

1.6 Investigation

Investigation of serious crime is a human rights obligation particularly in the context of saving people whose lives and safety are in danger. The way that investigations are carried out also raises human rights and gender considerations. UNODC must act to promote rights-based and gender equal approaches to the investigation of migrant smuggling and trafficking in persons. Particularly in relation to the latter, for those States that fall within the jurisdiction of the European Court of Human

Rights, the case of *Rantsev v Cyprus and Russia* identified that States of origin, transit and destination have an obligation to investigate, by taking “such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State” and to cooperate with each other in cases of cross border trafficking.⁷⁰

⁷⁰ The European Court of Human Rights (*Rantsev v Cyprus and Russia*, Application no. 25965/04, Judgment of 7 January 2010, para 286.

Table: Considerations in conducting interviews with victims / witnesses:

Location	Interviews should not be conducted in public areas where privacy cannot be guaranteed or in the presence of others who could influence the interviewee, including other witnesses or victims, or potential perpetrators, and other law enforcement officials who are not required to be present for the interview.
Persons present	<p>Persons conducting the interview should be aware of the rules of evidence in their jurisdiction, as this may have significant impact on how the interview is conducted, how the interviewee is interacted with, and what can be done with the information that emerges.</p> <p>Whenever possible, the preference of the victim or witness regarding the sex of the interviewer should be accommodated. Consider allowing the presence of support persons or friends during the interview, when requested by the victim or witness. Parents / appointed guardians may be required where victim or witnesses being interviewed are children. At the same time, it is important to be aware of the role of family members who may not be supportive of victims/witnesses, but may censor victims or even have been involved in the crime under investigation.</p>
T r a u m a - sensitivity	Retrieve any prior statements given by the victim or witness so as not to unnecessarily require the interviewee to recount traumatic experiences from their trafficking or smuggling experience. Interviewers should remain conscious of the interviewee's emotional and physical needs by observing signs of distress and post-traumatic stress disorder. They should be prepared to provide information on or referrals to support services, and also keep in mind that victims who are traumatized or lack trust in authorities may not fully disclose their situation in an initial interview. It is also necessary to keep in mind that victims and witnesses may have difficulty responding to questioning if discussing sexual violence, if the use of certain terminology may be taboo, or if being a victim of sexual and gender-based violence could result in stigmatization.

Consent	Interviewers should always obtain the informed consent of the interviewees, including consent for the interview, the use of recording devices, the taking of photographs, conducting of physical examinations, possible subsequent uses of the information obtained and evidence collected, and the transfer of information to third parties if relevant, including other investigating agencies and the courts. It is also required that victims and witnesses (but not suspects) be informed that they can withdraw consent and request to suspend the interview.
Content	It is important to ask questions to obtain information that may be relevant in establishing the elements of crimes involving sexual and gender-based violence. However, these questions should be non-leading and use terminology used by the victim / witness.
Use of interpreters	Ensure that interpreters used in interviews are: (a) appropriately trained in working with victims and witnesses (including those who may be suffering trauma or have experienced sexual and gender-based violence); (b) sensitive to the cultural, religious and social context; and (c) comfortable with using the terminology of sexual and gender-based violence, in order to ensure that their personal views or discomfort do not affect interpretation. Both male and female interpreters should be available.

Extracted from *Gender Dimensions of Criminal Justice Responses to Terrorism* (UNODC, 2019:74)

A significant part of UNODC's technical cooperation involves criminal justice capacity building, including of law enforcers. UNODC's rights-based approach mitigates risk of its criminal justice capacity building work being detrimental to human rights. Examples may include special investigative techniques being badly applied or applied by inadequately-trained practitioners in ways that unjustifiably interfere with privacy or that put lives and safety in danger (for instance, including controlled delivery where human lives and safety are at risk), or evidence being collected in ways that amount to torture, or cruel, inhuman or degrading treatment or punishment.

Select human rights relevant to the work of law enforcement officials include:

- Right to life (ICCPR, Art 6)
- Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (ICCPR, Art 7; CAT Article 2)
- Right to liberty, security of person, and non-arbitrary arrest or detention (ICCPR, art 9)
- Right to be informed of reasons for arrest (ICCPR, Art 9(2))
- Right to be brought promptly before a court (ICCPR, Art 9(3))
- Right not to be subjected to arbitrary or unlawful interference with privacy, family or home (ICCPR, Art 17)
- Right to freedom of association (ICCPR, Art 22)
- Right to liberty of movement (ICCPR, Art 12)
- Right not to be subjected to enforced disappearance (ICPED, Art 1)
- Obligation to take appropriate measures to investigate acts of enforced disappearance (ICPED, Art 3)

The human rights standards relevant to investigation of trafficking in persons and smuggling of migrants must be upheld. States are obliged to uphold the human rights of individuals who are affected by crimes in their jurisdictions. This obligation extends to taking a trauma-informed and victim-centred approach to victims of trafficking in investigations of trafficking in persons. Failure to uphold victims' rights throughout their engagement with the justice system, not only results in a failure of States to meet their obligations to victims of trafficking, but also undermines the integrity of the justice system.

Further, the treatment of persons who are suspected or accused of perpetrating those crimes that are mentioned in the UNODC Position Paper on human rights (2012) are:

- Law enforcement officials shall respect and protect human dignity and maintain and uphold the rights of all
- Law enforcement officials shall not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment
- Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. Firearms shall only be used in self-defence or defence of others against the imminent threat of death or serious injury
- Anyone who is arrested shall be informed at the time of the arrest of the reasons for his/her arrest and shall be promptly informed of any charges
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer. Pre-trial detention should be an exception and as short as possible
- Powers of seizure and confiscation must be applied in a non-arbitrary, case proportionate manner and – depending upon the procedure in national law – in conformity with the right to a fair trial

- Searches and arrests must be based on real suspicion of criminal intent and not solely on the grounds of race
- Any interference with the right to privacy, family, home or correspondence should be authorized by provisions of law that are publicly accessible, precise and proportionate to the security threat, and offer effective guarantees against abuse
- Evidence, including confessions, elicited as a result of torture or other cruel, inhuman or degrading treatment must not be used in any proceedings⁷¹.

It is important that criminal justice practitioners understand that treatment of suspected or accused smugglers and / or traffickers in a way that does not uphold their human rights, can undermine the integrity of criminal justice procedures against them, and reduce the likelihood of achieving justice.

In respect to **gender equality**, States have committed to ending discrimination against women. In the context of investigations, this obligation speaks to the need to anchor their efforts in women's rights, gender equality and the prohibition of discrimination against women and girls⁷², which has been acknowledged as a root cause trafficking in women and girls. Accordingly, investigating gender-based violence is a component of responding to both crimes. Also important in the investigative response to both crimes, is an understanding of how people of all genders experience these crimes and the criminal justice responses to them. For instance, sexual violence perpetrated against men and boys is a distinct form of gender-based violence. Intersecting with gender are traits such as

⁷¹ UNODC and the promotion and protection of human rights position paper (UNODC, 2012) 14. The UNODC Position Paper is partially based on the UN Code of Conduct for Law Enforcement Officers, adopted by General Assembly resolution 34/169 of 17 December 1979 and the UN Basic principles on the use of force and firearms by law enforcement officials, adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁷² See for instance: General Recommendation No. 19: Violence against women, Committee on the elimination of discrimination against women, 11th Session (1992).

ethnicity, race and other factors that result in people having different experiences of crime and the criminal justice system. Ensuring that investigations are carried out in ways that are gender-sensitive requires that investigators are not only sufficiently trained to carry out investigations of complex and often transnational investigations of trafficking in persons and smuggling of migrants, but are also periodically given gender- and cultural-sensitivity training to ensure that investigative procedures are carried out in ways that ensure rights-based treatment of victims and people being investigated. In the context of counter-trafficking investigations, it also requires that investigators be equipped and encouraged to work in multi-disciplinary teams to ensure that needs of individuals can be appropriately identified and met.

Gender mainstreaming does not only speak to the need to ensure that gender-responsive approaches are taken to all activities. Gender mainstreaming also speaks to the need for institutional responses to reflect gender diversity. Women and other underrepresented groups including people who are not gender binary, ethnic and other minorities, should be included in national law enforcement agencies as part of the investigative response, and their capacity built so that they can meaningfully respond to these crimes. Their inclusion also has strong operational advantages, particularly with regard to the accurate identification of trafficked persons, many of whom may be more comfortable speaking with officers of a particular gender. Gender mainstreaming benefits from a portion of resources being dedicated to criminal justice capacity building through empowerment of women.

Table: Example of advocacy points 3.7 on sentencing

Human rights / gender concern User to specify issue that arose in advocating for a human rights-based / gender sensitive approach	Advocacy point to address concern User to outline arguments that persuaded stakeholders of the value of human rights-based / gender sensitive approach
Law enforcement officials consider fulfilment of human rights obligations to be barriers to effective investigation of TIP and SOM	Human rights and gender-based approaches to investigations of TIP and SOM can increase the likelihood that evidence collected will support prosecution, and be admissible and persuasive in court. Evidence collection in accordance with domestic law and human rights considerations is critical to the success of subsequent proceedings.
Law enforcement officials consider that evidentiary gains outweigh victims' rights in investigative approaches	Where evidence is collected contrary to human rights (for instance, through the use of controlled delivery of humans in a way that compromises life and safety) evidence may be inadmissible and investigators themselves become the subject of investigations or legal actions
Authorities think that resources invested in achieving gender parity among law enforcers are not well spent	Increased numbers of females among law enforcement officials increase the capacity of law enforcement officials to achieve a gender-sensitive approach to investigation and increases investigative capacity including through more successful interviewing practices with female victims / witnesses Female investigators are required in order to be able to effectively gather evidence from female victims / witnesses
Authorities think that women have the same opportunities as men to work in criminal justice system, but choose not to do so.	In law and on paper, women may have the same opportunities as men do to enter criminal justice practice, but face many barriers that men do not such as gender stereotyping, harassment, challenges combining work and home life
The onset of conflict has deprioritized the investigation of trafficking and smuggling	Data and evidence against potential traffickers in persons and smugglers of migrants should be collected so that they can be brought to justice later at such a stage that the country is equipped to prosecute as an important component of a country's post-conflict recovery and reconciliation Efforts against traffickers and smugglers should be sustained given that they may act to take advantage of conflict situations and exacerbate instability