

1.9 Sentencing

Sanctions imposed on convicted smugglers and traffickers must be effective, dissuasive and proportionate. Where sentences are too lenient, justice may not be served and public confidence in the justice system may be undermined. However, sanctions that are too severe may fail to meet human rights standards, for instance, where mandatory minimum custodial sentences, corporal punishment or the death penalty (which UNODC advocates for the abolition of) are imposed. Where they are punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, smuggling of migrants and trafficking in persons constitute “serious crimes” as defined in article 2(b) of UNTOC. And indeed, many States prescribe maximum penalties that are significantly higher. Here it is important to understand that some human rights instruments restrict the types of punishments that States can impose.

Select human rights relevant to sentencing:

- Prohibition on torture or cruel, inhuman or degrading treatment or punishment (ICCPR, Art 7, CRC, Art 37, CAT, Art 16)
- Treatment of prisoners (ICCPR, Art 10)
- Prohibition of the death penalty (ICCPR-OP2)
- Restrictions on application of the death penalty (ICCPR, Art 6(2); Report of the Special Rapporteur A/HRC/4/20, para 53; ECOSOC Res 1984/50)
- Prohibition on imprisonment related to contractual obligations (ICCPR, Art 11)
- Provision of adequate facilities for prisoners (Standard Minimum Rules for the Treatment of Prisoners, paras 9-26)
- Communication with family and visits (Standard Minimum Rules, paras 37- 39)
- Proportionality of penalties – A/CONF.144/28/Rev.1 at p.164

Article 10(4) of the UNTOC requires that persons found liable to offences established under the

UNTOC and its Protocols be subject to ‘effective, proportionate and dissuasive criminal or non-criminal sanctions’. Further, article 11(1) requires States to make the commission of offences liable to sanctions that ‘take into account the gravity of that offence’. Article 2(b) of UNTOC defines ‘serious crime’ as conduct constituting an offence punishable by at least four years. As serious crimes, human trafficking and migrant smuggling are not meant to capture minor criminal conduct. Yet cases abound of severe sentences being imposed on minor offenders for their involvement in ‘trafficking’ or ‘smuggling’. The complexity of both crimes, involving actors of varying levels of culpability and sometimes even vulnerability, means that the specifics of individual cases should inform what is an ‘effective, proportionate and dissuasive’ sentence in the circumstances.⁷⁶

Aggravated sentences in the Smuggling of Migrants Protocol

Article 6(3) of Smuggling of Migrants Protocol requires States to adopt legislative and other measures as may be necessary to establish as aggravating circumstances, those that endanger or are likely to endanger the lives or safety of the migrants concerned or that entail inhuman or degrading treatment, including for exploitation, of such migrants. The inclusion of exploitation as an aggravated circumstance here (which is ‘without prejudice to the scope and application’ of the Trafficking Protocol) underscores the complex interrelationship between migrant smuggling and human trafficking⁷⁷.

The standards that UNODC’s human rights policy (2012) sets out in relation to sentencing state that the severity of penalties must be

⁷⁶ Legislative guide for the protocol to prevent, suppress and punish trafficking in persons, especially women and children (UNODC, 2020) 50

⁷⁷ Interpretative notes, A/55/383/Add.1, 3 November 2000, paragraph 96.

proportionate to the criminal offence, that imprisonment should be used as a penalty of last resort, and that the choice between penalties should take into account likelihood of rehabilitation. Where persons are deprived of their liberty, they must be treated with humanity and respect for their inherent dignity. In international law, this means that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, in accordance with the United Nations Standard Minimum Rules for Treatment of Prisoners (The Nelson Mandela Rules⁷⁸). Prisoners are also entitled to be provided with clothing and separate and sufficient bedding, food of nutritional value adequate for health and strength, drinking water, adequate bath and shower facilities, and adequate medical facilities. Prisoners shall be allowed under necessary supervision to communicate with their family and friends at regular intervals, both by correspondence and visits.

Human rights of women in prison

To ensure the human rights of women in prison and their children, in accordance with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial measures for women offenders (the Bangkok Rules), access needs to be given to maternity and health services and hygiene products especially related to reproductive health such as menstruation, menopause, pregnancy and breastfeeding. Legislation should provide for alternatives to incarceration for mothers with underage children and pregnant women⁷⁹. Where prisons do not have the capacity to fulfill these standards, the principle of 'do no harm' emerges in relation to the human rights implications of UNODC's work to increase the prosecution and subsequent imprisonment of convicted traffickers and smugglers. These efforts should come hand in hand with its efforts in respect of prison reform. Pursuit

of prosecutions and serving out sentences for serious crimes cannot be delayed while prisons are reformed. Therefore, States must be supported to improve prison systems in accordance with human rights obligations, at the same time as they are supported to impose punishments that are proportionate to the gravity of the offence. This may involve promoting consideration of aggravating and mitigating circumstances (for instance, where perpetrators of trafficking are former victims) to determine appropriate punishments for individual offenders.⁸⁰

⁷⁸ See Female victims of human trafficking for sexual exploitation as defendants: A case law analysis (UNODC, 2020) 94-100, available at: https://www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf

⁷⁹ The United Nations Standard Minimum Rules for Treatment of Prisoners (The Nelson Mandela Rules) General Assembly resolution 70/175, annex, adopted on 17 December 2015

⁷⁹ For more information, see Handbook on Women and Imprisonment (2nd Edition, UNODC, 2014).

Gender dimensions / stereotypes in approaches to deprivation of liberty

Sentencing: Harsher sentences may be imposed on women because of the gender expectations imposed on them resulting in the perception that women's criminality is a higher transgression than the same crime perpetrated by a male. Lack of understanding of the 'pathways' of women into crime being marred by abuse and victimization, and criminal behavior connected to relationships with others, may mean sentences are not appropriately mitigated.⁸¹ On the other hand, research has also suggested that female criminal behavior has been perceived as a less serious problem than male criminal behavior⁸². Female offenders may get more lenient sentencing because of their perceived lack of agency.

Sexual abuse of persons deprived of their liberty: Sexual abuse can manifest in inmates being abused by staff or being 'traded' among male prisoners, even where there are separate facilities for males and females, sometimes with complicity of guards. In some countries, sexual abuse of males deprived of their liberty is more prevalent than sexual abuse of females in those settings. However, in many of the countries that UNODC works, women and LGBTQI+ people are more likely to be subject to sexual abuse than male offenders. Women who have been charged with 'crimes against morality' are particularly vulnerable. Regardless of the gender of the victim, perpetrators are predominantly male.

Needs of persons deprived of their liberty: Women have a range of particular needs in detention that may not be considered in prison systems designed to accommodate males. Deprivation of liberty may not take into consideration the role of caregivers and mothers, which are usually attributed to women by societies and communities, and the subsequent impacts on both the women and their children. It also may overlook the economic impacts on families where breadwinners (who may be women or men) are imprisoned, and the psychological impact on children in female-headed households when mothers are incarcerated.

Alternatives to deprivation of liberty: Women may be disadvantaged in accessing alternatives to imprisonment, for example, where gender-neutral conditions are imposed on (1) bail conditions that require regular reporting to authorities, which disadvantage those who are primary carers or women who can only travel with a male chaperone), and (2) cash bonds that women cannot afford because they do not have equal access to household economic resources.

⁸¹ Resource Package for Paroling Authorities on Criminal Justice Involved Women (National Parole Resource Centre), available at: <https://www.nationalparoleresourcecenter.org/resource-package-justice-involved-women/womens-unique-pathways-into-crime.htm>

⁸² Gender brief for UNODC staff: Mainstreaming gender in justice projects (UNODC, 2020) 13

Source: *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (UNODC, 2019:15-16). Also see the *UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, General Assembly Resolution 65/229 on 21 December 2010 and *Handbook on Women and Imprisonment* (2nd ed., UNODC, 2014:14-15).

Death penalty

Some countries provide for corporal punishment (such as caning or whipping) for some offences, even for administrative, immigration-related offences. Some even prescribe the death penalty for some crimes. The **death penalty** is prohibited for States parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (ICCPR-OP2) adopted in 1989. For countries that have not yet abolished the death penalty - including UNODC partner countries - the sentence of death may be imposed only 'for the most serious crimes' (ICCPR 6(2)) and not on children or pregnant women (article 6(5)). Importantly, article 6(6) of the ICCPR States that this provision cannot be invoked to delay the abolition of capital punishment. Where trial procedures do lead to the imposition of the death penalty it is imperative that they are based on the right to a fair trial (as per article 14 of the ICCPR set out above). A death penalty that is imposed following a trial that is not fair, constitutes a violation of the right to life (ICCPR, Article 6).

On the basis of these considerations, and because the UN advocates the abolition of the death penalty, UNODC should not establish nor participate in any tribunal that allows the death penalty to be imposed. Further, it should encourage Member States not to allow for the imposition of the death penalty, even for 'the most serious crimes in accordance with law' as (set out in article 6(2) of the ICCPR) and not to increase the number of crimes that carry the death penalty. Vitally, in the case of children in conflict with the law, article 37 of the CRC states that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

When providing technical assistance for capacity building in countries that do retain the death penalty, UNODC staff should

promote implementation of the 'Safeguards guaranteeing the rights of those facing the death penalty' (1984) to avoid its work contributing to practices contrary to those guidelines. UNODC should also identify measures that Government may be willing to adopt to annul use of the death penalty in human trafficking or smuggling of migrants cases.

To achieve these goals, UNODC can inform government counterparts of the human rights implications of the use of the death penalty. These include its impediment to mutual legal assistance, extradition and other forms of international cooperation, as many States are legally unable to cooperate with a State in a way that might lead to the application of the death penalty. The threat of the death penalty can increase the danger to victims as traffickers may take extreme measures to eliminate the evidence against them. In some jurisdictions, the possibility of the death penalty or other severe sentences may also increase reluctance to convict.

UNODC should be prepared to explain to stakeholders the challenges it faces in engaging with and providing support to States that apply the death penalty. If a State continues to apply the death penalty to human trafficking and migrant smuggling offences, consideration will need to be given to whether UNODC's technical assistance amounts to aiding or assisting the human rights violation, and the extent to which it is responsible for them. In such situations, continued support could be considered as legitimizing those actions and may need to be withdrawn.

Table: Example of advocacy points [Tool 3.7](#) on sentencing

Human rights / gender concern	Advocacy point to address concern
User to specify issue that arose in advocating for a human rights-based / gender sensitive approach:	User to outline arguments that persuaded stakeholders of the value of human rights-based / gender sensitive approach
Sentences against smugglers are not effective, dissuasive and proportionate to the gravity of the offence and do not take into account aggravating factors	Where sentences are too lenient, justice may not be served and public confidence in the justice system is undermined. Where sentences do not effectively prevent recidivism and deter offending, traffickers are able to re-victimize people.
The death penalty is provided for in domestic legislation (on trafficking in persons/smuggling of migrants) and / or is applied in practice	Use of the death penalty dissuades counterparts in other countries from sharing intelligence. Use of the death penalty is a barrier to extradition. UNODC faces significant difficulties in engaging with and providing support to States that apply the death penalty.