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Anti-human trafficking manual for criminal justice practitioners

Module 14

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Anti-human trafficking manual for criminal justice practitioners

Module 14

Considerations in sentencing in
trafficking in persons cases



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Module 14: Considerations in sentencing in trafficking in persons cases

Objectives

On completing this module users will be able to:

- Recall the main principles of sentencing;
- Explain the role of the judiciary in sentencing;
- Recall the common aggravating factors to be considered in sentencing in trafficking in persons cases;
- Recall the common mitigating factors in trafficking in persons cases;
- Describe the ways in which information may be found to assist in sentencing decisions in trafficking in persons cases.

Introduction

Theories of punishment have existed for thousands of years, dominated by two principle philosophies. Generally speaking, one theory advocates that the punishment administered should be justified on the basis of the crime committed. The other dominant school of thought argues that punishment should be forward thinking and imposed on the basis of the positive impact such punishment will have on the offender or on society more generally. Criminal justice systems around the world have adopted a mixture of these elements as justification for imposing punishment on the guilty.

The general principles of punishment are, of course, applicable to trafficking in persons cases. Trafficking cases may pose some unique characteristics including the fact that the crime is often committed in conjunction with a range of other offences.

The purpose of this chapter is to provide a short overview of factors that may be relevant to sentencing in trafficking cases. It should be remembered that the penalties provided for crimes will vary from jurisdiction to jurisdiction and be based upon various legal traditions, jurisprudence, national practices and differing policy objectives. An awareness of these factors will assist practitioners in ensuring that the penalties which are imposed accurately reflect the gravity of the offence(s) committed and the impact that such crimes have on victims, their families and society more generally.

The module first outlines the general principles of sentences. It then considers some of the potential aggravating and mitigating factors found in trafficking cases. Finally some guidance is given on how information to support sentencing decisions may be found.

Principles of sentencing

As noted above, the principles which underline sentencing regimes around the world are varied and based upon a variety of factors. Having said this, some of the dominant principles of sentencing reflected in various legal systems include:

- **Proportionality:** A sentence should be proportionate to the harm imposed and the benefits derived from trafficking and related exploitation. The harm may be to the individual victim, to their family or to the community at large (see discussion of harm below). It should be noted that this principle is explicitly recognized in article 11 of the United Nations Convention against Transnational Organized Crime (UNTOC). The article requires penalties to take into account the gravity of the offence and give due regard to deterrence. Various national penal laws confirm the tenor of this provision.
- **Retribution or denunciation:** The penalty is imposed in response to the offence and reflects society's outrage towards the offence committed.
- **Deterrence (both general and specific):** With general deterrence, the penalty is imposed in order to deter society in general and to promote social order while specific deterrence is designed to prevent the particular offender from repeating the crime again in the future.
- **Rehabilitation:** This principle suggests that a sentence should assist in rehabilitating the offender so that they can cease to be a threat to society and in turn become a positive participant in society.
- **Incapacitation or separation:** The sentence is imposed in order to remove the offender, and the threat of harm he poses, from society at large.
- **Reparation:** The penalty is imposed on the basis that it restores balance by returning the victim to the place they were before the crime was committed.

In systems where there is judicial discretion in the imposition of a sentence, it will be important for criminal justice system participants to be familiar with the sentencing regime which governs your legal system.

Depending on your legal system those responsible for investigations can be guided by the principles outlined above (as well as aggravating and mitigating factors which are discussed below) in the collection of evidence and the presentation of the case to those responsible for prosecution or adjudication.

Prosecutors can use this information to assist them in developing their theory of the case, structuring their arguments and in particular drawing to the court's attention that the facts of the case warrant particular consideration in relation to sentencing principles. As has been noted elsewhere in other modules, when possible it is advisable for those responsible for investigation and prosecution to liaise early and often for necessary and relevant information that may help the sentencing pattern.

Judges responsibilities in sentencing

Some legal systems may require courts to give primary consideration to certain principles of sentencing over others while other systems may leave it to the discretion of the judge. Other legal systems may provide little discretion to the court in imposing a sentence.

The judge will be guided by the principles of sentencing within their legal system. The judge will balance the applicable aggravating and mitigating factors against one another in determining a just and proportionate sentence for the particular case.

In some jurisdictions, members of the jury may have a role in recommending or determining sentences.



Self-assessment

What are the main principles of sentencing?

What is the role of the judiciary (and in some cases juries) in sentencing?

What are the main forms of “harm” in the context of trafficking in persons?

Aggravating factors

Aggravating factors are those circumstances present in the case, which warrant an increase in the penalty prescribed. In some jurisdictions, these factors may be expressly prescribed in laws; in others they may be reflected in jurisprudence. It is important to remember that what may have been an aggravating factor in one case need not necessarily be so in another. Aggravating factors are context specific having regard to the particular facts at play.

In some cases, what has been identified in laws or jurisprudence as an aggravating factor may already necessarily be part of the offence. For example, in jurisdictions where there is a distinct offence for trafficking in children, the fact that the victim is a child is necessarily reflected in the design of the offence and the penalty, which is assigned to it. In such a case, the fact that the offence was committed against a child should not be viewed as an aggravating factor and used as a justification for increasing the penalty.

In short, each case is fact specific and the facts must be thoroughly examined and held up against the offences within your jurisdiction as well as any aggravating factors that may exist in your legal system.

The list of aggravating factors below is illustrative only and may or may not apply to any given case of trafficking in persons in your jurisdiction.

Previous conviction(s) and behaviour, particularly where the previous convictions are for trafficking in persons or related offences

A guilty party's previous criminal record can be of relevance for sentencing considerations, particularly when they have been previously convicted for trafficking offences or related conduct such as offences involving coercion or violence. This factor can impact on a number of the sentencing principles identified above including specific deterrence, and denunciation. Efforts should be made to identify, obtain and verify this information. Care should be taken in determining the relevance of the record. For example, if the offence is unrelated to trafficking and occurred a considerable time in the past, its relevance for sentencing purposes may be less clear.

Prior "bad" conduct

Some jurisdictions may allow evidence of prior "bad" conduct to be considered when sentencing, even when this does not involve a previous conviction. "Bad" conduct may be very broadly defined.

Such conduct will be introduced for the purpose of establishing the character of the convicted party. It will be necessary to assess whether such information is relevant and how it relates to one of the principles of sentencing in your jurisdiction.

The offence was motivated by bias, prejudice or hate based on race, religion, sex, age or other personal characteristics that are immutable

While trafficking cases are unquestionably motivated by money, traffickers may choose or target their victims on the basis of their personal characteristics. Where evidence demonstrates that the convicted person deliberately chose his/her victims because of a bias, prejudice or hate based on the personal characteristics of the victim, this should be presented to the court as a factor that warrants an increase in the penalty.

The offence involved planning and deliberation

Most trafficking cases will involve planning on the part of the offender that is often long-term and in great detail. Any claim from a defendant that they committed a trafficking offence with no prior planning should be investigated thoroughly. The fact that the offence was planned thoroughly speaks to the blameworthiness of the guilty party and such pre-meditation demonstrates a deliberate intent to harm the victim and to commit the criminal act.

The offender intended more serious harm than actually resulted

The fact that the guilty party's intended exploitation did not actually take place should not diminish the severity of the offence. The consequences of the trafficking are relevant to the determination of an appropriate sentence. There is a danger that offenders could escape with lighter sentences because they have been intercepted at an early stage of the trafficking process, such as the recruitment stage.

Any evidence that shows serious harm would have been the likely outcome if their plans had been successful should be reflected in the sentencing submissions.

The offender operated in conjunction with an organized criminal group

The crime of trafficking is often perpetrated by a group involved in a criminal enterprise. Care should be taken to investigate any possible linkages to an organized criminal group whether it is a well-organized criminal organization or a loosely affiliated crime group. If established during the sentencing process, this factor demonstrates a heightened threat to society and an increase in the gravity of the offence.

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According to article 2 of the United Nations Convention against Transnational Organized Crime, “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

The offence was motivated by financial or material gain

This aggravating feature is likely to be present in virtually all trafficking cases to some degree and should be a significant factor for sentencing purposes. Financial gain should not simply be seen in terms of money; payment in kind, such as free accommodation, food, access to vehicles, and gifts all represents a financial or material gain for the offender.

The fact that human trafficking involves the ongoing exploitation and violation of the autonomy of the victim and is motivated by the greed of those who traffic makes the crime particularly heinous.

Evidence that the convicted person received a high level of profit from the activity may only strengthen claims for a strong penalty of incarceration.

Deliberate attempts to obstruction of justice

If there is evidence to demonstrate that the convicted party deliberately attempted to obstruct the administration of justice during the investigative, or prosecutorial stages or during the sentencing, this can be taken to be an aggravating factor. Examples could include attempting to destroy or conceal evidence, misleading criminal justice officials or attempting to intimidate witnesses, police officers, prosecutors or other justice system participants.

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According to Article 23 of the United Nations Convention against Transnational Organized Crime, obstruction of justice is to be criminalized. Obstruction means:

- (a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;
- (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

The offence was committed while subject to conditions

Individuals who have been released on bail, are on probation, parole or some other form of release with conditions and who commit crime demonstrate a further disrespect for the justice system. As with other factors, the extent to which this is an aggravating factor in a case of trafficking will depend on the facts. For example, if a person was released in relation to previous charges for trafficking or related offences and commits a trafficking offence while on release, it will likely be an aggravating factor. A defendant on bail for an offence of petty theft is not likely to indicate greater culpability in a trafficking case, but again it will be important to consider the totality of the facts.

Trafficking is frequently transnational, so enquiries should be made to establish if an offender is on bail or parole in another jurisdiction and if so, for what offence. It is relevant when sentencing to consider parole or bail in other jurisdictions, but proper enquiries must be made to establish the accuracy of such information.

Deliberate targeting of vulnerable groups

The deliberate targeting of vulnerable groups as victims can be relevant as an aggravating factor in at least two ways:

- It reflects pre-meditation on the part of the convicted party to purposefully seek out a particularly vulnerable person as his victim
- It undermines the principle that society has a special responsibility to protect its most vulnerable citizens.

Vulnerable groups who may be targeted in trafficking cases include the young, physically or mentally disabled persons, the indigent or homeless. The same may apply to pregnant women. The factor of vulnerability is likely to be present in many trafficking cases.

The impact of the criminal conduct may be particularly harmful for vulnerable victims. Child victims, for example, lose contact with their families and communities, have their education and development impeded and may lose their language and culture if trafficked into another country. Such impacts can have lasting and irreparable impacts on young victims.

Use of a weapon to frighten or injure victim(s) or persons known to them

The use of a weapon to instil harm or to provoke a state of fear in the victim always makes the offence more severe. In trafficking cases, weapons may be used to control victims, through inflicting physical or psychological harm, in order to maintain the victim in a state of exploitation. The use of weapons may also extend to persons known to victims in order to maintain control. For example, a trafficker may threaten to harm the victim's family members if he/she does not continue to do as they are told while brandishing a gun.

Cruelty or brutality demonstrated through deliberate, repeated or gratuitous violence or other forms of degradation

The ongoing exploitation and violation of a person's autonomy makes trafficking in persons cases particularly reprehensible. Often these crimes are associated with heightened levels of brutality and can involve persistent attacks and crimes being committed against the victim. Excessive violence may also be used in order to demonstrate control.

Traffickers may also subject their victims to other forms of degradation. Examples include taking photographs or filming a victim while being sexually exploited (to be further used as a method of control or for the benefit of the traffickers) or subjecting people to other humiliating activity, such as begging for "privileges".

Assaults in the presence of others

In trafficking cases involving multiple victims, traffickers may chose to "make examples" out of their victims in the presence of others in order to maintain control. These assaults not only cause physical and psychological harm to the victim but also to those who have seen them.

Abuse of a position of power/authority or a position of trust

A position of trust or authority stems from the role an individual may occupy. It may be by virtue of a position where a person has been given power over others or a privileged position in relation to the operations of a business or organization. However, a position of authority or power may also extend to any relationship where one can actually exercise control over another, for example a parent occupies a position of trust and authority over a child. In some countries the same may apply to spouses or conjugal partners.

The abuse of a position of power or trust over another in a trafficking in persons case should be a strong aggravating factor particularly where it involves government officials whose

responsibility includes protecting the public and upholding the rule of law. Instances of corruption in trafficking cases undoubtedly raise questions about the abuse of a position of trust or authority and such facts should be put to the sentencing judge as aggravating circumstances.

The use of narcotics to maintain control over the victim

The use of drugs to maintain control over the victim, including by placing them in a position of vulnerability, may also occur in trafficking in persons cases. The drugs may be forcefully administered or the trafficker may introduce the victim to drugs indicating that they will help the victim deal with the situation. This, in turn, may lead to a drug dependency on the part of the victim creating an additional vulnerability that can be exploited by the trafficker to maintain control over the victim.

Multiple victims or multiple incidents

For obvious reasons, the longer the crime continues and the greater the number of victims, the greater the overall level of harm. Trafficking cases often involve multiple victims and generally involved persistent and repeated criminal conduct against the victim.

Victimization of individuals causes harm to many others, such as their families, friends and community of origin. Numerous direct victims are likely to mean many more indirect victims of the victim.

The victim is exposed to serious illness or injury

In trafficking for sexual exploitation, victims may be exposed to a number of health risks and diseases ranging from sexually transmitted infections, including HIV/AIDS.

Poor living conditions found in all forms of trafficking in persons may also expose the victim to a host of diseases.

Manufacturing, mining and agricultural processes may expose trafficking victims to risk of injury or illness, particularly where equipment is dangerous or poorly maintained.

The exposure to the potential injury or illness is the key point. It is largely irrelevant whether or not any actual injury etc. took place



Self-assessment

List the common aggravating factors to be considered when sentencing in trafficking in persons cases.



Case example

The defendant participated in a trafficking ring that took women from East Asia to North America, and required them to work to pay off debts. The defendant was given a 120-month sentence by the court after he pleaded guilty to conspiracy and forced labour. The defendant appealed against his sentence. On review, the court upheld the defendant's sentence. Under national sentencing guidelines, the defendant's role as the leader or organizer of the forced labour at a club owned by him was sufficient for the enhancement because the defendant controlled the activities at the club and directed his wife and club employees in the criminal activity. The court held that the defendant commanded the criminal conspiracy that was the subject of his conviction. Further, the enhancement was proper because at least one victim came from an impoverished background and had limited language skills. The defendant took advantage of her background and illegal immigration status when telling her that her contract to repay her debt was enforceable in the destination country. The choice of the women to violate the law by entering the country illegally did not preclude them from receiving protection.

Mitigating factors

The presence of a mitigating factor may serve to diminish the relevance of a sentencing principle in a particular case and have an impact on the overall sentence issued. Mitigating factors may be statutorily prescribed or developed through the common law. As with aggravating factors, mitigation is context specific and will depend on the particular facts of the case, the offence in question and the principles that guide sentencing in your jurisdiction.

The list below is not exhaustive but provides the practitioner with some general information on common mitigating factors that may be of relevance in a trafficking in persons case.

First-time offender

The fact that the convicted party has no criminal record may be viewed as a mitigating factor in your jurisdiction. Such a factor is likely to cause a sentencing court to consider the prospects of rehabilitation as a primary consideration in handing out a sentence (where such considerations are permitted by your legal system). Determining whether a trafficker has a prior criminal record may require liaising with criminal justice officials outside of your jurisdiction.

Prior good character

Just as prior bad character may be a relevant aggravating factor, the prior good character of an individual can be a relevant mitigating factor. The prior good character of the convicted person, demonstrated primarily through evidence of their reputation in the community as well as their deeds, demonstrates qualities that stand in opposition to those of a convicted criminal.

Remorse or conduct following arrest

The attitude or conduct of the accused following their arrest may serve as a mitigating factor. An individual who agrees to cooperate with law enforcement, who chooses to plead guilty early or who demonstrates genuine remorse for their actions and for their victim(s) may deserve consideration of these factors by the sentencing court.

The offender has also been a victim of trafficking in persons

It is not unusual for trafficked persons to subsequently become traffickers themselves. There are many reasons for this but the fact that the individual has also been trafficked may serve as a mitigating factor in a case involving prosecution for their role in a trafficking crime. In such cases, facts related to the convicted person's own victimization may be relevant to a sentencing hearing. These facts can include:

- They were subjected to prolonged control measures prior to becoming an offender.
- Their own trafficking has caused such trauma that they are unable to take on any other form of work.
- They believed that if they became a trafficker this would enable them to escape their own exploitative situation.
- They have been rejected by their own communities as a consequence of being trafficked.
- They have no skills or cannot speak the local language and have no other means of support.

Actions committed under duress

In cases where a defence of duress is not successful, the arguments advanced by the defence that demonstrate that the party acted under duress may still be relevant as a mitigating factor. This may include circumstances where:

- A parent driven by extreme poverty and who is aware of the risks of such action nonetheless agrees to "lease" their child to a local community member.
- A trafficked person becomes a trafficker and claims that it was the only way they could escape their own exploitative situation.

Module 4: "Control methods in trafficking in persons" gives further guidance.

Offender's age

The age of the offender may be relevant as a mitigating factor in sentencing; however, its effect on mitigation may be minimal given the seriousness of the crime of trafficking in persons.

Role in the offence

The extent of the offender's involvement in the actual commission of the crime may have an impact in determining an appropriate sentence though will not generally impact their culpability.

Examples of minor roles in trafficking in persons cases include:

- One-off transporting a victim for a short distance;
- Working as a cook or cleaning-person in a trafficking operation;
- Renting facilities knowing that they will be used by a trafficking operation;
- Loaning vehicles knowing that they will be used to move trafficked persons;
- Preparing fraudulent documents knowing they will be used to facilitate the movement of trafficked people.



Self-assessment

What are the common mitigating factors in sentencing trafficking in persons cases?

What is the difference between aggravating and mitigating factors in sentencing?

Finding information to assist in sentencing decisions

In many cases the information presented at court will give sufficient information to make a decision on sentence. In some cases there may be a need to find further information. The proper procedure to be adopted may be governed by your national laws and procedures. The following are suggestions that you may wish to adapt for use in your own legal system

Pre-sentence adjournment of a case for further enquires.

There may be the need to have a pre-sentence adjournment of a case for certain enquiries. Such enquiries include background checks of the convict to be undertaken for a proper evaluation of the circumstances that may be considered in pronouncing the appropriate sentence. In order to come to a proportionate sentence, judges may have the authority to ask for simultaneous reports from various parties and may direct (where this is allowed) specific areas of focus for the enquiry.

In some jurisdictions there is an official process for such enquiries to be conducted by an independent body or officials such as probation officers. It is desirable that where these processes do exist the people making enquiries and reports to the courts are aware of some of the specific issues in trafficking in persons cases. Module 3: "Psychological reactions of victims of trafficking in persons" and module 4: "Control methods in trafficking in persons" may be useful in developing this awareness.

Enquiries abroad may be required in some cases. If these are considered, judges should be aware these are likely to take a long time, will probably require the use of international legal procedures and involve some cost. In some cases it may be highly unlikely that the information either exists or is accessible.

A decision on foreign enquiries should be made on a case-by-case basis. Where they are made, a lengthy adjournment of court proceedings will almost certainly be required.


Sentencing information during court proceedings

In some jurisdictions there may be an opportunity to ask for information relating to the background of the offender to be obtained before the final hearing, to enable the judge to determine the sentence to be imposed. These enquiries should not prejudice the outcome of the case. Early enquiries may help reduce delays in sentencing and may be fair to both the victim and the convicted person.

Victim impact or personal statements

A number of jurisdictions permit the victim to provide a statement to the court detailing the impact the crime has had on him/her. This statement is provided after a finding of guilt but prior to the determination of sentence. This may include the harm suffered as well as the effects the crime has had not only on the victim but also his/her family members and loved ones. The purpose of the statement is to enable the victim to play a more prominent role in the process by enabling him/her to describe directly how the crime has affected his/her life.

“Victim” may be defined in some jurisdictions to include not only the person who was immediately the victim of the crime but may also include their family members or loved ones. In some jurisdictions, this information must be taken into consideration by the sentencing court.

	Self-assessment
How can you find information that may assist in sentencing decisions in trafficking in persons cases?	

Summary

Decisions on sentencing should be the sole responsibility of the judiciary (and in some cases juries) acting within the legislation of their jurisdiction.

Prosecutors and investigators should put all possible facts to the judiciary to allow them to make sentencing decisions that are fair and accurately reflect the circumstances of individual cases.

Some of the dominant principles of sentencing reflected in various legal systems include:

- Proportionality;
- Retribution or denunciation;
- Deterrence;
- Rehabilitation;
- Incapacitation or separation;
- Reparation.

Aggravating factors in trafficking in persons cases include:

- Previous conviction(s), particularly for trafficking offences;
- Prior “bad” conduct;
- Offence was motivated by bias, prejudice or hate on racial and other grounds;
- Evidence of prior planning;
- More serious harm was intended than actually resulted;
- The offence was committed by a group or gang;
- The offence was motivated by financial or material gain;
- Attempts to frustrate or impede the administration of justice;
- The offender committed crime while subject to pre-trial or sentence conditions;
- Vulnerable victim(s) were targeted;
- Weapons were used to frighten or injure victim(s) or persons known to them;
- Deliberate, repeated or gratuitous violence or other forms of degradation were used;
- Victims were assaulted in the presence of others;
- Offenders abused a position of power, authority or trust;
- Narcotics were used to maintain control over the victim;
- There were multiple victims or multiple incidents;
- Victims were exposed to serious illness;
- The victim played a significant role in the community.

Mitigating factors in trafficking in persons cases include:

- It is the offender's first offence.
- The offender:
 - Is of previous good character;
 - Has shown remorse or good conduct following arrest;
 - Has also been a victim of trafficking in persons;
 - Committed the offence under duress;
 - Is very young/old;
 - Had a minor role in the offence.



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