

POLICY BRIEF: Human Trafficking in Kenya

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Abbreviations

AIDS	Acquired Immunodeficiency Syndrome
CSAM	Child Sexual Exploitation Material
CSEC	Commercial Sexual Exploitation of Children
CTIP	Counter-trafficking in Person
HAART	Awareness Against Human Trafficking
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
IDP	Internally Displaced Persons
IOM	International Organisation of Migration
MGCSD	Ministry for Gender, Children and Social Development
NAP	National Action Plan
NCM	National Coordination Mechanism
NCRC	National Crime Research Centre
NEA	National Employment Authority
NGO	Non-Governmental Organisations
SECTT`	Sexual Exploitation of Children in Travel and Tourism
TVPA	Trafficking Victims Protection Act
UAE	United Arab Emirates
UNHCR	United Nations High Commission for Refugees
US TIP Report	United States Trafficking in Persons Report
USA	United States of America

Executive Summary

Kenyans are trafficked internally within Kenya as well as transnationally for labour and sexual exploitation. Transnational trafficking is the most identified form of human trafficking and the Middle East is the primary destination for Kenyan victims of human trafficking as reports show that Kenyan migrant workers are exploited in domestic servitude and in brothels and massage parlours for sexual exploitation. Nationals of other East African States are also trafficked into Kenya for exploitation in domestic service as well as cattle herding and commercial sexual exploitation. Kenya has also been identified as a transit route for human trafficking as traffickers and smugglers move their victims through Kenya to various destinations including the Middle East and South Africa.

Internal human trafficking in Kenya occurs mostly through child trafficking. Children are trafficked from low income, rural, and underserved communities to urban areas for exploitation in street begging, domestic servitude, and sexual exploitation. Nairobi and Mombasa have been identified as popular destinations for victims of trafficking within Kenya. Human trafficking within and around Kenya's coastal areas of Mombasa is manifested through Sexual Exploitation of Children in Travel and Tourism (SECTT) where boys and girls are exploited in the hospitality, travel and tourism industry as well as in the production of Child Sexual Abuse Material (CSAM).

Contributing to the prevalence of human trafficking in Kenya is the presence of a large population of victims of forced displacement and other forced migrants. Kenya hosts over 490,000 refugees in its Dadaab and Kakuma camps and other urban areas. Reports show the presence of traffickers looking to recruit unsuspecting refugees and asylum seekers for exploitation in armed conflict. Older Somali women have been reported to be involved in the trafficking of younger Somali women in the refugee camps. Internally Displaced Persons in Kenya also experience a higher vulnerability to human trafficking than members of host communities with reports findings showing the occurrence of human trafficking for labour and sexual exploitation within IDP communities.

The diversity in forms of trafficking and population of trafficking victims is also reflected in the diversity in the means of recruitment for trafficking and exploitation. Victims of transnational trafficking in Kenya are usually deceived into migrating to the Middle East on false promises of jobs. However, on arrival in destination countries, labour migrants may find themselves in trafficking situations exploited for sexual and labour purposes. Both licensed and unlicensed recruitment agencies have been identified as perpetrators of false labour recruitment.

Orphaned children and children living without their parents have been identified as the most vulnerable population of children to exploitation by child traffickers. Religious leaders, parents, friends, and family members have been identified as possible perpetrators of child trafficking.

The Kenyan Government has taken important legal and policy steps to eliminate human trafficking in the country. The Government has ratified key international anti-trafficking legislation such as the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Girls,

supplementing the United Nations Convention Against Transnational Organised Crime (Palermo Protocol). Additionally, Kenya has developed its own dedicated domestic anti-trafficking legislation. Despite the considerably intensive efforts of the Kenyan Government at anti-trafficking, human trafficking in Kenya remains a problem. This can be attributed the inconsistent implementation of some of the developed standards as well as the inability of the government to close some of the gaps in its laws and policies.

1.0 Introduction

Like many other countries in the East and Horn of Africa region, Kenya is faced with the problem of human trafficking. In the East African region, Kenya is an important centre for mixed migration, serving primarily as a destination country for asylum seekers and economic migrants, as well as a popular transit route for irregular migrants journeying towards South Africa and the Middle East.¹ Contributing to these flows are networks of migrant smugglers and human traffickers who operate with varying degrees of criminality; ranging from completely decentralised, to semi-structured, and centralised criminal organisations.² Within Kenya, the displacement that occurred as a result of the 2008 post-election violence resulted in the internal displacement of over 600,000³ persons, leaving them at greater risk of exploitation by traffickers and criminal organisations.⁴

This Policy Brief examines human trafficking in the Kenyan context, highlighting the various trends in adult and child trafficking and the links between displacement and human trafficking. It also highlights the Kenyan Government's legal and policy response to human trafficking.

2.0 Human Trafficking in Kenya

Kenya has been identified as a source, transit and destination country for victims of human trafficking and human traffickers.⁵ According to the 2020 USA State Department Trafficking in Persons Report (US TIP Report), Kenya is ranked as a Tier 2 country; a ranking reserved for countries that do not meet the minimum requirements of the US Trafficking Victims Protection Act (TVPA) but are working to do so.⁶

Human traffickers in Kenya exploit victims both within and outside Kenya. Victims of transnational human trafficking are mostly recruited by both legal, and illegal and unregulated recruitment agencies, or voluntarily migrate to countries in the Middle East, Southeast Asia, and Europe on fake promises of employment.⁷ Upon arrival in destination countries, trafficking victims often have their passport seized by their employers before being subjected to sexual exploitation in massage parlours and brothels, or forced into manual labour or domestic servitude for long hours of work with little to no pay.⁸ According to the Kenyan National Crime Research Centre (NCRC), internal trafficking in Kenya deals mostly with

¹ Expertise France, *Kenya Country Statement: Addressing Migrant Smuggling and Human Trafficking*, 2017, page 1. Available here <https://www.expertisefrance.fr/documents/20182/234347/AMMi+++Country+Report++Kenya.pdf/51146abe-92b9-456a-b05b-ddedca54208b>

² Ibid.

³ Wanjiru J, *Inclusive education for Internally Displaced Children in Kenya: children perceptions of their learning and development needs in post-conflict schooling*, International Journal of Child Care and Education Policy 12:7, 2018, page 3.

⁴ Malinowski R, Otube S, Alexander A and Mogambi A, *Displacement, violence and vulnerability: Trafficking among Internally Displaced Persons in Kenya*, HAART Research Series No. 1, 2016. Available here <https://humantraffickingsearch.org/wp-content/uploads/2017/07/HT-IDP-Research-2016.pdf>

⁵ Expertise France (n 1), page 1.

⁶ United States of America Department of State, *Trafficking in Persons Report 2020 (US TIP Report)*, page 292. Available here <https://www.state.gov/trafficking-in-persons-report-2020/>

⁷ Expertise France (n 1), p 1.

⁸ Ibid page 16.

trafficking of persons from rural areas to urban areas like Nairobi and Mombasa, mainly for domestic work and sexual exploitation.⁹

Human trafficking in Kenya is not only limited to adults, as children are also trafficked in Kenya. Like other forms of trafficking, trafficking in children occurs both on the internal and transnational fronts, with Kenya acting mostly as a source and destination country for victims of transnational child trafficking.¹⁰ According to a 2015 Awareness Against Human Trafficking (HAART) report on child trafficking, child trafficking is mostly perpetrated by someone close and known to the children or their family, but children in Kenya have also been reported to be abducted and trafficked into exploitative practices as well.¹¹ The report also notes that children from low income, rural, and coastal areas in Kenya and neighbouring countries in the region are more vulnerable to trafficking.¹² Although exploitation for sexual and labour purposes are the most common forms of exploitation in human trafficking in Kenya, HAART notes other different forms of exploitation, such as, illegal organ removal as well as a mix of both sexual and labour exploitation.¹³

2.1 Transnational Human Trafficking in Kenya

As a source, destination, and transit country, transnational human trafficking in Kenya varies depending on the victims, destination, type of exploitation, and transit/travel route.

A. Kenya as a Source Country

Although there is no reliable data on the number of Kenyan nationals working outside Kenya, it is estimated that as many as 3 million Kenyans work abroad, but the majority of Kenyan labour migrants work in the Middle East.¹⁴ As a source country for transnational human trafficking, Kenyans are trafficked to countries in the Middle East, Europe, North America and neighbouring African countries for labour exploitation in domestic work as well as sexual exploitation.

Initially, migration to countries in the Middle East such as Saudi Arabia, the United Arab Emirates (UAE), Qatar and Oman was driven primarily by kinship ties, especially for Kenyans living in the coastal areas seeking economic opportunities.¹⁵ However, with the economic downturn in Kenya at the start of the millennium and a sharp increase in the wealth of oil states in the Middle East, economic migration has become a survival strategy for unemployed youths in Kenya to escape poverty. Strong push and pull factors have resulted in the rise in the supply of and demand for unskilled labour, which has been

⁹ Kenyan NCRC, *Report on Human Trafficking in Kenya*, June 2015, page 9 - 10. Available here <http://crimeresearch.go.ke/wp-content/uploads/2018/05/Human-Trafficking-in-Kenya.pdf>

¹⁰ HAART, *Kenya's Child Market – Lure, Sell and Dispose*, 2015, page 8. Available here <https://haartkenya.org/wp-content/uploads/2018/11/Awareness-Against-Human-Trafficking-2015.pdf>

¹¹ Ibid.

¹² Ibid.

¹³ HAART, *Human Trafficking in Kenya: Analysis of data obtained from victims*, 2015, page 16.

¹⁴ Daghar M, *The New Slavery: Kenyan workers in the Middle East*, ENACT Policy Brief, Issue 16, June 2020, page 2. Available here <https://enactafrica.org/research/policy-briefs/the-new-slavery-kenyan-workers-in-the-middle-east>

¹⁵ Ibid, page 1.

exploited by unregulated labour recruitment agencies and has made Kenyan labour migrants easy targets for traffickers.¹⁶

With increased media reports of Kenyans suffering sexual and labour exploitation in destination countries and complaints by repatriated trafficked workers from the Middle East, the Kenyan Government temporarily banned the recruitment of Kenyan workers to the Middle East in September 2014.¹⁷ However, the Government lifted the ban in 2017 but prohibited recruitment to the Middle East unless through accredited recruitment agencies that have been vetted and have obtained new licenses from the government.¹⁸

Despite this, reports of exploitation and human trafficking of Kenyans abroad persist. Reports show that the measures adopted by the Government to streamline recruitment activities carried out by agencies have driven criminal activity underground as recruitment agents have found different ways to bypass the ban and vetting process.¹⁹ This is also aided by the reports of collusion between traffickers and Government officials in procurement of passports.²⁰

In addition to the prevalence of human trafficking to the Middle East for exploitation, the US State Department has also reported that Kenyan women have also been exploited by Nigerian and Kenyan criminal organisations in Thailand.²¹ Additionally, Kenyan nationals have been reported to have been trafficked within the East African region to Somalia for exploitation in armed conflict, and to other East African countries for sexual and labour exploitation.²²

B. Kenya as a Transit Country

In addition to being a source country, Kenya is also a transit route for victims of trafficking. As a transit country, identified victims include Ethiopians, Somalis, Indians, Ugandans, and nationals of other East African countries who are trafficked through Kenya *enroute* to South Africa and the Middle East.²³

There is no reliable data on the number of people that are smuggled or trafficked through Kenya. However, Media and NGO reports indicate that East African nationals are brought into Kenya before being trafficked to the Middle East.²⁴ During the ban on labour externalisation to the Middle East in

¹⁶ Ibid.

¹⁷ Brian Ngugi, *Kenyan government moves to combat migrant worker abuse in the Gulf*, Equal Times, 13 October 2014. Available here <https://www.equaltimes.org/kenyan-government-moves-to-combat?lang=en#XzXDGShKioo>

¹⁸ Christabel Ligami, *Kenya Lifts Ban on Sending Domestic Workers to the Middle East*, Newsdeeply, 13 December 2017. Available here <https://www.newsdeeply.com/womensadvancement/articles/2017/12/13/kenya-lifts-ban-on-sending-domestic-workers-to-the-middle-east>

¹⁹ Daghar (n 14) page 3.

²⁰ Ibid, page 4.

²¹ US TIP Report (n 6) page 295.

²² Ibid.

²³ Expertise France (n 1) page 5.

²⁴ Xinhua News, *Uganda Cracks whip on human trafficking*, 29, October 2019. Available here http://www.xinhuanet.com/english/2019-10/29/c_138513189.htm

Uganda due to reports of increasing human rights violations including human trafficking suffered by Ugandan nationals, traffickers used Kenya as an alternative trafficking route to the Middle East.²⁵

C. Kenya as a Destination Country

Sustained years of considerable economic growth, political stability, and a standard of living considerably higher than that of neighbouring East African countries has contributed to making Kenya a destination for victims of human trafficking.²⁶ Nationals of other African and Asian countries are trafficked into Kenya for various forms of exploitation.²⁷

Victims of trafficking for work in the domestic service sector also experience sexual exploitation. Urban areas such as Nairobi and Mombasa are preferred destinations for traffickers within Kenya.²⁸ Reports have also shown an increase in the trafficking of Ugandan girls for sexual and labour exploitation in Kenya, especially in the Eastleigh district.²⁹ Media reports have further highlighted the increased trafficking of young Ugandan girls into Kenya for exploitation as domestic workers, where they are subjected to work for long hours with little to no pay.³⁰ Further evidence of this has been reported in the 2020 US TIP Report which noted that the Kenyan Government identified and rescued 96 Ugandan nationals who were trafficked into Kenya for exploitation.³¹

Reports of the trafficking of Nepalese, Indian, and Pakistani women for sexual exploitation in Kenya especially in Mombasa persist.³² Recruiters and traffickers have been reported to use debt bondage to force victims from the aforementioned countries to work in *Mujra* dance clubs in Nairobi and Mombasa, where they are also exploited through commercial sexual exploitation to pay off their debts.³³

²⁵ United States of America Department of State, *Trafficking in Persons Report 2014 (US TIP Report)*, page 389.

²⁶ Expertise France (n.1) page 4.

²⁷ Ministry of Labour Social Security and Services, *The National Plan of Action for Combatting Human Trafficking: Strategic Framework 2013 – 2017, 2014*, page 2. Available here <http://laboursp.go.ke/wp-content/uploads/2018/05/26-May-2015-NPA-Human-Trafficking-2013-2017-final.pdf>

²⁸ HAART (n 13) page 14.

²⁹ US TIP (n 6) page 295.

³⁰ BBC News Africa Eye, *The Hidden Lives of 'Housegirls' in Kenya*, 20 May 2019. Available here <https://www.bbc.com/news/av/world-africa-48308502/the-hidden-lives-of-housegirls-in-kenya>

³¹ US TIP Report (no 6) page 292.

³² IOM, *Assessment Report on the Human Trafficking Situation in the Coastal Region of Kenya*, May 2018, page 11. Available here

http://kenya.iom.int/sites/default/files/ASSESSMENT%20REPORT%20ON%20HUMAN%20TRAFFICKING%20SITUATION%20-%20-%20COASTAL%20REGION%20KENYA%20REVISED%20LOWRES%2023072018%20F_o.pdf

³³ Ibid.

2.2 Internal Human Trafficking in Kenya

In addition to transnational human trafficking, Kenyan nationals and residents are also trafficked within Kenyan borders. Internal trafficking in Kenya is characterised by the movement of people from rural, low income, and underserved areas to larger cities like Nairobi and the coastal area of Mombasa.³⁴

Victims of internal trafficking are often attracted by job and education opportunities in these areas but enter into trafficking situations where they are exploited through forced labour, domestic servitude, street begging, and various forms of sexual exploitation.³⁵

According to the NCRC 2015 Report, poverty and unemployment are the main drivers of internal trafficking within Kenya as a major trend in internal migration is rural – urban migration.³⁶ Other identified contributing factors include peer pressure, poor remuneration, lack of awareness and illiteracy. Although adults and children are trafficked internally within Kenya, the profile of victims of internal trafficking in Kenya are mostly unemployed, single, Kenyans below the age of 18, who are in search of well-paying jobs to support themselves and their families.³⁷

2.3 Child Trafficking in Kenya.

Like adults, children are trafficked within and into Kenya for various forms of exploitation. Trafficked children in Kenya are exploited through forced domestic servitude, work in the agricultural sector, fishing, cattle herding, and sexual exploitation.³⁸

Child trafficking in Kenya is mostly internal, occurring within Kenyan borders and involving the movement of children from low income and rural areas to urban or coastal areas such as Mombasa, Nairobi, Kisumu, and Malindi. However, there have been reports of the trafficking of children from neighbouring countries into Kenya for commercial sexual exploitation, forced labour in the agricultural sector, street begging and vending, organ removal, and illicit adoption.³⁹

Child trafficking victims are mostly recruited by way of deception through false offers of a better life, education and work opportunities, However, there have also been reports of abduction of children for illegal organ harvesting.⁴⁰ Family members, close friends, neighbours, and even parents are the most frequently identified recruiters and traffickers of children, although criminal gangs, employment

³⁴ HAART (n 13) page 14.

³⁵ Ibid.

³⁶ NCRC (n 9) page 71.

³⁷ Ibid 40.

³⁸ HAART (n 10) page 10 - 11

³⁹ IOM, Migration in Kenya: A Country Profile 2015, 2015, page 26. Available at https://publications.iom.int/system/files/pdf/migration_profile_kenya.pdf

⁴⁰ HAART (n 10) page 8.

recruitment agencies, religious leaders, and ‘respectable’ community figures have also been identified as possible recruiters and traffickers.⁴¹

Other child trafficking channels such as education agencies, inter-country adoption agencies, and children’s homes have been identified. The NCRC Report on human trafficking in Kenya shows that some children who were left orphaned due to HIV and AIDS and were fostered by relatives or foreigners are vulnerable to human trafficking as well.⁴² Reports further shows that orphaned children in care have been trafficked for work in domestic service and the sexual industry with their ‘wages’ paid to their ‘foster parents’.⁴³ Although there is no reliable data on the number of child victims of human trafficking in Kenya, a 2012 report by the Journal of Defence Resource Management estimated that over 20,000 children are trafficked in Kenya annually.⁴⁴

Additionally, according to HAART, children who are separated from their families face a high risk of vulnerability to trafficking due to the lack of parental protection. However, poverty has been identified as a more serious vulnerability indicator for child trafficking in Kenya. Kenyan parents in poorer communities have been shown to be more willing to give away their children due to the inability to provide for them, despite the possibility of putting children at the risk of trafficking.⁴⁵

Trafficking for labour exploitation has been identified as one of the most common forms of exploitation in child trafficking. HAART reports that girls and younger boys are mostly trafficked for exploitation in domestic service, while older boys are trafficked for work in the agricultural sector, working in flower, khat, coffee, and tea farms as well as in the fishing industry and cattle herding.⁴⁶

In addition to trafficking for labour exploitation, children in Kenya are also trafficked for sexual exploitation through forced marriages, production of CSAM, and commercial sexual exploitation of children (CSEC).⁴⁷ According to a 2018 IOM Report on human trafficking in Kenya, children are also trafficked for sexual exploitation near goldmines in western Kenya, by fishermen on Lake Victoria and by truck drivers along major highways.⁴⁸

Child trafficking victims in Kenya also face exploitation in the travel and tourism sector. SECTT occurs widely in the Kenyan trafficking setting and is more prevalent in the coastal regions of Kenya, specifically Mombasa. Children in street situations have been identified to be more vulnerable to trafficking for exploitation in SECTT. However, HAART in a report on SECTT revealed that “*shelter is in no way a*

⁴¹ Ibid 9.

⁴² NCRC (n 9) page 39

⁴³ Ibid.

⁴⁴ HAART (n 10) page 13.

⁴⁵ Ibid, page 9.

⁴⁶ Ibid, page 10.

⁴⁷ IOM (n 39), page 26.

⁴⁸ IOM (32), page 14.

*disqualifying factor for children to become victims of sexual exploitation.*⁴⁹ Reports show that girls are the most vulnerable to SECTT, but boys are also trafficked for sex work and the production of CSAM, especially in the coastal tourist areas.⁵⁰ According to a 2018 IOM Report on human trafficking, there is an estimated 10,000 – 15,000 girls living in and involved in sex work in Kenya’s coastal areas.⁵¹

Other forms of child trafficking include trafficking of children for exploitation in street begging and hawking. Media and NGO reports show that children from neighbouring countries are also trafficked into Kenya for exploitation in street begging. Increasingly, traffickers have been reported to exploit Tanzanian children living with disabilities in street begging and vending situations.⁵² Additionally, local children in Somaliland who are enrolled into dubious Koranic schools by unsuspecting parents have also been reported to suffer indoctrination and radicalisation, after which they are trafficked for exploitation in armed conflict by armed groups like Al Shabaab.⁵³

2.4 Human Trafficking and Forced Displacement in Kenya

Kenya is a hub for mixed internal and transnational migration in the East African region. Internal movement in Kenya is often characterised by voluntary urban – rural migration. However, following the post-election violence of 2008, over 600,000 Kenyans became displaced internally, and consequently became more vulnerable to human trafficking.

Transnational migration is also a mixture of voluntary and forced migration as Kenya attracts a mixture of economic migrants and forced migrants seeking asylum. The presence of IDPs and large clusters of refugees living in camp situations creates the opportunities for human trafficking to thrive.

A 2016 HAART study on IDPs in Kenya found that IDPs in Kenya are more vulnerable to human trafficking than the local population or host communities.⁵⁴ According to the study, internally displaced adults and children are all vulnerable to human trafficking. However, most cases of trafficking among IDPs involve victims aged 20 to 25 years old.⁵⁵ Although IDPs in Kenya are more vulnerable to human trafficking than the local community, not all IDPs are equally vulnerable to human trafficking. According to the study, persons displaced as a result of post electoral violence and ethnic conflict were more vulnerable to trafficking than persons displaced due to natural disasters or environmental issues.⁵⁶ Trafficking for labour exploitation is the most common type of exploitation as labour recruiters have been identified as

⁴⁹ Schulze M, *Exploring Attitudes towards the Sexual Exploitation of Children in Tourism and Travel along the Coast of Kenya*, 2017, HAART Research Series No. 2, page 11. Available at <https://haartkenya.org/wp-content/uploads/2018/11/HAART-Research-Tourism-LR-R2018.pdf>

⁵⁰ HAART, (n 10), page 10.

⁵¹ IOM, (32), page 15.

⁵² Eudias Kigai, Kenya-Tanzania: Trafficking handicapped children and the economy of misery, The Africa Report, 29 July 2013. Available here <https://www.theafricareport.com/5476/kenya-tanzania-trafficking-handicapped-children-and-the-economy-of-misery/>

⁵³ Expertise France, (n 1), page 5.

⁵⁴ HAART (no 2), page 9.

⁵⁵ Ibid.

⁵⁶ Ibid, page 40.

the most common set of traffickers, followed by sexual exploitation. However, there have also been reports of early child marriage among IDP communities.⁵⁷

Large scale displacement due to armed conflict in the East African region has also contributed to the increase in forced migration, which has exacerbated the growth in the supply of vulnerable and often desperate persons to human traffickers and criminal networks. In addition to being vulnerable to exploitation by criminal organisations, such groups are also open to exploitation by armed groups engaged in conflict. According to United Nations High Commission for Refugees (UNHCR) data, Kenya hosts over 494,000 refugees, an overwhelming majority of whom are hosted in Kenya's Dadaab⁵⁸ and Kakuma camps,⁵⁹ while a much smaller minority are spread around other urban living areas.⁶⁰ Refugees in Kenya have limited access to education and livelihood opportunities and according to Art 9(4) of the 2000 Palermo Protocol, these are factors that contribute to increased vulnerability to human trafficking.⁶¹

According to the 2015 NCRC Report on human trafficking in Kenya, the active presence of Al Shabaab recruiters who are engaged in trafficking for recruitment into armed conflict have been reported in the camps. The report also indicated that Somali children in the Dadaab complex are trafficked for labour exploitation outside the camp in flower and tobacco farms, and *khat* cultivation areas, while others are trafficked for sexual exploitation.⁶²

A 2019 ENACT Report on human trafficking in conflict contexts in Africa reported that older Somali women in refugee camps engage in the smuggling and trafficking of younger Somali girls for labour and sexual exploitation.⁶³ The older women have been known to pay smugglers to transport younger Somali women from refugee camps to work as 'tea girls' in Nairobi, where they also face sexual exploitation, including commercial sexual exploitation. Reports further show that the lack of adequate immigration and refugee documentation makes it harder for trafficked Somali girls to leave their trafficker or report to authorities, for fear of repercussions or punishments for working without a permit.⁶⁴

Additionally, the announced closure of the Dadaab camp by the Kenyan government and the lack of adequate resettlement plans for the over 200,000 refugees living within the camp, creates a perfect

⁵⁷ Ibid page 36.

⁵⁸ Dadaab Refugee Complex holds about 217,511 refugees.

⁵⁹ Kakuma Camp holds about 196,050 refugees.

⁶⁰ UNHCR Kenya Infographics 31st of March 2020, available at <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2020/04/Kenya-Infographics-31-Mar-2020.pdf>

⁶¹ "States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons ... vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity."

⁶² NCRC (n 9) page 75.

⁶³ Lucia Bird, Tuesday Reitano, Trafficking in Persons in Conflict Contexts: What is a realistic response from Africa, ENACT Policy Brief, Issue 10, June 2019, page 6.

⁶⁴ Ibid.

situation for traffickers to exploit the desperation of camp inhabitants, most of whom have nowhere else to go.

3.0 Response to Human Trafficking

To address trafficking in the country, Kenya has taken different legislative and operational counter-trafficking measures. Over the years, Kenya has enacted laws and developed policies specifically and generally aimed at responding to human trafficking.

3.1 Legal Response

The starting point for legislative measures to counter trafficking in Kenya is the Kenyan Constitution. Article 2(6) of the 2010 Kenyan Constitution provides that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁶⁵ This means that Kenya having ratified the Palermo Protocol in 2005 is bound by its provisions. This does not only apply to the Palermo Protocol but also to the following ratified international documents:

a. 1979 Convention on the Elimination of All Forms of Discrimination against Women

Article 6 - “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”⁶⁶

b. 1989 Convention on the Rights of a Child

Article 34 - “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”⁶⁷

c. 1999 Worst Forms of Child Labour Convention

Article 3 “For the purposes of this Convention, the term the worst forms of child labour comprises:”
*a. all forms of slavery or practices similar to slavery, such as the sale and trafficking of children...*⁶⁸

d. 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa

Article 2 “States Parties shall take appropriate and effective measures to: (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk”⁶⁹

e. African Charter on Human and Peoples Rights

Article 5 - “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”⁷⁰

f. 1990 African Charter on the Rights and Welfare of a Child

⁶⁵ Art 2(6) of the 2010 Kenyan Constitution.

⁶⁶ Art 6 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

⁶⁷ Art. 34 of the 1989 Convention on the Rights of a Child.

⁶⁸ Art. 3 of the 1999 Worst Forms of Child Labour Convention.

⁶⁹ Art.2 (g) of the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa.

⁷⁰ Art 5 of the African Charter on Human and Peoples Rights

Article 24 - *“State Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall: (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;”*⁷¹

Article 29 - *“State Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; (b) the use of children in all forms of begging.”*⁷²

Like other countries in the East African Region, Kenya has a wide range of international and regional law resources for dealing with trafficking in persons. In addition to the international and regional law resources, Kenya has adopted domestic anti-trafficking legislative measures.

Similar to the international and regional law measures, the point of commencement is the 2010 Kenyan Constitution. Although the Kenyan constitution does not specifically address trafficking in persons, some of its provisions such as the prohibition of forced labour and slavery and servitude, and other provisions on the rights of the child can be applied to human trafficking.

In 2010, Kenya adopted the Counter-Trafficking in Persons Act⁷³ (CTIP Act) to specifically address different forms of human trafficking in the country. The 2010 CTIP Act was enacted to implement Kenya’s obligation under Article 5 of the Palermo Protocol, and the CTIP Act covers the offence of human trafficking and other ancillary offences, modalities of the trial of offenders, and system of provision of victims’ rights.⁷⁴ Other domestic legislation such as the 2006 Refugee Act and the 2001 Children’s Act have provisions that prohibit and criminalise trafficking in different forms..

A. The Kenyan Constitution

Article 25 of the Kenyan Constitution provides for some fundamental rights that may not be limited or derogated from

*“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited— (b) freedom from slavery or servitude;”*⁷⁵

Article 30 prohibits slavery, servitude and forced labour

⁷¹ Art. 24 (d) of the 1990 African Charter on the Rights and Welfare of a Child.

⁷² Ibid, Art. 29.

⁷³ Counter-Trafficking Act of 2010.

⁷⁴ Ministry of Labour Social Security and Services, *The National Plan of Action for Combatting Human Trafficking: Strategic Framework 2013 – 2017, 2014*, page 4.

⁷⁵ Art 25 (b) of the 2010 Kenyan Constitution.

“(1) A person shall not be held in slavery or servitude.⁷⁶ (2) A person shall not be required to perform forced labour.”⁷⁷

Article 53 in providing for the rights of children states

“Every child has the right— (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;”⁷⁸

“A child’s best interests are of paramount importance in every matter concerning the child.”⁷⁹

B. The Counter-Trafficking in Persons Act 2010

Definition of Trafficking –

“A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for the purpose of 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.”⁸⁰

Consent - *The consent of a victim of trafficking in persons to the intended exploitation shall not be relevant where any of the means set out in subsection (1) have been used.*⁸¹

Child Trafficking – *“The recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in subsection (1) of this Act.”⁸²*

Punishment for Trafficking –

*“A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than **thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.**”⁸³*

*A person who finances, controls, aids or abets the commission of an offence under subsection (1) shall be liable to **imprisonment for a term of not less than thirty years or to a fine of not less***

⁷⁶ Ibid, Art 30 (1).

⁷⁷ Ibid, Art 30 (2).

⁷⁸ Ibid, Art 53 (1)(2).

⁷⁹ Ibid, Art 53(2).

⁸⁰ Section 3 (1) of the 2010 Counter-Trafficking in Persons Act.

⁸¹ Ibid, Section 3 (2)

⁸² Ibid, Section 3 (3)

⁸³ Ibid, Section 3 (5)

*than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.*⁸⁴

Provision for other ancillary offences

The 2010 CTIP Act also has provisions for the punishment of offences related or done in furtherance of trafficking in persons. Offences such as

- a. **Promotion of Child Trafficking:** – This includes adoption, fostering and guardianship or the offers and attempt thereof, for the purpose of trafficking. These offences all carry an imprisonment term not less than 30 years to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.⁸⁵
- b. **Promotion of Trafficking:** - The Act considers a promoter of human trafficking to be any person who
*“(a) knowingly leases, or being the occupier thereof, permits to be used any house, building, or other premises for the purpose of promoting trafficking in persons; (b) publishes, exports or imports, any material for purposes of promoting trafficking in persons; or (c) manages, runs or finances any job recruitment agency for the purposes of promoting trafficking in persons; (d) by any other means promotes trafficking in persons, commits an offence and is liable to imprisonment for a term of not less than twenty years or to a fine of not less than twenty million shillings or to both and upon subsequent conviction, to imprisonment for life.”*⁸⁶
- c. **Acquisition of travel documents by fraud or misrepresentation:** - Section 6 of the 2010 CTIP Act criminalises the acquisition of travel documents by fraud or misrepresentation for the commission of trafficking in persons, and makes offenders liable to a minimum prison term of 10 years, or to a fine of not less than ten million shillings, or to both, and upon subsequent conviction, to imprisonment for a term of not less than ten years without the option of a fine.⁸⁷
- d. **Facilitating entry into or exit out of the country:** - Section 7 of the 2010 CTIP Act criminalises the facilitation (for the purpose of trafficking in persons) of exit or entry into Kenya via any official or unofficial entry points. Offenders are liable to punishment of an imprisonment term of not less than thirty years, or to a fine of not less than thirty million shillings, or to both, and upon subsequent conviction, to imprisonment for a term of not less than thirty years without the option of a fine.⁸⁸
- e. **Interfering with travel documents and personal effects:** - Section 8 deals with the confiscation, concealment, alteration, destruction of any personal effects and identification or

⁸⁴ Ibid, Section 3 (6)

⁸⁵ Ibid, Section 4.

⁸⁶ Ibid, Section 5.

⁸⁷ Ibid, Section 6.

⁸⁸ Ibid, Section 7.

travel documents, of another person for trafficking purposes or to prevent that other person from leaving the country or seeking redress from the Government or appropriate agencies. Offenders under this provision are liable to imprisonment for a term of not less than ten years or to a fine of not less than ten million shillings or to both and upon subsequent conviction, to imprisonment for a term of not less than ten years without the option of a fine.⁸⁹

- f. **Life threatening circumstances or death:** - This relates to situations where a victim of trafficking suffers any permanent or life-threatening bodily harm, death, any other life threatening or terminal illnesses. Offenders are liable to imprisonment for life.⁹⁰
- g. **Trafficking in persons for organized crime:** - When trafficking occurs as part of an organized criminal group, offenders are liable to imprisonment for life.⁹¹

The 2010 CTIP Act also makes provisions for the protection of victims' rights during prosecution; ensuring victims confidentiality during trafficking proceedings,⁹² rendering of victim impact statements⁹³ and exemption from paying fees in civil suits.⁹⁴ The rights of victims are also protected outside prosecution through the following:

- a. Provision of restitution to victims;⁹⁵
- b. Victim immunity from prosecution for offences committed as a result of being trafficked;⁹⁶
- c. Provision of support and protection to victims of trafficking in persons. Support in this sense includes: *“(a) return to and from Kenya; (b) resettlement; (c) re-integration; (d) appropriate shelter and other basic needs; (e) psychosocial support; (f) appropriate medical assistance; (g) legal assistance or legal information, including information on the relevant judicial and administrative proceedings; or (h) any other necessary assistance that a victim may require.”*⁹⁷
- d. Repatriation of trafficked persons to and from Kenya: - Section 18 of the Act provides for the minister responsible for immigration in Kenya to make arrangements for the repatriation of foreigners trafficked into Kenya to their respective places of origin. However, if the repatriation could expose the victim to danger, the victim may be granted permission to remain in Kenya. The minister in charge of immigration may also provide for the repatriation of Kenyan nationals who are also victims of transnational trafficking back to Kenya.⁹⁸

Section 19 of the 2010 CTIP Act further established within the Ministry of Gender, Children and Social Development (MGCSD), an inter-ministerial Counter Trafficking in Persons Advisory Committee

⁸⁹ Ibid, Section 8.

⁹⁰ Ibid, Section 9.

⁹¹ Ibid, Section 10.

⁹² Ibid, Section 11.

⁹³ Ibid, Section 12.

⁹⁴ Ibid, Section 16.

⁹⁵ Ibid, Section 13.

⁹⁶ Ibid, Section 14.

⁹⁷ Ibid, Section 15.

⁹⁸ Ibid, Section 18.

comprised of the government and civil society organisations.⁹⁹ The CTIP Act charges the Advisory Committee with the responsibility of advising the MGCS D Minister on inter-agency counter trafficking activities, and the implementation of preventive, protective and rehabilitative measures for victims of trafficking. Apart from advisory functions, the committee is also responsible for counter trafficking policy formulation and coordination between stakeholders, and implementation of counter trafficking mechanisms.

Section 22 of the CTIP Act also makes special provision for the establishment of a National Trust fund for assisting victims of trafficking. The Act provides for funding the trust fund through parliamentary budgetary allocations, proceeds from items confiscated from traffickers, donations, and investments made on behalf of the fund.¹⁰⁰

C. The Children Act 2001

The Kenyan Children Act enacted in 2001 makes provisions for the protection of children from all forms of trafficking. Section 13 of the Act states that

“A child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person.

Any child who becomes the victim of abuse, in the terms of subsection (1), shall be accorded appropriate treatment and rehabilitation in accordance with such regulations as the Minister may make.”¹⁰¹

D. The Refugees Act of 2006.

The Kenyan 2006 Refugees Act makes direct provisions for the protection of unaccompanied and separated asylum-seeking children from trafficking. Section 15 (2) and (3)(e) of the Act state

(2) “Where the actual age of an unaccompanied child cannot be ascertained by the child or the registration officer, the registration officer shall request that an age assessment be carried out in the prescribed manner.”¹⁰²

(3) A registration officer shall— (e) satisfy himself that a child who has applied for registration under these regulations is not a victim of child trafficking;”¹⁰³

E. International Crimes Act of 2008

The International Crimes Act of 2008 domesticated the Rome Statute into Kenyan law.¹⁰⁴ This permits the Kenyan courts to prosecute any of the crimes listed in the Rome Statute, namely war

⁹⁹ Ibid, Section 19.

¹⁰⁰ Ibid, Section 22.

¹⁰¹ Section 13 of the Children Act of 2001

¹⁰² Section 15(2) of the Refugee Act of 2006.

¹⁰³ Ibid, Section 15(3)(e).

¹⁰⁴ Section 5 of the International Crimes Act of 2008.

crimes, crimes against humanity, and genocide.¹⁰⁵ In the context of trafficking in persons, the crimes of enslavement and sexual slavery as a crime against humanity,¹⁰⁶ are similar in conduct to the crime of trafficking in persons.

With regard to enslavement, Article 7(2) of the Rome Statute states:

*“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power **in the course of trafficking in persons**, in particular women and children.”*

For both enslavement and sexual slavery, the ICC Elements of Crimes states that the first element of each crime is that

*“1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by **purchasing, selling, lending or bartering** such a person or persons, or by imposing on them a **similar deprivation of liberty**.”¹⁰⁷*

Moreover, with regard to the deprivation of liberty, it is expressly stated that

*“...such deprivation of liberty may, in some circumstances, include **exacting forced labour** or otherwise reducing a person to a **servile status** as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element **includes trafficking in persons**, in particular women and children.”¹⁰⁸*

In order to amount to a crime against humanity, the conduct must be committed “as part of a widespread or systematic attack directed against a civilian population”, the so-called “nexus” requirement.¹⁰⁹ In 2007-08, post-election violence erupted across Kenya and displaced thousands into refugee camps. Pre-Trial Chamber II of the International Criminal Court concluded that crimes against humanity had occurred and authorised an investigation by the ICC Prosecutor,¹¹⁰ and charges of forcible transfer were initially brought against six suspects.¹¹¹ Arguably, therefore, any subsequent trafficking of persons displaced during the post-election violence could be prosecuted as a crime against humanity, because there is a factual nexus between the attack, the displacement, and the trafficking that later occurs. The passage of time

¹⁰⁵ Ibid, section 6.

¹⁰⁶ Rome Statute, article 7(1)(c) & (g).

¹⁰⁷ ICC Elements of Crimes, p.6 & 8.

¹⁰⁸ ICC Elements of Crimes, p.6 (fn 11) & p.8 (fn 18).

¹⁰⁹ ICC Elements of Crimes, p.6 & 8, element 2.

¹¹⁰ Pre-Trial Chamber II, *Situation in the Republic of Kenya*, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’, 31 March 2010.

¹¹¹ Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 29 January 2012; *Prosecutor v Ruto et al.*, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 29 January 2012.

would not necessarily be a bar to such prosecutions. For example, in the Libyan situation, the ICC Prosecutor is currently investigating the trafficking of persons both within and from Libya, conduct which persists to the present day, and which has a nexus to the conflict which began almost ten years ago in 2011.¹¹²

F. Victim Protection Act of 2014

The Victim Protection Act of 2014 seeks to protect all victims of any offence under Kenyan law and provide various remedies to victims, and to protect their dignity through:

- (i) provision of better information, support services, reparations and compensation from the offender, in accordance with this Act;*
- (ii) establishment of programs to assist vulnerable victims;*
- (iii) supporting reconciliation in appropriate cases by means of a restorative justice response;*
- (iv) establishment of programmes to prevent victimization at all levels of government;*
- (v) preventing re-victimization in the justice process; and crime.*¹¹³

The 2014 Act expressly states that a victim of a crime as defined under the 2010 CTIP Act is to be deemed a victim for the purposes of the 2014 Act.¹¹⁴ The Act provides for various procedural rights for victims, such as to be present at trial, to give a victim impact statement¹¹⁵ and to compensation.¹¹⁶

Importantly, the Act provides that various services should be available to a victim, including to help them:

- (a) deal with physical injury and emotional trauma;*
- (b) access and participate in the criminal justice process;*
- (c) participate in restorative justice to obtain reparations; or*
- (d) cope with problems associated with victimization.*¹¹⁷

A Victim Protection Trust Fund is also to be set up under the Act to make provision for the services legislated for,¹¹⁸ although it is unclear to what extent the provisions of the 2014 Act have been utilised to date.

¹¹² Fatou Bensouda, 'Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)', 8 May 2019.

¹¹³ Victim Protection Act of 2014, section 3.

¹¹⁴ Ibid, section 5(2).

¹¹⁵ Ibid, section 12.

¹¹⁶ Ibid, section 23.

¹¹⁷ Ibid, section 14(2).

¹¹⁸ Ibid, sections 27-30.

3.2 Policy Framework

Kenya's primary counter trafficking initiative is developed through the National Plan of Action for Combating Human Trafficking (NAP) originally scheduled to run from 2013 – 2017. The objectives of the NAP were conceived around the 3Ps of counter trafficking (Prevention, Prosecution and Protection).¹¹⁹ The NAP was developed by the CTIP Advisory Committee and launched in 2014 by the MGCSD to promote co-operation between anti-trafficking stakeholders from all sectors in Kenya, and lay the groundwork for closer international co-operation. Although the operating period of the NAP has expired, the Government has continued to implement its provisions. However, a new NAP that is meant to operate from 2019-2022 has been finalised but has not yet been operationalised due to lack of funding.

A. Prevention –

The NAP highlights the need to move preventive anti-trafficking efforts from a singular focus on public awareness campaigns on human trafficking, to a more robust approach that includes rectifying laws that omit classes of vulnerable groups, and promoting measures that significantly reduce vulnerabilities.¹²⁰ The NAP also makes provision for inclusion and partnership with non-governmental organizations and other relevant stakeholders to achieve this goal. Activities under this sector include:

Capacity Building: In line with Article 10 of the Palermo Protocol, which requires states to strengthen training of anti-trafficking stakeholders along the 3Ps of anti-trafficking.¹²¹ The NAP requires the Kenyan government to do the following:

- Organise training of criminal justice practitioners including law enforcement officials, prosecutors and judges, customs officers, immigration officers, tourism industry workers, labour inspectors, and other protective and social services officials on identification of vulnerabilities to trafficking, as well as identification of victims of trafficking.
- Conduct further training activities on victim assistance, the impact of media reporting, in particular on sensitizing the media on reporting potential human trafficking cases; how a smuggled migrant may become a trafficked victim; methods of reducing trafficking in the tourism sector.¹²²

Public sensitisation: Conduct wide public sensitisation campaigns aimed at raising awareness on deception and other means used by traffickers to conduct human trafficking as well as campaigns on the identification of fraudulent employment advertisement to prevent recruitment for trafficking.

¹¹⁹ Ministry of Labour Social Security and Services, *The National Plan of Action for Combatting Human Trafficking: Strategic Framework 2013 – 2017, 2014*, page 7.

¹²⁰ Ibid.

¹²¹ Article 10 of the Palermo Protocol.

¹²² Ibid, page 8.

Reducing Fraudulent Employment Opportunities: The NAP requires the Kenyan government to monitor and regulate employment and recruitment agencies to ensure best practices are adhered to, and to detect potential gaps in recruitment processes that could be exploited by traffickers.¹²³

B. Protection-

Article 6 of the Palermo Protocol makes provisions for the protection of victims of human trafficking and requires states to implement mechanisms to ensure the protection of the rights of victims of human trafficking.¹²⁴ Additionally, PART III and V of the 2010 CTIP Act also make provision for the protection of the rights of victims and survivors of human trafficking. The protection plan under the NAP is centred around the 3Rs (Rescue, Rehabilitation and Reintegration). Activities divided along these themes include:

Direct Assistance: According to the NAP, providing direct assistance should be aimed at the development of mechanisms to facilitate the recovery and empowerment of victims. Additionally, the implementation of these develop mechanisms to provide direct assistance to victims should be based on the primacy of the principle of the best interest of the victim. This means that action should only be taken when it is beneficial to the victim, and it safe and legal to act.¹²⁵ Victim protection activities include:

- Build and fund the running of shelters and safe homes for identified victims of both child and adult human trafficking.
- Develop and disseminate national guidelines for identification of victims.
- Map out existing support services available to victims of trafficking and develop national victim referral mechanisms.
- Operationalise Section 22 of the 2010 CTIP Act by funding the National Assistance Trust Fund for victims of trafficking.

Capacity Building for Service Providers: Kenya relies on partnerships between civil society and the government to provide a wide range of services to victims of human trafficking. The NAP requires the Kenyan government to

- Conduct assessments and trainings for duty bearers and different stakeholders in counter trafficking while paying special attention to trafficking hotspots in the country.¹²⁶

C. Prosecution-

The protection component of the NAP acknowledges the international nature of trafficking and the need for international and regional cooperation to counter trafficking. In recognising the international nature of trafficking, the NAP also notes the importance of developing strong and effective systems to enable

¹²³ Ibid,

¹²⁴ Article 6 of the Palermo Protocol.

¹²⁵ Ibid, page 9.

¹²⁶ Ibid

law enforcement officers, judiciary and prosecution take a rights-based approach to investigation and prosecution of trafficking cases.¹²⁷ To achieve this, the following activities were suggested:

- a. Strengthening Legislative Frameworks: This includes the development of operational regulations to implement the 2010 CTIP Act.
- b. Operationalization of the Counter Trafficking in Persons Act: Operationalization of the CTIP Act in building the capacity of prosecutors and judicial officers on the Act.
- c. Data base on Case law and research: Development and compilation of human trafficking case law on issues related to trafficking in persons.¹²⁸

3.3 Prosecutions of Trafficking Crimes in Kenya

According to the US State Department Trafficking in Persons Report 2020, the Kenyan government prosecuted at least 22 individuals under the trafficking law in 2019, compared with at least 33 individuals for trafficking in 2018. Courts convicted at least three defendants under the Counter-Trafficking in Persons Act and sentenced them to 1.3 million shillings (\$12,840) fine or 15 years' imprisonment, 2.3 million shillings (\$22,720) fine or 30 years' imprisonment, and 3.4 million shillings (\$33,580) fine or 30 years' imprisonment respectively. This was a decrease from courts convicting 7 defendants for trafficking and 12 defendants for trafficking-related crimes in 2018.¹²⁹

Caselaw indicates that prosecutorial and judicial handling of trafficking cases is sometimes weak. Convictions have been overturned on appeal for insufficient evidence presented at trial¹³⁰ and failing to properly plead facts that would otherwise be present.¹³¹ The judiciary may also be in need of further training, as in one 2018 case the judge ruled that “convincing” a young boy to travel to another town for informal labour did not amount to “coercion” within the meaning of the 2010 Act, and so overturned the trafficking conviction.¹³²

¹²⁷ Ibid, page 10.

¹²⁸ Ibid

¹²⁹ US State Department, Trafficking in Persons Report, 2020, p.292.

¹³⁰ *Muhammad Asif v Republic of Kenya*, Criminal Appeal no. 82 of 2017. Available here: <http://kenyalaw.org/caselaw/cases/view/140413>

¹³¹ *Bernard Onyandi v Republic of Kenya*, Criminal Appeal no. 24 of 2016. Available here: <http://kenyalaw.org/caselaw/cases/view/162737>

¹³² *Eli Marumbu Wanyo, v Republic of Kenya*, Criminal Appeal no. 117 of 2018. Available here: <http://kenyalaw.org/caselaw/cases/view/180358>

4.0 International Human Rights Law focus on Kenya

4.1 Concluding Observations of the CEDAW Committee (5th April 2011)

CEDAW/C/KEN/CO/7¹³³

In the 2011 CEDAW Committee concluding observations on Kenya, the committee commented on trafficking for sexual exploitation and prostitution in Kenya. Drawing attention to trafficking of women for sexual exploitation and prostitution, the committee acknowledged the enactment of the CTIP Act and the efforts of the Kenyan government in raising awareness on and combating sex tourism and child prostitution. The Committee also expressed concern about women entering into commercial sex work to support themselves and their families as a result of poverty, but the law criminalises prostitution while punishing the supply and not the demand side.¹³⁴

The Committee urged the Kenyan government to fully implement article 6 of the 1979 Convention, including through:

“Effectively implementing the new legislation on trafficking, ensuring that perpetrators are punished and victims adequately protected and assisted;

Increasing its efforts at international, regional and bilateral cooperation with countries of origin, transit and destination through information exchange in order to prevent trafficking and harmonize legal procedures aimed at the prosecution of traffickers;

Conducting comparative studies on trafficking and prostitution to identify and address their root causes in order to eliminate the vulnerability of girls and women to sexual exploitation and traffickers and facilitate recovery and social integration of victims;

Pursuing a comprehensive approach in addressing the question of prostitution, including exit programmes for women who wish to leave prostitution and legislation to sanction the demand side; and

Adopting a comprehensive action plan to address trafficking and sexual exploitation of women and girls and ensure the allocation of sufficient human and financial resources for its effective implementation, including collection of disaggregated data, and to include such data in its next periodic report.”¹³⁵

¹³³ Concluding Observations of the CEDAW Committee (CEDAW/C/KEN/CO/7), 2011.

¹³⁴ Ibid, para 27.

¹³⁵ Ibid, para 28.

4.2 Concluding Observations of the Committee on the Rights of the Child (21st June 2016) CRC/C/KEN/CO/3-5¹³⁶

In 2016, the Committee on the Rights of the Child released their concluding observations on Kenya and made specific recommendations on trafficking.

The committee expressed concern about the wide prevalence of child labour, including the commercial sexual exploitation of children and child trafficking for labour exploitation purposes.¹³⁷ The committee further recommended that the Kenyan government adhere to the UN Guiding Principles on Business and Human Rights to ensure effective regulation of the practices of businesses in relation to the right of children.¹³⁸

The committee also expressed serious concern about killings and trafficking of children with albinism for body parts.¹³⁹ The committee urged the Kenyan government to take the following steps

- a. Adopt a comprehensive strategy, including awareness-raising, to fully ensure the immediate and long-term protection of children with albinism and to address the root causes of the violence they suffer;
- b. Strengthen awareness-raising campaigns against superstitious beliefs concerning children with albinism;
- c. Expedite the investigation and prosecution of all cases involving children with albinism so that no perpetrator can escape with impunity and provide the victims with rehabilitation and redress.¹⁴⁰

The committee also noted the prevalence of economic exploitation of children in child labour and trafficking through activities such as; illicit drug trafficking, begging and scavenging; and increasing reports of employment of children as domestic workers.¹⁴¹

Finally, the committee urged the Kenyan government to better implement the CTIP Act.¹⁴²

¹³⁶ Concluding Observations of the Committee on the Rights of the Child (CRC/C/KEN/CO/3-5), 2016.

¹³⁷ Ibid, para 19(c)

¹³⁸ Ibid, para 20(c)

¹³⁹ Ibid, para 25

¹⁴⁰ Ibid, para 26.

¹⁴¹ Ibid, para 71.

¹⁴² Ibid, para 74.

4.3 Concluding Observations of the Human Rights Committee (31st August 2012) CCPR/C/KEN/CO/3¹⁴³

In 2012, the Human Rights Committee released their concluding observations on Kenya and made specific note on trafficking in persons especially people living with albinism.¹⁴⁴ The Committee urged the Kenyan government to:

“continue to strengthen its efforts to eradicate trafficking in persons by raising awareness among the public and relevant stakeholders, particularly in the hospitality industry, regarding the problem of trafficking in persons. Furthermore, the State party should vigorously pursue efforts aimed at ensuring that alleged perpetrators are prosecuted and, if convicted, punished with appropriate sanctions, and that the victims are adequately compensated.”¹⁴⁵

¹⁴³ Concluding Observations of the Human Rights Committee (CCPR/C/KEN/CO/3), 2012.

¹⁴⁴ Ibid, para 17.

¹⁴⁵ Ibid, para 18.

5.0 Practice and Implementation Gaps in Kenya's Anti-Trafficking Framework

In response to the prevalence of child trafficking, the Kenyan Government has adopted domestic legislation in addition to the ratification of international human rights and anti-trafficking legislation. The Government has also adopted a wide range of policy frameworks to counter human trafficking in the country. Despite the wealth of adopted legal and policy measures, human trafficking continues in Kenya. This can be attributed to weaknesses in anti-trafficking practice, and legal and policy implementation gaps.

In 2011, the Kenyan Ministry of Foreign Affairs issued a directive requiring foreign companies or employment agencies to submit information regarding employment openings (such as remuneration, type of job offered and terms of service) to Kenyan recruitment companies before hiring any Kenyans.¹⁴⁶ The Kenyan Government has also completed bilateral labour agreements with the UAE, Saudi Arabia and Qatar and was reported in 2019 to be in negotiations on bilateral agreements with Uganda, Jordan, Lebanon, Oman, and Kuwait.¹⁴⁷ Additionally, the Government has also implemented a system for regulating and licensing labour recruitment agencies.

Despite these efforts, media and other NGO reports continue to highlight cases of exploitation of Kenyans in the Middle East, and unregistered and unlicensed recruitment agencies continue to operate with relative freedom within Kenya.¹⁴⁸ Returned victims have claimed that upon arrival, signed labour contracts are swapped for newer contracts mostly written in Arabic, which they are forced to sign without having access to interpreters.¹⁴⁹

Following recommendations of the NAP on taking a victims' rights approach to counter trafficking, Kenya adopted the Victim Protection Act in 2014¹⁵⁰ to support and operationalize the protection component of the CTIP Act. The Victim Protection Act aims to make it easier to secure convictions for trafficking cases while ensuring respect for victims' rights.¹⁵¹ However as aforementioned, the extent to which the Victims Protection Act is being implemented is unknown.

In 2016, the Kenyan government launched the National Migration Coordination Mechanism (NCM), a government led interagency coordination platform responsible for national migration issues in Kenya. The NCM is charged with the responsibility of facilitating interagency coordination, collaboration, and information-sharing on migration concerns at the national level.¹⁵²

¹⁴⁶ US State Department, Trafficking in Persons Report, 2011, page 207.

¹⁴⁷ US State Department, Trafficking in Persons Report, 2019, page 273.

¹⁴⁸ Daghar (n 14) page 4.

¹⁴⁹ Ibid, page 7.

¹⁵⁰ Kenyan Victims Protection Act, 2014.

¹⁵¹ Expertise France, (n 1), page 17.

¹⁵² Ibid, page 18.

The Government has also begun funding and utilising the National Victim Assistance Trust Fund for Assisting Victims of Trafficking. Additionally, the National Referral Mechanism has been supported and funded as well. However, according to the 2020 US TIP Report, despite the continuous funding of the trust fund, the first disbursement of funds to victims occurred as a result of a lawsuit. This raises serious questions of corruption, embezzlement, and accountability of government anti-trafficking officials. Furthermore, there have been reports of the lack of implementation of the NRM, which shows inconsistencies in Kenya's anti-trafficking approach.¹⁵³

The Government has also been reported to partner with NGOs to identify and refer child victims of human trafficking to care services. Child victims and survivors of human trafficking have been placed in children's homes and the Government has taken steps to ensure the provision of support services.¹⁵⁴ Despite this, the Government has been criticised for failing to provide adequate protection to foreign nationals trafficked into Kenya.

Efforts by the Kenyan Government to ensure the safe and orderly repatriation of Kenyan victims and survivors of human trafficking abroad has increased over the years. In addition to signing bi-lateral labour agreements, the Kenyan Government through the Ministry of Labour has also assigned labour attaché offices to Kenyan missions in Qatar, the UAE, and Saudi Arabia. Labour attachés reportedly advocated for the rights of Kenyan migrant workers in host countries, helped resolve workplace disputes, and also partnered with licensed employment agencies to help Kenyans find safe job opportunities.¹⁵⁵

A National Employment Authority (NEA) was created by the Government in 2016 with the mandate to regulate labour migration and other related matters. The NEA published a list of accredited recruitment agencies in Kenya as well as implementing e-recruitment platform for the recruitment and placement of Kenyans to jobs in Saudi Arabia. The NEA has also conducted predeparture trainings for labour migrants before departure to the Middle East.¹⁵⁶

The Government has also collaborated with NGOs and other human trafficking stakeholders to conduct training activities and provide technical support for government officials such as immigration officers, judges, prosecutors and law enforcement officials on the identification, investigation and prosecution of human trafficking cases. However, understanding of human trafficking and the interpretation of the CTIP Act remains problematic. The CTIP Act allowing fines in place of prison terms for perpetrators of human trafficking is contrary to the provision of international law and creates gaps that can be exploited by human traffickers.

Despite increased training of officials on anti-trafficking, government officials reportedly violated the non-punishment principle as reports of the US State Department show that Kenyan authorities penalise

¹⁵³ US TIP Report (n 6) page 293.

¹⁵⁴ Ibid.

¹⁵⁵ Daghar (n 14) page 9.

¹⁵⁶ US TIP Report (no 6) page 295.

trafficking victims for acts committed as a result of being trafficked. The report further explains that trafficking victims were punished for immigration violations, shooting pornography and other commercial sex crimes.¹⁵⁷

Furthermore, Section 11(3) of the 2006 Refugee Act protects asylum seekers or refugees who have arrived Kenya through irregular means from being detained or penalised.¹⁵⁸ However, Section 11(1) also requires that irregular migrants present themselves before Kenyan authorities immediately after entry or within 30 days of entry to declare their wish to seek asylum. Where no report is filled, the immigrant will be liable to a fine of 20,000 Kenyan Shillings or imprisonment of not more than 6 months, or both.¹⁵⁹ The provision of this law can result in the re-victimisation of victims of trafficking, who have been trafficked into Kenya, or asylum seekers who after having agreed to be smuggled into Kenya to seek asylum, find themselves in trafficking situations and are unable to present themselves before a commissioner in time.

Claims of corruption and collusion have been levelled at Kenyan government officials. According to the US TIP Report, bribes are often paid by traffickers to police officers to warn them of impending anti-trafficking operations and investigations.¹⁶⁰ This has been reported to be common in the coastal areas. Other NGO reports have highlighted the complicity of government officials in the procurement of falsified identity documents.¹⁶¹

¹⁵⁷ Ibid, page 294.

¹⁵⁸ Section 11 (3) of the 2006 Refugee Act.

¹⁵⁹ Section 11(1) of the 2006 Refugee Act.

¹⁶⁰ US TIP Report (no 6) page 293.

¹⁶¹ Daghar (n 14) page 5.

6.0 Conclusions

The primary objective of this Brief was to explore the human trafficking phenomenon in Kenya and to further map out the legal and policy response of the Kenyan Government. As has been highlighted throughout this Brief, there is a high prevalence of human trafficking in Kenya. Human trafficking in Kenya is multifaceted, occurring on multiple fronts and affecting a wide population group.

Kenyans are trafficked both within Kenya and abroad to other countries, especially the Middle East. However, transnational trafficking to the Middle East is the most identified form of trafficking, followed by trafficking of children in the travel and tourism sector, which is internal. Kenya's political and economic position in East Africa also makes it a suitable destination for traffickers to operate in as well as a suitable transit route for traffickers *en route* to South Africa or the Middle East.

The political instability in some countries in the region has seen the number of refugees in Kenya rise over the years. Forced displacement within Kenya has also contributed to the rise of internally displaced populations within Kenya. The desperation that these situations create increase the risks of vulnerability of forced migrants and other displaced persons to exploitation by human traffickers.

The Government has taken certain steps to eliminate human trafficking within Kenya. The ratification of important international anti-trafficking and human rights legislation has been bolstered by the adoption of domestic anti-trafficking legislation that is to a considerable extent consistent with international law provisions. The Government has also implemented a wide range of policy measures to further strengthen its anti-trafficking efforts.

Although Kenya has made considerable efforts in the fight against human trafficking, inconsistent application of standards and weak practices has contributed to developing a climate of impunity that enables human trafficking to thrive in the country.

7.0 Recommendations

Reports of corruption of Government officials in human trafficking negatively impacts on the efforts of the Kenyan Government. This is also exacerbated by the failure to prosecute or convict suspected or accused officials. The Government should increase the investigation of allegedly complicit officials and further prosecute and subsequently convict any guilty parties.

Continue to cooperate with civil society and other anti-trafficking stakeholders in the provision of support services to victims of trafficking. The Government should also increase its support both financially and otherwise to NGOs that are working in human trafficking.

The delay in the implementation of the new NAP could negatively impact anti-trafficking activities in the country. The new NAP that has been developed should be adopted and all anti-trafficking activities should be streamlined with its provisions.

Fully utilise the National Referral Mechanisms and train law enforcement and other government officials on the identification of victims of trafficking in need of care services, especially victims of transnational human trafficking that have been repatriated from destination countries.

The protection of victims and survivors of human trafficking during trial and prosecution of offenders is important. The Government should ensure the full implementation of the Victims Protection Act as well as promote victim protection procedures and services during legal proceedings.

Substitution of prison sentences for fines creates gaps that reduce the seriousness of the punishments for human trafficking. Furthermore, reports of lesser sentences being handed out to offenders also limits the deterrent effect that the CTIP Act would normally provide. The Government should make efforts to close those loopholes and gaps in its anti-trafficking legislation as well as increase training for criminal justice and law enforcement actors on the proper implementation of anti-trafficking legislation.

In addition to increasing training activities, training activities should also be extended to all levels of the government, including areas beyond urban centres. Government officials in the coastal areas of Mombasa and rural areas should also be included in training activities aimed at identification, investigation, and handling of trafficking cases.

The Government should intensify its regulatory and oversight activities for recruitment agencies operating in Kenya. In addition to publishing lists of licensed and registered recruitment agencies, the Government should also publish lists of unlicensed and banned recruitment agencies.

Although the Government has made commendable steps in creating labour attaché offices in 3 destination countries, the offices comprise of just one government official, which is insufficient considering the number of Kenyans working abroad. The Government should also ensure that offices are created in other destination countries.

Adequate information is a key factor in the fight against human trafficking, hence the Government should continue intensify the conduct of awareness campaigns throughout the country. These efforts should focus on areas where human trafficking has been repeatedly reported such as low income, rural, and underserved communities.

Trafficking in the coastal areas continue to rise despite media reports exposing the practise. The Government should continue to focus on the travel and tourism sector. Engaging with key stakeholders such as hotel and bar owners is also very key to the identification of victims of trafficking for SECTT purposes.

The trafficking of forced migrants in camps and urban areas is mostly overlooked and underreported. These groups have been shown to be more vulnerable than host populations because of the precarious living and social situations that they are faced with. The Government should investigate reports and other

allegations of human trafficking occurring within those populations. Camp officials should also receive training on the identification and investigation of human trafficking cases.

Finally, different factors have been identified as the root causes of human trafficking in Kenya. Factors such as poverty, unemployment, and lack of opportunity have been identified as the major factors promoting both internal and transnational human trafficking in Kenya. The Government should make efforts to address the root causes of human trafficking through job creation schemes, vocational, and skills empowerment programmes, and the provision of livelihood support to youths.