

**Kenya**



ECPAT International has developed [a legal checklist](https://ecpat.org/wp-content/uploads/2021/09/SECTT-Checklist_ENG-1.pdf) for governments providing guidance for legal interventions and measures to adopt in order to improve their national legal frameworks. This will help to effectively address the crime of sexual exploitation of children in travel and tourism, including its online elements.

The legal checklist was developed based on the recommendations of the first [Global Study](https://ecpat.org/wp-content/uploads/2021/08/Global-Report-Offenders-on-the-Move.pdf) on sexual exploitation of children in the context of travel and tourism. Following the development of this legal checklist, ECPAT International conducted country legal analysis for Kenya and other countries in Africa, as well as Southeast Asia, Asia and the Americas.

The country analysis serves as a baseline to indicate and track the implementation status of the legal interventions within and across the four regions. It provides governments with clear directions for improving their actions with respect to child protection against sexual exploitation in the context of travel and tourism, including its online elements.

The table below allows easy assessment of existing legislation against the 24 measures of the legal checklist. It will be updated as the laws and policies change. An [explanatory note](https://ecpat.org/wp-content/uploads/2021/08/SECTT-Checklist_ENG_Explanatory-note.pdf) and an [assessment matrix](https://ecpat.org/wp-content/uploads/2021/09/Assesment-Matrix_2021SEP_ENG_v2.pdf) can be consulted for further reference.

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Recommendations** | **Implemented** | **Legislation** |
| 1. | Establish by law **extra-territorial jurisdiction**, within the parameters of Article 4 OPSC, for all offences of sexual exploitation of children, including those occurring in the online environment. | Partially | Section 6 of the Penal Code stipulates that every person who within the jurisdiction commits an offence partly within and partly beyond the jurisdiction will be tried and punished under the Code.  The Sexual Offences Act establishes that extraterritorial jurisdiction will apply when a Kenyan citizen or a resident of Kenya commits an act outside Kenya which act would constitute a sexual offence under this Act (Section 41). Here, provisions don't include passive extraterritorial jurisdiction.  Article 66 of the Computer Misuse and Cybercrimes Act states that extraterritorial jurisdiction will apply when a Kenyan citizen or a resident of Kenya commits an act outside Kenya which act would constitute an offence under this Act and the offence is committed against a Kenyan citizen or against property belonging to the Government of Kenya outside Kenya, or the person who commits the act or omission is, after its commission or omission, present in Kenya.  Article 25 of the Counter-Trafficking in Persons Act stipulates that a citizen of Kenya, or a person who permanently resides in Kenya, who commits an act outside Kenya that constitutes an offence under this Act if committed in Kenya, commits such an offence and is liable on conviction to the same penalty prescribed for such offence under this Act. Here, provisions don't include passive extraterritorial jurisdiction.  The laws do not provide for universal extraterritorial jurisdiction. |
| 2. | Include in extradition treaties the sexual exploitation of children as **extraditable offences** and apply when appropriate the rules of article 5 OPSC, regardless the nationality of the (alleged) offender. | Partially | Article 4 of the Extradition (Commonwealth Countries) Act states that an offence is an extraditable offence when:   * it is an offence against the law of a requesting country which falls within any of the descriptions contained in the Schedule to the Extradition Act; and * it is an offence punishable under that law with imprisonment for a term of twelve months or any greater punishment; and * it would constitute an offence against the law of Kenya if it took place within Kenya.   The Schedule to the Extradition Act vaguely mentions only two offences in relation to children: “trafficking in young persons for immoral purposes” and “stealing, abandoning, exposing or unlawfully detaining a child”. |
| 3. | Do NOT require the principle of **double criminality** for proceeding with extraterritorial jurisdiction or extradition for sexual offences against children. | No | The principle of double criminality applies in cases of extra-territorial jurisdiction (mentioned in point no.1).  The principle of double criminality applies under the Kenyan law in case of extradition (mentioned in point 2). |
| 4. | Abolish **statutory limitations** for the prosecution of ALL offences of sexual exploitation of children. | Yes | Article 219 of the Criminal Procedural Code provides that only offences punishable by less than 6 months or a fine of one thousand shillings (approx. US$9 as of October 2020) are subjected to a limitation period. No offences related to sexual exploitation of children fit into this category. |
| 5. | Set up **conditions for any travel** by persons convicted of sexual exploitation of children. | Partially | Article 3 of the Immigration Act prohibits a person who is not a citizen of Kenya, and not having received a free pardon, has been convicted in any country, including Kenya, of murder or of any offence for which a sentence of imprisonment has been passed for any term and who, by reason of such conviction, is considered by the Minister to be an undesirable immigrant.  No provisions on the prohibition of persons convicted of sexual exploitation of children to leave the country have been found. |
| 6. | Ensure **consistency in the definition of a ‘child’** as anyone under the age of 18 for all crimes of sexual exploitation, regardless of the age of sexual consent. | Yes | According to the Constitution of Kenya, a “child means an individual who has not attained the age of eighteen years”. A similar definition is provided under the Children’s Act, the Sexual Offences Act, the Marriage Act, the Employment Act, and the Computer Misuse and Cybercrimes Act. Therefore, the definition of a child is consistent across major legislations in Kenya. |
| 7. | Ensure that the **age of sexual consent** for both males and females is 18 and a close in age exemption (up to 3 years) is provided for consensual sexual relationships between adolescents in order to allow voluntary, well-informed and mutual sexual contact between close in age peers and to prevent criminalization of young people in willing sexual relationships. | No |  |
| 8. | Have a law or regulation establishing a **mechanism for centrally registering sex offenders** that has been implemented/setup. | Yes | In 2012, The Kenyan Government launched, under the Sexual Offences Act, the Sexual Offenders Register. This database holds the record of all convicted sexual offenders, including their names, identification card numbers, the crime committed and the age of their victim. |
| 9. | Establish **bail conditions** that prohibit individual accused of sexual offences against children from traveling outside of the country. | No | Based on a combined reading of Article 123 of the Criminal Procedure Code and Article 49 (1)(h), the right to bail is granted to any person who is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings. However, the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance. |
| 10. | Provide in law that the **mere attempt** to commit a crime of sexual exploitation of children is criminalised. | Yes | The attempt to commit crimes of sexual exploitation included in the Penal Code and Computer Misuse and Cybercrimes Act is criminalised.  Section 389 of the Penal Code establishes that any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.  Section 42(2) of the Computer Misuse and Cybercrimes Act criminalises the attempt to commit offences under the Act is punishable by imprisonment up to four years or a fine up to seven million shillings or both |
| 11. | Impose more severe sentences for **reoffending** in case of sexual exploitation against children, e.g. by defining reoffending as an aggravating circumstance, regardless of whether the crimes were perpetrated abroad or in-country. | No | Article 39 of the Sexual Offences Act establishes that the court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has more than one conviction for a sexual offence. Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence. A person who has been declared a dangerous sexual offender and who does not comply with a supervision order in accordance with this section is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings (approx. US$460 as of October 2020) or to both.  No other provisions have been found in the national laws. |
| 12. | Provide for **mandatory reporting** for particular professions that have likelihood to have contact with kids who might disclose. | No | In Kenya, there is no mandatory obligation on the professionals working with children to report cases of sexual exploitation. |
| 13. | Establish obligatory government-regulated child protection standards for the tourism industry for example, attach responsibility to an appropriate regulatory authority and/or implement industry specific **national codes for child protection** as a legal requirement for the travel and tourism industry to operate. | No |  |
| 14. | Ensure the liability of travel and tourism businesses (in operations and supply chains) for criminal conduct including:   * Organising travel arrangements or transportation that are explicitly or implicitly meant to create or facilitate opportunities to engage (involve) children in sexual activities; * Procuring, aiding or abetting the exploitative sexual conduct with a child; * Advertising or promoting sexual exploitation of children;   Benefitting, by any means, from any form of sexual exploitation of a child (or children) in the context of their travel and tourism business. | Yes | The Sexual Offences Act, article 13 and 14, criminalises SECTT and child trafficking for purposes of the commission of any sexual offence under this Act with such child or any other person, to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings.  Article 14 of the Sexual Offences Act establishes that a person including a juristic person who:  - (a) makes or organizes any travel arrangements for or on behalf of any other person, whether that other person is resident within or outside the borders of Kenya, with the intention of facilitating the commission of any sexual offence against a child, irrespective of whether that offence is committed; or  - (b) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child;  - (c) introduces, organizes or facilitates contact with another person under the auspices of promoting tourism, in any manner, in order to promote conduct that would constitute a sexual offence against a child;  is guilty of an offence of promoting child sex tourism and is liable upon conviction to imprisonment for a term of not less than ten years and where the accused person is a juristic person to a fine of not less than two million shillings. |
| 15. | Criminalise the **grooming of children for sexual purposes** (often called ‘solicitation’ in law) including through Internet and other communication technologies to facilitate either online or offline sexual exploitation. | No |  |
| 16. | Establish legislation requiring for a **criminal background check** for every person (national or non-national) applying for work with or for children or who is currently working with or for children. Introduce legislation prohibiting convicted sex offenders to hold positions involving or facilitating contact with children. | No | It doesn’t seem mandatory in Kenya to provide a criminal record before starting any employment.  However, the Sexual Offences Act, article 30, states that a person who has been convicted of a sexual offence and who fails to disclose such conviction when applying for employment which places him or her in a position of authority or care of children or any other vulnerable person or when offering or agreeing to take care of or supervise children or any other vulnerable person is guilty of an offence and liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.  In addition, article 39 establishes that the court may declare a person who has been convicted of a sexual offence a dangerous sexual offender. If so, an order may specify that the offender is required to refrain from seeking employment of a specified nature. |
| 17. | Regulate and monitor the use of volunteers (including in **‘voluntourism’**) in settings and activities that involve direct contact with children, particularly prohibiting visits to orphanages/residential care settings in favour of redirecting the industry towards solutions that support community-based care. | No |  |
| 18. | Ratify and implement relevant **regional and international instruments** related to child’s rights and sexual exploitation of children. | No | * Convention on the Rights of the Child - Ratified in 1990 * Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography - Not ratified * Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure - Not ratified * ILO Convention on the Worst Forms of Child Labour (No. 182) - Ratified in 2001 * UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and children - Ratified in 2005 * The United Nations’ World Tourism Organisation’s (UNWTO) Framework Convention on Tourism Ethics - Not ratified * Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) - Not Ratified * Council of Europe Convention on Cybercrime (Budapest Convention) - Not ratified * African Union Charter on the Rights and Welfare of the Child - Ratified in 2000 * African Union Convention on Cyber Security and Personal Data Protection - Not ratified |
| 19. | Establish **protection measures** for child victims at any stage of the legal process against the suspected offender. | Yes | The Victim Protection Act makes it the duty of courts, administrative authorities or persons performing functions under the Act to ensure that the dignity of a victim is preserved at each stage of the trial and also during the post-trial phase (article 4). Article 2 defines a victim as “*any natural person who suffers injury, loss or damage as a consequence of an offence*”.  The Victim Protection Act applies to nationals and non-nationals child victims (article 5).  The Children Act entitles every child to be provided with legal representation at any stage of the legal proceedings and at the expense of the State (article 77). The Children Act applies to nationals and non-nationals child victims (article 5).  Article 15 of the Counter-Trafficking in Persons Act establishes support and protection of victims of trafficking in persons including legal assistance or legal information, including information on the relevant judicial and administrative proceedings. The Counter-Trafficking in Persons Act applies to nationals and non-nationals child victims (article 15).  The Victim Protection Board can take measures to provide services to the victims to help them deal with physical injury and emotional trauma, access and participate in the criminal justice process and cope with problems associated with victimization.  A child victim is entitled to the right to such information which is necessary to realise his or her rights under the Victim Protection Act. Further, a victim including a child victim has the right to be assisted by an interpreter provided by the State where he or she cannot understand the language in which the trial is conducted. However, these provisions are general and there is no explicit provision in the law that makes it mandatory for the authorities to provide a child victim with information related to legal proceeding in a child-friendly manner.  The Sexual Offences Act provides that a child victim in a legal proceeding relating to sexual offences committed under the Act, may be declared a vulnerable witness by the court in which such proceeding is being carried out. Accordingly, the child victim would be protected with certain measures which include allowing him or her to give evidence in a witness protection box and give evidence through an intermediary. |
| 20. | Establish **child-friendly interviewing practices by professionally trained police.** | No |  |
| 21. | Ensure that national legislation provides the **right for child victims to receive support in their recovery and rehabilitation**, including accessing re-integration services. | Yes | The Children Act stipulates that any children in need of care and protection, which includes a child who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography (article 129), shall be accorded appropriate treatment and rehabilitation such as medical care or access to rehabilitation school (article 119 and 121).  The Victim Act, article 32, outlines the role of the Victim Protection Board in advising the Cabinet Secretary on activities aimed at the implementation of rehabilitative programmes for victims of crimes. Those programmes include psychosocial interventions, medical treatment, legal aid and social services designed to assist victims recover from loss, injury or damage suffered as a consequence of the offence.  Article 15 of the Counter-Trafficking in Persons Act establishes support and protection of victims of trafficking in persons including resettlement, re-integration, appropriate shelter and other basic needs, psychosocial support and appropriate medical assistance. In addition, article 20 defines the functions of the Advisory Committee including the implementation of preventive, protective and rehabilitative programmes for trafficked persons. |
| 22. | Establish a **national reporting mechanism (e.g. hotline)** that coordinates access to services, and helps to overcome reluctance to report sexual exploitation of children. | Yes | In 2008, the Government set up a national free helpline (116) for children and all citizen to be able to report cases of children in need of care and protection including child neglect, physical abuse, sexual abuse, school related, custody and maintenance, FGM, early/forced marriages, child labour, exploitation of children in prostitution, child trafficking among others. |
| 23. | Create **data retention and** preservation laws, regulations and procedures, to ensure the retention and preservation of digital evidence and enable cooperation with law enforcement which applies to ISPs, mobile phone companies, digital social media and communication companies, cloud storage companies, based in/operating in national jurisdiction. | No | The Computer Misuse and Cybercrimes Act provides search and seizure powers to investigating agencies to investigate offences committed under the Act. A service provider can be compelled to collect or record Internet traffic data in real time; or to cooperate with the police or other authorized persons in carrying out the same (article 52). |
| 24. | Ensure that national legislation provides the **right for all child victims of sexual exploitation to seek compensation** in national courts from convicted perpetrators who harmed them and/or through state-managed funds. | Yes | The Criminal Procedure Code and the Penal Code establish the possibility for victims to seek compensation.  Article 45 of the Computer Misuse and Cybercrimes Act establishes the possibility for victims to seek compensation. The law does not make explicit difference between national and non-national child victims, but it does not even clearly state if relevant provisions would be applied to non-nationals.  The Victim Protection Act, article 23, establishes the possibility for victims to seek compensation. The Victim Protection Act applies to nationals and non-nationals child victims (article 5).  Article 13 of the Counter-Trafficking in Persons Act establishes the possibility for victims to seek compensation. The Counter-Trafficking in Persons Act applies to nationals and non-nationals child victims (article 15). |

**Kenya - Legislation**

[Constitution](https://www.wipo.int/edocs/lexdocs/laws/en/ke/ke019en.pdf)

[Penal Code](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/28595/115477/F-857725769/KEN28595.pdf)

[Criminal Procedure Code](https://sherloc.unodc.org/res/cld/document/ken/1930/criminal_procedure_code_html/CriminalProcedureCode.pdf)

[The Children Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ChildrenAct_No8of2001.pdf)

[The Sexual Offences Act](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_127528.pdf)

[The Computer Misuse and Cybercrimes Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf)

[Extradition (Commonwealth Countries) Act](http://www.vertic.org/media/National%20Legislation/Kenya/KE_Extradition_Commonwealth_Act.pdf)

[Extradition (Contiguous and Foreign Countries) Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Extradition_ContiguousandForeignCountries_Act_Cap76.pdf)

[The Victim Protection Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/VictimProtectionAct17of2014.pdf)

[The Immigration Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/ImmigrationActCap172.pdf)

[Counter-Trafficking in Persons Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf)

[Employment Act](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EmploymentAct_Cap226-No11of2007_01.pdf)