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Abused and Neglected



A Gender Perspective on Aggravated Migrant Smuggling Offences and Response

Acknowledgements

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Executive summary

Migrant smuggling is a type of organized crime with links to other serious criminal offences, including illicit financial flows, corruption and trafficking in persons. Smuggling is an illegal service that is offered to countless people and requires a financial or material remuneration. Many migrants who do not have other viable options to move across borders, regularly depend on the services provided by smugglers to migrate. In principle, once the smuggling transaction is completed and the person arrives at the desired destination, the relationship between the smuggler and the migrant ceases without any harm being done. Too often, however, smuggled migrants and refugees suffer from various dangerous circumstances and abusive and violent treatment while under the control of smugglers.

This Study considers the underlying risk factors that lead to abuse and violence during the smuggling operation and analyses whether gender influences the type of violence that is inflicted upon smuggled migrants. It also analyses the criminal justice responses to these abuses and the practical obstacles that may hamper the reporting, investigating or prosecuting of these “aggravations”. Finally, the Study provides recommendations for reducing the impunity of the people involved in such offences along the smuggling routes.

UNODC, through the analysis of case law within its Knowledge Portal on Smuggling of Migrants, noted that there was little evidence of migrant smuggling being prosecuted in the countries where the smuggling venture occurred, let alone for cases where smuggling became abusive or exploitative. Yet, civil society, researchers and academia have increasingly raised their concerns over the extreme violence faced by people on the move along certain routes.

To have a better understanding of the dynamics at play and the challenges to obtain justice in this context, this Study looks into two major transit regions, North Africa and Central America. It uses recently collected data from the UNODC Observatory on Migrant Smuggling that contains testimonies from frontline responders, smuggled migrants and migrant smugglers from West and North Africa. Aggravations occurring along the Central Mediterranean route also feature in the Study, as they are characteristic of the various types of abuse that migrants face before embarking on their dangerous sea crossings. It is often over those cases that courts in destination countries assess jurisdiction to prosecute smugglers and provide access to justice to the affected smuggled migrants. Practitioners were also interviewed for the Study to gain knowledge about smuggling characteristics in Central America. The present Study therefore focuses on these two regions, typically coined as transit regions for migrant smuggling operations.

Abuses encountered during the smuggling operation are highly gendered

In general terms, male migrants report significantly higher instances of forced labour, physical violence and inhuman and degrading treatment while in transit. Men also report a wider range of abuses than women. These findings must, however, be contextualized by the fact that adult men represent the largest group of smuggled migrants on a global scale. Women report a much higher exposure to sexual violence while migrating and report “not having access to sufficient health care” as a significant obstacle, showing an increased need for such services likely linked to the impact of sexual violence experienced as part of their journey.

Physical violence and inhuman and degrading treatment are the most prevalent forms of abuses encountered by migrants in transit. Though often inflicted with no apparent reason, physical violence is also used as a form of punishment, intimidation or coercion. The most severe forms of violence, such as torture, often have extortion as the purpose and are associated with other forms of abuses and crimes, including kidnapping or coercion. Several court cases analyzed in the Study led to the understanding that in many instances, smuggled men and women were intentionally separated in order to exercise different types of violence upon them; while men would suffer severe forms of physical violence including torture practices, women would primarily be targeted for sexual torture.

Sexual violence is an unfortunate common feature of all smuggling routes that affects female migrants in a much larger proportion than men. It is inflicted as a form of retaliation for alleged misconduct or by lack of other means, as a form of payment, where women are coerced into sexual services in order to pay for transportation or bribes. As reported to the UNODC Observatory on Migrant Smuggling by a case worker in West Africa “women can use sex as a currency to pay their smugglers or kidnappers and move on”¹ and a law enforcement officer “kickbacks and sex-for-passage (usually affecting women and girls), have been the most common types of bribery along the smuggling corridor”². Generally, the analysis suggests that, due to a variety of gendered factors, women are more likely to be short of money earlier and more frequently during the migration process, making them more vulnerable to sexual abuse to compensate with in-kind payment in the form of what the Study refers to as “transactional rape”.

Sexual violence is also perpetrated for no purpose other than a demonstration of power, misogyny, racism or sexual gratification. The Study also highlights the impact of sexual violence on women and girls and the social and medical consequences of abuses such as unwanted pregnancies and abortion that may be difficult to address on the move. Sexual violence could also be used as a means to coerce fellow migrants who are forced to witness the rape of travel companions, while at times technology is being used to perpetuate the victimization and stigmatization by the broadcasting of material depicting sexual violence among the community of the victim.

When men experience sexual violence, it is often with the intention of humiliating them. It is often used to attack their social status as a “man” in various cultural and societal contexts. It may include forced witnessing of sexual violence against others (particularly family members or members of their community), genital violence attacking their reproductive capacity, or in the form of anal rape and sexual exploitation (especially when the victim is known to be from the LGBTQI+ community).

Most dangerous transit points

In the two transit regions studied, particularly dangerous transit points were identified, namely the Darian Gap in Central America, the Sahara Desert in West/North Africa and the Mediterranean Sea. Crossing these transit points usually requires the assistance of smugglers and involves high risks of exposure to unsafe and dangerous travel conditions and abandonment as well as various forms of criminality and violence at the hands of non-State armed groups or public officials. An increased presence of these actors often leads to smugglers taking more dangerous routes which, in turn, considerably increases the risk of casualties and aggravations for the smuggled migrants.

In the course of their journeys through these transit points, migrants often lack access to safe water, and endure significant exposure to natural hazards and dangerous animals. Evidence collected through this Study suggests that women run a significantly higher risk of experiencing health dangers in this environment as they are performing tasks like childcare or breastfeeding while in transit. Pregnant women, children and elderly migrants are also more likely to be abandoned during a smuggling operation as this group may be less able to keep up with travelling or walking long distances due to their restricted mobility. In this scenario, women are often pressured into staying behind as well due to social expectations to care for the sick and injured.

¹ NG_K_01: testimony from an organization worker UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

² NG_Imo_K_20: testimony from a Nigerian Law enforcement officer UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

Although many migrants who reach North Africa do not originally intend to cross the Mediterranean, a significant portion of them eventually does, sometimes through coercion of a smuggler or to flee exploitation. During the sea crossing in the Mediterranean, migrants are exposed to considerable risks, including death at sea. It is in fact in the Mediterranean Sea where almost half of the detected migrant fatalities worldwide are recorded. While men are the majority of those undertaking the sea journey, women appear to be disproportionately at risk of dying on this route.

In reaction to those heightened risks, groups of migrants in Central America relied on “*caravanas*” as a form of collective protection to travel northward. As the Study indicates, these caravans are not specifically formed with the intention to protect a specific group but are a collective form of protection through which mostly men, but also women and children, may be better protected from criminal forms of violence, from state violence, and from paying for smugglers for the sections of their journey for which they would have otherwise needed their assistance.

Little evidence of prosecution of abusive conduct in the context of smuggling in transit zones

Despite the severity of the violence inflicted upon smuggled migrants in transit, only a small number of cases could be identified that take abuses against migrants into account when prosecuting smugglers and others involved in the crime. Various factors may explain this situation.

To date, over three quarter of UN Member States are party to the Smuggling of Migrants Protocol supplementing the United Nations Convention on Transnational Organized Crime. State Parties are required to take action against the facilitation of illegal border crossing when committed with the intent to make a profit and to apply more severe sentences when aggravating circumstances are present. The violence and abuses that migrants experience during a smuggling operation is not always considered as a relevant factor in national legislation pertaining to smuggling. In these situations, charges may not lead to more severe penalties for perpetrators, despite the obligation of States Parties to do so in Art. 6 (3) of the Smuggling of Migrant Protocol. Yet, offences such as rape, sexual assault, or murder, are criminalized in most, if not all, national systems, and could be prosecuted as standalone offences, independent from the smuggling charges. The Study discusses these challenges in prosecuting such abuses and offers elements to be taken into consideration when deciding upon a prosecution strategy.

Another significant factor may be the lack of reporting by victims. In the case of sexual violence, same sex intercourse (in the case of LGBTQI+ victims) may be a criminal offence; sex outside marriage may be considered adultery while forced or clandestine abortion may be illegal - even when all these are caused by sexual violence or against the will of the victims. This exposes the victims to criminalization and the risk of being charged and prosecuted themselves, a fact that severely discourages the reporting of such abuses.

Several reports exist about migrants and refugees being detained in centres reportedly run by militias, paramilitary, or criminal groups in Libya, where migrants are subjected to extreme violence and neglect. Other practical barriers to reporting are due to the involvement or complicity of public officials in the abuse of the migrants.

Mass deportation or transfers of irregular migrants often without indication of procedural rights or without distinguishing between profiles are also often reported. The correlation between a stronger crackdown on irregular migration in certain countries and migrants taking more dangerous routes where more aggravations occur can also be observed.

In addition, a lack of information about the assistance and services available, including in a language migrants understand, a lack of legal institutions where migrants can safely report and/or restricted access to these institutions due to the constraints imposed by the smugglers, may also impact the reporting of these abuses.

Finally, the nature of the crime, the modus operandi of smugglers and the speed at which migrants move (especially in the Central American context) may also explain the lack of reporting. The overall reluctance to report is influenced by a widespread sense of impunity and lack of trust in the authorities, in addition to the irregular status of migrants that may expose them to detention and deportation, and the potential delays to their journey if they are to take their case to the authorities.

This Study made apparent that, although there was little evidence of prosecution of cases of smuggling with aggravations relating to the life and safety or treatment of migrants in the regions where it took place, these cases have at times been addressed by jurisdictions of third countries (usually a “destination” country).

This Study offers some initial discussion on the challenges faced and on the optimal prosecution of abuses experienced as part of a smuggling operation. It highlights some elements such as the effectiveness of the prosecution, available coordination mechanisms, applicable law, jurisdictional issues, but also the interest and protection needs of the smuggled migrant (in the spirit of a victim-centered investigation and prosecution).

From the data available, there seems to be a general lack of gender considerations in States’ responses to aggravated smuggling offences, although gender plays an important role in how these offences are committed and what specific protection needs smuggled migrants have. More segregated data is needed, including more relevant jurisprudence, to allow for a more comprehensive analysis of the phenomenon in the regions studied and others.

This Study represents a first steppingstone for practitioners to discover and discuss the complexities identified therein. In particular, the need for more concrete State responses to consider these gender dimensions in order to better understand how smuggling of migrant is perpetrated but also in order to offer gender-sensitive protection measures and prevent impunity for the worse forms of this crime.

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I. Introduction

The United Nations Office on Drugs and Crime (UNODC) is mandated to assist Member States in countering illicit drugs, crime and terrorism. The work of UNODC is guided by a broad range of international treaties and instruments, which include, among others, the United Nations Convention against Transnational Organized Crime (Organized Crime Convention) and its supplementing protocols, including the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling of Migrants Protocol), which is specifically relevant to the present study and the stated purpose of which is: “to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants” (Art. 2).

In resolutions 2331 (2016) and 2388 (2017), the Security Council recognized the connection between trafficking in persons, sexual violence, armed conflict and terrorism and called on Member States to combat crimes associated with conflict related trafficking in persons, including smuggling of migrants. Both Resolutions mandate UNODC to support - in accordance with its respective mandate and expertise - Member States to develop relevant capabilities. Resolution 5/3 of the Conference of the Parties (COP) to the UN Convention on Transnational Organized Crime on the Implementation of the Smuggling of Migrants Protocol, underlined “the need to provide migrants with humane treatment and full protection, in accordance with the Smuggling of Migrants Protocol, mindful in that regard that States parties are obliged, in accordance with article 16 of the Smuggling of Migrants Protocol, to take all appropriate measures to protect the rights of persons who have been the object of smuggling in accordance with the Protocol, in particular the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment”. In its first meeting in 2012, the Working Group to the COP on the Smuggling of Migrants also adopted the following recommendation: “20. States parties should adopt appropriate measures, including legislation, if necessary, to protect smuggled migrants from violence, discrimination, torture or other cruel, inhuman and degrading treatment or punishment, as well as violation of their rights, and should provide smuggled migrants who have been victims of other crimes with effective access to justice and to legal assistance when it is envisaged in national legislation.” The Commission on Crime Prevention and Criminal Justice (CCPCJ), the principal policymaking body of the United Nation in the field of crime prevention and criminal justice, adopted two resolutions on the issue of migrant smuggling; Resolution 2014/23, where the CCPCJ noted the “roles and responsibilities of countries of origin, transit and destination in protecting the rights of smuggled migrants and the need to avoid approaches that might aggravate their vulnerability [...], taking into account the special needs of women and children” and – in a resolution adopted in 2021 – “urg[ing] States parties to take [...] all appropriate measures [...] to preserve and protect the rights of persons who have been [smuggled], in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”³

In pursuing its objectives, UNODC follows a human rights-based approach and integrates a gender perspective throughout its work. This is in accordance with the 2030 Agenda for Sustainable Development and its Sustainable Development Goals as well as the Global Compact for Safe, Orderly and Regular Migration (GCM), which calls in its objective 9 to strengthen the transnational response to smuggling of migrants. Together with the 2030 Agenda, the GCM emphasizes gender equality and the empowerment of women as well as a gender-responsive approach as cross-cutting. In

³ Commission on Crime Prevention and Criminal Justice, Strengthening international cooperation in addressing the smuggling of migrants, UN Doc. E/CN.15/2021/L.3/Rev.1.

accordance with human rights obligations⁴ on non-discrimination, gender equality and prevention of human rights violations, the GCM calls for understanding the specific needs of women, men, boys and girls at all steps of the migration process, including access to justice as well as referrals to state services specialized in providing assistance according to each migrant's individual needs. In particular, the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) emphasizes that discrimination against women and girls includes gender-based violence, the prohibition of which has evolved into a principle of customary international law⁵. In its General Recommendation No. 38⁶, the CEDAW Committee outlines how 'gender-neutral provisions in States' migration policies contribute to limiting women's access to safe and regular migration pathways'.

Sustainable Development Goal 5 (Target 5.2) calls on Member States to eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation. Other Sustainable Development Goals relevant are, Goal 10, on reducing inequalities, with target 10.7 calling to facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies; broadly Goal 8, on decent work and economic growth; and finally Goal 16, on peace, justice and strong institutions, with target 16.1 to significantly reduce all forms of violence and related death rates everywhere and 16.2 calling for the ending of abuse, exploitation, trafficking and all forms of violence against and torture of children.

UNODC undertakes research and reviews emerging trends and practices to provide timely and effective policy and technical guidance to Member States and other stakeholders against the smuggling of migrants. In accordance with the central, transformative 2030 Agenda of leaving no one behind, the current study looks at smuggled migrants in the most vulnerable situations having been victimized by aggravating circumstances.

Where smugglers partly or wholly facilitate the journeys of migrants and refugees travelling irregularly, the smugglers' *modi operandi* may include inhuman or degrading treatments, injuries, exploitation, abuse of vulnerabilities, etc. Such abuses may also be perpetrated by other actors in the smuggling context, including armed groups and militias or even public officials involved at some point in the crime. Women and girls often suffer sexual and gender-based violence en route. Men and boys also face risks of violence, including sexual violence, as part of their smuggling experience. Understanding how violence and abuse affect different groups of migrants requires tackling the complexity of how different (often inter-related) vulnerabilities expose migrants to those abuses. The consequences, such as medical complications, traumas, serious injuries or death, may also vary depending on the victims' profiles and often require different intervention and prevention measures.

⁴ As enshrined in the UN Universal Declaration of Human Rights (A/RES/217(III)[A]), the UN Convention on the Rights of the Child (A/RES/44/25) and the Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180).

⁵ The international customary law character of the prohibition of gender-based violence was first recognized in CEDAW General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, available here: <file:///C:/Users/hemmi/Downloads/N1723154.pdf>.

⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020, available at: <https://www.refworld.org/docid/6006fa354.html> [accessed 22 April 2021]

The increased adoption and enforcement of restrictive regulations to combat irregular migration, the emergence or resurgence of conflicts, or - more recently - the global COVID-19 pandemic, have shaped how migrants move on a global and regional level. As recent UNODC findings suggest, these developments are likely to make smuggling of migrants riskier and more expensive, especially for people fleeing persecution, violence and conflict pushing migrants into more dangerous routes with an increased risk of abuses and aggravations taking place.⁷

1. Purpose of the current paper

UNODC has intensified its engagement on understanding and addressing the gender dimension of the crime of migrant smuggling. An earlier study analyzed the role of women in smuggling activities with considerations of how women experience smuggling of migrants, based on a sample of court cases where women were defendants, and found that they were largely involved in support roles. However, the broader human rights aspects and gender dimensions of aggravated migrant smuggling offences remain broadly understudied. Anecdotal evidence and reports point at grave violations of human rights and gender-based violence inflicted upon smuggled migrants, demonstrating often links with other forms of crimes, such as trafficking in persons, unlawful deprivation of liberty and torture or inhuman and degrading treatment. Lacking sufficient safe and legal avenues for migration, people on the move, including those fleeing conflict and persecution, often resort to the services of smugglers to help them cross borders, putting themselves at risk of abuse and exploitation. Women and girls are more likely to suffer sex and gender-based violence en route, and migrants of all genders may suffer physical harm from extortion or violence at the hands of state and non-state actors. While boys and men are particularly affected by ill-treatment along migration routes, including for the purpose of extortion, children of all genders, especially unaccompanied children, are extremely vulnerable to various forms of violence, abuse and exploitation. Particularly, access to justice or redress for survivors of aggravated smuggling offences remains hindered and affects women, men, girls and boys.

The current study developed under UNODC's Global Programme against the Smuggling of Migrants, aims at promoting evidence-based responses for addressing the gender dimensions of aggravated migrant smuggling offences. These are defined in Article 6 (3) of the Smuggling of Migrants Protocol: "establish as aggravating circumstances to [the smuggling of migrants] [...] circumstances (a) that endanger, or are likely to endanger, the lives and safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation". To bring to the forefront the gender dimensions of aggravated smuggling offences and, contribute towards policy development and technical support, the following questions were considered for this study:

- (i) What types of aggravations are reported or observed and what are their underlying gender dimensions?
- (ii) What obstacles exist for smuggled migrants to receive access to justice, most notably when they have experienced violence or other forms of abuses while being smuggled? Are there gender dimensions that can be identified that prevent smuggled migrants from accessing justice?

⁷ UNODC, How COVID-19 restriction and the economic consequences are likely to impact migrant smuggling and cross-border trafficking in persons to Europe and North America, 2020, available here: <https://www.unodc.org/documents/data-and-analysis/covid/Covid-related-impact-on-SoM-TiP-web3.pdf> [accessed 1 June 2021].

- (iii) How are aggravations to smuggling addressed in national law and by criminal justice practitioners? Is there a gender dimension in the way these acts are qualified, prosecuted and adjudicated?
- (iv) What links exist between aggravated smuggling of migrant offences and other crimes? Should abuses be prosecuted as part of stand-alone offences or as aggravations to the crime of smuggling of migrants? What elements should be taken into consideration when deciding upon a prosecution strategy?

There is a vast body of literature that points at grave violations of human rights inflicted upon migrants during their journey, demonstrating often links with various types of crime. In order to understand the way violence and abuses occur in the context of smuggling, it is essential to examine why these abuses happen and how different forms of violence affect migrants differently. The academic literature does not systematically examine these aspects and often simply replicates general findings and data sources without sufficiently taking into account the gendered nature of these acts nor their immediate and long-term causes and consequences or their various factors of vulnerability. The present study wants to serve as a first steppingstone for practitioners to become aware of and discuss these complex issues as well as to offer some deliberations on providing a gender-sensitive and victim-centered response to aggravated migrant smuggling offences.

Some regions have been studied more extensively than others. The Northern Africa and Central American zones are pivotal transit points for migrants and have received different levels of attention. In Northern Africa, Libya dominates the available data while the migrants' experiences through Mexico are also better documented than through Central America. The present study examines the aggravations to the crime of migrant smuggling occurring in these two transit areas. The objective is to determine whether the sex of the victims and perpetrators, as well as gender norms and perceptions, played a role in the causes of and responses to aggravated smuggling, and to examine the gender-specific consequences aggravations may have on the victims. This analysis will contribute to a better understanding of the underlying gender dimensions and to more targeted prevention, protection and prosecution efforts in addressing the crime of migrant smuggling, especially in its most dangerous and abusive forms.

2. Structure of the paper

This final report is structured around six sections. The first section provides an introduction to the topic and overall study. The second part outlines the study methodology with a particular focus on the applied definitions and approaches that were relevant to the context and thorough analysis work for examining potential gender dimensions in cases of aggravating smuggling. The study focused on actual cases of aggravated smuggling and the existing criminal justice response in two transit regions: the Northern African and the Central American transit zones, which are introduced and described in the third section. The fourth section presents the types of aggravations observed and their gender dimensions while the fifth section examines the criminal justice responses to aggravated smuggling of migrant offences. The report concludes with overall policy considerations and recommendations in the final sixth part. The fifth section examines the legal and law enforcement responses to aggravated smuggling of migrant offences. The report concludes with overall policy considerations and recommendations in the final sixth part.

II. Methodology, definitions and approaches

1. Methodology

Data for this report comes from different sources, including academic and journalistic literature as well as various reports published by international organizations and civil society. For the Northern African portion of the study, the UNODC Observatory on Smuggling of Migrants (hereafter UNODC Observatory) provided a sample of 87 interviews conducted with people on the move (51 men, 32 women, 1 unreported) and 3 smugglers in Italy (December 2019), Morocco (first quarter of 2020) and Nigeria (November 2019). The majority of the interviews concerned refugees and migrants moving northwards from West and Central Africa to North Africa (Morocco), or travelling by air. This body of data also included interviews with NGO workers and investigators. The case law used in this report was selected by UNODC following a desk review of the UNODC Smuggling of Migrant Knowledge Portal⁸ providing a sample of case law from various jurisdictions. Cases examined on the Mediterranean migration route included mostly decisions from destination countries, such as Italy, Spain and Belgium. Court cases and information collected from transit countries contained limited instances of aggravation and their gender dimensions. There might be different reasons for this. On the one hand, countries may not be equipped to identify, investigate and prosecute such cases or may have prosecuted abuses as standalone offences not in connection with a smuggling of migrant charges (see section V.2 for more in-depth discussion). On the other hand, court rulings might not analyse or specify gender aspects even if they have been considered. Further, migrants might not report abuses and their victimization en route due to different reasons as outline throughout the report, most notably due to a lack of access to legal institutions where migrants can safely report abuses as well as their overall reluctance to report given the wide-spread sense of impunity and lack of trust into authorities.

The Central American chapter involved case law analysis and interviews with stakeholders. Ten interviews were conducted between September and November 2020 with stakeholders based in the region (law enforcement officials, staff from international organizations and NGOs) on counter-smuggling operations, human rights, and gender. Prior to the interviews, stakeholders were provided with a set of questions which included queries on migrant smuggling dynamics, on the role gender played in the smuggling activities, the institutional challenges that they faced as organizations at implementing counter-smuggling operations, and on the impacts of COVID 19 on smuggling dynamics in their corresponding regions or countries. Further, to mitigate the lack of relevant recent jurisprudence available in the area, UNODC was provided with documentation of 15 ongoing investigations of smuggling operations that occurred throughout the Central American sub-continent.

The current study and analysis of available data applied a gender lens to examine how differences in gender roles, activities, needs, opportunities and rights/entitlement affect girls, boys, women and men, including LGBTQI+ people in particular situations or contexts. The aim is to ensure that injustices, inequalities and potentially heightened vulnerabilities are not exacerbated by an oversimplified understanding of the issue at hand or the interventions developed to address it.

In the case of aggravated smuggling, this approach could for instance lead to the realization that women and girls are particularly affected by sexual violence and consider increasing the number of female law enforcement personnel to improve reporting and victims' cooperation with

⁸ UNODC Knowledge Portal on Smuggling of Migrant (powered by SHERLOC) hosts a Case Law Database on court cases concerning smuggling of migrants, a bibliographic database and a Database on Legislation: <https://sherloc.unodc.org/cld/en/v3/som/>.

investigations. At the same time, it facilitates better understanding that men and boys also suffer from sexual violence and highlight the barriers that exists for men and boys to report these crimes. Thus, the gender lens aims to consider these complexities and provide a more nuanced understanding and response.

Additional relevant gender terminology is introduced and defined in Annex 1.

2. Limitations

Smuggling of migrants is a complex crime that is often not criminalized or implemented in accordance with international law and is rarely investigated and prosecuted to its full extent, including its organized crime dimensions and financial investigations into the criminal assets of the organization. Aggravating circumstances may not be applicable, or those acts are prosecuted under other charges. Adding the layer of gender to these analyses further adds to the complexity. As mentioned, considering gender dimensions of aggravated smuggling and the responses thereto has been seriously understudied so far. This study aims to cover this gap, while acknowledging the need for additional in-depth analysis and an improved understanding of these aspects in the future.

In the case of the African portions studied, the interviews provided were a sub-sample from a larger sample made available by the UNODC Observatory on Smuggling of Migrants. The interviews of this sub-sample were conducted with questionnaires prepared in the framework of a different research project in which gender was not a variable of analyses, and therefore gender-related data was often limited or inexistent.

In the Central American case, several stakeholders were unfortunately not available for interviews or not at liberty to provide requested information which in turn limited the interview sample. Furthermore, during the research phase of the project, two hurricanes severely affected the region and the devastation they caused prevented conducting additional interviews, as many stakeholders were attending to the emergency.

While there is abundant data on the experiences of Central American migrants and the abuses that they experience in the context of migrant smuggling and irregular migration journeys in Mexico, there is a dearth of data on their experiences within Central America. In part as a result of the COVID-19 pandemic that limited international travel and access to shelters, no interviews were carried out with migrants and refugees, nor with smugglers coming from this region. While in the case of Northern Africa, the UNODC sample included transcripts of three interviews conducted with smugglers or former smugglers⁹, the chapter on Central America lacks such interviews. In general, interviews with smugglers remain a data gap in research on migrant smuggling.¹⁰ The current study thus focused mostly on the aggravations of smuggling and, in particular, the victimisation migrants and refugees experience as well as known statistical data on the smugglers.

Limitations regarding the available jurisprudence must also be noted. While the study initially intended to give an overview of the criminal justice responses of countries where abuses and aggravations occurred, available data showed that abuses committed in the focus regions were often adjudicated in a court of the country of destination of the migrant. The study discusses several

⁹ IDI 65, IDI 72, IDI 73.

¹⁰ The UNODC Observatory on Smuggling of Migrants plans to conduct interviews with migrant smugglers in West and North Africa in the course of 2021.

hypotheses in an attempt to explain this phenomenon and mitigates the issue by including jurisprudence of destination countries in its analysis.

Further, while many abuses are reported to happen in the context of smuggling, the available data does not always allow to determine it precisely. The study tried to distinguish between abuses committed as part of a transnational smuggling operation and abuses linked to the irregular migration journey of migrants and refugees in general. Nevertheless, it should be noted that all forms of abuse described in the wider context of irregular migration journeys could, in some form or another, be related to smuggling despite not being specified as such in the available data.

Other limitations are mainly due to the focus of the study on responses by the criminal justice system to aggravated smuggling. If no sufficient case law could be identified to consider certain aspects (including circumstances of aggravations concluding in deaths of migrants and impact on child migrants) these could only be considered briefly in the absence of available elements for an in-depth analysis. The gaps in data and understanding are addressed in the concluding part of the study outlining the recommendations. Some data gaps were addressed through interviews with other stakeholders. To the extent possible, the validity of data was verified with other reports or data sources. The report has been further supplemented by feedback provided by a panel of international experts via a virtual meeting organized by UNODC on 3 December 2020.

With regards to the fatalities of people on the move during smuggling activities other causes include accidents, extreme terrain and weather conditions as well as deliberate killings - the number of recorded deaths due to drowning far exceeds other causes. Deaths during overland journeys facilitated by smugglers in both West and North Africa, as well as Central America and Mexico, are also less recorded. The present study has focused its analysis on deaths occurring at sea, in particular along the Mediterranean Sea routes, where almost half of the recorded migrant fatalities worldwide have reportedly occurred.¹¹

Finally, the study did not focus specifically on smuggled children. In general, more research is needed to consider the experiences, risks and vulnerabilities of smuggled children and the response of authorities, including those responsible for child protection. A recent ICMPD study has indicated some gender dimensions when considering boys and girls in the smuggling context, showing that girls are more at risk of sexual violence. Boys can also become victims of sexual violence but are more at risk of physical violence, kidnapping for extortion and forced criminal activity.¹²

3. Definitions and approaches

A comprehensive list of definitions and approaches used in this study can be found in Annex 1, including a description of the study's geographical scope, the gender-related concepts used as well as terminologies used regarding the groups of persons involved in smuggling operations. Nevertheless, the criminal offence of smuggling of migrants and its mandatory aggravations as understood by the UN Smuggling of Migrants protocol should briefly be described here.

¹¹ IOM, Missing Migrants Project, Total of deaths recorded in the Mediterranean from 01 January to 01 March, available at: <https://missingmigrants.iom.int/region/mediterranean>.

¹² ICMPD (2019). The strength to carry on. Resilience and vulnerability to trafficking and other abuses among people travelling along migration routes to Europe. Available at: www.icmpd.org/fileadmin/ICMPD-Website/2019/New_Strive_Study_Final.pdf

a) Smuggling of migrants

Smuggling of migrants is defined by Art. 3 (a) of the Smuggling of Migrants Protocol, supplementing the Organized Crime Convention as: «the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident». Under this definition, migrant smuggling occurs if a single offender or a group engaged in the act (procuring illegal entry of a person who is not a national or permanent resident), and did so intentionally and for the purpose of obtaining a financial or other material benefit. In addition to the smuggling of migrant offence in a strict sense, the Smuggling of Migrants Protocol requires the criminalisation, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, of enabling irregular stay of migrants under its Art. 6 (c) as well as producing or otherwise procuring a fraudulent travel or identity document for the purpose of smuggling under its Art. 6 (b).

b) Aggravating circumstances to smuggling

According to the Protocol, the aggravating circumstances to the crime of smuggling of migrants should be understood as: « circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants».¹³

At large, these circumstances cover almost all abuses and ill-treatments migrants are subjected to along the migration routes.

While States Parties must provide for aggravating circumstances to the smuggling offences in their national laws, UNODC's Model law against the Smuggling of Migrants¹⁴ (UNODC Model law) recommends integrating other aggravating circumstances and gives Member States the latitude to criminalize these aggravations directly in the offence of smuggling of migrants, or as stand-alone offences (e.g. murder, assault)¹⁵. This report also examines offences involving serious injury endangering the lives of migrants, cases where the offender abused the vulnerability or dependency of the migrant for material gain, where the offender was a public official, where the smuggled migrant was a child, where the smuggled migrant is pregnant, or where the offender used or threatened to use any form of violence.

For the current study, relevant abuses committed against migrants during a smuggling operation are those likely to endanger the lives or safety of the migrants and those entailing inhuman or degrading treatment, when it led to serious injury, or involved the use or the threat to use violence. In the framework of this research, these abuses include: physical violence, inhuman and degrading treatments, death occurring at sea, sexual and gender-based violence (including as a witness), forced labour, kidnapping and extortion, negligence and unsafe and dangerous travel conditions, and risks related to exposure and abandonment during transit. These acts are often designated in the literature with the terms: security incidents, protection incidents, abuses, crimes against migrants, etc. For the purpose of this study, they are considered as falling under the scope of aggravating circumstances to smuggling of migrant offences and may be addressed by national legislation under the migrant smuggling offence or as separate offences.

¹³ Article 6 (3) of the Smuggling of Migrants Protocol.

¹⁴ UNODC, *Model Law against the smuggling of migrants* (2010), available at https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf.

¹⁵ UNODC, *Model Law against the smuggling of migrants*, p.41

Lastly, cases of trafficking in persons have not been specifically included in the analysis as part of the current study. The same perpetrators may commit both aggravated migrant smuggling offences and trafficking in persons, with the same victims. Smuggled migrants may end up in situations of exploitation in accordance with the three elements defined in Art. 3 of the Trafficking in Persons Protocol (an act, an illicit means and an exploitative purpose; no means elements need to be established in the case of child victims).¹⁶ Such exploitation might start in the form of aggravating smuggling. However, in cases where the three elements of trafficking in persons can be identified for adult victims, or the act and the exploitative purpose for children, these cases should be addressed as trafficking cases. For the purpose of this research, smuggling cases that did not appear at the first stages of the process to be trafficking in persons but included later exploitative elements such as sexual exploitation or forced labour were included. Cases where the three elements of trafficking in persons affecting adults, or two elements for children, could be clearly identified were generally not included (unless it added clear value to the analysis). This study thus includes all forms of exploitation that occurred on the way and where not clearly referred to or classified as trafficking in persons.

A more comprehensive legal background on elements of aggravations as well as the State responses to prosecuting aggravated smuggling offences is provided in section V of this study.

¹⁶ Art. 3 (a) of the Trafficking in Persons Protocol: “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.

III. Regional smuggling dimensions

1. The Northern African transit zone

a) Introduction

Mixed migration flows of migrants, asylum seekers and refugees travelling irregularly from Africa to Europe use three main routes: The Western Mediterranean, the Central Mediterranean and the Eastern Mediterranean routes. Migrants and refugees using Western and Central Mediterranean routes transit through West and Northern Africa for short or long periods, joining other migrants whose final destination was North African countries.

With the – often called – “refugee and migration crisis” in 2015 in Europe, the number of people travelling irregularly through the Mediterranean increased. These flows of migrants pushed in a great proportion by political crisis and war, affected more vulnerable migrants than before. In 2015, frontline responders observed an increase in women migrating,¹⁷ often travelling on their own. Slowly, partially due to the restrictive European migration policies adopted in response, the migration trends changed again from 2016 onwards: the overall number of migrants arriving in Europe from Africa decreased and departures from Morocco and Algeria (and later Tunisia) were increasingly more common than from Libya.¹⁸ In 2018, data showed that routes shifted and the Western Mediterranean route via Morocco to Spain became the main point of entry to Europe by sea.¹⁹ While recent trends show more changes in the migration routes, Libya and Morocco (and Tunisia from 2020) remain the most used points of departure for the Mediterranean crossing to Europe. FRONTEX noted that in 2019 there was « an increase in the share of vulnerable groups among migrants » reaching Europe, with a « slight growth in the share of women ».²⁰

Abuses and criminal offences of many kinds committed against migrants along irregular migration routes and in Northern Africa are well documented. The perpetrators have various profiles (smugglers, security forces, members of criminal groups, etc.). The reported contexts in which the abuses occur are multiple: the locations vary (on the roads, in detention centers, in informal housing areas (“ghettos”), at the borders, in the desert, in conflict situations etc.) as well the circumstances (reprisal for perceived misbehaviors, compensation for an alleged debt, means of payment for various services, extortion, etc.).

Data and analysis about the gender dimensions of these types of conduct is scarce. Recent literature is often limited to the desegregation of abuses by sex. The way the offences are committed, the abuses’ immediate and long-term causes and consequences, the factors of vulnerability to these abuses, and the judicial responses of countries where the abuses occur are rarely explored.

¹⁷ Freedman, J. “Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean Crisis”, *J. Refugee Stud.*, 29 (2016), pp. 568-569.

¹⁸ UNHCR, *Routes towards the Mediterranean, reducing risks and strengthening protection* (2019) p.5. Available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20Routes%20Towards%20the%20Mediterranean%20Appeal%20-%20June%202019.pdf>.

¹⁹ UNHCR, *Routes towards the Mediterranean, reducing risks and strengthening protection* (2019) p.6, available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20Routes%20Towards%20the%20Mediterranean%20Appeal%20-%20June%202019.pdf>.

²⁰ FRONTEX, *Annual Risk Analysis for 2020* (2020) p.8, available at: https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Annual_Risk_Analysis_2020.pdf.

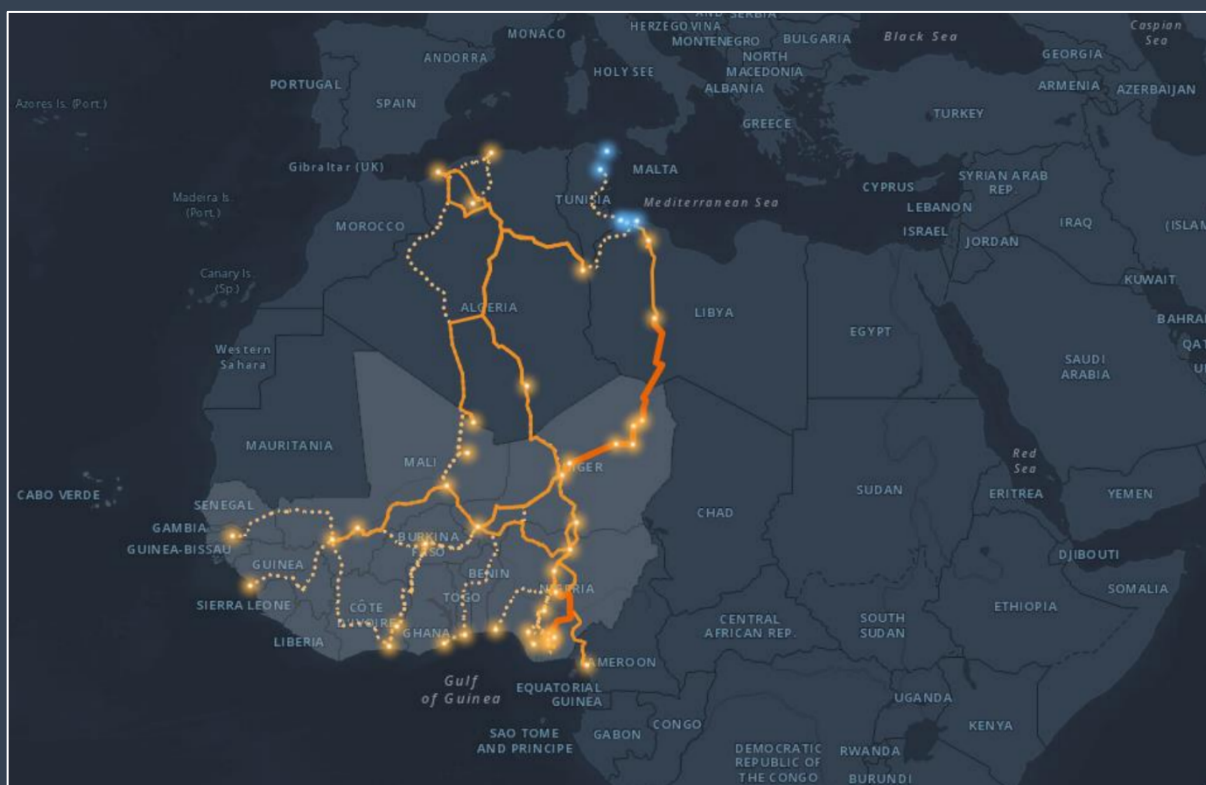


Figure 1 – Map providing an overview of the journey of 49 people interviewed for the UNODC Observatory research (UNODC Observatory on Smuggling of Migrants, 2021)²¹

Two questions are worth asking in this context. Do abuses and their consequences in the context of smuggling of migrants affect differently men and women? Are the commission of abuses and the nature of the judicial responses to these forms of aggravated smuggling influenced by gender aspects?

b) Context of migrant smuggling in the Northern African transit zone

A number of studies show that there is a high risk for migrants to be subjected to abuses in Western and Northern Africa, particularly across the Sahara Desert. While it is not always clear if these abuses are directly related to smuggling (particularly when security forces or non-state armed groups are involved), in some areas, the abusers are in a great proportion smugglers (see figure 2). Libya has been reported to be one of the countries with the higher rate of migrants reporting violence, exploitation, and inhuman and degrading treatments. A report from March 2020 shows that 85% of 3.000 migrants who arrived in Italy after transiting through Libya between 2014 and 2020 suffered torture and inhuman or degrading treatments there.²² The route through Mali, Mauritania and

²¹ Region colorized in light grey represents the ECOWAS free movement zone inside which – under certain circumstances - visa-free travel is open to nationals of other participating States.

²² Reques L. et al., *Episodes of violence suffered by migrants transiting through Libya: a cross-sectional study in “Médecins du Monde’s” reception and healthcare centre in Seine-Saint-Denis, France*, Conflict Health 14, p.12 (2020), available at: <https://doi.org/10.1186/s13031-020-0256-3>; UNHCR, ‘On this journey, no one cares’, p.17.

Morocco is also presented as extremely risky by an interviewee in Nigeria for the UNODC Observatory on Smuggling of Migrants in 2019:

“A few of the smugglers and victims have been exploring the Cotonou-Mali-Mauritania-Morocco route (sometimes via Western Sahara), but information that has been collected on this route from numerous returnee-migrants who had made use of the route, point to utmost cruelty and infeasibility of travel plans”.²³

Many migrants interviewed in the framework of various pieces of research²⁴ reported having suffered from hunger, thirst and low or no access to health care, injuries due to car accidents, robberies, kidnapping, extortion, unlawful deprivation of liberty, exploitation, sexual violence, and a range of physical violence from beating to inhuman and degrading treatment and torture. Many of them witnessed killing or violence committed against other migrants, sometimes with the purpose to intimidate or coerce them (into paying ransoms for instance).²⁵ These abuses have psychological, medical and social immediate, mid- and long-term consequences for the victims.

Among the most frequently reported incidents are physical violence and the deprivation of food, water and access to health care, which may fall within the scope of Art. 6 (3) of the Smuggling of Migrants Protocol under ‘inhuman or degrading treatment’ or ‘threat to life or safety’. Furthermore, most migrants face financial issues, which contributes in many cases to the migrants’ vulnerability to abuse,²⁶ including during smuggling operations.

The categories of abuses observed, their prevalence, and the way abuses are perpetrated, vary depending on the location and the context. Transit hubs are key stages in the migration process, where funds for the next leg of the journey are raised. Jobs presented by the smugglers as a way to reimburse debts or anticipate future costs often turn out to be sexual exploitation or forced labour. These situations may become actual cases of trafficking in persons if the three elements of the crime (two in cases of children) can be identified. Tamanrasset (Algeria), Agadez (Niger), Sabha (Libya), and other places in Algeria, Niger, Libya, and Mali are often mentioned in that sense.

²³ NG_Lagos_K_20 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

²⁴ IOM, *Migrant Deaths and Disappearances Worldwide :2016 Analysis* (2017), available at: https://publications.iom.int/system/files/pdf/gmdac_data_briefing_series_issue_8.pdf; IOM, *Panamá prepare COVID-19 response for 2.500 migrants stranded at Borders* (2020), available at: <https://www.iom.int/news/iom-panama-prepare-covid-19-response-2500-migrants-stranded-borders>; MMC, *A Sharper Lens on Vulnerability (North Africa), A statistical analysis of the determinants of vulnerability to protection incidents among refugees and migrants on the move in North Africa* (2020), available at: <http://www.mixedmigration.org/resource/a-sharper-lens-on-vulnerability-north-africa/>; Women’s Refugee Commission, *Sexual Violence against Men and Boys in Conflict and Displacement: Findings from a Qualitative Study in Bangladesh, Italy, and Kenya* (2020), available at: <https://www.womensrefugeecommission.org/research-resources/sexual-violence-against-men-and-boys-in-conflict-and-displacement-findings-bangladesh-italy-kenya/>; Amnesty International, *Libya’s dark web of collusion, abuses against Europe bound refugees and migrants* (2017), available at: <https://www.amnesty.org/en/documents/mde19/7561/2017/en/>; UNODC Observatory data, 2020.

²⁵ These abuses occurred in various locations throughout the countries crossed (Niger, Mali, Burkina Faso, Algeria, Libya, Morocco, etc.). Most of the reported abuses occurred in the Sahara.

²⁶ Migrants from West Africa (mostly from Sahel countries) reported that financial issues (47%), hunger and thirst (41%), no shelter (38%), attacks (6%), and deprivation of liberty (2%) were the most important challenges they face along their migration processes: IOM, *Migration in West and North Africa and across the Mediterranean, Trends, risks, development and governance* (2020), p.141, available at: <https://publications.iom.int/books/migration-west-and-north-africa-and-across-mediterranean>.

c) Profile of migrant smugglers in the Northern African transit zone

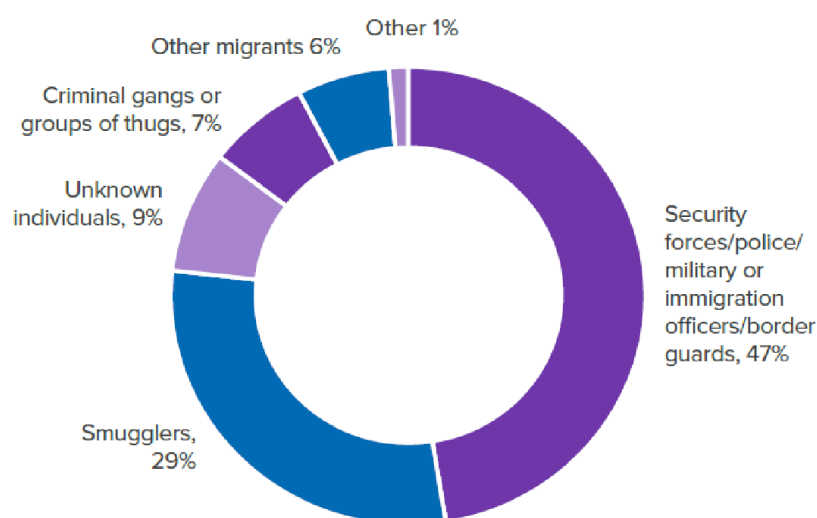


Figure 2 - Alleged perpetrators of physical violence along the Central Mediterranean Route (UNHCR, 2020)

The profiles of perpetrators are generally consistent. Figure 2 corroborates general findings from the UNODC Observatory data: perpetrators are primarily adult male smugglers, members of armed groups or militias, and law enforcement officials. They can also, to a lesser extent, be other migrants (including accompanying persons and male spouses). In such cases, the abuses however are not related to the smuggling offence itself but take place at the same time, which illustrates that smuggled migrants may be exposed to violence at the hand of different actors and in different situations, i.e. upon detection in detention facilities or violence experienced in safe houses prior, during and after a smuggling operation by actors not affiliated with the smuggling. UNODC Observatory data suggest that outside Libya, members of armed groups in the Sahara (Niger and Mali) are often involved in attacks against migrant convoys, leading to theft, sexual and physical violence (including torture), while smugglers (organizers of the journeys, drivers, intermediaries and service providers of all kinds) are involved in the sale, exploitation of, and physical and sexual violence against migrants. It is difficult to differentiate between armed groups, paramilitary forces and officials as perpetrators in Libya when analysing witness and victim testimonies. Moreover, where the abusers are not smugglers, available data is not precise enough to systematically determine whether they were involved in smuggling-related activities when they abused the victim.²⁷ It is however clear that some of them were.

While a majority of detected smugglers are male, it is fundamental to mention that men and women of all ages participate in smuggling activities. Many of these roles take place along gender lines. Women for example, tend to be more involved in caring for migrants, hosting them, and preparing

²⁷ Many abuses were reported to be committed in the context of attacks from criminal gangs, robberies, or police controls for instance.

meals for them, while men are more likely to work as guides, transporters, drivers. However, these roles are temporary and likely to change, and smugglers adapt to the demand of their markets.²⁸

In both focus regions of this study, a certain level of participation of semi-nomadic, native or indigenous groups in the facilitation of irregular migration can be identified. Scholars have shown that the facilitation of migration and trade have been a long-standing income generating strategy for these communities. The increase in irregular migration journeys, however, has often led to their designation as forms of smuggling. In the case of Northern Africa, members of certain ethnic groups are known to facilitate journeys in the Sahel, in the Southern part of Libya, and in Senegal. Their participation does not only include men: all members of a household are expected to contribute to the livelihoods of the family. Children may queue up to get fuel for migrant smuggling or contraband activities²⁹ while women are involved in the facilitation of migrants' journeys from Niger to Libya and, to a certain extent, to Algeria (until Niger passed anti-smuggling legislation in 2015).³⁰

2. Central American transit corridor

a) Introduction

The knowledge concerning irregular migration from Central America and the share that is facilitated for profit is quite scant. What is known is mostly anecdotal and can be pieced together from a wide range of sources of varying quality. In general terms, most migrants and refugees turn to smugglers when their options to travel or continue their journeys become limited, primarily as a result of the lack of safe, regular ways of migration.

Irregular migration dynamics along the smuggling transit corridor can be divided in two: those pertaining to Central American migrants and refugees themselves, especially from El Salvador, Honduras and Guatemala, who have a decades-long, well established tradition of migration towards the United States through Mexico and to Mexico itself. A second dynamic involves the journeys of people from outside Central America -- primarily, people from the Caribbean and South America, and increasingly, migrants from Africa and Asia.

²⁸ Ritcher, L. *Doing bizness: Migrant smuggling and everyday life in the Maghreb*, Focaal (85), (2019) pp.26-36; Moussaoui, F.N. *Le trabendo ou la mondialisation par la marge*, Politique africaine (1), (2015) pp.117-128; Gabriella Sanchez, *Women's participation in the facilitation of human smuggling: The case of the US southwest*, *Geopolitics*, 21(2), (2016) pp.387-406.

²⁹ Moussaoui, F.N. (2015) "Le trabendo ou la mondialisation".

³⁰ Zandonini, G. "After crackdown, what do people employed in migration market do?", Al Jazeera, (4 March 2019), available at: <https://www.aljazeera.com/features/2019/3/4/after-crackdown-what-do-people-employed-in-migration-market-do>.

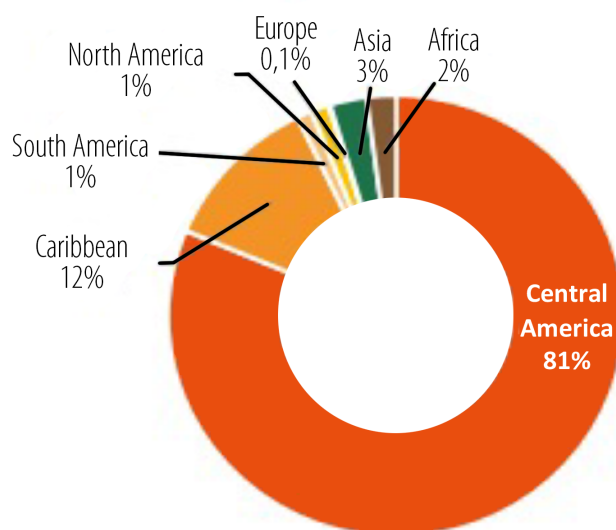


Figure 3 - Detection of irregular migrants in Mexico by region (UNODC, 2018)

While migrants originally from the northern part of the region travel primarily on their own or assisted by local smugglers or coyotes, available evidence suggests that migrants coming from outside Central America rely on a combination of well-coordinated smugglers who operate transnationally, and men and women who throughout the journey provide transportation, room and board.

The visibility of some migration dynamics (the migrant caravans, extra-continental migration, the introduction of stricter border enforcement and controls, and the restrictions emerging from the COVID-19 pandemic) have led to an increase in the attention paid by researchers and policymakers to irregular migration in Central America, despite the region's long history of migration. While changing, most of the research on Central America's irregular migration carried out to date has focused on the experiences of migrants' journeys through Mexico, along the US-Mexico border and into the United States. This has translated into limited knowledge of irregular migration and its facilitation within Central America and most troublingly to the obscuring of the experiences of those who travel irregularly through the region on their journeys elsewhere. In addition, the experiences, especially of women, children and LGBTQI+ people moving through the regions as part of migration journeys have not been systematically assessed or considered.

Reports on irregular migration from Central America often do not pay sufficient consideration to the subregional characteristics and specificities. In them, migration is depicted involving south-north journeys towards the United States by Central American migrants seeking safety from non-state forms of violence. Innumerable publications depict Central American migration as an exodus driven by maras, groups depicted as barbaric urban gangs comprised by violent men allegedly at the core of organized criminal activity in the region. Migrants in this context are portrayed as assailed and desperate victims escaping the maras' monopoly over terror, driven by the only hope of reaching the United States and achieving the American dream.

The impact of organized criminality in driving migration from Central America must not be underestimated. However, sensationalistic and simplistic depictions hide the complexities of what has become one of the most important migratory corridors in the world –albeit a seriously understudied one. Most references on irregular migration from Central America simplify or dismiss long-standing geopolitical dimensions, most notably the prevalence of civil wars in the region and

their aftermath, shaped by the activities of external actors whose securitization and militarization practices still afflict the region, and in particular El Salvador, Honduras and Guatemala in the Northern part of the sub-continent. Narratives of migration also minimize Central America's current challenges– ranging from excessive and unsustainable resource extraction to climate change to increasing poverty to the region becoming a critical segment in the journeys of migrants from the Caribbean, South America, West Africa, the Horn of Africa, and even Central Asia, pursuing destinations throughout North America.

If there is limited work examining these dynamics, there is even less work that explores them through the lens of gender. There is increasing interest in the trajectories of young people and children traveling on their own,³¹ and the ways they perform specific behaviors - for example, pretending to be gang members, posing as violent young men in order to scare people into believing they can be violent, and in this way advance their journeys.³² There is a growing body of work examining the journeys of LGBTQI+ migrants traveling from the region, that counters the flat depictions of Central American countries as inherently discriminatory and homo/transphobic and of trans women and men as merely victims.³³ Yet much of these analyses are framed through the lens of US and Mexican migration policy and dynamics, leaving Central American specificities aside.

This section of the report on aggravated migrant smuggling in Central America shows that efforts to map irregular migration and its facilitation from and through the region are still quite limited, often lacking insights from migrants themselves. It also shows that biases concerning ethnicity, class and gender often shape the perceptions and the responses of law enforcement officials assigned to counter-smuggling activities. In line with the focus of this report, findings also demonstrate the lack of a gender lens in the treatment of migrant smuggling and raises concerns over the gendered impacts of counter-smuggling practices.

b) Context of migrant smuggling in the Central American transit corridor

Contrary to the common tendencies to depict it as a region of emigration only, and to explain its migration patterns as driven by gang-led violence alone, Central America is a complex migratory corridor, witnessing movement within, between and through countries, which might be facilitated by smugglers if it is transnational movement. Currently, the region, historically afflicted by violence and security, is experiencing an escalating emergency, coupled with COVID-related restrictions, widespread poverty and environmental degradation. In November 2020, hurricanes Eta and Iota caused vast devastation across the entire region. Together these factors are putting the lives of many people across Central America at risk and exacerbating the hardships they face. It is estimated that by the end of 2019, conditions across the region had forced about 720,000 Central Americans alone to flee their homes towards other parts of Central America, Mexico and the United States.³⁴

³¹ Heidbrink, L. "Circulation of care among unaccompanied migrant youth from Guatemala", *Children and Youth Services Review*, 92, (2018) pp. 30-38, Heidbrink, L. Statz, M. "Parents of global youth: contesting debt and belonging", *Children's Geographies*, 15(5), (2017) pp. 545-557.

³² Yates, C. "Fusion points: the perceived, performed, and passive merging of criminality and mobility in Mexico.", *public anthropologist*, (forthcoming, March 2021).

³³ Rojas, M.L. "Evadir lo necro: el desplazamiento forzado de mujeres trans centroamericanas hacia México", in Amarela Varela (ed.) *Necropolítica y migración en la frontera vertical mexicana: un ejercicio de conocimiento situado*, (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México 2020).

³⁴ UNHCR, *Central America's displacement crisis aggravated by COVID-19* (2020), available at: <https://www.unhcr.org/news/briefing/2020/5/5ebe47394/central-americas-displacement-crisis-aggravated-covid-19.html>.

As mentioned before, migration from the region has also been a response to natural disasters and political and economic instability; decades of foreign destabilization, civil war, oppression and genocide;³⁵ failed/faulty development initiatives manifested in widespread unemployment; deficient or inexistent legal systems, impunity, and a systemic lack of legal, safe and accessible paths for migration.³⁶

At the same time, throughout Central America migration constitutes “a critical rite of passage and a cultural [manifestation] of care”,³⁷ revealing of long-standing notions of responsibility and obligation, which are shaped to a vast degree by gender. Male and female migrants do not merely leave their communities out of fear or desperation: their motivations and goals also reflect personal aspirations to improve their lives but also those of the people around them. In other words, rather than being “simple victims of poverty or stigmatized gang members”, Central American migrants travel in response to community and family expectations and “contribute to the survival of their households through their care, labour and mobility”.³⁸

Efforts to highlight the critical importance of Central American migration as part of Latin America’s larger migratory dynamics are not new. Civil wars across Central America have been critical in the emergence and consolidation of US-bound migration and have had dramatic consequences on the lives of families in the diaspora. As mentioned before, historically the Central American migratory experience was often minimized by the dominance of research on US-bound migration from Mexico, in which the journeys of Central American migrants were peripheral if at all mentioned.³⁹

The invisibility of Central American migration has however changed. High profile cases involving massacres of Central American and other migrants traveling through Mexico – often victimized by kidnapping and drug trafficking groups⁴⁰—initially led the Mexican government to pay closer attention to the challenges migrants encountered while traveling through its territory. While several initiatives to contain irregular migration from Central America have been implemented over the last two decades, neither irregular migration nor the violence against migrants has stopped. Kidnappings, extortion, fraud, forced disappearances and trafficking for sexual exploitation and

³⁵ For example, Ríos Montt, J.F., Guatemala’s former de facto head of state, was sentenced in 2013 to 80 years for “his leading role in the killing of 1,771 people during his time in office between 1982 and 1983, as well as for the forced displacement, starvation, torture, and systematic rape and sexual assault that were deliberately inflicted on Guatemala’s Mayan Ixil communities”. Available at: <https://news.un.org/en/story/2013/05/439412-guatemala-un-rights-chief-welcomes-historic-genocide-conviction-former-military#:~:text=UN%20Podcasts-,Guatemala%3A%20UN%20rights%20chief%20welcomes%20historic%20genocide,conviction%20of%20former%20military%20leader&text=The%20top%20United%20Nations%20human,genocide%20and%20crimes%20against%20humanity>.

³⁶ Heidbrink, L. “*Circulation of care*”; Nyberg-Sørensen, N. “*From Migrant Identity to Migration Industry: The changing conditions of transnational migration*”, (2018), pp. 213-220; Deborah Levenson, *Adiós, Nino: the gangs of Guatemala City and the Politics of death* (London, Duke University Press 2013).

³⁷ Heidbrink, L. *Circulation of care*.

³⁸ Heidbrink, L. *Circulation of care*, p.11.

³⁹ Casillas, R. *Una vida discreta, fugaz y anónima: los centroamericanos transmigrantes en México*, Comisión Nacional de los Derechos Humanos, (2007); Winters, N. Reichl, E., “Pay and go? Transit migration regimes and migrant navigation in Central America”, *Border Criminologies Blog* (9 April 2020), available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/04/pay-and-go>.

⁴⁰ For examples see Yates, C. Leutert, S. *A gender perspective of migrant kidnapping in Mexico, Victims & Offenders* 15(3), (2020), pp. 295-312, and Comisión Nacional de Derechos Humanos (CNDH) *Informe Especial sobre secuestro de migrantes en México* 2011) available at: https://www.cndh.org.mx/sites/all/doc/Informes/Especiales/2011_secigrantes.pdf.

forced labour targeting Central American migrants traveling through Mexico continue to be documented to this day, demonstrating a clear pattern of violence and abuse.

Research on Central American migration has been reenergized by the visibility of caravanas de migrantes or migrant caravans, community-organized and led efforts involving primarily Honduran migrants who travel together for protection, leaving Central America towards destinations in Mexico, the United States and Canada.⁴¹ Despite their historical nature (migrants have in fact relied on caravans for protection for decades),⁴² caravans have been increasingly depicted by the authorities as a strategy carried out by organized criminal actors to promote instability,⁴³ or as infiltrated by gang members and even terrorists trying to reach the United States.⁴⁴ Traveling by caravan is a way for migrants to protect themselves through safety in numbers, by travelling together, for all migrants to be protected from state violence, from criminal forms of violence, and to avoid paying for smugglers or facilitators of internal travel for the sections that one would typically travel accompanied by them. As research indicates, caravans are not necessarily formed with the intention to protect specific groups but are a collective form of protection. Most migrants who rely on caravans are men, but women, boys and girls also travel in this fashion. They often don't move uniformly or as an organized group and frequently disband over time, particularly when crossing an international border. Elderly migrants, pregnant women, children and migrants with disabilities who cannot keep up with the speed of the group are often left behind. There is also evidence that LGBTQI+ migrants form contingents within the caravans to travel more safely. They, however, often report facing violence, discrimination, etc. This is exemplified by a recent report on an incident in Mexico in 2018, where the shelter of a group of transwomen – who needed to be sheltered separately because of the level of discrimination they were facing during the transit – was set on fire.⁴⁵

Another important phenomenon that has increased the visibility of migration from Central America is the one involving the journeys of larger numbers of extra-regional and extra-continental migrants

⁴¹ Frank-Vitale, A. *From Caravan to Exodus, from Migration to Movement* NACLA blog (2018), available at: <https://nacla.org/news/2018/11/26/caravan-exodus-migration-movement>; Frank-Vitale A. & Nunez-Chaim M. "El Poder de la Migración Indocumentada" Viento Sur (2020), available at : <https://vientosur.info/el-poder-de-la-migracion-indocumentada/>.

⁴² Some of the first caravans were in fact organized by the mothers of men and women who had gone missing in the context of their US-bound journeys. They can be traced to the year 2000 with the establishment of COFAMIDE, *Comité de Familiares de Migrantes Fallecidos y Desaparecidos de El Salvador* (Committee of Relatives of Dead and Disappeared Migrants in El Salvador), and the *Caravana de Madres de Migrantes Desaparecidos* (Caravans of mothers of Missing Migrants) in 2005. The mothers travel together as a group through Mexico every year searching for missing and disappeared migrants and advocating for migrants' rights. See Marta Sanchez, "Resisting Invisibility: Mothers of Missing Migrants", Border Criminologies Blog (2018), available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/12/resisting>; Daniel Villafuerte-Solis, *Tiempo de Fronteras: una visión geopolítica de Mexico* (Juan Pablos Editor 2017).

⁴³ Associated Press, *Presidente mexicano culpa a contrabandistas por caravanas de migrantes*, La Tribuna (29 August 2019), available at: <https://www.latribuna.hn/2019/08/29/presidente-mexicano-culpa-a-contrabandistas-por-caravanas-de-migrantes/>; Associated Foreign Press, *Criminales infiltran en México caravanas migrantes que van para E.E.U.U.*, El Periódico de Guatemala (28 January 2019), available at: <https://elperiodico.com.gt/mundo/2019/01/28/criminales-infiltran-en-mexico-caravanas-migrantes-que-van-a-ee-uu/>.

⁴⁴ US Department of Homeland Security (US DHS), *Myth vs. Fact: Caravan*, available at: <https://www.dhs.gov/news/2018/11/01/myth-vs-fact-caravan>.

⁴⁵ Martínez, G. Escobar, A. *Atacan a migrantes trans en albergue*, El Universal (5 August 2019). Available at: <https://www.eluniversal.com.mx/estados/atacan-migrantes-trans-en-albergue-de-tijuana>.

(primarily migrants from the Caribbean and South America, but also people from countries across Africa and Asia) who seek to travel north. This has turned Central America into one of the most active transit corridors in the world. While no official numbers concerning extra-continental migrants in Central America are available, Mexican authorities reported that in 2019, 7,065 migrants from Africa, 5,878 from Asia, and 11,068 from the Caribbean had entered in contact with immigration authorities along the Mexico-Guatemala border alone, representing 13,12% of the overall share.⁴⁶

Also important are the growing numbers of restrictions to migration and reinstated administrative and financial requirements⁴⁷ that countries in the region have implemented – many of them in the context of the COVID-19 pandemic. The lack of legal documents and/or financial resources to overcome some of these restrictions have been well documented as the main cause leading migrants to hire the services of migrant smugglers, who often opt for more remote, distant and dangerous areas and methods to reach their destinations. Traveling clandestinely has dangerous implications in the lives of migrants. While data in the Central American context is sparse, notes on assaults, accidents, disappearances and deaths involving migrants are regularly reported by the media in the region.

c) Profile of migrant smugglers in the Central American transit corridor

According to case law and stakeholder interviews, smugglers and other facilitators of movement – known locally as polleros or coyotes – tend in their vast majority to be members of the communities along the migration pathway. In the northern part of the region, smugglers are often members of indigenous communities with a long history of living in the region and of knowing its geography and landscape, and have profited historically from guiding migrants through their journeys.⁴⁸ As facilitating irregular migration is seen as a community effort, it is common for all members of a household to play a role. Certain indigenous women often provide room and board to migrants during transit in secluded areas.⁴⁹ In Guatemala, certain indigenous women have reportedly provided a type of training that shows other women how to act in the course of their journeys.⁵⁰

Coyotes enjoy wide social recognition and power, since their services are seen as essential to the mobility and wellbeing of their communities. It is also common for coyotes to be of indigenous origin.

Towards the south, in places along the borders between Colombia and Panama, smugglers or guides tend to be people displaced from the Colombian conflict, who sought refuge in the jungles connecting South with Central America, and who developed deep knowledge of the land. Alongside them, there are plenty of other men and women who for a fee provide room, board, guidance and

⁴⁶ Unidad de Política Migratoria, *Boletín Mensual de Estadísticas Migratorias*. Mexico City: Gobierno de México: Secretaría de Gobernación (2019). Available at: http://portales.segob.gob.mx/work/models/PoliticaMigratoria/CEM/Estadisticas/Boletines_Estadisticos/2019/Boletin_2019.pdf

⁴⁷ Nyberg-Sorensen, N. Castilla, C. *Latin America's evolving migration crisis*, DIIS: Copenhagen (8 March 2019), available at: <https://www.diis.dk/en/research/latin-americas-evolving-migration-crisis>; Winters, N. "Haciendo-lugar en tránsito. Reflexión sobre la migración africana y trabajo de campo en Darién, Panamá", *REMHU: Revista Interdisciplinaria da Mobilidade Humana*, 27(56), (2019), pp. 235-243.

⁴⁸ Yates, C. *How Panama became the most treacherous crossing point for migrants on a long journey to the US*, Time Magazine (25 July 2018), available at: <https://time.com/5340697/migration-america-panama/>; Vick, K. Poole, L. *Smugglers Inc.: a voyage through the freight, life changing and totally routine \$35 billion human smuggling business*, Time Magazine (2016), available at: <https://time.com/smugglers-inc/>.

⁴⁹ Winters, N. *Haciendo-lugar en tránsito*, (2019).

⁵⁰ Stone-Cadena, V. Velasco, S.A. *Historicizing mobility: Coyoterismo in the indigenous Ecuadorian migration industry*, *The ANNALS of the American Academy of Political and Social Science*, 676(1), (2018), pp.194-211.

transportation to migrants in transit, working independently and with no specific criminal intention nor as part of criminal networks, yet solely to generate survival or supplemental income.⁵¹

According to statements from stakeholders, along with the available literature, male and female coyotes put their knowledge to use on behalf of friends, family members and locals seeking to migrate. While community-based smugglers are indeed common, there are also those who are constituted into more complex groups, often operating across different countries. These groups were often described by stakeholders as set up into hierarchical networks, set up by coyotes with a vast network of transnational and trans-border connections.⁵²

Smugglers –strictly and specifically identified as men in this case – supervise other men in other regions or territories who in turn manage or handle local logistics related to the facilitation of irregular migration on an everyday basis. Some of these lesser-ranked coyotes are also in charge of activities associated with migrant smuggling, like money laundering, debt bondage, extortion, or the securing of plane tickets or other travel arrangements.

In some cases, investigations pointed to the proliferation of smuggling among impoverished people facing extremely marginalized conditions, in exchange for what was often a small compensation or in-kind return. Several interviewees recognized that many of those facing smuggling charges were often unemployed or underemployed, chronically ill, or disabled men and women who were merely seeking to generate survival income, and lacked criminal intentions or oversight from any group or organization.⁵³ One interviewee, for example, described the case of a fisherman who, unable to work as a result of the pandemic, was intercepted as he was transporting two people in his boat. While cognizant of the precariousness that may lead people to engage in these activities, the stakeholder repeatedly stated the need to enforce the law amid what they considered the rampant growth of smuggling in the region, which is what led him to carry out the man’s apprehension.

Interviewees also reported the participation of young people and children (particularly males) in the facilitation of irregular migration in Honduras, Guatemala and El Salvador. These boys and young men reportedly work as guides, pilot boats and act as lookouts. While the tasks they perform are considered as peripheral or unimportant given their age and social status, they also involve significant risks. Boys and young men often must cross militarized borders, interact with criminal groups, face violence, and often extreme environmental conditions. Two stakeholders emphasized how young people and children often work for minimal amounts, despite the high-risk activities they perform. Another interviewee explained children are seen as disposable by those who hire them,⁵⁴ who do not hesitate to put them at risk for profit.

As mentioned above, women also participate in the facilitation of tasks conducive of irregular migration. They collect fees, recruit clients and other smugglers, and plan logistics;⁵⁵ they are also known to house and feed migrants in transit, to care for injured, sick migrants, and on occasions to

⁵¹ IOM, *Panamá prepare COVID-19 response*.

⁵² The term “coyote” assumes smugglers are male only. Evidence shows the facilitation of migrant’s journeys includes men, women, children, young people and the elderly.

⁵³ One interviewee referred to this form of smuggling as *tráfico de sobrevivencia*, or survival smuggling.

⁵⁴ A 2014 study by UNHCR revealed that out of a total of 268 Mexican and Central American migrant children interviewed on the US-Mexico border, 102 (thirty-eight percent) admitted to having participate in migrant smuggling activities (See ACNUR 2014).

⁵⁵ Sanchez, M. “Resisting Invisibility”; Zhang S. et al., “Women's participation in Chinese transnational human smuggling: a gendered market perspective”, *Criminology*, 45(3), (2007), pp.699-733.

perform roles that are seen or considered to be “masculine,” like driving people across checkpoints, or even engaging in violent behavior when under attack.⁵⁶

Some cases involving women have generated significant media attention. Ana Yansy López Martínez –known as Mamá Africa – resident from La Cruz, Costa Rica, was detained by the immigration police in the context of an investigation by Costa Rica’s prosecutor office, who had identified her as part of a migrant smuggling network. In La Cruz, as in other rural and border communities across Central America, families provide room and board, transportation, or other services to migrants in transit. While residents are fully aware that these activities are considered illicit, they do not consider them criminal. Lopez-Martinez did not deny having provided assistance, including against payment, to migrants, who she said often came to her asking for guidance, food, a place to stay and transportation. She also allowed migrants to prepare food in her kitchen and helped them coordinate journeys north.⁵⁷

While women are essential in the facilitation of smuggling, their roles are often dismissed as irrelevant or secondary by criminal justice practitioners.⁵⁸ During interviews, stakeholders often made comments concerning women that revealed some gender biases – for example, claiming that younger, attractive women “with a long history of family rejection and abuse, uneducated and inexperienced” were more likely to be recruited by smugglers given their low self-esteem and become their romantic and sexual partners. This finding has been mirrored in a recent case law analysis by UNODC identifying such patterns of control and abuse of a position of vulnerability as a control method by traffickers.⁵⁹ Other women, stakeholders also said, were smugglers’ wives, and were given some profits from smuggling so that they could set up small businesses, laundering returns to support their children and families.

⁵⁶ Solano, N.E. “Forbidden Passages: human smuggling along the migrant route through the Americas. Series Migrants from another world part 3”, *Caravan Magazine* (2020), available at: <https://caravanmagazine.in/reportage/human-smugglers-in-nicaragua>

⁵⁷ *Ibid.*

⁵⁸ Zhang et al., *Women’s participation*; Sanchez, *Women’s participation in the facilitation*.

⁵⁹ UNODC, *Female victims of trafficking for sexual exploitation as defendants - a case law analysis* (2020), available at: https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf.

IV. Aggravating circumstances and their gender dimensions

The following section discusses the abuses and aggravations encountered by smuggled migrants in the two focus regions and discusses their gender implications and consequences. Each type of abuse is individually assessed with regard to its gender dimensions and its legal qualification as an aggravating factor to the criminal offence of migrant smuggling as set out in by the Smuggling of Migrants Protocol.

Gender seems to be playing a role in some vulnerabilities to and types of abuse and violence inflicted upon migrants. The general rates of men and women facing abuses, all forms combined, is rarely available. However, evidence from various reports show that the proportion of women facing sexual violence is significantly higher, that forced labour affects more men, and that men are more likely to face a wider range of abuses than women (see figures 4 and 5). These findings must, however, be contextualized by the fact that adult males represent the significantly largest group of smuggled migrants on a global scale.⁶⁰ Among all abuses affecting migrants, sexual violence and forced labour are most notably gender-specific. In general, there is most likely serious underreporting of cases overall. Thus, these findings may not be representative of the actual prevalence of sexual violence against men due to gender stereotypes and obstacles to reporting by men, but also women, who tend to report less on suffered abuses in general. Apart from sexual violence and forced labour, data consistently shows that men are slightly more likely to report kidnapping and detention, although some samples (see figure 6) show a very small prevalence.

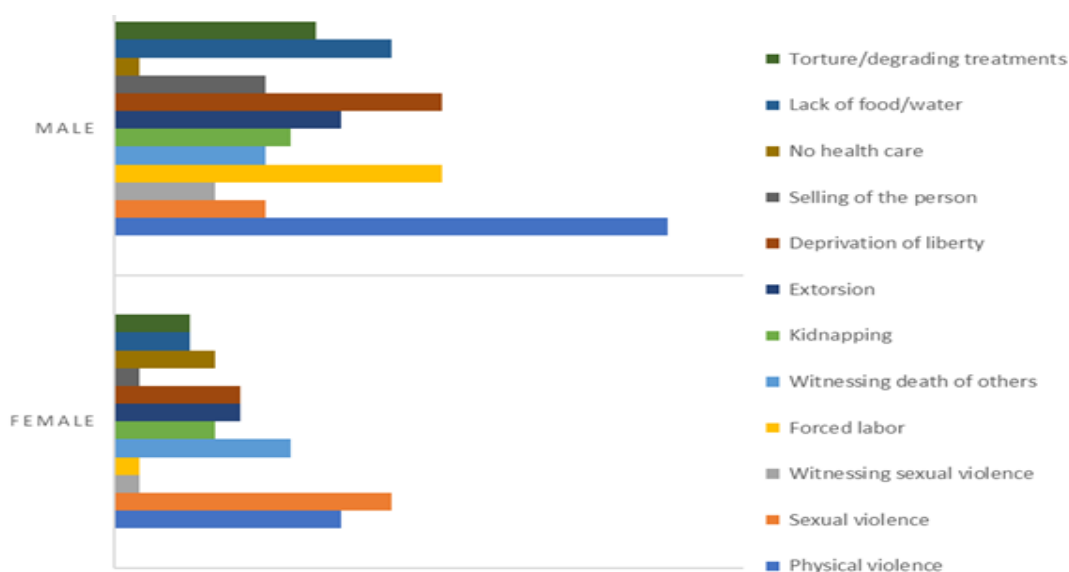


Figure 4 – Reported abuses by type and gender – Western and Central African routes (UNODC, 2020).
Note: many migrants interviewed passed through Libya

⁶⁰ UNODC, *Global Study on smuggling of migrants*, (2018) p. 32.

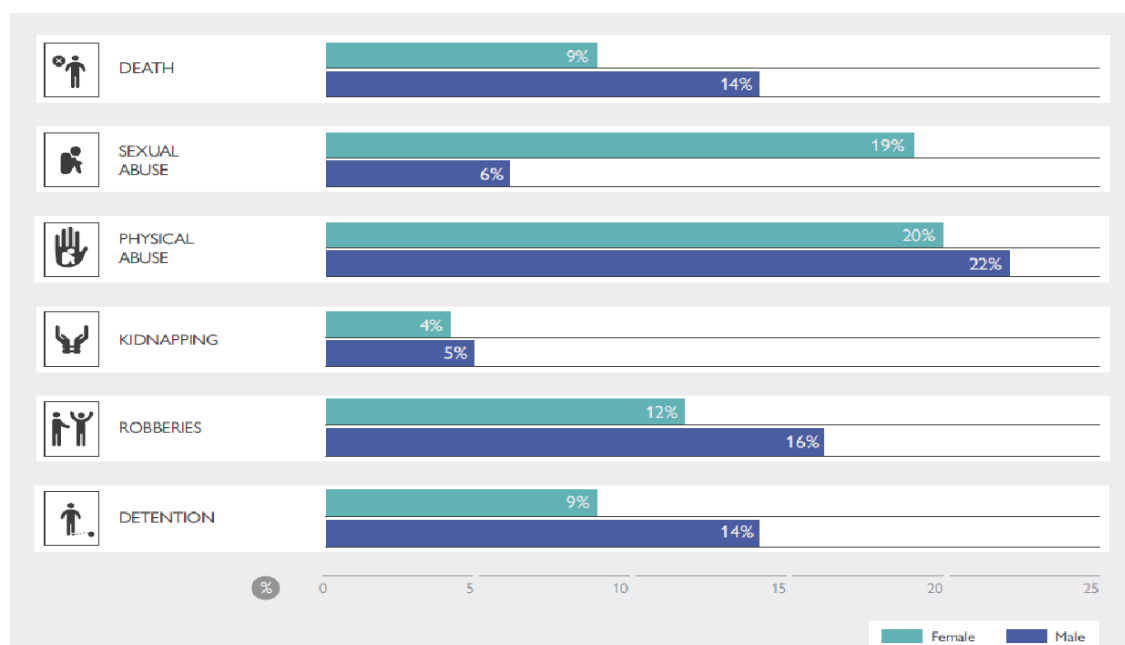


Figure 5 - Prevalence of protection incidents [abuses] among interviewed migrants in Libya by gender (IOM, 2020)

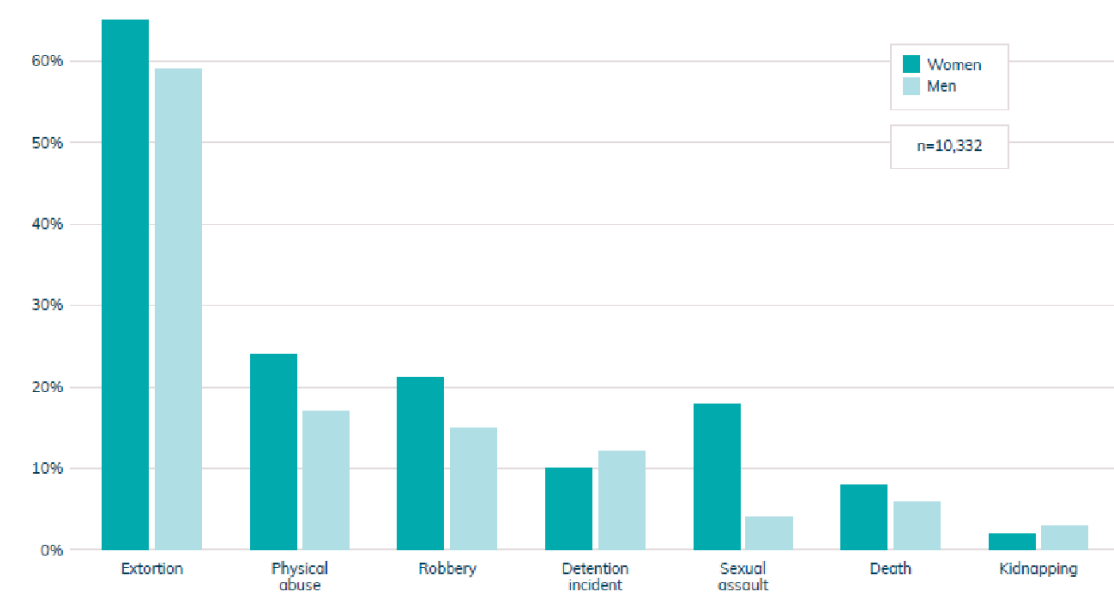


Figure 6 – Reported protection incidents [abuses], by type and gender - West Africa (MMC, 2020)

The following types of aggravations will be discussed in more detail in the sections below: (i) physical violence and inhuman and degrading treatment, (ii) death along the Mediterranean Sea routes (iii) sexual and gender-based violence and the witnessing of sexual violence, (iv) forced labour, (v) kidnapping and extortion, (vi) negligence, unsafe and dangerous travel conditions and finally (vii) exposure and abandonment during transit.

1. Physical violence and inhuman and degrading treatment

In a legal context, inhuman and degrading treatments are aggravating circumstances to the offence of smuggling of migrants. Physical violence, where it endangers the life or safety of the migrants, where it is inhuman or degrading, where it causes serious injuries or the migrant's death, can also be considered an aggravating circumstance within the meaning of Art. 6 (3) of the Smuggling of Migrants Protocol.

Physical violence against migrants is widespread in Northern and Western Africa and along the Western and Central Mediterranean migration routes. Migrants recently interviewed by the International Organization for Migration (IOM) mentioned physical abuse or harassment as the most prevalent form of abuses encountered.⁶¹ In the UNODC Observatory data, physical violence is among the most prevalent categories of abuses identified, and by far the most commonly reported by men.⁶² One reason, given the very high prevalence of sexual violence among women (see below), can be that violent acts perpetrated against women are more often of a sexual nature.

Physical violence acts are of different kinds and severity and are committed by perpetrators with various profiles. While it often has no obvious purpose, it can aim to punish the victims (for perceived misbehaviors for instance, i.e. laziness or rebellion),⁶³ intimidate, coerce, etc. The most severe forms of violence, like torture or inhuman or degrading treatment, often have extortion as the purpose and are associated with other forms of abuses (kidnapping, deprivation of liberty, sexual violence, etc.).

« When we planned our escape, we were very scared. If they find you they would bring you to a little room which was like a box, with a ceiling which was 40 centimeters high, it was worse than the beatings ». ⁶⁴ 32-year-old Ivorian woman.

« In Sebha, I was tortured, beaten, [received] electric shocks, I was held to the ceiling, people would have me lying on the floor and then hit me with a big stone on my legs, I was burned. (...) I suffered a lot in that place. They wanted money, I had nobody to call ». ⁶⁵ 28-year old Nigerian man.

According to the United Nations High Commissioner for Refugees (UNHCR), in the Western portion of the Central Mediterranean route, men are mostly suffering physical violence from security forces, and women from a various range of actors; while in other regions (North and East portions of the route),⁶⁶ the perpetrators' profiles seem to be the same regardless of the victim's gender.⁶⁷

How gender aspects might influence the type and degree of violence smuggled migrants are exposed to can be exemplified with a case adjudicated before the U.S. District Court for the Southern District of Florida.⁶⁸

Example: The defendants in this case, along with a third person, worked for the leader of a transnational organized smuggling group based in Turbo, Colombia. In September 2016, the

⁶¹ IOM, *Migration in North and West Africa*, p.180.

⁶² UNODC, *Observatory data*.

⁶³ NG_Imo_K_13 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

⁶⁴ B_ITA_5_atlas UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

⁶⁵ B_ITA_4_atlas UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

⁶⁶ See figure 1.

⁶⁷ UNHCR, *'On this journey, no one cares'*, (2020) p.21.

⁶⁸ United States of America v. Palacio and Aspillá, Judgment of the U.S. District Court for the Southern District of Florida of 18 October 2018, WL 8192211, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/usa/2018/united_states_of_america_v_palacios_asprilla.html.

defendants offered three Cuban nationals (two males, one female) in Colombia to take them to Panama across the notoriously dangerous Darien Gap. The migrants met their smugglers, including the leader of the group on the local port and were told to board a boat, believing they would be taken to the United States. The boat then travelled towards Panama, but ultimately went into a canal area where suddenly the defendants produced a firearm and a knife on the victims. The two men were tied up and thrown overboard without killing them; the female migrant was first raped and then murdered with a knife. The male migrants were then pulled back into the vessel, one was killed on the spot while the other one was able to free himself and escape.

This case example illustrates extreme forms of violence and deaths of migrants during their migration journey, facilitated by smugglers. The woman is raped and killed. One of the men is also killed. It is unclear if the rape of the woman was meant to be witnessed by the two men as an additional act of violence. Furthermore, it is unclear why the migrants were killed: misogyny, cover-up of the rape or xenophobia against migrants. Considering these aspects might be important to decide about aggravating factors in sentencing but also needs for prevention, protection and support.

Another striking example on the gender dimensions of severe physical abuse against smuggled migrants was recently discussed by an Italian court:

Example: A Somali defendant who was charged with procuring the illegal entry of hundreds of migrants to Italy, was accused of running two illegal migrant detention camps in Libya. Inside these camps, several hundred migrants were deprived of their personal freedom and severely abused as a way to punish the non-payment of the sum demanded for the smuggling operation. Male migrants would regularly be brought to "torture rooms" where they were tortured through electric shocks, whips, hit with sticks and iron bars, or left for hours dehydrated under the sun, causing them fractures and in some cases even death. Another type of violence, perpetrated by the defendant towards male migrants exclusively, was to cause severe burns by setting fire to plastic bags that were placed on the migrants' backs. These acts of torture were perpetuated in order to give a "warning" to other prisoners about the consequences to which they would be exposed in case of rebellion or in case their payment would not come on time. The inhuman and degrading treatments committed against women, on the other hand, were primarily of sexual nature. The victims, many of them children at the time, experienced rape and other sexual violence on a daily basis, especially targeting their virginity.⁶⁹

2. Death along the Mediterranean Sea routes

When smuggling of migrants involves conducts that endanger the life or safety of the migrants to an extent that ultimately leads to the migrants' death, or creates a significant risk of death, it may be

⁶⁹ Italy vs. Matammud, Proc. N. 333307/16 N. 10/17, Judgment of the Milan First Court of Assise of 10 October 2017, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2017/n.33330716_n.1017_-_italy_vs._matammud_.html?lng=en&tmpl=sherloc

prosecuted as a separate offence but it also constitutes an aggravating circumstance for the purposes of Art. 6 (3) of the Smuggling of Migrants Protocol.

a) The phenomenon

As shown by figure 7 below, while deaths along the smuggling routes can occur due to a variety of causes that include harsh conditions, illness, accidents as well as deliberate homicides, the number of deaths due to drowning far exceeds other causes. In this context, the Mediterranean occupies a central position as most of the migrants' deaths worldwide are recorded in attempts to cross the Mediterranean Sea to reach Europe. Data show that 46 per cent of the total migrant fatalities recorded in 2016 took place in the Mediterranean Sea.⁷⁰ Indeed, more than 20,000 migrants have died along this route since 2014, a figure that represents only a minimum estimate of the actual phenomenon as many deaths remain unrecorded.⁷¹ In the first two months of 2021, the number of reported deaths of migrants in the Mediterranean has already reached 221.⁷²

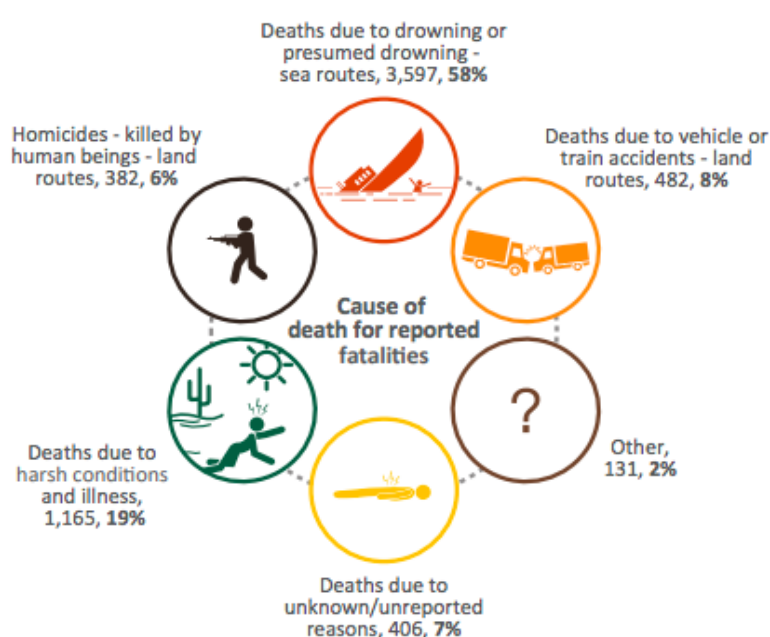


Figure 7 – Number of migrant fatalities reported, by cause of death, worldwide 2017 (UNODC, 2018)

Among the three main Mediterranean Sea routes, the Central Mediterranean is to be considered the deadliest one, accounting for 69 per cent of the deaths documented in the Mediterranean in 2020.⁷³ There are two main reasons behind this. The first one is linked to migration flows and geographical considerations. The Central route is not only a busy route but also a long one, which covers a larger area than many other widely used sea routes. The sea journey in the Central Mediterranean can be up to 300 kilometers long, meaning that a large number of migrants are exposed to the risks of the high seas for a long period of time.

⁷⁰ UNODC, *Global Study*, p.39.

⁷¹ IOM, *Calculating "Death Rates" In The Context Of Migration Journeys: Focus on the Central Mediterranean* (2020), available at: <https://publications.iom.int/system/files/pdf/mortality-rates.pdf>.

⁷² IOM, *Missing Migrants Project*, Total of deaths recorded in the Mediterranean from 01 January to 01 March, available at: <https://missingmigrants.iom.int/region/mediterranean>.

⁷³ IOM, *Missing Migrants, Deaths by route*, (2020)

The second reason relates to the *modus operandi* of smugglers active along this route, arranging travels in unseaworthy and overcrowded boats. Many migrants do not know how to swim while safety equipment is hardly ever provided as it is too expensive and at most can be negotiated as a costly extra to the smuggling package. Life vests are generally considered too bulky, thus taking away precious space on the boat, and too brightly coloured, thus increasing the risk of detection by the State of departure coastguard.⁷⁴ Food and water on the vessels are often scarce, and so is fuel.⁷⁵ It is indeed very frequent for vessels to run out of fuel, experience engine problems, get lost at sea or fill up with water.⁷⁶

There is also a seasonal aspect to the phenomenon. While it would be safer to attempt the Mediterranean Sea crossing during the summer months, when the sea is quieter, recent trends show that smugglers continue to organize crossings even in early spring or late autumn despite the rougher weather conditions. This has resulted in a peak of fatalities during the springtime crossings from North Africa to Italy.⁷⁷

In some cases, smugglers may go as far as deliberately killing or endangering the migrants' lives. It is indeed part of the *modus operandi* of many smugglers to sabotage vessels or instruct migrants on board to do so – e.g. by intentionally puncturing inflatable boats or setting on fire wooden boats – in order to cause distress at sea and trigger the coastal State's duty to rescue persons in danger once the vessels are in the sea zone of competence of destination countries. On the other hand, for the opposite purpose of avoiding interception by the authorities, the recklessness of smugglers has also led them to push migrants overboard far away from the shore. Even when the sea is calm, this is a deadly practice for migrants unable to swim.⁷⁸

b) Gender implications

Applying a gender perspective to the phenomenon of deaths at sea is a challenging exercise, given the general lack of reliable sex-disaggregated data on deaths across the Mediterranean. Indeed, the identity of those who die at sea often remains unknown.⁷⁹ Despite the scarcity of information, in the same way women's lives are endangered differently from men's on land, their experiences when crossing the sea appear to be distinct as well, with women being exposed to greater risks. It should be taken into account, however, that on the Mediterranean route, the majority of people travelling are men and boys, and they are therefore disproportionately represented in terms of deaths along the route.

During the sea crossing women experience hunger, thirst and extreme cold, as men do on board the vessels. Regarding health consequences, it has been common to diagnose women with acute urine retention once they arrive on land due to circumstances on the boat and lack of suitable options for

⁷⁴ InfoMigrants, *Why migrants cross the Mediterranean without life jackets*, 21 February 2019, available at: <https://www.infomigrants.net/en/post/15304/why-migrants-cross-the-mediterranean-without-life-jackets>

⁷⁵ Amnesty International, *Between the devil and the deep blue sea Europe fails refugees and migrants in the Central Mediterranean* (2018) available at: <https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>

⁷⁶ UNODC, *Global Study*, p.40.

⁷⁷ UNODC, *Global Study*, p.39.

⁷⁸ UNODC, *Issue Paper: Smuggling of Migrants by Sea* (2011) p.32.

⁷⁹ For instance, only 31 per cent of the incidents recorded by IOM's Missing Migrants Project reports any information on the sex of those that died or went missing. IOM Migration Data Portal, "How a lack of data is perpetuating the invisibility of migrant women's deaths" (2020) available at: <https://migrationdataportal.org/blog/how-lack-data-perpetuating-invisibility-migrant-womens-deaths>.

women to urinate.⁸⁰ In addition, women are significantly more likely to suffer a range of sexual abuses during the journey.

In terms of fatalities, 64 per cent of recorded migrant women's deaths in 2017 were due to drowning (see figure 8). Proportionally, more women than men drown when trying to cross the sea.⁸¹ This vulnerability in those circumstances is due to a range of factors that partly reflect gendered social practices.

First of all, women's position on the boats is determined by misconceptions that unintentionally endanger them more. In the Central Mediterranean, women are often placed in the middle of the rubber boat, where they are thought to be more protected as they are as far as possible from the water. However, it is in the middle of the boat that seawater and fuel mix up, creating a toxic substance that burns people's skin and often causes them severe injuries. There they are also more at risk of being stepped on and suffocated when the boat is in distress and chaos breaks out on board. For the same protective purpose, in larger wooden boats women and children often sit in the vessel's hold, where they are more exposed to suffocation due to the toxic fumes and where, if the boat capsizes, escaping is more difficult.⁸²

Findings also indicate that women tend to have weaker swimming skills, which is compounded by the fact that they often wear longer and heavier clothes than men, making it harder for them to float.⁸³

Another element to take into account is that a percentage of women engage in the journey while being pregnant and are therefore subject to reduced mobility and an increased risk of dehydration. Data concerning pregnant women are particularly incomplete given that pregnancy is recorded only when late-term and thus visible, but it may also be explained by the fact that sexual abuses suffered during the previous legs of their journey led in many cases to unwanted pregnancies, as further discussed in section IV.3.(c) below.⁸⁴

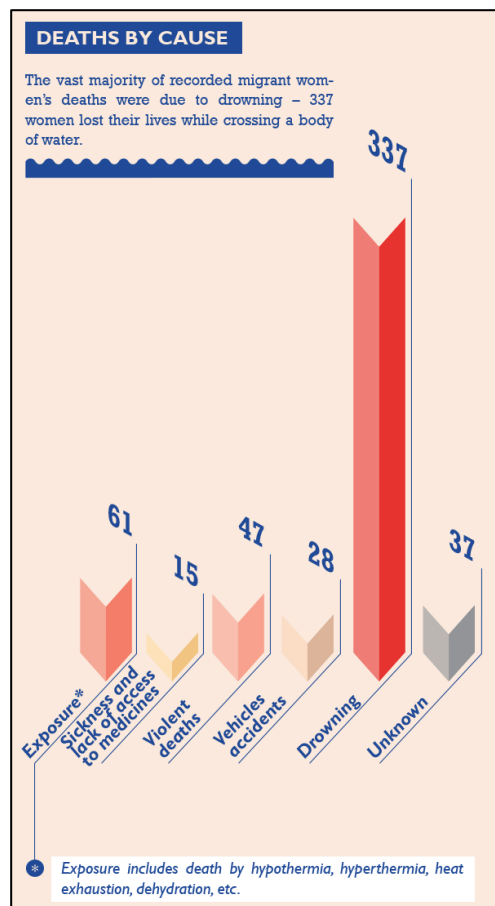


Figure 8 – Migrant Women's deaths by cause along migration routes in 2017 (IOM 2017)⁸¹

⁸⁰ María D.M. Jiménez-Lasserrotte et al., *Understanding Violence against Women Irregular Migrants Who Arrive in Spain in Small Boats*, *Healthcare* 8, 3 (2020) p.299, available at: <https://doi.org/10.3390/healthcare8030299>.

⁸¹ IOM Migration Data Portal, *How a lack of data*; (2020) IOM, *Fatal Journeys. Tracking Lives Lost during Migration* (2014) available at: https://publications.iom.int/system/files/pdf/fataljourneys_countingtheuncounted.pdf.

⁸² Pickering, S. Cochrane, B. *Irregular border-crossing deaths and gender: Where, how and why women die crossing borders*, *Theoretical Criminology* 17, 1 (2012) p.33; Alarm Phone, *From the sea to the city! 5 years of Alarm Phone* (2019), p.28, available at: https://alarmphone.org/wp-content/uploads/sites/25/2019/10/AP_5-Years_2019_E.pdf; IOM Migration Data Portal, *How a lack of data*.

⁸³ Alarm Phone, *From the sea to the city*; IOM Migration Data Portal, *How a lack of data*.

⁸⁴ Jiménez-Lasserrotte, *Understanding Violence against Women*, p. 306; Pickering, "Irregular border-crossing", p.3.4.

Finally, women often hold the responsibility to care for young children that travel with them, even when they are not theirs. It has been reported that smugglers, on one hand, intentionally separate children from their mothers as means of control of female migrants. Other reports show that women are regularly forced to take care of sick migrants, elderly migrants or children that are not theirs.⁸⁵ This entails that in situations of distress, on board and at sea, women have to struggle for both their own lives and those of children or people under their care who are often not self-sufficient, thus making it harder for them to face the emergency and survive.

On the other hand, before the sinking occurs, when it comes to communicating with third parties to arrange rescue operations, women have proved to be a key resource. First-hand accounts report that in the middle of situations of panic on board, more than once women emerged as the best point of contact, as they managed to stay calm, listen carefully to understand how to find the GPS coordinates on the phone and speak clearly to provide precious information.⁸⁶

Lastly, in the Central Mediterranean route, gender differentiation has been noticed also in the treatment of the corpses once arrived on land and in the search for missing and dead migrant relatives. The gender of the dead body has been found to be an essential element to determine the treatment it receives. As an expert in the field of dead and missing migrants in Sicily (Italy) explained:

«Almost all bodies arrive in the Provinces of Agrigento or Trapani [Sicily, Italy]. [...] Migrants are often buried underground, without a proper tomb, a treatment that is considered undignified in local Sicilian culture. As such, some local families have offered to bury these bodies in their family chapel. Some gravediggers have tried to find available tombs or more dignified graves [to bury the bodies in the cemeteries they work in]. Interestingly enough, these cases only concern women's bodies. When women and children die [at sea], they are no longer associated with the image of the 'irregular migrant,' but become an example of the eternal sacrifice. Women specifically become examples of the purity of the dead, they transcend their historical circumstances, to become icons of the image of the woman: pure, virgin, mother».⁸⁷

In addition, Dearden and Dionis (2021) point out that women face additional barriers when searching for missing or dead migrant relatives.⁸⁸ Women do often not receive relevant information that could help them to locate loved ones due to gender stereotypes that portray women as overly emotional. They are excluded from decision-making processes in an attempt to "reduce their suffering" which often leads to women's perspectives being dismissed. They are often denied access to social spaces that would help them in their rescue mission and are often disproportionately impacted by financial costs linked to search and repatriation operations.

⁸⁵ Jiménez-Lasserrotte, *Understanding Violence against Women*, p.308; Alarm phone, "From the sea to the city".

⁸⁶ Alarm Phone, *Struggles of women on the move* (2020), available at: https://alarmphone.org/en/2020/04/08/struggles-of-women-on-the-move/?post_type_release_type=post.

⁸⁷ Observatory_ITA_K_16 UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

⁸⁸ Dearden K. and Sánchez D., *How gender shapes women's experiences of searching for missing migrant relatives*, (2021), Available at: https://weblog.iom.int/how-gender-shapes-women%E2%80%99s-experiences-searching-missing-migrant-relatives?fbclid=IwAR0-INJ3ewoA0fK490vCoaV2YUYk7Im0_FaCDUt1owl4hW5sHN2f9gJH9u0.

3. Sexual and gender-based violence and witnessing of sexual violence

From a legal perspective, sexual violence is often criminalized in form of various stand-alone offences in national legislation (e.g. sexual assaults, rape, benefiting from the prostitution of others, etc.). Sexual exploitation is also often prosecuted with trafficking-related offences. As outlined before, the nexus between trafficking in persons and smuggling of migrants is not discussed in the present report due to the limited scope of the study.⁸⁹ However, it should be noted that depending on the national definitions of the offences, sexual exploitation could be punished as an aggravating circumstance to the offence of smuggling of migrants, as trafficking in persons, and/or as a standalone offence. Thus, for the purpose of this report, sexual violence and sex trafficking can be considered as an aggravating circumstance to the offence of smuggling as part of Art. 6 (3) of the Smuggling of Migrants Protocol in two ways; as a form of inhuman or degrading treatment, taking advantage of the victims' vulnerability for material gain as well as under endangering the life of the migrants (see below under consequences of sexual violence for migrants).

a) Sexual violence along smuggling routes

Sexual violence is omnipresent along all migration routes. It is reported to be committed along the Central Mediterranean route by smugglers, members of criminal groups, and, to a lesser extent, public officials.⁹⁰ Many testimonies suggest that it may also be perpetrated by other migrants⁹¹, but this is rarely reported as such.

Sexual violence is perpetrated as a form of retaliation (for alleged misconducts, impossibility for migrants to pay the requested fees, etc.), intimidation or coercion, as a means of payment, or with no purpose besides demonstration of power, misogyny, racism or sexual gratification. In many cases, it appears to have a financial dimension (see below).

The literature reviewed shows that a much larger proportion of female migrants is reported to have been subjected to sexual violence. The table below provides figures from various organization's studies that reflect the percentage of women and men interviewed who reported having been victims of sexual violence.

⁸⁹ See the methodology.

⁹⁰ UNHCR, *On this journey, no one cares if you live or die*, (2020) p.20.

⁹¹ 10% according to UNHCR: *ibid.*, p.20

	IOM's report ⁹²	UNHCR's report ⁹³	MMC's report ⁹⁴	UNODC Observatory data	Médecins du Monde's report ⁹⁵
Percentage of female migrants/refugees reporting sexual violence (including as witnesses)	19%	19%	18%	34%	53%
Percentage of male migrants/refugees reporting sexual violence (including as witnesses)	6%	6%	4%	12%	19%

Figure 9 – Prevalence of sexual violence by gender: figures provided in reports published by various organizations in 2020 (figures from IOM, UNHCR and the Mixed Migration Centre (MMC) have for source a 4Mi survey; Médecins du Monde's questions were limited to abuses committed in Libya)⁹⁶

These figures consistently show that women are about three times more likely to be subjected to sexual violence than men, along the Western and Central Mediterranean routes combined.

Sexual violence has clear gender dimensions. The way it is perpetrated against children of any gender, women, men and LGBTQI+ people relates to the offender's perception of sexuality and gender.

Both the migrants' descriptions of sexual violence against women and girls⁹⁷ and systematized or ritualized sexual violence against female migrants⁹⁸ suggest that sexual violence against women in irregular migration processes remains endemic. Sexual violence against female migrants is very often reported to be used as a source of profit (from the smugglers i.e. exploitation), or as a means of payment (from the migrants' side). In transit points along the route, such as Agadez (Niger) or Tamanrasset (Algeria), as well as in various locations in Libya,⁹⁹ migrants are frequently sexually exploited: sometimes kidnapped and forced into practices similar to slavery, sometimes convinced or pushed to «work» to cover for the costs of the next leg of the journey.¹⁰⁰

⁹² IOM, *Migration in West and North Africa*.

⁹³ UNHCR, *On this journey, no one cares if you live or die*, (2020) p.20

⁹⁴ MMC, *A Sharper Lens on Vulnerability*.

⁹⁵ Reques L. et al., *Episodes of violence suffered by migrants*.

⁹⁶ Some figures of the table were calculated based on the figures available in the reports.

⁹⁷ UNODC, *Observatory data*.

⁹⁸ In Libya, for instance, «operators of various camps usually have sex with the women before they can be fed »: NG_Lagos_M_12 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

⁹⁹ UNHCR, *'On this journey, no one cares'*, (2020) p21.

¹⁰⁰ Exploitation is where the line between smuggling of migrants and trafficking of women is blurry. For the purpose of this research, the initial intention to ultimately exploit the migrant is selected as a way to differentiate trafficking in persons and aggravated smuggling.

“We (girls and women) were used to make money (forced prostitution) by our landlords (camp operators) without break. I can remember some situations when landlords would forcefully have sex with some of the women (and girls). In all honesty, I was also a victim. But, what can anyone (any of the migrants) do than to cooperate? Regular threats, tortures and even needless killings were very common within the camp”.¹⁰¹ 22-year-old Nigerian woman.

In many occasions, sexual violence is used or imposed as a direct means of payment for specific services (transportation, food or water, accommodation, etc.), and for bribes to officials¹⁰², which qualifies as sexual abuse.

«Women are more exposed to sexual exploitation along the route (...) because woman can use sex as a currency to pay their smugglers or kidnappers and move on»¹⁰³

«Kickbacks and sex-for-passage (usually affecting women and girls), have been the most common types of bribery along the smuggling corridor [Owerri (Nigeria)-Agadez (Niger Republic)-Sahara Desert-Libya]»¹⁰⁴

With regards to male victims, the Women’s Refugee Commission divided sexual violence perpetrated against male migrants in Libya into three categories: forced witnessing of sexual violence against others (particularly rape of female family and community members),¹⁰⁵ genital violence (including beating, burning, tying, cutting, and amputating), and anal rape.¹⁰⁶ The two first categories show that sexual violence may be often seen as a way to attack the victim’s identity as a male, attack his reproductive capacity and subsequently humiliate him and/or violate his dignity. Forced witnessing of sexual violence against others further illustrates that sexual violence is instrumentalized for coercion purposes. While men also report such abuse, it appears that victims are more likely to be women (at least in Libya). The fact that the victims whose violation they witness are family or community members suggests that this practice is based on gender stereotypes related to the role of men towards their female relatives or acquaintances for instance as protectors or guardians and also male honour being linked to the experience of female relatives (see in that sense the section related to kidnapping and extortion). OSCE has analysed sexual violence in places of deprivation of liberty and concluded that sexual violence can qualify as sexualised torture when it involves “the intentional infliction of severe pain or suffering - mental or physical- on an individual to obtain information or a confession; for punishment, intimidation or coercion, or for any reason based on discrimination”.¹⁰⁷ Cultural beliefs and practices can also play a role in how migrants perceive violence as sexualized or not.

¹⁰¹ NG_Imo_M_5 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹⁰² NG_Imo_K_12: testimony from a Nigerian investigator UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹⁰³ NG_K_01: testimony from an organization worker UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹⁰⁴ NG_Imo_K_20: testimony from a Nigerian Law enforcement officer UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹⁰⁵ When sexual violence is used as a means of coercion (to obtain a ransom for instance), the perpetrator directly assaults the person or another migrant preferably close to this person (often a female friend or relative) - (see below the section related to extortion).

¹⁰⁶ Women’s Refugee Commission, *Sexual Violence against Men*.

¹⁰⁷ OSCE, *Preventing and addressing sexual and gender-based violence in places of deprivation of liberty*, (2019), p.27, available at: <https://www.osce.org/files/f/documents/f/b/427448.pdf> p.27.

«In my country we say that the functioning of the male genital organ depends on your feet, we say the two are linked. In Libya, Arab men [guarding the prisoners in centers] beat you on the soles of your feet all the time.»¹⁰⁸ 31-year-old Ivorian man.

b) LGBTQI+ dimensions of sexual violence along smuggling routes

Data concerning the forms of violence encountered by LGBTQI+ people are difficult to obtain, due to the lack of disaggregated data and limitations that prevent people from making official reports. Gender identity and sexual orientation can also play a role in the abuse inflicted on smuggled migrants. Very little information has been found on violence committed against LGBTQI+ migrants in UNODC Observatory data. It only related to sexual violence and suggested that it may target gay men and boys whose sexual orientation is known.¹⁰⁹

“I think there is major sexual violence against homosexual men rather than heterosexual men in Libya—once they realize that they are gay. The moment that [smugglers or armed groups] steal their telephones, they check the photos and videos and they understand from that point that these people are together [a romantic couple]. One gay couple was separated from the rest and put into a specific camp because they were gay and were going to be sexually exploited”¹¹⁰ Testimony from a legal aid officer in Italy.

Since many times victims are not identified as LGBTQI+, crimes against them cannot be cataloged as GBV. As a result of their sexual orientation or gender identity, LGBTQI+ people often face rejection from their families and communities, and barriers in accessing basic services such as health, education, and employment.¹¹¹ Consequently, LGBTQI+ migrants may not have the social networks that can provide them with financial resources to migrate safely making them more vulnerable to situations of sexual exploitation and abuse. They often remain in detention longer, where they encounter abuse and violence, quite often at the hands of detention staff, other immigration authorities or other inmates. In addition, legal obstacles, such as criminalization of LGBTQI+ conduct or widespread discrimination, might prevent people from coming forward and report abuses to authorities.

Violence against LGBTQI+ people on the move needs to be understood in the wider context of severe forms of physical violence. In Honduras, El Salvador and Guatemala, the rate of femicides far exceeds those at the global level.¹¹² While these incidences and other forms of GBV are often attributed to culturally accepted behaviors concerning the treatment of women and LGBTQI+ people, it is important to keep in mind Central America’s decades-long history of civil war and conflict, and the collective and generational impact of violence have also played a critical role in the

¹⁰⁸ B_ITA_11_atlas UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

¹⁰⁹ Women’s Refugee Commission, *Sexual Violence against Men*, p.9.

¹¹⁰ Observatory_ITA_K_13 UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

¹¹¹ REDLAC (Regional Group on Risks, Emergencies and Disasters for Latin America and the Caribbean), *The Impact of Violence on LGBTI people in the North of Central America*, (2019), available at: <https://boletinesredlac.com/2020/10/27/snapshot-6-the-impact-of-violence-on-lgbti-people/>.

¹¹² Leutert, S. *Migrant Caravans in Mexico: Fall 2019-Spring 2020*, Policy Research Report 217, Central America and Mexico Policy Initiative, Strauss Center, The University of Texas at Austin (2020), available at: https://repositories.lib.utexas.edu/bitstream/handle/2152/81746/prp_217-Migrant_Caravans_in_Mexico-2020.pdf?sequence=3; Kennon, I. Valdevitt, G. *Women protest for their lives: fighting femicide in Latin America* Atlantic Council Blog (2020), available at: <https://www.atlanticcouncil.org/blogs/new-atlanticist/women-protest-for-their-lives-fighting-femicide-in-latin-america/>.

emergence of specific forms of violence that force people out of their communities. The violence against LGBTQI+ migrants often emerges within this context, fueled by the lack of access to justice and a systemic lack of response on the part of the state against the actions of criminal entities.¹¹³

c) The consequences of sexual violence for smuggled migrants

Two gender-specific consequences of sexual violence are presented as they became relevant in the data analysis of this current study. The psychological trauma and psychosocial needs are not discussed in detail. These are however important factors to consider when discussing support needs of migrants, especially regarding reintegration and social inclusion.

- 1) Regarding consequences with medical implications for women and girls the following can be reported:¹¹⁴ sexual violence may lead to unwanted pregnancies in a number of cases.¹¹⁵ Pregnancies due to rapes cause severe physical consequences (in addition to grave psychological trauma): abortions (sometimes forced) in countries where it may be illegal - putting women at risk of prosecution and imprisonment, and abortions or deliveries in very poor hygiene and medical conditions causing severe complications. A study by the NGO Médecins du Monde showed that 17.6% of the female migrants interviewed reported having had unsafe abortions during their journeys.¹¹⁶

It is especially difficult for girls and women to get both physical and psychological healthcare services for experiences of sexual violence, reproductive health, prenatal care, birth control, treatment for sexually transmitted diseases (STDs) and the effects of trauma on mental health. In general, migrants affected by sexual violence may refuse or avoid medical services for different reasons, including a fear to fall behind in their journeys. Intersectionalities, such as gender and sexual orientation, might exacerbate the situation, preventing already marginalized groups of migrants from accessing health services out of fear of discrimination or abuse. This may consequently lead some conditions to remain undetected or untreated (HIV, other STDs, pregnancy, hormonal treatment, PTSD etc.). As women, girls and LGBTQI+ people tend to be disproportionately the targets of sexual violence, it is important to identify ways to provide assistance during their journeys.

In order to avoid sexual violence, a few female migrants also reported taking pills to provoke vaginal bleeding (and give the impression they were menstruating).¹¹⁷ This medication caused complications:

«At a point, I had to be on pills that ensured that I was perpetually menstruating when the burden of sexual harassment, sexual violation and rape became heavy for me. (...) I am still battling with various health complications that have cropped up from the usage of those pills. (...) Without any doubt, this made my case to be worsened”.¹¹⁸ 23-year-old Nigerian woman.

¹¹³ Rojas, L. *Evadir lo necro*, p.143.

¹¹⁴ Direct medical consequences of sexual abuses for men is not included due to the scarcity of data found.

¹¹⁵ UNHCR, IMPACT, Altai, *Mixed Migration Trends in Libya: Changing Dynamics and Protection Challenges* (2017) p.125, available at: <https://www.unhcr.org/595a02b44.pdf>; IOM, *Migration in West and North Africa*, p.194.

¹¹⁶ Reques, L. et al., *Episodes of violence suffered by migrants*.

¹¹⁷ UNODC *Observatory data*.

¹¹⁸ NG_Imo_M_2 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

The nature of complications is not detailed in testimonies. Making a parallel with what is known from sexual abuses in other contexts, they may include infertility or gynecological complications. In the Central American corridor, it has been widely reported that women take birth control prior to their journeys to avoid pregnancies (including those that may be the result of sexual assault).¹¹⁹

- 2) In addition, there are social consequences of sexual abuses that may lead to stigmatization or revictimization. Findings show that both male and female migrants may be forced to commit rape or witness sexual violence against other migrants (including against family members).¹²⁰ When the purpose is extortion, sexual abuses are frequently filmed or live streamed and there is a threat to, or they are actually shared with the victims' families.¹²¹ Videos and sound records may circulate among the victims' communities or on the internet, causing repeated secondary abuse and traumas to the victims.

Moreover, one of the consequences of sexual violence is shame, felt by the victim, and by the victims' relatives or communities. Where the abuse is known, victims of sexual violence may thus be rejected, stigmatized, and even face a security risk in being revictimized.¹²² Whatever the victim's gender, this reflects the communities' perceptions of femininity and masculinity, and social, religious or cultural gendered norms related to sexual activities and victimization.

4. Forced labour

Forced labour is often criminalized as a stand-alone offence. Alternatively, smugglers who subject migrants to situations of labour exploitation may also be prosecuted under the charges of trafficking in persons. These situations of forced labour can be organised by the smuggler or traffickers (in cases of trafficking in persons) or third parties not involved in the smuggling offence. The forced labour might thereby be used to pay smuggling fees or costs of stay etc. during the transit, taking advantage of the migrants' situation of vulnerability in terms of their need to pay smuggling fees in order to continue their journey. Legally, it can be considered as an aggravating circumstance to the offence of smuggling as part of the inhuman or degrading treatment and exploitation provision in Art. 6(3) lit. b of the Smuggling of Migrants Protocol

In the Northern African transit zone, as stated above, migrants report being frequently exploited in transit hubs in Niger and Algeria, as well as in Libya¹²³. Forced labour is reported to occur in a high proportion in the Sahara Desert.¹²⁴

«For some months I was practically enslaved in a transit camp in Agadez and also in Libya before my eventual return to Nigeria in 2016»¹²⁵

¹¹⁹ Schmidt, L.A. Buechler, S. *I risk everything because I have already lost everything": Central American Female Migrants Speak Out on the Migrant Trail in Oaxaca, Mexico*, *Journal of Latin American Geography* 16(1) (2017), pp.139-164.

¹²⁰ This practice is particularly reported to occur in Libya.

¹²¹ Gender-Based Violence AOR, *Global Protection Cluster, Libya Gender-based violence AOR, Jan-Sept updates*, (2019), available at: https://reliefweb.int/sites/reliefweb.int/files/resources/jan-sept_updates_eng_web.pdf

¹²² The circulation of information about or records of sexual violence significantly increases the risk of being stigmatized or revictimized.

¹²³ UNHCR, *On this journey, no one cares*, (2020) p.21.

¹²⁴ UNODC, *Observatory data*.

¹²⁵ NG_Lagos_M_11 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

In the UNODC Observatory data, forced labour appears to be almost exclusively reported by men. While women are more exposed to sexual exploitation, male migrants more often report being exploited through forced labour, mostly in construction sites or agriculture,¹²⁶ Women who report forced labour rather mention domestic work and cleaning (this is often presented as a form of trafficking in persons).¹²⁷ This suggests that the perpetrators' decision to impose or propose a certain type of labour to male and female migrants is driven by gendered representations of work and of men's and women's social roles, and most probably reflects gender-specific labour demand and supply.

Like sexual exploitation in the context of smuggling of migrants, forced labour may be used as a means of payment for past or future legs of the journey due to lack of cash to pay for smuggling services as a whole and also unpredictable costs demanded by smugglers. This creates situations of vulnerability for smuggled migrants to be exploited in forced labour. Furthermore, forced labour can be used as a means of coercion, or as a way to punish migrants who are not able to pay ransoms.¹²⁸

Forced labour is very often associated with other forms of abuses such as the sale of victims, deprivation of liberty, restricted access to medical care, deprivation of food and water, and physical and sexual violence. Within the UNODC Observatory data, Libya is where the most severe forms of abuses associated with forced labour are reported, sometimes leading to the killing of male migrants who became unproductive due to sickness or disabilities.¹²⁹ There, and in other areas of the Sahara, the exploitation cycle of sale/kidnapping - detention - forced labour - escape/release can be repeated numerous times.

« I (...) worked in construction. I had to carry heavy stuff all the time. He would give me something to eat sometimes. On other occasions I did not eat for days. In Libya, he gave me to another Nigerian man. This is the man that finally organized the journey to cross the sea. He told me I had to work if I wanted to eat, until he organizes the last leg of the journey. He gave me to another man, an Arab. I had to work for him, and he would feed me. I was starved and tortured ». ¹³⁰ 29-year old Nigerian man.

5. Kidnapping/extortion

In the legal context of the Smuggling of Migrants Protocol, kidnapping and extortion are most often criminalized as stand-alone offences. They could also be punished as aggravated circumstances to the smuggling of migrant offence since these practices could amount to inhuman or degrading treatments within the meaning of Art. 6 (3) lit. b of the Smuggling of Migrants Protocol.

Kidnapping of migrants has generally two objectives: detention and profit (through exploitation or extortion). It is consequently always associated with deprivation of the victims' liberty and many other types of abuses.

¹²⁶ IOM, *Migration in West and North Africa*, p.xvi ; NGA_K_01 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019; Reques L. et al., "Episodes of violence suffered by migrants"; IOM, *Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes*, (2017), available at: <https://publications.iom.int/books/migrant-vulnerability-human-trafficking-and-exploitation-evidence-central-and-eastern>.

¹²⁷ IOM, *Migration in West and North Africa*, pp.84, 242.; UNHCR, IMPACT, Atali, *Mixed migration trends in Libya*, p.121.

¹²⁸ UNODC, *Observatory data*; UNHCR, *On this journey, no one cares*, p.15.

¹²⁹ NG_Imo_M_2 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹³⁰ B_ITA_3_atlas UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

A few testimonies reveal that migrants may be kidnapped and exploited in situations of armed conflicts.¹³¹

“(…) rebels are the most dangerous people to encounter within the Sahel in the process of connecting Libya via the Sahara Desert. They usually capture migrants and turn them into slaves or train them as fighters”¹³²

Concerning the Northern Africa transit zone, kidnapping and extortion are often reported to occur in Libya,¹³³ in Sudan and Egypt.¹³⁴ At Sudanese borders, 70% of the kidnapping cases identified in 5,000 interviews of migrants had extortion as the final aim.¹³⁵ In Morocco (Nador), migrants interviewed by UNODC reported that smugglers sometimes retain migrants as a guarantee of payment if they cannot pay for the sea-crossing upfront.¹³⁶

Extortion practices (particularly in Libya) are extensively documented. The methods used often imply an extremely high level of violence: beating with cables, sexual torture, humiliations, murders, etc. These abuses may be recorded¹³⁷ and showed to the migrants’ families to obtain ransoms.

Example: Italian Court Case No. 12809/2019 involved an organised criminal group operating in Libya. The defendants were running an illegal detention facility in an abandoned military base in Zawiya where they forcibly detained migrants, routinely subjecting them to various forms of inhumane and degrading treatment, torture, physical and sexual abuse and in extreme cases, even murder. The victims would either be kidnapped during their journey towards Italy, with the complicity of local police officers, or were sold to the defendants by other criminals. They were guarded at all times by armed security personnel. The only way to be freed from the ‘prison’ was to pay the ransom requested by the criminal group. If no payment was made, the migrants would either be tortured and killed or sold. This case not only shows the types of aggravations which migrants are subjected to, but also how the aggravations differ according to the migrant’s gender. Abusive treatment was perpetrated on both sexes, but women had the additional sufferance of being raped and sexually abused. They were in fact kept separate from the men and on a regular basis, selected individuals would be taken out of the cells and subjected to crimes of sexual violence.¹³⁸

Several recent studies show that men are more likely to report extortion than women both in Libya and in West African countries¹³⁹. The reasons behind this remain unclear. It is worth noting though that in multiple cases women are used in extortion practices (violence against girls and women is then used as a means of coercion - see also the section related to sexual violence).

“A brother and sister from Somalia were traveling together with the brother’s best friend. The best friend was going out with the sister, he was her boyfriend. They were held captive in Al Kufrah [in Libya] for a few months. The captors gang-raped the sister for six days in a row in front of the two boys. (...) These boys were 16 and 17 years old. This sexual violence

¹³¹ UNHCR, *On this journey, no one cares*, (2020), pp.14,17; UNODC Observatory data.

¹³² NG_Lagos_M_12 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹³³ UNODC Observatory data.

¹³⁴ IOM, *Migration in West and North Africa*, p.154.

¹³⁵ UNHCR, *‘On this journey, no one cares’*, (2020) p.21.

¹³⁶ IDI 73.

¹³⁷ UNHCR, *‘On this journey, no one cares’*, (2020) p.20.

¹³⁸ Proc. No. 12809/2019, available at: https://sherloc.unodc.org/cld/case-law/doc/criminalgroupcrimetype/ita/2019/proc._no._128092019.html?lng=en&tmpl=sherloc

¹³⁹ MMC, *A sharper lens on vulnerability*.

was used as a method of torture for extortion—to force her brother and her boyfriend to witness this, unable to defend or protect her. They were then forced to ring their families and they begged for help. By the time the money came, the girl was dead.”¹⁴⁰

This case illustrates extreme forms of violence and even the girl’s death. Furthermore, gender stereotypes associated with the roles of boys become evident as it is assumed that they function as family providers and protectors of female family members. This, however, does not exclude the fact that boys are subjected themselves to violence for the purpose of coercion and extortion.

In the Central American transit corridor, on the other hand, there is limited knowledge concerning kidnapping dynamics. Anecdotal evidence suggests transit migrants can be kidnapped or held by smugglers against their will in safe houses¹⁴¹ along their trajectory until fees are paid. None of the stakeholders interviewed nor the data collected made specific reference to kidnapping practices in the region contrary to what is observed on the Mexico section of the journey.

Data from Mexico has, however, shown that most kidnappings involving Central American migrants take place during their transit through Mexico and once they have crossed the border into the United States, rather than in Central America itself. Data suggests that most perpetrators of kidnappings are men.¹⁴² However, women are also known to play roles identifying potential kidnapping targets, making ransom calls, and staffing/running safe houses where people are held against their will.¹⁴³

Researchers have found that quite often Central American migrants who become involved in kidnapping cases as perpetrators have been themselves the target of kidnapping groups, who force them to help identify other potential victims. In other words, migrants are often involved in kidnapping acts under pressure from criminal entities.¹⁴⁴ Migrants fear repercussions in the event of not following these orders, often having witnessed acts of violence carried out against themselves or other migrants. They are also often concerned that their families in the countries of origin may be the target of violence in the event they do not comply. This might invite considerations of non-punishment provisions due to forced criminality when prosecuting such cases, and suggests the incidence of cases of trafficking for exploitation in forced criminality.

6. Negligence, unsafe and dangerous travel conditions

Smuggled migrants are often kept in conditions that endanger their health, safety and lives. This includes lack of oxygen, space and safety measures as well as no or inadequate access to food, water or medical care. In the context of smuggling, these forms of negligence and endangerment may

¹⁴⁰ Women’s Refugee Commission, *Sexual Violence against Men*, p.13.

¹⁴¹ A safehouse is a location (house, warehouse, storefront) where migrants wait/are kept in the course of their journeys. Migrants often have to wait at these locations for payments to be made so that they can continue with their journeys.

¹⁴² Yates, C. Leutert, S. *A gender perspective of migrant kidnapping in Mexico, Victims & Offenders*, 15(3), (2020), pp. 295-312; Palacios, S. P. I. “Post-Structural Violence: Central American Migrants and Drug Cartels in Mexico”, *Revista de Estudios Sociales* (56), (2016), pp. 12-25; Comisión Nacional de Derechos Humanos (CNDH) *Informe Especial sobre secuestro de migrantes*.

¹⁴³ Yates, C. Leutert S. “A gender perspective”; Sanchez, “Women’s participation in the facilitation” (2019).

¹⁴⁴ ICAT, *Non-punishment of victims of trafficking* (2020), available at: https://www.unodc.org/documents/human-trafficking/ICAT/19-10800_ICAT_Issue_Brief_8_Ebook.pdf; Comisión Nacional de Derechos Humanos (CNDH), *Informe especial sobre secuestro de migrantes*; Yates, C. Leutert S. “a gender perspective” (2019); Palacios, I. “Post-Structural Violence”.

cause serious injuries or death and may consequently be considered as an aggravation to smuggling within the meaning of Art. 6 (3) lit. a of the Smuggling of Migrants Protocol.

The lack of food, water, hygiene and health care is commonly reported as one of the most frequent issues faced by migrants. It occurs primarily in the desert and in places of deprivation of liberty¹⁴⁵ (camps or places of exploitation for instance).

« In prison you would eat only once a day, they would throw the food through the door and people would fight and get hurt and injured trying to grab some food. We were so thin, we were skeletons ». ¹⁴⁶ 32-year-old Ivorian woman.

While there does not seem to be a difference regarding the prevalence of deprivations of food, water and access to health care between male or female migrants, UNODC Observatory data shows a slight difference: men report more deprivations of food and water, and women report more poor access to health/medical care.¹⁴⁷ This might be due to the fact that women might be in more obvious need for health/ medical care due to experiences of sexual violence, pregnancies or hygienic needs due to menstruation.

Other forms of negligence, including endangering the lives of migrants through dangerous smuggling practices, may equally qualify as an aggravating factor in smuggling offences.

Example: In a judgment of the Provincial Court of Melilla, Spain, one female and one male defendant were found guilty of migrant smuggling and the falsification of documents. In July 2016, Defendant 1 travelled from Morocco to Melilla (Spain) through the border post of Beni-Enzar. The vehicle he drove presented a fraudulent license plate and had been manipulated through the creation of hidden compartments. Following a search operation, law-enforcement agents discovered two irregular migrants in a hidden compartment at the front of the car and one irregular migrant hidden in the rear cubicle. The three migrants did not have the necessary documentation to enter and stay in Spain legally. The sentencing of Defendant 1 was based on a plea agreement, in which the defendant acknowledged that his conduct had triggered aggravating circumstances, namely the endangerment of the life and safety of the migrants. To this regard, the Court identified the aggravating circumstances the migrants experienced on the road to consist of the (i) reduced dimensions of the hidden compartments where the migrants were transported, (ii) lack of ventilation, (iii) inhalation of contaminated air, and (iv), the impossibility of moving.

Gender dimensions regarding the placement in and access to transport methods that may influence the safety of the migrants have been identified. These are discussed under section V.2 in relation to deaths at sea.

7. Exposure and abandonment during transit

Migrants face significant risks when being smuggled as a result of having to travel clandestinely, often using poorly maintained, remote roads, while simultaneously seeking to keep their presence hidden from authorities. News reporting of migrants in transit being involved in accidents where they sustain injuries or even die are quite common. In Central America, the journeys through the Darien Gap are particularly dangerous. In the course of their journeys through the Gap, migrants

¹⁴⁵ UNHCR, *'On this journey, no one cares'*, (2020) pp. 14-17.

¹⁴⁶ B_ITA_5_atlas UNODC Observatory on Smuggling of Migrants, interview conducted in Italy in 2019.

¹⁴⁷ UNODC Observatory data.

often lack access to safe water, endure significant exposure to natural hazards and dangerous animals, while also enduring robbery, abuse and exploitation, not only at the hands of smugglers, but also by local guides, residents, and law enforcement officials.¹⁴⁸ Similarly, a vast majority of migrants undertaking the Western and Central Mediterranean routes report having suffered from starvation, dehydration and injuries as a result of poor road safety. These incidents can be due to the conditions of the migratory journey (very hot weather, absence of health-care services, etc.), but may also be the result of smugglers' behaviors (smugglers may use these deprivations as a means of punishment or coercion for instance) or neglect.

Despite not constituting a stand-alone criminal offence, abandonment during transit can constitute an inherent threat to life of migrants and may consequently fall within the scope of Art. 6 (3) lit. a of the Smuggling of Migrants Protocol. A look into gender and protection dynamics may provide important insights into understanding gender-specific vulnerabilities. Numbers involving migrants who died while crossing the US-Mexico border indicate women are three times more likely than men to die of exposure, while children are also three times more likely to die in motor vehicle accidents.¹⁴⁹

In the case of women, there is evidence that many are unable to keep up with the demands of the journeys, or that the journeys may be tougher on them since they are performing tasks like childcare, breastfeeding, caring for other migrants, etc. Pregnant women may present more vulnerability to exposure, or be unable to keep up with traveling or walking long distances. As previously discussed in section IV.2.(b), in some corridors, it also appears that women are more likely to die than men while crossing through bodies of water or deserts, given their position/location on board vehicles or boats.

Children and young people traveling on their own are often unable to withstand the conditions of longer, more dangerous journeys. They may lack the support of adults who can provide some assistance or protection; and they often work off fees to pay off their journeys.¹⁵⁰ They may be given spots on board boats that are too small or dangerous for them to travel in. Children, together with elderly migrants and people with disabilities, may not be as able to hold on to trains, and moving vehicles and are hence more likely to be injured during transit. There are abundant examples in the journalistic record of migrant smugglers abandoning those too weak, injured or too sick to continue with their journeys. In such a scenario, women may socially be expected to care for the sick and injured, and many may feel compelled to stay behind as well.

For the purpose of smuggling infants, children, and pregnant women – considered aggravating circumstances in certain national legislations in Central America (see below) – research shows communities in El Salvador, Honduras and Guatemala specifically hire specialized smugglers.¹⁵¹ The rationale for this practice is that facilitators, by virtue of charging a significantly higher fee, will provide preferential treatment to the children and women placed under their care. As reported,

¹⁴⁸ Winters, N. "Haciendo-lugar en tránsito" (2019); UNICEF (2020).

¹⁴⁹ Jimenez, M. *Humanitarian crisis: Migrant deaths at the US–Mexico border*. American Civil Liberties Council of San Diego and Imperial Counties, (Mexico's National Commission of Human Rights, 2009).

¹⁵⁰ IOM, *Egyptian Unaccompanied Migrant Children: a case study on irregular migration* (2016), available at: <https://publications.iom.int/books/egyptian-unaccompanied-migrant-children-case-study-irregular-migration>.

¹⁵¹ Hagan, J.M. *Migration miracle* (Harvard University Press 2008); Vogt, W.A. "Lives in transit: Violence and intimacy on the migrant journey", University of California Press (2018); Gabriella Sanchez, "This Time I Am Going to Cross!": Fighting Entrapment Processes Through the Provision of Human Smuggling Services on the US–Mexico Border" in Francesco Vecchio, Alison Gerard, *Entrapping Asylum Seekers*, Palgrave Macmillan, (2017) pp. 135-155.

families do in fact invest in more expensive forms of travel with the hope that their loved ones are able to travel more safely. Due to its clandestine nature, it is impossible to determine the effectiveness of smuggling facilitators in the provision of their services for these two groups. Research shows families typically entrust their children, mothers, wives and sisters to smugglers known for their reliability and success rate. However, conditions along the migration pathway (including weather, checkpoints, bus routes and their availability, capacity at shelters, etc.) vary significantly, these variables often not being under the control of coyotes or polleros.¹⁵²

Consideration of gender-based vulnerability factors

As outlined in the analysis above, factors that create or contribute to situations of vulnerability certainly have a gender dimension. The following considerations may also play a role in creating these factors and situations of vulnerability.

Experience of gender-based violence: IOM recently identified personal violence (including intimate partner violence, the intention to avoid female genital mutilation, and the need to escape persecution due to sexual orientation or gender identity)¹⁵³ to be among the main reasons for female migrants and LGBTQI+ migrants to start a migration process¹⁵⁴.

Economic inequality: Financial issues are identified to be a very serious challenge by most migrants and a recurring cause of abuses. This is somehow logical, considering that smuggling is a profit-led activity. Because it is illegal, the smugglers will tend to make this activity the most profitable possible in order to compensate for the risks taken. They might then refuse to cater for the migrants' basic needs, rob them, extort them or exploit them in various ways. Being short of money may consequently lead migrants to be particularly vulnerable. Yet, few testimonies state that the whole journey, the sea-crossing, or some services may cost more to women than to men¹⁵⁵. It has been reported, for instance, that "to get out [of a detention center], you have to pay [USD] 1,000 for men and 1,500 for women"¹⁵⁶. Should this fact be confirmed, there is a possibility that women will be short of money earlier or more frequently in the migration process, making them more vulnerable to abuse (and especially sexual violence and exploitation, often considered as a means of payment (see above)).

Nota bene: The ability to pay smuggling fees is quite often shaped by issues related to gender and class. While we often see references to the fees migrants pay to embark on their journeys, one must keep in mind that these costs are often estimates, that not everyone on board of vessels pays the same amounts, and that in fact many of these journeys are self-organized in whole or in part. Depending vastly on the financial abilities of families, migrants may at times be able to get access to less precarious travel or smuggling conditions through their social support system.

¹⁵² Slack, J. Martínez, D.E. *What makes a good human smuggler? The differences between satisfaction with and recommendation of coyotes on the US-Mexico border*, *The Annals of the American Academy of Political and Social Science* 676(1), (2018), pp. 152-173.

¹⁵³ IOM, *Migration in West and North Africa*, p.193.

¹⁵⁴ The respondents, interviewed in Italy between 2016 and 2018, were from West Africa (in majority), North Africa, Southern Asia, and East Africa.

¹⁵⁵ IDI 2, IDI 16, IDI 20, IDI 23, IDI 46.

¹⁵⁶ Amnesty International, *Libya's dark web of collusion*, p.41.

V.Criminal justice responses to aggravated migrant smuggling offences

1. General considerations on aggravated migrant smuggling offences

The offence of migrant smuggling is defined in the Smuggling of Migrants Protocol.¹⁵⁷ States Parties are required to domesticate it into their national criminal law, together with the mandatory aggravating circumstances mentioned in Art. 6 (3) of the Protocol.

As a reminder, according to Articles 3 and 6 (1) of the Protocol, the offence of smuggling migrants is the act of procuring, for material or financial gain, the illegal entry of a person into a State of which he or she is not a national or permanent resident. The production, possession or provision of travel documents or means of transport for the same purpose is a related offence, as well as helping that person to remain in that State without fulfilling the legal conditions of residence, in both cases only if it is carried out with the purpose to obtain a material or financial gain.

Under article 6, paragraph 3 (a) and (b), of the Protocol, States parties are required to ensure that the following circumstances are circumstances of aggravation (thereafter mandatory aggravating circumstances): circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned and circumstances that entail inhuman or degrading treatment, including for exploitation, of such migrants.

The aim here is to recognize the seriousness of these acts and to allow for a more severe sentence to be handed down to smugglers who have committed a crime in these aggravating circumstances.

Aggravating circumstances in criminal law exist in most systems and the nature of the circumstances provided for by the law is often similar from one offence to another. The legislator, when domesticating the Protocol into national law, must therefore ensure that the aggravating circumstances provided for the smuggling of migrants are consistent with the ones of other offences covered by the criminal code. The Protocol, with this approach, only requires the domestication of two aggravating circumstances that exist in substance in most criminal laws: the circumstances in which the offence was committed endangered or were likely to endanger the life or safety of the migrants, or where they constituted inhuman or degrading treatment including through exploitation.

UNODC's Model law against the Smuggling of Migrants, which analyses the Protocol with a view to assisting States parties in its implementation, lists other optional aggravating circumstances that may be domesticated into national laws. They may refer to the profile and experience of the migrant, or to the profile and action of the offender. Here are some examples from the UNODC Model Law:

- The offence involved serious injury or death of the smuggled migrant or another person, including death as a result of suicide;
- The offender [took advantage of] [abused] the particular vulnerability or dependency of the smuggled migrant for financial or other material gain;
- The offender has committed the same or similar offences before;
- The offence was committed as part of the activity of an organized criminal group;
- The offender used drugs, medications or weapons in the commission of the offence;
- The offence involved [a large number of] smuggled migrants;

¹⁵⁷ Articles 3 and 6 of the Smuggling of Migrants Protocol.

- The offender was, at the relevant time, a public official;
- The offender abused his or her position of authority or position as a public official in the commission of the offence;
- The smuggled migrant is a child;
- The offender used a child as an accomplice or participant in the criminal conduct;
- The smuggled migrant is pregnant;
- The smuggled migrant has an intellectual or physical disability;
- The offender used or threatened to use any form of violence against the smuggled migrant or their family;
- The offender confiscated, destroyed or attempted to destroy the travel or identity documents of the smuggled migrant.

Aggravating circumstances, whether mandatory or optional, are therefore linked to the predicate offences of migrant smuggling and related conduct. As such, they must be committed in the context of these offences (see below).

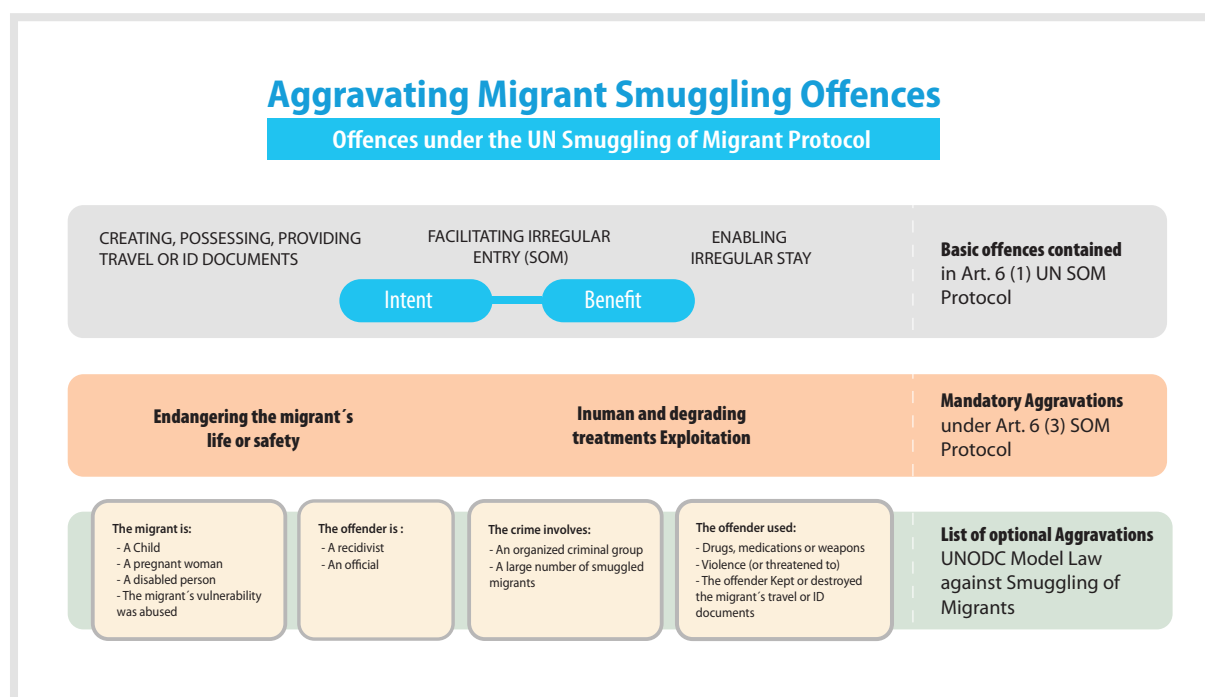


Figure 10 - The articulation between the offences of migrant smuggling and related conduct and their mandatory and optional aggravating circumstances (UNODC, 2021)

The two mandatory aggravating circumstances are broad enough to encompass most abuses and violence committed against migrants throughout the organized irregular migration process.¹⁵⁸ Many

¹⁵⁸ It should be noted that the violence and abuse is not always reported in a sufficiently precise manner to determine where it was committed, or whether it was committed in a context of regular or irregular migration (the line being tenuous and the circumstances fluctuating, particularly in border areas of a free movement zone - such as the ECOWAS area - where the borders are not clearly marked or identifiable (see figure 1 for a highlighted map of the ECOWAS free movement region)). Similarly, the elements reported do not always allow

of the smuggling-related abuses described in this report could thus fall within these two definitions, whether (1) they were committed at the time of the organization of the journey, during transport, during periods of temporary irregular stay in a transit country (waiting for documents, raising funds to finance the next stage, etc.), as well as in the country of destination (where facilitation is necessary to allow irregular stay) and/or (2) they are related to the payment of smuggling fees.

Many of the optional aggravating circumstances should not be challenging to enforce as their definitions do not require much interpretation (the migrant was a child, the smuggler used a weapon, etc.). On the other hand, other aggravating circumstances (including the mandatory ones) are more complex (the migrant's life was endangered as a result of the offence, the migrant was subjected to inhuman and degrading treatment, the migrant's death resulted, etc.). Indeed, not only do these aggravating circumstances require interpretations, but the acts to which they refer may also correspond to other offences (murder, rape, torture, trafficking in persons, etc.).¹⁵⁹ Judicial authorities will thus complete complex tasks when defining the charges and bringing evidence forward. In addition, the *mens rea*, or intention to commit the crime for a certain purpose, is often challenging to prove.

More specifically, as per the Protocol, the mandatory aggravating circumstances may be directly related to the acts of smuggling (see Case 1 below), but may also refer to the commission of other acts occurring in the course of migrant smuggling operations or related offences (see Case 2 below).

Fictitious case 1 - LOLA CASE: Vincente, a smuggler, and Lola, a young woman from Country A with an irregular immigration status, are in Country B's capital city. Vincente is in charge of providing forged passports to migrants in transit in the capital city. Lola cannot pay for the forged passport. Vincente asks her to have sex with him and other men for two months in exchange for the passport. He then uses the forged passport to take Lola to Country C.

In this case, Vincente is the direct perpetrator of the aggravations. He could be prosecuted for aggravated migrant smuggling, committed in circumstances that entailed inhuman or degrading treatments (sexual exploitation).

Fictitious case 2 - NOLIME CASE: Nolime is transported in a pick-up truck from City A in Country A to City B in Country B. Shortly before the border, the pick-up is stopped by a group of armed men, who rob Nolime's belongings and beat her up, then escort the pick-up to City B.

In this case, the pick-up's driver may be indirectly involved in the aggravating acts. He could be prosecuted for smuggling migrants under circumstances that endangered the safety of the migrants. The armed men, who escort the pick-up across the border, can also be prosecuted for smuggling and aggravating acts.

Moreover, in each case, depending on the charges, the Courts of both countries mentioned may have jurisdiction to consider the case.

Selecting the charges and the best way to prosecute the perpetrators is crucial. The following section proposes an analysis of different possibilities focusing on the mandatory aggravating circumstances.

to determine whether the perpetrator was facilitating the irregular migration of victims. The victims themselves are often not able to clearly identify who the perpetrator was and his or her status (civilian, police, military...).

¹⁵⁹ The UNODC Model Law allows for these aggravating circumstances to be transformed into national law either as aggravating circumstances to migrant smuggling offences or as stand-alone offences.

2. The different ways of qualifying abuses and prosecuting perpetrators in the context of migrant smuggling

a) Prosecuting the perpetrators of aggravated migrant smuggling offences

The fact that these aggravating circumstances take place in the context of a predicate offence implies that the person prosecuted is the perpetrator of one or more of the predicate offences, i.e. that he or she has participated in facilitating the victims' illegal border crossing for a material gain.

It is not clear from the wording of Article 6 of the Protocol whether that person should also have a direct role in the aggravating circumstances. In other words, a smuggler could in theory be prosecuted for smuggling migrants in circumstances that endangered the migrants' safety, without him/her being necessarily the direct perpetrator of damages suffered by the migrants.

NOLIME CASE (fictitious): Nolime is transported in a pick-up truck from City A in Country A to City B in Country B. Shortly before the border, the pick-up is stopped by a group of armed men, who rob Nolime's belongings and beat her up, then escort the pick-up to City B.

In this case, the driver could be prosecuted for smuggling migrants in circumstances that endangered Nolime's safety.

From a criminal perspective, it is needed to establish:

- The existence of the principal act (smuggling of migrants);
- The smuggler's responsibility in the main act (the driver's responsibility for smuggling migrants);
- The existence of aggravating circumstance (danger to the migrants' life or safety, i.e. beating);
- The causal link between the main act and the aggravating circumstances (i.e. in the fictitious case n°2 (Nolime), it must be demonstrated, in order for the driver to be held responsible, that Nolime's safety was endangered because of the driver's migrant smuggling activities).

Whether the smuggler may or may not have a direct role in the aggravations shall be confirmed by national laws or case law.

The Criminal Court of Antwerp, Belgium, in a decision of 14 August 2018¹⁶⁰, convicted two Nigerian women, one of them for aggravated migrant smuggling (and trafficking in persons). The latter had organized the transport of young Nigerian women from Nigeria to Belgium by land (via Niger and Libya) and sea (via the Mediterranean Sea). One of the victims had drifted at sea for several days before being rescued by the Italian coastguard. The defendant was directly involved in the acts of migrant smuggling that allowed the young woman to irregularly enter Belgian territory, and these acts led the victim to be in danger at sea. The Court therefore added aggravating circumstances to the charges of migrant smuggling. In this case, it can be considered that the defendant did not play a direct role in putting the girl in danger at sea. This can though be discussed, as the defendant was partly behind the smuggling acts.

¹⁶⁰ Tribunal correctionnel d'Anvers, 14 août 2018, available at: <https://www.myria.be/fr/traite/jurisprudence/tribunal-correctionnel-anvers-14-aout-2018>.

The United States Court of Appeals for the Fifth Circuit of New Orleans's decision of 27 December 2016¹⁶¹ can also be interpreted as recognizing the smugglers' responsibilities in the aggravations although they were not directly involved. Therein, the Court considers that "guiding persons through, or abandoning [migrants] in, a dangerous or remote geographic area without adequate food, water, clothing, or protection" can constitute "reckless conduct creating a substantial risk [for the migrants]". The Court thus opens up the possibility of prosecuting smugglers for aggravated smuggling simply because they failed to provide the necessary protection to the migrants given the circumstances in which they were travelling. Any behavior, whether willful or reckless, which results in endangering the life or safety of migrants (for instance), could then be considered as aggravated smuggling. Following this reasoning, almost all the smuggling-related abuses detailed in this report (kidnapping, sexual violence, etc.) would then trigger aggravating circumstances when committed in the context of profit-driven facilitated irregular migration, insofar as the migrants would have been exposed to the risks due to the voluntary or negligent behavior of their smugglers (who would have failed to protect them).

NOLIME CASE (fictitious), according to this interpretation, the pick-up driver could be prosecuted for aggravated smuggling, only because he chose an unsafe road and failed in protecting the migrants, and even if he had not been involved in any way in the attack by the armed men.

However, few similar decisions have been found. Other Italian courts decisions have comparable reasoning (i.e. holding smugglers liable for abuse they did not necessarily commit themselves but that they indirectly contributed to), but the legal approach was different: the aggravations in these cases were not qualified as aggravated smuggling but as stand-alone offences.

b) Prosecuting the perpetrators under other charges

The Protocol allows States Parties to criminalize the aggravating circumstances of migrant smuggling as stand-alone offences.

Perpetrators of acts that endangered the life or safety of migrants or constituted inhuman or degrading treatment could therefore be prosecuted under other charges (kidnapping, rape, trafficking in persons, assault, etc.). The prosecutor may choose to charge the perpetrator with these stand-alone offences only, or also with migrant smuggling.

LOLA CASE (fictitious): Vincente, a smuggler, and Lola, a young woman from Country A with an irregular immigration status, are in Country B's capital city. Vincente is in charge of providing forged passports to migrants in transit in the capital city. Lola cannot pay for the forged passport. Vincente asks her to have sex with him and other men for two months in exchange for the passport. He then uses the forged passport to drive Lola to Country C.

In this case, Vincente could be prosecuted for rape or human trafficking (and migrant smuggling).

A number of jurisdictions opt for a multiple charges approach.

¹⁶¹ United States of America v. A.M.O, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/usa/2016/united_states_of_america_v._a.m.o.html?lng=en&tmpl=sherloc.

Example 1. In 2007, the Public Prosecutor of the Court of Palermo [Sicily, Italy] charged the defendant with multiple stand-alone offences instead of aggravated smuggling¹⁶². In this case, the defendant, arrested in Italy, was held responsible for his participation in abuses committed against migrants in Libya (kidnapping, enslavement, physical violence, and deprivation of food and water). The defendant was charged with trafficking in persons, migrant smuggling, and kidnapping for the purpose of extortion. He was held accountable on the basis of his involvement in an organized criminal group, the existence of which was confirmed thanks to a well-established *modus operandi*. The commission of abuses against migrants were considered part of the group's *modus operandi*, thus allowing to hold the defendant accountable although it is not confirmed that he directly committed the abuse. The perpetrator in this case had been identified by the victims.

This decision is particularly important because it demonstrates the possibility of prosecuting a perpetrator for abuse and violence committed in a third country. It is also a good illustration of the use of stand-alone offences.

Example 2: In a case brought before the U.S. District Court for the District of New Jersey, a 50-year old woman, naturalized U.S. citizen originally from El Salvador, was considered to be the head of the smuggling and trafficking ring. Together with defendants located both in the U.S. and Honduras she was found guilty of forced labour and "bringing and harbouring illegal aliens". The case involved at least 10 women and girls, Honduran nationals, who were recruited and smuggled from Honduras to the United States, where they were sexually exploited in order to "pay back their smuggling debts". Already in transit, several victims were raped by one of the male defendants, who worked as a coyote within the criminal organization. At least three victims were forced to abort subsequent pregnancies, including at least one late-term abortion. Female defendants were notably in charge of recruiting and directing the victims, while the two male defendants accompanied victims during the transit to the United States.¹⁶³

It appears through the analysis of the case law that where the criminal acts involve both smuggling of migrants and trafficking in persons elements, the crimes are often prosecuted under multiple charges. In the previous case, forced labor was preferred over the charge of trafficking in persons, but in many others, smuggling of migrants and trafficking in persons offences are combined. This also illustrates the difficulty regularly encountered by magistrates in differentiating between trafficking in persons and migrant smuggling.

In a case previously mentioned, the Antwerp Criminal Court sentenced two women for trafficking in persons for sexual exploitation and aggravated migrant smuggling¹⁶⁴. In this case, two young Nigerian women had been sexually exploited in Belgium. One of the two defendants had organized the victims' journey from Nigeria to Belgium.

¹⁶² Proc. nr. 10023/2017/DDA R.G.N.R. Order of precautionary detention, available at: https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2017/proc._nr._100232017dda_r.g.n.r._order_of_precautionary_detention_.html?lng=en&tmpl=sherloc.

¹⁶³ United States v. Noris Elvira Rosales Martinez, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/usa/2008/united_states_v_noris_elvira_rosales_martinez.html?lng=en&tmpl=sherlock.

¹⁶⁴ Tribunal correctionnel d'Anvers, 14 août 2018, available at: <https://www.myria.be/fr/traite/jurisprudence/tribunal-correctionnel-anvers-14-aout-2018>.

N.B.: In this case, the organization of the victim's journey could also be considered a constitutive element of trafficking in persons.

Another decision taken in 2009 in the context of an investigation by the Italian police in Bari¹⁶⁵, Italy (R.G. 4026/2009), takes the same approach. In this case, Ghanaian, Tunisian, Sudanese and Cameroonian migrants had been transported to Sicily where they were forced to perform agricultural work in extremely poor working and living conditions. The defendants were charged with the offences of facilitating illegal immigration, extortion, forced labor and slavery, trafficking in persons and forgery of documents for the second one.

Complexities of prosecuting offences in conflict zones

Irregular migration routes can pass through international or non-international areas of armed conflict¹⁶⁶, where civilian populations often experience abuses.

A 2020 OECD report¹⁶⁷ highlights that recorded incidence of violence against civilians due to armed conflict in West Africa increased by five hundred percent between 2011 and 2018, with victims of attacks, kidnapping and sexual violence exceeding the number of deaths due to fighting between government forces and armed groups. Furthermore, borders are presented as the most dangerous areas (one third of deaths due to violent events related to conflicts recorded as occurring within 50 km of a border), and particularly in the Sahel region.

Irregular migration routes necessarily pass through some of these borders and conflict zones. Smugglers in some of these areas may include or use armed groups to secure or facilitate migration. People migrating irregularly in this context will therefore be exposed to risks of violence at some point in their journey. It is frequently reported in UNODC Observatory data that armed groups present in the areas engage in violence against migrants en route or in transit. This is particularly observed in the Saharan zone covering the north of Niger and Mali and the south of Algeria and Libya, and Libyan territory more generally.

The question therefore arises of these perpetrators' accountability. When violence against migrants is committed in an area of armed conflict and by parties to the conflict, this violence could also, in some circumstances, be qualified as an international crime. International humanitarian law or international criminal law would then apply.

The main challenge here, however, is the reality and effectiveness of prosecutions. Recognizing the criminal liability of perpetrators of abuses committed in the context of armed conflict is complex and often extremely time-consuming. The deterioration of law enforcement and justice in these areas, the political dimensions of the conflicts and, the fact that migrant victims will often leave the area in question at a certain point, seriously hamper the securing of evidence and prosecutions, whether for national criminal offences (SOM, kidnapping, etc.) or for international crimes.

¹⁶⁵ R.G. 40262009 – Smuggling Case, available at: R.G. 40262009 - Smuggling Case (unodc.org).

¹⁶⁶ This is the case, for example, for migration routes from sub-Saharan Africa to Europe, which pass through many conflict zones where migrants are known to be subject to serious violence (e.g. Libya).

¹⁶⁷ OECD, *The geography of conflict in North and West Africa*, (2020) p.24, available at: https://read.oecd-ilibrary.org/development/the-geography-of-conflict-in-north-and-west-africa_02181039-en#page24

3. Jurisdictional aspect of prosecuting aggravated migrant smuggling offences

Beyond the selection of charges, a key question relates to where these acts can be prosecuted, and therefore which Courts have jurisdiction over them. This is particularly important in view of preventing impunity given the limited capacity to prosecute such crimes in certain States (e.g. as seen above in conflict areas).

According to the criminal jurisdiction principles, for the perpetrators to be prosecuted, the victim should report the abuse in a country where the offence or parts of the offence took place (territorial jurisdiction), or where at least one of the perpetrators resides (personal jurisdiction).

a) Prosecution in countries where the smuggling-related abuse occurred

According to Art. 15 (1) of the Organized Crime Convention, States are required to adopt legislation allowing for jurisdiction over offences committed in their territory or on board a vessel that is flying their flag. The situation where perpetrators of aggravated migrant smuggling offences are prosecuted in the territory where the acts were committed is hence the most straightforward due to the principle of territorial jurisdiction.

If the aggravation is directly linked to a constituent element of the smuggling offence, the qualification of aggravated migrant smuggling offence is also less challenging. Thus, the courts of several countries have considered that the conditions of transport used to smuggle a foreign national into their national territory endangered the safety or life of the migrants, and hence constituted an aggravating circumstance of migrant smuggling.

The Provincial Court of Melilla, Spain, for instance, convicted two persons for facilitating the irregular entry of three migrants into Melilla [a Spanish enclave in North Africa surrounded by Moroccan territory], in conditions that endangered their safety and lives.¹⁶⁸ In this case, the vehicle used to transport these persons from Morocco had been modified: the three migrants were hidden in compartments added under the dashboard, at the front of the vehicle, and behind the back seat. The Court considered that the very limited space of these compartments prevented mobility, the fact that the front compartment exposed the person to a serious risk in the event of an accident, the impossibility of opening the compartment from the inside, the exposure to the high temperature and engine fumes, as well as the duration of the journey in these conditions, had endangered the health and safety of the persons transported. This reasoning seems well established as the Court based its decision on a Supreme Court decision of 9 April 2015 (STS 503/2014) establishing the following elements as indicative of endangering the life and safety of migrants: objective symptoms of physical damage, lack of ventilation, the configuration of the compartment [hidden in the vehicle] and the time spent in the compartment. Other Spanish court decisions also point in the same direction.¹⁶⁹

¹⁶⁸ Resolución 54/2016, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/esp/2016/resolucion_542016.html?lng=en&tmpl=sherloc.

¹⁶⁹ Resolución 55/2016, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/esp/2016/resolucion_552016.html?lng=en&tmpl=sherloc; 52/2016, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/esp/2016/resolucion_522016.html?lng=en&tmpl=sherloc.

Nota Bene: In this case, by questioning the fact that the accused was unaware of the presence of migrants in his vehicle, the Court has indirectly introduced an element of intentionality in the commission of aggravated smuggling. This could mean that the driver would not be held liable if he was really unaware of the presence of these migrants.

Courts in other countries (such as Italy¹⁷⁰ and the United States) have made similar rulings. The Italian courts have repeatedly held that dangerous conditions of transport at sea could constitute aggravations to migrant smuggling.

In particular, the United States Court of Appeals for the Fifth Circuit of New Orleans, in its case decided on 27 December 2016,¹⁷¹ established that "the offence involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person", specifying that "reckless conduct" included "transporting persons in the trunk or engine compartment of a motor vehicle". In this case, a smuggler had transported a migrant to the US in the bed of a pick-up truck.

It appears therefore that, where the acts were committed on their national territory, a number of States are inclined to prosecute perpetrators for aggravated smuggling offences, particularly where these aggravations were related to the transport of migrants.

b) Prosecution in third countries

Prosecution might also take place in a third country with no territorial nexus to the crime. However, such decisions remain rare (especially when the conditions of transport are not in question). And in countries where most aggravations are committed, few prosecutions of offenders are initiated (as will be seen below).

To overcome these difficulties, an alternative is to facilitate the prosecution of offenders in third countries. Art. 15 (2) and (3) of the Organized Crime Convention further allows State parties to establish jurisdiction over offences committed by or against one of their national and may, under certain circumstances, also accept jurisdiction if violations occurred abroad but the alleged offender is present on their territory and not extradited to another State that has jurisdiction. Courts might therefore be at liberty to adjudicate cases that occurred outside their territory.

Also, as stated, perpetrators shall primarily be prosecuted where they committed the crime or part of the crime. Yet, parts of the offences may be committed in third countries thus triggering their jurisdictions over the whole crime. The transnational characteristic of the migrant smuggling offence encourages the prosecution of these acts in all States where part of the constitutive elements took place. Several Italian Courts adopted this approach in recent years to prosecute and convict offenders who abused migrants in Libya.

As an example,¹⁷² in May 2017, 307 irregular migrants were rescued from a vessel close to the Libyan coast and were brought to Lampedusa, Italy. Five migrants declared having been

¹⁷⁰ See, for example, the following decision, in which the defendants transported migrants by ship for irregular entry into Italy, in conditions that created a serious risk to the migrants' lives and health: 675/2016 https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/ita/2016/proc._nr_6752016_r.i.m.c..html?lng=en&tmpl=sherloc.

¹⁷¹ United States of America v. A.M.O. available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/usa/2016/united_states_of_america_v._a.m.o.html?lng=en&tmpl=sherloc.

¹⁷² Proc. Nr. 10023/2017/DDA R.G.N.R. Order of precautionary detention, available at: <https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita>

kidnapped in Kufra, Libya, and witnessed the death of other migrants who had been ill-treated, tortured or killed. The five migrants recognized a 23-year-old Somali offender among the group. The Public Prosecutor Office of the Court of Palermo ordered precautionary detention for the Somali man suspected of participation in an organized criminal group with the purpose of promoting migrant smuggling, irregular immigration, and kidnapping for the purpose of extortion.

The Italian Criminal Code provides that for a lawful exercise of the jurisdiction, the criminal act or part of it shall be committed on Italian territory,¹⁷³ or the natural result of the act shall occur on the Italian territory. In the present case, the perpetrator's arrival in Italy, taken as a part of the offence of smuggling organized by a criminal group, triggered the Italian jurisdiction.

Several other decisions from the Italian courts take the same path, sometimes based on the same legal reasoning, sometimes based on others like the use of the extraterritorial jurisdiction¹⁷⁴ (article 10 of the Italian Criminal Code).¹⁷⁵

Ensuring an effective judicial response in countries where the crimes are committed is essential to provide redress to migrants who have become victims of their smugglers. Nonetheless, encouraging third countries to investigate other parts of the crime and use international cooperation would also help combating impunity.

In the above example, the facilitation of the migrants' irregular entry - an essential element of the smuggling offence - was committed on the courts' national territory, easing the courts' decision to accept jurisdiction. Other elements of the offence can also be committed on the territory of third countries, such as the use of internet-based services (hosted in the third country) or the transfer/transit of money. Investigating smuggling offences through a cyber or financial angle may therefore enable the courts of other States to have jurisdiction over all elements of the offence.

Nonetheless, an additional complexity must briefly be mentioned in this respect. When prosecuting offences that occurred in another country, courts may be required to apply the criminal provision of the State where the conduct occurred (*lex locus delicti*). To do so, judges and prosecutors might face linguistic barriers in addition to being unfamiliar with the legal order and interpretation of legal provisions of another State.

4. Discussion on an optimal prosecution of abuses experienced as part of a smuggling operation

a) The pursuit of an effective prosecution

As described above, several legal ways exist to prosecute smuggling-related abuses. Perpetrators may be prosecuted for aggravated migrant smuggling or for migrant smuggling in combination with

/2017/proc._nr._100232017dda_r.g.n.r.
_order_of_precautionary_detention_.html?lng=en&tmpl=sherloc.

¹⁷³ Article 6 of the Italian criminal code

¹⁷⁴ 17770/2017/DDA, available at: https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/ita/2017/n.177702017dda_.html?lng=en&tmpl=sherloc.

¹⁷⁵ This is an exception to the criminal jurisdiction principles explained above. The extraterritorial jurisdiction is not available in all countries.

other offences (e.g. rape). Further, perpetrators may be prosecuted in the country where abuses occurred or in a third country whose courts accept jurisdiction.

If efficiency is the primary objective, perpetrators should be prosecuted where they committed the offence giving full effect to the principle of territoriality. It facilitates evidence gathering and the identification of witnesses, accomplices and co-perpetrators. However, where abuses were committed in countries of origin or transit of migrants, prosecution of such offences might be hampered for a number of reasons. The judicial systems may have limited capacities to investigate organized and mobile criminal networks, national laws might not criminalise migrant smuggling and its aggravations, countries often face challenges of corruption or lack of means and migrants often do not report abuses due to a fear of criminalization, discrimination or to an urge to move on in their journey. In such cases, prosecuting perpetrators in third countries is the only option to prevent impunity for crimes committed.

The third countries' courts will, nevertheless, face difficulties due to legislative reciprocity, language barriers and complex collection of evidence. In a situation when a court assumes jurisdiction over a crime committed abroad, the question arises as to the determination of the charges (aggravated migrant smuggling or separate offences) and the applicable law.

Stand-alone offences, unlike aggravated smuggling, will not require establishing a direct link between the smuggling and the abuse. The perpetrator's participation in the offence must however be demonstrated. Smugglers who did not participate in committing the abuse (rape, assault, etc.) can often not be convicted under these stand-alone offences. In these circumstances, analyzing and assessing the organized crime dimension of these crimes becomes a vital aspect in prosecuting co-conspirators for violations occurring during smuggling operations. However, even if charges are brought against the perpetrator, prosecutions under these offences in third countries will bring additional challenges. Indeed, if neither the victim nor the perpetrator are nationals of the State where proceedings are introduced, and if the abuse is also not committed in said State, the courts of those third countries will be unlikely to assume jurisdiction due to practical considerations.

NOLIME CASE (fictitious): Nolime is transported in a pick-up truck from City A in Country A to City B in Country B. Shortly before the border, the pick-up is stopped by a group of armed men, who rob Nolime's belongings and beat her up, then escort the pick-up to City B in order to avoid administrative hassles for the driver.

The armed men could be prosecuted in Country A for migrant smuggling, as well as armed robbery and assault. It is unlikely, although possible, that the Country B courts prosecute them for robbery and assault, but the armed men could be prosecuted there for aggravated migrant smuggling.

The driver could be prosecuted in Country A for migrant smuggling, and complicity in robbery and assault if his participation in the offences is demonstrated (which will be difficult if he was not involved at the time). It is also unlikely that he will be prosecuted in Country B for complicity in robbery and assault. However, he could be prosecuted in both countries for aggravated migrant smuggling.

Nonetheless, the elements of stand-alone offence are sometimes more complicated to prove. For example, under many criminal laws proving rape implies to demonstrate that an act of penetration was committed under duress. For abuse of this nature, it may be easier for prosecutors to prove that the smuggling circumstances endangered the safety of the person (who was abused), than to prove the penetration and the lack of consent of the victim.

Prosecuting abuses as part of an aggravated migrant smuggling offence which are often committed as part of transnational organized crime, may offer additional advantages. On the one hand, it facilitates the prosecution of perpetrators in third countries through its definition as a cross-border process, in which a perpetrator can be involved in only one act and still be held accountable for the crime. In addition, prosecutors may rely on the internationally accepted definition of migrant smuggling offences and on the international cooperation mechanism established through the Smuggling of Migrants Protocol and UNTOC, both elements that will significantly facilitate cross-border collaboration and information gathering. Further, many countries allow for special investigative techniques to be applied in the context of crimes recognized under the Organized Crime Convention and its protocols (use of wiretapping, under-cover investigations, more flexible search rules, etc.). Law enforcement officers will therefore have enhanced capacities to investigate and prosecute the abuse where the perpetrator is charged with aggravated smuggling.¹⁷⁶

Another advantage is that aggravated migrant smuggling investigations will not depend on victims lodging a complaint as prosecution needs to initiate *ex officio*. When abuses are prosecuted as stand-alone offences, a focus is given on the individual harm to a person. In this respect, although this is not required in many systems, complaints are often the starting points of investigations. Yet, some victims are reluctant to report the abuse they have suffered, particularly victims of sexual violence, people with an irregular migration status, LGBTQI+ people and or members of ethnic or other minority – as described in more detail below.

From a prosecutorial point of view, the prosecution of abuses as aggravated migrant smuggling offences may therefore be of interest to prevent impunity and facilitate an effective criminal justice system.

b) The importance of victim-centered investigations and prosecutions

The efficiency of procedures and prosecutions is certainly a relevant aspect to be taken into consideration also in view of protection of rights and interests of the victims. The more efficient the procedure, the more likely the victim will be recognized as such and have a chance that the abuse that the person has suffered is effectively punished. Criminal prosecution is a vital step also in respecting and implementing the victims' right to remedy and redress and facilitates the victims' legal grounds to receive reparation for the harm suffered. Also, the faster and more efficient the proceedings, the less likely the victim will be lost or re-traumatized by delays, procedural repetition and judicial dysfunctions. Choosing the most efficient and effective solution is therefore beneficial for victims as well.

Beyond efficiency, the possibilities detailed above also present advantages and disadvantages for the victims of these aggravations.

Taking a victim-centered approach is a vital and necessary step in guaranteeing a fair and adequate judicial system. In many countries, a victim of violence, for instance, will benefit from specific procedures set in place and be assisted, have access to appropriate care and sociocultural, psychological and legal assistance. Victims of sexual violence or trafficking in persons are particularly protected in this respect – limiting for example the number of their interviews or using techniques that avoid secondary victimization, having access to emergency sheltering, protection, anonymity

¹⁷⁶ Investigations of trafficking in persons can often also be conducted using these special investigative techniques. In cases of trafficking in persons, the qualification of smuggling of migrants will therefore not be particularly advantageous in this respect (nor would it be for the victim).

measures, and even to special compensation funds for victims of sexual violence or trafficking in persons. In many systems, official recognition of victim status is necessary for these measures to be implemented. Nevertheless, assistance and support measures are less developed for smuggled migrants. Migrant smuggling offences are first and foremost considered crimes against a State. Criminal justice practitioners often refer to the consent of the migrants and refugees, who seek services to facilitate their irregular migration despite the fact that migrants and refugees have become victims of severe, often violent, abuses by the hand of criminals. This may limit the recognition of their status as victims. In any circumstance, Art. 16 of the Smuggling of Migrants Protocol specifically sets out the obligation to assist and protect the rights of smuggled migrants, also taking into account the specific needs of smuggled women and children.

Moreover, recognizing the violence, sometimes extreme, that migrants may suffer only through the lens of an aggravating circumstance of the offence of migrant smuggling may be insufficient from the point of view of the concerned victim. Not only may this reduce the perpetrators' criminal and civil liability and the potential sentence imposed on him or her, but it also does not do justice to the severity of these acts. This can be particularly difficult to bear for victims who may struggle to recover from multiple traumas and, sometimes irreversible, serious physical injuries.

In general, from the smuggled migrant's point of view, prosecuting abuses as part of aggravation to the offence of migrant smuggling does not always seem to be in the interests of the victims despite the fact that it facilitates prosecution and does not require a complaint to initiate proceedings. In any case, clear protection measures should be specifically adopted and applied regardless of the charges brought against the perpetrator. More research of best practices in this field would be necessary to confirm this analysis.

To conclude, prosecuting abuses as part of a stand-alone offence or as part of an aggravating circumstance to the offence of migrant smuggling has advantages and disadvantages. Some of these have been discussed in this study but should not be considered as exhaustive. The most suitable option will therefore most often depend on the circumstances of each case and the prosecutorial discretion of the State where proceedings are considered to be introduced. In any case, both the procedures' efficiency and the victim's rights and needs must be taken into account when determining the charges and ways to prosecute smuggling-related abuse.

5. State responses to aggravated migrant smuggling and their gender dimensions

The present section intends to describe the State responses to aggravated smuggling occurring in the two regions of transit studied. It summarizes the legislative and practical approaches of selected countries to the facilitation of irregular migration and anti-smuggling initiatives and considers whether relevant gender observations can be drawn from them. For the purpose of keeping the study concise, Annex 2 offers a comprehensive table with the national smuggling of migrant provisions of Algeria, Libya, Morocco, Guatemala, El Salvador, Honduras and Costa Rica. The reader is advised to consult the table for an overview of elements contained in each national jurisdiction, most notably regarding aggravations adopted within a national context.

In a general manner, it is difficult to obtain a relevant number of arrests, prosecutions and convictions for migrant smuggling for both transit regions studied, let alone on offences related to aggravated smuggling. Either numbers have not been collected systematically or are not publicly available. In these circumstances, the question arises in what way abuses linked to smuggling

operations are prosecuted, either as aggravated smuggling offences or for stand-alone offences (e.g. assault or rape). The answer to this question would require a more detailed analysis of the national case law, particularly with regard to prosecutions for stand-alone offences that occurred in conjunction with a smuggling operation. It may, however, be assumed that the number of unreported and unprosecuted cases of abuses experienced by migrants in these regions is considerably high.

a) National laws and their implementation framework

Regarding State legislation analysed from the Northern African Transit zone, most countries from the region are parties to the Organized Crime Convention, with certain countries, such as Libya and Algeria, additionally having ratified the Smuggling of Migrants Protocol.

Domestic legislation criminalizing the smuggling of migrants in the region do often not contain elements linked to the inhuman or degrading treatment of migrants or the endangerment of their lives as an aggravating factor.¹⁷⁷ Instead, a legislative focus is given to the participation of public officials or of organized criminal groups in committing these crimes as elements of aggravation.

Most of the smuggling-related abuses committed in the region can therefore not be punished as aggravating circumstances to the offence of smuggling, but rather under other stand-alone criminal offences (kidnapping, rape, trafficking in persons, etc.). Yet, while this is not a requirement, stand-alone offences often depend on complaints being introduced by the respective victims. As described in a previous chapter, this may severely hamper the efficiency of criminal prosecutions and, in a number of cases, may even lead to impunity of offences committed.

In the Central America transit corridor, not all countries have legal frameworks in place to address migrant smuggling in the first place. While some have ratified the Smuggling of Migrants Protocol, others have done so with reservations.¹⁷⁸ Costa Rica, as an example, has codified migrant smuggling as part of its General Law on Migration and Aliens while other countries in the region have adopted a specific migrant smuggling statute.

Different to the legislation discussed from the Northern African transit region, some national anti-smuggling legislations in Central America contain aggravating elements to the smuggling of migrant offences that go beyond the legal minimum requirement of what is contained in Art. 6 (3) of the Smuggling of Migrants Protocol. There seems to exist a general agreement over what constitutes aggravating circumstances in the Central American region (see Annex 2). Guatemala, El Salvador and Costa Rica, for example, consider the smuggling of a person under the age of 18 an

¹⁷⁷ Libyan Law No. (19) of 2010 on Combatting Illegal Immigration. Article 2 of the Libyan law defines the smuggling acts as the admission of immigrants into the country, the intentional transportation or facilitation of transportation of illegal immigrants, the harboring or facilitation of harboring of illegal immigrants, the preparation acquiring or provision of counterfeit travel or identity documents, or organizing, assisting or instructing other persons to perform these acts. Anyone deliberately obtaining a benefit from the commission of these acts risks a detention and fine sentence (article 4).

Algerian law No. 08-11 of 25 July 2008 related to the entry, stay and circulation of foreigners in Algeria criminalizes the smuggling of migrants. Articles 38 and 46 define the smuggling acts as facilitating (or attempting to facilitate) the irregular entry, circulation, stay or exit of a foreigner on the national territory of Algeria, and the illegal harbouring of migrants.

Moroccan Law No. 1-03-196 of 11 November 2003 related to the entry and stay of foreigners in the Kingdom of Morocco, to emigration and irregular immigration. Article 52 defines the smuggling acts as: organizing, facilitating the clandestine entry to or exit from the Moroccan territory.

¹⁷⁸ See *Declarations and Reservations concerning the UNODC Migrant Smuggling Protocol: El Salvador*, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en

aggravating circumstance. Other prominent aggravating circumstances in smuggling of migrant provisions in the region are the smuggling of a pregnant women, the deprivation of liberty of the smuggled migrant, or the one involving the participation of public officials in smuggling operations. El Salvador additionally considers the smuggling of migrants with a physical, psychosocial, intellectual, sensory disability and the smuggling of blind or deaf migrants as an aggravating factor. In addition, Guatemala, Costa Rica and Honduras consider an aggravating circumstance the participation of two or more people in the facilitation of smuggling.¹⁷⁹

When deciding cases that involve additional aggravating elements, courts in Central America may be faced with unique complexities, as shown by a judgment of the Appellate Court of Guanacaste (Costa Rica):

The case involved the transportation of a group of migrants by a single male defendant within Costa Rican territory. The defendant, a Costa Rican national, was charged with smuggling of migrants, including one minor, as well as the participation in an organized criminal group, both aspects considered as aggravating factors to smuggling of migrants under Costa Rican law. According to the national legislation, for the offence to apply, the smuggling activity must have been committed “for entering or leaving the country” which in case it did not. The Court nevertheless found the aggravated smuggling of migrants offence applicable due to the case’s transnational organized crime dimension: although the defendant did not smuggle migrants across international borders himself, the fact that he was a member of a transnational smuggling organization was sufficient to convict him for aggravated smuggling of migrants.¹⁸⁰

Furthermore, migrant smuggling legislation in Guatemala allows migrants who endured cases of abuse or violence in the context of their journeys to file reports in the country. Families (for those who died in the context of their journeys) can also file reports against the facilitators of their loved ones’ journeys. According to interviews with stakeholders, the law also allows families in Guatemala to start a process against smugglers who abandoned or left behind a migrant he or she had committed to transport to a specific destination. Unfortunately, cases filed by families are often dismissed, for the filing of cases does not ensure the opening of an investigation into the case. Smugglers often disappear to avoid being investigated or detained, and under the current efforts to expedite the handling of cases, complaints that are incomplete or not investigated within a specific timeframe are deleted or eliminated from the system.

b) Gender dimensions of legal and practical barriers to report abuses by migrants

While national legislations are put in place to combat and prosecute smugglers and the abuses committed against smuggled migrants, several legal barriers and State practices exist that prevent or discourage migrants from collaborating with local authorities and report abuses experienced.

¹⁷⁹ The United Nations Convention against Transnational Organized Crime defines organized criminal group as “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 Convention requires States Parties to criminalize acts that involve participation in or contributions to an organized criminal group. Specific aggravating circumstances to the crime of migrant smuggling, that apply when the crime is committed by a group of people, might not fall within the definition of organized criminal group pursuant to the Convention.

¹⁸⁰ 17/001699-0396-PE, available at: <https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/cr/2018/17-001699-0396-pe.html>.

First of all, the criminalization of their irregular presence or entry into the country concerned or violence stemming from authorities may prevent effective prosecution. In Libya, for example, the centers where migrants and refugees are detained and subjected to extreme violence and neglect are reportedly either run by officials¹⁸¹ or by militias, paramilitary or criminal groups. In most cases, detentions are largely unlawful.¹⁸² In the absence of legal process and a set maximum duration for detention, migrants are held for months with no possibility to challenge their deprivation of liberty¹⁸³. Moreover, the Libyan crisis considerably limits the prosecutor's authority over certain areas and resources to conduct proper investigations¹⁸⁴. Very few smugglers are arrested¹⁸⁵. Perpetrators are rarely prosecuted,¹⁸⁶ and collusion has been observed between officials and smuggling groups¹⁸⁷. In this context, crimes perpetrated against migrants remain largely unpunished.

“For the entire five years that I was left stranded in Libya, it was hell on earth. Most of the work that I did was not paid for and there was no one to report to. (...) (the landlord) usually threatened me with eviction. At times he will threaten to report me to the authorities as an illegal immigrant. It was really horrible. For several days, I would be left without anything to eat despite working round the clock». ¹⁸⁸ 25-year old Nigerian man.

Further, an increased effort to tackle organized crime in the region was often reflected in countries crack-down on irregular migration. Reports from the region capture allegations of mass transfers of irregular migrants within a country or over international borders. These transfers are reportedly made without assessing the migrant's profiles (the migrants' vulnerabilities are not taken into account neither in the decision to deport them nor for their treatment during deportation), and without indications of invoking their procedural rights.¹⁸⁹ Some of these operations lack gender considerations and disregard vulnerabilities that some migrants might possess:

«Police raided our house, grabbed us; they didn't explain why, they didn't ask for documents. (...) I told them I was recovering from a caesarean section but they still took me. The children were sleeping and they took them as well». 23-year old Ivorian woman. A humanitarian worker in Niger also reported receiving in Agadez two pregnant women deported: one had a broken leg and the second delivered right after her arrival.¹⁹⁰

Secondly, national criminal law may contain provisions that would potentially incriminate victims, particularly women and the LGBTQI+ community, and hence may discourage them from reporting abuse they have suffered.

In some countries in Northern Africa, abortion and same sex sexual relations are illegal and sentenced with imprisonment with the exception of when the pregnancy endangers the mother's

¹⁸¹ Run by the DCIM that has the mandate to combat illegal immigration since 2012.

¹⁸² Amnesty international, *Libya's dark web of collusion*, (2017), p.7.

¹⁸³ Amnesty International, *Libya's dark web of collusion*, (2017) pp. 9-24.

¹⁸⁴ *Ibid.*

¹⁸⁵ UNHCR, *On this journey, no one cares*, (2020) p.34.

¹⁸⁶ Tondo L, *Libya releases man described as the world's most wanted human trafficker*, *The Guardian* (13 April 2021), available at: <https://www.theguardian.com/world/2021/apr/13/libya-releases-most-wanted-human-trafficker-bija>

¹⁸⁷ UN, *Final report of the Panel of Experts on Libya*, (2019), S/2019/914.

¹⁸⁸ NG_Kano_M_11 UNODC Observatory on Smuggling of Migrants, interview conducted in Nigeria in 2019.

¹⁸⁹ Miles, T. Chikhi, L. *U.N. criticizes Algeria for mass deportations of migrants*, *Reuters* (2018), available at: <https://www.reuters.com/article/us-algeria-un-migrants-idUSKCN1IN2FZ>.

¹⁹⁰ Human Rights Watch, *Algeria: Migrants, Asylum Seekers Forced Out*, *News* (2020), available at: <https://www.hrw.org/fr/news/2020/10/09/algerie-des-migrants-et-demandeurs-dasile-forces-quitter-le-pays>.

life or her health. Further, sexual relations outside marriage (adultery) and prostitution are also criminalized in most countries in the Northern Africa transit zone. In some cases, adultery is only prosecuted on the complaint of the spouse, this restriction is, however, regularly lifted when the spouse resides abroad. All these acts can refer to consensual sex as well as coerced sex (whatever form the coercion takes). In the context of aggravated migrant smuggling, these acts will either constitute or be the consequence of sexual violence. However, nothing in these laws currently exempts the victims from their criminal responsibility in the event that these incriminated acts are the result of sexual violence. In concrete terms, this means that any smuggled migrant who is a victim of rape or other sexual violence by a person of the same sex (or of the opposite sex if the migrant is married), or of sexual exploitation, forced abortion or clandestine abortion following a rape, according to the laws of these three countries, runs the risk of being prosecuted. For this reason, migrants who are victims of sexual violence are unlikely to report the abuse to the authorities.

Similar trends can be observed in Central America. Legislations criminalizing abortion and same sex sexual acts directly target women and members of the LGBTQI+ community. In El Salvador and Honduras, abortion is criminalized in all circumstances, in Guatemala abortion is only legal when there is a danger to the mother's life. Furthermore, as demonstrated above, the vast majority of victims of sexual violence in the context of migration are women and girls. These laws present inherent gender discrimination and hamper the access to justice and redress for these victims.

The laws suggest that there may also be a gender dimension to the treatment of migrants by the authorities, in particular when considering discriminating practices and behaviors towards women, girls and LGBTQI+ people. However, further research is needed to confirm this point. A stakeholder from an international human rights organization interviewed for this study attributed the lack of reports and data concerning sexual abuse and/or assault involving migrants from or transiting through Central America to the speed through which people transit through the region. The expert believed the lack of data could be a consequence of the lack of legal institutions to which migrants who have been victims of violence could report crimes committed against them, and the overall reluctance to report given a widespread sense of impunity and lack of trust in the authorities, in addition to their irregular status. The same stakeholder expressed concerns over how increasing restrictions and regulations concerning irregular migration (that is, stepped-up counter-smuggling efforts) could be forcing people into even more dangerous routes and conditions, where the likelihood of them suffering forms of gender-based violence may increase. The expert outlined that the low incidence of reports of sexual assault against migrants in a country with exceedingly high numbers of sexual assault like Guatemala, is really a matter of concern. The expert hypothesized that the numbers could be related to the routes and methods that smugglers use to transport migrants preventing from entering in contact with the authorities to report any abuses, or to the reluctance of migrants to spend time reporting a crime and, in the process, delaying their journeys. The same expert held; "The migrants we tend to serve are people who travel along highways and purposely seek out humanitarian assistance. But they do not report a lot of violence. I do not know if those who are in fact suffering abuses are simply less visible, or if their smugglers take them through more remote routes. I really do not have an explanation for the low numbers".

Thirdly, during interviews, stakeholders often made reference to the involvement of law enforcement officers in the facilitation of irregular migration, and to the prevalence of corruption as a relevant factor to be taken into consideration in anti-smuggling responses.

In the Northern African transit zone, the involvement of public officials in facilitating irregular migration is an aggravation to the offence in most countries. However, Libya limits this provision to officers who monitor ports, crossing points, or borders¹⁹¹ Conversely, all Central American legal provisions examined for this report contain such aggravations to the crime of migrant smuggling (see Annex 2). The passive or active participation of government officials in the criminal scheme is often cited as a barrier to countering the incidence of migrant smuggling.

One interviewee for this research also described the precarity faced by border guards across Central America, and referred to their lack of advanced equipment, modern facilities and vehicles. Stakeholders emphasized how despite their low salaries, border officials had to often pay for what constituted work-related expenses like fuel, supplies and travel in the context of their investigations. The remote nature of many of the locations where they operated also implied that officials may be in a position to accept bribes or other forms of compensation to allow the transit of migrants without witnesses in locations not subjected to surveillance. At least one interviewee of supervisory rank indicated that the restrictions imposed in the context of the COVID-19 response could in fact lead border officials to demand higher bribes from smugglers and migrants in order to avoid detention or questioning.

Gender impact of criminalization of humanitarian assistance

Quite a significant concern among people in both regions for humanitarian organizations, migrant advocates and researchers, is the growing impact of counter-smuggling operations, and how humanitarian acts of assistance (like the provision of room or board, first aid or long-term care, transportation, including to avoid environmental exposure or plain exhaustion) are increasingly being qualified by authorities as smuggling. This has important gendered implications, as several of the tasks identified as potentially constituting smuggling in the law, are roles or activities that present a gendered nature.

With regard to the criminalization of assistance in the Mediterranean Sea, the European Union Agency for Fundamental Rights (FRA) published an updated table of administrative and criminal proceedings introduced by EU Member States against private entities involved in Search and Rescue operations in December 2020.¹⁹² It shows that some 50 proceedings have been introduced since 2016 often brought against non-governmental organizations and private entities assisting migrants without a specific intent to obtain a financial or material benefit from them (see definition of Art. 3 (a) of the Smuggling of Migrant Protocol).

In Central America, Winters (2020) documents several examples in the Panamanian village of Metití of locals being charged, threatened to be charged, or fearing to be charged with migrant smuggling by the border police over their provision of assistance to migrants in transit.¹⁹³ One of these cases involved testimony from a woman whose husband, who was a taxi driver, transported a pregnant migrant in distress to a local hospital, his actions leading to two weeks in detention under migrant smuggling charges. While he was eventually released –as many other people in the area – his family feared for his safety, not to mention the fact that the fear of sanctions

¹⁹¹ Libyan Law No. (19) of 2010 on Combatting Illegal Immigration, article 4.

¹⁹² Table 2: Legal proceedings by EU Member States against private entities involved in SAR operation in the Mediterranean Sea (15 December 2020), https://fra.europa.eu/sites/default/files/fra_uploads/table_2_criminalisation_ngo_sar_as_of_december_2020_002.pdf.

¹⁹³ Winters, N. *Haciendo-lugar en tránsito*.

damaged the local fabric of solidarity and support people of Metití once put at the service for people in transit. This is an example of how activities that have long been considered as part of the provision of solidarity, care afforded to strangers and/or foreigners, are increasingly becoming typified as smuggling acts.

Many of the most notable smuggling cases reported in Central America have involved the participation of women, who have seen highly gendered tasks (the provision of room and board; assisting with first aid; caring for pregnant women or children) being treated as smuggling-related offences. Research shows that women in communities along the migration pathway in Mesoamerica (the geographic region comprised of Central America and Mexico) have traditionally performed tasks to further or advance migrants journeys.¹⁹⁴ However, these tasks are seen as part of gendered obligations of courtesy and mutual support, rather than as crimes. The ways national laws criminalize the facilitation of irregular migration vary and may impact well-established local traditions by disproportionately criminalizing women for assistance given to migrants in transit..

c) General lack of evidence of gender consideration in States' responses

The analysis of aggravating circumstances provides a good platform to identify specific abuses and carve potential solutions for victimized migrants. However, it is important to emphasize that States' responses to migrant smuggling, would it be the legislations (aside from the reference to pregnant migrants in very few national acts) or their implementation frameworks, lack of gender perspectives: that is, "the process of assessing the implications for women and men of any planned action, including legislation, policies or programs".¹⁹⁵

To be clear, some of the information available concerning the kinds of abuses faced by migrants in their transits through Northern Africa or Central America may be in line with what states have established as aggravating circumstances.

However, along the migration pathway, researchers have established how the frequency and kinds of violence sustained by men and women are often gender-based. Elements from the Northern Africa transit zone have been detailed above. In the Central America transit corridor, migrant women are more likely to be targeted for sexual abuse and assault, while men (while not reported as often) are more often experience sexual violence for humiliation and emasculation, as well as homophobic and transphobic violence.¹⁹⁶ While documented by academics, there are no official sources documenting gender-based violence in the context of migrant smuggling within Central America.

LGBTQI+ migrants also endure violence and discrimination. Countries across both transit regions however lack special legislation protecting this specific community. Furthermore, the fact that official tools developed to collect data on the incidence of violence lack a specific variable for sexual orientation or gender identity (similar to the kind existing for sex or age) further obscure the understanding of the frequency and kind of crimes or abuses committed against LGBTQI+ people, including those who are migrants. In other words, there are no structural mechanisms that allow to

¹⁹⁴ Vogt, W.A. *Lives in transit: Violence and intimacy*; Guevara-González, Y. *Navigating with coyotes: Pathways of Central American migrants in Mexico's southern borders*, *The ANNALS of the American Academy of Political and Social Science* 676(1), (2018), pp. 174-193.

¹⁹⁵ ECOSOC, UN Economic and Social Council Resolution 1997/2: Agreed Conclusions (1997) 1997/2.

¹⁹⁶ Vogt, W.A. *Lives in transit: Violence and intimacy*; Brigden, N.K. *The migrant passage: Clandestine journeys from central America* (Cornell University Press, 2018).

map quantitatively the violence faced by LGBTQI+ migrants and the dimensions of acts of GBV carried out against this community of migrants.¹⁹⁷

Therefore, precisely given the lack of gender perspectives in national laws and their implementation frameworks (including data collection), important gender and gendered dynamics present on the migrant trail and experienced by migrants are at risk of becoming sidelined and/or of being rendered irrelevant.

¹⁹⁷ A good practice implemented by Guatemala's *Ministerio Público* (a public prosecutor's office in charge of recording civil and criminal offences against individuals) was to incorporate an "LGBTQI" box in the forms used to record complaints filed by LGBTQI+ citizens. From the time the box was included in the forms, the MP has been able to identify the specific kinds of crimes most often afflicting LGBTQI+ complainants, and to better understand the forms of violence they endure. See Sindy Hernández-Bonilla, Adela Morales-Orellana, *Un éxodo que no se nombra: aproximaciones al desplazamiento forzado interno por violencia en Guatemala (2010-2019)*, (Universidad Rafael Landívar, IDGT, PDH, 2020), p.46. However, we strongly discourage to collect this kind of data if belonging to the LGBTQI+ community is criminalised and if it leads to further discrimination and harm rather than more targeted and effective responses.

VI. Conclusions and recommendations

The nature and prevalence of abuses against migrants and aggravated smuggling, their gender dimensions, the profiles of migrant victims and perpetrators, and the States' responses to these crimes highly vary according to location. In the Northern Africa transit zone, Libya dominates the available data and research while the migrants' experiences through Mexico are also better documented than through the Central America transit corridor. The purpose of the current study was to identify and address some of these gaps in a view to promote evidence-based criminal justice responses. Understanding the regional smuggling dimensions will, however, require a more contextualized assessment, better taking into consideration the national and sub-regional specificities. Regarding abuses experienced by smuggled migrants in these regions the risk to be subjected to abuse during a smuggling operation is high, especially across the Sahara, the Mediterranean Sea and the Darien Gap. The perpetrators of these abuses are predominantly male and often involved in other type of criminal activity or individuals with a deep knowledge of the land. Furthermore, public officials are often involved in smuggling operations, showing the need to coordinate anti-smuggling with anti-corruption efforts. Women - and to a certain extent children - also participate in smuggling activities at all stages of the operation. Their roles can vary from co-conspirators to main offender to - often influenced by societal gender roles - secondary and supportive roles. Criminal justice responses often do not recognize the gender complexities at play when prosecuting women for migrant smuggling.

Smuggled migrants interviewed, consistently reported having suffered from physical violence, inhuman and degrading treatments, sexual violence, kidnapping, extortion, unlawful deprivation of liberty, exploitation, hunger, thirst, or low/no access to health care with many losing their lives while in transit. These abuses and aggravations to smuggling are rarely committed in isolation and are often multifaceted. Abuses committed against migrants have diverse causes including profit, the perpetrator's satisfaction, coercion, intimidation, punishment or control of the smuggled migrants due to fear of detection or for advancement of the journey. Profit appears to be a predominant cause across the categories of abuse.

Gender seems to be playing a predominant role in some vulnerabilities and types of abuse and violence inflicted upon migrants. Men seem to be reporting a wider variety of abuses with forced labour being the aggravation almost exclusively reported by men. This trend is particularly observed in Libya where male migrants experience a high degree of inhuman and degrading treatment and forced labour. It must, nevertheless, be mentioned that male migrants fall victims to all forms of aggravations and might experience a different type and degree of violence compared to women and are likely to be facing specific gender barriers when it comes to reporting these crimes. Sexual violence is, for example, often intended to humiliate or punish male migrants or targets them because of their perceived social role in a male-dominated society.

Female migrants, on the other hand, seem to be exposed to higher risk of aggravations also due to the social pressure to care for other travelers (mostly sick migrants or children) while in transit. Different forms of sexual violence, sexual exploitation, rape or assaults of women are omnipresent in all migration and smuggling routes and seem to affect almost exclusively women when it has a financial dimension (i.e. sexual exploitation for a financial gain). Women often face additional challenges to cope with consequences of sexual abuses experienced during transit, consequences that indeed exacerbate the endangerment to their lives through a higher vulnerability to physical injuries, exposure, or lack of adequate medical and health care.

Throughout the study, the experiences of smuggled children and members of the LGBTQI+ community were included in the analysis where information was available. It does, however, not

change the fact that the specific vulnerabilities of children to abuses experienced during a smuggling operation are severely understudied as are the LGBTQI+ dimensions of smuggling offences. More comprehensive research is needed in these perspectives which will require additional data collection.

Also, challenges in addressing aggravating smuggling offences in State responses must be considered. The study contemplated the advantages and disadvantages of prosecuting abuses experienced by migrants during a smuggling operation as stand-alone offences or as aggravations to a smuggling of migrant offence and confirmed the importance of prosecutorial discretion in this aspect. It described the jurisdictional aspects of prosecuting these abuses either in a third country or in the country where abuses occurred. In many situations, however, legal and practical barriers prevent migrants from reporting abuses in the specific national and regional context of the transit regions studied, barriers that affect women and members of the LGBTQI+ more. The criminalization of irregular migration and of offences directly linked to abuses experienced by migrants (criminalization of victims for sexual violence, rape, same-sex relations or undocumented labour activities etc.), the limited protective provisions in smuggling laws, and the distrust in authorities due to corruption and potential involvement in violence towards the migrants, discourage migrant victims from reporting the crimes.

More appropriate and efficient policy, legal and judicial responses to aggravated smuggling, taking into account gender-specific vulnerabilities and gender-sensitive consequences of State responses, should be developed and implemented. This observation added to the transnational nature of the smuggling offence illustrates the need for States to establish jurisdiction over serious abuses suffered during smuggling ventures by people present on their territory where otherwise it would lead to impunity. In addition, misidentification or overlooking experiences of aggravated smuggling in destination countries may hinder access to appropriate support and assistance services exacerbating psycho-social consequences connected to victimisation and trauma.

This study aimed at better understanding the complexities of identifying and addressing the gender dimensions of aggravated smuggling of migrant offences criminal justice practitioners face. Although the issue would deserve further research and analysis, including by considering other regions of transit, the following recommendations are offered to start filling some of the gaps and needs identified in the study, as well as the existing international legal framework on smuggling of migrants, human rights law, agreements and recommendations, including from the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, as well as the Working Group on Smuggling of Migrants of the Conference of the Parties to the UN Convention on Transnational Organized Crime. States, together with relevant stakeholders to the issue of migrant smuggling, are therefore encouraged to consider and implement these obligations, commitments and principles.

1. Member States are encouraged to accede to the Smuggling of Migrants Protocol, adopt measures to achieve its goals and address migrant smuggling as the facilitation of illegal entry for the purpose of obtaining a financial or other material benefit, in their domestic legislation.
2. State Parties shall ensure that circumstances that endanger, or are likely to endanger, the lives or safety of smuggled migrants and circumstances that entail inhuman or degrading treatment, including for the exploitation of such migrants, are considered aggravations in domestic legislation. By doing so, States Parties recognize the seriousness of these acts and

allow for a more severe sentence to be handed down to smugglers in line with Art. 6 (3) lit. a and b of the Protocol

3. The study has emphasized throughout the analysis that there is a serious lack of data on the issue under review to develop evidence-based targeted and effective responses to the smuggling of migrants, that protect the human rights of migrants and provide them with assistance and support. Accessing court decisions and judicial documents pertaining to migrant smuggling for example is a challenge not only in the two regions of transit that were considered for this study but also more generally. Among available caselaw, aggravations were rarely addressed. Further research on aggravating circumstances in smuggling of migrants cases and how the criminal justice in handling them is needed in the first place. In order to also capture the gender dimension of this crime, data collection should include feedback provided by those affected on barriers to reporting abuse and accessing justice, on their experience with criminal justice authorities and how gender factors/ discrimination may have influenced their treatment.
4. The findings of this study show that criminal justice authorities may lack information on aggravating circumstances to smuggling in general and its links to gender considerations specifically. Capacity building needs have to be identified in order to address migrant smuggling and gender-based violence inflicted on smuggled migrants in gender- and age-responsive as well as trauma-informed ways.
5. Aggravations in cases of smuggling of migrants are often complex and intertwined with abuse and exploitation that could be associated with trafficking in persons. Many of the mechanisms that should be available to victims of trafficking would be beneficial to smuggled migrants who have been subjected to aggravated smuggling. Appropriate referral mechanisms should be established to refer smuggled migrants in need of protection and assistance to the appropriate services. State responses must consider the underlying gender dimensions as described in this study in order to better understand how smuggling of migrant is perpetrated, to offer gender-sensitive and victim-centered protection and assistance measures and in order to prevent impunity for this crime.
6. State Parties should take all necessary efforts to assist people with missing or deceased family members in their search and rescue missions by identifying and sharing relevant information. States must further ensure that the remains of dead migrants are handled with dignity and must take all possible measures to document burial sites in a way that provides answers to the bereaved family.
7. States must assess how to best prosecute abuses experienced by smuggled migrants as described as part of this study. The needs for assistance and support of the migrants should be taken into consideration when deciding on the strategy, affording access to justice, protection and assistance to the victims of the crime who are smuggled migrants in accordance with Art. 16 of the Smuggling of Migrants Protocol.
8. In order to establish evidence-based responses to smuggling of migrants operation, including but not limited to gender-sensitive screening, ensuring access to female staff as well as access to relevant information and protection from discrimination, there is a clear need to increase the understanding of the complex gender dimensions at play. States are encouraged to consider UNODC's mandate in that matter in view of achieving the 2030

Agenda for Sustainable Development and its Sustainable Development Goals as well as the Global Compact for Safe, Orderly and Regular Migration.

9. Preventive mechanisms should be put in place and sanctions need to be imposed on corruption and human rights violations involving public officials in relation to migrant smuggling offences and their aggravations.
10. International cooperation needs to be strengthened to more effectively respond to the smuggling of migrants in general and aggravating circumstances and their gender dimensions in particular since the abuses experienced by smuggled migrants are most often not reported where they take place but might come to light in other transit or destination countries. UNODC can assist with designing standard operating procedures, or support with the MLA request writer tool¹⁹⁸ and its online directory of competent national authorities.¹⁹⁹ Regional organisations and their specialized agencies could also provide support to States to better detect and address migrant smuggling, and rescue and support migrants whose life and safety has been put in danger or who were subjected to degrading or ill-treatment. Exchange of good practices among criminal justice practitioners on how to successfully prosecute migrant smuggling cases with elements of serious abuse that took place outside their jurisdiction should be actively supported.

¹⁹⁸ Mutual Legal Assistance Request Writer Tool available: <https://www.unodc.org/mla/>.

¹⁹⁹ The online directory of Competent National Authorities is a password protected tool, listing over one thousand competent national authorities designated under: (1) the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (2) the United Nations Convention against Transnational Organized Crime and the Protocols thereto, (3) the United Nations Convention against Corruption and (4) other applicable legal instruments, such as Security Council resolution 2322 (2016), General Assembly resolution 68/186 and decisions 3/2 and 4/2 of the Conference of the Parties to the Convention against Transnational Organized Crime available: <https://sherloc.unodc.org/cld/en/v3/sherloc/cnadir.html>.

List of Acronyms

CCPCJ	Commission on Crime Prevention and Criminal Justice
COP	Conference of The Parties
CNDH	Comisión Nacional de Derechos Humanos (National Commission of Human Rights)
COFAMIDE	Comité de Familiares de Migrantes Fallecidos y Desaparecidos de El Salvador (Committee of Relatives of Dead and Disappeared Migrants in El Salvador)
DGSN	La Direction Générale de la Sûreté Nationale (The General Directorate of National Security)
ECOWAS	The Economic Community of West African States
ECOSOC	UN Economic and Social Council Resolution
FRA	European Union Agency for Fundamental Rights
FRONTEX	European Border and Coast Guard Agency
GBV	Gender-Based Violence
GCM	Global Compact for Safe, Orderly and Regular Migration
HIV	Human Immunodeficiency Virus
ICAT	Inter-Agency Coordination Group against Trafficking in Persons
ICMPD	International Center for Migration Policy Development
IDGT	Instituto de Investigación y Proyección sobre Dinámicas Globales y Territoriales (Institute for Research and Projection on Global and Territorial Dynamics)
IOM	International Organization for Migration
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer and Intersex+
MLA	Mutual Legal Assistance
MMC	Mixed Migration Center
NACLA	North American Congress on Latin America
NGO	Non-Governmental Organization
NHCHR	Nations High Commissioner for Refugees
OECD	Organisation for Economic Co-Operation and Development
OHCHR	Office of The United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-Operation In Europe
REMHU	Revista Interdisciplinar da Mobilidade Humana (Journal of Interdisciplinary Human Mobility)

SHERLOC UNODC	Sharing Electronic Resources and Laws on Crime UNODC
SOM	Smuggling of Migrants
STDs	Sexually Transmitted Diseases
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNODC	United Nations Office on Drugs and Crime
UNODC Model Law	UNODC Model Law against the Smuggling of Migrants
US DHS	US Department of Homeland Security

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Annex 1: Definitions of concepts used in the study

a) Geographical coverage

The following section defines the geographical coverage of the study as well as specifies geographical terminologies used.

- Central and Western Mediterranean routes (African portions): West African migration routes passing through the Sahara and Libya (Central Mediterranean route) or through the Sahara and Morocco (Western Mediterranean route), or from the Northwestern African coast to the Spanish Canary Islands [see the map in figure 1].
- Northern Africa Transit Zone: territories in Northern Africa that are used as transit points by people travelling irregularly to Europe, including Morocco, Algeria, Libya, Mali (Northern regions) and Niger (Northern regions).
- Central American Transit corridor: region used as transit points by people travelling irregularly towards Mexico and the USA, including Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Mexico (Southern regions), as well as Panama and Colombia for what relates to the Darien Gap.

b) Persons involved

The following section elaborates on the terminologies used regarding the groups of persons mentioned in the study.

- Migrants

The term “migrants” in the context of this study covers all those travelling along irregular migration routes with the view to reach another country. This includes individuals migrating for various purposes (economic reasons, family reunification, etc.), but also asylum seekers and refugees who flee persecution and conflicts.²⁰⁰ As outlined in the IOM Migration Glossary²⁰¹, this is an umbrella term, which is not defined under international law. Migrants travelling irregularly may organize their migration on their own and not have recourse to the various services offered to circumvent border controls, or they may need to pay smugglers to organize all or part of their journeys. Most likely, migrants travelling irregularly move within mixed migration flows. These mixed migration flows comprise independently travelling and smuggled migrants, refugees, asylum seekers, victims of crime, potential victims of trafficking in persons and sometimes even perpetrators of crime. It is important to consider and acknowledge mixed migration flows in order to be inclusive of all people on the move, irrespective of their status at first. Recognition should focus on risks and vulnerabilities as well as needs for protection and support. This study focuses in particular on the experiences, vulnerabilities and needs of people whose movement was facilitated by smugglers and who become victims of aggravated smuggling offences and the criminal justice responses to these offences. Smuggled migrants might thus become victims of crime or they might be e.g. children, pregnant women or girls, refugees or migrants with grounds for asylum applications, all of which provide additional considerations and rights for protection to them.

²⁰⁰ According to the definition provided for by the Convention relating to the Status of Refugees, 1951, 189 UNTS 137 (28 July 1951), amended by the Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267 (16 December 1966).

²⁰¹ https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf

- **Perpetrators**

The terms perpetrators and abusers in the context of this research designates individuals who engaged in smuggling and related conduct, including smuggling-related offences or abuses against migrants in the context of smuggling operations.

Note: It is often unclear if public officials (police, gendarmerie, militaries, etc.) were involved as perpetrators in reported abuses. It has been reported that officials are involved in migrant smuggling, which is an aggravated form of smuggling in itself under several national legislations without the need to identify further abuse or violence that the migrant has suffered. Corruption of public officials has been identified as an enabler for smuggling of migrants.²⁰² Therefore, the Organized Crime Convention calls on States to criminalise corruption and strengthen non-corruption compliance among its public servants. In addition, officials might also be involved in further abuses of the smuggled migrants. Available data did, however, not always specify if officials were involved in the abuse in the case under discussion.

- **Smugglers**

The term “smugglers” in the context of this research refers to all persons (including migrants) involved in regular or occasional migrant smuggling-related activities, meaning the facilitation of irregular migration while seeking to obtain a profit from it, in accordance with the definition provided in the Smuggling of Migrants Protocol.

c) **Gender-related terminology**

This section provides definitions of relevant gender terminology that are essential for the framing of the analysis that took place as part of the current study. The definitions provided are based on the UN Women gender glossary²⁰³ and adapted as needed.

- **Gender**

Gender refers to the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a girl/woman or a boy/man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities.

- **Gender equality**

This refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality implies that all human beings are free to develop their personal abilities and make choices

²⁰²UNODC, *Corruption and the smuggling of migrants*, Issue Paper, (2013), available at: https://www.unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf.

²⁰³ UN Women, *Gender equality glossary*, available at: <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36>.

without the limitations set by stereotypes, rigid gender roles or prejudices. Gender equality is not a women's issue but should concern and fully engage boys and men as well as girls and women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development. In accordance with the UNODC toolkit for mainstreaming human rights and gender equality, this publication understands gender equality as applying to all individuals, including people who are lesbian, gay, bisexual, transgender, intersex, queer or have other sexual orientations or gender identities (LGBTQI+).²⁰⁴

- **Gender main streaming**

Gender mainstreaming is the chosen approach of the United Nations system and international community toward realizing progress on women's and girls' rights, as a sub-set of human rights to which the United Nations dedicates itself. It is not a goal or objective on its own. It is a strategy for implementing greater equality for women and girls in relation to men and boys. Mainstreaming a gender perspective is the process of assessing the implications for girls, women, boys and men of any planned action, including legislation, policies or programs, in all areas and at all levels.

- **Intersectionality**²⁰⁵

Gender is part of the broader socio-cultural context, as are other important criteria for socio-cultural analysis including class, race, poverty level, ethnic group, sexual orientation, gender identity, age, etc. When considering gender dimensions gender identity and sexual orientation also are important underlying gender dimensions. As outlined above, gender equality calls for equality for all. LGBTQI+ people have therefore been included in the analysis of the current study to the extent possible and sexual orientation and gender identities as important, intersecting factors, especially when considering discrimination and crimes committed against persons as part of aggravated smuggling.

- **Gender-based violence (GBV)**

GBV is an umbrella term for any harmful act, including threats of such acts, that are perpetrated against a person's will and that is based on socially ascribed (gender) differences between individuals. The nature and extent of specific types of GBV vary across cultures, countries and regions. However, they result, or are likely to result in, physical, sexual or mental harm or suffering.²⁰⁶ Examples include sexual violence, including sexual exploitation/abuse and forced prostitution; domestic violence; transphobic violence; trafficking; forced/early marriage; harmful traditional practices such as female genital mutilation; honour killings; and widow inheritance. GBV is rooted in gender inequality, the abuse of power and harmful norms.²⁰⁷ Thus, the CEDAW Committee has repeatedly affirmed that GBV is a form of discrimination against women and girls and that it is often

²⁰⁴ LGBTQI+ people might face specific risks to violence and exploitation and find themselves in increased situations of vulnerabilities. In addition, they often face stigma and discrimination in society. Moreover, there are severe laws in some countries criminalising same-sex relationships and/or non-cisgender identities. UNODC therefore strongly discourages collecting and analyzing data about identifying as LGBTQI+ in countries and situations where this information would do harm to individuals.

²⁰⁵ An in-depth analysis of intersectionalities was outside the scope of the current study. However, where data was available on intersecting factors relevant to the gender dimensions of aggravated smuggling, information was included in the report. A particular effort was made to include findings on experiences, vulnerabilities and protection needs for LGBTQI+ people where data allowed.

²⁰⁶ General Assembly, resolution 48/104, (1993), available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf.

²⁰⁷ UNHCR, available at: <https://www.unhcr.org/gender-based-violence.html>.

exacerbated in situations of displacement or migration.²⁰⁸ Gender-based violence is defined in its General Recommendations 1932 and 3533 of the Committee. Its elimination is addressed as an overarching goal.

- **Sexual violence**

OHCHR offers the following comprehensive definition: “Sexual violence is a form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any persons regardless of their relationship to the victim, in any setting.”²⁰⁹ Examples include rape, marital rape and attempted rape. Other types of sexual violence include being forced to watch somebody being raped, forcing somebody to rape in front of others, sexual harassment, and abuse related to reproduction (forced pregnancy, forced abortion, forced sterilization, castrations and other forms of genital mutilations). For the purpose of this study, sexual abuse is included in instances of sexual violence. All sexual activity with a child (i.e. under 18 years old) is considered as sexual abuse.²¹⁰

- **Sexual exploitation**

Sexual exploitation is any actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. This includes acts such as transactional rape,²¹¹ solicitation of transactional rape, and exploitative relationships.²¹²

- **Harmful social norms²¹³**

A social norm refers to a society’s ideas about the roles, behaviours and attributes that are considered appropriate for persons and associated with socially constructed ideals, based on messages, stereotypes, and social instructions. Men and women are often under pressure to display gender-appropriate behaviours. When referring to harmful social norms we refer to a patriarchal ideal masculine and feminine constructs, which are characterized by opposites e.g. aspects such as toughness, stoicism, heterosexuality, self-sufficient attitudes and restriction of emotional expression for men. In all social and cultural contexts this is used to varying extents to maintain dominance, discrimination and inequality. Instead, the aim of gender-responsive interventions and activities

²⁰⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020, available at: <https://www.refworld.org/docid/6006fa354.html> [accessed 22 April 2021]

²⁰⁹ UNHCR, *Sexual and gender-based violence in the context of transitional justice*, (2014) available at: https://www.ohchr.org/documents/issues/women/wrgs/onepaggers/sexual_and_gender-based_violence.pdf.

²¹⁰ All forms of sexual violence can have severe medical, psychological or social consequences, including sexually transmitted diseases.

²¹¹ The exchange of money, employment, goods or services for sex, including sexual favours, other forms of humiliating, degrading or exploitative behaviour.

²¹² UN glossary, available at: <https://conduct.unmissions.org/glossary>.

²¹³ This definition is based on the discussions in the following two publications: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/discussion-paper-work-with-men-and-boys-for-gender-equality-en.pdf?la=en&vs=3559> and <https://www.apa.org/pi/about/newsletter/2018/09/harmful-masculinity>.

should be to increase gender-equitable attitudes and behaviours and free individuals from limiting social concepts of masculinity or femininity.²¹⁴

Already, the preamble of the 1979 CEDAW Convention stresses "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women". In Article 5 States parties are therefore called upon to work towards the modification of social and cultural patterns of individual conduct in order to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".²¹⁵

²¹⁴ Considering this definition, we would like to highlight the following two observations: social norms include informal, social rules as well as personal/ internal beliefs. Furthermore, just as women and girls, men and boys should never be viewed one-dimensionally but their diverse and overlapping identities should be acknowledged. Thus, an intersectional approach to experiences, behaviours and needs is called for.

²¹⁵ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 22 April 2021].

Annex 2: Smuggling of migrant provisions in transit countries

	Algeria ²¹⁶	Libya ²¹⁷	Morocco ²¹⁸	Guatemala ²¹⁹	El Salvador ²²⁰	Honduras ²²¹	Costa Rica ²²²
Party to the Smuggling of Migrants Protocol							
	Yes with reservations	Yes	No	Yes	Yes with reservations	Yes	Yes
Smuggling of migrants offence							
	Facilitating the irregular entry, movement, stay, or exit of a foreigner on Algerian territory (including through harboring)	Obtaining a benefit from facilitating illegal immigrants' entry, stay or exit (including through transporting, harboring or concealing the immigrants, or preparing, providing or acquiring forged documents)	Facilitating anyone's irregular entry or exit (including through the use of forged documents)	Promoting or facilitating anyone's illegal entry, transit, or stay with the aim of obtaining a material benefit (including through abduction, transfer, transportation, harbouring and concealment or by creating false travel or identity documents or	Facilitating (i) foreigners' irregular entry for the purpose of evading the immigration controls of the country or other countries; (ii) nationals' evasion of immigration controls of the country or other	Promoting, favoring or facilitating the illegal smuggling or clandestine immigration of persons from, in transit or with destination to Honduras or to another country, in	Facilitating anyone's irregular entry, stay or exit from the Country (including through transportation, harboring, concealment or by using false or altered

²¹⁶ Article 38 and 46, Algerian law No. 08-11 of 25 July 2008 related to the entry, stay and circulation of foreigners in Algeria criminalizes the smuggling of migrants.

²¹⁷ Article 2 and 4, Libyan Law No. (19) of 2010 on Combatting Illegal Immigration.

²¹⁸ Article 52, Moroccan Law No. 1-03-196 of 11 November 2003 related to the entry and stay of foreigners in the Kingdom of Morocco, to emigration and irregular immigration.

²¹⁹ Article 108, Congress of the Republic of Guatemala, Migration Law (Decree No. 95-98 of 26 November 1998) as amended by Decree No. 10 of 19 November 2015.

²²⁰ Article 367-A, Legislative Assembly of the Republic of El Salvador, Criminal Code (Decree No. 1030 of 30 April 1997).

²²¹ Article 297, National Congress of the Republic of Honduras, Criminal Code (Decree No. 130/2017).

²²² Article 249, Legislative Assembly of the Republic of Costa Rica, Migration and Immigration Law (Law No. 8764 of 1 September 2009).

				facilitating the provision of the documents).	countries (both including through harboring, transporting and guiding).	violation of the relevant legislation, with the aim of obtaining a material benefit.	information or documents).
Aggravating circumstances							
The use of forged documents		Element of the principal offence	Element of the principal offence	Element of the principal offence	PRESENT (Rely on false or fraudulent travel or identity documents, or on other people's authentic ones, to facilitate anyone's exit from the country).		Element of the principal offence
The offence is committed in circumstances that endanger, or are likely to endanger, the lives or safety of the migrants	PARTIALLY PRESENT (The offence exposed the migrants to an imminent risk of death, maiming or permanent disability)	PARTIALLY PRESENT (The migrant's transportation into or out of the country caused his/her permanent disability).	PARTIALLY PRESENT (The offence caused permanent disability or the death of the migrant).	PRESENT (The life, integrity or health of the migrant is endangered as a result of the conditions or means by which the act is performed, or serious physical or mental injury is	PARTIALLY PRESENT (The migrant suffers deprivation of liberty abroad, becomes victim of crimes of any kind or dies as a result of violent		PRESENT (The migrant's life or health is endangered owing to the conditions under which the offence is committed or severe physical or mental

		(The migrant died as a result of the offence).		caused to the migrant; the migrant suffers deprivation of liberty while abroad, falls victim of other crimes or dies).	causes or negligence).		suffering is inflicted upon the migrant).
The offence is committed in circumstances that entail inhuman or degrading treatment, including for exploitation	PARTIALLY PRESENT (The migrants were subjected to conditions of life, transportation, work and harboring incompatible with human dignity, as a result of the offence).			PRESENT (The migrant is victim of cruel, inhumane or degrading treatment).	PARTIALLY PRESENT (The migrant suffers deprivation of liberty abroad, or becomes victim of crimes of any kind).		PARTIALLY PRESENT (Severe physical or mental suffering is inflicted upon the migrant).
The perpetrator is a public official		PARTIALLY PRESENT (The perpetrator was involved in guarding or monitoring ports of entry, crossing points, ports, or borders).	PARTIALLY PRESENT (The perpetrator is a civil servant at a commandment level, or is in charge of controlling, or is employed in	PRESENT (The perpetrator or participant is a public official, or an employee. The perpetrator or participant is a notary who, in the exercise of his or her functions and with knowledge, favours	PRESENT (The perpetrator is a civil servant, public employee or a representative of the authorities).	PRESENT (The perpetrator is a public servant or employee in the performance of his or her duties).	PRESENT (The perpetrator or participant is a public official).

			transportation services).	or facilitates the commission of the crime).			
The migrant is a minor				PRESENT (The migrant is under the age of 18).	PRESENT (The migrant is under the age of 18).		PRESENT (The migrant is a minor).
The migrant is a disabled person					PRESENT (The migrant has physical, psychosocial, intellectual, sensory, blind or deaf disabilities).		
The migrant is pregnant				PRESENT (The woman migrant is pregnant).			
The offence is committed by an organized criminal group	PARTIALLY PRESENT (The offence is committed by 2 or more persons when the smuggled migrants are more than 2 persons)	PRESENT (The perpetrator belonged to an organised gang for smuggling immigrants at the time the crime was committed)	PRESENT (The perpetrators are members of any association or conspiracy formed or established with the aim of preparing or	PRESENT (The crime is committed by a group of 3 or more people, whether or not it constitutes organized crime).		PRESENT (The criminal acts are carried out as part of an organised criminal group).	PRESENT (The offence is committed by an organized group of two or more persons).

			committing the crime).				
The perpetrator used a weapon	PRESENT (Carrying a weapon)						
Others	<p>The perpetrators used specific equipment, telecommunication or transport means.</p> <p>The offence led to separate unaccompanied minors from their families or traditional environments.</p>		The offence is committed habitually.	The migrant suffers deprivation of liberty while abroad, or falls victim of other crimes.	The migrant suffers deprivation of liberty abroad, or becomes victim of crimes of any kind.		