



12 February 2021

This submission in response to the Call for Submission issued by the Special Rapporteur on Trafficking in Persons, especially women and children on the principle of non-punishment is jointly made by:

- **Life Bloom Services International (LBSI)**, a Kenyan NGO based in Naivasha, and supporting women and girls who have experienced or are at risk of sex trafficking and sexual exploitation.
- **Trace Kenya**, a national counter trafficking NGO based in Mombasa, Kenya that supports women, young people and children who have experienced human trafficking.
- **People Serving Girls at Risk**, a Malawian organization supporting survivors of sex trafficking to access justice and rebuild their lives.
- **Equality Now**, an international human rights organization advocating for legal and systemic change to end violence and discrimination against women and girls globally.

Our submission highlights our experiences in working with and supporting victims and survivors of sex trafficking in Kenya, Malawi and the United States.

Kenya

Section 14 of the Counter Trafficking in Persons Act (2010) provides that victims of trafficking are immune from criminal prosecution, and “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.” However, the experiences of victims and survivors that Trace Kenya and LBSI supports show that criminalization of trafficked persons is still a common occurrence in Kenya. This occurs for a number of reasons such as law enforcement agents not being fully aware of the realities faced by victims, and failing to make full inquiries about the circumstances surrounding the commission of the crime.

Some of the experiences of trafficked persons include:

1. **They are likely to be charged with violating immigration laws:** People trafficked from outside Kenya often travel without correct travel documents, or with fake documents, or their travel documents are under the traffickers’ control. Even where there are indications that trafficking may have occurred, e.g. where victims state that someone else is in possession of their travel documents, or they have been found living in confined places, instead of seeking to establish if trafficking has occurred, the default position of law enforcement agents is to arrest and charge them with immigration offences. They are made to pay a fine, and deported back to their countries of origin. If they are nationals from other countries within East Africa, based on the agreements on free travel within the region, they are required to pay an administrative fine and are informed to return to their countries and regularize their travel.
2. **Women victims of sex trafficking may be charged with violating prostitution laws.** Trafficked women are exploited for sex in Kenya’s sex trade in tourist areas such as the Coastal Region and in the urban areas of Nairobi and Naivasha. There are reports of women and girls trafficked from Nepal and Uganda into dancing clubs, where they are sexually exploited. In some cases, instead of law enforcement seeking to verify the circumstances of these women and whether trafficking may be involved, they are arrested and charged with violating the Penal Code provisions which prohibit living off the proceeds of prostitution. An example is of a case that

occurred in 2019, where Trace Kenya supported a group of young women in Mombasa who had been charged with violating pornography laws when in fact they were being held under duress and coercion and exploited for sex, including video recording of the exploitation.

3. **The experience of criminalization further traumatizes trafficked persons.** Being held in a police station can be an extremely traumatizing experience, especially for women and girls, who have already experienced sexual exploitation. The police stations have not been designed with the needs of vulnerable women and girls in mind. For instance, there is no counselling or psychosocial support available, or facilities to ensure their privacy and personal hygiene needs. In a police station, they are essentially held as criminals rather than vulnerable people requiring support and services. This compounds the trauma and harm they have already experienced from being trafficked and exploited. Both LBSI and Trace Kenya have intervened in cases where women and girls who were potentially trafficked persons were held in police custody, and worked with the authorities to ensure that women and girls were moved to a safe house or shelter where they would get the support they required.

A compounding challenge is that Kenya does not have any government designated shelters for adult victims of human trafficking. Due to the inadequacy of the police stations, and if the trafficking case is not being investigated, victims may be left with no choice but to liaise with their traffickers to bail them out, thus continuing to remain under the control of traffickers.

Other survivor experiences:

Margaret*¹, aged 14 and an orphan living with HIV, was trafficked from Kinangop to Naivasha for employment purposes. A well wisher reported her case and accompanied her to a police station. Margaret was detained in police cells for 3 weeks and in isolation. She experienced psychological trauma as a result of the experience. Later, the Gender Officer of Naivasha sub-county referred her case to LBSI. LBSI provided trauma counselling, providing her with food and traced Margaret's uncle who came and re-integrated her back to her family. No one was arrested.

Mary* a 12 year old girl was trafficked by a truck driver from Bungoma to Nairobi. The police on a road checkpoint in Gilgil interrogated the truck driver who did not have a concrete reason for having the 12 year old in his truck. The police took Agnes to the police where she stayed in a police cell for 2 days. The police physically assaulted her during the interview process to “make her narrate the whole scenario and share her details”. LBSI was made aware of the case, and referred her to a rescue centre, where she received counselling and later reunited with her father.

4. **Inadequate victim identification undermines the rights of trafficked persons, discourages reporting and cooperation with investigations and prosecutions, and negatively affects the justice system at large.** Defaulting to arresting and criminalizing possible trafficked persons before full investigations are conducted results in many victims falling through the cracks as they are treated as criminals, and do not receive the support they need nor justice through the legal system. It also means that many traffickers and others who exploit are not being brought to account, and thus continuing to operate with impunity. As a result victims are likely to remain under the control of their traffickers, and risk being trafficked again. Both LBSI and Trace Kenya are aware of people that have been trafficked, and go through the criminal process, only to be re-trafficked again by the same traffickers.

¹ Not her real name

5. **Having a criminal record presents challenges for trafficked persons, and hinders their integration back into society, as well as diminishes their chances towards self-reliance through taking up employment.** In Kenya, when applying for a job, a certificate of conduct is one of the key requirements that many employers will ask for, especially in government departments. The certificate, which is issued by the Criminal Investigations Department, will help to show if one has engaged in any criminal activities before and that one follows the rules and regulations of the country. Most employers will ask for a certificate of conduct which is obtained on an annual basis. For trafficked persons, who are likely to have had limited options in the first place, a criminal record means they will not be able to obtain a positive certificate of conduct, and ultimately this hinders employment opportunities.

Malawi

Like Kenya, Malawi is a signatory to the Palermo Protocol and in Section 42 of the Trafficking in Persons Act (2015) provides that a person who has been certified to be a trafficked person “shall not be subjected to criminal proceedings directly relating to, or as a consequence of their trafficking situation as a trafficked person.” The Act requires one to be “certified” a trafficked person before they can be protected from criminal liability. This leaves open the possibility that some trafficked persons who have not yet gone through the court system, even when there are some indications that trafficking may have occurred, will be arrested first before the authorities investigate any suspicions of trafficking.

6. **Many sex trafficking victims in the border areas are arrested for violating immigration laws:** PSGR and other local organisations have noted many cases of sex trafficking that are occurring in border areas such as Mthini, Karonga, Mwanza, Dedza and Muloza. In these areas, many women and girls from the neighboring Zambia, Tanzania, Mozambique and Zimbabwe are trafficked by their recruiters and pimps and coerced into prostitution. When these girls and women are rounded up by immigration and other security officials, they are held in police cells, and released after spending a number of days in those cells. In most cases, they are charged for flouting immigration laws and requirements, and made to pay fines. Sex trafficking is rarely investigated, and traffickers and pimps are rarely charged. This means that women and girls are treated as law breakers and not as victims of human trafficking and exploitation. They are not provided services such as psychosocial counseling and medical support. There have also been reports that some police officers will solicit them for sex in exchange for not deporting them.
7. **Inadequate support and services to trafficked persons results in their re-traumatization: Even in cases where human trafficking is being investigated, victims can be re-traumatized by lack of adequate support and services.** For example, in 2019 PSGR monitored a case involving 4 Nepalese women who had been trafficked into Malawi for sex exploitation purposes. The government was not able to provide adequate shelter support and the women felt isolated in police custody. Witness protection measures were not put in place, and the traffickers were able to communicate with the women. The traffickers took advantage of this gap in support and due process, and influenced the women to change their statements. The women were eventually repatriated with the help of UNODC, and no further arrests or charges against the traffickers were made.
8. In 2020, PSGR also supported a 17 year old girl who had been trafficked into Malawi from Mozambique by an unknown truck driver. The truck driver sold her to a man who forcedly married her, confined her indoors, impregnated and infected her with HIV. The girl was rescued by the police and later referred to PSGR for counselling and other support. Her experience highlighted the lack of appropriate facilities and support when trafficked persons are detained by the police. She did not receive any psychosocial support and she also found the interviewing

process traumatic and was unable to speak about her experience until she was referred to PSGR and supported to access a suitable shelter. In January 2021 she was repatriated back to Mozambique with the help of Social Welfare and the Mozambican Consulate in Blantyre. No-one has been charged.

United States of America

We would like to bring your attention to the case of Zephaniah Trevino, who is currently being charged as an adult for crimes committed by her trafficker when she was a sixteen-year-old child under his control. Prosecuting her as an adult when she was a child at the time the alleged crimes were committed—indeed prosecuting her at all for crimes that were committed while she was being trafficked—violates the principle of non-punishment.

The facts that Equality Now and partner organizations have gathered from media coverage and other reliable sources show that under federal law, Zephaniah was a domestically trafficked child at the time the alleged crimes were committed. The US Trafficking Victims Protection Act defines sex trafficking as the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years. Significantly, the law further defines any act of commercial sex with a person under the age of 18 as “a severe form of trafficking.” Therefore, at the time of the alleged crimes with which she is charged, Zephaniah was a domestically trafficked child subjected to a severe form of trafficking.

The facts also show that under Texas’ human trafficking offense, which includes all commercial sexual exploitation of minors, Zephaniah was indisputably a victim of sex trafficking. In addition, just like federal anti-trafficking law, Texas’s human trafficking law applies to buyers of commercial sex, specifying that buying commercial sex with a person who is under the age of eighteen constitutes human trafficking. Texas’ Penal Code Ann. § 20A.02(a)(7), (8), provides that when the victim is a minor, means of force, fraud, or coercion are not required. We understand from the facts that the deceased intended to traffic Zephaniah by purchasing her for sex at the time he was killed by Zephaniah’s trafficker.

Under Texas law minors, those aged 17 or younger, are legally incapable of consenting to sex. Therefore, under Texas law, an adult aged 18 or older who engages in sex with a minor has committed the crime of statutory rape. It is indisputable that Zephaniah was the victim of statutory rape by her trafficker and that prior to his death the deceased intended to subject Zephaniah to the crime of statutory rape.

Equality Now is among organizations calling on the District Attorney to weigh heavily the fact that under Texas law and U.S. federal law, a child who is sold for sexual services or advertised for sexual services, is by definition a sex trafficked child. Whether that child was engaged in criminal activity during the time of her exploitation does not alter the status of her victimization, but it should absolve her of criminal responsibility for those actions.

Recommendations

We urge the Special Rapporteur to consider the following:

- Encourage States to extend the non-punishment principle to enable criminal records to be vacated or expunged for individuals who were convicted of crimes committed as a direct result of trafficking. This would enable victims to get back into society and rebuild their lives.

- Encourage States to provide training to law enforcement and social services on early victim identification and ensure that victims are provided access to services that are appropriate for their specific needs to support their physical, psychological and social recovery.
- Encourage States to adopt a human rights based approach to supporting victims of human trafficking, and ensure that they respond to the needs of women and girls, and recognizes the particular circumstances and needs of the specific victim.
- Encourage States to review prostitution laws and end criminalisation of people in prostitution, whilst creating/strengthening accountability for those who exploit (e.g. traffickers, pimps, sex buyers). This would help efforts to ensure that trafficked persons are never criminalised under prostitution laws. Instead, states should promote measures and efforts to increase support services, including support to exit prostitution, for those who wish to.