

Policy Brief

Accessing Justice: Challenges faced by trafficked persons and smuggled migrants



UNODC

United Nations Office on Drugs and Crime

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Background and purpose

Ensuring victims of crime can access justice mechanisms is not just a key component of a fair, humane, effective, inclusive and efficient criminal justice system, but also a key means of ensuring respect, protection and fulfillment of human rights.¹ The importance of access to justice for all, an integral component of fair trial proceedings, is also shown by its inclusion in Goal 16 of the 2030 Agenda for Sustainable Development.

Victims of human trafficking and smuggled persons subjected to criminal abuse are entitled to access the mechanisms of justice. In reality, however, many challenges hinder this access.

The United Nations Office on Drugs and Crime (UNODC) works to promote equal access to justice by focusing on the provision of legal advisory services and technical assistance for States in their fight against trafficking in persons and the smuggling of migrants.

In the context of the 32nd Commission on Crime Prevention and Criminal Justice (CCPCJ), UNODC published an extensive Thematic Guide² providing an overview of international standards, challenges and promising practices relating to access to justice. This brief aims to provide an insight of the obstacles faced by smuggled migrants (in a first part) and trafficked persons (in a second part) in their attempt to access justice. Further, it provides recommendations to Member States on how to best ensure unhindered access to justice for the victims of crime discussed here. This brief does not attempt to be comprehensive but rather to raise issues and possible ways to address them.

¹ UNODC, [Submission to the third session of the Forum on Human Rights, Democracy and the Rule of Law on "Equal access to justice for all: a necessary element of democracy, rule of law and human rights protection,"](#) 2021.

² Commission on Crime Prevention and Criminal Justice, [Guide for the thematic discussion on enhancing the functioning of the criminal justice system to ensure access to justice and to realize a safe and secure society,](#) E/CN.15/2023/6, 2023.

Legal framework on access to justice for smuggled migrants

Under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air³, smuggled migrants are considered the object of smuggling. Though not considered victims of smuggling crimes, migrants may become victims of other crimes perpetrated by their smugglers, such as assault, kidnapping, sexual violence, trafficking in persons, torture or degrading and inhumane treatment. They may also withdraw their consent to being smuggled but be forced to continue with the process. The Protocol emphasizes that smuggled migrants should receive protection. Article 16, for example, obliges States to implement protection and assistance measures, including the adoption of legislative and other measures that preserve and protect the rights and lives of persons who have been the object of aggravated smuggling. Further to Article 6(3), aggravated smuggling is that which endangers or is likely to endanger migrants, or that entails inhuman and degrading treatment. Further guidance can be found in the Global Compact for Safe, Orderly and Regular Migration and its objective 7: “Address and reduce vulnerabilities in migration”.

Smuggled migrants should also **be informed about their rights** and about where and how they may access services specific to their needs. They should be provided with information concerning any legal processes that they may have an interest in, including in respect of any charges against smugglers, or concerning their status in the country where they are found. This information should be communicated to them in a manner and language that they understand. In the criminal justice context, measures should be taken to ensure that migrants have **meaningful access to free legal aid services** if they lack the means to pay for a lawyer, in case they are facing criminal charges or police detention related to their status,⁴ as well as in their capacity as victims of crime.

³ [Smuggling of Migrants Protocol](#)

⁴ [International Covenant on Civil and Political Rights](#), art. 14.

Challenges in access to justice

Lacking sufficient safe, orderly, and regular avenues for migration, people on the move, in the search for safety and opportunity, often expose themselves to circumstances that endanger their physical and mental integrity, including violence and abuse, by using the services of smugglers to cross borders illegally. Beyond loss of life, frequently reported crimes faced by smuggled migrants include sexual and gender-based violence, theft, kidnapping for ransom, robbery, extortion and trafficking in persons. Unaccompanied children are particularly exposed to exploitation, violence and abuse, while women and girls are likely to suffer sexual and gender-based violence en route, as a form of retaliation for alleged misconduct or as payment, where they are coerced into sexual services to pay for transportation or bribes.⁵

Although any person on the move who is a victim of a crime has the right to access justice without discrimination of any kind or on any grounds, such as their immigration status,⁶ smuggled migrants are often **prevented or discouraged from reporting abuses**, seeking justice and remedies, and receiving the required protection and assistance.

This can be attributed to several factors. Many people on the move with irregular migratory status are, upon first contact with the authorities, immediately processed under immigration frameworks. When **authorities ignore vulnerability screenings and focus solely on determining immigration status**, migrants who experienced violence and abuse may choose not to self-identify or may not know how to identify as a victim of crime.⁷

In addition, migrant smuggling-related offences are considered crimes against the State in most jurisdictions and are often applied against smuggled persons, as criminal justice practitioners may refer to the consent of the persons to being smuggled while ignoring that they might have become victims of severe abuse and violence perpetrated by smugglers. Rather than being considered victims, they are treated as offenders because of their irregular migratory status. As a result, for fear of detention or deportation, they refrain from self-reporting crimes, which can place them at a higher risk of suffering further abuse and exploitation.⁸

Even when people on the move are not penalized for their irregular presence or entry into a State, other conduct they undertake in that State may be criminalized and discourage them from reporting any abuse they suffer, as can be the case for victims of trafficking for sexual exploitation. That can occur, for example, when abortion, same-sex intercourse or prostitution are criminalized in the country, regardless of whether the acts are consensual or coerced. Furthermore, biases concerning ethnicity and gender may shape the perceptions and responses of law enforcement officials assigned to counter-smuggling activities, and negatively impact on smuggled persons subjected to criminal abuse.

Fear of corruption and a lack of trust in the authorities are additional barriers for smuggled refugees and migrants to access justice, as law enforcement officials may have been involved in not only aiding their smuggling through bribes and compensation but also in perpetrating the violence committed against them.⁹ Another fre-

5 UNODC, [COVID-19 and the Smuggling of Migrants](#), (Vienna, 2021), pg. 10.

6 [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (UNGA resolution 40/34)

7 OHCHR, [In Search of Dignity: Report on the human rights of migrants at Europe's borders](#), 2017, pg. 19.

8 Ibid, pg. 13.

9 UNODC, [Abused and Neglected](#), pg. 7.

quent impediment to justice being realized is the heavy burden placed on people in highly vulnerable situations - for many good reasons, refugees and migrants are often anxious to move on in their journey and prefer not to report abuses which could not only delay them, but prevent them from reaching their targeted destination. Moreover, due to the limited capacities and resources of judicial systems, the investigation and prosecution of organized and mobile criminal smuggling networks might not be prioritized.

Addressing obstacles regarding access to justice for people on the move, whether internally displaced persons, refugees or migrants, is thus an urgent requirement for fair criminal justice systems.

Legal framework on access to justice for trafficked persons

The latest Global Report on Trafficking in Persons (GLOTIP 2022) notes for the first time a decrease in the number of trafficking victims identified globally, and further observes that the capacity to adjudicate trafficking cases has deteriorated all over the world in recent years. The Report also stresses that fewer traffickers were convicted in the last reporting period and fewer victims of trafficking identified globally.¹⁰ A key issue then is what obstacles are faced by victims of trafficking in accessing justice. General and clear principles that apply to all victims of crime also apply to victims of trafficking, such as the need to provide victims with sufficient information to make an informed decision about their participation in judicial proceedings against their traffickers¹¹, given, amongst other things, the implications their participation may have on their safety and their stay in the country if the trial takes place in a country that is not their own. If they choose to participate, trafficking victims should be kept informed of progress of the relevant process, and be given proper legal assistance throughout. Their privacy should be maintained throughout the process. And steps must be taken to ensure that any persons participating as witnesses are provided with legal and other assistance in relation to court proceedings, in a language and format they understand.¹²

Article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹³, supplementing the UN Convention against Transnational Organized Crime, requires States to ensure that victims have access to justice and redress. Specifically, it requires

States parties to provide victims with information and an opportunity for their views and concerns to be presented and considered at criminal proceedings against offenders. It also obliges States parties to provide victims with information on relevant court and administrative proceedings and with counselling and information about their legal rights in a language they are able to understand. The Protocol also contains provisions on assistance and protection. Those commitments were most recently reiterated by Member States in the 2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons.¹⁴

However, victims of trafficking are often unable to exercise their rights to access justice for multiple reasons:

When they **are not formally identified as victims**, trafficked persons may be treated as suspects/offenders or regarded solely as witnesses whose testimonies are necessary to secure convictions, instead of being treated as persons whose rights have been violated.¹⁵ The GLOTIP 2022 has also found that, recently, the majority of identified victims have “self-rescued”, that is, have escaped their trafficking situation and reached out to the authorities on their own initiative, not because law enforcement officials have intervened.¹⁶ This is a concerning result as many victims may not identify themselves as such, and not consider the corresponding rights they have to access justice and to receive protection and assistance.

10 UNODC, [Global Report on Trafficking in Persons](#), 2022, pg. 38.

11 [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (UNGA 40/34).

12 Ibid. See also UNODC, [Toolkit for mainstreaming human rights and gender equality](#), (Vienna, 2021), pg.63.

13 [Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children](#)

14 UNGA resolution [76/7](#), 2021.

15 ICAT, [20th Anniversary of the Trafficking in Persons Protocol: An analytical review](#), 2020, pg. 18.

16 UNODC, [Global Report on Trafficking in Persons](#), 2022, pg. VI.

Further, while there has been increasing momentum towards global acceptance of the **principle of non-punishment** of victims of trafficking (which states that trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked¹⁷), this principle is infrequently and/or inadequately implemented. Given the trauma they have already endured and the risk of reprisals by traffickers, the added fear of prosecution and punishment for their conduct while being trafficked only further discourage victims of trafficking from seeking protection, assistance and justice.

Similarly, if victims are not identified as such and face criminal charges, **trial waiver systems**, such as plea bargaining, can have severe implications on serving justice. While noting the benefits of these systems, the diminishing use of trials might also bear the risk of innocent people pleading guilty due to coercion or personal circumstances (e.g., high financial costs of proceedings) and the limitations on procedural rights and a fair trial.¹⁸ This practice even more requires an early identification of victims and granting them the adequate and corresponding status in the proceedings.

During proceedings, when these are not trauma-informed, gender- and child-responsive, trafficked persons may be forced into situations that could result in **retraumatization** or further victimization. This may be the case when a victim is questioned repeatedly, the investigation phase is prolonged excessively, and the prosecutors rely too heavily on victims' testimonies. Without the involvement of support mechanisms, such as specialized non-governmental organizations or trained legal aid providers, the potential harm-

ful consequences for victims are often multiplied and may also impact the quality of victims' testimonies and their access to redress. Access to support should never be made conditional upon initiating criminal proceedings or cooperating with authorities, as tying support to cooperation with authorities may have a detrimental effect on victims.¹⁹ This conflicts with a victim/survivor-centered approach to human trafficking, in which victims can decide freely to testify or not against traffickers.

Access to justice for victims of trafficking can also be hindered due to a **lack of legal assistance**. Without understanding their rights, victims cannot exercise them properly. Further without legal counsel, victims may not be fully aware of their rights and role in criminal proceedings. For example, they may have trouble in accessing compensation, as filing a compensation claim generally requires basic legal counselling. Also, they may not have anyone who can assist them in expressing their views and enforcing their procedural rights. Furthermore, without legal representation, victims of trafficking may not be prepared for criminal proceedings which may impose further trauma on them or could lead to discrepancies in their statements.²⁰

Moreover, where a prosecution is not successful and no offenders are convicted of a trafficking crime, a trafficked person may face numerous challenges including access not only to assistance and protection services, but to pursuing remedies in general including compensation.

UNODC has found that **women investigated** for trafficking-related crimes are significantly more likely to be convicted than men, which may be due to inter alia reduced access to justice for women compared to men during trafficking

17 ICAT, [Issue Brief: Non-Punishment of Victims of Trafficking](#), 2020, pg. 1. See also the extensive work done by the UN Special Rapporteur on Trafficking in Persons on this topic, including the thematic report A/HRC/47/34 of 2021.

18 Fair Trials, [The Disappearing Trial](#), pg. 12.

19 Article 6 of the [Trafficking in Persons Protocol](#) and article 25 of the [UNTOC](#). See also UNODC, [Legislative Guide for the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children](#) (Vienna, 2020), p. 60, and OHCHR, [Recommended Principles and Guidelines on Human Rights and Human Trafficking](#), Principles 8 and 9, and Guideline 6.

20 UNODC, [Toolkit to Combat Trafficking in Persons, Tool 8.16: Access to information and legal representation](#), 2008.

prosecutions.²¹ Not only have criminal justice systems been designed historically by men for men, but globalization and emerging trends have re-shaped the scope and nature of crime, causing indirect and direct discriminatory criminalization against women.²² For example, trafficked women, representing the majority of identified victims of trafficking in persons, may find themselves in conflict with the law when they are accused of committing crimes directly linked to their status as a trafficked person or in breach of immigration regulations. Behaviors that are defined as offensive to public morality, for instance, which are often criminalized, affect predominantly women. Besides the criminalization of acts that disproportionately or solely affect women, access to justice for women can also be hindered due, amongst others, to limited financial means, illiteracy (linked to structural factors such as access to education), childcare obligations or mobility issues.²³

In addition, research suggests that people who are gender non-binary, as well as LGBTQI+ persons, already at heightened risk of human trafficking, lack access to justice owing to the acute discrimination they face in the criminal justice system.²⁴

To assure the existence of fair criminal justice systems it is thus essential to address such obstacles that hinder the full exercise of the right to access to justice by victims of trafficking.

21 UNODC, [Global Report on Trafficking in Persons](#), 2022, pg. XIV.

22 [CEDAW GR 33](#), para. 51(I); UN Women, UNDP, UNODC and OHCHR: [A Practitioner's Toolkit on Women's Access to Justice Programming](#), pg. 270.

23 UNODC, [Global Report on Trafficking in Persons](#), 2022, pg. 25.

24 UNODC, [Toolkit for Mainstreaming human rights and gender equality](#), 2021, p.25.

Recommendations to improve access to justice for smuggled persons subjected to criminal abuse

1. 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.²⁵
2. Expand safe, orderly, and regular pathways of migration, in line with commitments made under the Global Compact for Safe, Orderly and Regular Migration, as a way to reduce instances of irregular migration and the subsequent increase of vulnerability of irregular migrants and asylum seekers to exploitation as well as their fear to report crimes.
3. Establish means to provide early identification of smuggled migrants who may be victims of crime by training frontline officers to conduct identification and referral procedures with a victim/survivor-centered approach.²⁶
4. Create and make available sufficient and appropriate shelter spaces for people on the move in vulnerable situations, ensuring that they are not placed in detention facilities. If unable to provide separate shelter, ensure that persons in vulnerable situations are provided with effective protection that does not further traumatize or victimize them.
5. Put in place preventive mechanisms and sanctions for public officials involved in corruption and human rights violations in relation to migrant smuggling offences and their aggravations.²⁷

25 UNODC, [Abused and Neglected](#), pg. 78.

26 ICAT, [20th Anniversary of the Trafficking in Persons Protocol: An analytical review](#), 2020, pg. 18.

27 UNODC, [Abused and Neglected](#), pg. 80.

Recommendations to improve access to justice for victims of trafficking

6. Ensure that access to assistance, support, justice, and remedies are not made conditional to initiating criminal proceedings or cooperating with law enforcement and judicial authorities and that all victim/survivors of trafficking in persons have access to free legal aid and procedural rights.²⁸
7. Put into place criminal justice and assistance standards to ensure that victims of trafficking are not punished or prosecuted for acts committed as a direct consequence of their victimization and, in the same spirit, enable criminal records to be vacated or expunged for individuals who were convicted of crimes committed as a direct result of trafficking.²⁹
8. Review criminalization of acts that disproportionately or solely affect women and girls.
9. Apply the Principles on Effective Interviewing when interviewing suspects, witnesses and victims of trafficking, which shifts from coercive interrogations to rapport-based interviews and enhance the (early) identification of trafficking victims instead of wrongful arrests and accusations as alleged offenders.³⁰
10. Make certain that criminal proceedings are trauma-informed, gender- and child-responsive, to ensure that victim/survivors of trafficking are not forced into situations that could result in re-traumatization or further victimization. At minimum, be sure to involve support mechanisms, such as specialized non-governmental organizations or trained defense lawyers in the criminal proceedings.

28 ICAT, [20th Anniversary of the Trafficking in Persons Protocol: An analytical review](#), 2020, pg. 18; Article 6 of the [Trafficking in Persons Protocol](#) and article 25 of the [UNTOC](#). See also UNODC, [Legislative Guide for the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children](#) (Vienna, 2020), p. 60, and OHCHR, [Recommended Principles and Guidelines on Human Rights and Human Trafficking](#), Principles 8 and 9, and Guideline 6.

29 ICAT, [Issue Brief: Non-Punishment of Victims of Trafficking](#), 2020, pg. 6.

30 UNGA [A/RES/77/209](#); [A/RES/77/219](#).

UNODC Human Trafficking and Migrant Smuggling Section

UNODC's Human Trafficking and Migrant Smuggling Section supports Member in developing and implementing more effective responses to human trafficking and migrant smuggling, with a particular focus on the organized crime aspects, in line with international law and with full respect for human rights.

The Section's Normative and Policy Team provides global normative and policy knowledge, guidance and support to respond to these crimes in full compliance with human rights.



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