

## **1.8 Prosecution and defence**

UNODC's approach to strengthening criminal justice responses to human trafficking and migrant smuggling requires rights-based and gender equality approaches to prosecution and defence. In pursuing the 'prosecution' objective of both the Trafficking in Persons Protocol and the Smuggling of Migrants Protocol, UNODC works to end impunity for human traffickers and migrant smugglers. Conviction rates for both crimes remain abysmally low for a range of complex reasons. Particularly in the case of trafficking in persons, where trafficked persons entitled to rights as victims of crime, the prosecution of traffickers is an important component their protection and access to justice and remedies. Crucially in the prosecution of traffickers, it is a victim-centred and trauma-informed

approach to human trafficking requires that the involvement of victims of trafficking in criminal justice proceedings does not result in their re-victimization and re-traumatization.

### **Rights of victims of trafficking in persons in criminal justice processes**

While the involvement of victims in prosecutions of traffickers is often key to successful conviction, victims must not be treated purely as criminal justice resources. The rights of victims of trafficking and victim/witnesses must be protected throughout criminal justice processes, with special account taken of their needs, including by respecting their dignity, by protecting their privacy and avoiding any delays in justice proceedings.

### **Sources of rights of victims of trafficking in persons in criminal justice processes**

- The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that victims must be 'entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered' and offer guidance to minimize some human rights risks faced by persons who participate as victims / witnesses.
- The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking further provide that appropriate efforts be made to protect trafficked persons during investigations and trial processes, and any subsequent period when the safety of the trafficked person so requires.
- The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and the Model Guidelines for the Effective Prosecution of Crimes against Children (2017) are useful tools to support the protection of rights in criminal justice proceedings. Involving child victims / witnesses. The special rights, needs, vulnerabilities of children must always be considered in line with the best interests of the child as the primary consideration set forth in article 3 of the Convention on the Rights of the Child.

Some jurisdictions have taken victim-centred approaches that have resulted in procedure being put in place to ensure that victims of trafficking - particularly children - do not have to directly face accused persons in court, to protect victims from re-traumatization. Victim statements may in some jurisdictions be admitted in lieu of testimonies can achieve this or allowing victims to testify from behind

screens or via video-link from another room or another region or country if they have already returned home. In some cases, measures can be taken (such as the removal of robes and uniforms) to reduce the intimidation of formal courtroom settings, particularly in cases of children. Increased proactive investigative capacity has also resulted evidence aside from testimonies of victims, to shift dependency

away from victim testimony as the primary form of evidence. However, in many jurisdictions around the world, over reliance on victim testimony sometimes as the sole form of evidence, has meant that victims - including children - have been kept in shelters indefinitely against their best interests and well-being, as their testimony diminishes as they lose faith in criminal justice systems, meaning that traffickers may go free. Again, the victim-centred approach to criminal justice proceedings is confirmed as critical to their success in achieving convictions.

Consideration must be given to the impact that participation in court proceedings may have on victims and witnesses to crime. Victims of trafficking have a legitimate interest in proceedings against their traffickers and by virtue of article 6(6) of the Trafficking in Persons Protocol, States are required to ensure the their legal system contains measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered. However, unless a rights and gender-based approach is taken, for instance, to understand the risk that of threats of gender-based violence and risks of stigmatization that may be used to intimidate or coerce victim-witnesses into retracting statements or giving testimony, their involvement in criminal justice procedures against perpetrators can result in violation of their rights. The participation of victims in criminal justice procedures can result in arbitrary detention in shelters and other facilities, violations of their right to privacy and exposure to risks of retaliation for their involvement.

Article 6 of the Trafficking Protocol obliges States to protect the privacy and identity of victims by making legal proceedings confidential, and ensure that its domestic legal or administrative system contains measures that provides victims, in appropriate cases, with a) information on court and administrative proceedings; and b) assistance to enable

their views and concerns to be presented and considered during proceedings, in a manner not prejudicial to the rights of the defence. States are required to consider implementing measures, in cooperation with NGOs and other relevant actors, to provide victims with counselling and information on their legal rights in a language they can understand. In implementing this article, States are to take into account the age, gender and special needs of victims of trafficking. In relation to age, particular account must be taken of the special needs of children but elderly people may also have special needs that need to be addressed. Child-friendly court processes can also be applied in cases where victims or witnesses are children.

The principles set out in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* emphasize the need to provide victims with sufficient **information to make an informed** decision about their participation, including about 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, they should be kept informed of the process, and be given proper legal assistance throughout. Their privacy should be maintained throughout the process and any unnecessary delays avoided. 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. Where witnesses are children, they will need to be provided with information in a way that is child friendly, and there may be situations where they should be accompanied by support persons.

### **Access to justice**

Access to justice, an integral component of fair trial proceedings, is a key component of Sustainable Development Goal No. 16 concerning peace, justice and strong

institutions. Access to justice refers to the ability of people to seek and receive a remedy in formal or informal justice processes, in compliance with human rights standards. It also includes fair trial guarantees of accused persons, including: the right to equality before courts

and tribunals; the presumption of innocent until proven guilty; the right to a fair and public hearing by a competent, independent and impartial tribunal established by law if they face criminal charges; procedural guarantees, and compensation for miscarriages of justice (article 14, ICCPR).

### Principles of a human rights-based approach to access to justice

A human rights-based approach to access to justice requires:

- **Participation:** meaning the courts reach out to communities with information about using the courts, provide access to everyone (close, affordable, welcoming, understandable), maximize community participation in decisions regarding services.
- **Accountability (and transparency):** meaning courts publicly account for the justice services they provide, have systems for user and community feedback and processes for dealing fairly with complaints by court users.
- **Non-discrimination (and equality):** meaning these principles are reflected in court decisions and courts cater for **empowerment:** meaning communities where court users are made aware of their rights, know how to claim them and receive assistance to do so, where needed. Access to justice for persons with disabilities on an equal basis to others (article 13(1) CRPD).
- **Legality:** meaning court decisions and processes are legal, including that they adhere to human rights standards.<sup>1</sup>

<sup>1</sup> Human Rights Toolkit, New Zealand Foreign Affairs and Trade and Federal Court of Australia (Pacific Judicial Strengthening Initiative, 2017)  
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Ensuring access to justice also requires that the **barriers** faced by particular individuals, including people who are responsible for looking after children or aging parents, children, people in rural areas, and migrants who may be in irregular situations, be overcome. The barriers faced by people in conflict-affected settings, may be particularly acute and require involvement of a range of State and non-state actors, including humanitarian actors, to effectively overcome.

**Table: Examples of barriers to accessing justice**

<b>Barrier: Lack of knowledge</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<ul style="list-style-type: none"> <li>■ Lack of opportunity to learn about the justice system (e.g. because of lower socioeconomic and education status; because people may not be informed in a way they can understand).</li> <li>■ Information not presented to people with disabilities in a way they can access</li> <li>■ Information not communicated to migrants in a language they can understand</li> </ul>	<ul style="list-style-type: none"> <li>■ Criminal justice outreach, including to target specific groups such as women, migrants, children, people with disabilities</li> <li>■ Disseminate easy to understand information in relevant languages</li> <li>■ Engage target audiences in design of information campaigns to increase understanding and knowledge about justice</li> </ul>
<b>Barrier: Lack of mobility, time and money</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<ul style="list-style-type: none"> <li>■ Lack of ability to travel owing to gender issues (e.g. role of women in home, child care commitments, requirement for women to obtain male permission)</li> <li>■ Lack of ability to travel (e.g. because cannot afford; immobility owing to age or disability)</li> <li>■ Lack of mobility owing to detention in immigration detention or accommodation in shelters</li> </ul>	<ul style="list-style-type: none"> <li>■ Allowances for court-related expenses (transport, food and accommodation)</li> <li>■ Disability access at courts</li> <li>■ Child care facilities at courts</li> <li>■ Court fee waivers for people in vulnerable situations</li> <li>■ Explore ways to support mobility, and reduce cost of mobility</li> <li>■ Circuit / mobile court services</li> <li>■ Remote access to courts including through technology (phone and internet)</li> <li>■ Arrangement for trafficked persons in shelters and detained migrants to be able to leave facilities to access justice</li> </ul>

<b>Barrier: Lack of access to legal assistance</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<p>Lack of functioning criminal justice system</p> <ul style="list-style-type: none"> <li>■ Insufficient number of lawyers/advocates to provide affordable or free labour of advocacy assistance</li> <li>■ Legal aid may not be available to men and women on an equal basis, e.g. women may not have equal access to family income which may be used as the basis to determine eligibility for legal aid</li> <li>■ Migrants in irregular situations may fear deportation or have already been deported</li> </ul>	<ul style="list-style-type: none"> <li>■ Advocate for expanded range of State-funded legal aid services available</li> <li>■ Strengthen engagement with legal aid and advocate for legal aid organisations to provide services</li> <li>■ Encourage legal aid services to be provided in a way they can be accessed by people in vulnerable situations, including in ways that are culturally sensitive and in a language that is understood</li> <li>■ Explore opportunities for law schools to provide support under supervision of qualified lawyers</li> <li>■ Explore options to regularize stay of irregular migrants to participate in criminal justice processes and opportunities to access legal aid remotely.<sup>1</sup></li> </ul>
<b>Barrier: Discriminatory laws and practices</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<ul style="list-style-type: none"> <li>■ Laws may be out-dated or discriminatory (e.g. against women)</li> <li>■ Courts may prioritize hearing some cases over others in ways that amount to discriminatory practices</li> <li>■ Criminal justice practitioners may be biased against certain people (e.g. people in the sex industry, people in irregular situations)</li> <li>■ Harmful gender stereotypes and bias of criminal justice personnel (including police, lawyers and judges), may manifest in cases being influenced by perceptions of victim and perpetrator behaviour</li> <li>■ Attitudes and beliefs about sexual / marital / other forms of violence may prevent people from accessing justice</li> </ul>	<ul style="list-style-type: none"> <li>■ Advocate for amendment of discriminatory laws and practices, in line with international human rights law</li> <li>■ Train criminal justice practitioners to apply human rights and gender equality standards</li> <li>■ Provide training on unconscious bias and develop monitoring mechanisms for cases involving vulnerable people</li> <li>■ Ensure that cases involving violent crimes have sufficient witness protection mechanisms in place</li> </ul>

<sup>1</sup> Also see: UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, resolution adopted by the General Assembly 67/187, 2012

<b>Barrier: Family / community pressure and risk of stigmatization</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<ul style="list-style-type: none"> <li>■ Family and community attitudes can make victims of crime feel that they are to blame, including owing to gender expectations</li> <li>■ Family and community attitudes may promote the idea that issues should be dealt with privately / informally, rather than through official justice channels</li> <li>■ Victims may be pressed not to testify against members of their family or community</li> <li>■ Victims and their families may have normalized the situation and not recognize it as exploitative, and/or have no faith in justice system to compensate victims for lost income, making them prefer to remain in the exploitative situation</li> </ul>	<ul style="list-style-type: none"> <li>■ Ensure that legal aid is available on an ongoing basis</li> <li>■ Ensure that independent counselling and advice is provided so that victims / others are given sufficient information</li> <li>■ Put in place measures to ensure that victims are not intimidated by perpetrators or their associates</li> <li>■ Outreach to increase understanding and increase confidence in the criminal justice system</li> <li>■ Collaborate with service providers to ensure relevant services are available to vulnerable people, particularly in cases involving women, children and persons with disabilities.</li> </ul>
<b>Barrier: Economic / social costs of participating in justice processes</b>	
<b>Possible causes</b>	<b>Possible solutions</b>
<ul style="list-style-type: none"> <li>■ Victims who seek justice in courts may be delayed in returning home</li> <li>■ People who participate in criminal justice processes as victims / witnesses, may not be able to work during proceedings or freedom of movement may be restricted</li> </ul>	<ul style="list-style-type: none"> <li>■ Explore ways for victims to access justice processes once they have been returned home (e.g. brought back for specific events; remote testimony by phone or internet)</li> <li>■ Explore opportunities for victims to be accommodated in community settings and work during criminal justice processes</li> <li>■ Explore opportunities for compensation outside the criminal justice system including civil remedies and state-funded compensation schemes.</li> </ul>

Source: Adapted from PJSI, 2017:13-15, and UNODC, 2019:16

Human rights-based approaches require attention to be given to access to justice for persons with disabilities (article 13(2) CRPD), so that people engaged in court proceedings are able to recognize disabilities and ensure that needs are met. Measures that may need to be taken to ensure inclusive court rooms and procedures in trials involving people with disabilities (whether they are victims, witnesses or alleged perpetrators), include: (1) removing communication barriers (both audio and visual); (2) ensuring information is provided and explained in a way that can be understood; and (3) ensuring that physical barriers to participation are overcome. In addition, rights-based approaches need to consider possible attitudinal issues of relevant actors who may make assumptions about people with their disabilities and their capacity to participate in proceedings<sup>73</sup>.

### Right to a fair trial

The balance of rights that must take place in criminal justice responses to trafficking and smuggling requires consideration of the rights of the defence, and the rights of trafficked and smuggled persons themselves. For instance, how to ensure that a defendant can face his or her accuser in court, while also efficiently repatriating victims of trafficking to their home countries?

A key human right to respect, protect and fulfil in the context of prosecution is the **right to a fair trial** (ICCPR, article 14). All persons, including alleged traffickers and smugglers, are entitled to a fair and public trial. Rules surrounding the administration of justice must be upheld to ensure that persons on trial receive a fair trial and public hearing by a competent, independent and impartial tribunal. Laws that are unduly restrictive on the rights of accused persons, or are insufficiently protective of the rights of victims and witnesses, and poor quality prosecutions can result in violations of

the right to fair trial.

Criminal justice capacity building efforts often focus on strengthening capacity of prosecutors, which is vital to ensuring they have sufficient capacity to confront well-trained lawyers engaged by often well-resourced criminals. Yet an effective defence is a key component of effective justice systems, and its absence can violate the rights of an accused person to receive a fair trial, many of whom may come from marginalized sections of society. There are also instances of victims of trafficking being prosecuted as being traffickers themselves, underscoring the criticality of strong support for victims, understanding their vulnerability owing to prior or concurrent victimization and application of the principle of non-punishment. There are significant gender issues at play here too. UNODC research also shows that women comprise a comparatively large portion of persons convicted for trafficking, relative to other crimes. Court cases and other qualitative data indicate that many convicted women used to recruit other women, and that particularly in the field of trafficking for the purpose of sexual exploitation, many are former victims who have taken the opportunity to recruit new victims to reduce their debt to traffickers or otherwise end their own exploitation. These considerations point to the fact the complexity of differentiating between traffickers and victims.

### Select human rights relevant to prosecutions and defence:

- Right to a fair trial (ICCPR, Art 14)
- Right to be presumed innocent (ICCPR, Art 14(2))
- Adequate time and facilities for defence (ICCPR, Art 14(3)(b))
- Prohibition on use of evidence obtained by torture (CAT, Art 15)
- Prohibition on retroactive criminal offences (ICCPR, Art 15)
- Timeliness of criminal proceedings (ICCPR, Art 9(3), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Art 38))

<sup>73</sup> Human Rights Toolkit, New Zealand Foreign Affairs and Trade and Federal Court of Australia (Pacific Judicial Strengthening Initiative, 2017) 31-2

There are several relevant human rights standards set out in UNODC's 2012 position paper on human rights, including the following:

- Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty by law and to be tried by a competent, independent and impartial tribunal
- Criminal proceedings must be started and completed within a reasonable time
- In the determination of any criminal charge, persons shall have the right to adequate time and facilities for the preparation of defence and to defend themselves through legal assistance of their own choosing. In any case where the accused does not have sufficient means to pay, and the interests of justice so require, legal assistance shall be assigned without payment by the accused
- Both the accused and the prosecution in a criminal trial must be in a procedurally equal position during the course of the trial and have an equal opportunity to make their case
- The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any direct or indirect restrictions, improper influences, inducements, pressures, threats or interferences
- Witnesses, relatives and defence counsel, as well as persons participating in the investigation, shall be protected against all ill-treatment or intimidation as a consequence of the investigation or evidence given.

The UN *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, adopted by the General Assembly 67/187, 2012 emphasize **legal aid** as a foundation for the enjoyment of other rights in fair, human and efficient criminal justice system, including the right to a fair trial. Legal aid is a key consideration too in human rights and gender-related dimensions relevant to victims'

rights during criminal justice proceedings, the rights of children, women and others in conflict with the law, as well as prisoners<sup>74</sup>. In particular, principle 10 on equity in access to legal aid, indicates that special measures should be taken to ensure meaningful access to **legal aid for women, children and groups with special needs**, including, but not limited to, the elderly, minorities, persons with disabilities, persons with mental illnesses, persons living with HIV and other serious contagious diseases, drug users, indigenous and aboriginal people, **stateless persons, asylum seekers, foreign citizens, migrants and migrant workers, refugees and internally displaced persons**. Such measures should address the special needs of those groups, including gender sensitive and age-appropriate measures. Research has shown access to legal aid is particularly limited for women, with access to justice often limited to female victims with suspects and accused women often able to access justice. Women may not only lack financial resources to afford legal advice, but are also at higher risk of discrimination by criminal justice officials and abandonment by their families owing to harmful gender stereotypes<sup>75</sup>.

<sup>74</sup> United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) A/RES/65/229 (2011); The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) A/RES/70/175 (2015); United Nations Model Strategies And Practical Measures On The Elimination Of Violence Against Children In The Field Of Crime Prevention And Criminal Justice A/RES/69/251 (2014).

<sup>75</sup> Gender brief for UNODC staff: Mainstreaming gender in justice projects (UNODC, 2020)

**Table: Fair trial standards**

Standard	Source
The right not to be detained or without a valid reason and the right to not be tortured in detention	Article 9 and Article 7 ICCPR
Equality before courts and tribunals	Article 14(1) ICCPR
Fair and public hearing by a competent, independent and impartial tribunal established by law; criminal judgments to be made public except where the interests of a juvenile person otherwise requires	Article 14(1) ICCPR
The right to be presumed innocent until proven guilty according to law	Article 14(2) ICCPR
To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her	Article 14(3) ICCPR
To have adequate time and facilities for the preparation of his/her defence and to communicate with counsel of his own choosing	Article 14(3)(a) ICCPR
To be tried without undue delay	Article 14(3)(b) ICCPR
To be tried in his/her presence, and to defend himself/herself in person or through legal assistance of his own choosing; to be informed, if he/she does not have legal assistance, of this right; and to have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment by him/her in any such case if he does not have sufficient means to pay for it	Article 14(3)(d) ICCPR
To examine, or have examined, the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him (the right to call witnesses and examine witnesses against them)	Article 14(3)(e) ICCPR
To have the free assistance of an interpreter if he/she cannot understand or speak the language used in court	Article 14(3)(f) ICCPR
Not to be compelled to testify against himself/herself or to confess guilt (the right to remain silent)	Article 14(3)(g) ICCPR
In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation (Special protections for juveniles and other vulnerable persons); child accused of having infringed criminal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth	Article 14(4) ICCPR; 10(2)(b) ICCPR; CRC article 40; Beijing Rules; CEDAW; CRPD.
The right to his/her conviction and sentence being reviewed by a higher tribunal according to law (the right to appeal)	Article 14(5) ICCPR
When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he/she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him	Article 14(6) ICCPR
No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country (the right not to be tried for the same offence twice).	(Article 14(7)) ICCPR

**Table: Fair trial standards**

<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
Victims of trafficking are made to participate in criminal justice proceedings against their will and best interests	Unless victims are assisted and protected in accordance with their rights, their testimony against traffickers will weaken as they lose trust and faith in the criminal justice proceedings. Upholding victims' rights and supporting their reintegration is key to achieving their cooperation and preserving their testimonies. Alternatives to victim testimony such as use of statements and evidence obtained through special investigative techniques is key to both upholding victims' rights and to effective prosecutions of traffickers.
Training of defence lawyers in pursuit of an accused person's right to a fair trial is avoided because of concerns that prosecution of traffickers and smugglers will be hampered	Unless defence lawyers are trained alongside prosecutors, prosecutors are not able to fully develop their skills and will lack capacity to confront organized criminals who have engaged highly-skilled lawyers to defend them, meaning that prosecutions less likely to be effective. Fair trials are less likely to leave fewer grounds for appeal for convicted traffickers / smugglers.

A rights-based approach to trafficking in persons and smuggling of migrants requires that prosecutions be measured not only by their quantity but also by the quality of criminal justice processes and outcomes, including their adherence to human rights norms and standards. Given the relatively high reported risk of the punishment/prosecution of victims of trafficking in persons, as well as a tendency of criminal investigations to target lower-level offenders, special consideration may also need to be given to the human rights consequences that may result from convictions. UNODC's work to increase prosecutions may result in the treatment of persons incompatible with the UN Standard Minimum Rules for Treatment of Prisoners (the Nelson Mandela Rules).

Accordingly, UNODC's efforts to strengthen the prosecution of traffickers and smugglers must work hand in hand with its prison and criminal justice system reform efforts. The gendered differences of peoples' experiences as prisoners, including because they are female or because they are LGBTQI+ are also important to ensuring rights-based treatment of persons sentenced to imprisonment.