

Call for written submissions: Report of the United Nations Special Rapporteur on trafficking in persons especially women and children.

Implementation of the Non-Punishment Principle in the context of trafficking in persons.

Submission by the Counter Trafficking in Persons Secretariat, Ministry of Labour and Social Protection, Republic of Kenya.

The Government of Kenya is committed to the protection of victims of trafficking in persons. While doing so the principle of non-punishment is upheld. The principle is enshrined in the legislation governing trafficking in persons.

The Counter Trafficking in Persons Act, Section 14 provides, "Notwithstanding the provisions of any other law, a victim of trafficking in persons shall not be criminally liable for any offence related to being in Kenya illegally or for any criminal act that was a direct result of being trafficked".

Incidents of forced return to his or her country of origin as punishment

The law further provides that victims of trafficking in persons shall be permitted to remain in Kenya until legal proceedings are concluded and may by order of court in such proceedings be allowed to bring their children (Section 15, sub-section 4).

The Minister responsible for immigration matters may arrange for the repatriation of the victims of trafficking in persons to their place of origin as provided for by the Counter Trafficking in Persons Act. This does not constitute forced repatriation. The National Assistance Trust Fund for Victims of Trafficking in 2019 funded the repatriation of five victims from Kenya to Nepal and India.

Where a Kenyan victim of trafficking in persons across the borders does not have proper documentation, the Government shall issue the necessary travel documents to enable the victim of trafficking in persons to travel and re-enter the country. This has been done severally and the victims are not expected to pay for the documents or their return to Kenya.

Where, in the opinion of the Minister for the time being in charge of immigration, the repatriation of a victim of trafficking in persons from Kenya is likely to or would expose the trafficked person to danger, the Minister may permit the trafficked person to continue staying in Kenya for such period as the Minister may consider fit.(Section 18)

Where a victim of a trafficking in persons' offence institutes civil action for damages, the victim of trafficking in persons shall be exempt from the payment of court fees (Section 16 of the Counter Trafficking in Persons Act).

Arrest, detention or other forms of custody of trafficked persons as punishment

Normally when the Police or Immigration officials intercept persons entering the country irregularly and they suspect they may be victims of trafficking, they liaise with the Counter Trafficking in Persons Secretariat so that the suspected persons are housed in shelters and not detained in Police Cells. In the few cases where victims are not identified at the onset and the matter gets to court, the victims are referred to the Secretariat for victim assistance and the criminal case is withdrawn.

Examples of deprivation of citizenship as punishment against trafficked persons

The Secretariat to the Counter Trafficking in Persons advisory Committee has not come across any incidence where deprivation of citizenship has been used as punishment against trafficked persons.

Information on laws and policies on the implementation the non-punishment principle, in particular examples of good practice, including specific legislation, policies or guidance adopted on the implementation of the non-punishment principle.

- Counter Trafficking in Persons Act
- Kenya Citizenship and Immigration Act
- The Penal Code
- The Sexual Offences Act

The gender dimensions of implementation of the non-punishment principle

There is an assumption that victims of trafficking are primarily or exclusively women, girls and children and this characterises the redress interventions and the criminal justice system responses often masking the role of women as traffickers.

The limits or challenges on the application of the non-punishment principle, in law or in practice;

- It is not easy to determine whether one is a victim of trafficking in situations where persons are found to have entered the country irregularly. There is risk of having the traffickers get away with the crime if law enforcement officers do not undertake due diligence in investigations to separate the traffickers from the victims.

- Kenya, being in the Greater Horn of Africa is a neighbour to a number of war torn countries. Human trafficking is exacerbated by armed conflicts.
- Kenya has two distinct legal frameworks one for measures to counter human trafficking and another covering the criminal justice system in general. The later poses challenges for the application of the principle. Provisions of criminal law under which human trafficking acts or conduct are punishable are usually formulated in gender-neutral terms and do not distinguish between the gender of the alleged perpetrators or the different impacts that such criminalization has on women and men.

