise benefited financially from snatching many children of their mothers. A girl fetched from Kenya shillings fifty thousand while a boy fetched from Kenya Shillings eighty thousand in the market (BBC News Africa, 2020).

Until 2010, the felony of Trafficking in human beings, especially children, did not specifically exist in the national legislation; Other related legislations addressed child trafficking. However, Kenya had been a party to the CRC sanctioned in July 1990. In 2001 Kenya domesticated the CRC inform of the Children's Act 2001

(IOM Rapid Assessment,2014). The Kenyan Constitution 2010 has made a provision on identifying and defending constitutional rights to preserve persons and the communities there by upholding impartiality and actualizing human potentiality (Constitution of Kenya,2010). In addition to ratifying the Palermo Protocol, Kenya has enacted the Counter-Trafficking in Persons Act 2010 and the National Plan of Action for combatting Human Trafficking and Strategic Framework (2013-2017). Trafficking in children is still prevalent in Kenya paradoxically after ratifying universal and regional mechanisms improving the practice.

Statement of the problem

Despite evolution and ratification of international legal norms and an increase in the number of intervention strategies towards addressing child trafficking, including initiatives, laws, and international instruments, States like Kenya have had little success in addressing child trafficking.

Child trafficking remains an imminent challenge at the international stage, regional, and state levels. Worldwide, an estimate of 1.2 million children are trafficked annually. This translates to 27% of victims of trafficking being children, and among any three trafficked children, one is a boy and two are girls, with the majority 68% coming from Asia and the Middle East. (UNICEF, 2007, UNODC,2012). Although the actual statistics on child trafficking in Africa remains a challenge, Kenya has been recognized as a country of origin, transit, and destination with 98 routes used by traffickers (Freedom Collaborative, 2020).

Kenya has adopted specific penalties against Trafficking in children in the Counter-Trafficking in Persons Act 2010. However, there is still a gap when addressing crime while ensuring the protection of the victims. The challenge remains as to why the number of trafficked children is still skyrocketing, with an estimated 20,000 being trafficked annually in Kenya (APPNCAN, 2017). This points at a gap in the regulation of child trafficking in Kenya by the international laws.

According to the British Broadcasting reports of 18 November 2020 by Andrew Wasike, the Kenya Police uncovered a child trafficking syndicate which led to the arrest of three medical officers. This was after an outcry by members of the public of the disappearance of children in hospitals and children homes. This led to issuance of a directive by Kenya's police Inspector General Hilary Mutyambai that the police should collaborate with other stakeholders to conduct a joint investigation of child trafficking. In addition, the Ministry of Labour and Social protection vowed to decisively deal with child trafficking in Kenya. (Ajansi,2020).

Such an examination, ultimately sought to rethink through the international legal framework on child trafficking operational in Kenya in terms of the compliance, implementation and the hurdles faced in addressing child trafficking. The shifts in the international law had questionably augmented state duty and widened the parameters of social protection of children against trafficking. This study pursued to make a contribution to promotion of a consistent and well-coordinated protection response among key stakeholders in Kenya.

Objective of the Study

The principal objective of this study was to explore international law and the regulation of Child trafficking in Kenya. The Specific objectives were; To examine the international legal framework applicable towards addressing child trafficking in Kenya; To assess the extent of Kenya's compliance with its international obligation towards addressing child trafficking; To analyze the challenges in efforts to address child trafficking in Kenya.

Scope of the Study

The breadth of this study was international law and the regulation of child trafficking in Kenya. The international legal framework and the Children's act of 2001 were complimentary. The international regulations include resolutions and state pronouncements, including those adopted in the UNGA and the UN Human Rights Council, although not legally binding form normative frameworks on state conduct in the international system. First, this study examined the international legal instruments that Kenya has ratified in addressing child trafficking. Then, the study focused on Kenya's compliance with its specific legal obligations in addressing child trafficking as a state with a responsibility to protect its citizens. Lastly, the study illuminated the challenges faced in a bid to address child trafficking in Kenya.

II. LITERATURE REVIEW

2.1 Empirical Review

2.1.1 International law and regulation of child trafficking in Kenya

The international law on Trafficking in human beings has evolved for over a century, as CdeBaca (2011) in his keynote address at Michigan Law School observes. The development of the various conventions, instruments, and institutions is a testament to his observation. These instruments have addressed crucial aspects of Trafficking in persons such as slavery, forced labor, enslavement, and servitude. His observation gives a

vivid depiction of the history of the international law of trafficking in humans from the most notable moments in history yet fails to illuminate the issue of child trading.

Morcom & Schleonhardt (2011) explore how the concept of Trafficking in humans has evolved in the international law context. International law on human Trafficking has resulted from anti-slavery conventions such as the League of Nations anti-slavery convention of 1962. On addressing forced labor and prostitution, the 1957 Abolition of Forced Labour Convention and the UN Convention for the Suppression of the Trafficking in Persons and the Exploitation of Prostitution of Others in 1949 were adopted. To protect children from Trafficking, the UNCRC (1989) and its additional protocols were adopted. Consequently, the adoption of the UN TOC (2002) and 'Palermo' protocol gave the universal definitive framework on Trafficking and became the focus in suppression trafficking in humans.

In her in-depth analysis of the international law on trafficking in human beings, Gallagher (2010) links laws with various rules such as the key standards of transnational criminal law, international criminal law, the international human rights law, the refugee law, and the international law on the state responsibility in a bid to identify the process of explaining the major duties of states to define, prevent, protect and act against the offenders. Notably, this observation helps explain the various criminal aspects of the crime of trade in humans in relation to international legislations yet being light on child trafficking.

In Kenya, the regulation on child trafficking has undergone significant milestones. Oduor (2013) observes that Kenya is a monistic system where the Constitution of Kenya 2010 recognizes and accepts international law as part of the Kenyan law. Previously Kenya was a dualistic state which was a major challenge in addressing child trafficking as international laws addressing child trafficking had to be domesticated before enforcement.

Odhiambo (2017) observes that prior to 2012, no specific law dealt explicitly with the menace of humans trafficking until the Counter-Trafficking in Persons Act (CTiP) 2010, was put into effect in 2012. Previously, the legal mechanisms used to address the crime of this nature were the Children's Act 2001, Sections of the Penal Code, and Sexual Offenses Act 2006, partially addressing the issue. She fails to include the Constitution 2010, which is very instrumental in creating the CTiP (2010) alongside provisions for safeguarding basic rights and human dignity. In Addition, while legislation is a crucial tool in addressing prevention, protection, prosecution, and execution of the international law, other issues arise due to laxity among stakeholders and the government that the study uncovered.

2.1.2 Kenya's compliance with international law on child trafficking

Henkins (1968) argues that states behave largely in compliance with international law in reference to his famous aphorism, which affirms that the majority of nations observe nearly all values of universal law. However, he is less clear on why the states comply, but he lists a set of factors that favor compliance, such as the state's reputation and domestic politics of state's reciprocity.

International regulations still have a grip-like influence on both the workings and the structures of the national constitutions (Maluwa, 1999). While international law regulating human Trafficking has had various successes, such as coming up with a solid definition, the law has similarly been beleaguered with failure on several grounds. Birdsall (2009) observes that one problem concerning the international law relevant in the children's rights context is the weak enforcement mechanisms. Under the UN Treaty law, international law is only legally binding upon the state's ratification. However, when the state breaks the agreement, there are no forceful consequences in terms of a sovereign body above the states. This, however, does not convey the specific challenges that may lead to a state non-compliance with its universal commitments to address child trafficking, which is one of the aims of this study.

The United States Trafficking in Persons report (2009) places countries in trilogy (Tier 1, Tier 2, and Tier3) according to the overall efforts made by the states to fight human trafficking. States that have initiated significant attempts to take action on Trafficking in persons get tier 1 classification. In contrast, Tier 2, 3 are for countries that have not done enough, according to the US Department of State. In addition, Barnabe (2012) notes that the United States Department of State, to a large extent, rewards countries via the provision of foreign aid. This is in relation to how countries respond well to Trafficking in people, inventiveness to address the crime, as well as the specific initiatives to counter human trafficking. The specific sanctions that the United States can issue on the poor performers are the withdrawal of the much needed foreign aid in the developing countries, education and cultural aid withdrawal, and the reluctance to continue with the military support. As a result, governments have been misinforming on the depth of the initiatives to counter human trafficking.

2.1.3 The challenges of addressing child trafficking in Kenya

As Nyataya et al (2017) observe, the cost factor accrued when investigating transnational cases is high. This is because Trafficking in persons, in particular, carries many crimes with it. It is time and resource-consuming for countries with limited resources. However, it should not be an excuse for the states involved not to put in endeavors to pursue trafficking across borders.

While trafficking in people has lately been termed a national security issue, criminal jurisdiction issue, and a human rights violation. Davidson (2016) observes the United States of America (USA) and the European Union (EU) spending a vast amount of resources aimed at erecting barriers to this movement of people. The barriers involve both traditional barring methods: building walls, fences, and checkpoints to modern and sophisticated use of high technology surveillance systems. The externalization of the European Union's effort on border control through funding the establishment of migration detention facilities, bilateral agreements, visa regimes, and military training has further helped reduce the transnational traffic flow within the European Union member states. Kenya, however, is a developing state plagued with a resource shortage. Both workforce and finances have been weak at erecting the barriers to the movement of people though being a member of EU transnational agreements and destination point for trafficked persons such as BMM.

Mendelson (2014) observes that it's largely that the benefactor community has not placed combatting human Trafficking as a high priority issue as with eradication of poverty or improving maternal health. Both were top of the list of the United Nation's Millennium Development Goals (MDGs). Notwithstanding, having both bilateral development institutions like the U.S Agency for International Development and numerous private philanthropies working relentlessly to curb Trafficking in persons, there has been a slow rate in addressing the aspects of child trafficking.

As Salihu et al. (2016) note, it's the essence of every government to prioritize safety actions to safeguard the life and properties of the citizens. While establishing partnerships with international non-governmental organizations like the United Nations Children's Fund (UNICEF) may be deemed necessary, the domestication of the international treaties, subsequent enforcement, and public awareness on the vice is of utmost importance in addressing child trafficking.

International Labour Office (ILO) (2014) asserts that child trafficking is a unique and worst of child labor (WFCL) in the ILO Convention No.182. Stating that child trafficking has to be eradicated as an urgent matter that is regardless of a state's development rank by setting a challenge for the states that by the year 2016, this crime will be past. This meant that states would have to live up to the challenge by setting up mechanisms that would prevent children from being trafficked or re-trafficked, removing children from the exploitation areas, and providing victim assistance.

2.2 Theoretical framework

The critical legal studies movement started critical legal theory in the United States in the 1970s as a precedent of legal realism. With several scholars as proponents, the theory draws inspiration from Marx and later Foucault and Duncan Kennedy. The primary assumption of the critical legal theory is that; Law is a mask that is a manifestation of power. From this expression, the law itself is not neutral, but it is ideologically driven in the form of power that is additionally used to serve the interests of the elite in the society. The rules are flexible, and politics have a very significant influence on the approaches of law and interests. As a result, personal and moral positions impact the law (Tushnet, 1990).

Politics and whoever is in power determines the specific issues that ought to be discussed in the international arena. Trafficking in Persons has made it to prominent international theaters like the United Nations General Assembly with notable achievements, including 'Palermo' protocol (2000). The protocol is the key international legal apparatus on which the definitional and the global anti-trafficking policies are anchored. The introduction of the Tier system classification by the USA to curb trafficking in people and the subsequent classification of countries into three categories (Tier 1, Tier 2, and Tier3) depending on the determinations to curb Trafficking in people. (United States Department of State, 2009). In itself, it's an expression of power coming into play in influencing the moral position of law.

Critical legal theorists propose that Law is indeterminate and is therefore not a doctrine or a precedent that drives the outcomes of the judicial decisions but other factors. The critical legal theorist exposes the hidden political nature of the law and the interpretation of the legal language for that same effect. The other factors that indeed determine the regulation of human Trafficking largely involve the diversity of actors in the international system with varying interests, whether governments, Inter-Governmental Organizations, and Non-Governmental Organizations. These actors are key players in understanding Trafficking in persons as a phenomenon that includes definitional aspects and the international legal formulation (Orakhelashvili, 2011).

Critical legal theorists are concerned with the idea of reification, especially in the context of rights where the concept requires a form of independence beyond its creation in the social context. This brings conflictual ideas in the international system where governmental and the non-governmental divides bring issues relating to state compliance. It also raises complex issues in relation to the lenses of social contexts in which Trafficking in persons is to be addressed. This breeds a new set of challenges that states face in the regulation of Trafficking in persons. In addition, critical legal theorists believe that placing one's complete trust in the legal system to be the guardian of one's rights is misplaced due to the high prospects for manipulation.

Tushnet (1990) denounces rights in particular as 'illusions and myths,' which are well formulated to guise vital inequalities be it social, political, or economic. According to him, rights create divisive fractions

within communities, thus acting as an agent of separation, which logically diminishes their chance for collective political action. The trans nationality aspect of Trafficking in human beings anchored on transnational movement has made a provision for states to justify an aggressive border control plan in the pretext of combatting Trafficking in persons. In addition, it provides an avenue for solid states to showcase their might to the world.

III. RESEARCH METHODOLOGY

The study employed exploratory research design hence using the qualitative research method approach. This aided the researcher gain insights and a deep comprehension of the subject matter and expanded the breadth and scope of study. This was achieved by identification of the problems in the study objectives and areas of interest specifically suited for this research. This approach in the study aided the researcher to study international law and the regulation of child trafficking in its natural settings.

The study area was Nairobi, Kenya. The justification being Nairobi holds its strategic position in holding the regional offices of international and local head offices of government ministries that are key to this study.

International law on child trafficking being the study's unit of analysis, the researcher identified key organizations and departments dealing with child trafficking in Kenya which formed the target population. After identifying the target population, the researcher moved towards selecting a sample from the accessible population through various techniques. The study used non-probability sampling techniques to sample target groups. In this study, purposive and snowballing sampling methods were used.

The purposive sampling technique was based on the researcher's needs. The specific needs of the researcher include the skills and judgment, and experience of the target population. To identify the respondents who might have rich information on child trafficking and its regulation, this study used purposive sampling for the relevant government officials and non-governmental organization officials. Snowballing was used where the population was not easily accessible and identifiable.

Using Cochran's formula,

$$n_0 = z^2pq/e_2$$

With the assumption that half the target key informants will answer the questionnaire, the maximum variability was then. Therefore, $p=0.5$. Assuming a confidence level of 95% and a precision of plus or minus 5, the confidence level of 95% gives a Z value of 1.96.

Hence, $n_0 = ((1.96)^2 (0.5) (0.5)) / (0.05)^2 = 385$.

The study involved a smaller population; thus, Cochran's modified formula for sample size calculation in small populations was used.

$$n = \frac{n_0}{1 + \frac{(n_0 - 1)}{N}}$$

n_0 - standard sample size recommendation of 385 (Cochran's).

N - population size (target population size) was 32

n - new sample size

Therefore, $n = 385 / (1 + (384/32))$

$n = 29.6$

As per Cochran's formula, the sample size for this study was 30 key informants drawn from;

IV. RESULTS AND FINDINGS

4.1 The international legal framework aimed at regulating child trafficking in Kenya

Under objective One, the study established the existence of an international legal framework regulating child trafficking in Kenya, the relationship between the international laws and domestic laws addressing child trafficking in Kenya, and the implementation of a global legal framework in Kenya. The findings under this study were gathered from key informant interviews and content analysis of relevant documents. The findings will therefore be presented based on four major themes; The existence of an international legal framework in addressing child trafficking in Kenya, a high level of awareness among stakeholders of the international legal framework ratified by Kenya to address child trafficking, existence of complementarity of the international legal

framework and domestic law, and existence of gaps in implementation of international law. These themes are elaborated in the following sections.

4.1.1 The existence of an international legal framework in addressing child trafficking in Kenya

The History of the international legal framework on child trafficking

Trafficking in human beings’ despite being a modern-day legal issue, has a lengthy political and legal history and has evolved over time. (Gallagher, 2010, p.13). Allain (2017) separates the international legal framework aimed at addressing Trafficking in persons into three distinct categories dating from the before establishment of the League of Nations era, then to League of Nations period, and lastly, the United Nations.

Before establishment of the League of Nations, Faulkner (2019, p.104), in her work, ‘The development of child trafficking within the international law’ traces origins of Trafficking in persons’ definitions to International Convention for The Suppression of White Slave Traffic 1910. During League of Nations, a Committee for Protection of Children (1919) was formed. In 1924, the Declaration on the Rights of the Child (1924) was adopted. This led to conception of the Geneva Declaration of the Rights of the Child in 1924. The United Nations (UN) was established to replace the League of nations.

In the following section, this study presents some key conventions and protocols addressing child trafficking in Kenya.

Key Conventions and Protocols addressing child trafficking in Kenya

According to treaty law, the study established a treaty can only be applicable in a state after it has been ratified or acceded by a country. Article 11 (1) of the Vienna Convention on the Law of Treaties state that;

“...The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed...”

Table 4. 1: Treaties ratified or acceded by Kenya that address child trafficking

Name of the Treaty	Year of Adoption	Year Kenya Acceded to
The United Nations Convention on the Rights of the Child (UNCRC)	1989	30th July 1990
United Nations Convention against Transnational Organized Crime (UNTOC) (Palermo protocol)	2000	5 th January 2005
International Labour Organization (ILO) Conventions. Forced Labour Convention The Minimum Age Convention	1964	2001
	1979	1979
The African Charter on the Rights and Welfare of the Child (ACRWC)	1990	25 th July 2000

Source: Researcher 2021

4.1.1.1 The United Nations Convention on the Rights of the Child (UNCRC) (1989)

The examination of the UNCRC revealed that it was adopted on 20th November 1989 under the UN RES 44/25. It purposed to recognize children rights by providing a framework for the safeguarding of civil, social-political, and cultural rights of the child. To date, 196 countries have ratified the UNCRC, making it the most widely ratified convention (Palmqvist, 2006, p. 6). Kenya became a party on 30th July 1990 (CRC/C/KEN/2, 2006, p.13). The study found out that the UNCRC is internationally binding law on the protection of children from trafficking by making four main provisions; Articles 32, 34,35 and 36

Table 4. 2: Specific articles in the UNCRC addressing child trafficking

Article 32	Prohibits economic exploitation of children through the performance of any work that would harm a child’s development in any form.
Article 34	Commits states to secure children against all types of sexual abuse and misuse.
Article 35	Encourages states make efforts to forestall abduction, offer or traffic of children.
Article 36	Compels states to take action in protecting all forms of exploitation that will be endangering a child’s welfare

Source: Researcher 2021

The UNCRC was short on addressing commercial sex exploitation, which resulted in the First World Congress on the commercial sexual exploitation of Children (CSEC) held in Sweden (1996), from which Kenya developed its “National Plan of Action Against Commercial Sexual Exploitation of Children in Kenya (2013-2017)” (NCCS, 2013). As a result of realizing the gap, a Special Rapporteur focusing on the sale of children, child prostitution, and child pornography was formed (Cedrangolo, 2009, p.1). Additionally, the international community enacted an optional protocol to address the issue specifically; The CRC-OP-SC (2000), to which Kenya became a signatory on 8th September 2000 (OHCRC, n.d).

Findings indicate that there was some opposition even from the CRC Committee to form the CRC-OP-SC. The CRC-OP-SC goes beyond the UNCRC in that it introduces the criminal justice aspects obliging states to criminalize and penalize elements involved (Gallanger, 2010 p.67). The protocol obliges states to strengthen cooperation in prosecuting child traffickers and protecting children who are trafficking victims.

The study uncovered that UNCRC instituted a Committee on the Rights of the Child that monitors its application (Gallagher, 2010, p.66). In this regard, the researcher found out that the committee has regularly raised concerns about Trafficking in children in Kenya in its various forms and for different purposes. In 2016, the UNCRC Concluding Observations, particularly the combined third to fifth periodic Kenyan reports, the UNCRC treaty monitoring committee indicated “... the wide prevalence of child labor, including the commercial sexual exploitation of children and human trafficking for child labor.... the committee is seriously concerned about killings of and Trafficking of children with albinism for body parts” (CRC/C/KEN/CO/3-5, 2016, p.5-6).

In response, Kenya cited the following measures to address child trafficking; “...the implementation of the National Referral Mechanism to assist victims of trafficking in twelve counties...” (A/HRC/WG.6/35/KEN/1 2019, p 13). On addressing CSEC, the following legislations are in place to criminalize it; The Kenya Penal code 2009 section 174, which criminalizes child stealing, Sexual Offences Act 2006 section 13 criminalizes child trafficking for sexual exploitation and CTiP (2010) section 4 which highlights acts that promote child trafficking. On the sale, Trafficking, and the abduction of children, Kenya has established Regulations on adoptions (2005) and The Constitution of Kenya 2010, which enshrines provisions to deal with child trafficking (CRC/C/KEN/3-5, 2015).

The committee, in response, expressed serious concerns about the Trafficking and killing for the body parts of albino children, increased child marriages, high level of economic exploitation of children through increased enrollment as domestic workers. Given these, the committee recommended that Kenya fully implement the Counter-Trafficking in Persons Act (2010) (CRC/C/KEN/CO/3-5, 2016).

4.1.1.2 United Nations Convention against Transnational Organized Crime (2000)

Discussions on Organized crime first came up during the Fifth United Nations Congress in Geneva in September 1975, which was held to discuss how to prevent crime and treat offenders. It focused on the evolution of national and transnational crime as a business (A/CONF.203/15 para.7). This study established that this led to the materialization of UN TOC in November 2000 in Palermo, Italy. So far, UN TOC has 147 signatories and 190 state parties (UN TOC, n. d chapter XVIII). UN TOC prerequisite for a crime to be defined under the convention is that a crime has to be transnational with an identifiable criminal organization and heinous.

Gallagher (2010 p.75) observes that the key motive of the convention is the criminalization of a variety of offences ranging from; money laundering to corruption. Additional provisions in the protocol called for cooperative measures among states, such as offering technical and mutual legal assistance, information sharing, and witness protection, are also envisaged in the convention.

The convention has three constituent protocols; Protocol against illegal manufacturing and trafficking of firearms, The Protocol on Migrants smuggling, and the one more relevant to this study, the Protocol on Trafficking in human beings, particularly women and children. In this regard, this section will center its discussion on the Palermo Protocol.

The Palermo Protocol

The Argentinian government was the first to propose the drafting of a convention addressing Trafficking in children. This was due to increasing proof of the activity being key in organized crime groups and slow drafting of the CRC-OP-SC, which resulted in suggestions to draft a protocol addressing Trafficking in women and children. (E/CN.4/RES/1999/40).

The drafting of a protocol that enlisted only women and children was deemed restraining. Hence, United States came up with the first inclusive draft ‘Trafficking in Persons’ which in a sense expanded the purposes of exploitation beyond sexual and submitted it to the Ad Hoc Committee under the title “Draft Protocol to Combat International Trafficking in Women and Children” (A/AC/254/4/Add.3, 1998). A majority of countries, including Kenya, welcomed this draft. The following are the provisions of the Palermo protocol.

Table 4. 3: Provisions of the Palermo Protocol that address child trafficking

Part	provision
Article 2,3	The protocol purposes to prevent and counter human trafficking, protect victims and encourage collaboration among party states. It also defines the acts, means, and purpose elements of Trafficking and there after defining a child as persons below eighteen.
Article 6,8	Obliges states to offer protection to victims and provide psychosocial support mechanisms that ensure full recovery of victims of Trafficking while taking account of special populations such as children.
Article 9	Encourages states to come up with strong measures to prevent Human Trafficking.

Source: Researcher 2021

The drafting of the Palermo Protocol was an essential step to Curb Trafficking in persons. Kenya is a signatory to the protocol domesticated the CTiP Act (2010) enforced in 2012. Section I of the Act criminalizes trafficking in persons for sex or labor purposes (Gathigah, 2019).

The “National Plan of Action on Human Trafficking (2013-2017)” was developed to address Trafficking across the 47 counties in Kenya, which was a step toward implementing the Palermo protocol. Replies of Kenya on the 68th session in 2017 on “Constitutional and Legislative Framework and Harmonization of Laws” the Victim Protection Act 2013 is highlighted in Articles 6 and 8 of the Palermo Protocol on states obligation to provide victim assistance. The Act seeks to provide assistance to trafficked victims for the provision of protections against police harassment and provision of psycho-social care (OHCHR Replies of Kenya, 2017 Para. 37).

4.1.1.3 ILO Forced Labour Conventions (1964) and the Minimum Age Convention (1979)

The study findings were that ILO Conventions have been ratified by 182 countries, with Kenya being a State party since 2001. The ILO conventions are codes that offer protection for vulnerable groups in exploitative labor with a unique mandate on protecting the rights of persons from forced labor; it seeks to address the business of trafficking in humans as a sociological problem.

The following are the provisions;

Table 4. 4: Provisions of the ILO Conventions that address child trafficking

ILO Convention	Provisions
Forced Labour Convention 1930 (No 29)	Criminalizes mandatory work and Obligates state parties to punish traffickers under the penal code.
Abolition of Forced Labour convention 1957 (No 105)	Obliges countries to subdue forced labor.
Minimum Age Convention 1973. (NO 138)	A child can begin working at sixteen years for light work and eighteen years for hazardous work.
Worst Forms of Child Labour 1999 (NO 182)	Article 1, Mandates countries to enforce measures in eliminating worst forms of child labor with urgency. Article 3 (ILO 182) affirms the restriction and prohibition exceeding forms of child labor (WFCL), including sale and Trafficking of children, slavery for labor, buying a child for pornographic activities, recruiting of children in illegal undertakings such as trade in drugs, forms of debt bondage and use of children for any work which could harm children.

Source: Researcher 2021

Kenya has been an ILO member since January 1964. The convention came into force in 2001. It was also established that there is a reporting mechanism to Committee of Experts on the Application of Conventions and Recommendations (CEACR) once in three years.

Submissions by CEACR on International Labour Conference 109th Session in 2020 revealed that, under the Minimum Age Convention, 1973 (No. 138), the Kenyan government has combated child labor through programs such as Support the National Action Plan (SNAP) project. However, CEACR was deeply concerned with increasing numbers of children not attending school and taking part in hazardous work, mostly in farm

work, domestic work, and street vending, increasing their vulnerability to child trafficking. This was revealed after an International Labour Organization- International Program on the Elimination of Child Labour (ILO-IPEC) Labour Market Survey conducted in Busia and Kitui in 2012 (International Labour Conference, 2020).

According to Carol Bellamy, the then Executive Director UNICEF in 2003, in order to fight child trafficking, governments needed to end excessive forms of child labor.

How can we put an end to the most abhorrent forms of child labor when the Trafficking of women and children remains unabated...? children are increasingly treated as commodities by organized crime networks where the profit derived from these children being traded into slavery or compulsive labor. (Bellamy, 2003, para. 2)

The Committee’s comments on WFCL 1999 (No.182) lamented Kenya’s failure to provide a report on WFCL. Due to the high number of children doing domestic work and children being recruited in Al- Shabaab militants, the Committee then urged Kenya to apply and effectively regulate children working in dangerous environment. (International Labour Conference, 2020).

4.1.1.4 The African Charter on the Rights and Welfare of the Child (ACRWC)(1990)

The study findings established that the ACRWC was adopted on 26th Organization of African Unity (OAU) Ordinary Session Head of State Assembly Addis Ababa, Ethiopia in 1990 (CAB/LEG/24.9/49 1990). As of June 2019, it had been ratified by 49 African Union (AU) states (Global Initiative to end corporal punishment,2019 para 1). Kenya ratified the charter on 25th June 2000.

The ACRWC is the African framework that enshrines provisions for African child protection. It is unique from the UNCRC in that it addresses problems that face the African Child, such as Female Genital Mutilation and Child Marriages. (Mansingh, (2017), para 10)

The general provisions are;

Table 4. 5: Provisions in the ACRWC that address Child Trafficking

Article	Provisions
Article 15	Makes provisions for child protection from all types of economic misuse.
Article 16	Obligates states to protect children from detrimental societal and cultural practices such as child marriages.
Article 21	State parties should protect children from inter-country adoptions that will lead to Trafficking by ensuring that the child's best interest is protected.
Article 27	States should protect children from all types of sexual abuse.
Article 29	States to take initiatives suitable in prevention sale of, abduction, and Trafficking in any form.

Source: Researcher 2021

The first state report to the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (2008-2011), Kenya, reported having increased the number of adoption societies and created more awareness about the adoption process to address child trafficking. Kenya cited the 2010 constitution as a guarantor of children against all types of exploitation. In addition, the enactment of the CTiP Act (2010) to safeguard children from trafficking (ACEWRC 1st State Party Report-Kenya, 2013).

In response, the ACERWC voiced concerns about the high rates of forced child marriages and female genital mutilation, suggesting judicial officers and magistrates training on child protection laws (SA2590, 2014).

In the second and third state party report 2012-2017 to the ACERWC urged the Kenyan government to implement the CTiP Act (2010) fully and address Child Prostitution in response, Kenya cited reviewing of the ‘National Plan of Action against Sexual Exploitation of Children 2013-2017’ (Article 27) and National Plan of Action against Human Trafficking (Article 29).The committee of experts esteemed use of the CTiP Act (2010) and expressed dissatisfaction with the government’s failure to act on child prostitution. (2nd and 3rd State Party Report-Kenya, 2018)

4.1.1.5 Key Kenyan laws that address Child Trafficking

Apart from the international legal framework, in Kenya, the national constitution is the supreme law regulating the affairs of the state. Article 2(5) of the Kenyan Constitution outlines that international law becomes a part of Kenyan law. Article 260 of the Kenyan constitution outlines a child to mean “... an individual who has not attained the age of eighteen years...” Additionally, it protects the Kenyan child from exploitative labor in (Article 53, 1 (d)) which is further expounded in the Children’s Act 2001 to address sexual exploitation, harmful cultural practices and trafficking of children thus safeguard the welfare of the children.

In addition, Kenya has enacted a variety of laws, including the CTiP Act (2010). The Act makes a provision for the deterrence and fighting trafficking in children by protecting victims and penalizing perpetrators

by attracting a fine of thirty million or thirty years' imprisonment or both. The Employment Act 2007 makes a provision for shielding children from exposure to child labor and trafficking.

The penal code in Section 256 outlaw's abduction or kidnapping children under fourteen years with an intention to steal it. Subsequently, the Sexual Offences Act 2006 criminalizes CSEC (Article 15), child sex tourism (article 14), and child pornography (Article 16). In addition, the Marriage Act 2014 criminalizes child marriages by stating the legal marriage age to be eighteen years (Article 4). This protects children from being trafficked for child marriages.

4.1.2 A high level of awareness among stakeholders of the international legal framework ratified by Kenya to address child trafficking

When the respondents were asked about the international legal framework ratified by Kenya to address child trafficking that they knew of, out of twenty Key informants, seventeen key informants had a prior knowledge of the main international legal framework that Kenya has ratified in efforts to address child trafficking. The question aimed at assessing the awareness of the international legal instruments among key stakeholders, and here is what some of the respondents said;

"...I know of several international legal instruments that address the prohibition of trafficking in children case in point the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Convention against the Transnational Organized Crime (UNTOC) supplemented by the Palermo protocol...."

(Key Informant R8: Senior officer Child helpline Kenya on 21st October 2020).

"...I know of a lot of laws that address child trafficking internationally and in the region.... We have the ACRWC, which protects the African child, also the Ouagadougou action plan (2006) to combat Trafficking on women and children in Africa. Then there is the EAC bill 2016 close home, which has not been passed yet, but it's a close replica of the Kenyan counter trafficking in persons Act 2010...."

(Key Informant R10: Senior Officer at KAACR 15th October 2020)

"...I have an idea of these laws, the Palermo protocol just to mention and the most important and most overlooked to address illegal adoption is The Hague Convention on inter country adoption rights...."

(Key Informant R25: Principal Immigration Officer, 20th Oct 2020)

"...Kenya is a party to various conventions and protocols addressing child trafficking...although the Palermo protocol is the most cited, we have the UNCRC, the Universal Declaration on Human Rights 1948, and in Africa, we have the ACWRC, which have been domesticated into the Children's Act 2001...."

(Key Informant R2: KNCHR Officer, 19th Nov 2020).

The above responses were an illustration that the knowledge of the international legal framework aimed at addressing child trafficking in Kenya was in existence among key stakeholders in the child protection spheres. The demonstration of the domestication of these laws ultimately gives a funnel approach application of the international law down to the local context.

4.1.3 The existence of complementarity of the international legal framework and domestic law on child trafficking

During the field work, twenty key informants were asked the link between the international legal framework and domestic law addressing child trafficking. Fifteen of the key informants cited there were aware of a high degree of complementarity between international laws and domestic laws in addressing child trafficking. The aim of the question was to gain an understanding of the relationship between the laws in question, as the following statements illustrate.

"...most of these laws are in agreement with the current domesticated laws in the country. We have the Counter-Trafficking in Persons Act 2010, which illustrates this...."

(Key Informant R15: Senior Officer at NCCS on 26th October 2020)

"...these laws showcase complementarity with each other for instance, the domestication of Children's Act 2001 is a testament to this as it is a domestication of the UNCRC...."

(Key Informant R6: Senior Coordinator, Salvation Army 14th October 2020)

Three of the respondents looked at the complementarity aspect in terms of the content of our pre-existing laws in contrast with the international laws.

"...when you look at the Counter-Trafficking in Persons Act (2010), we have copied the definition of trafficking in persons from the Palermo protocol word for word...."

(Key Informant R12 and R13: Senior Officers at Department of Children Services 16th October 2020)

The Key Informants R12 and R13 were accurate as was confirmed during the triangulation process, as shown below;

Extract from Palermo Protocol;

Article 3(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring, or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of

the abuse of power or of a position of vulnerability or of receiving or giving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.

Extract from Counter Trafficking in Persons Act (2010);

3. Trafficking in persons.

(1) A person commits an offence of Trafficking in persons when the person recruits, transports, transfers, harbors, or receives another person for exploitation by means of-(a) threat or use of force or other forms of coercion;(b) abduction;(c) fraud;(d) deception; (e) abuse of power or of position of vulnerability;(f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or (g) giving or receiving payments or benefits to obtain the consent of a person having control over another person.

“...these laws just feed into each other, that’s how I can explain it briefly...”

(Key Informant R 9: Senior officer, Stop Traffik Kenya 30th October 2020)

The complementarity of the laws is a vital aspect to look at when examining the gaps that inform the domestication of international law. 2010

4.1.4 Existence of gaps in the implementation of international law

When the key informants were asked about factors that challenge the application of the international legal framework in addressing child trafficking in Kenya; they cited challenges in implementation of international legal framework and criminal prosecution of perpetrators with other related crimes as the main weaknesses due to lack of awareness on child trafficking laws among the Criminal Justice personnel.

Kenya is obligated by Palermo protocol, to which it is a state party, to prosecute the perpetrators while protecting the trafficked victims in Articles 5 and 7. The respondents identified that one of the major challenges that plague the enforcement of the international legal framework in Kenya is the gaps that lie in the implementation framework, as evident from the responses illustrated below;

“...no single document addresses the various aspects of child trafficking; they are too scattered. This makes the perpetrators to be charged with other crimes such as Employment Act violations, Child Labor, Sexual Offences....”

(Key Informant R10: Senior Officer at Kenya Alliance for the Advancement of Children 15th October 2020)

Another respondent lamented on the failure of implementation although Kenya has ratified a lot of laws, “...Kenya is rated one of the most child-friendly countries in Africa due to the large number of laws that it has ratified and domesticated to protect children from vices, including child trafficking. The number of policy documents, the National Plans of Action are many, but they remain to gather dust on a shelf somewhere. Perpetrators of child trafficking are charged with other related crimes since there is a disconnect in having to prove the case in court as a case of child trafficking....”

(Key Informant R 17: Senior officer at the NCCS 14th October 2020)

“...you know the punishment for trafficking is thirty years’ imprisonment, having this in mind traffickers bribe law enforcement officers who in turn charge them with other related crimes which attract fewer penalties also most police offices are not aware of child trafficking laws which makes them charge perpetrators with other related crimes....”

(Key Informant R 27: Officer at National Police Service 6th November 2020)

During the second reading of the Prevention of Organized Crime Bill (BILL NO.4 of 2010), Prof. Saitoti, the then Minister for Internal Security and Provincial Administration, cited Gaps in Kenya legal systems that often lead to a lot of acquittals which demoralizes our security agencies as explained by the Parliamentary Proceedings during the discussions

“...while security organizations have and continue to put in place concerted efforts to combat organized crime, the existing laws seem inadequate to assist in preferring appropriate charges and meting out deterrent penalties against the offenders... this particular Bill is expected to fill in the legal lacuna that exists in our laws....”

Ms. Millie Odhiambo, in parliamentary proceeding tabling the CTiP Bill 2010, acknowledged there’s a problem in execution of our laws as she stated,

“...one of the things that we have excelled as a country in the last 10 or 15 years is coming up with very many new laws, but the challenge has been the implementation... So, it is not enough for us to come up with these laws, but we must show that we are serious in dealing with issues that affect us as a country....”

Case studies showing hurdles encountered in addressing Child Trafficking in Kenya

The study examined some of the child trafficking cases in Kenya, particulars of cases, and verdicts while assessing the application of anti-trafficking laws in Kenya. The cases settled upon exposed the hurdles that plague the implementation and the application of the counter-trafficking in person’s laws.

In the case of *Adan Ibrahim Harrow vs. Republic, Marsabit High Court*, 3rd May 2019. By Judge S. Chitembe, The Criminal Appeal No. 2 of 2019 was from an appeal of original conviction and sentence in criminal case No. 24 of 2017 of the Hon. BM OMBEWA principle magistrate court at Marsabit. The appellant was charged with child trafficking on count one, contrary the section 13 of the Sexual Offences Act No.3 of 2006 and Defilement as count two, Contrary with Section 8(3) of the Sexual Offence Act No.3 of 2006. Adan transported K.A, aged 13 years, to Manyatta Didi Rigatu using a motor vehicle to perpetrate a sexual offence with the child. The appellant denied the charges but was convicted. Upon appeal, count two charges on defilement were upheld, and count one charge on trafficking were dropped, citing that Section 13 of the Sexual Offences Act was repealed and thus improper (*Adan Ibrahim Harrow v Republic* [2019] eKLR).

The researcher observed that in 2016 when this case was first presented in court, the CTiP Act,2010 was in place, but Adan was charged with a repealed section in the Sexual Offences Act 2006. This shows ignorance of the CTiP Act 2010 by personnel in the criminal justice systems, which was in force since 2012.

In the case of *Newton Chomba Wathitha Vs. Republic, Embu High Court* on 3rd May 2012 Judge H. I Ong'udi. The appeal was from a previous conviction and sentencing of Senior Resident magistrate case number 533 of 2008 delivered on 19th May 2008 at Gichugu Resident Magistrate Court. Newton Chomba was charged with child trafficking on count one, contrary to section 13(b) of the SOA No. 3 of 2006. Between the 11th and 16th of May 2008, in Kirinyaga district, Newton harbored a girl A.K.G under 15 years to have unlawful sexual contact. The appellant pleaded guilty and was convicted. However, on appeal, Judge H. I Ong'udi set the appellant at liberty because the appellant was sentenced before he was convicted, which was procedurally wrong. Secondly, there was no offence of 'child trafficking' in law at the time. In his defense, he cited that Section 13 of the SOA was repealed in 2010; hence the appellant could not be convicted of the offence (*Newton Chomba Wathitha V Republic* [2012] eKLR).

The study observation was that prior to the enactment of the CTiP Act 2010, there was no law addressing child trafficking in Kenya, and traffickers got convicted of other crimes or were acquitted.

4.2 Assessing Kenya's compliance to its international legal obligations in addressing child trafficking

The analysis of objective two aimed at assessing Kenya's compliance to its international legal commitments, the responsibility of the international community at addressing child trafficking, and Kenya's efforts both at the state level and as a regional player. The findings for objective two were sought from twenty-eight key informants and twenty key documents as key sources.

The findings will therefore be presented in three major themes; formulation of laws, policies, and action plans, accountability mechanisms in the international system, and transnational Collaboration.

4.2.1 Formulations of laws, guidelines, and policies

The study established that the international community plays a significant role in creating attention to contemporary issues such as child trafficking at a global stage. The proactive role played has steered advancement and formulation of different pacts, resolutions, policies, guidelines, and the subsequent National plan of actions geared at addressing child trafficking. This section seeks to briefly state the international community's role in the formulation of laws and discussions on the existing guidelines and policies that have been put in place to address child trafficking both internationally and locally.

Findings from the study revealed that the international community provides a platform where states discuss issues affecting them through the United Nations General Assembly (UNGA), conventions, workshops, seminars, and recently webinars. Consequently, state parties formulate laws, become signatories, and later ratify and domesticate these laws in their respective states. The most cited laws in addressing child trafficking include the Palermo protocol, CRC, ACRWC, Hague Conventions, and ILO Conventions.

4.2.1.1 The International Situation

The study revealed that the implementation of these international legal frameworks has resulted in the formulation of policies that provide technical assistance to their operationalization. Below is an analysis of some of the key guidelines.

The UNODC (2009) provides a 'Framework for Action' as an essential guideline that addresses trafficking in persons, including trafficking in children. The guideline affects the implementation of the Palermo Protocol. The Framework hereby addresses three main facets of trafficking in humans; prevention, protection of victims, and indictment of traffickers. Additionally, the Framework provides practical actions to circumvent the challenges that plague efforts aimed at combating trade in persons comprehensively. In addressing child trafficking, the framework recommends the use of an approach based on Child participation and Child-Rights while ensuring child's best interests as guiding principles (UNODC, 2009 p. 8)

The Office of the United Nations High Commissioner for Human Rights(OHCHR) provides guidelines that encompass efforts to forestall child trafficking, victim protection, and assistance should ensure special

considerations to child victims' particular needs and vulnerabilities. The child's best interest should be considered for child victims of trafficking (OHCHR, 2010, p. 161).

UNICEF provides a guide for reference on safeguarding the rights of trafficked children of for Europe to address child protection in various avenues; at the intergovernmental level, governmental level, and non-governmental level. The guidelines provide; an emphasis on nondiscrimination principle, the child's best interest concerning child's rights to privacy, and the right of each child to air their views (UNICEF, 2006 p. 11).

4.2.1.2 The Kenyan Situation

The outcome of the research established that Kenya had made considerable endeavors to address and act against child trafficking. This has been through the advancement of various strategies and regulations. The subsequent discussions seek to highlight the significant strides.

The "National Plan of Action for Children (2015-2022)" provides a framework through which stakeholders and patrons coordinate, plan, implement and monitor programs for Kenyan children. To address child trafficking, the NPA aims to; strengthen the National Steering Committee on child trafficking, operationalize CTiP Act provisions while presenting findings from research on child trafficking interventions (NPA, 2015 p.35).

The National Referral Mechanism (NRM) provides a standard procedure for assisting trafficked persons. NRM provides a system for identifying, referring, offering holistic support, and providing indicators for identifying child victims of trafficking while providing a platform that envisages cooperation between stakeholders (NRM, 2018 p.4). The NRM has been very effective in the referral of victims to shelters. In 2019, a total of 78 victims were referred for shelter services. Among them were 40 children (USDOS TiP Report, 2020).

Various legislations address child trafficking; among them, the Constitution of Kenya 2010 Article 53 enshrines rights and mandates promotion of a child's best interest (Constitution,2010 article 53). The Children's Act 2001 is a domestication of UNCRC and ACRWC, which provides a framework for a Kenyan child's rights. Articles 13, 14, and 15 have provisions on protecting children from all types of misuse, including trafficking (Children Act, 2001, Articles 13, 14, and 15). The Employment Act of 2014 under Article 53 prohibits the employment of a child in excessive and harmful labor (Employment Act, 2014 article 53). The Sexual Offences Act, 2006, under Article 36, Criminalizes recruitment, harboring, and transferring of children for sex use (Sexual Offences Act, 2006 article 36). The CTiP Act (2010) in Article 4 criminalizes any action promoting child trafficking. In addition, Article 19 of the act establishes the counter-trafficking in person's advisory committee mandated to coordinate multi-agency activities geared towards combating human trafficking (CTiP Act (2010) Articles 4 and 19).

The Anti-Human Trafficking and Child Protection Unit (AHTCPU) was founded in 2006 to curb sexual abuse in Kenya. Recently, the unit has access to high-speed internet that facilitates data sharing, precise reporting, record keeping, and monitoring gender-based violence, child trafficking, and child exploitation. To control high levels of Online Sexual Exploitation of Children (OSEC) in the country, the unit has partnered with a US-based National Centre for Missing and Exploited Children (NCMEC), the DCI, and the United States Department of Homeland Security (DHS). It's the only unit of its kind in East Africa (UNODC,2019).

The key informants were asked to highlight the efforts made by the international community and Kenya to address child trafficking. Below are some verbatim quotations from the key respondents about the efforts.

"...the international community plays a proactive role in coming up with treaties and compelling states to make commitments to comply with the treaties; other efforts include funding projects, arresting tourists who sexually exploit children in Africa, and prosecuting them. Mainly from Germany, Sweden, Britain, and other EU nations...."

(Key Informant R8: Senior Officer at Child Helpline Kenya on 23rd October 2020)

"...the international community aids in the prosecution of criminal perpetrators and formulation of policies, guidelines and more effective laws to punish traffickers and deter potential perpetrators...."

(Key Informant R16: Senior Officer at NCCS on 26th October 2020)

"...the international community has come up with Conventions, policies, effective laws which upon domestication, the Kenyan government comes up with relevant legislation and NPAs to address child trafficking...."

(Key Informant R10: Senior personnel at KAACR 15/10/2020)

4.2.2 Accountability Mechanisms

The study uncovered that the international community ensures compliance through a system of checks and balances, such as requiring reports to be submitted every specified given timeline. The most notable reports being the Universal Periodic Review (UPR), United States Department of State (US DOS), and specific reports affiliated to the specific treaties a state is a signatory to. These include reports to the CRC, ACEWRC, and ILO CEACR committees.

The UPR is a procedural assessment of human rights records in UN member states to which Kenya is a party. The UPR is characterized by state-initiated procedures where each state compiles actions to improve human rights conditions in their countries. UPR receives submissions from Kenya as a state and its stakeholders, who are NGOs and NHRIs, on human rights situations and violations every five years. The OHCHR then gives areas of improvement to Kenya, which goes through the review process and offers recommendations.

For instance, in the outcome of the second UPR cycle in 2015, Kenya received the recommendations to combat child trafficking in the recommendations 142.60, 142.77, 142.71, 142.78, 142.81 (A/HRC/29/10, 2015 p.17-18). In response to the National Report on child trafficking, Kenya reported having disseminated the National Referral Mechanism. This mechanism provides for guiding framework to combat and protect trafficked victims in twelve counties identified as hotspots of trafficking. In addition, Kenya reported on the gazette of the second advisory committee and disseminating 300 officers of the law enforcement to address trafficking. (A/HRC/WG.6/35/KEN/1, 2019 p.13).

The United States Department of State (US DOS) conducts an annual review on the extent of trafficking in humans in different countries worldwide. The Trafficking in Persons reports serve as a roadmap for the diplomatic arrangement on trafficking in humans. Each state is rated according to its level of compliance in different tier rankings with justifications.

Findings from the 2020 Trafficking in Persons (TiP) report pointed out that Kenya has been continuously rated tier 2 since it does not entirely meet least criteria of Trafficking Victims Protection Act (TVPA). Although some efforts have been made in terms of; increment in the number of the identified victims, the launch of a cyber-crime center at Anti- Human Trafficking –Child Protection Unit (AHT-CPU) that will specifically deal with the inquiry of Online Sexual Exploitation of Children (OSEC) and improvement in terms of cooperation among countries, there has been a relative decrease in the number of inquiries, enactment, and convictions. Recommendations included that Kenya should increase training in the criminal justice system by offering harsh sentences to perpetrators.

When asked how the international system ensures Kenya's compliance to international legal obligations, the key informants pointed out the following,

“...the international community has come up with several reporting mechanisms to ensure compliance to the international treaties. These mechanisms include the CRC review committee, which is a monitoring body for the UNCRC. Then we have the ACEWRC, which is monitors the ACWRC. We also have UPR, a reporting mechanism that works on monitoring respect for human rights globally. In addition, we have the CSO forums and the academia who presents complementary reports that keep the government in check. The CSO forums present reports by annually updating the ACEWRC on the status of children's rights....”
(Key Informant 9: Senior Personnel at Stop the Traffik on 30th October 2020)

4.2.3 Transnational Collaboration

The study findings indicate that Child trafficking is a global phenomenon that requires countries, organizations both local and international, to cooperate to address this menace. Kenya is a leading player in the region in addressing human trafficking. She is a part of various regional initiatives, among them; The Khartoum Process, the Better Migration Management (BMM), Inter Governmental Organization for Development (IGAD), and the East Africa Community (EAC), which will be discussed in the following sections.

The Khartoum Process is a platform for regional dialogue on cooperation to address trafficking in humans and migrants smuggling in countries of source, passage, and destination along with the horn of Africa-Europe Migration Route. Kenya is a leading partner in this process. The platform provides an avenue for countries to consult, coordinate and cooperate politically to address trafficking in humans and migrant smuggling. It promotes a mutual understanding of challenges and opportunities for partnership with governments and intergovernmental institutions such as UNODC, IOM, UNHCR, ICMPD, and IGAD to combat migrant smuggling and trafficking in humans (Khartoum process 2014).

In an attempt to address smuggling and trading in humans within and from horn of Africa, the European Union Trust Fund for Africa and the German Ministry for Economic Cooperation and Development (BMZ) funded the Better Migration Management (BMM) Program. The BMM programs are implemented by IOM in the following countries; Kenya, Djibouti, Somalia, Uganda, Ethiopia, South Sudan, and Sudan. The BMM works closely with the Africa Union Commission and Inter Governmental Organization for Development (IGAD) to foster regional cooperation that will enhance development and stability while observing international treaties and human rights (IOM, 2020)

IGAD seeks to address human trafficking by addressing the factors that encourage trafficking and the challenges involved. For instance, through its Security Sector Program, IGAD held joint discussions with INTERPOL on “Disrupting the Finances of Criminal Networks Responsible for Human Smuggling and Trafficking in the Horn of Africa.” The discussions centered on strengthening international collaboration in dismantling these networks hence an emphasis on the partnership. Besides, the partnership aimed to disrupt

related illegal financial flows, consequently building institutional capacities in confronting human trafficking. (IGAD SSP, 2019 Para 1)

The EAC partner states recognize the magnitude of trade in humans in the region. In 2016 the East African Legislative Assembly passed EAC Anti-Trafficking in Persons Bill. The bill has a legal basis for preventing human trafficking, prosecuting the traffickers, victim protection mechanisms, and encouraging cooperation in efforts to curb human trafficking. The bill is awaiting assent by EAC heads of states. (EAC 2016, para 1)

When asked about the role of Kenya in addressing child trafficking, the Key respondents revealed the following; "...child trafficking in the region has been well addressed by organizing regional forums, seminars, workshops and inter-country benchmarking with countries like Sudan, South Sudan...."

(Key Informant R12, 13: Senior Officers at Department of Children Services 16th October 2020)

"...region-wise, we are trying to create awareness on child protection issues, including child trafficking. This is characterized by governments collaborating to do the inter-country tracing, coordination between immigration officials through improved communication in border town with the one-stop border points...."

(Key Informant R18: Senior Officer at NCCS on 26th October 2020)

"...there has been inter-agencies coordination through the investigations of trafficking by the Interpol. The trafficking syndicates are often dynamic and amorphous "faceless" since they are operating transnationally from the dark web hence requiring a lot of cooperation from other governments...."

(Key Informant R15: Senior Officer at NCCS on 26th October 2020)

4.3 Analyzing the challenges encountered in efforts to address child trafficking in Kenya

Objective three sought to analyze the challenges encountered in an effort to address child trafficking in Kenya. The findings for this objective were sought from twenty-eight key informants and key documents. The study revealed the following five major themes; challenges exacerbated by COVID 19 pandemic, difficulty in the identification of child victims of trafficking, the challenge of Transnationality in combatting Child Trafficking, inadequate prioritization of child trafficking, and poor collaboration among key stakeholders.

4.3.1 Challenges exacerbated by COVID 19 pandemic

Since March 2020, COVID 19 has ravaged almost all aspects of our lives. After reporting the first few cases of COVID 19 in Kenya, the president ordered the closure of schools, and all children were forced to remain at home indefinitely. This prompted the researcher to gain a keen interest in the pandemic's effect on child trafficking in Kenya.

The study sought to investigate the challenges posed and exacerbated by the global pandemic and how this affected child trafficking. The findings revealed three significant challenges; increased economic pressure, reduced donor funding, and increase in online sexual exploitation of children(OSEC).

Increased Economic Pressure

The study results indicated that the economy is hard hit by the pandemic characterized by massive layoffs, a shutdown of businesses, and a reduction of wages. This led to a loss of the source of livelihood for many families. Approximately 1.72 million persons lost their jobs during the lockdown (Munda, 2020).

The discussions with the key informants revealed the risks brought by increased economic pressure. Below are some of the quotations from the key informants that reveal the perils of increased economic pressure on child trafficking.

"...Loss of livelihood has opened up a Pandora's box that has exposed children to a lot of vulnerabilities such as child labour exploitation and commercial sexual exploitation...."

(Key Informant R15: Senior Officer at NCCS on 26th October 2020)

"...there have been increased cases of child trafficking accentuated by the fact that many people are laid off, making children more vulnerable. Children are forced to 'chip in' because they feel 'big' and need to fend for their families. Looking for jobs to increase the household incomes without national Identity Cards makes them increasingly vulnerable to child trafficking...."

(Key Informant R8: Senior Officer at Child Helpline Kenya 23rd October 2020)

"...the loss of livelihood for parents has directly contributed to increased vulnerability for children as they are inclined to look for an alternative source of income and thus recruited into worst forms of child labour like child trafficking. The children have also been absorbed in other sectors of the economy; boys have been recruited for herding, mining, and fishing. Girls have been recruited for domestic labour and commercial sexual exploitation...."

(Key Informant R6: Senior Officer at Salvation Army on 21st October 2020)

Trafficking of children for labor purposes has seen a surge as most families are grappling with the fact that they can no longer feed themselves. The desperation has led to increased children susceptibility to exploitation into excessive practices of child labour and sexual exploitation.

Reduced Donor Funding

The study revealed that donors have a leading part in addressing child trafficking by providing funds and technical assistance. The outbreak of the COVID 19 pandemic has led to shifting in donor funding from child trafficking to combating the spread of the pandemic. The following are some of the quotations from key respondents;

“...with too much focus on COVID 19 prevention efforts, there has been a lack of focus on child protection in general. The donors focus on other aspects of the COVID 19 pandemic resulting in cessation in some donor funding. This stagnates child protection projects that heavily rely on donor funding for their sustenance...”

(Key Informant R4&R5: Senior Personnel at Consolation East Africa on 8th October 2020)

“...since most organizations rely on donor funding when the funds are slashed, the organizations are forced to reduce staff capacity and services. This has resulted in a reduction in child rescue services...”

(Key Informant 12&13: Senior Personnel at DCS on 30th October 2020)

Online sexual exploitation of Children(OSEC)

The study findings indicate that with the closure of schools and the introduction of online learning, children have been exposed to online sexual predators. Freedom collaborative (2020) report indicated that online child pornography and child trafficking risks have increased due to uncensored internet access due to the online learning modes (Freedom Collaborative, 2020 p.22). The key respondents amplified these claims, as quoted below.

“...while most sex dens and brothels have remained closed where sex predators used to frequent, the predators have now shifted their focus online leading to increased cases of online sexual exploitation of children...”

(Key Informant R6: Senior Officer at Salvation Army on 21st October 2020)

“...with children accessing their classes online, the internet has exposed them to increased chances of child trafficking through being lured by traffickers through social media platforms...”

(Key Informant 12&13: Senior Personnel at DCS on 30th October 2020)

4.3.2 Difficulty in the identification of child victims

The study uncovered that the identification is the first step in rescue of victims of child trafficking. When the key respondents were asked to highlight the process from identifying a victim to taking the victim to a shelter, they cited identification of child victims as the main challenge. The following key respondents indicated some of the difficulties;

“...the identification is hard for people of Somali origin, but once we suspect a case, we act on it...”

(Key Informant R 25: Senior Immigration Officer 2nd October 2020)

“...most people are unaware of child trafficking; hence victims end up unnoticed...”

(Key Informant R 17: Senior Officer at NCCS on 13th October 2020)

“...identification of child trafficking cases is hard because children blend in quite well; unless it is a group of children, it's hard to single out one...”

(Key Informant R 14: Senior Officer at NCCS on 13th October 2020)

4.3.3 The challenge of Transnationality in combatting Child Trafficking

From the study findings, Child Trafficking is a universal menace, and Kenya is not an exception being an origin, transit, and destination country to child victims. A report done by Freedom Collaborative uncovered that Kenya's trafficking locations and cross-border routes total up to 98. Kenya is an origin country for children trafficked to; Chad, France, Spain, Rwanda, Germany, Netherlands, Uganda, Italy, and Tanzania. As an end country, Kenya harbors children trafficked from; Democratic Republic of Congo, Somalia, Uganda, Ethiopia, and Tanzania. In addition, Kenya is a transit point for children being trafficked from; the Democratic Republic of Congo to Ethiopia, Uganda to Somalia, and Tanzania to Burundi (Freedom Collaborative, 2020 p. 14).

Discussions with key informants revealed that transnationality was a great hindrance in investigations and prosecution of child trafficking cases by citing the following;

“...transnationality is a very important aspect to look at. Although the internal cases are high, the external cases are on the rise, with exceptional cases on the media. Children are mostly trafficked from Somalia to Eastleigh, Kenya, for child marriages which are rampant. The investigation is thus faced with a language barrier as the main challenge...”

(Key Informant 12&13: Senior Personnel at DCS on 30th October 2020)

“...the transnationality of child trafficking cases should be taken seriously; recently, there was a case of trafficking of one hundred Karamoja girls from Uganda into Kenya. Although they have been successfully repatriated, it took a lot of bureaucratic engagements which slowed down the process of repatriation...”

(Key Informant R 01: Senior Personnel at CHTEA 19th October 2020)

The investigation and prosecution of transnational child trafficking cases should be bestowed the same attention accorded to internal cases. These will require the government to commit more resources to their investigation and conduct more joint efforts with the other states involved.

4.3.4 Inadequate prioritization

Prioritization aids in marshaling resources and combining efforts in the international and national circles, especially when dealing with transnational crimes. As the study revealed, the Kenyan government has not put in place enough measures and resources in combating child trafficking in comparison to other international crimes like terrorism. When asked whether child trafficking was getting enough prioritization in terms of resource allocation in contrast to other transnational crimes, the Key Respondents highlighted the following,

“...prioritization is a big issue. When it comes to the allocation of funds for child trafficking, there is a budget for child protection, but in most cases, it is misused. When the need arises for child victims to use the funds, the funds are not there....”

(Key Informant R4&R5: Senior Personnel at Consolation East Africa on 8th October 2020)

“...when we talk of transnational organized crime; we talk of terrorism, poaching, drug trafficking, small arms trafficking, and human trafficking. Other than trafficking in persons, the rest get hefty budgets from the international community in a bid to address them because they always seem “overwhelming” with an emphasis on terrorism, where people have looming fear in their faces that it’s always there. With human trafficking, it always seems distant as if they are stories that happen to distant people....”

(Key Informant R9: Senior Personnel at Stop the Traffik Ke on 30th October 2020)

“...the issue of child trafficking is clearly not a government priority. If you want to measure the seriousness try repatriating a foreign national who is a victim of child trafficking....”

(Key Informant R 03: Senior Personnel at Okoa Sasa 20th November 2020)

4.3.5 Poor collaboration among key stakeholders

The study revealed that the collaboration of various institutions is crucial in addressing the menace of child trafficking. Most institutions cited lax collaboration in addressing child trafficking. A report done by the Freedom Collaborative revealed that the stakeholders, despite the existence of mechanisms for collaboration such as the National Referral Mechanisms, majority of the stakeholders held each other in distrust, citing the lack of goodwill among them (Freedom Collaborative, 2020). Below are quotations from various respondents.

“...there is a need to map organizations that rescue victims of child trafficking. This will help reduce duplication of efforts and better coordination in securing a safe place for child victims....”

(Key Informant R 19: Senior Personnel at TRACE ke 21st October 2020)

“...there is a sloppy collaboration from the government side, from reporting to the police all the way to the children officers when it comes to identification and rescuing of child trafficking victims....”

(Key Informant R 17: Senior Officer at NCCS on 13th October 2020)

“...most of the institutions have internal policies that prohibit the sharing of information among the stakeholders, which need to be reviewed for the purpose of combatting the menace of child trafficking across the board. The policies should thereby encourage data collaboration efforts in order to close the knowledge gap that is in existence at the moment....”

(Key Informant R 27: Senior Officer at NPS on 22nd November 2020)

With an observation of the lack of a national data repository mechanism specifically on child trafficking despite its provision in the Counter Trafficking in Persons Act (2010). This creates a disconnect in knowledge generation.

V. SUMMARY, CONCLUSION, AND RECOMMENDATIONS

This chapter will focus on four sections; a summary of the study findings on each objective, the conclusion of the study, the recommendations from the study findings, and suggestions for further research.

5.1 Summary

A state’s compliance with international law is characterized by states' ratification of a treaty. The level of commitment is monitored by relevant treaty monitoring committees, which keeps states in check on the observance of the treaty obligations. A State’s Tier Ranking is a reflection of the efforts in place to address trafficking in humans.

International law plays a pivotal part in addressing child trafficking in Kenya. Objective one was to examine the international legal framework aimed at combating child trafficking in Kenya. The study results indicated that the regulation of child trafficking in Kenya by international law draws its framework from the various conventions and protocols, namely, UNCRC, Palermo protocol, ILO conventions on Forced Labour, and

Minimum Age, and ACRWC. An assessment of the key stakeholders' knowledge of the international legal framework indicated a high level of awareness of the international legal framework ratified by Kenya to address child trafficking. In addition, the study discovered a high level of complementarity between the international legal framework and domestic law. However, there are still gaps in implementation of international law.

Giving reference to the second objective on assessing Kenya's compliance to its international obligations in addressing child trafficking, the study results revealed compliance in various forms. Kenya has been formulating various laws, policies, and action plans such as the CTiP Act 2010, the National Plan of Actions, and the National Referral Mechanism. To enhance accountability, Kenya has been issuing periodic reports on child trafficking status in the country, as evidenced by the submission of the Universal Periodic Review (UPR) report, ACEWRC, CEACR, CRC Committee reports. In addition, Kenya is a party to regional collaboration initiatives such as The Khartoum Process, BMM, and EAC.

The third objective focused on analyzing the challenges encountered in attempts to address child trafficking in Kenya. The study findings illustrated that the COVID 19 pandemic has increased the vulnerability of children to child trafficking by aggregating the economic pressure. Identification of child victims of trafficking remains a significant obstacle in tackling this menace. Furthermore, the inadequacy in prioritizing child trafficking coupled with poor collaboration among key stakeholders poses major impediments in addressing child trafficking.

5.2 Conclusion

International law has been instrumental in regulating child trafficking in Kenya. It has been the genesis of a lot of domestic laws that address child trafficking. Kenya has made significant efforts to curb child trafficking, such as promoting regional collaboration and complying with international reporting mechanisms by sending periodic reports, coming up with the National Plan of Action, and legislations such as the CTiP Act 2010.

To this end, international law has emerged as a powerful conduit in the regulation of child trafficking in Kenya by obligating Kenya to formulate laws, policies, and guidelines. Kenya is amongst the friendliest nations in child protection laws and has been instrumental in promoting regional collaboration in the fight against child trafficking. However, child trafficking cases are still on the rise, and there is a lot to be done to implement laws.

5.3 Recommendations

Child trafficking results from the lax implementation of laws, inadequate resource allocation, increasing economic pressures, and poor collaboration among stakeholders. Based on these findings, the study recommends the following; The Department of Children Services should liaise with the media, religious institutions, and the ministry of education to create awareness of child trafficking among children and parents. The awareness should encompass the components of child trafficking, victim identification, reporting mechanisms, and victim protection procedures; Policymakers should develop a multi-agency approach that will include all key stakeholders such as the Department of Children Services, the National Police Service, Immigration department, and NGOs. This will help in the mapping of the rescue centers and enhance multi-agency collaboration, which will reduce child trafficking cases.

5.4 Suggestions for further research

Considering the finding of this study, a study may be conducted on the role of Charitable Children Institutions in encouraging child trafficking in Kenya; A study should be carried to determine how Anti Child trafficking laws discourage people from reporting and seeking victim support services; A study may be conducted to find out if child trafficking needs different approaches and interventions from adult trafficking in Kenya.

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