10.7 Facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies.
PREFACE

The main goal of this handbook is to enhance a culture of human rights by observing, respecting and promoting human dignity in migration processes. Further, it aims at enhancing the capacity of government officers and all stakeholders as a simple accessible reference book; which will improve service delivery to the public in matters concerning migration of human beings.

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BACKGROUND

The Kenya National Commission on Human Rights (KNCHR) is an independent National Human Rights Institution (NHRI) established under Article 59 of the Constitution, 2010 and the KNCHR Act, 2011. The Commission is mandated to ensure the promotion and protection of human rights in Kenya. The Commission’s establishment and operations are guided by the UN’s Paris principles as well as relevant laws in Kenya.

The Better Migration Management Programme (BMM) is a regional programme formed by EU and countries of the Khartoum Process aiming to improve migration management and in particular to address the trafficking and smuggling of migrants within and from the Horn of Africa. BMM is an example of cooperation between the European Commission and the German Federal Ministry for Economic Cooperation and Development (BMZ). The project is implemented by GIZ in partnership with European and International agencies.

The Commission in partnership with the BMM Programme has designed this handbook in line with international best practices and KNCHR institutional tenets stated as:

- The Vision: A society that upholds human rights for all.
- The Mission: To protect, promote and monitor the respect for human rights in Kenya through law, policy and practice.
- The Goal: Increased enjoyment of fundamental rights and freedoms by all in Kenya.
- The Values: Accessibility, impartiality, integrity, independence and inclusiveness.

THE OBJECTIVES OF THIS HANDBOOK ARE:

- To provide an easy to read, simple reference material on migration and human rights which will be used by the duty bearers and stakeholders and enhance service delivery to all.
- To mainstream human rights approaches in service delivery to the public and migrants.
- To enhance knowledge on human rights and obligation of migrants and prevent human rights violations especially at the border points.
- To provide an understanding of reporting mechanisms and assistance pathways for victims of human trafficking and smuggling in Kenya.
Migration and Human Rights

DEFINITIONS

Migration

Movement from one place to another of an individual or a group of people. It can be organized or spontaneous for different reasons. It can be voluntary or involuntary.

Human Rights

Human rights are claims/entitlements that are inherent to all human beings and cannot be taken away by anyone despite your colour, origin, religion or any other status. These rights are all interrelated, interdependent and indivisible.

Chapter 4 of the Constitution of Kenya provides for all human rights and fundamental freedoms while Article 25 stipulates when enjoyment of these rights can be limited.

The state and its agents have a duty to fulfil, observe, respect and protect the enjoyment of rights. Further, under international law states have rights to admit/exclude immigrants within their territories.

The public has a right to claim their rights but also to fulfil the accompanying responsibilities for enjoyment of rights by others.
WHY DO PEOPLE MOVE/MIGRATE?

To find better jobs/income
To improve their livelihoods, quality of life/lifestyle
To enjoy more rights and freedoms
To seek better education opportunities
For family reasons (marriage, accompanying a child/parent/relative)
Investing in a new country
Enjoying better health care
Escaping persecution
Escaping war
Escaping poverty
Escaping environmental/natural disasters
...and the list goes on

THESE ARE THE PUSH AND PULL FACTORS OF MIGRATION.

TYPES OF MIGRATION

Migration can be voluntary or involuntary as shown below.

VOLUNTARY MOVEMENT
Migrants, immigrants, transnationals

ECONOMIC MIGRANTS, ENVIRONMENTAL MIGRANTS, FORCED MIGRANTS (ARMED CONFLICTS)

INVOLUNTARY MOVEMENT
Forced migrants, asylum-seekers, refugees

Figure 2: People on the move
Figure 3: Types of Migration
Categories of Migrants

**REGULAR MIGRANT:**
- Someone who enters a country lawfully and remains in the country in accordance with his or her admission conditions.
- Obtains work permit and/other required documents to be lawfully employed in the country.

**IRREGULAR MIGRANTS:**
- A person who enters a country without possessing all the documentation in line with the law and immigration requirements of that country.
- A person who overstays the period of his/her visa period or a person who enters a country legally but breaches conditions of entry such as overstays visa duration, breaches the law.

Figure 4: Cartoon on Migrant rights. Source: OHCHR Web portal
Migration and Human Rights

In principle, states are free to exercise their territorial sovereignty in regulating the entry, residency, and departure of people from its territory. However, this freedom is not absolute. The right to freedom of movement and freedom to choose one’s residence under ICCPR (Art. 12) is applicable not only to nationals of the country concerned, but also to ‘everyone lawfully within [the] territory’ of any state. Foreigners who meet this condition are therefore also protected.

Migrants also have rights enshrined in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and other regional and international instruments.

RIGHTS OF MIGRANTS

- Right to receive medical treatment in emergency cases
- Right to life
- Right to security of person
- Right to communicate with one’s family or lawyer upon detention
- Right to dignity and respectful treatment
- Right to access justice through a due process of law before deportation or imprisonment
- Right to humane treatment during detention
- Right to equality before the law
- Freedom from torture, inhumane and degrading treatment and slave-like practices
- Right to non-discrimination
- Right to hold documentation e.g. passports and IDs
- Right to apply for citizenship or asylum in accordance with the Laws of Kenya.
ADDITIONAL RIGHTS OF REGULAR/DOCUMENTED MIGRANTS

- Right to social security and benefits such as medical, education and unemployment benefits where applicable
- Right to family reunification
- Right to freedom of movement
- Migrant workers are entitled to equal treatment as nationals in enjoyment of labour rights
- Right to be members of trade union

OBLIGATIONS OF MIGRANTS

- To uphold the law by complying with the laws of that country relating to migration (at the point of entry, residence and exit)
- Seek the necessary work permits in the country for migrant workers
- Respect the rights of others and abide by the laws of that country
- Comply with the laws and regulations of any country of transit and the state of employment
- Respect the cultural identity of others
- Report to the nearest migration offices at the border point and consulate offices upon their arrival to any country for purposes of security
- Adhere to the immigration procedures and practices of the country of destination

WHAT IS YOUR ROLE AS A DUTY BEARER TOWARD MIGRANTS?

- A duty bearer (government or its officer) shall uphold human rights of migrants during service delivery in order to reduce human rights violations
- Offer services to a migrant and uphold their human dignity
- Assist victims to report to relevant office about any human rights violation
- Keep victims informed of the action you are going to take and the progress of the case
- Identify the migrant and whether or not they are in distress (i.e. in forced migration situation)
- Be impartial, polite, respectful and helpful to all victims
- Be sure that the needs of victims are attended to
- Show empathy; avoid being judgmental or making humiliating remarks
- Avoid interviewing victims in full view of the public or in a manner that will make them uncomfortable
- Use referral pathways to assist a victim of forced migration (trafficking) to access services
- Use existing referral channels to assist a migrant seek relevant services
- Use a victim-centered approach in investigations if a migrant is in need of assistance
Migration Trends in Kenya

Kenya is a critical hub for mixed migration in the region. Kenya has been described as a major origin of trafficking within the Greater Horn of Africa. It is a transit country mainly for Ethiopians and Somalis migrating south towards South Africa and also a destination for refugees, asylum seekers and economic migrants from throughout the region. Mixed migration movements into Kenya include refugees, trafficked persons, irregular and economic migrants from other African countries particularly from East African countries including South-Central Somalia, Ethiopia, South Sudan, Tanzania and Uganda. According to IOM, Kenya is also a regional hub for smuggling with an estimated 20,000 Somali and Ethiopian male migrants being smuggled to South Africa every year. Migrants in an irregular situation risk exploitation in domestic servitude, sexual exploitation and provision of cheap labour.

Human trafficking is the trade of women, men and children for the purposes of exploitation. Section 3 (a) of the Counter Trafficking in Persons Act, 2010; defines Trafficking in Persons as ‘the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.’ Trafficking in Persons is a national, regional and global problem and a serious crime.

WHAT IS HUMAN TRAFFICKING (TRAFFICKING IN PERSONS)?

1. THE ACT: recruitment, transportation, transfer, harbouring or receipt of persons

2. THE MEANS: coercion, abduction, fraud, deception, abuse of power or abuse of position of vulnerability

3. THE PURPOSE: exploitation, prostitution or forced labour or services, child marriage, slavery, debt bondage, illegal organ transplant etc
**CHILD TRAFFICKING:**

Section 3 (3) of the Counter Trafficking in Persons Act, 2010; defines child trafficking as ‘the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set out in Section 3 subsection (1) of this Act.

The definition of trafficking in persons who are adults differs from child trafficking because the latter does not include the component of “means”. This is because children do not have the capacity to consent.

Children particularly are vulnerable to human trafficking. Studies have shown that an estimated 20,000 children are trafficked in Kenya annually. Refer to ANPPCAN baseline survey on child trafficking in Busia, Mandera and Marsabit, 2017.

The above illustrations show the basis of victim identification process. A victim of trafficking can be identified by checking if the above elements are present. If they are, then action should be taken to report the case of trafficking and ensure that the victim is assisted by the relevant authorities. This will enhance the protection of the rights of the victims of trafficking and help in curbing this crime.
WHAT IS SMUGGLING?

‘Smuggling’ is an illegal business which involves helping people cross international borders of a country illegally without valid documentation and without following the required entry and residency conditions.

TRAFFICKING AND SMUGGLING: DIFFERENCES AND SIMILARITIES

TRAFFICKING:
- Legal, illegal or no border crossing
- Legal or illegal documents
- Documents not with the victim
- Coercion and repeated exploitation
- Restricted movement, control
- An individual is seen as a commodity

CRIMINAL NETWORKS
Profitable business involving humans as a commodity
Crime against state and the individual

SMUGGLING:
- Illegal border crossing
- Illegal (false or stolen) documents are given to the person being smuggled
- Voluntary (a party is aware)
- The service/movement is seen as a commodity
- Crime against the State

Figure 9: Similarities between Human Trafficking and Smuggling

Kenya has acceded to the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children. It is intended to prevent and combat such crime and facilitate international cooperation against it. This Protocol was domesticated in Kenya through the Counter-Trafficking in Persons Act, 2010. In line with the Act, the Kenya Government launched the Counter Trafficking in Persons National Advisory Committee to coordinate implementation of policies related to combat human trafficking and provide prevention and protection services to victims.
Human Rights Based Approach (HRBA) to Migration

The KNCHR supports government’s effort to combat human trafficking and also control migration by advocating for a human rights based approach which safeguards rights for all parties, reminds parties of their responsibilities in upholding the rule of law for good governance.

- Migrant rights are human rights. Migrants are human beings regardless of their status. Migrant workers make a vital contribution to the countries of destination and origin. Nonetheless, many migrants face exploitation and violations of their rights thus a rights based approach.
- Human rights based approach lays more emphasis on using human rights principles (participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law) when dealing with different migration situations.
- Calls for upholding of human dignity for all in enforcement of the laws of any state.
- Stresses on importance of safeguarding human rights. It is about human beings, specifically the rights and responsibilities of all parties involved in migration processes as either duty bearers (state and its officers) and right holders (public and migrants).
- Guides on the need to empower communities to claim their rights and undertake their responsibilities. On the other hand the duty bearers are empowered to undertake their obligations and their rights in order to ensure the enjoyment of the rights by right holders.
- For instance, always counter check if the migrant is a victim of trafficking because the Counter Trafficking in Persons Act, 2010 proposes a victim centered approach which protects a victim of trafficking from being criminalized or penalized. A victim centered approach underscores the need for thorough investigations to unearth the crime and cartels of human trafficking and not criminalize the victim.
Reporting Mechanisms and the National Referral Mechanism (NRM) guidelines in Kenya.

If you come across a case or suspect a situation of human trafficking or smuggling or abuse of human rights violations of a migrant please report to the following institutions:

1. Visit a nearby police station or a local administration office like chief’s office or report to nearby border official.
2. Call 24 hour Childline Kenya on 116 or visit the nearest government children office for cases involving children.
3. Call KNCHR on 0726600159 or send an SMS to 22359 or visit any of our offices or our website www.knchr.org
4. Report to the Department of Children’s Services who hosts the secretariat of the National Advisory Committee on counter trafficking in persons for further assistance.
5. If the victim of trafficking needs medical or any other assistance, please check the National Referral Mechanisms Guidelines for identification and assistance of victims of trafficking in Kenya from the Department of Children Services offices, Ministry’s website or KNCHR’s website.

Note: The NRM guidelines provide a system of identification, referral, holistic support and assistance based on the gender, age, specific needs and reintegration of victims of trafficking in Kenya. The goal of the NRM is to promote co-operation between all relevant government departments and other organizations and agencies involved in working with victims of trafficking. It aims to protect the rights of victims through a professional victim identification process, provision of better support and protection services and establishment of programs for full recovery and rehabilitation as envisioned in the Counter Trafficking in Persons Act, 2010. However, for the duty bearers the guidelines will empower you to identify your role in assisting the victims of trafficking using a human rights based approach.
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