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Legislating the Counter-Trafficking in Persons Act: The Advocacy Role of Civil Society

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Legislating the Counter-Trafficking in Persons Act

The Advocacy role of civil society

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Abbreviations and acronyms

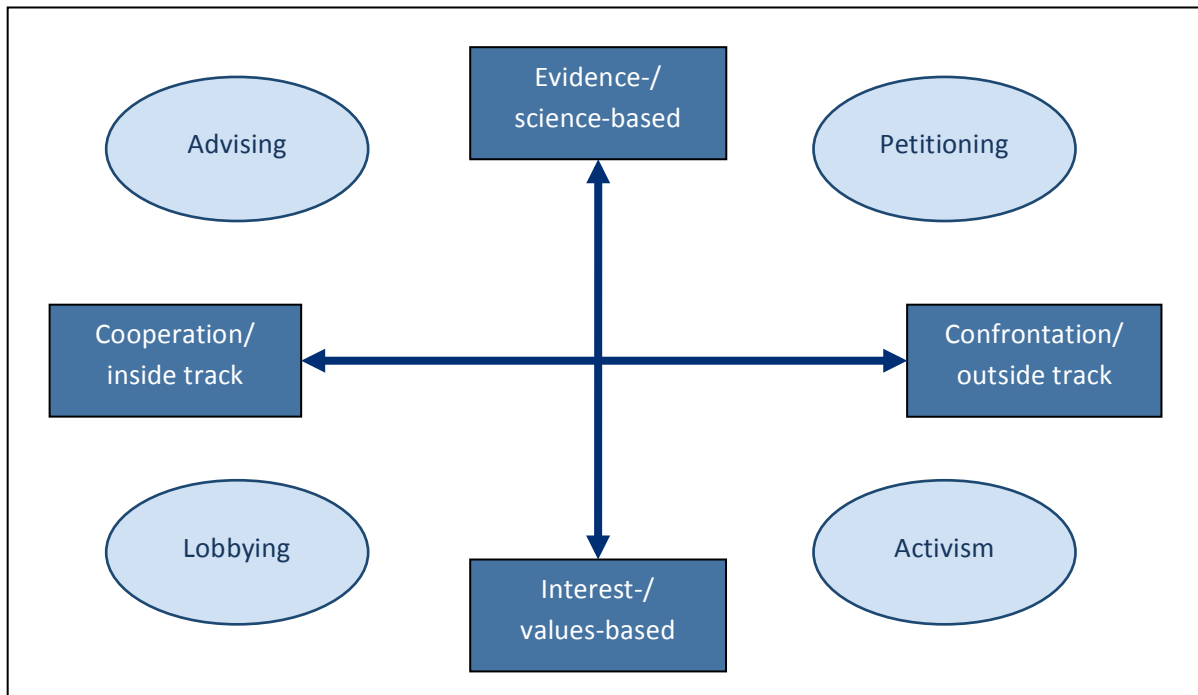
AG	Attorney-General
AMWIK	Association of Media Women in Kenya
ANPPCAN	African Network for the Prevention and Protection against Child Abuse and Neglect
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COVAW	Coalition on Violence against Women
CRADLE	The Children Foundation
UNCRC	United Nations Convention on the Rights of the Child
CREAW	Centre for Rights Education and Awareness
CSO	Civil Society Organisation
DPP	Director of Public Prosecutions
ECPIK	End Child Prostitution in Kenya
FIDA	Federation of Women Lawyers (Kenya)
ILA	International Institute of Legislative Affairs
IOM	International Organisation for Migration
KEWOPA	Kenya Women Parliamentary Association
KNCHR	Kenya National Commission on Human Rights
MP	Member of Parliament
NGO	Non-Governmental Organisation
UNICEF	United Nations Children Fund
UNODC	United Nations Office on Drugs and Crime

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1 Introduction

This study forms part of a larger project on the efficacy of Kenyan civil society organisations in promoting the rights of children. It is centred on children and youth in a major slum area in Nairobi: Kibera. Our point of departure is a fourfold typology of instruments that CSOs employ to exert influence, as depicted in the figure below.



Source: Adapted from Daniel Start and Ingie Hovland, *Tools for Policy Impact: A Handbook for Researchers*, London: ODI (Research and Policy in Development (RAPID) Toolkit), 2004.

This particular study provides an example of how civil society organisations seek to influence a legislative process. It documents the effectiveness of *advice* and *lobbying* as two principal means of advocacy, i.e. the provision of tangible inputs to the process and direct face-to-face engagement with policy-makers and legislators, respectively. It should be noted that both of these means of advocacy belong on the left-hand side of the figure, i.e. they are on the inside track of cooperation with the state. Advice is largely evidence-based and lobbying rest on the values and interests of children.

The study seeks to understand and identify the actors who have driven the legislative process to its completion and those who have thwarted or slowed down the process. It also considers the structural conditions that have facilitated or impeded agency in the process. The main research method has been semi-structured qualitative interviews with key informants, supplemented by analyses of written documents.

1.1 How legislation is enacted in Kenya

The Kenyan legal system is based on English Common Law. Most of the laws in Kenya emanate from an act of Parliament. They are introduced into Parliament as Bills. A Bill has to be published in the *Kenya Gazette* fourteen days before its introduction. Then follows the First Reading, which is a formal reading of the title of the Bill. The subsequent Second Reading provides an occasion for debate on the general principles of the Bill, after which it is referred to a Committee of the National Assembly for debate and discussion on the detailed provisions. If the Committee reports favourably back to the Assembly, the Bill is subjected to its Third and final reading. The debate during the Third Reading, if any, is restricted to a general statement or reiteration of objections. If approved, the Bill is ready for Presidential assent, after which it becomes an Act of Parliament. The date of entry into force of the Act is either the date when it received Presidential assent, or a date shortly thereafter, or it can be brought into force by order made by the appropriate Minister.

Bills are tabled in Parliament either by the Attorney General or as private member's bills. With regard to the latter, the speed of its passage depends on how well the particular member is able to mobilise other players, and, of course, the political sensitivity of its substance. Generally, Bills tabled by the Attorney General move faster. Previously, private member's Bills would stall and just be shelved, e.g. the Legal Aid Bill that was championed by Kituo cha Sheria, a civil society organisation. In that particular case, stakeholders and CSOs attended various meetings at the Attorney General's Office, consultants Oketch Owiti and Carls Wislink did some preparatory work and made recommendations to the Attorney General, but the Bill was shelved.¹

In most instances, Bills are dealt with substantively at the committee stage, where the legal division of Parliament considers the draft and proposes additions or omissions for the purpose of capturing the essence of the Bill. After the Committee stage, the Bill is introduced in Parliament and goes through several readings as described below.²

First Reading

The first reading is when a bill is first introduced to the legislature. Typically, the bill is assigned a tracking number and immediately assigned to a committee. In most British-influenced legislatures (Westminster systems), such as Kenya's, the committee consideration occurs between the second and third readings.

Second Reading

The second reading is the stage of the legislative process where a draft of a bill is read a second time. In most Westminster systems, a vote is taken on the general outlines of the bill before it is sent to the designated committee.

¹ Interview with Eric Ogwang, CEO of CRADLE, 1 August 2012.

² See www.kenyalaw.org

Third Reading

The third reading is the stage of a legislative process, in which a bill is read with all amendments and given final approval by the legislative body. In legislatures whose procedures are based on those of the Westminster system, the third reading occurs after the bill has been amended by the designated committee.

Presidential Assent

The granting of Presidential Assent is the formal method by which the head of the Executive arm of government completes the legislative process by formally assenting or giving his consent to an Act of Parliament.

Commencement

Quite often, an Act of Parliament may provide that it will come into effect on a specified date. In such cases, after the Act has received Presidential Assent, notification of the date of its coming into effect is given through a legal notice, usually by the Minister at the time in charge of the matters with which the Act is concerned.

1.2 Lobbying

Lobbying usually starts at the very beginning of the legislative process, with the identification of interested parties and continues, until the law is ultimately passed. There are also avenues for post-passage lobbying. A case in point is the Committee on the Implementation of the Constitution that can receive reports of breach and act upon it.

CSOs can also encourage the President to assent to the Bill if he refuses to do so in the first instance. They can also monitor implementation. In principle, the lobbying process can start and end at any stage in the process. The crux of the matter is what impact it may have.

Stakeholders, first of all caucus, conduct research and select the issues that need to be addressed by a new law, how they should be dealt with, and what the problems are with current laws on the subject matter, if any. Each stakeholder then lobbies for their individual interests. These could be various constituencies of interest groups, CSOs and professional bodies.

Lobbying is the process of influencing public and government policy at any levels of governance. A 'lobbyist' is the actual person or entity that does the work of lobbying. The term lobbyist originates from England in the mid-17th century, when citizens would gather in a lobby near the House of Commons to express their views to Members of Parliament.

Lobbying is an important aspect of law-making, because, apart from providing information and creating public participation, it generates a pool of diverse and competing opinions and analysis. This facilitates balanced decision-making within government. The lobby groups provide for checks and balances within the legislative process. The level of influence, however, varies with the degree of breakthrough by each lobbyist.

Some may be of the opinion that lobbyists are just people who seek political favours in exchange for their support of certain issues. In some countries there are efforts to compel the government to regulate lobbyists and their activities. For example, in the United States the Lobbying Disclosure Act was

enacted in 1995. This Act addresses disclosure, registration, and a ban on gifts and meals, but it leaves large loopholes, the largest being the ability of lobbyists to make large contributions to the campaign committees of members of Congress.

The lobbying process is no different in Kenya, except that we do not have legislation such as the one in the United States. This has had significant impact, the most recent being on the Constitution of 2010, to certain sections of which various constituencies, including religious groupings, raised concerns. The draft tried, as much as possible, to encompass the interests of all.

1.3 Objective of the study

The purpose of this study was to look at the legislative process leading to the enactment of the Counter-Trafficking Act in Kenya. It traced and documented the effectiveness of advice and lobbying as means of advocacy on the part of civil society. It also considered the structural conditions that facilitated or impeded agency in the process of enacting the Bill into law.

For a long time, cases of human trafficking have been rife, not only in Kenya but all over Africa where many people are vulnerable on account of abject poverty and exploitation. Child labour, prostitution, early marriage, forced labour, witchcraft and retrogressive cultural practices are some of the underlying factors in human trafficking.

There are many consequences of trafficking children, at worst leading to the death or disappearance of victims. Yet, little is known about the prevalence of the problem and why it persists, given its covert nature.³

The underlying rationale of the Act stemmed from cases related to human trafficking with which CRADLE (The Children Foundation) and other CSOs had dealt, involving many children. Some of these cases are mentioned below to demonstrate that trafficking was and still remains rampant in Kenya. CRADLE, when dealing with some cases, observed the following:

A couple had a child and he allegedly died, they were then told they were HIV-positive yet they were found negative upon testing. This was followed by myriads of such cases of child stealing and the infamous “miracle babies” saga around 2005-2006 led the organisation to conduct further research in Kenya, Lebanon, etc.⁴

Other studies also followed, e.g. by ANPPCAN which in 2006 undertook a similar investigation in four countries – Ethiopia, Kenya, Uganda and Tanzania – supported by the OAK Foundation. The study findings confirmed that trafficking in children was common in the four countries, but more so in Kenya which served as both a destination and a transit country. Many children were also being trafficked within Kenya into worst forms of child labour such as sexual exploitation and domestic labour.⁵

³ See ANPPCAN, *An Action Oriented Study In Ethiopia, Kenya, Tanzania And Uganda*, Nairobi: ANPPCAN, 2008, p. 1.

⁴ Interview with Hon. Millie Odhiambo-Mabona, nominated Member of Parliament (2003-2013), founder of CRADLE, an advocate of the High Court, and a civil society activist, 17 July 2012.

⁵ ANPPCAN, *An Action Oriented Study In Ethiopia, Kenya, Tanzania And Uganda*, Nairobi: ANPPCAN, 2008, p. 1.

All this information led to the drafting of the Counter-Trafficking Bill, led by CRADLE. While drafting the Bill, CRADLE relied on Bills from other countries, such as the United Kingdom and Australia. Other organisations that took part in the initiative included FIDA (Federation of Women Lawyers (Kenya); CREAW (Centre for Rights Education and Awareness); Council for Children Services in Kenya; KARC; and ANPPCAN, among others. The drafting of the Bill depended, by and large, on the monitoring of cases that were being reported and addressed, and on what was being reported in the media that bordered in trafficking.

1.4 Research methodology

The main research method used in this study was semi-structured, qualitative in-depth interviews with key informants and relevant stakeholders. Supplementary information was obtained from secondary sources, such as reports, journals and handbooks, as well as relevant legal instruments, essays and commentaries on the subject.

2 Child trafficking in Kenya

On 20 June 2012, the *Daily Nation* (a nationally distributed mainstream newspaper) reported:

Kenya moved a step closer to being hit with sanctions for allegedly failing to combat “modern-day slavery.” The country dropped one notch to the third grouping on a four-tier US ranking system that measures 196 countries’ performance in preventing and prosecuting human trafficking cases. It is now placed on a “watch list” that includes more than 40 countries in which the number of trafficking victims is increasing and whose governments are failing to provide evidence of stronger action against the vice.⁶

Child trafficking has a domestic and an international dimension. Children have been trafficked within their countries and across borders. Key informants cited Kenya as the main destination of trafficked children within the region, as compared to Ethiopia, Tanzania and Uganda. As large a proportion as 64 per cent of children reported Kenya to be the main country of destination.⁷

Respondents in Kenya (both Moyale and Busia) acknowledged that many children serving in Kenya hotels hail from Ethiopia, mainly of primary school-going age. Findings singled out Moyale as one of the towns with children trafficked from Ethiopia as well as other rural areas through arranged employment contracts between parents and traffickers. Most trafficked children reportedly end up in urban centres, possibly due to availability of employment opportunities, particularly by business people seeking cheap and exploitable labour.⁸

When children are trafficked, they do not necessarily end up within the region, but even beyond the region. External destinations of trafficked children that were reported by adults included Arab

⁶ Kevin Kelley (New York correspondent), 20 June 2012. Available at <http://www.nation.co.ke/News/Kenya-slips-in-child-trafficking-list/-/1056/1431768/-/eqyvfnz/-/index.html>

⁷ ANPPCAN, *An Action Oriented Study In Ethiopia, Kenya, Tanzania And Uganda*, Nairobi: ANPPCAN, 2008, p. 18.

⁸ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, p. 18.

countries (34%), South Africa (33%) and Europe (28%). Arab countries included Dubai and other countries in the Middle East.⁹

Pull factors associated with trafficking often draw children from their communities or countries of origin to communities or countries of destination. They can also be described as factors that make it easy for child traffickers to persuade children to leave their places of origin to move to a new destination. These include promises of better lives, schooling, employment and independence. The same factors were identified as major means used to induce parents into accepting trafficking of their children.¹⁰

The promise of good living conditions emerged as a key pull factor. Children may be lured with simple inducements such as juices and cakes. It was noted that traffickers often persuade victims and their parents/relations that once released their children will lead good lives compared to those they are leading at their place/country of residence. Nairobi was commonly reported as one of the cities where children are promised such kinds of livelihoods in East Africa, and London in Europe. It was further revealed that such prospects encourage children to go ‘voluntarily’ with the traffickers.¹¹

Employment opportunities in the countries of destination were reported to be a major inducement in child trafficking. It was revealed that trafficked children find the jobs attractive, especially if they were not working before being trafficked. The desire to be independent was also noted to be driving them into being trafficked. Children who have been working in their countries of origin are promised higher pay. Such empty promises help traffickers to persuade children to live with them with a purported prospect of a good life in return. Children who fell victim of being promised relatively higher pay compared to what they were formerly earning in their communities/countries of origin, were reported to include child labourers on plantations in Kenya. Key informants in both Kenya and Uganda noted that potential victims are encouraged while still in their countries of origin such as Uganda, Tanzania and Ethiopia to move to countries such as Kenya for better paying jobs. Victims then start anticipating improved lives, after some years of work, when they return to their original homes.¹²

Poverty is another factor exacerbating child trafficking. Poverty entails unfavourable living conditions and lack of basic necessities, which drive children to leave their homes in search of income-generating opportunities. In addition to poverty, respondents reported increasing social and economic inequality as a major factor contributing to child trafficking. Similarly, the inability by both parents and guardians/caretakers to provide necessities for children was reported to drive them into selling off children to traffickers. Others encourage their children to go out in pursuit of employment with the hope that their earnings will improve household incomes. It was also noted that owing to poverty, parents are encouraged to force their children into seeking employment to support them or even

⁹ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, p. 19.

¹⁰ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, p. 23.

¹¹ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, p. 23.

¹² ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, p. 23.

connive with traffickers to take their children with the hope of receiving money. Social factors such as child-parent relations, poor parenting and family conflicts were noted as push factors.¹³

Additional factors such as political unrest cause children and women to be trafficked for the purpose of recruitment in armed conflicts. Societal discrimination against women renders them particularly vulnerable.

The women are economically vulnerable on account of their dependence on their spouses, divorce, abandonment, separation, etc. That is why they are prone to opt for migration whether legal or illegal in search of greener pastures. They often end up being duped by traffickers and ultimately trafficked only to be exploited by their so-called employers in foreign countries.

According to a study conducted by UNICEF, other factors that encourage and drive child trafficking include lack of vocational opportunities for youth in rural areas, insufficient and/or inaccessible educational opportunities, ignorance on the part of families and children at risk of being trafficked about such abuses as rape, torture, exposure to HIV & AIDS and even psychological risks related to separation and emotional isolation; traditional migration of adults within the framework of economic activities; high demand for cheap and submissive labour in the informal sector; opportunities to travel provided through easy means of communication and transport; the desire of young people for liberation through migration; and institutional lapses such as inadequate political commitment, non-existent national legislation against child trafficking; and the absence of a judicial framework to hold the perpetrators of trafficking to account for their acts.

The International Labour Organisation (ILO) estimated that in 2006, the number of trafficked children aged 10-14 years was roughly 12 million.

Studies by Consultancy Africa Intelligence revealed that close to 800,000 men, women and children are trafficked across international borders each year. This does not include those trafficked within individual countries. UNICEF estimates that in West Africa, profits from human trafficking are only rivalled by those from drugs and weapons.

The most recent reports on trafficking in Kenya by the US Department of State revealed that Kenya is a source, transit, and destination country for men, women, and children subjected to forced labour and sex trafficking.¹⁴ Traffickers, who gain poor families' trust through familial, ethnic, or religious ties, falsely offer to raise and educate children in towns or to place adults in lucrative employment. Within the country, Kenyan children are forced to labour in domestic service, agriculture, fishing, cattle herding, street vending, begging, and in selling of illicit brews. Children are also exploited in prostitution throughout Kenya, including in the coastal sex tourism industry, in the eastern *khat* cultivation areas, and near Nyanza's gold mines. Children are lured into brothels by promises of jobs as domestic workers in cities, while others are introduced by their families to the sex trade. Brothel-based child prostitution is reportedly increasing in Migori, Homa Bay, and Kisii counties, particularly

¹³ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, pp. 26-27.

¹⁴ United States Department of State, *Trafficking in Persons Report - Kenya*, 19 June 2012. Available at <http://www.unhcr.org/refworld/docid/4fe30cbbc.html> [accessed 7 January 2013]

around markets along the border with Tanzania. Vehicles transporting *khat* to Somalia return carrying Somali girls and women who often end up in brothels in Nairobi or Mombasa.¹⁵

Both women and ‘beach boys’ as young as 14 pimp children in coastal areas and receive commissions as high as the equivalent of USD 240 from tourists for each girl secured. Some Kenyan tenant rice farmers work in situations of debt bondage to farm owners or supervisors, often to repay funds that were provided as an advance – for school fees, food, or medical needs – by their employers. Kenyan men, women, and children voluntarily migrate to other East African nations, South Sudan, Europe, the United States, and the Middle East – particularly Saudi Arabia, but also Qatar, Kuwait, the United Arab Emirates (UAE), Lebanon, and Oman – in search of employment, where they are at times exploited in domestic servitude, massage parlours and brothels, or forced manual labour, including in the construction industry. Officials at the Saudi Arabian embassy in Nairobi allegedly collude with unlicensed recruitment agents to place Kenyans into situations of forced labour in Saudi Arabia. Recruitment of women for overseas domestic work reportedly increased during the year in Mombasa, Nairobi’s Eastleigh area, and major towns in Central Province. In 2011, gay and bisexual Kenyan men recounted being lured from universities with promises of overseas jobs, only to be forced into prostitution in Qatar. Children from Burundi, Ethiopia, Somalia, South Sudan, Tanzania, and Uganda are subjected to forced labour and prostitution in Kenya.¹⁶

These statistics show how grave and widespread trafficking is and why it was justified and necessary to enact legislation to counter the practice. The justification is reinforced by the fact that the victims are generally not aware of their rights.

Children from social and economically vulnerable families, particularly girls, are known to be most at risk of trafficking. Orphans are especially exposed to trafficking with no hope of getting any support from relations.

Trafficking deprives child victims the opportunity to exercise a wide range of rights, including the right to belong/identity, the right to freedom, education, health care, to rest and leisure as well as the right not to be subjected to torture, or cruel and degrading, inhuman treatment. When children are first recruited to be trafficked, they may leave home peacefully or by deception or violence, as well as abduction and application of drugs to secure children’s obedience.¹⁷

The harm inflicted on trafficked children depends on the form or forms of exploitation to which they are subjected. Through ANPPCAN’s programme to counter trafficking, many children have already benefited in the targeted countries, through advocacy and awareness-raising, capacity-building and improved networking.¹⁸

¹⁵ *Khat* is a flowering plant native to the Horn of Africa and the Arabian Peninsula. *Khat* chewing has a long history as a social custom. It contains a monoamine alkaloid called *cathinone*, an amphetamine-like stimulant, which is said to cause excitement, loss of appetite and euphoria. In 1980, the World Health Organisation (WHO) classified it as a drug of abuse.

¹⁶ United States Department of State, *Trafficking in Persons Report - Kenya*, 19 June 2012. Available at <http://www.unhcr.org/refworld/docid/4fe30cbbc.html> [accessed 7 January 2013]

¹⁷ ANPPCAN, *Child Trafficking Programme Factsheet*. Available on ANPPCAN’s website: <http://www.anppcan.org/>.

¹⁸ ANPPCAN, *Child Trafficking Programme Factsheet*. Available on ANPPCAN’s website: <http://www.anppcan.org/>.

A trafficking process or network involves different actors including victims, users and traffickers. Parents and other relations may sometimes be involved, when they decide to avail their children for trafficking. Children are also active agents who may connive with traffickers with the aim of helping them get to other targeted children.¹⁹

Data further revealed that very few trafficked children are recovered and re-united with their families.²⁰

Nevertheless, the presence of government structures and agencies willing to engage in activities that address the problem presents an opportunity for interventions by civil society. Some CSOs are already engaged in work that deals with poverty eradication, education and other interventions that address the root causes (push factors) of trafficking. Although most of these CSOs are operating on a small scale and are not directly influenced by the trafficking problem, with better awareness of the problem their potential can be fully exploited and their activities enhanced to address child trafficking.²¹

The background above is the reason why Millie Odhiambo stated in Parliament that she moved the Counter-Trafficking Bill. As a country, Kenya did not have an adequate legislative framework that responded to cases of trafficking in persons. At the international level, a lot has been done, dating way back to the year 1222 with the Charter of Mali that was formulated by King Sundiata Keita, the ruler of Mali. Initiatives that had to do with counter-trafficking actually emanated in Africa because Africa has been most vulnerable to human trafficking which is akin to modern-day slavery.

3 Legislative responses

The United Nations Convention against Transnational Organised Crime was signed in Palermo, Italy in 2000. The convention was supplemented by two protocols: (a) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and (b) the Protocol against the Smuggling of Migrants by Land, Sea and Air. The former is sometimes referred to as the Trafficking Protocol or most commonly as the Palermo Protocol. The conventions defined trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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. The Palermo Protocol was adopted and opened for signature, ratification and accession by UN General Assembly resolution 55/25 of 15 November 2000. Kenya ratified the Palermo Protocol in 2004.

¹⁹ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, pp. 1.

²⁰ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, pp. 2.

²¹ ANPPCAN, *An Action Oriented Study in Ethiopia, Kenya, Tanzania and Uganda*, Nairobi: ANPPCAN, 2008, pp. 2.

The Palermo Protocol reinforced the legal framework against child trafficking earlier laid down in the CRC (i.e. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography), Article 35 and 39.

In the year 2007, the Kenyan Government, with the help of IOM (International Organisation for Migration), developed a national plan of action to counter the human trafficking vice. Prevention, protection and prosecution were the main pillars. There was no legal instrument, however, to prosecute traffickers and to implement the policies at that time. In turn, this lack of legal tools spurred efforts between 2008 and 2010 to prepare local legislation to fill the gap.

Between 2008 and 2010, Kenya was a dualist state in terms of legislation. Therefore, the mere ratification of the Palermo Protocol was not enough; it had to be domesticated through the Counter-Trafficking in Persons Act. After the promulgation of the new Constitution of Kenya on 27 August 2010, as per Article 2(6), Kenya became a monistic state by virtue of which international law would automatically become an integral part of the laws of Kenya from the time of ratification. Domestication by means of a separate law is no longer necessary.

The Palermo Protocol was the main legal instrument upon which the Counter-Trafficking of Persons Act was drafted. It entered into effect in 2010 and remains the legal foundation of counter-trafficking policies and action. However, the Act is yet to be implemented because the legal drafters ‘forgot’ (sic!) to gazette the commencement date.

Other international instruments include CEDAW (Article 6) which also imposes an obligation on the signatories: “States parties shall take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women.” Trafficking is incompatible with the equal enjoyment of rights by women and puts women at a special risk of violence and abuse.

The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa also obliges state parties to take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators and protect women most at risk.

3.1 Effectiveness of Legislation

Trafficking in persons and human smuggling cannot be prevented merely by establishing a penal and law enforcement regime. Criminalisation is imperative and necessary, yet insufficient. A multi-pronged approach is required, including appropriate social and economic measures which will address the root causes such as poverty, economic disparities and unemployment. Anti-trafficking legislation should also recognise trafficked persons as victims entitled to protection of their basic human rights. Laws on immigration, labour, health and child protection must be reviewed and amended to cover all aspects of trafficking, so as to provide a comprehensive framework for addressing the phenomenon. They must then be effectively enforced and their implementation monitored.

States must build a comprehensive framework aimed at preventing victimisation and re-victimisation, at protecting those who have suffered from the crime and at prosecuting the criminals. They must combat the contributing factors, striving to provide for their citizens in ways that diminish vulnerability to trafficking and to develop alternatives to the exploitation that is at times inherent in the demand for cheap labour and services. They must be vigilant in enforcing laws and monitoring activities so as to minimise the profits made from trafficking in persons.

4 Legislating the Counter-Trafficking Act

Parts of the legislative process – whether formal or informal – takes place both outside the legislative assembly by actors in civil society, the media, etc., and inside the legislative body according to laid down procedures, i.e. within Parliament itself.

4.1 Outside Parliament

The enactment of the Counter-Trafficking in Persons Act would not have been possible without the input of CSOs. Tony Odera, the Executive Director of the Kibera Centre for Legal Aid and Human Rights, said that there was broad-based mobilisation of civil society. Some of the organisations involved in the process included CRADLE (The Children Foundation), FIDA (Federation of Women Lawyers (Kenya)), COVAW (Coalition on Violence against Women), ANPPCAN (African Network for the Prevention and Protection Against Child Abuse and Neglect), the IOM (International Organisation for Migration), the Ministry of Immigration, the Police, the Office of the Director of Public Prosecution, the office of the Attorney General, and the JJN (Juvenile Justice Network). Almost all the mentioned stakeholders became directly involved in the drafting of the Bill. A lot of research was conducted by CSOs.

Community members involved in the process were from Eastleigh in Nairobi, especially Somalis, Ethiopians and people from the Coast Province. Representatives from the coast took a special interest in the matter because of sex trafficking in coastal areas.

Members of the public are not well sensitised on trafficking. For example, a lady pharmacist in her mid-thirties said her domestic worker was only sixteen years of age and was transported from Samburu to Mombasa by her mother to work and earn money so she could send it all home. The pharmacist was not aware that this amounted to trafficking.²²

The elites take part in the trafficking vice knowingly and unknowingly. A contributing factor is the lack of legal recourse and even if there were, there is no vigilance. It has become a ‘normal’ practice. Since everyone is doing it, it is condoned and not considered wrong.

The lobbying that took place to promote the enactment of the Counter-Trafficking Act was characterised by sensitisation of the public and civil society organizations, including those not addressing trafficking specifically, as well as Members of Parliament, to enhance the appreciation of the issue at hand. This process was necessary to elicit support for the draft Bill and to speed up its enactment.

Travaux préparatoires

These are the preparatory works, documents, drafts, minutes and other materials that led to the negotiation of the Bill. The *travaux préparatoires* are available in a file at the FIDA (Federation of Women Lawyers (Kenya)) offices and thus available to the public upon formal request, although they have to be consulted within the organisation’s premises. The final Bill on trafficking and the national plan of action were lodged with the Ministry of Gender, Culture, Social Services and Children Development, i.e. in the Children’s Department. The contents included the preliminary drafts,

²² Interview with member of the public.

information on trafficking in persons and related offenses, the trial of offenders and remedies for victims of trafficking, the counter-trafficking in persons advisory committee, the national assistance fund for victims of trafficking, and miscellaneous other material.²³

The Cabinet memorandum attached to the Bill had a summary of all the legal documents relied upon in the drafting process.

The preparatory research generated insights into comparative systems and best practices. A lot depended on the US Department of Immigration report of 2000.²⁴ It included international laws on trafficking, bills from other countries such as the UK, South Africa and Australia. Although the legal and social structures of those other countries may be different, even the prevalence of trafficking, their experiences, nevertheless, proved useful. In light of the above, Hon. Millie Odhiambo, nominated Member of Parliament, made sure that these documents were adapted to the local circumstances.

Workshops, newspaper reports and the report of the Nakuru Protection Working Group were also among the documents relied upon. This contrasted to most cases in which reference points for laws in Kenya are sought in British and South African experiences and practices.

The Bill was tabled in Parliament by Hon. Millie Odhiambo. She started her professional career as a state counsel at the State Law Offices. She later joined FIDA as a legal officer. In 1997, she founded CRADLE, a civil society organisation that champions the rights of children in Kenya. She was nominated to Parliament in 2007 and has since then promoted the causes of women and children in the National Assembly. She played a major role in ensuring that the Counter-Trafficking in Persons Act became a successful example of a legislative process. The experience she garnered as a human rights advocate, while in civil society, propelled her to fight for the rights of women and children in Kenya. She wore two hats, so to speak. As a civil society activist who fought for social justice and as a nominated member of parliament who ensured the passage of several laws in Parliament, including, but not limited to, the Counter-Trafficking of Persons Act 2010.

Research by Millie Odhiambo in 2006 provided evidence that many children from rural Kenya are brought to coastal towns of Kenya with the aim of being employed as domestic house helps, but instead end up as prostitutes. Many of them have no means to return to their homes, and many of them are threatened if they do so. This phenomenon is not specific to Kenyan children only as there are also cases of trafficking of children from neighbouring countries such as Ethiopia, Uganda, Tanzania, as well as those that have experienced turmoil, such as Sudan and Rwanda.

4.2 Mobilizing support for legislation against trafficking in persons

CSOs have taken a very active role in pushing for the amendment and enactment of legislation in Kenya. This stance has been fostered by Article 119 of the Constitution of Kenya 2010, which gives every person the right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation.

²³ Interview with Mary Rashina of FIDA, 23 July 2012.

²⁴ Interview with Tony Odera, Kibera Center for Legal Aid and Human Rights, 26 July 2012.

CRADLE (The Children Foundation)

This was the organisation that spearheaded the whole legislative process, through Hon. Millie Odhiambo-Mabona. CRADLE took members of Parliament through training to sensitise them. They enlisted other CSOs to work in concert. Lobbying is usually more effective when done as a group as opposed to individuals. CRADLE also organised meetings to induce the relevant Ministry join the process.

The CRADLE study revealed various legislative and institutional gaps such as the absence of an agency that deals comprehensively with victims/returnees. At that time, the legal framework was very weak. Until the enactment of the Counter-Trafficking Act, only the Children Act mentioned trafficking explicitly and provided for some punishment of the traffickers.²⁵ However, this provision was not comprehensive enough and provided for lenient sentences. The country needed stiffer penalties to deter the offenders and, if possible, to provide for compensation to the victims by the perpetrators.

Federation of Women Lawyers Kenya (FIDA)

FIDA Kenya had acknowledged the problem and learnt from other networks in Asia. Kenya was found to be in the second tier as per the US State Department report: a transit, destination and origin country of trafficking in persons.²⁶

In 2005, FIDA started a network on trafficking in persons in collaboration with the Association of Media Women in Kenya (AMWIK) and Women in Law East Africa (WLEA). FIDA was the host organisation of the network which grew to incorporate other civil society organisations and government ministries, international organisations and embassies.

The organisations included the IOM, the USAID, CRADLE, and American Centre for International Labour Solidarity (SC), Kudheisha Workers, the KNCHR, the US Embassy, ANPPCAN Regional and the ECPIK (End Child Prostitution in Kenya). Since 2013, the network has been coordinated and hosted by the Department of Children Services. It has been transformed into a National Task Force on Trafficking in Persons, including children.

However, lobbying by CSOs is more effective at the grassroots. Higher up the ladder, e.g. in Parliament, an inside champion is needed, as was Hon. Millie Odhiambo-Mabona in pushing the Counter-Trafficking Act. Another example is the Sexual Offences Act, which Hon. Millie Odhiambo-Mabona earlier on had tried to push through to Parliament, before she became an MP. But she was frustrated by the Attorney General's chambers. It was not until Supreme Court Judge Njoki Ndung'u, who was then in Parliament, picked it up that it sailed through.

The heat generated by CSO lobbying tends not to reach Parliament, because most CSOs do not have easy access to Parliament; and the MPs tend not to attend CSO meetings when called upon.

²⁵ Interview with Eric Ogwang, CEO of CRADLE, 1 August 2012.

²⁶ Interview with Mary Rashina, FIDA, 23 July 2012.

4.3 CSOs providing advice to the drafters of the bill

The initial draft was done by Hon. Millie Odhiambo-Mabona, who was then involved in the network on trafficking in persons to assist further with the drafting through input from all stakeholders. Monthly meetings were held at the Ministry to share information and to chart a way forward. While the network drafted the Bill, Hon. Millie Odhiambo-Mabona tabled it in Parliament. Hence it received the support of the women caucus KEWOPA (Kenya Women Parliamentary Association).

In Parliament Hon. Odhiambo stated:

The process of writing this Bill had support from the Ministry of Gender, Children and Social Development, Office of the Attorney-General, Ministry of Justice, National Cohesion and Constitutional Affairs and several civil society organisations that I have mentioned earlier including Cradle, the Children Foundation, the International Organisation for Migration (IOM), the United Nations Office on Drugs and Crime (UNODC) and the Federation of Women Lawyers (FIDA, amongst many others.²⁷

Thus, the Attorney General's office was not the principal drafter, though it offered some support.

4.4 CSO contributions in terms of substance and direction

In 2005, FIDA Kenya started a network on trafficking in persons in collaboration with the Association of Media Women in Kenya (AMWIK) and Women in Law East Africa (WLEA). For all intents and purposes this network played a central role in drafting the bill and in pushing it through Parliament.

There was no opposition during the process of enacting the Bill. The approach to the enactment involved at first the provision of content through forums. The trafficking of children to Saudi Arabia under the guise of employment featured prominently in the media at the time. There was really no problem in appreciating the problem and understanding that it cried out for a solution. Unlike the Counter-Terrorism Act, the Counter-Trafficking Act was a people-driven legislative process.

4.5 The role of the mass media

The media were able to profile the issue and give egregious stories. But it was up to CSOs to follow through and build a partnership with the print and electronic media. The results of recent opinion polls indicate that Kenyans trust the media. Therefore, if the media are used as a tool they can be very effective.

A key informant who is a journalist at the Standard Media Group and recipient of the David Astor Journalism Awards Trust 2012 (a London-based human rights charity that works to promote and strengthen independent journalism in Africa), was of the opinion that when the media raise issues and create awareness they hugely influence decisions by parliamentarians because MPs need to look good in the public eye.²⁸ He stated, however, that the Counter-Trafficking in Persons Bill did not receive much media attention and publicity because it was not a controversial piece of legislation.

Another key informant from a local FM radio station and formerly of Nation TV also opined that every good and bad thing that is popularised is the result of media coverage, and only recently the

²⁷ Parliament Hansard.

²⁸ Interview with Kenfrey Kiberenge, 22 June 2012.

social media platform.²⁹ Kenyans depend a great deal on information provided by the media and hence play an important role in influencing decision-making, even at the parliamentary level. When the media have set the mood in the public arena, it is only prudent for MPs to represent the interests of their constituents.

4.6 In Parliament

At the parliamentary stage, it would be relevant to borrow some excerpts from the key address made by Hon. Millie Odhiambo-Mabona when she introduced the Bill. It highlighted key issues that informed the enactment of the Bill.

Trafficking in persons has become prevalent, including internal land conflict, especially the one we saw recently; poverty, flawed birth registration system in Kenya that has made a lot of children unaccounted for and undocumented and, therefore, makes them easy targets for trafficking; gender inequality and the low status that is placed in women; the incidence of HIV/AIDS, that has especially affected a lot of children and orphaned several; unemployment and growth in technology; trafficking for labour and the debt bondage; illegal inter-country adoptions and child sex tourism, especially in the coastal towns of Kenya.

There is also the issue of marriage and mail order brides that affects a lot of our young women, especially in the coastal region of Kenya, who are promised that they will be married off to wealthy men, especially in the Middle East. But many of them end up either as prostitutes or domestic helps, and are denied their passports and means of travel, so that they have no means of coming back to Kenya. As a country, we have actually witnessed a lot of cases that have been reported that affect women, especially in those countries.

Cases of benefit fraud, where many people take our children and use them for claiming benefits in other countries. For instance, in some countries like the United Kingdom (UK), if you have a child as a dependant, then you are entitled to extra benefits. So, you find that some communities take children and one child at one point will belong to as many as ten couples. They are moved from one place to another and the child will not be attending school.

Another reason why we have trafficking is the issue of begging and hawking. We have many people who now use children to get money by pretending that the children are poor. I do not want to discount the fact that we have many poor children but many people now use that as a form of business.³⁰

By introducing this Bill, Hon. Odhiambo hoped that Kenya would domesticate the Palermo Protocol. Many other conventions make reference to the protection of women and children, including the Convention on the Rights of the Child; the Convention on the Elimination of all Forms of Discrimination against Women; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention on the Rights of the Child on the sale of children and child prostitution and child pornography; the Universal Declaration of Human Rights; the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour which is an ILO Convention; the Convention on the Protection of Children and Cooperation in respect of the inter-country adoption, otherwise referred to as the Hague Convention; and the Rome Statute that includes trafficking as a war crime and a crime against humanity alongside rape and gender-based violence.

²⁹ Interview with Shabaan Ndege, Sheki FM Radio, 22 June 2012.

³⁰ Parliament Hansard.

4.7 Process in Parliament

The Bill had a free flow in Parliament. There was no opposition, because the members of Parliament had been sufficiently educated about the essence of the Bill and were aware of the problem to be solved. The Bill was not tabled by the relevant ministry (The Ministry of Gender and Children Services) due to other priorities. The Bill was tabled as a private member's Bill but supported and seconded by the Ministry. The drafting of the Bill had been done by Hon. Millie Odhiambo-Mabona, with input from CSOs. Once in Parliament it was fine-tuned by the Parliamentary Drafting Department, but the office of the Attorney General was not actively involved.

Once the Bill was tabled in the Parliamentary committee and relevant caucuses, there was not much opposition, and it sailed through without much ado. The debate was positive. Most of the contributing MPs on the floor of the House did not oppose the Bill. The reason for their intervention was a wish to increase the penalties for offenders. After an effective sensitisation process, there was no need for further advocacy by civil society. The voting pattern in Parliament cut across party lines, although no voting figures are available.

On 10 December 2008, the Counter-Trafficking in Persons Bill was introduced in Parliament through a notice of motion by Hon. Odhiambo-Mabona. She stated that trafficking in persons was classified as modern-day slavery, constituting the third most lucrative transnational organised crime after the drugs and arms trade; noting further that Kenya was classified as a country of origin, transit and destination for human trafficking due to increasing economic differentiation within and between the countries of East Africa; concerned that there is no comprehensive law or policy addressing this issue.

On 30 March 2010, the Bill went through the 1st reading and on 15 June through the 2nd reading as a private member's Bill, and further on 6 July 2010 through the 3rd reading. On 15 July 2010, Hon. Millie Odhiambo-Mabona moved amendments to the Bill at the Committee stage. The Minister for Gender, Children and Social Development also proposed amendments to the Bill on the same day.

The legislative process was fairly fast because Hon. Millie Odhiambo-Mabona was already in Parliament as a backbencher who could sponsor it. MPs also attended a training and sensitisation workshop with CRADLE to help them understand the nature of the vice. Mobilisation was conducted through meetings with the Minister of the relevant Ministry and the Parliamentary caucus on children. KEWOPA (Kenya Women Parliamentary Association) was also actively involved.³¹

4.8 Deliberation on the Bill in parliamentary committee

In summary, the contributions of MPs were positive and the Bill never faced any form of open resistance apart from comments for amendments and additions to strengthen it. Most of the MPs supported the Bill at the committee stage. The highlights are as follows:

The MP for Saboti, Hon. Wamalwa, seconded the Bill, and so did the MP for Dujis, Hon. Duale, cited sex tourism at the Coast, rampant migration from our neighbouring countries due to instability and migration to the Middle East as sources of concern. The MP for Sotik, Hon. Laboso, called for domestication of international laws that curb trafficking because the vice is still rampant even with international laws in place. She also mentioned that the domestic laws that attempt to curb trafficking

³¹ Interview with Hon. Millie Odhiambo, 17 July 2012.

are not punitive enough and that the foreigners who, posing as guardians, abduct children should be dealt with.

The MP for Githunguri, Hon. Baiya, gave an account of an incident that occurred in his constituency and supported the Bill, so did the MP for Karachuonyo, Hon. Rege, who referred to trafficking by means of social media such as Facebook and asked the government and the security forces to be extra vigilant, while Hon. Njuguna and Hon. Muthama, MPs for Lari and Kangundo, respectively, supported the Bill.

The then Minister for Gender, Children and Social Services, Hon. Murugi, applauded the work of Hon. Millie Odhiambo-Mabona and said that the Ministry has been working very closely with her and other stakeholders in producing the Bill. She also stated that when the Bill was being prepared, her Ministry, the Ministry of State for Provincial Administration and Internal Security, the Police Department, the Ministry of State for Immigration and Registration of Persons and Ministry of Labour were all involved.

However, she moved motions for two minor amendments. One was that since the Bill dealt with human beings as did her ministry, she wanted the secretariat to be housed within the Ministry to ensure coordination. On the issue of the Fund to be established, she emphasised the need to work out modalities of creating a Fund so that those who were victimised could be rehabilitated. She stated that rehabilitation centres needed to be created.

The MP for Kisumu Town, Hon. Shakeel, also dwelt on the issue of the Trust Fund. He said its establishment was a good idea and hoped that the implementation would equally be good. The sources of the funds had been limited to three: (a) revenue generated from investments; (b) confiscated funds and proceeds of crime; and (c) donations. He further stated that owing to the importance of counter-trafficking, it was imperative that the Ministry of Gender, Children and Social Development provide some funding of this Trust Fund from its budget. He also suggested that DNA records of traffickers be taken, and proper records of cases be kept.

The then Minister for Foreign Affairs, Hon. Wetangula, suggested a couple of amendments at the Committee Stage. In the definition of organised criminal group the words “existing for a period of time” should be deleted. This amendment was necessary because a group can be formed and mutate into something very big within a short period of time and engage in criminality of unparalleled proportions. He also said that the definition of trafficking in persons needed to be expanded. The Bill said that a person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person. He suggested the mover to expand that to include a person who funds or finances such activities, directs or controls such activities or is in any other way associated with a similar offence so that it is all encompassing. He reasoned that if one limits oneself to recruiting, transporting, transferring, and harbouring and receiving, then one is, in fact, leaving out the key players in human trafficking, i.e. rich people who sit somewhere with a lot of money and control the trafficking of human beings.

He also noted that the advisory committee was too cumbersome for the Government and was unlikely to be productive. He said that what was needed in an advisory committee was the Ministry responsible for children, Immigration, Foreign Affairs, Security and the Attorney-General. The rest could be consulted and co-opted as and when needed. He was concerned that an advisory committee of 14

members would most likely encounter problems of quorum. There would also be a challenge of reaching consensus. A smaller, effective committee would be preferable.

Being largely a Government advisory committee, he advised that consultations with the Treasury be initiated to forestall that traffickers contribute money to the fund and thus compromise its integrity, undermine its effectiveness and defeat its very purpose. He lastly mentioned that children's homes needed to be regulated as they were used as fronts for fraudulent adoption and trafficking.

The MP for Rarieda, Hon. Gumbo, suggested that people from the private sector be included in the committee instead of being heavily laden with Government officials, and also called for stiffer penalties such as the death penalty.

The Assistant Minister for Youth Affairs and Sports, Hon. Kabando, who was also the MP for Mukurweini, stood up to support the Bill and said they had been working closely with Hon. Millie Odhiambo-Mabona and attested to her diligence and seriousness. She has the kind of commitment that you find in organised civil society which those in Government are sometimes quick to dismiss when they do not like matters emanating from those organisations. He also moved that a person with financial management skills run the fund, and called for stiffer penalties.

The Assistant Minister for Tourism, Hon. Mbarire and Hon. Mbadi, respectively MPs for Runyenjes and Gwasi supported the calls for stiffer penalties.

The MP for Kilgoris, Hon. Konchela, in supporting the Bill called for a special police unit to deal with investigation and arrest in an attempt to rescue those people who are confined, by tracing their whereabouts. He also wished that the Ministry of State for Immigration and Registration of Persons would open a special department that would deal with young people going abroad because they have been married or are going to work somewhere. Most of them are cheated to go and work or go to school but end up being slaves. The police should be able to train a special force and send them all over the world to trace Kenyans. He believed it was possible to have a database of all Kenyans leaving the country and then be able to trace them wherever they go.

After the deliberations at the Committee stage, the recommendations were fine-tuned by Hon. Millie Odhiambo-Mabona and the Bill was tabled again in Parliament as a private member's Bill.

4.9 Inter-governmental initiatives

The process of writing the Bill had support by the Ministry of Gender, Children and Social Development, the Ministry of Justice, and the National Commission for Cohesion and Integration, and Constitutional Affairs.³²

The office of the Attorney-General rejected the earlier version of the Bill until it was amended. Efforts to enlist the assistance of the Attorney-General's Office had been thwarted by the bureaucracy.

The police were involved in the process of drafting the Act.³³ They were invited to attend workshops organised by civil society groups when the Bill was discussed and participants were educated on the nature of the Bill. There were no reservations from the police. Some of the contributions raised by the

³² Parliament of Kenya Hansard.

³³ This information stems from sources in the Kenya police that prefer to be anonymous.

police were included in the final draft. However, most of the work was done by CSOs including the research material used for sensitisation purposes.³⁴

5 Successes and challenges

5.1 Enactment

The Act came into being by Presidential assent on 13 September 2010 and its commencement on 13 December 2010.

The implementation of the Counter-Trafficking in Persons Act has faced challenges. Response is still nascent if the number of reported cases of women being trafficked to the Middle East with promises of jobs and greener pastures is anything to go by. It could mean that more cases will be reported when awareness has increased in society at large. So far, most people are not aware of the existence of the Act. This is evident in cases of local trafficking, e.g. domestic workers from the villages to urban centres. The vice exists for socio-economic reasons.³⁵

Sources in the Police say that since the enactment of the Act there have been no prosecutions because the Act is yet to be fully implemented owing to insufficient resources allocated to setting up the institutions created under the Act.

The Kenyan police force is thoroughly equipped to handle trafficking cases. The coordination between the Ministry of Immigration and the Police leaves some scope for improvement to ensure better flow of information between the two departments. The Ministry of Immigration under the Act has the mandate of arresting perpetrators of trafficking. Nothing in the Act prohibits the police from making arrests. Kenya's borders are secure and the security systems are being tightened every day to ensure that no case of trafficking goes undetected. However, adequate resources should be allocated to establish the institutions charged with the duty of curbing trafficking under the Act. Overall the Act is a good piece of legislation but commensurate resources are required for it to become fully implemented.

5.2 Challenges

After passing the Bill into law, the Government is yet to commence full implementation and enforcement. The mistake done was that the drafters 'forgot' to include the date of commencement in order for the Act to be gazetted. The Act has not yet brought significant changes. Cases exist but not serious ones. No bodies that were created under the Act have been formed yet. Loopholes or constraints cannot be clearly foreseen until actual implementation commences.

Civil society has also done nothing more than holding strategy meetings.³⁶ Since the enactment there have been no prosecutions for the simple reason that the Act has been inoperative. The challenges of enforcement may well be related to both lack of institutional capacity and lack of resources. But in

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³⁵ Interview with Vincent Kimosop, Executive Director of the International Institute for Legislative Affairs (ILA), 13 June 2012.

³⁶ Interviews with Hon. Odhiambo, 17 July 2012 and Eric Ogwang', CEO of CRADLE, 1 August 2012.

addition there may be lack of good will. The Minister may well have seconded the Bill in Parliament simply because she felt it was the right thing to do or due to the media hype. If she had any good will at the time of enactment, it may well have left the Ministry upon her transfer to another ministry. A knowledge and institutional memory gap may also have been created due to the reshuffling process.

A major concern regarding the Counter-Trafficking Act is that after all the work that went into its enactment, more than two years down the line it is yet to be gazetted. Parliament changed the law to give the Minister the prerogative to decide when it is operational.³⁷ CRADLE moved to court on 18 July 2012 and filed a petition at the High Court Constitutional and Judicial Review Division to challenge the Attorney General and the Minister for Gender, Children and Social Development to operationalise the Act and to compel the court to declare that the miscellaneous amendments that give the prerogative to the Minister was wrong.³⁸

6 Conclusions and lessons learnt

6.1 Politics and sociology of law-making

Compared to the days of the former regime, democratic space has really opened up for lobbying to become more effective. There are now more actors, a good example being the Nairobi Plus 21 Gender Conference. This contributed to the inclusion of ‘favourable’ clauses for women in the Constitution 2010.³⁹

Lobbying has moved from ‘high voltage’ political change to social issues. Lobbying is currently informed by facts and figures, media coverage and communication. In Parliament one can lobby in the following ways: (a) supporting individual MPs through technical support such as drafting and mobilising stakeholders; (b) engaging Parliament as an institution; and (c) pushing parliamentarians to the public sphere, thus prompting them to act. Other means include building a credible partnership with the media and a section of parliamentarians to research the facts and issues which are used to inform the public. It is also easier to lobby on pro-poor issues that give MPs political credit.

Lobbying can be done at different levels, from the identification of the problem, to the enactment of a law and to policy formulation, as well as to implementation and evaluation. It is of paramount importance, therefore, to tailor lobbying activities to the relevant level and phase of the process, e.g. addressing the appropriate stakeholders and in a language they will understand.

The timing of lobbying is important. For example, during an election campaign incumbent MPs and new contestants are more likely to be receptive to messages of lobby groups. However, a caveat must be observed: parliamentarians pass many laws in a hurry to beat deadlines without paying attention to detail, which, in turn, may create loopholes that give rise to demand for amendments. Apart from election campaign periods, it is relevant to consult the parliamentary calendar to assess when Parliament is in session and the number of MPs present is high.

³⁷ Interview with Hon. Odhiambo, 17 July 2012.

³⁸ Interview with Eric Ogwang, CEO of CRADLE, 1 August 2012.

³⁹ Interview with Vincent Kimosop, Executive Director, International Institute for Legislative Affairs, 13 June 2012.

On the other hand, it may be futile and risky to engage in lobbying for a particular issue during an election campaign. A good example is when ILA (Institute of Legislative Affairs) worked on the Psychologists, Counsellors and Psychotherapists Bill. They started their lobbying during electioneering but the MP championing the Bill was not re-elected. Hence, they were back to square one and had to start the process afresh. Another example would be the ICJ (International Commission of Jurists) Freedom of Information Bill that was being sponsored by Hon. Anyang' Nyong'o, but upon becoming a Minister he could not continue sponsoring it and the process stalled.

The lobbying stage is important as the Constitution makes public participation in legislation mandatory in terms of Article 118. Article 119 gives every person the right to petition parliament to enact or amend legislation. However, the level of preparedness by members of the public to contribute is low and wanting.

Even at the parliamentary level, knowledge about the legislative process is deficient. The technical know-how in legal drafting is not up to par compared to that of the Attorney General's Department. That is where CSOs may come in by offering technical support to parliamentarians.⁴⁰

Even MPs have to lobby their fellow parliamentarians to support the agendas they are advancing. When former MP and now Supreme Court Judge Njoki Ndung'u was lobbying for access to sanitary towels to be made easier, she had to make her fellow male parliamentarians aware of the problem of sanitary towels by explaining how much they have to spend on that item for their wives and daughters and even relations. When you make them understand the matter as individuals it is easier to muster support for a Bill they will stand to benefit from directly.

Within Parliament there is the 'you-scratch-my-back-and-I-scratch-yours' mentality. If you want support from fellow MPs you had better reciprocate and support them in promoting their agendas when the occasion arises at a later time. When parties differ on issues it can slow down the lobbying process because consensus is difficult to reach. The counter-trafficking bill went through smoothly because it did not attract a lot of political controversy, unlike the amendment of the Finance Bill which divided the House into two camps.

One also has to balance demand and supply in law-making. If not, one is likely to attract suspicion and negative publicity. The interests of all parties must be considered. For example, when ILA (Institute of Legislative Affairs) lobbies, it works on public interest issues such as public health, governance, human rights. Then it identifies the people working on the issues at hand. In the case of mental health care, for example, the institutions involved can include Prisons, the Children's Department, the Ministry of Health, people with disabilities, the Ministry of Education, etc. Then they are all brought together for a discussion. In that process ILA provides leadership.

When drafting Bills, challenges arising depend on the circumstances. The drafters at the Attorney General's Chambers do not want outsiders' (CSOs) input because drafting is a highly paid job and thus very competitive. There is not an abundance of legal drafters in the country, not more than 15. That is where the rigidity comes in and causes delay.⁴¹

⁴⁰ Interview with Vincent Kimosop, Executive Director, International Institute for Legislative Affairs, 13 June 2012.

⁴¹ Interview with Vincent Kimosop, Executive Director, International Institute for Legislative Affairs, 13 June 2012.

Lobbying methods include research, mapping, and sensitisation of both members of parliament and the public through media to build demand and supply to meet the demand. To be effective one cannot work alone. Rather, one has to work with the right people, get technical support and increase the number of supporters. That is why it helps to rally other CSOs to assist when a particular CSO is pushing an issue.

Lobbying also works the other way round. MPs approach CSOs to lobby, based on their credibility. Other organisations may also approach lobby groups, both international and local organisations such as on the rights of LGBTI (Lesbian, Gay, Bisexual, Transgender, and Inter-sex) communities. The extent to which organisations cooperate depends on the issues in question. This is where the underlying values of organisations and their sponsors come in.

Another issue that may complicate lobbying is the credibility of an MP. If one wants one's issues addressed the 'messenger' should be credible. Some organisations have been 'tagged' and are associated with certain issues. Hence, at times they need to step down to allow other organisations to push an agenda through.⁴²

The effectiveness of the lobbying process in Kenya is influenced by the following factors among others:

(a) The credibility of the organisation and/or the MP fronting a piece of legislation.

It must be appreciated that society assesses individuals in terms of certain criteria and norms, and they often vary. In most cases, when MPs come forth in favour of certain interests, support may be overwhelming. This may result on account of their knowledge, their track record or even their political affiliation.⁴³ The same applies to legal persons such as organisations. People are more likely to associate with certain persons due to their credibility.

(b) Political season

When the political tide is running high and political temperatures reach a peak, the chances are that the support of agendas in parliament will be party-based. Parliament is the forum where the MPs show their loyalty towards whichever camp they are inclined. Therefore, they will automatically support the interests championed by members of their partisan camp. During such periods attention is focused on re-election campaigns and contestants may not be keen on trivial issues that CSOs might be raising.

(c) Effect on the public or public participation

The more impact a piece of legislation is likely to have on members of the public, whether positive or negative, the more likely it will be given much attention.

(d) Support from other stakeholders

As earlier mentioned, if the affected parties come together as a block, then the joint pressure will be commensurate with the impact that the lobbying process is likely to have. One needs not just numbers

⁴² Interview with Vincent Kimosop, Executive Director, International Institute for Legislative Affairs, 13 June 2012.

⁴³ Interview with Vincent Kimosop, Executive Director, International Institute for Legislative Affairs, 13 June 2012.

per se but numbers from the right people who can influence the decision-makers and even public opinion.

(e) Whether there is someone to champion the interest from within Parliament

The entry of Hon. Millie Odhiambo-Mabona into Parliament brought about a big difference in the children's rights civil society arena. Previously, there was no particular MP who championed children's rights. It is difficult to get through if there is no person inside to do it for you.⁴⁴

(f) Media support

It cannot be emphasised enough how important a role the media play in profiling certain issues and its resultant impact on the entire lobbying process. Media coverage increases public awareness.

(g) Availability of resources to mobilise other players

In order to organise forums and workshops and sensitisation campaigns, the lead CSO needs to have the material resources to finance the whole process as well as the intellectual resource to educate the other players.⁴⁵

(h) Party support in Parliament

As much as the voting pattern ought to be issue-based in Parliament, one cannot ignore the fact that MPs vote along party lines. Therefore, if the interest promoted by a CSO does not appeal to a certain party then the attitude may be hostile.

(i) Intimidation

There is an element of intimidation by means of threats and even the raiding of media houses by individuals in authority. The media ought to be objective but they are also interested parties in society. For example, they definitely advocate for peaceful elections. They are also, as mentioned earlier, a powerful tool in lobbying, so when they profile issues there is generally some impact. But in some situations the demand for payments to cover issues or lobby events can seriously hinder the efforts as commercialization of issues also sets in, at times with negative results.

7 Lessons for Kenya

In Kenya all matters of trafficking fall under the Ministry of Justice. In some instances there is overlap of functions with other Ministries and departments. The Kenyan trust fund to be established under the Act would be funded by the Government and by the confiscated assets of perpetrators. The implementation committee would have to be composed of a range of stakeholders, without top government officials. This composition is more practicable, because top government officials, such as Permanent Secretaries are often over-burdened. Hence, they might not be able to attend meetings. This may cause delays and real challenge during implementation.

⁴⁴ Interview with Eric Ogwang', CEO of CRADLE, 1 August 2012.

⁴⁵ Interview with Eric Ogwang', CEO of CRADLE, 1 August 2012.

The cost of enforcing the Act should be reflected in the budget estimates. Furthermore, the coordination mechanism between stakeholders, inside and outside government, is weak. Therefore, the Ministry should set up an advisory committee to ensure coordination. Tony Odera, the Executive Director of the Kibera Centre for Legal Aid and Human Rights is threatening to file a suit to compel the Minister to take action. However, the challenge of most of these committees is that roles are not well defined and they often like the driver of the issue to be within the government setup. This makes these settings look like gatherings with routine meetings. Many examples exist in Kenya.

Absence of data cripples efforts to combat trafficking. Governments need to know the extent of the crime, its geographical spread and the many forms it takes. One needs to understand how criminal networks function and what makes individuals vulnerable to being trafficked. Without such data it is difficult to assess the impact of the crime, develop solutions that will meet real needs and to evaluate the effectiveness of anti-trafficking efforts. Where authorities and other stakeholders are uninformed, a victim may be discriminated against, charged as a criminal or deported, while their exploiters remain active, free of investigation or censure.

In countries around the world, human trafficking continues because of ignorance. While the clandestine nature of the crime makes data collection difficult, it is not impossible garner information.⁴⁶ While there is rampant human trafficking globally, comprehensive and sustained research has yet to be done on the vice in Africa, specifically in Kenya, and especially its international tentacles. Much information on trafficking in Kenya is anecdotal, save for internal trafficking for domestic labour that has a body of literature. However, there have been a few efforts such as *Grand Illusions, Shattered Dreams: Report on the Status of Human Trafficking in Kenya*, as well as ANPPCAN's report of 2008.⁴⁷

The latest study on the state of trafficking in Kenya, conducted by the US Department of State, revealed that the Government of Kenya does not fully comply with the minimum standards for the elimination of trafficking. However, it is making significant efforts to do so. During the reporting period, the government's children's officers continued admirable efforts to identify and protect child trafficking victims throughout the country. The government failed, however, to fully enact its anti-trafficking law's implementing regulations, finalise its national plan of action, take tangible action against trafficking complicity among law enforcement officials, provide shelter and other protective services for adult victims, take concrete action against alleged incidences of child sex tourism, monitor the work of overseas labour recruitment agencies, or provide adequate anti-trafficking training to its officials, including diplomats, police, labour inspectors, and children's officers. The government has held few trafficking offenders accountable for their crimes in comparison to the significant number of child trafficking victims identified. Increasing efforts to combat human trafficking are needed. The government's efforts remain uncoordinated and lack strong oversight, thus, in effect, creating an environment conducive to trafficking.⁴⁸

The report further recommended that Kenya finalise necessary regulations and put in place appropriate structures to fully implement the anti-trafficking statute; use the anti-trafficking law to prosecute trafficking offenses and convict and punish trafficking offenders, including government officials

⁴⁶ Dissertation by Ochiel J Dudley, University of Nairobi.

⁴⁷ Dissertation by Ochiel J Dudley, University of Nairobi.

⁴⁸ United States Department of State, *Trafficking in Persons Report - Kenya*, 19 June 2012. Available at: <http://www.unhcr.org/refworld/docid/4fe30cbbc.html> [accessed 7 January 2013].

suspected of complicity in human trafficking; use the anti-trafficking law or Section 14 of the Sexual Offenses Act to prosecute and punish child sex tourists; provide additional training to all levels of the government, particularly law enforcement officials and diplomats, on identifying and responding to trafficking crimes; establish an official process for law enforcement officials to refer trafficking victims for assistance; continue to increase oversight of and accountability for overseas recruitment agencies; increase protective services available to adult trafficking victims, particularly those identified in and returned from the Middle East; and approve and implement the national action plan.⁴⁹

⁴⁹ United States Department of State, *Trafficking in Persons Report - Kenya*, 19 June 2012. Available at: <http://www.unhcr.org/refworld/docid/4fe30cbbc.html> [accessed 7 January 2013].

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This report forms part of a larger study titled Advancing the Rights of Children: Assessing the Effectiveness of Transnational Advocacy Networks for Child Rights. Norwegian-Kenyan Civil Society Partnerships Examined. It was conducted jointly by the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) and the Chr. Michelsen Institute (CMI). It traces the legislative process leading to the enactment of the Counter-Trafficking in Persons Act. The role of one particular civil society organisation is highlighted and specifically one individual acting first in the capacity of an activist and later as a Member of Parliament.