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**PREVENTION IS BETTER THAN CURE: The States Obligation To  
Prevent Child Trafficking**

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for the final examination of the Advanced LL.M. International Children's Rights



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## Executive Summary

Working in the area combating human trafficking for about 8 years has led me into questioning the efficacy of the work that I am doing. Why is it that every report that is produced every year is dammed? The dynamics of child trafficking are changing and even though the driving factors are well known, the need to address them is not addressed comprehensively. This is therefore the inspiration of this thesis, to establish why should the states re-orient the focus on the strategies to end child trafficking? What is the extent of legal obligation of the states to prevent child trafficking, and how can the states, for example, Kenya and Nepal, fulfil their legal obligation?

Chapter one therefore provides a foundation of the topic at hand. It focusses on the intricacies of child trafficking stemming from the compounded definition; manifestation; and the different approaches that are needed to combat it. For example, the differences in definitions of child trafficking adopted by states, as well as the aspect of defining the age of majority which acts as a hindrance to concerted efforts towards preventing child trafficking. This chapter highlights the trends and the drivers of child trafficking, ranging from age, lack of socio-economic opportunities, gender inequalities; domestic violence; amongst other factors that exacerbate the vulnerabilities of children. This is followed by an analysis of the 3P- Prevention, Protection and Prosecution, known as the UN Global Action Plan against Human trafficking and the Sustainable development goals agenda 5.2, 8.7, and 16.2 . This chapter demonstrates that focusing on the reactionary strategies such as protection and prosecution, which are somewhat driven by demand from the international community, leads to an unwinnable situation. By likening child trafficking to a jigsaw puzzle I propose that it requires a thorough approach, one that is focused on prevention, if we are going to make traction towards the fight against it.

Having established thus, the thesis then sets to understand what the legal obligation of the states is towards preventing child trafficking. The second chapter in this regard, focuses on the development of the law towards child trafficking, going as far back as 1904 to the present age. This overview reveals that the states response mechanisms and gendered perspective is based on the initial need for a law to protect girl children and women in Europe who were being trafficked across the international borders for sexual exploitation. As revealed through the travaux préparatoires, these notions have changed overtime. Therefore, the international and regional instruments, require states to protect both girls and boys from child trafficking. The second chapter posits that the Palermo Protocol, the CRC and the ACRWC impose a positive obligation on the state towards preventing child trafficking. The positive obligation can be deduced as substantive requiring the development of policies and programs to ensure that states deal with the drivers of child trafficking and procedural obligations ensuring that require states to undertake administrative measures to operationalise the said programs. These obligations have been buttressed by the CRC Committee, the African Committee of experts, and the European Court of Human Rights.

To offer a contextualised discourse on the subject matter, Chapter three offers a synopsis into the child trafficking situation in Nepal and Kenya, which are both signatories to the CRC and the Palermo Protocol. The two countries present a unique angle to child trafficking, in that while Kenya is an origin, transit and destination country, Nepal is mostly a country of origin and transit. In fact, in the recent past, a number of victims from Nepal have been found working in Kenya's entertainment clubs. The synopsis shows that despite enactment of laws and policies on child trafficking, the states' actions remain more reactionary as opposed to proactive, in fact as documented in their plans and programs minimal emphasis is made towards prevention. This therefore lays the foundation for the argument of the need to reorient their plans and programs to refocus on child prevention strategies. To this end, the chapter offers a two-pronged approach dubbed prevention is better than cure. This entails taking actions towards reducing vulnerabilities through examples provided by CRC Committee in General comment Number 13, secondly by applying transit border monitoring mechanisms to intercept child trafficking, a project that was started in Nepal but is currently being implemented in various countries with tremendous

success. These proposals do not claim to be a fail-proof plan to prevent child trafficking, instead, they offer to raise awareness of some aspects of prevention that States like Kenya and Nepal which are countries of origin, can do to develop a comprehensive prevention-oriented approach to child trafficking.

**Key words:**

*Child trafficking, Vulnerability, Sexual Exploitation, Child Labour, Poverty, Prevention*

## **Overview of the main Findings:**

### **Prevention is better than Cure.**

Ending child trafficking as is the motto of various campaigns and achieving SDG agenda, 5.2,8.7 and 16.2 will certainly not be done by waiting to see how many trafficked children are rescued, and the number of cases brought to court or number of perpetrators found guilty. This paper asserts that it can only be achieved by a re-orientation of the strategies, from responding to preventing.

To make a case for this, the paper first established the states positive obligations towards preventing child trafficking. Article 9 of the Palermo protocol, Article 19 and 35 CRC, Article 1 and 29 of the African Charter and Article 4 of ECHR, give rise to both substantive and procedural duties of the state towards. The substantive obligation is to develop and/or strengthen existing policies and programs and the procedural obligation is to ensure that they are addressing demand and the factors that make children vulnerable to trafficking. The states are required to go beyond simple acknowledgment of trafficking by ratifying treaties and domesticating them, but making tangible progress towards child trafficking, including administrative measures.

To fulfil the said obligations, the thesis proposes a two-pronged approach towards preventing child trafficking, first, is in reducing vulnerabilities through examples provided by CRC Committee in General comment Number 13 . Secondly is applying transit border monitoring mechanisms to intercept child trafficking, a project that was started in Nepal but is currently being implemented in various countries with tremendous success.

### **1. Minimizing Vulnerabilities to child trafficking:**

#### a) Strengthening household economies

Social economic inequalities have a ripple effect on the lives of children, best described by the butterfly effect analogy. Children born in economically challenged families are susceptible to domestic violence, lack of education, lack of access to social assistance and their quality of life is severely diminished, all of which increase vulnerabilities to child trafficking. In this regard, the CRC committee through GC.13 recommends that state integrate child caregiving and protection measures into mainstream of social policy by providing financial and social support to families at risk. In this regard, this paper proposes that cash transfer programs is one of the tried and tested methods of strengthening household economies.

#### b) Education

The right to education is central to the realisation of the rights of the child. It is the way through which children find their voice and agency. The CRC committee urges states to put in place educational measures that addressing attitudes, traditions, customs, and behavioural practices which condone violence against children. This is important as it has been established that child trafficking is sometimes driven by traditions such as child marriage and child labour. The form of education here, however, is not limited to institutional and formal education, but also includes age-appropriate knowledge on life skills, self-protection and on specific risks including those associated with the technological advancements. This paper asserts that seeing as child victims of trafficking are mostly those who cannot access formal education, the states must therefore adopt education measures that are available, accessible, and adaptable for all categories of children.

#### c) Coordination, cooperation, and budgetary allocations

In responding to organised crime such as child trafficking, there is need to for the state and its partners to be organised, otherwise the cracks in the systems and the silo mentality discussed in this thesis increases opportunities for children to be trafficked. An effective prevention strategy requires adequate budgetary allocation as provided in para. 40 of the GC.13. The thesis further recommends that all prevention measures ought to be designed into a comprehensive national coordinating framework with prevention as its central focus.

## **2 Transit Border Monitoring**

The second proposed approach is anchored on Article 11 of the Palermo protocol, which requires states to strengthen border controls as may be necessary to prevent trafficking in persons. To this end, the paper proposes that States ought to adopt the transit monitoring as tool to prevent child trafficking . It is premised on the fact that it is possible and preferable to identify victims and potential victims of trafficking, both children and adults while they are on transit and before they are exploited. This approach has a three-step process consisting of: (a) of visual identification of suspicious signs of trafficking, (b) of a conversation with possible victims or traffickers aimed at obtaining responses to specific questions, through a form known as Intercept record form, and (c) verification of the responses given through independent sources. The proposed concept is based on a project by Love Justice International (LJI) which, has since its inception 11 years ago, has intercept over 24,000 individuals, preventing them from being trafficked.

**List of Abbreviations**

- ILO-International Labour Organisation  
ACRWC- African Charter on the rights and the welfare of the child  
ACERWC- African Committee of Experts on the rights and the welfare of the child  
CRC- UN Convention on the rights of the Child  
ECHR- European Convention on Human Rights  
ECtHR- European Court on Human Rights  
US TIP- US Trafficking in Persons (report)

## Introduction

A 2016 report on forced labour by the ILO, estimated 40.3 million victims are trapped in modern-day slavery<sup>1</sup>. The 2020 UNODC Global Report on Trafficking in Persons<sup>2</sup> estimates that about one third of the overall victims of trafficking in persons are children, and that out of every 10 victims of trafficking detected globally, two were girls. Children are trafficked for various forms of exploitation. For girls, it is sexual exploitation, and for boys, it is mainly forced labour.<sup>3</sup> Children fall prey to the hands of traffickers as a result of their vulnerability, exacerbated various factors, including poverty, gender inequalities, harmful cultural practices, instability within their homes and lack of access to economic, social and cultural rights. All of these factors have been heightened by the COVID-19 pandemic, which as a result of the various measures taken by the government in a bid to curb it, have increased the rate of poverty, which has a direct correlation with child labour.<sup>4</sup> This said, the crime of human trafficking is one of the most dynamic and complex crimes which takes place in a wide variety of contexts, therefore rendering it difficult to detect<sup>5</sup> and to combat.

To tackle its multi layered nature, there have been various strategies at the international, regional and national levels to combat human trafficking. In 2010, the General Assembly adopted the United Nations Global Plan of Action to Combat human trafficking<sup>6</sup> which urges governments worldwide to take coordinated and consistent measures to try to defeat it through a three-pronged approach, famously dubbed as the 3Ps: Prevention, Protection and Prosecution. Further, the UN member states committed through the Sustainable development goals agenda 5.2, 8.7 and 16.2 to take immediate and effective measures to eradicate forced labour, modern slavery, human trafficking, child labour, abuse, exploitation, and all forms of violence against children by 2030. These plans have since become guiding tools through which states develop their action plans and measure their progress in combating child trafficking. Nonetheless, in adopting the said measures, a quick study of the implementation of action plans reveal that states have primarily focused on the criminalization and investigative aspect of combating child trafficking with a subpar focus on preventing trafficking. Whilst this approach has been somewhat effective, it is crucial to note that it has been 20 years since The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo protocol) was passed, and five years since UN Member States committed to taking action against modern slavery and human trafficking by 2030, and the worst forms of child labour by 2025. Yet, the global incidences of child trafficking are rife and the means through which children are trafficked are diversifying, as indicated in various reports. This therefore begs the question, are the efforts by the international, regional community and the states “*really working*” (emphasis mine)? Is it time to change the strategy? In support the ILO director during the launch of the ILO report stated that,

*“...the world won’t be in a position to achieve the Sustainable Development Goals, unless we dramatically increase our efforts to fight these scourges. These new global*

<sup>1</sup> International Labour Office (ILO), Geneva, Global estimates of modern slavery: Forced labour and forced marriage 2017

<sup>2</sup> UNODC, Global Report on Trafficking in Persons 2020 (United Nations publication, Sales No. E.20.IV.3): at 31

<sup>3</sup> Ibid at 33

<sup>4</sup>International Labour Organization and United Nations Children's Fund, 'COVID-19 and Child Labour: A time of crisis, a time to act', ILO and UNICEF, New York, 2020 at 8

<sup>5</sup> <https://migrationdataportal.org/themes/human-trafficking> accessed on 18th May 2021

<sup>6</sup>United Nations Global Plan of Action to Combat Trafficking in Persons A/RES/64/293, 12/08/2010

*estimates can help shape and develop interventions to prevent both forced labour and child labour<sup>7</sup>.*

The said approaches are embedded within international, regional and national laws. The Palermo protocol was the first law to address the crime of trafficking in persons, in its totality. It provides the definition of child trafficking in Article 3(c) as the recruitment, transportation, transfer, and harbouring of a minor for the purpose of exploitation. It further enunciates states' obligations towards combating trafficking in Article, 5-13, through putting in place mechanisms to criminalize and investigate trafficking, to protect and support victims and to prevent it by addressing factors that increase vulnerabilities to trafficking. The UN Convention on the Rights of the Child (CRC), which is the 'of children rights', also lays out legal obligations of the states towards combating child trafficking. Articulated in Article 19, 32, 34, and 36 of the CRC, the states are obligated to protect children from all forms of violence and exploitation. Towards prevention, A. 35 of the CRC obligates states parties to: "[T]ake 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." A clear picture of what prevention entails is captured under the General comment Number 13<sup>8</sup>, where the Committee on the Rights of the Child denotes that Child trafficking is a form of violence that states have an obligation of due diligence.

Despite the adoption of the international laws, states have been reluctant to view the issues of child trafficking from the perspective of a child and vulnerabilities that children who are at risk are exposed to; discrimination and/or migration issues. States view trafficking in persons as a problem requiring aggressive criminal justice response and therefore address it as such<sup>9</sup> with minimal efforts going into addressing the factors that make the children vulnerable to trafficking. The problem with such efforts is that they firstly deal with the aftermath of child trafficking.<sup>10</sup> This means that by the time the state has acted, the child is under the control of the trafficker, and most often than not, he or she is already exploited.

In this regard, the paper will seek to examine the chasm in the strategies towards ending child trafficking, premised on the fact that the states' current actions are "after the fact". The analysis that follows can be construed to contribute to a wider discourse on the need for a reorientation of strategies towards ending child trafficking, beyond migration control and crime prevention. The consistent focus of states towards only responding to child trafficking is worrying and quite aptly a violation of the rights of Children. The state has the ultimate responsibility to ensure the rights of the child are fulfilled, respected and protected. This paper asserts that failure of the states to prevent child trafficking by addressing the vulnerabilities is a failure to fulfil the rights of the child, particularly economic social and cultural rights, and a failure to protect the child from violation by 3<sup>rd</sup> parties. The paper posits that due to the intricacies of child trafficking, a comprehensive, prevention-oriented approach is needed to make real progress towards ending child trafficking. By analysing already existing strategies and the legal obligation to prevent, we can start drawing out some practical measures that the states must undertake towards pre-emptive

<sup>7</sup>Guy Ryder, ILO Director-General [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_574717/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_574717/lang--en/index.htm)

<sup>8</sup> UN Committee on the Rights of the Child (CRC), General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13,

<sup>9</sup> Chuang, Janie, "Beyond a Snapshot: Preventing Human Trafficking in the Global Economy" (2006). Articles in Law Reviews & Other Academic Journals. 1053

<sup>10</sup> David A. Feingold, *Think Again: Human Trafficking*, FOREIGN POL'Y, Sept.-Oct. 2005, at 26, 30 (discussing national and international efforts to prosecute sex traffickers); See also, US TIP report 2019

action, instead of waiting to intervene. This paper will then demonstrate the implementation of said practical approaches towards prevention in Kenya and Nepal.

### **Research questions and methods**

For over a decade, the media has been awash with campaigns dubbed “end Child trafficking”, “stop child trafficking”, or “children are not for sale”, to mention a few. Despite the formulation of policies, awareness initiatives, training and the number of traffickers imprisoned annually, the incidences of child trafficking are not decreasing. Due to the word count, this thesis barely scratches the surface on the question of the states’ legal responsibility towards preventing child trafficking. In this regard, the thesis will address the following research questions:

Why Should the states re-orient their strategies towards ending child trafficking? What are the states’ international legal obligations towards prevention of child trafficking? What do the obligations mean for Kenya and Nepal, and what are the practical solutions that can be applied towards fulfilling them?

To tackle the research questions, the paper shall employ a doctrinal approach through analysing social legal discourses on the subject of child trafficking and a hermeneutical analysis of legislative texts. Conducted through desk review, the research will include analysis of the law, case law, journal articles, NGO reports, Government reports and International organization reports on the complexities of fight towards ending child trafficking.

Chapter one will discuss the intricacies of child trafficking, stemming from the compounded definition; manifestation; and the different approaches that are needed to combat it. The chapter will lay the foundation of the thesis by elaborating the trends and driving factors of child trafficking. Followed by an analysis of the Prevention, Prosecution, Protection and Partnership (3P) strategy and the Sustainable development goals, in a bid to establish if the form a fool proof plan to defeat the scourge that is child trafficking.

Chapter two provides an analysis of the legal framework and aims to establish the obligations of the states towards preventing child trafficking. In discussing the extent of the states’ obligation towards combating child trafficking through prevention, this chapter will view the development of child trafficking laws, and the application and interpretation of the Palermo protocol through the lens of child rights, enunciated in the UNCRC and other regional instruments.

To offer a contextualised discourse on the subject matter, Chapter three will analyse the child trafficking situation in Nepal and Kenya, which are both signatories to the CRC and the Palermo Protocol. The two countries present a unique angle to child trafficking, in that while Kenya is an origin, transit and destination country, Nepal is mostly a country of origin and transit. In fact, in the recent past, several victims of trafficking from Nepal have been found working in Kenya’s entertainment clubs. This analysis is to seek to establish the need to reorient their plans and programs to refocus on child prevention strategies. In the end, the seeks to raise awareness for mechanisms that states can adopt to prevent child trafficking. A two-pronged approach dubbed prevention is better than cure founded on the General comment Number 13 and Article 11 of the Palermo protocol will be proposed.

## Background

"Poverty is the greatest injustice"<sup>11</sup> This statement is justified by simply taking a look at the world around us. As observed by Gary Haugen, "Poor people by virtue of their poverty are not only susceptible to hunger, disease, homelessness, illiteracy and a lack of opportunity, they are also susceptible to violence."<sup>12</sup> The forms of violence referred to here include sexual exploitation, forced labour, police brutality, assault, amongst others. This is in congruence with the various reports that have been issued concerning trafficking of persons. UNODC reports that people in economic need, children in dysfunctional families, and persons who are marginalized are among those susceptible to traffickers. In addition, the COVID-19 pandemic has amplified social and economic inequalities and hence increased the amount of people at risk of human trafficking.<sup>13</sup>

Human trafficking, also referred to as modern slavery, where men, women and children are reduced to commodities to be bought and sold to the highest bidder, is pernicious. Human trafficking, is an amalgamation of many crimes inflicted on a human being. The then General assembly president referred to trafficking in persons as: a heinous crime, robbing the men, women and children of their safety, freedom and dignity<sup>14</sup>. What is disconcerting and repugnant is that the perpetrators of the offence target, not just the socio-economically vulnerable adults but also children of all ages, especially those coming from poor households, dysfunctional families and or those who are abandoned with no parental care.

Though there is difficulty in measuring human trafficking, as there is no one source that provides comprehensive information on all forms of slavery, various organizations have attempted to collate and package data on human trafficking. The ILO estimated that 40.3 million individuals were victims of trafficking on any given day in 2016. Women and girls were largely over-represented making up to 71% of the victims.<sup>15</sup> The UNODC 2020 further showed that out of 10 victims, five were adult women, two were girls under the age of 18 years, and 20% were adult men.<sup>16</sup> It is important to note however that the profile of victims changes in different parts of the world. For example, there was a higher prevalence of child trafficking in sub-Saharan Africa, as compared to Eastern Europe and Central Asia where the shares of adults victims were greater<sup>17</sup>.

The purposes of trafficking are endless, hence the prevalence and profitability of the crime. Human trafficking earns a profit of \$150 billion, where \$90 billion is from commercial sexual exploitation and \$51 billion is from forced economic exploitation including domestic work, agriculture and other economic activities.<sup>18</sup> Women are mostly trafficked for sexual exploitation purposes and men for forced labour, this

<sup>11</sup> Mahatma Gandhi

<sup>12</sup> Garry Haugen (2013) The Locust effect at 50

<sup>13</sup> UNODC, Global Report on Trafficking in Persons 2020 (United Nations publication, Sales No. E.20.IV.3). at 18

<sup>14</sup> See Secretary-General Ban Ki-moon speech: <https://www.unodc.org/unodc/en/frontpage/2010/September/un-launches-global-plan-of-action-against-human-trafficking.html>

<sup>15</sup> International Labour Office (ILO) & Walk Free 2017, Methodology of the global estimates of modern slavery: Forced labour and forced marriage, ILO. Available from: [http://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_586127/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/publications/WCMS_586127/lang--en/index.htm). [7 February 2018]

<sup>16</sup> Supra note 2 at 31-33

<sup>17</sup> Supra note. 2

<sup>18</sup> Profits and poverty: the economics of forced labour / International Labour Office. - Geneva: ILO, 2014

is similar when it comes to child victims of trafficking.<sup>19</sup> Besides the horror stories told in movies like ‘taken’ and “trafficked”, child victims of trafficking not only find themselves in containers and brothels, also in households, working for more than 18 hours a day with little or no money to take home. There are young boys in the streets of Nairobi, Dakar, Kathmandu, chasing after cars, asking for “kitu-kidogo” ( Swahili slang for money) to take to the trafficker who has given them a daily target to bring back after a hard day of begging in the streets. Victims of trafficking are young girls who have moved from their homes to the big cities at the behest of a rich auntie or uncle who has promised to take her to school only for her to get there and find herself working as a domestic worker.

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<sup>19</sup> Supra note 2 at 33

## Chapter 1

### Introduction

Child trafficking, like human trafficking, is a complex crime. Its complexity is derived from various aspects: a compounded definition; manifestation; and the different approaches that are needed to combat it. Therefore, it is difficult to identify victims and the multileveled perpetrators through active measures and proposed strategies. Perpetrated by various actors, including organized criminal structures and opportunistic individual traffickers, trafficking of persons can occur within the country or across borders. Whichever the case, the UN, its member states and other international bodies recognize the need to fight this scourge through concerted efforts. Therefore, the UN Global Action Plan Against Trafficking (herein referred to as the Action Plan)<sup>20</sup> proposed the 3Ps approach in 2010 and also made it an agenda in the 2030 Sustainable Development Goals Blueprint. 20 years since the passing of the Palermo protocol<sup>21</sup>, 10 years since the development of the Action Plan and 10 years to go before the world reports whether the Sustainable development goals (SDGs) have been achieved, it seems like *la plus ça change, plus c'est la même chose?* The Palermo protocol has almost reached universal ratification, with 178 state parties, and that most of the countries have also domesticated the law by providing for a specific criminal offence of trafficking in persons.

The primary goal of this chapter is to establish the need for a reorientation of strategies towards child trafficking. The chapter first discusses what does the crime of child trafficking entail, the definition and trends of child trafficking. Thereafter, it will zoom into what fuels it, and finally provide an analysis of the Prevention, Prosecution, Protection and Partnership (3P) strategy and the sustainable development goals, in order to establish its efficacy in fighting the scourge that is child trafficking.

### 1.1 Child trafficking definitions: A jigsaw puzzle

The term child trafficking is foremost intertwined with the human rights discourse and unfortunately lost in a world of human trafficking. Arguably even in scholarship<sup>22</sup> there has been little contribution to the various aspects of the varying manifestations of child trafficking. Nevertheless, where child trafficking is mentioned there is a tendency to define it within the ambit of sex trafficking; particularly involving girls. However, this limited scope of defining child trafficking leaves many children susceptible to exploitation and many perpetrators going scot-free. Take for example the story of Lilian<sup>23</sup> below:

Lilian, a 15-year-old girl from Kenya, was the first child amongst her three siblings born into poverty deep in western Kenya. Lilian would help her mother with odd jobs during the weekend, but she would attend school during the week, albeit she was a bit behind compared to her peers. One evening, as recounted by Lilian, her mother's sister came to visit them and explained to her that she should accompany her to the city, where she would help her auntie with work over the weekend and attend a good school over the week. Excited, Lillian packed her bags and left with her auntie for the city. One year later, a leading organization on matters of trafficking was called

<sup>20</sup> United Nations Global Plan of Action to Combat Trafficking in Persons A/RES/64/293, 12/08/2010

<sup>21</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000

<sup>22</sup> West, Amanda. "Child Trafficking: A Concept Analysis." *International Journal of Social Science Studies*, vol. 4, no. 5, 2016, at 50

<sup>23</sup> Not her real name

by someone who identified as Lilian's neighbour. She reported that she had witnessed Lilian being physically assaulted by the Aunt. In addition, she noticed many times that Lilian would sleep outside and would not be allowed to play with her cousins. The neighbour also reported that sometimes Lillian would be forced by the auntie to take up odd jobs from other neighbours to substitute their income. One day, the neighbour talked to Lillian when she was nursing a wound and crying, only to discover that she was only 15 years of age. This prompted the neighbour to report the matter to the NGO. When Lilian was rescued and the matter taken to the police station, the police officer inquired from the NGO, whether this was a case of child neglect which could easily be resolved at home. Lilian on the other hand seemed scared, and stated that she wanted to go home to her Aunt's house so as not to offend her. She stated that going back to her parents in the village would mean a life of poverty for her.<sup>24</sup> Needless to say, Lilian was rescued and a good Samaritan paid for her school fees. A criminal case was filed against the aunt for child trafficking with purposes of child labour, child neglect and assault.

The excerpt above can be an example of child victims of trafficking, mostly in Africa and in Asia. There is a continuous debate whether such a case is *strictu sensu* child trafficking or a case of child labour? Would the fact that Lilian received a certain amount as a salary change this from child labour to child neglect? Or would this all be determined by the national law? Would the fact that the aunt was helping Lilian and her family negate the exploitation that was taking place? Should the case include cross border movement and include some form of sexual exploitation to amount to child trafficking? These are just some of the questions that have compounded the issue of child trafficking over the years thereby affecting the domestication and implementation of the various international laws on Child trafficking.

Child trafficking has a much broader meaning as defined within the Palermo protocol. Article 3 of the Palermo Protocol defines Human trafficking as:

- a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

From the definition, there are three key elements of trafficking: a) Act- recruitment, transfer, harbouring, or receipt of persons; b) Means, includes use of force, threats, abduction, fraud, deception, abuse of power or vulnerability, and c)purpose of which must be exploitative. The Palermo protocol therefore, distinguishes child trafficking as:

- c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article

The Palermo protocol borrowing from the UN Convention on the rights of the child<sup>25</sup>, first defines the child as a person under the age of 18 and secondly nullifies the aspect of a child's consent regardless

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<sup>24</sup> Excerpt from The CRADLE- The Children Foundation Files

<sup>25</sup> Hereon referred to as the CRC

of the child's own sense of choice or agency.<sup>26</sup> Therefore, elements of action and purpose serve as prerequisites to constitute the offence of child trafficking. Accordingly, child trafficking can be internal, that is within the borders of a country or international provided the purpose meets the exploitation threshold. The purposes provided in Article 3(1) are only a minimum as they could not be exhaustively listed in the protocol.

The first comprehensive definition of child trafficking is quite essential if Lillian's perpetrator is to be held accountable, yet, in a different context and jurisdiction, it presents a challenge. The definition of a child as a person under the age of 18 years is not a universally accepted definition. In fact, the UNCRC acknowledges the state party's variation of the age of majority<sup>27</sup>. In addition, unlike Kenya<sup>28</sup> which blanketly provides that a person under the age of 18 years has no capacity to consent, for some countries the concept of age varies on different acts. For example, the age of sexual consent varies between 13-18 years, the acceptable age of work varies between 13-18 years, regardless of signing onto the International Labour Conventions, the UNCRC or the Palermo Protocol. For example, in Zambia, the age of majority is 18 years, the age sexual consent is 16 years and the age of work is 15 years old<sup>29</sup>. In Nepal, whereas the age of majority is 18 years, the labour laws put the limit of work at 14 years.<sup>30</sup> The differences in national laws on the age of majority, consent creates a competition between the enforcement of national laws and the Palermo protocol. This affects the identification of child victims of trafficking as well as action taken against the perpetrators. The concept of child trafficking can also resemble a jigsaw puzzle<sup>31</sup>, with many aspects pieced together. This results from the fact that child trafficking is a process rather than one event, and the fact that the criminality of the exploitation is primarily determined by the state party's definition of the offence. For instance, what one country would consider child marriage or child labour might not be defined as a crime in another. Kotiswaran<sup>32</sup> observes that there is a competition between Article 3 of the Palermo protocol and other pre-existing transnational legal orders on slavery, servitude and forced labour, which have lead to poor enforcement. In addition, it creates loopholes for perpetrators of child trafficking providing leeway to traffic their victims to other countries where the criminal law is not as stringent. The trends of child trafficking reveal that it is a moving target with a critical need for a dynamic response mechanism.

## **1.2 Child trafficking trends: Children are 3 out of 10 of the people being trafficked.**

The issue of trafficking is quite old, that said, finding reliable, high quality and comprehensive data remains a challenge.<sup>33</sup> This stems from the complexities of trafficking elucidated in the previous part along with uncoordinated data collection and methodical problems<sup>34</sup>. Despite these caveats,

<sup>26</sup> Bovarnick, Silvie. "How do you define a "trafficked child"? A discursive analysis of practitioners' perceptions around child trafficking'." *Youth and Policy* 104 (2010): at 83

<sup>27</sup> Article 1 UNCRC: For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

<sup>28</sup> Section 2 of Kenya Age of Majority Act, 1974.

<sup>29</sup> see [http://www.africanchildforum.org/clr/Pages\\_EN/Zambia.html](http://www.africanchildforum.org/clr/Pages_EN/Zambia.html)

<sup>30</sup> See, Section 2 (A) of the Nepal Children's Act (1992); Nepal Labour Act (1992)

<sup>31</sup> 87 Youth & Policy No. 104 June 2010 HOW DO YOU DEFINE A 'TRAFFICKED CHILD'

<sup>32</sup> Kotiswaran, Prabha. "Trafficking: A Development Approach." *Current Legal Problems*, vol. 72, no. 1, 2019, at 382

<sup>33</sup> <https://migrationdataportal.org/themes/human-trafficking> visited on 2 May 2021

<sup>34</sup> Rafferty, Yvonne. "Child Trafficking and Commercial Sexual Exploitation: A Review of Promising Prevention Policies and Programs." *American Journal of Orthopsychiatry*, vol. 83, no. 4, 2013 at 560

organizations nationally, regionally and internationally have sought different methods of collecting and collating the data in order to show the magnitude of the problem. For example, ILO estimated in 2016, that on a given day, there were about 40.3 Million people being trafficked.<sup>35</sup> In its 2020 report, UNODC provides that of the number of persons trafficked, Children account for one third of detected victims.<sup>36</sup> UNODC 2020 report notes that the number of child victims has been increasing for the past 15 years to over 30% of the detected victims. However, the numbers differ according to the regions, for instance, children form a higher composition of victims in West Africa, South Asia and Central America. The difference in detection is seemingly related to the income of the country in that countries with low income tend to detect more children compared to high income countries.<sup>37</sup> This observation is key to this paper as it reflects the different trafficking patterns influenced by socio-economic conditions of a country, which serves to highlight the vulnerabilities to child trafficking.

Children are trafficked for various forms of exploitation. Children in low-income countries, particularly in Sub-Saharan Africa, are exploited for forced labour, whilst children in high-income countries are trafficked for sexual exploitation. Differentiated from forced labour, countries where there are more victims of child trafficking is where there is a high prevalence of child labour<sup>38</sup>. This is confirmed by UNICEF and ILO's reports, which indicate that children in the African continent have the highest number of children in labour.<sup>39</sup> Reports show that children are trafficked to work in plantations, mines, quarries, retail settings, and domestic work.<sup>40</sup> Children as young as 12 are trafficked for forced labour into domestic work, brick kilns, small hotels, the garment industry or agriculture. Reports also show that children trafficked for forced labour in agriculture start to work between the ages of six and nine.<sup>41</sup> Children are trafficked for sexual exploitation across the world, but foremost in central America, the Caribbean and East Asia. Girls aged between 14-17 years old appear to be the victims, which is connected to the pattern of sexual and gender-based violence, as well as other forms of violence against women.<sup>42</sup> Beyond forced labour and sexual exploitation, there are also reports of children trafficked for conscription into armed conflict, street begging and child marriage.<sup>43</sup>

### **1.3 Drivers of child trafficking**

Being a \$150 billion profit making crime<sup>44</sup>, human traffickers capitalize on the vulnerabilities of the victims. Vulnerability in human trafficking therefore refers to "a condition resulting from how individuals

<sup>35</sup> Supra note 1

<sup>36</sup> Supra note 2 at 81

<sup>37</sup> Supra note 2 at 82

<sup>38</sup> Child labour is differentiated from Child trafficking for purposes of Forced Labour as defined in the ILO Conventions

<sup>39</sup> See There is a statistical correlation between prevalence of children in labour (ILO estimates) and share of children detected among total victims of trafficking (UNODC) – Pearson's R +0.501, Sig 0,000, N 80 countries. International Labour Organization, Global Estimates of Child Labour. Results and trends, 2012-2016. ILO, Geneva, 2017.

<sup>40</sup> Supra note 2 at .8

<sup>41</sup> 58 Kumari, M. Child labour, a Sociological Study in Haryana, International Research Journal of Social Science, Vol. 2 (8), 15-18 August 2013, at 17.

<sup>42</sup> Supra note 2 at 8

<sup>43</sup> Supra note 2

<sup>44</sup> See Supra note 18

negatively experience the complex interaction of social, cultural, economic, political and environmental factors that create the context for their communities". Vulnerability is not a static absolute state, but one that changes according to context and the capacity for individual response.<sup>45</sup> Relative to adults, children by virtue of their physical and intellectual development are vulnerable to threats to their well-being<sup>46</sup>. This vulnerability leaves children not only prone to various abuses by 3rd parties, but also violation of their rights by their parents or legal guardians who have the primary obligation to protect them. These vulnerabilities are exacerbated by the poor conditions of living, though poverty is normally accompanied by another risk factor. Common causes of vulnerability to child trafficking include, lack of birth registration, discrimination, orphanhood, illness in the family, domestic violence, conflict or natural disasters, traveling alone through smugglers, unregulated informal economy, corruption, amongst others.<sup>47</sup> In addition, ILO's report identifies socio-economic pressures including absence of social safety nets, driving families to not rely on their children's labour or push them to resort to high-risk or coercive forms of credit<sup>48</sup>.

Traffickers exploit individuals experiencing deteriorating economic needs by offering what seems like a solution to the victim's dire economic need. This is not particular to any specific gender or age. A child's vulnerability to trafficking is also connected to the family background. For instance, in an attempt to cope with the dire economic needs, like Lillian from the above case study, families in West Africa, Latin America and South Asia<sup>49</sup> often send children for employment outside their household, thus increasing their risk of the child being trafficked. There is also a link between social economic factors and culture, for example, child marriage. For some families, it is as much a cultural practice as it is a survival tactic; a girl child is married off for material or other benefit. Another practice is sending the boy children to residential religious schools, which are linked to forced begging. Senegal is one of the countries that has been found culpable for not putting measures in place to govern such religious schools, and to ensure children are not exploited through forced begging.<sup>50</sup> Children without parental care also make easy targets for traffickers. Children trafficked for purposes of sexual exploitation make a majority of this category<sup>51</sup>. Street children are especially vulnerable to being trafficked for purposes of criminal activity in exchange of food, shelter, or other basic survival needs.<sup>52</sup> Dysfunctional families also make the children vulnerable to trafficking, to the extent that the family members themselves procure the children directly to buyers for sexual exploitation and/or forced labour, forced begging and or child sexual abuse imagery.<sup>53</sup> In this case, the trafficker even develops some form of relationship with the victim, and the

<sup>45</sup> United Nations Office on Drugs and Crime, *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, 2008

<sup>46</sup> Tobin, John. "Understanding Children's Rights: A Vision beyond Vulnerability." *Nordic Journal of International Law = Acta Scandinavica Juris Gentium*, vol. 84, no. 2, 2015, at 158

<sup>47</sup> ILO Child trafficking – Essentials, 2010 GLO/05/51/USA[*ILO\_REF*] at 2

<sup>48</sup> Ending child labour, forced labour and human trafficking in global supply chains, ILO, OECD, IOM, UNICEF - Geneva, 2019.

<sup>49</sup> International Labour Organization, *Child Labour in the Primary Production of Sugarcane*, ILO, 2017. at.24 170 and Kumari M. (2013) Child labour, a Sociological Study in Haryana, India, *International Research Journal of Social Science*, Vol. 2 (8), 15-18 August 2013, at 17

<sup>50</sup> Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Government of Senegal, ACERWC, DECISION: N° 003/Com/001/2012

<sup>51</sup> Supra note 2 at 88

<sup>52</sup> Ibid.

<sup>53</sup> Noutsougan, A.K., (2010) *La réinsertion des enfants mendians à Niamey : situation et perspectives* Centre d'enseignement et de recherche en action humanitaire de Genève/Université de Genève, 2010, pp9-10 Ballet, J., Bhukuth, A., Rakatonirinjanhary, F. et Rakatonirinjanhary, M. (2010) *Les Enfants Mendiant à Antananarivo : Quelles Logiques Familiales Sont à l'œuvre ?* Institute national d'études démographiques, CAIRN, 2010, p. 812;

children are enticed to use drugs and alcohol, hence increasing the control the traffickers have over them.

Arguably, COVID-19 has made matters worse; the damage of which will only be felt in years to come. What is clear so far is that the various response measures adopted by the states including reservations of certain rights, like education, has increased children's vulnerability to trafficking and other forms of exploitation. In addition, the economic impact of Covid-19, including widespread job loss, increases the risk of the children being trafficked for survival. To wit, social protection is vital during a crisis, as it aids those who are most vulnerable.<sup>54</sup>

#### **1.4 The strategies of combating Child trafficking.**

To address the factors that contribute to human trafficking, the General Assembly adopted the United Nations Global Plan of Action to Combat Human Trafficking<sup>55</sup> which urges governments worldwide to take coordinated and consistent measures to attempt defeating the scourge. In its preamble, the plan of action recognizes that poverty, lack of socio-economic opportunities, gender-based violence, discrimination and marginalization are contributing factors to a person's vulnerability to human trafficking. The UN member states made a commitment to take urgent action to prevent trafficking of persons, protect its victims, prosecute the perpetrators and strengthen partnerships by promoting and considering, as a priority, ratifying or acceding to the United Nations Convention against Transnational Organized Crime and the Palermo protocol, as well as other relevant international instruments<sup>56</sup>. Towards these efforts states have developed national action plans with strategies around the 3Ps model, that is to prevent, protect and prosecute, with partnership as a complimentary towards combatting human trafficking.

Furthermore, United Nations member states committed to act against child trafficking through the Sustainable Development Goals (SDG)<sup>57</sup>, with three of these goals leading to combating trafficking of persons. Target 5.2, 8.7, and 16.2 , the states commit themselves to: eliminate all forms of violence against women and girls, including trafficking and sexual exploitation, to take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms<sup>58</sup>. In addition, the states committed themselves to end abuse, exploitation, trafficking and all forms of violence and torture against children.<sup>59</sup>

#### **United Nations Global Plan of Action to Combat Trafficking in Persons: The 3P strategy**

##### **1.4.1 Prevention**

The prevention strategy addresses the social, economic, cultural, political, and other factors that make people vulnerable to trafficking in persons, such as poverty, unemployment, inequality, humanitarian emergencies, including armed conflicts, natural disasters, sexual violence, gender discrimination, social

Court case 147-South Africa; court case 163 – Israel; court case 175 – Serbia; court case 332 – Ukraine; court case 346 – Honduras

<sup>54</sup> Guy Ryder ILO director [COVID-19 and child labour: COVID-19 may push millions more children into child labour – ILO and UNICEF](#) visited on 23/05/2021

<sup>55</sup> United Nations Global Plan of Action to Combat Trafficking in Persons A/RES/64/293, 12/08/2010

<sup>56</sup> Ibid para 4

<sup>57</sup> UN General Assembly, Transforming our world : the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1

<sup>58</sup> Ibid para 8.7

<sup>59</sup> Ibid para 16.2

exclusion and marginalization, as well as a culture of tolerance towards violence against women, youth and children<sup>60</sup>. In this pillar, the states are expected to mainstream the issue of human trafficking, adopt and implement comprehensive policies on migration, education, gender equality, and crime prevention so as to prevent all forms of trafficking. As such, the states are expected to conduct research so as to inform response, promote information and mass media campaigns with a view to discourage the demand that encourages exploitation of children. The role of education is emphasized, and states are expected to promote education, especially human rights education, and increase the capacity for law enforcement, social workers and other relevant officials. The states are also expected to reinforce efforts when it comes to the right of identity and provision of identity documents.<sup>61</sup> The states are required to consider child-sensitive issues in developing their response. In this regard, the prevention pillar seeks to respond before a person becomes a victim of trafficking.

#### 1.4.2 Protection

Protection is a key pillar as it is aimed at ensuring a victim is assisted to mitigate harms suffered, such as social, physical and psychological abuses. Of key importance under this pillar is the States obligation towards protecting the rights of trafficking victims. The states are expected to ensure that victims are not treated as criminals, through the national legislation. The states are further called upon to protect the privacy and identity of victims of trafficking, throughout the criminal proceedings and provide services to support them towards recovery, rehabilitation and reintegration. This pillar recognizes the need for the consideration of the child's best interest when dealing with child victims and *those at risk of being of trafficking* (emphasis mine). As such, it urges states to provide appropriate services for the child's wellbeing, education, rehabilitation and reintegration in coordination with existing child protection services<sup>62</sup>.

The protection pillar is also targeted inter-alia, towards strengthening the capacity of relevant officials likely to encounter and identify possible victims of human trafficking, such as law enforcement personnel, border control officers, labour inspectors, consular or embassy officials, judges, prosecutors, peacekeepers, and ensure the availability of needed resources to the relevant sectors and institutions, including those of civil society. Save for the recognition of the child who is at risk of being trafficked, the protection pillar's response is focused on the aftermath of trafficking.

#### 1.4.3 Prosecution

The prosecution strategy features, inter-alia, efforts towards enactment and implementation of legislation that criminalizes all forms of exploitation and trafficking, through prosecution and adopting legislation that criminalizes attempts and complicity in the crime of trafficking of persons<sup>63</sup>. Furthermore, enhancing efforts towards investigation and use of confiscated assets from the perpetrators to support the victims of trafficking. In recognizing the transnational nature of trafficking, the strategy requires states to collaborate and cooperate to combat crimes that might be connected to human trafficking including, money laundering, corruption, smuggling of persons and all forms of organized crime.<sup>64</sup> It also requires that states ensure that all persons who ought to be held liable are appropriate and in line with relevant international instruments. The prosecution strategy focuses on the effectiveness of the criminal justice system to put an end to human trafficking.

<sup>60</sup>Supra N. 55 para 12

<sup>61</sup> Ibid para 20

<sup>62</sup> Ibid para 37

<sup>63</sup> Ibid para 43 (a)

<sup>64</sup> Ibid para 48

#### 1.4.4 Partnership

The global action plan recognizes that capacity building is critical in ensuring that the various bodies are coordinated and co-operating to fight human trafficking. The partnership strategy encourages states to co-operate at the national, bilateral, subregional and international levels.<sup>65</sup> The cooperation is not just amongst states, but also within the various governmental institutions as well as civil society organization and the private sector. For effective implementation, the action plan encourages member states to voluntary make contributions to the UN in their work to combat trafficking of persons.<sup>66</sup>

The partnership is a cross cutting and complimentary strategy which strengthens the 3P approach towards combating human trafficking.

#### **Fool Proof plan?**

The 3P action plan has not only been incorporated into national strategic plans (or other action plans), but have also been used to measure a state's efforts. For instance, since 2003 the US Trafficking in Persons report uses this paradigm to assess and describe government efforts in fighting trafficking, and in tandem, grant recommendations using the same format.<sup>67</sup> The reports have indicated that this 3P plan is not a full proof plan. There are regional disparities across the globe on the uptake and implementation of the Global Action plan by the states, despite being developed from the obligations stipulated in the Palermo Protocol. The 3P Anti-trafficking Index<sup>68</sup> shows that whereas there has been an improvement in efforts of combating human trafficking through the 3P model, with a kin focus on prosecution, there are regional disparities in anti-trafficking efforts, resulting from availability of resources, domestication of legal framework and a state's priority.

Given the nature of child victims of trafficking, and the vulnerabilities that surround the children, it is necessary to analyse which of the 3Ps would be the most apt response? In fact, the special rapporteur on trafficking<sup>69</sup> recognizes the need for a shift in the approach which has predominantly focused on the investigations and prosecutions and urges states to adopt a more human rights-based approach<sup>70</sup>. The criminal justice approach, while it is useful in addressing harm, is not an effective plan to end child trafficking. While trusted and allowing the utilization of already existing institutions and processing, the criminal justice approach alone has limitations as it does not address the root causes of child trafficking. Perhaps what has not been established in scholarly work and in case law, is to what extent is this an obligation of the state? This will be covered in detail in the next chapter.

#### 1.4.5 Sustainable Development Goals (SDGS) as a strategy

It has been six years since the UN member states adopted the 2030 agenda for sustainable development, centred around 17 goals, broken down into 169 targets, that call for action by the states in a range of policy directions focused on People, Planet, Prosperity, Peace and Partnership. The SDGs provide a vision of a world that invests in the children and in which every child grows up free from violence and exploitation.<sup>71</sup> With a call to prioritize children, the UN Secretary General views the SDGs

<sup>65</sup> Ibid para 53

<sup>66</sup> Ibid para 61

<sup>67</sup> United States Department of State, *2020 Trafficking in Persons Report - United States of America*, June 2020,

<sup>68</sup> Seo-Young Cho (2015) Evaluating Policies Against Human Trafficking Worldwide: An Overview and Review of the 3P Index, *Journal of Human Trafficking*, 1:1, 86-99,

<sup>69</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children A/HRC/44/45

<sup>70</sup> Jonathan Todres, "Preventing Child Trafficking: A Public Health Approach." *Journal of Legal Medicine*, 40(3-4), pp. 427–428

<sup>71</sup> United Nations, *Transforming our World*, 2015.

as a pathway which, if implemented, would lead to ending violence against children by 2030.<sup>72</sup> Three goals are dedicated to ending violence against children, including child trafficking, that is target 5.2, 8.7 and 16.2. The states committed to:

Eliminating all forms of violence against women and girls in the public and private spheres including trafficking and sexual and other types of exploitation.

Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

And

End abuse, exploitation, trafficking and all forms of violence against and torture of children.

The above targets cannot be achieved on their own and therefore a commitment to implementing other goals<sup>73</sup> is expected and would lead to the achievement of ending violence against children., including sexual exploitation and child trafficking. The SDGs are seen as negotiated commitments and therefore self-binding by the countries as compared to the international laws. The SDGs have indicators through which states committed to check their achievements, developed by Inter-Agency and Expert Group on SDG Indicators (IAEG-SDGs). Interestingly, of the tree targets, only SDG 16.2 has a specific indicator; 16.2.2, measuring number of victims of trafficking per 100,000 population by sex, age and forms of exploitation. To measure this, states are expected to only use detected and undetected data collected by the national authorities. As such, a caveat is provided that the interpretation of trends should be done with caution<sup>74</sup>. Indicator 16.2.3<sup>75</sup> has borrowed the definition of sexual violence from General comment number 13<sup>76</sup> and therefore measure states' progress towards child trafficking for purposes of sexual exploitation. Indicators of goal 8.7<sup>77</sup> measures progress through the number of children between 5-17 years of age who are engaged in economic activities and/or household chores at or above age-specific hourly thresholds. Child labour in this case includes hazardous work, and the worst forms of child labour, which are measured through indicator 8.7.1, though not adequately.<sup>78</sup> One of the benefits of indicator 16.2.2 is the categorisation of data by age and sex, which ensures that children are represented in the efforts that countries undertake to combat trafficking of persons. Overall, the benefit of having the indicators is the requirement of continuous collection of data on the various subjects which is supposed to ensure that states are up to date with their information. It is therefore a wonder that in 2019, the reports still lament on the lack of credible data on child trafficking. Some of the reports that have emanated from these collations of reports in response to the indicators include the ILO report on

<sup>72</sup> UNICEF (2019) Keeping the Promise: Ending Violence against Children by 2030 at 7

<sup>73</sup> Ibid at 34

<sup>74</sup> SDG indicator metadata <https://unstats.un.org/sdgs/metadata/files/Metadata-16-02-02.pdf>

<sup>75</sup> SDG indicator metadata <https://unstats.un.org/sdgs/metadata/files/Metadata-16-02-03.pdf>

<sup>76</sup> Sexual violence comprises any sexual activities imposed by an adult on a child against which the child is entitled to protection by criminal law. This includes: (a) The inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity; (b) The use of children in commercial sexual exploitation; (c) The use of children in audio or visual images of child sexual abuse; and (d) Child prostitution, sexual slavery, sexual exploitation in travel and tourism, trafficking for purposes of sexual exploitation (within and between countries), sale of children for sexual purposes and forced marriage. General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, United Nations document CRC/C/GC/13, Office of the High Commissioner for Human Rights, Geneva, 18 April 2011

<sup>77</sup> Indicator 8.7.1: Proportion and number of children aged 5-17 years engaged in child labour, by sex and age

<sup>78</sup> SDG indicator metadata <https://unstats.un.org/sdgs/metadata/files/Metadata-08-07-01.pdf>

Global estimates of modern slavery: Forced labour and forced marriage,' and 'Global estimates of child labour: Results and trends'<sup>79</sup>.

Critics have noted that the SDGs are more focused on global quantitative indicators to assess progress as opposed to more important objectives, such as fulfilling human rights obligations. In spite this very elaborate plan to end violence against children including, reports by UNICEF, ILO, Global Slavery Index, and UNODC, continue to show an increase in detected number of child trafficking victims. As observed by Saner et al,<sup>80</sup> perhaps SDGs are yet another instrument that make strong rhetorical commitments to the intersections of labour, migration and exploitation, but lacks in clarity and the operational strength it needs to lead the path in reduction, if not elimination of such exploitative practices. An analysis of the metadata will show that the effective measures that states ought to take to address the root causes of child trafficking are not elaborated on the indicators. Like the 3P approach, where the states have focused on the prosecution pillar, the SDGs measure of success are mostly after the harm of child trafficking has taken place.

### **1.5 Conclusion**

Exacerbated by pandemics, such as COVID-19, conflict and natural disasters, child trafficking is certainly a complex issue. Child trafficking can be likened to a jigsaw puzzle that requires a very careful and thorough approach that we have not achieved yet. This chapter has attempted to elaborate the intricacies of child trafficking and the challenges that arise. For instance, the differences in definitions adopted by states, as well as the aspect of defining the age of majority which acts as hindrances to concerted efforts towards preventing child trafficking. This chapter highlighted the trends and drivers of child trafficking, ranging from age, lack of socio-economic opportunities, gender inequalities, domestic violence, amongst other factors that exacerbate the vulnerabilities of children.

Finally, the chapter analysed the UN strategy towards combating child trafficking originating from the UN Global Action Plan against Human trafficking. Despite the adoption and interpretation of the 3Ps of prevention, protection, prosecution and partnership by various countries, the cases of child trafficking are still rising as various reports have shown. This was followed by an analysis of the SDGs blueprint to achieve a world where children grow up without fear of violence. An analysis of the metadata, which provides measurements for the states' progress towards child trafficking, shows a gap in definition of effective measures and an elaborate planning answering to the drivers of child trafficking.

From the foregoing, the paper has established that child trafficking is not just transnational but also internal, primarily in the global south where the children are trafficked for sexual exploitation and child labour. Notwithstanding the difficulty in accessing reliable, high quality data, the available data shines a light on the fact that there is an increase in forced labour cases, especially within the African region. The complexities of child trafficking have clearly demonstrated that the reactionary interventions by states towards prosecution, investigation or rescue and rehabilitation, leads to an unwinnable situation as there are many children who are vulnerable or already victims of trafficking. The refocus of states' approach ought to be geared towards prevention, as established within the Palermo Protocol and the CRC, by targeting the identified root causes of child trafficking. The following chapter therefore sets out to provide the legal foundation of the states' obligation towards preventing child trafficking.

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<sup>79</sup> Supra note 1

<sup>80</sup> R. Saner et al, 'The Measuring and Monitoring of Human Trafficking', (2018) 21 Public Administration and Policy 94–106

## **Chapter 2:**

### **Child trafficking and the Obligation to Prevent- The Legal Framework**

Having established the need for states to put more efforts towards preventing child trafficking, this chapter will deduce the legal obligations of the states to prevent the scourge. The development of laws on trafficking of persons is anchored on the need to protect girl children and women who were deemed victims of cross border sexual exploitation and prostitution. Between 1904 and 1939 four treaties dealing with trafficking of women and girls were concluded.<sup>81</sup> Hereinafter, the laws were consolidated into the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The convention which does not provide an elaborate definition of trafficking, is limited to trafficking for purposes of prostitution for women, men, children regardless of their age and consent. It was the first of the conventions to provide for the responsibility of the states to prevent trafficking, requiring states to put in place social, economic and other related services and measures for the prevention of prostitution.

The 1949 convention received much criticism but remained the only law that contained specific provisions on trafficking, until 1989 when the UN Convention on the Rights of the Child (herein after referred to as CRC) was adopted. The CRC provides a framework for the protection of the rights of the child, recognizing the child as an autonomous being, albeit one who requires protection. The CRC refers explicitly to child trafficking and imposes an obligation on the states to "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."<sup>82</sup> In addition, the Optional Protocol on the Sale of Children, child prostitution and child pornography (herein after referred to as OPSC), complementing the CRC, recognizes the increase of child trafficking cases and takes a criminal justice approach, obligating the states to criminalize acts that contribute to contemporary forms of trafficking. The CRC committee with the mandate to monitor its implementation, has also identified child trafficking as one of the forms of violence that state parties have a positive obligation to take comprehensive action against, including targeting the root causes of violence at the levels of the child, family, community, institution, and society. As the CRC committee has opined that prevention measures offer the greatest long-term return<sup>83</sup>.

In addition, the Palermo Protocol<sup>84</sup> adopted 10 years after the CRC, provides a comprehensive definition of trafficking for adults and children. It requires the states to establish comprehensive policies, programs and measures to prevent and combat human trafficking and to protect victims from revictimization. The

<sup>81</sup> International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, done May 4, 1904, entered into force July 18, 1905. International Convention for the Suppression of the White Slave Traffic, 3 LNTS 278, done May 4, 1910, entered into force Aug. 8, 1912. (Both amended by a protocol approved by the General Assembly on May 4, 1949, 30 UNTS 23.) International Convention for the Suppression of Traffic in Women and Children, 9 LNTS 415, done Sept. 30, 1921, entered into force June 15, 1922. International Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431, done Oct. 11, 1933, entered into force Aug. 24, 1934. (Both instruments were amended by a Protocol approved by the General Assembly on Nov. 12, 1947, 53 UNTS 13.)

<sup>82</sup> Article 35 CRC

<sup>83</sup> See Supra Note 8

<sup>84</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, G.A. Res 55/25, U.N. Doc. A/RES/55/25 (January 8, 2001) entered into force December 25, 2003,

use of the imperative term ‘shall’, in the language of the convention creates an obligation **to fulfil** on the states to take the necessary steps towards addressing vulnerabilities that amplify the cases of child trafficking.

In an attempt to identify the extent of the states’ obligation towards combating child trafficking through prevention, this chapter will discuss the development of child trafficking law and interrogate the application and interpretation of the Palermo protocol through the lens of child rights enunciated in the CRC and other regional instruments. Highlighted first, the discussion of the development of international law on child trafficking, followed by an overview of child trafficking law within the CRC, the OPSC, and the Palermo protocol, all the while providing an analysis of the obligations of the states towards preventing child trafficking. Discussed finally the interpretation of the regional instruments, first through the African Charter on the Rights of the welfare of the child and then through the European Convention Human Rights.

## **2.1 Development of the Child trafficking Law towards prevention**

The development of child trafficking laws cannot be discussed without mentioning the role of historical transatlantic slavery, servitude and slave trade,<sup>85</sup> as it provided a framework for the fight against trafficking. Worsened by growth of sexual exploitation of women and girls in Europe as a result of economic downfall, the *International agreement for the suppression of white slave traffic 1904* was adopted. The agreement was particular in protecting women of full age as well as girls who were underage procured for “immoral purposes”<sup>86</sup>. As Faulkner observes, it was adopted in response to a “moral panic” over the sexual exploitation of white women and girls.<sup>87</sup> The picture painted here was normally of young white women who were being coerced into prostitution in foreign countries, resulting in an emphasis on trafficking for women for purposes of sexual exploitation. This agreement is criticized as it only protected white women who were trafficked in a foreign country.<sup>88</sup> The agreement further, did not have a strong provision on the action that states ought to take to prevent the trafficking.<sup>89</sup>

The agreement was followed by the *1910 International convention for the suppression of the white slave traffic*; the first time the Act, Means and Purpose of trafficking were identified. The convention defined underage girls as below the age of 20 and acknowledged the states’ discretion at setting the age higher provided it was applied uniformly to all the girls or women of all nationalities<sup>90</sup>. The convention was the first to criminalize acts of procurement, recruitment and enticement through the means of fraud, violence or abuse of authority of women or girls who were underage for ‘immoral purposes’<sup>91</sup>. This convention also established the concept of negating the consent of the women or girls who were being trafficked.<sup>92</sup>

<sup>85</sup> Chapdelaine (2015)

<sup>86</sup> Preamble International agreement for the suppression of white slave traffic 1904

<sup>87</sup> Elizabeth A. Faulkner, 2019. The development of child trafficking within international law: a socio-legal and archival analysis. In Pluralising International Legal Scholarship. Edward Elgar Publishing at 109

<sup>88</sup> Article 1, 3 and 6 *International agreement for the suppression of white slave traffic 1904*

<sup>89</sup> N. Demleitner, ‘Forced Prostitution: Naming an International Offence,’ 18 Fordham International Law Journal (2000), 163–96, at 167.

<sup>90</sup> 1910 International convention for the suppression of the white slave traffic, Final protocol para. B

<sup>91</sup> 1910 convention, Article 1

Whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl underage, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

<sup>92</sup> 1910 Convention, Article 2

The contracting parties to the convention were encouraged to propose a change in the law, where necessary, to punish the perpetrators of the said offences. Further, the convention instituted the aspect of international co-operation between states in the fight against trafficking for sexual exploitation purposes.<sup>93</sup> While lacking in language of obligation, a responsibility of the states to undertake the necessary legislative measures and adopt international corporation to deal with cases of child trafficking can be inferred. Like its predecessor, the law was still centred around white victims.

The two conventions were later amended by the 1921 International Convention for the Suppression of the Traffic in Women and Children (1921 Convention). The 1921 convention, adopted under the auspices of the new league of nations, reiterated some of the provisions of the 1910 convention. This convention was vital because it recognized that children, both male and female, are vulnerable to trafficking<sup>94</sup>, therefore requiring the states to prosecute such offences. It also raised the age of protection from 20 to 21, and was not limited to white "underaged" girls or women<sup>95</sup>. Article 7 of the convention required states to make regulations for the protection of women and children travelling on emigrant ships, including exhibitions of notices warning them of the danger of the traffic. Further amendments were included in the 1921 convention such as the criminalization of attempted offences and acts preparatory to trafficking<sup>96</sup>. Leading to the adoption of the 1933 *International Convention for the Suppression of the Traffic in Women of the Full Age* (Hereinafter the 1933 Convention). The convention expanded the meaning of the word country to include colonies and protectorates of the high contracting parties.<sup>97</sup> It furthermore eliminated the notion of consent, which meant that for cross-border trafficking, force or coercion was not an element of trafficking for either adults or children. The 1933 convention expanded the purposes of trafficking beyond prostitution, to include all sexual and immoral purposes. It also subjected certain domestic activities to the provisions of the convention, with respect to the offence of procurement, enticement and leading away.

Post-World War II period the UN consolidated the four previous instruments. In 1949 the General Assembly approved the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, which entered into force on July 25, 1951. The convention, limited to trafficking for purposes of prostitution, applied to both women and men<sup>98</sup>. The 1949 convention also

Whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral

purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.

<sup>93</sup> Ibid Article 3

The Contracting Parties whose legislation may not at present be sufficient to deal with the offences contemplated by the two preceding Articles engage to take or to propose to their respective legislatures the necessary steps to punish these offences according to their gravity.

<sup>94</sup> **1921 Convention** Article 2: The High Contracting Parties agree to take all measures to discover and prosecute persons

who are engaged in the traffic in children of both sexes and who commit offences within the meaning of Article 1 of the Convention of May 4, 1910.

<sup>95</sup> Ibid., Article 5

<sup>96</sup> 1933 International Convention For The Suppression Of The Traffic In Women Of Full Age, Article 1

<sup>97</sup> 1933 International Convention, Article 1

<sup>98</sup> Article 1 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,<sup>15</sup> which entered into force on July 25, 1951.

criminalized the keeping or managing brothels, or letting or renting other places for purposes of prostitution.<sup>99</sup> For purposes of the present writing, Articles 16 and 17 are of great importance as they present the responsibilities of states to prevent trafficking for purposes of prostitution. Article 16 provides:

The Parties to the present Convention agree to take or to encourage, through their public and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention.

Read together with Article 17, states are required “To take appropriate measures to ensure supervision of railway stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution” and therein lies the foundation of the duty of the states to prevent child trafficking, by creating awareness and supervising border points”. Despite the much criticism that the 1949<sup>100</sup> convention received, this convention survived as the only treaty dealing with trafficking in persons for more than half a century.<sup>101</sup> Two other instruments that specifically made provision for trafficking during this period, are the Convention on Elimination of Discrimination against women (CEDAW) 1979 and the UN Convention on the Rights of the Child (UNCRC), which will be discussed later in this chapter.

The chronological analysis of the development of international law on child trafficking indicates the growth in the concept of definitions and the responsibility of states. It highlights the gendered aspect of child trafficking and justifies the reason for “after-the fact” response to child trafficking. The law was primarily founded on the need to protect the women and girls as response to the sexual exploitation and prostitution in Europe. The law against the offence of child trafficking therefore developed from prostitution of white girls across the border to acts leading to procurement, enticing, concerning any child for purposes of sexual exploitation including prostitution. By the end of this era, the states had seen the need to go beyond reacting to the issues of trafficking or prostitution, but instead to take social and economic prevention measures.

## **2.2 UN Convention the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography**

The CRC was adopted by the United Nations General Assembly by consensus on 20<sup>th</sup> November 1989<sup>102</sup> and entered into force on 2 September 1990. The CRC provides for the child's civil-political rights and economic-social cultural rights, as well as makes provisions for children who have no family

<sup>99</sup> Ibid., Article 2;

<sup>100</sup> See M. McAdam, 'The International Legal Framework on Human Trafficking: Contemporary Understandings and Continuing Confusions', in *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (2019), 18 at 4 and Obokata, Tom. "Human Trafficking in Africa: Opportunities and Challenges for the African Court of Justice and Human Rights." *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, edited by Charles C. Jalloh et al., Cambridge University Press, Cambridge, 2019, pp. 529–552. and Gallagher, Anne T, 2010. *The International Law of Human Trafficking*, New York: Cambridge University Press. at 61

<sup>101</sup> Trafficking in transnational criminal law – Anne Gallagher Piotrowicz, et al. *Routledge Handbook of Human Trafficking*. 2018 at 21

<sup>102</sup>Convention on the Rights of the Child, adopted Nov. 20, 1989, G.A. Res. 44/25, 1 U.N. GAOR Supp. No. 4a), U.N. Doc. A/144/149 (1989), 28 I.L.M. 1448 (1989), corrected at 29 I.L.M. 1340 (1990) (entered into force Sept. 2, 1990)

or in time of war, and aids in physical recovery and social reintegration of children who have been traumatised by a variety of causes.<sup>103</sup>

The CRC is anchored on four 'P's" The Participation of Children in decisions affecting their own destiny; the Protection of children against discrimination and all forms of neglect and exploitation; the Prevention of harm to the children; and the Provision of assistance for their basic need. These are often categorised within three different groups of children's rights: (1) survival and development rights, (2) protection rights, and (3) children's empowerment rights<sup>104</sup>. It defines a child as a person below the age of 18, unless in the age of majority is attained earlier in the state party,<sup>105</sup> and one capable of bearing his or her own rights.

Being the only other contemporary international human rights treaty to refer explicitly to trafficking at the time, the CRC, under Article 35, obligates states to "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." Regardless of the fact that the CRC does not offer any definition for the word traffic, it acts as a fail-safe and additional protection provision, addressing the movement of the child (traffic) and commodification (sale) of the child.<sup>106</sup> The context of this Article is also provided by the preceding and proceeding provisions, that is Article 32<sup>107</sup>, 34<sup>108</sup>, and 36 which emphasize that the states undertake to protect the children from all forms of exploitation, including sexual exploitation and child labour. Taking a protectionist stance, Article 19 of the CRC further places an obligation on the state parties to take appropriate legislative, administrative, social and educational measures to protect children from all forms of violence, including sexual abuse while in the care of parents or legal guardians.<sup>109</sup> This provision is not only elaborate on the forms of violence that children must be protected from, but it is just as elaborate when it comes to the different steps that the states should take to protect children from violence. Article 19(2) provides that states should include effective procedures for the establishment of social programmes to provide support for the children and for other forms of prevention. This creates a watertight system of child protection, which if implemented fully by the states, would not only address the aftermath, of child trafficking but would prevent child trafficking from taking place.

<sup>103</sup> Ibid Article 20, 21, 22, 28, and 31

<sup>104</sup> Susan O.V. Struensee, Violence, Exploitation and Children. Highlights of the United Nations Children's Convention and International Response to Children's Human Rights, 18 SUFFOLK TRANSNAT'L L. REV. (1995). P. 589,

<sup>105</sup> CRC , Article 1

<sup>106</sup> Helmut Sax, 'Child trafficking – a call for rights-based integrated approaches', in *Routledge Handbook of Human Trafficking* (2017), at 255

<sup>107</sup> Article 32: States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

<sup>108</sup> Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

<sup>109</sup> Article 19 UNCRC.

The UNCRC is also complimented by the three optional protocols, relevant for the discourse at hand, is (OPSC)<sup>110</sup>. Entered into force in January 2002, it expands the scope of the CRC in relation to the Sale of Children, Child Prostitution and Child Pornography, which are also purposes of child trafficking. In its preamble, the OPSC notes the concern of the state parties on the increase of internal trafficking in children, that can be eliminated through concerted efforts which address the contributing factors such as poverty, economic disparities, dysfunctional families, lack of education. In addition, OPSC provides a broad definition of Sale of Children which includes, inter-alia sexual exploitation, transfer of organs for profit, engagement of children in forced labour and illicit adoption.<sup>111</sup> The protocol adopts a criminal justice approach to the issue detailing obligations of the state to prohibit, criminalize and appropriately punish the relevant acts.<sup>112</sup> Article 9 is of particular importance as it sets out the states obligation to adopt or strengthen, implement and disseminate laws, administrative and social policies to prevent the said offences, paying particular attention to children who are vulnerable to such practices.

Embedded within the CRC is its monitoring and implementation mechanism: the UN Committee on the rights of the Child (CRC Committee). The CRC Committee discharges its mandate through evaluation of state party reports on implementation of the convention and its protocols. It provides further guidance on the implementation of the CRC through various documents including the General Comments. The committee has a raised concern and draws the attention on the states to specific actions that they must undertake to combat child trafficking<sup>113</sup>. Further, the CRC Committee, through the General Comment number 13<sup>114</sup> elaborates and guides the implementation of Article 19 of the CRC. The CRC Committee is clear that the duty of the state to protect the children from all forms of violence through prevention is essential for promoting the full set of children rights under the convention.<sup>115</sup> The CRC committee also notes that child protection must begin with proactive prevention and explicit prohibition of all forms of violence. Nevertheless, commitment to prevention does not lessen states' duties to respond effectively to violence when it occurs.<sup>116</sup> Accordingly, the obligations set out under Article 19 are those of due diligence; states must take active steps to prevent violence and to also protect child victims as well as punish those responsible and provide access to redress of the said violations.<sup>117</sup> Lack of adherence to this will be a violation of the rights of the child enshrined within the CRC and its protocols.

At a time when the states were dealing with child trafficking from only a protection and prosecution perspective, the development of the UN Convention on the Rights of the Child and its protocol was apt. The specific provisions on combating child trafficking, as a form of violence, with the continuous interpretation of the law through the work of the CRC committee, have allowed for a comprehensive approach. That is, from preventing child trafficking to a wholesome response, within the context of a child who derives autonomy from the law, but one who requires protection due to their vulnerable nature.

<sup>110</sup> Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, GA Res. 54/263, Annex I, 54 UN GAOR Supp. (No. 49), 7, UN Doc. A/54/49, Vol. III (2000), done May 25, 2000, entered into force Jan. 18, 2002

<sup>111</sup> OPSC, Article 3

<sup>112</sup> OPSC Articles 1, 3.

<sup>113</sup> See: Concluding observations to Nepal CRC/C/NPL/CO/3-5; Kenya: CRC/C/KEN/CO/3-5; Nigeria CRC/C/NGA/CO/3-4

<sup>114</sup> CRC General Comment Number 13, para 46.

<sup>115</sup> CRC General Comment Number 13, para 13.

<sup>116</sup> CRC General Comment Number 13, Para 46.

<sup>117</sup> CRC General Comment Number 13, para 5.

### **2.3 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children**

The Palermo protocol was adopted and opened for signature by the General Assembly resolution 55/25, in November 2000. Its development can be traced back to Argentina's interest in the issue of child trafficking and the difficult process of developing an additional protocol to the CRC to address child prostitution and pornography. During negotiations, human rights lobbyist asserted that the rights based concerns and priorities related to trafficking would dissipate in the process of building a criminal justice system to confront the issue.<sup>118</sup> On the other hand, Argentina recognized the need to fight trafficking from a transnational organized crime perspective instead of a human rights perspective.<sup>119</sup> In 1997, the UN Commission on Crime Prevention and Criminal Justice discussed Argentina's proposal for a convention for trafficking against minors. This was aptly timed as the States were beginning to take cognizance of the issue.<sup>120</sup> However, Argentina's original proposal on trafficking of women and children was seen as quite limited since there was additional need to expand the purposes of trafficking beyond sexual exploitation. Accordingly, through resolution 53/111, of 9 December 1998, the General Assembly established an Ad Hoc Committee, open to all states, to elaborate the international convention against transnational organized crime and three additional international legal protocols. The travaux préparatoires indicate that most states supported that the trafficking protocol supplementing the UN Convention against Transnational Organised Crime (UNCTOC), should address trafficking of all persons but with special attention on women and children.<sup>121</sup> The negotiation process was praised for its effective and diverse participation, where the non-governmental organizations and the international organizations played an active role in lobbying for certain aspects to be included in the protocol. Some of these aspects include: coercion-based definition of trafficking which recognizes a number of end purposes in addition to sexual exploitation, the protection of rights as a principal objective and references to international law.<sup>122</sup>

The raison d'être for the Palermo protocol is (1) prevent and combat trafficking, (2) protect the victims and (3) facilitate international cooperation. As discussed in chapter one, the Palermo protocol, first to define trafficking in persons, also includes the definition of child trafficking, by negating the aspect of consent and the means set out within Article 3 (a) of the trafficking protocol.<sup>123</sup> One of the important provisions of the Palermo protocol is the expanded definition of the forms of exploitation to include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or similar practices, servitude or the removal of organs<sup>124</sup>. This was a great foresight from the drafters, as it has been displayed in the first chapter, child trafficking purposes have now expanded to radicalisation, child begging, harmful cultural practices, amongst others.<sup>125</sup> Another important provision

<sup>118</sup> F. Lenzerini, 'International Legal Instrument on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled Human Trafficking: Global and Local Perspectives', (2009) 4 Intercultural Human Rights Law Review 205–238 at 6.

<sup>119</sup> Anne T. Gallagher, 'Trafficking in transnational criminal law', in *Routledge Handbook of Human Trafficking* (2017), at 24.

<sup>120</sup> Ibid

<sup>121</sup> Travaux Préparatoires for the Organized Crime Convention and Protocols p 322.

<sup>122</sup> Supra note 119 at 25

<sup>123</sup> See Chapter 1 of this paper

<sup>124</sup> Palermo Protocol at Art. 3.

<sup>125</sup> Supra note 2

regarding child trafficking is the state parties' responsibility to take into consideration the special needs of child victims of trafficking including appropriate housing, education and care.<sup>126</sup>

### **Obligations of the State Parties**

The purposes of the Palermo are to be fulfilled by state parties of whom must have also signed on to the UNCTOC, by applying *mutatis mutandis*, the provisions of the convention. The main purpose of the UNCTOC as espoused in Article 1 is to promote corporation to prevent and combat transnational crime more effectively, thus implementing various obligations of the state in dealing with transnational organized crime. Following the purposes of the Palermo protocol, the drafters anchored their fulfilment by imposing three main obligations on the state. These include:

- a. the obligation **on criminalization, investigation and punishment of trafficking**, anchored in Article 5 of the protocol<sup>127</sup>. Here the states are required to adopt legislative and other measures to combat trafficking in persons. This has been interpreted over time to also include empowerment of law enforcement agencies to be able to handle trafficking cases.<sup>128</sup>
- b. the **obligation of the State parties towards victim protection and support**, anchored on Article 6 of the protocol. The states are expected to protect the privacy and identity of victims of trafficking and to consider the provision of various social services to enable their recovery.
- c. and the **obligation to prevent trafficking** by addressing factors that increase vulnerability of persons. As the main point of departure for this thesis, the obligation to prevent trafficking in persons is espoused on Article 9 and requires states to establish comprehensive policies, programs and other measures to prevent trafficking in person, to take measures such as research ,(...) social economic initiatives to prevent and combat trafficking in persons and to also take measures to address and alleviate factors that make persons especially women and children vulnerable to trafficking.<sup>129</sup> From the travaux préparatoires, it is clear that the states agreed on the need to prevent trafficking, what was not clear

<sup>126</sup> Trafficking Protocol, at Art. 6(4). The provision requires consideration of "age, gender and special needs of victims of trafficking in persons, in particular the special needs of children."

<sup>127</sup> Article 5 Palermo protocol

<sup>128</sup>T. Obokata, 'Human Trafficking in Africa: Opportunities and Challenges for the African Court of Justice and Human Rights', in C.C. Jalloh et al (ed.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019), 529 at 532

<sup>129</sup> Article 9- Palermo Protocol: Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:
  - (a) To prevent and combat trafficking in persons; and
  - (b) To protect victims of trafficking in persons, especially women and children, from revictimization.
2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

however, was to what extent this was mandatory by using the word “shall” or, the phrase ‘as appropriate’ and ‘shall endeavour to’. Following submissions by the states, NGOs, and a position paper by the Special Rapporteur on violence against women, where she argued that the protocol should use stronger language to promote awareness and prevention of trafficking<sup>130</sup>, this obligation was adopted. This obligation is formulated in a mandatory language, not hortative language<sup>131</sup>, hence establishing the positive obligation to be fulfilled by the states. Article 9 (4) (b) is particular on the need to address factors that make children vulnerable to trafficking such as poverty, underdevelopment and lack of equal opportunity. These obligations are reinforced by the prevention obligations under the UNCTOC, which requires states to, inter-alia, address the adverse social and economic conditions believed to contribute to the desire to migrate, and hence to the vulnerability of victims of cross-border trafficking as well as highlight the need for education and awareness raising aimed at improving understanding of trafficking.<sup>132</sup> Though expressed in qualified terms, one can deduce that the provisions above set out both substantive and procedural duties of the state towards preventing child trafficking. First, by putting in place and/or strengthening policies and programmes, and secondly, operationalising and taking additional measures to include social and economic initiatives to prevent trafficking. Despite poverty amelioration being primarily addressed through economic, social and cultural rights, which the states are expected to fulfil, progressively to the maximum of its available resources<sup>133</sup>, the provision of these obligations under the convention and the Palermo protocol exposes an urgency, especially to the states of origin.

These obligations have also been discussed and expounded in various UN Political organ, UN human rights bodies, and a range of international policy documents. For example, in UN Principles and Guidelines on Human Rights and Human Trafficking.<sup>134</sup> The soft law consists of 17 principles and 11 guidelines built on four pillars a) the primacy of human rights, (b) the prevention of trafficking by addressing root causes, (c) the extension of protection and assistance to all victims (instead of criminalization), and (d) the punishment of perpetrators and redress of victims. Guideline Number 7 on prevention provides that states should collaborate with intergovernmental and non-governmental organizations to develop programs that offer livelihood options, improve children’s access to educational opportunities and increasing levels of school attendance, principally of the girl child.<sup>135</sup> In addition, the Special Rapporteur on trafficking in persons, especially women and children, reflected in her report on the gaps that have bedevilled the fight against trafficking in persons. She opines that profound changes are needed in the approach to anti-trafficking action and observes that the positive obligations of the state to prevent trafficking not only stem from ratification of international instruments but from due diligence obligations under international human rights laws.<sup>136</sup>

<sup>130</sup>See A/AC.254/CRP.13

<sup>131</sup> “Obligations to Prevent Trafficking and Respond Lawfully.” The International Law of Human Trafficking, by Anne T. Gallagher, Cambridge University Press, Cambridge, 2010, pp. 414–460.

<sup>132</sup> ibid. at 416

<sup>133</sup> According to the ICESCR Article 2 of ICESCR, and General Comment No. 3, para. 3; Article 2 of ICCPR, Articles 2(d) and 4(a) of CERD, supra and General Recommendation No. 7 (Legislation to Eradicate Racial Discrimination)(1985) of the Committee on the Elimination of Racial Discrimination, Compilation of General Comments, supra; and Article 2 (b) of CEDAW,

<sup>134</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, E/2002/68/Add.1

<sup>135</sup> Ibid Guideline 7.3

<sup>136</sup> Supra note 69 A/HRC/44/45 - E - A/HRC/44/45

From the foregoing, 20 years on, the Palermo protocol has advanced the cause of combating child trafficking. However, as it has been argued that the protocol only pays lip service to human rights, hence lacking a true commitment to the human rights approach, which seeks to address the root causes of trafficking.<sup>137</sup>

#### **2.4 African Charter on the rights and the welfare of the child**

As a way of promoting the UNCRC into the continent, lawyers in Africa considered ways in which they could adapt the proposals in an African context. A meeting was organized in May 1988, and a number of issues which were relevant to African context were considered; this included children and apartheid; living conditions, female genital mutilation and unequal treatment of the girl child, refugee children; adoption, definition of child, amongst others<sup>138</sup>. A committee of experts was appointed which drafted a document for the African Charter on the rights and the welfare of the child (herein after referred to as ACRWC or the African Charter); the draft was then submitted to the OAU and adopted unanimously.<sup>139</sup> The African human rights system was the first to adopt a regional treaty specifically dealing with children rights and issues providing for the promotion, protection and monitoring of the rights and welfare of the child and implicitly provides for the performance of duties by children.

The ACRWC is grounded on the four principles of non-discrimination: best interest of the child, right to survival, and development and the view of the child.<sup>140</sup> Unlike the UNCRC, which provision for the age of majority as 18 with the exception of “the law applicable”,<sup>141</sup> the ACRWC states that a child is any human being under the age 18 years. The provision is crucial when countries are defining acts of child trafficking within the laws.

Due to the growing number of child trafficking cases in west Africa, the ACRWC dealt with child trafficking for sexual exploitation and adoption<sup>142</sup>. The main provision against child trafficking within the ACRWC is Article 29 which imposes obligation on state parties to undertake appropriate measures to prevent the abduction, sale and trafficking of children. The African Charter explicitly mentions the role of parents or legal guardians as perpetrators of trafficking and prevention of trafficking of children for purposes of begging. The African Charter also makes provisions for protection of children from economic exploitation under Article 15, where state parties are required to provide mechanisms for safeguarding children from labour exploitation by requiring state parties to undertake all appropriate legislative and administrative measures to ensure the full implementation of the provisions. When addressing adoption, the charter requires states to ensure that intercountry adoption does not result to child trafficking.<sup>143</sup> Article 21 and 27 further provide for protection of children against harmful cultural practices and sexual exploitation, both of which have been reported to be factors promoting child trafficking.

<sup>137</sup>Elżbieta M. Goździak & Kathleen M. Vogel (2020) Palermo at 20: A Retrospective and Prospective, Journal of Human Trafficking, 6:2, 109-118, DOI: 10.1080/23322705.2020.1690117 at 111

<sup>138</sup> Twenty-sixth session AHSG, OAU Doc CAB/LEG/24.9/49 (1990)

<sup>139</sup> Amanda Llyod, Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet; [2002] 10 Int'l J. Child. Rts. 185

<sup>140</sup> Article 3, 4, 5 and 6 (2) of the ACRWC respectively

<sup>141</sup> Article 2 of the UNCRC

<sup>142</sup> C. Mensah-Ankrah, *The Modern Trend of Human Trafficking in Africa and the Role of the African Union...* (2017)

<sup>143</sup> Article 24 ACRWC

Like the CRC, the ACRWC establishes the Africa Committee of Experts (hereon referred to as ACERWC or the Committee of experts), who are charged with the mandate to promote and protect the rights enshrined in the ACRWC, to oversee compliance of state parties and implementation of the ACRWC and to interpret provisions of the charter<sup>144</sup>. The mandate of the committee of experts is effected through the state party reporting mechanism, interpretation of the provisions of the African Charter, and adjudication of communications brought to it against the state parties. Through the concluding observations, Committee of experts has continuously reminded the states of their obligations towards implementing A.29 of the ACRWC through recommendations and concluding observations.<sup>145</sup>

The committee of experts provides guidance on state parties in regard to their obligations to implement the charter, through General comment number 5<sup>146</sup>, which dictates that state parties, are duty bound by Article 1 to execute the provisions of the Charter in its entirety. The state's duty here is due diligence, which the committee has emphasized as an obligation of result, in that the compliance of a state party is assessed against the efficacy of the implementation measures taken to enforce laws and administrative and other measures<sup>147</sup>. This was upheld in the case of *Minority Rights Group International and SOS-Enclaves on Behalf of Said Ould Salem and Yarg Ould Salem vs Government of the Republic of Mauritania*.<sup>148</sup> In this case, two NGOs brought a communication against the Republic of Mauritania on behalf of two brothers, Said Ouid Salem, born in 2000, and Yarg Ould Salem, born in 2003, who alleged that they were victims of child slavery for 11 years. The committee of experts found the government of Mauritania in violation of the A.1 of ACRWC and stated that the obligation raised in this article is that of due diligence, which is measured by result. Furthermore, the committee also found the state of Mauritania in violation of Articles 3, 4, 5, 11, 12, 15, 16, and 21 on non-discrimination, best interest of the child, survival and development, right to education, leisure, recreation and cultural activities, child labour and protection against child abuse and torture, and protection from harmful cultural practices. The committee of experts however found that the question of violation of Article 29 on trafficking, had been adequately dealt with under Article 15 of the Charter, which is a missed opportunity by the committee of experts to elaborate on what is expected of the states when dealing with child trafficking.

In an earlier communication against Senegal<sup>149</sup>, the committee of experts found multiple violations of the African charter including Article 4, 5, 11, 14, 15, 21 and 29. Regarding child trafficking, the committee stated that though the state had taken legislative measures against begging and trafficking, that alone could not sufficiently protect children and that the state should have taken appropriate measures to ensure children are not subjected to begging<sup>150</sup>.

<sup>144</sup> Article 42 of the African Charter on the Rights and the Welfare of the Child

<sup>145</sup> See for example: Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Kenya 1st periodic report on the status of implementation of the African Charter on the rights and welfare of the child;

<sup>146</sup> General Comment no 5 on "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection

<sup>147</sup> Decision on the communication submitted by Minority Rights Group International and SOS-Enslaves on behalf of Said Ould Salem and Yarg Ould Salem Against the Government of the Republic of Mauritania (Decision 003/2017 par 53,54

<sup>148</sup> Communication No.003/Com/003/2015, Merits Decisions, 30th Ordinary Session (2017), para. 97.

<sup>149</sup> The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Défense des Droits de l'Homme (Senegal) v Government of Senegal, ACERWC, DECISION: N° 003/Com/001/2012

<sup>150</sup> This case addresses the plight of as many as 100,000 children (known as talibés), who while attending Qur'anic schools (daaras) in Senegal, are forced by some instructors to beg in the streets, to secure their own survival and enrich the teachers. The children live away from their families, often in deplorable conditions, and are

Based on the provisions of the African Charter and the Committee of experts' views, a clear inference can be drawn on the nuanced nature of the obligations of the African states towards prevention of child trafficking and unique issues bedevilling the African child such as begging. In that, there is a clear direction that the Committee of experts has given through the various general comments on the implementation of the ACRWC. Member states have a higher threshold in fulfilling the obligations under the ACRWC, beyond due diligence, meaning a state's action is required to produce results. To address the root causes of trafficking, states must assure that the social economic rights enunciated within the ACRWC are available, accessible and adequate.

## **2.5 Obligation to prevent through the European Court of Human Rights**

The obligation of the states has also been laid out by the European court of Human rights<sup>151</sup> held in the case of Rantseva case<sup>152</sup>; where the court was called to determine whether the state of Russia and Cyprus had violated Article 2,4 and 5 of the European Convention on Human Rights (ECHR). In this case, Ms Rantseva, a Russian national, had died of unexplained circumstances after falling from a window of private property in Cyprus in March 2001. She had arrived in Cyprus on a cabaret-artiste visa, but had left her work and lodging, stating that she wanted to go back to Russia. The court held first that indeed trafficking as defined within Article 3 of the Palermo protocol and 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings, fell within the scope of Article 4 of the European convention. In this regard, the court found that the states had a positive obligation, emanating in part from the Palermo convention, and The Council of Europe Convention on Action against Trafficking in Human Beings, illustrating that only a combination of measures proves effective, hence giving rise to positive obligations to take measures to prevent trafficking, protect victims, and prosecute those responsible for trafficking. The court found that Cyprus had failed to comply with the positive obligation on two fronts: putting in place appropriate legal and administrative frameworks to combat trafficking, and the procedural obligation to investigate the case. The court found that the artiste visas regime by Cyprus had failed to grant Ms. Rantseva practical and effective protection against trafficking and exploitation. Similarly, against Russia, the court found that the state had failed in its positive obligation when investigating her death and circumstances of her departure.

This ruling was founded on the court's decision on *Siliadin's case against France*<sup>153</sup> where the ECtHR delivered its first judgement related to a trafficking case. Siliadin was a 15-year-old girl from Togo brought to France with intentions to study. The plan was that she would work for Mrs. D for a period to pay for her airfare, after which she would be placed in school. She was instead made to work as a domestic servant without pay in Mrs. D's house, who also confiscated her passport. She was later lent to another family-B by Mrs. D, where she worked for 15 hours a day without breaks or pay. The ECtHR determined whether France had any positive obligations stemming from the ECHR Article 4. The court stated that it would be contrary to international laws if a state's responsibility is limited to only negative obligation, stopping state's interference with Article 4 of the ECHR. As a result, the court observed that

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exposed to brutal physical assaults, malnutrition, illness, sexual abuse, and several other vulnerabilities. The forced begging leaves no time for a proper education. In 2012, the Centre for Human Rights jointly with La Rencontre Africaine pour la Defense des Droits de l'Homme, submitted a communication (case) on this matter to the African Committee of Experts on the Rights and Welfare of the Child (Committee).

<sup>151</sup> Hereinafter referred to as ECtHR

<sup>152</sup> Rantsev v. Cyprus and Russia, App. No. 25965/04 (Eur. Ct. H.R. 2010), available at <http://hudoc.echr.coe.int/eng?i=001-96549>

<sup>153</sup> Application No 73316/01, Merits and Just Satisfaction, 26 July 2005.

the positive obligations of the state include adopting effective criminal law to punish private and public actors<sup>154</sup>. The court noted that slavery and servitude were not explicitly limited under the French criminal law and therefore failed to protect the child victim.<sup>155</sup>

Article 4 of the ECHR prohibits slavery, servitude and forced labour, though not explicitly defined in its text, the ECtHR has relied on the interpretation from of the ILO Forced Labour conventions and the CRC. The ECtHR also continues to recognize positive obligations<sup>156</sup> as they are used to compensate for the lack of social economic rights in the ECHR or to reinforce the deeper concept of human rights<sup>157</sup>.

## 2.6 Conclusion

This chapter provides an analysis of the development of the laws towards trafficking in persons with a focus on child trafficking. From the 1904 Agreement to the Palermo protocol, the need to protect children from exploitation has been a key factor towards the development of laws to prevent and suppress trafficking in persons. The after-the-fact response mechanisms the states utilize have resulted in the law only requiring the states to respond to the already existing cases of sexual exploitation. In addition, the chapter has shown the struggle between the human rights approach vis a vis the criminal justice approach to dealing with trafficking. Evidently, the provisions of the CRC and the regional standards on child trafficking, brings a balance between the two systems, thereby viewing the child as an autonomous rights bearer who needs to be protected from the harms that may occur due to vulnerability.

This chapter has established that the states have a positive legal obligation to prevent child trafficking. Article 9 of the Palermo protocol, Article 19 and 35 CRC, Article 1 and 29 of the African Charter and Article 4 of ECHR, give rise to both substantive and procedural duty of the state towards preventing child trafficking. As such states are under duty to develop and or strengthen existing policies and programs that prevent child trafficking and procedural obligation to ensure that the said policies and programs are addressing demand and the factors that make children vulnerable to trafficking. One thing is clear, that the states are required to go beyond paying lip service to trafficking by ratifying treaties and domesticating them but making actual resultant progress towards child trafficking, including administrative measures. These obligations have been buttressed by the CRC Committee, the African Committee of experts, and the European Court of Human Rights.

Having established this, the question therefore remains; what can the states do to fulfil the obligation to prevent child trafficking? Development of legislative measures are just one side of the coin in addressing child trafficking. The next chapter will therefore delve into the practical aspects of shifting to a prevention orientated strategy.

<sup>154</sup> Ibid n. 30 para 89

<sup>155</sup> Ibid n. 30 para 148

<sup>156</sup> See case of V.C.L. and A.N. v. the United Kingdom, App. nos. 77587/12 and 74603/12, (Eur. Ct. H.R. 2021), available at <http://hudoc.echr.coe.int/eng?i=001-207927>; where the court held that the state is under obligation not to prosecute victims of child trafficking and that failure to adequately investigate such cases undermines the right to fair trial.

<sup>157</sup> McBride, 'Protecting Life: A Positive Obligation to Help', (1999) 24 *European Law Review, Supplement Human Rights Survey* 43.

## **Chapter 3**

### **Preventing Child trafficking: A contextualised view from Kenya and Nepal**

Having established the State's positive obligations to prevent child trafficking by addressing the factors that increase vulnerability, this chapter shall propose mechanisms that give effect to this obligation. To offer a contextualised discourse on the subject matter, this chapter will have two main parts. The first part will offer a synopsis into the child trafficking situation in Nepal and Kenya, which are both signatories to the CRC and the Palermo Protocol. The two countries present a unique angle to child trafficking, in that while Kenya is an origin, transit and destination country, Nepal is mostly a country of origin and transit. In fact, in the recent past, several victims from Nepal have been found working in Kenya's entertainment clubs<sup>158</sup>. Both are placed in Tier 2<sup>159</sup> on the US Trafficking in Persons Report, meaning that they do not fully comply with the minimum standards of the Trafficking Victims Protection Act, but are making significant efforts towards compliance<sup>160</sup>. According to reports, the factors contributing to child trafficking, in these two countries are the same: poverty, limited access to education, health, domestic violence, gender discrimination, and practices that normalize violence against children. Despite enactment of laws and policies on child trafficking, the States' actions remain more reactionary as opposed to proactive. The situation analysis of the two countries does not purport to be conclusive or comprehensive due to limitations of time and space. It does, however, lay the foundation that will be used to anchor the proposed strategies towards preventing child trafficking.

The second part of the chapter will then propose a two-pronged approach towards preventing child trafficking, first, in reducing vulnerabilities through examples provided by CRC Committee in General comment Number 13. Secondly in applying transit border monitoring mechanism to intercept child trafficking, a project that was started in Nepal but is currently being implemented in various countries with tremendous success. The main aim of this part is therefore to raise awareness of some aspects of prevention that States like Kenya and Nepal which are countries of origin, can apply towards a comprehensive prevention-oriented approach to child trafficking.

The subsequent pages will first provide a brief description of the child trafficking situation in Kenya followed by measures that the Kenyan government has put in place to combat it. A similar trajectory will be used to provide a snapshot into the state of Nepal. In the end, the chapter offers practical solutions aimed at minimizing vulnerabilities to child trafficking and strengthening of border controls. This chapter asserts that by applying the said solutions, the States will not only be fulfilling their legal obligations but in addition, will be inadvertently dealing with other forms of violence against children.

#### **3.1 Child trafficking: A situation analysis of Kenya and Nepal**

##### **3.1.1 Child Trafficking Trends In Kenya**

Kenya is as an origin, transit and destination country when it comes to trafficking in persons. Whilst children make about half of the Kenyan population, they are also the most susceptible to child trafficking. The National Crime Research Centre study on human trafficking indicated that Child trafficking was the

<sup>158</sup> Supra note 67

<sup>159</sup> Ibid at 292 for Kenya and at 364 for Nepal.

<sup>160</sup> See ibid., at 39

most prevalent in Kenya by 39%.<sup>161</sup> However, out of the child trafficking cases detected, few of them are reported and action taken against the perpetrators. As the 2020 Economic Survey of Kenya also indicates, that within the Child protection management system there were only 2,329<sup>162</sup> cases of child trafficking reported. Nonetheless, there is a consensus that there has been an increase in reported cases of children trafficking by 34.9 percent, between 2017-2019.<sup>163</sup>

According to the US TIP report on Kenya, Children are trafficked for purposes of forced labour in domestic servitude, agriculture, fishing, cattle herding, street vending and begging. Boys are increasingly subjected to trafficking. Driven by poverty, rural to urban migration whilst seeking a better life, lack of access to education opportunities and unstable family life<sup>164</sup>, girls and boys are sexually exploited throughout Kenya, including in sex tourism in Nairobi, Kisumu and on the coast, particularly in informal settlement<sup>165</sup>. Children are also exploited in sex trafficking by people working in khat cultivation areas, near gold mines in western Kenya, by truck drivers along major highways and by fishermen on Lake Victoria<sup>166</sup>. Sometimes this is facilitated by their parents or guardians<sup>167</sup>. Reports indicate that domestic servitude by children is the most prevalent but also a hidden industry through which children are exploited.<sup>168</sup> This is because of the cultural connotations of child work, where it is seen as respectful for children to help their elders with work either at home or in the farms. Reportedly children from the rural part of Kenya are trafficked to the urban centres such as Nairobi, Mombasa (coast) and Kisumu mostly for domestic servitude, sexual exploitation and to the work in the fishing industry, respectively. This is due to the high demand for domestic work in the Nairobi and the surrounding areas, demand in the sex tourism industry mostly plaguing the coast and demand in the fishing industry in Kisumu.<sup>169</sup> Above is just a synopsis of the trends of child trafficking in Kenya, an exhaustive description can be found in the referenced reports.

### 3.1.1.1 Action by the Kenyan government to Curb Child trafficking

As signatory to the Palermo protocol<sup>170</sup> and the CRC<sup>171</sup>, the Kenyan government has taken legislative administrative and other measures to curb child trafficking. The US TIP report concurs, that over time

<sup>161</sup> National Crime Research Centre Report, Kenya, Human Trafficking in Kenya. June 2015 at 27

<sup>162</sup> Kenya National Bureau of Statistics, Economic Survey Kenya 2020, at 327

<sup>163</sup> Ibid at 237

<sup>164</sup> Terre des Hommes Netherlands, East Africa Office, Child Trafficking in Urban Kenya, April 2014 at 7

<sup>165</sup> STOP THE TRAFFIK , Child Trafficking in Kenya: Trends in Kisumu, Nairobi and Mombasa. Centre for Intelligence Led Prevention, London, August 2018 at 3

<sup>166</sup> International Organisation for Migration, Assessment report on the human trafficking situation in the coastal region of Kenya, May 2018, at 14

<sup>167</sup> Ibid

<sup>168</sup> Supra note 161 at 3

<sup>169</sup> Supra note 161 at 4

<sup>170</sup> Kenya Acceded to the Palermo Protocol on 16 Jun 2004

<sup>171</sup> Kenya Acceded to the CRC on 30 Jul 1990

the Government has demonstrated relatively increasing efforts to combat child trafficking<sup>172</sup>. The government in its report to the CRC Committee<sup>173</sup> confirms that it has taken legislative measures to curb child trafficking through enacting the Sexual offences Act 2006; the Counter trafficking in Persons Act 2010 and the Children Act 2001, albeit all of which are in the process of amendments to harmonize them with the Constitution 2010. Article 2(5)<sup>174</sup> of the Kenyan Constitution (2010) establishes that all international treaties that Kenya has signed, automatically become law. However, since the Palermo protocol and the CRC were ratified before the 2010 Constitution, they were domesticated through the Counter trafficking in Persons Act and the Children Act 2001 respectively. In addition, the rights of the child are anchored within the bill of rights which provides that the best interest of the child are of paramount importance<sup>175</sup>. However, the provision of Child trafficking within the Children Act, in particular the penal sanctions,<sup>176</sup> conflict with the provisions in the Counter trafficking in Persons Act<sup>177</sup>. This has been identified as one of the hinderances to enforcing the law as the prosecutors rely on other laws that address child neglect, child labour, exploitation or immigration illegalities and not the entire trafficking process as described in the Counter trafficking in Persons Act<sup>178</sup>.

Administratively, Kenya made steps towards implementation of the Counter trafficking in persons Act through the establishment of the Counter trafficking in Person advisory committee in 2014 and the National Assistance Trust Fund for victims of trafficking board. The two bodies are mandated to lead the government in implementing the Counter trafficking In person Act<sup>179</sup>. To effectively support their mandate the government of Kenya, under the Ministry of Labour has established Counter Trafficking in Persons Secretariat.<sup>180</sup> To date, the Committee has developed Kenya's first National Plan of Action on Combatting Trafficking in Persons 2013-2017, currently under review<sup>181</sup>, and enabled victims' identification and support through the development of the National Referral Mechanism<sup>182</sup>. This national plan of action is anchored on the 3P strategy discussed on Chapter 1 and has an indicative cost of implementation. A study of it reveals that the government's plan at the time was more geared towards protection and victim support and very limited actions towards prevention, save for the capacity building, public awareness campaigns and reducing fraudulent employment opportunities<sup>183</sup>. Thus demonstrates the State's ineffectiveness in addressing the root causes of trafficking from a prevention standpoint. The government is also implementing national action plans Against Sexual Exploitation of Children 2018-

<sup>172</sup> Supra note 161 at 292

<sup>173</sup> Combined third, fourth and fifth periodic reports of States parties-Kenya, 2015, CRC/C/KEN/3-5

<sup>174</sup> Article 2 (5) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

<sup>175</sup> Article 53 of the Kenyan Constitution

<sup>176</sup> Section 13 and Section 20 of Children Act 2001, Act Number 8, Laws of Kenya

<sup>177</sup> Section 3 (5) of the Counter Trafficking in Persons Act

<sup>178</sup> Supra note 161 at 293

<sup>179</sup> Section 15,20 and of the Counter trafficking in Persons Act 2010

<sup>180</sup> <https://www.socialprotection.go.ke/counter-trafficking-in-persons-sectionctip-section/>

<sup>181</sup> National Plan of Action for Combating Human Trafficking, Strategic Framework, 2013-2017. Available on <https://laboursp.go.ke/wp-content/uploads/2018/05/26-May-2015-NPA-Human-Trafficking-2013-2017-final.pdf>

<sup>182</sup> National referral Mechanism for assisting Victims of Human Trafficking in Kenya  
<https://www.socialprotection.go.ke/wp-content/uploads/2019/07/NRM-Guidelines-for-Kenya-law-res.pdf>

<sup>183</sup> Supra 181 at 8

2022 and the National Plan of Action for Children in Kenya 2015-2022, which though are not specific on trafficking address violence against children. This shows that the State's efforts while necessary, are disjointed and duplicated.

The government has further established a specialised unit under the directorate of criminal investigations, known as the Anti-Human trafficking and Child Protection Unit (AHTCPU). The unit's work is enhanced through continuous specialised training and investigative platforms such as the cybercrime centre. The AHTCPU has partnered with both local and international organisation such as INTERPOL, and National Centre for Missing and Exploited Children (NECMEC) which provide avenues for high level investigation and cyber tips in relation to online child sexual exploitation coordination. Although the US TIP report shows that there was a decline in the number of investigations and prosecutions and convictions in 2020<sup>184</sup>, through close partnerships, the State was able to rescue 96 Ugandan victims, 41 of these victims were Children aged between 14-18 years, and over 30 Nepalese Women and girls all who were victims of trafficking<sup>185</sup>. However, there was concern on the allocation of funding for the victim protection fund, which is aimed at supporting victims of trafficking, to reduce trafficking<sup>186</sup>.

From the foregoing, efforts that Kenya has put in place to fight against child trafficking, are reactive and not proactive. There are two significant weaknesses in the action plan against trafficking, neither does it fully address the root causes of trafficking nor does it provide a comprehensive prevention strategy that is focused reducing vulnerabilities. In addition, the various action plans on child rights indicate duplicated and disjointed responses of addressing violence against children in Kenya. In fact, the CRC Committee has raised its concern with Kenya's efforts in addressing Child trafficking especially towards begging and domestic servitude and therefore recommends that Kenya, to pay special attention to combating the use of children as domestic work, to harmonize all legislation on child labour to children working in non-contractual employment.<sup>187</sup>

### 3.1.2 Child Trafficking Trends In Nepal

Human trafficking in Nepal happens both internally and across the border, mainly to countries across Asia and the Middle East. Nepal acts majorly as the source of human trafficking for both sex trafficking and forced labour.<sup>188</sup> The border between India and Nepal is open, making it convenient for not only those who travel between the countries, but also for child traffickers to cross in and out.<sup>189</sup>

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<sup>184</sup> US TIP Report 2020 at 293

<sup>185</sup> ibid

<sup>186</sup> , US TIP Report 2020 at 296

<sup>187</sup> UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined third to fifth periodic reports of Kenya*, 21 March 2016, CRC/C/KEN/CO/3-5, para 72

<sup>188</sup> National Human Rights Commission (NHRC), Trafficking in Persons Especially on Women and Children in Nepal: National Report, 2011.

<sup>189</sup> Dennis and Patrick Weinert, The Danger of Human Trafficking Is No Secret in Nepal. Why Is It Still So Common? *World Politics Review*, 21 August 2018

It has been estimated that there are approximately 12000 children who are trafficked to India mainly for purposes of sexual exploitation<sup>190</sup>. An estimated 11000-13000, girls (some as young as *eight* or *nine* years) and women are working in the night entertainment industry, in Kathmandu valley, alone<sup>191</sup>.

The main destinations for victims of child trafficking in Nepal are Nepal itself, that is, from rural areas to the urban areas. Outside Nepal, victims of child trafficking are often taken to India, Saudi Arabia, Pakistan, the United Arab Emirates, Malaysia, Russia and most recently East Africa.

The most prevalent form of child trafficking is for sexual exploitation especially within the tourism sector. Children are trafficked for sexual exploitation in places such as dance restaurants, massage parlours, and other places within the tourism sector.<sup>192</sup> Another common form of child trafficking in Nepal is forced labour. Forced labour comprises elements of deception, exploitation and abuse, in violation of the International Labour Organization standards of labour.<sup>193</sup> The traffickers lure the children with promises of a better future, education, and meals, only for them to end up being exploited and abused.<sup>194</sup> Nepal has a high rate of child labour with children often working in exchange for money to give to their parents, with many of them being girls.<sup>195</sup> Victims often end up working in various places and are not allowed to leave their places of work which are mostly of slave-like conditions. Forced labour can be in form of slavery or debt bondage, the latter being common in Nepal. Debt bondage happens when individuals give themselves into slavery as a form of repayment to a loan owed to traffickers or those associated with them. Bonded labour is mostly in agriculture, hospitality sector, domestic work and embroidery workshops.<sup>196</sup> Families are tricked or trapped into working for very little or no pay, as they find that debt repayment is impossible.

The current high rates of child trafficking in Nepal could be attributed to the earthquake in 2015. It was feared that there would be a surge in trafficking cases as a result of the second deadly earthquake within that year in Nepal in 2015<sup>197</sup>. The earthquake greatly disrupted the social and economic structures of the country, leaving many people in poverty. In the rural areas of Nepal, children are expected to take care of their family members, especially younger siblings, when they are still of a young age. In contrast, children from in the urban areas spend their time doing schoolwork and playing as a normal part of their upbringing.<sup>198</sup>

<sup>190</sup> ILO (International Labour Organisation). 2002. A Future Without Child Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Geneva: ILO

<sup>191</sup> Terre des Hommes (2010). Trafficking and Exploitation in the Entertainment Sector and Sex Industries in Nepal: A Handbook for Decision Makers.

Available from: [https://www.tdh.ch/sites/default/files/study\\_trafficking\\_tdh\\_2010.pdf](https://www.tdh.ch/sites/default/files/study_trafficking_tdh_2010.pdf)

<sup>192</sup> Subedi Govind, Trafficking in Girls and women in Nepal for Commercial Sexual Exploitation: Emerging Concerns and Gaps, *Pakistan Journal of Women's Studies*, Vol 16, 2009; 121-143

<sup>193</sup> International Labour Organization Declaration on Fundamental Principles and Rights at Work (adopted 18 June, 1998)

<sup>194</sup> The Circle, 'Stopping Child Trafficking', 2020 available at <https://thecircle.ngo/project/stopping-child-trafficking/> accessed 26 May 2021

<sup>195</sup> CNN, 'No life for a Child: The Grim Reality of Nepal's Child Labourers', 2017 retrieved from [www.cnn.com](http://www.cnn.com) on 26 May 2021

<sup>196</sup> End Slavery Now, 'Bonded Labour/Debt Bondage or Peonage', 2016 from [www.endslaverynow.org](http://www.endslaverynow.org) accessed 26 May 2021

<sup>197</sup> United States Department of State, 2016 Trafficking in Persons Report - Nepal, 30 June 2016

<sup>198</sup> Giri B, 'The Bounded Labour System in Nepal: Perspectives of Haliya and Kamaiya Child Workers', *Journal of Asian and African Studies*, 2009, 599-623

In addition to the false promise of a better life, traffickers use the ‘dowry’ trick in places that particularly practice the Hindu religion. Male recruiters target impoverished families and present themselves as potential grooms looking for a bride, without asking for dowry from the girl’s family as is required by custom. The girl’s family gets lured by the idea of not having to pay dowry for their daughter, which is usually exorbitant. The girl then leaves with the ‘groom’, only to end up being sexually exploited<sup>199</sup>. Usually, ‘demand’ for children is translated to be demand for commercial sex from boys and men. However, the main demand for children who are trafficked often comes from those who can potentially make a profit out of them, either while recruiting them for exploitation, or when they reach the destination where exploitation takes place. The potential of high ‘profits’, coupled with failures of law enforcement enables traffickers to continue recruiting children to make money out of them.<sup>200</sup>

### *3.1.2.1 Action Taken by Nepal To Combat Child Trafficking*

In a bid to protect human trafficking, especially of women and children, Nepal has enacted the Human Trafficking and Transportation (Control) Act, 2007 which defines human trafficking in line with the Palermo Protocol, provides for the punishment of the crime trafficking. Nepal also has enacted the Children’s Act, 1992 and the National Child Policy, 2012<sup>201</sup> and the National Plan of Action Combating trafficking 2001. The law’s however do not criminalize all forms of labour trafficking and sex trafficking. The US TIP report noted that the identification of male victims was considerably low as a result of the inadequacies of the law on forced labour.<sup>202</sup> At the international level, Nepal has ratified several international instruments These instruments include: the UN Convention against Transnational Organized Crime, Palermo Protocol, ILO Convention No. 182 on the Worst Forms of Child Labour, ILO Forced Labour Convention No. 29 to combat trafficking and forced labour and UNCRC and optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>203</sup>

Administratively, the government of Nepal has established agencies the Secretariat to combat trafficking under the Ministry of Women, Children, and Senior Citizens. The Ministry has established Women and Children Offices in all the districts in Nepal. The programs and services under the ministry include, raising awareness in the communities, expanding local committees on child trafficking and funding rehabilitation centres for victims of trafficking.<sup>204</sup>

Nonetheless, the efforts of the Nepali government are hampered by severe corruption and complicity in trafficking offences, which the government has not taken any measures against, in clear violation of human rights obligations. Further the government’s efforts have been criticized for decreasing the efforts towards preventing trafficking, for example the National Committee for Controlling Human Trafficking (NCCHT) which is the lead agency in interagency efforts is highly underfunded, which hampers its efforts largely. Like Kenya, the efforts are mostly reactionary focused on the rescue, repatriation and rehabilitation and thus fails to examine the root causes of child trafficking<sup>205</sup>

<sup>199</sup> UNICEF, Report on Action to Prevent Child Trafficking in South Eastern Europe, 2020

<sup>200</sup> UNICEF, Report on Action to Prevent Child Trafficking in South Eastern Europe, 2020

<sup>201</sup> Shovita Dhakal Adhikari & Jackie Turton, *Understanding ‘trafficking vulnerabilities’ among children: the responses linking to child protection issues in Nepal*, Children’s Geographies, (2020) 18:4, at 394

<sup>202</sup> US TIP report (2020) at 364

<sup>203</sup> [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN)

<sup>204</sup> UNICEF, Q&A: Trafficking of Children and Women In Nepal, June 2015

<sup>205</sup> Shovita Dhakal et al (2020) at 397

### **3.2 Prevention Is Better Than Cure**

Regardless of the efforts that have been put in by Kenya and Nepal, the goal to end violence against children, particularly child trafficking seems like an insurmountable task especially since the States focus seem to be more geared to responding after the harm is done. The Special Rapporteur on trafficking in persons, especially women and children, observes, that states have a responsibility to address the root causes of child trafficking and failure to do so is tantamount to violation of human rights as the states will have failed in their due diligence<sup>206</sup>. Particularly in the present age where the world has been hit by the COVID19 pandemic which puts children in a more precarious state than before and thereby exposing the gaps in the existing child protection systems. Ending child trafficking as is the motto of various campaigns and SDG 5.2,8.7 and 16.2 will certainly not be achieved by waiting to see how many trafficked children are rescued, and the number of cases brought to court or number of perpetrators found guilty. It is only by States refocusing their strategies to prevention by targeting children at risk of being trafficked.

A re-orientation of the states' strategies ought to minimise vulnerabilities to child trafficking by re-enforcing social safety nets for households in economic need, ensure access to education both formal and informal, building comprehensive prevention strategies through a prevention focused national coordinating framework and improving coordination, cooperation, and budgetary allocation towards preventing child trafficking. These proposed measures are anchored on General Comment Number 13<sup>207</sup>, as the CRC Committee identifies that child trafficking is one of the forms of violence that states must proactively prevent. The other proposed measure is transit border monitoring anchored on the states responsibility to strengthen, border controls to prevent trafficking in persons.

#### **3.2.1 Minimizing Vulnerabilities to child trafficking:**

##### **a) Strengthening household economies**

Social economic inequalities have a ripple effect on the lives of children, best described by the butter effect analogy. As seen in the first chapter of the thesis, Children born in economically challenged families are susceptible to domestic violence, lack of education, lack of access to social assistance and their quality of life is severely diminished, all of which increase vulnerabilities to child trafficking. In this regard, the CRC committee through GC.13 recommends that states ought to provide basic and targeted services to vulnerable groups<sup>208</sup>. This includes, integrating child caregiving and protection measures into mainstream of social policy by providing financial and social support to families at risk and identifying and preventing factors and circumstances which hinder vulnerable groups from fully enjoying their rights. Over time, this has been successfully achieved through cash transfers programs. There is strong evidence<sup>209</sup> that cash transfers have for instance significantly contributed to a reduction in child labour. Through the additional income in the household and the conditionalities that come with the programs, it enables parents or caregivers, to substitute child labour with school enrolment. As a result of the

<sup>206</sup> Human Rights Council (HRC) Report by Special Rapporteur on trafficking in persons, especially women and children, (6 April 2020 ) UN Doc A/HRC/44/45 para 14-17

<sup>207</sup> Supra note 8 / CRC/C/GC/13

<sup>208</sup> CRC/C/GC/13 para. 43

<sup>209</sup> Simulating the impact of the global economic crisis and policy responses on children in West and Central Africa ([socialprotection.gov.bd](http://socialprotection.gov.bd)) at Food and Agriculture Organisation of the UN (FAO), The economic impacts of cash transfer programmes in sub-Saharan Africa, October 2014

conditionalities, such as birth registration, school enrolment and attendance, these programs provide avenues for states to monitor a child's development trajectory and thus create a safety net around the child. Examples from Mexico, Kenya, Malawi amongst others indicate that such programs have improved school attendance and higher retention particularly for the girl child.<sup>210</sup> As such the CRC Committee through the Concluding observations urge the State of Nepal to establish units of social services, including technical and financial resources, to ensure the needs of children vulnerable to human trafficking are addressed.<sup>211</sup>

### **b) Education**

The right to education is central to the realisation of the rights of the child. It is the way through which children find their voice and agency. The CRC committee urges states to put in place educational measures that addressing attitudes, traditions, customs, and behavioural practices which condone violence against children.<sup>212</sup> This is important as it has been established in the first chapter, that child trafficking is sometimes driven by traditions such as child marriage and child labour. The form of education here, however, is not limited to institutional and formal education, but it also includes age-appropriate knowledge on life skills, self-protection and on specific risks including those associated with the technological advancements. It should also empower children on their rights to be heard and the need to participate in matters concerning them, this is targeted at the different levels for instance, stakeholders, families and communities as well as governments.<sup>213</sup> Seeing as the child victims of trafficking are mostly those who cannot access formal education, the states must therefore adopt education measures that are available, accessible and adaptable<sup>214</sup> to the various environs that the children find themselves in. As indicated in previous part, access to education removes children from being at risk to traffickers.

### **c) Coordination, cooperation, and budgetary allocations**

The CRC committee recommends that states take administrative measures to combat violence against children at the national and subnational governmental level<sup>215</sup>. They include, inter-alia, establishing government focal point to coordinate child protection services and strategies, ensuring decentralization of safeguarding services and establishing national data collection systems to ensure systematic monitoring and evaluation. In responding to organised crime such as child trafficking, there is need for the state and its partners to be organised, otherwise the cracks in the systems and the silo mentality discussed in the previous part increases opportunities for children to be trafficked. Coordination and corporation especially amongst sectors are a great challenge for many countries. As such the committee through the concluding observation underscore the need for a coordinated response amongst the government bodies as well as its partners.<sup>216</sup>

<sup>210</sup> ibid

<sup>211</sup> CRC Committee, Concluding observations on the combined third to fifth periodic reports of Nepal, 8 July 2016, CRC/C/NPL/CO/3-5, para 67

<sup>212</sup> CRC/C/GC/13 para. 44

<sup>213</sup> CRC/C/GC/13 para. 44, b,c,d

<sup>214</sup> Committee on Economic, Social and Cultural Rights, General Comment Number 13, (1999) ESCR E/C.12/1999/10

<sup>215</sup> CRC/C/GC/13 para. 42

<sup>216</sup> See Supra note 224 and CRC/C/KEN/CO/3-5

At the heart of any prevention strategy is adequate budgetary allocation as provided in para. 40 of the GC.13. Dealing with the aftermath of child trafficking is a costly affair, this can be seen through the budget implications of Kenya's first national plan of action, where the state estimated to use more resources to support, rescue, rehabilitate, and repatriate victims of trafficking as compared to the preventing it.<sup>217</sup> The CRC Committee on its concluding observations to Kenya and Nepal expressed their concern on the budgetary allocation and therefore recommends that they should endeavour to increase and prioritize allocations to ensure the implementation of the rights of the child at all levels. <sup>218</sup>

Finally, the national coordinating framework. Borrowing a leaf from the bible, "... Write the vision; make it plain on tablets, so he may run who reads it."<sup>219</sup> A comprehensive prevention mechanism can only be fully implemented if all the aspirations of the state are properly documented. To this end, the CRC committee recognises that states have had challenges implementing, monitoring, and evaluating the National Plans of Action, albeit their successes,<sup>220</sup> and hence proposes a coordinating framework on violence against children. In this regard, the coordinating mechanism is seen as a tool that promotes communication between the various forms of government and civil society and one that allows for flexibility on implementation of the various initiatives. The committee recommends that this coordinating framework includes comprehensive prevention measures.

This paper postulates that prevention of child trafficking requires a multifaceted approach with a strong coordination and adequate allocation of funds. The examples provided above are not just proposal for the governments of Kenya and or Nepal to undertake, they are also legal obligations, which if not undertaken, the states must provide remedies for their violations.

### 3.2.2 Transit Border Monitoring

The second proposed mechanism to prevent child trafficking is anchored on Article 11 of the Palermo protocol, which requires states to strengthen border controls as may be necessary to prevent trafficking in persons and to adopt measures to prevent transporters to be complicit in the crime of trafficking. To this end, the paper proposes that States ought to adopt the transit monitoring as tool to prevent trafficking<sup>221</sup>. Transit monitoring is premised on the fact that it is possible and preferable to identify victims and potential victims of trafficking, both children and adults while they are on transit and before they are exploited. The benefits of transit monitoring is that it acts as a go-between. If the states prevention mechanisms proposed in the first part are not adequate and a child falls in the hands of the trafficker, this process would enable the quick identification and rescuing of the child after the process of trafficking has begun but before the exploitation actually takes place<sup>222</sup>. While transit monitoring is not a new concept, it is however mostly relegated narrowly to migration officers at international border crossings<sup>223</sup>, which is mostly not effective as the officials are mostly looking at the validity of the travel documents.

<sup>217</sup> Ibid (NPA Trafficking)

<sup>218</sup> CRC Concluding observation- Kenya CRC/C/KEN/CO/3-5 para 11

<sup>219</sup> Habakkuk 2:2-3

<sup>220</sup> CRC/C/GC/13 para. 68

<sup>221</sup> Kaufman, M. R., & Crawford, M. (2011). Research and activism review: Sex trafficking in Nepal: A review of intervention and prevention programs. *Violence Against Women*, 17(5), 651–665.

<sup>222</sup> Fighting Human Trafficking Through Transit Monitoring: A Data-Driven Model Developed in Nepal

<sup>223</sup> Several articles from the 2013 special issue of the *Anti-Trafficking Review* describe the conceptual challenges associated with identifying victims of human trafficking at border crossings but fail to consider the benefits that

The proposed concept is based on a project by Love Justice International<sup>224</sup> (LJI) which, amongst other organizations, initiated the project in Nepal. The 1850 kilometres, open border connecting Nepal and India, where Nepalese and Indian citizens are allowed to cross without showing any form of official documentation, creates an environment for transnational crime including smuggling, drug trafficking and human trafficking.<sup>225</sup> This approach to human trafficking has helped the organization to intercept over 24,000 individuals, preventing them from being trafficked.<sup>226</sup> The modus operandi as established by LJI is that the organization works with community volunteers mostly under the guidance and supervision of a local church and in close collaboration with the law enforcement. They work at identified hotspots, including border points, bust stations, markets and unofficially marked routes at international borders. The volunteers, who mostly work in pairs are stationed at the border points and or hotspots to identify potential victims of trafficking who are on transit on foot or in the buses sometimes with their trafficker in tow. One of the observations made by LJI is that the traffickers at the border points, are aware of the various organizations that are conducting border monitoring activities and therefore have managed to use different routes or means of transport to avoid getting caught.<sup>227</sup> LJI therefore has gotten better at transit border monitoring by setting up the transit sights further from the borders.<sup>228</sup> This approach has a three-step process consisting of: (a) of visual identification of suspicious signs of trafficking, (b) of a conversation with possible victims or traffickers aimed at obtaining responses to specific questions, through a form known as Intercept record form, and (c) verification of the responses given through independent sources.

The volunteers who are placed at the borders or hotspots must constantly be on the lookout for any suspicious behaviour among people crossing the border or walking around the hotspots especially if they appear to be a couple, a group of children, or an adult male walking with a young girl. Some of the giveaway signs have been of a young girls or boys travelling with adults looking drugged, drowsy, nervous, scared or confused<sup>229</sup>. Though very subjective at this point and can lead to having conversations with a large group of people especially at the initial stages of the project, a person can only be intercepted subject to confirmation and evidence that they are at risk of being trafficked or that they are indeed being trafficked.

The second step is more targeted as the volunteer(s) are able to identify indicators or risk factors of trafficking while engaging the individuals in a conversation. At this point the volunteers will engage suspected travellers, after introducing themselves with their NGO ID Cards and requesting them if they

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NGOs can bring to intervention at this stage (Miller & Baumeister, 2013; McAdam, 2013; Ham, Segrave, & Pickering, 2013).

<sup>224</sup> Kansakar, V. B. S. (2001). Nepal-India open border: Prospects, problems and challenges. Retrieved from [http://www.nepaldemocracy.org/documents/treaties\\_agreements/nep\\_india\\_open\\_border.htm](http://www.nepaldemocracy.org/documents/treaties_agreements/nep_india_open_border.htm)

<sup>225</sup> Felbab-Brown, V. (2013). The impact of organized crime on governance: A case study of Nepal. In C. Kavanagh (Ed.), *Getting smart and scaling up: Responding to the impact of organized crime on governance in developing countries* (pp. 52–96). New York, NY: New York University Center on International Cooperation. Retrieved from: [http://cic.nyu.edu/sites/default/files/kavanagh\\_crime\\_developing\\_countries\\_nepal\\_study.pdf](http://cic.nyu.edu/sites/default/files/kavanagh_crime_developing_countries_nepal_study.pdf)

<sup>226</sup> <https://www.lovejustice.ngo/projectbeautiful>

<sup>227</sup> Jonathan Hudlow (2015) Fighting Human Trafficking Through Transit Monitoring: A Data-Driven Model Developed in Nepal, Journal of Human Trafficking, 1:4, 275-295, DOI: 10.1080/23322705.2015.1098521 at page

<sup>228</sup> Maiti Nepal has also operated monitoring stations away from border areas at least since 2001 when it opened a station at Thankot on the road out of Kathmandu (Maiti Nepal, 2013b).

<sup>229</sup>UNODC, Anti-human trafficking manual for criminal justice practitioners: Module 2 , at 9 these have also been identified as human trafficking indicators in the training manual developed by UNODC

would ask them a set of questions. The questions are guided by a protocol known as the Intercept Record Form (IRF) which has a set of weighted red flags and green flags. The questions are designed to bring out the aspect of trafficking, from identifying the traveller, the documents they possess, with whom they are travelling with and for what reason the person(s) is traveling. The weighting of the red flags , based on a point system is helpful as it guides the volunteers on when to intercept. Examples of red flags include, travelling without proper documentation, when someone believes they are going for work with a relatively higher pay than what they have been paid in the past as well as going to meet someone who has promised them a job. Another give away is mostly when an adult traveling with a young girl says that they are relatives while it is clear from the information collected that they are from a different caste.<sup>230</sup> The IRF also collects information of the travellers such as their residence, towns, villages which has proven to be useful to identify sources of trafficking victims and perpetrators.<sup>231</sup>

The last step is the verification of key responses, done via a phone call to a third party for example a parent of the child, or the would-be employer who the traveller is said to be meeting in India and or confirmation of enrolment documents for education. A red flag at this point is when the said employer cannot verify the job and or knowing the employee. Another form of verification involves a process of calling and cross checking the names of possible traffickers against a *central fusion centre*. This is a database that is maintained by LJI in Nepal. The fusion centre contains information of more than 9000 individuals known or suspected as perpetrators of human trafficking. The centre also contains information about possible victims collected through the IRFs. Once a trafficker is identified through the centre, the volunteers involve the police as this is clear evidence of trafficking. If none of the red flags are checked, then the persons is allowed to continue with their trip. Notably, it is easiest for the volunteers of LJI to decide on intercepting cases of children, particularly when the child is traveling with someone without informed consent from the parent.<sup>232</sup> At this point the child is rescued and taken to the LJI shelter awaiting to be picked up by the parent or await trial. The success of this process is the fact that evidence of trafficking is collected at this point and can be adduced in court even before the exploitation takes place.

This concept, however, is not without its challenges, in practice it is not easy to identify potential victims of trafficking in a border or any kind of hotspot like a market. The challenges are compounded when the victims themselves proactively evade detection at the borders, believing that they are smuggled persons or that the “grass is greener on the other side”.<sup>233</sup> Further even when there is evidence of trafficking, it is very hard to intercept people who are already on the move, especially when they have travelled from far to get there. The victims normally inquire if they would get their money back. In addition, it maybe insufficient to intercept a person and send them back home, as they are still at the risk of being re-trafficked since the concept does not address the social economic equalities that pushed the person to this situation in the first place.

The transit monitoring approach is one of the most practical, tried, and tested methods of preventing child trafficking. Save for the fact that it directly implements Article 11 of the Palermo protocol, the in-depth data collected from travellers: potential victims of trafficking, the process through which they were trafficked, specific locations of the victims and perpetrators can be synthesized to develop trends of trafficking. Further this information collected enables intelligence led investigations, as this information is used to crack trafficking rings and follow high level perpetrators. Finally, the process is cost effective,

<sup>230</sup> Ibid note 227 at 275

<sup>231</sup> Ibid note 227 at 276

<sup>232</sup> Ibid at 277

<sup>233</sup> Ibid note 278

as all LJI has pegged the cost to intercept one person at \$100 dollars.<sup>234</sup> This project that begun 11 years ago, has now grown from one project site in Nepal, in 2020, to other countries totalling to 55 stations in Africa and in Asia. In 2020, they had 3,118 intercepts out of which emanated 138 arrests<sup>235</sup>. A move that greatly contributes to the fight against not just child trafficking but also violence against children.

### 3.3 Conclusion

This chapter has delved into child trafficking in Kenya and Nepal, showing the different approaches that the government have undertaken to combat child trafficking. As demonstrated the government's efforts towards combating child trafficking are partially effective to dealing with child trafficking. This is because the states' efforts are hampered by disjointed approaches, lack of adequate resources, corruption, and complicity in governance of child trafficking issues, as well as conflict within the various statutory instruments. The short study on the states' response to child trafficking, also reveal that their focus is largely on victim protection, support and a considerable investment on investigation and investigative techniques, and lacking in nuanced prevention measures, save for capacity building and training. It is evident that whilst developing their national action plans, the states' have not given considerable thought to prevention aspect of their mandate. In this regard, this paper asserts that the states are in violation of the legal obligations established under the Palermo Protocol and the CRC.

To address how the states can fulfil their obligations to prevent child trafficking, the chapter has extrapolated examples from the CRC Committee's, General Comment Number 13 and a case study of the Transit border Monitoring project from Love Justice international. This chapter proposes that states can prevent child trafficking by reducing vulnerabilities, through strengthening household economies, ensuring that education (formal and informal) is available, accessible and adaptable and through coordination, cooperation and adequate budgetary allocation. As echoed by the CRC Committee in their concluding observations, the states must consider cash transfer to support vulnerable families, ensure that all children and their guardians have to education, that will empower them to participate and finally, with adequate budgetary allocation, develop a comprehensive national coordinating mechanism that is focused on prevention. In the end this chapter demonstrated the workings of the transit border monitoring, which is a practical prevention mechanism that leads to the implementation of Article 11 of the Palermo protocol. These proposals do not claim to be a fail-proof plan to prevent child trafficking, instead, they offer to raise awareness of some aspects of prevention that States like Kenya and Nepal which are countries of origin, can do to develop a comprehensive prevention-oriented approach to child trafficking.

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<sup>234</sup>Ibid note 278

<sup>235</sup> Love Justice International, Annual Report 2020.

## 4 Conclusion

This thesis set out to establish the following fundamental question, why should the states re-orient the focus on the strategies to end child trafficking? What is the extent of legal obligation of the states to prevent child trafficking, and how can the states, for example, Kenya and Nepal, fulfil their legal obligation to prevent?

This thesis established that child trafficking is clouded with intricacies stemming from the compounded definitions; manifestation; and the different approaches that are needed to combat it. It also highlighted the trends and the drivers of child trafficking, ranging from age, lack of socio-economic opportunities, gender inequalities; domestic violence; amongst other factors that exacerbate the vulnerabilities of children. An analysis of the 3P- Prevention, Protection and Prosecution, known as the UN Global Action Plan against Human trafficking and the Sustainable development goals agenda 5.2, 8.7, and 16.2 demonstrated that focusing on the reactionary strategies such as protection and prosecution, which are somewhat driven by demand from the international community, leads to an unwinnable situation in the fight against child trafficking.

Secondly, the thesis established the states positive obligations towards preventing child trafficking. Article 9 of the Palermo protocol, Article 19 and 35 CRC, Article 1 and 29 of the African Charter and Article 4 of ECHR, give rise to both substantive and procedural duties of the state towards. The substantive obligation is to develop and/or strengthen existing policies and programs and the procedural obligation is to ensure that they are addressing demand and the factors that make children vulnerable to trafficking. The states are required to go beyond simple acknowledgment of trafficking by ratifying treaties and domesticating them, but making tangible progress towards child trafficking, including administrative measures.

Following an analysis of the situation child trafficking in Kenya and Nepal, the paper reveals that the two states are in violation of the obligations set out within the Palermo Protocol and the CRC towards preventing child trafficking. In addition, that albeit the important responses of the state towards child trafficking, they are reactive and hampered by a myriad of issues for example the disjointed approach to child trafficking. To guide the states in fulfilling its obligations, thesis proposes a two-pronged approach. First, is in reducing vulnerabilities through examples provided by CRC Committee in General comment Number 13 . Secondly is applying transit border monitoring mechanisms to intercept child trafficking, a project that was started in Nepal but is currently being implemented in various countries with tremendous success.

### **1. Minimizing Vulnerabilities to child trafficking:**

#### a) Strengthening household economies

Social economic inequalities have a ripple effect on the lives of children, best described by the butterfly effect analogy. Children born in economically challenged families are susceptible to domestic violence, lack of education, lack of access to social assistance and their quality of life is severely diminished, all of which increase vulnerabilities to child trafficking. In this regard, the CRC committee through GC.13 recommends that state integrate child caregiving and protection measures into mainstream of social policy by providing financial and social support to families at risk. In this regard, this paper proposes that cash transfer programs is one of the tried and tested methods of strengthening household economies.

#### b) Education

The right to education is central to the realisation of the rights of the child. It is the way through which children find their voice and agency. The CRC committee urges states to put in place educational measures that addressing attitudes, traditions, customs, and behavioural practices which condone violence against children. This is important as it has been established that child trafficking is sometimes driven by traditions such as child marriage and child labour. The form of education here, however, is not

limited to institutional and formal education, but also includes age-appropriate knowledge on life skills, self-protection and on specific risks including those associated with the technological advancements. This paper asserts that seeing as child victims of trafficking are mostly those who cannot access formal education, the states must therefore adopt education measures that are available, accessible, and adaptable for all categories of children.

c) Coordination, cooperation, and budgetary allocations

In responding to organised crime such as child trafficking, there is need to for the state and its partners to be organised, otherwise the cracks in the systems and the silo mentality discussed in this thesis increases opportunities for children to be trafficked. An effective prevention strategy requires adequate budgetary allocation as provided in para. 40 of the GC.13. The thesis further recommends that all prevention measures ought to be designed into a comprehensive national coordinating framework with prevention as its central focus.

## **2 Transit Border Monitoring**

The second proposed approach is anchored on Article 11 of the Palermo protocol, which requires states to strengthen border controls as may be necessary to prevent trafficking in persons. To this end, the paper proposes that States ought to adopt the transit monitoring as tool to prevent child trafficking . It is premised on the fact that it is possible and preferable to identify victims and potential victims of trafficking, both children and adults while they are on transit and before they are exploited. This approach has a three-step process consisting of: (a) of visual identification of suspicious signs of trafficking, (b) of a conversation with possible victims or traffickers aimed at obtaining responses to specific questions, through a form known as Intercept record form, and (c) verification of the responses given through independent sources. The proposed concept is based on a project by Love Justice International (LJI) which, has since its inception 11 years ago, has intercept over 24,000 individuals, preventing them from being trafficked.

Ending child trafficking as is the motto of various campaigns and achieving SDG agenda, 5.2,8.7 and 16.2, will certainly not be done by waiting to see how many trafficked children are rescued, the number of cases brought to court or number of perpetrators found guilty. This paper asserts that it can only be achieved by a re-orientation of the strategies, from responding to preventing. Consequently, comprehensive approaches to child trafficking requires a re-thinking of the strategies from criminal justice-based solutions to child rights-based solutions which answer the question, why are really children trafficked? Perhaps it is time states are put to task litigiously to establish why they have not effectively addressed the root causes of child trafficking despite the countless research have identified them.

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