

# Part 1

## TOOLS TO UNDERSTAND HUMAN RIGHTS AND GENDER EQUALITY CONSIDERATIONS WHEN PREVENTING AND ADDRESSING TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS



### 1.1 Legislation

purposes beyond criminal justice response, and may have a deleterious effect on rights-holders.

#### **What are the limitations of indicators?**

In selecting and interpreting indicators, it is important to understand that all indicators have limitations as tools for monitoring progress and evaluating outcomes. The data on which indicators are based may be flawed from a human rights and gender-equality perspective, whether because its collection has violated privacy and confidentiality, or because it is interpreted in a way that stigmatizes a given group of rights-holders.

Legislation can play an integral role in upholding human rights and gender equality, by explicitly enshrining both in accordance with international law. In working

to strengthen trafficking in persons and smuggling of migrants legislation, UNODC staff and consultants need to understand the human rights protections in domestic law and what, if any, exclusions apply to nationals and non-nationals including victims of trafficking, smuggled migrants and accused and /or convicted persons<sup>29</sup>. This may require consideration of not only human trafficking and migrant smuggling law, but also other legislation including on human rights, labour laws, social welfare, migration legislation, and other instruments.

For instance, article 6(4) of the Trafficking in Persons Protocol, requires that States parties take into account the age, gender

<sup>29</sup> UNODC is one of many partners supporting a strategy to repeal discriminatory laws. See Equality in Law for Women and Girls by 2030: A multistakeholder strategy for accelerated action (UN Women, 2019)

and special needs of victims of trafficking, in particular the special needs of children, in providing appropriate housing, counselling and information, medical, psychological and material assistance, employment, education and training. This provision does not require legislative measures, but to give appropriate effect to these protection and assistance obligations, States parties may have to amend their social welfare and child protection legislative and policy instruments to ensure that age, gender and special needs of trafficked persons are sufficiently protected and assisted and that any barriers to access to services are removed.

In relation to smuggled migrants, article 16(1) of the Smuggling of Migrants Protocol requires States parties to take appropriate measures, *including legislation if necessary*, to preserve and protect the rights of persons who have been smuggled, in particular the right to life and the right not to be subject to torture or to other cruel, inhuman or degrading treatment or punishment. To ensure that smuggled migrants are sufficiently protected then, explicit protections in smuggling-related legislation may be necessary, as may amendments to other legislation whether immigration or human rights legislation, for instance to remove language that protects these basic rights only of 'citizens'.

In accordance with the 'do no harm' principle, the various human rights risks that can emerge from the introduction of legislation on human trafficking and/or migrant smuggling must also be considered in supporting States to draft or amend legislation.

### **Criminalization and non-discrimination**

Criminalization of the crimes of trafficking in persons and smuggling of migrants in accordance with the Trafficking in Persons and Smuggling of Migrants Protocols, is integral to effective criminal justice responses to both crimes. From a gender equality perspective,

this means ensuring that people of all genders can be recognized as victims of trafficking for all prescribed forms of exploitation, and be recognized and fairly criminalized as perpetrators of smuggling and trafficking related offences.

A gender-equal approach also requires ensuring that the legislative (and policy) protections put in place to protect both trafficked persons and smuggled migrants are available irrespective of gender. This includes ensuring that people who are particularly affected in informal sectors are also afforded full legal protection. Some forms of work in informal sectors may have particular gender dimensions that impact people of a particular sex, including domestic work that significantly impact females and are often not recognized as work, meaning that labour law protections may not be accessible. There is also significant evidence to suggest that people who are gender non-binary are at heightened risk of trafficking in persons, and lack access to justice owing to the acute discrimination they face in the criminal justice system.

**Table: Gender stereotypes in the criminal justice system and criminal law**

<b>Aspect of Criminal Justice system</b>	<b>Gender dimension / stereotype</b>
<b>Nature of victims and offenders</b>	<p>Tendency to see men’s role as perpetrators and women as passive victims. Indeed, the majority of convicted traffickers are men (in 2018, 62% of convicted traffickers were male and 38% women<sup>1</sup>). However, women are commonly involved in trafficking for the purposes of sexual exploitation. Here there are gender dynamics at play in the role of women as traffickers. The involvement of women in the trafficking of women and girls is often related to recruitment, mostly for sexual exploitation, with gender assumed to facilitate trust with potential victims because women are seen as being less threatening<sup>2</sup>. Secondly, there is a pattern of women or girls who have been trafficked going on to traffic other women and girls to lessen their own exploitation, meaning that women may be both victims and perpetrators<sup>3</sup>. There are differences in the nature and frequency of crimes committed against women and men, driven by different risk factors<sup>4</sup>.</p>
<b>Criminalization of offences</b>	<p>Some criminal law is overtly discriminatory or has entrenched gender-based inequalities. Some sexual crimes, for example, may be defined in a gendered way that precludes their applicability to both males and females (e.g. human trafficking for sexual exploitation and rape offences may only recognize females as potential victims).</p> <p>Other laws may be seen to operate equally for men and women, but have different effects due to structural gender inequalities. This includes offences punishing adultery, certain sexual activities or prostitution, which disproportionately affect females, or people who are gender non-binary or are not heterosexual, even when they are formulated in a gender-neutral way.</p>
<b>Implementation of offences</b>	<p>In some countries, women are more likely to face prosecution for offences related to ‘morality’ and ‘culture’.</p> <p>In some countries, forms of violence against women and girls are normalized on the basis of culture, tradition and religion and are therefore not criminalized (e.g. harmful forms of marriage, including early, child, forced or temporary marriage). In some cases, the law itself (e.g. on the legal age of marriage) may put people at risk. As a result, victims of crime are not protected under law and perpetrators are not punished.</p>

<sup>1</sup> See Global Report on Trafficking in Persons 2020 (UNODC, 2020) 32, available at: <https://www.unodc.org/unodc/en/data-and-analysis/glotip.html>

<sup>2</sup> See Female victims of human trafficking for sexual exploitation as defendants: A case law analysis (UNODC, 2020) 26, available at: [https://www.unodc.org/documents/human-trafficking/2020/final\\_Female\\_victims\\_of\\_trafficking\\_for\\_sexual\\_exploitation\\_as\\_defendants.pdf](https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf)

<sup>3</sup> See Gender and TIP and SOM offenders, E4J University Module Series: Trafficking in Persons and Smuggling of Migrants, available at: <https://www.unodc.org/e4j/en/tip-and-som/module-13/key-issues/gender-and-tip-and-som-offenders.html>

<sup>4</sup> Guidance Note for UNODC Staff: Gender Mainstreaming in the Work of UNODC (UNODC, 2013) 69

The table is adapted from *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (UNODC, 2019:15-16)

## Non-criminalization / non-punishment considerations

Where trafficking in persons and smuggling of migrants are not defined domestically and understood in accordance with international law, there is a risk that offences may be criminalized in ways that are detrimental to human rights. The target of both Protocols is the perpetrator of these crimes (both natural and legal persons); neither instrument provides any basis for criminalizing victims of trafficking for having being trafficking, or smuggled migrants for having being smuggled. However, in many countries, trafficked persons and smuggled migrants are criminalized, while traffickers and smugglers continue to commit their crimes with impunity.

UNODC, as the guardian of the international instruments on trafficking in persons and smuggling of migrants, is responsible for ensuring that these instruments are not misused as a basis for prosecuting people acting for humanitarian or other non-profit purposes, or victims and migrants themselves.

In relation to smuggling of migrants, criminalization of that offence in accordance with international law is integral to a human rights-based approach and is necessary to bring criminal smuggling networks to justice. Notwithstanding the clear intentions of the drafters of the international law to criminalize smugglers, some States have incorrectly deployed the discourse of migrant smuggling (or 'people smuggling') in taking action against others, inconsistent with the purpose of the Smuggling of Migrants Protocol.

The interpretative notes to the definition of trafficking explain that the financial or other material benefit was included as an element of smuggling of migrants offence;

...in order to emphasize that the intention was to include the activities of the organized criminal groups acting for profit, but to

exclude the activities of those who provide support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.<sup>30</sup>

Where 'the financial or material benefit element' of the international definition is omitted from domestic legislation, the result can be that persons who are not smugglers are criminalized. This can have a rights-detrimental effect, for instance, when persons are deterred from rendering aid to migrants in need of support due to fear of being prosecuted as migrant smugglers. Persons who facilitate irregular border crossing for non-profit purposes, such as to support a person to flee a situation of conflict or persecution, or who are transporting them to the nearest port after having carried out a rescue at sea, have found themselves falling foul of domestic law.

There has been a rise in charges for migrant smuggling laid against people who have carried out rescue or rendered assistance to migrants, including those who are acting to save lives at sea in accordance with the right to life. This risk of those who are acting for humanitarian or other non-profit purposes being criminalized, is recognized in the Global Compact on Safe, Orderly and Regular Migration in which States parties commit to:

Develop procedures and agreements on search and rescue of migrants, with the primary objective to protect migrants' right to life that uphold the prohibition of collective expulsion, guarantee due process and individual assessments, enhance reception and assistance capacities, and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful.

<sup>30</sup> Interpretative notes, A/55/383/Add.1, 3 November 2000, paragraph 88.

There is also a risk that legislation is drafted in such a way that smuggled migrants themselves are prosecuted for having been smuggled. The Smuggling of Migrants Protocol states at article 5 that migrants shall not become liable to criminal prosecution for the fact of having been smuggled. However, article 6 of the Smuggling Protocol states that nothing in the Protocol shall prevent a State party from taking measures against a person whose conduct constitutes an offence under its domestic law. This means that while the Protocol cannot be used as a basis for creating or justifying offences that criminalize the act of being smuggled, it does not prohibit States from taking action against migrants for other violations of domestic legislation. In practice however, this provision has mostly been relied on to justify prosecuting smuggled migrants for illegal entry, effectively rendering meaningless the provision prohibiting their criminalization for being objects of smuggling.

Not criminalizing smuggled migrants for having been smuggled serves criminal justice ends, in better allowing for smuggled migrant to serve as witnesses against smugglers. It is also in accordance with a human rights approach that upholds the rights of migrants and acknowledges that many smuggled migrants may be vulnerable to or already have experienced exploitation and abuse<sup>31</sup>. Indeed, many smuggled migrants may be victims of trafficking. The prosecution of migrants for migration-related offences therefore does not only impact smuggled migrants, but victims of trafficking too. Where authorities encounter migrants as potential offenders, they may fail to identify victims of trafficking (and other crimes) among them. Victims of trafficking may then be prosecuted for possession of false documents or illegal entry or stay or other offences, contrary to the principle of non-

punishment<sup>32</sup>

### **The principle of non-punishment of victims of trafficking in persons**

In respect to victims of trafficking, there is a principle of non-criminalization of victims, whereby States should consider not punishing or prosecuting trafficked persons “for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts<sup>33</sup>.” Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (E/2002/68/Add.1), states that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

The purpose of the non-criminalization / non-punishment principle aims to protect trafficked persons from prosecution or punishment for criminal activities that they may have committed as a direct consequence of being trafficked, so as to protect their rights, avoid further victimization, and importantly, encourage them to act as witnesses in criminal proceedings against perpetrators. Crimes that trafficked people may commit as a direct result of being trafficked may include participation in illegal work or illegal activities, including where people are trafficked into criminal activities such as drug cultivation, terrorist or trafficking activities or for immigration offences committed in the

<sup>31</sup> See for instance, IOM Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse (IOM, 2020); Exploitation and abuse of international migrants, particularly those in an irregular situation; a human rights approach (Global Migration Group, 2013).

<sup>32</sup> Interagency Coordination Group against Trafficking in Persons, Non-punishment of victims of trafficking (ICAT, Issue Brief 8/2020).

<sup>33</sup> UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, UN Doc. CTOC/COP/WG.4/2009/2, para. 12.

course of being trafficked to another country. The inclusion of a specific non-punishment clause in legislation is increasingly considered a good practice norm<sup>34</sup>. Additionally, the Inter-Agency Coordination Group against Trafficking in Persons (ICAT) also notes other ways that States can implement the principle, beyond specific legislation, including through policies, by discontinuing proceedings against trafficked persons, by reflecting the degree of responsibility in sentencing, and by eliminating any criminal records of convictions.<sup>35</sup> For the principle to have meaning in practice, it does not apply only in the criminal justice context,

but in all engagements from the moment that a person is recognized as potentially being a victim of trafficking, from which moment onwards that person should be treated as a victim of trafficking for the purpose of providing initial assistance and protection<sup>36</sup>. As testament to the importance of this principle in counter-trafficking, former Special Rapporteur on Trafficking in Persons, Maria Grazia Giammarinaro, dedicated her final report in that capacity to “the importance of implementing the non-punishment provision: the obligation to protect victims<sup>37</sup>”.

<sup>34</sup> The inclusion of such a provision in domestic law is promoted for instance by the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings (GRETA). The ASEAN Convention on Trafficking in Persons provides an explicit non-punishment provision at article 14(7).

<sup>35</sup> Interagency Coordination Group against Trafficking in Persons, Non-punishment of victims of trafficking (ICAT, Issue Brief 8/2020) 4.

<sup>36</sup> The Bali Process Policy Guide on Identifying Victims of Trafficking (Bali Process, 2015) recommends that States “Introduce a presumption in favour of treating presumed victims of trafficking as victims.”

<sup>37</sup> The importance of implementing the non-punishment provision: the obligation to protect victims, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children (OHCHR, July 2020) available at: <https://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf>

**Table: Example of advocacy points 3.7 on legislation**

<b>Human rights / gender concern</b> User to specify issue that arose in advocating for a human rights-based / gender sensitive approach:	<b>Advocacy point to address concern</b> User to outline arguments that persuaded stakeholders of the value of human rights-based / gender sensitive approach
There is reticence to support human rights and gender based approaches to domestic legislation on trafficking in persons and smuggling of migrants	Human rights based approaches to domestic legislation on trafficking and smuggling <a href="#">Tool 2.3</a> will help States to fulfil their obligations under the UNTOC and the Protocols thereto, and also under the international human rights instruments that States may be party to <a href="#">Tool 2.2</a>  Human rights and gender equality approaches are based on commitments State parties have already made by virtue of their ratification of international human rights instruments.
Victims of trafficking are criminalized for crimes committed as a direct result of being trafficked	Victims who are criminalized as perpetrators may be unable or unwilling to cooperate with authorities in investigations and prosecutions of traffickers
Smuggled migrants are criminalized for being smuggled, or for migration-related offences	Criminalization of smuggled migrants may deter or prevent smuggled migrants to serving as witnesses against smugglers.  Criminalization of smuggled migrants diverts scarce criminal justice resources away from serious organized criminals who are profiting from migrant smuggling.